

FEDERAL TRADE COMMISSION DECISIONS

FINDING, OPINIONS, AND ORDERS

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April J. Tabor and Robert F. Swenson, Editors

**MEMBERS OF THE FEDERAL TRADE COMMISSION
DURING THE PERIOD
JANUARY 1, 2000 TO JUNE 30, 2000**

ROBERT PITOFISKY, *Chairman*

Took oath of office April 12, 1995.

SHEILA F. ANTHONY, *Commissioner*

Took oath of office September 30, 1997.

MOZELLE W. THOMPSON, *Commissioner*

Took oath of office December 17, 1997.

ORSON SWINDLE, *Commissioner*

Took oath of office December 18, 1997.

THOMAS B. LEARY, *Commissioner*

Took oath of office November 17, 1999.

DONALD S. CLARK, *Secretary*

Appointed August 28, 1988.

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FEDERAL TRADE COMMISSION DECISIONS

FINDINGS, OPINIONS, AND ORDERS

JANUARY 1, 2000, TO JUNE 30, 2000

IN THE MATTER OF

EL PASO ENERGY CORPORATION

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

*Docket C-3915; File No. 991 0178
Complaint, January 6, 2000--Decision, January 6, 2000*

This consent addresses the acquisition by El Paso Energy Corporation of Sonat Inc., an integrated energy company engaged in exploration and production of oil and natural gas, interstate transmission of natural gas and energy services. The complaint alleges that the proposed acquisition would substantially lessen competition in the markets for transmission of natural gas out of producing fields and transmission of natural gas into gas consuming areas. The consent order requires El Paso to divest the East Tennessee Natural Gas Company ("ETNG"), a wholly-owned subsidiary that serves cities in east Tennessee and northern Georgia, and requires Sonat to divest the Sea Robin Pipeline Company ("Sea Robin"). Divestiture of the relevant assets within six months of the date the consent is signed at no minimum price and in a manner approved by the Commission.

Participants

For the Commission: *Roberta S. Baruch, Molly Boast, Phillip L. Broyles, J. Elizabeth Callison, Frank Lipson, Mark Menna, and Gregory Vistnes.*

For the Respondents: *Linda R. Blumkin and Eric H. Queen, Fried, Frank, Harris, Shiver & Jacobson; and Clifford H. Aronson and Joel Mitnick, Skadden, Arps, Slate, Meagher & Flom.*

Complaint

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 El Paso Energy Corporation has entered into an agreement to acquire all of the outstanding securities of Sonat Inc., all subject to the jurisdiction of the Commission, in violation of Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45, that such acquisition, if consummated, would violate Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18, and Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45, and that a proceeding in respect thereof would be in the public interest, hereby issues its complaint, stating its charges as follows:

DEFINITIONS

1. For purposes of this complaint, the following definitions shall apply:
 - a. "Respondent" or "El Paso" means El Paso Energy Corporation, its subsidiaries, divisions, groups, affiliate entities, and each of their directors, officers, employees, agents and representatives; and each partnership, joint venture, joint stock company or concession in which El Paso is a participant.
 - b. "Sonat" means Sonat Inc., its subsidiaries, divisions, groups, affiliate entities, and each of their directors, officers, employees, agents and representatives; and each partnership, joint venture, joint stock company or concession in which Sonat Inc. is a participant.
 - c. "The acquisition" means the transaction described, in whole or in part, in Paragraph 9 of this Complaint.

Complaint

EL PASO

2. Respondent El Paso is a corporation organized and doing business under the laws of the State of Delaware with its executive offices at 1001 Louisiana Street, Houston, Texas 77002.
3. Respondent El Paso operates through six business units: Tennessee Gas Pipeline Company, East Tennessee Natural Gas, El Paso Natural Gas Company, El Paso Field Services Company, El Paso Energy Marketing Company, and El Paso Energy International Company. The company owns the nation's only integrated coast-to-coast natural gas pipeline system and has operations in natural gas transmission, gas gathering and processing, energy marketing, power generation and international energy infrastructure development.
4. Respondent's 1998 revenues were over \$5.5 billion and its total assets exceeded \$10 billion.
5. At all times relevant herein, Respondent El Paso has been and is now 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.

SONAT

6. Sonat is a corporation organized and doing business under the laws of the State of Delaware with its headquarters at 1900 Fifth Avenue North, Birmingham, Alabama 35203.
7. Sonat Inc. is an integrated energy company engaged in exploration and production of oil and natural gas, interstate transmission of natural gas, and energy services. Sonat has

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assets of nearly \$4.4 billion. Its 1998 revenue was \$3.7 billion. Through its natural gas transmission segment, Sonat owns interests in more than 14,000 miles of natural gas pipelines. Southern Natural Gas Company is the major pipeline in the Southeast, with customers in seven states, while Sonat's 50 percent-owned Florida Gas Transmission Company is the principal pipeline serving Florida.

8. At all times relevant herein, Sonat has been and is now 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.

THE ACQUISITION

9. Pursuant to the Agreement and Plan of Merger dated March 13, 1999, by and between El Paso and Sonat, El Paso Energy Corporation intends to acquire 100% of the voting securities of Sonat.

COUNT ONE

10. One relevant line of commerce is the transportation of natural gas out of producing fields.
11. One relevant section of the country is the area of the Gulf of Mexico off the coast of the State of Louisiana that contains portions of the areas known as the West Cameron Area, West Cameron South Addition Area, East Cameron Area, East Cameron South Addition Area, Vermillion Area and Vermillion Area South Addition, and the Garden Banks Area.
12. Consumption of natural gas in the relevant section of the country is substantially below production, with the result that most production in each portion of the relevant section of the country is transported by pipelines to consuming areas along

Complaint

the Gulf Coast and elsewhere in the United States. Pipeline capacity for transporting natural gas out of this section of the country is approximately 2900 million cubic feet per day.

13. The business of transporting natural gas by pipeline out of producing fields in the relevant section of the country is highly concentrated. The acquisition would substantially increase concentration in each portion of the relevant section of the country. In the relevant section of the country as a whole, the acquisition would increase the Herfindahl-Hirschman Index (commonly referred to as "HHI") by over 1000 points to over 4400.
14. Respondent El Paso holds a 34.5 percent effective ownership interest in, and is the general partner of, Leviathan Gas Pipeline Partners, L.P., a publicly held Delaware limited partnership. Leviathan Gas Pipeline Partners, L.P. is a 50 percent owner of Stingray Pipeline Company, which owns a large natural gas transmission system extending more than 120 miles into the Gulf of Mexico off the coast of Louisiana. It gathers gas from various areas in the Gulf of Mexico, including the West Cameron and East Cameron areas, and delivers the gas to shore.
15. Sonat owns and operates Sea Robin Pipeline Company, which starts from shore a few miles to the east of Stingray. Sea Robin Pipeline Company gathers gas from various areas in the Gulf of Mexico, including the West Cameron and East Cameron areas, and transports the gas to shore.
16. Respondent El Paso, through its general partnership in Leviathan Gas Pipeline Partners, L.P., and Sonat, through its ownership interests in the Sea Robin Pipeline Company, are direct and substantial competitors in the business of transporting natural gas out of producing fields in the relevant section of the country set out in Complaint Paragraph 11.

Complaint

17. The effect of the acquisition may be substantially to lessen competition or tend to create a monopoly in the transportation of natural gas out of producing fields in the relevant section of the country set out in Complaint Paragraph 11, in violation of Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18, and Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45, in the following ways, among others:
- a. the acquisition will eliminate actual and potential competition between El Paso and Sonat;
 - b. the acquisition will eliminate actual and potential competition among competitors generally; and
 - c. the acquisition will increase concentration in the transportation of natural gas out of producing fields in the relevant section of the country set out in Complaint Paragraph 11, therefore increasing the likelihood of collusion.
18. Entry would not be timely, likely, or sufficient to prevent anticompetitive effects in the relevant section of the country.

COUNT TWO

19. One relevant line of commerce is the transportation of natural gas out of producing fields.
20. One relevant section of the country is the area of the Gulf of Mexico off the coast of the State of Louisiana that contains portions of the areas known as the Main Pass including its additions and extensions, South Pass, South Pass East Addition, Viosca Knoll, and Mississippi Canyon.
21. Consumption of natural gas in the relevant section of the country is substantially below production, with the result that most production in each portion of the relevant section of the

Complaint

country is transported by pipelines to consuming areas along the Gulf Coast and elsewhere in the United States. Pipeline capacity for transporting natural gas out of this section of the country is approximately 3050 million cubic feet per day.

22. The business of transporting natural gas by pipeline out of producing fields in the relevant section of the country is highly concentrated. The acquisition would substantially increase concentration in each portion of the relevant section of the country. In the relevant section of the country as a whole, the acquisition would increase the HHI by over 1000 points to over 4300.
23. Respondent El Paso holds a 34.5 percent effective ownership interest in, and is the general partner of, Leviathan Gas Pipeline Partners, L.P., a publicly held Delaware limited partnership. Leviathan Gas Pipeline Partners, L.P. owns a 99 percent interest in Viosca Knoll Gathering Company, a Delaware Joint Venture ("VKGC"). VKGC operates a large natural gas gathering system extending more than 100 miles into the Gulf of Mexico off the coast of Louisiana. It transports gas primarily from wells in the Mississippi Canyon and Viosca Knoll areas.
24. Destin Pipeline Company, L.L.C. ("Destin") owns a large natural gas gathering system extending approximately 75 miles into the Gulf of Mexico off the coast of Louisiana. Sonat is the owner of a one-third membership interest in Destin and the operator of the pipeline owned by Destin. Destin transports gas primarily from wells in the Mississippi Canyon and Viosca Knoll areas.
25. Respondent El Paso, through its general partnership in Leviathan Gas Pipeline Partners, L.P., and Sonat, through its ownership interests in Destin, and in other ways, are direct and substantial competitors in the business of transporting

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natural gas out of producing fields in the relevant section of the country set out in Complaint Paragraph 20.

26. The effect of the acquisition may be substantially to lessen competition or tend to create a monopoly in the transportation of natural gas out of producing fields in the relevant section of the country set out in Complaint Paragraph 20, in violation of Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18, and Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45, in the following ways among others:
 - a. the acquisition will eliminate actual and potential competition between El Paso and Sonat;
 - b. the acquisition will eliminate actual and potential competition among competitors generally; and
 - c. the acquisition will increase concentration in the transportation of natural gas out of producing fields in the relevant section of the country set out in Complaint Paragraph 20, therefore increasing the likelihood of collusion.
27. Entry would not be timely, likely, or sufficient to prevent anticompetitive effects in the relevant section of the country.

COUNT THREE

28. One relevant line of commerce is the transportation of natural gas into gas consuming areas.
29. One relevant section of the country is eastern Tennessee and northern Georgia and certain portions thereof.
30. Consumption of natural gas in the relevant section of the country is substantially higher than production, with the result that most natural gas consumed in each portion of the relevant section of the country is transported by pipelines from

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producing areas in the Gulf of Mexico and elsewhere in the United States. Customers in the relevant section of the country purchase contracts for the transportation and delivery of over 750 million cubic feet of natural gas per day.

31. The business of transporting natural gas by pipeline into the relevant section of the country is highly concentrated. The acquisition would substantially increase concentration in each portion of the relevant section of the country. In the least concentrated portion of the relevant section of the country, the acquisition would increase the HHI by over 1000 points to over 5700. In certain other portions, the acquisition would increase the HHI by over 4500 points to 10000.
32. Respondent's subsidiary Tennessee Gas Pipeline Company owns and operates a large natural gas transmission system extending from producing fields in the Gulf of Mexico, Texas, and Louisiana through several States in the southern United States, including Tennessee, and on into the northern United States. In the State of Tennessee, Tennessee Gas Pipeline interconnects with, and delivers natural gas to, a pipeline owned and operated by East Tennessee Natural Gas, also an El Paso subsidiary.
33. East Tennessee Natural Gas transports natural gas received from Tennessee Gas Pipeline Company, and from other sources, to many local gas distribution utilities in eastern Tennessee and northern Georgia.
34. Sonat owns Southern Natural Gas Company, which owns and operates a large natural gas transmission system extending from producing fields in the Gulf of Mexico and Louisiana through several States in the southern United States, including Georgia and Tennessee.

Complaint

35. Sonat, either directly, or via interconnection with East Tennessee Natural Gas, transports natural gas to many local gas distribution utilities in eastern Tennessee and northern Georgia.
36. El Paso offered reduced transportation rates to local gas distribution utilities located in eastern Tennessee in response to a threat by Sonat to by-pass East Tennessee Natural Gas by extending its own pipeline.
37. Respondent El Paso and Sonat are direct and substantial competitors in the business of transporting natural gas into the relevant section of the country set out in Complaint Paragraph 29.
38. The effect of the acquisition may be substantially to lessen competition or tend to create a monopoly in the transportation of natural gas into the relevant section of the country set out in Complaint Paragraph 29, in violation of Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18, and Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45, in the following ways among others:
 - a. the acquisition will eliminate actual and potential competition between El Paso and Sonat;
 - b. the acquisition will eliminate actual and potential competition among competitors generally; and
 - c. the acquisition will increase concentration in the transportation of natural gas into the relevant section of the country set out in Complaint Paragraph 29, therefore increasing the likelihood of collusion.
39. Entry would not be timely, likely, or sufficient to prevent anticompetitive effects in the relevant section of the country.

Decision and Order

VIOLATION CHARGED

40. The proposed acquisition of the stock or assets of Sonat by El Paso, as set forth in Complaint Paragraph 9 herein, 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.

WHEREFORE, THE PREMISES CONSIDERED, the Federal Trade Commission on this sixth day of January, 2000, issues its complaint against said respondent.

By the Commission, Commissioner Leary not participating.

DECISION AND ORDER

The Federal Trade Commission ("Commission"), having initiated an investigation of the proposed acquisition of all the outstanding securities of Sonat Inc., by El Paso Energy Corporation and it now appearing that El Paso, hereinafter sometimes referred to as "Respondent," having been furnished with a copy of a draft complaint that the Bureau of Competition proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge Respondent with violations of Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45, and Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18; and

Respondent, its attorneys, and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by Respondent of all the jurisdictional facts set forth in the aforesaid draft of complaint, a statement that the

Decision and Order

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 waives and other provisions as required by the Commission's Rules; and

The Commission having thereafter considered the matter and having determined that it had reason to believe that the Respondent has violated the said Acts, and that complaint should issue stating its charges in that respect, and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of thirty (30) days, and having duly considered the comment received pursuant to Section 2.34 of its Rules, now in further conformity with the procedure prescribed in Section 2.34 of its Rules, the Commission hereby issues its complaint, makes the following jurisdictional findings and enters the following Order:

1. Respondent El Paso Energy Corporation is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware with its office and principal place of business located at 1001 Louisiana Street, Houston, Texas 77002.
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" means El Paso Energy Corporation, its directors, officers, employees, agents, representatives, successors, and assigns; its subsidiaries, divisions, groups, and affiliates controlled by El Paso Energy

Decision and Order

Corporation, and the respective directors, officers, employees, agents, representatives, successors, and assigns of each.

- B. "Acquisition" means the acquisition by El Paso Energy Corporation of 100 percent of the voting securities of Sonat, pursuant to the Agreement and Plan of Merger dated March 13, 1999 by and between El Paso and Sonat.
- C. "Commission" means the Federal Trade Commission.
- D. "Competing Pipeline" means any existing, planned or proposed pipeline owned or operated by anyone other than El Paso or Sonat that transports, or is intended to transport, natural gas produced in the Gulf of Mexico Outer Continental Shelf.
- E. "Connection Agreement" means any agreement between natural gas pipelines that provides for, among other things, (i) the connection of a pipeline and the associated installation of valves, measurement apparatus, flanges and other devices necessary to deliver or receive natural gas and (ii) the measurement, nomination, scheduling, or balancing of the volume of natural gas received or delivered.
- F. "Destin Interest" means Sonat's ownership interest in Destin Pipeline Company, L.L.C. Sonat owns 33 and 1/3 percent of the membership interests of Destin.
- G. "Divestiture Period" means the period of time beginning on August 1, 1999, and ending on the date Respondent divests ETNG.

Decision and Order

- H. “ETNG” means the East Tennessee Natural Gas Company, a wholly-owned subsidiary of El Paso.
- I. “Exhibit A” means the arbitration provisions attached to and made part of this Order.
- J. “Gulf Offshore Area A” means a quadrilateral shaped area of the Gulf of Mexico cornered by and including the following blocks (as those areas and blocks are defined by the Mineral Management Service of the United States Department of Interior): Vermilion Area Block 148, Garden Banks Area Block 122, Garden Banks Area Block 278, and West Cameron West Addition Block 407.
- K. “Gulf Offshore Area B” means a quadrilateral shaped area of the Gulf of Mexico cornered by and including the following blocks (as those areas and blocks are defined by the Mineral Management Service of the United States Department of Interior): Viosca Knoll Area Block 38, Viosca Knoll Area Block 1006, Mississippi Canyon Area Block 441, and Grand Isle Area Block 25.
- L. “Leviathan” means Leviathan Gas Pipeline Partners, L.P., a publicly held Delaware limited partnership, in which El Paso owns a 34.5 percent effective ownership interest and of which El Paso is the General Partner.
- M. “Open and Non-Discriminatory Access Obligations” means the obligations (i) to permit any shipper requesting access to Viosca Knoll to obtain such access, at the shipper's expense if any construction of pipe is required; (ii) to permit any other pipeline to interconnect with Viosca Knoll, at the expense of the pipeline requesting the connection, and (iii) not to engage in discrimination in scheduling, rates and terms and conditions of service on Viosca Knoll.

Decision and Order

- N. "Schedule A Properties" means "ETNG", "Destin Interest", and "Sea Robin," also set forth in Schedule A attached to and made part of this Order.
- O. "Schedule B Agreement" means those transportation and storage agreements listed in Schedule B attached to and made part of this Order.
- P. "Sea Robin" means the Sea Robin Pipeline Co., a wholly-owned subsidiary of Sonat.
- Q. "Sonat" means Sonat Inc. as it was constituted prior to the acquisition, its predecessors, subsidiaries, divisions, groups and affiliates controlled by Sonat Inc. and the respective directors, officers, employees, agents, representatives, successors, and assigns of each.
- R. "TGP" means Tennessee Gas Pipeline Company, a wholly-owned subsidiary of El Paso.
- S. "Viosca Knoll" means the Viosca Knoll Gathering Company, a Delaware joint venture, which is 99 percent owned by Leviathan, or the natural gas gathering system it owns in Gulf Offshore Area B.

II.**IT IS FURTHER ORDERED** that:

- A. Respondent shall divest, absolutely and in good faith, and at no minimum price, within six months from the date Respondent executes the Agreement Containing Consent Order, the Schedule A Properties.

Decision and Order

- B. Respondent shall divest the Schedule A Properties only to an acquirer or acquirers that receive the prior approval of the Commission and only in a manner that receives the prior approval of the Commission.
- C. The purpose of the divestiture of the Schedule A Properties is to ensure the continued use of the Schedule A Properties in the same business in which the Schedule A Properties are engaged at the time of the acquisition, and to remedy the lessening of competition resulting from the acquisition as alleged in the Commission's complaint.
- D. Pending divestiture of the Schedule A Properties, Respondent shall take such actions as are necessary to maintain the viability and marketability of the Schedule A Properties and to prevent the destruction, removal, wasting, deterioration, or impairment of any of the Schedule A Properties except for ordinary wear and tear.

III.**IT IS FURTHER ORDERED** that:

- A. If Respondent has not divested, absolutely and in good faith and with the Commission's prior approval, the Schedule A Properties within the time set forth in Paragraph II, the Commission may appoint a trustee to divest the Schedule A Properties. In the event that the Commission or the Attorney General brings an action pursuant to § 5(*l*) of the Federal Trade Commission Act, 15 U.S.C. § 45(*l*), or any other statute enforced by the Commission, Respondent shall consent to the appointment of a trustee in such action. Neither the appointment of a trustee nor a decision not to appoint a trustee under this Paragraph shall preclude the Commission or the Attorney General from seeking

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civil penalties or any other relief available to it, including a court-appointed trustee, pursuant to § 5(l) of the Federal Trade Commission Act, or any other statute enforced by the Commission, for any failure by the Respondent to comply with this Order.

- B. If a trustee is appointed by the Commission or a court pursuant to Paragraph III. A. of this Order, Respondent shall consent to the following terms and conditions regarding the trustee's powers, duties, authority, and responsibilities:
1. The Commission shall select the trustee, subject to the consent of Respondent, which consent shall not be unreasonably withheld. The trustee shall be a person with experience and expertise in acquisitions and divestitures involving natural gas pipelines. If Respondent has not opposed, in writing, including the reasons for opposing, the selection of any proposed trustee within ten (10) days after notice by the staff of the Commission to Respondent of the identity of any proposed trustee, Respondent shall be deemed to have consented to the selection of the proposed trustee.
 2. Subject to the prior approval of the Commission, the trustee shall have the exclusive power and authority to divest the Schedule A Properties.
 3. Within ten (10) days after appointment of the trustee, Respondent shall execute a trust agreement that, subject to the prior approval of the Commission and, in the case of a court-appointed trustee, of the court, transfers to the trustee all rights and powers necessary to permit the trustee to effect the divestiture required by this Order.

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4. The trustee shall have twelve (12) months from the date the Commission approves the trust agreement described in Paragraph III. B. 3. to accomplish the divestiture, which shall be subject to the prior approval of the Commission. If, however, at the end of the twelve-month period, the trustee has submitted a plan of divestiture or believes that divestiture can be achieved within a reasonable time, the divestiture period may be extended by the Commission, or, in the case of a court-appointed trustee, by the court; provided, however, the Commission may extend this period only two (2) times.
5. The trustee shall have full and complete access to the personnel, books, records and facilities related to the Schedule A Properties or to any other relevant information, as the trustee may request. Respondent shall develop such financial or other information as such trustee may request and shall cooperate with the trustee. Respondent shall take no action to interfere with or impede the trustee's accomplishment of the divestiture. Any delays in divestiture caused by Respondent shall extend the time for divestiture under this Paragraph in an amount equal to the delay, as determined by the Commission or, for a court-appointed trustee, by the court.
6. The trustee shall use his or her best efforts to negotiate the most favorable price and terms available in each contract that is submitted to the Commission, subject to Respondent's absolute and unconditional obligation to divest expeditiously at no minimum price. The divestiture shall be made in a manner and to an acquirer or acquirers as set out in Paragraph II of this Order; provided,

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however, if the trustee receives bona fide offers from more than one acquiring entity, and if the Commission determines to approve more than one such acquiring entity, the trustee shall divest to the acquiring entity or entities selected by Respondent from among those approved by the Commission, provided, however, that Respondent shall select such entity within five (5) days of receiving notification of the Commission's approval.

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

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duties, including all reasonable fees of counsel and other expenses incurred in connection with the preparation for, or defense of any claim, whether or not resulting in any liability, except to the extent that such liabilities, losses, damages, claims, or expenses result from misfeasance, gross negligence, willful or wanton acts, or bad faith by the trustee.

9. If the trustee ceases to act or fails to act diligently, a substitute trustee shall be appointed in the same manner as provided in Paragraph III. A. of this Order.
10. The Commission or, in the case of a court-appointed trustee, the court, may on its own initiative or at the request of the trustee issue such additional orders or directions as may be necessary or appropriate to accomplish the divestiture required by this Order.
11. In the event that the trustee determines that he or she is unable to divest the Schedule A Properties in a manner consistent with the Commission's purpose as described in Paragraph II, the trustee may divest additional assets of Respondent that are ancillary to the operation of the Schedule A properties, but shall not include additional pipelines, and effect such arrangements as are necessary to satisfy the requirements of this Order.
12. The trustee shall have no obligation or authority to operate or maintain the Schedule A Properties.

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

IV.

IT IS FURTHER ORDERED that, for a period of ten (10) years from the date this Order becomes final, Respondent shall not, without providing advance written notification to the Commission, directly or indirectly:

- A. Acquire any stock, share capital, equity or other interest in any concern, corporate or non-corporate, engaged in at the time of such acquisition, or within the two years preceding such acquisition, the transportation of natural gas by pipeline in Gulf Offshore Area A or Gulf Offshore Area B, or in the area north of latitude 34 degrees North within the States of Georgia or Alabama.
- B. Acquire any assets used or previously used (and still suitable for use) in the transportation of natural gas by pipeline in Gulf Offshore Area A or Gulf Offshore Area B, or in the area north of latitude 34 degrees North within the States of Georgia or Alabama.

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 shall be filed with the Secretary of the Commission, notification need not be made to the

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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 C.F.R. § 803.20), Respondent shall not consummate the transaction until twenty days after submitting such additional information or 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 shall not be required by this paragraph for a transaction for which notification is required to be made, and has been made, pursuant to Section 7A of the Clayton Act, 15 U.S.C. § 18a. Provided, however, nothing in this Order shall require prior notification to the Federal Trade Commission of the acquisition of stocks, assets or other interests if the total consideration does not exceed nine million dollars (\$9,000,000).

V.**IT IS FURTHER ORDERED** that:

- A. Respondent shall cause Viosca Knoll to adhere to the Open and Non-Discriminatory Access Obligations.
- B. Respondent shall cause Viosca Knoll to submit to binding arbitration at the request of any shipper, producer, or pipeline owner who alleges that Respondent is not adhering to the Open and Non-Discriminatory Access Obligations.

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- C. Within thirty (30) days of receipt of a written request from a Competing Pipeline to interconnect with Viosca Knoll, Respondent shall cause Viosca Knoll to enter into a Connection Agreement with such pipeline. Such Connection Agreements shall be on terms that are usual and customary for pipeline connection on the Outer Continental Shelf of the Gulf of Mexico. Provided, that Respondent need not enter into a Connection Agreement that would require Viosca Knoll to receive natural gas from a “natural gas company” or otherwise cause it to become a “natural gas company” as defined by 15 U.S.C. § 717a(6).
- D. If the Respondent and a Competing Pipeline are unable to agree on the terms and conditions of a Connection Agreement under Paragraph V. C., and if the Competing Pipeline elects to cause the issue to be submitted to binding arbitration, Respondent shall cause Viosca Knoll to submit to such arbitration.
- E. Respondent shall cause Leviathan to publish Paragraph V. of the Order and related definitions on Leviathan's electronic website and incorporate Paragraph V into future contracts with shippers and connecting pipelines and shall notify all shippers and connecting pipelines with whom it has existing contracts of this obligation.
- F. Respondent shall immediately notify the Commission of the initiation of any arbitration proceedings under this Paragraph. Arbitration under this Paragraph shall be pursuant to the terms of the alternative dispute resolution procedures of the Federal Energy Regulatory Commission (“FERC”) set forth at 18 C.F.R. § 385.605 (Rule 605), or if the Rule 605 procedures are unavailable (for reasons other than the

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refusal of the other party to the arbitration to agree to a FERC arbitration), in accordance with the procedures in Exhibit A. Failure of Respondent thereafter to abide by the arbitrator's decision shall be a violation of this Order. Provided, however, Viosca Knoll will not be required to abide by an arbitration decision if the decision is vacated by the FERC.

- G. The provisions of Paragraph V. shall be suspended upon a showing by Respondent by means of affidavit that at least one-third of the membership interests in Destin Pipeline Company, L.L.C. is controlled by a person who does not have an interest in wells or leases in the Viosca Knoll, Mississippi Canyon, Destin Dome, or De Soto Canyon areas of the Gulf of Mexico Outer Continental Shelf. The suspension shall be effective for periods of six months each, beginning 30 days following the submission of Respondent's affidavit, unless the Assistant Director of the Compliance Division of the Bureau of Competition determines that the affidavit is incorrect. Arbitrations under Paragraph V. that were begun during the time the provisions of Paragraph V. were in effect, and the validity of arbitration decisions made thereunder, shall not be affected by the suspension permitted by this subparagraph.
- H. The provisions of Paragraph V. shall be terminated upon a showing by Respondent by means of affidavit that (a) Respondent is not the operator of Viosca Knoll, (b) Respondent is not the general partner of Leviathan, and (c) El Paso's effective ownership interest in Viosca Knoll and in Leviathan falls below 15 percent or (d) neither Leviathan nor El Paso owns a majority interest in Viosca Knoll.

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- I. The purpose of this Paragraph is to remedy the anticompetitive effects of the acquisition as alleged in the Complaint, if Sonat's interest in Destin Pipeline Company, L.L.C., is sold to a firm with interests in wells or leases in the area in which VKGC or Destin Pipeline Company, L.L.C., are likely to compete.

VI.**IT IS FURTHER ORDERED** that:

- A. Within ten (10) days from the date that the Commission accepts the Agreement Containing Consent Order in this matter, Respondent shall provide to each customer who has signed a Schedule B Agreement a written notification (i) extending the period during which such customer may give notice of its election to terminate, extend, or roll over such Agreement(s) to 60 days after the date of the divestiture of ETNG, and (ii) extending, at the customer's option, the termination date of the Schedule B Agreement(s). Such termination date may be extended, without penalty, at the customer's option, to either October 31 of the year in which ETNG is divested or October 31 of the year after the year in which ETNG is divested. The customer's option concerning the termination date of the Schedule B Agreement must be exercised at the time the customer provides its notice of election to terminate, extend, or roll over its Schedule B Agreement(s).
- B. Any Schedule B Agreements and the following agreements entered into, or extended, by an ETNG customer during the Divestiture Period may be terminated, without penalty, if the customer gives notice to ETNG and TGP within 60 days after the date

Decision and Order

ETNG is divested: 1) firm transportation agreements on ETNG; 2) firm transportation agreements on TGP for Primary Deliveries into ETNG; or 3) firm storage agreements on TGP that utilize a firm transportation agreement on TGP for Primary Deliveries into ETNG. Termination shall be effective on October 31 of the year the customer gives notice or October 31 of the following year at the customer's option.

- C. Respondent, for at least three years from the date of the ETNG divestiture, shall refrain from taking any action that causes the TGP/ETNG interconnects at Lobelville, Tennessee, and at Ridgetop, Tennessee, to cease having swing capability within the meaning of Section 7.1 of ETNG's FERC Tariff Rate Schedule LMS-MA ("Section 7.1") and, thereafter, until the tenth anniversary of the divestiture of ETNG, to provide at least 60 days' written notice to each TGP customer that receives Primary Deliveries at either Lobelville or Ridgetop of Respondent's change in operation which would cause such interconnect to no longer have swing capability within the meaning of Section 7.1.

VII.**IT IS FURTHER ORDERED** that:

- A. Within thirty (30) days after the date this Order becomes final and every thirty (30) days thereafter until Respondent has fully complied with the provisions of this Order, Respondent shall submit to the Commission a verified written report setting forth in detail the manner and form in which it intends to comply, is complying, and has complied with this Order. Respondent shall include in its compliance reports, among other things that are required from time to time, a full description of the efforts being made to

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comply with the Order, including a description of all substantive contacts or negotiations for the divestiture and the identity of all parties contacted. Respondent shall include in its compliance reports copies of all written communications to and from such parties, all internal memoranda, and all reports and recommendations concerning divestiture. The final compliance report shall include a statement that the divestiture has been accomplished in the manner approved by the Commission and shall include the date the divestiture was accomplished.

- B. One year (1) from the date this Order becomes final, annually for the next nine (9) years on the anniversary of the date this Order becomes final, and at other times as the Commission may require, Respondent shall file a verified written report with the Commission setting forth in detail the manner and form in which it has complied and is complying with this Order.

VIII.

IT IS FURTHER ORDERED that Respondent shall notify the Commission at least thirty (30) days prior to any proposed change in the corporate Respondent that may affect compliance obligations arising out of the Order, 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.

IX.

IT IS FURTHER ORDERED that, for the purpose of determining or securing compliance with this Order, upon written request, Respondent shall permit any duly authorized representative of the Commission:

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- A. Access, during office hours and in the presence of counsel, to all facilities and access 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, employees, agents or independent contractors of Respondent.

X.

IT IS FURTHER ORDERED that this Order will terminate on January 6, 2020.

By the Commission, Commissioner Leary not participating.

**SCHEDULE A
PROPERTIES**

Properties to be divested:

ETNG
Destin Interest
Sea Robin

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**SCHEDULE B
AGREEMENTS**

1. Each TGP firm transportation agreements that has (i) a Primary Delivery Point at an TGP/ETNG interconnect, (ii) an initial term of twelve months or longer, and (iii) a currently effective election deadline in the Divestiture Period:

Designated as TGP FT agreements on the attached spreadsheet.

2. Each ETNG firm transportation or storage agreement with an initial term of twelve months or longer that has a currently effective election deadline in the Divestiture Period:

Designated as ETNG FT or ETNG FS Agreements on the attached spreadsheet.

3. Each TGP storage agreement with an initial term of twelve months or longer that has a currently effective election deadline in the Divestiture Period and was entered into with a person who also has a firm transportation agreement with ETNG:

Designated as TGP FS agreements on the attached spreadsheet.

EXHIBIT A
ARBITRATION PROVISIONS

- (a) A person desiring arbitration under the Order will give at least ten days notice in writing of the subject it wishes to discuss, provide a written statement of the dispute, and designate an officer or other representative of such party with complete power to resolve the dispute to attend the meeting. Within ten days after receipt of such request, the Respondent will provide a responsive written statement and will designate an officer or other representative of such party who will attend the meeting with complete power to resolve the dispute.
- (b) If the meeting fails to resolve the dispute among the officers or other representatives of the parties, the dispute shall be submitted for nonappealable, binding determination through arbitration.
- (c) An officer or other representative with complete authority to resolve the dispute for each party shall attend the arbitration. Three arbitrators shall be chosen from the arbitrators available through the Houston, Texas office, of the American Arbitration Association (“AAA”) (or any successor thereto, or if there is no successor thereto, the Judicial Arbitration and Mediation Services, Inc.).
- (d) The arbitrators shall be appointed by the AAA in accordance with the AAA's rules for selection of arbitrators. Unless otherwise agreed by the parties, the arbitrators shall be individuals with a minimum of ten years experience in the pipeline and energy industry and who are not, and have not previously been, employed by either party (or an affiliate thereof), and do not have a direct or indirect interest in either party (or an affiliate thereof) or the subject matter of the arbitration.

Analysis to Aid Public Comment

- (e) The parties shall make discovery and disclosure of all matters relevant to the dispute to the extent and in the manner provided by AAA. The arbitrators will rule on all requests for discovery and disclosure and discovery shall be completed within 30 days of the date of first notice pursuant to (a) above. The arbitrators may consider any matter relevant to the subject of the dispute and shall follow the statutes and decisions of the substantive law of Texas. The arbitrators shall issue a final ruling within 60 days of the date of the first notice pursuant to (a) above.
- (f) The ruling of the arbitrators shall be in writing and signed and shall be final and binding upon the Parties. The fees and expenses of counsel, witnesses and employees of the Parties and all other costs and expenses incurred in connection with arbitration shall be allocated as determined by the arbitrators. All meetings and arbitration help pursuant to this Section shall take place in Houston, Texas.

**ANALYSIS AND PROPOSED CONSENT ORDER
TO AID PUBLIC COMMENT**

I. Introduction

The Federal Trade Commission ("Commission") has accepted for public comment from El Paso Energy Corporation ("El Paso") an Agreement Containing Consent Order ("the proposed consent order"). El Paso has also reviewed a draft complaint that the Commission contemplates issuing. The proposed consent order is designed to remedy likely anticompetitive effects arising from El

Paso's proposed acquisition of all of the voting securities of Sonat Inc.

II. Description of the Parties and the Proposed Acquisition

El Paso, a Delaware corporation headquartered in Houston, Texas, owns and operates natural gas transmission, gas gathering and processing, energy marketing, power generation and international energy infrastructure development companies. It operates through the following business units: Tennessee Gas Pipeline Company, East Tennessee Natural Gas Company, El Paso Natural Gas Company, El Paso Field Services Company, El Paso Energy Marketing Company, and El Paso Energy International Company.

In addition to its wholly-owned interests, El Paso also controls offshore pipelines through its interest in Leviathan Gas Pipeline Partners, L.P. ("Leviathan"), a publicly held Delaware limited partnership. El Paso holds a 34.5 percent effective ownership interest in, and is the general partner of, Leviathan. Leviathan owns interests in pipelines across the Gulf of Mexico, including Stingray and Viosca Knoll Gathering Company ("VKGC"), the two pipelines relevant to this matter. El Paso operates both of these pipelines.

Sonat, a Delaware corporation headquartered in Birmingham, Alabama, is an integrated energy company engaged in exploration and production of oil and natural gas, interstate transmission of natural gas and energy services. Through its natural gas transmission segment, Sonat owns interests in more than 14,000 miles of natural gas pipelines. Sonat's Southern Natural Gas Company is the major pipeline in the Southeast, with customers in seven states. Sonat's 50 percent-owned Florida Gas Transmission Company is the principal pipeline serving Florida. Sonat's revenues for the year ending 1998 were \$3.7 billion. It has assets of nearly \$4.4 billion.

Analysis to Aid Public Comment

On March 13, 1999, El Paso and Sonat entered into an Agreement and Plan of Merger pursuant to which El Paso intended to acquire 100 percent of the voting securities of Sonat.

III. The Draft Complaint

The draft complaint alleges two relevant lines of commerce: the transportation of natural gas out of producing fields and the transportation of natural gas into gas consuming areas.

A. Transportation of Natural Gas out of the Producing Fields

The draft complaint alleges two relevant sections of the country in which to analyze the acquisition by El Paso of Sonat's natural gas pipelines out of the producing fields. The first is the area of the Gulf of Mexico off the coast of the State of Louisiana that contains portions of the areas known as the West Cameron Area, West Cameron South Addition Area, East Cameron Area, East Cameron South Addition Area, Vermillion Area and Vermillion Area South Addition, and the Garden Banks Area. Pipeline capacity for transporting natural gas out of this section of the country is approximately 2900 million cubic feet per day.

El Paso and Sonat are direct and substantial horizontal competitors in this relevant market. El Paso, through its interests in Leviathan, controls a 50 percent share of Stingray Pipeline Company, which owns a large natural gas transmission system extending more than 100 miles into the Gulf of Mexico off the coast of Louisiana. It gathers gas from these areas and delivers the gas to shore. Sonat owns and operates Sea Robin Pipeline Company which starts from shore a few miles east of Stingray. Sea Robin also gathers gas from these areas and delivers it to shore.

Analysis to Aid Public Comment

The draft complaint alleges that the post-merger market would be highly concentrated and that the acquisition would substantially increase concentration in the market. The acquisition would increase the Herfindahl-Hirschman Index (commonly referred to as "HHI")⁽¹⁾ in the geographic market by over 1000 points to over 4400.

The draft complaint further alleges that the effect of the acquisition may be substantially to lessen competition or tend to create a monopoly in the transportation of natural gas out of producing fields in the relevant section of the country by eliminating actual and potential competition between El Paso and Sonat; by eliminating actual and potential competition among competitors generally; and by increasing concentration in the transportation of natural gas out of producing fields in the relevant section of the country, therefore increasing the likelihood of collusion.

The draft complaint alleges that entry would not be timely, likely or sufficient to prevent anticompetitive effects in the relevant markets.

The second relevant offshore geographic market consists of portions the offshore Gulf of Mexico areas known as the Main Pass, including its additions and extensions; South Pass; South Pass East Addition; Viosca Knoll; and Mississippi Canyon. Pipeline capacity for transporting natural gas out of this section of the country is approximately 3050 million cubic feet per day.

El Paso, through its control of VKGC, and Sonat, through its ownership interests in Destin Pipeline Company, L.L.C. ("Destin"), and in other ways, are direct and substantial competitors in the business of transporting natural gas out of producing fields in the relevant sections of the country listed above. VKGC operates a large natural gas gathering system extending more than 100 miles into the Gulf of Mexico off the coast of Louisiana. Destin owns a large natural gas gathering system extending more than 100 miles into the Gulf of Mexico off

Analysis to Aid Public Comment

the coast of Louisiana. Sonat owns a one-third membership interest in Destin and operates the pipeline owned by Destin.

The draft complaint alleges that the post-merger market would be highly concentrated, and that the acquisition would substantially increase concentration in the market. The acquisition would increase the HHI in the geographic market by over 1000 points to over 4300.

The draft complaint alleges that the effect of the acquisition may be substantially to lessen competition or tend to create a monopoly in the transportation of natural gas out of producing fields in the relevant section of the country by eliminating actual and potential competition between El Paso and Sonat; by eliminating actual and potential competition among competitors generally; and by increasing concentration in the transportation of natural gas out of producing fields in the relevant section of the country, therefore increasing the likelihood of collusion.

The draft complaint further alleges that entry would not be timely, likely, or sufficient to prevent anticompetitive effects in the relevant market.

B. Transportation of Natural Gas into Gas Consuming Areas

The draft complaint alleges that a relevant line of commerce is the transportation of natural gas into gas consuming areas and a relevant section of the country is eastern Tennessee and northern Georgia and submarkets thereof. This region includes the metropolitan areas of Atlanta, Georgia and Chattanooga and Knoxville, Tennessee. Customers in this area of the country purchase contracts for the transportation and delivery of over 750 million cubic feet of natural gas per day.

Analysis to Aid Public Comment

El Paso and Sonat are direct and substantial competitors in the business of transporting natural gas into this section of the country. El Paso's Tennessee Gas Pipeline Company owns and operates a large natural gas transmission system extending from producing fields in the Gulf of Mexico, Texas, and Louisiana through several states in the southern United States, including Tennessee, and on into the northern United States. In the State of Tennessee, Tennessee Gas Pipeline interconnects with, and delivers natural gas to, a pipeline owned and operated by East Tennessee Natural Gas Company ("ETNG"), also an El Paso subsidiary. ETNG transports natural gas received from Tennessee Gas Pipeline Company, and from other sources, to many local gas distribution utilities in eastern Tennessee and northern Georgia. Sonat owns Southern Natural Gas Company, which owns and operates a large natural gas transmission system extending from producing fields in the Gulf of Mexico and Louisiana through several states in the southern United States, including Georgia and Tennessee. Sonat, either directly, or via interconnection with East Tennessee Natural Gas, transports natural gas for many local gas distribution utilities in eastern Tennessee and northern Georgia. El Paso offered reduced transportation rates to local gas distribution utilities located in eastern Tennessee in response to a threat by Sonat to by-pass ETNG by extending its own pipeline.

The draft complaint alleges that the post-merger market would be highly concentrated, and that the acquisition would substantially increase concentration in the market. In the least concentrated submarket of the geographic market, the acquisition would increase the HHI by over 1000 points to over 5700. In certain other submarkets, the acquisition would increase the HHI by over 4500 points to 10000.

The draft complaint alleges that the effect of the acquisition may be substantially to lessen competition or tend to create a monopoly in the transportation of natural gas into the relevant section of the country by eliminating actual and potential competition between El Paso and Sonat; by eliminating actual and potential competition among competitors generally; and by

Analysis to Aid Public Comment

increasing concentration in the transportation of natural gas into the relevant section of the country, therefore increasing the likelihood of collusion.

The draft complaint further alleges that entry would not be timely, likely or sufficient to prevent anticompetitive effects in the relevant markets.

IV. Terms of the Proposed Consent Order

The proposed consent order is designed to remedy the Commission's competitive concerns about the proposed acquisition. To solve the competitive concerns in the onshore markets, the proposed consent order requires El Paso to divest ETNG, the owner of the El Paso system that serves cities in east Tennessee and northern Georgia. To solve the competitive concerns offshore, the proposed order requires El Paso to divest Sea Robin (a wholly-owned subsidiary of Sonat) and Sonat's 33 percent interest in Destin.

The proposed consent order requires divestiture of the relevant assets within six months of the date on which the consent agreement was signed at no minimum price to a buyer and in a manner that are approved by the Commission. In the event divestiture has not occurred within six months, the proposed order provides that the Commission may appoint a trustee to divest the assets. The proposed order does not require that El Paso present the Commission with a buyer of the assets to be divested before acceptance of the proposed consent agreement for public comment (an "up-front buyer") because El Paso has satisfied the Commission that, in this instance, consumers will not be harmed by a post-order divestiture.

In some cases the Commission has required a respondent to divest "crown jewel" assets in the event the respondent fails to divest a narrower package of assets promptly. Such a crown jewel

Analysis to Aid Public Comment

is unnecessary in this case. El Paso has agreed to divest a package of assets that includes ETNG and Sea Robin in their entirety, which should help ensure that the divestiture will convey a saleable and competitively viable set of assets. This will increase the likelihood of finding a buyer acceptable to the Commission in a timely manner. Therefore, the proposed divestiture should readily suffice to remedy consumer harm.

The proposed order contains ancillary provisions in both the onshore and offshore markets. Many customers on the ETNG system have ETNG and Tennessee Gas Pipeline transportation and/or storage contracts with renewal elections to be made in the midst of the proposed ETNG divestiture process. The proposed order extends the renewal deadline for these contracts until 60 days following the divestiture of ETNG, provides customers the option of extending the expiration dates of these contracts, and allows customers to terminate certain other ETNG and Tennessee Gas Pipeline contracts entered into as the proposed divestiture process is underway. The purpose of these provisions is to permit the customer to know the identity of the acquirer of ETNG before having to commit to new contracts for transportation or storage either on ETNG or, more significantly, on the trunklines that transport the gas from the Gulf of Mexico into ETNG. The Commission anticipates that the acquirer of ETNG will open additional interconnections with trunklines that currently intersect with the ETNG system so as to provide customers with alternative routes for gas supply. The tolling provision will give customers the option of using these new sources if they so choose.

The proposed order also contains ancillary provisions regarding VKGC which are in effect in the event Sonat's Destin interest is sold to a natural gas producer. The sale of Sonat's interest to a producer could result in Destin's being less than fully competitive in certain instances in which the producer elected to serve its own producing interests by reserving one part of the Destin system at the expense of independent producers seeking access to certain other parts of the Destin system. To remedy the potential for the divestiture to have this anticompetitive result, the

Analysis to Aid Public Comment

proposed consent order requires El Paso to cause VKGC to adhere to benchmarks established by competition between VKGC and Destin. Specifically, the proposed order requires El Paso to cause VKGC to allow any shipper to obtain access to VKGC, which would be at the shipper's expense if any construction of pipe is required, and to allow any other pipeline to interconnect with VKGC, at the expense of the pipeline requesting the connection. The proposed consent prohibits El Paso from engaging in discrimination in scheduling, rates and terms and conditions of service on VKGC. The connecting pipeline can elect to submit a dispute regarding the terms and conditions of a connection to binding arbitration. El Paso is required to publish the arbitration clause in the order on Leviathan's electronic web site and to incorporate it into further contracts with shippers and connecting pipelines. El Paso is also required to notify the Commission of arbitration proceedings initiated under the proposed order. The requirement to provide open and non-discriminatory access to VKGC may be suspended upon a showing by El Paso that at least one-third of the membership interest in Destin is controlled by a person who does not have an interest in wells or leases in certain areas of the Gulf of Mexico.

V. Opportunity for Public Comment

The proposed consent order has been placed on the public record for 30 days for receipt of comments by interested persons. Comments received during this period will become part of the public record. After 30 days, the Commission will again review the proposed consent order and the comments received and will decide whether it should withdraw from the agreement or make the proposed consent order final.

By accepting the proposed consent order subject to final approval, the Commission anticipates that the competitive problems alleged in the complaint will be resolved. The purpose of this analysis is to invite public comment on the proposed

Analysis to Aid Public Comment

consent order in order to aid the Commission in its determination of whether to make the proposed consent order final. This analysis is not intended to constitute an official interpretation of the proposed consent order nor is it intended to modify the terms of the proposed consent order in any way.

Endnotes:

1. The HHI is a measurement of market concentration calculated by summing the squares of the individual market shares of all the participants.

Complaint

IN THE MATTER OF

**NEW ENGLAND TRACTOR TRAILER
TRAINING SCHOOL OF MASSACHUSETTS,
INC.; NEW ENGLAND TRACTOR TRAILER
TRAINING SCHOOL OF CONNECTICUT, INC.;**
AND MARK GREENBERG

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

Docket C-3916; File No. 982 3040

Complaint, January 10, 2000--Decision, January 10, 2000

This consent order prohibits respondent New England Tractor Trailer Training School of Massachusetts, Inc. ("NETTTS") from making future misrepresentations concerning the results or benefits of NETTTS's training programs or career services. Respondent is also required to disclose its placement rates if they make any representation about the employment or placement rates of graduates from their program. This disclosure is required in writing before a prospective student is given enrollment papers or forms. Respondent must also disclose their licensing test pass rates if they make any statement about any test passing rates by graduates of their program, or before any prospective student is given any enrollment papers or forms.

Participants

For the Commission: *Heather A. Hipsley, Carol Jennings,*
and *Elaine D. Kolish.*

For the Respondents: *Ann Plaza Collier and Judith Oldham,*
Shannon, Rill & Scott.

COMPLAINT

The Federal Trade Commission, having reason to believe that New England Tractor Trailer Training School of Massachusetts, Inc. and New England Tractor Trailer Training School of

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Connecticut, Inc., corporations, and Mark Greenberg, individually and as an officer and director of the corporations (“respondents”), have violated the provisions of the Federal Trade Commission Act, and it appearing to the Commission that this proceeding is in the public interest, alleges:

1. Respondent New England Tractor Trailer Training School of Massachusetts, Inc., is a Massachusetts corporation with its principal office or place of business at 1050 Hancock Street, Quincy, Massachusetts 02169.

2. Respondent New England Tractor Trailer Training School of Connecticut, Inc., is a Connecticut corporation with its principal office or place of business at 32 Field Road, Somers, Connecticut 06071.

3. Respondent Mark Greenberg is an officer and director of the corporate respondents. Individually or in concert with others, he formulates, directs, or controls the policies, acts, or practices of the corporations, including the acts or practices alleged in this complaint. His principal office or place of business is the same as that of New England Tractor Trailer Training School of Massachusetts, Inc.

4. Respondents are engaged, and have been engaged, in the sale and offering for sale of vocational training programs to the public, including but not limited to driver training for tractor trailer and heavy straight trucks. Respondents’ truck driver training programs typically last from one to four weeks and cost from \$1700 to \$3600.

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

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6. Respondents have disseminated or have caused to be disseminated advertisements and promotional materials for their training programs. These advertisements and promotional materials contain the following statements:

- a. "We deliver careers. That means plenty of career opportunities for those with professional training and licensed know-how in heavy truck operation. NETTTS [New England Tractor Trailer Training School] will prepare you to take your state's test for a Commercial Driver's License that can be your start in an independent and rewarding career moving America's goods. With your license, you can put a great career in gear and go."
- b. "The trucking industry needs at least 450,000 drivers this year. . . . You could be one of them."
- c. "Get your Commercial Driver's License and get on the road to a new job."
- d. "You can enter the NETTTS program for tractor trailer drivers or commercial heavy straight truck drivers if you have:
 - A high school diploma, or a GED (high school equivalent certificate), or you pass an approved ability-to-benefit test.
 - A valid driver's license (from any state).
 - Ability to pass a U.S. Department of Transportation physical."
- e. "New England Tractor Trailer Training School has been around for thirty years. Simply put, nobody has the experience we do in preparing people for a career in trucking."

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- f. "Learn to drive the big rigs in just 3 short weeks."
- g. "1 week Commercial Drivers License training."
- h. "When you graduate from a CDL A program, you *will be ready* for a career as a professional tractor trailer driver." (Emphasis in original.)
- i. "We have earned a reputation for training excellence by combining the necessary classroom training with hands-on knowledge and operating practice you need to take and pass your state's Commercial Driver's License (CDL) test."
- j. "Our experienced instructors can help you become a professional driver fully prepared to earn a good living hauling America's products."
- k. "With our comprehensive behind-the-wheel training and career placement assistance we can have you licensed and on the road."
- l. "You will practice on NETTTS' own big rigs. We have over 150 tractors and trailers spread among our five campuses in the northeastern United States."
- m. "NETTTS puts students in touch with trucking companies that reimburse students' tuition."
- n. "And because you live in the Northeast, you won't have to move or give up your home life to earn it."
- o. "84% of All Graduates Requested Placement. 81% Requesting Placement Are Placed. The 16% of our graduates not requesting placement are obtaining their licenses to upgrade their positions with their current employers or have already acquired employment on their own."

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7. During interviews with prospective students, employees of respondents have made the following oral representations to persuade prospective students to enroll in their programs:

- a. Over 85% of our students are hired before they get their CDL licenses.
- b. 95% of NETTTS' graduates pass the CDL test.
- c. NETTTS' placement service places 85% of NETTTS' graduates in truck driving jobs.
- d. NETTTS' placement service places nearly all of NETTTS' graduates in truck driving jobs.
- e. Local jobs are available to NETTTS' graduates.

8. Through the means described in Paragraphs 6 and 7, respondents have represented, expressly or by implication, that:

- a. NETTTS' placement services place a high percentage of NETTTS graduates in jobs as truck drivers.
- b. All or virtually all of NETTTS' graduates obtain employment as truck drivers.
- c. A high percentage of NETTTS' graduates will be able to obtain local truck driving jobs.
- d. Ninety-five percent (95%) of NETTTS' graduates pass the CDL test.
- e. A high percentage of NETTTS' graduates pass the CDL test the first time they take it.

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- f. Students who complete NETTTS' training program will receive adequate instruction, including a sufficient opportunity for practice driving, to enable them to pass the CDL test.
 - g. Many NETTTS' graduates are reimbursed the cost of their tuition by trucking companies that employ them.
 - h. NETTTS admits only students who possess a high school diploma or equivalency or pass an admissions test, and are otherwise qualified to complete the training program and to obtain a Commercial Drivers License (CDL).
9. In truth and in fact:
- a. NETTTS' placement services do not place a high percentage of NETTTS' graduates in jobs as truck drivers.
 - b. Not all of NETTTS' graduates are able to obtain employment as truck drivers.
 - c. A significant percentage of NETTTS' graduates are not able to obtain local truck driving jobs.
 - d. The rate of passing of the CDL test by graduates of the NETTTS' program is substantially less than 95%.
 - e. A significant percentage of NETTTS' graduates do not pass the CDL test the first time they take it.
 - f. In numerous instances, students who complete NETTTS' training program do not receive adequate instruction, including a sufficient opportunity for practice driving, to enable them to pass the CDL test.

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- g. A significant number of NETTTS' graduates are not reimbursed the cost of their tuition by trucking companies that employ them.
- h. NETTTS admitted some students who did not meet its own admissions criteria and were unqualified to complete the training program and to obtain a CDL.

Therefore, the representations set forth in Paragraph 8 were, and are, false or misleading.

10. Through the means described in Paragraphs 6 and 7, respondents have represented, expressly or by implication, that they possessed and relied upon a reasonable basis that substantiated the representations set forth in Paragraph 8, at the time the representations were made.

11. In truth and in fact, respondents did not possess and rely upon a reasonable basis that substantiated the representations set forth in Paragraph 8, at the time the representations were made. Therefore, the representation set forth in Paragraph 10 was, and is, false or misleading.

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

THEREFORE, the Federal Trade Commission this tenth day of January, 2000, has issued this complaint against respondents.

By the Commission, Commissioner Leary not participating.

DECISION AND ORDER

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

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

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

1. Respondent New England Tractor Trailer Training School of Massachusetts, Inc., is a Massachusetts corporation with its headquarters located at 1050 Hancock Street, Quincey, Massachusetts.

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2. Respondent New England Tractor Trailer Training School of Connecticut, Inc., is a Connecticut corporation with its headquarters located at 32 Field Road, Somers, Connecticut 06071.
3. Respondent Mark Greenberg is an officer and director of the corporate respondents. Individually or in concert with others, he formulates, directs, or controls the policies, acts, or practices of the corporations. His principal office or place of business is the same as that of New England Tractor Trailer Training School of Massachusetts, Inc.
4. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondents, and the proceeding is in the public interest.

ORDER**DEFINITIONS**

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

1. "Training program" shall mean any and all training or instructional course or program of whatever type, duration, or medium used.
2. "Clearly and prominently" shall mean as follows:
 - A. In an advertisement communicated through an electronic medium (such as television, video, radio, and interactive media such as the Internet and online services), the disclosure shall be presented simultaneously in both the audio and video

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portions of the advertisement. *Provided, however,* that in any advertisement presented solely through video or audio means, the disclosure may be made through the same means in which the advertisement is presented. The audio disclosure shall be delivered in a volume and cadence sufficient for an ordinary consumer to hear and comprehend it. The video disclosure shall be of a size and shade, and shall appear on the screen for a duration, sufficient for an ordinary consumer to read and comprehend it. In addition to the foregoing, in interactive media the disclosure shall be unavoidable and shall be presented prior to the consumer incurring any financial obligation.

- B. In a print advertisement, promotional material, or instructional manual, the disclosure shall be in a type size and location sufficiently noticeable for an ordinary consumer to read and comprehend it, in print that contrasts with the background against which it appears. In multi-page documents, the disclosure shall appear on the cover or first page.
 - C. In oral communications, the disclosure shall be delivered in a volume and cadence sufficient for an ordinary consumer to hear and comprehend it.
 - D. In all cases, the disclosure must be in understandable language and syntax, and in the same language as the representation that triggers the disclosure, and nothing contrary to, inconsistent with, or in mitigation of the disclosure shall be used.
3. Unless otherwise specified, “respondents” shall mean New England Tractor Trailer Training School of Massachusetts, Inc., and New England Tractor Trailer Training School of Connecticut, Inc., corporations,

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their successors and assigns and their officers; Mark Greenberg, individually and as an officer and director of the corporations; and each of the above's agents, representatives, and employees.

4. "Commerce" shall mean as defined in Section 4 of the Federal Trade Commission Act, 15 U.S.C. § 44.

I.

IT IS ORDERED that respondents, directly or through any corporation, subsidiary, division, or other device, in connection with the advertising, promotion, offering for sale, or sale, of any training program, in or affecting commerce, shall not make any representation, in any manner, expressly or by implication, about:

- A. the job placement rate or record of employment success of graduates of their training programs;
- B. the opportunities for employment, or employment demand, for graduates of their training programs;
- C. the percent, number or portion of graduates of their training programs who pass qualifying tests, including, but not limited to, the CDL test;
- D. the adequacy of their training programs to prepare graduates to pass qualifying tests, including, but not limited to, the CDL test;
- E. the placement assistance that respondents provide to graduates of their training programs;
- F. reimbursement of the cost of tuition by employers of graduates of respondents' training programs;

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- G. the equipment used in their training programs;
- H. the experience and qualifications of their instructors;
- I. the amount of student driving time included in their training programs;
- J. the terms and conditions of admittance to or completion of respondents' training programs; and
- K. any other representation regarding the results or benefits of respondents' training programs or career services;

unless the representation is true and, at the time it is made, respondents possess and rely upon competent and reliable evidence that substantiates the representation.

II.**PLACEMENT RATES DISCLOSURE**

IT IS FURTHER ORDERED that respondents, directly or through any corporation, subsidiary, division or other device, in connection with the advertising, promotion, offering for sale, or sale of any training program, in or affecting commerce,

- A. shall not make any representation, in any manner, expressly or by implication, about the number of graduates of respondents' training programs, or similar types of training programs, who obtain employment, or the rate of placement or employment of such graduates, or use any terms (including, but not limited to, *many* or *most*) that purport to quantify the likelihood that such graduates will obtain employment, unless respondents disclose, clearly and prominently, and in close proximity to the representation,

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respondents' "Placement Rates," as calculated pursuant to Appendix A; and

- B. shall provide, during the initial discussion of enrollment with any prospective purchaser of respondents' training programs and prior to the time the enrollment agreement and other enrollment forms are presented to the prospective student, a copy of the Placement Rates Disclosure Statement (to be retained by the prospective purchaser), set forth in Appendix B. The Placement Rates Disclosure Statement shall be set forth in the same format and type size as set forth in Appendix B. The Disclosure Statement shall be set forth in a separate document and shall contain no other information in the same document, except that the Test Pass Rates Disclosure Statement, required by Part III of this Order, may be included in the same document. Respondents shall hand the Disclosure Statement to the prospective purchaser separately from other documents and shall, in immediate proximity thereto, clearly and prominently, make the following oral disclosure, or a substantially similar statement:

Here are the job placement rates for the programs at our school.

If test pass rates are included on the Disclosure Statement, the following oral disclosure, or a substantially similar statement, shall be substituted:

Here are the job placement rates and CDL [or other] test pass rate for the programs at our school.

III.**TEST PASS RATES DISCLOSURE**

IT IS FURTHER ORDERED that respondents, directly or through any corporation, subsidiary, division or other device, in connection with the advertising, promotion, offering for sale, or sale of any training program, in or affecting commerce,

- A. shall not make any representation, in any manner, expressly or by implication, about the rate of passing of any test, including but not limited to the CDL test, by graduates of their training programs, or of similar types of training programs, unless respondents disclose, clearly and prominently, and in close proximity to the representation, respondents' "Test Pass Rates," as calculated pursuant to Appendix C; and
- B. shall provide, during the initial discussion of enrollment with any prospective purchaser of respondents' training programs and prior to the time the enrollment agreement and other enrollment forms are presented to the prospective student, a copy of the Test Pass Rates Disclosure Statement (to be retained by the prospective purchaser), set forth in Appendix D. The Test Past Rates Disclosure Statement shall be set forth in a separate document in the same format and type size as set forth in Appendix D, and shall contain no other information in the same document, except that the Placement Rates Disclosure Statement, required by Part II of this Order, may be included in the same document. Respondents shall hand the Disclosure Statement to the prospective purchaser separately from other documents and shall, in immediate proximity thereto, clearly and prominently, make the following oral disclosure, or a substantially similar statement:

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Here is the CDL [or other] test pass rate for the programs at our school.

If placement rates are included on the Disclosure Statement, the following oral disclosure, or a substantially similar statement, shall be substituted:

Here are the job placement rates and CDL [or other] test pass rate for the programs at our school.

IV.**RECORD KEEPING**

IT IS FURTHER ORDERED that respondents New England Tractor Trailer Training School of Massachusetts, Inc., and New England Tractor Trailer Training School of Connecticut, Inc., and their successors and assigns, and respondent Mark Greenberg 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, business records demonstrating their compliance with the terms and provisions of this Order, including but not limited to:

- A. all advertisements and promotional materials, sales or admissions interview scripts or training manuals, catalogs, or other marketing materials;
- B. all materials that were relied upon in disseminating any representation covered by this Order; and
- C. all evidence in their possession or control that contradicts, qualifies, or calls into question the representation, or the basis relied upon for the representation, including complaints, and the responses

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thereto, and other communications with consumers or with governmental or consumer protection organizations.

V.**DISTRIBUTION OF ORDER**

IT IS FURTHER ORDERED that, for a period of five (5) years from the date of issuance of this Order, respondents New England Tractor Trailer Training School of Massachusetts, Inc., and New England Tractor Trailer Training School of Connecticut, Inc., and their successors and assigns, and respondent Mark Greenberg shall:

- A. Provide a copy of this Order to, and obtain a signed and dated acknowledgment of receipt of same from each officer and director, each individual serving in a management capacity who has any responsibilities with respect to the subject matter of this Order, all personnel involved in responding to consumer complaints or inquiries, and all sales personnel, recruiters, and admissions representatives (whether designated as employees, consultants, independent contractors or otherwise), as follows: (1) to current personnel, within thirty (30) days after the date of service of this Order and (2) to future personnel immediately after the person assumes such position or responsibilities;
- B. Maintain for a period of three (3) years after creation, and upon reasonable notice, make available to representatives of the Commission, the original signed and dated acknowledgments of the receipt of copies of this Order, as required in Paragraph A. of this Part.

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VI.**NOTIFICATION BY CORPORATE RESPONDENTS**

IT IS FURTHER ORDERED that respondents New England Tractor Trailer Training School of Massachusetts, Inc., and New England Tractor Trailer Training School of Connecticut, Inc., and their successors and assigns, shall notify the Commission at least thirty (30) days prior to any change in the corporations that may affect compliance obligations arising under this Order, including but not limited to a dissolution, assignment, sale, merger, or other action that would result in the emergence of a successor corporation; the creation or dissolution of a subsidiary, parent, or affiliate that engages in 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(s) about which respondents learn less than thirty (30) days prior to the date such action is to take place, respondents shall notify the Commission as soon as is practicable after obtaining such knowledge. All notices required by this Part shall be sent by certified mail to the Associate Director, Division of Enforcement, Bureau of Consumer Protection, Federal Trade Commission, Washington, D.C. 20580.

VII.**NOTIFICATION BY INDIVIDUAL RESPONDENT**

IT IS FURTHER ORDERED that respondent Mark Greenberg, for a period of five (5) years from the date of issuance of this Order, shall notify the Commission of each affiliation with a new business or employment the activities of which include the advertising, promotion, sale, or offering for sale of vocational training programs, or of his affiliation with a new business or employment in which his duties and responsibilities involve the

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advertising, promotion, sale, or offering for sale of vocational training programs. The notice shall include respondent's new business address and telephone number and a description of the nature of the business or employment and his duties and responsibilities. All notices required by this Part shall be sent by certified mail to the Associate Director, Division of Enforcement, Bureau of Consumer Protection, Federal Trade Commission, Washington, D.C. 20580.

VIII.**MONITORING COMPLIANCE OF SALES PERSONNEL**

IT IS FURTHER ORDERED that, for a period of five (5) years from the date of issuance of this Order, respondents New England Tractor Trailer Training School of Massachusetts, Inc., and New England Tractor Trailer Training School of Connecticut, Inc., and their successors and assigns, and respondent Mark Greenberg, in connection with any business that provides training programs, shall:

- A. Take reasonable steps sufficient to monitor and ensure that all employees and/or independent contractors engaged in admissions, recruiting, sales or other customer service functions comply with Parts I, II, and III of this Order. Such steps shall include adequate monitoring of admission interviews, recruiting activity, sales presentations or other contacts with prospective purchasers, and shall also include, at a minimum, the following: (1) listening, on a regular basis, to the oral representations made by persons engaged in admissions, recruiting, sales or other customer service functions; (2) establishing a procedure for receiving and responding to consumer complaints; and (3) ascertaining the number and nature of consumer complaints regarding transactions in which each employee or independent contractor is involved; *provided*, that this Paragraph does not authorize or

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require the defendants to take any steps that violate any federal, state or local laws;

- B. Investigate promptly and fully any consumer complaint received by any business to which this Part applies; and
- C. Take corrective action with respect to any admission representative, recruiter, or sales person who is not complying with this Order, which action may include training, disciplining, and/or terminating such person.

IX.**COMPLIANCE REPORT**

IT IS FURTHER ORDERED that respondents New England Tractor Trailer Training School of Massachusetts, Inc., and New England Tractor Trailer Training School of Connecticut, Inc., and their successors and assigns, and respondent Mark Greenberg, shall file with the Commission, according to the following schedule, written reports setting forth in detail the manner and form in which they have complied with this Order:

- A. The first report shall be filed within one hundred and twenty (120) days after the date of service of this Order;
- B. The second report shall be filed within one (1) year after the date of service of this Order; and
- C. Subsequent reports shall be filed at such other times as the Federal Trade Commission may require.

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X.**MONITORING OF COMPLIANCE BY COMMISSION**

IT IS FURTHER ORDERED that the Commission is authorized to use investigators posing as consumers or prospective consumers of respondents, without the necessity of identification or prior notice.

XI.**SUNSET OF ORDER**

This Order will terminate on January 10, 2020, 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

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later of the deadline for appealing such dismissal or ruling and the date such dismissal or ruling is upheld on appeal.

By the Commission, Commissioner Leary not participating.

APPENDIX A**CALCULATION OF PLACEMENT RATES**

“PLACEMENT RATES” shall be expressed as a percentage, calculated by dividing (a) the number of persons who graduated, during the time period, who were employed in jobs for which the program trained them by (b) the number of persons who graduated, during the time period, who were available for placement.

The time period shall be the period disclosed on the form set forth in Appendix B, in the heading “STUDENTS GRADUATING BETWEEN _____ AND _____,” and shall be at least a twelve month period, and no more than a twenty-four month period. Respondents shall use the time period covered by the school’s most recent report to the school’s accrediting agency or the state licensure body. If the school is not accredited or licensed, respondents shall use the time periods specified for any such reports by the appropriate accrediting agency or licensing body.

For purposes of the disclosure required by Part II.A of this Order, the placement rates disclosed shall be for the same program as that referred to in the representation that triggers the disclosure.

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For purposes of the disclosure required by Part II.B of this Order, the placement rates must be disclosed separately for all certificate programs offered by the school at which the disclosure is made.

APPENDIX B**PLACEMENT RATES DISCLOSURE STATEMENT**

<u>PLACEMENT RATES:</u> <u>PERCENTAGE OF GRADUATES WHO OBTAINED</u> <u>EMPLOYMENT</u>	
STUDENTS GRADUATING BETWEEN _____ AND _____	
PROGRAM	PLACEMENT RATE

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APPENDIX C

“TEST PASS RATE” shall be expressed as a percentage, calculated by dividing (a) the number of persons who graduated, during the time period, who passed the test by (b) the number of persons who graduated, during the time period, who took the test.

The time period shall be as defined in Appendix A.

For purposes of the disclosure required by Part III.A of this Order, the test pass rate disclosed shall be for the same program as that referred to in the representation that triggers the disclosure.

For purposes of the disclosure required by Part III.B of this Order, the test pass rates must be disclosed separately for all certificate programs offered by the school at which the disclosure is made.

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APPENDIX D**TEST PASS RATES DISCLOSURE STATEMENT**

<u>TEST PASS RATES*</u>		
STUDENTS GRADUATING BETWEEN _____ AND _____		
TEST	Number Taking Test	Percent Passing Test

* Graduates may have had to take the test more than once before passing.

Analysis to Aid Public Comment

ANALYSIS OF PROPOSED CONSENT ORDER TO AID PUBLIC COMMENT

The Federal Trade Commission has accepted, subject to final approval, an agreement to a proposed consent order from respondents New England Tractor Trailer Training School of Massachusetts, Inc., New England Tractor Trailer Training School of Connecticut, Inc., and Mark Greenberg, individually and as president of the corporate respondents.

The proposed consent order has been placed on the public record for sixty (60) days for reception of comments by interested persons. Comments received during this period will become part of the public record. After sixty (60) days, the Commission will again review the agreement and the comments received and will decide whether it should withdraw from the agreement and take other appropriate action or make final the agreement's proposed order.

This matter concerns practices related to the advertising, promotion, and sale of vocational training programs, including driver training for tractor trailer and heavy straight trucks. The Commission's complaint charges that respondents violated the Federal Trade Commission Act, 15 U.S.C. § 41 *et seq.*, by making numerous representations that were false and for which they lacked a reasonable basis of substantiation. These representations concerned: employment and/or placement rates for graduates of respondents' program; the availability of local truck driving jobs; the rate of passing the CDL test by graduates of respondents' program; the number of graduates of the program who pass the CDL test the first time they take it; the adequacy of training to prepare students for the Commercial Drivers License (CDL) test; the extent to which future employers will reimburse the cost of tuition; and the admissions criteria for respondents' program.

Analysis to Aid Public Comment

Part I of the proposed consent order prohibits future misrepresentations concerning the above, as well as other results or benefits of respondents' training programs or career services.

Part II of the proposed order requires a disclosure of respondents' placement rates. This disclosure is triggered by any representations about the rate of employment or placement of graduates of respondents' program. In addition, this disclosure is required to be given to prospective students, in writing, prior to the time that students are presented with the enrollment agreement and other enrollment forms. Appendices A and B to the proposed order set forth the prescribed manner of calculation of placement rates and the form in which the information will be given to prospective students.

Part III of the proposed order requires disclosure of the licensing test pass rates for graduates of respondents' program. This disclosure is triggered by any representations about the rate of passing any test, including but not limited to the CDL test, by graduates of respondents' program. In addition, this disclosure is required to be given to prospective students, in writing, prior to the time that students are presented with the enrollment agreement and other enrollment forms. Appendices C and D to the proposed order set forth the prescribed manner of calculation of test pass rates and the form in which the information will be given to prospective students.

Part IV of the proposed order is a record keeping provision that requires the respondents to maintain certain records for five (5) years after the last date of dissemination of any representation covered by the consent order. These records include: (1) all advertisements and promotional materials, sales or admissions interview scripts or training manuals, catalogs, and other marketing materials; (2) all materials relied upon in making any representation covered by the order; and (3) all evidence in respondents' possession or control that contradicts, qualifies, or calls into question the representation or the basis relied upon for it.

Analysis to Aid Public Comment

Part V of the proposed order requires distribution of the order, for five (5) years from the date of issuance, to officers and directors of the corporations; managers who have responsibilities with respect to the subject matter of the order; and personnel involved in sales, admissions, recruitment, or responding to consumer complaints and inquiries.

Part VI of the proposed order requires that the Commission be notified of any changes in the corporations that might affect compliance obligations under the order. Part VII of the proposed order requires that, for a period of five (5) years, the individual respondent notify the Commission of any new business affiliation or employment that involves the advertising, promotion, or sale of vocational training programs.

Part VIII of the proposed order requires that for a period of five (5) years, respondents undertake a monitoring program to ensure that all employees or independent contractors engaged in admissions, recruiting, sales, or other customer service, comply with Parts I, II, and III of the order.

Part IX of the proposed order requires the respondents to file compliance reports with the Commission. Part X of the proposed order states that the Commission, without prior notice, may use investigators to pose as prospective consumers of respondents. Finally, Part XI of the proposed order states that, absent certain circumstance, the order will terminate twenty (20) years from the date it is issued.

The purpose of this analysis is to facilitate public comment on the proposed consent order. It is not intended to constitute an official interpretation of the agreement and proposed order or to modify their terms in any way.

Analysis to Aid Public Comment

**CONCURRING STATEMENT
OF COMMISSIONER SWINDLE**

When the Commission issued its revised guides for vocational schools, I dissented on the ground that the guides were not needed because these schools were already subject to the standards of and regulation by the United States Department of Education, state licensing boards, and private accreditation bodies. I also explained that these federal and state regulatory bodies should act in the first instance to enforce their standards to address misrepresentations by vocational schools. If their enforcement efforts are unsuccessful, then Commission law enforcement action may be justified. Because the respondents continued to make misrepresentations even after the United States Department of Education terminated their participation in a federal loan program and after state authorities twice issued citations to them, Commission law enforcement action here is warranted.

Complaint

IN THE MATTER OF

**THE KROGER COMPANY AND FRED MEYER,
INC.**

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

*Docket C-3917; File No. 991 0024
Complaint, January 10, 2000--Decision, January 10, 2000*

This consent order addresses the merger of respondent Jobsite Holdings, Inc., a wholly-owned subsidiary of Kroger, with and into Fred Meyer, through which Fred Meyer will become a wholly-owned subsidiary of Kroger. The consent order requires, among other things, to divest eight specific supermarkets in relevant markets, five of which were owned by Kroger and three of which were owned by Fred Meyers prior to the merger. From the time of the merger until the completion of the divestitures, respondents must maintain the competitiveness and viability of the assets to be divested.

Participants

For the Commission: *Phillip L. Broyles, Daniel P. Ducore, Alan A. Fisher, Jill M. Frumin, Jonathan Kanter, Richard Liebeskind, Valicia A. Spriggs, and Gregory S. Vistnes.*

For the Respondents: *Deborah L. Feinstein, Arnold & Porter; and Brian Byrne and David I. Gelfand, Cleary, Gottlieb, Steen & Hamilton.*

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 The Kroger Co.

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("Kroger") has entered into an agreement to acquire all of the voting securities of respondent Fred Meyer, Inc. ("Fred Meyer"), all subject to the jurisdiction of the Commission, in violation of Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45; that such acquisition, if consummated, would violate Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18, and Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45; and that a proceeding in respect thereof would be in the public interest, hereby issues its complaint, stating its charges as follows:

DEFINITION

PARAGRAPH ONE: For the purposes of this complaint, the term "Supermarket" means a full-line retail grocery store with annual sales of at least \$2 million that carries a wide variety of food and grocery items in particular product categories, including bread and dairy products; refrigerated and frozen food and beverage products; fresh and prepared meats and poultry; produce, including fresh fruits and vegetables; shelf-stable food and beverage products, including canned and other types of packaged products; staple foodstuffs, which may include salt, sugar, flour, sauces, spices, coffee, and tea; and other grocery products, including nonfood items such as soaps, detergents, paper goods, other household products, and health and beauty aids.

THE KROGER CO.

PARAGRAPH TWO: Respondent Kroger is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Ohio, with its office and principal place of business located at 1014 Vine Street, Cincinnati, Ohio 45202.

PARAGRAPH THREE: Respondent Kroger, directly and through Dillon Companies, Inc., its wholly-owned domestic subsidiary, is, and at all times relevant herein has been, engaged in the operation of supermarkets in Alabama, Arizona, Arkansas,

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Colorado, Georgia, Illinois, Indiana, Kansas, Kentucky, Louisiana, Michigan, Mississippi, Missouri, North Carolina, Ohio, Oklahoma, South Carolina, Tennessee, Texas, Utah, Virginia, West Virginia, and Wyoming. Kroger and its wholly-owned domestic subsidiaries operate approximately 1,410 supermarkets in these states under the Kroger, Fry's, Dillons, King Soopers, City Markets, and Gerbes trade names. Kroger had approximately \$26.57 billion in total United States sales for the fiscal year that ended on December 27, 1997.

PARAGRAPH FOUR: Respondent Kroger 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.

FRED MEYER, INC.

PARAGRAPH FIVE: Respondent Fred Meyer 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 3800 S.E. 22nd Avenue, Portland, Oregon 97202.

PARAGRAPH SIX: Respondent Fred Meyer is, and at all times relevant herein has been, engaged in the operation of supermarkets in Alaska, Arizona, California, Idaho, Montana, Nevada, New Mexico, Oregon, Texas, Utah, Washington, and Wyoming. Fred Meyer operates approximately 800 supermarkets under the Fred Meyer, Smith's Food & Drug Centers, Ralph's, Quality Food Centers, Price Rite, Food 4 Less, Cala, Bell, and FoodsCo. trade names. Fred Meyer had \$14.88 billion in total sales for the fiscal year that ended on January 31, 1999.

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PARAGRAPH SEVEN: Respondent Fred Meyer is, and at all times relevant herein has been, engaged in commerce as “commerce” is defined in Section 1 of the Clayton Act, as amended, 15 U.S.C. § 12, and is a corporation whose business is in or affecting commerce as “commerce” is defined in Section 4 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 44.

ACQUISITION

PARAGRAPH EIGHT: On or about October 18, 1998, Kroger, Fred Meyer, and Jobsite Holdings, Inc. (“Jobsite”), a wholly-owned subsidiary of Kroger, entered into an Agreement and Plan of Merger pursuant to which Jobsite will merge with and into Fred Meyer and Fred Meyer will become a wholly-owned subsidiary of Kroger. The total value of the proposed merger is approximately \$15 billion.

TRADE AND COMMERCE

PARAGRAPH NINE: The relevant line of commerce (*i.e.*, the product market) in which to analyze the acquisition described herein is the retail sale of food and grocery products in supermarkets.

PARAGRAPH TEN: Supermarkets provide a distinct set of products and services for consumers who desire to one-stop shop for food and grocery products. Supermarkets carry a full line and wide selection of both food and nonfood products (typically more than 10,000 different stock-keeping units (“SKUs”)) as well as a deep inventory of those SKUs. In order to accommodate the large number of food and nonfood products necessary for one-stop shopping, supermarkets are large stores that typically have at least 10,000 square feet of selling space.

PARAGRAPH ELEVEN: Supermarkets compete primarily with other supermarkets that provide one-stop shopping for food and grocery products. Supermarkets primarily base their food and grocery prices on the prices of food and grocery products sold at

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nearby supermarkets. Supermarkets do not regularly price-check food and grocery products sold at other types of stores and do not significantly change their food and grocery prices in response to prices at other types of stores. Most consumers shopping for food and grocery products at supermarkets are not likely to shop elsewhere in response to a small price increase by supermarkets.

PARAGRAPH TWELVE: Retail stores other than supermarkets that sell food and grocery products, such as neighborhood “mom & pop” grocery stores, convenience stores, specialty food stores (*e.g.*, seafood markets, bakeries, etc.), club stores, military commissaries, and mass merchants, do not effectively constrain prices at supermarkets. None of these stores offers a supermarket’s distinct set of products and services that enable consumers to one-stop shop for food and grocery products.

PARAGRAPH THIRTEEN: The relevant sections of the country (*i.e.*, the geographic markets) in which to analyze the acquisition described herein are the areas in and near the following cities and towns:

- a. Prescott, Arizona;
- b. Sierra Vista, Arizona;
- c. Yuma, Arizona;
- d. Cheyenne, Wyoming;
- e. Green River, Wyoming;
- f. Rock Springs, Wyoming; and
- g. Price, Utah.

MARKET STRUCTURE

PARAGRAPH FOURTEEN: The Prescott, Arizona; Sierra Vista, Arizona; Yuma, Arizona; Green River, Wyoming; Rock Springs, Wyoming; and Price, Utah relevant markets are highly concentrated, whether measured by the Herfindahl-Hirschman

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Index (commonly referred to as “HHI”) or by two-firm and four-firm concentration ratios. The acquisition would substantially increase concentration in each market. Kroger and Fred Meyer would have a combined market share of near or greater than 35% in each geographic market. The post-acquisition HHIs in the geographic markets range from 2,793 to 10,000.

PARAGRAPH FIFTEEN: The Cheyenne, Wyoming, relevant market is highly concentrated. The market will remain highly concentrated as a result of this acquisition, and will be significantly more concentrated than it would have been but for this acquisition.

ENTRY CONDITIONS

PARAGRAPH SIXTEEN: Entry would not be timely, likely, or sufficient to prevent anticompetitive effects in the relevant markets.

ACTUAL COMPETITION

PARAGRAPH SEVENTEEN: Kroger and Fred Meyer are actual and direct competitors in and near Prescott, Arizona; Sierra Vista, Arizona; Yuma, Arizona; Green River, Wyoming; Rock Springs, Wyoming; and Price, Utah.

ACTUAL POTENTIAL COMPETITION

PARAGRAPH EIGHTEEN: Kroger is an actual potential competitor against Fred Meyer in and near Cheyenne, Wyoming. But for the acquisition, Kroger and Fred Meyer would have become direct competitors in the Cheyenne, Wyoming, relevant market. The acquisition will eliminate that competition.

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EFFECTS

PARAGRAPH NINETEEN: The effect of the acquisition, if consummated, may be substantially to lessen competition in the relevant line of commerce in the relevant sections of the country in violation of Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18, and Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45, in the following ways, among others:

- a. by eliminating direct competition between supermarkets owned or controlled by Kroger and supermarkets owned or controlled by Fred Meyer;
- b. by eliminating actual potential competition between supermarkets owned or controlled by Kroger and supermarkets owned or controlled by Fred Meyer;
- c. by increasing the likelihood that Kroger will unilaterally exercise market power; and
- d. by increasing the likelihood of, or facilitating, collusion or coordinated interaction,

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

VIOLATIONS CHARGED

PARAGRAPH TWENTY: The Agreement and Plan of Merger between Kroger and Fred Meyer, pursuant to which Jobsite will merge with and into Fred Meyer and Fred Meyer will become a wholly-owned subsidiary of Kroger, violates Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45, and the proposed acquisition would, if consummated, violate

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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.

WHEREFORE, THE PREMISES CONSIDERED, the Federal Trade Commission on this tenth day of January, 2000, issues its complaint against said respondents.

By the Commission, Commissioner Leary not participating.

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The Federal Trade Commission ("Commission"), having initiated an investigation of the proposed acquisition by The Kroger Co. ("Kroger") of Fred Meyer, Inc. ("Fred Meyer"), and it now appearing that Kroger and Fred Meyer, hereinafter sometimes referred to as "Respondents," having been furnished with a copy of a draft complaint that the Bureau of Competition proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge Respondents with violations of Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45, and Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18; and

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

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Fleming Companies, Inc. ("Fleming"), having purchased some of the assets to be divested under the terms of the Consent Agreement, Fleming having expressed an intention to resell some of those assets to another purchaser, and Fleming having executed the Consent Agreement; and

The Commission having thereafter considered the matter and having determined that it had reason to believe that the Respondents have violated the said Acts, and that complaint should issue stating its charges in that respect, and having thereupon accepted the executed Consent Agreement and placed such agreement on the public record for a period of sixty (60) days, and having duly considered the comments received, and having modified the Decision & Order in certain respects, 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 Kroger is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Ohio, with its office and principal place of business located at 1014 Vine Street, Cincinnati, Ohio 45202.
2. Respondent Fred Meyer 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 3800 Southeast 22nd Avenue, Portland, Oregon 97202.
3. Fleming is a corporation organized, existing and doing business under and by virtue of the laws of the State of Oklahoma, with its principal place of business located at 6301 Waterford Boulevard, Oklahoma City, Oklahoma 73126.

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4. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding, of the Respondents, and of Fleming, 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. "Kroger" means The Kroger Co., its directors, officers, employees, agents, representatives, predecessors, successors, and assigns; its subsidiaries, divisions, groups, and affiliates controlled by The Kroger Co., and the respective directors, officers, employees, agents, representatives, successors, and assigns of each. Kroger, after consummation of the Acquisition, includes Fred Meyer.
- B. "Fred Meyer" means Fred Meyer, Inc., its directors, officers, employees, agents, representatives, predecessors, successors, and assigns; its subsidiaries, divisions, groups, and affiliates controlled by Fred Meyer, Inc., and the respective directors, officers, employees, agents, representatives, successors, and assigns of each.
- C. "Respondents" means Kroger and Fred Meyer, individually and collectively.
- D. "Fleming" means Fleming Companies, Inc., its directors, officers, employees, agents, representatives, predecessors, successors, and assigns; its subsidiaries, divisions, groups, and affiliates controlled by Fleming Companies, Inc., and the respective directors, officers,

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employees, agents, representatives, successors, and assigns of each.

- E. “Commission” means the Federal Trade Commission.
- F. “Acquisition” means Kroger’s proposed acquisition of Fred Meyer pursuant to the Agreement dated October 18, 1998.
- G. “Assets To Be Divested” means the Schedule A Assets, the Schedule B Assets, and the Schedule C Assets.
- H. “Schedule A Assets” means the Supermarkets identified in Schedule A of this Order and all assets, leases, properties, government permits (to the extent transferable), customer lists, businesses and goodwill, tangible and intangible, related to or utilized in the Supermarket business operated at those locations, but shall not include those assets consisting of or pertaining to any of the Respondents’ trade marks, trade dress, service marks, or trade names.
- I. “Schedule B Assets” means the Supermarkets identified in Schedule B of this Order and all assets, leases, properties, government permits (to the extent transferable), customer lists, businesses and goodwill, tangible and intangible, related to or utilized in the Supermarket business operated at those locations, but shall not include those assets consisting of or pertaining to any of the Respondents’ trade marks, trade dress, service marks, or trade names.
- J. “Schedule B Wyoming Assets” means the Supermarkets identified in Schedule B of this Order that are located in Green River, Wyoming, and Rock

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Springs, Wyoming, and all assets, leases, properties, government permits (to the extent transferable), customer lists, businesses and goodwill, tangible and intangible, related to or utilized in the Supermarket business operated at those locations, but shall not include those assets consisting of or pertaining to any of the Respondents' trade marks, trade dress, service marks, or trade names.

- K. "Schedule C Assets" means the Supermarkets identified in Schedule C of this Order and all assets, leases, properties, government permits (to the extent transferable), customer lists, businesses and goodwill, tangible and intangible, related to or utilized in the Supermarket business operated at those locations, but shall not include those assets consisting of or pertaining to any of the Respondents' trade marks, trade dress, service marks, or trade names.
- L. "Supermarket" means a full-line retail grocery store that carries a wide variety of food and grocery items in particular product categories, including bread and dairy products; frozen and refrigerated food and beverage products; fresh and prepared meats and poultry; produce, including fresh fruits and vegetables; shelf-stable food and beverage products, including canned and other types of packaged products; staple foodstuffs, which may include salt, sugar, flour, sauces, spices, coffee, and tea; and other grocery products, including nonfood items such as soaps, detergents, paper goods, other household products, and health and beauty aids.
- M. "Supermarkets To Be Divested" means the Supermarkets identified in Schedule A, Schedule B, and Schedule C of this Order.

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- N. “Albertson’s” means Albertson’s, Inc., a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware, with its principal place of business located at East Parkcenter Boulevard, Boise, Idaho 83726.
- O. “Nash-Finch” means Nash-Finch Company, a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware, with its principal place of business located at 7600 France Avenue South, P.O. Box 355, Minneapolis, Minnesota 55440.
- P. “Albertson’s Agreement” means the Purchase Agreement between Albertson’s and Kroger executed on March 31, 1999, for the divestiture by Respondents to Albertson’s of the Schedule A Assets.
- Q. “Fleming Agreement” means the Purchase Agreements between Fleming Companies, Inc. and Kroger executed on March 31, 1999, and April 7, 1999, for the divestiture by Respondents to Fleming Companies, Inc. of the Schedule B Assets.
- R. “Nash-Finch Agreement” means the Purchase Agreement between Nash-Finch and Smith’s Food & Drug Centers, Inc., a wholly-owned subsidiary of Fred Meyer, executed on March 31, 1999, for the divestiture by Respondents to Nash-Finch of the Schedule C Assets.
- S. “Acquirer(s)” means Albertson’s, Fleming Companies, Inc., Nash-Finch, and/or any other entity or entities approved by the Commission to acquire the Assets To Be Divested pursuant to this Order, individually and collectively.

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- T. “Third Party Consents” means all consents from any other person, including all landlords, that are necessary to effect the complete transfer to the Acquirer(s) of the Assets To Be Divested.

II.**IT IS FURTHER ORDERED** that:

- A. Respondents shall divest, absolutely and in good faith, the Schedule A Assets to Albertson’s, in accordance with the Albertson’s Agreement (which agreement shall not be construed to vary or contradict the terms of this Order), no later than:
1. twenty (20) days after the date on which the Acquisition is consummated, or
 2. four (4) months after the date on which Respondents sign the Agreement Containing Consent Order,

whichever is earlier.

Provided, however, that if Respondents have divested the Schedule A Assets to Albertson’s pursuant to the Albertson’s Agreement prior to the date the Order becomes final, and if, at the time the Commission determines to make the Order final, the Commission notifies Respondents that Albertson’s is not an acceptable acquirer or that the Albertson’s Agreement is not an acceptable manner of divestiture, then Respondents shall immediately rescind the transaction with Albertson’s and shall divest the Schedule A Assets within three (3) months of the date the Order becomes final, absolutely and in good faith, at no minimum price, to an acquirer that receives the prior approval of the Commission and only in a manner that receives the prior approval of the Commission.

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- B. Respondents shall divest, absolutely and in good faith, the Schedule B Assets to Fleming in accordance with the Fleming Agreement (which agreement shall not be construed to vary or contradict the terms of this Order), no later than
1. twenty (20) days after the date on which the Acquisition is consummated, or
 2. four (4) months after the date on which Respondents sign the Agreement Containing Consent Order,

whichever is earlier.

Provided, however, that if Respondents have divested the Schedule B Assets to Fleming pursuant to the Fleming Agreement prior to the date the Order becomes final, and if, at the time the Commission determines to make the Order final, the Commission notifies Respondents that Fleming is not an acceptable acquirer or that the Fleming Agreement is not an acceptable manner of divestiture, then Respondents shall immediately rescind the transaction with Fleming, and shall divest the Schedule B Assets within three (3) months of the date the Order becomes final, absolutely and in good faith, at no minimum price, to an acquirer that receives the prior approval of the Commission and only in a manner that receives the prior approval of the Commission.

- C. Respondents shall divest, absolutely and in good faith, the Schedule C Assets to Nash-Finch, in accordance with the Nash-Finch Agreement (which agreement shall not be construed to vary or contradict the terms of this Order), no later than

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1. twenty (20) days after the date on which the Acquisition is consummated, or
2. four (4) months after the date on which Respondents sign the Agreement Containing Consent Order,

whichever is earlier.

Provided, however, that if Respondents have divested the Schedule C Assets to Nash-Finch pursuant to the Nash-Finch Agreement prior to the date the Order becomes final, and if, at the time the Commission determines to make the Order final, the Commission notifies Respondents that Nash-Finch is not an acceptable acquirer or that the Nash-Finch Agreement is not an acceptable manner of divestiture, then Respondents shall immediately rescind the transaction with Nash-Finch and shall divest the Schedule C Assets within three (3) months of the date the Order becomes final, absolutely and in good faith, at no minimum price, to an acquirer that receives the prior approval of the Commission and only in a manner that receives the prior approval of the Commission.

- D. Respondents shall obtain all required Third Party Consents prior to the closing of the Albertson's Agreement, the Fleming Agreement, the Nash-Finch Agreement, or any other agreement pursuant to which the Assets To Be Divested are divested to an Acquirer.
- E. The purpose of the divestitures is to ensure the continuation of the Assets To Be Divested as ongoing viable enterprises engaged in the Supermarket business and to remedy the lessening of competition resulting from the Acquisition alleged in the Commission's complaint.

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III.

IT IS FURTHER ORDERED that, if Fleming purchases any Schedule B Wyoming Assets, Fleming shall sell or otherwise convey, directly or indirectly, any such Schedule B Wyoming Assets, only to an Acquirer approved by the Commission and only in a manner that receives the prior approval of the Commission. Fleming shall comply with this Paragraph until three (3) years after the date this Order becomes final.

IV.

IT IS FURTHER ORDERED that:

- A. If Respondents have not divested, absolutely and in good faith and with the Commission's prior approval, the Assets To Be Divested within the time required by Paragraph II of this Order, the Commission may appoint a trustee to divest the Assets To Be Divested. In the event that the Commission or the Attorney General brings an action pursuant to Section 5(l) of the Federal Trade Commission Act, 15 U.S.C. § 45(l), or any other statute enforced by the Commission, Respondents shall consent to the appointment of a trustee in such action. Neither the appointment of a trustee nor a decision not to appoint a trustee under this Paragraph shall preclude the Commission or the Attorney General from seeking civil penalties or any other relief available to it, including a court-appointed trustee, pursuant to Section 5(l) of the Federal Trade Commission Act, or any other statute enforced by the Commission, for any failure by the Respondents to comply with this Order.

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- B. If a trustee is appointed by the Commission or a court pursuant to Paragraph IV.A. of this Order, Respondents shall consent to the following terms and conditions regarding the trustee's powers, duties, authority, and responsibilities:
1. The Commission shall select the trustee, subject to the consent of Respondents, which consent shall not be unreasonably withheld. The trustee shall be a person with experience and expertise in acquisitions and divestitures. If Respondents have not opposed, in writing, including the reasons for opposing, the selection of any proposed trustee within ten (10) days after receipt of written notice by the staff of the Commission to Respondents of the identity of any proposed trustee, Respondents shall be deemed to have consented to the selection of the proposed trustee.
 2. Subject to the prior approval of the Commission, the trustee shall have the exclusive power and authority to divest the Assets To Be Divested.
 3. Within ten (10) days after appointment of the trustee, Respondents shall execute a trust agreement that, subject to the prior approval of the Commission and, in the case of a court-appointed trustee, of the court, transfers to the trustee all rights and powers necessary to permit the trustee to effect each divestiture required by this Order.
 4. The trustee shall have twelve (12) months from the date the Commission or court approves the trust agreement described in Paragraph IV.B.3. to accomplish the divestitures, which shall be subject to the prior approval of the Commission. If, however, at the end of the twelve-month period, the trustee has submitted a plan of divestiture or

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believes that divestiture can be achieved within a reasonable time, the divestiture period may be extended by the Commission, or, in the case of a court-appointed trustee, by the court; provided, however, the Commission may extend the period for no more than two (2) additional periods.

5. The trustee shall have full and complete access to the personnel, books, records, and facilities related to the Assets To Be Divested or to any other relevant information, as the trustee may request. Respondents shall develop such financial or other information as such trustee may reasonably request and shall cooperate with the trustee. Respondents shall take no action to interfere with or impede the trustee's accomplishment of the divestitures. Any delays in divestiture caused by Respondents shall extend the time for divestiture under this Paragraph in an amount equal to the delay, as determined by the Commission or, for a court-appointed trustee, by the court.
6. The trustee shall use his or her best efforts to negotiate the most favorable price and terms available in each contract that is submitted to the Commission, subject to Respondents' absolute and unconditional obligation to divest expeditiously at no minimum price. The divestitures shall be made in the manner and to the acquirer or acquirers as set out in Paragraph II of this Order; provided, however, if the trustee receives bona fide offers for an asset to be divested from more than one acquiring entity, and if the Commission determines to approve more than one such acquiring entity, the trustee shall divest such asset to the acquiring

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entity or entities selected by Kroger from among those approved by the Commission.

7. The trustee shall serve, without bond or other security, at the cost and expense of Respondents, on such reasonable and customary terms and conditions as the Commission or a court may set. The trustee shall have the authority to employ, at the cost and expense of Respondents, such consultants, accountants, attorneys, investment bankers, business brokers, appraisers, and other representatives and assistants as are necessary to carry out the trustee's duties and responsibilities. The trustee shall account for all monies derived from the divestitures 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 Kroger, and the trustee's power shall be terminated. The trustee's compensation shall be based at least in significant part on a commission arrangement contingent on the trustee's divesting the Assets To Be Divested.
8. Respondents shall indemnify the trustee and hold the trustee harmless against any losses, claims, damages, liabilities, or expenses arising out of, or in connection with, the performance of the trustee's duties, including all reasonable fees of counsel and other expenses incurred in connection with the preparation for or defense of any claim, whether or not resulting in any liability, except to the extent that such liabilities, losses, damages, claims, or expenses result from misfeasance, gross negligence, willful or wanton acts, or bad faith by the trustee.

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9. If the trustee ceases to act or fails to act diligently, a substitute trustee shall be appointed in the same manner as provided in Paragraph IV.A. of this Order.
10. The Commission or, in the case of a court-appointed trustee, the court, may on its own initiative or at the request of the trustee issue such additional orders or directions as may be necessary or appropriate to accomplish each divestiture required by this Order.
11. In the event that the trustee determines that he or she is unable to divest the Assets To Be Divested in a manner consistent with the Commission's purpose as described in Paragraph II, the trustee may divest additional ancillary assets of Respondents and effect such arrangements as are necessary to satisfy the requirements of this Order.
12. The trustee shall have no obligation or authority to operate or maintain the Assets To Be Divested.
13. The trustee shall report in writing to Respondents and the Commission every sixty (60) days concerning the trustee's efforts to accomplish each divestiture required by this Order.

V.

IT IS FURTHER ORDERED that Respondents shall maintain the viability, marketability, and competitiveness of the Assets To Be Divested, and shall not cause the wasting or deterioration of the Assets To Be Divested, nor shall they cause the Assets To Be Divested to be operated in a manner inconsistent with applicable laws, nor shall they sell, transfer, encumber or

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otherwise impair the viability, marketability or competitiveness of the Assets To Be Divested. Respondents shall comply with the terms of this Paragraph until such time as Respondents have divested the Assets To Be Divested pursuant to the terms of this order. Respondents shall conduct or cause to be conducted the business of the Assets To Be Divested in the regular and ordinary course and in accordance with past practice (including regular repair and maintenance efforts) and shall use their best efforts to preserve the existing relationships with suppliers, customers, employees, and others having business relations with the Assets To Be Divested in the ordinary course of business and in accordance with past practice. Respondents shall not terminate the operation of any Supermarket To Be Divested. Respondents shall continue to maintain the inventory of each Supermarket To Be Divested at levels and selections (*e.g.*, stock-keeping units) consistent with those maintained by such Respondent(s) at such Supermarket in the ordinary course of business consistent with past practice. Respondents shall use best efforts to keep the organization and properties of each Supermarket To Be Divested intact, including current business operations, physical facilities, working conditions, and a work force of equivalent size, training, and expertise associated with the Supermarket. Included in the above obligations, Respondents shall, without limitation:

- A. maintain operations and departments and not reduce hours at each Supermarket To Be Divested;
- B. not transfer inventory from any Supermarket To Be Divested other than in the ordinary course of business consistent with past practice;
- C. make any payment required to be paid under any contract or lease when due, and otherwise pay all liabilities and satisfy all obligations associated with any Supermarket To Be Divested, in each case in a manner consistent with past practice;

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- D. maintain the books and records of each Supermarket To Be Divested;
- E. not display any signs or conduct any advertising (*e.g.*, direct mailing, point-of-purchase coupons) that indicates that any Respondent is moving its operations at a Supermarket To Be Divested to another location, or that indicates a Supermarket To Be Divested will close;
- F. not conduct any “going out of business,” “close-out,” “liquidation” or similar sales or promotions at or relating to any Supermarket To Be Divested; and
- G. not change or modify in any material respect the existing advertising practices, programs and policies for any Supermarket To Be Divested, other than changes in the ordinary course of business consistent with past practice for Supermarkets of the Respondents not being closed or relocated.

VI.

IT IS FURTHER ORDERED that, for a period of ten (10) years from the date this order becomes final, Kroger shall not, directly or indirectly, through subsidiaries, partnerships, or otherwise, without providing advance written notification to the Commission:

- A. Acquire any ownership or leasehold interest in any facility that has operated as a Supermarket within six (6) months prior to the date of such proposed acquisition in Yavapai, Cochise, or Yuma counties in Arizona; Laramie or Sweetwater counties in Wyoming; or Carbon County in Utah.

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- B. Acquire any stock, share capital, equity, or other interest in any entity that owns any interest in or operates any Supermarket or owned any interest in or operated any Supermarket within six (6) months prior to such proposed acquisition in Yavapai, Cochise, or Yuma counties in Arizona; Laramie or Sweetwater counties in Wyoming; or Carbon County in Utah.

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

Said notification shall be given on the Notification and Report Form set forth in the Appendix to Part 803 of Title 16 of the Code of Federal Regulations as amended (hereinafter referred to as "the Notification"), and shall be prepared and transmitted in accordance with the requirements of that part, except that no filing fee will be required for any such notification, notification shall be filed with the Secretary of the Commission, notification need not be made to the United States Department of Justice, and notification is required only of Kroger and not of any other party to the transaction. Kroger shall provide the Notification to the Commission at least thirty days prior to consummating any such transaction (hereinafter referred to as the "first waiting period"). If, within the first waiting period, representatives of the Commission make a written request for additional information or documentary material (within the meaning of 16 C.F.R. § 803.20), Kroger shall not consummate the transaction until twenty days after substantially complying with such request. Early termination of the waiting periods in this Paragraph may be requested and, where appropriate, granted by letter from the Bureau of Competition. Provided, however, that prior notification shall not be required by this Paragraph for a transaction for which notification is required to be made, and has been made, pursuant to Section 7A of the Clayton Act, 15 U.S.C. § 18a.

Decision and Order

VII.

IT IS FURTHER ORDERED that, for a period of ten (10) years commencing on the date this Order becomes final:

- A. Kroger shall neither enter into nor enforce any agreement that restricts the ability of any person (as defined in Section 1(a) of the Clayton Act, 15 U.S.C. § 12(a)) that acquires any Supermarket, any leasehold interest in any Supermarket, or any interest in any retail location used as a Supermarket on or after January 1, 1998, in Yavapai, Cochise, or Yuma counties in Arizona; Laramie or Sweetwater counties in Wyoming; or Carbon County in Utah, to operate a Supermarket at that site if such Supermarket was formerly owned or operated by Kroger.
- B. Kroger shall not remove any fixtures or equipment from a property owned or leased by Kroger in Yavapai, Cochise, or Yuma counties in Arizona; Laramie or Sweetwater counties in Wyoming; or Carbon County in Utah, that is no longer in operation as a Supermarket, except (1) prior to and as part of a sale, sublease, assignment, or change in occupancy of such Supermarket; or (2) to relocate such fixtures or equipment in the ordinary course of business to any other Supermarket owned or operated by Kroger.

VIII.

IT IS FURTHER ORDERED that:

- A. Within thirty (30) days after the date Respondents signed the Agreement Containing Consent Order and every thirty (30) days thereafter until Respondents have fully complied with the provisions of Paragraphs

Decision and Order

II, IV, and V of this Order, Respondents shall submit to the Commission verified written reports setting forth in detail the manner and form in which they intend to comply, are complying, and have complied with Paragraphs II, IV, and V of this Order. Respondents shall include in their compliance reports, among other things that are required from time to time, a full description of the efforts being made to comply with Paragraphs II, IV, and V of the Order, including a description of all substantive contacts or negotiations for divestitures and the identity of all parties contacted. Respondents shall include in their compliance reports copies of all written communications to and from such parties, all internal memoranda, and all reports and recommendations concerning divestiture.

- B. One (1) year from the date this Order becomes final, annually for the next nine (9) years on the anniversary of the date this Order becomes final, and at other times as the Commission may require, Kroger shall file verified written reports with the Commission setting forth in detail the manner and form in which it has complied and is complying with this Order.

IX.

IT IS FURTHER ORDERED that Respondents shall notify the Commission at least thirty (30) days prior to any proposed change in the corporate Respondents, such as dissolution, assignment, sale resulting in the emergence of a successor corporation, or the creation or dissolution of subsidiaries or any other change in Respondents that may affect compliance obligations arising out of the Order.

Decision and Order

X.

IT IS FURTHER ORDERED that, for the purpose of determining or securing compliance with this Order, upon written request with five (5) days' notice, Respondents and Fleming shall permit any duly authorized representative of the Commission:

- A. Access, during office hours and in the presence of counsel, to inspect the facilities and to inspect and copy all books, ledgers, accounts, correspondence, memoranda and other records and documents in the possession or under the control of Respondents or Fleming relating to any matters contained in this Order; and
- B. Without restraint or interference from Respondents and Fleming, to interview Respondents, Fleming, or officers, directors, or employees of Respondents or Fleming in the presence of counsel.

By the Commission, Commissioner Leary not participating.

SCHEDULE A

All Supermarkets in Price, Utah, in which Kroger had a financial interest prior to the consummation of the Acquisition, including, but not limited to, the Supermarket operated under the name "City Market" at 760 Price River Drive, Price, Utah 84501.

Decision and Order

SCHEDULE B

1. All Supermarkets in Rock Springs, Wyoming, in which Kroger had a financial interest prior to the consummation of the Acquisition, including, but not limited to, the Supermarket operated under the name "City Market" at 401 N. Center, Rock Springs, Wyoming 82901.
2. All Supermarkets in Green River, Wyoming, in which Kroger had a financial interest prior to the consummation of the Acquisition, including, but not limited to, the Supermarket operated under the name "City Market" at 400 Uinta Avenue, Green River, Wyoming 82935.
3. All Supermarkets in Prescott, Arizona, in which Kroger had a financial interest prior to the consummation of the Acquisition, including, but not limited to, the Supermarket operated under the name "Fry's" at 1519 W. Gurley Road, Prescott, Arizona 86301.
4. All Supermarkets in Yuma, Arizona, in which Kroger had a financial interest prior to the consummation of the Acquisition, including, but not limited to, the Supermarket operated under the name "Fry's" at 2600 West 16th Street, Yuma, Arizona 85364.
5. All Supermarkets in Sierra Vista, Arizona, in which Fred Meyer had a financial interest prior to the consummation of the Acquisition, including, but not limited to, the Supermarket operated under the name "Smith's" at 85 South Highway 92, Sierra Vista, Arizona 85635.

Analysis to Aid Public Comment

SCHEDULE C

All Supermarkets in Cheyenne, Wyoming, in which Fred Meyer had a financial interest prior to the consummation of the Acquisition, including, but not limited to:

1. the Supermarket operated under the name “Smith’s” at 1600 East Pershing Boulevard, Cheyenne, Wyoming 82001; and
2. the Supermarket operated under the name “Smith’s” at 3745 East Lincoln Way, Cheyenne, Wyoming 82001.

**ANALYSIS OF THE PROPOSED CONSENT ORDER
TO AID PUBLIC COMMENT****I. Introduction**

The Federal Trade Commission (“Commission”) has accepted for public comment from The Kroger Co. (“Kroger”) and Fred Meyer Stores, Inc. (“Fred Meyer”) (collectively “the Proposed Respondents”) an Agreement Containing Consent Order (“the proposed consent order”). The Proposed Respondents have also reviewed a draft complaint contemplated by the Commission. The proposed consent order is designed to remedy likely anticompetitive effects arising from the merger of Jobsite Holdings, Inc. (“Jobsite”), a wholly-owned subsidiary of Kroger, with and into Fred Meyer (the “Merger”), through which Fred Meyer will become a wholly-owned subsidiary of Kroger.

II. Description of the Parties and the Proposed Acquisition

Kroger, an Ohio corporation headquartered in Cincinnati, Ohio, operates over 1,400 supermarkets in 23 states. Kroger's supermarkets operate under the "Kroger," "Fry's," "Dillons," "King Soopers," "City Markets," and "Gerbes" trade names. In the states where Kroger competes with Fred Meyer, Kroger operates supermarkets in Arizona under the "Fry's" trade name and in Utah and Wyoming under the "City Market" and "King Sooper" trade names. Kroger has plans to open a supermarket in Cheyenne, Wyoming, under the "King Sooper" trade name. Kroger had \$26.57 billion in United States revenues for the fiscal year that ended on December 27, 1997. Following the merger, Kroger will remain the largest supermarket firm in the United States.

Fred Meyer, a Delaware corporation headquartered in Portland, Oregon, operates approximately 800 supermarkets in 12 western states. Fred Meyer's supermarkets operate under the "Smith's Food & Drug Centers" trade name in Arizona, Utah, and Wyoming, as well as the "Fred Meyer" trade name in Arizona and Utah, and the "Price Rite" trade name in Arizona. Fred Meyer had \$14.88 billion in total sales for the fiscal year that ended on January 31, 1999.

Pursuant to the Merger proposed by Kroger and Fred Meyer, Jobsite will merge with and into Fred Meyer and Fred Meyer will become a wholly-owned subsidiary of Kroger. As a result of the Merger, Fred Meyer's outstanding shares of common stock will be extinguished and the holder of each such share will be entitled to receive one newly-issued share of common stock of Kroger in exchange for each extinguished share of Fred Meyer common stock. The total equity value of the proposed merger is approximately \$15 billion.

Analysis to Aid Public Comment

III. The Draft Complaint

The draft complaint alleges that the relevant line of commerce (*i.e.*, the product market) is the retail sale of food and grocery items in supermarkets. Supermarkets provide a distinct set of products and services for consumers who desire to one-stop shop for food and grocery products. Supermarkets carry a full line and wide selection of both food and nonfood products (typically more than 10,000 different stock-keeping units (“SKUs”)), as well as a deep inventory of those SKUs. In order to accommodate the large number of food and nonfood products necessary for one-stop shopping, supermarkets are large stores that typically have at least 10,000 square feet of selling space.

Supermarkets compete primarily with other supermarkets that provide one-stop shopping for food and grocery products. Supermarkets primarily base their food and grocery prices on the prices of food and grocery products sold at other nearby supermarkets. Supermarkets do not regularly price-check food and grocery products sold at other types of stores, and do not significantly change their food and grocery prices in response to prices at other types of stores. Most consumers shopping for food and grocery products at supermarkets are not likely to shop elsewhere in response to a small price increase by supermarkets.

Retail stores other than supermarkets that sell food and grocery products, such as neighborhood “mom & pop” grocery stores, convenience stores, specialty food stores (*e.g.*, seafood markets, bakeries, etc.), club stores, military commissaries, and mass merchants, do not effectively constrain prices at supermarkets. These other stores operate significantly different retail formats. None of these stores offers a supermarket's distinct set of products and services that enable consumers to one-stop shop for food and grocery products.

Analysis to Aid Public Comment

According to the draft complaint, the relevant sections of the country (*i.e.*, the geographic markets) in which to analyze the acquisition are the areas in and near the following cities and towns: (a) Prescott, Arizona; (b) Sierra Vista, Arizona; (c) Yuma, Arizona; (d) Cheyenne, Wyoming; (e) Green River, Wyoming; (f) Rock Springs, Wyoming; and (g) Price, Utah.

Kroger and Fred Meyer are actual and direct competitors in and near Prescott, Sierra Vista, Yuma, Green River, Rock Springs, and Price. Kroger is an actual potential competitor against Fred Meyer in and near the Cheyenne relevant market. But for the acquisition, Kroger and Fred Meyer would become direct competitors in the Cheyenne relevant market. The acquisition will eliminate that competition.

According to the draft complaint, the Prescott, Sierra Vista, Yuma, Arizona; Green River, Rock Springs, Wyoming; and Price, Utah, relevant markets are highly concentrated, whether measured by the Herfindahl-Hirschman Index (commonly referred to as “HHI”)¹ or by two-firm and four-firm concentration ratios. The acquisition would substantially increase concentration in each market. Kroger and Fred Meyer would have a combined market share of near or greater than 35% in each geographic market. The post-acquisition HHIs in the geographic markets range from 2,793 to 10,000.

The draft complaint further alleges that the Cheyenne, Wyoming, relevant market is also highly concentrated. The market will remain highly concentrated as a result of this acquisition, and will be significantly more concentrated than it would have been but for the acquisition.

According to the draft complaint, entry is difficult and would not be timely, likely, or sufficient to prevent anticompetitive effects in the relevant geographic markets.

¹ The HHI is a measurement of market concentration calculated by summing the squares of the individual market shares of all the participants.

Analysis to Aid Public Comment

According to the draft complaint, the Agreement and Plan of Merger between Kroger and Fred Meyer, pursuant to which Jobsite will merge with and into Fred Meyer and Fred Meyer will become a wholly-owned subsidiary of Kroger, may substantially lessen competition in the relevant markets in violation of Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18, and Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45, by eliminating direct competition between supermarkets owned or controlled by Kroger and supermarkets owned or controlled by Fred Meyer; by eliminating actual potential competition between supermarkets owned or controlled by Kroger and supermarkets owned or controlled by Fred Meyer; by increasing the likelihood that Kroger will unilaterally exercise market power; and by increasing the likelihood of, or facilitating, collusion or coordinated interaction among the remaining supermarket firms. Each of these effects increases the likelihood that the prices of food, groceries, or services will increase, and the quality and selection of food, groceries, or services will decrease, in the relevant sections of the country.

IV. Terms of the Proposed Consent Order

The proposed consent order will remedy the Commission's competitive concerns about the proposed acquisition. Under the terms of the proposed consent order, the Proposed Respondents must divest eight specific supermarkets in the relevant markets. Five of the supermarkets that the Proposed Respondents must divest are currently owned and operated by Kroger (of which two operate under the "Fry's" banner and three operate under the "City Market" banner), and three of the supermarkets are currently owned and operated by Fred Meyer (all of which operate under the "Smith's" banner). The Proposed Respondents must divest: (1) two Fred Meyer "Smith's" in Cheyenne, Wyoming, to Nash-Finch Company ("Nash-Finch"), one of the largest food wholesalers in the United States and an operator of many company-owned

Analysis to Aid Public Comment

supermarkets; (2) one Kroger "City Market" in Price, Utah, to Albertson's, Inc., one of the largest retail food and drug chains operating in the United States; and (3) two Kroger "Fry's," two Kroger "City Markets," and one Fred Meyer "Smith's" in various locations to Fleming Companies, Inc. ("Fleming"), the second-largest supermarket wholesaler in the United States and an operator of many company-owned supermarkets. These divestitures include every Kroger supermarket or every Fred Meyer supermarket in each relevant market. Each upfront buyer owns no supermarkets in the same market where it is acquiring one or more divested supermarkets from the Proposed Respondents. The specific supermarkets that the Proposed Respondents must divest to Nash-Finch, Albertson's, and Fleming are listed below.

The two supermarkets that the Proposed Respondents must divest to Nash-Finch in accordance with the agreement between Kroger and Nash-Finch dated March 31, 1999, are:

1. Smith's store no. 175 operating under the "Smith's Food & Drug Centers" trade name, located at 1600 E. Pershing Blvd., Cheyenne, Wyoming 82001 (Laramie County); and
2. Smith's store no. 176 operating under the "Smith's Food & Drug Centers" trade name, located at 3745 East Lincoln Way, Cheyenne, Wyoming 82001 (Laramie County).

The one supermarket that the Proposed Respondents must divest to Albertson's in accordance with the agreement between Kroger and Albertson's dated March 31, 1999, is:

1. Kroger store no. 27 operating under the "City Market" trade name, located at 760 Price River Dr., Price, Utah 84501 (Carbon County).

Analysis to Aid Public Comment

The five supermarkets that the Proposed Respondents must divest to Fleming in accordance with the agreements between Kroger and Fleming dated March 31, 1999, and April 7, 1999, are:

1. Kroger store no. 24 operating under the "City Market" trade name, located at 401 N. Center, Rock Springs, Wyoming 82901 (Sweetwater County);
2. Kroger store no. 23 operating under the "City Market" trade name, located at 400 Uinta Drive, Green River, Wyoming 82935 (Sweetwater County);
3. Kroger store no. 9 operating under the "Fry's" trade name, located at 1519 W. Gurley Street, Prescott, Arizona 86305 (Yavapai County);
4. Smith's store no. 305 operating under the "Smith's Food & Drug Centers" trade name, located at #85 South Hwy. 92, Sierra Vista, Arizona 85635 (Cochise County); and
5. Kroger store no. 47 operating under the "Fry's" trade name, located at 2600 W. 16th Street, Yuma, Arizona 85364 (Yuma County).

From the time Jobsite merges with and into Fred Meyer until the divestitures have been completed, the Proposed Respondents are required to maintain the viability, competitiveness, and marketability of the assets to be divested, must not cause their wasting or deterioration, and cannot sell, transfer, or otherwise impair their marketability or viability.

Analysis to Aid Public Comment

The proposed consent order specifically requires that the divestitures occur no later than twenty days after Jobsite merges with and into Fred Meyer and Fred Meyer becomes a wholly-owned subsidiary of Kroger or four months after the Proposed Respondents signed the proposed consent order (April 29, 1999), whichever is earlier. The proposed consent agreement also requires Kroger to include rescission provisions in its upfront buyer agreements that allow it to rescind the transaction(s) if the Commission, after the comment period, decides to reject any of the upfront buyers. If Kroger divests the supermarkets to be divested prior to the date the proposed consent order becomes final, and if, at the time the Commission decides to make the proposed consent order final, the Commission notifies Kroger that any of the upfront buyers is not an acceptable acquirer or that any of the upfront buyer agreements is not an acceptable manner of divestiture, then Kroger must immediately rescind the transaction in question and divest those assets within three months after the proposed consent order becomes final. At that time, Kroger must divest those assets only to an acquirer that receives the prior approval of the Commission and only in a manner that receives the prior approval of the Commission. In the event that any Commission-approved buyer is unable to take or keep possession of any of the supermarkets identified for divestiture, a trustee that the Commission may appoint has the power to divest any of the supermarkets or properties in the markets alleged in Paragraph 13 of the complaint that the Proposed Respondents own to remedy the anticompetitive effects alleged in the complaint.

The Commission's goal in evaluating possible purchasers of divested assets is to maintain the competitive environment that existed prior to the acquisition. When divestiture is an appropriate remedy for a supermarket merger, the Commission requires the merging parties to find a buyer for the divested stores. A proposed buyer must not itself present competitive problems. For example, the Commission is less likely to approve a buyer that already has a large retail presence in the relevant geographic area than a buyer without such a presence. The Commission is satisfied that the purchasers presented by the parties are well qualified to run the

Analysis to Aid Public Comment

divested stores and that divestiture to these purchasers poses no separate competitive issues.

For a period of ten years from the date the proposed consent order becomes final, Kroger is required to provide notice to the Commission prior to acquiring supermarket assets located in, or any interest (such as stock) in any entity that owns or operates a supermarket located in, Cochise, Yavapai, or Yuma counties, Arizona; Laramie or Sweetwater counties, Wyoming; or Carbon County, Utah. Kroger may not complete such an acquisition until it has provided information requested by the Commission. This provision does not restrict Kroger from constructing new supermarket facilities on its own; nor does it restrict Kroger from leasing facilities not operated as supermarkets within the previous six months.

For a period of ten years, the proposed consent order also prohibits Kroger from entering into or enforcing any agreement that restricts the ability of any person that acquires any supermarket, any leasehold interest in any supermarket, or any interest in any retail location used as a supermarket on or after January 1, 1998, to operate a supermarket at that site if such supermarket was formerly owned or operated by Kroger in Cochise, Yavapai, or Yuma counties, Arizona; Laramie or Sweetwater counties, Wyoming; or Carbon County, Utah. In addition, Kroger may not remove fixtures or equipment from a store or property owned or leased in Cochise, Yavapai, or Yuma counties, Arizona; Laramie or Sweetwater counties, Wyoming; or Carbon County, Utah, that is no longer in operation as a supermarket, except (1) prior to a sale, sublease, assignment, or change in occupancy or (2) to relocate such fixtures or equipment in the ordinary course of business to any other supermarket owned or operated by Kroger.

Analysis to Aid Public Comment

The Proposed Respondents are required to provide to the Commission a report of compliance with the proposed consent order within thirty days following the date on which they signed the proposed consent and every thirty days thereafter until the divestitures are completed. Kroger is required to provide to the Commission a report of compliance annually for a period of ten years. The obligations of Jobsite under the proposed consent order will terminate upon consummation of the proposed acquisition.

V. Opportunity for Public Comment

The proposed consent order has been placed on the public record for 60 days for receipt of comments by interested persons. Comments received during this period will become part of the public record. After 60 days, the Commission will again review the agreement and the comments received and will decide whether it should withdraw from the agreement or make the proposed consent order final.

By accepting the proposed consent order subject to final approval, the Commission anticipates that the competitive problems alleged in the complaint will be resolved. The purpose of this analysis is to invite public comment on the proposed consent order, including the proposed sale of supermarkets to Nash-Finch, Albertson's, and Fleming, in order to aid the Commission in its determination of whether to make the proposed consent order final. This analysis is not intended to constitute an official interpretation of the proposed consent order nor is it intended to modify the terms of the proposed consent order in any way.

Complaint

IN THE MATTER OF

HOECHST AG AND RHÔNE-POULENC S.A.

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

Docket C-3919; File No. 9910071

Complaint, January 18, 2000--Decision, January 18, 2000

This consent order addresses the merger of Respondent Glaxo Wellcome plc ("Glaxo") and Respondent SmithKline Beecham plc ("SB"). The order, among other things, requires the respondents (1) to divest all of SB's worldwide rights and intellectual property relating to its antiemetic drug, Kytril, to F. Hoffman LaRoche; (2) to divest SB's intellectual property rights to manufacture and market ceftazidime (an injectable antibiotic used to treat serious hospital-borne infections) to Abbott Laboratories; (3) to divest SB's worldwide rights and intellectual property relating to its antiviral drugs, Famvir and Denavir, to Novartis Pharm AG and Novartis Pharmaceuticals Corporation; and (4) to return to Cantab Pharmaceuticals plc all rights to use Cantab's DISC technology for the development of a prophylactic herpes vaccine. The order also requires the respondents (5) to divest Glaxo's United States and Canadian Zantac trademark rights to Pfizer; (6) to assign or relinquish all of SB's relevant intellectual property rights and options to the drug renzapride (used to treat irritable bowel syndrome) to Alizyme plc; (7) to assign all of Glaxo's relevant intellectual property rights to GI147211C, a topoisomerase I inhibitor (used to treat certain types of cancer), to Gilead Sciences, Inc.; and (8) to assign all of SB's relevant intellectual property rights and relinquish all options to regain control over frovatriptan (used to treat migraine headaches) to Vernalis Ltd.

Participants

For the Commission: *Molly S. Boast, Laura I. Brem, Linda D. Cunningham, Daniel P. Ducore, Wallace W. Easterling, Elizabeth A. Jex, Roy B. Levy, Ann Malester, Robert R. Pickett, Elizabeth A. Schneirov, and Gregory S. Vistnes.*

For the Respondents: *Alec Chang and William Pelster, Skadden Arps Slate Meagher & Flom, L.L.P., and Jessica Biggio, Steven Sunshine, and David Wales, Shearman & Sterling.*

Complaint

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act and of the Clayton Act, and by virtue of the authority vested in it by said Acts, the Federal Trade Commission (the "Commission"), having reason to believe that Respondents Hoechst AG ("Hoechst"), a corporation, and Rhône-Poulenc S.A. ("RP"), a corporation, both subject to the jurisdiction of the Commission, have agreed to merge into the new entity Aventis S.A. ("Aventis"), a corporation, in violation of Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18, and Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45, and it appearing to the Commission that a proceeding in respect thereof would be in the public interest, hereby issues its Complaint, stating its charges as follows:

I. RESPONDENTS

1. Respondent Hoechst is a corporation organized, existing and doing business under and by virtue of the laws of Germany, with its office and principal place of business located at D-65926 Frankfurt am Main, Germany. Hoechst is engaged in the discovery, development, manufacture and sale of chemicals, proprietary and generic human pharmaceutical products, and animal health products. In the United States, Hoechst operates its pharmaceutical business through its subsidiary, Hoechst Marion Roussel, Inc. ("HMRI"), based in Kansas City, Missouri.

2. Respondent RP is a corporation organized, existing, and doing business under and by virtue of the laws of France, with its office and principal place of business located at 25 Quai Paul Doumer, F-92408 Courbevoie, France. Rhône-Poulenc is to be renamed Aventis S.A. with its registered office relocated at Strasbourg (Bas-Rhin)-Espace Europeen de L'Entreprise, 67300 Schiltigheim, France after the closing of the Business Combination Agreement between Hoechst and RP dated May 20, 1999. RP is engaged in the discovery, development, manufacture

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and sale of chemicals, and proprietary and generic human pharmaceutical products. In the United States, Rhône-Poulenc operates its pharmaceutical business through its subsidiary, RP Rorer, Inc. ("RPR"), located in Collegeville, Pennsylvania.

II. JURISDICTION

3. Hoechst and RP are, and at all times relevant herein have been, engaged in commerce as "commerce" is defined in Section 1 of the Clayton Act, as amended, 15 U.S.C. § 12, and are corporations whose businesses are in or affect commerce as "commerce" is defined in Section 4 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 44.

III. THE PROPOSED MERGER

4. On or about May 20, 1999, Hoechst and RP signed a merger agreement, providing that each company will contribute most of its respective businesses into a newly formed entity, Aventis ("the merger"). The merger will be accomplished via an exchange offer by RP for all of Hoechst's outstanding shares, with Hoechst shareholders receiving one RP share for each 1.33 outstanding Hoechst share. The estimated value of the exchange of Hoechst shares is \$16 billion. The merged entity, Aventis, will control worldwide assets valued at approximately \$80 billion.

IV. THE RELEVANT MARKETS

5. One relevant line of commerce in which to analyze the effects of the proposed merger is the research, development, manufacture and sale of direct thrombin inhibitors. Direct thrombin inhibitors are used in the treatment of many blood clotting diseases, because of their unique mechanism of action in the blood clotting cascade of targeting thrombin. There are no acceptable substitutes for direct thrombin inhibitors because of their unique mechanism of action.

Complaint

6. Another relevant line of commerce in which to analyze the effects of the proposed merger is the manufacture, marketing, and sale of cellulose acetate. Cellulose acetate is a thermoplastic used to produce, among other things, cigarette filters, tool handles, tapes and film.

7. The demand for cellulose acetate is highly inelastic in applications where it is used today, such as cigarette filters, tool handles, and tape and film applications, because its performance properties are superior to those of competing materials. There are no cost effective substitutes for cellulose acetate in these applications.

8. The United States is a relevant geographic area in which to analyze the effects of the merger.

V. STRUCTURE OF THE MARKETS

Direct Thrombin Inhibitors

9. The market for the research, development, manufacture and sale of direct thrombin inhibitors is highly concentrated. Hoechst and RP are the two leading companies developing direct thrombin inhibitor products. Hoechst and RP (based on its license from Novartis AG) control the substantial proprietary rights necessary to commercialize direct thrombin inhibitor products and possess the technological, manufacturing, clinical and regulatory expertise and manufacturing capability to commercially develop direct thrombin inhibitor products. Hoechst's direct thrombin inhibitor, Recludan, has already obtained FDA approval for treatment of the blood clotting disease Heparin-Induced Thrombocytopenia. RP is in late stage development of its direct thrombin inhibitor, Revasc, for Deep Vein Thrombosis. Both Hoechst and RP are either in or near clinical development for the treatment of other blood clotting diseases.

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10. The direct thrombin inhibitor market is highly concentrated. Only Hoechst has successfully commercially developed a direct thrombin inhibitor product, Recludan, and only RP is in the final stages of clinical development to obtain FDA approval for its direct thrombin inhibitor product, Revasc.

Cellulose Acetate

11. The market for the manufacture, marketing, and sale of cellulose acetate is highly concentrated. There are three producers of cellulose acetate in the United States: Eastman Chemical Company ("Eastman"); RP, through Primester, a 50-50 joint venture with Eastman and Rhodia, a RP subsidiary; and Celanese AG ("Celanese"). Celanese and Eastman, through each of their wholly-owned facilities, control approximately 45 percent of U.S. cellulose acetate capacity. The Primester joint venture between Rhodia and Eastman accounts for approximately 10 percent of U.S. production capacity.

12. One Celanese shareholder, the Kuwait Petroleum Company ("KPC"), holds 25 percent of Celanese, and pursuant to the merger will hold between 12.5 and 15 percent of Aventis. Therefore, because the remaining shares of both entities are widely held, KPC will gain significant control of Rhodia, through Aventis, and will also control Celanese. The merged entity will also succeed to Rhodia's interest in the Primester joint venture with Eastman, the only other producer of cellulose acetate in the market in the U.S.

VI. ENTRY CONDITIONS**Direct Thrombin Inhibitors**

13. Entry into the direct thrombin inhibitor market would not be timely, likely, or sufficient in its magnitude, character, and scope to deter or counteract the anticompetitive effects of the

Complaint

merger. FDA regulations covering direct thrombin inhibitor products create long lead times for the introduction of new products. Additionally, patents and other intellectual property create large and potentially insurmountable barriers to entry.

14. Entry into the direct thrombin inhibitor market requires lengthy clinical trials, data collection and analysis, and expenditures of significant resources over many years to qualify manufacturing facilities with the FDA. FDA approval of each blood clotting indication can extend up to and beyond 10 years. The FDA must approve all phases of development, including extensive preclinical and clinical work. The most significant barriers to entry include technical, regulatory, patent, clinical and production barriers. No company can reach advanced stages of development in the relevant market without: (1) clinical expertise; (2) scientific research that requires years to complete; (3) patent rights to all the necessary inputs into the direct thrombin inhibitor product sufficient to provide the company with reasonable assurances of freedom to operate; and (4) clinical grade product manufacturing expertise, regulatory approvals and capacity to complete clinical development. The necessary proprietary inputs include methods of using direct thrombin inhibitors for the treatment of various blood clotting diseases and methods of manufacturing direct thrombin inhibitor products.

Cellulose Acetate

15. Entry into the cellulose acetate market would not be timely, likely, or sufficient in its magnitude, character, and scope to deter or counteract the anticompetitive effects of the merger. The demand for cellulose acetate is declining. Cellulose acetate was one of the first thermoplastics developed. Consequently, it has been displaced in many applications by newer materials. Given the reduction in demand and the high costs associated with developing the capability to manufacture, market, and sell these products, entry is unattractive because it is doubtful that the entry investment could be recovered in a reasonable time period, if at all.

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VII. EFFECTS OF THE PROPOSED MERGER

16. The effects of the merger, if consummated, may be substantially to lessen competition or tend to create a monopoly in the direct thrombin inhibitor market and the cellulose acetate market in violation of Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18, and Section 5 of the FTC Act, as amended, 15 U.S.C. § 45. Specifically the merger will:

Direct Thrombin Inhibitors

- a. eliminate Hoechst and RP as substantial, independent competitors;
- b. eliminate actual, direct, and substantial competition between Hoechst and RP;
- c. reduce innovation competition among researchers and developers of direct thrombin inhibitor products, including the reduction in, delay of or redirection of research and development projects;
- d. increase the level of concentration in the relevant market;
- e. eliminate actual potential and perceived potential competition in the relevant market;
- f. increase barriers to entry into the relevant market, in part by combining portfolios of patents and patent applications;
- g. increase the merged firm's ability to exercise market power unilaterally.

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Cellulose Acetate

- h. eliminate Hoechst and RP as substantial, independent competitors;
- i. eliminate actual, direct, and substantial competition between Hoechst and RP;
- j. increase the level of concentration in the relevant market;
- k. eliminate actual potential and perceived potential competition in the relevant market;
- l. increase barriers to entry into the relevant products;
and
- m. increase the likelihood of coordinated interaction.

VIII. VIOLATIONS CHARGED

17. The merger agreement described in Paragraph 4 constitutes a violation of Section 5 of the FTC Act, as amended, 15 U.S.C. § 45.

18. The merger described in Paragraph 4, if consummated, would constitute a violation of Section 5 of the FTC Act, as amended, 15 U.S.C. § 45, and Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18.

WHEREFORE, THE PREMISES CONSIDERED, the Federal Trade Commission on this eighteenth day of January, 2000, issues its Complaint against said Respondents.

By the Commission.

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The Federal Trade Commission having initiated an investigation of the proposed merger between Respondent Hoechst AG and Respondent Rhône-Poulenc S.A. into Respondent Aventis S.A., a new entity, and Respondents having been furnished thereafter with a copy of a draft of Complaint that the Bureau of Competition presented to the Commission for its consideration and which, if issued by the Commission, would charge Respondents with violations of Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18, and Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45; and

Respondents, their attorneys, and counsel for the Commission having thereafter executed an Agreement Containing Consent Order ("Consent Agreement"), containing an admission by Respondents of all the jurisdictional facts set forth in the aforesaid draft of Complaint, a statement that the signing of said Consent Agreement is for settlement purposes only and does not constitute an admission by Respondents that the law has been violated as alleged in such Complaint, or that the facts as alleged in such Complaint, other than jurisdictional facts, are true, and waivers and other provisions as required by the Commission's Rules; and

The Commission having thereafter considered the matter and having determined that it had reason to believe that Respondents have violated the said Acts, and that a Complaint should issue stating its charges in that respect, and having thereupon accepted the executed Agreement Containing Consent Order and placed such Consent Agreement on the public record for a period of thirty (30) days for the receipt and consideration of public comments, now in further conformity with the procedure described in Commission Rule 2.34, 16 C.F.R. § 2.34, the Commission hereby issues its Complaint, makes the following jurisdictional findings and enters the following Order:

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- A. Respondent Hoechst is a corporation organized, existing and doing business under and by virtue of the laws of Germany, with its office and principal place of business located at D-65926 Frankfurt am Main, Germany.
- B. Respondent RP is a corporation organized, existing and doing business under and by virtue of the laws of France, with its office and principal place of business located at 25 Quai Paul Doumer, F-92408 Courbevoie, France, that is to be renamed Aventis S.A. with its registered office relocated at Strasbourg (Bas-Rhin)-Espace Europeen de L'Entreprise, 67300 Schiltigheim, France pursuant to the Business Combination Agreement between Hoechst and RP dated May 20, 1999, after consummation of that Agreement.
- C. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of Respondents, and the proceeding is in the public interest.

ORDER

I.

IT IS ORDERED that, as used in this order, the following definitions shall apply:

- A. "Hoechst" means Hoechst AG, its directors, officers, employees, agents, and representatives, predecessors, successors, and assigns; the subsidiaries, divisions, groups and affiliates controlled by Hoechst, and the respective directors, officers, employees, agents, representatives, successors, and assigns of each.
- B. "RP" means Rhône-Poulenc S.A., its directors, officers, employees, agents and representatives, predecessors, successors, and assigns; the subsidiaries,

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divisions, groups and affiliates controlled by RP, and the respective directors, officers, employees, agents, representatives, successors, and assigns of each.

- C. "Aventis" means Aventis S.A., its directors, officers, employees, agents and representatives, predecessors, successors, and assigns; the subsidiaries, divisions, groups and affiliates controlled by Aventis, and the respective directors, officers, employees, agents, representatives, successors, and assigns of each.
- D. "Respondents" means Hoechst, RP and Aventis.
- E. "Commission" means the Federal Trade Commission.
- F. "Revasc" means any pharmaceutical preparation containing the drug substance desirudin (chemical name: desulfatohirudin) that is the subject of the Agreement dated June 25, 1998 by and between Novartis Pharma AG and Rhône-Poulenc Rorer Inc., any of its constituent elements, active ingredients or intermediaries, including, but not limited to, vials containing the lyophilized desirudin and solvent ampules needed for reconstitution, and all rights relating to the research, development, manufacture and sale of Revasc, including without limitation Revasc Patent Rights and Know-how granted in the Agreement dated June 25, 1998 by and between Novartis Pharma AG and Rhône-Poulenc Rorer Inc.
- G. "Revasc License" means the rights that RP licensed from Novartis pursuant to the Agreement dated June 25, 1998 by and between Novartis Pharma AG and Rhône-Poulenc Rorer Inc., attached hereto as non-public Appendix I.

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- H. “Revasc Divestiture Assets” means all rights granted to RP pursuant to the Revasc License and all assets and contracts that are related to the research, development, marketing, sale or use of Revasc.
- I. “Novartis” means Novartis Pharma AG, a Swiss corporation, with its office and principal place of business located at Lichstrasse 35, CH-4002 Basel, Switzerland, and includes its directors, officers, employees, agents and representatives, licensees, predecessors, successors, and assigns; the subsidiaries, divisions, groups and affiliates controlled by Novartis, and the respective directors, officers, employees, agents, representatives, successors, and assigns of each.
- J. “Dr. Madaus GmbH” means Dr. Madaus GmbH, a German corporation, with its offices and principal place of business located at Herderstraße 2, D-83512, Wasserburg am Inn, Germany, and includes its directors, officers, employees, agents, representatives, licensees, predecessors, successors, and assigns; the subsidiaries, divisions, groups and affiliates controlled by Dr. Madaus GmbH, and the respective directors, officers, employees, agents, and representatives, successors, and assigns of each.
- K. “FDA” means the United States Food and Drug Administration.
- L. “DVT” means deep vein thrombosis.
- M. “Know-how” means all technological, technical, scientific, chemical, biological, pharmacological, toxicological, regulatory, marketing and other information, including without limitation all formulae, trade secrets, inventions, techniques, patents, patent applications, discoveries, compounds, compositions of

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matter, assays, reagents, and biological materials, trademarks, research data, technical data and information, testing data, preclinical and clinical data, toxicological and pharmacological data, statistical analysis, analytical data, clinical protocols, specifications, designs, drawings, processes, testing and quality assurance/quality control data, manufacturing data and information, regulatory submissions, and any other information and experience.

- N. “Revasc Know-how” means all confidential business information and Know-how presently owned by RP that relates in whole or in part to Revasc, including without limitation information stored on management information systems (and specifications sufficient for Novartis or the sublicensee specified in Paragraph II to use such information); proprietary software used in connection with Respondent RP’s Revasc; all data, contractual rights, materials and information relating to obtaining FDA approvals and other government or regulatory approvals for RP’s Revasc; and any other information and experience relating to Revasc.
- O. “Confidential Business Information” means all information concerning the research, development, marketing, distribution, cost, pricing, sale and commercialization of a product or product in development.
- P. “NDA” means a New Drug Application, any preparatory work, drafts and data necessary for the preparation thereof, and Know-how, and includes without limitation both supplemental and abbreviated NDAs.

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- Q. “New Indications” means any indication other than DVT, and includes, but is not limited to, Heparin-Induced Thrombocytopenia and arterial indications.
- R. “Revasc Patent Rights” means any and all patents and patent applications owned, licensed or controlled by Respondents related to Revasc, including, but not limited to, the patents listed in or issuing on applications listed in the Annex attached to the Revasc License attached hereto as non-public Appendix I, and any and all reissues, extensions (including supplementary protection certificates), substitutions, confirmations, registrations, revalidations, additions, continuations or divisions of or to any of the aforesaid patents.
- S. “Revasc Business Plan” means the development work for Revasc as provided in the Revasc Business Plan of 1999, attached hereto as non-public Appendix II and incorporated by reference herein.
- T. “Merger” means the proposed merger of Hoechst and RP by means of an exchange offer by RP for all of Hoechst’s outstanding shares, with Hoechst shareholders receiving one RP share for each 1.33 outstanding Hoechst shares pursuant to the Business Combination Agreement between Hoechst and RP dated May 20, 1999.
- U. “Direct cost” means the cost of labor and materials associated with preparing, reviewing, modifying and submitting New Drug Applications to the FDA and other worldwide health authorities, and includes the cost of training personnel in accomplishing those duties and in responding to inquiries from the FDA and other worldwide health authorities regarding those applications.

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- V. “Refludan” means the drug substance lepirudin (chemical name : desulfatohirudin).
- W. “Refludan Assets” means all of Respondents’ assets and rights relating to the research, development and manufacture of Refludan for sale in North America, including the regulatory approvals, physical assets necessary to manufacture Refludan (excluding the production assets in Marburg, Germany), and all of its brand names and trade names. Refludan Assets include the New Drug Application Number 20-807 on file with the Food and Drug Administration (“FDA”), and include, but are not limited to:
1. manufacturing operations, machinery, fixtures, equipment, furniture, tools and other tangible personal property necessary to manufacture Refludan;
 2. all intellectual property, inventions, technology, know-how, patents, trademarks, brand names, trade names, trade secrets and copyrights;
 3. all research materials, formulations, patent rights, trade secrets, specifications, protocols, technical information, management information systems, software, specifications, designs, drawings, processes and quality control data;
 4. all customer lists, vendor lists, catalogs, sales promotion literature and advertising materials;
 5. inventory and storage capacity;

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6. all rights, titles and interests in and to owned or leased real property, together with appurtenances, licenses and permits relating to the assets described in Definition W;
7. all rights, titles and interests in and to contracts relating to the research and development of Refludan;
8. all rights, titles and interests in and to the contracts entered into in the ordinary course of business with customers (together with associated bid and performance bonds), suppliers, sales representatives, distributors, agents, personal property lessors, personal property lessees, licensors, licensees, consignors and consignees;
9. all rights under warranties and guarantees, express or implied;
10. all books, records and files; and
11. all items of prepaid expense relating to the assets described in Definition W;

Provided, however, that the Refludan Assets shall also include all research, development and manufacturing assets necessary to produce Refludan in an FDA Good Manufacturing Practice-approved facility if the person acquiring the Refludan Assets requests such assets.

- X. "Celanese" means Celanese AG, its directors, officers, employees, agents and representatives, predecessors, successors, and assigns; the subsidiaries, divisions, groups and affiliates controlled by Celanese, and the respective directors, officers, employees, agents, representatives, successors, and assigns of each.

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- Y. “Rhodia” means Rhodia, its directors, officers, employees, agents and representatives, predecessors, successors, and assigns; the subsidiaries, divisions, groups and affiliates controlled by Rhodia, and the respective directors, officers, employees, agents, representatives, successors, and assigns of each.
- Z. “KPC” means the Kuwait Petroleum Corporation, its directors, officers, employees, agents and representatives, predecessors, successors, and assigns; the subsidiaries, divisions, groups and affiliates controlled by KPC, and the respective directors, officers, employees, agents, representatives, successors, and assigns of each.
- AA. “Cellulose Acetate Business” means the production, marketing, distribution, and/or sale of cellulose acetate flake, filament, and tow products.
- BB. “Primester” means the cellulose acetate flake manufacturing joint venture between Rhodia and Eastman Chemical Company, located in Tennessee.

II.**IT IS FURTHER ORDERED** that:

- A. Respondents shall not develop, manufacture, distribute, or sell Revasc or participate in the development, manufacture, distribution or sale of Revasc and shall not assert any rights granted by the Revasc License or any other contract against any person for any activities related to the use of Revasc; *provided, however*, that Respondents shall retain such rights under the Revasc License and other contract(s)

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as are necessary to fulfill the requirements of Paragraph II of this Order.

- B. Respondent RP shall offer to transfer and surrender at no minimum price to Novartis, absolutely and in good faith, within ten (10) days from the date the Agreement Containing Consent Order in this matter is accepted by the Commission for public comment, the Revasc Divestiture Assets.
- C. If Novartis, within twenty (20) days from receipt of RP's offer as required by Paragraph II.B. of this Order, fails to accept the return of the Revasc Divestiture Assets, then Respondents shall absolutely and in good faith, within six (6) months from the date the Agreement Containing Consent Order in this matter is accepted by the Commission for public comment, sublicense, at no minimum price, the Revasc Divestiture Assets only to a licensee that receives the approval of Novartis, pursuant to Section 14 of the Revasc License, and that receives the prior approval of the Commission and only in a manner that receives the prior approval of the Commission; *provided, however,* that Respondents' sublicense shall restrict Respondents' access to Revasc Know-how, except to the extent that such information is specifically required to perform the short-term service contract and Support required by Paragraph II.E. of this Order, and shall restrict Respondents' use of such information solely for those purposes. An Interim Trustee shall be used where appropriate to avoid the necessity of Respondents' gaining access to Revasc Know-how.
- D. Respondents shall assign or transfer their rights relating to the manufacturing of Revasc, including, but not limited to, the toll manufacturing agreement and any other agreements between or among RP, Aventis, Novartis and Dr. Madaus GmbH relating to the

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manufacture or preparation of Revasc, to Novartis within ten (10) days from the date that Novartis accepts the offer described in Paragraph II.B., or to the sublicensee within ten (10) days from the date that the sublicensee is approved pursuant to Paragraph II.C. of this Order.

- E. At the option of Novartis or Respondent RP's sublicensee, Respondents shall enter into a short-term service contract with Novartis or the sublicensee to continue to perform the development work for Revasc at a price not to exceed direct cost. The short-term service contract shall terminate no later than one year after the date on which the FDA approves Revasc for the prevention of DVT. Additionally, at the option of Novartis or the sublicensee, Respondents shall provide expertise and grant reasonable support to Novartis or the sublicensee in the transfer of Revasc Know-how, in the handover of data necessary for preparation of any dossier for Revasc, including the NDA for Revasc for the United States, and in assisting Novartis or the sublicensee to address questions from the FDA or other regulatory agencies (all of the foregoing, collectively "Support") at a price not to exceed Respondents' direct cost.

- F. Within ten (10) days from the date that Novartis accepts return of the Revasc Divestiture Assets, or within ten (10) days from the date that the Commission approves the sublicensee, Respondent RP shall transfer and surrender to Novartis or the sublicensee, all Revasc Know-how and shall not keep copies of such Revasc Know-how unless otherwise agreed to by Novartis or the sublicensee for the purpose of performing the Support obligations or development work for Revasc as provided in the Revasc Business

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Plan; *provided, however*, that Respondents shall keep such information as is required solely for the purpose of performing the short-term service contract and Support required by Paragraph II.E. of this Order, and shall use such information solely for those purposes. In no event shall Respondents keep any copies of Revasc Know-how after the earlier of either: (1) termination of the short-term service contract; or (2) written request by Novartis (if it accepts the Revasc Divestiture Assets), or by the sublicensee for the transfer of the Revasc Know-how.

- G. Respondents shall take such actions as are necessary to maintain the development of Revasc and to prevent the destruction, removal, wasting, delay, deterioration, or impairment of the assets used in the research, development, manufacturing or sale of Revasc, including but not limited to the submission of the NDA for Revasc pursuant to RP's Revasc Business Plan, until Respondents have fully complied with the obligations specified in Paragraphs II.B. through II.F. of this Order.
- H. The purpose of this Paragraph II is to ensure the continued research, development, manufacture and sale of Revasc in the United States and to remedy the lessening of competition resulting from the Merger as alleged in the Commission's Complaint.

III.**IT IS FURTHER ORDERED** that:

- A. At any time after the Agreement Containing Consent Order in this matter is accepted by the Commission for public comment, the Commission may appoint an individual to serve as a trustee ("the Interim Trustee") to assure that Respondents expeditiously perform their

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responsibilities as required by Paragraphs II and V of this Order.

- B. If an Interim Trustee is appointed pursuant to Paragraph III. A. of this Order, Respondents shall consent to the following terms and conditions regarding the powers, duties, authorities, and responsibilities of the Interim Trustee:
1. The Commission shall select the Interim Trustee, subject to the consent of Respondents, which consent shall not be unreasonably withheld. If Respondents have not opposed, in writing, including the reasons for opposing, the selection of any proposed trustee within ten (10) days after notice by the staff of the Commission to Respondents of the identity of any proposed trustee, Respondents shall be deemed to have consented to the selection of the proposed trustee.
 2. The Interim Trustee shall have the power and authority to monitor Respondents' compliance with the terms of this Order, and shall exercise such power and authority and carry out the duties and responsibilities of the Interim Trustee in a manner consistent with the purposes of this Order and in consultation with the Commission.
 3. Within ten (10) days after appointment of the Interim Trustee, Respondents 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 Respondents' compliance with the terms of this Order and in a manner consistent with the purposes of this Order.

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4. The Interim Trustee shall serve until the later of the divestiture of the Revasc Divestiture Assets or, if any options under Paragraph II.E. are exercised, the date that all agreements entered into pursuant to Paragraph II.E. have terminated; *provided however*, the Commission may extend this period as may be necessary or appropriate to accomplish the purposes of this Order; *provided further, however*, that if the Refludan Assets are divested pursuant to Paragraphs IV. and V. of this Order, then the Interim Trustee shall serve until all agreements entered into pursuant to Paragraphs IV. and V. have terminated.
5. The Interim Trustee shall have full and complete access to Respondents' personnel, books, records, documents, facilities and technical information relating to the research, development, manufacture, importation, distribution and sale of Revasc, 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 manufacture of Revasc and all materials and information relating to the FDA and other government or regulatory approvals. Respondents shall cooperate with any reasonable request of the Interim Trustee. Respondents shall take no action to interfere with or impede the Interim Trustee's ability to monitor Respondents' compliance with this Order.
6. The Interim Trustee shall serve, without bond or other security, at the expense of Respondents, on such reasonable and customary terms and conditions as the Commission may set. The Commission may, among other things, require the

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Interim Trustee to sign an appropriate confidentiality agreement relating to Commission materials and information received in connection with the performance of the Interim Trustee's duties. The Interim Trustee shall have authority to employ, at the expense of Respondents, 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. Respondents 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 preparation for or defense of any claim, whether or not resulting in any liability, except to the extent that such losses, claims, damages, liabilities or expenses result from misfeasance, gross negligence, willful or wanton acts, or bad faith by the Interim Trustee.
8. If the Commission determines that the Interim Trustee has ceased to act or failed to act diligently, the Commission may appoint a substitute Interim Trustee in the same manner as provided in Paragraph III.B.1. of this Order.

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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.
10. Respondents shall submit reports as required by the Interim Trustee. The Interim Trustee shall obtain and evaluate reports submitted to him or her by Respondents with respect to the performance of Respondents' obligations under the Order. The Interim Trustee shall report in writing to the staff of the Commission every two (2) months for the period that he or she serves as Interim Trustee.

IV.**IT IS FURTHER ORDERED** that:

- A. If Respondents have not fully complied with the obligations specified in Paragraph II.B. through II.G. of this Order, the Commission may appoint an individual to serve as a trustee to divest either: (1) the Revasc Divestiture Assets, Revasc Know-how and all other rights granted to Respondent RP by the Revasc License; or (2) the Recludan Assets. In the event that the Commission or the Attorney General brings an action pursuant to § 5(l) of the Federal Trade Commission Act, 15 U.S.C. § 45(l), or any other statute enforced by the Commission, Respondents shall consent to the appointment of a trustee in such action to divest all of Respondent RP's Revasc Divestiture Assets or the Recludan Assets. Neither the appointment of a trustee nor a decision not to appoint a trustee under this Paragraph shall preclude the Commission or the Attorney General from seeking civil penalties or any other relief available to it, including a court-appointed trustee, pursuant to § 5(l)

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of the Federal Trade Commission Act, or any other statute enforced by the Commission, for any failure by the Respondents to comply with this Order.

- B. If a trustee is appointed by the Commission or a court pursuant to Paragraph IV. A. of this Order, Respondents shall consent to the following terms and conditions regarding the trustee's powers, duties, authority, and responsibilities:
1. The Commission shall select the trustee, subject to the consent of Respondents, which consent shall not be unreasonably withheld. The trustee shall be a person with experience and expertise in acquisitions and divestitures. If Respondents have not opposed, in writing, including the reasons for opposing, the selection of any proposed trustee within ten (10) days after notice by the staff of the Commission to Respondents of the identity of any proposed trustee, Respondents shall be deemed to have consented to the selection of the proposed trustee.
 2. Subject to the prior approval of the Commission, the trustee shall have the exclusive power and authority to divest all of Respondent RP's Revasc Divestiture Assets.
 3. Within ten (10) days after appointment of the trustee, Respondents shall execute a trust agreement that, subject to the prior approval of the Commission and, in the case of a court-appointed trustee, of the court, transfers to the trustee all rights and powers necessary to permit the trustee to effect the divestiture required by Paragraph II. of this Order.

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4. The trustee shall have twelve (12) months from the date the Commission approves the trust agreement described in Paragraph IV. B. 3. to accomplish the divestiture, which shall be subject to the prior approval of the Commission. If, however, at the end of the twelve-month period, the trustee has submitted a plan of divestiture or believes that divestiture can be achieved within a reasonable time, the divestiture period may be extended by the Commission, or, in the case of a court-appointed trustee, by the court; *provided however*, the Commission may extend this period only two (2) times.
5. The trustee shall have full and complete access to the personnel, books, records and facilities related to Revasc or to any other relevant information, as the trustee may request. Respondents shall develop such financial or other information as the trustee may request and shall cooperate with the trustee. Respondents shall take no action to interfere with or impede the trustee's accomplishment of the divestiture. Any delays in divestiture caused by Respondents shall extend the time for divestiture under this Paragraph in an amount equal to the delay, as determined by the Commission or, for a court-appointed trustee, by the court.
6. The trustee shall use his or her best efforts to negotiate the most favorable price and terms available in each contract that is submitted to the Commission, subject to Respondents' absolute and unconditional obligation to divest at no minimum price. The divestiture shall be made in the manner and to an acquirer as set out in Paragraph II of this Order; *provided however*, if the trustee receives bona fide offers from more than one acquiring

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entity, and if the Commission determines to approve more than one such acquiring entity, the trustee shall divest to the acquiring entity selected by Respondents from among those approved by the Commission; *provided further, however*, that Respondents shall select such entity within five (5) business days of receiving notification of the Commission's approval.

7. The trustee shall serve, without bond or other security, at the cost and expense of Respondents, on such reasonable and customary terms and conditions as the Commission or a court may set. The trustee shall have the authority to employ, at the cost and expense of Respondents, such consultants, accountants, attorneys, investment bankers, business brokers, appraisers, and other representatives and assistants as are necessary to carry out the trustee's duties and responsibilities. The trustee shall account for all monies derived from the divestiture and all expenses incurred. After approval by the Commission and, in the case of a court-appointed trustee, by the court, of the account of the trustee, including fees for his or her services, all remaining monies shall be paid at the direction of the Respondents, and the trustee's power shall be terminated. The trustee's compensation shall be based at least in significant part on a commission arrangement contingent on the trustee's divesting all of Respondent RP's Revasc Divestiture Assets.
8. Respondents shall indemnify the trustee and hold the trustee harmless against any losses, claims, damages, liabilities, or expenses arising out of, or in connection with, the performance of the trustee's

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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 losses, claims, damages, liabilities or expenses result from misfeasance, gross negligence, willful or wanton acts, or bad faith by the trustee.

9. If the trustee ceases to act or fails to act diligently, a substitute trustee shall be appointed in the same manner as provided in Paragraph IV.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 divestiture required by this Order.
11. The trustee shall have no obligation or authority to operate or maintain the Revasc Divestiture Assets.
12. The trustee shall report in writing to Respondents and the Commission every sixty (60) days concerning the trustee's efforts to accomplish the divestiture.

V.

IT IS FURTHER ORDERED that in the event that the Commission appoints a trustee to divest the Recludan Assets, the trustee shall divest the Recludan Assets on behalf of Respondents in the following manner:

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- A. The assets shall be divested, absolutely and in good faith, as a competitively viable, ongoing product line in North America, at no minimum price, to an Acquirer that receives the prior approval of the Commission and only in a manner that receives the prior approval of the Commission. The purpose of the divestiture is to ensure the continued research, development, manufacture and sale of Refludan in North America and to remedy the lessening of competition resulting from the Merger as alleged in the Commission's complaint.
- B. Respondents' agreement with the Acquirer or the New Acquirer (as specified in Paragraph V.B.9-10) (hereinafter the "Divestiture Agreement") shall include the following provisions, and Respondents shall commit to satisfy the following:
1. Respondents shall contract manufacture on behalf of and deliver to the Acquirer or the New Acquirer, in a timely manner and under reasonable terms and conditions ("the Contract Manufacturing Arrangement"), a supply of Refludan, specified in the Divestiture Agreement at cost for a period not to exceed four (4) years from the date the Divestiture Agreement is approved, or three (3) months after the date the Acquirer or the New Acquirer obtains all necessary FDA approvals to manufacture and sell Refludan in the United States, whichever is earlier; *provided however*, that the four (4) year period may be extended by the Commission in twelve (12) month increments for a period not to exceed two (2) years.

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2. After Respondents commence delivery of Refludan to the Acquirer or the New Acquirer pursuant to the Divestiture Agreement and for the term of the Contract Manufacturing Arrangement for Refludan, referred to in Paragraph V.B.1. of this Order, Respondents will make inventory of Refludan available for sale or resale in the United States and Canada only to the Acquirer or New Acquirer.
3. Respondents shall make representations and warranties that the Refludan supplied pursuant to the Divestiture Agreement meets the FDA approved specifications. Respondents 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 Refludan supplied to the Acquirer or New Acquirer pursuant to the Divestiture Agreement by Respondents to meet FDA specifications. This obligation shall be contingent upon the Acquirer or the New Acquirer giving Respondents prompt, adequate notice of such claim, cooperating fully in the defense of such claim, and permitting Respondents to assume the sole control of all phases of the defense and/or settlement of such claim, including the selection of counsel; *provided however*, any such defense and/or settlement shall be consistent with the obligations assumed by Respondents under this Order. This obligation shall not require Respondents 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 Respondents to the Acquirer or the New Acquirer.

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4. Respondents shall make representations and warranties that Respondents will hold harmless and indemnify the Acquirer or New Acquirer for any liabilities or loss of profits resulting from the failure by Respondents to deliver Refludan in a timely manner as required by the Divestiture Agreement unless Respondents can demonstrate that their failure was entirely beyond the control of Respondents and in no part the result of negligence or willful misconduct on Respondents' part.
5. During the term of the Contract Manufacturing Arrangement between Respondents and the Acquirer or the New Acquirer, upon request by the Acquirer, New Acquirer or the Interim Trustee, Respondents shall make available to the Interim Trustee all records that relate to the manufacture of Refludan.
6. Upon reasonable notice and request from the Acquirer or the New Acquirer to Respondents, Respondents shall provide in a timely manner: (a) assistance and advice to enable the Acquirer or the New Acquirer (or the designees of the Acquirer or New Acquirer) to obtain all necessary FDA approvals to manufacture and sell Refludan; (b) assistance to the Acquirer or New Acquirer (or the designee thereof) as is necessary to enable the Acquirer or New Acquirer (or the designee thereof) to manufacture Refludan in substantially the same manner and quality employed or achieved by Respondents; and (c) consultation with knowledgeable employees of Respondents and training, at the request of and at the facility of the Acquirer's or the New Acquirer's choosing, until

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the Acquirer or New Acquirer (or the designee thereof) receives certification from the FDA or abandons its efforts for certification from the FDA, sufficient to satisfy the management of the Acquirer or New Acquirer that its personnel (or the designee's personnel) are adequately trained in the manufacture of Refludan. Such assistance shall include on-site inspections of the manufacturing plants, at the Acquirer's or New Acquirer's request, which is the specified source of supply of the Contract Manufacturing. Respondents may require reimbursement from the Acquirer or New Acquirer for all their direct out-of-pocket expenses incurred in providing the services required by this Paragraph.

7. The Divestiture Agreement shall require the Acquirer or the New Acquirer to submit to the Commission within ten (10) days of signing the Divestiture Agreement a certification attesting to the good faith intention of the Acquirer or the New Acquirer, including a plan by the Acquirer or the New Acquirer, to obtain in an expeditious manner all necessary FDA approvals to manufacture and sell Refludan.
8. The Divestiture Agreement shall require the Acquirer or the New Acquirer to submit to the Commission and Interim Trustee periodic, verified written reports, setting forth in detail the efforts of the Acquirer or the New Acquirer to sell Refludan obtained pursuant to the Divestiture Agreement and to obtain all FDA approvals necessary to manufacture and sell Refludan. The Divestiture Agreement shall require the first such report to be submitted sixty (60) days from the date the Divestiture Agreement is approved by the Commission and every ninety (90) days thereafter

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until all necessary FDA approvals are obtained by the Acquirer or the New Acquirer to manufacture and sell Refludan 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 Refludan obtained pursuant to the Divestiture Agreement for any time period exceeding sixty (60) days or abandoning its efforts to obtain all necessary FDA approvals to manufacture and sell Refludan in the United States. The Acquirer or New Acquirer shall provide the Interim Trustee access to all records and all facilities that relate to its efforts, pursuant to the Divestiture Agreement, to sell or manufacture Refludan or obtain FDA approvals.

9. 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, or otherwise fails to pursue good faith efforts to sell, Refludan in the United States prior to obtaining all necessary FDA approvals to manufacture and sell Refludan in the United States;
 - (b) fails to pursue good faith efforts to obtain all necessary FDA approvals to manufacture and sell Refludan in the United States; or
 - (c) fails to obtain all necessary FDA approvals of its own to manufacture and sell Refludan in the United States within four (4) years from the date the Commission approves the Divestiture Agreement between Respondents and the Acquirer or the New Acquirer; *provided however*, that the four (4) year period may be extended by the Commission in

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twelve (12) month increments for a period not to exceed an additional two (2) years if it appears that such FDA approvals are likely to be obtained within such extended time period.

10. The Divestiture Agreement shall provide that if it is terminated, the Recludan Assets shall revert back to Respondents and shall be divested by the trustee to a New Acquirer pursuant to the provisions of Paragraph IV. of this order.

VI.**IT IS FURTHER ORDERED** that:

- A. Respondents shall not complete the Merger until Hoechst has divested its interest in Celanese as set out in the Form F-1 initially filed by Hoechst with the U.S. Securities and Exchange Commission on September 27, 1999.
- B. Respondents shall not participate in any decisions relating to, or receive confidential business information concerning, and shall not directly or indirectly influence or seek to influence the conduct of Rhodia's Cellulose Acetate Business in any way through board membership, shareholdings or otherwise whenever all of the following are true:
 1. KPC holds more than five (5) percent of the voting securities in Celanese;
 2. KPC holds more than five (5) percent of the voting securities in Aventis;
 3. Respondents hold more than five (5) percent of the voting securities in Rhodia or have a seat on Rhodia's board of directors; and

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4. Rhodia holds any interest in Primester.
- C. Within three (3) months of the date the Agreement Containing Consent Order in this matter is accepted by the Commission for public comment, Respondents shall have reduced their holdings in Rhodia to 5 percent or less of Rhodia's issued and outstanding voting securities. For purposes of this Paragraph VI. C. only, any Rhodia shares held in escrow by RP at that time, to be exchanged with the exchangeable notes issued by RP in a private placement as described in the Prospectus dated October 14, 1999, filed by Rhodia with the Securities and Exchange Commission on October 18, 1999, in connection with Rhodia's Registration Statement on Form F-3 (Reg. No. 333-10832) (the "Form F-3"), shall not be included as shares held by RP for purposes of calculating RP's Rhodia holdings.
- D. Within six (6) months of the end of the note exchange period described in the Form F-3, Respondents shall have reduced their holdings in Rhodia to five (5) percent or less of Rhodia's issued and outstanding voting securities.

VII.**IT IS FURTHER ORDERED** that:

- A. If Respondents have not fully complied with the obligations specified in Paragraph VI.C of this Order, the Commission may appoint a trustee to divest any shares of Rhodia held in Respondents' names, excluding those Rhodia shares Respondents are required to hold pursuant to the private placement

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described in the Form F-3. In the event that the Commission or the Attorney General brings an action pursuant to § 45(*l*) of the Federal Trade Commission Act, 15 U.S.C. § 45(*l*), or any other statute enforced by the Commission, Respondents shall consent to the appointment of a trustee in such action to divest any Rhodia shares held in Respondents' names above five (5) percent of Rhodia's issued and outstanding voting securities, excluding those Rhodia shares Respondents are required to hold pursuant to the private placement described in the Form F-3. Neither the appointment of a trustee nor a decision not to appoint a trustee under this Paragraph shall preclude the Commission or the Attorney General from seeking civil penalties or any other relief available to it, including a court-appointed trustee, pursuant to § 5(*l*) of the Federal Trade Commission Act or any other statute enforced by the Commission, for any failure by the Respondents to comply with this Order.

- B. If a trustee is appointed by the Commission or a court pursuant to Paragraph VII.A. of this Order, Respondents shall consent to the following terms and conditions regarding the trustee's powers, duties, authority, and responsibilities:
1. The Commission shall select the trustee, subject to the consent of Respondents, which consent shall not be unreasonably withheld. The trustee shall be a person with experience and expertise in acquisitions and divestitures. If Respondents have not opposed, in writing, including the reasons for opposing, the selection of any proposed trustee within ten (10) days after notice by the staff of the Commission to Respondents of the identity of any proposed trustee, Respondents shall be deemed to have consented to the selection of the proposed trustee.

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2. Subject to the prior approval of the Commission, the trustee shall have the exclusive power and authority to divest any shares of Rhodia held in Respondents' names, excluding those Rhodia shares held in Respondents' names pursuant to the note exchange program described in the Form F-3.
3. Within ten (10) days after appointment of the trustee, Respondents shall execute a trust agreement that, subject to the prior approval of the Commission and, in the case of a court-appointed trustee, of the court, transfers to the trustee all rights and powers necessary to permit the trustee to effect the divestiture required by Paragraph VI.C of this Order.
4. The trustee shall have twelve (12) months from the date the Commission approves the trust agreement described in Paragraph VII.B.3. to accomplish the divestiture, which shall be subject to the prior approval of the Commission, unless accomplished through sales of the shares on the open market. If, however, at the end of the twelve-month period, the trustee has submitted a plan of divestiture or believes that divestiture can be achieved within a reasonable time, the divestiture period may be extended by the Commission, or, in the case of a court-appointed trustee, by the court; *provided however*, the Commission may extend this period only two (2) times.
5. The trustee shall have full and complete access to the personnel, books, records and facilities related to Respondents' holdings in Rhodia or to any other relevant information, as the trustee may request.

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Respondents shall develop such financial or other information as the trustee may request and shall cooperate with the trustee. Respondents shall take no action to interfere with or impede the trustee's accomplishment of the divestiture. Any delays in divestiture caused by Respondents shall extend the time for divestiture under this Paragraph in an amount equal to the delay, as determined by the Commission or, for a court-appointed trustee, by the court.

6. The trustee shall use his or her best efforts to negotiate the most favorable price and terms available in each contract that is submitted to the Commission subject to Respondents' absolute and unconditional obligation to divest at no minimum price. The divestiture shall be made in the manner and to an acquirer as directed by the Commission; *provided however*, if the trustee receives bona fide offers from more than one acquiring entity, and if the Commission determines to approve more than one such acquiring entity, the trustee shall divest to the acquiring entity selected by Respondents from among those approved by the Commission; *provided further, however*, that Respondents shall select such entity within five (5) business days of receiving notification of the Commission's approval.
7. The trustee shall serve, without bond or other security, at the cost and expense of Respondents, on such reasonable and customary terms and conditions as the Commission or a court may set. The trustee shall have the authority to employ, at the cost and expense of Respondents, such consultants, accountants, attorneys, investment bankers, business brokers, appraisers, and other representatives and assistants as are necessary to

Decision and Order

carry out the trustee's duties and responsibilities. The trustee shall account for all monies derived from the divestiture and all expenses incurred. After approval by the Commission and, in the case of a court-appointed trustee, by the court, of the account of the trustee, including fees for his or her services, all remaining monies shall be paid at the direction of the Respondents, and the trustee's power shall be terminated. The trustee's compensation shall be based at least in significant part on a commission arrangement contingent on the trustee's divesting all of the shares specified in Paragraph VII.A.

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

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or appropriate to accomplish the divestiture required by this Order.

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

VIII.**IT IS FURTHER ORDERED** that:

- A. If Respondents have not fully complied with the obligations specified in Paragraph VI.D of this Order, the Commission may appoint a trustee to divest any shares of Rhodia held in Respondents' names. In the event that the Commission or the Attorney General brings an action pursuant to § 45(*l*) of the Federal Trade Commission Act, 15 U.S.C. § 45(*l*), or any other statute enforced by the Commission, Respondents shall consent to the appointment of a trustee in such action to divest any Rhodia shares held in Respondents' names above five (5) percent of Rhodia's issued and outstanding voting securities. Neither the appointment of a trustee nor a decision not to appoint a trustee under this Paragraph shall preclude the Commission or the Attorney General from seeking civil penalties or any other relief available to it, including a court-appointed trustee, pursuant to § 5(*l*) of the Federal Trade Commission Act or any other statute enforced by the Commission, for any failure by the Respondents to comply with this Order.
- B. If a trustee is appointed by the Commission or a court pursuant to Paragraph VIII.A. of this Order, Respondents shall consent to the following terms and conditions regarding the trustee's powers, duties, authority, and responsibilities:

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1. The Commission shall select the trustee, subject to the consent of Respondents, which consent shall not be unreasonably withheld. The trustee shall be a person with experience and expertise in acquisitions and divestitures. If Respondents have not opposed, in writing, including the reasons for opposing, the selection of any proposed trustee within ten (10) days after notice by the staff of the Commission to Respondents of the identity of any proposed trustee. Respondents shall be deemed to have consented to the selection of the proposed trustee.
2. Subject to the prior approval of the Commission, the trustee shall have the exclusive power and authority to divest any shares of Rhodia held in Respondents' names.
3. Within ten (10) days after appointment of the trustee, Respondents shall execute a trust agreement that, subject to the prior approval of the Commission and, in the case of a court-appointed trustee, of the court, transfers to the trustee all rights and powers necessary to permit the trustee to effect the divestiture required by Paragraph VI.D of this Order.
4. The trustee shall have twelve (12) months, from the date the Commission approves the trust agreement described in Paragraph VIII.B.3. to accomplish the divestiture, which shall be subject to the prior approval of the Commission, unless accomplished through sales of the shares on the open market. If, however, at the end of the twelve-month period, the trustee has submitted a plan of

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divestiture or believes that divestiture can be achieved within a reasonable time, the divestiture period may be extended by the Commission, or, in the case of a court-appointed trustee, by the court; provided, however, the Commission may extend this period only two (2) times.

5. The trustee shall have full and complete access to the personnel, books, records and facilities related to Respondents' holdings in Rhodia or to any other relevant information, as the trustee may request. Respondents shall develop such financial or other information as the trustee may request and shall cooperate with the trustee. Respondents shall take no action to interfere with or impede the trustee's accomplishment of the divestiture. Any delays in divestiture caused by Respondents shall extend the time for divestiture under this Paragraph in an amount equal to the delay, as determined by the Commission or, for a court-appointed trustee, by the court.
6. The trustee shall use his or her best efforts to negotiate the most favorable price and terms available in each contract that is submitted to the Commission. The divestiture shall be made in the manner and to an acquirer as directed by the Commission; *provided however*, if the trustee receives bona fide offers from more than one acquiring entity, and if the Commission determines to approve more than one such acquiring entity, the trustee shall divest to the acquiring entity selected by Respondents from among those approved by the Commission; *provided further, however*, that Respondents shall select such entity within five (5) business days of receiving notification of the Commission's approval.

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7. The trustee shall serve, without bond or other security, at the cost and expense of Respondents, on such reasonable and customary terms and conditions as the Commission or a court may set. The trustee shall have the authority to employ, at the cost and expense of Respondents, such consultants, accountants, attorneys, investment bankers, business brokers, appraisers, and other representatives and assistants as are necessary to carry out the trustee's duties and responsibilities. The trustee shall account for all monies derived from the divestiture and all expenses incurred. After approval by the Commission and, in the case of a court-appointed trustee, by the court, of the account of the trustee, including fees for his or her services, all remaining monies shall be paid at the direction of the Respondents, and the trustee's power shall be terminated. The trustee's compensation shall be based at least in significant part on a commission arrangement contingent on the trustee's divesting all of the shares specified in Paragraph VIII.A.
8. Respondents shall indemnify the trustee and hold the trustee harmless against any losses, claims, damages, liabilities, or expenses arising out of, or in connection with, the performance of the trustee's duties, including all reasonable fees of counsel and other expenses incurred in connection with the preparation for or defense of any claim, whether or not resulting in any liability, except to the extent that such losses, claims, damages, liabilities, or expenses result from misfeasance, gross negligence, willful or wanton acts, or bad faith by the trustee.

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9. If the trustee ceases to act or fails to act diligently, a substitute trustee shall be appointed in the same manner provided in Paragraph VIII.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 divestiture required by this Order.
11. The trustee shall report in writing to Respondents and the Commission every sixty (60) days concerning the trustee's efforts to accomplish the divestiture.

IX.

IT IS FURTHER ORDERED that within thirty (30) days after the date this Order becomes final and every sixty (60) days thereafter until Respondents have fully complied with the provisions of Paragraphs II.B. through II.G., or until a trustee has been appointed pursuant to Paragraph IV.A., and Respondents have complied with Paragraphs VI.A. and VI.C. of this Order, Respondents shall submit to the Commission a verified written report setting forth in detail the manner and form in which they intend to comply, are complying, and have complied with this Order. Respondents shall submit at the same time a copy of their report concerning compliance with this Order to any Interim Trustee(s) who has been appointed. Respondents shall include in their reports, among other things that are required from time to time, a full description of the efforts being made to comply with Paragraphs II.B. through II.G. and Paragraphs VI.A. through VI.D. of the Order, including a description of all substantive contacts or negotiations for the divestiture and the identities of all parties contacted. Respondents shall include in their reports copies of all written communications to and from such parties, all

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internal memoranda, and all reports and recommendations concerning completing the obligations. After completing the obligations required under Paragraphs II.B. through II.G. and Paragraphs VI.A. and VI.C. of this Order, Respondents shall submit reports, setting forth in detail the manner and form in which they intend to comply, are complying, and have complied with the Order, every year beginning on the anniversary of the date this Order became final until and including the tenth anniversary date of this Order.

X.

IT IS FURTHER ORDERED that Respondents shall notify the Commission at least thirty (30) days prior to any proposed change in the corporate Respondents such as dissolution, assignment, sale resulting in the emergence of a successor corporation, or the creation or dissolution of subsidiaries or any other change in the corporation that may affect compliance obligations arising out of the Order.

XI.

IT IS FURTHER ORDERED that, for the purpose of determining or securing compliance with this Order, and subject to any legally recognized privilege, and upon written request with reasonable notice to Respondents made to their principal United States office, Respondents shall permit any duly authorized representative of the Commission:

- A. Access, during office hours of Respondents and in the presence of counsel, to all facilities and access to inspect and copy all books, ledgers, accounts, correspondence, memoranda and all other records and documents in the possession or under the control of Respondents relating to compliance with this Order; and

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

XII.

IT IS FURTHER ORDERED that this order shall terminate at the earlier of (1) January 18, 2010; or (2) after the divestitures required by Paragraphs II.B. through II.F., IV., V., VI., and VII. of this Order have been accomplished.

By the Commission.

APPENDIX I

NON-PUBLIC

COPY OF REVASC LICENSE

**[Redacted From the Public Record Version But Incorporated
By Reference]**

Analysis to Aid Public Comment

APPENDIX II

NON-PUBLIC

REVASC BUSINESS PLAN

**[Redacted From the Public Record Version But Incorporated
By Reference]**

APPENDIX III

NON-PUBLIC

INTERIM TRUSTEE AGREEMENT

**[Redacted From the Public Record Version But Incorporated
By Reference]**

ANALYSIS OF PROPOSED CONSENT ORDER TO AID PUBLIC COMMENT

The Federal Trade Commission (“Commission”) has accepted provisionally an agreement containing a proposed consent order from Hoechst AG (“Hoechst”) and Rhône-Poulenc S.A. (“RP”) under which RP would be required: (1) to divest the assets relating to RP’s direct thrombin inhibitor drug Revasc; and (2) to divest its interest in Rhodia, its specialty chemicals subsidiary which produces cellulose acetate, to a level of 5% or less and to sequester that interest pending its divestiture, thereby preserving

Analysis to Aid Public Comment

competition in the manufacture, marketing, and sale of cellulose acetate thermoplastics.

The proposed Consent Order has been placed on the public record for thirty (30) days for reception of comments by interested persons. Comments received during this period will become part of the public record. After thirty (30) days, the Commission will again review the agreement and the comments received, and will decide whether it should withdraw from the agreement or make final the agreement's proposed Consent Order.

In a proposed merger agreement, Hoechst and RP will combine most of their respective businesses through an exchange offer by RP for all of Hoechst's outstanding shares, with Hoechst shareholders receiving one RP share for each 1.33 outstanding Hoechst shares. Thereafter, the merged entity will be renamed Aventis S.A. ("Aventis"). The proposed complaint alleges that the proposed merger, if consummated, would constitute a violation of Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18, and Section 5 of the FTC Act, as amended, 15 U.S.C. § 45, in the markets for: (1) cellulose acetate; and (2) direct thrombin inhibitors. The proposed Consent Order would remedy the alleged violations by replacing the lost competition that would result from the merger.

Cellulose Acetate

Cellulose acetate is a thermoplastic that is used to produce, among other products, cigarette filters, tool handles, tapes and films. In applications where it is used, there are no cost effective substitutes. U.S. consumers purchase approximately \$1 billion worth of cellulose acetate yearly.

The market for cellulose acetate is highly concentrated. Three companies currently produce cellulose acetate in the United States: (1) Eastman Chemical Company ("Eastman"); (2) Primester, a joint venture whose shares are owned 50% by Eastman and 50% by Rhodia (a specialty chemicals company that

Analysis to Aid Public Comment

is itself 67% owned by RP); and (3) Celanese Limited (“Celanese”), until recently a wholly-owned subsidiary of Hoechst. Celanese controls approximately 46% of U.S. production capacity, Eastman owns approximately 44% of U.S. production capacity, and Primester holds the remaining 10%. Eastman and Rhodia are each entitled to one-half of the production of Primester. Rhodia currently sells cellulose acetate only outside the United States; thus, Celanese and Eastman are the only companies currently selling cellulose acetate in the United States.

There are significant barriers to entry into the cellulose acetate market. In order to enter the market, a firm must incur substantial sunk costs to build a dedicated production facility. Moreover, reductions in the demand for this material and its limited growth potential create disincentives to new entry.

The merger of RP and Hoechst will increase the likelihood of coordinated interaction in the market for cellulose acetate. The Kuwait Petroleum Company (“KPC”) will hold significant interests in Celanese and Aventis after the merger. Because the remaining shareholders of Celanese and Aventis are (and will remain) widely diversified, KPC currently owns a controlling interest in Celanese, and will acquire working control (defined as 10% or more interest in a corporation whose stock is widely held) of Aventis. These shareholdings could permit KPC to coordinate the activities of Celanese and, through Aventis, Rhodia and Primester after the merger. In addition, Aventis' indirect holding, through Rhodia, of 50% of the Primester joint venture with Eastman may facilitate coordination between the KPC-controlled entities and Eastman following the merger. For these reasons, the proposed transaction could create conditions that increase the likelihood of collusion in the cellulose acetate market.

Analysis to Aid Public Comment

On September 15, 1999, the parties entered into undertakings with the Antitrust Directorate of the European Commission ("EC") to resolve competitive concerns raised by the proposed merger of Hoechst and RP to form Aventis. Among other conditions, the EC undertakings required Hoechst to spin off Celanese and required RP to divest its holding in Rhodia. Pursuant to those undertakings, Hoechst spun off the Celanese division to Hoechst shareholders on October 26, 1999. To date, RP has not divested Rhodia, and the EC undertakings did not require RP to divest Rhodia prior to the formation of Aventis.

The proposed Consent Order is designed to supplement the EC undertakings by preserving interim competition among Celanese, Rhodia and Eastman in the cellulose acetate market in the United States pending Aventis' divestiture of Rhodia. The proposed Consent Order requires the parties to divest their holding of Rhodia to a level of 5% or less of total outstanding shares within three months of the date the consent agreement is accepted by the Commission for public comment. In the case of shares held in escrow as collateral for RP debt obligations, the shares must be divested within six months of the end of the exchange period for those shares. The proposed Consent Order also requires the parties to refrain from participating in the decisions of, seeking to influence the conduct of, or receiving confidential business information concerning Rhodia's cellulose acetate business.

Direct Thrombin Inhibitors

Direct thrombin inhibitors are used in the treatment of various blood clotting diseases. While certain other products may also be used for the treatment of blood clotting diseases, direct thrombin inhibitors are both more effective and safer than any available alternatives. U.S. sales of direct thrombin inhibitors currently total only approximately \$15 million, but have the potential to increase significantly in the future.

Analysis to Aid Public Comment

Hoechst sells the only direct thrombin inhibitor currently on the U.S. market, Refludan. RP is in the final stages of developing its direct thrombin inhibitor, Revasc, which it licensed from Novartis AG ("Novartis") in 1998. RP plans to submit its New Drug Application for Revasc to the Food and Drug Administration for approval shortly. Available evidence indicates that RP and Hoechst are each other's closest competitors in the direct thrombin inhibitor market. Each party priced its products in relation to those of the other and based its product development strategy on the other's development and position in the market. Other companies currently developing direct thrombin inhibitors are years behind Hoechst and RP.

The planned merger is likely to create anticompetitive effects in the direct thrombin inhibitor market by eliminating the actual, direct, and substantial competition between Hoechst and RP that would otherwise continue to exist. In addition, the proposed transaction reduces potential competition and innovation competition among researchers and developers of direct thrombin inhibitor products by eliminating a significant competitor and increasing the barriers to entry to others by, among other results, combining RP and Hoechst's portfolios of patents and patent applications.

To resolve these anticompetitive concerns, the proposed Consent Order is designed to transfer all of RP's rights in the direct thrombin inhibitor Revasc to Novartis or an independent third party. Novartis (the original licensor) holds a contractual right of prior approval for any transfer of RP's rights in Revasc to any third party. Thus, while other companies have expressed interest in acquiring the rights to Revasc, none may do so without the prior approval of Novartis. The proposed Consent Order requires the parties to return RP's rights in Revasc to Novartis or to sublicense all such rights to another company, subject to Novartis's contractual right of approval. The proposed Consent Order would also require the parties to enter into a short-term

Analysis to Aid Public Comment

service contract with the acquirer of the Revasc rights in order to ensure the continued performance of development work on Revasc. Should RP be unable to divest Revasc during the allotted time period, the proposed Consent Order permits the appointment of a trustee to divest either RP's Revasc assets or the North American rights to Hoechst's own drug, Refludan. Further, in order to prevent any interim harm to assets related to Revasc, the parties have signed a trustee agreement and an Interim Trustee has been approved by the Commission. The proposed Consent Order would provide for the immediate involvement of the Interim Trustee to ensure the continued development and viability of Revasc as an independent competitor to Hoechst's Refludan.

The purpose of this analysis is to facilitate public comment on the propose Consent Order, and it is not intended to constitute an official interpretation of the agreement and proposed Consent Order or to modify their terms in any way.

Complaint

IN THE MATTER OF

RECKITT & COLMAN PLCCONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATIONS OF
SEC. 7 OF THE CLAYTON ACT AND SEC. 5 OF THE
FEDERAL TRADE COMMISSION ACT*Docket C-3918; File No. 991 0306**Complaint, January 18, 2000--Decision, January 18, 2000*

This consent order addresses respondent Reckitt & Colman plc's acquisition of the voting securities of Benckiser N.V. from NRV Vermögensverwaltung GmbH. Reckitt & Colman and Benckiser are two of the leading producers and marketers of a number of household cleaning products in the United States. The Consent Agreement requires Reckitt & Colman to divest Benckiser's Scrub Free[®] and Delicare[®] household cleaning product businesses -- which respectively market hard surface bathroom cleaners and fine fabric wash products -- to a third party. These assets include all Scrub Free[®] and Delicare[®] trademarks and related intellectual property, trade secrets, technical and manufacturing know-how, and customer and vendor lists and information. Reckitt & Colman will provide the purchaser with short-term integration assistance, including production planning and order and billing processing.

Participants

For the *Commission*: Michael Antalics, Molly Boast, Judith A. Cole, and Richard G. Parker.

For the *Respondents*: Charles E. Koob, Simpson Thacher.

COMPLAINT

The Federal Trade Commission ("Commission"), having reason to believe that Respondent, Reckitt & Colman plc ("Reckitt & Colman"), a corporation subject to the jurisdiction of the Commission, has agreed to acquire the voting securities of Benckiser N.V., an entity subject to the jurisdiction of the Commission, in violation of Section 7 of the Clayton Act, as

Complaint

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

1. Respondent Reckitt & Colman is a corporation organized, existing, and doing business under and by virtue of the laws of England, with its principal place of business located at 67 Alma Road, Windsor, Berkshire SL4 3HD, United Kingdom.

2. Respondent is engaged in, among other things, the research, development, formulation, manufacture, marketing, and sale of Hard Surface Bathroom Cleaners and Fine Fabric Wash Products.

II. JURISDICTION

3. Respondent is, and at all times relevant herein has been, engaged in commerce as "commerce" is defined in Section 1 of the Clayton Act, as amended, 15 U.S.C. § 12, and is a corporation whose business is in or affects commerce as "commerce" is defined in Section 4 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 44.

III. THE ACQUIRED COMPANY

4. Benckiser N.V. ("Benckiser") is a corporation organized, existing, and doing business under and by virtue of the laws of The Netherlands, with its office and principal place of business located at World Trade Center, Amsterdam Airport, Tower C, Schipholboulevard 229, 1118 BH Schiphol Airport, The Netherlands; and includes, but is not limited to, Benckiser Consumer Products Inc., a corporation organized, existing, and doing business under and by virtue of the laws of Delaware, with its office and principal place of business located at Greenwich

Complaint

American Centre, 5 American Lane, Greenwich, Connecticut 06831-2513. Benckiser's ultimate parent is NRV Vermögensverwaltung GmbH ("Vermögensverwaltung"), a corporation organized, existing, and doing business under and by virtue of the laws of Germany.

5. Benckiser is engaged in, among other things, the research, development, formulation, manufacture, marketing, and sale of Hard Surface Bathroom Cleaners and of Fine Fabric Wash Products.

6. Benckiser is, and at all times relevant herein has been, engaged in commerce as "commerce" is defined in Section 1 of the Clayton Act, as amended, 15 U.S.C. § 12, and is a corporation whose business is in or affects commerce as "commerce" is defined in Section 4 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 44.

IV. THE PROPOSED ACQUISITION

7. On July 27, 1999, Reckitt & Colman entered into a Merger Agreement to acquire up to 100 percent of the voting securities of Benckiser from Vermögensverwaltung for approximately \$2.7 billion (the "Acquisition").

V. THE RELEVANT MARKETS

8. A relevant line of commerce in which to analyze the effects of the Acquisition is the research, development, formulation, manufacture, marketing, and sale of Hard Surface Bathroom Cleaners.

9. Hard Surface Bathroom Cleaners are products used by consumers to remove from fixtures and cabinets the types of soil and stains that are found in the bathroom, such as built-up dirt, mineral deposits, soap scum, and residues from various personal

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care products like shampoo and toothpaste. Hard Surface Bathroom Cleaners generally are sold with a trigger or aerosol delivery system.

10. Hard Surface Bathroom Cleaners for consumer use primarily are differentiated through branding. Reckitt & Colman researches, develops, formulates and manufactures Hard Surface Bathroom Cleaners which it markets and sells under the Lysol® brand name. Benckiser researches, develops, formulates and manufactures Hard Surface Bathroom Cleaners which it markets and sells under the Scrub Free® brand name. Lysol® and Scrub Free® are two of the leading brands of Hard Surface Bathroom Cleaners.

11. Other types of household cleaners (including all purpose cleaners, which generally are pourables and dilutables used to clean large surfaces throughout the home; kitchen cleaners, which are formulated to remove greasy residues from kitchen appliances and other kitchen surfaces; and abrasive powders and creams, which generally are used to remove heavy deposits of rust or other stains in the sink) are not substitutes for Hard Surface Bathroom Cleaners.

12. Consumers are not likely to switch from Hard Surface Bathroom Cleaners to other types of household cleaners in response to a small but significant and nontransitory increase in price because of differences between those products and Hard Surface Bathroom Cleaners in terms of convenience, method of application, and efficacy.

13. Another relevant line of commerce in which to analyze the effects of the Acquisition is the research, development, formulation, manufacture, marketing, and sale of Fine Fabric Wash Products.

Complaint

14. Fine Fabric Wash Products are used by consumers to clean safely and to freshen delicate fabrics, such as silk, woolens, undergarments, sportswear and vibrantly colored articles of clothing.

15. Fine Fabric Wash Products primarily are differentiated through branding. Reckitt & Colman researches, develops, formulates and manufactures Fine Fabric Wash Products which it markets and sells under the Woolite® brand name. Benckiser researches, develops, formulates and manufactures Fine Fabric Wash Products which it markets and sells under the Delicare® brand name. These are the only two national brands of Fine Fabric Wash Products.

16. Detergents used to launder washable fabrics contain ingredients not found in Fine Fabric Wash Products. These ingredients are important to the ability of the detergent to remove stains and heavy soils from clothing but are harsh on fabrics. Consequently, detergents are likely to cause fading and delicate fabric fiber damage with continued use, and are not substitutes for Fine Fabric Wash Products.

17. Consumers are not likely to switch from Fine Fabric Wash Products to detergents in response to a small but significant and nontransitory increase in price because of the differences in product performance characteristics.

18. The United States is the relevant geographic area in which to analyze the effects of the Acquisition in the relevant lines of commerce because products sold exclusively outside the United States do not have brand acceptance among United States consumers, and because of the high costs associated with shipping relatively low-value products composed primarily of water.

Complaint

VI. STRUCTURE OF THE MARKETS

19. The market for the research, development, formulation, manufacture, marketing, and sale of Hard Surface Bathroom Cleaners is highly concentrated as measured by the Herfindahl-Hirschman Index ("HHI"). The post-merger HHI is approximately 2300 points, which is an increase of about 500 points over the premerger HHI level. Reckitt & Colman and Benckiser are two leading suppliers of Hard Surface Bathroom Cleaners in the United States.

20. Reckitt & Colman and Benckiser are actual competitors in the relevant market for the research, development, formulation, manufacture, marketing, and sale of Hard Surface Bathroom Cleaners in the United States.

21. The market for the research, development, formulation, manufacture, marketing, and sale of Fine Fabric Wash Products is highly concentrated as measured by the HHI. The post-merger HHI is approximately 8500 points, which is an increase of about 700 points over the premerger HHI level. Reckitt & Colman and Benckiser are the two leading suppliers of Fine Fabric Wash Products in the United States.

22. Reckitt & Colman and Benckiser are actual competitors in the relevant market for the research, development, formulation, manufacture, marketing and sale of Fine Fabric Wash Products in the United States.

VII. BARRIERS TO ENTRY

23. Entry into the relevant markets is unlikely and would not occur in a timely manner to deter or counteract the adverse competitive effects described in Paragraph 24 because of, among other things, the difficulty of developing a new product, gaining brand name recognition and customer acceptance, and establishing a network of retail distributors.

Complaint

VIII. EFFECTS OF THE ACQUISITION

24. The effects of the Acquisition, if consummated, may be substantially to lessen competition and to tend to create a monopoly in the relevant markets in violation of Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18, and Section 5 of the FTC Act, as amended, 15 U.S.C. § 45, in the following ways, among others:

- (a) by eliminating actual, direct, and substantial competition between Reckitt & Colman and Benckiser in the relevant markets;
- (b) by increasing the likelihood that Reckitt & Colman will unilaterally exercise market power in the relevant markets;
- (c) by increasing the likelihood of, or facilitating, collusion or coordinated interaction between Reckitt & Colman and the remaining competitors in Hard Surface Bathroom Cleaners; and
- (d) by increasing the likelihood that consumers of Hard Surface Bathroom Cleaners and Fine Fabric Wash Products would be forced to pay higher prices.

IX. VIOLATIONS CHARGED

25. The Merger Agreement described in Paragraph 7 constitutes a violation of Section 5 of the FTC Act, as amended, 15 U.S.C. § 45.

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

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WHEREFORE, THE PREMISES CONSIDERED, the Federal Trade Commission on this eighteenth day of January, 2000, issues its Complaint against said Respondent.

By the Commission, Commissioner Leary recused.

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The Federal Trade Commission having initiated an investigation of the proposed acquisition by Reckitt & Colman of 100 percent of the voting securities of Benckiser NV, and Respondent having been furnished thereafter with a copy of a draft of Complaint that the Bureau of Competition presented to the Commission for its consideration and which, if issued by the Commission, would charge Respondent with violations of Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18, and Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45; and

Respondent, its attorneys, and counsel for the Commission having thereafter executed an Agreement Containing Consent Order ("Consent Agreement"), containing an admission by Respondent of all the jurisdictional facts set forth in the aforesaid draft of Complaint, a statement that the signing of said Consent 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

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should issue stating its charges in that respect, and having accepted the executed Consent Agreement and placed such Consent Agreement on the public record for a period of thirty (30) days for the receipt and consideration of public comments, now in further conformity with the procedure described in Commission Rule 2.34, 16 C.F.R. § 2.34, the Commission hereby issues its Complaint, makes the following jurisdictional findings, and issues the following Order:

1. Respondent Reckitt & Colman plc is a public limited company organized, existing and doing business under and by virtue of the laws of England, with its office and principal place of business at 67 Alma Road, Windsor, Berkshire SL4 3HD, United Kingdom.
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 "Reckitt & Colman" means Reckitt & Colman plc, its directors, officers, employees, agents, representatives, predecessors, successors, and assigns; its subsidiaries, divisions, groups, and affiliates controlled by Reckitt & Colman plc, and the respective directors, officers, employees, agents, representatives, successors, and assigns of each.
- B. "Vermögensverwaltung" means NRV Vermögensverwaltung, a corporation organized, existing, and doing business under and by virtue of the

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laws of Germany, with its office and principal place of business located at Ludwig-Bertram Strasse 8+10, 67059 Ludwigshafen, Germany.

- C. “Benckiser” means Benckiser N.V., a subsidiary controlled by Vermögensverwaltung, which is organized, existing, and doing business under and by virtue of the laws of The Netherlands, with its office and principal place of business located at World Trade Center, Amsterdam Airport, Tower C, Schipholboulevard 229, 1118 BH Schiphol Airport, The Netherlands, and includes, but is not limited to, Benckiser’s wholly-owned subsidiary, Benckiser Consumer Products Inc., a corporation organized, existing, and doing business under and by virtue of the laws of Delaware, with its office and principal place of business located at Greenwich American Centre, 5 American Lane, Greenwich, Connecticut 06831-2513.
- D. “Church & Dwight” means Church & Dwight Co., Inc., a corporation organized, existing, and doing business under and by virtue of the laws of Delaware, with its office and principal place of business located at 469 North Harrison Street, Princeton, New Jersey 08543-5297.
- E. “Commission” means the Federal Trade Commission.
- F. “Acquisition” means the acquisition of Benckiser by Reckitt & Colman pursuant to a Merger Agreement dated July 27, 1999.
- G. “Acquirer” means either Church & Dwight, if Respondent divests pursuant to Paragraph II.A.1. of this Order, or such other entity to whom Respondent divests the Divested Assets pursuant to any other provision of this Order.

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- H. “Hard Surface Bathroom Cleaners” means products specially formulated, marketed, and used by consumers to remove built-up soils and stains from bathroom surfaces.
- I. “Fine Fabric Wash Products” means products specially formulated, marketed, and used by consumers to safely clean fine fabrics such as silks, woolens or other delicate fabrics.
- J. “Divested Assets” means all of Respondent’s rights, title, and interest, acquired from Vermögensverwaltung pursuant to the Acquisition, in assets and businesses relating to the research, development, manufacture, sale, and distribution of Hard Surface Bathroom Cleaners and Fine Fabric Wash Products (collectively the “Divested Products”), including, without limitation, the following:
1. the trade dress, brand and trademark, “Scrub Free,” and associated goodwill;
 2. the trade dress, brand and trademark, “Delicare,” and associated goodwill;
 3. all inventory, customer lists, vendor lists, supplier contact lists, price lists, catalogs, sales and promotion plans, materials and literature, advertising materials, cost and pricing information, marketing plans, information and materials, product development information, research materials, technical information, claims support, product liability claim files, business plans (including, but not limited to, actual plans currently in force for the top 20 accounts), trade secrets, technology, technical know-how, formulae,

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manufacturing processes, recipes, blue prints, research records, specifications, packaging designs (including product labels), artwork, drawings, and process and quality control data;

4. intellectual property rights (including, but not limited to, an assignment of all rights under a Patent and Know-How License Agreement (July 1, 1987) between Ecolab, Inc., and Joh. A. Benckiser GmbH, and the First Amendment to the Patent and Know-How Agreement (November 4, 1999) between Benckiser N.V. and Ecolab, Inc.), copyrights, trademarks, trade dress, trade names, and Universal Product Code Product Identifier Codes (but excluding Universal Product Code Company Identifier Codes);
 5. all rights, title and interest in and to the contracts entered into in the ordinary course of business with customers, retailers of Divested Products (including, but not limited to, letters of confirmation of trade promotions and slotting letters), suppliers, sales representatives, brokers, licensees, or any other person;
 6. all rights under warranties and guarantees, express or implied;
 7. all books, records, files, and supporting documents; and,
 8. all Environmental Protection Agency applications, registrations, permits, and the like, and all documents related thereto.
- K. "Divestiture Agreement" means each and all of the following:

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1. the agreement for the sale of the Divested Assets to Church & Dwight dated October 12, 1999, as amended by the First Amendment to the Asset Purchase Agreement (November 5, 1999);
 2. the Trademark Purchase Agreement between Benckiser and Church & Dwight dated October 12, 1999;
 3. the Transitional Services Agreement between Benckiser and Church & Dwight dated October 21, 1999; and,
 4. the Assignment and Assumption Agreement between Benckiser and Church & Dwight.
- L. “New Divestiture Agreement” means all agreements for the sale of the Divested Assets other than the Divestiture Agreement, and includes any divestiture agreements entered into by a trustee pursuant to Paragraph III of this Order.
- M. “Cost” means direct cash cost of raw materials, packaging and labor.
- N. “Non-Public Acquirer Information” means any information not in the public domain obtained by Respondent directly or indirectly from the Acquirer in the course of negotiation or performance of the Divestiture Agreement or the New Divestiture Agreement. Non-Public Acquirer Information shall not include information that falls within the public domain through no violation of this Order by Respondent.

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II.**IT IS FURTHER ORDERED** that:

- A. 1. Respondent shall divest, absolutely and in good faith, the Divested Assets to Church & Dwight pursuant to the Divestiture Agreement (which agreement shall not be read to vary or contradict the terms of this Order), subsequently to the date upon which the Commission accepts the Consent Agreement for public comment, but on or before the date that Respondent consummates the Acquisition.
2. *Provided, however,* that if Respondent divests pursuant to Paragraph II.A.1., Respondent need divest only (a) such Divested Assets that are identified in Paragraph I.J.1. through I.J.8., and (b) such assets that are included in the Divestiture Agreement.
- B. *Provided, however,* that if the Commission determines to make the Order final, but notifies the Respondent either that Church & Dwight is not an acceptable acquirer, or that the Divestiture Agreement is not an acceptable manner of divestiture, then Respondent shall rescind the Divestiture Agreement and rescind any divestiture to Church & Dwight, and Respondent shall divest the Divested Assets, absolutely and in good faith, and at no minimum price, pursuant to a New Divestiture Agreement within ninety (90) days of the date the Order becomes final to an Acquirer or Acquirers that receive the prior approval of the Commission and in a manner that receives the prior approval of the Commission.
- C. Any New Divestiture Agreement shall require Respondent to:

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1. Indemnify, defend and hold the Acquirer harmless from any and all suits, claims, actions, demands, liabilities, expenses or losses arising from any manufacture or sale of the Hard Surface Bathroom Cleaners and/or Fine Fabric Wash Products supplied to the Acquirer by Respondent pursuant to the New Divestiture Agreement; *provided, however,* that the obligations of this Paragraph II.C.1. may be contingent upon the Acquirer's giving Respondent prompt, adequate notice of such claim, cooperating fully in the defense of such claim, and permitting Respondent to assume the sole control of all phases of the defense and/or settlement of such claim, including the selection of counsel; *and provided further* that the obligations of this Paragraph II.C.1. may not require Respondent to be liable for any negligent act or omission of the Acquirer or for any representations and warranties, express or implied, made by the Acquirer that exceed the representations and warranties made by Respondent to the Acquirer;
2. Make available to the Acquirer, upon reasonable notice and request by the Acquirer, for a period not to exceed eighteen (18) months from the date Respondent begins delivery of products pursuant the New Divestiture Agreement, all records kept in the normal course of business that relate to the Cost of manufacturing or supplying the Hard Surface Bathroom Cleaners and Fine Fabric Wash Products;
3. Make available to the Acquirer, upon reasonable notice and request by the Acquirer, for a period not to exceed eighteen (18) months from the date

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Respondent first provides assistance, personnel, or training to the Acquirer pursuant to the New Divestiture Agreement, all records kept in the normal course of business that relate to the Cost of providing such assistance, personnel, or training to the Acquirer.

- D. If Respondent or a trustee divests pursuant to Paragraph II.B. or Paragraph III. of this Order, Respondent shall, at the option of the Acquirer, enter into a contract:
1. To supply and deliver to the Acquirer in a timely manner and under reasonable terms and conditions, up to a twelve (12) month supply of any and all of the Hard Surface Bathroom Cleaners and Fine Fabric Wash Products at Cost, in such quantities as the Acquirer may request up to 110% of Benckiser's 1999 or 2000 production forecast, whichever is greater;
 2. To assign or otherwise convey to the Acquirer all of Respondent's right, title, and interest in any contract with any person relating to research, development, manufacture, marketing, sale, brokerage, or distribution of Hard Surface Bathroom Cleaners and/or Fine Fabric Wash Products; *provided that* if such assignment or conveyance may not be made or be made effective without the consent of any person, Respondent shall use its best efforts to obtain all necessary consents from such person and, failing such consent, shall enter into an agreement with the Acquirer to provide to the Acquirer all the benefits flowing to Respondent pursuant to such contract;

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3. To provide to the Acquirer, at Cost, for a period not to exceed six (6) months from the date of consummation of the New Divestiture Agreement, such assistance, personnel and training as requested by the Acquirer (including its agents and contractors) relating to:
 - (a) the research, development, manufacture, sale, and distribution of the Hard Surface Bathroom Cleaners and/or Fine Fabric Wash Products; and
 - (b) any Environmental Protection Agency applications, registrations, procedures, proceedings, or approvals related to the research, development, manufacture, sale and distribution of Hard Surface Bathroom Cleaners and Fine Fabric Wash Products in the United States;
4. To sell any capital equipment, fixtures, machines, buildings, structures, vehicles, real property, or other tangible assets (other than books and records) used in the research, development, manufacture, sale, or distribution of the Divested Products;

provided, however, that with respect to the assets that are to be divested and the contracts that are to be entered into pursuant to this Paragraph II.D. at the option of the Acquirer or Acquirers, Respondent need not divest such assets or enter into such contracts only if the Acquirer or Acquirers choose not to acquire such assets or enter such contracts and the Commission approves the divestiture without such assets or contracts.

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- E. Respondent shall comply with the terms of the Divestiture Agreement (if Respondent divests pursuant to Paragraph II.A. of this Order) or the New Divestiture Agreement (if Respondent, or a trustee, divests pursuant to Paragraph II.B. or Paragraph III. of this Order), which terms are incorporated by reference into this Order, and made a part hereof. Any failure by Respondent to comply with the Divestiture Agreement or the New Divestiture Agreement shall constitute a failure to comply with this Order.
- F. The purpose of the divestiture of the Divested Assets is to ensure the continued use of the Divested Assets in the same businesses in which the Divested Assets are engaged at the time of the Acquisition, and to remedy any lessening of competition resulting from the Acquisition as alleged in the Commission's Complaint.
- G. Respondent shall not provide, disclose or otherwise make available to any of its employees any Non-Public Acquirer Information, nor shall Respondent use any Non-Public Acquirer Information obtained or derived by Respondent in connection with the negotiation or performance of either the Divestiture Agreement or New Divestiture Agreement; *provided, however*, that Respondent may provide, disclose, or otherwise make available Non-Public Acquirer Information to its employees whose duties include negotiating, or performing Respondent's obligations under, the Divestiture Agreement or New Divestiture Agreement, and Respondent may use Non-Public Acquirer Information in connection with negotiating or performing the Divestiture Agreement or New Divestiture Agreement.
- H. Pending divestiture of the Divested Assets, Respondent shall take such actions as are necessary to maintain the viability, marketability and

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competitiveness of the Divested Assets, and to prevent the destruction, removal, wasting, deterioration, or impairment of any of the Divested Assets.

III.**IT IS FURTHER ORDERED** that:

- A. If Respondent fails to divest absolutely and in good faith the Divested Assets pursuant to Paragraph II. of this Order, the Commission may appoint a trustee to divest the Divested Assets. In the event that the Commission or the Attorney General brings an action pursuant to § 5(l) of the Federal Trade Commission Act, 15 U.S.C. § 45(l), or any other statute enforced by the Commission, Respondent shall consent to the appointment of a trustee in such action. Neither the appointment of a trustee nor a decision not to appoint a trustee under this Paragraph shall preclude the Commission or the Attorney General from seeking civil penalties or any other relief available to it, including a court-appointed trustee pursuant to § 5(l) of the Federal Trade Commission Act, or any other statute enforced by the Commission, for any failure by Respondent to comply with this Order.

- B. If a trustee is appointed by the Commission or a court pursuant to Paragraph III.A. of this Order, Respondent shall consent to the following terms and conditions regarding the trustee's powers, duties, authority, and responsibilities:
 - 1. The Commission shall select the trustee, subject to the consent of Respondent, which consent shall not be unreasonably withheld. The trustee shall be a person with experience and expertise in

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acquisitions and divestitures. If Respondent has not opposed, in writing, including the reasons for opposing, the selection of any proposed trustee within ten (10) days after notice by the staff of the Commission to Respondent of the identity of any proposed trustee, Respondent shall be deemed to have consented to the selection of the proposed trustee.

2. Subject to the prior approval of the Commission, the trustee shall have the exclusive power and authority to accomplish the divestiture described in Paragraph III.A. of the Order.
3. Within ten (10) days after appointment of the trustee, Respondent shall execute a trust agreement that, subject to the prior approval of the Commission, and in the case of a court-appointed trustee, of the court, transfers to the trustee all rights and powers necessary to permit the trustee to effect the divestiture required by this Order and to execute a New Divestiture Agreement on behalf of Respondent.
4. The trustee shall have twelve (12) months from the date the Commission approves the trust agreement described in Paragraph III.B.3. to accomplish the divestiture, which shall be to an Acquirer or Acquirers who receive the prior approval of the Commission, and in a manner and pursuant to a New Divestiture Agreement that receive the prior approval of the Commission. If, however, at the end of the twelve-month period, the trustee has submitted a plan for divestiture, or believes that the divestiture required by this Order can be achieved within a reasonable time, then the divestiture period may be extended by the Commission, or, in the case of a court-appointed trustee, by the court;

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provided, however, the Commission may extend the trustee's period for divestiture only two (2) times.

5. The trustee shall have full and complete access to the personnel, books, records and facilities related to the Divested Assets or to any other relevant information, as the trustee may request. Respondent shall develop such financial or other information as the trustee may request and shall cooperate with the trustee. Respondent shall take no action to interfere with or impede the trustee's accomplishment of the divestiture. Any delays in any divestiture caused by Respondent shall extend the time for that divestiture under this Paragraph in an amount equal to the delay, as determined by the Commission or, for a court-appointed trustee, by the court.
6. The trustee shall use his or her best efforts to negotiate the most favorable price and terms available in each contract that is submitted to the Commission, subject to Respondent's absolute and unconditional obligation to divest expeditiously at no minimum price. The divestiture shall be made in a manner consistent with the terms of this Order; *provided, however,* if the trustee receives bona fide offers from more than one acquiring entity, and if the Commission determines to approve more than one such acquiring entity, the trustee shall divest to the acquiring entity or entities selected by Respondent from among those approved by the Commission; *provided further, however,* that Respondent shall select such entity within five (5) days of receiving notification of the Commission's approval.

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7. The trustee shall serve, without bond or other security, at the cost and expense of Respondent, on such reasonable and customary terms and conditions as the Commission or a court may set. The trustee shall have the authority to employ, at the cost and expense of Respondent, and at reasonable fees, such consultants, accountants, attorneys, investment bankers, business brokers, appraisers, and other representatives and assistants as are necessary to carry out the trustee's duties and responsibilities. The trustee shall account for all monies derived from the divestiture and all expenses incurred. After approval by the Commission and, in the case of a court-appointed trustee, by the court, of the account of the trustee, including fees for his or her services, all remaining monies shall be paid at the direction of the 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 accomplishing the divestiture required by Paragraph III.A. of this Order.
8. Respondent shall indemnify the trustee and hold the trustee harmless against any losses, claims, damages, liabilities, or expenses arising out of, or in connection with, the performance of the trustee's duties, including all reasonable fees of counsel and other expenses incurred in connection with the preparation for, or defense of, any claim whether or not resulting in any liability, except to the extent that such losses, claims, damages, liabilities, or expenses result from misfeasance, gross negligence, willful or wanton acts, or bad faith by the trustee.

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9. If the trustee ceases to act or fails to act diligently, a substitute trustee shall be appointed in the same manner as provided in this Paragraph.
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 reasonably necessary or appropriate to accomplish the divestiture required by this Order.
11. The trustee may divest such additional ancillary assets related to the Divested Assets and effect such ancillary arrangements as are necessary to satisfy the requirements or purposes of this Order.
12. The trustee shall have no obligation or authority to operate or maintain the Divested Assets.
13. The trustee shall report in writing to Respondent and the Commission every sixty (60) days concerning the trustee's efforts to accomplish the divestiture required by this Order.

IV.

IT IS FURTHER ORDERED that within thirty (30) days after the date this Order becomes final, and every thirty (30) days thereafter until Respondent has completed the divestiture of the Divested Assets and every ninety (90) days thereafter until Respondent has fully complied with the provisions of Paragraphs II. and III. of this Order, Respondent shall submit to the Commission verified written reports setting forth in detail the manner and form in which it intends to comply, is complying, and has complied with the requirements of this Order. Respondent shall include in its compliance reports, among other things that are

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required from time to time, a full description of the efforts being made to comply with Paragraphs II. and III. of the Order, including a description of all substantive contacts or negotiations for the divestiture and the identity of all parties contacted. Respondent shall include in its compliance reports copies of all written communications to and from such parties, all internal documents (except privileged documents), and all reports and recommendations, concerning the divestiture.

V.

IT IS FURTHER ORDERED that Respondent shall notify the Commission at least thirty (30) days prior to any proposed change in the corporate Respondent such as dissolution, assignment, sale resulting in the emergence of a successor corporation, or the creation or dissolution of subsidiaries or any other change in the corporation that may affect compliance obligations arising out of the Order.

VI.

IT IS FURTHER ORDERED that, for the purpose of determining or securing compliance with this Order, Respondent shall permit any duly authorized representative of the Commission:

- A. Access, during office hours and in the presence of counsel, to all facilities and access to inspect and copy all books, ledgers, accounts, correspondence, memoranda and other records and documents in the possession or under the control of Respondent relating to any matters contained in this Order; and
- B. Upon five (5) days' notice to Respondent and without restraint or interference from Respondent, to interview officers, directors, or employees of Respondent, who may have counsel present, regarding such matters.

Analysis to Aid Public Comment

VII.

IT IS FURTHER ORDERED that this order shall terminate five (5) years after the divestiture required in Paragraph II.A. of this order has been accomplished.

By the Commission, Commissioner Leary recused.

ANALYSIS OF AGREEMENT CONTAINING CONSENT ORDER TO AID PUBLIC COMMENT

The Federal Trade Commission (“Commission”) has accepted, subject to final approval, an Agreement Containing Consent Order (“Consent Agreement”) from Reckitt & Colman plc (“Reckitt & Colman”), which is designed to remedy the anticompetitive effects resulting from Reckitt & Colman's acquisition of the voting securities of Benckiser N.V. from NRV Vermögensverwaltung GmbH (“Vermögensverwaltung”). Under the terms of the Decision & Order, Reckitt & Colman will be required to divest Benckiser's Scrub Free[®] and Delicare[®] businesses to Church & Dwight Co., Inc. (“Church & Dwight”) after the date upon which the Commission preliminarily accepts the Consent Agreement. Church & Dwight produces a number of household products under the Arm & Hammer[®] brand name.

The proposed Consent Agreement has been placed on the public record for thirty (30) days for reception of comments from interested persons. Comments received during this period will become part of the public record. After thirty (30) days, the Commission will again review the proposed Consent Agreement and the comments received, and will decide whether it should

Analysis to Aid Public Comment

withdraw from the proposed Consent Agreement or make final the Decision & Order.

On July 27, 1999, Reckitt & Colman and entities controlled by Vermögensverwaltung entered into a Merger Agreement under which Reckitt & Colman agreed to purchase all of the voting securities of Benckiser N.V. for approximately \$2.7 billion. The Commission's Complaint alleges that the merger, 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, in the markets for the research, development, formulation, manufacture, marketing and sale of hard surface bathroom cleaners and fine fabric wash products.

Hard surface bathroom cleaners are products specially formulated, sold and used by consumers to remove built-up soils and stains from bathroom surfaces. Reckitt & Colman, which sells Lysol,[®] and Benckiser, which sells Scrub Free,[®] are two significant U.S. suppliers of hard surface bathroom cleaners. Fine fabric wash products are specially formulated, sold and used by consumers to launder fine fabrics such as silks, woolens or other delicate fabrics. Reckitt & Colman, which sells Woolite,[®] and Benckiser, which sells Delicare,[®] are the two largest suppliers of fine fabric wash products.

The United States is the relevant geographic area in which to evaluate the effects of the proposed acquisition of Benckiser by Reckitt & Colman. It is unlikely that the competition eliminated by the proposed transaction would be replaced by foreign manufacturers of hard surface bathroom cleaners and fine fabric wash products. Foreign manufacturers of these products are unable to compete effectively in the U.S. because they lack the necessary brand recognition among U.S. consumers and face substantial transportation costs, which make importing their products into the U.S. uneconomical.

Analysis to Aid Public Comment

The hard surface bathroom cleaner and fine fabric wash markets are highly concentrated in the United States, and the proposed acquisition would substantially increase concentration in each market. In the hard surface bathroom cleaner market, the acquisition would result in an increase in the Herfindahl-Hirschman Index (“HHI”) to approximately 2300 points, which is an increase of about 500 points over the premerger HHI level. In the fine fabric wash market, the post-merger HHI would be approximately 8500 points, which is an increase of about 700 points over the premerger HHI level.

By eliminating competition between these competitors in these highly concentrated markets, the proposed acquisition could allow Reckitt & Colman unilaterally to exercise market power or could facilitate coordinated interaction among the remaining competitors in the hard surface bathroom cleaner market, and could allow Reckitt & Colman unilaterally to exercise market power in the fine fabric wash market, thereby increasing the likelihood that consumers of hard surface bathroom cleaners and fine fabric wash products would be forced to pay higher prices.

In addition, new entry would not deter or counteract the anticompetitive effects likely to flow from the proposed transaction. A new entrant into either the hard surface bathroom cleaner or fine fabric wash market would need to undertake the difficult, expensive and time-consuming process of developing a competitive product, creating brand recognition among U.S. consumers, and establishing a viable retail distribution network. Because of the difficulty of accomplishing these tasks, new entry into either market could not be accomplished in a timely manner. Moreover, because of the high sunk costs involved, it is not likely that new entry into either market would occur at all, even in response to a small, nontransitory increase in price in either market after the transaction. Similarly, entry through brand name product line extension is not likely. Large, vertically integrated manufacturers of household cleaners are set up for high volume

Analysis to Aid Public Comment

production and not for the production of small or individual stock keeping units for niche markets.

The Consent Agreement effectively remedies the acquisition's anticompetitive effects in the hard surface bathroom cleaner and fine fabric wash markets by requiring Reckitt & Colman to divest Benckiser's Scrub Free[®] and Delicare[®] businesses to a third party. These assets include all Scrub Free[®] and Delicare[®] trademarks and related intellectual property, trade secrets, technical and manufacturing know-how, and customer and vendor lists and information. Pursuant to the Consent Agreement, the Benckiser businesses must be divested to Church & Dwight after the Commission accepts this Consent Agreement for public comment, but on or before the date that Reckitt & Colman acquires Benckiser. Church & Dwight is a well established, financially viable company that offers value priced consumer cleaning products under established brands including Arm & Hammer[®], Parsons[®], Brillo[®], and Sno Bol[®]. In order to ensure an orderly transition, Reckitt & Colman will provide Church & Dwight with short-term integration assistance, including production planning and order and billing processing. In the event that these businesses are not divested to Church & Dwight, the Decision & Order contains a provision that requires Reckitt & Colman to divest Benckiser's Scrub Free[®] and Delicare[®] businesses to an alternative acquirer approved by the Commission within ninety (90) days of the date the Decision & Order becomes final. At the alternative acquirer's option, additional related assets may be divested including fixtures, machines, buildings, structures, vehicles, real property, or other tangible assets used in the research, development, formulation, manufacture, sale, or distribution of these businesses.

In the event that the Benckiser Scrub Free[®] and Delicare[®] businesses are not divested to Church & Dwight or to an alternative acquirer within 90 days of the date the Commission's Decision & Order becomes final, the Decision & Order provides that the Commission may appoint a trustee to divest these assets,

Analysis to Aid Public Comment

and, at the purchaser's option, to divest additional related assets to a Commission-approved purchaser.

The Order also requires Reckitt & Colman to provide to the Commission a report of compliance with the divestiture provisions of the Decision & Order within thirty (30) days following the date the Decision & Order becomes final, every thirty (30) days thereafter until Reckitt & Colman has completed the required divestiture, and every ninety (90) days thereafter until Reckitt & Colman has completed its divestiture obligations under the Order.

The purpose of this analysis is to facilitate public comment on the Consent Agreement, and it is not intended to constitute an official interpretation of the Consent Agreement or to modify its terms in any way.

Complaint

IN THE MATTER OF

**MACDERMID, INC. AND POLYFIBRON
TECHNOLOGIES, INC.**CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATIONS OF
SEC. 7 OF THE CLAYTON ACT AND SEC. 5 OF THE
FEDERAL TRADE COMMISSION ACT*Docket C-3911; File No. 991 0167**Complaint, December 21, 1999--Decision, February 4, 2000*

This consent order addresses the proposed acquisition by respondent MacDermid, Inc. of Polyfibron Technologies, Inc. Under the terms of the consent order, respondents are required to divest Polyfibron's North American liquid photopolymer business. The consent order requires that respondents divest to a Commission-approved acquirer all trade secrets, know-how, trademarks and trade names, and intangible and tangible assets, including equipment, supply contracts, and business information relating to Polyfibron's liquid photopolymer business. The consent order also requires that respondents provide incentives to certain employees identified by the acquirer as important to the continued competitiveness and viability of the liquid photopolymer business and that they facilitate of know-how to the acquirer. The respondents are also required to terminate their distribution agreements with BASF and Asahi. The Order to Maintain Assets requires that respondents preserve the Polyfibron liquid photopolymer business as a viable and competitive business until it is transferred to the Commission-approved acquirer. The respondents are obligated to maintain a sufficient inventory of liquid photopolymers to ensure there is no shortage during the transition of the liquid photopolymer business to the Commission-approved acquirer.

Participants

For the Commission: *Michael Antalics, Morris Bloom, Randall Conner, Daniel P. Ducore, Timothy J. Feighery, Erica S. Mintzer, and Jacqueline Tapp.*

For the Respondents: *Robert C. Jones and Phil Proger, Jones, Day, Reavis & Pogue; Suzanne L. Glassburn and Neil Motenko, Nutter, McClennen & Fish, LLP.*

Complaint

COMPLAINT

The Federal Trade Commission (“Commission”), having reason to believe that MacDermid, Inc. has agreed to acquire Polyfibron Technologies, Inc., both corporations subject to the jurisdiction of the Commission, in violation of Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18, and Section 5 of the Federal Trade Commission Act (“FTC Act”), 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. RESPONDENTS

1. Respondent MacDermid, Inc. (“MacDermid”) is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Connecticut, with its executive offices located at 245 Freight Street, Waterbury, Connecticut 06702.

2. Respondent Polyfibron Technologies, Inc. (“Polyfibron”) 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 900 Middlesex Turnpike, Building 2, Billerica, Massachusetts 01821-3946.

3. For purposes of this proceeding, Respondents are, and at all times relevant herein have been, engaged in commerce as “commerce” is defined in Section 1 of the Clayton Act, as amended, 15 U.S.C. § 12, and are corporations whose businesses are in or affecting commerce as “commerce” is defined in Section 4 of the FTC Act, as amended, 15 U.S.C. § 44.

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II. THE ACQUISITION

4. Pursuant to a Plan and Agreement of Merger dated February 18, 1999, MacDermid will acquire all of the voting securities of Polyfibron for approximately \$299 million (“the Acquisition”).

III. THE RELEVANT MARKETS

5. One relevant line of commerce in which to analyze the likely effects of the proposed Acquisition is the research, development, manufacture and sale of liquid photopolymers for use in the production of printing plates for the packaging industry (“Liquid Photopolymers”). Printing plates made from Liquid Photopolymers are essential to the printing of relatively simple graphics on packaging materials, such as, for example, graphics that identify the kind, source and weight of particular goods contained in multi-wall bags and corrugated containers. Liquid Photopolymers provide customers with an inexpensive, flexible and environmentally safe material for manufacturing printing plates for printing on packaging materials. There are no economic substitutes for Liquid Photopolymers to which customers would switch in response to a small but significant price increase in Liquid Photopolymers.

6. Another relevant line of commerce within which to analyze the likely effects of the proposed transaction is the research, development and sale of solid sheet photopolymers for use in the production of printing plates for the packaging industry (“Sheet Photopolymers”). Printing plates made from Sheet Photopolymers are essential to the printing of sophisticated graphics on packaging materials, such as, for example, the printing of multi-colored designs, logos and photograph-quality prints on folding cartons for consumer products, as well as multi-wall bags and corrugated containers. Sheet Photopolymers provide customers with a consistently high quality, inexpensive material for printing sophisticated graphics on packaging materials. There are no economic substitutes for Sheet

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Photopolymers to which customers would switch in response to a small but significant price increase in Sheet Photopolymers.

7. For purposes of this Complaint, the relevant geographic area in which to analyze the effects of the proposed Acquisition on competition in Liquid Photopolymers and Sheet Photopolymers is North America. Liquid Photopolymers and Sheet Photopolymers produced outside North America are not economic substitutes because of customers' need for local sales and technical service support, because the delays and uncertainties inherent in long-distance shipping are unacceptable to customers in an industry that requires just in time delivery, and, in the case of Liquid Photopolymers, because of the high shipping costs associated with a relatively low-value product consisting largely of water. There are no significant sources of imports of Liquid Photopolymers or Sheet Photopolymers, and no substantial import or export response to exchange rate fluctuations.

IV. MARKET STRUCTURE

8. The Liquid Photopolymer market is very highly concentrated, whether measured by the Herfindahl-Hirschman Index ("HHI") or by two-firm concentration ratios. MacDermid and Polyfibron are the two largest sellers of Liquid Photopolymers in North America, controlling approximately 99 percent North American sales. The proposed Acquisition thus represents a virtual merger to monopoly.

9. The Sheet Photopolymer market is very highly concentrated, whether measured by the HHI or two-firm concentration ratios, with Polyfibron and E.I. du Pont de Nemours and Company ("DuPont") together controlling over 90 percent of North American sales. Polyfibron's share of the North American market includes sales of its own manufactured Sheet Photopolymers, as well as its sales of Sheet Photopolymers manufactured by BASF Drucksysteme GmbH ("BASF," formerly

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known as BASF Lacke + Farben AG), pursuant to a distribution agreement dated August 25, 1995 between BASF and NAPP Systems, Inc., a subsidiary of Polyfibron. While MacDermid does not manufacture Sheet Photopolymers, it has the exclusive right, under a December 14, 1998 agreement with Asahi Chemical Industry Co., Ltd. ("Asahi"), to distribute Asahi's Sheet Photopolymers in North America. Along with DuPont, Polyfibron and BASF, Asahi is one of the major producers of Sheet Photopolymers in the world.

10. Entry into the relevant markets requires significant sunk costs and would not be timely, likely and sufficient to deter or counteract the adverse competitive effects described in Paragraphs 11 - 12 because of, among other things: the length of time and expense necessary to build appropriate chemical production facilities; the difficulty of acquiring the technical expertise necessary to produce commercial-quality polymers at the quantities and consistency required by customers; the difficulty of acquiring research and development capabilities necessary to be able to offer customers continuing innovation; the need to offer to customers plate-making equipment on a consignment or lease basis; and the difficulty of gaining recognition in a marketplace in which customers are reluctant to change from proven suppliers. Furthermore, most customers in the market are engaged in long-term equipment lease and material supply contracts with either MacDermid or Polyfibron, further reducing the market available to a new entrant at any given time. Thus, it is unlikely that a new entrant could enter successfully so as to counteract a small but significant price increase.

IV. EFFECTS OF THE ACQUISITION

11. The effect of the Acquisition may be substantially to lessen competition and to tend to create a monopoly in the relevant markets in violation of Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18, and Section 5 of the FTC Act, as amended, 15 U.S.C. § 45, in the following ways, among others:

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- a. It will eliminate actual, direct and substantial competition between Polyfibron and MacDermid in the relevant market for Liquid Photopolymers;
- b. It will substantially increase the level of concentration, to the point of creating a monopoly, in the relevant market for Liquid Photopolymers;
- c. It will increase the likelihood that the firm created by the merger of MacDermid and Polyfibron will unilaterally exercise market power in the relevant market for Liquid Photopolymers;
- d. It will increase the likelihood that purchasers of Liquid Photopolymers in the relevant market will be forced to pay higher prices;
- e. It will increase the likelihood that technical and sales services provided to purchasers of Liquid Photopolymers in the relevant market will be reduced;
- f. It will increase the likelihood that innovation in the development of Liquid Photopolymers will be reduced;
- g. It will eliminate the strong potential for direct and substantial competition between and among Polyfibron, BASF and Asahi in the relevant market for Sheet Photopolymers due to the exclusive distribution agreements between Polyfibron and BASF and between MacDermid and Asahi, and thereby further entrench the existing duopoly;

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- h. It will significantly enhance the likelihood of coordinated interaction in the relevant market among the competitors in the production and sale of Sheet Photopolymers; and
- i. It will increase barriers to entry in the relevant markets.

12. All of the above increase the likelihood that the Acquisition would result in increased prices, reduced innovation, or reduced services in the near future and in the long term in the relevant markets.

V. ANTICOMPETITIVE CONDUCT

13. In 1972, Hercules, Inc. ("Hercules"), entered into a licensing arrangement with Asahi for the manufacture of Liquid Photopolymers, which license was fully paid up and expired in 1989. The applicable Asahi patents expired in or about 1990, and Hercules was free thereafter to manufacture Liquid Photopolymers pursuant to the Asahi technology without restriction. In 1995, MacDermid acquired the printing business of Hercules, and continued to produce Liquid Photopolymers, without any transfer or sharing of technology with Asahi. In 1995, shortly after MacDermid's acquisition of Hercules' printing business, Asahi expressed to MacDermid's Business Director its interest in maintaining its understandings with MacDermid, as the acquirer of the Hercules liquid photopolymer business.

14. From 1995 through December 1998, MacDermid and Asahi engaged in continuing discussions and correspondence which repeatedly confirmed the parties' understanding that Asahi would not compete in the sale of Liquid Photopolymers in North America while MacDermid would not compete in the sale of Liquid Photopolymers in Japan. Since the expiration of the Asahi/Hercules license agreement in 1989, Asahi has in fact not competed in the sale of Liquid Photopolymers in North America, while MacDermid has not competed with Asahi in the sale of

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Liquid Photopolymers in Japan. Although the earlier licensing agreement between Hercules and Asahi may have been justified as a reasonable agreement to transfer technology, the continued understanding between MacDermid and Asahi had the purpose and effect of allocating or dividing territories or markets for the manufacture and sale of Liquid Photopolymers, and restricting competition, including price competition, between MacDermid and Asahi.

15. Also from 1995 through 1998, Polyfibron engaged in continuing discussions with Asahi. Correspondence between the two companies, and internal Polyfibron memoranda, identify the goal of such discussions as an agreement that Polyfibron not enter the Japanese markets for the sale of Liquid Photopolymers and Sheet Photopolymers, and that Asahi not enter the North American markets for the sale of Liquid Photopolymers and Sheet Photopolymers. In the course of the discussions that took place between Polyfibron and Asahi during 1997, Polyfibron, on several occasions, invited Asahi to agree not to compete in the sale of Sheet Photopolymers and Liquid Photopolymers in North America in return for Polyfibron's agreement not to compete in the sale of Liquid Photopolymers and Sheet Photopolymers in Japan. These invitations, if consummated, would have had the purpose and effect of allocating or dividing markets for the manufacture and sale of Liquid Photopolymers and Sheet Photopolymers, and restricting competition, including price competition, between Polyfibron and Asahi.

VI. VIOLATIONS CHARGED

16. The acquisition agreement described in Paragraph 4 constitutes a violation of Section 5 of the FTC Act, as amended, 15 U.S.C. § 45.

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17. The Acquisition described in Paragraph 4, if consummated, would constitute a violation of Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18, and Section 5 of the FTC Act, as amended, 15 U.S.C. § 45.

18. The agreement between MacDermid and Asahi described in Paragraphs 13 and 14 violates Section 5 of the FTC Act, as amended, 15 U.S.C. § 45.

19. The acts and practices of Polyfibron described in Paragraph 15 constitute unfair methods of competition in or affecting commerce in violation of Section 5 of the FTC Act, as amended, 15 U.S.C. § 45.

IN WITNESS WHEREOF, the Federal Trade Commission has caused this Complaint to be signed by the Secretary and its official seal to be affixed, at Washington, D.C. this twenty-first day of December, 1999.

By the Commission.

DECISION AND ORDER

The Federal Trade Commission having initiated an investigation of the proposed acquisition by the Respondent MacDermid, Incorporated, of the Respondent Polyfibron Technologies, Inc., hereinafter referred to as "Respondents," and the Respondents having been furnished thereafter with a copy of a draft of the Complaint that the Bureau of Competition presented to the Commission for its consideration and which, if issued by the Commission, would charge the Respondents with violations of Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18, and Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45; and

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Respondents, their attorneys, and counsel for the Commission having thereafter executed an Agreement Containing Consent Orders (“Consent Agreement”), containing an admission by the Respondents of all of the jurisdictional facts set forth in the aforesaid draft of the Complaint, a statement that the signing of said Consent Agreement is for settlement purposes only and does not constitute an admission by the Respondents that the law has been violated as alleged in such Complaint, or that the facts as alleged in such Complaint, other than the jurisdictional facts, are true, and waivers and other provisions as required by the Commission’s Rules; and

The Commission having thereafter considered the matter and having determined that it had reason to believe that the Respondents have violated the said Acts, and that a Complaint should issue stating its charges in that respect, and having thereupon issued its Complaint and its Order to Maintain Assets and accepted the executed Consent Agreement and placed such Agreement on the public record for a period of thirty (30) days for the receipt and consideration of public comments, now in further conformity with the procedure described in Commission Rule 2.34, 16 C.F.R. § 2.34, the Commission hereby makes the following jurisdictional findings and issues the following Order:

1. Respondent MacDermid is a corporation organized, existing and doing business under and by virtue of the laws of the State of Connecticut, with its executive offices located at 245 Freight Street, Waterbury, Connecticut 06702.
2. Respondent Polyfibron 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 900 Middlesex

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Turnpike, Building 2, Billerica, Massachusetts 01821-3946.

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

ORDER**I.**

IT IS ORDERED that, as used in this Decision and Order, the following definitions shall apply:

- A. “MacDermid” means MacDermid, Incorporated, its directors, officers, employees, agents and representatives, predecessors, successors, and assigns; its joint ventures, subsidiaries, divisions, groups, and affiliates controlled by MacDermid, Incorporated, and the respective directors, officers, employees, agents, representatives, successors, and assigns of each.
- B. “Polyfibron” means Polyfibron Technologies, Inc., its directors, officers, employees, agents and representatives, predecessors, successors, and assigns; its joint ventures, subsidiaries, divisions, groups, and affiliates controlled by Polyfibron Technologies, Inc., and the respective directors, officers, employees, agents, representatives, successors, and assigns of each.
- C. “Commission” means the Federal Trade Commission.
- D. “Respondents” means MacDermid and Polyfibron, individually and collectively.

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E. "Acquisition" means MacDermid's proposed acquisition of the common stock of Polyfibron pursuant to the Plan and Agreement of Merger dated February 18, 1999, as amended on July 27, 1999; September 23, 1999; and October 29, 1999.

F. "Assets To Be Divested" means:

all rights, title, and interest in all equipment, machinery, tools, furniture and other tangible property listed in Schedule A to this Decision and Order and any additional equipment, machinery, tools, furniture and other tangible property, identified by the Commission-approved acquirer within six months of the date of closing as set forth in the agreement to transfer such assets to the Commission-approved acquirer, listed in Schedule B to this Decision and Order;

all rights, title, and interest in and to Patents relating to the research, design, development, manufacture, distribution, marketing, or sale of Polyfibron Liquid Photopolymer Products in North America, including, but not limited to, those patents listed in Schedule C to this Decision and Order, provided that Respondents may negotiate licenses from the Commission-approved acquirer to enable Respondents to operate the Polyfibron Sheet Photopolymer Business and the Polyfibron International Liquid Photopolymer Business;

all rights, titles, and interest in and to Intellectual Property, other than Patents, relating to the research, design, development, manufacture, distribution, marketing, or sale of Polyfibron Liquid Photopolymer Products in North America, provided that Respondents

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may retain a non-exclusive right to such of the foregoing Intellectual Property as may be required to operate and for the purposes of operating the Polyfibron Sheet Photopolymer Business and the Polyfibron International Liquid Photopolymer Business;

all rights, title, and interest in and to inventories of products, raw materials (to the extent requested by the Commission-approved acquirer), supplies and parts, including work-in-process and finished goods, relating to the research, design, manufacture, development, marketing, or sale of Polyfibron Liquid Photopolymer Products in North America, listed and described in Schedule D to this Decision and Order;

all rights, title, and interest in and to agreements, express or implied, relating to the research, design, development, manufacture, distribution, marketing, or sale of Polyfibron Liquid Photopolymer Products in North America, regardless of whether such agreements relate exclusively to such purposes, including, but not limited to, warranties, guarantees, and contracts with joint venture partners, suppliers, including plate-making equipment suppliers, personal property lessors, personal property lessees, licensors, licensees, consignors, consignees, and customers; provided that Respondents may retain a non-exclusive right to such agreements as may be required to operate and for the purposes of operating the Polyfibron Sheet Photopolymer Business and the Polyfibron International Liquid Photopolymer Business;

all rights, title and interest in and to Permits and Approvals relating to the research, design, development, manufacture, distribution, marketing, or sale of Polyfibron Liquid Photopolymer Products in North America, regardless of whether such Permits

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and Approvals relate exclusively to such purposes, to the extent such Permits and Approvals are transferrable; and

all customer and vendor lists, catalogs, sales promotion literature and advertising materials relating to the research, design, development, manufacture, distribution, marketing, or sale of Polyfibron Liquid Photopolymer Products in North America.

provided, however, the Assets To Be Divested do not include those assets of Polyfibron that relate exclusively to the Polyfibron Sheet Photopolymer Business or the Polyfibron International Liquid Photopolymer Business.

- G. "Capability to Manufacture the Polyfibron Liquid Photopolymer Resins" means the ability of the Commission-approved acquirer to manufacture each of the Polyfibron Liquid Photopolymer Resins manufactured by Polyfibron since January 1, 1999, used to produce printing plates for the printing of packaging materials to specifications identical to the Polyfibron Liquid Photopolymer Resins produced by Polyfibron, which ability shall be determined using an infra red spectrometer and verified by both Polyfibron and the Commission-approved acquirer, and that the equipment, materials, tools, furniture and other tangible property listed in Schedule A to this Decision and Order have been relocated to the facilities of the Commission-approved acquirer and are fully operational.
- H. "Chemence" means Chemence Incorporated, a corporation organized, existing and doing business under and by virtue of the laws of the State of Ohio,

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with its office and principal place of business located at 185 Bluegrass Parkway, Alpharetta, Georgia 30005.

- I. “Chemence Agreement” means the Agreement of Purchase and Sale dated November 29, 1999 by and between Chemence and Polyfibron.
- J. “Intellectual Property” means any form of intellectual property, including, but not limited to, trademarks, Patents, trade secrets, research materials, technical information, management information systems, software, inventions, test data, technological know-how, licenses, registrations, submissions, approvals, technology, specifications, designs, drawings, processes, recipes, protocols, formulas, customer lists, vendor lists, catalogs, sales promotion literature, advertising materials, quality control data, books, records, and files.
- K. “Liquid Photopolymers” means liquid photopolymer resins used to produce printing plates for any printing application.
- L. “Non-Technical Documents” means documents that do not contain any technical information concerning Polyfibron Liquid Photopolymer Products.
- M. “North America” means the United States, Canada and Mexico.
- N. “Patents” means any patents and patent rights, patent applications, patents of addition, re-examinations, reissues, extensions, granted supplementary protection certificates, substitutions, confirmations, registrations, revalidations, revisions, additions and the like, of or to said patents and patent rights and any and all continuations and continuations-in-part and divisionals.

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- O. “Permits and Approvals” means licenses, permits, registrations or other governmental approvals.
- P. “Photopolymer Products” means liquid photopolymer resins or solid sheet photopolymers used to produce printing plates for any printing application.
- Q. “Polyfibron Atlanta Facility” means the facility of Polyfibron located at 5210 Phillip Lee Drive, Atlanta, Georgia.
- R. “Polyfibron International Liquid Photopolymer Business” means the business of Polyfibron of researching, designing, developing, manufacturing, distributing, marketing and selling: (1) liquid photopolymer printing plate products and equipment for customers outside North America; and (2) liquid photopolymer printing plate products and equipment for publishing, including newspapers, newspaper inserts, and books, anywhere in the world.
- S. “Polyfibron Liquid Photopolymer Business” means the business of Polyfibron of researching, designing, developing, manufacturing, distributing, marketing and selling the Polyfibron Liquid Photopolymer Products.
- T. “Polyfibron Liquid Photopolymer Products” means:
- any liquid photopolymer resins used to produce printing plates,
- any plate-backing and cover films used in conjunction with liquid photopolymer resins in the production of photopolymer printing plates,

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any chemicals and related products used in conjunction with liquid photopolymer resins in the production of photopolymer printing plates, and

any equipment, agreements relating to equipment, or rights in or to equipment, used to produce photopolymer printing plates from liquid photopolymer resins,

that have been manufactured, distributed, leased or sold by Polyfibrion, or have been the subject of research or development by Polyfibrion, in North America.

- U. “Polyfibrion Liquid Photopolymer Resins” means all of the kinds and types of liquid photopolymer resins manufactured by Polyfibrion used to produce photopolymer printing plates.
- V. “Polyfibrion Sheet Photopolymer Business” means the business of Polyfibrion of researching, designing, developing, manufacturing, distributing, marketing and selling solid sheet photopolymer printing plate products and equipment for any printing applications anywhere in the world.

II.

IT IS FURTHER ORDERED that:

- A. Respondents shall divest, absolutely and in good faith, the Assets To Be Divested, to Chemence, in accordance with the Chemence Agreement (which agreement is appended hereto and which shall not be read to vary or contradict the terms of this Decision and Order), no later than twenty (20) days from the date on which this Decision and Order becomes final. The purpose of the divestiture is to ensure the continued use of the Assets To Be Divested in the

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research, design, development, manufacture, distribution, marketing and sale of the Polyfibron Liquid Photopolymer Products;

Provided, however, the physical transfer of the Assets To Be Divested located at the Polyfibron Atlanta Facility to a facility owned by Chemence pursuant to the Chemence Agreement shall not occur until after this Decision and Order becomes final;

Provided further, however, that if the Respondents consummate the Chemence Agreement prior to the date this Decision and Order becomes final, and if the Commission determines to issue this Decision and Order and notifies Respondents that Chemence is not an acceptable acquirer or that the Chemence Agreement is not an acceptable manner of divestiture, the Respondents shall divest the Assets To Be Divested within three (3) months of the date this Decision and Order becomes final, absolutely and in good faith, at no minimum price, to an acquirer that receives the prior approval of the Commission and in a manner that receives the prior approval of the Commission.

- B. During the pendency of any Patent dispute that: (1) challenges or seeks to render invalid any of the Patents divested pursuant to this Decision and Order; and (2) could affect the manufacture or sale of the Polyfibron Liquid Photopolymer Products, Respondents shall cooperate in the defense of rights they have transferred to the Commission-approved acquirer. This cooperation shall be at Respondents' own expense during the first three (3) years following the date on which this Decision and Order becomes final.

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- C. At the time of execution of a purchase agreement with a proposed acquirer, Respondents shall provide the proposed acquirer with a complete list of all non-clerical employees, attached at Schedule E to this Decision and Order, who have been engaged in the research, development or sale of Polyfibron Liquid Photopolymer Products at any time during the period from January 1, 1999, until the date of such purchase agreement. Such list shall state each such individual's name and position.
- D. For a period of six (6) months following the divestiture pursuant to this Decision and Order, Respondents shall provide the Commission-approved acquirer the opportunity to enter into employment contracts with the individuals listed in Schedule E to this Decision and Order, or Schedule F if the Commission-approved acquirer is Chemence.
- E. For a period of six (6) months following the divestiture pursuant to this Decision and Order, Respondents shall provide the Commission-approved acquirer with an opportunity to inspect the personnel files and other documentation relating to all non-clerical employees, attached at Schedule E to this Decision and Order, who have been engaged in the research, development or sale of Polyfibron Liquid Photopolymer Products, to the extent permissible under applicable laws, at the request of the Commission-approved acquirer at any time after the execution of the related purchase agreement.
- F. Respondents shall, directly or through agreement with the Commission-approved acquirer, provide the individuals identified in Schedule F of this Decision and Order with financial incentives to continue in their employment positions during the period covered by the Order to Maintain Assets in this matter and to accept

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employment with the Commission-approved acquirer at the time of the divestiture. Such incentives shall consist of:

vesting of all pension benefits under the Polyfibron pension plan and Polyfibron's 401(k) Employees Savings and Investment Plan;

continuation of all employee benefits offered by Polyfibron until the divestiture is completed;

a bonus equal to twenty (20) percent of the employee's annual salary (including any other bonuses) as of the date the Order to Maintain Assets becomes final for any individual who agrees to accept an offer of employment from the Commission-approved acquirer, payable by Respondents, directly or through agreement with the Commission-approved acquirer, as follows: 1) ten (10) percent bonus upon the beginning of the employee's employment with the Commission-approved acquirer; and 2) ten (10) percent upon the employee's completion of one (1) year of employment with the Commission-approved acquirer; and

a severance payment if, less than twelve (12) months after the date on which such employee commences employment with the Commission-approved acquirer, the Commission-approved acquirer terminates the employment of such employee for reasons other than cause. The amount of such severance payment shall be equal to the payment that such employee would have received had he or she remained in the employ of Polyfibron and been terminated at such time, less any severance payment actually paid by the Commission-approved acquirer.

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- G. For a period of one (1) year from the date of the divestiture pursuant to this Decision and Order, Respondents shall not employ or make offers of employment to any individual listed in Schedule E, or Schedule F if the Commission-approved acquirer is Chemence, who has been offered employment with the Commission-approved acquirer, unless the individual has been granted a release by the Commission-approved acquirer to permit the individual to be employed by Respondents.
- H. Respondents shall not interfere with the employment by the Commission-approved acquirer of the individuals listed in Schedule E, or Schedule F if the Commission-approved acquirer is Chemence; shall not offer any incentive to such employees to decline employment with the Commission-approved acquirer or to accept other employment with the Respondents; shall remove any impediments that may deter such employees from accepting employment with the Commission-approved acquirer, including, but not limited to, any non-compete or confidentiality provisions of employment or other contracts with the Respondents that would affect the ability of those individuals to be employed by the Commission-approved acquirer; provided that Respondents may continue to enforce such provisions with respect to the Polyfibron International Liquid Photopolymer Business and the Polyfibron Sheet Photopolymer Business.
- I. For a period of ninety (90) days from the date of the divestiture required by this Decision and Order, or until the Commission-approved acquirer has achieved the Capability to Manufacture the Polyfibron Liquid Photopolymer Resins, whichever is earlier, Respondents shall not solicit, induce or attempt to solicit or induce the Liquid Photopolymer business of

Decision and Order

any customer or client of the Commission-approved acquirer, including Liquid Photopolymer customers or clients of Polyfibrion and customers or clients of distributors that have purchased Polyfibrion Liquid Photopolymer Products; provided, however, that nothing in this paragraph shall be interpreted as restricting Respondents from (a) providing any product or service to any customer of the Commission-approved acquirer that solicits such purchases from Respondents; (b) engaging in general price reductions, increasing their general level of rebates, or improving generally the level of quality or service with respect to any products; (c) general advertising or engaging in general promotion of any product consistent with their prior business practice; or (d) continuing to solicit customers of the Polyfibrion International Liquid Photopolymer Business or the Polyfibrion Sheet Photopolymer Business.

- J. Pending the divestiture pursuant to this Decision and Order, Respondents shall take such actions as are necessary to maintain the viability, competitiveness, and marketability of the Polyfibrion Liquid Photopolymer Business and the Assets To Be Divested; shall not sell, transfer, or encumber the Assets To Be Divested or other assets related to the Polyfibrion Liquid Photopolymer Business, other than the sale of parts and finished goods inventory in the ordinary 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 Assets To Be Divested or other assets related to the Polyfibrion Liquid Photopolymer Business, except for ordinary wear and tear.

Decision and Order

- K. Except as required by law; except to the extent necessary information is exchanged in the course of evaluating the Acquisition, defending investigations or litigation, obtaining legal advice, negotiating agreements to divest assets, or complying with this Decision and Order or the Order to Maintain Assets; or except as necessary to operate the Polyfibrion International Liquid Photopolymer Business and the Polyfibrion Sheet Photopolymer Business, MacDermid shall not receive or have access to any competitively sensitive or proprietary information, including, but not limited to, customer lists, price lists, marketing methods, patents, technologies, processes or other trade secrets, not independently known to MacDermid from sources other than Polyfibrion and that relate to the Assets To Be Divested.

III.**IT IS FURTHER ORDERED** that:

- A. If Respondents have not divested, absolutely and in good faith, the Assets To Be Divested in accordance with Paragraph II.A. of this Decision and Order, the Commission may appoint a trustee to divest the Assets To Be Divested. In the event that the Commission or the Attorney General brings an action pursuant to Section 5(l) of the Federal Trade Commission Act, 15 U.S.C. § 45(l), or any other statute enforced by the Commission, Respondents shall consent to the appointment of a trustee in such action. Neither the appointment of a trustee nor a decision not to appoint a trustee under this Paragraph shall preclude the Commission or the Attorney General from seeking civil penalties or any other relief available to it, including a court-appointed trustee, pursuant to § 5(l) of the Federal Trade Commission Act, or any other statute enforced by the Commission, for any failure by

Decision and Order

the Respondents to comply with this Decision and Order.

- B. If a trustee is appointed by the Commission or a court pursuant to Paragraph III.A. of this Decision and Order, Respondents shall consent to the following terms and conditions regarding the trustee's powers, duties, authority, and responsibilities:

The Commission shall select the trustee, subject to the consent of Respondents, which consent shall not be unreasonably withheld. The trustee shall be a person with experience and expertise in acquisitions and divestitures. If Respondents have not opposed, in writing, including the reasons for opposing, the selection of any proposed trustee within ten (10) days after receipt of written notice by the staff of the Commission to Respondents of the identity of any proposed trustee, Respondents shall be deemed to have consented to the selection of the proposed trustee.

Subject to the prior approval of the Commission, the trustee shall have the exclusive power and authority to divest the Assets To Be Divested.

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

The trustee shall have twelve (12) months from the date the Commission approves or the court approves the trust agreement described in Paragraph III.B.3. to

Decision and Order

accomplish the divestiture, which shall be subject to the prior approval of the Commission. If, however, at the end of the applicable twelve-month period, the trustee has submitted 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 this twelve (12) month period for no more than two (2) additional such periods.

The trustee shall have full and complete access to the personnel, books, records and facilities related to the Assets To Be Divested or to any other relevant information, as the trustee may request. Respondents shall develop such financial or other information as such trustee may request and shall cooperate with the trustee. Respondents shall take no action to interfere with or impede the trustee's accomplishment of the divestiture. Any delays in divestiture caused by Respondents shall extend the time for divestiture under this Paragraph in an amount equal to the delay, as determined by the Commission or, for a court-appointed trustee, by the court.

The trustee shall use his or her best efforts to negotiate the most favorable price and terms available in each contract that is submitted to the Commission, subject to Respondents' absolute and unconditional obligation to divest expeditiously at no minimum price. The divestiture shall be made in a manner that receives the prior approval of the Commission and to an acquirer that receives the prior approval of the Commission; provided, however, if the trustee receives bona fide offers for the Assets To Be Divested from more than one (1) acquiring entity, and if the Commission determines to approve more than one (1) such acquiring entity, the trustee shall divest to the

Decision and Order

acquiring entity selected by Respondents from among those approved by the Commission; provided further, however, that Respondents shall select such entity within five (5) business days of receiving notification of the Commission's approval.

The trustee shall serve, without bond or other security, at the cost and expense of Respondents, on such reasonable and customary terms and conditions as the Commission or a court may set. The trustee shall have the authority to employ, at the cost and expense of the Respondents, such consultants, accountants, attorneys, investment bankers, business brokers, appraisers, and other representatives and assistants as are necessary to carry out the trustee's duties and responsibilities. The trustee shall account for all monies derived from the 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 Respondents, and the trustee's power shall be terminated. The trustee's compensation shall be based at least in significant part on a commission arrangement contingent on the trustee's divesting the Assets To Be Divested.

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

Decision and Order

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

If the trustee ceases to act or fails to act diligently, a substitute trustee shall be appointed in the same manner as provided in Paragraph III.A. of this Decision and Order.

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

In the event that the trustee determines that he or she is unable to divest the Assets To Be Divested in a manner that preserves their marketability, viability and competitiveness and ensures their continued use in the research, design, development, manufacture, distribution, marketing and sale of the Polyfibron Liquid Photopolymer Products, the trustee may divest such additional assets related to the Assets To Be Divested of the Respondents and effect such arrangements as are necessary to satisfy the requirements of this Decision and Order.

The trustee shall have no obligation or authority to operate or maintain the Assets To Be Divested.

The trustee shall report in writing to Respondents and to the Commission every sixty (60) days concerning the trustee's efforts to accomplish the divestiture required by this Decision and Order.

Decision and Order

IV.**IT IS FURTHER ORDERED** that:

- A. Within ninety (90) days of the date this Decision and Order becomes final, Respondents shall terminate any distribution agreements entered into with any other manufacturer of Photopolymer Products, including, but not limited to, the Distribution Agreement between NAPP Systems, Inc. and BASF Lacke + Farben AG dated August 25, 1995, and the Distribution Agreement entered into between MacDermid and Asahi Chemical Industry Co., Ltd. dated December 14, 1998.
- B. Respondents cease and desist from, directly, indirectly, or through any corporate or other device, in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, inviting, entering into, attempting to enter into, organizing, attempting to organize, implementing, attempting to implement, continuing, attempting to continue, soliciting, or otherwise facilitating any combination, agreement, or understanding, either express or implied, with any producer of Photopolymer Products to allocate or divide markets, customers, contracts, or geographic territories for Photopolymer Products.
- C. One year from the date this Decision and Order becomes final and annually thereafter for nine (9) years on the anniversary of the date of which this Decision and Order became final, Respondents shall file with the Secretary of the Commission a verified written report of their compliance with this Paragraph.

Decision and Order

V.

IT IS FURTHER ORDERED that within thirty (30) days of the date this Decision and Order is issued and every thirty (30) days thereafter until Respondents have fully complied with the provisions of Paragraphs II. or III. of this Decision and Order, Respondents shall submit to the Commission a verified written report setting forth in detail the manner and form in which they intend to comply, are complying, and have complied with Paragraphs II. and III. of this Decision and Order. Respondents shall include in their compliance reports, among other things that are required from time to time, a full description of the efforts being made to comply with Paragraphs II. and III. of this Decision and Order, including a description of all substantive contacts or negotiations for divestiture and the identity of all parties contacted. Respondents shall include in their compliance reports copies of all written communications to and from such parties, all internal memoranda, and all reports and recommendations concerning divestiture.

VI.

IT IS FURTHER ORDERED that, for the purpose of determining or securing compliance with this Decision and Order, upon written request, Respondents shall permit any duly authorized representatives of the Commission:

- A. Access, during office hours and in the presence of counsel, to all facilities and to inspect and copy all books, ledgers, accounts, correspondence, memoranda and other records and documents in the possession or under the control of Respondents, relating to any matters contained in this Decision and Order; and
- B. Upon five (5) days' notice to Respondents, and without restraint or interference from Respondents, to interview officers, directors, or employees of

Decision and Order

Respondents, who may have counsel present, regarding any such matters.

VII.

IT IS FURTHER ORDERED that Respondents shall notify the Commission at least thirty (30) days prior to any proposed change in the corporate Respondents, such as dissolution, assignment, sale resulting in the emergence of a successor corporation, or the creation or dissolution of subsidiaries or any other change in the corporation, that may affect compliance obligations arising out of this Decision and Order.

VIII.

IT IS FURTHER ORDERED that this Decision and Order shall terminate on February 4, 2020.

By the Commission.

Schedules A - F

Schedule A

(1.1(a) of Chémence Agreement)

SCHEDULE 1.1(a)**ATLANTA - LIQUID PHOTOPOLYMER PRINTING PLATES
MACHINERY AND EQUIPMENT SOLD TO BUYER**

PTI Tag #	Description:
	<u>PRODUCTION AREA:</u>
	<u>Reactor No. 1:</u>
247	Reactor No. 1 including hoses
248	Disconnect Switch
249	Drum Holst
250	Vacuum Trap
252	Floor Scale
253	Discharge line and scale
254	Reactor Scale
255	Electrical Panel
256	Drum Scale
257	Gram Scale
258	Reactor solvent cleaning pump system
259	High viscosity pump
260	Myers mixer
261	Dip tube and drum pump No. 1
262	Dip tube and drum pump No. 2
263	Box stapler
353	Water Bath No. 3
	<u>Reactor No. 3:</u>
246	Reactor No. 3 including hoses
246	Flexo Polymer Process System
246	Agitator Shaft
246	Reactor Access
354	Water Bath No. 4
266	Discharge line and scale
267	Electrical panel
268	Reactor scale
269	Drum scale
270	Table scale
271	Pail sealer
272	Floor scale
273	Air sparge system
274	Vacuum trap
	<u>Miscellaneous Auxiliary Equipment:</u>
347	Reactor Cleaning Wand
352	Water Bath Control Panel
366	Air Dryer & Inlet Filter
395	Walden Air Operated Diaphragm Pump
	<u>Storage Tanks:</u>
279	5,200 gallon used recycle tank
280	2,500 gallon clean solvent tank
385	TDI Concentration Meter
388	Alarm System Panel for Solvent Tanks

Schedules A - F

SCHEDULE 1.1(a)**ATLANTA - LIQUID PHOTOPOLYMER PRINTING PLATES
MACHINERY AND EQUIPMENT SOLD TO BUYER**

PTI Tag #	Description:
	<u>Warehouse:</u>
287	Floor scrubber and charger
288	Pallet jack
289	Storage racks in yard (20)
289	Warehouse racks (in yard)
275	Fork lift No. 1
276	Drum hoist
278	Fork lift charger
406	Manual Pallet Jack
407	Manual Pallet Jack
377	Extension Boom for Forklift
	<u>Q C Wet Lab:</u>
290	Fisher Scientific Iso Temp Water Bath
291	Neslab Refrigerated Bath Circulator
465	Thermoseal Unit
466	Thermoseal Unit
315	RVT Viscometer
317	LVT Viscometer
295	Analytical Balance
296	Aqua Star V-5000 Moisture Analyzer
297	Top loading balance
298	Oven No. 1
299	Oven No. 2
300	Bench top Ultrasonic cleaners
301	Fisher APHA Color test system
302	Flammable cabinet
420	Brookfield Viscometer
424	Titration Stand
435	Titration Stand
444	VariSpeed Mixer Controller
445	VariSpeed Mixer Controller
467	Motor Mixer
446	Lab Mixer
	<u>Q C Instrument Lab:</u>
303	IR Spectrometer
304	FTIR Dell Computer
305	Monitor
306	Printer
309	Autotitrator
310	Table top micrometer
311	Resiliometer
312	Punch press

Schedules A - F

SCHEDULE 1.1(a)**ATLANTA - LIQUID PHOTOPOLYMER PRINTING PLATES
MACHINERY AND EQUIPMENT SOLD TO BUYER**

PTI Tag #	Description:
	<u>Boxcor/LF Substrate Lab:</u>
318	Amergraph Cure Unit
319	Computer labeling system printer
320	Monitor
	<u>Letterflex Machine Lab:</u>
321	Letterflex IIIA System - exposure unit
322	Post expose 'pizza' oven
323	Merigraph exposure unit
324	Roll / Drum washout unit
325	Post exposure unit
326	Drying oven
	<u>Customer Demonstration Room:</u>
327	Letterflex 30 x 50 Exposure Unit
328	30 x 50 PDS Serial # TGE 247A
329	30 x 50 PDS Serial # TGE 247B
330	Letterflex 30 x 50 processor
331	Heavy duty shear
332	Light Box
469	Guillotine
470	Lab Bench
471	Precision Oven
473	Bench
475	Desk
476	Substrate Cabinet
477	Negative cabinet 1
478	Negative cabinet 2
480	Cabinet
	<u>Platemaking Room:</u>
333	LFX 42 x 60 Processor
334	LFX 42 x 60 exposure unit
335	PDS system Serial # 420008
	<u>Upstairs Labs:</u>
454	Blue M Oven
455	Blue M Oven
456	Blue M Oven
457	Blue M Oven
	<u>Other:</u>
No tag	Colorite Software

Schedules A - F

Schedule B

(1.3(a) of Chémence Agreement)

Schedules A - F

SCHEDULE 1.3(a)**ATLANTA - LIQUID PHOTOPOLYMER PRINTING PLATES
ADDITIONAL MACHINERY AND EQUIPMENT AVAILABLE TO BUYER
FOR SIX MONTHS FOLLOWING CLOSING**

PTI Tag #	Description:
	<u>PRODUCTION AREA:</u>
	<u>Reactor No. 2:</u>
339	Flow meters for 3 bulk tanks
	<u>Miscellaneous Auxillary Equipment:</u>
367	Vacuum Tank
	<u>Storage Tanks:</u>
283	7,500 gallon raw material tank
284	7,500 gallon rinse water tank
285	Scale for rinse water tank
286	Scale for raw material tank
383	Inlet Filter Assembly for Bulk Tanks
359	Air Dryer for Storage Tanks incl. Manifold Control
	<u>Warehouse:</u>
412	Battery Charger (Crown)
371	Battery Charger for Forklift (Toyota)
	<u>Q C Wet Lab:</u>
292	Perkin-Elmer 1310 Infrared Spectrophotometer
	<u>Q C Instrument Lab:</u>
314	Instron
	<u>Customer Demonstration Room:</u>
479	Square work bench
no tag	Six pictures on wall

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Schedule C

(1.1(b) of Chémence Agreement)

Schedules A - F

Schedule 1.1 (b)

I. PATENTS¹

U.S. patent No. 5,147,761 dated September 15, 1992 entitled METHOD FOR PREPARING RELIEF IMAGE PRINTING PLATES. Serial No. 535,819 filed June 11, 1990.

II. TRADEMARKS AND OTHER INTELLECTUAL PROPERTY**A. North America License**

Buyer shall be granted a royalty free license for use in North America only of formulations, equipment designs, patents and trademarks related to Liquid Flexo photopolymers marketed to the North American packaging industry as more specifically defined below.

NON-EXCLUSIVE LICENSE**Trademarks²**

LETTERFLEX U.S. registration No. 855,774 dated 9/3/68
LETTERFLEX Logo U.S. registration No. 871,571 dated 6/24/69
LETTERFLEX U.S. registration No. 881,546 dated 12/2/69
LETTERFLEX Logo U.S. registration No. 882,364 dated 12/16/69

Formulations

All non-Claim product formulations contained within "Book 1" to be delivered under separate cover at closing.

Equipment Designs

All packaging LETTERFLEX machine drawings in the custody of Photo-Meca as listed in "Book 1" to be delivered under separate cover at closing.

¹ Subject to Patent Assignment and Patent License Agreement (Section 4.8).

² Subject to additional restrictions contained in Transitional Services Agreement (Section 4.6).

EXCLUSIVE LICENSE**Trademark**³

ACCLAIM U.S. application no. 636,787 dated 2/8/99

Formulations

All ACCLAIM product formulations contained within "Book 1" to be delivered under separate cover at closing.

B. Worldwide License

Buyer shall also be granted a non-exclusive, worldwide royalty free right and license to use ACCLAIM product formulations contained within "Book 1" to be delivered under separate cover at closing.

#143025

³ Rights granted to Buyer with respect to the ACCLAIM trademark and the ACCLAIM product formulations are subject to terms and conditions contained in the License Agreement (Section 4.7).

Schedules A - F

CONFIDENTIAL

SCHEDULE “D”

REDACTED

Schedule D

(1.1(c) of Chémence Agreement

FEDERAL TRADE COMMISSION DECISIONS
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Schedules A - F

Schedule E

(1.10A of Chémence Agreement)

Polyfibrón Technologies, Inc.

Schedule E

(a/k/a Schedule 1.10A to Purchase & Sale Agreement)

Active Employees

Name	Title	Name	Title
Ansaldó, Eric J.	R & D Technician II	Gavin, Thomas	Executive Vice President
Baklini, Leonard	Production Supervisor II	Gaudry, Gerard U.	Process Dev Group Leader
Beckerman, David	President & CEO	Golden, B. C.	Product Manager I
Benham, Douglas F.	Technical Services Rep III	Goss, William K.	R&D Manager
Berthiaume, Stephan	Technical Sales Rep I	Gray, Gary D.	National Sales Mgr II
Bishop, Thomas L.	Technical Sales Rep I	Griffin, Patricia R.	Marketing Services Coordinatc
Blair, Harold	Lab Technician II	Hall, Gerald E.	Marketing & Tech Service Mgr
Boaz, Edward A.	Technical Sales Rep II	Haller, Wanda J.	Supervisor, Order Proc I
Bowman, Christopher H	Sr Sales Correspondent	Hamedany, Tony	Group Leader II
Boyce, Carrie E.	Secretary II	Hennessy, James	Engineering Manager
Brothers, Ellen B.	Supervisor, Order Proc I	Holton, Robin L.	Executive Secretary IV
Bryant, Laurie A.	Product Manager I	Howell, Stephen P.	Sales Representative II
Caplinger, Thomas R.	Sales/Mktg Mgr. - L.A.	Hruska, John D.	Central Regional Manager
Capriotti, Bruce W.	Product Analyst	Jenson, Steven R.	SA - Tech/Sales Rep
Carlsen, Chris A.	Systems Engineer I	Johnson, Deborah L.	Q C Supervisor
Carswell, Victor E.	Systems Engineer I	Kanga, Rustom S.	Research Associate
Cassano, Thomas J.	Technical Services Rep III	Keran, Scott E.	Technical Sales Rep I
Cathcart, Patricia A.	Technical Sales Rep III	King, Melanie D.	Accounting Associate
Chen, Jinghong	Sr Chemist I	Krafft, Bettylyn O.	Technical Services Rep II
Cheng, Antony K.	Mgr. Mkt Forec. Fin Rep. Acctg	Kumpfmiller, Ronald J.	Research Chemist I
Cook, Brian R.	Technical Services Rep II	Lepis, Mary Lou S.	Secretary II
Corley, Jeffrey L.	Technical Services Rep II	Loose, Kevin P.	Sales Representative II
Dancer, Jeff W.	Technical Sales Rep I	Lyons-Michaud, Sally A.	Marketing Assistant II
Davis, Henry R.	Technical Sales Rep I	Marks, Martin J.	Technical Services Rep II
De Angelo, Janice	Secretary III	McAfee, Jerry	Chief Engineer
Duke, J. W.	Lab Technician III	McKenzie, Richard D.	Sr Systems Engineer II
Durham, Jeffrey S.	Sr Sales Representative	Morrison, Jean	Temporary Secretary/Off Asst
Emmerling, Richard A.	Technical Support Manager	Mullaney, Patrick J	Eastern Regional Sales Mgr
Farmer, Gerald W.	Sr Systems Engineer II	Murphy, Edward T.	VP General Mgr Plates/Americ
Favors, Michael H.	Systems Engineer I	Ordonez, Ruben	Technical Service - L.A.
Fino, James	Technical Sales Rep II	Owenby, Dan A.	Sr Field Test Engineer
Formwalt, Donald B.	Technical Sales Rep II	Paris, Linda P.	Secretary II
Galliers, Philip G.	Sales Representative II	Philmon, William W.	Sr Systems Engineer II

Schedules A - F

Active Employees

Name	Title
Pina, Nicholas	Sr Systems Engineer III
Prater, Shannon C.	Sales Representative II
Puckhaber, Kurt D.	Financial Analyst I
Randall, Alvin V.	Technical Services Rep
Recchia, David A.	Printing Process Specialist
Richards, Marshall	Mechanical Design Engineer
Roberts, Kevin J.	National Accounts Mgr-Plates
Rosen, Daniel	Product Manager III
Shradel, Jan M.	Technical Service Lab Manager
Taylor, Robert O.	Technical Services Rep II
Tsao, Jung H.	Prod Development Group Ldr
Ventola, Joan	Engineering Purchasing Coordii
Vest, Ryan W.	Research Chemist I
Vincent, David E.	Field Service Manager
Warren, Brian	Project Engineer
Weaver, Keisha N.	Chem/Research Technician
Weglewski, Linda L.	Regulatory Affairs Manager
Wilson, Billy J.	Plant Manager I
Winkle, Jean E.	Sr Sales Correspondent
Wyman, James V.	Western Regional Sales Mgr
Yang, Michael W.	Research Fellow

Terminated Employees

Name	Title
Black, Regina	Receptionist I
Dennison, Sarah	Chem/Research Technician
Dobrev, Bisser	Sr Network Analyst
Ellington, Erica	R & D Technician II
Gardner, Kevin	Technical Services Rep II
Hall, Cathy	Secretary III
Hannah, Mark	Chem/Research Technician
Ritch, Robert	Information Systems Specialis
Valerio, Frank	Sales Correspondent III
Yu, Jason	Research Specialist I

Production Workers	
Name	Title
Barboza, Miguel	Chemical Operator
Hatmaker, Jeffrey	Maint I
Jackson, Robert	Chemical Operator
Lee, Leon	Waste Handler
Riley, Odell	Material Handler
Sanchez, Rogelio	Lead Chemical Operator
Shipp, Jeffrey	Chemical Operator
Stone, Willie	Shipper/Receiver

Schedules A - F

Schedule F**SCHEDULE F**

1	Baklani, Len
2	Boaz, Alan
3	Davis, Ricky
4	Durham, Jeff
5	Fornwalt, Brent
6	Howell, Stephen
7	Karen, Scott
8	Marks, Martin
9	Owenby, Dan
10	Pena, Nick
11	Philmon, Bill
12	Barboza, Miguel
13	Hatmaker, Jeffrey
14	Jackson, Robert
15	Lee, Leon
16	Riley, Odell
17	Sanchez, Rogelio
18	Shipp, Jeffrey
19	Stone, Willie

Order to Maintain Assets

ORDER TO MAINTAIN ASSETS

The Federal Trade Commission having initiated an investigation of the proposed acquisition by the Respondent MacDermid, Incorporated of the Respondent Polyfibrion Technologies, Inc., hereinafter referred to as "Respondents," and the Respondents having been furnished thereafter with a copy of a draft of the Complaint that the Bureau of Competition presented to the Commission for its consideration and which, if issued by the Commission, would charge the Respondents with violations of Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18, and Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45; and

Respondents, their attorneys, and counsel for the Commission having thereafter executed an Agreement Containing Consent Orders ("Consent Agreement"), containing an admission by the Respondents of all of the jurisdictional facts set forth in the aforesaid draft of the Complaint, a statement that the signing of said Consent Agreement is for settlement purposes only and does not constitute an admission by the Respondents that the law has been violated as alleged in such Complaint, or that the facts as alleged in such Complaint, other than the 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 has reason to believe that Respondents have violated the said Acts, and that a Complaint should issue stating its charges in that respect, and having determined to accept the executed Agreement Containing Consent Orders and to place such Agreement on the public record for a period of thirty (30) days, the Commission hereby issues its Complaint, makes the following jurisdictional findings and issues this Order to Maintain Assets:

Order to Maintain Assets

1. MacDermid is a corporation organized, existing and doing business under and by virtue of the laws of the State of Connecticut, with its executive offices located at 245 Freight Street, Waterbury, Connecticut 06702.
2. Polyfibron 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 900 Middlesex Turnpike, Building 2, Billerica, Massachusetts 01821-3946.
3. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of Respondents, and the proceeding is in the public interest.

ORDER**I.**

IT IS ORDERED that, as used in this Order to Maintain Assets, the following definitions shall apply:

- A. "MacDermid" means MacDermid, Incorporated, its directors, officers, employees, agents and representatives, predecessors, successors, and assigns; its joint ventures, subsidiaries, divisions, groups, and affiliates controlled by MacDermid, Incorporated, and the respective directors, officers, employees, agents, representatives, successors, and assigns of each.
- B. "Polyfibron" means Polyfibron Technologies, Inc., its directors, officers, employees, agents and representatives, predecessors, successors, and assigns; its joint ventures, subsidiaries, divisions, groups, and affiliates controlled by Polyfibron Technologies, Inc., and the respective directors, officers, employees, agents, representatives, successors, and assigns of each.

Order to Maintain Assets

- C. "Commission" means the Federal Trade Commission.
- D. "Acquisition" means MacDermid's proposed acquisition of the common stock of Polyfibron pursuant to the Plan and Agreement of Merger dated February 18, 1999, as amended on July 27, 1999; September 23, 1999; and October 29, 1999.
- E. "Assets To Be Divested" means:
1. all rights, title, and interest in all equipment, machinery, tools, furniture and other tangible property listed in Schedule A to the related Decision and Order and any additional equipment, machinery, tools, furniture and other tangible property, identified by the Commission-approved acquirer within six months of the date of closing as set forth in the agreement to transfer such assets to the Commission-approved acquirer, listed in Schedule B to the related Decision and Order;
 2. all rights, title, and interest in and to Patents relating to the research, design, development, manufacture, distribution, marketing, or sale of Polyfibron Liquid Photopolymer Products in North America, including, but not limited to, those patents listed in Schedule C to the related Decision and Order, provided that Respondents may negotiate licenses from the Commission-approved acquirer to enable Respondents to operate the Polyfibron Sheet Photopolymer Business and the Polyfibron International Liquid Photopolymer Business;

Order to Maintain Assets

3. all rights, titles, and interest in and to Intellectual Property, other than Patents, relating to the research, design, development, manufacture, distribution, marketing, or sale of Polyfibron Liquid Photopolymer Products in North America, provided that Respondents may retain a non-exclusive right to such of the foregoing Intellectual Property as may be required to operate and for the purposes of operating the Polyfibron Sheet Photopolymer Business and the Polyfibron International Liquid Photopolymer Business;
4. all rights, title, and interest in and to inventories of products, raw materials (to the extent requested by the Commission-approved acquirer), supplies and parts, including work-in-process and finished goods, relating to the research, design, manufacture, development, marketing, or sale of Polyfibron Liquid Photopolymer Products in North America, listed and described in Schedule D to the related Decision and Order;
5. all rights, title, and interest in and to agreements, express or implied, relating to the research, design, development, manufacture, distribution, marketing, or sale of Polyfibron Liquid Photopolymer Products in North America, regardless of whether such agreements relate exclusively to such purposes, including, but not limited to, warranties, guarantees, and contracts with joint venture partners, suppliers, including plate-making equipment suppliers, personal property lessors, personal property lessees, licensors, licensees, consignors, consignees, and customers; provided that Respondents may retain a non-exclusive right to such agreements as may be required to operate and for the purposes of operating the Polyfibron

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Sheet Photopolymer Business and the Polyfibron International Liquid Photopolymer Business;

6. all rights, title and interest in and to Permits and Approvals relating to the research, design, development, manufacture, distribution, marketing, or sale of Polyfibron Liquid Photopolymer Products in North America, regardless of whether such Permits and Approvals relate exclusively to such purposes, to the extent such Permits and Approvals are transferrable; and
7. all customer and vendor lists, catalogs, sales promotion literature and advertising materials relating to the research, design, development, manufacture, distribution, marketing, or sale of Polyfibron Liquid Photopolymer Products in North America.

provided, however, the Assets To Be Divested do not include those assets of Polyfibron that relate exclusively to the Polyfibron Sheet Photopolymer Business or the Polyfibron International Liquid Photopolymer Business.

- F. "Capability to Manufacture the Polyfibron Liquid Photopolymer Resins" means the ability of the Commission-approved acquirer to manufacture each of the Polyfibron Liquid Photopolymer Resins manufactured by Polyfibron since January 1, 1999 used to produce printing plates for the printing of packaging materials to specifications identical to the Polyfibron Liquid Photopolymer Resins produced by Polyfibron, which ability shall be determined using an infra red spectrometer and verified by both Polyfibron and the Commission-approved acquirer, and that the

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equipment, materials, tools, furniture and other tangible property listed in Schedule A to the related Decision and Order have been relocated to the facilities of the Commission-approved acquirer and are fully operational.

- G. “Chemence” means Chemence Incorporated, a corporation organized, existing and doing business under and by virtue of the laws of the State of Ohio, with its office and principal place of business located at 185 Bluegrass Parkway, Alpharetta, Georgia 30005.
- H. “Liquid Photopolymers” means liquid photopolymer resins used to produce printing plates for any printing application.
- I. “Polyfibron International Liquid Photopolymer Business” means the business of Polyfibron of researching, designing, developing, manufacturing, distributing, marketing and selling: (1) liquid photopolymer printing plate products and equipment for customers outside North America; and (2) liquid photopolymer printing plate products and equipment for publishing, including newspapers, newspaper inserts, and books anywhere in the world.
- J. “Polyfibron Liquid Photopolymer Business” means the business of Polyfibron of researching, designing, developing, manufacturing, distributing, marketing and selling the Polyfibron Liquid Photopolymer Products.
- K. “Polyfibron Liquid Photopolymer Products” means:
 - 1. any liquid photopolymer resins used to produce printing plates,

Order to Maintain Assets

2. any plate-backing and cover films used in conjunction with liquid photopolymer resins in the production of photopolymer printing plates,
3. any chemicals and related products used in conjunction with liquid photopolymer resins in the production of photopolymer printing plates, and
4. any equipment, agreements relating to equipment, or rights in or to equipment, used to produce photopolymer printing plates from liquid photopolymer resins,

that have been manufactured, distributed, leased or sold by Polyfibron, or have been the subject of research or development by Polyfibron, in North America.

- L. "Polyfibron Liquid Photopolymer Resins" means all of the kinds and types of liquid photopolymer resins manufactured by Polyfibron used to produce photopolymer printing plates.
- M. "Polyfibron Sheet Photopolymer Business" means the business of Polyfibron of researching, designing, developing, manufacturing, distributing, marketing and selling solid sheet photopolymer printing plate products and equipment for any printing applications anywhere in the world.

Order to Maintain Assets

II.**IT IS FURTHER ORDERED** that:

- A. The purpose of this order is: (i) to preserve the Polyfibron Liquid Photopolymer Business as a viable, competitive, and ongoing business until the divestiture, as described in Paragraphs II and III of the related Decision and Order, is achieved; (ii) to assure that no material confidential information is exchanged between the respective liquid photopolymer businesses of MacDermid and Polyfibron; and (iii) to prevent interim harm to competition pending divestiture and other relief.
- B. Respondents shall take such actions as are necessary to maintain the viability, competitiveness, and marketability of the Polyfibron Liquid Photopolymer Business and the Assets To Be Divested; shall not sell, transfer, or encumber the Assets To Be Divested or other assets related to the Polyfibron Liquid Photopolymer Business other than to the Commission-approved acquirer in accordance with Paragraph II.A. of the related Decision and Order and the sale of parts and finished goods inventory in the ordinary 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 Assets To Be Divested or other assets related to the Polyfibron Liquid Photopolymer Business, except for ordinary wear and tear.
- C. Respondents shall conduct or cause to be conducted the Polyfibron Liquid Photopolymer Business in the regular and ordinary course and in accordance with past practice (including regular repair and maintenance efforts) and shall use their best efforts to preserve existing relationships with suppliers, customers, employees, and others having business relations with the Polyfibron Liquid Photopolymer Business.

Order to Maintain Assets

- D. Prior to the physical transfer of the Assets To Be Divested used in the manufacture of Polyfibron Liquid Photopolymer Products, Respondents shall ensure that a sufficient inventory of Polyfibron Liquid Photopolymer Products is maintained and built up, consistent with past and/or projected demand, so as to assure that no shortages of such products occur at any time, including the period in which the manufacturing assets are shut down for removal, physically transferred to the Commission-approved acquirer, and reassembled and capable of producing Polyfibron Liquid Photopolymer Products in sufficient quantity and quality to satisfy demand for such products.
- E. Respondents shall maintain a work force of equivalent size, training, and expertise associated with the Polyfibron Liquid Photopolymer Business. Respondents shall, directly or through agreement with Chemence or any other proposed acquirer, provide the individuals identified in Schedule F of the related Decision and Order with financial incentives to continue in their employment positions during the period covered by this Order to Maintain Assets. Such incentives shall consist of:
1. continuation of all employee benefits offered by Polyfibron until the divestiture is completed; and
 2. a bonus equal to ten (10) percent of the employee's annual salary (including any other bonuses) as of the date this Order to Maintain Assets is issued by the Commission to those Polyfibron employees that continue their employment with Polyfibron until the divestiture described in the related Decision and Order is completed. Employees identified in Schedule E of the related Decision and Order, or Schedule F if the Commission-approved acquirer is Chemence, that

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accept employment with the Commission-approved acquirer are entitled to an additional twenty (20) percent bonus under the terms specified in the Decision and Order.

- F. Respondents shall not make offers to remain in Respondents' employment after the divestiture to the individuals listed in Schedule E or Schedule F of the related Decision and Order,.
- G. Respondents shall not interfere with the employment by the Commission-approved acquirer of Polyfibron employees listed in Schedule E of the related Decision and Order, or Schedule F of the related Decision and Order if the Commission-approved acquirer is Chemence; shall not offer any incentive to such employees to decline employment with the Commission-approved acquirer or to accept other employment with the Respondents; and shall remove any impediments that may deter such employees from accepting employment with the Commission-approved acquirer, including, but not limited to, any non-compete or confidentiality provisions of employment or other contracts with the Respondents that would affect the ability of those individuals to be employed by the Commission-approved acquirer; provided that Respondents may continue to enforce such provisions with respect to the Polyfibron International Liquid Photopolymer Business and the Polyfibron Sheet Photopolymer Business.
- H. At the time of execution of a purchase agreement with a Commission-approved acquirer, Respondents shall provide the Commission-approved acquirer with a complete list of all non-clerical employees who have been engaged in the research, design, development, manufacture, distribution, marketing and sale of the Polyfibron Liquid Photopolymer Products at any time during the period from January 1, 1999, until the date of

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such purchase agreement (Schedule E of the related Decision and Order). Such list shall state each such individual's name and position.

- I. Respondents shall provide the Commission-approved acquirer the opportunity to enter into employment contracts with the individuals listed in Schedule E of the related Decision and Order, or Schedule F of the related Decision and Order if the Commission-approved acquirer is Chemence.
- J. Except as required by law; except to the extent necessary information is exchanged in the course of evaluating the Acquisition, defending investigations or litigation, obtaining legal advice, negotiating agreements to divest assets, or complying with the related Decision and Order or this Order to Maintain Assets; or except as necessary to operate the Polyfibron International Liquid Photopolymer Business and the Polyfibron Sheet Photopolymer Business, MacDermid shall not receive or have access to any competitively sensitive or proprietary information, including, but not limited to, customer lists, price lists, marketing methods, patents, technologies, processes or other trade secrets, not independently known to MacDermid from sources other than Polyfibron and that relate to the Assets To Be Divested.
- K. For a period of ninety (90) days from the date of the divestiture required by the related Decision and Order, or until the Commission-approved acquirer has achieved the Capability to Manufacture the Polyfibron Liquid Photopolymer Resins, whichever is earlier, Respondents shall not solicit, induce or attempt to solicit or induce the Liquid Photopolymer business of any customer or client of the Commission-approved acquirer, including Liquid Photopolymer customers or clients of Polyfibron and

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customers or clients of distributors that have purchased Polyfibron Liquid Photopolymer Products, provided, however, that nothing in this paragraph shall be interpreted as restricting Respondents from (a) providing any product or service to any customer of the Commission-approved acquirer that solicits such purchases from Respondents; (b) engaging in general price reductions, increasing their general level of rebates, or improving generally the level of quality or service with respect to any products; (c) general advertising or engaging in general promotion of any product consistent with their prior business practice; or (d) continuing to solicit customers of the Polyfibron International Liquid Photopolymer Business or the Polyfibron Sheet Photopolymer Business.

III.

IT IS FURTHER ORDERED that Respondents shall notify the Commission at least thirty (30) days prior to any proposed change in Respondents, such as dissolution, assignment, sale resulting in the emergence of a successor corporation, or the creation or dissolution of subsidiaries or any other change in the corporation, that may affect compliance obligations arising out of this Order to Maintain Assets.

IV.

IT IS FURTHER ORDERED that for the purposes of determining or securing compliance with this Order to Maintain Assets, and subject to any legally recognized privilege, and upon written request with reasonable notice to Respondents made to their principal United States offices, Respondents shall permit any duly authorized representatives of the Commission:

- A. Access, during office hours of Respondents and in the presence of counsel, to all facilities, and access to inspect and copy all books, ledgers, accounts, correspondence, memoranda, and all other records and documents in the

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possession or under the control of the Respondents relating to compliance with this Order to Maintain Assets; and

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

V.

IT IS FURTHER ORDERED that this Order to Maintain Assets shall terminate on the earlier of:

- A. Three (3) business days after the Commission withdraws its acceptance of the Consent Agreement pursuant to the provisions of Commission Rule 2.34, 16 C.F.R. § 2.34; or
- B. The day after the divestiture, as described in and required by the related Decision and Order, is completed.

By the Commission.

**ANALYSIS OF PROPOSED CONSENT ORDER TO AID
PUBLIC COMMENT**

The Federal Trade Commission ("Commission") has accepted, subject to final approval, an Agreement Containing Consent Orders ("Agreement") from MacDermid, Inc. ("MacDermid") and Polyfibron Technologies, Inc. ("Polyfibron") to resolve competitive concerns arising out of MacDermid's proposed acquisition of Polyfibron. The Agreement includes a proposed

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Decision and Order (the “proposed Order”) which would require MacDermid and Polyfibron (“respondents”) to divest the Polyfibron business of producing and selling liquid photopolymers; to terminate their respective agreements to distribute sheet photopolymers in North America (MacDermid's 1998 distribution agreement with Asahi Chemical Industry Co., Ltd. (“Asahi”), and Polyfibron's 1995 distribution agreement with BASF Lacke + Farben AG (“BASF”)); and to cease and desist from inviting, entering into or participating in any agreements with other photopolymer manufacturers that have as their effect any allocation, division or illegal restriction of competition. The Agreement also includes an Order to Maintain Assets which requires respondents to preserve the Polyfibron business of producing and selling liquid photopolymers as a viable, competitive, and ongoing business until the divestiture is achieved.

The proposed Order has been placed on the public record for thirty (30) days for reception of comments by interested persons. Comments received during this period will become part of the public record. After thirty (30) days, the Commission will review the Agreement and comments received and decide whether to withdraw its acceptance of the Agreement or make final the Agreement's proposed Order.

The proposed complaint alleges that the acquisition, if consummated, would violate Section 7 of the Clayton Act, 15 U.S.C. § 18, as amended, and Section 5 of the Federal Trade Commission Act (“FTC Act”), 15 U.S.C. § 45, as amended, in the following markets: (1) the research, development, manufacture, and sale of liquid photopolymers for use in the manufacture of flexographic printing plates for printing on packaging materials, such as corrugated containers and multi-wall bags (“Liquid Photopolymers”); and (2) the research, development and sale of solid sheet photopolymers for use in the manufacture of flexographic printing plates for printing on packaging materials such as plastic bags and other flexible packaging, as well as

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corrugated containers and multi-wall bags (“Sheet Photopolymers”).

The proposed complaint alleges that the Liquid Photopolymer market in North America is highly concentrated, and that the proposed acquisition of Polyfibron by MacDermid represents a virtual merger to monopoly in that market.

The proposed complaint also alleges that the Sheet Photopolymer market in North America is highly concentrated, with the pre-merger market being dominated by two firms, E.I. du Pont de Nemours & Co., Inc. (“DuPont”) and Polyfibron (selling its own-manufactured Sheet Photopolymer products, and those of BASF under the 1995 distribution agreement). Other firms that participate in the North American Sheet Photopolymer market are niche players with minor market shares. While MacDermid does not produce Sheet Photopolymers, it entered into a distribution agreement with Asahi in 1998 that gives it the right—which it has not yet exercised—to distribute and sell Asahi’s Sheet Photopolymer products in North America. The proposed complaint alleges that the existence of the respective distribution agreements means that the present duopoly in the sale of Sheet Photopolymers in North America would be further entrenched, because the only two likely entrants, BASF and Asahi, are bound by the distribution agreements to sell only through Polyfibron and MacDermid, respectively.

The proposed complaint further alleges that the effect of the acquisition may be to substantially lessen competition and to tend to create a monopoly by, among other things, eliminating direct competition between MacDermid and Polyfibron in the manufacture, distribution and sale of Liquid Photopolymers, entrenching the existing duopoly in North America in the sale of Sheet Photopolymers, increasing the likelihood that purchasers of Liquid Photopolymers and Sheet Photopolymers will be forced to pay higher prices, increasing the likelihood that technical and

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sales services provided to customers will be reduced, and increasing the likelihood that innovation will be reduced. Customers have complained that the effect of the transaction would be increased prices for Liquid Photopolymers and Sheet Photopolymers and reduced technical service, support, and innovation.

The proposed complaint further alleges that entry into the relevant markets would not be timely, likely, or sufficient to deter or offset the adverse effects of the acquisition on competition. Entry is difficult in this market because of the length of time it would take and the expense that would be incurred in building appropriate chemical production facilities; the difficulty of perfecting the underlying polymer chemistry without violating existing patents; the need to offer to customers plate-making equipment on a consignment or lease basis and the concurrent difficulty and cost of obtaining a source of supply for plate-making equipment; and the difficulty of gaining recognition in a marketplace in which customers are reluctant to change from proven suppliers. In addition, the proposed complaint alleges that most customers in the relevant market for Liquid Photopolymers are engaged in long-term equipment and material supply contracts with either MacDermid or Polyfibron, further reducing the number of customers available to a new entrant at any given time.

Finally, the proposed complaint alleges that the respondents have allocated markets for the sale of photopolymers with competitors, or invited competitors to allocate markets for the sale of photopolymers. Specifically, the complaint alleges that beginning in 1995, when MacDermid first entered the market for the production and sale of Liquid Photopolymers (by virtue of its acquisition of Hercules, Inc.'s photopolymer business), MacDermid and Asahi agreed to allocate markets such that MacDermid would not compete in the sale of Liquid Photopolymers in Japan and in other areas of the world in which Asahi sold Liquid Photopolymers while Asahi would not compete in the sale of Liquid Photopolymers in North America. In the case of Polyfibron, the proposed complaint alleges that during the

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same period of 1995 through 1998, Polyfibron engaged in discussions with Asahi that had as their purpose the division of markets between the two companies. The proposed complaint alleges that on several occasions during this time period, Polyfibron invited Asahi to agree not to compete in the sale of Sheet Photopolymers and Liquid Photopolymers in North America in return for Polyfibron's agreement not to compete in the sale of Sheet Photopolymers and Liquid Photopolymers in Japan.

The proposed Order is designed to remedy the anticompetitive effects of the acquisition in the North American markets for Liquid Photopolymers and Sheet Photopolymers, as alleged in the complaint, by requiring the divestiture of Polyfibron's Liquid Photopolymer business, by requiring the respondents to terminate their respective distribution agreements with Asahi and BASF, and by requiring the respondents to cease and desist from entering into, inviting or participating in any agreements to allocate, divide or illegally restrict competition in the relevant markets.

Under the terms of the proposed Order, respondents are required to divest Polyfibron's North American Liquid Photopolymer business to Chemence, Inc. ("Chemence"), no later than twenty (20) days after the date the Order becomes final. Chemence currently produces adhesives, sealants and photopolymers for making printing stamps, using technology similar to that involved in Liquid Photopolymers. Chemence also produces a small amount of Liquid Photopolymers in its facilities in Alpharetta, Georgia, as well as in the United Kingdom.

Divestiture of Polyfibron's Liquid Photopolymer business to Chemence is designed to promote the viability and competitiveness of the divested business by placing the business in the hands of a company with extensive expertise in photopolymer technology, expertise in related chemistries, and economies of scale resulting from shared research and

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development, overhead and production. The divestiture package, in turn, will permit Chemence to penetrate the North American market. It provides Chemence with a photopolymer technology that is well-known, well-respected and proven in the marketplace, access to plate-making equipment that it may offer to its resin customers, a sales and technical support force that is well-known in the industry, customer lists, and long-term equipment/resin supply contracts with those customers.

The proposed Order requires that respondents divest all trade secrets, know-how, trade marks and trade names, intellectual property, intangible assets, tangible assets including equipment, and supply contracts and business information (including purchasing, sales, marketing, licensing, and similar information) relating to Polyfibron's Liquid Photopolymer business. The proposed Order also requires that respondents provide incentives to certain employees identified by the acquirer as important to the continued competitiveness and viability of the Liquid Photopolymers business, to facilitate their transfer and the transfer of know-how to the acquirer.

The proposed Order to Maintain Assets requires that respondents preserve the Polyfibron Liquid Photopolymer business as a viable and competitive business until it is transferred to the Commission-approved acquirer. It includes an obligation on respondents to build and maintain a sufficient inventory of Liquid Photopolymers to ensure there is no shortage of supply during the period that the business is being transitioned to the Commission-approved acquirer, and obligations to maintain an adequate workforce.

Both the proposed Order and the Order to Maintain Assets include provisions designed to protect the Commission-approved acquirer during the transition period from the possibility that respondents might target customers on the customer lists being transferred to the Commission-approved acquirer. The provisions prohibit respondents from soliciting Liquid Photopolymer customers of Polyfibron for the transition period, which in any

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event is not to exceed ninety (90) days from the date the assets to be divested are transferred to the Commission-approved acquirer.

If, following receipt and review of public comments regarding the proposed Order, the Commission determines to disapprove the divestiture to Chemence, respondents are required to rescind the transaction with Chemence and divest Polyfibron's Liquid Photopolymers business, within three (3) months, to an acquirer that receives the prior approval of the Commission. The proposed Order also provides that if respondents fail to divest the Liquid Photopolymers business as required by the proposed Order, the Commission may appoint a Divestiture Trustee to divest the business along with any assets related to the business that are necessary to effect the purposes of the proposed Order.

Under the terms of the proposed Order, respondents are required to terminate their distribution agreements with BASF and Asahi. These provisions of the proposed Order are designed to remedy the foreseeable anticompetitive effects of maintaining the existing duopoly in the sale of Sheet Photopolymers in North America. Presently, DuPont and Polyfibron represent over ninety (90) percent of the sales of Sheet Photopolymers in North America. The investigation revealed that prices for Sheet Photopolymers in North America are considerably higher than prices for Sheet Photopolymers in other areas of the world where all of the major world players--DuPont, Polyfibron, BASF and Asahi--compete for business. Furthermore, the investigation revealed evidence of coordinated price activity in the sale of Sheet Photopolymers in North America among the two major firms. By requiring the respondents to terminate the distribution agreements with BASF and Asahi, the order frees BASF and Asahi to enter the North American market independently, and thereby to act as a competitive counterweight to DuPont and respondents.

Analysis to Aid Public Comment

Finally, the proposed Order requires that respondents cease and desist from inviting, creating, maintaining, adhering to, participating in, or enforcing any agreement with any producer of photopolymer products to allocate, divide or illegally restrict competition in the relevant markets. This provision of the proposed Order is designed to further enhance competition in the North American markets for Liquid Photopolymers and Sheet Photopolymers by ensuring that no potential entrant into these markets refrains from entering because of any illegal invitations from or arrangements with the respondents.

The proposed Order requires respondents to provide the Commission, within thirty (30) days of the date the Agreement is signed, with an initial report setting forth in detail the manner in which respondents will comply with the provisions relating to the divestiture of assets. The proposed Order further requires respondents to provide the Commission with a report of compliance with the Order within thirty (30) days following the date the Order becomes final and every thirty (30) days thereafter until they have complied with the divestiture provisions of the Order. Furthermore, the Order requires respondents to report annually to the Commission, for ten (10) years, regarding their compliance with the provisions of the Order relating to the Sheet Photopolymer distribution agreements and market allocation agreements.

The purpose of this analysis is to facilitate public comment on the proposed Order. This analysis is not intended to constitute an official interpretation of the Agreement or the proposed Order or in any way to modify the terms of the Agreement or the proposed Order.

Complaint

IN THE MATTER OF

**MARTY SUSSMAN ORGANIZATION, INC., AND
MARTIN E. SUSSMAN**

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATIONS OF
SEC. 5 OF THE FEDERAL TRADE COMMISSION ACT, THE
CONSUMER LEASING ACT, AND THE TRUTH IN LENDING ACT

*Docket C-3923; File No. 992 3078
Complaint, February 7, 2000 – Decision, February 7, 2000*

Respondents, the owners and operators of several automobile dealerships, are alleged to have violated Section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45, by misrepresenting the terms under which consumers can lease respondents' vehicles. Specifically, respondents failed to disclose material terms pertaining to the lease offer, such as the total amount due at lease signing or extra charges that may be imposed at the end of the lease term. The consent order requires respondents to disclose clearly and conspicuously all of the lease terms, including the fact that the transaction advertised is a lease; the total amount due at lease signing; and the annual percentage rate. With respect to credit advertisements, the proposed orders prohibit respondents from stating the amount or percentage of any downpayment, the number of payments or period of repayment, the amount of any payment, or the amount of any finance charge, without disclosing clearly and conspicuously all of the terms, the amount or percentage of the downpayment; the terms of repayment; and the correct annual percentage rate, using that term or the abbreviation "APR." If the annual percentage rate may be increased after consummation of the credit transaction, that fact must also be disclosed. The consent order also prohibits respondents from stating a rate of finance charge without stating the rate as an "annual percentage rate" or "APR."

Participants

For the Commission: *Rolando Berrelez, Sally Forman Pitofsky, and David Medine.*

For the Respondents: *Richard M. Meltzer, Mesirov, Gelman, Jaffe, Cramer, & Jamieson.*

Complaint

COMPLAINT

The Federal Trade Commission, having reason to believe that Marty Sussman Organization, Inc., a corporation, also doing business as Sussman Honda, Sussman Acura, Sussman Mazda, Sussman Hyundai, Sussman Oldsmobile, and Sussman Lincoln Mercury, and Martin E. Sussman, individually and as an officer of the corporation, (“respondents”) have violated the provisions of the Federal Trade Commission Act, 15 U.S.C. §§ 45-58, as amended, the Consumer Leasing Act, 15 U.S.C. §§ 1667-1667f, as amended, and its implementing Regulation M, 12 C.F.R. § 213, as amended, and the Truth in Lending Act, 15 U.S.C. §§ 1601-1667, as amended, and its implementing Regulation Z, 12 C.F.R. § 226, as amended, and it appearing to the Commission that this proceeding is in the public interest, alleges:

1. Respondent Marty Sussman Organization, Inc. is a Pennsylvania corporation with its principal office or place of business at Jenkintown & Baeder Roads, Jenkintown, Pennsylvania 19046. Respondent offers automobiles for sale or lease to consumers.

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

3. Respondents have disseminated advertisements to the public that promote consumer leases, as the terms “advertisement” and “consumer lease” are defined in Section 213.2 of Regulation M, 12 C.F.R. § 213.2, as amended.

4. Respondents have disseminated advertisements to the public that promote credit sales and other extensions of closed-end credit in consumer credit transactions, as the terms

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“advertisement,” “credit sale,” and “consumer credit” are defined in Section 226.2 of Regulation Z, 12 C.F.R. § 226.2, as amended.

5. The acts and practices of respondents alleged in this complaint have been in or affecting commerce, as “commerce” is defined in Section 4 of the Federal Trade Commission Act, 15 U.S.C. § 44.

6. Respondents have disseminated or have caused to be disseminated advertisements promoting consumer leases (“lease advertisements”) and/or credit sales (“credit advertisements”) for automobiles, including but not necessarily limited to the attached Sussman Exhibits A and B. Sussman Exhibits A and B are advertisements in the print media. These lease and/or credit advertisements contain the following statements:

- A. [Sussman Exhibit A states several lease and credit offers, including:]

**“1998 CUTLASS GL . . .
1.9% FINANCING AVAILABLE
\$199 A MONTH FOR 36 MONTHS”**

[A fine print disclosure next to the monthly payment amount states, “36 month lease based on 12K miles per year with \$2,250 cap cost reduction, bank fee, security deposit, and 1st month payment due at inception with approved credit. Tax and Tags Extra.”]

**“1998 ACURA 2.3 CL
\$279 A MONTH
FOR 39 MONTHS . . .**

**1998 ACURA 2.5 TL
\$339 A MONTH
FOR 39 MONTHS “**

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[A fine print disclosure below the monthly payment amounts states, "CL & TL 39 month leases based on 12,000 miles per year with \$999 Cap Cost Reduction, bank fee, security deposit, and 1st month payment due at inception with approved credit. Tax and tags extra."]
(Sussman Exhibit A)

- B. [Sussman Exhibit B states several lease and credit offers, including:]

**"1998 MAZDA
MILLENNIA L . . .
\$239 A MO. FOR 36 MOS."**

[A fine print disclosure below the monthly payment amount states, "36 month lease based on 12K miles per year with \$2,000 cap cost reduction, bank fee, and 1st month payment due at inception with approved credit. Tax and tags extra."]
...

"LINCOLN MERCURY . . .

**1.75%
Financing
Available**

**1998 MERCURY SABLE LS . . . \$269
A MONTH FOR 33 MONTHS"**

[A fine print disclosure below the monthly payment amount states, "33 month lease based on 12,000 miles per year with \$1,995 cap cost reduction, 1st month payment, security deposit due at inception with approved credit. Tax and tags extra. Price includes all rebates."]
(Sussman Exhibit B)

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FEDERAL TRADE COMMISSION ACT VIOLATIONS**COUNT I: FAILURE TO DISCLOSE LEASE TERMS**

7. In lease advertisements, including but not necessarily limited to Sussman Exhibits A and B, respondents have represented, expressly or by implication, that consumers can lease the advertised vehicles at the terms prominently stated in the advertisements, including but not necessarily limited to the monthly payment amount.

8. These lease advertisements have failed to disclose additional terms pertaining to the lease offer, such as the total amount due at lease inception. This information would be material to consumers in deciding whether to visit respondents' dealerships and/or whether to lease an automobile from respondents. The failure to disclose these additional terms, in light of the representation made, was, and is, a deceptive practice.

9. Respondents' practices constitute deceptive acts or practices in or affecting commerce in violation of Section 5(a) of the Federal Trade Commission Act, 15 U.S.C. § 45(a).

CONSUMER LEASING ACT AND REGULATION M VIOLATIONS**COUNT II: FAILURE TO DISCLOSE REQUIRED INFORMATION**

10. Respondents' lease advertisements, including but not necessarily limited to Sussman Exhibits A and B, state a monthly payment amount, but fail to disclose certain additional terms required by the Consumer Leasing Act and Regulation M, including one or more of the following terms:

- a. that the transaction advertised is a lease;

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- b. the total amount due prior to or at consummation, or by delivery, if delivery occurs after consummation. This total amount may: 1) exclude third-party fees that vary by state or locality, such as taxes, licenses, and registration fees, and disclose that fact or 2) provide a total that includes third-party fees based on a particular state or locality as long as that fact and the fact that such fees may vary by state or locality are disclosed;
- c. whether or not a security deposit is required;
- d. the number, amounts, and timing of scheduled payments; and
- e. that an extra charge may be imposed at the end of the lease term in a lease where the liability of the consumer is based on the difference between the residual value of the leased property and its realized value at the end of the lease term.

11. Respondents' practices have violated Section 184 of the Consumer Leasing Act, 15 U.S.C. § 1667c, and Section 213.7 of Regulation M, 12 C.F.R. § 213.7.

**COUNT III: FAILURE TO DISCLOSE THE TOTAL
AMOUNT DUE AT LEASE SIGNING WITH EQUAL
PROMINENCE**

12. Respondents' lease advertisements, including but not necessarily limited to Sussman Exhibits A and B, state a downpayment amount more prominently than the disclosure of the total amount due at lease signing, in violation of Section 213.7(b)(1) of Regulation M, 12 C.F.R. § 213.7(b)(1).

13. Respondents' practices have violated Section 213.7(b)(1) of Regulation M, 12 C.F.R. § 213.7(b)(1).

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**TRUTH IN LENDING ACT AND REGULATION Z
VIOLATIONS**

**COUNT IV: FAILURE TO STATE RATE OF FINANCE
CHARGE AS ANNUAL PERCENTAGE RATE**

14. In credit advertisements, including but not necessarily limited to Sussman Exhibits A and B, respondents have stated a rate of finance charge without stating that rate as an "annual percentage rate," using that term or the abbreviation "APR."

15. Respondents' practice constitutes a violation of Section 144 and 107 of the TILA, 15 U.S.C. §§ 1664 and 1606, respectively, and Sections 226.24(b) and 226.22 of Regulation Z, 12 C.F.R. §§ 226.24(b) and 226.22, respectively.

THEREFORE, the Federal Trade Commission this seventh day of February, 2000, has issued this complaint against respondents.

By the Commission.

Complaint Exhibits

Exhibit A



SUSSMAN ORGANIZATION

Visit us on the web at www.sussman.org



WE'VE MOVED!

TO A NEW SHOWROOM ON EASTON ROAD IN WILLOW GROVE 2 blocks below the Mall.
Every car in our new facility is on sale! Every new Honda, Hyundai, Oldsmobile and every pre-owned vehicle is reduced!

SUSSMAN Oldsmobile

1998 OUTLASS GL

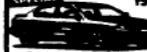


\$199

1601 Easton Road Willow Grove, PA (215) 887-1800

SUSSMAN HYUNDAI

1998 ELANTRA



\$129

1601 Easton Road Willow Grove, PA (215) 887-1800

SUSSMAN MAZDA

1998 MAZDA C26 LX



\$189

1601 Easton Road Willow Grove, PA (215) 887-1800

ACURA Pre-Moving Sale!

Sussman Acura will be moving soon to a new showroom on Easton Road in Willow Grove just below the Mall. In preparation for the move, we need to reduce our inventory of new and used automobiles. Hurry in and SAVE!

1998 ACURA INTEGRA RS



\$199

1601 Easton Road Willow Grove, PA (215) 887-1800

1998 ACURA 2.3 CL



\$279

1601 Easton Road Willow Grove, PA (215) 887-1800

1998 ACURA 2.5 TL



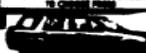
\$339

1601 Easton Road Willow Grove, PA (215) 887-1800

HONDA

OVER 150 NEW HONDAS

1998 CRV EX



\$20,495

CRV EX	CRV EX	CRV EX	CRV EX
CRV EX	CRV EX	CRV EX	CRV EX
CRV EX	CRV EX	CRV EX	CRV EX
CRV EX	CRV EX	CRV EX	CRV EX

1543 Easton Rd. Willow Grove, PA (215) 657-7050

LINCOLN Mercury

1998 LINCOLN CONTINENTAL



\$359

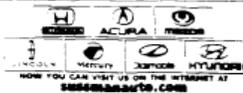
Continental	Continental	Continental	Continental
Continental	Continental	Continental	Continental
Continental	Continental	Continental	Continental
Continental	Continental	Continental	Continental

OLD YORK RD. & THE FAIRWAY (215) 884-3400

Complaint Exhibits

Exhibit B





HOW YOU CAN VISIT US ON THE INTERNET AT www.sussman.com

Grand Opening

All stores are celebrating with storewide savings!

NEW LOCATION

HYUNDAI
1st Time Buyers
Fast Credit Approval!



1998 ACCENT \$89 A MO. FOR 36 MO.!

2 Door, Front Wheel Drive, Cold Air, Side, Comprehensive Warranty

Price based on 12,000 miles per year with \$1,000 cash down. Price includes dealer ready tax, title and license and optional anti-lock. Tax & title extra. Price includes dealer ready tax.

Sussman Hyundai
2401 Easton Rd., Willow Grove, PA (215) 887-1800

WE'VE MOVED

ACURA, MAZDA, OLDSMOBILE & HYUNDAI SALES

to new showrooms on Easton Rd, 2 blocks south of the Willow Grove Mall.

NEW LOCATION

MAZDA



1998 MAZDA MILLENIA L \$239 A MO. FOR 36 MO.!

Leather interior, Power Seats, Moonroof, Traction Control, ABS, CD Player, Air, 4-Wheel Control

23 month lease based on 12,000 miles per year with \$1,000 cash down. Tax and license extra.

Sussman Mazda
1401 Easton Rd., Willow Grove, PA (215) 887-1800

NEW LOCATION

Oldsmobile



1998 INTRIGUE \$249 A MO. FOR 36 MO.!

4 Dr, V6, Power Windows, Entry, ABS, Cruise, New FRONT!

23 month lease based on 12,000 miles per year with \$1,000 cash down. Tax and license extra.

Sussman Oldsmobile
1401 Easton Rd., Willow Grove, PA (215) 887-1800

Over 600

New & Used Vehicles to select from on one convenient stretch of Easton Rd. So many cars people are calling it Sussman City.

NEW LOCATION

ACURA



1998 ACURA INTEGRA \$199 A MO. FOR 36 MO.!

4 Dr, V6, Power Windows, Entry, ABS, Cruise, New FRONT!

23 month lease based on 12,000 miles per year with \$1,000 cash down. Tax and license extra.

Sussman Acura
1401 Easton Rd., Willow Grove, PA (215) 887-1800



1998 ACURA INTEGRA	1998 ACURA INTEGRA	1998 ACURA INTEGRA	1998 ACURA INTEGRA
\$199	\$199	\$199	\$199
1998 ACURA INTEGRA	1998 ACURA INTEGRA	1998 ACURA INTEGRA	1998 ACURA INTEGRA
\$199	\$199	\$199	\$199

1998 ACURA INTEGRA	1998 ACURA INTEGRA	1998 ACURA INTEGRA	1998 ACURA INTEGRA
\$199	\$199	\$199	\$199
1998 ACURA INTEGRA	1998 ACURA INTEGRA	1998 ACURA INTEGRA	1998 ACURA INTEGRA
\$199	\$199	\$199	\$199

HONDA
Member of Triple A & Sam's Buying Club



1998 ACCORD LX SEDAN \$16,995

3 Speed, Air, P.S., P.W., P.M.S., T.B. Wheel, Cruise, Cassette Player

IN STOCK NOW

1998 ACCORD EX 4 Door V6 Sedan

Sussman Honda
1543 Easton Rd., Willow Grove, PA (215) 677-7050

LINCOLN Mercury



1998 MERCURY SABLE LS \$269 A MONTH FOR 24 MONTHS!

Leather, Automatic, Air Cond., Moonroof, ABS, P.S., P.W., P.M.S., T.B. Wheel, Cassette Player

1.75% Financing Available

IN STOCK NOW

1999 MERCURY COUGAR

Sussman Lincoln Mercury
Old York Rd. & The Fairway Jenkintown, PA (215) 884-3400

Decision and Order

DECISION AND ORDER

The Federal Trade Commission having initiated an investigation of certain acts and practices of the respondents named in the caption hereof, and the respondents having been furnished thereafter with a copy of a draft of complaint which the Bureau of Consumer Protection proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge the respondents with violations of the Federal Trade Commission Act, 15 U.S.C. §§ 45-58, as amended, the Consumer Leasing Act, 15 U.S.C. §§ 1667-1667f, as amended, and its implementing Regulation M, 12 C.F.R. § 213, as amended, and the Truth in Lending Act, 15 U.S.C. §§ 1601-1667, as amended, and its implementing Regulation Z, 12 C.F.R. § 226, as amended; and

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

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

Decision and Order

1. Respondent Marty Sussman Organization, Inc. is a Pennsylvania corporation with its principal office or place of business at Jenkintown & Baeder Roads, Jenkintown, Pennsylvania 19046.
2. Respondent Martin E. Sussman is an officer of the corporate respondent. Individually or in concert with others, he formulates, directs, or controls the policies, acts, or practices of the corporation. His principal office or place of business is the same as that of the corporate respondent.
3. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondents, and the proceeding is in the public interest.

ORDER**DEFINITIONS**

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

1. "Clearly and conspicuously" shall mean as follows:
 - a. In a television, video, radio, or Internet or other electronic advertisement, an audio disclosure shall be delivered in a volume, cadence, and location sufficient for an ordinary consumer to hear and comprehend it. A video disclosure shall be of a size and shade, and shall appear on the screen for a duration and in a location, sufficient for an ordinary consumer to read and comprehend it.

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- b. In a print advertisement, a disclosure shall be in a type size and location sufficiently noticeable for an ordinary consumer to read and comprehend it, in print that contrasts with the background against which it appears.

The disclosure shall be in understandable language and syntax. Nothing contrary to, inconsistent with, or in mitigation of the disclosure shall be used in any advertisement.

2. "Equal prominence" shall mean as follows:
 - a. In a television, video, radio, or Internet or other electronic advertisement, a video disclosure shall be presented in the same or similar format, including but not necessarily limited to type size, shade, contrast, duration, and placement. An audio disclosure shall be delivered in the same or similar manner, including but not necessarily limited to volume, cadence, pace, and placement.
 - b. In a print advertisement, a disclosure shall be presented in the same or similar format, including but not necessarily limited to type size, shade, contrast, and placement.

Nothing contrary to, inconsistent with, or in mitigation of the disclosure shall be used in any advertisement.

3. "Total amount due at lease signing or delivery" as used herein shall mean the total amount of any initial payments required to be paid by the lessee on or before consummation of the lease or delivery of the vehicle, whichever is later, as required by Regulation M, 12 C.F.R. § 213, as amended. The total amount due at lease signing or delivery may 1) exclude third-party fees, such as taxes, licenses, and registration fees, and

Decision and Order

disclose that fact or 2) provide a total that includes third-party fees based on a particular state or locality as long as that fact and the fact that such fees may vary by state or locality are disclosed. (Section 213.7 of Regulation M, 12 C.F.R. § 213.7, as amended.)

4. "Commerce" shall mean as defined in Section 4 of the Federal Trade Commission Act, 15 U.S.C. § 44.
5. Unless otherwise specified, "respondents" shall mean Marty Sussman Organization, Inc., a corporation, its successors and assigns and its officers; Martin E. Sussman, individually and as an officer of the corporation; and each of the above's agents, representatives, and employees.

I.

IT IS ORDERED that respondents, directly or through any corporation, subsidiary, division, or any other device, in connection with any advertisement to promote, directly or indirectly, any consumer lease in or affecting commerce, as "advertisement" and "consumer lease" are defined in Section 213.2 of Regulation M, 12 C.F.R. § 213.2, as amended, shall not, in any manner, expressly or by implication:

- A. Make any reference to any charge that is part of the total amount due at lease signing or delivery or that no such charge is required, not including a statement of the periodic payment, unless the advertisement also states with equal prominence the total amount due at lease signing or delivery.
- B. State the amount of any payment or that any or no initial payment is required at lease signing or delivery, if delivery occurs after consummation, without

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disclosing clearly and conspicuously all of the terms required by Regulation M, as follows:

1. that the transaction advertised is a lease;
2. the total amount due at lease signing or delivery;
3. whether or not a security deposit is required;
4. the number, amounts, and timing of scheduled payments; and
5. that an extra charge may be imposed at the end of the lease term in a lease in which the liability of the consumer at the end of the lease term is based on the anticipated residual value of the vehicle.

(Section 184(a) of the Consumer Leasing Act (“CLA”), 15 U.S.C. § 1667c(a), as amended, and Section 213.7 of Regulation M, 12 C.F.R. § 213.7, as amended.)

For radio advertisements, respondents may also comply with the requirements of this subparagraph by utilizing Section 184(c) of the CLA, 15 U.S.C. § 1667c(C), and Section 213.7(f) of Regulation M, 12 C.F.R. § 213.7(f), as amended. For television advertisements, respondents may also comply with the requirements of this subparagraph by utilizing Section 213.7(f) of Regulation M, as amended.

- C. Fail to comply in any other respect with Regulation M, 12 C.F.R. § 213, as amended, and the CLA, 15 U.S.C. §§ 1667-1667f, as amended.

Decision and Order

II.

IT IS FURTHER ORDERED that respondents, directly or through any corporation, subsidiary, division, or any other device, in connection with any advertisement to promote, directly or indirectly, any extension of consumer credit in or affecting commerce, as “advertisement” and “consumer credit” are defined in Section 226.2 of Regulation Z, 12 C.F.R. § 226.2, as amended, shall not, in any manner, expressly or by implication:

- A. State the amount or percentage of any downpayment, the number of payments or period of repayment, the amount of any payment, or the amount of any finance charge, without disclosing clearly and conspicuously all of the terms required by Regulation Z, as follows:
1. the amount or percentage of the downpayment;
 2. the terms of repayment; and
 3. the correct annual percentage rate, using that term or the abbreviation “APR.” If the annual percentage rate may be increased after consummation of the credit transaction, that fact must also be disclosed.

(Sections 107 and 144(d) of the TILA, 15 U.S.C. §§ 1606 and 1664(d), as amended, and Sections 226.22 and 226.24(c) of Regulation Z, 12 C.F.R. §§ 226.22 and 226.24(c), as amended.)

- B. State a rate of finance charge without stating the rate as an “annual percentage rate” or the abbreviation “APR,” using that term.

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- C. Fail to comply in any other respect with Regulation Z, 12 C.F.R. § 226, as amended, and the TILA, 15 U.S.C. §§ 1601-1667, as amended.

III.

IT IS FURTHER ORDERED that respondent Marty Sussman Organization, Inc., and its successors and assigns, and respondent Martin E. Sussman 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 all records that will demonstrate compliance with the requirements of this order.

IV.

IT IS FURTHER ORDERED that respondent Marty Sussman Organization, Inc., and its successors and assigns, and respondent Martin E. Sussman shall deliver a copy of this order to all current and future principals, officers, directors, and managers, and to all current and future employees, agents, and representatives having responsibilities with respect to the subject matter of this order, and shall secure from each such person a signed and dated statement acknowledging receipt of the order. Respondents shall deliver this order to such current personnel within thirty (30) days after the date of service of this order, and to such future personnel within thirty (30) days after the person assumes such position or responsibilities.

V.

IT IS FURTHER ORDERED that respondent Marty Sussman Organization, Inc., and its successors and assigns, shall notify the Commission at least thirty (30) days prior to any change in the corporation that may affect compliance obligations arising under this order, including but not necessarily limited to a dissolution, assignment, sale, merger, or other action that would result in the emergence of a successor corporation; the creation or

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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. 20580.

VI.

IT IS FURTHER ORDERED that respondent Martin E. Sussman, for a period of ten (10) years after the date of issuance of this order, shall notify the Commission of the discontinuance of his current business or employment, or of his affiliation with any new business or employment involving the advertising and/or extension of a “consumer lease,” as that term is defined in the CLA and its implementing Regulation M, or the advertising and/or extension of “consumer credit,” as that term is defined in the TILA and its implementing Regulation Z. The notice shall include respondent's new business address and telephone number and a description of the nature of the business or employment and his duties and responsibilities. All notices required by this Part shall be sent by certified mail to the Associate Director, Division of Enforcement, Bureau of Consumer Protection, Federal Trade Commission, Washington, D.C. 20580.

VII.

IT IS FURTHER ORDERED that respondent Marty Sussman Organization, Inc., and its successors and assigns, and respondent Martin E. Sussman shall, within sixty (60) days after the date of service of this order, and at such other times as the

Decision and Order

Federal Trade Commission may require, file with the Commission a report, in writing, setting forth in detail the manner and form in which they have complied with this order.

VIII.

This order will terminate on February 7, 2020, 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 respondents 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.

By the Commission.

Analysis to Aid Public Comment

ANALYSIS OF PROPOSED CONSENT ORDERS TO AID PUBLIC COMMENT

Summary

The Federal Trade Commission has accepted separate agreements, subject to final approval, orders from respondents Dunphy Nissan, Inc. and Serge Naumovsky (“Dunphy”); Norristown Automobile Co., Inc. and William Milliken (“Norristown”); Northeast Auto Outlet, Inc. and Arthur Micchelli (“Northeast”); Pacifico Ardmore, Inc. and Kerry J. Pacifico (“Pacifico Ardmore”); Pacifico Ford, Inc. and Kerry T. Pacifico (“Pacifico Ford”); and Marty Sussman Organization, Inc. and Martin E. Sussman (“Sussman”)(together “respondents”). The persons named in these actions are named individually and as officers of their respective corporations.

The proposed consent orders have been placed on the public record for sixty (60) days for receipt of comments by interested persons. Comments received during this period will become part of the public record. After sixty (60) days, the Commission will again review the agreements and the comments received and will decide whether it should withdraw from the agreement or make final the agreements' proposed orders.

I. Complaint Allegations

A. FTC Act Violations

The complaints against the respondents allege that their automobile lease advertisements violate the Federal Trade Commission Act (“FTC Act”), the Consumer Leasing Act (“CLA”), and Regulation M. The complaints also allege that respondents' credit advertisements have violated the Truth in Lending Act (“TILA”) and Regulation Z. Section 5 of the FTC Act prohibits false, misleading, or deceptive representations or

Analysis to Aid Public Comment

omissions of material information in advertisements. In addition, Congress established statutory disclosure requirements for lease and credit advertising under the CLA and the TILA, respectively, and directed the Federal Reserve Board ("Board") to promulgate regulations implementing such statutes -- Regulations M and Z respectively. *See* 15 U.S.C. §§ 1601-1667e; 12 C.F.R. Part 213; 12 C.F.R. Part 226.

The complaints against respondents allege that their lease advertisements represent that consumers can lease the advertised vehicles at the terms prominently stated in the advertisements, including but not necessarily limited to the monthly payment amount and the downpayment amount. These lease advertisements, according to the complaints, have failed to disclose, and/or failed to disclose adequately, additional terms pertaining to the lease offer, such as the total amount due at lease inception. The complaints allege that this information does not appear at all or appears in fine print in the advertisements and that the information would be material to consumers in deciding whether to visit respondents' dealerships and/or whether to lease an automobile from respondents. These practices, according to the complaints, constitute deceptive practices in violation of Section 5(a) of the FTC Act.

The complaints against Dunphy and Northeast also allege that these respondents misrepresent that consumers can purchase the advertised vehicles for the monthly payment amounts prominently stated in the advertisements. According to the complaints, the monthly payment amounts prominently stated in the advertisements are components of lease offers and not credit offers. These practices, according to the complaints, constitute deceptive practices in violation of Section 5(a) of the FTC Act.

The complaint against Dunphy further alleges that Dunphy misrepresents that the amount stated as "down" or "downpayment" is the total amount consumers must pay at lease inception to lease the advertised vehicles. According to the complaint, however, consumers are required to pay additional fees beyond the amount

Analysis to Aid Public Comment

stated as “down” or “downpayment,” including but not limited to the first month's payment, a security deposit, and/or a bank fee. This practice, according to the complaint, constitutes a deceptive practice in violation of Section 5(a) of the FTC Act.

The complaint against Northeast also alleges that Northeast misrepresents that the offer to double consumers' downpayments up to \$4,000 applied to the lease or credit offers advertised. According to the complaint, the offer to double consumers' downpayments up to \$4,000 was not available with the advertised lease or credit offers. This practice, according to the complaint, constitutes a deceptive practice in violation of Section 5(a) of the FTC Act.

The complaints against Dunphy, Northeast, Norristown, and Pacifico Ardmore allege that their credit advertisements represent that consumers can purchase the advertised vehicles at the terms prominently stated in the advertisements, including but not necessarily limited to the sales price and/or downpayment amount. According to the complaints, these credit advertisements fail to disclose additional terms pertaining to the credit offer, such as the terms of repayment and the annual percentage rate. Such information is alleged to be material to consumers in deciding whether to visit respondents' dealerships and/or whether to purchase an automobile from respondents. These practices, according to the complaints, constitute deceptive practices in violation of Section 5(a) of the FTC Act.

B. CLA and Regulation M Violations

The complaints allege that all respondents violated the CLA and Regulation M. The complaints allege that respondents' lease ads state a monthly payment amount and/or downpayment amount, but fail to disclose, and/or fail to disclose clearly and conspicuously, one or more of the following required terms: that the transaction advertised is a lease; the total amount due prior to

Analysis to Aid Public Comment

or at consummation, or by delivery, if delivery occurs after consummation and that such amount: 1) excludes third-party fees that vary by state or locality, such as taxes, licenses, and registration fees, and discloses that fact or 2) includes third-party fees based on a particular state or locality and discloses that fact and the fact that such fees may vary by state or locality; whether or not a security deposit is required; the number, amounts, and timing of scheduled payments; and that an extra charge may be imposed at the end of the lease term in a lease where the liability of the consumer is based on the difference between the residual value of the leased property and its realized value at the end of the lease term.

According to the complaints, the lease disclosures in respondents' lease advertisements are not clear and conspicuous because they appear in fine print and/or in an inconspicuous location. These practices, according to the complaints, violate the advertising requirements of the CLA and Regulation M

The complaints also allege that respondents' lease advertisements state a downpayment amount more prominently than the disclosure of the total amount due at lease signing. According to the complaints, these practices violate Regulation M.

C. TILA and Regulation Z Violations

The complaints against Dunphy, Norristown, Northeast, Pacifico Ardmore, and Pacifico Ford allege that these respondents violated the TILA and Regulation Z. According to the complaints, these respondents state a monthly payment amount and/or a downpayment amount as terms for financing the purchase of the advertised vehicles, but fail to disclose the following items of information required by Regulation Z: the annual percentage rate and the terms of repayment. In addition, the complaints against all respondents allege that their credit ads do not properly state the finance charge as the annual percentage rate, as required by Regulation Z.

Analysis to Aid Public Comment

II. Proposed Orders

The proposed orders prohibit respondents from disseminating advertisements that state the amount of any payment due at inception (excluding the monthly payment amount) or the fact that any or no inception payment is due without also disclosing with “equal prominence” the total amount a consumer must pay at lease signing or delivery. This requirement parallels an identical requirement found in Regulation M.

The proposed orders also prohibit respondents from disseminating advertisements that state the amount of any payment or that any or no initial payment is required at lease signing or delivery, if delivery occurs after consummation, without disclosing clearly and conspicuously all of the terms required by Regulation M, as follows: that the transaction advertised is a lease; the total amount due at lease signing or delivery; whether or not a security deposit is required; the number, amounts, and timing of scheduled payments; and that an extra charge may be imposed at the end of the lease term in a lease in which the liability of the consumer at the end of the lease term is based on the anticipated residual value of the vehicle. This requirement is intended to enjoin the respondents from deceptively advertising only the most attractive portions of its lease offers by requiring clear and conspicuous disclosure of the information necessary for consumers to make informed decisions about advertised lease offers. This paragraph parallels the advertising disclosure requirements from the CLA and Regulation M. The proposed orders also prohibit respondents from violating the CLA and Regulation M.

In addition, the proposed order for Dunphy prohibits Dunphy from misrepresenting the costs of leasing, including the total due at lease inception. The proposed orders for respondents Dunphy and Northeast prohibit these respondents from misrepresenting

Analysis to Aid Public Comment

that advertised terms apply to a cash or credit offer, when, in fact, the terms apply to an offer to lease the advertised vehicle. The proposed order for Northeast also prohibits Northeast from misrepresenting the availability of any advertised offer.

With respect to credit advertisements, the proposed orders prohibit respondents from stating the amount or percentage of any downpayment, the number of payments or period of repayment, the amount of any payment, or the amount of any finance charge, without disclosing clearly and conspicuously all of the terms required by Regulation Z, as follows: the amount or percentage of the downpayment; the terms of repayment; and the correct annual percentage rate, using that term or the abbreviation "APR." If the annual percentage rate may be increased after consummation of the credit transaction, that fact must also be disclosed.

The proposed orders also prohibit respondents from stating a rate of finance charge without stating the rate as an "annual percentage rate" or "APR." The proposed orders also prohibit all respondents from violating the TILA or Regulation Z.

The purpose of this analysis is to facilitate public comment on the proposed orders, and it is not intended to constitute an official interpretation of the agreements and proposed orders or to modify in any way their terms.

Complaint

IN THE MATTER OF

PACIFICO FORD, INC., ET AL.

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATIONS OF
SEC. 5 OF THE FEDERAL TRADE COMMISSION ACT, THE
CONSUMER LEASING ACT, AND THE TRUTH IN LENDING ACT

Docket C-3921; File No. 992 3079
Complaint, February 7, 2000 – Decision, February 7, 2000

This consent order prohibits respondents from disseminating advertisements that state the amount of any payment due at inception (excluding the monthly payment amount) or the fact that any or no inception payment is due without also disclosing with “equal prominence” the total amount a consumer must pay at lease signing or delivery. The consent orders also prohibit respondents from disseminating advertisements that state the amount of any payment or that any or no initial payment is required at lease signing or delivery, if delivery occurs after consummation, without disclosing clearly and conspicuously all of the terms required, that the transaction advertised is a lease; the total amount due at lease signing or delivery; whether or not a security deposit is required; the number, amounts, and timing of scheduled payments; and that an extra charge may be imposed at the end of the lease term in a lease in which the liability of the consumer at the end of the lease term is based on the anticipated residual value of the vehicle. With respect to credit advertisements, the proposed orders prohibit respondents from stating the amount or percentage of any down payment, the number of payments or period of repayment, the amount of any payment, or the amount of any finance charge, without disclosing clearly and conspicuously all of the terms, the amount or percentage of the down payment; the terms of repayment; and the correct annual percentage rate, using that term or the abbreviation “APR.” If the annual percentage rate may be increased after consummation of the credit transaction, that fact must also be disclosed. The consent orders also prohibit respondents from stating a rate of finance charge without stating the rate as an “annual percentage rate” or “APR.”

Participants

For the Commission: *Rolando Berrelez, David Medine, and Sally Forman Pitofsky.*

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For the Respondents: *Richard A. Sprague, Sprague & Sprague.*

COMPLAINT

The Federal Trade Commission, having reason to believe that Pacifico Ford, Inc., a corporation, and Kerry T. Pacifico, individually and as an officer of the corporation (“respondents”), have violated the provisions of the Federal Trade Commission Act, 15 U.S.C. §§ 45-58, as amended, the Consumer Leasing Act, 15 U.S.C. §§ 1667-1667f, as amended, and its implementing Regulation M, 12 C.F.R. § 213, as amended, and the Truth in Lending Act, 15 U.S.C. §§ 1601-1667, as amended, and its implementing Regulation Z, 12 C.F.R. § 226, as amended, and it appearing to the Commission that this proceeding is in the public interest, alleges:

1. Respondent Pacifico Ford, Inc. is a Pennsylvania corporation with its principal office or place of business at 6701 Essington Avenue, Philadelphia, Pennsylvania 19153. Respondent offers automobiles for sale or lease to consumers.

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

3. Respondents have disseminated advertisements to the public that promote consumer leases, as the terms “advertisement” and “consumer lease” are defined in Section 213.2 of Regulation M, 12 C.F.R. § 213.2, as amended.

4. Respondents have disseminated advertisements to the public that promote credit sales and other extensions of closed-end credit in consumer credit transactions, as the terms

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“advertisement,” “credit sale,” and “consumer credit” are defined in Section 226.2 of Regulation Z, 12 C.F.R. § 226.2, as amended.

5. The acts and practices of respondents alleged in this complaint have been in or affecting commerce, as “commerce” is defined in Section 4 of the Federal Trade Commission Act, 15 U.S.C. § 44.

6. Respondents have disseminated or have caused to be disseminated advertisements promoting consumer leases (“lease advertisements”) and credit sales (“credit advertisements”) for automobiles, including but not necessarily limited to the attached Pacifico Ford Exhibit A and B. Pacifico Ford Exhibits A and B are advertisements in the print media. These lease and/or credit advertisements contain the following statements:

- A. [Pacifico Ford Exhibit A states several lease and credit offers, including:]

“NEW ‘99 FORD TAURUS LX. . .
1.9%
Financing up
to 36 mos.

BUY FOR \$15,995

LEASE FOR: OR \$199 A MO.
FOR 36 MOS.. . .

NEW ‘99 FORD WINDSTAR . . .

BUY FOR \$21,999

OR LEASE FOR \$229 A MO. FOR
36 MOS.

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0.9% FINANCING UP TO 48 MONTHS TO
QUALIFIED BUYERS . . .”

[A fine print disclosure at the bottom of the ad states, “. . . All leases 36 mo. cel with \$2,500 down cash or trade. 1st mo. pymt., ref., sec.dep., bank fee, plus tax & tags.] (Pacifco Ford Exhibit A)

B. [Pacifco Ford Exhibit B states several lease offers including:]

“FACTORY AUTHORIZED CLEARANCE. . .
ALL NEW 1998 TAURUS YOU GET \$750
REBATE AND 0.9% FINANCING . . .

98 EXPLORER XLT 4X4 . . .

BUY	\$26,998	OR	\$369	PER MO.
FOR		LEASE		36 MOS.
		FOR		***”

[A fine print disclosure at the bottom of the ad states, “*** 36 Mo. Closed End Lease, Due at inception \$2,500 down cash or trade, 1st mo. payment, ref.sec.dep., bank fee (if req.) Tax & Tags Extra to qualified buyers.”] (Pacifco Ford Exhibit B)

FEDERAL TRADE COMMISSION ACT VIOLATIONS

COUNT I: FAILURE TO DISCLOSE, AND/OR FAILURE TO DISCLOSE ADEQUATELY, LEASE TERMS

7. In lease advertisements, including but not necessarily limited to Pacifco Ford Exhibits A and B, respondents have represented, expressly or by implication, that consumers can lease the advertised vehicles at the terms prominently stated in the advertisements, including but not necessarily limited to the monthly payment amount.

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8. These lease advertisements have failed to disclose, and/or failed to disclose adequately, additional terms pertaining to the lease offer, such as the total amount due at lease inception. This information either does not appear at all or appears in fine print in the advertisements. This information would be material to consumers in deciding whether to visit respondents' dealerships and/or whether to lease an automobile from respondents. The failure to disclose, and/or failure to disclose adequately, these additional terms, in light of the representation made, was, and is, a deceptive practice.

9. Respondents' practices constitute deceptive acts or practices in or affecting commerce in violation of Section 5(a) of the Federal Trade Commission Act, 15 U.S.C. § 45(a).

**CONSUMER LEASING ACT AND REGULATION M
VIOLATIONS**

**COUNT II: FAILURE TO DISCLOSE, AND/OR FAILURE
TO DISCLOSE CLEARLY AND CONSPICUOUSLY,
REQUIRED INFORMATION**

10. Respondents' lease advertisements, including but not necessarily limited to Pacifico Ford Exhibits A and B, state a monthly payment amount, but fail to disclose, and/or fail to disclose clearly and conspicuously, certain additional terms required by the Consumer Leasing Act and Regulation M, including one or more of the following terms:

- a. that the transaction advertised is a lease;
- b. the total amount due prior to or at consummation, or by delivery, if delivery occurs after consummation. This total amount may: 1) exclude third-party fees that vary by state or locality, such as taxes, licenses, and registration fees, and disclose that fact or 2) provide a

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total that includes third-party fees based on a particular state or locality as long as that fact and the fact that such fees may vary by state or locality are disclosed;

- c. whether or not a security deposit is required;
- d. the number, amounts, and timing of scheduled payments; and
- e. that an extra charge may be imposed at the end of the lease term in a lease where the liability of the consumer is based on the difference between the residual value of the leased property and its realized value at the end of the lease term.

11. The lease disclosures required by Regulation M, if provided, are not clear and conspicuous because they appear in fine print and/or in an inconspicuous location.

12. Respondents' practices have violated Section 184 of the Consumer Leasing Act, 15 U.S.C. § 1667c, and Section 213.7 of Regulation M, 12 C.F.R. § 213.7.

**COUNT III: FAILURE TO DISCLOSE THE TOTAL
AMOUNT DUE AT LEASE SIGNING WITH EQUAL
PROMINENCE**

13. Respondents' lease advertisements, including but not necessarily limited to Pacifico Ford Exhibits A and B, state a downpayment amount more prominently than the disclosure of the total amount due at lease signing, in violation of Section 213.7(b)(1) of Regulation M, 12 C.F.R. § 213.7(b)(1).

14. Respondents' practices have violated Section 213.7(b)(1) of Regulation M, 12 C.F.R. § 213.7(b)(1).

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**TRUTH IN LENDING ACT AND REGULATION Z
VIOLATIONS****COUNT IV: FAILURE TO DISCLOSE REQUIRED
INFORMATION**

15. In credit advertisements, including but not necessarily limited to Pacifico Ford Exhibit A, respondents have stated the period of repayment, but have failed to disclose clearly and conspicuously, the following items of information required by Regulation Z: the amount or percentage of the downpayment, the terms of repayment, and/or the annual percentage rate.

16. Respondents' practices have violated Section 144 of the Truth in Lending Act, 15 U.S.C. § 1664, and Section 226.24(c) of Regulation Z, 12 C.F.R. § 226.24(c).

**COUNT V: FAILURE TO STATE RATE OF FINANCE
CHARGE AS ANNUAL PERCENTAGE RATE**

17. In credit advertisements, including but not necessarily limited to Pacifico Ford Exhibits A and B, respondents have stated a rate of finance charge without stating that rate as an "annual percentage rate," using that term or the abbreviation "APR."

18. Respondents' practice constitutes a violation of Section 144 and 107 of the TILA, 15 U.S.C. §§ 1664 and 1606, respectively, and Sections 226.24(b) and 226.22 of Regulation Z, 12 C.F.R. §§ 226.24(b) and 226.22, respectively.

THEREFORE, the Federal Trade Commission this seventh day of February, 2000, has issued this complaint against respondents.

By the Commission.

Complaint Exhibits

Exhibit A

WE'RE CLOSING OUT 1998 WITH THE... BIGGEST SAVINGS BLAST OF THE YEAR!

NEW '99 FORD TAURUS LX
V6 Auto, CD, P.S., P.B. & MORE! Stock #11208

TOTAL SAVINGS \$2,051

BUY FOR \$15,995

OR **LEASE FOR \$199** A MO. FOR 36 MO.

RETAIL PRICE \$18,050
FORD REBATE \$500
PACIFIC DISC. \$1,551
SALE PRICE \$15,999

ONLY AT PACIFICO WILL YOU GET 1.9% FINANCING AND THE REBATE ON ALL NEW 1999 FORD TAURUS LX MODELS

NEW '99 FORD ESCORT ZX3 COUPE
2.0L 16V, 164 Color, City, AUTO/MAT, 1541 Year Math, Anti-Hair/Nerote Entry, P.S., Air, AM/FM Stereo Cass. Stock #119222

TOTAL SAVINGS \$1,878

BUY FOR \$12,697

OR **LEASE FOR \$129** A MO. FOR 36 MO.

RETAIL PRICE \$14,575
FORD DISCOUNT \$1,000
PACIFIC DISC. \$878
SALE PRICE \$12,697

INVENTORIES ARE AT AN ALL TIME HIGH. WE MUST SELL 100 VEHICLES THIS WEEK REGARDLESS OF PROFIT!

TRUCK HEADQUARTERS

NEW '99 FORD CONTOUR LX
4 Cylinder, Automatic, CD, R.D.W., AM/FM Stereo Cass., P.W., P.D.L. Stock #128163

TOTAL SAVINGS \$2,241

BUY FOR \$13,999

OR **LEASE FOR \$199** A MO. FOR 36 MO.

RETAIL PRICE \$16,240
FORD REBATE \$500
PACIFIC DISC. \$1,741
SALE PRICE \$13,999

ALL SALE PRICES WITH NO MONEY DOWN

0.9% FINANCING UP TO 48 MONTHS TO QUALIFIED BUYERS

NEW '99 FORD F150 RITZLEHIDE PICK-UP
V-6 Engine, 5-Speed CD, Heavy Duty, 17 Windows, Air, AM/FM Stereo, P.S., Steering, P.B., 5th, 4x2, 3.0L

TOTAL SAVINGS \$2,616

BUY FOR \$13,999

OR **LEASE FOR \$129** A MO. FOR 36 MO.

RETAIL PRICE \$16,615
FORD DISCOUNT \$1,000
PACIFIC DISC. \$1,016
SALE PRICE \$13,999

NEW '99 FORD WINDSTAR
2.0L Auto, CD, 7 Passenger, Cloth, 16, New, Right Hand/Left Hand, 15" Alloy Wheels, 2nd/3rd row privacy glass, P.S., Air, Stk. #108295

TOTAL SAVINGS \$4,196

BUY FOR \$21,999

OR **LEASE FOR \$229** A MO. FOR 36 MO.

RETAIL PRICE \$26,195
FORD DISCOUNT \$900
FORD REBATE \$1,000
PACIFIC DISC. \$821
SALE PRICE \$21,999

NEW '99 FORD EXPLORER 4WD
V6 Auto, All Terrain Tires, AM/FM Stereo & Cass., CD, Day After Chrome Wheels, Fog Lamps, 802943

TOTAL SAVINGS \$3,771

BUY FOR \$24,999

OR **LEASE FOR \$269** A MO. FOR 36 MO.

RETAIL PRICE \$28,770
FORD DISCOUNT \$1,200
PACIFIC DISC. \$821
SALE PRICE \$24,999

RECEIVE A 4 DAY-3 NIGHT FAMILY VACATION TO ONE OF THE FOLLOWING SUN-FILED DESTINATIONS:

- MYRTLE BEACH
- ORLANDO
- MONTREAL
- POCONOS
- VIRGINIA BEACH
- STANTON
- WILLIAMSBURG, VA

4 DAY - 3 NIGHT COMPLIMENTARY VACATION With Every New Escort/Taurus Purchase (thru 12/31/98)

Bad Credit? No Problem! CALL MRS. HENDERSON 215-492-1700 EXT. 268 For Pacifco's Credit Connection

ALL NEW TAURUS SHO MODELS 4 TO CHOOSE FROM! MINIMUM DISC \$4,500

On all Newer SHO's in Stock! For a limited time!

Philadelphin Airport Automall

Pacifco Ford

6701 ESSINGTON AVE. (215) 492-1700 Pacifco

All Sale Prices include all rebates including fact, and/or direct mail rebates. All leases 36 mo. call with \$5,000 down cash or trade in (no form, not req. dep. base fee, plus tax & reg. - 12¢ miles per year. Tax coverage to qualified buyers. Vacation for 2 adults, children stay free. Vacation must be used within 1 year and does not include airfare. Offer expires 7 days from publication date.

ONLY 0% SALES TAX TO NON-CITY RESIDENCE VISIT US AT OUR WEB SITE: <http://www.pacifcoford.com>

Pacifco Ford Exhibit A

Complaint Exhibits

Exhibit B

08-MW The Philadelphia Inquirer Sunday, August 9, 1998

SEDAN HEAD QUARTERS

'98 ESCORT LX SAVE \$2,177

1.8L 100hp 5-Speed Manual Trans. Front/Power Floor Mats, PDR, AM/FM Stereo, Cass. Deck/VCR, Lock/Track Buckle-Beats. VIN #8P9W0203

RETAIL PRICE	\$12,175
FORD REBATE	\$1,000
PACIFICO DISCOUNT	\$1,177
SALE PRICE	\$10,000

BUY FOR: **\$9,988** OR LEASE FOR: **\$139** PER MO. 36 MOS.

ALL SALE PRICES WITH NO MONEY DOWN!

FACTORY AUTHORIZED

'98 F-150 STYLESIDE SAVE \$2,207

PEP #P80A, 4.3L 111hp Eng. 5-Speed Manual 4x4 Trans. Heavy Duty Winch, Backup, Cass. Deck, AM/FM, Cass. Deck, VIN #1WMC31467

RETAIL PRICE	\$16,700
PACIFICO DISC.	\$1,200
SALE PRICE	\$15,500

BUY FOR: **\$14,498** OR LEASE FOR: **\$169** PER MO. 36 MOS.

TRUCK HEAD QUARTERS

BUY A NEW ESCORT IN AUGUST & GET A FREE VACUUM!
*See Salesperson for Details.

CLEARANCE

'98 CONTOUR LX SAVE \$2,542

2.0L DOHC 4-Cyl. Eng. 5-Speed 5-SP. Trans. AM/COM. 17" Wheel, Carpeted Floor Mats, PDR, AM/FM Stereo, Cass. Deck, PDR, VIN #1W03346

RETAIL PRICE	\$16,300
FORD REBATE	\$1,000
PACIFICO DISCOUNT	\$1,542
SALE PRICE	\$13,800

BUY FOR: **\$13,698** OR LEASE FOR: **\$179** PER MO. 36 MOS.

ALL NEW 1998 TAURUS

YOU GET BOTH \$750 REBATE AND 0.9% FINANCING

Bad Credit No Problem! Call 1-888-LOANCAR 1-888-562-6227 For Pacifico's Credit Connection

'98 F-150 SUPERCAB 4x4 SAVE \$3,117

PEP #P80A, 4.3L 111hp Eng. 5-Speed Manual 4x4 Trans. Eng. Heavy Duty Winch, Fog Lamps, Alarm W/Wh. 4.5M AM/FM Stereo, VIN #1W03346

RETAIL PRICE	\$28,715
FORD INDOOR	\$1,500
SALE PRICE	\$27,215

BUY FOR: **\$24,598** OR LEASE FOR: **\$239** PER MO. 36 MOS.

'98 TAURUS LX SAVE \$3,897

2.0L 107hp Eng. AUTOMATIC 5-SP. TRANS. Fuel Thr. See Back, Center Seating Console, VIN #1W03346

RETAIL PRICE	\$14,890
FORD REBATE	\$1,000
PACIFICO DISCOUNT	\$3,897
SALE PRICE	\$10,000

BUY FOR: **\$14,998** OR LEASE FOR: **\$199** PER MO. 36 MOS.

'98 CONVERSION VAN SAVE \$2,915

B-100 BCONVERSION, PEP #743A, 4.9L Eng. ABS. Stereo, 4 AL, EP1 VR Eng. Auto CO Trans. 7 Motors. 4.5M AM/FM Stereo, Cass. Deck, VIN #1W03346

RETAIL PRICE	\$27,915
FORD REBATE	\$1,000
PACIFICO DISCOUNT	\$3,415
SALE PRICE	\$23,500

BUY FOR: **\$24,998** OR LEASE FOR: **\$379** PER MO. 36 MOS.

'98 EXPLORER XLT 4x4 SAVE \$3,707

Standard, PEP #P80A, 4.5L 135hp Eng. 4-SP. Auto CO. 4WD, 4.5M AM/FM Stereo, Heavy Duty, Heavy Duty, Cass. Deck, VIN #1W03346

RETAIL PRICE	\$30,715
FORD DISCOUNT	\$1,000
PACIFICO DISCOUNT	\$4,000
SALE PRICE	\$25,715

BUY FOR: **\$26,998** OR LEASE FOR: **\$369** PER MO. 36 MOS.

Pacifico Ford **6701 ESSINGTON AVE.**

Philadelphia Airport Automall **(215) 492-1700** **Pacifico**

*In Mo. Down Payment. Due at delivery. \$750 down cash or trade. No cash payment. See us, we'll show you. Tax & Title Extra! Excludes buyers. 10.9% for 36 months. In Sales Prices includes all options including fact. and/or direct purchase.

SEE OUR WEBSITE: <http://www.pacificoford.com>

Decision and Order

DECISION AND ORDER

The Federal Trade Commission having initiated an investigation of certain acts and practices of the respondents named in the caption hereof, and the respondents having been furnished thereafter with a copy of a draft of complaint which the Bureau of Consumer Protection proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge the respondents with violations of the Federal Trade Commission Act, 15 U.S.C. §§ 45-58, as amended, the Consumer Leasing Act, 15 U.S.C. §§ 1667-1667f, as amended, and its implementing Regulation M, 12 C.F.R. § 213, as amended, and the Truth in Lending Act, 15 U.S.C. §§ 1601-1667, as amended, and its implementing Regulation Z, 12 C.F.R. § 226, as amended; and

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

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

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1. Respondent Pacifico Ford, Inc. is a Pennsylvania corporation with its principal office or place of business at 6701 Essington Avenue, Philadelphia, Pennsylvania 19153.
2. Respondent Kerry T. Pacifico is an officer of the corporate respondent. Individually or in concert with others, he formulates, directs, or controls the policies, acts, or practices of the corporation. His principal office or place of business is the same as that of the corporate respondent.
3. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondents, and the proceeding is in the public interest.

ORDER**DEFINITIONS**

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

1. "Clearly and conspicuously" shall mean as follows:
 - a. In a television, video, radio, or Internet or other electronic advertisement, an audio disclosure shall be delivered in a volume, cadence, and location sufficient for an ordinary consumer to hear and comprehend it. A video disclosure shall be of a size and shade, and shall appear on the screen for a duration and in a location, sufficient for an ordinary consumer to read and comprehend it.

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- b. In a print advertisement, a disclosure shall be in a type size and location sufficiently noticeable for an ordinary consumer to read and comprehend it, in print that contrasts with the background against which it appears.

The disclosure shall be in understandable language and syntax. Nothing contrary to, inconsistent with, or in mitigation of the disclosure shall be used in any advertisement.

2. "Equal prominence" shall mean as follows:
 - a. In a television, video, radio, or Internet or other electronic advertisement, a video disclosure shall be presented in the same or similar format, including but not necessarily limited to type size, shade, contrast, duration, and placement. An audio disclosure shall be delivered in the same or similar manner, including but not necessarily limited to volume, cadence, pace, and placement.
 - b. In a print advertisement, a disclosure shall be presented in the same or similar format, including but not necessarily limited to type size, shade, contrast, and placement.

Nothing contrary to, inconsistent with, or in mitigation of the disclosure shall be used in any advertisement.

3. "Total amount due at lease signing or delivery" as used herein shall mean the total amount of any initial payments required to be paid by the lessee on or before consummation of the lease or delivery of the vehicle, whichever is later, as required by Regulation M, 12 C.F.R. § 213, as amended. The total amount due at lease signing or delivery may 1) exclude third-party fees, such as taxes, licenses, and registration fees, and

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disclose that fact or 2) provide a total that includes third-party fees based on a particular state or locality as long as that fact and the fact that such fees may vary by state or locality are disclosed. (Section 213.7 of Regulation M, 12 C.F.R. § 213.7, as amended.)

4. "Commerce" shall mean as defined in Section 4 of the Federal Trade Commission Act, 15 U.S.C. § 44.
5. Unless otherwise specified, "respondents" shall mean Pacifico Ford, Inc., a corporation, its successors and assigns and its officers; Kerry T. Pacifico, individually and as an officer of the corporation; and each of the above's agents, representatives, and employees.

I.

IT IS ORDERED that respondents, directly or through any corporation, subsidiary, division, or any other device, in connection with any advertisement to promote, directly or indirectly, any consumer lease in or affecting commerce, as "advertisement" and "consumer lease" are defined in Section 213.2 of Regulation M, 12 C.F.R. § 213.2, as amended, shall not, in any manner, expressly or by implication:

- A. Make any reference to any charge that is part of the total amount due at lease signing or delivery or that no such charge is required, not including a statement of the periodic payment, unless the advertisement also states with equal prominence the total amount due at lease signing or delivery.
- B. State the amount of any payment or that any or no initial payment is required at lease signing or delivery, if delivery occurs after consummation, without

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disclosing clearly and conspicuously all of the terms required by Regulation M, as follows:

1. that the transaction advertised is a lease;
2. the total amount due at lease signing or delivery;
3. whether or not a security deposit is required;
4. the number, amounts, and timing of scheduled payments; and
5. that an extra charge may be imposed at the end of the lease term in a lease in which the liability of the consumer at the end of the lease term is based on the anticipated residual value of the vehicle.

(Section 184(a) of the Consumer Leasing Act (“CLA”), 15 U.S.C. § 1667c(a), as amended, and Section 213.7 of Regulation M, 12 C.F.R. § 213.7, as amended.)

For radio advertisements, respondents may also comply with the requirements of this subparagraph by utilizing Section 184(c) of the CLA, 15 U.S.C. § 1667c(C), and Section 213.7(f) of Regulation M, 12 C.F.R. § 213.7(f), as amended. For television advertisements, respondents may also comply with the requirements of this subparagraph by utilizing Section 213.7(f) of Regulation M, as amended.

- C. Fail to comply in any other respect with Regulation M, 12 C.F.R. § 213, as amended, and the CLA, 15 U.S.C. §§ 1667-1667f, as amended.

II.

IT IS FURTHER ORDERED that respondents, directly or through any corporation, subsidiary, division, or any other device, in connection with any advertisement to promote, directly or

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indirectly, any extension of consumer credit in or affecting commerce, as “advertisement” and “consumer credit” are defined in Section 226.2 of Regulation Z, 12 C.F.R. § 226.2, as amended, shall not, in any manner, expressly or by implication:

- A. State the amount or percentage of any downpayment, the number of payments or period of repayment, the amount of any payment, or the amount of any finance charge, without disclosing clearly and conspicuously all of the terms required by Regulation Z, as follows:
 - 1. the amount or percentage of the downpayment;
 - 2. the terms of repayment; and
 - 3. the correct annual percentage rate, using that term or the abbreviation “APR.” If the annual percentage rate may be increased after consummation of the credit transaction, that fact must also be disclosed.

(Sections 107 and 144(d) of the TILA, 15 U.S.C. §§ 1606 and 1664(d), as amended, and Sections 226.22 and 226.24(c) of Regulation Z, 12 C.F.R. §§ 226.22 and 226.24(c), as amended.)
- B. State a rate of finance charge without stating the rate as an “annual percentage rate” or the abbreviation “APR,” using that term.
- C. Fail to comply in any other respect with Regulation Z, 12 C.F.R. § 226, as amended, and the TILA, 15 U.S.C. §§ 1601-1667, as amended.

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III.

IT IS FURTHER ORDERED that respondent Pacifico Ford, Inc., and its successors and assigns, and respondent Kerry T. Pacifico 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 all records that will demonstrate compliance with the requirements of this order.

IV.

IT IS FURTHER ORDERED that respondent Pacifico Ford, Inc., and its successors and assigns, and respondent Kerry T. Pacifico shall deliver a copy of this order to all current and future principals, officers, directors, and managers, and to all current and future employees, agents, and representatives having responsibilities with respect to the subject matter of this order, and shall secure from each such person a signed and dated statement acknowledging receipt of the order. Respondents shall deliver this order to such current personnel within thirty (30) days after the date of service of this order, and to such future personnel within thirty (30) days after the person assumes such position or responsibilities.

V.

IT IS FURTHER ORDERED that respondent Pacifico Ford, Inc., and its successors and assigns, shall notify the Commission at least thirty (30) days prior to any change in the corporation that may affect compliance obligations arising under this order, including but not necessarily 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

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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. 20580.

VI.

IT IS FURTHER ORDERED that respondents Kerry T. Pacifico, for a period of ten (10) years after the date of issuance of this order, shall notify the Commission of the discontinuance of his current business or employment, or of his affiliation with any new business or employment involving the advertising and/or extension of a “consumer lease,” as that term is defined in the CLA and its implementing Regulation M, or the advertising and/or extension of “consumer credit,” as that term is defined in the TILA and its implementing Regulation Z. The notice shall include respondent's new business address and telephone number and a description of the nature of the business or employment and his duties and responsibilities. All notices required by this Part shall be sent by certified mail to the Associate Director, Division of Enforcement, Bureau of Consumer Protection, Federal Trade Commission, Washington, D.C. 20580.

VII.

IT IS FURTHER ORDERED that respondent Pacifico Ford, Inc., and its successors and assigns, and respondent Kerry T. Pacifico shall, within sixty (60) days after the date of service of this order, and at such other times as the Federal Trade Commission may require, file with the Commission a report, in writing, setting forth in detail the manner and form in which they have complied with this order.

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VIII.

This order will terminate on February 7, 2020, 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 respondents 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.

By the Commission.

Analysis to Aid Public Comment

Analysis of Proposed Consent Orders to Aid Public Comment

Summary

The Federal Trade Commission has accepted separate agreements, subject to final approval, orders from respondents Dunphy Nissan, Inc. and Serge Naumovsky (“Dunphy”); Norristown Automobile Co., Inc. and William Milliken (“Norristown”); Northeast Auto Outlet, Inc. and Arthur Micchelli (“Northeast”); Pacifico Ardmore, Inc. and Kerry J. Pacifico (“Pacifico Ardmore”); Pacifico Ford, Inc. and Kerry T. Pacifico (“Pacifico Ford”); and Marty Sussman Organization, Inc. and Martin E. Sussman (“Sussman”)(together “respondents”). The persons named in these actions are named individually and as officers of their respective corporations.

The proposed consent orders have been placed on the public record for sixty (60) days for receipt of comments by interested persons. Comments received during this period will become part of the public record. After sixty (60) days, the Commission will again review the agreements and the comments received and will decide whether it should withdraw from the agreement or make final the agreements' proposed orders.

I. Complaint Allegations

A. FTC Act Violations

The complaints against the respondents allege that their automobile lease advertisements violate the Federal Trade Commission Act (“FTC Act”), the Consumer Leasing Act (“CLA”), and Regulation M. The complaints also allege that respondents' credit advertisements have violated the Truth in Lending Act (“TILA”) and Regulation Z. Section 5 of the FTC Act prohibits false, misleading, or deceptive representations or

Analysis to Aid Public Comment

omissions of material information in advertisements. In addition, Congress established statutory disclosure requirements for lease and credit advertising under the CLA and the TILA, respectively, and directed the Federal Reserve Board ("Board") to promulgate regulations implementing such statutes -- Regulations M and Z respectively. See 15 U.S.C. §§ 1601-1667e; 12 C.F.R. Part 213; 12 C.F.R. Part 226.

The complaints against respondents allege that their lease advertisements represent that consumers can lease the advertised vehicles at the terms prominently stated in the advertisements, including but not necessarily limited to the monthly payment amount and the downpayment amount. These lease advertisements, according to the complaints, have failed to disclose, and/or failed to disclose adequately, additional terms pertaining to the lease offer, such as the total amount due at lease inception. The complaints allege that this information does not appear at all or appears in fine print in the advertisements and that the information would be material to consumers in deciding whether to visit respondents' dealerships and/or whether to lease an automobile from respondents. These practices, according to the complaints, constitute deceptive practices in violation of Section 5(a) of the FTC Act.

The complaints against Dunphy and Northeast also allege that these respondents misrepresent that consumers can purchase the advertised vehicles for the monthly payment amounts prominently stated in the advertisements. According to the complaints, the monthly payment amounts prominently stated in the advertisements are components of lease offers and not credit offers. These practices, according to the complaints, constitute deceptive practices in violation of Section 5(a) of the FTC Act.

The complaint against Dunphy further alleges that Dunphy misrepresents that the amount stated as "down" or "downpayment" is the total amount consumers must pay at lease inception to lease the advertised vehicles. According to the complaint, however, consumers are required to pay additional fees beyond the amount

Analysis to Aid Public Comment

stated as “down” or “downpayment,” including but not limited to the first month's payment, a security deposit, and/or a bank fee. This practice, according to the complaint, constitutes a deceptive practice in violation of Section 5(a) of the FTC Act.

The complaint against Northeast also alleges that Northeast misrepresents that the offer to double consumers' downpayments up to \$4,000 applied to the lease or credit offers advertised. According to the complaint, the offer to double consumers' downpayments up to \$4,000 was not available with the advertised lease or credit offers. This practice, according to the complaint, constitutes a deceptive practice in violation of Section 5(a) of the FTC Act.

The complaints against Dunphy, Northeast, Norristown, and Pacifico Ardmore allege that their credit advertisements represent that consumers can purchase the advertised vehicles at the terms prominently stated in the advertisements, including but not necessarily limited to the sales price and/or downpayment amount. According to the complaints, these credit advertisements fail to disclose additional terms pertaining to the credit offer, such as the terms of repayment and the annual percentage rate. Such information is alleged to be material to consumers in deciding whether to visit respondents' dealerships and/or whether to purchase an automobile from respondents. These practices, according to the complaints, constitute deceptive practices in violation of Section 5(a) of the FTC Act.

B. CLA and Regulation M Violations

The complaints allege that all respondents violated the CLA and Regulation M. The complaints allege that respondents' lease ads state a monthly payment amount and/or downpayment amount, but fail to disclose, and/or fail to disclose clearly and conspicuously, one or more of the following required terms: that the transaction advertised is a lease; the total amount due prior to

Analysis to Aid Public Comment

or at consummation, or by delivery, if delivery occurs after consummation and that such amount: 1) excludes third-party fees that vary by state or locality, such as taxes, licenses, and registration fees, and discloses that fact or 2) includes third-party fees based on a particular state or locality and discloses that fact and the fact that such fees may vary by state or locality; whether or not a security deposit is required; the number, amounts, and timing of scheduled payments; and that an extra charge may be imposed at the end of the lease term in a lease where the liability of the consumer is based on the difference between the residual value of the leased property and its realized value at the end of the lease term.

According to the complaints, the lease disclosures in respondents' lease advertisements are not clear and conspicuous because they appear in fine print and/or in an inconspicuous location. These practices, according to the complaints, violate the advertising requirements of the CLA and Regulation M

The complaints also allege that respondents' lease advertisements state a downpayment amount more prominently than the disclosure of the total amount due at lease signing. According to the complaints, these practices violate Regulation M.

C. TILA and Regulation Z Violations

The complaints against Dunphy, Norristown, Northeast, Pacifico Ardmere, and Pacifico Ford allege that these respondents violated the TILA and Regulation Z. According to the complaints, these respondents state a monthly payment amount and/or a downpayment amount as terms for financing the purchase of the advertised vehicles, but fail to disclose the following items of information required by Regulation Z: the annual percentage rate and the terms of repayment. In addition, the complaints against all respondents allege that their credit ads do not properly state the finance charge as the annual percentage rate, as required by Regulation Z.

Analysis to Aid Public Comment

II. Proposed Orders

The proposed orders prohibit respondents from disseminating advertisements that state the amount of any payment due at inception (excluding the monthly payment amount) or the fact that any or no inception payment is due without also disclosing with “equal prominence” the total amount a consumer must pay at lease signing or delivery. This requirement parallels an identical requirement found in Regulation M.

The proposed orders also prohibit respondents from disseminating advertisements that state the amount of any payment or that any or no initial payment is required at lease signing or delivery, if delivery occurs after consummation, without disclosing clearly and conspicuously all of the terms required by Regulation M, as follows: that the transaction advertised is a lease; the total amount due at lease signing or delivery; whether or not a security deposit is required; the number, amounts, and timing of scheduled payments; and that an extra charge may be imposed at the end of the lease term in a lease in which the liability of the consumer at the end of the lease term is based on the anticipated residual value of the vehicle. This requirement is intended to enjoin the respondents from deceptively advertising only the most attractive portions of its lease offers by requiring clear and conspicuous disclosure of the information necessary for consumers to make informed decisions about advertised lease offers. This paragraph parallels the advertising disclosure requirements from the CLA and Regulation M. The proposed orders also prohibit respondents from violating the CLA and Regulation M.

In addition, the proposed order for Dunphy prohibits Dunphy from misrepresenting the costs of leasing, including the total due at lease inception. The proposed orders for respondents Dunphy and Northeast prohibit these respondents from misrepresenting

Analysis to Aid Public Comment

that advertised terms apply to a cash or credit offer, when, in fact, the terms apply to an offer to lease the advertised vehicle. The proposed order for Northeast also prohibits Northeast from misrepresenting the availability of any advertised offer.

With respect to credit advertisements, the proposed orders prohibit respondents from stating the amount or percentage of any downpayment, the number of payments or period of repayment, the amount of any payment, or the amount of any finance charge, without disclosing clearly and conspicuously all of the terms required by Regulation Z, as follows: the amount or percentage of the downpayment; the terms of repayment; and the correct annual percentage rate, using that term or the abbreviation "APR." If the annual percentage rate may be increased after consummation of the credit transaction, that fact must also be disclosed.

The proposed orders also prohibit respondents from stating a rate of finance charge without stating the rate as an "annual percentage rate" or "APR." The proposed orders also prohibit all respondents from violating the TILA or Regulation Z.

The purpose of this analysis is to facilitate public comment on the proposed orders, and it is not intended to constitute an official interpretation of the agreements and proposed orders or to modify in any way their terms.

Complaint

IN THE MATTER OF

NORTHEAST AUTO OUTLET, INC., ET AL.

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATIONS OF
SEC. 5 OF THE FEDERAL TRADE COMMISSION ACT, THE
CONSUMER LEASING ACT, AND THE TRUTH IN LENDING ACT

*Docket C-3925; File No. 992 3080
Complaint, February 7, 2000 – Decision, February 7, 2000*

This consent order prohibits respondents from disseminating advertisements that state the amount of any payment due at inception (excluding the monthly payment amount) or the fact that any or no inception payment is due without also disclosing with “equal prominence” the total amount a consumer must pay at lease signing or delivery. The consent orders also prohibit respondents from disseminating advertisements that state the amount of any payment or that any or no initial payment is required at lease signing or delivery, if delivery occurs after consummation, without disclosing clearly and conspicuously all of the terms required, that the transaction advertised is a lease; the total amount due at lease signing or delivery; whether or not a security deposit is required; the number, amounts, and timing of scheduled payments; and that an extra charge may be imposed at the end of the lease term in a lease in which the liability of the consumer at the end of the lease term is based on the anticipated residual value of the vehicle. With respect to credit advertisements, the proposed orders prohibit respondents from stating the amount or percentage of any down payment, the number of payments or period of repayment, the amount of any payment, or the amount of any finance charge, without disclosing clearly and conspicuously all of the terms, the amount or percentage of the down payment; the terms of repayment; and the correct annual percentage rate, using that term or the abbreviation “APR.” If the annual percentage rate may be increased after consummation of the credit transaction, that fact must also be disclosed. The consent orders also prohibit respondents from stating a rate of finance charge without stating the rate as an “annual percentage rate” or “APR.”

Participants

For the Commission: *Rolando Berrelez, David Medine, and Sally Forman Pitofsky.*

Complaint

For the Respondents: *Richard A. Sprague, Sprague & Sprague.*

COMPLAINT

The Federal Trade Commission, having reason to believe that Northeast Auto Outlet, Inc and Northeast Auto Outlet Corporation, corporations, also doing business as Northeast Chevy/Geo, Northeast Kia, Northeast Dodge, Northeast Hyundai, Northeast Buick, Northeast Isuzu, Northeast Jeep/Eagle, Northeast Volkswagen, and Arthur Micchelli, individually and as an officer of the corporations, ("respondents") have violated the provisions of the Federal Trade Commission Act, 15 U.S.C. §§ 45-58, as amended, the Consumer Leasing Act, 15 U.S.C. §§ 1667-1667f, as amended, and its implementing Regulation M, 12 C.F.R. § 213, as amended, and the Truth in Lending Act, 15 U.S.C. §§ 1601-1667, as amended, and its implementing Regulation Z, 12 C.F.R. § 226, as amended, and it appearing to the Commission that this proceeding is in the public interest, alleges:

1. Respondent Northeast Auto Outlet, Inc. is a Pennsylvania corporation with its principal office or place of business at 3301 Grant Avenue, Philadelphia, PA 19114. Respondent offers automobiles for sale or lease to consumers.

2. Respondent Northeast Auto Outlet Corporation is a Pennsylvania corporation with its principal office or place of business at 3301 Grant Avenue, Philadelphia, PA 19114. Respondent offers automobiles for sale or lease to consumers.

3. Respondent Arthur Micchelli is an officer of the corporate respondents. Individually or in concert with others, he formulates, directs, controls, and participates in the policies, acts, or practices of the corporations, including the acts or practices alleged in this complaint. His principal office or place of business is the same as that of the corporate respondents.

Complaint

4. Respondents have disseminated advertisements to the public that promote consumer leases, as the terms “advertisement” and “consumer lease” are defined in Section 213.2 of Regulation M, 12 C.F.R. § 213.2, as amended.

5. Respondents have disseminated advertisements to the public that promote credit sales and other extensions of closed-end credit in consumer credit transactions, as the terms “advertisement,” “credit sale,” and “consumer credit” are defined in Section 226.2 of Regulation Z, 12 C.F.R. § 226.2, as amended.

6. The acts and practices of respondents alleged in this complaint have been in or affecting commerce, as “commerce” is defined in Section 4 of the Federal Trade Commission Act, 15 U.S.C. § 44.

7. Respondents have disseminated or have caused to be disseminated advertisements promoting consumer leases (“lease advertisements”) and/or credit sales (“credit advertisements”) for automobiles, including but not necessarily limited to the attached Northeast Exhibits A, B, and C. Northeast Exhibits A, B, and C are advertisements in the print media. These lease and/or credit advertisements contain the following statements:

- A. [Northeast Exhibit A states numerous lease and credit offers, including:]

**“98 CARAVANS *You Pay Only* . . .
From \$13,985 OR \$189 PER MO.
36 MO.†**

. . .

**Northeast Auto Outlet Will . . .
DOUBLE YOUR DOWN PAYMENT
UP \$4000!*
TO**

Complaint

'98 TROOPER
\$22,985
 OR
\$299 PER MO.†
36 MO.

...

'98 CAVALIER LS *You Pay Only*
\$8695
 OR
\$169 PER MO.
36 MO.†”

[A fine print disclosure at the bottom of the ad states, “To qualified buyers. Sales prices and leases based on \$1250 (\$3000 on Cavalier & Jetta \$2000 on Jeeps and Buicks) down cash or trade, plus bank fee, M.V. & tax. All rebates & incentives to dealer, including \$400 college grad rebates. ** Severity of credit affects term, down payment & A.P.R. Bankruptcies must be discharged. †Lease down payment + first mo., ref.sec.dep & bank fee due at lease signing + m.v. & tax. . . . *Applies to purchase at dealer retail only. Not available on advertised specials or in conjunction with any ad or offer. All rebates & incentives to dealer.”](Northeast Exhibit A)

- B. [Northeast Exhibit B states numerous lease and credit offers, including:]

“FINANCING AS LOW AS 0%*

...

'98 CAVALIER
\$7995 OR \$109 Per Month Lease”

Complaint

[A fine print disclosure adjacent to the above cost information states: "To qualified buyers, lease payments of \$109/mo. For 48 mos. \$2854 due at lease signing plus M.V. & tax. . . Security deposit may apply."]

**"98 CARAVANS
\$13,995 OR \$159 Per Month Lease"**

[A fine print disclosure adjacent to the above cost information states: "To qualified buyers, lease payments of \$159/mo. For 36 mos. \$2924 due at lease signing plus M.V. & tax. . . Security deposit may apply."]

**"98 CHEROKEE SE
\$13,595 OR \$139 Per Month Lease"**

[A fine print disclosure adjacent to the cost information states: To qualified buyers, lease payments of \$139/mo. for 36 mos. \$3645 due at lease signing plus M.V. & tax. . . Security deposit may apply."]

[A fine print disclosure at the bottom of the ad states, "*Up to 60 months on select vehicles. Sales prices (including used vehicles) based on \$2000 down cash or trade, plus bank fee, M.V. & tax. . . .] (Northeast Exhibit B).

C. [Northeast Exhibit C states three lease and credit offers:]

"98 Jetta GL . . .		'98 Jetta TDI . . .		'98 Passat GLS . . .	
\$11,995		\$13,795		\$17,095	
OR	PER	OR	PER	OR	PER
LEASE	\$149	LEASE	\$179	LEASE	\$199
	MONTH		MONTH		
FOR	36	FOR	36	FOR	36
	MO.		MO.		MO."

Complaint

[A fine print disclosure at the bottom of the ad states: “Prices and leases include \$1250 (\$3000 on GL) down cash or trade. Down payment, sec. deposit, bank fee & 1st month due at lease signing. MV, tax & tag not included. . . .”] (Northeast Exhibit C)

FEDERAL TRADE COMMISSION ACT VIOLATIONS**COUNT I: MISREPRESENTATION OF ADVERTISED TRANSACTION**

8. In lease advertisements, including but not necessarily limited to Northeast Exhibit A, respondents have represented, expressly or by implication, that consumers can purchase the advertised vehicles by financing the vehicle through credit for the monthly payment amounts prominently stated in the advertisements.

9. In truth and in fact, consumers cannot purchase the advertised vehicles by financing the vehicle through credit for the monthly payment amounts prominently stated in the advertisements. The monthly payment amounts prominently stated in the advertisements are components of lease offers and not credit offers. Therefore, respondents’ representation as alleged in Paragraph 8 was, and is, false or misleading.

10. Respondents’ practices constitute deceptive acts or practices in or affecting commerce in violation of Section 5(a) of the Federal Trade Commission Act, 15 U.S.C. § 45(a).

COUNT II: MISREPRESENTATION OF THE AVAILABILITY OF ADVERTISED OFFERS

11. In lease and/or credit advertisements, including but not necessarily limited to Northeast Exhibit A, respondents have represented, expressly or by implication, that the offer to double consumers’ downpayments up to \$4,000 would be available for the lease or credit offers advertised.

Complaint

12. In truth and in fact, the offer to double consumers' downpayments up to \$4,000 was not available with the advertised lease or credit offers. Therefore, respondents' representation as alleged in Paragraph 11 was, and is, false or misleading.

13. Respondents' practices constitute deceptive acts or practices in or affecting commerce in violation of Section 5(a) of the Federal Trade Commission Act, 15 U.S.C. § 45(a).

COUNT III: FAILURE TO DISCLOSE, AND/OR FAILURE TO DISCLOSE ADEQUATELY, LEASE TERMS

14. In lease advertisements, including but not necessarily limited to Northeast Exhibits A, B, and C, respondents have represented, expressly or by implication, that consumers can lease or purchase the advertised vehicles at the terms prominently stated in the advertisements, including but not necessarily limited to the monthly payment amount.

15. These lease advertisements have failed to disclose, and/or failed to disclose adequately, additional terms pertaining to the lease offer, such as the total amount due at lease inception. This information either does not appear at all or appears in fine print in the advertisements. This information would be material to consumers in deciding whether to visit respondents' dealerships and/or whether to lease an automobile from respondents. The failure to disclose, and/or failure to disclose adequately, these additional terms, in light of the representation made, was, and is, a deceptive practice.

16. Respondents' practices constitute deceptive acts or practices in or affecting commerce in violation of Section 5(a) of the Federal Trade Commission Act, 15 U.S.C. § 45(a).

Complaint

**COUNT IV: FAILURE TO DISCLOSE, AND/OR FAILURE
TO DISCLOSE ADEQUATELY, CREDIT TERMS**

17. In credit advertisements, including but not necessarily limited to Northeast Exhibits A, B, and C, respondents have represented, expressly or by implication, that consumers can finance the purchase of the advertised vehicles at the terms stated in the advertisements, including but not necessarily limited to the sales price and/or the downpayment amount.

18. These credit advertisements have failed to disclose, and/or failed to disclose adequately, additional terms pertaining to the credit offer, such as the annual percentage rate, and/or the terms of repayment. This information either does not appear at all or appears in fine print in the advertisements. This information would be material to consumers in deciding whether to visit respondents' dealerships and/or whether to purchase an automobile from respondents. The failure to disclose adequately these additional terms, in light of the representation made, was, and is, a deceptive practice.

19. Respondents' practices constitute deceptive acts or practices in or affecting commerce in violation of Section 5(a) of the Federal Trade Commission Act, 15 U.S.C. § 45(a).

**CONSUMER LEASING ACT AND REGULATION M
VIOLATIONS****COUNT V: FAILURE TO DISCLOSE, AND/OR FAILURE
TO DISCLOSE CLEARLY AND CONSPICUOUSLY,
REQUIRED INFORMATION**

20. Respondents' lease advertisements, including but not necessarily limited to Northeast Exhibits A, B, and C, state a monthly payment amount, but fail to disclose, and/or fail to disclose clearly and conspicuously, certain additional terms

Complaint

required by the Consumer Leasing Act and Regulation M, including one or more of the following terms:

- a. that the transaction advertised is a lease;
- b. the total amount due prior to or at consummation, or by delivery, if delivery occurs after consummation. This total amount may: 1) exclude third-party fees that vary by state or locality, such as taxes, licenses, and registration fees, and disclose that fact or 2) provide a total that includes third-party fees based on a particular state or locality as long as that fact and the fact that such fees may vary by state or locality are disclosed;
- c. whether or not a security deposit is required;
- d. the number, amounts, and timing of scheduled payments; and
- e. that an extra charge may be imposed at the end of the lease term in a lease where the liability of the consumer is based on the difference between the residual value of the leased property and its realized value at the end of the lease term.

21. The lease disclosures required by Regulation M, if provided, are not clear and conspicuous because they appear in fine print and/or in an inconspicuous location.

22. Respondents' practices have violated Section 184 of the Consumer Leasing Act, 15 U.S.C. § 1667c, and Section 213.7 of Regulation M, 12 C.F.R. § 213.7.

Complaint

**COUNT VI: FAILURE TO DISCLOSE THE TOTAL
AMOUNT DUE AT LEASE SIGNING WITH EQUAL
PROMINENCE**

23. Respondents' lease advertisements, including but not necessarily limited to Northeast Exhibits A, B, and C, state a downpayment amount more prominently than the disclosure of the total amount due at lease signing, in violation of Section 213.7(b)(1) of Regulation M, 12 C.F.R. § 213.7(b)(1).

24. Respondents' practices have violated Section 213.7(b)(1) of Regulation M, 12 C.F.R. § 213.7(b)(1).

**TRUTH IN LENDING ACT AND REGULATION Z
VIOLATIONS****COUNT VII: FAILURE TO DISCLOSE, AND/OR
FAILURE TO DISCLOSE CLEARLY AND
CONSPICUOUSLY, REQUIRED INFORMATION**

25. In credit advertisements, including but not necessarily limited to Northeast Exhibits A, B, and C, respondents have stated the amount of the downpayment as terms for financing the purchase of the advertised vehicles, but have failed to disclose, and/or failed to disclose clearly and conspicuously, the following items of information required by Regulation Z: the amount of any downpayment, the annual percentage rate, and/or the terms of repayment.

26. The credit disclosures required by Regulation Z, if provided, are not clear and conspicuous because they appear in fine print and/or in an inconspicuous location.

27. Respondents' practices have violated Section 144 of the Truth in Lending Act, 15 U.S.C. § 1664, and Section 226.24(c) of Regulation Z, 12 C.F.R. § 226.24(c).

Complaint

**COUNT VIII: FAILURE TO STATE RATE OF FINANCE
CHARGE AS ANNUAL PERCENTAGE RATE**

28. In credit advertisements, including but not necessarily limited to Northeast Exhibit B, respondents have stated a rate of finance charge without stating that rate as an "annual percentage rate," using that term or the abbreviation "APR."

29. Respondents' practice constitutes a violation of Section 144 and 107 of the TILA, 15 U.S.C. §§ 1664 and 1606, respectively, and Sections 226.24(b) and 226.22 of Regulation Z, 12 C.F.R. §§ 226.24(b) and 226.22, respectively.

THEREFORE, the Federal Trade Commission this seventh day of February, 2000, has issued this complaint against respondents.

By the Commission.

Complaint Exhibits

Exhibit A

Northeast Auto Outlet Will...

**DOUBLE YOUR
DOWN PAYMENT**

\$4,000!

TAX RETURNS WELCOME

UP TO

100% SATISFACTION
LOWEST
GUARANTEED
PRICE

DODGE OUTLET

'98 CARAVANS *Lowest Price*
\$13,985 ~~\$1,169~~

'98 DAKOTA PU *Lowest Price*
\$9,125
\$129

'98 STRATUS *Lowest Price*
\$12,895
\$159

'98 INTREPID *Lowest Price*
\$16,995
\$299

'98 DURANGO *Lowest Price*
\$22,972
\$299

CHEVY OUTLET

'98 CAVALIER LS *Lowest Price*
\$8,695
\$169

'98 MALIBU *Lowest Price*
\$13,995
\$239

'98 CAMARO *Lowest Price*
\$13,795
\$219

'98 EL CAMINO *Lowest Price*
\$22,295
\$299

'97 LUMINA *Lowest Price*
\$11,995
\$299

JEEP OUTLET

'98 CHEROKEE SE *Lowest Price*
\$14,995 - \$239

'98 WRANGLER SPORT *Lowest Price*
\$17,495 - \$199

'98 RAM CHROME LARAMIE *Lowest Price*
\$22,995 - \$309

'97 EAGLE TALON *Lowest Price*
\$14,997 - \$199

ISUZU OUTLET

'98 RODEO *Lowest Price*
\$19,575
\$229

'98 TROOPER *Lowest Price*
\$22,985
\$299

HYUNDAI OUTLET

'98 ACCENT *Lowest Price*
\$6,895
\$299

'97 ELANTRA GLS *Lowest Price*
\$9,595

BUICK OUTLET

'98 LESABRE *Lowest Price*
\$18,995
\$279

'98 CENTURY *Lowest Price*
\$14,995
\$259

VW OUTLET

'98 PASSAT GLS *Lowest Price*
\$17,095
\$199

'98 JETTA GL *Lowest Price*
\$11,995
\$149

VIA OUTLET

'97 SPORTAGE *Lowest Price*
\$13,995
\$219

'97 SEPHIA LS *Lowest Price*
\$7,495
\$189

USED CAR & TRUCK OUTLET

'97 Buick Skyline \$695
'98 Plymouth Voyager \$1995
'98 Mitsubishi Eclipse \$4995
'93 Ford Probe \$5295
'93 Dodge Cavalier \$5695
'93 Dodge Dakota \$5995
'93 Chrysler Conv. \$6495

'97 Ford \$7495
'92 Ford F-150 P/U \$7895
'94 Saturn SC \$7895
'94 Dodge Cavalier SE \$9995
'93 Nissan Maxima \$10995
'97 Jeep Wrangler \$13495
'96 GMC PickUp \$1595

WE'LL BEAT ANY PRICE ON ANY MAKE OR MODEL

NORTHEAST AUTO OUTLET

FRANK AVE. & ACADEMY RD. 215-824-0800 Buy Online at WWW.NORTHEASTAUTO.COM

Complaint Exhibits

Exhibit B

SENSATIONAL Summer Spectacular!

NO PAYMENTS 1999

\$1000 IN SUMMER MERCHANDISE OF EQUAL CASH SAVINGS!

CHEVY OUTLET DODGE OUTLET

'98 Cavalier	7995-109	'98 Neon	9255-143
'98 Camaro	2995-179	'98 Stratus	12595-169
'98 Blazer	3695-219	'98 Intrepid	15895-179
'98 Tahoe LS	2795-219	'98 Caravans	13995-159
	2795-249	'98 Dakota 4x4 Club Cab	17227-227

BUICK OUTLET

'98 Falcon TSi	13995	'98 Regal GS	10000-270
'98 Stratus	13595-139	'98 Century	14495-270
'98 Grand Cherokee	19995	'98 Park Ave	22995

SAATCHI OUTLET SUZUKI OUTLET

'98 Sierra LS	16995	'98 Accord	5895	'98 Cavalier	15995-189	'98 Amigos	12995
'98 Postage	12995	'98 Blazer	8195	'98 Astra GLE	13195-89	'98 Rodeos	17995
'98 Escort	12995	'98 Tiburon	10695	'97 Astra	12795	'98 Troopers	19995

Special Models Sale!

'88 Dodge Stratus	11595	'91 Ford Taurus	2295	'94 Plymouth Excel	2995	'95 Plymouth Blazer	3995
'93 Ford Taurus GL	5495	'94 Ford Taurus	5595	'95 Jeep Com. Bl.	12995	'92 Jaguar XJS	16995
'98 Chevy Cavalier	9995	'98 Buick Wildcat	13995	'98 Pontiac Grand Prix	13995	'98 Chevy	1495
'97 Buick Wildcat	14995	'98 Pontiac Grand Prix	1695	'98 Pontiac Grand Prix	1695	'98 Pontiac Grand Prix	1695

WE'LL BEAT ANY PRICE ON ANY MAKE OR MODEL!

NORTHEAST AUTO OUTLET

GRANT AVENUE & ACADEMY ROAD

SALES: MON-FRI 9-6
SERVICE: MON-FRI 7-30-4
SAT 9-5

ISUZU & USED ext 369

Complaint Exhibits

Exhibit C

Autos for Sale Autos for Sale Autos for Sale Auto: for Sale Autos for Sale

1.9% APR AVAILABLE ON SELECT MODELS

NORTHEAST Buy Online at WWW.NORTHEASTAUTO.COM

VOLKSWAGEN

Of Philadelphia

'98 Jetta GL '98 Jetta TDI '98 Passat GLS

		
4 Dr, 4 Cyl, 5 Spd, FWD, P/S/B, Air, AM/FM Cass, R/Def, T/Glss, Int/Wpr, P/Roof, Cruise, MSRP-\$16,835, SIK#680013	4 Dr, 4 Cyl, 5 Spd, FWD, P/S/B, Air, AM/FM Cass, P/L, R/Def, T/Glss, P/Win, Int/Wpr, Moonroof, Velour Buckets, Radials, MSRP-\$18,380, SIK#680033	4 Dr, 4 Cyl, 5 Spd, FWD, P/S/B, Air, AM/FM Cass, P/L, Tilt, R/Def, T/Glss, P/Win, Int/Wpr, Velour Buckets, Radials, MSRP-\$21,250, SIK#680050
\$11,995	\$13,795	\$17,095
OR LEASE FOR \$149 PER MONTH 36 MO.	OR LEASE FOR \$179 PER MONTH 36 MO.	OR LEASE FOR \$199 PER MONTH 36 MO.

Drivers wanted.

NORTHEAST *Of Philadelphia*

VOLKSWAGEN

GRANT AVE. & ACADEMY RD. 31 MILE FROM FRANKLIN MILLS MALL

215-824-0800 SALES: MON-FRI 9-9 • SAT 9-6
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Northeast Exhibit C

Decision and Order

DECISION AND ORDER

The Federal Trade Commission having initiated an investigation of certain acts and practices of the respondents named in the caption hereof, and the respondents having been furnished thereafter with a copy of a draft of complaint which the Bureau of Consumer Protection proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge the respondents with violations of the Federal Trade Commission Act, 15 U.S.C. §§ 45-58, as amended, the Consumer Leasing Act, 15 U.S.C. §§ 1667-1667f, as amended, and its implementing Regulation M, 12 C.F.R. § 213, as amended, and the Truth in Lending Act, 15 U.S.C. §§ 1601-1667, as amended, and its implementing Regulation Z, 12 C.F.R. § 226, as amended; and

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

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

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complaint, makes the following jurisdictional findings and enters the following order:

1. Respondent Northeast Auto Outlet, Inc. is a Pennsylvania corporation with its principal office or place of business at 3301 Grant Avenue, Philadelphia, PA 19114.
2. Respondent Northeast Auto Outlet Corporation is a Pennsylvania corporation with its principal office or place of business at 3301 Grant Avenue, Philadelphia, PA 19114.
3. Respondent Arthur Micchelli is an officer of the corporate respondents. Individually or in concert with others, he formulates, directs, or controls the policies, acts, or practices of the corporations. His principal office or place of business is the same as that of the corporate respondents.
4. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondents, and the proceeding is in the public interest.

ORDER**DEFINITIONS**

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

1. "Clearly and conspicuously" shall mean as follows:
 - a. In a television, video, radio, or Internet or other electronic advertisement, an audio disclosure shall be delivered in a volume, cadence, and location sufficient for an ordinary consumer to hear and

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comprehend it. A video disclosure shall be of a size and shade, and shall appear on the screen for a duration and in a location, sufficient for an ordinary consumer to read and comprehend it.

- b. In a print advertisement, a disclosure shall be in a type size and location sufficiently noticeable for an ordinary consumer to read and comprehend it, in print that contrasts with the background against which it appears.

The disclosure shall be in understandable language and syntax. Nothing contrary to, inconsistent with, or in mitigation of the disclosure shall be used in any advertisement.

2. "Equal prominence" shall mean as follows:
 - a. In a television, video, radio, or Internet or other electronic advertisement, a video disclosure shall be presented in the same or similar format, including but not necessarily limited to type size, shade, contrast, duration, and placement. An audio disclosure shall be delivered in the same or similar manner, including but not necessarily limited to volume, cadence, pace, and placement.
 - b. In a print advertisement, a disclosure shall be presented in the same or similar format, including but not necessarily limited to type size, shade, contrast, and placement.

Nothing contrary to, inconsistent with, or in mitigation of the disclosure shall be used in any advertisement.

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3. "Total amount due at lease signing or delivery" as used herein shall mean the total amount of any initial payments required to be paid by the lessee on or before consummation of the lease or delivery of the vehicle, whichever is later, as required by Regulation M, 12 C.F.R. § 213, as amended. The total amount due at lease signing or delivery may 1) exclude third-party fees, such as taxes, licenses, and registration fees, and disclose that fact or 2) provide a total that includes third-party fees based on a particular state or locality as long as that fact and the fact that such fees may vary by state or locality are disclosed. (Section 213.7 of Regulation M, 12 C.F.R. § 213.7, as amended.)
4. "Commerce" shall mean as defined in Section 4 of the Federal Trade Commission Act, 15 U.S.C. § 44.
5. Unless otherwise specified, "respondents" shall mean Northeast Auto Outlet, Inc. and Northeast Auto Outlet Corporation, corporations, their successors and assigns and their officers; Arthur Micchelli, individually and as an officer of the corporations; and each of the above's agents, representatives, and employees.

I.

IT IS ORDERED that respondents, directly or through any corporation, subsidiary, division, or any other device, in connection with any advertisement to promote, directly or indirectly, any consumer lease in or affecting commerce, as "advertisement" and "consumer lease" are defined in Section 213.2 of Regulation M, 12 C.F.R. § 213.2, as amended, shall not, in any manner, expressly or by implication:

- A. Misrepresent that any advertised lease terms, including but not limited to a monthly payment amount or downpayment, pertain to a credit offer.

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- B. Misrepresent the availability of advertised lease or credit offers to consumers.
- C. Make any reference to any charge that is part of the total amount due at lease signing or delivery or that no such charge is required, not including a statement of the periodic payment, unless the advertisement also states with equal prominence the total amount due at lease signing or delivery.
- D. State the amount of any payment or that any or no initial payment is required at lease signing or delivery, if delivery occurs after consummation, without disclosing clearly and conspicuously all of the terms required by Regulation M, as follows:
 - 1. that the transaction advertised is a lease;
 - 2. the total amount due at lease signing or delivery;
 - 3. whether or not a security deposit is required;
 - 4. the number, amounts, and timing of scheduled payments; and
 - 5. that an extra charge may be imposed at the end of the lease term in a lease in which the liability of the consumer at the end of the lease term is based on the anticipated residual value of the vehicle.

(Section 184(a) of the Consumer Leasing Act ("CLA"), 15 U.S.C. § 1667c(a), as amended, and Section 213.7 of Regulation M, 12 C.F.R. § 213.7, as amended.)

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For radio advertisements, respondents may also comply with the requirements of this subparagraph by utilizing Section 184(c) of the CLA, 15 U.S.C. § 1667c(C), and Section 213.7(f) of Regulation M, 12 C.F.R. § 213.7(f), as amended. For television advertisements, respondents may also comply with the requirements of this subparagraph by utilizing Section 213.7(f) of Regulation M, as amended.

- E. Fail to comply in any other respect with Regulation M, 12 C.F.R. § 213, as amended, and the CLA, 15 U.S.C. §§ 1667-1667f, as amended.

II.

IT IS FURTHER ORDERED that respondents, directly or through any corporation, subsidiary, division, or any other device, in connection with any advertisement to promote, directly or indirectly, any extension of consumer credit in or affecting commerce, as “advertisement” and “consumer credit” are defined in Section 226.2 of Regulation Z, 12 C.F.R. § 226.2, as amended, shall not, in any manner, expressly or by implication:

- A. State the amount or percentage of any downpayment, the number of payments or period of repayment, the amount of any payment, or the amount of any finance charge, without disclosing clearly and conspicuously all of the terms required by Regulation Z, as follows:
 - 1. the amount or percentage of the downpayment;
 - 2. the terms of repayment; and
 - 3. the correct annual percentage rate, using that term or the abbreviation “APR.” If the annual percentage rate may be increased after consummation of the credit transaction, that fact must also be disclosed.

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(Sections 107 and 144(d) of the TILA, 15 U.S.C. §§ 1606 and 1664(d), as amended, and Sections 226.22 and 226.24(c) of Regulation Z, 12 C.F.R. §§ 226.22 and 226.24(c), as amended.)

- B. State a rate of finance charge without stating the rate as an “annual percentage rate” or the abbreviation “APR,” using that term.
- C. Fail to comply in any other respect with Regulation Z, 12 C.F.R. § 226, as amended, and the TILA, 15 U.S.C. §§ 1601-1667, as amended.

III.

IT IS FURTHER ORDERED that respondent Northeast Auto Outlet, Inc. and Northeast Auto Outlet Corporation, and their successors and assigns, and respondent Arthur Micchelli, 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 all records that will demonstrate compliance with the requirements of this order.

IV.

IT IS FURTHER ORDERED that respondent Northeast Auto Outlet, Inc. and Northeast Auto Outlet Corporation, and their successors and assigns, and respondent Arthur Micchelli, shall deliver a copy of this order to all current and future principals, officers, directors, and managers, and to all current and future employees, agents, and representatives having responsibilities with respect to the subject matter of this order, and shall secure from each such person a signed and dated statement acknowledging receipt of the order. Respondents shall deliver this

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order to such current personnel within thirty (30) days after the date of service of this order, and to such future personnel within thirty (30) days after the person assumes such position or responsibilities.

V.

IT IS FURTHER ORDERED that respondent Northeast Auto Outlet, Inc. and Northeast Auto Outlet Corporation, and their successors and assigns, shall notify the Commission at least thirty (30) days prior to any change in either corporation that may affect compliance obligations arising under this order, including but not necessarily 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 either corporation about which respondents learn less than thirty (30) days prior to the date such action is to take place, respondents shall notify the Commission as soon as is practicable after obtaining such knowledge. All notices required by this Part shall be sent by certified mail to the Associate Director, Division of Enforcement, Bureau of Consumer Protection, Federal Trade Commission, Washington, D.C. 20580.

VI.

IT IS FURTHER ORDERED that respondent Arthur Micchelli, for a period of ten (10) years after the date of issuance of this order, shall notify the Commission of the discontinuance of his current business or employment, or of his affiliation with any new business or employment involving the advertising and/or extension of a “consumer lease,” as that term is defined in the CLA and its implementing Regulation M, or the advertising and/or extension of “consumer credit,” as that term is defined in the TILA and its implementing Regulation Z. The notice shall

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include respondent's new business address and telephone number and a description of the nature of the business or employment and his duties and responsibilities. All notices required by this Part shall be sent by certified mail to the Associate Director, Division of Enforcement, Bureau of Consumer Protection, Federal Trade Commission, Washington, D.C. 20580.

VII.

IT IS FURTHER ORDERED that respondent Northeast Auto Outlet, Inc. and Northeast Auto Outlet Corporation, and their successors and assigns, and respondent Arthur Micchelli, shall, within sixty (60) days after the date of service of this order, and at such other times as the Federal Trade Commission may require, file with the Commission a report, in writing, setting forth in detail the manner and form in which they have complied with this order.

VIII.

This order will terminate on February 7, 2020, 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.

Analysis to Aid Public Comment

Provided, further, that if such complaint is dismissed or a federal court rules that the respondents 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.

By the Commission.

**Analysis of Proposed Consent Orders
to Aid Public Comment****Summary**

The Federal Trade Commission has accepted separate agreements, subject to final approval, orders from respondents Dunphy Nissan, Inc. and Serge Naumovsky (“Dunphy”); Norristown Automobile Co., Inc. and William Milliken (“Norristown”); Northeast Auto Outlet, Inc. and Arthur Micchelli (“Northeast”); Pacifico Ardmore, Inc. and Kerry J. Pacifico (“Pacifico Ardmore”); Pacifico Ford, Inc. and Kerry T. Pacifico (“Pacifico Ford”); and Marty Sussman Organization, Inc. and Martin E. Sussman (“Sussman”)(together “respondents”). The persons named in these actions are named individually and as officers of their respective corporations.

The proposed consent orders have been placed on the public record for sixty (60) days for receipt of comments by interested persons. Comments received during this period will become part of the public record. After sixty (60) days, the Commission will again review the agreements and the comments received and will

Analysis to Aid Public Comment

decide whether it should withdraw from the agreement or make final the agreements' proposed orders.

I. Complaint Allegations

A. FTC Act Violations

The complaints against the respondents allege that their automobile lease advertisements violate the Federal Trade Commission Act ("FTC Act"), the Consumer Leasing Act ("CLA"), and Regulation M. The complaints also allege that respondents' credit advertisements have violated the Truth in Lending Act ("TILA") and Regulation Z. Section 5 of the FTC Act prohibits false, misleading, or deceptive representations or omissions of material information in advertisements. In addition, Congress established statutory disclosure requirements for lease and credit advertising under the CLA and the TILA, respectively, and directed the Federal Reserve Board ("Board") to promulgate regulations implementing such statutes -- Regulations M and Z respectively. See 15 U.S.C. §§ 1601-1667e; 12 C.F.R. Part 213; 12 C.F.R. Part 226.

The complaints against respondents allege that their lease advertisements represent that consumers can lease the advertised vehicles at the terms prominently stated in the advertisements, including but not necessarily limited to the monthly payment amount and the down payment amount. These lease advertisements, according to the complaints, have failed to disclose, and/or failed to disclose adequately, additional terms pertaining to the lease offer, such as the total amount due at lease inception. The complaints allege that this information does not appear at all or appears in fine print in the advertisements and that the information would be material to consumers in deciding whether to visit respondents' dealerships and/or whether to lease an automobile from respondents. These practices, according to the

Analysis to Aid Public Comment

complaints, constitute deceptive practices in violation of Section 5(a) of the FTC Act.

The complaints against Dunphy and Northeast also allege that these respondents misrepresent that consumers can purchase the advertised vehicles for the monthly payment amounts prominently stated in the advertisements. According to the complaints, the monthly payment amounts prominently stated in the advertisements are components of lease offers and not credit offers. These practices, according to the complaints, constitute deceptive practices in violation of Section 5(a) of the FTC Act.

The complaint against Dunphy further alleges that Dunphy misrepresents that the amount stated as “down” or “down payment” is the total amount consumers must pay at lease inception to lease the advertised vehicles. According to the complaint, however, consumers are required to pay additional fees beyond the amount stated as “down” or “down payment,” including but not limited to the first month's payment, a security deposit, and/or a bank fee. This practice, according to the complaint, constitutes a deceptive practice in violation of Section 5(a) of the FTC Act.

The complaint against Northeast also alleges that Northeast misrepresents that the offer to double consumers' down payments up to \$4,000 applied to the lease or credit offers advertised. According to the complaint, the offer to double consumers' down payments up to \$4,000 was not available with the advertised lease or credit offers. This practice, according to the complaint, constitutes a deceptive practice in violation of Section 5(a) of the FTC Act.

The complaints against Dunphy, Northeast, Norristown, and Pacifico Ardmore allege that their credit advertisements represent that consumers can purchase the advertised vehicles at the terms prominently stated in the advertisements, including but not necessarily limited to the sales price and/or down payment amount. According to the complaints, these credit advertisements

Analysis to Aid Public Comment

fail to disclose additional terms pertaining to the credit offer, such as the terms of repayment and the annual percentage rate. Such information is alleged to be material to consumers in deciding whether to visit respondents' dealerships and/or whether to purchase an automobile from respondents. These practices, according to the complaints, constitute deceptive practices in violation of Section 5(a) of the FTC Act.

B. CLA and Regulation M Violations

The complaints allege that all respondents violated the CLA and Regulation M. The complaints allege that respondents' lease ads state a monthly payment amount and/or down payment amount, but fail to disclose, and/or fail to disclose clearly and conspicuously, one or more of the following required terms: that the transaction advertised is a lease; the total amount due prior to or at consummation, or by delivery, if delivery occurs after consummation and that such amount: 1) excludes third-party fees that vary by state or locality, such as taxes, licenses, and registration fees, and discloses that fact or 2) includes third-party fees based on a particular state or locality and discloses that fact and the fact that such fees may vary by state or locality; whether or not a security deposit is required; the number, amounts, and timing of scheduled payments; and that an extra charge may be imposed at the end of the lease term in a lease where the liability of the consumer is based on the difference between the residual value of the leased property and its realized value at the end of the lease term.

According to the complaints, the lease disclosures in respondents' lease advertisements are not clear and conspicuous because they appear in fine print and/or in an inconspicuous location. These practices, according to the complaints, violate the advertising requirements of the CLA and Regulation M.

Analysis to Aid Public Comment

The complaints also allege that respondents' lease advertisements state a down payment amount more prominently than the disclosure of the total amount due at lease signing. According to the complaints, these practices violate Regulation M.

C. TILA and Regulation Z Violations

The complaints against Dunphy, Norristown, Northeast, Pacifico Ardmore, and Pacifico Ford allege that these respondents violated the TILA and Regulation Z. According to the complaints, these respondents state a monthly payment amount and/or a down payment amount as terms for financing the purchase of the advertised vehicles, but fail to disclose the following items of information required by Regulation Z: the annual percentage rate and the terms of repayment. In addition, the complaints against all respondents allege that their credit ads do not properly state the finance charge as the annual percentage rate, as required by Regulation Z.

II. Proposed Orders

The proposed orders prohibit respondents from disseminating advertisements that state the amount of any payment due at inception (excluding the monthly payment amount) or the fact that any or no inception payment is due without also disclosing with "equal prominence" the total amount a consumer must pay at lease signing or delivery. This requirement parallels an identical requirement found in Regulation M.

The proposed orders also prohibit respondents from disseminating advertisements that state the amount of any payment or that any or no initial payment is required at lease signing or delivery, if delivery occurs after consummation, without disclosing clearly and conspicuously all of the terms required by Regulation M, as follows: that the transaction advertised is a lease; the total amount due at lease signing or delivery; whether or not a security deposit is required; the

Analysis to Aid Public Comment

number, amounts, and timing of scheduled payments; and that an extra charge may be imposed at the end of the lease term in a lease in which the liability of the consumer at the end of the lease term is based on the anticipated residual value of the vehicle. This requirement is intended to enjoin the respondents from deceptively advertising only the most attractive portions of its lease offers by requiring clear and conspicuous disclosure of the information necessary for consumers to make informed decisions about advertised lease offers. This paragraph parallels the advertising disclosure requirements from the CLA and Regulation M. The proposed orders also prohibit respondents from violating the CLA and Regulation M.

In addition, the proposed order for Dunphy prohibits Dunphy from misrepresenting the costs of leasing, including the total due at lease inception. The proposed orders for respondents Dunphy and Northeast prohibit these respondents from misrepresenting that advertised terms apply to a cash or credit offer, when, in fact, the terms apply to an offer to lease the advertised vehicle. The proposed order for Northeast also prohibits Northeast from misrepresenting the availability of any advertised offer.

With respect to credit advertisements, the proposed orders prohibit respondents from stating the amount or percentage of any down payment, the number of payments or period of repayment, the amount of any payment, or the amount of any finance charge, without disclosing clearly and conspicuously all of the terms required by Regulation Z, as follows: the amount or percentage of the down payment; the terms of repayment; and the correct annual percentage rate, using that term or the abbreviation "APR." If the annual percentage rate may be increased after consummation of the credit transaction, that fact must also be disclosed.

Analysis to Aid Public Comment

The proposed orders also prohibit respondents from stating a rate of finance charge without stating the rate as an “annual percentage rate” or “APR.” The proposed orders also prohibit all respondents from violating the TILA or Regulation Z.

The purpose of this analysis is to facilitate public comment on the proposed orders, and it is not intended to constitute an official interpretation of the agreements and proposed orders or to modify in any way their terms.

Complaint

IN THE MATTER OF

NORRISTOWN AUTOMOBILE CO., INC., ET AL.

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATIONS OF
SEC. 5 OF THE FEDERAL TRADE COMMISSION ACT, THE
CONSUMER LEASING ACT, AND THE TRUTH IN LENDING ACT

Docket C-3922; File No. 992 3081
Complaint, February 7, 2000 – Decision, February 7, 2000

This consent order prohibits respondents from disseminating advertisements that state the amount of any payment due at inception (excluding the monthly payment amount) or the fact that any or no inception payment is due without also disclosing with “equal prominence” the total amount a consumer must pay at lease signing or delivery. The consent orders also prohibit respondents from disseminating advertisements that state the amount of any payment or that any or no initial payment is required at lease signing or delivery, if delivery occurs after consummation, without disclosing clearly and conspicuously all of the terms required, that the transaction advertised is a lease; the total amount due at lease signing or delivery; whether or not a security deposit is required; the number, amounts, and timing of scheduled payments; and that an extra charge may be imposed at the end of the lease term in a lease in which the liability of the consumer at the end of the lease term is based on the anticipated residual value of the vehicle. With respect to credit advertisements, the proposed orders prohibit respondents from stating the amount or percentage of any down payment, the number of payments or period of repayment, the amount of any payment, or the amount of any finance charge, without disclosing clearly and conspicuously all of the terms, the amount or percentage of the down payment; the terms of repayment; and the correct annual percentage rate, using that term or the abbreviation “APR.” If the annual percentage rate may be increased after consummation of the credit transaction, that fact must also be disclosed. The consent orders also prohibit respondents from stating a rate of finance charge without stating the rate as an “annual percentage rate” or “APR.”

Participants

For the Commission: *Rolando Berrelez, David Medine, and Sally Forman Pitofsky.*

Complaint

For the Respondents: *Paul R. Rosen, Spector, Gadon & Rosen, P.C.*

COMPLAINT

The Federal Trade Commission, having reason to believe that Norristown Automobile Co., Inc., a corporation, doing business as Norristown Ford, and William Milliken, individually and as an officer of the corporation, (“respondents”), have violated the provisions of the Federal Trade Commission Act, 15 U.S.C. §§ 45-58, as amended, the Consumer Leasing Act, 15 U.S.C. §§ 1667-1667f, as amended, and its implementing Regulation M, 12 C.F.R. § 213, as amended, and the Truth in Lending Act, 15 U.S.C. §§ 1601-1667, as amended, and its implementing Regulation Z, 12 C.F.R. § 226, as amended, and it appearing to the Commission that this proceeding is in the public interest, alleges:

1. Respondent Norristown Automobile Co., Inc. is a Pennsylvania corporation with its principal office or place of business at Ridge Pike, Norristown, Pennsylvania 19404. Respondent offers automobiles for sale or lease to consumers.

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

3. Respondents have disseminated advertisements to the public that promote consumer leases, as the terms “advertisement” and “consumer lease” are defined in Section 213.2 of Regulation M, 12 C.F.R. § 213.2, as amended.

4. Respondents have disseminated advertisements to the public that promote credit sales and other extensions of closed-end credit in consumer credit transactions, as the terms

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“advertisement,” “credit sale,” and “consumer credit” are defined in Section 226.2 of Regulation Z, 12 C.F.R. § 226.2, as amended.

5. The acts and practices of respondents alleged in this complaint have been in or affecting commerce, as “commerce” is defined in Section 4 of the Federal Trade Commission Act, 15 U.S.C. § 44.

6. Respondents have disseminated or have caused to be disseminated advertisements promoting consumer leases (“lease advertisements”) and credit sales (“credit advertisements”) for automobiles, including but not necessarily limited to the attached Norristown Exhibits A and B. Norristown Exhibits A and B are advertisements in the print media. These lease and/or credit advertisements contain the following statements:

- A. [Norristown Exhibit A states numerous lease and credit offers, including:]

**“NEW 1998 FORD
TAURUS GL SEDAN. . .**

MSRP.....\$19,070
Pkg Disc./Rebate...\$1,000
College Grad.....\$400
Norristown Disc....\$1,242
Cash or Trade.....\$3,000

**LEASE FOR \$169
24
MOS.
or BUY FOR
 \$13,428”**

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[A fine print disclosure at the bottom of the ad states, “. . . Prices and payments are based upon \$3000 down cash or trade. All rebates including recent 24 months college grad rebate applied. All leases are closed end with 1st month payment, security deposit, bank fee, tax and tags due at lease signing. All purchase prices exclude title, tax and tags. . . .”] (Norristown Exhibit A)

- B. [Norristown Exhibit B states numerous lease and credit offers, including:]

“FINANCING*AS **0.9%** . . .

LOW

AS

NEW 1998 FORD

TAURUS SE SEDAN . . .

MSRP.....\$20,425

Rebate.....\$750

College Grad.....\$400

Cash or Trade.....\$3,000

Norristown Discount..\$2,360

BUY \$13,915**FOR****OR \$195 PER****LEASE MONTH****FOR 24****MONTHS”**

[A fine print disclosure at the bottom of the ad states, “. . . Prices and payments on new vehicles and special purchase vehicles are with \$3000 down cash or trade. All rebates including recent 24 months college grad rebate applied. All leases are closed end with 1st month payment, security deposit, bank fee, tax and tags due at

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lease signing. All purchase prices exclude title, tax and tags. . . ."]
(Norristown Exhibit B)

FEDERAL TRADE COMMISSION ACT VIOLATIONS**COUNT I: FAILURE TO DISCLOSE, AND/OR FAILURE TO DISCLOSE ADEQUATELY, LEASE TERMS**

7. In lease advertisements, including but not necessarily limited to Norristown Exhibits A and B, respondents have represented, expressly or by implication, that consumers can lease the advertised vehicles at the terms prominently stated in the advertisements, including but not necessarily limited to the monthly payment amount and/or the downpayment amount.

8. These lease advertisements have failed to disclose, and/or failed to disclose adequately, additional terms pertaining to the lease offer, such as the total amount due at lease inception. This information does not appear at all or appears in fine print in the advertisements. This information would be material to consumers in deciding whether to visit respondents' dealerships and/or whether to lease an automobile from respondents. The failure to disclose, and/or failure to disclose adequately, these additional terms, in light of the representation made, was, and is, a deceptive practice.

9. Respondents' practices constitute deceptive acts or practices in or affecting commerce in violation of Section 5(a) of the Federal Trade Commission Act, 15 U.S.C. § 45(a).

COUNT II: FAILURE TO DISCLOSE CREDIT TERMS

10. In credit advertisements, including but not necessarily limited to Norristown Exhibits A and B, respondents have represented, expressly or by implication, that consumers can purchase the advertised vehicles at the terms prominently stated in

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the advertisements, including but not necessarily limited to the sales price and downpayment amount.

11. These credit advertisements have failed to disclose additional terms pertaining to the credit offer, such as the annual percentage rate and the terms of repayment. This information would be material to consumers in deciding whether to visit respondents' dealerships and/or whether to purchase an automobile from respondents. The failure to disclose these additional terms, in light of the representation made, was, and is, a deceptive practice.

12. Respondents' practices constitute deceptive acts or practices in or affecting commerce in violation of Section 5(a) of the Federal Trade Commission Act, 15 U.S.C. § 45(a).

**CONSUMER LEASING ACT AND REGULATION M
VIOLATIONS**

**COUNT III: FAILURE TO DISCLOSE, AND/OR FAILURE
TO DISCLOSE CLEARLY AND CONSPICUOUSLY,
REQUIRED INFORMATION**

13. Respondents' lease advertisements, including but not necessarily limited to Norristown Exhibits A and B, state a monthly payment amount and down payment amount, but fail to disclose, and/or fail to disclose clearly and conspicuously, certain additional terms required by the Consumer Leasing Act and Regulation M, including one or more of the following terms:

- a. that the transaction advertised is a lease;
- b. the total amount due prior to or at consummation, or by delivery, if delivery occurs after consummation. This total amount may: 1) exclude third-party fees that vary by state or locality, such as taxes, licenses, and registration fees, and disclose that fact or 2) provide a total that includes third-party fees

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based on a particular state or locality as long as that fact and the fact that such fees may vary by state or locality are disclosed;

- c. whether or not a security deposit is required;
- d. the number, amounts, and timing of scheduled payments; and
- e. that an extra charge may be imposed at the end of the lease term in a lease where the liability of the consumer is based on the difference between the residual value of the leased property and its realized value at the end of the lease term.

14. The lease disclosures required by Regulation M, if provided, are not clear and conspicuous because they appear in fine print and/or in an inconspicuous location.

15. Respondents' practices have violated Section 184 of the Consumer Leasing Act, 15 U.S.C. § 1667c, and Section 213.7 of Regulation M, 12 C.F.R. § 213.7.

**COUNT IV: FAILURE TO DISCLOSE THE TOTAL
AMOUNT DUE AT LEASE SIGNING WITH EQUAL
PROMINENCE**

16. Respondents' lease advertisements, including but not necessarily limited to Norristown Exhibits A and B, state a downpayment amount more prominently than the disclosure of the total amount due at lease signing, in violation of Section 213.7(b)(1) of Regulation M, 12 C.F.R. § 213.7(b)(1).

17. Respondents' practices have violated Section 213.7(b)(1) of Regulation M, 12 C.F.R. § 213.7(b)(1).

Complaint

**TRUTH IN LENDING ACT AND REGULATION Z
VIOLATIONS****COUNT V: FAILURE TO DISCLOSE REQUIRED
INFORMATION**

18. In credit advertisements, including but not necessarily limited to Exhibits A and B, respondents have stated the downpayment amount, but have failed to disclose the following items of information required by Regulation Z: the annual percentage rate and the terms of repayment.

19. Respondents' practices have violated Section 144 of the Truth in Lending Act, 15 U.S.C. § 1664, and Section 226.24(c) of Regulation Z, 12 C.F.R. § 226.24(c).

**COUNT VI: FAILURE TO STATE RATE OF FINANCE
CHARGE AS ANNUAL PERCENTAGE RATE**

20. In credit advertisements, including but not necessarily limited to Norristown Exhibit B, respondents have stated a rate of finance charge without stating that rate as an "annual percentage rate," using that term or the abbreviation "APR."

21. Respondents' practice constitutes a violation of Section 144 and 107 of the TILA, 15 U.S.C. §§ 1664 and 1606, respectively, and Sections 226.24(b) and 226.22 of Regulation Z, 12 C.F.R. §§ 226.24(b) and 226.22, respectively.

THEREFORE, the Federal Trade Commission this seventh day of February, 2000, has issued this complaint against respondents.

By the Commission.

Decision and Order

DECISION AND ORDER

The Federal Trade Commission having initiated an investigation of certain acts and practices of the respondents named in the caption hereof, and the respondents having been furnished thereafter with a copy of a draft of complaint which the Bureau of Consumer Protection proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge the respondents with violations of the Federal Trade Commission Act, 15 U.S.C. §§ 45-58, as amended, the Consumer Leasing Act, 15 U.S.C. §§ 1667-1667f, as amended, and its implementing Regulation M, 12 C.F.R. § 213, as amended, and the Truth in Lending Act, 15 U.S.C. §§ 1601-1667, as amended, and its implementing Regulation Z, 12 C.F.R. § 226, as amended; and

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

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

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complaint, makes the following jurisdictional findings and enters the following order:

1. Respondent Norristown Automobile Co., Inc. is a Pennsylvania corporation with its principal office or place of business at Ridge Pike, Norristown, Pennsylvania 19404.
2. Respondent William Milliken is an officer of the corporate respondent. Individually or in concert with others, he formulates, directs, or controls the policies, acts, or practices of the corporation. His principal office or place of business is the same as that of the corporate respondent.
3. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondents, and the proceeding is in the public interest.

ORDER**DEFINITIONS**

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

1. "Clearly and conspicuously" shall mean as follows:
 - a. In a television, video, radio, or Internet or other electronic advertisement, an audio disclosure shall be delivered in a volume, cadence, and location sufficient for an ordinary consumer to hear and comprehend it. A video disclosure shall be of a size and shade, and shall appear on the screen for a duration and in a location, sufficient for an ordinary consumer to read and comprehend it.

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- b. In a print advertisement, a disclosure shall be in a type size and location sufficiently noticeable for an ordinary consumer to read and comprehend it, in print that contrasts with the background against which it appears.

The disclosure shall be in understandable language and syntax. Nothing contrary to, inconsistent with, or in mitigation of the disclosure shall be used in any advertisement.

2. "Equal prominence" shall mean as follows:
 - a. In a television, video, radio, or Internet or other electronic advertisement, a video disclosure shall be presented in the same or similar format, including but not necessarily limited to type size, shade, contrast, duration, and placement. An audio disclosure shall be delivered in the same or similar manner, including but not necessarily limited to volume, cadence, pace, and placement.
 - b. In a print advertisement, a disclosure shall be presented in the same or similar format, including but not necessarily limited to type size, shade, contrast, and placement.

Nothing contrary to, inconsistent with, or in mitigation of the disclosure shall be used in any advertisement.

3. "Total amount due at lease signing or delivery" as used herein shall mean the total amount of any initial payments required to be paid by the lessee on or before consummation of the lease or delivery of the vehicle, whichever is later, as required by Regulation M, 12 C.F.R. § 213, as amended. The total amount due at

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lease signing or delivery may 1) exclude third-party fees, such as taxes, licenses, and registration fees, and disclose that fact or 2) provide a total that includes third-party fees based on a particular state or locality as long as that fact and the fact that such fees may vary by state or locality are disclosed. (Section 213.7 of Regulation M, 12 C.F.R. § 213.7, as amended.)

4. "Commerce" shall mean as defined in Section 4 of the Federal Trade Commission Act, 15 U.S.C. § 44.
5. Unless otherwise specified, "respondents" shall mean Norristown Automobile Co., Inc., a corporation, its successors and assigns and its officers; William Milliken, individually and as an officer of the corporation; and each of the above's agents, representatives, and employees.

I.

IT IS ORDERED that respondents, directly or through any corporation, subsidiary, division, or any other device, in connection with any advertisement to promote, directly or indirectly, any consumer lease in or affecting commerce, as "advertisement" and "consumer lease" are defined in Section 213.2 of Regulation M, 12 C.F.R. § 213.2, as amended, shall not, in any manner, expressly or by implication:

- A. Make any reference to any charge that is part of the total amount due at lease signing or delivery or that no such charge is required, not including a statement of the periodic payment, unless the advertisement also states with equal prominence the total amount due at lease signing or delivery.
- B. State the amount of any payment or that any or no initial payment is required at lease signing or delivery, if delivery occurs after consummation, without

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disclosing clearly and conspicuously all of the terms required by Regulation M, as follows:

1. that the transaction advertised is a lease;
2. the total amount due at lease signing or delivery;
3. whether or not a security deposit is required;
4. the number, amounts, and timing of scheduled payments; and
5. that an extra charge may be imposed at the end of the lease term in a lease in which the liability of the consumer at the end of the lease term is based on the anticipated residual value of the vehicle.

(Section 184(a) of the Consumer Leasing Act (“CLA”), 15 U.S.C. § 1667c(a), as amended, and Section 213.7 of Regulation M, 12 C.F.R. § 213.7, as amended.)

For radio advertisements, respondents may also comply with the requirements of this subparagraph by utilizing Section 184(c) of the CLA, 15 U.S.C. § 1667c(C), and Section 213.7(f) of Regulation M, 12 C.F.R. § 213.7(f), as amended. For television advertisements, respondents may also comply with the requirements of this subparagraph by utilizing Section 213.7(f) of Regulation M, as amended.

- C. Fail to comply in any other respect with Regulation M, 12 C.F.R. § 213, as amended, and the CLA, 15 U.S.C. §§ 1667-1667f, as amended.

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II.

IT IS FURTHER ORDERED that respondents, directly or through any corporation, subsidiary, division, or any other device, in connection with any advertisement to promote, directly or indirectly, any extension of consumer credit in or affecting commerce, as “advertisement” and “consumer credit” are defined in Section 226.2 of Regulation Z, 12 C.F.R. § 226.2, as amended, shall not, in any manner, expressly or by implication:

- A. State the amount or percentage of any downpayment, the number of payments or period of repayment, the amount of any payment, or the amount of any finance charge, without disclosing clearly and conspicuously all of the terms required by Regulation Z, as follows:
1. the amount or percentage of the downpayment;
 2. the terms of repayment; and
 3. the correct annual percentage rate, using that term or the abbreviation “APR.” If the annual percentage rate may be increased after consummation of the credit transaction, that fact must also be disclosed.
- (Sections 107 and 144(d) of the TILA, 15 U.S.C. §§ 1606 and 1664(d), as amended, and Sections 226.22 and 226.24(c) of Regulation Z, 12 C.F.R. §§ 226.22 and 226.24(c), as amended.)
- B. State a rate of finance charge without stating the rate as an “annual percentage rate” or the abbreviation “APR,” using that term.
- C. Fail to comply in any other respect with Regulation Z, 12 C.F.R. § 226, as amended, and the TILA, 15 U.S.C. §§ 1601-1667, as amended.

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III.

IT IS FURTHER ORDERED that respondent Norristown Automotive Co., Inc., and its successors and assigns, and respondent William Milliken 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 all records that will demonstrate compliance with the requirements of this order.

IV.

IT IS FURTHER ORDERED that respondent Norristown Automotive Co., Inc., and its successors and assigns, and respondent William Milliken shall deliver a copy of this order to all current and future principals, officers, directors, and managers, and to all current and future employees, agents, and representatives having responsibilities with respect to the subject matter of this order, and shall secure from each such person a signed and dated statement acknowledging receipt of the order. Respondents shall deliver this order to such current personnel within thirty (30) days after the date of service of this order, and to such future personnel within thirty (30) days after the person assumes such position or responsibilities.

V.

IT IS FURTHER ORDERED that respondent Norristown Automotive Co., Inc., and its successors and assigns, shall notify the Commission at least thirty (30) days prior to any change in the corporation that may affect compliance obligations arising under this order, including but not necessarily 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

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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. 20580.

VI.

IT IS FURTHER ORDERED that respondent William Milliken, for a period of ten (10) years after the date of issuance of this order, shall notify the Commission of the discontinuance of his current business or employment, or of his affiliation with any new business or employment involving the advertising and/or extension of a "consumer lease," as that term is defined in the CLA and its implementing Regulation M, or the advertising and/or extension of "consumer credit," as that term is defined in the TILA and its implementing Regulation Z. The notice shall include respondent's new business address and telephone number and a description of the nature of the business or employment and his duties and responsibilities. All notices required by this Part shall be sent by certified mail to the Associate Director, Division of Enforcement, Bureau of Consumer Protection, Federal Trade Commission, Washington, D.C. 20580.

VII.

IT IS FURTHER ORDERED that respondent Norristown Automobile Co., Inc., and its successors and assigns, and respondent William Milliken shall, within sixty (60) days after the date of service of this order, and at such other times as the Federal Trade Commission may require, file with the Commission a report, in writing, setting forth in detail the manner and form in which they have complied with this order.

Decision and Order

VIII.

This order will terminate on February 7, 2020, 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 respondents 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.

By the Commission.

Analysis to Aid Public Comment

**Analysis of Proposed Consent Orders
to Aid Public Comment****Summary**

The Federal Trade Commission has accepted separate agreements, subject to final approval, orders from respondents Dunphy Nissan, Inc. and Serge Naumovsky (“Dunphy”); Norristown Automobile Co., Inc. and William Milliken (“Norristown”); Northeast Auto Outlet, Inc. and Arthur Micchelli (“Northeast”); Pacifico Ardmore, Inc. and Kerry J. Pacifico (“Pacifico Ardmore”); Pacifico Ford, Inc. and Kerry T. Pacifico (“Pacifico Ford”); and Marty Sussman Organization, Inc. and Martin E. Sussman (“Sussman”)(together “respondents”). The persons named in these actions are named individually and as officers of their respective corporations.

The proposed consent orders have been placed on the public record for sixty (60) days for receipt of comments by interested persons. Comments received during this period will become part of the public record. After sixty (60) days, the Commission will again review the agreements and the comments received and will decide whether it should withdraw from the agreement or make final the agreements' proposed orders.

I. Complaint Allegations**A. FTC Act Violations**

The complaints against the respondents allege that their automobile lease advertisements violate the Federal Trade Commission Act (“FTC Act”), the Consumer Leasing Act (“CLA”), and Regulation M. The complaints also allege that respondents' credit advertisements have violated the Truth in Lending Act (“TILA”) and Regulation Z. Section 5 of the FTC Act prohibits false, misleading, or deceptive representations or omissions of material information in advertisements. In addition, Congress established statutory disclosure requirements for lease

Analysis to Aid Public Comment

and credit advertising under the CLA and the TILA, respectively, and directed the Federal Reserve Board (“Board”) to promulgate regulations implementing such statutes -- Regulations M and Z respectively. See 15 U.S.C. §§ 1601-1667e; 12 C.F.R. Part 213; 12 C.F.R. Part 226.

The complaints against respondents allege that their lease advertisements represent that consumers can lease the advertised vehicles at the terms prominently stated in the advertisements, including but not necessarily limited to the monthly payment amount and the downpayment amount. These lease advertisements, according to the complaints, have failed to disclose, and/or failed to disclose adequately, additional terms pertaining to the lease offer, such as the total amount due at lease inception. The complaints allege that this information does not appear at all or appears in fine print in the advertisements and that the information would be material to consumers in deciding whether to visit respondents' dealerships and/or whether to lease an automobile from respondents. These practices, according to the complaints, constitute deceptive practices in violation of Section 5(a) of the FTC Act.

The complaints against Dunphy and Northeast also allege that these respondents misrepresent that consumers can purchase the advertised vehicles for the monthly payment amounts prominently stated in the advertisements. According to the complaints, the monthly payment amounts prominently stated in the advertisements are components of lease offers and not credit offers. These practices, according to the complaints, constitute deceptive practices in violation of Section 5(a) of the FTC Act.

The complaint against Dunphy further alleges that Dunphy misrepresents that the amount stated as “down” or “downpayment” is the total amount consumers must pay at lease inception to lease the advertised vehicles. According to the complaint, however, consumers are required to pay additional fees beyond the amount

Analysis to Aid Public Comment

stated as “down” or “downpayment,” including but not limited to the first month's payment, a security deposit, and/or a bank fee. This practice, according to the complaint, constitutes a deceptive practice in violation of Section 5(a) of the FTC Act.

The complaint against Northeast also alleges that Northeast misrepresents that the offer to double consumers' downpayments up to \$4,000 applied to the lease or credit offers advertised. According to the complaint, the offer to double consumers' downpayments up to \$4,000 was not available with the advertised lease or credit offers. This practice, according to the complaint, constitutes a deceptive practice in violation of Section 5(a) of the FTC Act.

The complaints against Dunphy, Northeast, Norristown, and Pacifico Ardmore allege that their credit advertisements represent that consumers can purchase the advertised vehicles at the terms prominently stated in the advertisements, including but not necessarily limited to the sales price and/or downpayment amount. According to the complaints, these credit advertisements fail to disclose additional terms pertaining to the credit offer, such as the terms of repayment and the annual percentage rate. Such information is alleged to be material to consumers in deciding whether to visit respondents' dealerships and/or whether to purchase an automobile from respondents. These practices, according to the complaints, constitute deceptive practices in violation of Section 5(a) of the FTC Act.

B. CLA and Regulation M Violations

The complaints allege that all respondents violated the CLA and Regulation M. The complaints allege that respondents' lease ads state a monthly payment amount and/or downpayment amount, but fail to disclose, and/or fail to disclose clearly and conspicuously, one or more of the following required terms: that the transaction advertised is a lease; the total amount due prior to or at consummation, or by delivery, if delivery occurs after consummation and that such amount: 1) excludes third-party fees

Analysis to Aid Public Comment

that vary by state or locality, such as taxes, licenses, and registration fees, and discloses that fact or 2) includes third-party fees based on a particular state or locality and discloses that fact and the fact that such fees may vary by state or locality; whether or not a security deposit is required; the number, amounts, and timing of scheduled payments; and that an extra charge may be imposed at the end of the lease term in a lease where the liability of the consumer is based on the difference between the residual value of the leased property and its realized value at the end of the lease term.

According to the complaints, the lease disclosures in respondents' lease advertisements are not clear and conspicuous because they appear in fine print and/or in an inconspicuous location. These practices, according to the complaints, violate the advertising requirements of the CLA and Regulation M

The complaints also allege that respondents' lease advertisements state a downpayment amount more prominently than the disclosure of the total amount due at lease signing. According to the complaints, these practices violate Regulation M.

C. TILA and Regulation Z Violations

The complaints against Dunphy, Norristown, Northeast, Pacifico Ardmore, and Pacifico Ford allege that these respondents violated the TILA and Regulation Z. According to the complaints, these respondents state a monthly payment amount and/or a downpayment amount as terms for financing the purchase of the advertised vehicles, but fail to disclose the following items of information required by Regulation Z: the annual percentage rate and the terms of repayment. In addition, the complaints against all respondents allege that their credit ads do not properly state the finance charge as the annual percentage rate, as required by Regulation Z.

II. Proposed Orders

The proposed orders prohibit respondents from disseminating advertisements that state the amount of any payment due at inception (excluding the monthly payment amount) or the fact that any or no inception payment is due without also disclosing with “equal prominence” the total amount a consumer must pay at lease signing or delivery. This requirement parallels an identical requirement found in Regulation M.

The proposed orders also prohibit respondents from disseminating advertisements that state the amount of any payment or that any or no initial payment is required at lease signing or delivery, if delivery occurs after consummation, without disclosing clearly and conspicuously all of the terms required by Regulation M, as follows: that the transaction advertised is a lease; the total amount due at lease signing or delivery; whether or not a security deposit is required; the number, amounts, and timing of scheduled payments; and that an extra charge may be imposed at the end of the lease term in a lease in which the liability of the consumer at the end of the lease term is based on the anticipated residual value of the vehicle. This requirement is intended to enjoin the respondents from deceptively advertising only the most attractive portions of its lease offers by requiring clear and conspicuous disclosure of the information necessary for consumers to make informed decisions about advertised lease offers. This paragraph parallels the advertising disclosure requirements from the CLA and Regulation M. The proposed orders also prohibit respondents from violating the CLA and Regulation M.

In addition, the proposed order for Dunphy prohibits Dunphy from misrepresenting the costs of leasing, including the total due at lease inception. The proposed orders for respondents Dunphy and Northeast prohibit these respondents from misrepresenting that advertised terms apply to a cash or credit offer, when, in fact, the terms apply to an offer to lease the advertised vehicle. The

Analysis to Aid Public Comment

proposed order for Northeast also prohibits Northeast from misrepresenting the availability of any advertised offer.

With respect to credit advertisements, the proposed orders prohibit respondents from stating the amount or percentage of any downpayment, the number of payments or period of repayment, the amount of any payment, or the amount of any finance charge, without disclosing clearly and conspicuously all of the terms required by Regulation Z, as follows: the amount or percentage of the downpayment; the terms of repayment; and the correct annual percentage rate, using that term or the abbreviation "APR." If the annual percentage rate may be increased after consummation of the credit transaction, that fact must also be disclosed.

The proposed orders also prohibit respondents from stating a rate of finance charge without stating the rate as an "annual percentage rate" or "APR." The proposed orders also prohibit all respondents from violating the TILA or Regulation Z.

The purpose of this analysis is to facilitate public comment on the proposed orders, and it is not intended to constitute an official interpretation of the agreements and proposed orders or to modify in any way their terms.

Complaint

IN THE MATTER OF

DUNPHY NISSAN, INC., ET AL.

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATIONS OF
SEC. 5 OF THE FEDERAL TRADE COMMISSION ACT, THE
CONSUMER LEASING ACT, AND THE TRUTH IN LENDING ACT

Docket C-3924; File No. 992 3082
Complaint, February 7, 2000 – Decision, February 7, 2000

This consent order prohibits respondents from disseminating advertisements that state the amount of any payment due at inception (excluding the monthly payment amount) or the fact that any or no inception payment is due without also disclosing with “equal prominence” the total amount a consumer must pay at lease signing or delivery. The consent orders also prohibit respondents from disseminating advertisements that state the amount of any payment or that any or no initial payment is required at lease signing or delivery, if delivery occurs after consummation, without disclosing clearly and conspicuously all of the terms required, that the transaction advertised is a lease; the total amount due at lease signing or delivery; whether or not a security deposit is required; the number, amounts, and timing of scheduled payments; and that an extra charge may be imposed at the end of the lease term in a lease in which the liability of the consumer at the end of the lease term is based on the anticipated residual value of the vehicle. With respect to credit advertisements, the proposed orders prohibit respondents from stating the amount or percentage of any down payment, the number of payments or period of repayment, the amount of any payment, or the amount of any finance charge, without disclosing clearly and conspicuously all of the terms, the amount or percentage of the down payment; the terms of repayment; and the correct annual percentage rate, using that term or the abbreviation “APR.” If the annual percentage rate may be increased after consummation of the credit transaction, that fact must also be disclosed. The consent orders also prohibit respondents from stating a rate of finance charge without stating the rate as an “annual percentage rate” or “APR.” Respondent is also prohibited from

Participants

For the Commission: *Rolando Berrelez, David Medine, and Sally Forman Pitofsky.*

For the Respondents: *Serge Naumovsky, Dunphy Nissan, Inc.*

Complaint

COMPLAINT

The Federal Trade Commission, having reason to believe that Dunphy Nissan, Inc., a corporation, and Serge Naumovsky, individually and as an officer of the corporation, (“respondents”) have violated the provisions of the Federal Trade Commission Act, 15 U.S.C. §§ 45-58, as amended, the Consumer Leasing Act, 15 U.S.C. §§ 1667-1667f, as amended, and its implementing Regulation M, 12 C.F.R. § 213, as amended, and the Truth in Lending Act, 15 U.S.C. §§ 1601-1667, as amended, and its implementing Regulation Z, 12 C.F.R. § 226, as amended, and it appearing to the Commission that this proceeding is in the public interest, alleges:

1. Respondent Dunphy Nissan, Inc. is a Pennsylvania corporation with its principal office or place of business at 5018 Township Line Rd., Drexel Hill, Pennsylvania 19083. Respondent offers automobiles for sale or lease to consumers.

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

3. Respondents have disseminated advertisements to the public that promote consumer leases, as the terms “advertisement” and “consumer lease” are defined in Section 213.2 of Regulation M, 12 C.F.R. § 213.2, as amended.

4. Respondents have disseminated advertisements to the public that promote credit sales and other extensions of closed-end credit in consumer credit transactions, as the terms “advertisement,” “credit sale,” and “consumer credit” are defined in Section 226.2 of Regulation Z, 12 C.F.R. § 226.2, as amended.

Complaint

5. The acts and practices of respondents alleged in this complaint have been in or affecting commerce, as “commerce” is defined in Section 4 of the Federal Trade Commission Act, 15 U.S.C. § 44.

6. Respondents have disseminated or have caused to be disseminated consumer lease advertisements (“lease advertisements”) and credit sale advertisements (“credit advertisements”) for automobiles, including but not necessarily limited to the attached Dunphy Exhibits A, B, and C. Dunphy Exhibits A, B, and C are advertisements in the print media. These lease and/or credit advertisements contain the following statements:

A. [Dunphy Exhibit A states numerous lease and credit offers, including:]

**“HURRY! FINAL 2 DAYS TO TAKE ADVANTAGE
OF THE SPECIAL OFFERS! . . .**

FINANCING AS LOW AS 0% . . .

**ASK ABOUT OUR FAMOUS NO MONEY DOWN
PROGRAM . . .**

	ONLY \$999 DOWN	‘0 DOWN DEALS’
NEW ‘98 ALTIMA GXE \$14,295	\$179 LEASE PER MO.	\$199 LEASE PER MO.
NEW ‘98 ALTIMA SE \$15,599	\$189 LEASE PER MO.	\$219 LEASE PER MO.

Complaint

NEW '98 ALTIMA GLE	\$199 LEASE	\$229 LEASE
\$15,999	PER MO.	PER
	MO."	

[A fine print disclosure at the bottom of the ad states, "Altima/Maxima/Pathfinder/term/miles per year/42/42/50/12/12/12 All leases are with no money down, no cap cost reduction, 1st mo. Pymt., Ref.Sec.Dep., Bank Fee, Taxes, Tags & Registration are due at inception. All Buy Prices with \$2000 cash or trade. . . ."]
(Dunphy Exhibit A)

B. [Dunphy Exhibit B states several lease and credit offers, including:]

**"PRESIDENTS DAY SALE! . . .
WITH LOW DOWN PAYMENT OF ONLY
\$399 LOOK WHAT YOU GET!
HURRY! SPECIAL SALES INCENTIVES END
MONDAY AT 10PM**

...

FINANCING AS LOW AS
6.9%
& YOU KEEP THE REBATE. . .

ASK ABOUT OUR FAMOUS NO MONEY DOWN
PROGRAM

...

'98 ALTIMA GXE. . .		
\$195	OR	\$15,999
PER MONTH		BUY FOR

'98 PATHFINDER SE. . .		
\$299	OR	\$24,999

Complaint

PER MONTH		BUY FOR
'98 QUEST . . .		
\$299	OR	\$18,299"
PER MONTH		BUY FOR

[Fine print disclosures near the bottom and at the bottom of the ad state "Prices and payments include down payment of \$399. All leases are for 42 months with 12,000 mile a year with approved credit, 1st months payment, security deposit, bank fee & reg. are required at inception. All payments and prices are plus tax and include all factory rebates and incentives.] (Exhibit B)

C. [Dunphy Exhibit C states numerous lease and credit offers, including:]

"SUMMER SAVINGS EVENT!

**FINANCING AS LOW AS 0%
ON EVERY NEW VEHICLE**

**NEW '98 MAXIMA SE . . .
\$18,999 with \$2000 cash or trade
\$2,000 DOWN DEALS
\$229 LEASE PER MO.
'0 DOWN DEALS'
\$289 LEASE PER MO. . . .**

**NEW '98 PATHFINDER SE . . .
\$23,699 with \$2000 cash or trade**

**\$2,000 DOWN DEALS
\$269 LEASE PER MO.'0 DOWN DEALS'
\$319 LEASE PER MO. . . ."**

[A fine print disclosure at the bottom of the ad states:
"ALTIMA/MAXIMA/PATHFINDER/SENTRA/QUEST/TERM/
MILES PER YEAR/48/38/48/48/48/12/10/12/12/12 1ST MO.

Complaint

PYMT., REF.SEC.DEF., BANK FEE, TAXES, TAGS, & REGISTRATION ARE DUE AT INCEPTION”] (Dunphy Exhibit C)

FEDERAL TRADE COMMISSION ACT VIOLATIONS**COUNT I: MISREPRESENTATION OF INCEPTION FEES**

7. In lease advertisements, including but not necessarily limited to Dunphy Exhibits A, B, and C, respondents have represented, expressly or by implication, that the amount stated as “down” or “downpayment” is the total amount consumers must pay at lease inception to lease the advertised vehicles.

8. In truth and in fact, the amount stated as “down” or “downpayment” in respondents’ lease advertisements is not the total amount consumers must pay at lease inception to lease the advertised vehicles. Consumers are required to pay additional fees beyond the amount stated as “down” or “downpayment,” including but not limited to the first month’s payment, a security deposit, and/or a bank fee. Therefore, respondents’ representation as alleged in Paragraph 7 was, and is, false or misleading.

9. Respondents’ practices constitute deceptive acts or practices in or affecting commerce in violation of Section 5(a) of the Federal Trade Commission Act, 15 U.S.C. § 45(a).

COUNT II: MISREPRESENTATION OF ADVERTISED TRANSACTION

10. In lease advertisements, including but not necessarily limited to Dunphy Exhibit B, respondents have represented, expressly or by implication, that consumers can finance the purchase of the advertised vehicles for the monthly payment amounts prominently stated in the advertisements.

Complaint

11. In truth and in fact, consumers cannot finance the purchase of the advertised vehicles for the monthly payment amounts prominently stated in the advertisements. The monthly payment amounts prominently stated in the advertisements are components of lease offers and not credit offers. Therefore, respondents' representation as alleged in Paragraph 10 was, and is, false or misleading.

12. Respondents' practices constitute deceptive acts or practices in or affecting commerce in violation of Section 5(a) of the Federal Trade Commission Act, 15 U.S.C. § 45(a).

COUNT III: FAILURE TO DISCLOSE, AND/OR FAILURE TO DISCLOSE ADEQUATELY, LEASE TERMS

13. In lease advertisements, including but not necessarily limited to Dunphy Exhibits A, B, and C, respondents have represented, expressly or by implication, that consumers can lease the advertised vehicles at the terms prominently stated in the advertisements, including but not necessarily limited to the monthly payment amount and/or the downpayment amount.

14. These lease advertisements have failed to disclose, and/or failed to disclose adequately, additional terms pertaining to the lease offer, such as the total amount due at lease inception. This information does not appear at all or appears in fine print in the advertisements. This information would be material to consumers in deciding whether to visit respondents' dealerships and/or whether to lease an automobile from respondents. The failure to disclose, and/or failure to disclose adequately, these additional terms, in light of the representation made, was, and is, a deceptive practice.

15. Respondents' practices constitute deceptive acts or practices in or affecting commerce in violation of Section 5(a) of the Federal Trade Commission Act, 15 U.S.C. § 45(a).

Complaint

COUNT IV: FAILURE TO DISCLOSE CREDIT TERMS

16. In credit advertisements, including but not necessarily limited to Dunphy Exhibits A, B, and C, respondents have represented, expressly or by implication, that consumers can purchase the advertised vehicles at the terms prominently stated in the advertisements, including but not necessarily limited to the sales price and/or downpayment amount.

17. These credit advertisements have failed to disclose additional terms pertaining to the credit offer, such as the annual percentage rate and the terms of repayment. This information would be material to consumers in deciding whether to visit respondents' dealerships and/or whether to purchase an automobile from respondents. The failure to disclose these additional terms, in light of the representation made, was, and is, a deceptive practice.

18. Respondents' practices constitute deceptive acts or practices in or affecting commerce in violation of Section 5(a) of the Federal Trade Commission Act, 15 U.S.C. § 45(a).

CONSUMER LEASING ACT AND REGULATION M VIOLATIONS**COUNT V: FAILURE TO DISCLOSE, AND/OR FAILURE TO DISCLOSE CLEARLY AND CONSPICUOUSLY REQUIRED INFORMATION**

19. Respondents' lease advertisements, including but not necessarily limited to Dunphy Exhibits A, B, and C, state a monthly payment amount and/or downpayment amount, but fail to disclose, and/or fail to disclose clearly and conspicuously, certain additional terms required by the Consumer Leasing Act and Regulation M, including one or more of the following terms:

Complaint

- a. that the transaction advertised is a lease;
- b. the total amount due prior to or at consummation, or by delivery, if delivery occurs after consummation. This total amount may: 1) exclude third-party fees that vary by state or locality, such as taxes, licenses, and registration fees, and disclose that fact or 2) provide a total that includes third-party fees based on a particular state or locality as long as that fact and the fact that such fees may vary by state or locality are disclosed;
- c. whether or not a security deposit is required;
- d. the number, amounts, and timing of scheduled payments; and
- e. that an extra charge may be imposed at the end of the lease term in a lease where the liability of the consumer is based on the difference between the residual value of the leased property and its realized value at the end of the lease term.

20. The lease disclosures required by Regulation M, if provided, are not clear and conspicuous because they appear in fine print and/or in an inconspicuous location.

21. Respondents' practices have violated Section 184 of the Consumer Leasing Act, 15 U.S.C. § 1667c, and Section 213.7 of Regulation M, 12 C.F.R. § 213.7.

**COUNT VI: FAILURE TO DISCLOSE THE TOTAL
AMOUNT DUE AT LEASE SIGNING WITH EQUAL
PROMINENCE**

22. Respondents' lease advertisements, including but not necessarily limited to Dunphy Exhibits A, B, and C, state a downpayment amount more prominently than the disclosure of

Complaint

the total amount due at lease signing, in violation of Section 213.7(b)(1) of Regulation M, 12 C.F.R. § 213.7(b)(1).

23. Respondents' practices have violated Section 213.7(b)(1) of Regulation M, 12 C.F.R. § 213.7(b)(1).

**TRUTH IN LENDING ACT AND REGULATION Z
VIOLATIONS**

**COUNT VII: FAILURE TO DISCLOSE REQUIRED
INFORMATION**

24. In credit advertisements, including but not necessarily limited to Dunphy Exhibits A, B, and C, respondents have stated a monthly payment amount and/or a downpayment amount as terms for financing the purchase of the advertised vehicles, but have failed to disclose the following items of information required by Regulation Z: the annual percentage rate and the terms of repayment.

25. Respondents' practices have violated Section 144 of the Truth in Lending Act, 15 U.S.C. § 1664, and Section 226.24(c) of Regulation Z, 12 C.F.R. § 226.24(c).

**COUNT VIII: FAILURE TO STATE RATE OF FINANCE
CHARGE AS ANNUAL PERCENTAGE RATE**

26. In credit advertisements, including but not necessarily limited to Dunphy Exhibits A, B, and C, respondents have stated a rate of finance charge without stating that rate as an "annual percentage rate," using that term or the abbreviation "APR."

27. Respondents' practice constitutes a violation of Section 144 and 107 of the TILA, 15 U.S.C. §§ 1664 and 1606, respectively, and Sections 226.24(b) and 226.22 of Regulation Z, 12 C.F.R. §§ 226.24(b) and 226.22, respectively.

Complaint

THEREFORE, the Federal Trade Commission this seventh day of February, 2000, has issued this complaint against respondents.

By the Commission.

Complaint Exhibits

Exhibit A

YOU CLIP IT & WE'LL BEAT IT!
BRING US ANY NISSAN DEALERS AD OR BUYERS ORDER FROM ANYWHERE IN THE COUNTRY AND WE'LL BEAT IT!
DO NOT PASS UP THIS TREMENDOUS OPPORTUNITY

HURRY! FINAL 2 DAYS TO TAKE ADVANTAGE OF THE SPECIAL OFFERS!

WE GUARANTEE OUR PRICES, SERVICE & YOUR SATISFACTION. EXPERIENCE THE DIFFERENCE TODAY BY DIFFERENCE.

CALL OUR TOLL-FREE CREDIT HOTLINE
(800) 947-1110

ASK ABOUT OUR FAMOUS NO MONEY DOWN PROGRAM

CHOOSE FROM OVER 100 NEW & USED CAR INVENTORY

SAVINGS UP TO \$6,000

FINANCING AS LOW AS 0%

REBATES UP TO \$4,000

OVER 100 NEW CARS IN STOCK... ALL SIMILAR SAVINGS!

ONLY \$99 DOWN

"0 DOWN DEALS"

<p>NEW '98 ALTIMA GXE Automatic, Air Cond, Power Windows, ABS, Alloy, Sunroof, 170 Miles VIN: 1N4AL31P2LN1100895</p>	<p>NEW '98 MAXIMA SE Automatic, Power Windows, P1 Locks, Cass, 170 Miles VIN: 1N4AL31P2LN1100895</p>	<p>NEW '98 PATHFINDER SE Automatic, Air Cond, Power Windows, ABS, Alloy, Sunroof, 170 Miles VIN: 1N4AL31P2LN1100895</p>
<p>NEW '98 ALTIMA SE Automatic, Air Cond, Power Windows, ABS, Alloy, Sunroof, 170 Miles VIN: 1N4AL31P2LN1100895</p>	<p>NEW '98 ALTIMA GLE Automatic, Air Cond, Power Windows, P1 Locks, Leather, Alloy, Sunroof, 170 Miles VIN: 1N4AL31P2LN1100895</p>	<p>NEW '98 MAXIMA GLE Automatic, Air Cond, Power Windows, P1 Locks, Leather, Alloy, Sunroof, 170 Miles VIN: 1N4AL31P2LN1100895</p>
<p>NEW '98 MAXIMA GXE Automatic, Air Cond, Power Windows, ABS, Alloy, Sunroof, 170 Miles VIN: 1N4AL31P2LN1100895</p>	<p>NEW '98 MAXIMA SE Automatic, Power Windows, P1 Locks, Cass, 170 Miles VIN: 1N4AL31P2LN1100895</p>	<p>NEW '98 PATHFINDER VE Automatic, Air Cond, Power Windows, ABS, Alloy, Sunroof, 170 Miles VIN: 1N4AL31P2LN1100895</p>
<p>NEW '98 MAXIMA SE Automatic, Power Windows, P1 Locks, Cass, 170 Miles VIN: 1N4AL31P2LN1100895</p>	<p>NEW '98 MAXIMA GLE Automatic, Air Cond, Power Windows, P1 Locks, Leather, Alloy, Sunroof, 170 Miles VIN: 1N4AL31P2LN1100895</p>	<p>NEW '98 PATHFINDER SE Automatic, Air Cond, Power Windows, ABS, Alloy, Sunroof, 170 Miles VIN: 1N4AL31P2LN1100895</p>
<p>NEW '98 MAXIMA GLE Automatic, Air Cond, Power Windows, P1 Locks, Leather, Alloy, Sunroof, 170 Miles VIN: 1N4AL31P2LN1100895</p>	<p>NEW '98 PATHFINDER VE Automatic, Air Cond, Power Windows, ABS, Alloy, Sunroof, 170 Miles VIN: 1N4AL31P2LN1100895</p>	<p>NEW '98 PATHFINDER SE Automatic, Air Cond, Power Windows, ABS, Alloy, Sunroof, 170 Miles VIN: 1N4AL31P2LN1100895</p>

NISSAN

DUNPHY NISSAN

5018 TOWNSHIP LINE RD. DREXEL HILL, PA • 610-449-2800

Dunphy Exhibit A

Complaint Exhibits

Exhibit B

NEW DUNPHY NISSAN PRESIDENTS DAY SALE!

EXTENDED SALE HOURS!
SAT. 9AM TIL 6PM
SUN. 9AM TIL 10PM

WITH LOW DOWN PAYMENT OF ONLY \$399 LOOK WHAT YOU GET

EXURRY! SPECIAL SALES INCENTIVES END MONDAY AT 5PM

<p>'98 ALTIMA GXE Auto, Air, PW, PL, AMPP Cass, WCD Player, PDC, VIN C122188</p> <p>\$195 OR \$15,999</p>	<p>FACTORY REBATE \$1,400</p> <p>SAVINGS \$550</p> <p>COLLEGE GRAD REBATE \$500</p> <p>FINANCING AS LOW AS 6.9%</p> <p>IF YOU KEEP THE REBATE</p> <p>CHOOSE FROM OVER 3 MILLION DOLLARS OF NEW & USED CAR INVENTORY</p> <p>ASK ABOUT OUR FAMOUS NO MONEY DOWN PROGRAM</p> <p>CALL OUR TOLL-FREE CREDIT HOTLINE (800) 943-LEND</p> <p>WE GUARANTEE OUR PRICES, SERVICE & YOUR SATISFACTION. EXPERIENCE THE DUNPHY DIFFERENCE</p>	<p>'98 MAXIMA GXE Auto, Air, VS Eng, PW, PL, PDC, AMPP Cass, VIN M87148</p> <p>\$249 OR \$18,899</p>
<p>'98 ALTIMA SE Auto, Air, PW, PL, AMPP Stereo Cass, WCD, Spoiler, Alloy Wheels, VIN C128024</p> <p>\$225 OR \$17,999</p>		<p>'98 MAXIMA SE Auto, Air, PW, PL, Spoiler, Alloy Wheels, AMPP Cass, VIN T81208</p> <p>\$279 OR \$19,999</p>
<p>'98 ALTIMA GLE Auto, Air, PW, PL, AMPP Cass, WCD Player, Leather, TR, Cruise, Park, Cass KAT7083</p> <p>\$235 OR \$18,999</p>		<p>'98 MAXIMA GLE Auto, Air, PW, PL, TR, Cruise, Leather, Alloy Wheels, VIN M81222</p> <p>\$299 OR \$22,999</p>
<p>'98 PATHFINDER SE Auto, Air, 4 Dr, 4 Dr, PW, PL, Alloy Wheels, AMPP Cass, WCD, VIN W82108</p> <p>\$299 OR \$24,999</p>		<p>'98 FRONTIER Extended Cab, Air, VS, 4 Dr, Alloy Wheels, VIN C202541</p> <p>\$249 OR \$15,000</p>
<p>'98 PATHFINDER XE Auto, Air, 4 Dr, 4 Dr, PW, PL, Cass, WCD Player, VIN W22084</p> <p>\$265 OR \$21,999</p>		<p>'98 SENTRA GXE 4 Dr, Auto, Air, PW, PL, PDC, AMPP Stereo Cass, VIN C71308</p> <p>YOUR CHOICE</p> <p>'98 200 SX 4 Dr, Auto, Air, PW, PL, Alloy Wheels, Spoiler, AMPP Stereo Cass, VIN C56758</p> <p>\$199 OR \$13,999</p> <p>SAVE BIG!</p>

DUNPHY-NISSAN

5018 TOWNSHIP LINE RD. DREXEL HILL, PA

Complaint Exhibits

Exhibit C

G34-MNW The Philadelphia Inquirer

SUMMER SAVINGS EVENT!

FINANCING AS LOW AS 0% ON EVERY NEW VEHICLE

SAVINGS UP TO \$6000

LOWEST PRICES THIS YEAR! HURRY FOR BEST SELECTION!

THIS MONTH'S SPECIAL!
Get a New Maxima for What You Would Pay for an Altima at Another Dealer

NEW 1998 MAXIMA GXE
Automatic Transmission, Air Condition, Power Windows, Power Door Locks, Cruise, TR, SR, #2248



\$16,595 with \$2000 cash or trade
\$199 LEASE PER MO. 0% DOWN DEALS

SUMMER BLOWOUT!

NEW 1998 PATHFINDER XE
Auto, Air Cond., 4 Door, AM/FM Stereo Cass., w/ CD Player, SR, #2250



\$22,299 with \$2000 cash or trade
\$259 LEASE PER MO. 0% DOWN DEALS

OVER 100 NEW CARS IN STOCK, ALL AT SIMILAR SAVINGS!

<p>NEW '98 MAXIMA SE Automatic, 4-Door, 1700cc, Cass. w/CD, Alloy, Sport, SR, #2248</p> <p>\$18,999 with \$2000 cash or trade 2,000 DOWN DEALS \$229 LEASE PER MO. "0 DOWN DEALS" \$289 LEASE PER MO.</p>	<p>NEW '98 PATHFINDER SE Auto, Air, P.W., P.Locks, AM/CD & Cassette, Alloy, SR, #2248</p> <p>\$23,699 with \$2000 cash or trade 2,000 DOWN DEALS \$269 LEASE PER MO. "0 DOWN DEALS" \$319 LEASE PER MO.</p>	<p>NEW '98 SENTRA Auto, Air Condition, AM/FM Stereo Cassette, P.W., TR, SR, #2198</p> <p>\$9,999 with \$2000 cash or trade 2,000 DOWN DEALS \$119 LEASE PER MO. "0 DOWN DEALS" \$169 LEASE PER MO.</p>	<p>NEW '98 QUEST Auto, Air, 7 Passenger, P.W., P.L., Cass., AM/FM Stereo Cassette, SR, #4216</p> <p>\$17,199 with \$2000 cash or trade 2,000 DOWN DEALS \$229 LEASE PER MO. "0 DOWN DEALS" \$269 LEASE PER MO.</p>
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CHOOSE FROM OVER \$3,000,000 OF NEW & USED CAR INVENTORY

CALL OUR TOLL-FREE CREDIT HOTLINE (800) 947-LEND

EVERY NEW CAR IN STOCK \$2,000 REBATE PLUS HUGE DUNPHY DISCOUNTS

WE GUARANTEE OUR PRICES, SERVICE & YOUR SATISFACTION EXPERIENCE THE DUNPHY DIFFERENCE

DUNPHY NISSAN

5018 TOWNSHIP LINE RD. DREXEL HILL, PA

610-449-2800



ALL DUNPHY NISSAN DEALS ARE FINANCED THROUGH NISSAN FINANCIAL SERVICES PER YEAR. APR: 8.9% - 10.9% (10/12/12). 1ST MO. PPMT. REF. SEC. DEP. BIRTH FEE. TAXES. TITLE & REGISTRATION. NISSAN FIN. AT ACCEPTANCE. REBATES & INCENTIVES INCLUDED TO QUAL. BUYERS.

DECISION AND ORDER

The Federal Trade Commission having initiated an investigation of certain acts and practices of the respondents named in the caption hereof, and the respondents having been furnished thereafter with a copy of a draft of complaint which the Bureau of Consumer Protection proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge the respondents with violations of the Federal Trade Commission Act, 15 U.S.C. §§ 45-58, as amended, the Consumer Leasing Act, 15 U.S.C. §§ 1667-1667f, as amended, and its implementing Regulation M, 12 C.F.R. § 213, as amended, and the Truth in Lending Act, 15 U.S.C. §§ 1601-1667, as amended, and its implementing Regulation Z, 12 C.F.R. § 226, as amended; and

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

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

Decision and Order

1. Respondent Dunphy Nissan, Inc. is a Pennsylvania corporation with its principal office or place of business at 5018 Township Line Rd., Drexel Hill, Pennsylvania 19026.
2. Respondent Serge Naumovsky is an officer of the corporate respondent. Individually or in concert with others, he formulates, directs, or controls the policies, acts, or practices of the corporation. His principal office or place of business is the same as that of the corporate respondent.
3. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondents, and the proceeding is in the public interest.

ORDER**DEFINITIONS**

1. "Clearly and conspicuously" shall mean as follows:
 - a. In a television, video, radio, or Internet or other electronic advertisement, an audio disclosure shall be delivered in a volume, cadence, and location sufficient for an ordinary consumer to hear and comprehend it. A video disclosure shall be of a size and shade, and shall appear on the screen for a duration and in a location, sufficient for an ordinary consumer to read and comprehend it.
 - b. In a print advertisement, a disclosure shall be in a type size and location sufficiently noticeable for an ordinary consumer to read and comprehend it, in

Decision and Order

print that contrasts with the background against which it appears.

The disclosure shall be in understandable language and syntax. Nothing contrary to, inconsistent with, or in mitigation of the disclosure shall be used in any advertisement.

2. "Equal prominence" shall mean as follows:
 - a. In a television, video, radio, or Internet or other electronic advertisement, a video disclosure shall be presented in the same or similar format, including but not necessarily limited to type size, shade, contrast, duration, and placement. An audio disclosure shall be delivered in the same or similar manner, including but not necessarily limited to volume, cadence, pace, and placement.
 - b. In a print advertisement, a disclosure shall be presented in the same or similar format, including but not necessarily limited to type size, shade, contrast, and placement.

Nothing contrary to, inconsistent with, or in mitigation of the disclosure shall be used in any advertisement.

3. "Total amount due at lease signing or delivery" as used herein shall mean the total amount of any initial payments required to be paid by the lessee on or before consummation of the lease or delivery of the vehicle, whichever is later, as required by Regulation M, 12 C.F.R. § 213, as amended. The total amount due at lease signing or delivery may 1) exclude third-party fees, such as taxes, licenses, and registration fees, and disclose that fact or 2) provide a total that includes third-party fees based on a particular state or locality as long as that fact and the fact that such fees may vary

Decision and Order

by state or locality are disclosed. (Section 213.7 of Regulation M, 12 C.F.R. § 213.7, as amended.)

4. "Commerce" shall mean as defined in Section 4 of the Federal Trade Commission Act, 15 U.S.C. § 44.
5. Unless otherwise specified, "respondents" shall mean Dunphy Nissan, Inc., a corporation, its successors and assigns and its officers; Serge Naumovsky, individually and as an officer of the corporation; and each of the above's agents, representatives, and employees.

I.

IT IS ORDERED that respondents, directly or through any corporation, subsidiary, division, or any other device, in connection with any advertisement to promote, directly or indirectly, any consumer lease in or affecting commerce, as "advertisement" and "consumer lease" are defined in Section 213.2 of Regulation M, 12 C.F.R. § 213.2, as amended, shall not, in any manner, expressly or by implication:

- A. Misrepresent the costs of leasing a vehicle, including but not necessarily limited to the total amount due at lease inception.
- B. Misrepresent that any advertised lease terms, including but not limited to a monthly payment amount or downpayment, pertain to a cash or credit offer.
- C. Make any reference to any charge that is part of the total amount due at lease signing or delivery or that no such charge is required, not including a statement of the periodic payment, unless the advertisement also

Decision and Order

states with equal prominence the total amount due at lease signing or delivery.

- D. State the amount of any payment or that any or no initial payment is required at lease signing or delivery, if delivery occurs after consummation, without disclosing clearly and conspicuously all of the terms required by Regulation M, as follows:
1. that the transaction advertised is a lease;
 2. the total amount due at lease signing or delivery;
 3. whether or not a security deposit is required;
 4. the number, amounts, and timing of scheduled payments; and
 5. that an extra charge may be imposed at the end of the lease term in a lease in which the liability of the consumer at the end of the lease term is based on the anticipated residual value of the vehicle.

(Section 184(a) of the Consumer Leasing Act ("CLA"), 15 U.S.C. § 1667c(a), as amended, and Section 213.7 of Regulation M, 12 C.F.R. § 213.7, as amended.)

For radio advertisements, respondents may also comply with the requirements of this subparagraph by utilizing Section 184(c) of the CLA, 15 U.S.C. § 1667c(C), and Section 213.7(f) of Regulation M, 12 C.F.R. § 213.7(f), as amended. For television advertisements, respondents may also comply with the requirements of this subparagraph by utilizing Section 213.7(f) of Regulation M, as amended.

Decision and Order

- E. Fail to comply in any other respect with Regulation M, 12 C.F.R. § 213, as amended, and the CLA, 15 U.S.C. §§ 1667-1667f, as amended.

II.

IT IS FURTHER ORDERED that respondents, directly or through any corporation, subsidiary, division, or any other device, in connection with any advertisement to promote, directly or indirectly, any extension of consumer credit in or affecting commerce, as “advertisement” and “consumer credit” are defined in Section 226.2 of Regulation Z, 12 C.F.R. § 226.2, as amended, shall not, in any manner, expressly or by implication:

- A. State a rate of finance charge without stating the rate as an “annual percentage rate” or the abbreviation “APR,” using that term.
- B. State the amount or percentage of any downpayment, the number of payments or period of repayment, the amount of any payment, or the amount of any finance charge, without disclosing clearly and conspicuously all of the terms required by Regulation Z, as follows:
1. the amount or percentage of the downpayment;
 2. the terms of repayment; and
 3. the correct annual percentage rate, using that term or the abbreviation “APR.” If the annual percentage rate may be increased after consummation of the credit transaction, that fact must also be disclosed.

(Sections 107 and 144(d) of the TILA, 15 U.S.C. §§ 1606 and 1664(d), as amended, and Sections 226.22

Decision and Order

and 226.24(c) of Regulation Z, 12 C.F.R. §§ 226.22 and 226.24(c), as amended.)

- C. Fail to comply in any other respect with Regulation Z, 12 C.F.R. § 226, as amended, and the TILA, 15 U.S.C. §§ 1601-1667, as amended.

III.

IT IS FURTHER ORDERED that respondent Dunphy Nissan, Inc., and its successors and assigns, and respondent Serge Naumovsky, 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 all records that will demonstrate compliance with the requirements of this order.

IV.

IT IS FURTHER ORDERED that respondent Dunphy Nissan, Inc., and its successors and assigns, and respondent Serge Naumovsky, shall deliver a copy of this order to all current and future principals, officers, directors, and managers, and to all current and future employees, agents, and representatives having responsibilities with respect to the subject matter of this order, and shall secure from each such person a signed and dated statement acknowledging receipt of the order. Respondents shall deliver this order to such current personnel within thirty (30) days after the date of service of this order, and to such future personnel within thirty (30) days after the person assumes such position or responsibilities.

V.

IT IS FURTHER ORDERED that respondent Dunphy Nissan, Inc., and its successors and assigns, shall notify the Commission at least thirty (30) days prior to any change in the corporation that may affect compliance obligations arising under

Decision and Order

this order, including but not necessarily 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. 20580.

VI.

IT IS FURTHER ORDERED that respondent Serge Naumovsky for a period of ten (10) years after the date of issuance of this order, shall notify the Commission of the discontinuance of his current business or employment, or of his affiliation with any new business or employment involving the advertising and/or extension of a "consumer lease," as that term is defined in the CLA and its implementing Regulation M, or the advertising and/or extension of "consumer credit," as that term is defined in the TILA and its implementing Regulation Z. The notice shall include respondent's new business address and telephone number and a description of the nature of the business or employment and his duties and responsibilities. All notices required by this Part shall be sent by certified mail to the Associate Director, Division of Enforcement, Bureau of Consumer Protection, Federal Trade Commission, Washington, D.C. 20580.

Decision and Order

VII.

IT IS FURTHER ORDERED that respondent Dunphy Nissan, Inc., and its successors and assigns, and respondent Serge Naumovsky shall, within sixty (60) days after the date of service of this order, and at such other times as the Federal Trade Commission may require, file with the Commission a report, in writing, setting forth in detail the manner and form in which they have complied with this order.

VIII.

This order will terminate on February 7, 2020, 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 respondents 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.

By the Commission.

Analysis to Aid Public Comment

Analysis of Proposed Consent Orders to Aid Public Comment

Summary

The Federal Trade Commission has accepted separate agreements, subject to final approval, orders from respondents Dunphy Nissan, Inc. and Serge Naumovsky (“Dunphy”); Norristown Automobile Co., Inc. and William Milliken (“Norristown”); Northeast Auto Outlet, Inc. and Arthur Micchelli (“Northeast”); Pacifico Ardmore, Inc. and Kerry J. Pacifico (“Pacifico Ardmore”); Pacifico Ford, Inc. and Kerry T. Pacifico (“Pacifico Ford”); and Marty Sussman Organization, Inc. and Martin E. Sussman (“Sussman”)(together “respondents”). The persons named in these actions are named individually and as officers of their respective corporations.

The proposed consent orders have been placed on the public record for sixty (60) days for receipt of comments by interested persons. Comments received during this period will become part of the public record. After sixty (60) days, the Commission will again review the agreements and the comments received and will decide whether it should withdraw from the agreement or make final the agreements' proposed orders.

I. Complaint Allegations

A. FTC Act Violations

The complaints against the respondents allege that their automobile lease advertisements violate the Federal Trade Commission Act (“FTC Act”), the Consumer Leasing Act (“CLA”), and Regulation M. The complaints also allege that respondents' credit advertisements have violated the Truth in Lending Act (“TILA”) and Regulation Z. Section 5 of the FTC Act prohibits false, misleading, or deceptive representations or

Analysis to Aid Public Comment

omissions of material information in advertisements. In addition, Congress established statutory disclosure requirements for lease and credit advertising under the CLA and the TILA, respectively, and directed the Federal Reserve Board ("Board") to promulgate regulations implementing such statutes -- Regulations M and Z respectively. See 15 U.S.C. §§ 1601-1667e; 12 C.F.R. Part 213; 12 C.F.R. Part 226.

The complaints against respondents allege that their lease advertisements represent that consumers can lease the advertised vehicles at the terms prominently stated in the advertisements, including but not necessarily limited to the monthly payment amount and the downpayment amount. These lease advertisements, according to the complaints, have failed to disclose, and/or failed to disclose adequately, additional terms pertaining to the lease offer, such as the total amount due at lease inception. The complaints allege that this information does not appear at all or appears in fine print in the advertisements and that the information would be material to consumers in deciding whether to visit respondents' dealerships and/or whether to lease an automobile from respondents. These practices, according to the complaints, constitute deceptive practices in violation of Section 5(a) of the FTC Act.

The complaints against Dunphy and Northeast also allege that these respondents misrepresent that consumers can purchase the advertised vehicles for the monthly payment amounts prominently stated in the advertisements. According to the complaints, the monthly payment amounts prominently stated in the advertisements are components of lease offers and not credit offers. These practices, according to the complaints, constitute deceptive practices in violation of Section 5(a) of the FTC Act.

The complaint against Dunphy further alleges that Dunphy misrepresents that the amount stated as "down" or "downpayment" is the total amount consumers must pay at lease inception to lease the advertised vehicles. According to the complaint, however,

Analysis to Aid Public Comment

consumers are required to pay additional fees beyond the amount stated as “down” or “downpayment,” including but not limited to the first month's payment, a security deposit, and/or a bank fee. This practice, according to the complaint, constitutes a deceptive practice in violation of Section 5(a) of the FTC Act.

The complaint against Northeast also alleges that Northeast misrepresents that the offer to double consumers' downpayments up to \$4,000 applied to the lease or credit offers advertised. According to the complaint, the offer to double consumers' downpayments up to \$4,000 was not available with the advertised lease or credit offers. This practice, according to the complaint, constitutes a deceptive practice in violation of Section 5(a) of the FTC Act.

The complaints against Dunphy, Northeast, Norristown, and Pacifico Ardmore allege that their credit advertisements represent that consumers can purchase the advertised vehicles at the terms prominently stated in the advertisements, including but not necessarily limited to the sales price and/or downpayment amount. According to the complaints, these credit advertisements fail to disclose additional terms pertaining to the credit offer, such as the terms of repayment and the annual percentage rate. Such information is alleged to be material to consumers in deciding whether to visit respondents' dealerships and/or whether to purchase an automobile from respondents. These practices, according to the complaints, constitute deceptive practices in violation of Section 5(a) of the FTC Act.

B. CLA and Regulation M Violations

The complaints allege that all respondents violated the CLA and Regulation M. The complaints allege that respondents' lease ads state a monthly payment amount and/or downpayment amount, but fail to disclose, and/or fail to disclose clearly and conspicuously, one or more of the following required terms: that

Analysis to Aid Public Comment

the transaction advertised is a lease; the total amount due prior to or at consummation, or by delivery, if delivery occurs after consummation and that such amount: 1) excludes third-party fees that vary by state or locality, such as taxes, licenses, and registration fees, and discloses that fact or 2) includes third-party fees based on a particular state or locality and discloses that fact and the fact that such fees may vary by state or locality; whether or not a security deposit is required; the number, amounts, and timing of scheduled payments; and that an extra charge may be imposed at the end of the lease term in a lease where the liability of the consumer is based on the difference between the residual value of the leased property and its realized value at the end of the lease term.

According to the complaints, the lease disclosures in respondents' lease advertisements are not clear and conspicuous because they appear in fine print and/or in an inconspicuous location. These practices, according to the complaints, violate the advertising requirements of the CLA and Regulation M.

The complaints also allege that respondents' lease advertisements state a downpayment amount more prominently than the disclosure of the total amount due at lease signing. According to the complaints, these practices violate Regulation M.

C. TILA and Regulation Z Violations

The complaints against Dunphy, Norristown, Northeast, Pacifico Ardmore, and Pacifico Ford allege that these respondents violated the TILA and Regulation Z. According to the complaints, these respondents state a monthly payment amount and/or a downpayment amount as terms for financing the purchase of the advertised vehicles, but fail to disclose the following items of information required by Regulation Z: the annual percentage rate and the terms of repayment. In addition, the complaints against all respondents allege that their credit ads do not properly state the

Analysis to Aid Public Comment

finance charge as the annual percentage rate, as required by Regulation Z.

II. Proposed Orders

The proposed orders prohibit respondents from disseminating advertisements that state the amount of any payment due at inception (excluding the monthly payment amount) or the fact that any or no inception payment is due without also disclosing with “equal prominence” the total amount a consumer must pay at lease signing or delivery. This requirement parallels an identical requirement found in Regulation M.

The proposed orders also prohibit respondents from disseminating advertisements that state the amount of any payment or that any or no initial payment is required at lease signing or delivery, if delivery occurs after consummation, without disclosing clearly and conspicuously all of the terms required by Regulation M, as follows: that the transaction advertised is a lease; the total amount due at lease signing or delivery; whether or not a security deposit is required; the number, amounts, and timing of scheduled payments; and that an extra charge may be imposed at the end of the lease term in a lease in which the liability of the consumer at the end of the lease term is based on the anticipated residual value of the vehicle. This requirement is intended to enjoin the respondents from deceptively advertising only the most attractive portions of its lease offers by requiring clear and conspicuous disclosure of the information necessary for consumers to make informed decisions about advertised lease offers. This paragraph parallels the advertising disclosure requirements from the CLA and Regulation M. The proposed orders also prohibit respondents from violating the CLA and Regulation M.

Analysis to Aid Public Comment

In addition, the proposed order for Dunphy prohibits Dunphy from misrepresenting the costs of leasing, including the total due at lease inception. The proposed orders for respondents Dunphy and Northeast prohibit these respondents from misrepresenting that advertised terms apply to a cash or credit offer, when, in fact, the terms apply to an offer to lease the advertised vehicle. The proposed order for Northeast also prohibits Northeast from misrepresenting the availability of any advertised offer.

With respect to credit advertisements, the proposed orders prohibit respondents from stating the amount or percentage of any downpayment, the number of payments or period of repayment, the amount of any payment, or the amount of any finance charge, without disclosing clearly and conspicuously all of the terms required by Regulation Z, as follows: the amount or percentage of the downpayment; the terms of repayment; and the correct annual percentage rate, using that term or the abbreviation "APR." If the annual percentage rate may be increased after consummation of the credit transaction, that fact must also be disclosed.

The proposed orders also prohibit respondents from stating a rate of finance charge without stating the rate as an "annual percentage rate" or "APR." The proposed orders also prohibit all respondents from violating the TILA or Regulation Z.

The purpose of this analysis is to facilitate public comment on the proposed orders, and it is not intended to constitute an official interpretation of the agreements and proposed orders or to modify in any way their terms.

Complaint

IN THE MATTER OF

PACIFICO ARDMORE, INC., ET AL.

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATIONS OF
SEC. 5 OF THE FEDERAL TRADE COMMISSION ACT, THE
CONSUMER LEASING ACT, AND THE TRUTH IN LENDING ACT

*Docket C-3920; File No. 992 3116
Complaint, February 7, 2000 – Decision, February 7, 2000*

This consent order prohibits respondents from disseminating advertisements that state the amount of any payment due at inception (excluding the monthly payment amount) or the fact that any or no inception payment is due without also disclosing with “equal prominence” the total amount a consumer must pay at lease signing or delivery. The consent orders also prohibit respondents from disseminating advertisements that state the amount of any payment or that any or no initial payment is required at lease signing or delivery, if delivery occurs after consummation, without disclosing clearly and conspicuously all of the terms required, that the transaction advertised is a lease; the total amount due at lease signing or delivery; whether or not a security deposit is required; the number, amounts, and timing of scheduled payments; and that an extra charge may be imposed at the end of the lease term in a lease in which the liability of the consumer at the end of the lease term is based on the anticipated residual value of the vehicle. With respect to credit advertisements, the proposed orders prohibit respondents from stating the amount or percentage of any downpayment, the number of payments or period of repayment, the amount of any payment, or the amount of any finance charge, without disclosing clearly and conspicuously all of the terms, the amount or percentage of the downpayment; the terms of repayment; and the correct annual percentage rate, using that term or the abbreviation “APR.” If the annual percentage rate may be increased after consummation of the credit transaction, that fact must also be disclosed. The consent orders also prohibit respondents from stating a rate of finance charge without stating the rate as an “annual percentage rate” or “APR.”

Participants

For the Commission: *Rolando Berrelez, David Medine, and Sally Forman Pitofsky.*

Complaint

For the Respondents: *Richard A. Sprague, Sprague & Sprague.*

COMPLAINT

The Federal Trade Commission, having reason to believe that Pacifico Ardmore, Inc., a corporation, also doing business as Kerry's Pacifico Ford, and Kerry J. Pacifico, individually and as an officer of the corporation ("respondents"), have violated the provisions of the Federal Trade Commission Act, 15 U.S.C. §§ 45-58, as amended, the Consumer Leasing Act, 15 U.S.C. §§ 1667-1667f, as amended, and its implementing Regulation M, 12 C.F.R. § 213, as amended, and the Truth in Lending Act, 15 U.S.C. §§ 1601-1667, as amended, and its implementing Regulation Z, 12 C.F.R. § 226, as amended, and it appearing to the Commission that this proceeding is in the public interest, alleges:

1. Respondent Pacifico Ardmore, Inc. is a Pennsylvania corporation with its principal office or place of business at 211 East Lancaster Avenue, Ardmore, Pennsylvania 19903. Respondent offers automobiles for sale or lease to consumers.

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

3. Respondents have disseminated advertisements to the public that promote consumer leases, as the terms "advertisement" and "consumer lease" are defined in Section 213.2 of Regulation M, 12 C.F.R. § 213.2, as amended.

4. Respondents have disseminated advertisements to the public that promote credit sales and other extensions of closed-end credit in consumer credit transactions, as the terms

Complaint

“advertisement,” “credit sale,” and “consumer credit” are defined in Section 226.2 of Regulation Z, 12 C.F.R. § 226.2, as amended.

5. The acts and practices of respondents alleged in this complaint have been in or affecting commerce, as “commerce” is defined in Section 4 of the Federal Trade Commission Act, 15 U.S.C. § 44.

6. Respondents have disseminated or have caused to be disseminated advertisements promoting consumer leases (“lease advertisements”) and credit sales (“credit advertisements”) for automobiles, including but not necessarily limited to the attached Pacifico Ardmere Exhibits A and B. Pacifico Ardmere Exhibits A and B are advertisements in the print media. These lease and/or credit advertisements contains the following statements:

A. [Pacifico Ardmere Exhibit A states several lease and credit offers, including:]

“1998 FORD TAURUS LX. . .

CASH OR TRADE DOWN \$2,500
BUY \$14,54 FOR

OR LEASE FOR:
\$212 PER MO. 27 MOS. . . .

1998 FORD EXPLORER SPT 4X4. . .

CASH OR TRADE DOWN \$2,500
BUY \$22,105
FOR

OR LEASE FOR:
\$241 PER
MO.

Complaint

24
MOS. . . .

AS LOW AS 1.9% FINANCING. . .”

[A fine print disclosure at the bottom of the ad states, “1.9 Financing on Escort, Mustang, Contour & Ranger. Prior Sales Excluded. All Leases 24 Mo. (27 Mo. On Taurus). Due at inception \$2,500 down cash or trade, 1st mo. pymt., ref.sec.dep., bank fee (if req.) tax & tags.] (Pacifco Ardmore Exhibit A)

B. [Pacifco Ardmore Exhibit B states several lease and credit offers, including:]

“0%
FINANCING ...

‘99 FORD TAURUS . . .

LEASE PER MO
FOR: \$239 36 MOS.

BUY
FOR: \$16,899

‘99 FORD EXPEDITION XLT

LEASE \$339 PER MO.
FOR: 36 MOS. . . .”

[A fine print disclosure at the bottom of the ad states, “36 Mo. Closed End Lease, Due at inception \$2,000 down cash or trade, 1st Mo. pymt., Ref.sec.dep., bank fee, tax & tags to qual. buyers . . .] (Pacifco Ardmore Exhibit B)

Complaint

FEDERAL TRADE COMMISSION ACT VIOLATIONS**COUNT I: FAILURE TO DISCLOSE, AND/OR FAILURE TO DISCLOSE ADEQUATELY, LEASE TERMS**

7. In lease advertisements, including but not necessarily limited to Pacifico Ardmore Exhibits A and B, respondents have represented, expressly or by implication, that consumers can lease the advertised vehicles at the terms prominently stated in the advertisements, including but not necessarily limited to the monthly payment amount.

8. These lease advertisements have failed to disclose, and/or failed to disclose adequately, additional terms pertaining to the lease offer, such as the total amount due at lease inception. This information either does not appear at all or appears in fine print in the advertisements. This information would be material to consumers in deciding whether to visit respondents' dealerships and/or whether to lease an automobile from respondents. The failure to disclose, and/or failure to disclose adequately, these additional terms, in light of the representation made, was, and is, a deceptive practice.

9. Respondents' practices constitute deceptive acts or practices in or affecting commerce in violation of Section 5(a) of the Federal Trade Commission Act, 15 U.S.C. § 45(a).

COUNT II: FAILURE TO DISCLOSE, AND/OR FAILURE TO DISCLOSE ADEQUATELY, CREDIT TERMS

10. In credit advertisements, including but not necessarily limited to Pacifico Ardmore Exhibit A, respondents have represented, expressly or by implication, that consumers can finance the purchase of the advertised vehicles at the terms prominently stated in the advertisements, including but not necessarily limited to the sales price and a downpayment amount.

Complaint

11. These credit advertisements have failed to disclose, and/or failed to disclose adequately, additional terms pertaining to the credit offer, such as the terms of repayment and the annual percentage rate. This information would be material to consumers in deciding whether to visit respondents' dealerships and/or whether to purchase an automobile from respondents. The failure to disclose, and/or failure to disclose adequately, these additional terms, in light of the representation made, was, and is, a deceptive practice.

12. Respondents' practices constitute deceptive acts or practices in or affecting commerce in violation of Section 5(a) of the Federal Trade Commission Act, 15 U.S.C. § 45(a).

**CONSUMER LEASING ACT AND REGULATION M
VIOLATIONS**

**COUNT III: FAILURE TO DISCLOSE, AND/OR FAILURE
TO DISCLOSE CLEARLY AND CONSPICUOUSLY,
REQUIRED INFORMATION**

13. Respondents' lease advertisements, including but not necessarily limited to Pacifico Ardmore Exhibits A and B, state a monthly payment amount, but fail to disclose, and/or fail to disclose clearly and conspicuously, certain additional terms required by the Consumer Leasing Act and Regulation M, including one or more of the following terms:

- a. that the transaction advertised is a lease;
- b. the total amount due prior to or at consummation, or by delivery, if delivery occurs after consummation. This total amount may: 1) exclude third-party fees that vary by state or locality, such as taxes, licenses, and registration fees, and disclose that fact or 2) provide a total that includes third-party fees based on a particular

Complaint

state or locality as long as that fact and the fact that such fees may vary by state or locality are disclosed;

- c. whether or not a security deposit is required;
- d. the number, amounts, and timing of scheduled payments; and
- e. that an extra charge may be imposed at the end of the lease term in a lease where the liability of the consumer is based on the difference between the residual value of the leased property and its realized value at the end of the lease term.

14. The lease disclosures required by Regulation M, if provided, are not clear and conspicuous because they appear in fine print and/or in an inconspicuous location.

15. Respondents' practices have violated Section 184 of the Consumer Leasing Act, 15 U.S.C. § 1667c, and Section 213.7 of Regulation M, 12 C.F.R. § 213.7.

**COUNT IV: FAILURE TO DISCLOSE THE TOTAL
AMOUNT DUE AT LEASE SIGNING WITH EQUAL
PROMINENCE**

16. Respondents' lease advertisements, including but not necessarily limited to Pacifico Ardmore Exhibits A and B, state a downpayment amount more prominently than the disclosure of the total amount due at lease signing, in violation of Section 213.7(b)(1) of Regulation M, 12 C.F.R. § 213.7(b)(1).

17. Respondents' practices have violated Section 213.7(b)(1) of Regulation M, 12 C.F.R. § 213.7(b)(1).

Complaint

**TRUTH IN LENDING ACT AND REGULATION Z
VIOLATIONS****COUNT V: FAILURE TO DISCLOSE, AND/OR FAILURE
TO DISCLOSE CLEARLY AND CONSPICUOUSLY,
REQUIRED INFORMATION**

18. In credit advertisements, including but not necessarily limited to Pacifico Ardmore Exhibit A, respondents have stated a downpayment amount, but have failed to disclose, and/or failed to disclose clearly and conspicuously, the following items of information required by Regulation Z: the annual percentage rate and/or the terms of repayment.

19. The credit disclosures required by Regulation Z, if provided, are not clear and conspicuous because they appear in fine print and/or in an inconspicuous location.

20. Respondents' practices have violated Section 144 of the Truth in Lending Act, 15 U.S.C. § 1664, and Section 226.24(c) of Regulation Z, 12 C.F.R. § 226.24(c).

**COUNT VI: FAILURE TO STATE RATE OF FINANCE
CHARGE AS ANNUAL PERCENTAGE RATE**

21. In credit advertisements, including but not necessarily limited to Pacifico Ardmore Exhibits A and B, respondents have stated a rate of finance charge without stating that rate as an "annual percentage rate," using that term or the abbreviation "APR."

22. Respondents' practice constitutes a violation of Section 144 and 107 of the TILA, 15 U.S.C. §§ 1664 and 1606, respectively, and Sections 226.24(b) and 226.22 of Regulation Z, 12 C.F.R. §§ 226.24(b) and 226.22, respectively.

Complaint Exhibits

THEREFORE, the Federal Trade Commission this seventh day of February, 2000, has issued this complaint against respondents.

By the Commission.

Exhibit A

GREAT AMERICAN PRESIDENTS' DAY SELLABRATION!

AMERICA'S BEST CARS AND TRUCKS AT HUGE HOLIDAY DISCOUNTS & SAVINGS

<p>1998 FORD ESCORT SE</p> <p>REBATES UP TO \$2000</p> <p>2.0L SPI Engine, Automatic Trans., Front & Rear Floor Mats, AM/FM Stereo, Cassette, Smoker's Package \$28</p> <p>MSRP \$12,495, LEV \$2,295, TOP \$4,392</p> <p>RETAIL PRICE \$4,095</p> <p>FACTORY REBATE \$1,000</p> <p>KERRY PACIFICO DISCOUNT \$786</p> <p>CASH OR TRADE DOWN \$2,500</p> <p>BUY FOR \$9,779</p> <p>OR LEASE FOR:</p> <p>\$183 PER MO. 24 MOS.</p>	<p>1998 FORD TAURUS LX</p> <p>3.0L EFI V6 Eng., Auto. O/D Trans., F/Rear Carpeted Floor Mats, AM/FM Stereo/Cass., Power Door Locks, Sp. #FA124254, LEV \$1,927, TOP \$6,797</p> <p>NO RISK \$17.9M. 0.00% HILE SCHEDULED MAINTENANCE PROGRAM</p> <p>RETAIL PRICE \$14,542</p> <p>FACTORY REBATE \$1,000</p> <p>KERRY PACIFICO DISC. \$1,200</p> <p>CASH OR TRADE DOWN \$2,500</p> <p>BUY FOR \$14,542</p> <p>OR LEASE FOR:</p> <p>\$212 PER MO. 27 MOS.</p>	<p>1998 FORD EXPLORER SPT. 4X4</p> <p>PEP#83AA, Sol. Trim, Fog Lamps, Luggage Rack, 4.0 SOHC Eng., Auto. O/D Trans., Cass/CD, Color-Key Carpet Floor Mats, SR #4236855</p> <p>LEV \$18,742, TOP \$5,184</p> <p>RETAIL PRICE \$23,926</p> <p>KERRY PACIFICO DISCOUNT \$2,340</p> <p>CASH OR TRADE DOWN \$2,500</p> <p>BUY FOR \$22,105</p> <p>OR LEASE FOR:</p> <p>\$241 PER MO. 24 MOS.</p>	<p>1998 FORD EXPEDITION 4X4</p> <p>PEP#85BA, XLT Trim, Cruise, AM/FM Stereo/Cass., 4.9L EFI V8 Eng., Auto. Trans., Running Boards, Air Cond., 17" Cast Alum. W/hs, 3rd Row Seat, Cast Chain, SR #EP#85ALEV \$28,485, TOP \$6,818</p> <p>RETAIL PRICE \$35,303</p> <p>FACTORY DISCOUNT \$720</p> <p>KERRY PACIFICO DISCOUNT \$3,574</p> <p>CASH OR TRADE DOWN \$2,500</p> <p>BUY FOR \$30,686</p> <p>OR LEASE FOR:</p> <p>\$284 PER MO. 24 MOS.</p>
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Huge Savings on ALL 1997 LEFTOVERS

<p>'96 NISSAN MAXIMA 4 Door, LOADED, Air, Leather Int., Powerwindows, Alloy W/hs, Cass., 49,182 Miles, SR#E519102AA.</p> <p>\$4,995</p>	<p>'93 MAZDA PROTECK LX 4 Cyl., Auto., Air, Powersteering, P/W, P/Door Locks, TR Wheel, Cruise, Stereo, 49,843 Miles</p> <p>\$3,495</p>	<p>'96 FORD TAURUS LX 4 Door, Automatic, TR Wheel, Cruise, Air Condition, P/Windows, P/Locks, ABS, SR#720A</p> <p>\$9,995</p>	<p>'96 FORD CONTOUR 4 Door, Auto., Blue, P/B, P/B, P/B, P/L, Air, Stereo Cass., 21,413 Miles</p> <p>\$10,995</p>
<p>'96 PLYM. VOYAGER Auto, P/B, P/B, Air Cond., 7 PASSENGER, MUST SEE! 2 TO CHOOSE FROM.</p> <p>\$12,995</p>	<p>'94 FORD MUSTANG GT Auto, P/W, P/B, P/B, Alum. Wheel, Rear Spoiler, Air Condition, SR#1226767A</p> <p>30,578 Miles</p> <p>\$12,995</p>	<p>'94 TOYOTA CAMRY LE Cassette, Automatic, Air, P/W, P/L, Stereo, Cassette, TR Wheel, SR#E144128AA,</p> <p>39,841 Miles</p> <p>\$12,995</p>	<p>'97 FORD PROBE CPL Automatic, Powersteering, P/Brakes, Air, Stereo/Cass., Rear Spoiler, SR#0312005A</p> <p>ONLY 125 Miles</p> <p>\$12,995</p>
<p>'96 CHEV. CAVALIER 2-24 Sport Coupe, 6 Speed, P/Brakes, Powersteering, Air Condition, 21,568 Miles</p> <p>ONLY</p> <p>\$10,995</p>	<p>'97 CHEV. CORVETTE P/U Auto, P/B, P/B, V6, TR W/hs, Cruise, Stereo/Cass., Prem. Wheels, Dual Airbags</p> <p>6,568 Miles</p> <p>\$14,995</p>	<p>'94 FORD EXPLORER XLT, 4.9L P/W P/B, Cruise, Auto., P/B, P/B, Alloy Wheels, SR#82031, 29,992 Miles</p> <p>PRICED TO SELL!</p> <p>\$17,995</p>	

KERRY PACIFICO'S ARDMORE

211 East Lancaster Ave., ARDMORE

610 649-3700

VISIT US ON OUR WEBSITE AT www.dealersite@webtv.com

Decision and Order

Exhibit B

Pacifico Ardmore
Exhibit B

DECISION AND ORDER

The Federal Trade Commission having initiated an investigation of certain acts and practices of the respondents named in the caption hereof, and the respondents having been furnished thereafter with a copy of a draft of complaint which the Bureau of Consumer Protection proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge the respondents with violations of the Federal Trade Commission Act, 15 U.S.C. §§ 45-58, as amended, the Consumer Leasing Act, 15 U.S.C. §§ 1667-1667f, as amended, and its implementing Regulation M, 12 C.F.R. § 213, as

Decision and Order

amended, and the Truth in Lending Act, 15 U.S.C. §§ 1601-1667, as amended, and its implementing Regulation Z, 12 C.F.R. § 226, as amended; and

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

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

1. Respondent Pacifico Ardmore, Inc. is a Pennsylvania corporation with its principal office or place of business at 211 East Lancaster Avenue, Ardmore, Pennsylvania 19903.
2. Respondent Kerry J. Pacifico is an officer of the corporate respondent. Individually or in concert with others, he formulates, directs, or controls the policies, acts, or practices of the corporation. His principal

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

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

ORDER**DEFINITIONS**

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

1. “Clearly and conspicuously” shall mean as follows:
 - a. In a television, video, radio, or Internet or other electronic advertisement, an audio disclosure shall be delivered in a volume, cadence, and location sufficient for an ordinary consumer to hear and comprehend it. A video disclosure shall be of a size and shade, and shall appear on the screen for a duration and in a location, sufficient for an ordinary consumer to read and comprehend it.
 - b. In a print advertisement, a disclosure shall be in a type size and location sufficiently noticeable for an ordinary consumer to read and comprehend it, in print that contrasts with the background against which it appears.

The disclosure shall be in understandable language and syntax. Nothing contrary to, inconsistent with, or in mitigation of the disclosure shall be used in any advertisement.

Decision and Order

2. "Equal prominence" shall mean as follows:
 - a. In a television, video, radio, or Internet or other electronic advertisement, a video disclosure shall be presented in the same or similar format, including but not necessarily limited to type size, shade, contrast, duration, and placement. An audio disclosure shall be delivered in the same or similar manner, including but not necessarily limited to volume, cadence, pace, and placement.
 - b. In a print advertisement, a disclosure shall be presented in the same or similar format, including but not necessarily limited to type size, shade, contrast, and placement.

Nothing contrary to, inconsistent with, or in mitigation of the disclosure shall be used in any advertisement.

3. "Total amount due at lease signing or delivery" as used herein shall mean the total amount of any initial payments required to be paid by the lessee on or before consummation of the lease or delivery of the vehicle, whichever is later, as required by Regulation M, 12 C.F.R. § 213, as amended. The total amount due at lease signing or delivery may 1) exclude third-party fees, such as taxes, licenses, and registration fees, and disclose that fact or 2) provide a total that includes third-party fees based on a particular state or locality as long as that fact and the fact that such fees may vary by state or locality are disclosed. (Section 213.7 of Regulation M, 12 C.F.R. § 213.7, as amended.)
4. "Commerce" shall mean as defined in Section 4 of the Federal Trade Commission Act, 15 U.S.C. § 44.

Decision and Order

5. Unless otherwise specified, “respondents” shall mean Pacifico Ardmore, Inc., a corporation, its successors and assigns and its officers; Kerry J. Pacifico, individually and as an officer of the corporation; and each of the above's agents, representatives, and employees.

I.

IT IS ORDERED that respondents, directly or through any corporation, subsidiary, division, or any other device, in connection with any advertisement to promote, directly or indirectly, any consumer lease in or affecting commerce, as “advertisement” and “consumer lease” are defined in Section 213.2 of Regulation M, 12 C.F.R. § 213.2, as amended, shall not, in any manner, expressly or by implication:

- A. Make any reference to any charge that is part of the total amount due at lease signing or delivery or that no such charge is required, not including a statement of the periodic payment, unless the advertisement also states with equal prominence the total amount due at lease signing or delivery.
- B. State the amount of any payment or that any or no initial payment is required at lease signing or delivery, if delivery occurs after consummation, without disclosing clearly and conspicuously all of the terms required by Regulation M, as follows:
 1. that the transaction advertised is a lease;
 2. the total amount due at lease signing or delivery;
 3. whether or not a security deposit is required;
 4. the number, amounts, and timing of scheduled payments; and

Decision and Order

5. that an extra charge may be imposed at the end of the lease term in a lease in which the liability of the consumer at the end of the lease term is based on the anticipated residual value of the vehicle.

(Section 184(a) of the Consumer Leasing Act ("CLA"), 15 U.S.C. § 1667c(a), as amended, and Section 213.7 of Regulation M, 12 C.F.R. § 213.7, as amended.)

For radio advertisements, respondents may also comply with the requirements of this subparagraph by utilizing Section 184(c) of the CLA, 15 U.S.C. § 1667c(C), and Section 213.7(f) of Regulation M, 12 C.F.R. § 213.7(f), as amended. For television advertisements, respondents may also comply with the requirements of this subparagraph by utilizing Section 213.7(f) of Regulation M, as amended.

- C. Fail to comply in any other respect with Regulation M, 12 C.F.R. § 213, as amended, and the CLA, 15 U.S.C. §§ 1667-1667f, as amended.

II.

IT IS FURTHER ORDERED that respondents, directly or through any corporation, subsidiary, division, or any other device, in connection with any advertisement to promote, directly or indirectly, any extension of consumer credit in or affecting commerce, as "advertisement" and "consumer credit" are defined in Section 226.2 of Regulation Z, 12 C.F.R. § 226.2, as amended, shall not, in any manner, expressly or by implication:

- A. State the amount or percentage of any downpayment, the number of payments or period of repayment, the amount of any payment, or the amount of any finance

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charge, without disclosing clearly and conspicuously all of the terms required by Regulation Z, as follows:

1. the amount or percentage of the downpayment;
2. the terms of repayment; and
3. the correct annual percentage rate, using that term or the abbreviation "APR." If the annual percentage rate may be increased after consummation of the credit transaction, that fact must also be disclosed.

(Sections 107 and 144(d) of the TILA, 15 U.S.C. §§ 1606 and 1664(d), as amended, and Sections 226.22 and 226.24(c) of Regulation Z, 12 C.F.R. §§ 226.22 and 226.24(c), as amended.)

- B. State a rate of finance charge without stating the rate as an "annual percentage rate" or the abbreviation "APR," using that term.
- C. Fail to comply in any other respect with Regulation Z, 12 C.F.R. § 226, as amended, and the TILA, 15 U.S.C. §§ 1601-1667, as amended.

III.

IT IS FURTHER ORDERED that respondent Pacifico Ardmore, Inc., and its successors and assigns, and respondent Kerry J. Pacifico 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 all records that will demonstrate compliance with the requirements of this order.

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IV.

IT IS FURTHER ORDERED that respondent Pacifico Ardmore, Inc., and its successors and assigns, and respondent Kerry J. Pacifico shall deliver a copy of this order to all current and future principals, officers, directors, and managers, and to all current and future employees, agents, and representatives having responsibilities with respect to the subject matter of this order, and shall secure from each such person a signed and dated statement acknowledging receipt of the order. Respondents shall deliver this order to such current personnel within thirty (30) days after the date of service of this order, and to such future personnel within thirty (30) days after the person assumes such position or responsibilities.

V.

IT IS FURTHER ORDERED that respondent Pacifico Ardmore, Inc., and its successors and assigns, shall notify the Commission at least thirty (30) days prior to any change in the corporation that may affect compliance obligations arising under this order, including but not necessarily 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. 20580.

Decision and Order

VI.

IT IS FURTHER ORDERED that respondent Kerry J. Pacifico, for a period of ten (10) years after the date of issuance of this order, shall notify the Commission of the discontinuance of his current business or employment, or of his affiliation with any new business or employment involving the advertising and/or extension of a “consumer lease,” as that term is defined in the CLA and its implementing Regulation M, or the advertising and/or extension of “consumer credit,” as that term is defined in the TILA and its implementing Regulation Z. The notice shall include respondent's new business address and telephone number and a description of the nature of the business or employment and his duties and responsibilities. All notices required by this Part shall be sent by certified mail to the Associate Director, Division of Enforcement, Bureau of Consumer Protection, Federal Trade Commission, Washington, D.C. 20580.

VII.

IT IS FURTHER ORDERED that respondent Pacifico Ardmore, Inc., and its successors and assigns, and respondent Kerry J. Pacifico shall, within sixty (60) days after the date of service of this order, and at such other times as the Federal Trade Commission may require, file with the Commission a report, in writing, setting forth in detail the manner and form in which they have complied with this order.

VIII.

This order will terminate on February 7, 2020, 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:

Analysis to Aid Public Comment

- 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 respondents 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.

By the Commission.

**Analysis of Proposed Consent Orders
to Aid Public Comment**

Summary

The Federal Trade Commission has accepted separate agreements, subject to final approval, orders from respondents Dunphy Nissan, Inc. and Serge Naumovsky (“Dunphy”); Norristown Automobile Co., Inc. and William Milliken (“Norristown”); Northeast Auto Outlet, Inc. and Arthur Micchelli (“Northeast”); Pacifico Ardmore, Inc. and Kerry J. Pacifico (“Pacifico Ardmore”); Pacifico Ford, Inc. and Kerry T. Pacifico

Analysis to Aid Public Comment

("Pacifico Ford"); and Marty Sussman Organization, Inc. and Martin E. Sussman ("Sussman")(together "respondents"). The persons named in these actions are named individually and as officers of their respective corporations.

The proposed consent orders have been placed on the public record for sixty (60) days for receipt of comments by interested persons. Comments received during this period will become part of the public record. After sixty (60) days, the Commission will again review the agreements and the comments received and will decide whether it should withdraw from the agreement or make final the agreements' proposed orders.

I. Complaint Allegations

A. FTC Act Violations

The complaints against the respondents allege that their automobile lease advertisements violate the Federal Trade Commission Act ("FTC Act"), the Consumer Leasing Act ("CLA"), and Regulation M. The complaints also allege that respondents' credit advertisements have violated the Truth in Lending Act ("TILA") and Regulation Z. Section 5 of the FTC Act prohibits false, misleading, or deceptive representations or omissions of material information in advertisements. In addition, Congress established statutory disclosure requirements for lease and credit advertising under the CLA and the TILA, respectively, and directed the Federal Reserve Board ("Board") to promulgate regulations implementing such statutes -- Regulations M and Z respectively. *See* 15 U.S.C. §§ 1601-1667e; 12 C.F.R. Part 213; 12 C.F.R. Part 226.

The complaints against respondents allege that their lease advertisements represent that consumers can lease the advertised vehicles at the terms prominently stated in the advertisements, including but not necessarily limited to the monthly payment amount and the downpayment amount. These lease advertisements, according to the complaints, have failed to

Analysis to Aid Public Comment

disclose, and/or failed to disclose adequately, additional terms pertaining to the lease offer, such as the total amount due at lease inception. The complaints allege that this information does not appear at all or appears in fine print in the advertisements and that the information would be material to consumers in deciding whether to visit respondents' dealerships and/or whether to lease an automobile from respondents. These practices, according to the complaints, constitute deceptive practices in violation of Section 5(a) of the FTC Act.

The complaints against Dunphy and Northeast also allege that these respondents misrepresent that consumers can purchase the advertised vehicles for the monthly payment amounts prominently stated in the advertisements. According to the complaints, the monthly payment amounts prominently stated in the advertisements are components of lease offers and not credit offers. These practices, according to the complaints, constitute deceptive practices in violation of Section 5(a) of the FTC Act.

The complaint against Dunphy further alleges that Dunphy misrepresents that the amount stated as "down" or "downpayment" is the total amount consumers must pay at lease inception to lease the advertised vehicles. According to the complaint, however, consumers are required to pay additional fees beyond the amount stated as "down" or "downpayment," including but not limited to the first month's payment, a security deposit, and/or a bank fee. This practice, according to the complaint, constitutes a deceptive practice in violation of Section 5(a) of the FTC Act.

The complaint against Northeast also alleges that Northeast misrepresents that the offer to double consumers' downpayments up to \$4,000 applied to the lease or credit offers advertised. According to the complaint, the offer to double consumers' downpayments up to \$4,000 was not available with the advertised lease or credit offers. This practice, according to the complaint,

Analysis to Aid Public Comment

constitutes a deceptive practice in violation of Section 5(a) of the FTC Act.

The complaints against Dunphy, Northeast, Norristown, and Pacifico Ardmore allege that their credit advertisements represent that consumers can purchase the advertised vehicles at the terms prominently stated in the advertisements, including but not necessarily limited to the sales price and/or downpayment amount. According to the complaints, these credit advertisements fail to disclose additional terms pertaining to the credit offer, such as the terms of repayment and the annual percentage rate. Such information is alleged to be material to consumers in deciding whether to visit respondents' dealerships and/or whether to purchase an automobile from respondents. These practices, according to the complaints, constitute deceptive practices in violation of Section 5(a) of the FTC Act.

B. CLA and Regulation M Violations

The complaints allege that all respondents violated the CLA and Regulation M. The complaints allege that respondents' lease ads state a monthly payment amount and/or downpayment amount, but fail to disclose, and/or fail to disclose clearly and conspicuously, one or more of the following required terms: that the transaction advertised is a lease; the total amount due prior to or at consummation, or by delivery, if delivery occurs after consummation and that such amount: 1) excludes third-party fees that vary by state or locality, such as taxes, licenses, and registration fees, and discloses that fact or 2) includes third-party fees based on a particular state or locality and discloses that fact and the fact that such fees may vary by state or locality; whether or not a security deposit is required; the number, amounts, and timing of scheduled payments; and that an extra charge may be imposed at the end of the lease term in a lease where the liability of the consumer is based on the difference between the residual value of the leased property and its realized value at the end of the lease term.

Analysis to Aid Public Comment

According to the complaints, the lease disclosures in respondents' lease advertisements are not clear and conspicuous because they appear in fine print and/or in an inconspicuous location. These practices, according to the complaints, violate the advertising requirements of the CLA and Regulation M.

The complaints also allege that respondents' lease advertisements state a downpayment amount more prominently than the disclosure of the total amount due at lease signing. According to the complaints, these practices violate Regulation M.

C. TILA and Regulation Z Violations

The complaints against Dunphy, Norristown, Northeast, Pacifico Ardmore, and Pacifico Ford allege that these respondents violated the TILA and Regulation Z. According to the complaints, these respondents state a monthly payment amount and/or a downpayment amount as terms for financing the purchase of the advertised vehicles, but fail to disclose the following items of information required by Regulation Z: the annual percentage rate and the terms of repayment. In addition, the complaints against all respondents allege that their credit ads do not properly state the finance charge as the annual percentage rate, as required by Regulation Z.

II. Proposed Orders

The proposed orders prohibit respondents from disseminating advertisements that state the amount of any payment due at inception (excluding the monthly payment amount) or the fact that any or no inception payment is due without also disclosing with "equal prominence" the total amount a consumer must pay at lease signing or delivery. This requirement parallels an identical requirement found in Regulation M.

Analysis to Aid Public Comment

The proposed orders also prohibit respondents from disseminating advertisements that state the amount of any payment or that any or no initial payment is required at lease signing or delivery, if delivery occurs after consummation, without disclosing clearly and conspicuously all of the terms required by Regulation M, as follows: that the transaction advertised is a lease; the total amount due at lease signing or delivery; whether or not a security deposit is required; the number, amounts, and timing of scheduled payments; and that an extra charge may be imposed at the end of the lease term in a lease in which the liability of the consumer at the end of the lease term is based on the anticipated residual value of the vehicle. This requirement is intended to enjoin the respondents from deceptively advertising only the most attractive portions of its lease offers by requiring clear and conspicuous disclosure of the information necessary for consumers to make informed decisions about advertised lease offers. This paragraph parallels the advertising disclosure requirements from the CLA and Regulation M. The proposed orders also prohibit respondents from violating the CLA and Regulation M.

In addition, the proposed order for Dunphy prohibits Dunphy from misrepresenting the costs of leasing, including the total due at lease inception. The proposed orders for respondents Dunphy and Northeast prohibit these respondents from misrepresenting that advertised terms apply to a cash or credit offer, when, in fact, the terms apply to an offer to lease the advertised vehicle. The proposed order for Northeast also prohibits Northeast from misrepresenting the availability of any advertised offer.

With respect to credit advertisements, the proposed orders prohibit respondents from stating the amount or percentage of any downpayment, the number of payments or period of repayment, the amount of any payment, or the amount of any finance charge, without disclosing clearly and conspicuously all of the terms required by Regulation Z, as follows: the amount or percentage of the downpayment; the terms of repayment; and the correct annual percentage rate, using that term or the abbreviation "APR." If the

Analysis to Aid Public Comment

annual percentage rate may be increased after consummation of the credit transaction, that fact must also be disclosed.

The proposed orders also prohibit respondents from stating a rate of finance charge without stating the rate as an “annual percentage rate” or “APR.” The proposed orders also prohibit all respondents from violating the TILA or Regulation Z.

The purpose of this analysis is to facilitate public comment on the proposed orders, and it is not intended to constitute an official interpretation of the agreements and proposed orders or to modify in any way their terms.

Complaint

IN THE MATTER OF

THE QUIGLEY CORPORATION

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

Docket C-3926; File No. 982 3152
Complaint, February 10, 2000 – Decision, February 10, 2000

This consent order addresses representations by respondent Quigley Corporation concerning the effectiveness of its Cold-Eeze Zinc Lozenges, Cold-Eezer Plus Zinc Gluconate Lozenges, and Kids-Eeze Bubble Gum (“Kids-Eeze”) products. The consent order prohibits the respondent from making representations that its products prevent users from contracting colds and pneumonia; will treat allergies; will reduce the severity of colds in children; and that Kids-Eeze will reduce the severity of cold symptoms in children unless it possesses and relies upon competent and reliable scientific evidence that substantiates such representations. The consent order also prohibits the respondent from making any representation that any food, drug, or dietary supplement can or will cure, treat, or prevent any disease, or have any effect on the structure or function of the human body, unless it possesses and relies upon competent and reliable scientific evidence that substantiates the representation.

Participants

For the Commission: *Daniel Kaufman, Lisa B. Kopchik, C. Lee Peeler and Michelle K. Rusk.*

For the Respondent: *Lewis Rose, Arent Fox Plotkin & Kahn, PLLC; Alan K. Palmer, Cooper, Carvin & Rosenthal; Glenn A. Mitchell, Stein, Mitchell & Mezines; and Ed Glynn, Venable, Baetjer, Howard & Civiletti, LLP.*

COMPLAINT

The Federal Trade Commission, having reason to believe that The Quigley Corporation, 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:

Complaint

1. Respondent The Quigley Corporation (“Quigley”) is a Nevada corporation with its principal office or place of business at 10 South Clinton Street, Doylestown, PA 18901.

2. Respondent has manufactured, advertised, labeled, offered for sale, sold, and distributed dietary supplement products to the public, including Cold-Eezer Plus Zinc Gluconate Lozenges and Cold-Eeze Zinc Lozenges (hereinafter, collectively, “Cold-Eeze”), and Kids-Eeze Bubble Gum (“Kids-Eeze”). 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 Cold-Eeze, including but not limited to the attached Exhibits A through C, transcripts of television advertisements that appeared on QVC or Q2, home shopping cable channels run by QVC, Inc.; Exhibits D through E, advertisements that appeared on the Internet at www.quigleyco.com; and Exhibits F through H, advertisements that appeared on radio programs. These advertisements contain the following statements:

(a) C. Phillips: To have a strategy to help fight the common cold. The kids are in school. They are there right now.

...

C. Phillips: It’s a breeding ground. Everything they touch -- if the child before had a cold

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and they touch that spot and they touch their noses, its off to the races.

...

C. Phillips: So, there's a couple of strategies. One is we can take one a day and try to see if you can beat the cold to what they call prophylactic or a preventive medicine.

Show Host: Excellent

C. Phillips: Try taking one a day. Or if the child comes home and you see that it's here . . . that they have symptoms, start treating the child. Take one every three hours. But everyone in the family should take a couple to prevent picking up that cold.

(Exhibit A, p. 2).

(b) Caller: I just wanted you to know I have a granddaughter that's 12 years old, and ever since birth when she gets a cold, it turns into bronchitis.

...

Caller: And so I tried these . . . and it eliminated the cold almost immediately.

C. Phillips: Well, that's really important because we have several customers we know through QVC and other places where they really can't afford to have their children even get a cold because what

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happens is this exacerbated condition appears.

Show Host: Sure.

C. Phillips: You get bronchitis, pneumonias. And here's an opportunity right in front of us to stop it right now.

Show Host: Right. Exactly.

(Exhibit A, p. 3).

(c) C. Phillips: The other thing is allergies.

Show Host: Yes.

C. Phillips: We have many, many people who have reported to us that their usual choice is to have antihistamines, which make them dopey --

Show Host: Sure.

C. Phillips: -- which make them incapable of functioning, some of them.

Show Host: Right.

C. Phillips: And we suggested they try it. So, we -- they tried it and they take one and they see how long it lasts. It does diminish the symptoms of allergies.

(Exhibit A, p. 4).

Complaint

(d) Show Host: Children can absolutely take this. In fact, I've heard . . . people will wrap one of these in cheesecloth and let their toddler suck on it so they can get the benefits from it without actually risking choking or anything.

C. Phillips: Um-hum. Yes.

(Exhibit A, p. 6).

(e) Caller: And I was glad to hear you say something about taking one a day as a preventative. We've never tried that before.

C. Phillips: Yes. Well, now's the time to try it.

Show Host: Yep.

C. Phillips: This is -- this is a strategy that may pay off big-time because it does help block as you saw in the animation. If we can stop the viruses we pick up over the day, they will not have a chance to even start.

Show Host: Perfect.

C. Phillips: Therefore, it will preclude you getting the cold.

Caller: Yes.

C. Phillips: And it's a good strategy. We highly recommend people try that.

(Exhibit A, pp. 6-7)

Complaint

(f) C. Phillips: Well not only that, but zinc is a critical, very important mineral that we all need. A lot of us are deficient in it. . . . So, not only are you preventing a cold, but you're getting that zinc which has been proven many times to have a positive effect on many conditions of the body.

Show Host: So you're getting even healthier.

C. Phillips: Absolutely.

(Exhibit A, p. 9).

(g) Show Host: And actually, if you take these on a preventative basis, you might not ever get a cold at all.

R. Pollack: Right.

(Exhibit B, p. 3)

(h) Show Host: You know, my own grandma just got over pneumonia.

R. Pollack: Hmm.

Show Host: And I'm sending her these so that she can continue to take them, and as some of the people do, take them on a preventative basis.

R. Pollack: Right. Yes.

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Show Host: I know that you have women in nursing homes --

R. Pollack: Right.

Show Host: -- and gentlemen in retirement communities who are taking these.

R. Pollack: Yes. And they find them very effective.

(Exhibit B, p. 4).

(i) C. Phillips: We're suggesting to moms, get Cold-Eezer Plus in the house.

Show Host: Um-hum.

C. Phillips: Have it ready, and at the very first hint of a cold, start applying it. But even before then, try to use it as a preventative measure, so that if you know that the child has had an exposure, which is school, they can take one a day --

Show Host: Um-hum.

C. Phillips: -- to try to prevent getting a cold.

Show Host: And you're talking about schools, I mean, everywhere you go, I mean, other children have it, other adults have it, you're just always exposed.

C. Phillips: Always exposed, exactly. You touch things.

Show Host: Um-hum.

Complaint

C. Phillips: You touch a doorknob and you go up and you touch your nose, you've got the chance to have it.

Show Host: Right.

C. Phillips: So, what we're saying is, point one, if you don't have it in the house, get some in the house so that you have it to use at the very first sign of a cold.

Show Host: Um-hum.

C. Phillips: That's the important thing. This year we're saying, have it around and take one a day. Give your child one before he goes to school, that way, it can possibly prevent that child from getting a cold.

(Exhibit C, p. 2).

(j) C. Phillips: It's also excellent for allergies.

Show Host: Oh, really?

C. Phillips: Absolutely.

(Exhibit C, p. 5)

Complaint

Internet Advertisements

- (k) Don't pass the cold in your family!
Reach for Cold-Eeze with Zigg.

You know what happens when one of the kids comes home from school with a cold . . . it seems everybody in the family gets it. Well, now you can fight back with Cold-Eeze. It's the only zinc lozenge with Zigg (zinc gluconate glycine), the only patented formula clinically proven to reduce the severity and duration of common cold symptoms.

(Exhibit D).

- (l) When the Common Cold or Allergies Strike

- Sneezing
- Sore Throat
- Teary Eyes
- Runny Nose
- Stuffy Sinus

. . . Strike Back

with Homeopathic Sugar Free
Cold-Eeze Tablets with ZIGG

(Exhibit E).

Radio Advertisements

- (m) You already know that Cold-Eeze lozenges are effective against colds, but have you ever thought of using them against your airborne allergies? The sneezing, sniffing, runny-nose and watery eyes can make you miserable. Try taking Cold-Eeze, the great tasting breakthrough lozenge you've heard so much

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about, with the zinc-gluconate glycine formula. . . . In fact, Cold Eeze is so effective, consumer testimony and preliminary findings suggest Cold-Eeze may also relieve the discomfort from airborne allergies. Try Cold-Eeze, for relief from the dreadful symptoms of hay fever, mold-spores and other airborne allergies. Homeopathic Cold-Eeze is all natural and non-sedating.

(Exhibit F).

- (n) Remember when I told you about passing the cold in your family? You know, the kids bring a cold home from school and pass it onto everybody else. Now with the phenomenal success of Cold-Eeze lozenges, many imposters are trying to copy it! Beware of these fake imitators. Cold-Eeze is the only lozenge clinically proven in two double-blind studies to reduce the duration and severity of the common cold. In fact, Cold Eeze has been so effective against common colds in families that pediatric studies are underway. Try Cold-Eeze to help protect your little ones from the nasty clutches of full-blown colds. So remember the next time one of your kids bring the sniffles home from school, stay away from those fake imitators. There's only one zinc lozenge proven to work on colds. Cold Eeze. Ask for it by name. Clinically proven Cold-Eeze, it really works.

(Exhibit G).

- (o) Allergy season is here . . . warm weather, sunshine, flowers . . . it's a terrible time to start sneezing! So attack those symptoms with Cold-Eeze.

(Exhibit H).

Complaint

5. Through the means described in Paragraph 4, respondent has represented, expressly or by implication, that:

- (a) Daily use of Cold Eeze will prevent users from contracting colds.
- (b) Use of Cold-Eeze will prevent users from contracting colds.
- (c) Use of Cold Eeze will reduce the risk of contracting pneumonia.
- (d) Use of Cold Eeze will relieve or reduce the symptoms of hay fever or allergies.
- (e) Use of Cold Eeze will reduce the severity of cold symptoms in children.
- (f) Daily use of Cold Eeze will prevent children from contracting colds.

6. Through the means described in Paragraph 4, respondent has represented, expressly or by implication, that, it possessed and relied upon a reasonable basis that substantiated the representations set forth in Paragraph 5, at the time the representations were made.

7. In truth and in fact, respondent did not possess and rely upon a reasonable basis that substantiated the representations set forth in Paragraph 5, at the time the representations were made. Therefore, the representation set forth in Paragraph 6 was, and is, false or misleading.

Complaint

KIDS-EEZE

8. Respondent has disseminated or has caused to be disseminated advertisements for Kids-Eeze, including but not limited to the attached Exhibit I that appeared on the Internet at www.quigleyco.com, and Exhibit J, statements on product packaging. These advertisements contain the following statements:

(a) Kids-Eeze Bubble Gum

[clicking on the hyper-link for Kids-Eeze displays the following text:]

Cold-Eeze Bubble Gum Formula

The same clinically proven ZIGG formula and dosage
as regular COLD-EEZE Lozenges!

(Exhibit I).

Product Packaging

(b) [Front]

KIDS-EEZE

COLD-EEZE BUBBLE GUM

REDUCES THE DURATION AND
SEVERITY OF THE COMMON COLD

[Back]

COLD-EEZE HOMEOPATHIC SUGAR-FREE

Complaint

TABLETS (FOR COLDS AND ALLERGIES)

...

CLINICALLY PROVEN
COLD-EEZE WITH ZIGG

(Exhibit J)

9. Through the means described in Paragraph 8, respondent has represented, expressly or by implication, that use of Kids-eeze will reduce the severity of cold symptoms in children.

10. Through the means described in Paragraph 8, respondent has represented, expressly or by implication, that, it possessed and relied upon a reasonable basis that substantiated the representation set forth in Paragraph 9, at the time the representation was made.

11. In truth and in fact, respondent did not possess and rely upon a reasonable basis that substantiated the representation set forth in Paragraph 9, at the time the representation was made. Therefore, the representation set forth in Paragraph 10 was, and is, false or misleading.

12. 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.

IN WITNESS WHEREOF, the Federal Trade Commission has caused its complaint to be signed by its Secretary and its official seal to be hereto affixed at Washington, D.C. this tenth day of February, 2000.

By the Commission, Commissioner Anthony dissenting and Commissioner Leary not participating.

Complaint Exhibits

Exhibit A

TRANSCRIPT OF QVC

SEPTEMBER 11, 1997

OS SCREEN:
 A-36293
 60 Original or Cherry Flavor Cold-Eezers
 Lozenges
 QVC Price \$18.25
 S&H \$3.97
 QVC 1-800-345-1515
 The Health Connection

Show Host: See you later, Jill. It's good to see you, honey.

Jill Bauer is coming up following Health Connections. She's got the today's special value at noon. **And** then all of the jewelry that I have on, if you're interested, coming up at 1:00. All right. Here you go. 1-800-345-1515. We want to talk to you. We want to hear how you're doing with Cold-Eezers. How did it save you last year. How did it save your kids? How do you feel when you take them?

I'd like you to meet someone who's pretty new to QVC, Chuck Phillips, one of the founders of the Cold-Eezers company.

C. Phillips: Good morning, Patricia.

Show Host: So nice to have you here, sir.

C. Phillips: Thank you. Good to be here.

Show Host: Good to see you. **Now**, we are ready to put Chuck through the paces this morning on the morning show. So, thank you for sticking around. I appreciate it.

C. Phillips: My pleasure, ~~my~~ pleasure.

Show Host: Chuck is back ~~to~~ tell us why Cold-Eezers are so fabulous. Perfect time of year to bring them back because we've got hay fever and allergies combined with an upcoming cold season. Already I'm starting to see lots of sniffles around QVC.

C. Phillips: Yes.

Show Host: And, you **know**, we're so glad that you came back because I tell you what, whenever the Cold-Eezers come to town, they're gone instantly backstage. People just kind of **grab** little handfuls --

C. Phillips: They disappear.

Show Host: -- and then sort of scurry off with them. You're going to get lots of them, though. You get 60 for \$18.25. A-36293 is the item number in either the cherry, which you see there in the red wrapper, or the natural flavor, which you

Complaint Exhibits

see in the clear wrapper. So, if you're new to QVC, if you're new to Cold-Eezers, here's why they're so great. Take it away, Chuck.

C. Phillips: Well, it's -- first of all, it's an all-natural, homeopathic product.

Show Host: Right.

C. Phillips: It's a unique product here on QVC. It has been clinically proven to reduce the duration and severity of the common cold. And what we're asking people to do is to take a little more aggressive role in caring for their family.

Show Host: Right.

C. Phillips: To have a strategy to help fight the common cold. The kids are in school. They are there right now.

Show Host: Um-hum.

C. Phillips: And school is one of the most famous places to have --

Show Host: It's a breeding ground for germs.

C. Phillips: It's a breeding ground. Everything they touch -- if the child before had a cold and they touch that spot and they touch their nose, it's off to the races.

Show Host: Sure. That's it.

C. Phillips: So, there's a couple of strategies. One is we can take one a day and try to see you can beat the cold to what they call prophylactic or a preventive medicine.

Show Host: Excellent.

C. Phillips: Try taking one a day. Or if the child comes home and you see that it's here --

Show Host: Um-hum.

C. Phillips: -- that they have symptoms, start treating the child. Take one every three hours. But everyone in the family should take a couple to prevent picking up that cold.

Show Host: This is safe for kids to take.

C. Phillips: Absolutely.

Show Host: It's certainly safe for adults. It's safe for senior citizens to take. In fact, we got a call the last time I was on the air with Cold-Eezers of a woman whose mom was in a nursing home.

C. Phillips: Yes.

Show Host: And she was taking them one a day as a preventative measure because she was surrounded by lots of other people and lots of other germs. So, it's a great step to take in maintaining your health, and it's also really helpful when you get a cold. In fact, we have someone on the phone who's used Cold-Eezers in the

Complaint Exhibits

past. So, let's say good morning to Renee Hi. Renee. I'd like you to meet Chuck Phillips.

Caller: Hi. Hi. Chuck.

C. Phillips: Hi, Renee.

Caller: I just wanted you to know I have a granddaughter that's 12 years old, and ever since birth when she gets a cold, it turns into bronchitis

Show Host: Oh, that's tough.

C. Phillips: Uh-huh.

Caller: And so, I tried these because she was out here visiting from Illinois with me for three months, and it eliminated the cold almost immediately.

C. Phillips: Well, that's really important because we have several customers we know through QVC and other places where they really can't afford to have their children even get a cold because what happens is this exacerbated condition appears.

Show Host: Sure.

C. Phillips: You get bronchitis, pneumonia. And here's an opportunity right in front of us to stop it right now.

Show Host: Right. Exactly.

C. Phillips: Just nail it.

Caller: It -- it worked fantastic.

C. Phillips: Well, I'm glad that you had that.

Show Host: And you saw it work. Hands on experience, right, Renee?

Caller: Yes, I have. Because she was born with a weak lung and weak bronchial tubes.

Show Host: Uh-huh.

Caller: And ever since then, like I say, it goes into bronchitis or pneumonia.

Show Host: She's a little susceptible. Sure.

Caller: And I tried these and the cold just went away

Show Host: Oh, that is excellent. Good.

C. Phillips: Well, just get a little more aggressive now Just have her take one during cold season, one a day --

Show Host: Um-hum.

Complaint Exhibits

C. Phillips: -- and that will help to prevent this from even beginning. There's reports out that tell us that over 55 percent of people who get colds end up at the doctors.

Show Host: Ugh.

C. Phillips: So, now you have the doctor's bill --

Show Host: Right.

C. Phillips: -- you have the prescription and you still have the cold and the bronchitis

Show Host: You have time off from work and you have miserable kids if they're sick. too

C. Phillips: Absolutely.

Show Host: Well, Renee, **I'm** so glad it worked for you and for your granddaughter. Thanks for being a part of our show.

Caller: Thank you.

Show Host: You take care.

Caller: And have a great day, both of you.

Show Host: Bye-bye now.

C. Phillips: All right. *Thank* you, Renee.

Caller: Bye-bye.

C. Phillips: Bye-bye. The other **thing** is allergies.

Show Host: Yes.

C. Phillips: We have many, many people who have reported to us that their usual choice is to have antihistamines, which make them dopey --

Show Host: Sure.

C. Phillips: -- which make them incapable of functioning, some of them.

Show Host: Right.

C. Phillips: And we suggested they try it. So, we -- they tried it and they take one and they see how long it lasts. **It does** diminish the symptoms of allergies and --

Show Host: **Lots** of people have asked exactly how does it work, and we actually have some animation to show you. **I'm** just showing you, **this** is what one of the Cold-Eezers **looks** like up close and personal. Take a look at **this**. Now --

C. Phillips: Those -- those are purple rhinoviruses.

ON SCREEN: Animation

Complaint Exhibits

Show Host: Okay.

C. Phillips: And what they do is in your mouth. they lodge on the cells inside your mouth by, let's say, magnetism, electricity

Show Host: Urn-hum.

C. Phillips: Positives and negatives attract

Show Host: Um-hum.

C. Phillips: So, when they lodge, they intrude and replicate themselves, kill the cell, and then you have an irritation. But --

Show Host: Now, the little blue balls there --

C. Phillips: That's Cold-Eezer Plus double positive ions. They actually go and coat the areas on the rhinovirus --

Show Host: Uh-huh.

C. Phillips: -- that it would normally use to grab on to the cell. Now, they can't because it's an effective blockage to keep them from lodging. So --

Show Host: So, now, that actual cold cell that -- what gives us a cold, the common cold virus cell, cannot attach itself to our cells.

C. Phillips: That's right. That's right.

Show Host: So, it can't dock in and we can't get sick.

C. Phillips: And that allows the body's natural function, which is mucus --

Show Host: Um-hum.

C. Phillips: -- to wash them away. It can happen within eight or nine hours. If you have a rhinovirus enter within eight or nine hours, that process is begun.

Show Host: How many of these do we have to take, Chuck?

C. Phillips: You should take one every three to four hours.

Show Host: Okay.

C. Phillips: And remember, please, it's medicine. Some -- it tastes good.

Show Host: It does.

C. Phillips: It's wonderful. But take one every three hours.

Show Host: I want to show you some of the people who are able to use this. Airline pilots are allowed to use this. Now, you know that they're not allowed to take decongestants or antihistamines or anything obviously

Complaint Exhibits

C. Phillips: Exactly. Exactly

Show Host: School bus drivers can take this. Teachers can take this. Children can absolutely take this. In fact, I've heard how more people will wrap one of these in cheesecloth and let their toddler suck on it so they can get the benefits from it without actually risking choking or anything.

C. Phillips: Um-hum. Yes.

Show Host: Senior citizens can take it. Pregnant ladies can take it. Nursing moms can take it. It's perfectly safe to take. We're going to take a phone call actually.

C. Phillips: Excellent.

Show Host: We're going to head right back to the phones and say good morning to Doris. Hi, Doris. Come on in and meet Chuck Phillips.

Caller: Good morning.

C. Phillips: Good morning, Doris.

Show Host: How are you?

Caller: Just fine. We used these last year. I have a son who goes to college up in Minneapolis.

Show Host: Ah-ha.

Caller: And so, we sent them up there because he has a lot of cold weather and he has allergies.

Show Host: Yeah.

C. Phillips: Uh-huh.

Show Host: Um-hum.

Caller: And I was glad to hear you say something about taking one a day as a preventive. We've never tried that before.

C. Phillips: Yes. Well, now's the time to try it.

Show Host: Yep.

C. Phillips: This is -- this is a strategy that may pay off big-time because it does help block as you saw in the animation. If we can stop the viruses we pick up over the day, they will not have a chance to even start.

Show Host: Perfect.

C. Phillips: Therefore, it will preclude you getting the cold.

Caller: Yes.

Complaint Exhibits

C. Phillips: And it's a good strategy. We highly recommend people try that.

Caller: Well, I'm going to recommend it to him when I send another package to him

Show Host: Oh, good

C. Phillips: Good.

Show Host: That's a wonderful care package to get

Caller: Yeah. It helps us all of us. Since last year, we -- my husband and I have used them and really feel like it does help to keep from getting it any worse than what we do.

Show Host: Right.

C. Phillips: That's good. Well, make sure that you understand that it's got to have what we call ZIGG, zinc gluconate glycine. It is our patented process.

Show Host: Um-hum.

C. Phillips: You're going to see other zincs out in the world, but only Cold-Eezer Plus that has ZIGG in it, zinc gluconate glycine. is the one that's clinically proven, the one that does work.

Show Host: That's the only one.

Caller: Well --

C. Phillips: So, it's -- it's a caution, but you're in the right place and I know they'll get the product to you in a -- quick.

Show Host: Seven to ten days.

Caller: Yeah. Well, we have a few left, but -- and we really like the cherry-flavored ones.

Show Host: Yeah, that's my favorite, too.

Caller: Uh-huh.

Show Host: The other one is -- Just for everybody who is watching and wondering, the other one is a little more like a citrus or an orange flavor.

C. Phillips: Urn-hum.

Show Host: But I'm with you, I'm a cherry gal all the way.

Caller: Yeah. We are, too.

Show Host: Thanks for calling in and being part of our show

Caller: Uh-huh. Thank YOU.

Complaint Exhibits

Show Host: Take care now. Bve-bye.

Caller: Thank you.

C. Phillips: So long.

Show Host: \$18.25. Now, you get 60 lozenges. If you want to do it as a preventative measure, that's going to be a two month supply for you. If you want to stash some in your desk at work, stash some in the glove compartment in your car. Give a couple to your kids at school, because halfway through the day if they start to get that tickle in their throat, by taking one of these, they're already taking steps ahead to prevent getting sicker and to prevent spreading it to the rest of the family. So, these do last you a rood long time.

But this is the time of year to stock up. Even if you're not suffering from hav fever and allergies, you know that cold season has pretty much started --

C. Phillips: Oh, it's started.

Show Host: -- or else it's right around the corner

C. Phillips: It's definitely started.

Show Host: Right back to the phones we go. Chuck --

C. Phillips: Okay.

Show Host: -- this time we're going to say good morning to Alice. Alice, hello. How are you doing?

Caller: Well, good morning to both of you.

Show Host: Good morning.

Caller: And I'm doing great, and, of course, ordering more Cold-Eezers

C. Phillips: All right.

Show Host: So, you've tried them in the past, have you?

Caller: Oh, absolutely. I wouldn't be without them. I've bought some for my sons who are -- they live kind of close by but they're out of the home, and we all swear by them. And I definitely do. You know, I was kind of skeptical in the beginning about colds --

Show Host: Um-hum.

Caller: -- but they really do -- as soon as you feel you've got a cold, you know, you just put one in your mouth and, oh boy, they are just fantastic. They stop it right away. And like that other lady said, I was delighted to hear this morning that you could take one every day to prevent a cold.

Show Host: Sure.

Complaint Exhibits

Caller: And that's just terrific news. So, I'm going to start doing that right today

Show Host: Oh, good. Good for you.

C. Phillips: Good. Well, not only that, but zinc is a critical, very important mineral that we all need. A lot of us are deficient in it.

Show Host: Um-hum.

C. Phillips: So, not only are you preventing a cold, but you're getting that zinc which has been proven many times to have a positive effect on many conditions of the body.

Show Host: So you're getting even healthier

C. Phillips: Absolutely.

Caller: Oh, I think they're wonderful. As a matter of fact, I'm going to order more for my **sons**. **Now** that we can take one every day, I'm just going to go back and order some more.

Show Host: Oh, good. Good thinking.

C. Phillips: That's a **good** idea.

Show Host: Well, Alice, you sit tight **on** the lines. I'll send you back over to the operators and they can help you out, okay?

Caller: Okay.

Show Host: Take care.

Caller: Thank you very much.

Show Host: Thanks for your call, Alice.

Caller: Bye-bye.

Show Host: Bye-bye **now**.

Sixty of them, original flavor or cherry flavor for \$18.25. That's a great deal, and that's not a lot of money to spend preventing a cold. Because if you think of it, you **go to** the drugstore, you're going to spend a \$20 bill getting all the cold medicine **and** you're going to be out of work for a couple of days. If your kids are sick, you've got to take time off from work. It winds up costing a lot more than \$18.25.

Right back to the phones. Let's see if we can't get in one more quick call. This time we'll say good morning to Rachel. Rachel, how are you this morning?

Caller: Hi. **How** are you?

Show Host: Great. How are you doing?

Complaint Exhibits

C. Phillips: Hi, Rachel.

Caller: I have to tell you a story and this is honest truth I have two kids in college

Show Host: Ah-ha.

C. Phillips: Ahh.

Caller: I gave my son the other flavor, my daughter takes the cherry, and I ran out of it

Show Host: Uh-oh.

Caller: And she already told me, ma, I think I'm catching a cold.

Show Host: Oh, no. Quick, you got to get her more Cold-Eezers.

Caller: Because -- yeah. Because in college, one person sneezes --

Show Host: Um-hum.

Caller: -- 400, 500 kids, they all catch a cold.

C. Phillips: Oh, yes.

Show Host: You're absolutely right.

C. Phillips: It goes through like lightning.

Show Host: It **runs** through those dorms.

C. Phillips: Absolutely.

Caller: I wish I had them today, I'm going to go visit her this weekend.

Show Host: Oh.

Caller: But I did two orders *again*.

Show Host: That is marvelous. **And**, you know, for you and for everybody else, you can always do **our** bill to-ship to option. QVC will --

Caller: Yes, that's how I sent it today.

Show Host: Yes. Good for you. We'll do it.

Caller: Yes. Yeah, because they have the cleansing for the face, whatever, when I order from you **people**.

Show Host: Oh.

Caller: Thank you so much. The most wonderful things with the -- you know, with the zinc and everything.

Show Host: Oh, good.

Complaint Exhibits

Caller: I take it myself.

Show Host: Good.

C. Phillips: Good.

Caller: Because last year I had the worst -- the worst bronchitis.

Show Host: Uh-oh.

Caller: And I didn't have them with me.

Show Host: Oh.

C. Phillips: Ahh.

Show Host: See that?

C. Phillips: Now you know.

Show Host: Well, now you've got them all stocked up for the season. I'm so glad.

Caller: Yes. Yeah, thank you --

Show Host: Good for you.

Caller: -- and have a good day.

Show Host: You, too.

C. Phillips: Thank you.

Show Host: **Take** care of yourself.

Caller: **Thank** you again.

Show Host: Bye-bye.

C. Phillips: Bye-bye.

Caller: Bye-bye.

Show Host: If you are sending them to someone you love, family on the other side of the country, kids away in college, use our bill to-ship to. We'll ship them to them, we'll send you the bill. You don't have to worry about it. But be sure to pick some up for yourself.

Sixty of them, two packages, 30 in each package, cherry flavor or original flavor, the Cold-Eezers lozenges, \$**18.25**.

Chuck Phillips, what a delight to see you. Thanks so much for being a part of our show today.

C. Phillips: Thank you, Patricia.

Complaint Exhibits

Show Host: **Good to see you, sir.**

C Phillips: **Good to see you.**

Show Host: **We'll see you back.**

C. Phillips: **Okay.**

(The Cold-Eezers segment was concluded.)

Complaint Exhibits

Exhibit B

TRANSCRIPT OF QVC

JANUARY 28, 1997

Show Host: Please pick up the phone and call us at 1-800-345-1515. if you have used Cold-Eezers and you've knocked out that awful cold and you've taken care of it naturally and healthily because we have Dr. Robert Pollack joining us and we want to get going. We want to get going, we want to hear a story.

R. Pollack: Right, right.

Show Host: Hello, hello.

R. Pollack: Hello

Show Host: Good morning.

R. Pollack: Nice seeing you again.

Show Host: It's nice to have you back.

R. Pollack: Thank you.

ON SCREEN:
Dr. Robert Pollack

Show Host: We're so happy every time you come to town. And I have to tell you every time Dr. Robert is with us, he comes on and he's kind enough to leave a bag or two of the Cold-Eezers up front by the producer's desk and we all kind of pick and choose. Well, the last time you were here, they were gone.

ON SCREEN:
A-36293
60 Original or Cherry Flavor Cold-Eezers
Lozenges
QVC Price \$18.25
S&H \$3.97
QVC • 1-800-345-1515

R. Pollack: They were gone.

Show Host: By 9:00 in the morning. Everyone came down and stole them and ran

R. Pollack: Okay

Show Host: And that's what happens on air as well. We tend to get these into stock, and the next thing you know, they fly out the door.

R. Pollack: Right, because of the fact that they work

Complaint Exhibits

- Show Host: They sure do
- R. Pollack: They work.
- Show Host: We are talking about the Cold-Eezers lozenges, and we have two flavors to choose from, your original, which is sort of a citrusy, kind of an orangy -
- R. Pollack: Um-hum.
- Show Host: -- and the new cherry flavor. The item number is A-36293. \$18.25, you get two packages of them, so it's 60 lozenges in all.
- R. Pollack: Right.
- Show Host: And just like Dr. Pollack said, they work. And tell us why they work.
- R. Pollack: Well, the fact -- very simply, we've treated the zinc in a certain way, which it is zinc: just normal, natural zinc.
- Show Host: Um-hum.
- R. Pollack: **And** it plugs up the viruses, the crevices that attach to the contact points on our cells. There they --
- Show Host: Yeah.
- ON SCREEN: Animation**
- R. Pollack: There you see the picture of how the viruses are attaching to the cell.
- Show Host: Um-hum.
- R. Pollack: You see those little crevices that are in each side.
- Show Host: Um-hum.
- R. Pollack: They attach onto the cell **and** that's what causes the cold. They start replicating. Here we have the zinc. Notice how they plug up the crevices **and** they just can't attach to the cell. It's **as** simple as that and as effective as that. It's the first treatment that actually treats -- or is effective against the virus that causes the cold --
- Show Host: Yes
- R. Pollack: -- not the symptoms, the runny nose or the teary eyes.
- Show Host: Right.
- R. Pollack: Here, when we eliminate the virus, you eliminate the symptoms, all of them, not just one, the runny nose that you might buy something for, or the cough.
- Show Host: Sure, sure.

Complaint Exhibits

R. Pollack: So, you see, that's the difference. And it happens very rapidly.

Show Host: It really does. This cuts down the actual time you spend suffering from a cold. And actually, if you take these on a preventative basis, you might not ever get a cold at all.

R. Pollack: Right. So, there we have the fact that you can see they were plugging them up.

Show Host: Sure. We're going to head off to the phones and take our first phone call of the QVC Morning Show.

Caller: Hello, you're live on the air with Dr. Pollack and Patricia. Who's this, please?

Caller: Hello, Pat. This is Alice from (inaudible).

Show Host: Hi, Hi, Alice. How are you doing?

Caller: We're doing fine. How are you?

Show Host: Say hi to Dr. Bob.

R. Pollack: Hi. Hello, Alice.

Caller: Heilo.

Show Host: Alice, I --

Caller: We love your cold tablets.

Show Host: Um-hum.

Caller: This is our third order of them. They're very good.

R. Pollack: Well, good, I'm glad that you agree also.

Caller: Yes, we do. We've tried them, both kinds --

Show Host: Um-hum.

Caller: -- and this is the third time we ordered them.

R. Pollack: Um-hum.

Show Host: What kind of results have you seen, Alice'?

Caller: Well, as soon as we start getting a runny nose or a sore throat, we take them.

R. Pollack: Cm-hum.

Show Host: And does the --

Complaint Exhibits

Caller: They help nght away.

Show Host: Yep, they sure do. So, you've made it through this winter season okay, huh"

Caller: Yes, we have.

R. Pollack: Good.

Caller: And **I'm**83 years old and **I'm**doing fine

R. Pollack: Bless you.

Show Host: Wonderful. That's **so** wonderful to hear. Alice, thank you very much for your phone call. Thanks for being a part of the morning show.

Caller: Thank you for talking to me.

Show Host: Our pleasure.

Caller: Okay. Bye-bye.

Show Host: Have a great day.

R. Pollack: Bye.

Show Host: Bye-bye.

You know, my own grandma just got over pneumonia.

R. Pollack: Hmm.

Show Host: And I'm sending her these so that she can continue to take them, and as some of the people do, take them on a preventative basis.

R. Pollack: Right. Yes.

Show Host: I know that you have women in nursing homes --

R. Pollack: Right.

Show Host: -- **and** gentlemen in retirement communities who are taking these.

R. Pollack: **Yes**. And they **find** them very effective.

Show Host: They sure do. **And** we've got --

R. Pollack: Because of **all** the people together and so on.

Show Host: Well, that's -- that's where you get germs from --

R. Pollack: Right, right.

Complaint Exhibits

Show Host: -- you know, and living in close quarters

R. Pollack: Right, correct

Show Host: Sure. We have someone else on the phone, so we'll go ahead right back to the phones and see who else is with us this morning

Hello. You're on the QVC Morning Show with Patricia and Dr. Robert Pollack and Cold-Eezers. Who's this?

Caller: This is Sandra from Portland, Oregon

Show Host: Hi

R. Pollack: Hi, Sandra.

Caller: Good morning.

R. Pollack: Good morning to **you**.

Caller: I've been -- I've been **looking** for these for a long time

Show Host: Um-hum.

Caller: **And** I just got over a bad cold and I wish I would have had them.

R. Pollack: Ahh.

Show Host: Um-hum.

R. Pollack: Right.

Caller: I recently was -- heard on a national television program that these --

Show Host: Um-hum.

Caller: -- are one of the most effective things in stopping a cold --

R. Pollack: Right.

Caller: -- in about **three** or **four** days.

Show Host: Correct.

R. Pollack: Correct. **And if you** get it right at the beginning --

Show Host: Um-hum.

R. Pollack: -- then it's possible that **you** would have even greater effect and it would be even less than the three days.

Show Host: Yes.

Complaint Exhibits

- R. Pollack: When you get just the first sign and you say to yourself, uh-oh, I got that tickle or I have that --
- Show Host: Right.
- R. Pollack: -- you know, we know when we're going to get it
- Show Host: Yeah.
- R. Pollack: That's the time to have them ready, pop one in your mouth, and it's going to start like that picture you saw, immediately beginning to get an effect.
- Caller: Now, what is the action of the zinc" I understand the zinc coats itself to the lining of the nose?
- R. Pollack: Well, not quite. We feel that -- have you seen the pictures just before that we had on the air? It appears that the zinc --
- ON SCREEN: Animation**
- Show Host: There you go. There it is.
- R. Pollack: There they go.
- Show Host: Yeah, um-hum.
- R. Pollack: See, here's a virus with the crevices that you see, and they attach onto positively charged projections that are in our -- that line our nose and mouth and throat. Now, here's the zinc. Notice how they plug up the crevices --
- Caller: Oh.
- R. Pollack: -- and they can't attach to the cell and there is no way then that they're going to replicate and give us the cold.
- Caller: Oh.
- R. Pollack: That's the whole key. Now, the point is that we were talking before we came on the program --
- Show Host: Right.
- R. Pollack: -- there are others that are out there that are trying to imitate this, and they say because Cold-Eezer Plus has zinc and ours has zinc, they must be alike.
- Show Host: **Uh-uh.**
- R. Pollack: They're not.
- Caller: No.
- R. Pollack: Because in attempting to flavor them, they tie up the zinc so tightly, they can't

Complaint Exhibits

get down into those crevices that you saw in the picture and they won't work. Only Cold-Eezer Plus will do what you see -- well, here, of course, is where they're attaching again.

ON SCREEN: Animation

Show Host: Um-hum.

R. Pollack: And that's where the cold starts.

Caller: Well, thank you very much for the product. I really appreciate it.

Show Host: You're welcome, Sandra. Thank you for your phone call

Caller: Thank you very much.

Show Host: Sure. Bye-bye now.

Caller: Bye.

Show Host: Just like **Dr. Robert** says, these are effective and they work like no others out there, because these don't have other agents in them that prevent the zinc from doing the job they need to do.

Something else that's very important about these, they are non-medicating, they are not -- they will not make you drowsy, they are safe for pregnant ladies, they are safe for babies.

R. Pollack: Right.

Show Host: In fact, your ~~grandson~~ takes these, isn't that right?

R. Pollack: Yes, **right**. Just like that child there you see.

Show Host: Um-hum.

R. Pollack: It's safe for children, it's safe for adults.

Show Host: Yep.

R. Pollack: You are quite **right**, **there** is nothing in Cold-Eezer Plus that will stop any medication **from** working.

Show Host: Right.

R. Pollack: It doesn't really **matter**. It's all-natural.

Show Host: Um-hum.

R. Pollack: We need the items anyway, the nutrients that are there.

Show Host: Yes.

Complaint Exhibits

R. Pollack: It's just that we've treated them so that they're effective against the virus. Here you have a pilot -- or a child that is there.

Show Host: Urn-hum.

R. Pollack: The mother is putting it in her backpack to take to school.

Show Host: Right, sure.

R. Pollack: And they're beginning to recognize when a child is sucking on something, and there are a lot of colds going around, chances are it's a Cold-Eezer and not just some candy.

Show Host: It's safe for your kids, it's safe for your grandkids, it's safe for --

R. Pollack: There's the pilot.

Show Host: -- pilots and school bus drivers --

R. Pollack: Right, right.

Show Host: -- and anyone who is going to be driving a vehicle at all.

R. Pollack: Oh, right. They are -- they're prevented by law from taking anything that's -- that will sedate them.

Show Host: Absolutely.

R. Pollack: Cold-Eezer Plus is the **only thing** that they're allowed to take.

Show Host: There you go. We're going to head right back to the phones and see who else is taking Cold-Eezers with us.

Hello. You're on the Morning Show. Who's this, please?

Caller: This is Margie from Philadelphia, Pennsylvania.

Show Host: Hi, Margie. **How are you** doing?

Caller: **I'm** fine. **How are** you both?

Show Host: Great.

R. Pollack: Okay.

Show Host: Are you **taking** Cold-Eezers, Margie?

Caller: Well, this is the first time we've ever been able to get it.

Show Host: Oh.

Caller: And **I'm** really excited, because as you just showed, I have a four-year old.

Complaint Exhibits

Show Host: Hrm.

R. Pollack: Right.

Caller: And at school, they kept passing the colds around.

R. Pollack: Right.

Show Host: Yep.

Caller: So, I was really excited that I got through this morning.

R. Pollack: Good, good. Now you don't have to worry about that four-year old cold walking in through the door or the --

Caller: Exactly.

Show Host: Well, you know how it is, they bring you home gifts from school.

R. Pollack: Yeah, right.

Show Host: They bring home a picture they colored and they bring you home a cold all at the same time.

R. Pollack: Right.

Caller: Exactly. That's why I'm so excited. I was afraid to give her the zinc just by itself.

R. Pollack: Right.

Show Host: Right. Um-hum.

Caller: And with this being all-natural, then I'm really excited.

R. Pollack: Okay.

Show Host: Exactly. Well, you know, if Dr. Bob gives it to his grandson, it's got to work and it's definitely safe for kids.

R. Pollack: Right.

Show Host: So, that's super. Well, I'm glad you could get them.

Caller: Thank you.

Show Host: You were very smart to call in early.

Caller: I'm glad we got through. Thanks.

Show Host: They do tend to sell out every time we have them on air.

Complaint Exhibits

Caller: Yes, they do.

Show Host: It's a good thing you called in this morning.

Caller: Yes

Show Host: Thanks. Margie.

Caller: Thank you.

Show Host: Bye-bye now.

Caller: Bye-bye.

R. Pollack: Bye.

Show Host: You **know**, this is just about the only place that you can get them.

R. Pollack: Yes. It seems that this **is** true. And it's so wonderful that we have this national ability to get in touch **with** people and that they can get this, because you alluded to it before, the amount of money spent on just someone getting a cold is really incredible.

Show Host: Oh, it sure is.

R. Pollack: The wages that **are** concerned, if you can't get into work.

Show Host: Sure.

R. Pollack: If a child gets a cold, who's going to stay home with that —

Show Host: Mom's got to stay home.

R. Pollack: Right. It's mom **that** generally is going to be doing that.

Show Host: Sure. And those cold medicines are \$6 and \$7 a bottle.

R. Pollack: Right.

Show Host: And they **don't do anything** for your cold. They treat your symptoms.

R. Pollack: Exactly.

Show Host: They knock **you** on your **butt**. You're sleeping

R. Pollack: Right.

Show Host: Sure, you're sleeping **12 hours** a day, that's great. But they're doing nothing for the actual cold. **This** is revolutionary because it's actually doing something to prevent the cold **virus from** locking on to the respiratory cells. That's how we get sick.

Complaint Exhibits

R. Pollack: And clinically tested. They were actually clinically tested

Show Host: Yes

R. Pollack: And that's the marvelous part about it

Show Host: It jure is. Everyone at QVC has used these. All of the hosts have used them. The last time I had a cold, I used them. My cold was gone. I couldn't even believe it. in about a day and a half. I saw instant results and that was it. And I didn't take lots of them. I took one about. oh, gosh. every maybe four hours or so.

R. Pollack: Every three -- right. But see, you started early. That was the key.

Show Host: Yeah. um-hum.

R. Pollack: Right

Show Host: I'm going to unwrap this just so you can see what it looks like. There are two flavors. There's cherry, which is the newer flavor. this is what the cherry one looks like. And then there's your original. And they don't look too different, but I'm just going to hold them up so you can see. It's just a little hard candy, a little lozenge.

R. Pollack: Right

Show Host: And if you've seen Dr. Bob on before and you haven't given these a try, I really encourage you, please don't miss out on them because every time he's on air, we sell out. And we don't know when we can get him back in and get more Cold-Eezers back in.

R. Pollack: Right, right.

Show Host: You won't find these in the store probably

R. Pollack: Right.

Show Host: Probably. They either sell out very quickly --

R. Pollack: Right, correct.

Show Host: -- if you can get a store rhar carries them at all.

R. Pollack: Correct, yes.

Show Host: What you will find are other zinc products that are not at all like this, that don't work. that actually have ingredients added to them to prevent them from working. I know that sounds crazy, but it's true. This is it, right?

R. Pollack: Right.

Show Host: This is what you need to knock out that cold. Thank you so much.

Complaint Exhibits

R. Pollack: Thank you. It's been a pleasure

Show Host: It's nice to see you again, Dr. Poilack

R. Pollack: All right.

Show Host: The item number is A-36293. You're going to receive 60 of them -- that's two separate bags -- for \$18.25

R. Pollack: Right.

Show Host: What a deal.

(The Cold-Eezers segment was concluded.)

Complaint Exhibits

Exhibit C

TRANSCRIPT OF QVC

OCTOBER 2, 1997

Show Host: We're going to start off our Health Connection with something that, I guess, a lot of us -- a lot of us hopefully -- I'm actually fighting one right now

C. Phillips: Oh

Show Host: So, I'm going to start taking mine since you're here.

C. Phillips: Excellent. Start right now at the first sign

Show Host: Chuck Phillips is joining us to talk about Cold-Eezers. Thanks so much for joining us.

C. Phillips: Sure.

Show Host: We're just kind of meeting right here. So, we're going to jump in. You are, in fact -- you are the founder of the Quigley Corporation who brings us Cold-Eezers.

C. Phillips: One of the founders.

Show Host: One of the founders.

C. Phillips: Right.

Show Host: **And** this is something -- **and** if you have it, please give us a call, because many of you have used Cold-Eezers in the past. Maybe if you had the summer cold, you used them this summer. But I know the moms out there really want to hear about this.

ON SCREEN:
A-36293
60 Original or Cherry Flavor Cold-Eezers
Lozenges
QVC Price \$18.25
S&H \$3.97
QVC - 1-800-345-1515

C. Phillips: Absolutely.

Show Host: It helps reduce the symptoms of the common cold

C. Phillips: Right.

Show Host: This formula.

C. Phillips: Moms are waking up right now.

Complaint Exhibits

- Show Host: Um-hum.
- C. Phillips: And they're hearing that little voice --
- Show Host: Um-hum
- C. Phillips: -- mom, I don't feel so good. Well, what we're going to do this year is get more aggressive. we're going to attack the cold. We're suggesting to moms, get Cold-Eezer Plus in the house.
- Show Host: Um-hum.
- C. Phillips: Have it ready, and at the very first hint of a cold, start applying it. But even before then, try to use it as a preventative measure, so that if you know that the child has had an exposure, which is school, they can take one a day --
- Show Host: Um-hum.
- C. Phillips: -- to try to prevent getting a cold.
- Show Host: And you're talking about schools, I mean, everywhere you go, I mean, other children have it, other adults have it, you're just always exposed.
- C. Phillips: Always exposed, exactly. You touch things.
- Show Host: Um-hum.
- C. Phillips: You touch a doorknob and you go up and you touch your nose, you've got the chance to have it.
- Show Host: Right.
- C. Phillips: So, what we're saying is, point one, if you don't have it in the house, get some in the house so that you have it to use at the very first sign of a cold.
- Show Host: Um-hum.
- C. Phillips: That's the important thing. This year we're saying, have it around and take one a day. Give your child one before he goes to school, that way, it can possibly prevent that child from getting a cold.
- Show Host: Now, what do these contain? How do these work?
- C. Phillips: Well, it contains what we call ZIGG, zinc gluconate glycine.
- Show Host: Um-hum.
- C. Phillips: And it's a patented formula. It is homeopathic, it is all-natural. It's --
- Show Host: Right. That's important I know, especially when we're talking about little ones.
- C. Phillips: Little ones, right. It's non-sedating.
- Show Host: So, anybody -- you're not going to fall asleep on these.

Complaint Exhibits

C. Phillips: No, you're not.

Show Host: Which a lot of cold medicines make you fall asleep

C. Phillips: They tend to make you drowsy

Show Host: Um-hum.

C. Phillips: And they sort of take the wind out of your sails --

Show Host: Right.

C. Phillips: -- and make you feel tired. Cold-Eezer Plus will not do that

Show Host: Um-hum.

C. Phillips: You take one every three hours when you're treating a cold, but as I say, let's get aggressive, let's take one a day to see if we can stop the cold from even coming onto you. Another strategy is if a child comes home, they have a cold, it's very evident, they've started to sneeze --

Show Host: Um-hum.

C. Phillips: Everyone in the family should take one or two --

Show Host: To prevent them --

C. Phillips: -- to prevent them to be infected by this infection that's now come into the house.

Show Host: Now, if-- like I said, last Saturday, I woke up with a sore throat.

C. Phillips: Right.

Show Host: So, I mean, I -- this, I should take -- you know, I didn't have them in the house, so --

C. Phillips: Oh, boy.

Show Host: Now, I have them. I'm **going** to take one now. But this will help reduce -- if it's too late, if somebody already has gotten the signs of a cold, how does it help to reduce -- what symptoms will it help reduce?

C. Phillips: It's not **too** late!

Show Host: Okay.

C. Phillips: If you've had a cold for one or two days, it will basically reduce the duration of what's left of the cold **nearly** in half.

Show Host: Okay. Oh, really?

C. Phillips: Sure. **So**, it's not -- it's never too late.

Show Host: Um-hum.

Complaint Exhibits

- C. Phillips: The thing is, we want to be quicker. we want to catch it before it starts. and we want to even come before that and become preventative --
- Show Host: Right.
- C. Phillips: -- and try to anticipate things. You know when you've been infected. You've been on an airplane flight. That's recycled air.
- Show Host: Um-hum.
- C. Phillips: And you're breathing it in. It just takes one person on that plane --
- Show Host: To be sick.
- C. Phillips: -- to fill the air.
- Show Host: Um-hum.
- C. Phillips: And you land, take your Cold-Eeze
- Show Host: Right. Because you have many -- I do that all the time. In fact, when I came back from New York, I was on a train, and I think the **trains** are similar to the planes with that **air**.
- C. Phillips: Sure. It's a contained space.
- Show Host: And that's where I **think** I got my cold Saturday morning.
- C. Phillips: Sure. Cold-Eezer **Plus** should be taken, you know --
- Show Host: Right when I got **off** the **train**, I should have taken one.
- C. Phillips: -- **as soon as** you're **off** the train.
- Show Host: Right.
- C. Phillips: Or **in the evening at** your home and you've had most of the exposure or you've touched **everything** you're going to touch, you've washed your hands, take a Cold-Eezer **Plus**.
- Show Host: Now, with **this**, you're going to get two bags, each contain 30 lozenges and each have 135 grams of the zinc in it, which --
- C. Phillips: Well, each Cold-Eezer **Plus** lozenge has --
- Show Host: Right.
- C. Phillips: -- **14.2 milligrams of zinc gluconate glycine**.
- Show Host: Um-hum.
- C. Phillips: And basically one **every** three hours to treat the cold.
- Show Host: Um-hum.

Complaint Exhibits

C. Phillips: Or take one a day to try to prevent it.

Show Host: Preventive.

C. Phillips: It's also excellent for allergies

Show Host: Oh, really?

C. Phillips: Absolutely.

Show Host: We're going to go to the phones and see who's shopping with us this morning. Hi, Geraldine.

Caller: Hi. How are you this morning?

Show Host: I'm great. Now, do you have Cold-Eezers or are you picking them up?

Caller: I'm just buying them.

Show Host: Oh, good.

C. Phillips: Oh, good.

Show Host: Now, why did you decide to pick them up?

Caller: I have a grandson that lives with me that goes to preschool. He brings a cold home every season. My husband and I are sick all winter.

Show Host: Oh, no.

C. Phillips: Oh, boy.

Caller: So, we're hoping that this -- I'm going to try this and hope it will cut down the effects that we usually receive --

Show Host: Um-hum.

Caller: -- from the cold seasons. We haven't ever been this sick in years. But he brings all the fresh, nice, young germs into the house that we can't fight.

Show Host: The new germs.

Caller: Yes.

Show Host: Well, you know -- and as Chuck said, take this as a preventative, too. So, I mean, when he starts the preschool, you know, start taking maybe one a day.

C. Phillips: Right.

Show Host: And then if he brings it home, you're not going to get that.

Caller: Well, here's hoping because my husband moans.

Show Host: Oh.

Complaint Exhibits

Caller: He says every time this kid goes to school. I'm sick

Show Host: Um-hum

C. Phillips: Well, have him take one a day and he will not catch it and have the child perhaps take one in the morning before they go to school and --

Caller: Oh, that's a good idea.

C. Phillips: -- to prevent them from even getting the cold. It's preventive medicine. It's an aggressive family strategy to stop this spreading of the cold --

Show Host: Um-hum.

C. Phillips: -- and to help the child out almost instantly

Show Host: And it's nice, too, because it's all-natural. It's like a homeopathic way to prevent the cold and prevent the symptoms and it's also non-sedating. So, they're not going to go to preschool and be like, you know, snoozing on the side because there's no, you know, medicines in here to really bother you or the little ones

C. Phillips: They won't become tired. And rest assured, it's a stocking item here at QVC. You can get Cold-Eezer Plus 24 hours a day. You can't run out.

Show Host: Right.

Caller: Well, if they work -- if they work, I guarantee you, you'll have a lifetime member.

C. Phillips: Oh, good.

Show Host: Well, and let us know, Geraldine. Call us back after you try them and let us know how they do work for you. Okay?

Caller: I certainly will.

Show Host: Thank you so much.

Caller: And thank you for talking to me, and you have a real nice day

Show Host: You, too.

C. Phillips: You, too. Bye-bye.

Caller: Bye-bye

Show Host: I want to let everyone know, too, because a lot of people think zinc, they think bad taste. You've really helped that out a lot. You have two flavors to choose from, original or cherry. I love the cherry

C. Phillips: Yes. Well, zinc -- you can take zinc --

Show Host: Um-hum.

Complaint Exhibits

- C. Phillips: -- gluconate lozenges, just tablets and let them dissolve, but they actually can make you nauseous.
- Show Host: Um-hum.
- C. Phillips: So, Dr. John Godfrey, the inventor of our formula, found a way to sweeten zinc gluconate --
- Show Host: Um-hum.
- C. Phillips: -- yet release the zinc ions to the mucosal surfaces which does the job.
- Show Host: Um-hum.
- C. Phillips: That's what is stopping the rhinovirus from reproducing, but it's also what we think is perhaps clamping on the nerve endings in here and telling your system that you don't need to have mucus being produced.
- Show Host: Right. I think we have some tape that will show that.
- C. Phillips: Yes, good.
- Show Host: And maybe you can explain it again as we see it.
- ON SCREEN: Animation**
- C. Phillips: Absolutely. It's -- you see that the purple items are your rhinovirus in and around your mouth, and as they come in and touch the walls of the inside of your mouth and nose, they attach themselves.
- Show Host: Um-hum.
- C. Phillips: Boom, you have an infection going. They intrude, they replicate, and they kill the cell and send billions more out there.
- Show Host: Hmm.
- C. Phillips: Now what you see is the blue double positive zinc ions of Cold-Eezer Plus in and around the rhinovirus and they actually plug up the areas that the rhinovirus normally would use to, let's say, magnetically, by forces, positive and negative like a magnet, lodge onto your cells. So, the zinc gluconate glycine is stopping that. The zinc double positive ions are preventing the rhinovirus from even having a chance to get a foothold, and it just gets washed away by the body's normal system of cleaning this area, which is mucus.
- Show Host: Um-hum.
- C. Phillips: So, it works rather well.
- Show Host: And it will help reduce the symptoms and the duration. Not only the symptoms like the coughing --
- C. Phillips: Exactly

Complaint Exhibits

- Show Host: -- the cough and the stuffy nose and the sore throat and the nasal drip and the sneezing, but also the duration
- C. Phillips: The duration, which is the most important thing anyway
- Show Host: Because if you're out of work for three or four days, I mean, that's a long time --
- C. Phillips: Yes
- Show Host: -- to not get that paycheck or to just be out of work on your back and miserable I'd be miserable.
- C. Phillips: Well, miserable, the agony, the misery is what you want to get rid of
- Show Host: I know
- C. Phillips: Absolutely.
- Show Host: And as Geraldine said, you know, her husband is moaning. I mean, then the agony for everybody in the family.
- C. Phillips: Oh, really, everybody is awake
- Show Host: And the little ones who wake up and, you know, mom, I don't feel good, you know. This is going to --
- C. Phillips: And then you're into the whole thing, Mom's got to deal with this
- Show Host: Um-hum.
- C. Phillips: But we can stop that.
- Show Host: And then she gets the cold.
- C. Phillips: We can stop it --
- Show Host: Preventative.
- C. Phillips: -- (inaudible).
- Show Host: Right.
- C. Phillips: Now, there's a word about business in general, if you own a business, whether it's a single proprietor or AT&T.
- Show Host: Um-hum.
- C. Phillips: We suggest they take a good hard look at having Cold-Eezer Plus around for their employees.
- Show Host: Mmm.
- C. Phillips: Now, the United States last year lost \$21 billion from the common cold. We have them here at QVC.

Complaint Exhibits

- Show Host: Um-hum.
- C. Phillips: And they're available to most everyone here and we've heard that it works rather well.
- Show Host: My mother picked them up last year for her work.
- C. Phillips: Okay.
- Show Host: And she works -- she has a store, and so, you have, you know, all sorts of peopis coming in --
- C. Phillips: Sure.
- Show Host: -- and employees as well that you're going to get the cold
- C. Phillips: Well, of all the people to protect. your employees are very important
- Show Host: Right.
- C. Phillips: It costs a business approximately \$125 a day for that person to be absent.
- Show Host: Um-hum.
- C. Phillips: Now, if they're there, they're also spreading the cold, right? And so, I mean, it doubles the problem. Why not stop it immediately?
- Show Host: Right.
- C. Phillips: Have it available to the people that work for you. It's -- 55 percent of all colds end up at the doctor. It's amazing. Fifty five percent of everyone who gets a cold gets a condition that the cold began and --
- Show Host: Um-hum.
- C. Phillips: -- now it's gotten worse.
- Show Host: So, take this as a preventative, like once a day, but also, you know, take it -- if you were not able to do the preventative, make sure you take it once it starts and reduce the symptoms and reduce the duration.
- C. Phillips: Right. Real important, too, is the value of zinc. Nearly everyone in the United States is zinc deficient. There's very few places to get natural zinc.
- Show Host: Um-hum.
- C. Phillips: Oysters, things like this, which aren't readily available every day
- Show Host: No. And some people don't like oysters.
- C. Phillips: Right. And being zinc deficient puts you into various categories that are not good, let's say.
- Show Host: Um-hum.

Complaint Exhibits

C Phillips If you're taking the zinc, it will help aging, it will help immunity, it will help vision. It's good for 26 or 27 conditions of the human body. So, taking one a day, you're getting nearly the daily requirement --

Show Host Um-hum

C Phillips -- but you're also preventing that cold from getting a foothold on you

Show Host Right.

C Phillips And it stops the whole process --

Show Host Reducing --

C Phillips -- right in its tracks.

Show Host -- the symptoms and the duration of the common cold. We do have cherry flavor or original. You're going to have two bags of 30 lozenges in each one. They're \$18.25. Try them out. They really, really do work. I've used them. My mom has used them. Actually, I have one right now

C Phillips You have one right now. There's one working right now

Show Host: I know. There's one working right now A-36293, and they do taste great. I like the cherry personally, but there are -- you know, the other flavor is just as good. Both of those, \$18.25.

Thank you so much, Chuck.

C Phillips Thank you, Bonnie.

Show Host Thanks for keeping us healthy.

C Phillips Oh, I'll be glad to.

Show Host I'm sorry that you weren't here Saturday morning. But now my cold will go --

C Phillips One a day and you won't have this problem

Show Host That's right. Thanks so much A-36293

(The Cold-Eezers segment was concluded.)

Complaint Exhibits

Exhibit D

**Don't play pass the cold in your family!
Reach for Cold-Eeze® with Zigg™.**

You know what happens when one of the kids comes home from school with a cold... it seems everybody in the family gets it! Well, now you can fight back with Cold-Eeze®. It's the only zinc lozenge with Zigg™ (zinc gluconate glycine), the only patented formula clinically proven to reduce the severity and duration of common cold symptoms.



Cold-Eezes... there is no substitute!

The Quigley Corporation Makers of Cold-Eeze® with Zigg™, is proud to sponsor this year's tour of the World's Largest... Follow the Yellow Brick Road for tour engagements.

**Click Here to Enter The Cold-Eeze
Emerald Isle Sweepstakes
a Trip for 4 to Ireland!**

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Exhibit D

Complaint Exhibits

Exhibit E



When The Common Cold or Allergies Strike.....

- Sneezing
- Sore Throat
- Teary Eyes
- Runny Nose
- Stuffy Sinus

.....Strike Back
with Homeopathic Sugar Free
Cold-Eeze® Tablets with ZIGG

Exhibit E

Complaint Exhibits

Exhibit F

COLD-EEZE : :60
ALLERGIES

YOU ALREADY KNOW THAT COLD-EEZE LOZENGES ARE EFFECTIVE AGAINST COLDS. BUT HAVE YOU EVER THOUGHT OF USING THEM AGAINST YOUR AIRBORNE ALLERGIES? THE SNEEZING, SNIFFLING, RUNNY-NOSE AND WATERY EYES CAN MAKE YOU MISERABLE. TRY TAKING COLD-EEZE. THE GREAT TASTING BREAKTHROUGH LOZENGE YOU'VE HEARD SO MUCH ABOUT. WITH THE ZINC-GLUCONATE GLYCINE FORMULA. COLD-EEZE IS CLINICALLY PROVEN TO REDUCE THE DURATION AND SEVERITY OF THE COMMON COLD. IN FACT, COLD-EEZE IS SO EFFECTIVE. CONSUMER TESTIMONY AND PRELIMINARY FINDINGS SUGGEST COLD-EEZE ALSO MAY RELIEVE THE DISCOMFORT FROM AIRBORNE ALLERGIES. TRY COLD-EEZE, FOR RELIEF FROM THE DREADFUL SYMPTOMS OF HAYFEVER, MOLD-SPORES AND OTHER AIRBORNE ALLERGIES. HOMEOPATHIC COLD-EEZE IS ALL NATURAL AND NON-SEDATING. SO REMEMBER THERE IS ONLY ONE COLD-EEZE, ASK FOR IT BY NAME AND GIVE IT A TRY TODAY ...AND TOMORROW ...OR WHENEVER YOU NEED IT!

TAGS: AVAILABLE AT RITE AID, CVS, THRIFT DRUGS, DRUG EMPORIUM. ALL FINE OUTLETS EVERYWHERE.

Complaint Exhibits

Exhibit G

**COLD-EEZE :60
THE IMITATORS. Fake**

REMEMBER WHEN I TOLD YOU ABOUT PASSING THE COLD IN YOUR FAMILY? YOU KNOW, THE KIDS BRING A COLD HOME FROM SCHOOL AND PASS IT ONTO EVERYBODY ELSE.

NOW, WITH THE PHENOMENAL SUCCESS OF COLD-EEZE LOZENGES, MANY IMPOSTORS ARE TRYING TO COPY IT! BEWARE OF THESE FAKE IMITATORS.

COLD-EEZE IS THE ONLY LOZENGE CLINICALLY PROVEN IN TWO DOUBLE-BLIND STUDIES TO REDUCE THE DURATION AND SEVERITY OF THE COMMON COLD. IN FACT, COLD-EEZE HAS BEEN SO EFFECTIVE AGAINST COMMON COLDS IN FAMILIES THAT PEDIATRIC STUDIES ARE UNDERWAY TRY COLD-EEZE TO HELP PROTECT YOUR LITTLE ONES FROM THE NASTY CLUTCHES OF FULL-BLOWN COLDS.

SO REMEMBER THE NEXT TIME ONE OF YOUR KIDS BRING THE SNIFFLES HOME FROM SCHOOL, STAY AWAY FROM THOSE FAKE IMITATORS.

THERE'S ONLY ONE ZINC LOZENGE PROVEN TO WORK ON COLDS: COLD-EEZE. ASK FOR IT BY NAME. CLINICALLY PROVEN COLD-EEZE. IT REALLY WORKS!!

TAGS:

Complaint Exhibits

Exhibit H

COLD-EEZE

TAG #3
 4 13-UFN
 SPRING ALLERGIES

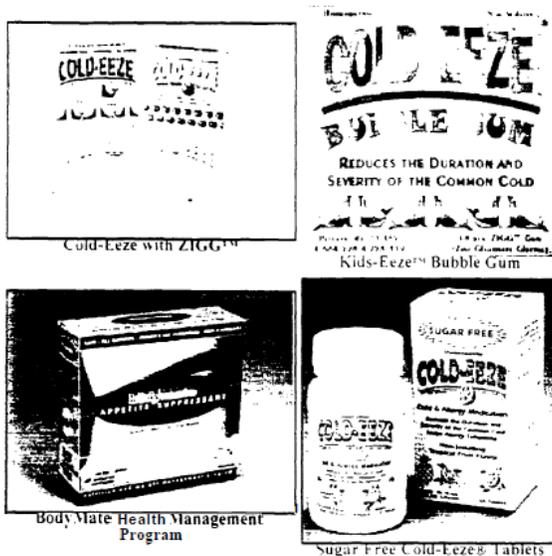
- * ALLERGY SEASON IS HERE...WARM WEATHER, SUNSHINE, FLOWERS...IT'S A TERRIBLE TIME TO START SNEEZING! SO ATTACK THOSE SYMPTOMS WITH **COLD-EEZE**.
- * **COLD-EEZE** IS NOW THE **MOST EFFECTIVE** AND **POPULAR** COLD FIGHTER IN THE COUNTRY.
- * THERE'S NO SUBSTITUTE FOR **COLD-EEZE** WHEN IT COMES TO EASING SYMPTOMS.
- * REMEMBER, WHEN YOU THINK ZINC, THINK **COLD-EEZE** THE ONLY LOZEYGE WITH "ZIGG" THAT'S **ZINC GLUCONATE GLYCINE** AND IT'S ONLY IN **COLD-EEZE**.
- * **COLD-EEZE** PATENTED, HOMEOPATHIC, ALL NATURAL, NON SEDATING, FAST ACTING AND CLINICALLY PROVEN.
- * NOW AVAILABLE IN FOUR SOOTHING FLAVORS TOO!
- * SO ENJOY THE SEASON, TAKE **COLD-EEZE** WITH YOU TO WORK, THE GYM OR EVEN ON VACATION.
- * THERE IS NOW **SUBSTITUTE ANYWHERE...**
- * **COLD-EEZE**, THE OFFICIAL SPONSOR OF THE NATIONAL TOURING STAGE **PRODUCTION** OF THE **WIZARD OF OZ**.

COLD-EEZE IS AVAILABLE AT.....

WALGREENS, OSCO/SAV-ON, JEWEL, DOMINICKS, K-MART, VONS,
 LUCKY'S, DUANE REAOE AND FINE STORES EVERYWHERE,

Complaint Exhibits

Exhibit I



The Quigley Corporation Makers of Cold-Eeze® with Zigg™, is proud to sponsor this year's tour of The Wizard Of Oz. Follow the Yellow Brick Road for tour engagements.

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Complaint Exhibits

Cold-Eeze Bubble Gum Formula



The same clinically proven ZIGG™ formula and dosage as regular COLD-EEZE® Lozenges!

Complaint Exhibits

Exhibit J

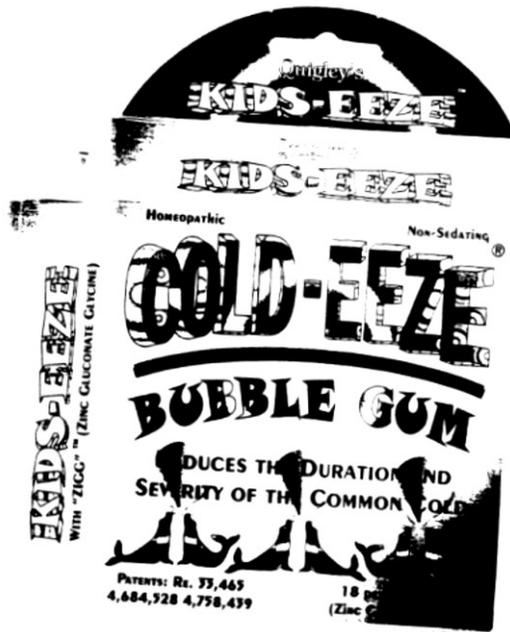


Exhibit J

Complaint Exhibits

TRY QUIGLEY CORPORATION'S OTHER FINE PRODUCTS
 COLD-EEZE® HOMEOPATHIC LOZENGES IN 4 FLAVORS
 COLD-EEZE® HOMEOPATHIC SUGAR-FREE TABLETS
 FOR COLDS & ALLERGIES
 BODYMAZE™ NUTRITION & WEIGHT MANAGEMENT PROGRAM



Indications: To reduce the duration and symptoms of the COMMON cold (cough, sore throat, stuffy nose, sneezing, post-nasal drip, hoarseness). Non-sedating.

Ingredients: Net contents: 18 pieces, bubble gum. Each 4.5g piece contains: Active ingredient: 13.3mg of ionic zinc from Zincum Gluconicum 2X (104mg zinc gluconate trihydrate) equivalent to Zincum 3X. Inactive ingredients: 4.49g including: Sucrose, Gum base, Corn Syrup, Glycine, Gluconic Acid, Glycerine, Artificial Flavors, Acesulfame Potassium, Red 40 Lake, Red 40, and BHT (To Maintain Freshness).

Directions: For maximum effectiveness, begin treatment at first sign of cold. Chew each piece for at least 20 minutes. Repeat every 2 to 4 hours as needed. Recommended daily dose is 5 pieces per day. To avoid minor upset, do not chew on an empty stomach. Do not eat or drink citrus fruits or juices 1/2 hour before & after chewing a piece. Otherwise, drink plenty of fluids.

Warnings: COLD-EEZE® Bubble Gum is formulated to relieve cold symptoms & may be insufficient treatment for flu. If symptoms worsen or persist beyond 7 days, consult a physician.

**CLINICALLY PROVEN
 COLD-EEZE® WITH ZIGG™**

The following studies apply only to the COLD-EEZE® formulation with ZIGG™ (Zinc Gluconate Glycine), the only great tasting formulation proven effective in treating a Common Cold.

A randomized, double-blind placebo study, with 23mg of ionic zinc in a citrus flavored lozenge, concluded that treatment of a cold with our Patented formula within 48 hours of the onset resulted in symptom relief and a 62% reduction in the duration of the common cold. Results were published in the Journal of International Medical Research, Godfrey et. al., Vol. 20, No. 3, June 1992.

A second, randomized, double-blind placebo study, with only 13.3mg of ionic zinc in a citrus flavored lozenge, concluded patients starting treatment with our Patented formula within 24 hours of the onset, taking an average of 6 lozenges per day, resulted in a 42% reduction in the duration of common cold symptoms. Results were published in the Annals of Internal Medicine, Massad et. al., Vol. 123, No. 2, July 15, 1996, pages 87-90.

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 THE QUIGLEY CORPORATION
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Decision and Order

DECISION & 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 the 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 respondent of all the jurisdictional facts set forth in the draft 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 or that the facts, as alleged in the complaint, other than jurisdictional facts, are true; and

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

1. Respondent The Quigley Corporation ("Quigley") is a Nevada corporation with its principal office or place of business at 10 South Clinton Street, P.O. Box 1349, Doylestown, PA 18901.

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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 The Quigley Corporation, its successors and assigns and its officers, agents, representatives, and employees.
3. “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 Cold-Eeze Zinc Lozenges, Kids-Eeze Bubble Gum, or any other food, drug or dietary supplement, as “food” and “drug” are defined in Section 15 of the Federal Trade Commission Act, in or affecting commerce, shall not make any representation, in any manner, expressly or by implication, that such product:

- A. will prevent users from contracting colds;

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- B. will reduce the risk of contracting pneumonia;
- C. will relieve or reduce the symptoms of hay fever and allergies;
- D. will reduce the severity of cold symptoms in children;
or
- E. will prevent children from contracting colds;

unless, at the time the representation is made, respondent possesses and relies upon competent and reliable scientific evidence that substantiates the representation.

II.

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 any food, drug or dietary supplement, as “food” and “drug” are defined in Section 15 of the Federal Trade Commission Act, in or affecting commerce, shall not make any representation, in any manner, expressly or by implication, that such food, drug or dietary supplement can or will cure, treat, or prevent any disease, or have any effect on the structure or function of the human body unless, at the time the representation is made, respondent possesses and relies upon competent and reliable scientific evidence that substantiates the representation.

III.

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

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IV.

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.

V.

IT IS FURTHER ORDERED that respondent The Quigley Corporation, 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 their possession or control that contradict, qualify, or call into question the representation, or the basis relied upon for the representation, including complaints and other communications with consumers or with governmental or consumer protection organizations.

VI.

IT IS FURTHER ORDERED that respondent The Quigley Corporation, and its successors and assigns, shall deliver a copy of this order to all current and future principals, officers, directors, and managers, and to all current and future employees, agents,

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and representatives having responsibilities with respect to the subject matter of this order, and shall secure from each such person a signed and dated statement acknowledging receipt of the order. Respondent shall deliver this order to current personnel within thirty (30) days after the date of service of this order, and to future personnel within thirty (30) days after the person assumes such position or responsibilities. Respondent shall maintain and upon request, make available to the Federal Trade Commission for inspection and copying, a copy of each signed statement acknowledging receipt of the order.

VII.

IT IS FURTHER ORDERED that respondent The Quigley Corporation, 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 respondents learn less than thirty (30) days prior to the date such action is to take place, respondents shall notify the Commission as soon as is practicable after obtaining such knowledge. All notices required by this Part shall be sent by certified mail to the Associate Director, Division of Enforcement, Bureau of Consumer Protection, Federal Trade Commission, 600 Pennsylvania Avenue, N.W., Washington, D.C. 20580.

VIII.

IT IS FURTHER ORDERED that respondent The Quigley Corporation, and its successors and assigns, shall, within sixty (60) days after the date of service of this order, and at such other

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times as the Federal Trade Commission may require, file with the Commission a report, in writing, setting forth in detail the manner and form in which they have complied with this order.

IX.

This order will terminate on February 10, 2020, 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.

By the Commission, Commissioner Anthony dissenting and Commissioner Leary not participating.

Analysis to Aid Public Comment

**ANALYSIS OF PROPOSED CONSENT ORDER
TO AID PUBLIC COMMENT**

The Federal Trade Commission has accepted, subject to final approval, an agreement containing consent order from respondent the Quigley Corporation (“Quigley”).

The proposed consent order has been placed on the public record for sixty (60) days for reception of comments by interested persons. Comments received during this period will become part of the public record. After sixty (60) days, the Commission will again review the agreement and the comments received and will decide whether it should withdraw from the agreement or make final the agreement's proposed order.

This matter involves alleged deceptive representations for Cold-Eeze Zinc Lozenges and Cold-Eezer Plus Zinc Gluconate Lozenges (hereinafter, collectively “Cold-Eeze”) and Kids-Eeze Bubble Gum (“Kids-Eeze”).

The Commission's proposed complaint alleges that Quigley made unsubstantiated representations that Cold-Eeze will prevent users from contracting colds and pneumonia; will treat allergies; will reduce the severity of colds in children; and that Kids-Eeze will reduce the severity of cold symptoms in children.

The proposed consent order contains provisions designed to prevent respondent from engaging in similar acts and practices in the future.

Part I of the proposed order prohibits the respondent from making the representations about Cold-Eeze and Kids-Eeze challenged in the complaint, unless it possesses and relies upon competent and reliable scientific evidence that substantiates the representation.

Analysis to Aid Public Comment

Part II of the proposed order prohibits respondent from making any representation that any food, drug, or dietary supplement can or will cure, treat or prevent any disease, or have any effect on the structure or function of the human body, unless it possesses and relies upon competent and reliable scientific evidence that substantiates the representation.

Part III of the proposed order allows the respondent to make any representations for any drug that are permitted in labeling for the drug under any tentative final or final Food and Drug Administration (“FDA”) standard or under any new drug application approved by the FDA.

Part IV of the proposed order allows the respondent to make representations for any product that are specifically permitted in labeling for that product by regulations issued by the FDA under the Nutrition Labeling and Education Act of 1990.

Parts V through VIII require the respondent to keep copies of advertisements making representations covered by the order; to keep records concerning those representations, including material that they relied upon when making the representations; to provide copies of the order to certain of the respondents' personnel; to notify the Commission of changes in corporate structure; and to file compliance reports with the Commission.

Part IX of the proposed order is a “sunset” provision, dictating that the order will terminate twenty years from the date it is issued or twenty years after a complaint is filed in federal court, by either the United States or the FTC, alleging any violation of the order.

The purpose of this analysis is to facilitate public comment on the proposed order. It is not intended to constitute an official interpretation of the agreement and proposed order or to modify in any way their terms.

Dissenting Statement

**DISSENTING STATEMENT OF
COMMISSIONER SHEILA F. ANTHONY**

I write separately to express my view that the consent in this matter does not adequately address Quigley Corporation's conduct with respect to its marketing of the Kids-Eeze product.

Complaint

IN THE MATTER OF

TRANS UNION CORPORATIONOPINION OF THE COMMISSION, FINAL ORDER, AND INITIAL
DECISION IN REGARD TO ALLEGED VIOLATIONS OF SECTIONS 604
AND 607 OF THE FAIR CREDIT REPORTING ACT*Docket No. 9255; File No. 922 3036**Complaint, December 15, 1992 – Opinion and Final Order, March 1, 2000*

In a unanimous Opinion, the Commission concluded that Trans Union Corporation (“Trans Union”), one of the three national credit bureaus, violated the Fair Credit Reporting Act (FCRA) by selling its consumer reports to target marketers who in turn solicit the consumers to purchase goods and services. As a consumer reporting agency, Trans Union received detailed credit information for over 160 million consumers from numerous credit grantors, including banks, mortgage companies, credit unions, auto dealers and others, and then compiled this information into consumer reports and sold these reports to target marketers. The Commission held that Trans Union’s disclosure of this information to entities that lacked a statutorily-defined permissible purpose for obtaining them, violated the FCRA, which protects the privacy of credit information by limiting the circumstances under which a consumer reporting agency can disclose a consumer report. In the Final Order, Trans Union is prohibited from selling consumer reports as target marketing lists to marketers lacking an authorized purpose for receiving them under the FCRA. The Final Order applies to a number of Trans Union’s target marketing list products, including its Master File/Selects products, its modeled products and its TransLink/reverse append products.

Participants

For the Commission: *Kellie A. Cosgrove, Annemarie Scanlon Harthun, Christopher W. Keller, Lucy Morris, and Jonathan A. Smollen.*

For the Respondents: *Stephen L. Agin, Elizabeth R. Bacon Ehlers, Roger L. Longtin, and Colleen E. McManus, Rudnick & Wolfe; Steven B. Feirman, Rudnick, Wolfe, Epstein & Zeidman.*

Complaint

COMPLAINT

The Federal Trade Commission, having reason to believe that Trans Union Corporation, a corporation, hereinafter sometimes referred to as respondent, has violated the Fair Credit Reporting Act, 15 U.S.C. § 1681 et seq., and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues this complaint, and alleges as follows:

DEFINITIONS

For the purposes of this complaint, the terms, "person," "consumer," "consumer report," and "consumer reporting agency" are defined as set forth in §§ 603(b), (c), (d), and (f), respectively, of the Fair Credit Reporting Act, 15 U.S.C. §§ 1681a(b), 1681a(c), 1681a(d) and 1681a(f).

"Credit information" means the information that respondent maintains bearing on any of the characteristics listed in § 603(d) of the Fair Credit Reporting Act, 15 U.S.C. § 1681a, as amended, with respect to any consumer that respondent: obtains from subscribers, court records or any other source and from which respondent creates consumer reports.

"Permissible purpose" means any of the purposes listed in Section 604 of the Fair Credit Reporting Act, 15 U.S.C. § 1681b, as amended, for which a consumer reporting agency may lawfully furnish a consumer report.

"Prescreening" means the process whereby respondent, utilizing credit information, compiles or edits for a client a list of consumers who meet specific criteria and provides this list to the client or a third party (such as a mailing service) on behalf of the client for use in soliciting those consumers for an offer of credit.

"Subscriber" means any person who furnishes credit information to respondent or who requests or obtains a consumer report from respondent, excluding consumers.

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PARAGRAPH ONE: Respondent, Trans Union Corporation is a corporation organized, existing and doing business under and by virtue of the laws of the state of Delaware, with its office and principal place of business located at 555 West Adams Street, Chicago, Illinois, 60661.

PARAGRAPH TWO: Respondent is, and has been, regularly engaged in the practice of procuring and assembling information on consumers for the purpose of furnishing for monetary fees, Consumer reports to subscribers and consumers. Respondent furnishes these consumer reports through the means and facilities of interstate commerce. Hence, respondent is a consumer reporting agency, as defined in Section 603(f) of the Fair Credit Reporting Act.

PARAGRAPH THREE: Respondent regularly provides consumer reports in the form of prescreened lists to credit grantors and fails to require or monitor that credit grantors that receive such lists make a firm offer of credit to each person on the list.

PARAGRAPH FOUR: By and through the acts and practices alleged in Paragraphs Two and Three, and others not specifically set forth herein, Respondent has violated Sections 604 and 607 of the Fair Credit Reporting Act by furnishing consumer reports to persons whom Respondent did not have reason to believe intended to use the information for a Permissible Purpose under Section 604.

PARAGRAPH FIVE: Respondent regularly compiles, for sale to clients, lists of consumers, based in whole or in part on information contained in its consumer reporting database bearing on the characteristics enumerated in Section 603, thereby creating consumer reports, and provides such consumer reports in the form of target marketing lists to persons that do not intend to make a

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firm offer of credit to all those consumers on the list and who intend to use the information for purposes not authorized under Section 604 of the Fair Credit Reporting Act.

PARAGRAPH SIX: By and through the acts and practices alleged in Paragraphs Two and Five, and others not specifically set forth herein, Respondent has violated Sections 604 and 607 of the Fair Credit Reporting Act by furnishing consumer reports to persons whom Respondent did not have reason to believe intended to use the information for a Permissible Purpose under Section 604.

NOTICE

Notice is hereby given to the respondent herein before named that the 16th day of March, 1993, at 10:00 o'clock is hereby fixed as the time and Federal Trade Commission Offices, Rm: 532, 6th and Pennsylvania Avenues, N.W., Washington, D.C. 20580, as the place when and where a hearing will be had before an Administrative Law Judge of the Federal Trade Commission, on the charges set forth in this complaint, at which time and place you will have the right under said Act to appear and show cause why an order should not be entered requiring you to cease and desist from the violations of the law charged in this complaint.

You are notified that the opportunity is afforded you to file with the Commission an answer to this complaint on or before the thirtieth (30) day after service of it upon you. An answer in which the allegations of the complaint are contested shall contain a concise statement of the facts constituting each ground of defense; and specific admission, denial, or, explanation of each fact alleged in the complaint or, if you are without knowledge thereof, a statement to that effect. Allegations of the complaint not thus answered shall be deemed to have been admitted.

If you elect not to contest the allegations of fact set forth in the complaint, the answer shall consist of a statement that you admit all of the material allegations to be true. Such an answer shall

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constitute a waiver of hearings as to the facts alleged in the complaint, and together with the complaint will provide a record basis on which the Administrative Law Judge shall file an initial decision containing appropriate findings and conclusions, and an appropriate order disposing of the proceeding. In such answer you may, however, reserve the right to submit proposed findings and conclusions and the right to appeal the initial decision to the Commission under Section 3.52 of the Commission's Rules of Practice for Adjudicative Proceedings.

Failure to answer within the time above provided shall be deemed to constitute a waiver of your right to appear and contest the allegations of the complaint and shall authorize the Administrative Law Judge, without further notice to you, to find the facts to be as alleged in the complaint and to enter an initial decision containing such findings, appropriate conclusions and order.

NOTICE OF CONTEMPLATED RELIEF

Should the Commission conclude from the record developed in any adjudicative proceeding in this matter that the Respondent, Trans Union Inc., is in violation of Sections 604 and 607 of the Fair Credit Reporting Act, as alleged in the complaint, the Commission may order such relief as is supported by the record and is necessary and appropriate including, but not limited to, ordering that Respondent:

1. Cease and desist from providing consumer reports in the form of prescreened lists to credit grantors and failing to require and monitor to ensure that credit grantors who receive such lists make a firm offer of credit to each person on the list;
2. Cease and desist from compiling and/or selling consumer reports in the form of target marketing lists to any person unless Respondent has reason to believe that such person either intends

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to make a firm offer of credit to all consumers on such lists or to use such lists for purposes authorized under Section 604 of the Fair Credit Reporting Act.

3. Maintain for at least five (5) years from the date of service of this order and upon request, make available to the Federal Trade Commission for inspection and copying, all records and documents necessary to demonstrate fully its compliance with this Order.

4. Deliver a copy of this Order to all present and future management officials having administrative, sales, advertising, or policy responsibilities with respect to the subject matter of this Order.

5. For the five (5) year period following the entry of this Order, notify the Commission at least thirty (30) days prior to any proposed change in Respondent such as dissolution, assignment, or sale resulting in the emergence of a successor corporation, the creation or dissolution of subsidiaries, or any other change in the corporation that might affect compliance obligations arising out of this Order.

6. Within one hundred and eighty (180) days of service of this order, deliver to the Commission a report, in writing, setting forth the manner and form in which it has complied with this Order as of that date.

IN WITNESS WHEREOF, the Federal Trade Commission has caused this complaint to be signed by its Secretary and its official seal to be hereto affixed at Washington, D.C. this fifteenth day of December, A.D. 1992.

By the Commission.

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OPINION OF THE COMMISSION

By Thompson, Commissioner:

I. INTRODUCTION

In this information age, technological advances in information gathering and dissemination have generated substantial benefits for American consumers by providing them with, among other things, the strongest and most efficient credit markets in the world. In 1970, Congress recognized the importance of personal financial data to these markets when it enacted the Fair Credit Reporting Act ("FCRA" or "Act"). Congress expressly noted in the Act's findings and statement of purpose that the "banking system is dependent upon fair and accurate credit reporting" and acknowledged the "vital role" of credit bureaus (called "consumer reporting agencies" under the Act) "in assembling and evaluating consumer credit and other information on consumers." 15 U.S.C. § 1681(a)(1) and (3).

Under the U.S. credit reporting system, consumer reporting agencies (hereinafter "CRAs") collect consumer credit information from credit grantors and other sources, compile the information into credit reports, and then sell the reports to banks and other lenders, as well as to employers and insurance companies. Credit grantors have an incentive to provide data to CRAs because they benefit from the credit reporting system as well. The effectiveness of this system depends upon a constant flow of consumers' credit information into large databases maintained by CRAs. It also depends on accuracy and timeliness. As a result, CRAs, unlike other data providers, have access to a broad range of continually-updated, detailed information about millions of consumers' personal credit histories. This information includes, for example, consumers' delinquencies and defaults, the types of credit accounts they have, when they obtained credit, and

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additional information that banks and other lenders often use in determining whether to extend credit.

Although Congress understood the importance of CRAs' access to such information regarding millions of consumers, it also recognized the importance of protecting consumers' financial privacy. In fact, legislative history reveals that one of the FCRA's principal goals was to protect the privacy of individuals whose sensitive credit and financial data are collected, used, reviewed and transmitted by CRAs¹. Thus, in enacting the FCRA, Congress struck a balance between these competing interests. While Congress did not disturb the ability of CRAs to collect personal credit information, it did provide safeguards designed to protect the confidentiality of these data. Specifically, Section 604 of the FCRA limits the circumstances under which a CRA may disclose a "consumer report"² - - the statutory term for information commonly referred to as a credit report. For instance, Section 604 allows a CRA to furnish consumer reports to, *inter alia*, persons with certain "permissible purposes." These permissible purposes include: (1) the extension of credit; (2) employment purposes; (3) underwriting of insurance; (4) determination of license eligibility; (5) risk assessment for an existing credit obligation; and (6) legitimate business need for the information. 15 U.S.C. § 1681b. Section 607 of the Act also requires CRAs to maintain reasonable procedures to ensure that they only furnish consumer reports for the purposes set forth in Section 604. *See* 15 U.S.C. § 1681e(a).

¹ Report of the Committee on Banking and Currency, S. Rep. No. 91-517 (1969).

² Section 603(d) of the FCRA defines "consumer report" as: "[a]ny written, oral, or other communication of any information by a consumer reporting agency bearing on a consumer's credit worthiness, credit standing, credit capacity, character, general reputation, personal characteristics, or mode of living which is used or expected to be used or collected in whole or in part for the purpose of serving as a factor in establishing a consumer's eligibility for . . . credit or insurance . . . [or] employment . . ." 15 U.S.C. § 1681a(d).

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After careful consideration of the parties' arguments and thorough review of the substantial record in this case, the Commission concludes that Trans Union Corporation ("Trans Union"), a CRA, violates or has violated Sections 604 and 607 of the FCRA through the activities of its target marketing business³. In connection with its consumer reporting business, Trans Union receives various types of personal, credit information about consumers. Much of this information constitutes a "consumer report" as that term is defined by Section 603(d). Trans Union's sale of consumer reports to target marketers without a "permissible purpose" under the FCRA is a violation of the Act.

II. PROCEDURAL HISTORY

On December 15, 1992, the Commission filed an administrative complaint alleging, in pertinent part, that Trans Union violated Sections 604 and 607(a) of the FCRA by

compil[ing], for sale to clients, lists of consumers, based in whole or in part on information contained in its consumer reporting database bearing on the characteristics enumerated in Section 603, thereby creating consumer reports, and provid[ing] such consumer reports in the form of target marketing lists to persons that do not intend to make a firm offer of credit to all those consumers on the list and who intend to use the information for purposes not authorized under [the FCRA].

In re Trans Union Corporation, 116 F.T.C. 1334, 1336 (1993).

³ As described *infra*, Trans Union may have discontinued some of the practices at issue in this matter. To the extent it continues to engage in certain other of the activities at issue, however, Trans Union's FCRA violations are ongoing.

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On September 20, 1993, Administrative Law Judge (“ALJ”) Parker entered a summary decision in favor of Complaint Counsel. The Commission upheld that decision, ruling specifically that Trans Union’s target marketing lists were “consumer reports” because the minimum criteria for a consumer file appearing on any of the target marketing lists - - that the consumer had at least two open credit accounts - - satisfied the definition of “consumer report” under Section 603(d) of the Act. *In re Trans Union Corporation*, 118 F.T.C. 821, 869-70 (1994). A key part of the Commission’s determination was its finding that the mere existence of two credit accounts, or “tradelines,”⁴ constituted information “collected in whole or in part by [Trans Union] with the expectation that it would be used by credit grantors for the purpose of serving as a factor in establishing the consumer’s eligibility [for credit].” *Id.* at 861. The Commission also held that target marketing is not a permissible purpose under the FCRA. Therefore, according to the Commission, Trans Union violated the FCRA by disclosing consumer reports to persons lacking any of the required permissible purposes.

In ruling on Trans Union’s appeal of the Commission’s decision, the United States Court of Appeals for the District of Columbia Circuit agreed that target marketing was not a

⁴ A “tradeline” is a segment of a consumer report that reflects a credit relationship between a consumer and a creditor - - usually a debt or a potential debt owed by the consumer to the credit grantor. An example of such an account relationship is a consumer’s Visa, American Express or other credit card account. A typical consumer report contains multiple tradelines, and each reveals specific information about the account relationship, including: the account holder’s account number, name, address, telephone number, date of birth, social security number, any generational suffix; the name and subscriber code of the credit grantor and its kind of business; the open date of the account; the verified date on the account; the type of loan; the credit limit assigned by the credit grantor; the payment patterns and history; the present status of the account; and the closed date of the account. Public record information such as bankruptcies, tax liens, foreclosures and civil judgments as well as collection accounts are also considered tradelines. *See Stockdale 872, 875/23--876/2, 888/5-24, 893/6-15, 894/4-12, 895/16--896/1, 896/19-23, 897/13--898/2; Botruff 2049/1-6; Weith 1844/18-22; Smith 3372/15--3373/15.*

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permissible purpose under the Act. *Trans Union Corp. v. F.T.C.*, 81 F.3d 228 (D.C. Cir. 1996). The Court also held, however, that it was inappropriate for the Commission to use summary procedures to decide whether Trans Union's target marketing lists were consumer reports because the question presented a genuine issue of material fact. Consequently, the Court remanded the case to the Commission to resolve two primary questions. The first is factual - - whether there is sufficient evidence to support the finding that Trans Union's target marketing lists are consumer reports. The second question is a legal one - - if we find that Trans Union's target marketing lists *are* consumer reports, does the FCRA pass constitutional muster?

On July 31, 1998, Administrative Law Judge James Timony issued an Initial Decision and Order on remand holding that Complaint Counsel provided sufficient evidence to show that Trans Union's lists are "consumer reports" under the Act and that Trans Union disclosed them to entities who lacked a permissible purpose. This disclosure violated Sections 604 and 607(a) of the FCRA. Judge Timony also held that the FCRA, as applied to Trans Union's practices, is constitutional. Trans Union appealed both rulings⁵.

⁵ References to the record are abbreviated as follows, using the following hypothetical examples:

Initial Decision	ID at 200.
Initial Decision Finding	IDF-500.
Complaint Counsel Exhibit	CX-500.
Trans Union Exhibit	TU-500.
Trial Transcript testimony	Jones 1234/56-78.
Deposition Transcript testimony	Jones CX-100 at 123/45-46.
Trans Union's Appellant Brief	TUAB at 200.
Complaint Counsel's Answering Brief	CCAB at 200.
Trans Union's Reply Brief	TURB at 200.
Complaint Counsel's Proposed Findings	CCPF at 200.
Trans Union's Proposed Findings	TUPF at 200.

After reviewing the full record in this case, including the extensive arguments of the parties, we adopt the ALJ's July 1998 findings and conclusions to the extent that they are consistent with those set forth in this opinion.

III. STANDARD OF REVIEW

The Commission reviews the decision of the ALJ under a *de novo* standard. FTC Rules of Practice, Rule 3.54(a). The Commission can, however, give some deference to the ALJ's credibility determinations because, as the trier of fact, the ALJ had the opportunity to "closely scrutinize witnesses' overall demeanor and to judge their credibility." *In the Matter of Horizon Corp.*, 97 F.T.C. 464, 857 n.77 (1981).

IV. FACTUAL BACKGROUND

A. Trans Union's Business

Trans Union is a Delaware corporation whose principal place of business is located at 555 West Adams Street, Chicago, IL 60661. Trans Union's primary business is credit reporting and it is a CRA under Section 603(f) of the Act. (**Rodgers CX-191 at 27/3-7**). As a CRA, Trans Union collects credit information about millions of American consumers from numerous credit grantors and others, compiles this information into credit reports and sells the reports to credit grantors nationwide. (**Connelly 2588/19-2590/18; Pendleton 404/12-405/9; Johnson 1206/16-1209/7**). Trans Union's main competitors in the credit reporting business are Experian (formerly TRW) and Equifax. (**Rodgers CX-191 at 47/10-12**). These companies are also CRAs.

The millions of pieces of consumer information Trans Union receives every month are maintained in an extensive database called CRONUS. (**Weith 1867/19-1870/9; Botruff CX 181 at**

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19/14-22)⁶. The information in CRONUS comes from credit grantors - - including banks, mortgage companies, credit unions and auto dealers - - collection agencies, public records and others. **(Stockdale 873/22-25)**. The information is very current as Trans Union receives new data every day and updates CRONUS weekly. **(Botruff CX 181 at 30/18--31/8)**. Information compiled on a specific consumer within CRONUS is called a consumer file.

In addition to its credit reporting business, Trans Union also sells a variety of target marketing products through its subsidiary, Performance Data (formerly Trans Mark and Trans Union Lists). Performance Data creates lists of the names and addresses of specific classes of consumers and sells them to target marketers who in turn solicit the consumers to purchase goods and services. Performance Data employs 46 people, including 10 salespersons. **(Davis 37/25--38/4)**. At the beginning of 1998, Performance Data had 440 customers; during 1997, it generated over \$34 million in sales. **(Davis 48/8-10, 141/13-14)**. Performance Data's sales comprise 2% of the target marketing industry. **(Davis 3322/15-18)**. Hereinafter, unless otherwise noted, our references to Trans Union's target marketing business include Performance Data's activities.

As a CRA, Trans Union is in a special position. Trans Union has access to a vast array of very current and detailed consumer information from its credit reporting business which affords it a distinct advantage as a target marketer. Trans Union takes consumer information from CRONUS to create two primary databases called the Master File and the Standard Characteristics database. **(Cabigon 1365/13-18; Kinsinger 2017/19-23; Weith CX-196 at 179/11-13)**. Trans Union offers different target marketing products based upon the information gathered in these two databases as well as data taken directly from CRONUS. *See*

⁶ Each month CRONUS takes in 85,000 updates from credit grantors and data providers and 1.8 billion tradelines. **(Stockdale 874/4-10, 908/1-19)**.

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chart detailing Trans Union's various target marketing products, appended hereto as Figure 1. For the reasons explained in detail *infra* p. 13, the fact that Trans Union uses CRONUS information in its target marketing business is significant because CRONUS information is far richer and more detailed than the data collected and used by non-CRA competitors who sell target marketing lists. Trans Union is also the only CRA that sells to target marketers an array of personal credit information obtained from its credit reporting database.

1. The Master File

The CRONUS-derived Master File is one of the databases Trans Union uses for target marketing. **(CX-72-C)**. It contains information on 160 million people and 105-110 million households. **(Weith 1859/8-18; CX-333)**. Trans Union updates the Master File three times per year. **(Cabigon 1366/10-12; Davis 62/16--63/7)**.

In order for Trans Union to include a CRONUS consumer file in the Master File, thereby making the consumer's name and address available for target marketing purposes, the consumer file must satisfy several minimum criteria. These criteria have changed over time. Prior to January 1998, each CRONUS consumer file had to show at least two open tradelines with one of the tradelines verified - - *i.e.*, that some reported activity took place - - during the preceding 12 months. **(Cabigon 1372/18--1373/7; CX-329-A; Weith CX-196 at 197/24--198/14)**. In addition, a qualifying tradeline could not be closed or an account about which there was a consumer dispute, and could not be a collection record or public record. These criteria are hereinafter referred to as the "pre-1998 Minimum Criteria." **(Weith CX-196 at 191/7-15, 227/1-5; Cabigon 1374/5-22)**.

In January 1998, in order to be included in the Master File, Trans Union began to require CRONUS consumer files to contain two tradelines active within the last six months *or* one tradeline active in the last six months with an address confirmed by an outside source. We refer to these later criteria as the "post-1997

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Minimum Criteria” and both sets jointly as the “Minimum Criteria”. (**Weith 1830/23--1831/4; Cabigon 1386/14--1388/7; CX-332-A; CX-339-A**). As with the pre-1998 Minimum Criteria, the qualifying tradeline could not be a collection record or a public record. (**Cabigon 1374/12-21; CX-332-A; CX-340-A**).

Trans Union claims that the two tradeline, pre-1998 Minimum Criteria did not reveal consumer credit information and that the two tradeline minimum was only important because it confirmed, by two sources, the subject’s current name and address. **TUAB at 11**. Statements made by Trans Union during the relevant time and in its regular course of business, however, belie this simple characterization. For instance, Trans Union’s promotions boasted that the Master File is a list of “135 million *financially active individuals*” (emphasis added), that “[a]ny adult with at least two active tradelines is represented,” and that a person with no activity in a 12 month period - - *i.e.*, making payments or establishing credit - - is dropped from the Master File. (**CX-70-A; CX-69-A; CX-58-C**). We agree with Trans Union’s written characterizations and find that the “two-tradeline minimum” criterion indicates more than just a confirmed address. It instead reveals a significant fact about consumers in the Master File, *i.e.*, that they are current, at least somewhat active users of credit.

2. Trans Union’s “Master File / Selects” Product

While the Master File contains names, addresses and other demographic information on people who meet the Minimum Criteria discussed above, it also is frequently enhanced with the addition of other personal, often credit-related, information on each individual. This enhancement enables Trans Union to offer its target marketing customers the opportunity to select, from the 160 million consumer files in the Master File, names and addresses of a smaller set of consumers who meet certain criteria specified by the target marketing customer. The criteria Trans Union uses to create these subsets are called “indicators” or

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“selects,” and Trans Union generates half of them from its consumer reporting database CRONUS. **(Cabigon 1438/12-25).**

Trans Union’s target marketing customers use the Master File / Selects product in two ways. Some customers provide a list of consumers to Trans Union and purchase Master File select information regarding those consumers. **(Davis 33/22-25).** Other customers request that Trans Union *extract* from the Master File names and addresses of those consumers who satisfy criteria selected by the customer. **(Davis 34/1-5).** In other words, Trans Union’s target marketing customers can choose from a menu of selects and ask for a tailored list of consumers’ names and addresses who, for example, have a bank card, an open mortgage, but never have obtained short term (30/60/90 day) financing. Trans Union sells these lists for one-time use by its customers either by rental or by license and charges a “base price” per thousand names, with additional charges per thousand based on the selects that the customer has chosen. **(Davis 44/6-24, 64/6-22, 65/3-14).**

Prior to October 1997, when it made certain changes in its business practices (*see infra* pp. 10-11), Trans Union permitted its target marketing customers to order from the Master File lists of the names and addresses of consumers who had the following types of credit accounts:

- *Automobile* - - indicating whether the consumer has an auto loan or lease not more than five years old; a second auto loan or lease not more than five years old; and for the most recent first and second loan or lease, the open date, expiration, and loan type, and range indicating high credit value (*i.e.*, highest amount ever owed);
- *Bank Card* - - indicating whether the consumer has an open bank card, including the open date of the most recent bank card account;
- *Premium Bank Card* - - indicating whether the consumer has an open premium bank card, defined as a bank card with a credit limit that exceeds \$9,999, and the open date of the most recent premium bank card account;

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- *Department Store Card* - - indicating whether the consumer has an open department store card account, including the open date of the most recent department store card account;
- *Finance Tradeline* - - indicating whether the consumer has an open account with a finance company, the open date of the most recent account with a finance company, and whether the account type is a mortgage or auto finance loan;⁷
- *"30/60/90 day" Finance Tradeline* - - indicating whether the consumer has a open account with a finance company with a 30, 60, or 90 day loan term;
- *Mail Order* - - indicating whether the consumer has an open account with any of a number of mail order companies;
- *Mortgage* - - indicating whether the consumer has a first mortgage and/or second mortgage; for the most recent first and second mortgage, the open date, closed date, loan type (refinance, secured mortgage, secured home improvement loan); and range indicating high credit value;
- *Student Loan* - - indicating whether the consumer has a student loan, the type of loan, the open date of the most recent student loan, whether it is closed, and the high credit amount (range); and
- *Upscale Retail Card* - - indicating whether the consumer has an upscale retail card, based upon the National Retail Federation's listing of "prestigious" stores, and the open date of the most recent upscale retail card.

⁷ In the lending industry, having a finance loan indicates that the consumer has approached a lender of "last resort" and is more likely to need credit. (**Rapaport 792/17--793/21**). Trans Union expressly advised its mortgage lender / customers to use the homeowner and finance tradeline selects because the finance tradeline select provides names of consumers who have "generally had trouble with their credit in the past and are highly responsive to credit offers." (**CX-33; CX-68-A**).

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Trans Union also offered its target marketing customers the option to purchase other types of “inferential” selects, including:

- *Head of Household* - - identifying the person in the household with greatest number of tradelines;
- *Length of Residence* - - identifying people who have maintained their residence for more than a certain period of time based on duration that credit grantors report on person at that residence or based on mortgage open dates;
- *Singles* - - identifying people without joint credit accounts; and
- *Drivers* - - identifying individuals with either an auto loan or a tradeline with a business that issues gas cards and thus presumably own or lease a car.⁸

The record contains ample evidence of how Trans Union’s customers used the Master File / Selects product. For example, Mercantile Mortgage Co. obtained information from Trans Union to advance its telemarketing promotion which offered homeowners who had been denied credit elsewhere the opportunity to reduce their monthly mortgage rates by refinancing their mortgage, thereby freeing up funds for “home improvements,” a “new car,” or a “dream vacation.” **(CX-18)**. Mercantile purchased from Trans Union a list of consumers in Mercantile’s area of business (Ohio), with telephone numbers (necessary for telemarketing promotion), who also had single or multiple mortgages (an important minimum eligibility factor) and credit with a finance company. *Id.*

Ramsay Mortgage purchased a target marketing list from Trans Union for its mail offer to lower consumer debt payments, clean up credit, consolidate debt, and/or refinance a mortgage. Ramsay obtained for the Spotsylvania, Virginia area a list of consumers with a mortgage, a bank card, and a retail card. **(CX-25)**. Another lender, the Mortgage Banc, purchased from Trans Union, for certain counties, lists of homeowners, with phone

⁸ **IDF-37; TUPF at 186; CX-1; Cabigon 1378/12-19.**

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numbers, who used finance companies, who had been at their residence for 6-15 years, and who also had a bank card. **(CX-23-C)**. In another example, Trans Union sold a target marketing list to Rubinstein Bros., a retail clothing store offering a no-fee charge account to promote its new “Ladies Department.” Rubinstein Bros. purchased a list of females from certain geographical areas, who were between age 25 and 75 and had upscale retail cards and phone numbers. **(CX-35)**.⁹

3. Trans Union’s Standard Characteristics / Model Products

As previously described, Trans Union also maintains a second database, called the “Standard Characteristics” or “Attribute” file. This file contains 313 attributes on each CRONUS consumer who meets the Master File Minimum Criteria. **(Cabigon 1373/23--1374/4; CX-329-A)**. Trans Union used this personal credit information to create certain proprietary models that it offered to target marketers until October 1997. These proprietary models assign a value, or “score,” to each consumer file in the following ways through the following products:

- E-Val. A scoring system that, using information in the Standard Characteristics file, estimates the amount of equity available in a consumer’s home. A Trans Union customer can purchase a consumer’s E-Val “score” showing: (1) the estimated actual amount of equity in the consumer’s home; (2) the percentage of equity over home value; and (3) the home value range. **(CX-1-I-J; CX-118-B; Davis 134/12--135/11)**.
- TIE. The TIE scoring system provides a consumer’s estimated income within a \$5,000 range (culminating in an over \$100,000 category). **(CX-1-X)**. TIE estimates income by

⁹ Most of these lenders sought lists of consumers with some type of finance tradeline. *See supra* n.7.

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modeling 23 attributes in the Standard Characteristics file. **(CX-120; CX-119-I; Wiermanski 1803/17-24).**

- **SOLO.** The Solo model places consumers into one of 40 “clusters,” based on a modeling of 35 attributes in the Standard Characteristics file. **(Wiermanski 1736/23-25; CX-114; Davis 67/2-13).** SOLO evaluates individual behavior and describes tendencies based on how individuals are using credit. **(IDF-85).** Examples of SOLO cluster categories are: “Urban Ethnics,” “Urban Upscale,” “Empty Nesters,” “Single Strugglers,” “Kids and Cars.” **(CX-114-F).**
- **P\$YCLE.** This model also assigns people to one of 60 “buckets” that are intended to estimate a consumer’s income producing assets. **(Pellizzon 3446/16--3447/3, 3461/12-15; Davis 109/16--110/24, 214/1-9).** Categories of buckets include, “The Wealth Market,” “Upscale Retired,” “Downscale Retired.” **(TU-22-B).**
- **PIC.** The PIC product uses the Standard Characteristics file to model the likelihood that a person owns financial service products. **(TU-20; Weith 1864/6-10).** On the Master File, the PIC option will indicate whether there is a negative or positive propensity to purchase, among other things, a home equity loan, a mutual fund, an installment loan or term life insurance. **(CX-1-S).**

4. Trans Union's Other Target Marketing Products

In addition to its Master File / Selects product and the Standard Characteristics models, Trans Union offers several other products derived from CRONUS, including:

- TransLink / Reverse Append. This product provides merchants with names and addresses of bank card holders. The merchant submits to Trans Union a list of bank card numbers that were used to make purchases from the merchant. Trans Union then retrieves from CRONUS the name and

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address of the primary cardholder¹⁰. (**Weith 1823/22--1824/14; Dexter 1305/24--1307/6; Davis 89/25--90/10; CX-126; CX-132-D; CX-133-B; CX-266**). While a customer name is presumably already available to the merchant,¹¹ the address is not. **TUAB at 4**. By purchasing TransLink, merchants can obtain a useful list of names and addresses without asking their customers for this information. TransLink is among Trans Union's largest selling target marketing services and Trans Union is the only CRA that provides this type of "reverse append" service. Until September 30, 1997, Trans Union appended SOLO, TIE and age data to TransLink lists; it currently only appends age data. (**Dexter 1236/22--1237/25; Smith 1488/23--1489/5; CX-125-E; CX-129**).

- New Issues File. This file contains names and addresses of individuals who received credit within the last 90 days. It also discloses when an individual obtained the credit and the type of credit issued. (**CX-4; IDF-106; Davis 42/16--43/1**).
- Emerging Consumers File. This file included individuals with only one tradeline from the prior twelve months. (**Cabigon 1373/12-22; CX 329-F**). To qualify, the tradeline must be open. (**IDF-107**). Trans Union discontinued the Emerging Consumers File in part because it feared that it might be "communicating information that we shouldn't be communicating." (**Davis 89/18-20**).

¹⁰ Citibank does not permit Trans Union to use its credit card account numbers for reverse-append disclosure of names and addresses through Trans Link. (**Marquis CX-188 at 147/20--148/1**).

¹¹ This information may not reflect the person who actually used the card with the merchant if the account is a joint account. (**Weith 1824/16--1825/17, 1827/4-15**).

5. Changes in Trans Union's Practices

The target marketing practices described above led the Commission to issue its complaint in 1992. In October 1997, contemporaneous with the effective date of the 1996 FCRA amendments, Trans Union discontinued some of the practices that were the most problematic under the FCRA. Specifically, the company stopped providing certain information about open dates of loans, high credit amounts, most loan types, and whether a student loan was closed. Trans Union also ceased providing to target marketing customers its modeled products (*e.g.*, E-Val, PIC), its New Issues File, and its Emerging Consumers File.¹²

Trans Union changed its practices shortly after the 1996 FCRA amendments authorized for the first time civil penalties of \$2,500 per FCRA violation (*i.e.*, \$2,500 per prohibited disclosure of consumer financial information). 15 U.S.C. § 1681s(2)(A). Trans Union's General Counsel Oscar Marquis stated that the company stopped providing certain lists in light of the new statute's provision for civil penalties. (**Marquis CX-188 at 174/23--175/6, 22-25**). In the words of Stephen Dexter, a senior account manager with Performance Data, "[a]s of 10/1/97, the risk outweighed the reward for violating the FCRA." (**Dexter 1280/19--1281/10**). Jan Davis, Vice President and General Manager at Performance Data, also testified that Trans Union "had gone from an environment where the worst thing that could happen is that we would have to stop selling certain lists to a world where there were significant financial penalties." (**Davis 142/21-25**). "[B]efore it was a cease and desist penalty, it now became a \$2,500 per occurrence penalty." (**Dexter 1280/19--1281/10**).

¹² Trans Union continues to offer these products to entities extending so called "firm offers" of credit, a practice allowed under the prescreening provisions of the FCRA, described *infra* p. 18.

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In December 1997, however, Trans Union reintroduced the practice of selling “type of tradeline” information - - *e.g.*, information reflecting a specific type of account relationship between a credit grantor and a customer. Thus, Trans Union currently offers its customers access to the following information about consumers in its Master File: whether the consumer has an auto loan; a second auto loan; a bank card; a department store card; a finance loan; a 30/60/90 day finance loan; a mortgage; two or more mortgages; a gold, platinum or optima card; a student loan; an upscale retail card; seven kinds of business tradelines; a mail order trade; and auto loans. **(CX-342; CX-315-D, E, G-M, Q-W; CX-332-B; Cabigon 1426/9-23, 1427/18--1428/3, 1429/9-1430/2; Weith 1832/2--1833/6).**

B. Trans Union and Its Competitors

Trans Union has both CRA and non-CRA competitors in the target marketing industry. But Trans Union differs from its CRA rivals - - Experian and Equifax - - in at least two significant respects. First, Trans Union bases its target marketing lists on a minimum requirement of some tradeline activity. Although Experian, like Trans Union, also derives its target marketing database from its consumer reporting database, it does not require that a tradeline exist. **(Smith 3428/18--3429/18)**. Similarly, Equifax also does not apply a minimum tradeline criterion. Its target marketing activities are limited to providing certain data to Claritas, Inc., which then offers target marketing products to customers. **(IDF-40, 162-163).**

Second, Trans Union is unique among CRAs because it provides credit data on individuals. By contrast, the other CRAs provide consumer credit information on an “aggregated” basis, *i.e.*, information about a group of people. Both Experian and Equifax aggregate information about individuals’ credit characteristics on a zip code or “zip-plus-four” geographic

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basis¹³. With zip-plus-four aggregation, a company essentially pulls all the credit reports of individuals within a geographical area covering 5-15 households (the zip-plus-four geographical area), adds all the credit data together, and then divides by the number of people in the area who have credit reports. (**Smith 3290/11-24**). This aggregation “shows what a typical consumer looks like in that area as opposed to the specific consumer in the area.” (**Smith 3290/14-18; TU-112; TU-113**).

Experian does provide some “individual-level data,” but it is limited by a consent agreement that the company entered into with the Commission in 1993 (hereinafter “TRW Consent”). Pursuant to the TRW Consent, Experian can disclose from its consumer reporting database only the following information about individuals: name, address, telephone number, mother’s maiden name, zip code, year of birth, age, any generational designation, social security number, or substantially similar identifier. (**TU-109; Smith 3287/11--3294/11**). This information is commonly referred to as “above the line” information because of its physical location on most consumer reports. *See, e.g., TU-61(a)*. The TRW Consent prohibits the disclosure of “below-the-line” information, *i.e.*, most tradeline data including credit performance information¹⁴. TRW / Experian previously offered a reverse append product, but apparently discontinued the practice based on the TRW Consent’s provisions. (**Smith 3295/9-17**). The TRW Consent agreement does not address the legality of Experian’s current practice of disclosing credit information on an *aggregated* basis.

¹³ “Zip-plus-four” is the Postal Service’s more refined zip code system which adds four additional digits to identify a specific area within a zip code location.

¹⁴ One of Trans Union’s promotional letters states that “Experian comes closest as a competitor, but since they cannot provide to you any credit based data only the demographic data obtained from the credit reports (abiding by the Consent Decree with the FTC) . . . our data far outweighs their strength.” (**CX-70-B**).

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Equifax, Trans Union's other CRA competitor, does not offer any individual credit data in its target marketing business. Prior to 1997, Equifax's subsidiary, National Decision Systems ("NDS"), offered "Ace Indicators," a product which disclosed information based on 39 credit performance characteristics aggregated at the zip-plus-four level. In 1997, however, Equifax sold NDS to Claritas, Inc., which now continues to use Equifax data at zip-plus-four-level to offer the Ace Indicators product. **(TU-103; TU-114; TU-177(c); Pellizzon 3440--3446)**. Claritas edits its ACE Indicators data to ensure that data are not released that describe one household, one record, or one individual. This "confidentiality edit" is applied where there are too few records in a zip-plus-four area. **(Pellizzon 3471/12--3472/4)**.

Trans Union also faces competition from various non-CRAs. The industry leaders in this category are R.L. Polk & Company ("Polk"), ACXION Corporation ("ACXION"), Metromail Corporation ("Metromail"), and First Data Solutions (formerly Donnelly Marketing)("First Data"). **(Davis 161/5-16; Cleary 2942/4-18; Hinman 2199/19--2200/17; M. Smith 3299/22--3300/8)**. These competitors also furnish consumer information on an aggregated basis, *e.g.*, at the household level or broader. **(IDF-157)**. While these companies obtain data from a host of sources, including state motor vehicle departments, county records, telephone directory white pages, census data, and self-reported data from surveys or product registration cards, such sources do not compare with the vast scope of information in Trans Union's credit reporting database. CRONUS information covers a wider population and includes a more comprehensive range of instantly available information on individuals. CRONUS data are also significantly more accurate and timely.

The difference between Trans Union's target marketing products and those its competitors sell is perhaps best described in Trans Union's own words: Trans Union states that its Master File contains "the freshest" and "most comprehensive" data due to its

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“robust and extensive source of the original credit based information” and that Trans Union has the largest data file of consumer credit information in the United States. **(CX-268-A; CX-264-A; CX-75-B)**. Trans Union further describes the Master File as the “richest source of individual-level data available” **(CX-321-J)**, and asserts that its database is “kept fresh and current by nearly two billion updates supplied by credit grantors every month.” **(CX-72-B)**. Finally, Trans Union touts its advantage over other target marketing list providers, due to its ability to capitalize on the information in its credit reporting database. Trans Union boasts that it is:

“a unique provider of credit-based marketing information. Our database is unmatched when compared to traditional direct marketing vehicles on the market today.” **(CX-260-B)**.

“[N]o one offers you a greater source of true individual-level data than we do This unique resource includes financial and behavioral data on over 140 million consumers This information is not only current, it is also highly accurate All information is based on actual behavior - - not self-reported or neighborhood values. Even our estimates - - of income, net worth, income producing assets, and home market value - - are modeled from actual observations for each individual in our file.

(CX-83-C). Such statements by Trans Union provide insight into the nature of the data it collects as a CRA and sells to target marketers.

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**V. FCRA ANALYSIS:
ARE TRANS UNION'S TARGET MARKETING LISTS
"CONSUMER REPORTS" UNDER THE FCRA?**

A. Introduction

As discussed above, Trans Union sells lists of consumer names and addresses to its target marketing customers. In creating these target marketing products, Trans Union applies various criteria to identify those consumers in its large database, CRONUS, who possess specific credit-related characteristics. The resulting lists thus communicate far more information to target marketers than simply names and addresses. A purchaser of a Trans Union target marketing list knows that every consumer included has at least one tradeline and possesses whatever additional characteristics the purchaser has specified.

A key question in this case is whether Trans Union's target marketing lists fall within the Act's definition of "consumer report." If they do, then Section 604 requires that Trans Union sell them only to entities who have a "permissible purpose" as defined by the Act. According to the court of appeals, target marketing is not a permissible purpose. *Trans Union*, 81 F.3d at 230. Thus, if Trans Union's lists are consumer reports then Trans Union has violated the FCRA by disseminating those lists for target marketing purposes.

Trans Union's target marketing lists qualify as consumer reports if they communicate information that: (1) bears on a consumer's "credit worthiness, credit standing, credit capacity, character, general reputation, personal characteristics, or mode of living" and (2) is "used or expected to be used or collected in whole or in part" to serve as a factor in determining credit eligibility. 15 U.S.C. § 1681a(d)(1) ("Section 603(d)"). Our determination of whether Trans Union's lists are consumer reports

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does not require a mere application of fact, but instead requires a close examination and interpretation of Section 603(d).¹⁵

The court of appeals determined that the tradeline information in Trans Union's lists meets the first prong of the consumer report definition - - *i.e.*, it bears on one or more of the seven enumerated factors¹⁶. With respect to the second prong, however, the Court held there was insufficient evidence to support the Commission's 1994 finding and remanded the case back to the Commission, stating:

On remand, if the FTC wishes to classify existence-of-tradeline¹⁷ information as a consumer report, it must gather evidence that indicates that Trans Union intended the mere existence of a tradeline, as distinguished from payment history . . . to serve as a factor in credit-granting decisions, or, of course, that someone used or expected it to be used for that purpose. *Evidence - - lacking here - - that credit decisions could be made, even in part, on such "existence" information might be probative of Trans Union's intent.* If under this standard, tradeline-existence information is found not to [be covered by the definition of consumer report], the FTC may of course embark on a similar inquiry about any individual list criterion to which it objects.

¹⁵ We are mindful that, to the extent that Section 603(d) raises constitutional questions, we must construe the statute where fairly possible to eliminate such questions as long as such construction is not plainly contrary to Congress' intent. *United States v. X-Citement Video, Inc.*, 513 U.S. 64, 78 (1994).

¹⁶ "The first element does not seem very demanding, and we do not understand Trans Union to even contest the proposition that a person's having two tradelines 'bear[s]' on one or more of the seven enumerated factors." *Trans Union*, 81 F.3d at 231.

¹⁷ "Existence of a tradeline" refers to the *mere* existence of tradeline information as determinative of whether the information disclosed is a consumer report under the FCRA. This term is distinct from the term "type of tradeline" which refers to the character or type of information that is disclosed. *See* discussion *infra* pp. 20-26.

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Trans Union, 81 F.3d at 233 (footnotes omitted)(emphasis added).

With this direction in mind, we have reviewed what is now a full record in this case and find that the existence-of-tradeline information, as well as other information Trans Union disclosed in its target marketing lists, meets the Section 603(d) definition of a consumer report. We therefore conclude that Trans Union violated the FCRA by selling consumer reports to target marketers who lacked a statutorily permissible purpose.

In reaching this conclusion, we examined Trans Union's various target marketing lists - - the Master File / Selects, proprietary models, and reverse append products - - and find that information disclosed through these products is the type of information that is "used" and/or "expected to be used" in whole or in part¹⁸ for the purpose of serving as a factor in establishing a consumer's eligibility for credit¹⁹. Accordingly, these products are consumer reports and Trans Union cannot lawfully sell them for target marketing purposes.

¹⁸ Under Section 603(d), it is not necessary to show that the information communicated by the target marketing lists, standing alone, could be used to make a credit-related decision. We need merely determine that the information is used or expected to be used as "a factor" in such a decision. *Trans Union*, 81 F.3d at 233. Something serves "as a factor" if it "contributes to the production of a result." *United States v. Wilson*, 896 F.2d 856, 858 n.3 (4th Cir. 1990), citing *Webster's 3rd International Dictionary*, 1971.

¹⁹ In 1995, the Commission took the position before the court of appeals that Trans Union's lists, based on the "existence of two tradelines" feature, were "collected for the purpose of" serving as a factor in credit eligibility decisions. The court of appeals rejected this argument on the grounds that the "existence of a tradeline" seems not so much 'collected' by Trans Union as created by it for organizing the nuts-and-bolts payment data upon which credit decisions are made." *Trans Union*, 81 F.3d at 232. On remand, Complaint Counsel and Trans Union have focused their argument on the *used* and *expected to be used* elements of the definition.

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We also analyzed the demographic information that Trans Union maintains in CRONUS and find that, based on the record before us, most of that information - - including name, mother's maiden name, generational designator, address, zip code, telephone number, and social security number - - does not constitute a consumer report because there is no showing that it is used or expected to be used as a factor in determining credit eligibility.²⁰ We conclude, however, that Trans Union, as a CRA, cannot lawfully disclose age information to target marketers because the record in this case shows that lenders use age as a credit factor and age bears on credit capacity²¹. Accordingly, products that Trans Union creates by way of its consumer reporting business that are based upon, or contain, references to age are consumer reports under Section 603(d) and their disclosure for target marketing purposes violates Section 604 of the Act.²²

B. Analysis of Target Marketing Products

1. Background

To determine whether the information communicated through Trans Union's target marketing lists is "used or expected to be

²⁰ The Commission's argument before the court of appeals focused on the relevance of Trans Union's data to consumer's *eligibility for credit*, and not to insurance, employment, or other items set forth in Section 603(d). The court of appeals followed suit as did the parties following remand. Accordingly, we limit our analysis to credit eligibility.

²¹ We also stress that, although the FCRA does not prohibit Trans Union from disclosing most demographic information, disclosure of such information may raise significant privacy concerns and may facilitate misuses including identity theft.

²² As noted, the TRW Consent permits Experian to use age information from its consumer reporting business for target marketing purposes. The TRW Consent is not before us in this matter and it is without precedential effect to this opinion.

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used” in credit eligibility decisions, we reviewed record evidence detailing the various factors lenders use in evaluating credit eligibility. We focused in particular on the factors that are important in calculating credit scores - - a tool that many lenders use in evaluating credit eligibility. We also examined the factors that are important to lenders offering credit in prescreening promotions.²³

Credit scoring systems use past credit information and other data to build models that predict a consumer’s likely future credit performance. **(Rapaport 673/15-23)**. Credit grantors - - such as credit card issuers, retailers and finance companies - - use credit scores in deciding whether to grant an applicant credit, to make a preapproved credit offer, to reissue, increase or decrease a credit line, or for over-limit authorizations. **(Rapaport 675/1-8, 680/23-682/16)**. Most of the data used for credit scoring comes from CRAs. **(Coffman 3825/18--3826/2)**.

Mr. Michael Rapaport of the Fair Isaac Company (“FICO”), the leading developer of credit scoring models, testified that credit scoring combines similar consumer credit files and then isolates the key 10 or 15 factors that are predictive of future credit performance for that group. **(Rapaport 686/25--687/9, 779/20-25)**²⁴. The record demonstrates that Trans Union was aware of the

²³ Through the 1996 amendments to the FCRA (effective September 30, 1997), Congress included an additional statutory permissible purpose - - “prescreening.” The FCRA amendments allow consumer reporting agencies to provide to a credit grantor names and addresses of consumers meeting certain credit-related criteria so long as the credit grantor makes a *firm offer* of credit or insurance to the recipient. Furthermore, to afford consumers privacy protection, individuals receiving a prescreened offer must be told that they were chosen because they met certain criteria, that they have the right to opt out of appearing on future prescreened offer lists, and the procedures for opting out. 15 U.S.C. § 1681m(d)(1).

²⁴ The first step is called “scorecard segmentation” and is useful because isolating a group with similar traits within a population can improve the

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factors that credit grantors use to predict future credit performance because Trans Union partnered with FICO to create its own models²⁵. **(Rapaport 672/25--673/6, 680/8-21)**. In fact, Trans Union and FICO *together* created scoring models to predict future credit risk generally (EMPIRICA), the likelihood a consumer will go bankrupt (Horizon), and the likelihood a mortgage account will become delinquent (Uniquote)²⁶. **(Rapaport 690/15--691/7, 692/21--693/7, 799/11--803/15)**. By working with FICO, Trans Union knew the categories of information in a consumer's credit file that lenders used as predictive characteristics in credit scoring, and hence in credit eligibility decisions.

Prescreening provides another way to determine the factors that bear on credit granting decisions. Trans Union was similarly aware of the prescreen criteria credit grantors use to make firm offers of credit.²⁷ In prescreening, the credit grantor mails a firm

predictive quality of the scoring model. **(Rapaport 685/1--686/11, 767/13 -- 768/24; CX-88-E)**. After determining the predictive characteristics, FICO assigns values to "attributes" within each predictive characteristic - - *e.g.*, four bank cards within "number of bankcards" characteristic. The sum of the values of the attributes is the credit score. **(Rapaport 687/16--688/6, 769/4-23, 851/2-17)**. Trans Union's credit scoring witness, Dr. John Coffman, flatly contradicted Mr. Rapaport by testifying that individual attributes have no meaning in credit scoring and that it is the combination taken as a whole that has value. **(TUPF at 92)**. Having seen both witnesses testify, the ALJ found Mr. Rapaport more credible and we give deference to this determination. *See In the Matter of Horizon Corp.*, 97 F.T.C. at 857 n.77. Moreover, based upon our review of the record, we find Mr. Rapaport's testimony to be more persuasive because it was based on Trans Union's own credit scoring models.

²⁵ FICO has partnered with each of the three major credit bureaus to develop credit risk scoring products. **(Rapaport 680/8-21)**.

²⁶ Industry Options, refinements of the EMPIRICA model, offer scores for the bank card, personal finance, installment and auto loan industries. **(Rapaport 692/1-18)**.

²⁷ Trans Union's subsidiary, Marketing Services, Inc., is engaged in the business of prescreening and reviews approximately four to five billion consumer files per month against criteria provided by approximately 100 to 150 prescreening clients per month. **(Rock 2115/24--2116/13)**.

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offer of credit to consumers who meet certain specifications or criteria. **(Koppin 482/21-23, 488/20-23; Pendleton 357/22--359/5)**. CRAs like Trans Union generate and sell lists of consumers meeting the specified criteria. **(Koppin 583/2-9; Zancola 668/22--669/1)**. For example, Chase Manhattan Bank sends firm offers of credit to consumers who meet its prescreen criteria, *e.g.*, three open tradelines, no charge-offs, no payments 60 days past due. **(CX-280-L)**. The specifications or criteria that credit grantors use in prescreen offers are based on statistical analyses of elements to predict credit behavior. **(Koppin 489/19--490/11, 511/3-14; Pendleton 360/5-8; Zancola 669/21--670/10; McCoy 599/7-18, 606/21--607/7)**.

The record in this case includes substantial evidence of factors important to credit scoring and prescreening criteria. The record demonstrates that much of the information Trans Union discloses in its target marketing lists - - including the Master File / Selects, proprietary models, and TransLink / reverse append products - - is the same information that credit grantors, such as Wachovia Bank Card Services, Inc. ("Wachovia"), First Card First Chicago NBD ("First Card"), the Northern Trust Company ("Northern Trust"), Discover Card Brand, Novus Services, Inc. ("Discover"), and Chase Manhattan Bank ("Chase Manhattan"), *use* in credit eligibility determinations. Moreover, the record shows that Trans Union *expected* its credit grantor customers to *use* the information as factors in such determinations.

2. Master File / Selects

Target marketers use Trans Union's Master File / Selects to obtain a variety of information about consumers. *See* discussion *supra* pp. 6-8. As detailed below, the record shows that credit grantors use the same types of information as factors in credit granting decisions. The record also demonstrates that, in many instances, Trans Union expected credit grantors to use such information for credit granting decisions. Accordingly, the Master

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File / Selects product falls under the FCRA's definition of consumer report and Trans Union's disclosure of it for target marketing purposes violates the Act.

a. Credit Limits

Trans Union does not contest the fact that information about a consumer's credit payment history, balance, *and credit limit*, is used by credit grantors in credit eligibility decisions; is covered by the definition of consumer report; and cannot be disclosed in target marketing. Indeed, the record confirms that credit limits, like payment history and balance, are pieces of information commonly used in credit scoring models. **(Coffman 3848/16–3850/8, 3882/7–3884/4).**

Trans Union instead argues that its target marketing lists did not provide any information about the credit limit on a consumer account. **(TUPF at 189, 229).** The record contradicts this statement. Evidence demonstrates that Trans Union did provide such information by selling lists of consumers who hold a premium bank card, which, as Trans Union expressly informed its target marketing customers, is defined as having a credit limit of over \$9,999. **(CX-64-A; Dexter 1271/17-20; Weith 1867/5-13).** Accordingly, we find that where Trans Union has disclosed credit limit information to target marketers, it violated the FCRA by disclosing a "consumer report" without a "permissible purpose."

b. Open Dates of Loans

Until October 1997, Trans Union routinely provided its target marketing customers with information, obtained from CRONUS, about the open date of loans. **(Cabigon 1377/10–1378/11).** The record sufficiently documents that the open date of a loan is a piece of information regularly used by credit grantors. How long credit has been established and how recently a consumer has pursued such credit are each strong predictors of future risk. **(Rapaport 774/6-19, 793/22--794/12).** "[M]ost recent date opened indicates a pursuit of new credit, which is one of the types of characteristics that are indicative of future credit risk."

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(Rapaport 792/12-15, see also 774/6-19, 793/22--794/12). It is, therefore, not surprising that scoring models look to the open date of tradelines to determine how long the consumer has had credit generally, and how long the consumer has had particular types of credit. **(Coffman 3847/12-24, 3876/14--3877/20)**²⁸. Importantly, Trans Union's own EMPIRICA and Uniquote models include the open date of loans among their predictive characteristics of credit risk. **(CX-93-P; CX-93-Z-4)**²⁹.

Because this evidence clearly demonstrates that credit grantors use open date information to make credit eligibility decisions, we find that the FCRA's definition of consumer report covers information on the open date of loans and that Trans Union violated the FCRA by disclosing such information in its target marketing lists.

c. Number of Tradelines

The record further shows that the number of tradelines in a consumer's credit file is also a predictive characteristic in [redacted] scoring models. **(CX-93)**. Lenders like Chase Manhattan also use a "number of tradelines" criterion in evaluating whether to grant credit³⁰. We therefore conclude that

²⁸ Mr. Rapaport testified that he has seen scoring models that score the open date of newest tradeline, open date of oldest tradeline, open date of newest finance loan, and open date of newest auto loan. **(Rapaport 772/9--774/10; see also Stormoen 3154, 3155/1-6, 3210/5-21)**.

²⁹ An open date is particularly significant in the mortgage context because it enables target marketers to determine the date a mortgage was taken out and the interest rate. The Mortgage Banc ordered a list of consumers with FHA mortgages opened between January 1994 and October 1995 with initial loan values between \$75,000-\$99,999 and \$100,000-\$150,000. **(CX-17-A-B)**.

³⁰ Chase Manhattan's prescreen criteria require that credit eligible consumers have at least three lines of credit; its analysis of existing account holders showed that consumers with fewer than three tradelines had a higher incidence of failing to repay their accounts. **(CX-280-L; Zancola 736/10-23)**.

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credit grantors use such information in credit eligibility determinations.

Trans Union concedes that lenders use the number of tradelines as a factor in credit granting decisions³¹. It argues, however, that it does not disclose such information in its target marketing lists. Trans Union instead claims that it merely discloses the existence of a tradeline and the existence of particular types of tradelines. **TUAB at 50**. We find that the record shows otherwise.

In many cases, Trans Union does reveal the number of tradelines a consumer has by permitting its target marketing customers to order, for example, lists of people who have a bank card *and* a retail card *and* an auto loan - - in other words, three tradelines, the minimum requirement in Chase Manhattan's prescreen. In addition, the record shows that even the "mere" existence of a tradeline counts as a meaningful *number* (*i.e.*, one) in credit scoring. *See infra* p. 25. Trans Union, therefore, violated the FCRA by disclosing in its target marketing lists information concerning an individual's number of tradelines.

d. Type of Tradeline

Based on our review of the factors that credit grantors use in credit scoring and prescreening, we also find that type of tradeline information is itself a factor in credit eligibility decisions, *regardless of performance on that tradeline*. Consequently, this category of information also constitutes a consumer report. Type of tradeline information is particularly important in this case because it constitutes the lion's share of Trans Union's target marketing business. This fact is demonstrated by the list of selects

³¹ Although Trans Union argued in the first proceeding before the Commission that the number of tradelines is not information that credit grantors use in establishing a consumer's eligibility for credit, Trans Union appears to have changed its position. Trans Union now argues that credit scoring models treat the characteristic "number of tradelines" (but not the "existence of a tradeline") as a predictive characteristic. **TUAB at 16, 33--34**.

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that Trans Union offers and sells to its customers. **(CX-1; CX-342)**. As noted, Trans Union offers and sells target marketing lists that provide the names of consumers who have a bank card or a mortgage or an auto loan, among other type-specific credit relationships. *See supra* pp. 7-8.

Evidence in the record also indicates that type of tradeline information is used as one of possibly a dozen predictors of future risk in credit scoring. For example, the existence of a bank card is given weight in Trans Union's own Uniquote and Horizon scoring models and other scoring models. **(Rapaport 785/4--786/7; Coffman 3869/16--3870/9)**³². One of Wachovia's scorecards also assigns points for the presence of a bank card. **(CX 275-R; Pendleton 400/22--401/4)**³³. The existence of a finance company tradeline is also scored in Trans Union's EMPIRICA and Horizon models. **(CX-93-H; Rapaport 789/15--790/15)**. According to Mr. Rapaport, this factor is scored because pursuit of new credit, particularly with a finance company, tends to be more indicative of future credit risk. **(Rapaport 792/17--793/21)**. For example, finance company users are people who have had credit problems in the past, and quite likely, have had a bankruptcy. **(Scott**

³² Section 701(d) of the Equal Credit Opportunity Act ("ECOA"), 15 U.S.C. § 1691(d), requires that when lenders deny credit applications, they must provide reasons for the denial. Credit scoring models generate descriptions of reasons why an applicant's score deviates from an optimal score which can be used by lenders to comply with ECOA obligations. One of EMPIRICA's reasons for denial is "lack of bank cards." **(CX-87; Rapaport 851/23--853/6)**.

³³ Trans Union has crafted a novel, but unsupportable argument that the only reason Wachovia "scored" a bank card reference was not as a factor relevant to establishing credit eligibility, but to establish whether the applicant was willing to list the presence of a bank card on his or her application - - a test of character if you will or, as described by Complaint Counsel, a lie-detector test. We agree with Complaint Counsel that this interpretation is not supported anywhere in the record, even though Trans Union had the opportunity to question Wachovia's witness about it.

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2855/23--2856/7). The existence of one mortgage tradeline, again without regard to performance on that account, also is used as a predictive attribute in credit scoring. (**Coffman 3862/9--3864/5**). In Discover's scoring model, for example, an applicant receives points for an open mortgage tradeline, regardless of the payment status of that mortgage. (**Stormoen 3153/8--3154/2, 3204/5-17**). Discover also assigns points for the existence of a retail tradeline and a bank card. (**Stormoen 3150/16--3151/3**). Indeed, Mr. Rapaport testified that he has seen as predictive characteristics in scoring models many of the types of tradelines disclosed by Trans Union's target marketing lists, including the existence of a bank card, retail account, finance loan, auto loan, and mortgage loan. (**Rapaport 772/24--774/19**).

Trans Union argues that credit scoring does not take into account particular types of tradelines but instead the number of types of tradelines. **TUAB at 46--50**. The record, however, shows that this claim is not true. In fact, Trans Union's own credit models score those who have [redacted] differently from those who have [redacted]; and they score consumers who have a [redacted] differently from those who have a [redacted]. (**CX-93; Rapaport 785/4--786/15, 789/15--790/15**). Furthermore, the testimony of Mr. Rapaport and other witnesses, as well as the documentary evidence, confirms that the existence of "mere" *types* of tradelines - - *e.g.*, a bank card, a finance tradeline or a mortgage tradeline - - without regard to performance on those accounts, conveys to credit grantors useful information about an individual's creditworthiness. Also, such information is in fact *used* in the credit scoring systems credit grantors employ³⁴.

³⁴ Trans Union also claims that the ALJ improperly ignored the testimony of Mr. Connelly who stated that the credit risk model requires all information on all tradelines to run - - and that it could not operate using only the information from the Master File. **TUAB at 33**. This argument also misses the point. The Commission is not finding, and need not find, that the information in the Master File is *all* a credit grantor needs to make a credit decision. We are simply required to determine what information is used or expected to be used, *in whole or in part*, by credit grantors as a *factor* in determining a consumer's eligibility for credit. *See* Section 603(d) of the FCRA.

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The importance of type of tradeline as a factor in credit eligibility is further illustrated in the context of prescreening. One Wachovia prescreening model considers the existence of a bank card so significant that it sets a lower minimum credit score for persons with a bank card as compared to those without. **(CX-275-I,J; Pendleton 396/2-13)**. Wachovia explained that “individuals who do not have any bank card experience are significantly riskier.” **(Pendleton 395/17--396/1)**. First Card finds the existence of a finance tradeline so significant that it excludes from one of its prescreen offers consumers with a small finance company tradeline. **(CX-278-B; Koppin 517/9-14)**. Similarly, Northern Trust’s 1996 home equity prescreen offer rejected files without at least one open mortgage. **(CX-283-A)**. Chase Manhattan’s prescreen requires at least two qualifying tradelines, one of which cannot be a refinanced loan or student loan. **(CX-280-O; Zancola 712/20--713/3)**.

To rebut the significance of type of tradeline in the prescreening context, Trans Union argues, based on the testimony of Ms. Judy Pendleton of Wachovia, that the ALJ failed to understand how prescreening works and overestimated the importance of type of tradeline in prescreen criteria. **TUAB at 55-57**. According to Trans Union, prescreening models first apply “exclusionary” factors, eliminating consumers whose credit files show, among other things, certain derogatory credit information. In Trans Union’s view, when Wachovia looks to see if a consumer has a bank card, it is actually looking to see if the consumer has a near perfect bank card. **(Pendleton 439--441)**. Here again, however, the record does not support Trans Union’s claim.

First Card’s prescreening model rejects a consumer with a small finance company tradeline, even a tradeline that has met “good performance” criteria. **(CX-278-B)**. Similarly, Chase Manhattan’s prescreen would reject a consumer whose only credit account is a student loan or a refinanced loan, even if such a

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tradelines passed the “good performance” test. **(CX-280-Z-34)**. Even in the Wachovia example, for a consumer that passes through a gauntlet of exclusionary criteria, the presence or absence of a bank card may determine the range of acceptable credit scores for a consumer to receive credit. **(CX-275-I, J; Pendleton 396/2-13)**.

These examples demonstrate that, even when all relevant consumer tradelines pass the exclusionary criteria, credit grantors value specific types of tradelines differently - - *e.g.*, a bank card tradeline is generally more highly valued than a finance tradeline. This is confirmed by Ms. Pendleton’s testimony about the risk associated with individuals who do not have any bank card experience, and Mr. Rapaport’s and Mr. Scott’s testimony that people with a finance tradeline are riskier and are likely to have had a bankruptcy. **(Pendleton 395/17--396/1; Scott 2855/23--2856/7; Rapaport 792/17--793/21)**. In addition, Trans Union’s argument that each individual criterion for a prescreen must be examined against other criteria that impose additional requirements simply fails to address the plain language of the FCRA’s Section 603(d) definition of a consumer report - - information that is used “in whole or in part” in credit eligibility determinations³⁵.

³⁵ Trans Union also argues, based on the testimony of First Card’s Mr. Koppin and Discover’s Mr. Stormoen, that the existence of a type of tradeline is not relevant to determining credit eligibility; rather, it is performance information found in that tradeline that counts. **TUAB 13-14. (Koppin 547-548; Stormoen 3180/6-24)**. Notwithstanding the selected statements of Mr. Koppin and Mr. Stormoen, the weight of the evidence indicates that the existence of a type of tradeline is used as a factor in determining credit eligibility. The portion of Mr. Stormoen’s testimony that Trans Union highlights is belied by the remainder of his testimony describing predictive characteristics that have nothing to do with credit performance, such as number of retail and bank card tradelines, existence of a mortgage, age of oldest tradeline, and even existence of a tradeline. **(Stormoen 3150/3--3151/3, 3153/8--3154/2, 3204/5-17, 3155/11--3156/4)**. Similarly, Mr. Koppin’s testimony must be viewed against First Card’s documentary evidence, described above, that requires the rejection of consumers who have a small company finance tradeline, even if they meet the other good performance criteria of no derogatory or adverse file flags, no trades currently 30 days past due, no trades historically 90 days past due, among others. **(CX-278-B)**.

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Finally, Trans Union's own promotions clearly indicate that it "expected," within the meaning of the FCRA Section 603(d), type of tradeline information to be used in credit granting decisions. Indeed, it boasted, "since credit has been established [for individuals on the student loan list], one could argue that this list would have higher pass rates through the credit bureaus." **(CX-136)**. According to Trans Union, the premium bank card target marketing list identifies individuals "who have been approved for this high amount of credit in the past." **(CX-64-A)**.

In light of these facts, the Commission finds that a type of tradeline, even without regard to performance on that account, is valuable information used by credit grantors to decide whether to extend credit. Therefore, because this information is both used and expected to be used in credit granting decisions, such information is covered by the FCRA's definition of consumer report, and Trans Union's disclosure of type of tradeline information to target marketers violates the Act.

e. Existence of a Tradeline

As discussed, the court of appeals remanded this case so that the Commission could determine whether there was sufficient evidence to show that the mere "existence of a tradeline" is information used, expected to be used, or collected for the purpose of establishing an individual's eligibility for credit. *Trans Union*, 81 F.3d at 233. The consumer names and addresses that Trans Union sells in its target marketing lists have met the Minimum Criteria,³⁶ including that his or her CRONUS (*i.e.*

³⁶ The exception is the lists of consumers Trans Union disclosed or discloses through its TransLink, New Issues and Emerging Consumer products. These names come directly from CRONUS rather than the Master File and thus do not necessarily meet all the elements of the Minimum Criteria. *See*

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“credit”) file has at least one tradeline or, for lists generated prior to January 1998, at least two tradelines. *See* discussion *supra* p. 6.

The record in this case, however, shows that Trans Union’s customers do not purchase only the names and addresses of consumers with a tradeline meeting the Minimum Criteria. Instead, they purchase the names and addresses of individuals who also meet other criteria, *e.g.*, consumers who also have an upscale retail card and an auto loan. Indeed, Trans Union’s promotional materials recognize that customers do not simply request the Master File list and the materials encourage them to narrow down that list based on additional criteria that meet their needs.

You’ll find . . . in our Master File . . . over 140 million consumers. Of course, you won’t want to reach all of them. That’s why each consumer record includes more than 350 variables that allow you to segment, select, target, and sell with unmatched precision.

(CX-79-B). In other words, Trans Union does not sell lists of people who just have one tradeline. Instead, Trans Union sells lists of people with a tradeline who meet other specified criteria.

Nonetheless, because the Minimum Criteria apply to virtually all of Trans Union target marketing lists, we make the following determinations based on our review of the record. First, the Minimum Criteria for appearing on Trans Union’s base marketing lists are not the “mere existence of tradeline.” Rather, the Minimum Criteria also reveal, among other things, the existence

discussion *supra* p. 10. Every consumer identified through these products does, however, have at least one tradeline, the existence of which bears on credit eligibility and is used in credit decisions. Specifically, Trans Link / Reverse Append discloses the names and addresses of consumers with a bank card (and in some instances age and other data) and the New Issues File and Emerging Consumers File disclose (or disclosed) consumers with open credit tradelines. *Id.* Accordingly, the lists Trans Union sells through these products constitute consumer reports.

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of a recently active and current credit relationship. Specifically, the prerequisite for appearing on a list is: (1) the existence of either two tradelines active within the last six months *or* one tradeline active within the last six months with an address matched to an outside vendor file, *and* (2) that the tradeline must have no closed date, must not be disputed, and cannot be a collection tradeline or a public record tradeline.

Second, the record shows that even these Minimum Criteria are more important than they initially appear. Interestingly, Trans Union's Minimum Criteria are substantially similar to FICO's minimum criteria for every credit scoring model that the three national CRAs use. Like the names in the Master File, for example, FICO requires initially that a consumer have at least one open line of credit updated within six months that is not the subject of a dispute and that gives no indication that the subject is deceased. **(Rapaport 763/4-23; CX-89-S; Wiermanski 1795/21-1796/20).**³⁷

The importance of the existence of a tradeline is further revealed through the scorecard segmentation process - - a mechanism for grouping like people together to better determine future risk. *See supra* n.24. Significantly, Mr. Rapaport testified that each of the three national credit reporting agencies uses scorecard segmentation and that they each have a scorecard for consumers who have only one tradeline; consumers who have either zero or two or more tradelines are evaluated through different scorecards. **(Rapaport 770/15--771/5).**

³⁷ When a loan applicant does not have a tradeline, Trans Union's EMPIRICA model cannot calculate a score and returns a message "EMPIRICA Not Scored - Insufficient Credit." **(Rapaport 764/12-15; CX-87-A).** In fact, most credit grantors will not approve an applicant where there is no score due to the absence of a tradeline, although some will build custom scorecards for those who have no tradeline. **(Rapaport 766/1-19).** Discover Card, for instance, declines credit applicants whose credit reports indicate no tradeline. **(Stormoen 3155/24-3156/4).**

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Prescreening criteria similarly illustrate the significance to credit grantors of having a tradeline. The Chase Manhattan prescreen criteria require that a person have at least one tradeline verified within the last six months. (**CX-280-L; Zancola 723/3-6**). Similarly, in the Wachovia prescreen, the first factor applied to a consumer's credit file, without reference to any performance information, is whether the consumer has a line of credit which has been open for a specified duration. (**Pendleton 393/3-23; CX-275-F; CX-276-A**).³⁸

Further, the record demonstrates that Trans Union "expected," within the meaning of the FCRA, that information regarding the existence of a tradeline (or two tradelines) would be used in credit eligibility decisions. Trans Union promoted: "Any adult with at least two active tradelines of credit is represented on the Masterfile." (**CX-33-A; CX-69-A**). "Any individual with at least two lines of credit is included in the [Master File's]140 million plus names and addresses." (**CX-61-A**). Trans Union's lists are "not just ordinary lists but lists of people who are active users of credit." *Trans Union*, 118 F.T.C. at 845.

These record examples establish that the information Trans Union routinely discloses through its Master File / Selects product is used and/or expected to be used by credit grantors in eligibility decisions. Therefore, the target marketing lists created from this product are consumer reports and Trans Union violates the FCRA by disclosing them to target marketers without a permissible purpose.

³⁸ One of Wachovia's prescreens requires one open tradeline for two years; another Wachovia prescreen requires at least one open tradeline for one year. (**CX-275-C, F; CX-276-A, C; Pendleton 393/3-23, 414/17--415/21**). In addition, First Card's prescreening criteria also reject consumers with no tradeline, although First Card extends credit to consumers without tradelines under special circumstances. (**CX-278-A; Koppin 515/17-24, 516/12-20, 526/9-528/4**). Also, Northern Trust's 1993 and 1996 home equity prescreens look to tradeline activity within the last year. (**CX-281-A; CX-283-A; McCoy 603/9-25, 611/8-12**).

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3. Proprietary Models³⁹

The lists Trans Union generated through its proprietary models -- E-Val, TIE, SOLO, P\$YCLE, and PIC -- similarly convey information that is used or expected to be used in credit eligibility determinations and Trans Union's disclosure of them to target marketers similarly violated the FCRA⁴⁰.

Trans Union's promotion of each of these products⁴¹ reveals its expectation that they would be used as factors in establishing credit eligibility. Trans Union marketed its E-Val product -- its scoring system that estimates the amount of equity available in a consumer's home -- to lenders as:

³⁹ Trans Union argues that Complaint Counsel "essentially" concedes that information disclosed in its proprietary target marketing models and its reverse append product is not a consumer report. **TURB at 1.** We find to the contrary. Complaint Counsel's brief expressly states that the modeled products "are not only derived from and disclose credit eligibility factors (IDF-82, 85, 92, 108), they are specifically marketed by Trans Union for *both* target marketing and credit eligibility uses (IDF-87, 89, 93-94)." **CCAB at 88, n.124.** Complaint Counsel's brief also discusses the privacy-intrusive aspects of reverse append and Trans Union's use of the product without a permissible purpose. *Id.* at 10.

⁴⁰ Trans Union objects that the ALJ "leaped" without analysis to the conclusion that its proprietary models are "consumer reports," arguing that the ALJ made no finding about whether the models were used or expected to be used as factors in establishing credit eligibility. **TUAB at 3--4.** We agree that such additional findings must be made before Trans Union can be held responsible for FCRA violations, and based on the record now before us, we make such findings here.

⁴¹ Trans Union openly characterized its "Standard Characteristics," upon which *all* of its five proprietary models were based, as "correlat[ing] highly with lending activity." **(CX-263-A).**

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the ideal tool for marketers of home equity lines of credit or other secured loans. It clearly identifies homeowners who have both equity available and an interest in securing credit. . . E-VAL can be of significant value to a wide range of marketers: Banks, Credit Unions, Brokerages, Mortgage Brokers, Mortgage Guarantors, Fannie Mae/Ginnie Mae Agencies, Ad Agencies, Modelers, [and] Catalogers.

(CX-118). The record also shows that Trans Union's lender/customers requested E-Val home values on individuals in deciding whether to make loan offers. **(CX-23; CX-24; CX-38).**

In its seller's guide, Trans Union describes the following uses for its income estimator model ("TIE"): "in credit risk scoring for new or existing accounts . . . in existing prescreen criteria . . . as a supplement to credit application data . . . to set initial credit limits." **(CX-119).** The guide also states that "[t]he most prominent markets for TIE are: credit grantors (including bank card issuers, finance companies, retailers, and auto finance companies) and other lenders (retail banks, savings & loans, and credit unions)." *Id.*⁴² Further, Trans Union's Vice President Chester Wiermanski testified that TIE was intended for use in approve/decline decisions. **(Wiermanski 1719/25--1720/20)**⁴³.

⁴² A product brochure for TIE states that customers can use TIE "with confidence" to "[f]ine tune credit limits and loan conditions on credit applications . . . '[r]ed flag' applicants whose low income estimate may indicate the need for additional verification," and "[f]lag accounts to increase/decrease lines of credit." **(CX-120-B, C).**

⁴³ Trans Union argues that the ALJ's finding that it "uses TIE in credit granting' (F 93)" is not supported by the record and that the record shows it merely "contemplates" using TIE in credit granting. **TUAB at 4.** Trans Union's characterization of the record is correct. Still, Trans Union's "contemplation" (the actual term used was "envisioning") of TIE for use in credit approve/decline decisions demonstrates that Trans Union expected information in TIE to be used in credit eligibility decisions. Because Section 603(d) of the FCRA covers such expected use, information in TIE is a consumer report.

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Clearly, Trans Union expected lenders to use information in TIE in credit granting decisions and knew that they did, in fact, use such information in these decisions.

Trans Union's internal seller's guide for SOLO also notes that "SOLO is most often used by credit grantors for non-preapproved offers, such as home equity offers or secured card offers." **(CX-115-O)**. It also discusses using SOLO in preapproved offers of credit. **(CX-115-Z-2)**. Trans Union, therefore, expected this product also to be used as a factor in credit granting, and conceded this point when it stated in oral argument that its target marketing customers were using SOLO in credit eligibility decisions. **(Oral Arg. Tr. 100/10-13; Davis 67/19--68/4)**.

The "P\$YCLE" model uses CRONUS data to estimate a consumer's income producing assets. Trans Union's promotional brochure for P\$YCLE states:

P\$YCLE allows marketers to segment consumers according to affluence, financial product and service usage, and account balances . . . P\$YCLE, designed for financial service companies.

(TU-56).

Similarly, PIC, Trans Union's model that predicts the likelihood that an individual owns financial service products, is promoted as follows:

It's easier to acquire individuals' money if you know where they keep it . . . Imagine the benefit of knowing which financial vehicles an individual investor will choose. That's exactly what PIC (Prospect Identification and Classification) offers to marketers of mutual funds, money market accounts, insurance, annuities and *home equity credit lines* . . . Tap into the richest source of

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individual-level financial data in America . . . a new, higher level of predictive behavior . . . and a profitable way for your company to acquire new business . . . (emphasis added)

(TU-20).

All of this evidence plainly shows that Trans Union fully expected lenders to use information in Trans Union's proprietary models to find the most eligible and profitable targets for the lenders' promotions⁴⁴. In addition, each of the models provides information about the consumer's income - - a significant factor "used" in credit eligibility decisions. For E-Val and SOLO in particular, the record shows that lenders used the model scores or categories to make such decisions.

Consequently, we find that Trans Union's proprietary models were "used or expected to be used" in credit eligibility decisions, and thus constitute consumer reports within Section 603(d) of the FCRA. By disclosing these reports to target marketers which do not have a permissible purpose under the Act, Trans Union has violated the FCRA.

⁴⁴ Trans Union's promotions also disclose in general terms what inputs it uses to generate its model results. For E-Val, Trans Union announced, "Open mortgage dates, initial mortgage amount, presence of additional mortgages - - [w]ith this information, we can create reliable estimates of the length of residence and the actual equity ratio and equity amount available to homeowners. By deducting existing mortgage balances from the estimated home value, and applying an adjustment factor of 75%, you now possess invaluable data on 62 million U.S. homeowners." **(CX-118-B)**. For SOLO, Trans Union stated: "[G]roups individual consumers with similar *lifestyle, spending and payment behaviors* into clusters." **(CX-114-B)**. For P\$YCLE, "The P\$YCLE model draws on the five economic and demographic factors that have the greatest effect on consumers' financial behavior: income producing assets, total household income, age of household head, home ownership, urbanization." **(TU-56)**. With TIE, the sellers guide tells Trans Union's salespeople that the model uses 23 key characteristics that predict income - - "age and type of accounts, amount of available credit, amount of credit used, number and type of new accounts." **(CX-119-I)**.

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4. TransLink - - the Reverse Append Product

TransLink is a special service through which Trans Union provides its merchant customers with names and addresses of the people who have used their bank cards to make purchases from a particular merchant. TransLink differs from Trans Union's other products because the merchant already has access to some of the information contained in the reverse append list, *i.e.*, the name of a purchaser and the account number based on the customer bank card transaction record. Trans Union does, however, communicate a variety of information that the merchant does not already have. Specifically, by matching the merchant's consumer information with the information in CRONUS, Trans Union confirms the accuracy of the merchant's data at the time it generates the list. Moreover, Trans Union communicates the consumer's address - - a valuable asset - - and, as previously noted (*see supra* p. 10), can also append age data⁴⁵ to its reverse append lists.

Despite the fact that the merchant purchasing a reverse append list already has a name and account number, the FCRA analysis for TransLink is the same as for Trans Union's other products. This analysis requires us to determine whether the information Trans Union sells through reverse append is a consumer report and whether the recipient of the information has a permissible purpose under the Act. Trans Union accesses its consumer reporting database to obtain, match and disclose names and addresses of consumers with a certain type of credit card, in this case an active bank card. The matching of a bank card number with a consumer's name and address, and the communication of that matched information to a merchant constitutes a consumer report under the Act. As discussed above, such type of tradeline information is used, or expected to be used, in determining credit eligibility. Accordingly, reverse append lists are consumer reports

⁴⁵ This is significant because we find that age data meets the FCRA's definition of a consumer report. *See* discussion *infra* pp. 30-31.

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and, because target marketing is not a permissible purpose under the Act, Trans Union cannot disclose these lists to its target marketing customers.

C. Analysis of Demographic Information

Section 603(d)'s definition of a consumer report requires not only that the information be "used" or "expected to be used" in a credit decision, but also that the information bear on a consumer's "credit worthiness, credit standing, credit capacity, character, general reputation, personal characteristics, or mode of living."⁴⁶

When viewed against the FCRA's statutory purpose of protecting the privacy of personal *credit* information,⁴⁷ we find that the "bearing on" limitation, set forth in Section 603(d) excludes from the FCRA's definition of consumer report certain predominantly identifying information including: name, mother's maiden name, generational designator, telephone number, and social security number. Although the record shows that certain lenders exclude from prescreening offers consumers who have a generational designator (*e.g.*, "Jr.," "Sr.," etc.), or do not have a social security number, they do so only based on concern about identity, *i.e.*, accessing the file of the correct individual. This information does not, however, bear on creditworthiness, credit capacity, credit standing, character, general reputation, personal characteristics, or mode of living, unless such terms are given an impermissibly broad meaning.⁴⁸

⁴⁶ See *supra* n.2 and p. 14. Although the court of appeals viewed this part of the definition as "not very demanding," it did so in the context of examining the impact of the existence of two tradelines. *Trans Union*, 81 F.3d at 231. This part of the definition is not as easily met for other information considered in credit decisions.

⁴⁷ See discussion *infra* pp. 37-39.

⁴⁸ See also *supra* n.21.

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The treatment of two other categories of demographic information - - (1) address and (2) age - - also merits additional analysis. With respect to the address of an individual, the court of appeals noted the ease with which zip codes, a component of an address, could be used in lending decisions to ensure that only the wealthy - - for example people living in the Beverly Hills, California zip code 90210 - - would be eligible for loans. *Trans Union*, 81 F.3d at 232. Regardless of whether this information might bear on credit worthiness, nothing in the record before us establishes that zip codes are actually used, or expected to be used as a credit eligibility factor in scoring or as a credit criterion in prescreening⁴⁹. Absent such evidence, the FCRA does not prohibit Trans Union's disclosure of simple address information to target marketers.⁵⁰

On the other hand, the record shows that an individual's age does bear on their credit capacity and is used in credit granting decisions. Witnesses from both Northern Trust and Chase Manhattan testified that their companies do not offer credit to consumers who are younger than the legal age. (**McCoy 631/19-24; Zancola 711/9-16**). In addition, Discover Card looks at "longevity" of "economic dealings people have," which may be determined by a consumer's age. (**Stormoen 3190/20-- 3191/7**). Mr. Rapaport also testified that some scorecards use age as a factor. (**Rapaport 847/8-16**). The record, therefore, demonstrates that lenders use age information as a factor in credit granting

⁴⁹ Mr. Rapaport testified that zip codes are not used in credit bureau scoring. (**Rapaport 847/17-21**). Mr. Koppin stated that zip codes are used in extracts to narrow the geographic area of First Card's prescreen list but zip codes are not used as a credit criterion. (**Koppin 582/1-16, 583/25--584/18**).

⁵⁰ Although some lenders will not extend credit to consumers with a P.O. Box address, we do not find that the P.O. Box feature bears on "credit worthiness, credit standing, credit capacity, character, general reputation, personal characteristics or mode of living."

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decisions⁵¹. Further, age clearly bears on credit capacity where state laws restrict contracting with minors. Therefore, age information falls within the definition of a consumer report and its disclosure by a CRA to target marketers violates the FCRA.

D. Trans Union's Remaining FCRA Arguments

Trans Union contends that the ALJ's decision is unsupported because the ALJ ignored the expert testimony of Dr. John Coffman, Mr. Kenneth Scott, and Mr. Barry Connelly, each of whom testified that the existence of a tradeline does not factor into credit eligibility decisions. **TUAB at 31-33**. Although Trans Union called these witnesses as expert witnesses, it is not clear that the ALJ found them qualified as "experts." Indeed, the ALJ stated that two of the purported experts were "not credible on this issue" and found that Dr. Coffman showed bias through his inconsistent testimony and that Mr. Scott had no relevant experience to support his testimony. **IDF at 86, n.183**. We agree with the ALJ.

The record indicates that Dr. Coffman made internally inconsistent statements on direct and cross examination. Dr. Coffman stated on direct that none of the information sold by Trans Union was used as a factor in determining credit eligibility, with the exception of P.O. Box information, which was used to exclude certain consumers from prescreened offers of credit. **(Coffman 3840/5-21)**. On cross examination, however, Dr. Coffman admitted that information on the existence and number of mortgages, auto loans, and open bank cards has been used as a predictive attribute in some scoring models. **(Coffman 3862/5--3863/22, 3868/16--3870/9)**.

⁵¹ We recognize that the Equal Credit Opportunity Act generally prohibits credit decisions based on age. 15 U.S.C. § 1691(a). There are exceptions, however: a lender can *favor* applicants who are age 62 or older. A lender also can consider age if it bears on other elements of creditworthiness. For example, a lender can consider whether an applicant is close to retirement age, which could impact future income. Section 202.6 of Regulation B (the implementing regulation of the ECOA), 12 C.F.R. § 202.6.

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We agree with the ALJ's finding that Mr. Scott's experience was not sufficient to support giving particular weight to his testimony. Mr. Scott's experience was in marketing credit cards and not in making credit eligibility decisions. While Trans Union argued that Mr. Scott testified extensively regarding his experience in credit eligibility, it offered no evidence to support this assertion. **TUAB at 22, 33.** We find that Mr. Scott's testimony, viewed in the best light for Trans Union, supports only that he attended meetings at American Express where credit eligibility criteria were discussed. **(Scott 2616/22--2617/16).** This fact only demonstrates that he had indirect knowledge of the subject matter. We thus find that the testimony of credit grantor witnesses, with far more intimate knowledge of the complex array of factors that influence credit eligibility decisions, substantially outweighs Mr. Scott's testimony.

As President of Associated Credit Bureaus ("ACB"), the primary trade association for credit bureaus, Mr. Connelly serves the interests of ACB's members and Trans Union is one of the three main dues paying members. **(Connelly 2565/4-12, 2566/4-11)**⁵². Although the ALJ did not specifically comment on Mr. Connelly's testimony, we have thoroughly considered it and determined that it is also entitled to little weight. Further, Mr. Connelly testified that he had no experience as a credit grantor or credit scorer and that he did not know how Trans Union's credit scoring model worked. **(Connelly 2560/11--2561/18, 2601/20--2602/1).**

Trans Union further notes that Complaint Counsel produced no expert testimony showing that the information disclosed in Trans Union lists is used by credit grantors in credit granting.

⁵² In addition, Trans Union's CEO and a Senior Vice President sit on ACB's Board of Directors and thereby control Mr. Connelly's budget as well as his salary. **(Connelly 2570/20--2571/8, 2572/5-11).**

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Complaint Counsel did, however, provide sufficient factual evidence - - both contemporaneous documentary evidence and non-expert testimony - - that Trans Union's target marketing lists disclose information used in credit granting decisions and constitute consumer reports that cannot be disclosed for target marketing purposes⁵³. Hence, Complaint Counsel was not required to present expert testimony to support the complaint allegations.

E. Conclusion

Based on a thorough review of the record, including the testimony, we find that Trans Union's target marketing lists are indeed consumer reports under the FCRA because they contain information that bears on the factors set forth in Section 603(d)(1) and is used or expected to be used as a factor in determining a consumer's eligibility for credit. By selling these lists to target marketers without a permissible purpose, Trans Union violates the FCRA. This conclusion applies to Trans Union's Master File / Selects; proprietary models; and TransLink / reverse append products.

Trans Union's disclosure to target marketers of information on the existence of a tradeline violates the FCRA. Further, Trans Union's disclosure in its target marketing products of other

⁵³ Trans Union's remaining arguments are, at best, splitting hairs as they have little impact on the core of Trans Union's practices and, thus, our analysis. For example, when Complaint Counsel showed that Wachovia's PCL prescreen requires at least one tradeline open for a year, Trans Union argues that such tradeline must also have a balance update, not just an open date. **TURB at 18**. In addition, responding to Complaint Counsel's showing that First Card's prescreen rejects any file showing a finance tradeline, Trans Union points out that the precise criteria are "small company finance trade[line] with a current balance of \$1.00 or more, excluding student loans." **TURB at 19**. The inquiry at issue, however, is whether the information disclosed by Trans Union, including the existence of a credit account and specific types of credit accounts, are used, *in whole or in part*, as factors in credit eligibility determinations. The more detailed description by Trans Union of Wachovia and First Card's prescreen criteria support the same answer of "yes."

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information, such as the existence of a type of tradeline, open date of tradeline, home equity information, and income estimations, among other list criteria described above, also violates the Act.

Finally, the record in this case supports, with one exception, the lawful disclosure of most demographic information. The one exception, however, is age information which the record here shows is used in credit decisions, bears on credit capacity, and is accordingly a consumer report that cannot be disclosed in target marketing.⁵⁴

VI. CONSTITUTIONAL ANALYSIS

Trans Union raises two constitutional defenses in this matter. Trans Union first asserts that, by barring it from selling target marketing lists, the FCRA violates the First Amendment of the United States Constitution. Second, Trans Union claims that the FCRA's definition of consumer report is unconstitutionally vague under the Fifth Amendment. We disagree with both arguments.

A. The FCRA Is a Constitutionally Permissible Restriction on Speech

The First Amendment states that "Congress shall make no law . . . abridging the freedom of speech" The right to free speech, however, is not unfettered and it is well settled that different types of speech merit different levels of constitutional protection. Specifically, courts apply the highest degree of

⁵⁴ We note here that our conclusions are consistent with the Commission's Statements of General Policy or Interpretations under the Fair Credit Reporting Act, 16 C.F.R. Part 600, *et seq.*, which offer general guidance on the FCRA and are not regulations and do not have the force of statutory provisions. 16 C.F.R. § 600.2(a) Further, the Statements appear to be of marginal relevance to the issues here, as neither the parties nor the ALJ based their arguments, conclusions or findings on these Statements.

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protection to speech related to issues of public concern such as political or social change or artistic or scientific expression. *See, e.g., Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 758-59 (1985) (plurality opinion). Such fully protected speech may be called “pure” speech. *American Future Systems, Inc. v. Pennsylvania State Univ.*, 752 F.2d 854, 861 (3rd Cir. 1984). By contrast, courts apply a reduced or intermediate level of protection to “commercial” speech - - speech, such as advertising, that is related to a commercial transaction. *See, e.g., Central Hudson Gas & Electric Corp. v. Public Serv. Comm’n of New York*, 447 U.S. 557, 561-63 (1980). Courts have also recognized that the First Amendment does not protect certain types of speech, such as obscenity and “fighting words,” *Dun & Bradstreet*, 472 U.S. at 758-59, n.5, or conduct that does not constitute speech, *Michael Barnes, et al. v. Glen Theatre, Inc., et al.*, 501 U.S. 560, 570 (1991). For the reasons discussed below, we find that Trans Union’s consumer reports are entitled to intermediate First Amendment protection. Accordingly, we analyze the FCRA under the standard established by the Supreme Court in *Central Hudson* and its progeny and conclude that the Act does not violate the First Amendment by prohibiting Trans Union from selling consumer reports to target marketers.

1. Type of Speech

In order to apply the appropriate First Amendment analysis to Trans Union’s challenge to the FCRA, we must initially determine what type of expression or conduct the Act regulates in this case.

- a. Pure Speech

Trans Union contends that its target marketing lists are pure speech and, as such, should receive the highest degree of constitutional protection. **TUAB at 67--68**. We are not persuaded, however, that Trans Union’s lists rise to the level of such fully protected pure speech. The Supreme Court has held that speech on public issues deserves the highest degree of protection because the First Amendment “was fashioned to assure the unfettered interchange of ideas for the bringing about of political and social

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changes desired by the people.” *Dun & Bradstreet*, 472 U.S. at 759, quoting *Roth v. United States*, 354 U.S. 476, 484 (1957). Speech related to matters of purely private concern, however, merits less First Amendment protection because regulation of such speech has less of an impact on the exchange of ideas on public issues. *Id.*

Here, the record clearly establishes that Trans Union’s target marketing lists do not concern the types of lofty or important public issues or themes traditionally recognized as central to the First Amendment’s guarantee of freedom of expression. *See, e.g., McIntyre v. Ohio Elections Comm’n.*, 514 U.S. 334 (1995) (distribution of anonymous political campaign literature); *City of Ladue v. Gilleo*, 512 U.S. 43 (1994) (display of sign opposing Persian Gulf War); *United States v. Eichman*, 496 U.S. 310 (1990) (burning American flag); *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46 (1988) (vulgar parody of public figure); *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964) (allegedly libelous newspaper editorial advertisement about public official and civil rights movement); *Kingsley International Pictures Corp. v. Regents of the University of the State of New York*, 360 U.S. 684 (1959) (exhibition of film depicting and expressing approval of adultery). Rather, the lists concern private information about individual consumers’ credit history and other confidential, personal financial data. Because the lists do not possess the type of public component that compels full First Amendment protection, we conclude that Trans Union’s lists are not pure speech and, consequently, we do not apply the strict scrutiny analysis to the FCRA’s restriction on the dissemination of these lists.

b. Nonspeech

We also reject Complaint Counsel’s position that the lists are not speech at all and thus fall outside the scope of First Amendment protection. Complaint Counsel argues that Trans

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Union's lists are not expression but, rather, are simply "commercial products" that Trans Union sells to its customers. **CCAB at 58-61**⁵⁵. Although Trans Union's lists are products, we find that they do possess a quality of speech because they communicate substantial consumer information to Trans Union's target marketer customers. In other words, the lists Trans Union sells to its clients are more than simply a collection of names and addresses. Instead, these lists reflect Trans Union's complex analysis and qualitative judgment regarding which consumers meet various credit and financial-related criteria. Moreover, although courts have accorded them varying levels of protection, they have also treated consumer reports as speech⁵⁶. Indeed, by questioning the application of the First Amendment here, the court of appeals in this case has necessarily assumed that a consumer report is some form of speech. *See Trans Union*, 81 F.3d at 235.

c. Commercial Speech

The ALJ held that Trans Union's lists constitute commercial speech and, as such, applied intermediate constitutional scrutiny to the FCRA. **ID at 88-89**. We find that, although the target marketing lists do not possess all the elements typically associated with commercial speech, the lists have sufficient commercial speech qualities (without rising to the level of fully protected pure

⁵⁵ Of course, both Trans Union and Complaint Counsel also assert in the alternative that the target marketing lists are commercial speech and that we should therefore apply intermediate level scrutiny to the FCRA. We analyze commercial speech *infra*.

⁵⁶ *See Dun & Bradstreet, Inc. v. Greenmoss Builders*, 472 U.S. 749, 762 (1985) (credit report "was speech solely in the individual interest of the speaker and its specific business audience"); *Millstone v. O'Hanlon Reports, Inc.*, 528 F.2d 829, 833 (8th Cir. 1976) (treating consumer credit reports as commercial speech); *U.D. Registry, Inc. v. State*, 40 Cal.Rptr.2d 228, 233 (Cal. 1995) (much of the information contained in the credit reports is "highly protected noncommercial speech"); *Equifax v. Cohen*, 420 A.2d 189 (Me. 1980) (rejecting appeal of lower court determination that credit reports are commercial speech), *cert. denied*, 450 U.S. 916 (1981).

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speech) to warrant intermediate First Amendment Protection. Our conclusion is supported by the full record here as well as Supreme Court precedent.

The Supreme Court has defined the “core notion of commercial speech” as an expression that does no more than propose a commercial transaction. *Bolger v. Young Drug Products Corp.*, 463 U.S. 60, 66 (1983) citing *Virginia Pharmacy Bd. v. Virginia Consumer Council*, 425 U.S. 748, 762 (1976). Recognizing that the line between commercial and other types of speech is not always distinct, the Court expanded upon the concept by identifying three factors relevant to the determination of whether speech is “commercial”: (1) whether the speech is an advertisement; (2) whether it mentions a specific product by name; and (3) whether it is economically motivated. *Bolger*, 463 U.S. at 66-67.

Trans Union’s lists do not fall neatly into this core notion of commercial speech as articulated by the Court in *Bolger*. The lists are not advertisements but instead are antecedent to advertisements - - *i.e.*, the solicitations that Trans Union’s target marketing customers send to the consumers identified in the target marketing lists. Trans Union’s lists also do not mention a product by name; instead, as asserted by Complaint Counsel, they *are* the actual product. Finally, although Trans Union’s marketing list business is certainly motivated by economic considerations, that fact alone does not confer commercial speech status. *See Bolger*, 463 U.S. at 67 (fact that party had an economic motivation for mailing pamphlets at issue was insufficient by itself to turn materials into commercial speech).

Still, *Bolger* does not establish a bright line test for commercial speech and the Supreme Court has also regarded “expression related solely to the economic interests of the speaker and its audience” as commercial speech. *Central Hudson*, 447 U.S. at 561. Similarly, Trans Union creates and sells its lists for

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its own economic benefit as well as the benefit of its target marketing customers. In other words, while the ultimate consumers who are the subject of Trans Union's lists have an interest in protecting their credit and financial privacy, Trans Union's sale of its target marketing lists is a commercial transaction motivated by the economic interests of the list seller and the list purchaser.

Moreover, in *Dun & Bradstreet*, which concerned a consumer report containing false information, a plurality of Justices found that the consumer report at issue deserved reduced First Amendment protection. The plurality opinion explained that speech related strictly to private concerns has less First Amendment value and merits less stringent protection than speech on matters of public concern. Thus, the level of protection the Court should give to a consumer report turned on whether the report concerned *public* or *private* matters. The plurality concluded that, based upon an examination of the content, form and context of the report, it involved "speech solely in the individual interest of the speaker and its specific business audience" and deserved reduced First Amendment protection. *Dun & Bradstreet*, 472 U.S. at 762 (plurality).⁵⁷

Even though Trans Union's lists do not embody all of the characteristics of core commercial speech outlined by the Court in *Bolger*, the lists concern private matters primarily concerning the economic interests of the speaker and its specific business audience. As such, we find that the best fit here is to grant Trans Union's lists the same degree of First Amendment protection

⁵⁷ Although Trans Union correctly notes that *Dun & Bradstreet*, unlike the instant matter, concerned the distribution of a false credit report that injured the reputation of the report's subject, the falsity of the credit report was only one of the several considerations that led the Court to conclude that its distribution was not entitled to full First Amendment protection. The fact that the consumer report was of limited distribution and, like advertising, was hardy and unlikely to be deterred by incidental state regulation supported this conclusion. *Id.* at 762.

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accorded to commercial speech⁵⁸. Consequently, we apply intermediate constitutional scrutiny to the FCRA's restriction of Trans Union's sale of its target marketing lists.⁵⁹

2. The FCRA Passes Intermediate Constitutional Scrutiny

The *Central Hudson* case and its progeny set forth the analysis appropriate for intermediate level scrutiny in a First Amendment context. Under this test, a court must examine the following: (1) whether the expression at issue concerns lawful activity and is not misleading; (2) whether the asserted governmental interest supporting the restriction is substantial; (3) whether the regulation directly and materially advances the governmental interest asserted; and (4) whether the regulation is narrowly drawn to advance the government interest. *Central Hudson*, 447 U.S. at 566. Because it is undisputed that the expression at issue here

⁵⁸ Our conclusion is supported by a recent ruling of the U.S. Court of Appeals for the Ninth Circuit in which the court held that a private party's sale of the names and addresses of arrestees was a "pure economic transaction" that constituted commercial speech entitled to intermediate First Amendment protection. *United Reporting Pub. Corp. v. California Highway Patrol*, 146 F.3d 1133 (9th Cir. 1998), *rev'd on other grounds, Los Angeles Police Dept. v. United Reporting Pub. Corp.*, 120 S. Ct. 483 (1999) (Court reversed facial invalidation of the statute and did not reach the issue of whether the information constituted commercial speech); *see also Lanphere & Urbaniak v. State of Colorado*, 21 F.3d 1508, 1513 (10th Cir. 1994) (state statute restricting release, for commercial use, of criminal justice records containing personal information was subject to intermediate First Amendment scrutiny).

⁵⁹ Because the precise nature of Trans Union's lists was unclear, in an abundance of caution, the Commission formerly applied both the commercial speech and fully protected pure speech analysis when it first examined Trans Union's target marketing lists. *See In re: Trans Union*, 118 F.T.C. at 881-89. The Commission ruled that the FCRA did not violate the First Amendment under either standard. Our review of this matter is *de novo* and, based on our evaluation of a full record that was not previously before the Commission, we have determined that Trans Union's lists are not fully protected speech and thus we decline to apply strict constitutional scrutiny to the FCRA.

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concerns truthful, non-misleading factual information, we will focus our attention on the other three prongs of the *Central Hudson* test.

a. The Government Has a Substantial Interest in Protecting the Privacy of Consumers' Personal Credit Information

The FCRA and its legislative history indicate that the government's interest in restricting CRAs' dissemination of consumer reports is to protect consumers' privacy of their personal credit information. Congress expressly found that:

“[t]here is a need to insure that consumer reporting agencies exercise their grave responsibilities with fairness, impartiality, and a *respect for the consumer's right to privacy.*”

15 U.S.C. § 1681(a)(4)(emphasis added). Congress based this finding on the record at the time of the Act's genesis, which demonstrated significant concerns in the area of consumer privacy. The record included, for instance, both media accounts as well as examples cited by Columbia University Professor Alan Westin regarding CRAs' disclosure of personal information for non-credit related purposes. **(Reidenberg 961/22--963/19).**⁶⁰

⁶⁰ During his testimony at Congressional hearings on the bill that became the FCRA, Professor Westin provided various examples of non-credit grantors easily obtaining consumer credit files. These examples include Professor Westin's own success in securing, without any credit-related purpose, a co-worker's consumer report as well as the ability of police agencies and federal investigators to obtain and use consumer reports in connection with non-credit related investigations. *Fair Credit Reporting: Hearings on S. 823 Before the Subcomm. on Financial Institutions of the Senate Comm. on Banking and Currency*, 91st Cong. 73-97, pp. 92-93 (1969) (testimony of Alan Westin).

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Senator Proxmire, in introducing the original legislation, stated that his bill “seeks to prevent an undue invasion of the individual’s right to privacy in the collection and dissemination of credit information.”⁶¹ He also noted that “[t]he consumer has . . . a right to see that the information is kept confidential and . . . he has a right to be free from unwarranted invasions of his personal privacy. The Fair Credit Reporting Act seeks to secure these rights.”⁶² In light of these concerns, Congress drafted the Act to limit CRAs’ disclosure of credit reports to people with a “permissible purpose.”

Congressional interest in protecting consumers’ privacy is further illustrated by the 1996 amendments to the FCRA, in which Congress added to the permissible purposes of consumer reports

⁶¹ Statement of Senator Proxmire, Committee on Banking and Currency, Subcommittee on Financial Institutions, S. REP. No. 91-517 (November 5, 1969). Further, “[a] fourth problem is that the information in a person’s credit file is not always kept strictly confidential.” S. REP. No. 91-517, at 4 (1969).

⁶² *Fair Credit Reporting: Hearings on S. 823 Before the Subcomm. on Financial Institutions of the Senate Comm. on Banking and Currency*, 91st Cong. 2 (1969) (statement of Senator Proxmire). In addition to the interest in protecting the confidentiality and privacy of personal credit information, the FCRA’s legislative history also makes clear the importance - - to consumers and CRAs alike - - of the free flow of accurate and reliable consumer credit information between consumers and credit grantors. The Committee Report cites the “vital role” of CRAs in our economy and states that credit grantors have the right to the facts necessary to make sound decisions on whether to grant credit. S. REP. No. 91-517, at 2 (1969). The report also stresses that consumers have the right to correct erroneous information in their credit files. *Id.* Professor Westin also referenced the importance of accurate credit information, stating that CRAs exist to help credit grantors avoid loss through fraud or misuse of credit and to keep the costs of such losses from falling on the average consumer. *Fair Credit Reporting: Hearings on S. 823 Before the Subcomm. on Financial Institutions of the Senate Comm. on Banking and Currency*, 91st Cong. 73-97, p.91 (1969) (testimony of Alan Westin). Consumers benefit from strong credit markets, which in turn require accurate, current and reliable data.

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prescreening for certain defined firm offers of credit and insurance. The Committee Report to the amendments notes an effort “to balance any privacy concerns created by prescreening with the benefit of a firm offer of credit or insurance for all consumers who meet the criteria for the credit or insurance being offered.”⁶³ In striking this balance, however, Congress ensured significant privacy protections for consumers, requiring that they receive notice that their personal credit information is being used for such purposes, and that they have the right to “opt out” of such use. *See* 15 U.S.C. § § 1681b(c), (e) and 1681m(d)(1). *Trans Union’s* practices at issue here do not provide for such safeguards.

Courts have also recognized that privacy protection of credit-related data is among the important purposes of the FCRA. The court of appeals in this matter found that “a major purpose of the Act is the privacy of a consumer’s credit-related data.” *Trans Union*, 81 F.3d at 234. *See also St. Paul Guardian Ins. Co. v. Johnson*, 884 F.2d 881, 884 (5th Cir. 1989); *Zamora v. Valley Fed. Sav. & Loan Ass’n*, 811 F.2d 1368, 1370 (10th Cir. 1987); *Heath v. Credit Bureau of Sheridan Inc.*, 618 F.2d 693, 696 (10th Cir. 1980).

Although enacted congressional policy does not necessarily constitute substantial governmental interest for purposes of the *Central Hudson* analysis, *Greater New Orleans Broadcasting Ass’n, Inc. v. United States*, 119 S. Ct. 1923, 1932 (1999), we are satisfied that the interest here is sufficient. First, the FCRA’s legislative history is consistent with other congressional enactments related to personal privacy and the concerns raised by compilations of personal information in large databases. In *United States Dep’t of Justice v. Reporters Committee for Freedom of the Press*, 489 U.S. 749, 762-67 (1989), the Supreme Court reviewed in detail the terms and history of the Privacy Act, 5 U.S.C. § 552a, as well as the privacy exemptions of the Freedom of Information Act (“FOIA”), 5 U.S.C. § 552. The Court recognized, for

⁶³ Economic Growth and Regulatory Paperwork Reduction Act of 1995 (12/14/95), S. REP. No. 104-185, at 36 (1995).

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example, that “[t]he Privacy Act was passed largely out of concern over ‘the impact of computer data banks on individual privacy.’” *Id.* at 766 (quoting H.R. REP. No. 93-1416, at p. 7 (1974)). Additionally, the Court concluded that the essence of the “privacy” interest Congress sought to protect under the FOIA was the individual’s “control of information concerning his or her person,” by deciding for him or herself the “degree of dissemination” of personal information. *Id.* Such Congressional consistency supports our conclusion that the government’s interest is substantial.

Furthermore, case law indicates well-settled privacy interests in personal information generally,⁶⁴ and financial and credit information in particular. *See, e.g., Barry v. City of New York*, 712 F.2d 1554, 1561 (2d Cir.) (“[w]e recognize that public disclosure of financial information may be personally embarrassing and highly intrusive.”) *cert. denied*, 464 U.S. 1017 (1983); *Millstone*, 528 F.2d at 833 (recognizing, in a FCRA case, that the right to privacy is “a significant personal right”). *But see U.S. West, Inc. v. Federal Communication Commission*, 182 F.3d 1224, 1228 (10th Cir. 1999) (vacating a Federal Communication Commission (“FCC”) regulation on First Amendment grounds).⁶⁵

⁶⁴ *See Edenfield v. Fane*, 507 U.S. 761, 769 (1993) (for purposes of *Central Hudson* analysis, state has substantial interest in protecting privacy of potential clients of certified public accountants); *Whalen v. Roe*, 429 U.S. 589, 599 (1976) (although the Supreme Court upheld a statute authorizing New York state to record names and addresses of consumers receiving prescriptions for certain drugs, the Court acknowledged that individuals have a protectable “interest in avoiding disclosure of personal matters”).

⁶⁵ *U.S. West* involved review of an FCC regulation implementing a section of the Telecommunications Act of 1996. The petitioner argued that the regulation violated the First Amendment by restricting its ability to engage in commercial speech with its customers. A majority of the panel applied a *Central Hudson* analysis and expressed “reservations” about whether the FCC had “asserted a substantial state interest in protecting people from the disclosure of sensitive and potentially embarrassing personal information.” *U.S. West*, 182 F.3d at 1235-36. The majority’s skepticism was based upon its

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Trans Union argues that any privacy interest in the existence of a consumer's credit relationship is *de minimis* because only 1% of consumer files in CRONUS do not have a tradeline. **TUAB 39-40, 72. (Stockdale 906/1-8, 21-23, 904/15-18; CX-358-G)**. This argument is not compelling. First, the mere fact that 99% of the consumer records in CRONUS have at least one tradeline is not indicative of whether there is a privacy interest worthy of FCRA protection⁶⁶. Section 603(d) of the Act focuses on the nature of the information disclosed and not the amount of information worthy of protection. Second, Trans Union itself asserts that CRONUS data relate to a subset of people. The fact that this number is clearly less than the total number of adults in the United States, demonstrates just how effective tradeline information is in restricting to credit worthy individuals the pool of consumers eligible to be included in Trans Union's target marketing lists.

Also, we believe that Trans Union's argument ignores the full range of CRONUS information that Trans Union actually discloses or has disclosed about individuals. As discussed, Trans Union not only discloses information about the existence of a consumer's credit relationship, but also open dates, credit limits, number of tradelines, type of tradelines, among other information.

Finally, Trans Union asserts that consumers' routine disclosure of credit relationships, through the use of credit cards or mortgage applications that appear on the public record,

concern about the lack of evidence that carriers such as U.S. West would actually disclose the regulated information to outside parties and thereby breach consumers' privacy. The case before us is distinguishable from *U.S. West* as the facts here differ significantly. It is undisputed that Trans Union discloses consumer information to third party target marketers; indeed, the record demonstrates that Trans Union actively promotes the value of its lists to third party purchasers.

⁶⁶ Moreover, as a practical matter, *see supra* p. 24, Trans Union's customers do not purchase lists of people with one tradeline.

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demonstrates that consumers do not view credit relationships as private. **TUAB at 73**. The examples Trans Union cites, however, involve situations where the consumer knowingly relinquishes his or her privacy in return for a direct and known benefit that is also sought by the consumer. In those cases, the consumers were exercising their right to control the dissemination of their own personal information. *See Reporters Committee*, 489 U.S. at 763. By contrast, Trans Union's disclosure of consumers' personal credit information - - including the fact that a consumer has a recently used credit account that is not the subject of a credit dispute - - shares neither of these important attributes. In fact, such disclosures are made without the consumer's knowledge.

For all these reasons, we find that the government has a substantial interest in protecting the privacy of consumers' personal credit information, and we reject Trans Union's arguments to the contrary.

b. The Restriction Directly and Materially Advances the Government's Interest

The next question in the *Central Hudson* analysis is whether the FCRA's speech restriction directly and materially advances the government's interest. To meet this burden, the government may not rely on "mere speculation or conjecture" but must instead demonstrate that the restriction at issue will alleviate real harms to a "material degree." *Edenfield*, 507 U.S. at 770-71. The Supreme Court has struck down regulations of commercial speech where the government failed to offer sufficient evidence that the restriction at issue would advance its interests. *See 44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 505 (1996) (no "findings of fact, or indeed any evidentiary support whatsoever"); *Edenfield*, 507 U.S. at 771 (no studies or anecdotal evidence presented); *see also Rubin*, 514 U.S. at 490 (1994) (government submits only "anecdotal evidence and educated guesses"); *cf. Edge Broadcasting*, 509 U.S. at 434 (upholding federal ban on lottery

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advertising based solely on “common sense judgment” that the ban would advance governmental interest in supporting the state’s anti-gambling policies).

We rely upon substantial record evidence rather than mere conjecture or speculation to conclude that the FCRA, by limiting CRAs’ disclosure of personal credit information, directly and materially advances the substantial government interest in protecting the privacy of personal credit information. Indeed, it is almost tautological - - because the unauthorized disclosure of personal credit information causes the privacy harm, restricting the unauthorized disclosure of the information directly limits the infringement on privacy.

In attacking the FCRA, Trans Union argues that the statute is underinclusive because it elsewhere allows practices that undermine the consumer privacy interest in the information that Trans Union’s target marketing lists communicate⁶⁷. **TUAB at 76-82**. The court of appeals expressed an underinclusiveness concern as well, remarking on the apparent freedom of Trans Union’s non-CRA competitors to gather and distribute the same information that Trans Union discloses in its marketing list business⁶⁸.

⁶⁷ Trans Union cites *United Reporting*, 146 F.3d at 1135, as an example of a statute struck down on First Amendment grounds. As noted, *supra* n.58, the Supreme Court recently reversed this decision. Furthermore, the FCRA is factually different. The statute at issue in *United Reporting* prohibited the release of arrest information for commercial purposes, but permitted it for “journalistic, scholarly, political, governmental, or investigative purposes.” Prior to reversal, the Ninth Circuit had found that the governmental interest in protecting the privacy of arrestees was substantial but that the exceptions to the statute - - which include the right to broadly publish this information - - precluded it from advancing the privacy interest in a direct and material way. Unlike the regulation at issue in *United Reporting*, however, in this case none of the FCRA’s permissible purposes allows broad public disclosure of consumer report information.

⁶⁸ In particular, the court criticized the position that Trans Union could “separately obtain” and distribute consumer information - - *i.e.*, gather the information at issue from sources other than its credit reporting database - - without violating the FCRA. Such a requirement, the court suggested, would

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As a general rule, however, a regulation's underinclusiveness is fatal only where it is material, substantial or significant. *Bad Frog Brewery v. New York State Liquor Auth.*, 134 F.3d 87, 98-99 (2d Cir. 1998). The Supreme Court has offered the following guidance:

“Nor do we require that the Government make progress on every front before it can make progress on any front . . . [T]he Government may be said to advance its purpose by substantially reducing [the proscribed conduct], even where it is not wholly eradicated.”

Edge Broadcasting, 509 U.S. at 434; *See also R.A.V.*, 505 U.S. at 387, *Moser v. F.C.C.*, 46 F.3d 970, 974 (9th Cir. 1995). Based on the full record developed on remand from the court of appeals, as well as the above-cited cases, we conclude that the FCRA's restrictions are not materially, substantially, or significantly underinclusive. Instead, we find that any disparity between Trans Union and its non-CRA competitors is reasonable given Trans Union's position as a CRA and the nature of the information it discloses in its target marketing products. In addition, neither the disclosure of information by credit grantors, nor the practice of prescreening, significantly undermines the Act's protection of privacy. Furthermore, the FCRA's restrictions on the dissemination of private, credit-related information are not, in

result in a waste of time and resources. Although it did not rule on the issue, the court indicated that the “disparity” between Trans Union (as a CRA) and its competitors raised constitutional concerns. *Trans Union*, 81 F. 3d at 235. The court of appeals' concern presupposed that Trans Union, wholly independent of its status as a CRA, could gather for target marketing purposes the same type of rich consumer information that it gathers by way of its consumer reporting business. As explained *infra*, the record now before us clearly establishes that this is not the case; rather, the high quality and comprehensiveness of the underlying data in Trans Union's target marketing products stem from its special position as a CRA.

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fact, restricted to CRAs. Section 1681e(e) imposes restrictions on the resale by a CRA's customer of a credit report that are similar to the restrictions on the CRA itself. Therefore, the FCRA does substantially reduce the harm to consumers of intrusion on the privacy of their personal credit information.

(i) The FCRA Regulates the Activities of Trans Union and Other CRAs Because They Have Access to Vastly Superior Information

The fact that the FCRA applies to CRAs, but not to other target marketing or data compilation companies, does not render the Act constitutionally infirm. As the record in this case demonstrates, CRAs are able to quickly obtain a broad array of current, accurate, detailed and highly personal credit information about consumers. Balancing this unique ability with safeguards against abuses, the FCRA requires that CRAs disclose such information only to persons with a permissible purpose as set forth in Section 604 of the Act. A comparison of Trans Union's operations to those of its non-CRA competitors demonstrates that Congress acted properly in treating CRAs differently than other information gatherers.

Trans Union's primary non-CRA competitors are Polk, Metromail, First Data, and ACXION. These companies obtain most of their data from state departments of motor vehicles ("DMVs"), census data, telephone directory white pages, county registrar and tax assessor records, self-reported surveys, and product registration or warranty cards. Polk, First Data, and Metromail's lists are compiled from two primary sources - - DMV data and white pages. **(Cleary 3085/9-20, 3114/6-19; TU-119-3; Litz 2969/16--2970/4; TU-115-p.158; Nusbaum 2880/8-12).**

As a CRA, Trans Union's data sources are far superior and, as a result, the information it obtains through its credit reporting business has considerable advantages over the information of its non-CRA competitors. The quality of Trans Union's data is superior in terms of detail and accuracy as well as availability and comprehensiveness. Credit grantors and other information

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providers are responsible for providing CRAs with accurate, complete and up-to-date information and/or providing supplemental information to correct errors⁶⁹. Because Trans Union obtains its information from third parties, its information is also less biased and thus more reliable than the self-reported information many non-CRA information brokers receive. Trans Union's own credit scoring witness testified that data from CRAs are objective and better predictors of future credit performance than information provided by a consumer filling out an application. (**Coffman 3806/2-14, 3857/24--3858/4, 3858/17--3859/3; CX-122-P**)⁷⁰. Finally, because Trans Union's information is reported and updated on an ongoing basis,⁷¹ it is far more current than reports by, for example, census bureaus and state DMVs.

By virtue of its status as a CRA, Trans Union also has the advantage of being able to provide an instant compilation of nearly all relevant information. Moreover, some of the more specialized information that Trans Union has access to and discloses in target marketing lists simply may not be available to other information brokers. Examples include the existence of 30/60/90 day finance trade; an upscale retail card; a student loan; a premium bank card; and the open dates of bank cards. (*See e.g.*, **TU-130-4; CCPF at 76; TU-117-2; TU-120-2; Schulte 3928/2-4; CX-310-D**). Although other types of information that Trans

⁶⁹ Section 623 of the FCRA, 15 U.S.C. § 1681s-2.

⁷⁰ Trans Union's competitors' modeled products are not as "predictive" as Trans Union's own CRONUS-derived products. (**Hinman 2270/13--2271/11**).

⁷¹ Trans Union receives information regarding 1.8 billion tradelines per month. (**Stockdale 908/1-19**). Some customers report information on a daily basis to TU; the majority report on a monthly basis or according to their billing cycles. (**Stockdale 904/8-14; Frank CX-186 at 19/3-7**).

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Union discloses may be separately available from a range of sources, only CRAs have instant access to them all.

Recent legislation and case law have recognized and, indeed, expanded the disparity between Trans Union and its non-CRA competitors. As noted, Polk, Donnelly, and First Data use DMV data as a primary source of information and First Data also offers automobile data from state DMVs. However, the 1994 enactment of the Federal Drivers Privacy Protection Act (“DPPA”), 18 U.S.C. § 2721, generally restricts state DMVs from disclosing, without the licensee’s permission, personal identifying information contained in state DMV records. Reversing the holding of the U.S. Court of Appeals for the Fourth Circuit, the Supreme Court in *Reno v. Condon*, 2000 WL 16317 (January 12, 2000), unanimously upheld the constitutionality of the DPPA. Thus, there is no question that the DPPA drastically limits the personal data that these information brokers can obtain⁷². Moreover, the DPPA aside, information brokers have never been able to obtain driver data on a nationwide basis. By contrast, Trans Union’s coverage provides continual access to current information on consumers’ auto loans in all 50 states.⁷³

Trans Union enjoys profound advantages with respect to other types of data as well. For instance, information brokers obtain consumer mortgage information from county records. (**Litz 2972/6-9, 2975/5--2976/7; M. Smith 3373/18-23, 3390/18--3392/9; Nusbaum 2889/1-8, 2914/22--2915/3, 2933/22--2934/15;**

⁷² The Court’s holding in *Condon v. Reno*, that Congress may regulate the sale or release of personal identifying information, implicitly supports the notion that individuals have a right to personal data privacy. The same notion is presented here through our determination that the government, through the FCRA, has a substantial interest in protecting the privacy of consumers’ personal credit information. *See supra* pp. 37-41.

⁷³ Trans Union understands its superiority as a source for consumer automobile data and has used this fact as a selling point. One of Trans Union’s promotional letters notes that its coverage for automobile loan information encompasses all states and is not limited by the commercial restrictions that some states have imposed upon access to similar information. (**CX-66-A**).

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Cleary 3099/16-23; Hinman 2250/5-14). Such information gathering can be quite burdensome; in Texas alone, for example, information brokers may need to consult over 240 counties to fully cover the state's mortgages⁷⁴. Trans Union has the advantage of having national coverage of this information through its single database. This allows Trans Union to offer more current mortgage information than the public record information non-CRAs sell. It was therefore not surprising when Polk's Vice President for Operational Planning & Analysis conceded that Polk's consumer model assigns greater reliability weight to mortgage data coming from Trans Union, as compared to the data coming from county records. **(Nusbaum 2888/2--2890/13, 2927/6-2928/11)**.⁷⁵

Another source of information for Trans Union's non-CRA information broker competitors is from consumer surveys and warranty cards where consumers are obviously under no duty to provide accurate or complete information. As a CRA, however, Trans Union must "assure maximum possible accuracy" of all the information it gathers and disseminates. Section 607(b), 15 U.S.C. § 1681e(b). Trans Union has stated that self-reported data are "inevitably biased" **(CX-115-Z-6)** and has promoted its Master File as a unique source for individual-level *observed* behavior data - - "without equal" that is "*based on actual behavior - - not self-reported or neighborhood values.*" (emphasis added) **(CX-**

⁷⁴ Mr. Kenneth Scott, witness for Trans Union, described the difficulty in obtaining such data, noting that information brokers send their employees with laptop computers to county courthouses to input public data and modem it to the front office. **(Scott 2659/10-14)**.

⁷⁵ Even the legislative history reveals a concern that public information may not be as current as consumer reporting information. "Unfortunately, the [public record] information cannot always be kept up to date either because it is costly or because the correct information is simply not available." Report of the Committee on Banking and Currency, S. REP. 91-517, at 4 (1969).

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83-C)⁷⁶. Consumer surveys and warranty cards are also weak with respect to coverage. The record shows that 20-40 million consumers respond to surveys or provide warranty cards. (**Nusbaum 2879/6-23; Cleary 3088/20--3089/6**). By contrast, Trans Union provides information on over 140 million people. Additionally, several information brokers use census data to estimate income. (**CX-119-Z-7; Cleary 3123**). These data are significantly less timely because they are only reported every ten years whereas Trans Union's income estimator, TIE, is updated every 7 days. (**Wiermanski 1723/10-24; CX-120-B**).

In light of the full record here, we find that Trans Union's status as a CRA allows it to collect a much wider array of consumer information that is richer, more detailed and more current than the information available to its non-CRA competitors. Trans Union could not obtain the same type and quality of information outside the scope of its consumer reporting business. Accordingly, we are not persuaded that the FCRA is unconstitutionally underinclusive because it treats CRAs and non-CRAs differently.⁷⁷

Our conclusion is consistent with relevant case law. The Supreme Court has recognized the special threats to privacy that *compilations* of information pose, even though each constituent bit of information may be publicly available elsewhere. In *D.O.J.*

⁷⁶ Elizabeth Dixon, Account Manager at Performance Data, and Patricia Porretto, Senior Account Executive at Performance Data, testified to the fact that the non-self-reported aspect of the Master File is a distinct advantage over other target marketers. (**Dixon 292/16--293/4; Porretto 1621/16-20**).

⁷⁷ Trans Union also differs from other CRAs in terms of the type of information it discloses. Although Experian and Equifax disclose credit information to target marketers - - either directly or through third parties - - they do so only on an aggregated, zip-plus-four basis. Such aggregated credit information relates to the *typical* consumer in a geographic area. By contrast, Trans Union's information concerns specific, identifiable individuals. Thus, it intrudes more acutely on individuals' privacy. In any event, the lawfulness of zip-plus-four aggregation is not an issue in this proceeding and we decline to rule on it here.

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v. Reporters Comm. for Freedom of the Press, 489 U.S. 749 (1989), the court considered whether a privacy-related Freedom of Information Act exemption applied to a request for a “rap sheet” (a compiled database of publicly available information “bits”). The Court found:

[T]he issue here is whether the compilation of otherwise hard-to-obtain information alters the privacy interest implicated by disclosure of that information. Plainly there is a vast difference between the public records that might be found after a diligent search of courthouse files, county archives, and local police stations throughout the country and a computerized summary located in a single clearinghouse of information.

Id. at 764. The Court acknowledged the “. . . power of compilations to affect personal privacy that outstrips the combined power of the bits of information contained within.”⁷⁸ *Id.* at 765.

(ii) Credit Grantors Do Not Disclose the Same Information As CRAs

To further support its underinclusiveness argument, Trans Union points to the “transactions or experiences” exception in Section 603(d)(2)(A)(i) and asserts that this provision undermines

⁷⁸ Trans Union argues that its witness, Kenneth Scott, testified that all of the selects available from Trans Union were also available from others in the marketplace. (**Scott 2711--2730**). We are unpersuaded. In reaching his conclusion, we find that Mr. Scott performed only a superficial analysis. Mr. Scott examined only what is currently available - - not Trans Union's past practices. Importantly, Mr. Scott did not examine the difference in the source of the information for each select. Thus, he did not take into account that Trans Union, using CRONUS as its primary source of information, uniquely and instantly has a full range of richer and more comprehensive information available to it.

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privacy protection under the Act because it allows credit grantors to disclose, for target marketing purposes, substantial information about their own customers⁷⁹. We disagree. Trans Union introduced evidence demonstrating that Wachovia, First Card, Discover, First USA Bank, and American Express provide credit information on their credit card customers for target marketing. **(Eulie 2376-78, 2381; Koppin 588-589; Stormoen 3165-66; Scott 2614-2622, 2628-2630)**. The information available to a single credit grantor, however, is far more limited than Trans Union's CRONUS database, which compiles information from hundreds of creditors. Also, the record shows that credit grantors generally do not disclose particulars about credit accounts beyond the name and address of account holders. They do not, for example, disclose open dates or credit limits. **(Pendleton 405/15-406/3; Koppin 588/6-589/6, 596/24-597/18; Stormoen 3165/3-3168/4; Eulie 2376/7-2377/23, 2380/4-10)**. Further, the ability of creditors and other merchants to collect customer information and disclose it may be limited by state law. New Jersey, Pennsylvania and Massachusetts, for example, prohibit merchants from *collecting* personal identification information that is not required for the transaction⁸⁰. Other states prohibit the *disclosure* of information by merchants and financial institutions⁸¹. Because it is a CRA, Trans Union is not subject to these restrictions.

⁷⁹ Under this provision, information related solely "to transactions or experiences between the consumer and the person making the report" is not a consumer report. Section 603(d)(2)(A)(i) of the FCRA, 15 U.S.C. § 1681a.

⁸⁰ See, N.J. STAT. ANN. § 56:11-17; PA. STAT. ANN. tit. 69, § 2602; MASS. ANN. LAWS ch. 93, § 105.

⁸¹ California and Virginia prohibit credit card issuers and merchants respectively from selling personal information to third parties without notifying the individual and providing him/her with the ability to opt out; New Jersey prohibits the disclosure of electronic fund transfer transactions for marketing purposes without consent. See CAL. CIV. CODE § 1748.12; N.J. STAT. ANN. § 17:16K-3; VA. CODE ANN. § 59.1-442. Connecticut prohibits financial institutions from selling the names of card holders or disclosing financial records without written consent. See CONN. GEN. STAT. Ann. § 42-133gg; CONN. GEN. STAT. § 36a-42 (1997).

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Trans Union also cites the National Marketing File (“NMF”) created by Business Development Inc. - - a target marketing list provider - - as additional evidence that the FCRA’s “credit grantor” exception can be used to intrude upon a consumer’s financial privacy. This argument fails because NMF information is far less complete, detailed or timely than the data in CRONUS.⁸²

Similarly, the existence of cooperatives that share data and reveal consumer credit information also fails to support Trans Union’s underinclusiveness argument. One such cooperative, Abacus, collects information regarding consumers’ mail order buying behavior from 700 catalogers and shares the information among its members. Abacus discloses how many credit transactions a consumer has had over his/her lifetime, how much money a consumer has spent using credit cards over the last 12 months, and other information about a person’s history of buying by credit card. (TU-206). Like NMF’s information, however, this type of data also does not share the same level of

⁸² The NMF discloses two types of information in two “fields”: (1) a counter field that shows the number of credit cards a consumer has up to nine, and (2) a bank card field that indicates whether there is one bank card or not. (Schultea 3911/3-3913/7, 3943/6-23). The NMF is not kept current and a record is deleted only when the person moves or dies. (Schultea 3912/4-12, 3918/24-3919/7, 3920/2-11). The NMF does not reveal whether the person has obtained or used credit within a specified time period; instead, it reveals only whether a consumer has *ever* had a bank card and how many, up to nine, accounts the consumer has *ever* had. Mr. Schultea, President of Business Development, testified that in all likelihood, the NMF contains references to credit card accounts that have been closed and/or are currently inactive. (Schultea 3922/3-14). The NMF also does not indicate open dates of any of the accounts, or the type of credit a consumer has obtained (other than the existence of a bank card). (TU-130 p. 4; TU-117 p. 2; TU-120 p. 2; Schultea 3928/2-4; CX-310-D). Finally, as for coverage, the information in the NMF comes from only 20-25 retail companies and bank clients with credit card customers. (Schultea 3915/2-3916/21).

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comprehensiveness as the Trans Union information. Moreover, several of the state laws previously described may limit the disclosure of personal credit information to such cooperatives.⁸³

(iii) Prescreening

Finally, Trans Union argues that the FCRA is underinclusive because the Act, as amended in 1996, allows the practice of prescreening for so-called “firm offers” of credit and insurance. We find that Congress’ decision to allow prescreening does not constitutionally undermine the FCRA. Any privacy intrusions that result from prescreening are significantly less harmful than the privacy intrusion at issue in Trans Union’s target marketing business. In prescreening, the types of consumer report information that can be used are restricted - - Section 604(c)(2) - - and prescreening itself may provide a concrete benefit to consumers, *i.e.*, a “firm offer of credit,” that they might not otherwise have. Equally important is the FCRA’s requirement that those seeking to use the prescreening mechanisms notify consumers that they may opt-out of future, prescreened solicitations. 15 U.S.C. §§ 1681b(c) and 1681m(d).

While a central concern of legislators at the time the FCRA was enacted was to protect the privacy of consumers’ personal credit information, a related concern was to limit the disclosure of consumers’ credit information. This latter concern and the means to address it were raised throughout the 1969 legislative hearings.

⁸³ We understand that substantial development of broad-based information-sharing agreements, in the presence of an ever-growing electronic information-handling medium, may advance the quality of information that such cooperatives offer. It is possible that over time, the disparity between CRAs and non-CRAs may narrow. If so, Congress may find it appropriate to respond to new threats to financial privacy with new legislation as they arise. *Cf.* Gramm-Leach-Bliley Act of 1999, Pub. L. 106-102 (limiting, *inter alia*, disclosure of nonpublic personal information to nonaffiliates). But that does not change the legal obligations the Act imposes upon CRAs like Trans Union as a result of their unique status and the benefits they receive. At this time, the range and detail of information provided by CRAs far surpasses that of other information brokers and supports the legislative scheme.

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Senator Proxmire, in introducing the original legislation, noted that “[t]he consumer has . . . a right to see that the information [is] . . . used for the purposes for which it is collected . . .”⁸⁴ Professor Alan Westin also testified that “[t]he central issue of privacy is the release of personal credit information to other than credit grantors.”⁸⁵ Even a representative from the credit reporting industry testified that information gathered specifically for credit-granting purposes should not be made available for other purposes.⁸⁶

Congress’s approach to prescreening, in particular its requirement of notice and opt out rights for the consumer, is consistent with the twin goals of protecting the privacy of consumers’ personal credit information and ensuring that consumer credit information not be used for inappropriate purposes. Permitting the disclosure of certain consumer credit information for prescreening, as tailored by statutory limitations, does not undermine the FCRA.

⁸⁴ Statement of Senator Proxmire, *Fair Credit Reporting: Hearings on S. 823 Before the Subcomm. on Financial Institutions of the Senate Comm. on Banking and Currency*, 91st Cong. 92 (1969). He also stated that “[a] second aspect to the problem of confidentiality is the use of information inconsistent with the purposes indicated when the information was collected.” 115 CONG. REC. S2340, 2410-16 (1969).

⁸⁵ *Fair Credit Reporting: Hearings on S. 823 Before the Subcomm. on Financial Institutions of the Senate Comm. on Banking and Currency*, 91st Cong. 73-97, at 92 (1969) (testimony of Alan Westin).

⁸⁶ *Fair Credit Reporting: Hearings on S. 823 Before the Subcomm. on Financial Institutions of the Senate Comm. on Banking and Currency*, 91st Cong. 224, 228 (1969) (statement of Harry C. Jordan, Chairman of the Board, Credit Data Corp., “[Credit Data’s] rules can be stated as follows: . . . Credit information is available to credit grantors only for credit purposes. . . . Credit Data, as a matter of policy sells information only to credit grantors.”).

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Consequently we find that the FCRA is not underinclusive. Congress recognized that CRAs like Trans Union, *by virtue of their credit reporting business*, are uniquely positioned to obtain the most up to date, detailed and comprehensive set of personal credit information on an individual, observed basis. Mishandling such information poses a special threat to consumer privacy. Therefore, by limiting the disclosure of this information, the FCRA directly and materially advances the government's interest in protecting the privacy of personal credit-related information. To find otherwise would allow Trans Union to have it both ways - - *i.e.*, to enjoy unique access to the widest array of the best consumer credit information available, without following the restrictions Congress imposed in order to protect consumer privacy. Further, the fact that the FCRA allows credit grantors to disclose limited information and permits prescreening does not make the Act underinclusive.

c. The Restriction Is Narrowly Tailored

The final prong of the *Central Hudson* test requires a reasonable fit between the goals of the statute and the statute itself. The proper fit "is not necessarily perfect, but reasonable"; it must "represent[] not necessarily the single best disposition but one whose scope is 'in proportion to the interest served.'" *Board of Trustees of the State University of New York v. Fox*, 492 U.S. 469, 480 (1989). With these words in mind, it is appropriate to consider whether there are alternative means of accomplishing the government's stated interest with a lesser intrusion into speech. In doing so, we recognize that a commercial speech restriction may be unconstitutional if there is a "far less restrictive" alternative. *Pearson v. Shalala*, 164 F.3d 650, 658 (D.C. Cir. 1999).

We believe that the FCRA's restriction on the disclosure of consumer reports, including Trans Union's target marketing lists, is narrowly tailored to protect the privacy of consumers' personal credit and other financial information. Moreover, we do not believe that alternative restrictions proposed by Trans Union are "far less restrictive," nor would they afford sufficient privacy protection.

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Congress established a three-tiered system for disclosure and privacy protection:⁸⁷

- No Consumer Permission Required. Where a consumer has initiated a transaction involving credit, employment, or insurance, for example, CRAs may provide a consumer report for purposes of that specific transaction without the consumer's permission.
- Notice and Opt Out. Where a consumer has not initiated such a transaction, but where a creditor or insurance company seeks to make a "firm offer of credit or insurance" (*i.e.*, prescreening), a CRA may provide certain consumer report information as long as the consumer is provided notice that his or her name was provided by a CRA and the opportunity to opt out of appearing on such lists in the future, *i.e.*, notice and opt out rights.
- Opt In. Where a consumer has not initiated a transaction, and where the purpose of the credit report is not for a permissible purpose under the Act, a consumer report may only be disclosed with a consumer's express consent, *i.e.*, an "opt in" system.

This three-tier scheme is sufficiently tailored to achieve Congress's goal. Congress's determination that consumers would not be adequately protected from privacy intrusions by target marketers through a "notice and opt out" system is reasonable.

⁸⁷ Congress has used a "tiered" privacy-protecting approach in other areas as well. In the Cable Communications Policy Act of 1984, 47 U.S.C. § 551, the Electronic Communications Privacy Act of 1986, 47 U.S.C. § 222(c), and the Video Privacy Protection Act of 1988, 18 U.S.C. § 2710, Congress afforded different levels of privacy protection - - from disclosure without consumer's permission, to notice and opt out, to opt in - - as the uses of such information become less related to the purposes for which the information was collected.

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Specifically, Congress's decision to favor the more privacy protective "opt in" is a sound system in light of documented problems of credit reports being widely disclosed for purposes unrelated to credit.

Trans Union contends that a simple opt out procedure would adequately protect consumer privacy without compromising Trans Union's speech. **TUAB at 82--85**. However, this proposal is untenable and is based upon a misstatement of the Equifax/Harris findings. According to Trans Union, the 1996 Equifax/Harris survey revealed that 80% of consumers surveyed who object to the use of credit reporting information, change their minds when they are told of the right to opt out. **(TU-88; Beales 3656--3665)**. Those survey findings, however, examined consumer attitudes about the use of credit reporting information *to provide pre-approved offers of automobile insurance or life insurance*. The survey did *not* examine consumer attitudes toward the use of such information for target marketing (at issue here).⁸⁸

Additionally, to the extent that Trans Union contends that opt out rights alone would adequately protect consumers in the target marketing context, Trans Union ignores the fact that, in the prescreening context, Congress authorized a *notice* and opt out system. The notice segment of the system is essential because it

⁸⁸ Survey evidence introduced by Complaint Counsel indicates that consumers view credit relationships as private and that they experience a privacy invasion from the disclosure of the existence of types of credit accounts. **(See CX-274; Mazis 1109/20-25)**. The survey, conducted by Dr. Michael Mazis, assessed the attitudes of 1,002 consumers regarding the use of information derived from CRONUS and from credit reports to compile marketing lists. **(Mazis 1080/10-18; CX-354-A; Waldeck 1060/12-16)**. A total of 68.1% of the respondents found the use of credit report information for the compilation of marketing lists to be unacceptable. **(Mazis 1105/13-20; CX-354-B)**. Based on these results, Complaint Counsel's expert opined that consumers have a strong privacy interest in the use of information from their credit reports. **(Mazis 1107/23-25)**.

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provides consumers the information to allow them to exercise opt out rights⁸⁹.

Further, Trans Union argues that S. 650, 104th Cong. (1995) (a bill that was not enacted) could serve as a less restrictive alternative to the FCRA. **(TU-214)**. Before a less restrictive alternative can be considered, however, it is necessary to determine whether the alternate approach furthers the government's interest to the same extent as the FCRA. Because S. 650 would have provided considerably less data privacy,⁹⁰ we cannot conclude that Congress acted unreasonably or disproportionately in the balance it struck between consumer privacy and commercial speech. Accordingly, the question of whether S. 650 would have had less of an impact on speech than the FCRA is irrelevant.

Based on this analysis, it is evident that the FCRA's restriction on Trans Union's target marketing lists is sufficiently narrowly tailored to achieve the goal of protecting the privacy of consumers' personal credit information. We therefore conclude

⁸⁹ Indeed, although the Direct Marketing Association offers consumers the right to opt out of appearing on its members' marketing lists, most consumers are unaware that they can opt out of such lists. **(Beales 3669/13--3670/10; Westin 3639/8-19; TU-88-2-58)**. It is also significant that, when faced with a question at oral argument about whether Trans Union would agree to a *notice* and opt out system in the target marketing area, counsel for Trans Union evinced a strong reluctance to do so unless non-CRA competitors were similarly asked to abide by a notice and opt out system. **(Oral Arg. 54/3-7)**. Trans Union's pursuit of equal treatment vis-a-vis non-CRA competitors is again based on its failure to recognize the special privacy concerns that CRAs' databases create.

⁹⁰ S. 650 would have permitted CRAs to sell target marketing lists that disclosed a wide variety of information, including information that is used in credit eligibility decisions and that bears on consumers' credit worthiness, such as number of tradelines, open dates of loans, and types of tradelines.

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that the provisions of the FCRA at issue here do not violate the First Amendment.

B. The FCRA Is Not “Void for Vagueness” Under the Fifth Amendment Due Process Clause

As a final argument, Trans Union claims that the FCRA is unconstitutional because the term “eligibility for credit” is too vague a concept under the Fifth Amendment. As previously discussed, the definition of consumer report in the FCRA is designed to protect personal credit-related information that is “used, expected to be used, or collected in whole or in part for the purpose of serving as a factor in establishing the consumer’s eligibility for credit.” 15 U.S.C. § 1681a. Trans Union argues that defining consumer reports based on the ultimate purpose to which information is put makes it impossible to know what information is covered and what is not. In this case, we disagree for the following reasons.

A statute is void for vagueness if its prohibitions are not clearly defined so as (1) to give regulated parties adequate notice and (2) to prohibit arbitrary and discriminatory law enforcement. *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972); *United States v. Thomas*, 864 F.2d 188, 194 (D.C. Cir. 1988). The level of vagueness that the Constitution will tolerate depends upon the type of regulation at issue.

Thus, economic regulation is subject to a less strict vagueness test because its subject matter is often more narrow, and because businesses, which face economic demands to plan behavior carefully, can be expected to consult relevant legislation in advance of action. Indeed, the regulated enterprise may have the ability to clarify the meaning of the regulation by its own inquiry, or by resort to an administrative process. The Court has also expressed greater tolerance of enactments with civil rather than criminal penalties because the consequences of imprecision are qualitatively less severe. And the Court has recognized that a scienter requirement may mitigate a

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law's vagueness, especially with respect to the adequacy of notice to the complainant that his conduct is proscribed.

Finally, perhaps the most important factor affecting the clarity that the Constitution demands of a law is whether it threatens to inhibit the exercise of constitutionally protected rights. If, for example, the law interfered with the right of free speech or of association, a more stringent vagueness test should apply.

Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc., 455 U.S. 489, 498-499 (1982).⁹¹

⁹¹ Trans Union contends that the level of scrutiny should be especially demanding because the FCRA is a content-based (as opposed to content-neutral) regulation of speech. We disagree. Stringent scrutiny of a content-based regulation, assuming this is a content-based regulation, is necessary only where the regulation will impose an "obvious chilling effect on free speech." See *Reno v. ACLU*, 521 U.S. 844, 871-72 (1997). Here, any "chilling" impact of the regulation is mitigated by the fact that the regulation is a civil regulation, and it affects the conduct of sophisticated businesses who have a substantial incentive, and the ability, to determine the reach of the statute. Indeed, the D.C. Circuit has indicated that in the context of an administratively enforced regulation of commercial speech, all the Fifth Amendment requires is that "it must be possible for the regulated class to perceive the principles which are guiding agency action." *Pearson*, 164 F.3d at 661. An agency can meet this requirement by "case by case" adjudication rather than through "a comprehensive definition all at once." *Id.* That standard is met here.

Trans Union also claims that stricter scrutiny is appropriate because Section 620 of the FCRA provides criminal sanctions in certain situations. However, this action is civil (indeed, the Commission lacks the authority to enforce the criminal provision of the FCRA) and the only issue here is whether the FCRA is sufficiently precise to support the Commission's civil enforcement action, not whether the FCRA would be unduly vague when enforced criminally. Nonetheless, even if judged as a criminal statute, the scienter requirement - - Section 620 covers a "knowing" or "willing" unauthorized disclosure - - "may mitigate a law's vagueness, especially with respect to the adequacy of notice to the complainant that his conduct is proscribed." *Hoffman Estates*, 455 U.S. at 499.

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Based on this guidance and the facts contained in the record, we conclude that the term “eligibility for credit” in the FCRA’s definition of a “consumer report” is not too vague to provide adequate notice to Trans Union of the conduct proscribed under the FCRA. We also believe that the term is sufficiently clear to prevent arbitrary and discriminatory enforcement. This is true even though the Act has some impact upon Trans Union’s First Amendment right to freedom of expression.

The record here amply demonstrates that information that indicates the existence of credit relationships, and other information about such credit relationships, is information that is used and expected to be used in establishing a consumer’s eligibility for credit. We therefore disagree with Trans Union’s contention that linking the information protected by the Act to the purpose for which the information is used is impermissibly vague. Our conclusion is buttressed by the Supreme Court’s instruction to examine whether the meaning of a regulation is clear from an industry member’s vantage point. *Hoffman Estates*, 455 U.S. at 501 n.18. Trans Union is a CRA that assists in the development of credit scoring models and has a substantial prescreening business. *See* discussion *supra* pp. 4 and 17-18. Its business also requires that it know what information is used in establishing a consumer’s credit eligibility. Accordingly, Trans Union cannot credibly argue that it had insufficient notice as to the information that falls under the consumer report definition. Indeed, Trans Union is statutorily obligated to know how its information is used. *See* Sections 604(a) and 607 of FCRA. We can also infer knowledge through Trans Union’s termination of many of the practices now challenged by the Commission, following the statutory amendments making clear that such conduct could lead to monetary penalties. *See* discussion *supra* p. 11.

Finally, Trans Union asserts that it is uncertain whether it can disclose certain information - - including name, address, social security number, and credit performance data - - on a zip-plus-four basis. Trans Union asserts that this uncertainty renders the FCRA unconstitutionally vague. We disagree because any

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question pertaining to the disclosure of these particular pieces of information is irrelevant to Trans Union's use of core consumer information which is of concern in this case. Moreover, any claim of "vagueness" is without merit as the Commission has never condoned the disclosure of credit performance information aggregated on a zip-plus four basis and pursuant to *Pearson*, we need not address this issue here where the question is not before us.⁹²

Accordingly, we conclude that the definition of "consumer report," including the term "eligibility," under Section 603(d) of the FCRA gives regulated parties like Trans Union adequate notice of what conduct is proscribed and is sufficiently clear to avoid risk of discriminatory enforcement⁹³. For these reasons, the FCRA is not unconstitutionally vague.

⁹² Trans Union asserts that this case is analogous to the recent Supreme Court case *Reno v. A.C.L.U.*, 521 U.S. 844, which struck down portions of the Communications Decency Act ("CDA"). The regulation in *Reno* defined prohibited speech "by contemporary community standards" and the Court held the speech restriction unconstitutional. *Id.* Here, Trans Union argues that the Commission's application of the FCRA is similarly dependent upon the views of the community receiving the message, implying that the FCRA is also constitutionally flawed. This analogy fails for several reasons. First, the *Reno* Court expressly declined to make any finding of constitutionality under the Fifth Amendment's void for vagueness doctrine, deciding the case on First Amendment grounds only. *Id.* at 864. Second, *Reno* involved a criminal statute and a complete ban on pure speech and therefore was evaluated under a stricter standard. Third, applying the definition of "consumer report" and the term "eligibility for credit" in this case does not depend on the *views* of the "community" recipients of the information. It depends on the *use* to which such recipients put the information, a use which Trans Union could easily ascertain. Finally, Trans Union's liability is also based in part on our finding that Trans Union provided information that it *expected* to be used in credit granting decisions. See discussion *supra* p. 33.

⁹³ See *Grayned*, 408 U.S. at 114 ("As always, enforcement requires the exercise of some degree of police judgment, but, as confined, that degree of judgment here is permissible.").

Final Order

VII. CONCLUSION

Based on the foregoing, as well as the thorough and substantial record in this case, we find that Trans Union violated Sections 604 and 607(a) of the FCRA because its target marketing lists are “consumer reports” that were disclosed without a “permissible purpose.” We also find that the FCRA, as applied in this case, passes constitutional muster.

FINAL ORDER

This matter has been heard by the Commission upon the appeal of respondent Trans Union Corporation from the Initial Decision and Order on remand, and upon briefs and oral argument in support of and in opposition to the appeal. For the reasons stated in the accompanying Opinion, the Commission has determined to adopt the Administrative Law Judge’s findings and conclusions to the extent that they are consistent with those set forth in the accompanying Opinion. Accordingly, the Commission enters the following order:

IT IS HEREBY ORDERED that, consistent with the terms of this opinion, respondent Trans Union Corporation, and its successors and assigns:

- a) Cease and desist from distributing or selling consumer reports, including those in the form of target marketing lists, to any person unless respondent has reason to believe that such person intends to use the consumer report for purposes authorized under Section 604 of the FCRA.

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- b) Maintain for at least five (5) years from the date of service of this Order and upon request make available to the Federal Trade Commission for inspection and copying, all records and documents necessary to demonstrate fully its compliance with this Order.
- c) Deliver a copy of this Order to all present and future management officials having administrative, sales, advertising, or policy responsibilities with respect to the subject matter of this Order.
- d) For the five (5) year period following the entry of this Order, notify the Commission at least thirty (30) days prior to any proposed change in respondent such as dissolution, assignment, sale or change in control resulting in the emergence of a successor corporation, the creation or dissolution of subsidiaries, or any other change in the corporation that might affect compliance obligations arising out of this Order.
- e) Within one hundred and eighty (180) days of service of this Order, deliver to the Commission a report, in writing, setting forth the manner and form in which it has complied with this Order as of that date.

By the Commission, Commissioner Leary not participating.

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INITIAL DECISION

By Timony, Administrative Law Judge:

I. INTRODUCTION

The complaint, filed on December 15, 1992, alleges that Trans Union's sale of target marketing lists, with consumer information from its credit reporting files, was the sale of consumer reports to persons who did not have a permissible purpose to receive them, in violation of the FCRA, 15 U.S.C. § 1681.¹ Administrative Law Judge Parker entered summary decision on September 20, 1993, upholding the complaint.

Trans Union appealed to the Commission, which upheld Judge Parker on September 28, 1994.² On appeal, the United States Court of Appeals for the District of Columbia Circuit held that there was a genuine issue of material fact and that summary decision was inappropriate and remanded the case to the Commission. *Trans Union Corp. v. FTC*, 81 F.3d 228 (D.C. Cir. 1996).

By Commission Order of July 9, 1996, the matter was remanded for trial. I was assigned to preside on December 22, 1997. The trial commenced on February 17, 1998. The transcript is 3,962 pages. About 500 exhibits were received. The record closed on March 27, 1998.³

¹ 116 F.T.C. 1334 (1993). The original complaint in this matter also alleged violations of the FCRA by Respondent in connection with its prescreening activities. Those allegations were settled by consent agreement on November 18, 1993. *Id.* at 1357-61. Respondent's prescreening is not, therefore, at issue.

² 118 F.T.C. 821 at 838-95 (1994).

³ Judge Parker ruled that the time limits required by recent amendment were impossible in this case. Order of September 30, 1996.

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II. FINDINGS OF FACT

A. Respondent

1. Trans Union Corporation (“Trans Union”) is a Delaware corporation, with its office at 555 West Adams Street, Chicago, Illinois 60661.

2. Trans Union gathers information on consumers and sells consumer reports in interstate commerce. Its main competitors are Experian and Equifax. (Rodgers CX 191 at 47/3-13.)⁴

3. Trans Union is a consumer reporting agency, Section 603(f), Fair Credit Reporting Act (“FCRA”). It sells data about the credit of millions of Americans. Buyers use this information to evaluate consumers' credit. (Rodgers CX 191 at 27/3-7.)

⁴ References to the record are made using the following abbreviations:

F	Finding of Fact
CX	Commission Exhibit
TU	Respondent's Exhibit

References to trial transcript are usually made using witness name, page and lines:

Dexter 1231/4-21.

References to exhibits include number and page:

CX 125-3

TU-115 p.4.

Reference to deposition exhibits include witness name, exhibit number, and transcript page and lines:

Marquis CX 188 at 147/20 -- 148/1.

4. PerformanceData is a division of Trans Union engaged in “target marketing” since 1987. Previously known as “TransMark” then as “Trans Union Lists,” it became “PerformanceData” in 1997. (CX 84-A.)

5. Trans Union's “target marketing” uses information from its consumer reports. It prepares a list of consumers who meet criteria specified by the client and sells this list for use in soliciting those consumers. Target marketing aims sales efforts to consumers most likely to respond to an offer. (Admitted.)

B. Consumer Reporting Agencies

1. Credit Reporting

6. In the United States, information on credit-worthiness of individuals for use by credit grantors is gathered by consumer reporting agencies from credit grantors. (Connelly 2508/10-14.)

7. Consumer reporting agencies do not pay for the data they receive from credit grantors, but charge those credit grantors for edited credit data. (Connelly 2590/8-17.)

8. Credit grantors supply information to consumer reporting agencies so they can later determine credit eligibility based on information they receive from consumer reporting agencies. (Pendleton 405/1-5.)

9. Credit grantors need accurate data about the creditworthiness of consumers. (Johnson 1206/17 -- 1209/7.)

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2. Evolution of the Credit Reporting Industry

10. The credit reporting industry has changed over time. Initially, retailers and other credit grantors relied on their own experience with a consumer to grant credit. Credit grantors started to exchange information about consumers. Credit bureaus developed to pool information about consumers. (Johnson 1206/16 -- 1208/1.)

11. After World War II, consumer credit grew. Computers enabled consumer reporting agencies to store more information. (Johnson 1205/24 -- 1206/11; 1210/7-16.) This led to a uniform system of reporting credit information. (Johnson 1206/7-11; 1210/7-16.) The industry consolidated with large regional and national privately held consumer reporting agencies. (Connelly 2494/19 -- 2496/21.)

12. From 1975 to 1980, the large national consumer reporting agencies offered "affiliations" whereby local bureaus own data housed in the computers of the national consumer reporting agencies which supply information in their computers to credit grantors. (Connelly 2498/4 -- 2499/2, 2499/7-15.) In the late 1980s, a final wave of consolidation took place, resulting in three consumer reporting agencies -- Equifax, Experian, and Trans Union. (Connelly 2506/2 -- 2508/14.)

3. Credit Scoring

13. The information credit grantors use to evaluate consumers has evolved. At first, credit grantors pooled only negative information. Consumer reporting agencies started gathering both negative and positive information. (Johnson 1209/12-25.)

14. Computers enabled credit grantors to analyze information about a consumer through "credit scoring." (Johnson 1209/15 -- 1213/11.)

15. Credit scoring uses credit information to build models to predict a consumer's likely future credit performance. Most of the data used for credit scoring comes from the consumer reporting agencies. (Coffman 3825/18 -- 3826/2; Rapaport 673/15-25.) This data is objective and is a better predictor than information provided by the consumer filling out an application. (Coffman 3806/2-14; 3857/24 -- 3858/4; 3858/17 -- 3859/3; CX 122-P.)

C. Trans Union Consumer Reporting

16. Trans Union has CRONUS, its system for supplying consumer reports. (Botruff 2043/3-6; Rock 2086/15-16.) CRONUS contains 600 million records. (Weith 1867/21-23.)

17. Trans Union receives consumer accounts receivable information from credit grantors such as banks, mortgage companies, credit unions, automobile dealers, and collection agencies, as well as public record information. (Stockdale 873/22-25.) Trans Union receives 16,000 magnetic tapes or computer disks monthly, with information on 85,000 customers. (Stockdale 874/4-23.)

18. Trans Union receives information on 1.8 billion tradelines⁵ a month, including public records, collections, student loans, and child support information. (Stockdale 908/1-19.) Some customers report information daily to Trans Union; most report monthly or according to their billing cycles. (Stockdale 904/8-11; Frank CX 186 at 19/3-6.) Most subscribers to Trans Union (credit grantors) report customer account information in the Metro Format, a form designed by credit grantors. (Stockdale 901/11-18; Botruff CX 181 at 26/15 -- 27/17; 65/3-12.)

⁵ A "tradeline" is a consumer account. F 22, 23.

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19. Information submitted by credit grantors to Trans Union is added to CRONUS. (Stockdale 879/14-19; 880/3 -- 881/8.) Accounts receivable information is separated geographically. (Stockdale 879/7-16.) Due to large volume, only some files on CRONUS can be updated each day. (Stockdale 879/13-16.) CRONUS is updated each week. (Botruff CX 181 at 30/18 -- 32/7.)

20. To match incoming information to that in CRONUS, Trans Union will use account number, name, account type and house number of address. If no match occurs, a new record is created on CRONUS. (Stockdale 909/13 -- 910/8; 911/17-25.)

21. Information is also added to CRONUS by the ANCI file. (Stockdale 881/10 -- 882/9; 884/6-11.) The ANCI file gets information from consumers and credit grantors. (Stockdale 882/10-24.) Each day the ANCI file is read into CRONUS. (Stockdale 884/6-11.)

22. For CRONUS, tradeline information includes: a customer's account number, name, address, telephone number, social security number, and any generational suffix; the open date of the account; the subscriber's (credit grantor) name and code, and its kind of business ("KOB"); the verified date on the account; the type of loan; the credit limit assigned by the credit grantor; and the closed date of the account. (Stockdale 893/6-15; 894/4-12; 895/16 -- 896/1; 896/19-22; 897/13 -- 898/2; Botruff 2049/1-6; Weith 1844/18-22; Tr. 872, 875-76, 3372-73.)

23. On CRONUS, public records and collection accounts are considered "tradelines." CRONUS contains records that have only public record information and records that contain inquiries only - that is, records with no trade information and no public record information; less than 1% of the records in CRONUS do not have tradelines. (Stockdale 906/1-8, 21-23; 904/15-18; Botruff CX 181 at 62/15-24; Tr. 904-05; CX 358-G.)

D. Trans Union's Target Marketing

24. Trans Union uses credit information from CRONUS, along with other information, to create products for its target marketing business, using the "Master File" database (F 25-36; 112-116), and "Standard Characteristics" (F 108-111). Trans Union's target marketing products are: "indicator" or "select" (F 37-76); modeled products (F 77-98); and TransLink and the other databases (F 99-107).

1. Trans Union's Master File

25. Trans Union's data for target marketing is its Master File. (CX 72-C.) The source for the Master File is CRONUS and the TransMark file which is a "snapshot" of CRONUS. (Cabigon 1365/13-18; Kinsinger 2017/19-23; Weith CX 196 at 179/11-13.) The TransMark database is created each month of records from CRONUS. (Weith CX 196 at 179/12-13, 21-22; 180/11-12.) It combines all CRONUS records on the same name and address. (Weith CX 196 at 186/12-19; 188/7-14.)

26. The Master File is rebuilt three times a year (in 1997, in April, September and December). (Admitted; Cabigon 1366/6-12; Davis 62/16 -- 63/8.) The Master File involves 160 million persons and 105-110 million households. (Weith 1859/8-18; CX 333.)

27. The Master File excludes persons based on the number of and qualifications of their tradelines. (Weith CX 196 at 189/19 -- 190/11; 191/7-15; CX 101-A - C; Cabigon 1372/7 -- 1374/8; CX 329-A; CX 341.)

28. The September 1997 Master File initially verifies the existence of at least one open and qualifying trade in the individual's CRONUS record. "Verified" means that some activity occurred within the last 12 months, and "activity" means that something was reported, such as the opening of the tradeline or

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the receipt of a payment. (Cabigon 1372/18 -- 1373/7; CX 329-A; Weith CX 196 at 197/24 -- 198/14.)

29. For a single trade to qualify for the Master File, there must be no date closed present on the record, the trade must not be disputed, and the trade cannot be a collection set or a public record set. (Weith CX 196 at 191/7-15; 227/1-5; Cabigon 1374/5-21.)

30. A single tradeline with an account type "I" (installment) or "M" (mortgage) and a current balance of zero will not count as the single qualifying trade for the Master File because those indicators signify that the tradeline is closed. (Weith CX 196 at 194/13 -- 195/3.)

31. The Master File "list exclusion" is a second qualification requiring that a consumer have at least two open trades, one verified within 12 months. Prior to January 1998, consumers with less than two open trades but still meeting the one qualified tradeline requirement were placed in the Emerging Consumers file. Consumers who have at least two open trades, one verified within 12 months, were then included in the Master File and the Attribute or Standard Characteristics File. (Cabigon 1373/8 -- 1374/4; CX 329-A; Weith CX 196 at 224/23 -- 225/10; CX 104-B.)

32. Trans Union withdrew some information in the Master File for sale after September 30, 1997, but the minimum requirement for the Master File did not change until January 1998. (Weith 1831/23 -- 1832/6.)

33. The minimum requirement for the Master File now is either two trades reported in the last six months, or one trade reported in the last six months matched to an outside vendor file. (Weith 1830/23 -- 1831/4; Cabigon 1386/14 -- 1388/7; CX 332-A; CX 339-A.)

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34. The Master File obtains a subscriber number from a person's tradeline in CRONUS. (Cabigon 1393/11-16; Weith 1847/13 -- 1848/19.)

35. Employees of ACXIOM, a corporation whose single largest stockholder and second largest customer is Trans Union, with Trans Union employees, build and sell information in the Master File. ACXIOM ensures that addresses are correct. (Davis 85/12-17; Weith 1842/4-15; Hinman 2338/7 -- 2339/11.)

36. The Master File is verified through the U.S. Postal Service's National Change of Address file ("NCOA"). (Weith 1838/10-21; Davis 87/1-10.) Fraudulent addresses are excluded. (Weith 1833/19 -- 1834/24.)

2. Indicators from the September 1997 Master File

37. The Master File contains "indicators" ("selects") (such as the fact that a person has a bank card) derived from CRONUS and other sources. CX 1-A -- Z-6 shows the selects available to a customer assembling a target marketing list. (Davis 91/2-21.) Half of this information is from CRONUS. (Cabigon 1438/12-25.)

a. Automobile

38. Trans Union offers data showing open automobile loans, loan type (lease, refinanced loan, equity transfer loan, automobile loan), open dates and expiration dates for the lease or loan, and the high credit amount of most current loans/leases. Trans Union also offers "driver" lists. (CX 1-A -- E.)

39. The source for the "auto expiration date" (CX 1-A), "auto high credit" (CX 1-B), "auto loan type" (CX 1-B), and "auto open date" (CX 1-C), is CRONUS. (Cabigon 1377/10-24.) A consumer is a "driver" (CX 1-E) if CRONUS shows an auto loan or a business that issues gasoline cards. (Cabigon 1378/12-19.) When the September 1997 Master File examines CRONUS to determine

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whether a person has an auto loan, it will not consider the loan if the open date is more than five years old. (Weith CX 196 at 211/13-16; 212/3-4.) The availability of loan and lease dates permits targeted promotions. (CX 45; CX 261-E -- G, J.)

40. [redacted]

41. [redacted]

42. [redacted]

43. [redacted]

b. Bank Card

44. Trans Union offers a list of persons with an open bank card (including the open date of the most recent bank card) and an open premium bank card (including the open date of the most recent premium bank card). (CX 1-C, R, T.) Trans Union's September 1997 Master List defines and calculates its premium bank card select as a bank card with a credit limit of more than \$ 9,999. (Dexter 1271/17-20; CX 64-A; Weith 1867/5-13.)

45. To generate the indicator "presence of an open bank card" (CX 1-C), the September 1997 Master File program looks to the CRONUS record. (Cabigon 1377/21 -- 1378/4.) For a person to qualify for a premium bank card, CRONUS must indicate a tradeline with a type of business "B," an account type equal "R," and a credit limit field indicating greater than or equal to \$ 9,999. (Weith CX 196 at 230/22 -- 231/8; CX 102-E; Cabigon 1427/9-17.)

46. Trans Union's target marketing competitors offer bank card and premium bank card selects obtained from self-reported survey responses or from files of credit card information obtained

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from Business Development, Incorporated (“Business Development”) or Dresden Direct. (F 47-50; 148-154.)

47. [redacted]

48. First Data's active bank card select is an open bank card in a household. (Cleary 3094/17-22; TU-119 at 6.) [redacted] Nothing in the self-reported credit card information nor in the information provided by Business Development reveals the open date of the bank cards or premium bank cards. (TU-130 p.4; TU-117 p.2; TU-120 p.2; Schulte 3928/2-4; CX 310-D.)

49. [redacted]

50. In addition to information from self-reported questionnaire responses and Dresden Direct, ACXIOM obtains credit card information from other sources, including information that a consumer used a credit card at one time, obtained from companies that compile that information. (Hinman 2247/18 -- 2248/7, 14-16.)

51. JAMI Marketing (“JAMI”) manages several lists that purport to provide credit card information. The source of the credit card data in those lists is neither credit grantors nor consumer reporting agencies. (Miller 3017/6-11.) The source is a list of the list owners' customers who used a credit card to make a purchase from the list owner. (Miller 3018/22 -- 3019/11; 3058/5-17; 3060/20 -- 3061/13; 3065/13 -- 3067/25.) JAMI-managed lists do not have premium bank card selects. (Miller 3019/22 -- 3020/5.)

c. Department Store Card

52. Trans Union's September 1997 Master File offers open department store trades (including open date of the most recent department store trade). (CX 1-E, R.) To generate the open department store card indicator (CX 1-E), the Master File looks to CRONUS. (Cabigon 1378/5-11.)

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53. Trans Union's target marketing competitors offer similar department store card selects obtained from self-reported survey responses or from files of credit card information obtained from Business Development, or Dresden Direct. (F 54; 47-48; 148-154.)

54. [redacted]

d. Finance Trade

55. Trans Union's September 1997 Master File List offers several finance loan lists including an open finance trade (with the open date of the most recent finance loan), a "30/60/90 day" finance trade, a mortgage or auto loan, and a closed finance loan trade. (CX 1-F, R.) A "30/60/90 day" trade is due in 30/60/90 days. (Davis 154/24 -- 155/7; Cabigon 1412/7-11.)

56. To generate the open finance trade indicator (CX 1-F), the September 1997 Master File examines CRONUS to determine if the subscriber's business is "finance," if the account type is installment, and if the finance trade has an open date. (Cabigon 1378/20-23; Weith CX 196 at 228/14-25; CX 102-A -- B.)

57. To generate the indicator "30/60/90 day finance trade" (CX 1-F), the September 1997 Master File determines if the individual has a tradeline with a finance company that issues 30/60/90 day loans by examining from CRONUS the subscriber's business and the account. (Cabigon 1378/24 -- 1379/16.) To generate the "finance loan closed" indicator (CX 1-F), the September 1997 Master File uses CRONUS. (Cabigon 1379/20-24.)

e. Head of Household

58. Trans Union offers a select for head of household. (CX 1-H.) The “head of household” (CX 1-H) is derived from CRONUS; the person with the highest number of trades is the head of household. (Cabigon 1380/1-19; Weith 1832/11-14.) If a household contains two CRONUS records with the same number of trades, the head is the first record on file. (Weith 1832/17 -- 1833/6.)

f. Mortgage

59. Trans Union offers mortgage lists from the September 1997 Master File List including: an open mortgage; a second open mortgage; and the open and closed dates and high credit amounts of both mortgages. An additional list for both mortgages is the loan type (including indicators for refinanced and secured mortgages and secured home improvement loans). (CX 1-N -- P.)

60. The September 1997 Master File lists “mortgage one” and “mortgage two” (CX 1-N), mortgage high credit (CX 1-O), mortgage closed dates (CX 1-O), and mortgage type (CX 1-P) are derived from CRONUS. (Cabigon 1381/18 -- 1383/1.)

61. The September 1997 Master File list “Home Value Range” uses E-Val's model to calculate an individual's home value. (CX 1-J.) The following are counted: (i) mortgage; or (ii) non-automobile installment loan with a high credit amount greater than \$ 49,000 or current balance greater than \$ 50,000; or (iii) real estate installment loan; or (iv) non-automobile secured installment loan with a high credit or current balance greater than \$ 16,000. (Weith CX 196 at 205/21 -- 207/3.)

62. CX 326-B specifies the Trans Union attributes (F 108-111) used for the home value calculation in September 1997. The following attributes were used to calculate home value: RE20 (months since oldest revolving trade opened, CX 327-B); MT28 (total mortgage high credit/credit limit, CX 327-B); MT32

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(maximum balance owed on all mortgage trades, CX 327-B); MT33 (total balance of all mortgage trades, CX 327-B); PB14 (number of premium bank card trades verified last 24 months, CX 327-D); and G051 (percent of trades never delinquent, CX 327-E). (Cabigon 1370/19 -- 1371/8; CX 3-S.)

63. Trans Union uses age, mortgage, the original mortgage amount, and the opening balance to calculate the current home market value for a house. (Weith 1848/24 -- 1849/25.) The calculation uses demographic information from CRONUS and from the census. (Weith 1850/17 -- 1851/3.)

64. The Master File list "home equity actual" (CX 1-I) (the dollar amount of equity in a person's home) and "home equity range" (CX 1-I) are calculated by using mortgage high credit and mortgage balance information from CRONUS and subtracting them from the estimated home value. (Weith 1846/17 -- 1847/5; 1850/1-3; Cabigon 1380/20 -- 1381/11.)

65. [redacted]

66. Metromail obtains information regarding mortgages -- including rate type, loan type (FHA, VA, Conventional), mortgage amount, and purchase price -- from deeds in the public record. (Litz 2972/6-9; 2975/5 -- 2976/7.) Metromail also offers its clients the "Equity Spenders" list which identifies households, from public record information and from self-reported information, that have recently refinanced or purchased a home. (Litz 2973/6-19; TU-115 p. 113; TU-116 p. 16.)

67. [redacted]

68. [redacted]

69. [redacted]

g. Length of Residence

70. Trans Union offers a length of residence select showing the number of years a person has resided at an address. (CX 1-J.) The Master File length of residence indicator uses data from CRONUS, including mortgage open dates. (Cabigon 1371/9 -- 1372/3; 1381/12-17; 1415/14-19.)

h. Mail Order Buyer

71. Trans Union lists mail order buyers, including its "MOB1" indicator (CX 1-J) based on identifying tradelines (such as Spiegel's, L.L. Bean, Eddie Bauer) on CRONUS and identifying as a mail-order buyer on the Master File persons with those tradelines. (Weith 1847/13 -- 1848/19.)

i. Singles Select

72. Trans Union offers a "singles" list showing single persons. (CX 1-U.) This Master File indicator is from tradelines on CRONUS showing that credit was granted to a person (rather than a joint account). (Cabigon 1419/21 -- 1420/4; Weith CX 196 at 219/2-4; CX 99-O.)

j. Student Loan

73. Trans Union offers several student loan selects showing a student loan (with the open date of the most recent student loan), the aggregate high credit amount of all of a person's student loans, and a closed student loan. (CX 1-W.) A CRONUS record qualifies as a student loan on the September 1997 Master File if the loan type is "student" and the date closed is not equal to zero. (Weith CX 196 at 212/10-21; CX 100-N.)

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k. Upscale Retail Card Selects

74. Trans Union's September 1997 Master File offers a select for an open upscale retail card (including the open date). In its promotional materials and internally, Trans Union indicates that its upscale store select is based upon the National Retail Federation's listing of "prestigious" stores. (CX 1-Q, Y; CX 72-C; Davis 226/24 -- 227/3.)

75. For the upscale retail card and open date indicators, the September 1997 Master File searches CRONUS records to find an open upscale retail card and an open date for the tradeline. (Cabigon 1383/2-12; 1393/11-16; Weith CX 196 at 229/7 -- 230/6; CX 102-D.)

76. [redacted]

3. The September 1997 Master Filea. Trans Union's "E-Val"

77. Trans Union offers a product called E-VAL, a scoring system that estimates the amount of equity available in a consumer's home, on its Master File in the form of its "Home Value Ranges," "Home Equity (Actual)," and "Home Equity Range" selects (F 61-64). (CX 1-I, J; Davis 134/12 -- 135/13; CX 118-B.) E-Val selects were available for sale to target marketing customers prior to October 1, 1997; they are now available only for firm offers of credit. (Davis 66/8-10, 73/4-14.)

b. PIC

78. PIC, a product created by Trans Union and LOCUS, predicts, inter alia, the likelihood that a person owns financial service products. PIC is derived from characteristics in CRONUS. (Tr. 1863-64.) Trans Union used its Standard Characteristics (F

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108-111) in developing PIC and appends individual-level credit data to survey data to model the likelihood of a person owning particular financial products. Until October 1, 1997, Trans Union offered PIC as a Master File select; PIC is currently available only for firm offers of credit. (Davis 111/25 -- 112/24; 136/2-6; 214/1-5; 234/17-19; Weith 3749/4 -- 3751/1.)

c. P\$ YCLE

79. [redacted]

80. [redacted]

d. SOLO

81. [redacted]

82. [redacted]

83. According to the SILHOUETTE User's Guide, "assignment to a cluster is based on a credit view of consumers . . . Cluster 8, because of its generally high level of credit activity, might contain consumers who are good candidates for credit offers." SILHOUETTE distinguishes its clusters based on some of the same factors used by Trans Union in its target marketing list products -- e.g., finance accounts, bank revolving, department store, retail -- and the variables in clusters can be "zero," "one," and higher numbers. (CX 122.)

84. [redacted]

85. [redacted]

86. Until October 1, 1997, Trans Union offered SOLO to its target marketing customers; currently SOLO is available only in the context of firm offers of credit. (Davis 68/19-22.) Trans Union withdrew SOLO because of the FCRA amendments and the fact

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that customers had learned that SOLO clusters correlated with credit performance characteristics. (Davis 67/23 -- 68/4.)

87. Prior to October 1, 1997, Trans Union attached SOLO codes to a customer's own client lists, allowing clients to analyze their existing customer base by SOLO codes. (Dexter 1312/17 -- 1315/4; Davis 70/6-18; CX 14.) This good credit risk list constitutes a consumer report. (Marquis CX 188 at 128/2-9.) [redacted]

88. Until September 30, 1997, Trans Union offered to append SOLO clusters to TransLink lists. (Dexter 1236/22 -- 1237/25; Davis 67/19 -- 68/4; CX 125-E.)

89. [redacted]

90. Products similar to Trans Union's SOLO and P\$ YCLE in the target marketing list industry are not as strong as the Trans Union products. (Hinman 2271/9-11.) ACXIOM received SOLO and P\$ YCLE codes from Trans Union until October 1, 1997. (Hinman 2269/15 -- 2270/12.) The models that ACXIOM used in place of P\$ YCLE and SOLO (Claritas' Affluence and WealthWise and Experian's P\$ YCLE) do not provide as strong predictive results as the Trans Union products. (Hinman 2270/13 - - 2271/15.)

e. TIE

91. [redacted]

92. [redacted]

93. [redacted]

94. [redacted]

95. [redacted]

96. [redacted]

97. [redacted]

98. Metromail contributes income information, based on census data and self-reported consumer survey responses, to IN-SOURCE, a joint product with Experian. (Litz 2983/14 -- 2984/11.) ACXIAM also has income information that it receives from other companies' self-reported survey or product registration questionnaires and the estimated income models available from other list providers such as Polk, Experian, and Metromail. (Hinman 2251/17 -- 2252/9.)

4. Trans Union's Other Target Marketing Files

a. TransLink

99. TransLink is Trans Union's reverse append product which matches a name and address with a bank card number. (Smith 1487/20-25.) TransLink works as follows: a merchant gets a bank card number from its customer, sends it to Trans Union, which returns a name and address ("reverse append"). The source of the account number and name and address information is CRONUS. (Weith 1823/22 -- 1824/14; Dexter 1305/24 -- 1307/6; Davis 89/25 -- 90/10; CX 126; CX 132-D; CX 133-B; CX 266.)

100. When a merchant supplies Trans Union with an account number of a joint account, Trans Union returns only one name -- the first name on that account. (Weith 1824/16 -- 1825/17; 1827/4-15.) The name of the owner of the card is returned to the merchant, regardless of who used the card. (Weith 1827/19-24.) A TransLink customer complained that the TransLink product returned names differing from the consumers. (Porretto 1628/7 -- 1630/9; CX 273-A -- K.)

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101. When Trans Union returns to the merchant the name and address of the person on the credit card, the merchant prints a mailing label and sends the consumer a piece of junk mail. The merchant can use the consumer's purchase information and know what the consumer bought. (Marquis CX 188 at 144/7-10; 151/10-12.)

102. Trans Union is the only consumer reporting agency that owns and markets this reverse append product. (Davis 141/6-9; CX 78-Z-29.) Direct Tech, currently owned by Experian, licenses the reverse append product from Trans Union. (Smith 3298/16-23; 3303/5-12.)

103. Citibank does not permit Trans Union to use their credit card account numbers for reverse-append disclosure of names and addresses in the TransLink product. (Marquis CX 188 at 147/20 -- 148/1.)

104. TransLink is among Trans Union's largest selling target marketing products. (Admission.)

105. Until September 30, 1997, Trans Union appended SOLO, TIE, age data, and other Master File elements to TransLink lists. (Dexter 1236/22 -- 1237/25; Smith 1488/23 -- 1489/5; CX 125-E; CX 129; CX 279-B.)

b. New Issues File

106. Trans Union offers the New Issues File whereby customers may rent a list of persons who received credit within the last 90 days. The file is created by selecting from CRONUS names and addresses of consumers with at least two tradelines, one of which has an open date within the last 90 days. (CX 4; Respondent's Admissions.) A customer sees the time (30/60/90 days) and the type of credit (retail, finance, mortgage or auto loan trades). (Davis 42/16 -- 43/1; CX 4.) Trans Union discontinued

the sale of the New Issues File for target marketing customers and now the file is available only for firm offers of credit. (Davis 81/24 -- 82/4.)

c. Emerging Consumers File

107. The Emerging Consumers File, based on data from CRONUS, included persons with one tradeline within the prior twelve months. (Cabigon 1373/13-23; CX 329-F.) The tradeline qualified if it was not closed. (Trans Union Corporation's Answers to Complaint Counsel's Third Set of Interrogatories, Answer to Interrogatory No. 3.) Trans Union discontinued the Emerging Consumer File in part because it might be "communicating information that we shouldn't be communicating." (Davis 89/18-20.)

5. Characteristics and Attributes

108. [redacted]

109. The source for the Attribute File is CRONUS. (Cabigon 1368/8-22; Davis 35/19-21.) To be included in the Attribute File, a person must have at least two open tradelines, one within the last 12 months. (Cabigon 1373/23 -- 1374/4; CX 329-A.)

110. Trans Union released to its target marketing clients its Standard Characteristics ("Marketing Variables" (CX 78-Z-20 -- 22)) with names and addresses. (Davis 58/22 -- 59/14.) Among these characteristics are: months since oldest trade opened, and the number of personal finance inquiries, finance installment trades opened in 24 months, and bank card trades. (CX 78-Z-20 -- Z-22.) Trans Union discontinued the disclosure of these characteristics for target marketing on October 1, 1997. (Davis 59/15-19.)

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111. The Standard Characteristics File is available for use in the PerformanceBase/RelationBase File only if a customer is extending a firm offer of credit. (Davis 40/10-16; 120/17 -- 121/4; Dexter 1281/11-16; CX 317.)

6. Changes in the Trans Union's Master File and Target Marketing Products

112. The Master File's content remained unchanged until December 1997. On October 1, 1997, Trans Union discontinued certain files for target marketing. CX 2 lists the files in September 1997 that remained available after October 1, 1997. Trans Union discontinued: all open dates; high credit and loan type (although a finance mortgage trade remained available); student loan closed; and PIC, P\$ YCLE, E-Val, SOLO and TIE. (CX 1-A -- Z-6; CX 2-A -- T; Dexter 1281/11 -- 1282/8; Davis 98/17 -- 99/7; 142/5-12.)

113. Trans Union discontinued the Master File items after October 1, 1997, which were reintroduced in December 1997: 30/60/90 day finance loan; premium bank card; length of residence; and income and home value (both purchased from an outside source). (Davis 165/7 -- 166/23; CX 342-E, H -- K, M -- N.)

114. Trans Union stopped offering the data in Findings 112-113 to its target marketing customers as of October 1, 1997, because "before it was a cease and desist penalty, it now became a \$ 2500 per occurrence penalty" (Dexter 1280/19 -- 1281/10; Marquis CX 188 at 174/23 -- 175/6, 22-25); Trans Union "had gone from an environment where the worst thing that could happen is that we would have to stop selling lists to a world where there were significant financial penalties" (Davis 142/22-25; CX 298-B.)

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115. CX 342 contains the Master File items available after December 1997, derived from CRONUS, showing presence of: an auto trade; second auto trade; bank card trade; department store card; driver data; finance loan; 30/60/90 day finance trade; head of household; seven KOB (kind of business) items; mail order trade; one mortgage; two or more mortgages; gold, platinum or optima card; student loan; and upscale retail trade. (CX 315-D, E, G -- M, Q -- W; CX 332-B; Cabigon 1426/9-23; 1427/18 -- 1428/3; 1429/9-17; 1429/22 -- 1430/2; Weith 13:1832/2 -- 1833/6.)

116. A file ("Preapproved File") similar to the September 1997 Master File is now available.

117. This file includes the Standard Characteristics and all of the data are only available for firm offers of credit. (Cabigon 1384/6 -- 1385/18; CX 340-B; CX 333; CX 334; CX 335.)

7. Promotion of Trans Union's Target Marketing

a. Sales and Revenue

118. Trans Union sells its target marketing lists nationwide. Salespeople look to firms using mail solicitations or telemarketing. Trans Union also sells lists to brokers, list managers, and wholesalers, who sell the information from Trans Union lists with their own data, for sale or lease to direct marketers. (Davis 45/3 -- 47/24; CX 15; CX 34; CX 41; CX 54; CX 307; CX 42; CX 51; Dexter 1231/4-21.)

119. Trans Union sells target marketing lists for one-time use by its customers either by rental or by license. Trans Union charges a "base price" per thousand names, with additional charges per thousand based on the "selects" that the customer has chosen. (Davis 44/6-24; 64/6-22; 65/3-14.)

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120. Trans Union and its competitors in the target marketing list industry advertise their lists in the Direct Marketing List Source which includes over 19,000 entries, including consumer, business, and international lists, that are available in 212 markets. It is published every other month by Standard Rate and Data Service ("SRDS"), the leading publisher of advertising rate and direct marketing information, and is considered to be the "Bible" of the target marketing list industry. (Markowski 2427/6-10; 2429/10-20; 2439/1-8; 2430/5-10; 2431/2-4; Dixon 298/9-16; Hinman 2256/17 -- 2257/22.)

121. The format for the Direct Marketing List Source has eleven segments, describing the list, selects and the list source. (TU-163 at A-11.) The information provided is obtained by SRDS from the list owner/manager. Numerous listings in SRDS, however, do not contain information for every segment, including source. The only segment that SRDS confirms independently involves the five most recent sales of the list. (Markowski 2440/3-11; 2441/6-25.)

122. Trans Union's PerformanceData division employs 46 people including 10 salespersons. PerformanceData had 440 target marketing customers and \$ 34 million in revenue in 1997. (Davis 27/18-21; 37/25 -- 38/4; 48/8-10; 141/10-14.)

b. Credit-Based Marketing Information

123. Trans Union promotes its Master File as a unique source of credit-based marketing information from CRONUS. (CX 57; CX 58-C; CX 60-A; CX 69; CX 81; CX 264-A; CX 297-A.) A promotional letter states: "Trans Union is a unique provider of credit-based marketing information. Our database is unmatched when compared to traditional direct marketing vehicles on the market today." (CX 260-B.)

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124. Trans Union promotes target marketing lists with credit information:

- a. Trans Union's Standard Characteristics correlate highly with "lending activity." (CX 263-A.)
- b. Trans Union data is "highly predictive in response modeling and profiling, especially with financial offers." (CX 265-A.)
- c. Trans Union's finance trade select provides consumers who have "generally had trouble with their credit in the past and are highly responsive to credit offers." (CX 68-A.)
- d. Trans Union information contains "spending, payment and demographic data" that is "highly predictive and cost effective." (CX 57.)
- e. "Since credit has been established [for consumers on the student loan list], one could argue that this list would have higher pass rates through the credit bureaus." (CX 136.)
- f. "[The demographic variables that Trans Union can provide] are derived from approved application information and financial information provided by subscribers." (CX 70-A.)
- g. Trans Union's premium bank card select indicates individuals "who have been approved for this high credit amount in the past." (CX 64-A.)

125. Trans Union distinguishes itself from "its traditional competitors within the credit reporting industry," who have not pursued Trans Union's "open policy" regarding the use of credit information by target marketers. (CX 61-A; CX 78-G; CX 268-A.) Although Experian "comes closest as a competitor," Experian

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“cannot provide . . . credit based data . . . our data far outweighs their strength.” (CX 70-B; Dixon 267/11 -- 268/1.)

126. Trans Union promotes the fact that each person in the Master File must have at least two active lines of credit. (CX 7; CX 33-A; CX 61-A; CX 78-G; CX 268-A.) Trans Union also publicizes that a person with no activity in a 12 month period, such as payments or credit, is dropped from the Master File. (CX 69-A.) Trans Union also publicizes the criteria for other lists in its Master File, such as the premium bank card with a credit limit above \$ 9,999. (CX 64-A.)

127. The Master File lists chosen by Trans Union's target marketing clients show individual credit information. (CX 33-A; CX 38-C, D; CX 62; CX 68; CX 79; CX 256-A, B; CX 257.) In response to a client offering a \$ 5,000 unsecured loan whose “ideal candidate” had \$ 10,000-\$ 15,000 in debt, and \$ 20,000+ in home equity, a salesperson recommended persons with open mortgage trades, open finance trades, \$ 30,000+ in home equity and a home market value below \$ 250,000. (CX 67.) Home Mortgage Funding, a mortgage refinancing lender, selected persons with open finance trades and multiple mortgages for a telemarketing offer to assist those whose property “came up as having a high interest” mortgage. (CX 19-A -- F.)

128. Mortgage refinance companies and home equity lenders use the Master File lists for finance loans, first and second mortgages, length of residence, high credit amounts or initial loan values for mortgages, and home equity or home value. (CX 18-A, B, J; CX 23-B, C, F, G; CX 24-A, B, L; CX 39-B -- D.) Client mail or telemarketing shows that those solicited have high interest loans or other debt to consolidate. (CX 19-F; CX 26-H; CX 28-B; CX 32-B; CX 39-D.) Clients, such as Mainstreet Mortgage, use a select identifying individuals with open mortgages issued from finance companies. (CX 40-C, D.) Respondent's witness, Kenneth Scott, stated that finance company users are people who have had

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credit problems in the past, and, quite likely, have had a bankruptcy. (Scott 2855/23 -- 2856/7.)

129. Trans Union's mortgage open date lists permit a target marketing client to determine the date a mortgage was taken out and the interest rate. The Mortgage Banc ordered a list of persons with FHA mortgages opened between January 1994 and October 1995 with initial loan values between \$ 75,000-\$ 99,999 and between \$ 100,000-\$ 150,000. (CX 17-A-B.) Another ordered a list of persons with FHA mortgages opened between January and June 1995 with an opening balance greater than \$ 100,000. (CX 21-A.)

130. Trans Union's lists allow target marketing customers to obtain lists based on detailed credit information, such as whether the person has at least three open tradelines and the types of tradelines (CX 25-A) or whether a person has two open tradelines, one of which has been open for more than 36 months. (CX 23-B - C; CX 28-A.)

131. Clients may copy information from the Master File. (Davis 162/2-17; Dexter 1249 -- 1250/10.) For the September 1997 Master File, "printable" information includes: open dates for the first and second most current auto loans/leases and mortgages; home value ranges; and length of residence. (CX 1-C, J, N, P.) Other information is "printable," including high credit amounts and loan type for auto loans and mortgages and the aggregate high credit for all student loans (CX 1-B, C, O, P, W.)

132. Trans Union's Master File showing the presence of an upscale retail card was used as part of the credit-based decision for a mailing of a "pre-approved Rubenstein Bros" credit offer. (CX 35-A; Tr. 1938-40, 1945-46, 1957-59, 1962-66, 1973-74.)

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c. Depth and Timeliness

133. Trans Union emphasizes that the Master File is “the freshest and most comprehensive” data due to its “robust and extensive source of original credit based information” (CX 268-A; CX 264-A), and that Trans Union has the largest data of consumer credit information in the United States. (CX 75-B.) Trans Union describes the Master File as the “richest source of individual-level financial data available” (CX 321), and that its database is “kept fresh and current by nearly two billion updates supplied by credit grantors every month, and is maintained for accuracy and quality.” (CX 72-B.)

134. Trans Union's “primary database” is updated every 6.5 days from accounts receivable information from the nation's credit grantors. (CX 78-G; CX 268-B.) Trans Union has automobile loan information for all states. (CX 66-A.)

d. Individual Observed Behavior

135. Trans Union promotes the Master File as a unique source for individual-level observed behavior data. According to CX 83-C, a PerformanceData brochure, the Master File is “without equal” and its information is “highly accurate” and is “based on actual behavior -- not self-reported or neighborhood values.” (CX 83-C.) The Master File is “living and breathing data,” “the most comprehensive available in terms of observed behavior (not self-reported)” (CX 264-A) and as the “only source of individual-level financial data” that is “individual and behavioral.” (CX 78-Z-36.)

136. The Master File's data has an advantage over target marketers like Polk, First Data, and Metromail, who rely on survey data directly from individuals, who may provide inaccurate information, while Trans Union's data is reported by third parties, making it more valid. (Dixon 292/14 -- 293/5; Porretto 1621/16-20.)

8. Individual Observed Credit Information for Target Marketing

a. Trans Union's Competitors' Target Marketing Lists

137. Trans Union's competitors in the target marketing list industry include: First Data Solutions (formerly Donnelley Marketing) ("First Data"); R.L. Polk & Company ("Polk"); Metromail Corporation ("Metromail"); ACXIAM Corporation ("ACXIAM"); and Experian (formerly TRW)("Experian"). (Davis 161/5-16; Cleary 2942/4-18; Hinman 2199/19 -- 2200/17; M.Smith 3299/22 -- 3300/8.)

(1) First Data, Metromail, and Polk

138. First Data, Metromail, and Polk provide their customers with lists of consumers for use in target marketing. (Hinman 2213/8 -- 2214/14; Scott 2686/15 -- 2687/8.) First Data's DQI<2> contains 97 million households and the names of 185 million persons (Cleary 3083/25 -- 3084/7); Metromail's National Consumer Database ("NCDB") contains 100 million households and the names of 155 million persons (Litz 2968/12-23; 2969/5-10); [redacted]

139. [redacted]

140. [redacted]

141. Metromail's NCDB gets information from: public records of real estate transactions from county clerks, courthouses and tax assessor files maintained in Metromail's Realty Database, a separate file of 30 million homeowners; information that Metromail obtains from newspapers; and information from catalogers and magazines that Metromail maintains in its Mail Order Responder (MOR) Bank. (TU-115 pp. 158 and 160; Litz 2970/5 -- 2971/7; 2972/10 -- 2973/3.)

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142. [redacted]

143. First Data, Metromail, and Polk have self-reported information. Metromail's BehaviorBank includes 28 million households and 40 million persons (TU-115 p. 166); Polk's Lifestyle Selector includes 36 million persons (Nusbaum 2879/11-19); [redacted] Self-reported information is obtained from responses to consumer surveys and from product registration cards. (TU-117; TU-120; TU-130.) Metromail's BehaviorBank data is stored separately from the NCDB information; some of the names in the two files overlap. (Litz 2976/16 -- 2977/17.) [redacted]

(2) ACXIOM

144. ACXIOM is developing a list database called InfoBase Prospects, on 117 million households and names of 160 million persons. (Hinman 2340/4-10; 2261/12-19) ACXIOM compiles Consumer InfoBase from data it obtains from credit card information from Trans Union and from Dresden Direct (Hinman 2247/23 -- 2248/21); property transaction data, including mortgage data from deeds obtained from county tax assessors registrars (Hinman 2250/5-14); and income information from self-reported survey data and estimated income models obtained from Polk, Experian and Metromail, and, prior to September 30, 1997, from Trans Union. (Hinman 2251/11 -- 2252/21.) Data in Consumer InfoBase is in InfoBase Prospects. ACXIOM is prohibited by contract from using in its target marketing list business any data supplied by Trans Union for Consumer InfoBase. (Hinman 2308/21 -- 2309/3.)

(3) Experian

145. [redacted]

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146. Experian uses individual information in its consumer reporting database (FileOne) to compile PDS allowed by the consent order Experian (at that time "TRW") entered with the FTC: name; telephone number; address; zip code; year of birth; age; generational designation; and social security number. The consent order permits Experian to also use mother's maiden name but it does not. (TU-109; M.Smith 3293/24 -- 3294/11.) [redacted] Prior to the consent order, Experian had used other information from its consumer reporting database in its target marketing business, including presence of a bank card, retail card, or a mortgage loan, and account numbers for the reverse append process, the use of which for target marketing purposes is now prohibited under the terms of the consent order. (M.Smith 3287/17 -- 3288/7.)

147. Every name that appears in Experian's consumer credit reporting database also appears in PDS, regardless of the number of tradelines the consumer does or does not have. To be included in Experian's FileOne, a consumer does not need any tradelines. (M.Smith 3428/18 -- 3429/8-18.)

(4) Business Development

148. To the extent Trans Union's competitors obtain any information provided by credit grantors for use in their target marketing list business, they generally do so indirectly from Business Development, a small company (4 1/2 employees, 1997 revenue of \$ 200,000, no profit in 1997) whose primary business is providing copies of its National Marketing File. Business Development is not a consumer reporting agency, but rather a business that collects information from credit grantors for use in their customer mailing lists. (Schultea 3946/23 -- 3947/12; 1028/5 -- 1029/2.)

149. The National Marketing File is a list of 90 million consumers who are credit users or who have used credit that Business Development provides to its contract customers -- including Dresden Direct and First Data. (Schultea 3905/10-16;

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3907/18 -- 3908/1; 3909/1-7; 3910/20 -- 3911/1.) The National Marketing File contains two credit card related fields: a counter field that indicates number of tradelines including credit cards, up to nine; and a bank card indicator field that is either blank or contains a single "B". (Schultea 3911/3 -- 3913/7; Tr. 3943/6-23.) The National Marketing File contains no names of credit grantors and does not differentiate any type of credit card except bank card. (Schultea 3911/22-24; 3913/2-7.)

150. The National Marketing File was built in 1989-1990 by merging the customer lists of 20-25 of Business Development's major retail company and bank clients who had credit card customers. The counter was increased by one each time a consumer's name appeared on one of the lists and a "B" was placed in the bank card field if the customer's name was on a list from a bank. (Schultea 3915/2 -- 3916/21.) These lists were obtained in connection with Business Development's providing target marketing services, such as developing target marketing lists. (Schultea 3913/12 -- 3914/23.)

151. Business Development updates the National Marketing File whenever it receives a list of consumers from a client. If a consumer is already in the National Marketing File, the counter is increased by one and, if the client is a bank and there is no "B" in the bank card field, a "B" is added. The bank card field contains only one "B" even if the consumer has appeared on more than one bank's list. (Schultea 3913/2-4.) If there is a consumer name on the client's list that is not already in the National Marketing File, the name is added to the file. (Schultea 3917/20 -- 3918/18.)

152. A record is deleted from the National Marketing File only when the U.S. Postal Service's National Change of Address ("NCOA") file indicates that the address is no longer viable or the consumer is deceased, in which case the entire record is removed from the National Marketing File. (Schultea 3912/4-12; 3918/24 - - 3919/7; 3920/2-11.) Otherwise, the information from the

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original file build in 1989-1990 is still contained in the National Marketing File, as is all information added later. The National Marketing File contains references to credit card accounts that have been closed or are inactive. (Schultea 3922/3-14.)

153. Business Development does not know that the consumers in the National Marketing File use one or more credit cards. Business Development's lists show active bank card holders, active retail card holders, and active finance users. (Schultea 3928-34, 3940.)

154. Business Development knows only that consumers have, or had, the number of credit cards -- but not that they are using that credit or that they currently have the number of cards designated. (CX 310-C, D; Schultea 3923/8-23; 3924/24 -- 3925/5.) A "B" indicates only that consumers have, or had, a bank card, not that they currently have or use a bank card. (Schultea 3926/16-20.) The National Marketing File does not contain salary ranges, age ranges, dates accounts were opened, credit limits on accounts, loan amounts, whether a consumer file has been closed, or whether a consumer has a new bank card. (Schultea 3927/15 -- 3928/13.)

b. Trans Union's Exclusively Individual-Level Data

155. Consumer information in target marketing lists can be individual, household, census block, zip-plus-four, and zip code. "Zip-plus-four" refers to a geographic area defined by a nine digit postal code and, in target marketing terms, "zip-plus-four" level data refers to aggregated data of consumers or households from a particular "zip-plus-four"; the information within the "zip-plus-four" is averaged. (Davis 156/1 -- 157/4.) [redacted]

156. Individual-level data is better for target marketing response rates and predicting buying behavior than data at broader levels, such as household or zip-plus-four. Respondent's witness, Donald Hinman, described the difference between the levels of data as follows: "The broader the geography, the less powerful the

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data tends to be. And when you go from a broad geography to a narrow geography, it's much more powerful. When you go from a household to an individual it gets even more powerful." "Powerful" in this context refers to the "ability to accomplish your market objective. To achieve your response rate or to predict a buying behavior." (Hinman 2259/6 -- 2260/2.)

157. Trans Union's competitors in the target marketing list industry furnish information in their target marketing lists primarily at the household level or broader.

158. [redacted]

159. [redacted]

160. ACXIAM collects information on an individual level and records it on a household level. (Hinman 2260/15-16.) Within ACXIAM's household-level records, estimated income is household-level, but age and date of birth is individual-level data. (Hinman 2262/4-11.)

161. [redacted]

162. [redacted]

163. [redacted]

E. Use of Trans Union's Target Marketing Information in Credit Eligibility

The Court of Appeals remanded this case on the issue of whether the existence of a tradeline constitutes a consumer report. The Court stated that complaint counsel might satisfy the factual burden with evidence indicating that Trans Union intended the existence of a tradeline to serve as a factor in credit-granting decisions. The Court added that evidence "that credit decisions

could be made, even in part, on such 'existence' information might be probative of Trans Union's intent," and that the Commission might embark on a similar inquiry with respect to any list criterion employed by Trans Union in its target marketing lists. *Trans Union*, 81 F.3d at 233.

164. The existence of a tradeline, sold by Trans Union in its target marketing business, is used in credit scoring models by credit grantors in their eligibility determinations.

1. Credit Scoring

165. Predictive decision tools use data and statistical analyses to develop ways of using past information to predict future outcomes. Credit scoring uses past information on credit to predict likely outcomes. (Rapaport 673/15-25; Coffman 379/16-22.)

166. Most credit risk models use credit bureau data to observe consumer behavior. (Coffman 3825/18 -- 3826/2.)

167. Established in 1956, Fair Isaac Company ("FICO") is the leading developer of tools used by the credit industry to determine credit risk. (Rapaport 672/25 -- 673/6.) FICO has scorecards using self-reported information from consumers' applications and credit bureau information to help credit grantors predict credit risk. (Rapaport 674/15-20; 675/18 -- 676/2.)

168. FICO collaborated with each major credit bureau to develop credit risk scoring offered by each bureau under different names: EMPIRICA at Trans Union; Experian/Fair Isaac model at Experian; and Beacon at Equifax. (Rapaport 680/8-21.)

169. A credit grantor can purchase a credit score along with a credit report from the three major credit bureaus. (Rapaport 681/19-25.) Credit bureau scores use information only available on a credit report and predict credit risk involving the general population, not just the individual credit grantor. Credit bureau

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scores can be used for decisions to grant an applicant credit, to make a preapproved credit offer, to reissue, increase or decrease a credit line, or for over-limit authorizations. (Rapaport 675/1-8; 679/11 -- 680/7; 680/25 -- 681/9.) Credit card issuers, retailers, finance companies, auto lenders, installment lenders, utilities, and student loan lenders use bureau scores. (Rapaport 682/9-16.)

170. The credit score is returned by the credit bureau from which it is purchased. FICO products return a score and four reason codes showing why an individual's score deviated from the optimal score. Credit grantors use reason codes to provide reasons for adverse action when denying credit. (Rapaport 681/21 -- 682/7; 689/14 -- 690/1.)

a. FICO's Scoring Models

171. Using Trans Union's credit bureau information, FICO and Trans Union offer: EMPIRICA, a generic risk score which predicts the likelihood of delinquency on a loan or credit transaction by a consumer having at least one tradeline that was delinquent or worse in a two year period; Horizon, which predicts the likelihood a consumer will go bankrupt; and UniQuote, which predicts the likelihood a mortgage account will become delinquent. (Rapaport 690/15 -- 691/7; 692/21 -- 693/7; Tr. 800-02.) Industry Options, a refinement of EMPIRICA, offers scores for the bank card, personal finance, installment and auto loan industries. (Rapaport 692/1-18.)

172. CX 87 is a list of all the scoring factors or adverse action reason codes that are used by EMPIRICA and its Industry Options. CX 309 contains reason codes for the Horizon bankruptcy score. (Rapaport 693/17-22.)

173. [redacted]

b. Scoring Model Design and Terminology

174. A credit scoring model may use scorecards, variables, and score values. A scorecard contains characteristics, ranges of attributes and score values of each attribute. (Rapaport 683/20 -- 684/18.)

175. A characteristic is a piece of information describing a consumer such as the number of bank cards in a consumer's credit report. (Coffman 3828/14-23.)

176. Each characteristic can be broken into attributes; for example, age of an applicant is a characteristic, and the attribute might be that the applicant's age is between 25 and 30 years old. (Coffman 3829/7-11.) An attribute is predictive if it adds statistically significant information to the forecast. (Coffman 3830/8-24.) The statistical model will look at each attribute within each characteristic. (Coffman 3829/12-13.)

177. [redacted]

c. Scorecard Segmentation

178. The first step in scoring divides a consumer's credit file into scorecards of characteristics. This applies the model to homogeneous groups of people, and is called segmentation analysis. (Rapaport 685/1-5, 17-21; 686/10-11.)

179. [redacted]

180. [redacted]

181. [redacted]

182. [redacted]

183. [redacted]

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2. Information Used in Scoring

184. Except for owning property in the case of a mortgage loan, there is no one factor that would make an applicant eligible for credit. (Coffman 3860/20 -- 3861/25.) [redacted]

a. Tradelines

185. [redacted]

186. [redacted]

187. [redacted]

188. [redacted] “EMPIRICA NOT SCORED: INSUFFICIENT CREDIT message occurs when a credit file does not contain a tradeline opened for at least six months and a tradeline updated within the last six months.” (CX 87-A.)

189. [redacted]

b. Characteristics and Attributes

190. [redacted]

191. [redacted]

(1) Bank Card

192. [redacted]

193. [redacted]

194. [redacted]

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195. Number of open bank card trades is a scorecard attribute. (Coffman 3868/16 -- 3869/10.) The predictive attribute “number of open bank card trades” may be qualified by the condition that the trades must have been updated within the last six or twelve months. (Coffman 3869/6-15.) In some models the weight given to the attribute “zero” open bank card trades and the weight given to “one” bank card trade differs. (Coffman 3869/16 -- 3870/9.)

(2) Open Date of Tradelines

196. Scoring models look to the open date of tradelines to determine the age of the oldest trade, how long the consumer has had credit, and how long the consumer has had certain types of credit. (Coffman 3847/13-17, 23-24; 3876/14 -- 3877/20.) Age of oldest trade is an important indicator of credit performance. (Rapaport 774/6-19.)

197. [redacted]

198. [redacted]

199. [redacted]

(3) Collection Account

200. [redacted]

201. [redacted]

(4) Finance Trade

202. [redacted]

203. [redacted]

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(5) Mortgage

204. The number and amount of mortgages are used as predictive attributes. (Coffman 3862/5-17.) Some scoring models accord different scores for mortgage trades. (Coffman 3860/20 -- 3861/25.)

205. Some scoring models use the attribute "mortgage exact amount" and verified mortgage trades with different loan amounts are given different scores. (Coffman 3870/10 -- 3871/4.)

(6) Automobile Loan

206. Some scoring models use as predictive variables the number of auto loans, updated and verified within a certain period as an open loan. (Coffman 3865/10 -- 3866/2; 3867/13-16; 3866/17 -- 3867/12.)

(7) Credit Limit and Date Verified

207. To calculate credit use, a scoring model examines the credit limit in the consumer's credit report; for the calculation, a trade would be open, timely verified, and undisputed. (Coffman 3849/12 -- 3850/8; 3882/7 -- 3884/4.) A recent analysis of a consumer's credit report is important. (Coffman 3850/10-23.)

(8) Zip, Age & SSN

208. [redacted]

209. [redacted]

210. [redacted]

3. Information Sold by Trans Union in its Target Marketing Business Used in Credit Scoring

211. The presence or absence of a tradeline, bank card, retail account, finance loan, auto loan, collection account or a mortgage is used in credit scoring; so are the amount of a mortgage, the open dates, credit limits, and date of a tradeline. (F 181, 182, 185-187, 189, 191, 192-207.)

4. Credit Grantors Eligibility

212. [redacted]

a. Invitation to Apply

213. An invitation to apply is an application for credit, mailed to persons who may return the application to the credit grantor. (Koppin 483/25 -- 484/2; 488/24 -- 489/2; Zancola 666/2-8; 666/25 -- 667/2.) Credit grantors purchase lists of names for mailing the invitation to apply. (Koppin 486/18-20; 487/2-4.) This mailing is not a guaranteed offer of credit. (Pendleton 360/13-18; Zancola 666/2-6; Koppin 482/24 -- 483/2; 489/2-4.) The credit grantor decides to grant credit only after receipt of the completed application. (Pendleton 360/13-25; Koppin 486/23 -- 487/1.)

(1) Wachovia's Invitation to Apply

214. In evaluating applications responding to an invitation to apply, Wachovia uses a credit scoring process by Wachovia and FICO. (Pendleton 360/20 -- 361/9.) [redacted].

215. [redacted]

216. [redacted]

217. [redacted]

218. [redacted]

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219. [redacted]

220. [redacted]

(2) Discover's Invitation to Apply

221. [redacted]

222. [redacted]

223. [redacted]

224. [redacted]

225. [redacted]

226. [redacted]

227. [redacted]

228. [redacted]

229. [redacted]

230. [redacted]

231. Discover formerly used the existence of a student loan as one of the factors in deciding to extend credit but that was stopped. (Stormoen 2959/22 -- 2960/24.)

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b. Information Sold by Trans Union in its Target Marketing Business is Used in Credit Grantors' Scoring

232. In deciding credit eligibility, credit grantors use the presence of a tradeline, bank card, or mortgage. Credit grantors also use: FICO scores, the number of retail cards, and the open dates and credit limits for tradelines. (F 216, 218, 220, 224, 226-229.)

c. Prescreened Offers of Credit

233. In a prescreened offer of credit, a credit grantor mails a firm offer of credit to a person. (Koppin 482/21-23, 488/20-23; Pendleton 357/23 -- 358/3; 359/1-6.)

234. Credit grantors obtain names of persons to consider for the prescreening from an outside list or by an “extract” of names from a consumer reporting agency. (Koppin 484/14-19; 485/2-7; Pendleton 357/23 -- 358/3; McCoy 495/14-24.)

235. [redacted]

236. [redacted]

237. Whether from an outside list or from an extract, the names are processed by a consumer reporting agency so that credit criteria may be applied. (Koppin 489/5-9; Pendleton 358/19 -- 359/6.) Credit grantors use the three national consumer reporting agencies to conduct prescreening. (Koppin 483/14-16; Pendleton 359/24 -- 360/2; Zancola 668/2-6; McCoy 495/14-20.)

238. [redacted]

239. [redacted]

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(1) Wachovia's Prescreen

240. [redacted]

241. [redacted]

242. [redacted]

243. [redacted]

244. [redacted]

245. [redacted]

246. [redacted]

247. [redacted]

248. [redacted]

249. [redacted]

250. [redacted]

251. [redacted]

252. [redacted]

253. [redacted]

254. [redacted]

255. [redacted]

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(2) First Card's Prescreen

256. [redacted]

257. [redacted]

258. [redacted]

259. [redacted]

260. [redacted]

261. [redacted]

262. [redacted]

263. [redacted]

264. [redacted]

265. [redacted]

266. [redacted]

267. [redacted]

268. [redacted]

269. [redacted]

270. [redacted]

271. [redacted]

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(3) Chase's Prescreen

272. [redacted]

273. [redacted]

274. [redacted]

275. [redacted]

276. [redacted]

277. [redacted]

278. [redacted]

279. [redacted]

280. [redacted]

281. [redacted]

282. [redacted]

283. [redacted]

284. [redacted]

285. [redacted]

286. [redacted]

(4) Northern Trust's Prescreen Process

287. [redacted]

288. [redacted]

289. [redacted]

290. [redacted]

291. [redacted]

292. [redacted]

293. [redacted]

294. [redacted]

d. Information Sold by Trans Union in its Target Marketing Business is Used in Credit Grantor's Prescreening

295. Credit grantors use a tradeline, bank card, finance company trade, mortgage, refinanced trade, and a student loan in prescreening. (F 243-245, 248-252, 258, 259, 269, 278-282, 288, 290, 291.) Credit grantors also use FICO scores, type of tradeline, and credit limit and open date of tradelines in prescreening. (F 242, 247, 253, 254, 264, 268, 275, 277, 283, 289.)

F. Consumers' Privacy and Disclosure of Consumer Reports

1. Survey of Consumer Privacy

296. Complaint counsel offered a survey to assess consumer attitudes regarding the use of information derived from CRONUS and from credit reports to compile marketing lists. (Mazis 1080/10-18.)

297. Dr. Michael Mazis wrote the questionnaire and determined the methodology for the privacy survey. (Mazis 1081/21-24.) International Communications Research ("ICR")

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conducted the survey using Dr. Mazis' questionnaire and methodology. (Mazis 1082/25 -- 1083/3; Waldeck 1057/1-8; 1057/14-20; 1068/8-23.) ICR is qualified to conduct such a consumer survey. (Waldeck 1051/24 -- 1052/3.)

298. Ms. Karen Waldeck collected and reported the data for Dr. Mazis' survey (CX 274) and prepared a final report. (CX 274; Waldeck 1054/3-5; 1054/20 -- 1055/1; 1063/1-9; 1064/16 -- 1065/6.)

299. Dr. Mazis used a telephone survey to obtain a nationally representative sample. (Mazis 1082/22 -- 1084/10.) ICR conducted the survey by telephone. (Waldeck 1057/3-7.)

300. ICR selected the households to be surveyed through random digit dialing. (Waldeck 1059/9-12; Mazis 1084/5-6, 24-25; CX 274-C; CX 354-A.)

301. In order to ensure a random sampling within each household, ICR used the "last birthday" method requiring interviewers to request to speak with the individual over the age of 18 who had the most recent birthday in each household. (Waldeck 1059/25 -- 1060/8; Mazis 1088/16-18; CX 274-C; CX 354-A.)

302. A pre-test of the questionnaire was conducted prior to conducting the survey. (Waldeck 1058/24 -- 1059/1; CX 354-A.) The pre-test resulted in only minor changes to the questionnaire, and demonstrated significant variation in responses indicating that the questions were understood. (Mazis 1087/3-14; Waldeck 1068/16-23.) The interviewers conducting the pre-test and the survey had no knowledge that the FTC was the client for whom the survey was conducted nor were they aware of the purpose for which it was conducted. (Waldeck 1061/12-15.)

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303. After collecting data, ICR conducted a test to verify the data and that the interview was properly conducted. (Waldeck 1064/4-15; Mazis 1089/11-16; CX 354-A.) ICR's validation test requires calling back at least 20% of the individuals surveyed and confirming their responses to selected questions. (Waldeck 1064/4-16.) A 20% validation test is considered standard within the survey industry. (Mazis 1089/14-16.)

304. The sample size of the survey ICR conducted was 1,002. (Waldeck 1060/12-16; CX 354-A.) This was projectable to United States households with a margin of error of plus or minus 3%. (Mazis 1089/17-19; CX 354-A.)

305. The questionnaire stated that the survey concerned marketing lists. (Mazis 1091/6-10; CX 274-Z-34.) Participants could indicate that they had "no opinion" in response to a question. (Mazis 1092/11-19; CX 274-Z-34.)

306. Participants were provided with potential responses from "very acceptable" to "somewhat acceptable" and "somewhat unacceptable" to "very unacceptable," and definitions of each of these terms. (Mazis 1092/2; 1092/24 -- 1093/5; CX 274-Z-34.)

307. Interviewers asked questions regarding types of consumer information used to create marketing lists. (Mazis 1095/14 -- 1096/1; 1097/10-21; CX 274-Z-34 -- Z-35.) For example: "Do you think that it is very acceptable, somewhat acceptable, somewhat unacceptable, very unacceptable to sell to companies a list of individuals based on whether or not they have a second mortgage?" (CX 274-Z-35.)

308. Fifty percent of the respondents were first asked: "Do you think that it is very acceptable, somewhat acceptable, somewhat unacceptable, very unacceptable to sell to companies a list of individuals based on whether or not they have a mortgage?" followed by the question: "Do you think that it is very acceptable, somewhat acceptable, somewhat unacceptable, very unacceptable to sell to companies a list of individuals based on the state that

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they live in?" (Mazis 1095/13-20; CX 274-Z-34.) For the other 50% of the interviewees the order of these questions was reversed. Consecutive questions on a similar topic are rotated to prevent "order bias." (Mazis 1094/13 -- 1095/10; CX 274-Z-34.)

309. Interviewers asked similar questions on a random basis, with regard to selling lists based on the following:

your estimated income

whether or not you have an auto loan or lease

whether or not you have a second mortgage

type of mortgage you have

the approximate amount of your mortgage

estimated amount of your home equity

whether or not you live in an apartment

whether or not you have a credit card

whether or not you have a premium bankcard

(Mazis 1097/23 -- 1098/8; CX 274-Z-35.)

310. Dr. Mazis prepared charts, CX 354-A -- D, summarizing his findings of the survey. (Mazis 1104/2-4; 1105/24 -- 1106/6; CX 354-A-D.)

311. The results were as follows (stated in terms of the combined percentage of respondents indicating somewhat or very unacceptable to sell marketing list based on):

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Approximate amount of mortgage	72.8%
whether or not you have a second mortgage	72.5%
estimated amount of home equity	70.1%
estimated income	68.6%
type of mortgage	66.1%
whether or not you have a mortgage	65.4%
whether or not you have an auto loan or lease	64.1%
whether or not you have a premium bank card	64.0%
whether or not you have a credit card	60.9%
whether or not you live in an apartment	55.5%
state of residence	46.1%

(CX 354-C; CX 274-Z-25 -- Z-26.)

312. These results extend from a high of 72.8% (regarding the approximate amount of a mortgage) to a low of 46.1% (regarding state of residence). (Mazis 1109/2-4; 1106/25 -- 1107/3.)

313. Next, the interviewers asked questions to determine consumer attitudes towards credit report data as a source of information for marketing lists. (Mazis 1080/15-24; 1099/17 -- 1100/3.) The next question in the survey stated: "When companies put together mailing or telemarketing lists to sell products to consumers they sometimes use information from consumers' credit reports. Have you heard of a credit report?" (Mazis 1099/22 -- 1100/3; CX 274-Z-35.)

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314. This filtering question insured that only respondents familiar with a credit report answered the next question. (Mazis 1100/13-17.) Eighty-nine point five percent of the respondents had heard of a credit report. (Mazis 1104/9-11; CX 274-Z-31; CX 354-B.) Ten point one percent of the respondents had not heard of a credit report and were not asked the next question. (Mazis 1100/10-12; 1101/3-5; CX 274-Z-31; CX 354-B.)

315. The following question stated: "Thinking about information from consumers' credit reports, do you think it is very acceptable, somewhat acceptable, somewhat unacceptable, or very unacceptable to use information from credit reports to put together marketing lists to sell products to consumers?" (CX 274-Z-36.)

316. Of those answering this question, 76% found this practice unacceptable. (Mazis 1104/22 -- 1105/3; CX 274-Z-32; CX 354-B.) This means that 68.1% of the survey's respondents found the use of credit report information for the compilation of marketing lists to be unacceptable. (Mazis 1105/13-19; CX 354-B.)

317. Based on these results, Dr. Mazis determined that consumers have a strong privacy interest in the use of information from their credit reports. (Mazis 1107/23-25.)

318. Consumers also have a strong privacy interest regarding the use of specific types of information derived from CRONUS for the purpose of compiling marketing lists. (Mazis 1109/20-25.)

319. The conclusion that the Fair Credit Reporting Act protects consumers' privacy interests by prohibiting the unauthorized dissemination of their credit histories to third-party marketers is supported by the results of the consumer survey performed by ICR.

2. Government Interest in Consumers' Privacy

320. Professor Joel Reidenberg testified to the privacy protections afforded to consumers' credit information under the Fair Credit Reporting Act. (Reidenberg 964/5-14.)

321. Fair information practices are a set of standards that are applied to the treatment of personal information. These standards focus on ensuring fairness to the individual in the treatment of his or her personal information. (Reidenberg 947/7-13.) Personal information is "information that relates to an identified or identifiable individual." (Reidenberg 949/20-21.)

322. Fair information practices espouse the principle that personal information should be collected openly for use for a specified purpose. (Reidenberg 947/14-19.) Once collected, personal information should only be used for the purpose for which it was collected, unless the individual has the opportunity to participate in the decision to allow other uses. (Reidenberg 947/18-24.)

323. Congress has enacted legislation regarding the use of personal information. (Reidenberg 953/24 -- 954/11.) The Fair Credit Reporting Act imposes legal obligations upon the credit reporting sector that are consistent with fair information practices standards. (Reidenberg 955/22 -- 956/18.)

324. Professor Reidenberg analyzed the legislative history of the FCRA. (Reidenberg 974/8-20; 986/10-13.)

325. In enacting the FCRA, Congress intended to ensure confidence in the credit reporting system. Congressional concern was due to the "rampant" disclosures unrelated to the extension of credit of information held by consumer reporting agencies. (Reidenberg 958/2-15.)

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326. Prior to the FCRA, the media publicized stories regarding non-credit related disclosures of information by consumer reporting agencies. These news accounts were considered by Congress in formulating the FCRA. (Reidenberg 960/19 -- 961/5.) Congress also considered testimony by Professor Alan Westin regarding examples of such disclosures. (Reidenberg 961/22 -- 962/5.)

327. The FCRA addressed non-credit disclosures by requiring “permissible purposes” for the disclosure of information held by consumer reporting agencies. (Reidenberg 955/22 -- 956/4; 956/9-11.)

328. Under the FCRA, a permissible purpose for disclosure exists if a consumer authorizes the disclosure. (Reidenberg 975/3-8.)

329. The 1996 amendments to the FCRA authorize disclosure of credit report information for prescreening if: (1) a firm offer of credit is made with limited post-screening to verify identity and continued compliance with the grantor's selection criteria; (2) the credit grantor's selection criteria are identified; (3) the prescreening has an opt-out system; and (4) the credit grantor provides notice to the individual. (Reidenberg 967/2-23; 971/5-11.)

330. Under the amended FCRA, the permissible purpose for disclosure of credit reports in prescreening extends to firm offers of credit or insurance. Oscar Marquis, Trans Union's general counsel, rejected proposed prescreen mailings of a sweepstakes/magazine subscription promotion and other non-credit offers, that would have used “credit criteria” because he did not consider them to be offers of credit. Prior to October 1, 1997 such offers would have been target marketing. (Marquis CX 188 at 167/24 -- 171/22.)

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331. In the amended FCRA, the right to opt-out of prescreening provides consumers with a right to participate in the decision to use their information for firm offers of credit. (Reidenberg 976/11-16.) Use of credit report data for a prescreen firm offer of credit is consistent with the purpose of collecting the information. (Reidenberg 966/19 -- 967/1.)

332. Professor Reidenberg testified that the maintenance of documentation of criteria is unique to the FCRA (Reidenberg 971/2-16), and that the opt-out requirements are the “only situation in the private sector where . . . a third party has to tell you where they got your name.” (Reidenberg 967/23 -- 968/1.)

333. Trans Union does not provide target marketing lists on New Hampshire residents because the state credit reporting statute requires prior consent. (Marquis CX 188 at 148/11-19; N.H. Rev. Stat. Ann. § 359.)

3. Opt-Out

334. “Opt-out” refers to the procedure whereby consumers can request that their names be removed from target marketing lists, including direct mail and telemarketing lists. (Davis 210/20-25.)

335. The target marketing list industry consists of list providers, list managers, list brokers, and list users/renters/purchasers. (Miller 3008/5-25; 3034/1-9, 17-24; 3034/25 -- 3035/1-25.) Consumers in general are unaware that their names and addresses are used to compile lists since the majority of all lists are developed as a result of secondary uses of information. (CX 151-A.)

336. Most consumers are unaware that they can opt-out of target marketing lists. (Beales 3669 -- 3670/14; Westin 3639/8-19.) Of consumers surveyed in 1991 and 1996, 44% stated that they were aware of procedures that would allow them to remove their name from direct mail lists. (TU-88 at FTC B0003194.)

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337. The Direct Marketing Association (“DMA”) maintains two opt-out files for use by its member companies. Consumers who request that DMA place their names on the opt-out lists must reregister after five years. (Cleary 3081/15 -- 3082/14.)

338. DMA member companies are not required to use the DMA opt-out files, and can nevertheless make available on their mailing and telemarketing lists the names of those consumers who have requested to opt-out at the DMA. (Cleary 3082/17 -- 3083/6; Nusbaum 2905/24 -- 2906/25.)

339. DMA has a small advertising budget to notify consumers of their right to opt-out and relies on consumer affairs columnists, government, and interview news programming to notify consumers of DMA opt-out availability. (Cleary 3142/10-20.)

340. List brokers and list managers do not notify consumers about the opt-out process. They rely on the opt-out service provided by the DMA. (Miller 3073/15-19.)

341. Respondent's own witness was unaware of any list providers that require their clients to notify consumers of the opt-out process, except where required by law in the context of prescreening. (Hinman 2238/1-17.)

342. Trans Union's opt-out program complies with Section 604(e)(5) of the Fair Credit Reporting Act, which requires consumer reporting agencies to notify consumers of their right to opt-out of firm offers of credit. (Botruff 2065/22 -- 2066/9; TU-203.) Trans Union provides consumers with the choice of opting out for a two-year period or opting out permanently -- the percentage of those who choose to opt-out permanently is in the high nineties. (Botruff 2063/1-7.)

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343. Trans Union does not require its list clients to notify consumers of their right to opt-out of target marketing lists other than on prescreen. Trans Union sales people who review non-prescreen promotional pieces are not aware of any such mailings that carry an opt-out notification. None of the non-prescreen promotional mail in evidence contains an opt-out notification that informs the consumers that their names are on a Trans Union list nor how to opt-out of Trans Union's target marketing lists. (Dexter 1276/15 -- 1277/1; Clifton 1916/25 -- 1917/23; CX 11; CX 18-A-J; CX 19-A-G; CX 20; CX 24-A-M; CX 25; CX 26-A-I; CX 26-A-E; CX 32-A-B; CX 35-A-D; CX 36 A-D; CX 39-A-D; CX 40-A-H; CX 256; TU-175; TU-176.) There is no direct, credible evidence of the success rate of the opt-out actually stopping direct mail or telemarketing calls.

344. DMA's Mail Preference Service consists of names of 3.5 million consumers who do not want their names to be included on any target marketing mailing lists. (Tr. 3081-82, 2203-04.)

345. DMA's Telephone Preference Service includes the names of 750,000 consumers who do not want their names included on any telemarketing lists. (Tr. 3081-82, 2204.)

346. Trans Union's "Privacy Protocol," which appears on Trans Union's website, states that Trans Union "believe[s] consumers should have the right to make informed decisions about the use of their personal data, including the right to be removed from direct marketing lists." (TU-50; TU-51.) PerformanceData employees, including Jay Frank, Senior Vice President in charge of PerformanceData, indicated that they had either never seen the protocol, or were unfamiliar with its substance. (Porretto 1620/2-13; Dixon 293/14-16; Dexter 1286/2-14; Frank CX 186 at 64/6 -- 65/11.)

347. CRONUS indicates whether a consumer wants to be excluded from any direct mail or telemarketing list. (Tr. 3677-78.). In January 1997, CRONUS contained the names of 5.1 million consumers who opted out. (Tr. 2060.)

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348. Trans Union placed an advertisement in the September 22, 1997 edition of the USA Today praising the benefits of direct mail advertisements and notifying consumers that information in Trans Union's consumer files may be used in connection with credit or insurance transactions that are not initiated by the consumer and of the address and toll-free telephone number for consumers to use to opt-out, but warning that the opt-out does not guarantee that the consumer won't receive direct mail offers from other sources. (TU-203.)

349. In February 1998, CRONUS contained the names of 6.1 million consumers who opted out. (Tr. 2066.)

350. PerformanceData does not include in the List Master File the name of any consumer in CRONUS who has opted out. (Tr. 3677-78.)

351. PerformanceData obtains from ACXIOM a list of telephone numbers to be included in the List Master File. (Tr. 3678.) The list of telephone numbers which PerformanceData receives from ACXIOM does not include unlisted telephone numbers or the telephone number of consumers whose names appear on DMA's Telephone Preference Service. (Tr. 3678-79.)

352. PerformanceData and the list providers who testified voluntarily do not include on any direct mailing or target marketing list the names of consumers who opt-out. (Tr. 3677-79, 2205, 2905-07, 2996-98, 3080-83, 3379-80.)

G. The Direct Marketing Industry

353. There are 15,000 companies engaged in supplying consumer direct marketing lists. (Tr. 3337.)

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354. The total gross annual revenue of companies supplying consumer direct marketing lists and file enhancement data may be \$ 1.5 billion. (Tr. 3320-21.) Five companies' revenues represent 40% of this \$ 1.5 billion market: R.L. Polk & Company, ACXIOM, Metromail Corporation, First Data Solutions and ABI/DBA. (Tr. 3321-22.) PerformanceData has a 2% share of this market. (Tr. 3322.)

355. There are 30,000 direct marketing lists. (Tr. 2213.) "The Direct Marketing List Source" identifies more than 19,000 lists in 212 markets. (Tr. 2429, 2432.)

H. Consent Decree With TRW

356. Prior to January 1993, Experian's predecessor, TRW Information Systems and Services ("TRW"), conducted its target marketing business in the same manner as PerformanceData's business which is at issue here. (Tr. 3287-88.)

357. On January 14, 1993, the Commission and TRW entered into an amendment to a previously-entered consent decree which provides that TRW is allowed to extract the following information from its consumer reporting database for target marketing: name, telephone number, mother's maiden name, address, zip code, year of birth, age, any generational designation, social security number, or substantially similar identifiers, or any combination thereof. (TU-109; Tr. 3286-87, 3293.) Under the consent decree, Experian (TRW), unlike Trans Union, does not extract open dates, high credit amounts, auto loan expiration dates, and loan dates from its consumer reporting data base for use in target marketing lists. (F 146.)

358. Experian's Fall 1997 Catalog of Consumer Lists and Processing Services advertises a "Consumer Database" composed of records on 161,235,677 consumers. (TU-112.) [redacted]

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359. Experian's Fall 1997 Catalog of Consumer Lists and Processing Services advertises a 30-day new mover list totaling 950,000 consumers a month and a 14-day new mover list totaling 550,000 consumers a month with a 12-month total of 11,406,804 consumers. (TU-112.)

360. At the time that TRW entered into the consent decree with the Commission, TRW was using credit attributes from its consumer reporting database, aggregated to a geographic area defined by a nine digit postal zip code ("zip-plus-four"), in connection with its target marketing business without objection by FTC representatives. (Tr. 3290-93, 3305-07.) This information was made available by TRW for statistical modeling and as a data attribute. (Tr. 3306.)

361. There are 20 million zip-plus-four's in the U.S. A zip-plus-four includes 5-15 households. (Tr. 2688.)

I. The 1996 Amendments to the FCRA

362. On September 30, 1996, Congress passed amendments to the FCRA effective September 30, 1997. These amendments were included in the Omnibus Consolidated Appropriations Act of 1997. (CX-167-A.)

363. Effective September 30, 1997, § 603 of the FCRA was amended to include a definition of "firm offer of credit or insurance." FCRA, § 603(1)(1997).

364. Section 604(c) of the amended FCRA created a new permissible purpose for transactions not initiated by consumers, i.e., prescreening; a provision addressing the information a credit grantor could receive on consumers in prescreening; and provisions for "opt-outs." FCRA, §§ 604(c) and (e)(1997).

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365. Under the amended FCRA, when a consumer responds and accepts a firm offer of credit, a credit grantor can then review the consumer's credit report and deny the consumer the credit offered if the consumer's credit report reflects something negative about the consumer's credit performance. FCRA, § 603(1)(1997).

366. The Senate passed S. 650, a bill amending the FCRA. (TU-214.) The bill passed by the Senate included the amendments to §§ 603 and 604 discussed above; however, the Senate bill also included a provision affirmatively authorizing the use of information from consumer files in connection with direct marketing transactions by defining the information the Senate considered to be outside the scope of "eligibility information" covered by the FCRA as "name and address of consumer and other information that would not disclose the credit payment history, credit limit, credit balance, or any negative information pertaining to the consumer." (TU-214; Tr. 2550-56, 3513-17.)

367. The FCRA amendments passed by Congress do not include the provision in the bill passed by the Senate which affirmatively authorized the use of information from consumer files in connection with direct marketing transactions. (CX-167-A[B] TU-213.) On September 30, 1996, the following colloquy took place between Senator Bryan and Chairman Alfonse D'Amato (R-NY):

Mr. BRYAN. Mr. President, I wish to engage my esteemed colleague Chairman D'Amato in a brief colloquy to clarify two items pertaining to the Fair Credit Reporting Act (FCRA) amendments contained in the H.R. 4278, the Omnibus Consolidated Appropriations Act of 1997. First, the House of Representatives in negotiations over the weekend deleted a Senate-approved measure which would have codified the permissibility of direct marketing under the FCRA. The deletion leaves the law silent on this issue, retaining the status quo. The House action does not reflect any congressional intent regarding the extent to which direct marketing is permissible under FCRA.

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The second item relates to a requirement imposed under section 609 of the FCRA for personnel being accessible to consumers. The requirement that personnel be available under normal business hours is not intended in any manner to interfere with the use of automated menu telephone systems which provide the consumers with a range of options. The standard is satisfied as long as the system provides a consumer the option to speak to a live operator at some point in the audio menu.

Does the chairman confirm these understandings?

Mr. D'AMATO. Yes, Senator Bryan. I agree with your assessment on these points.

(TU-213; Tr. 2555-56.)

III. ANALYSIS

A. Target Marketing

Target marketing involves selling goods and services directly to consumers by mail or telephone. Consumers are picked by geographic, credit-related, demographic traits. (F 5.) Marketers want to limit the number and type of persons solicited to improve the response rate in order to increase profits.

Trans Union's target marketing lists⁶ use consumer information from CRONUS. On October 1, 1997, Trans Union stopped selling some target marketing lists and data in non-prescreen promotions.⁷ On that day amendments to the FCRA

⁶ Trans Union sold its lists under different names -- TransMark, Trans Union Lists and PerformanceData. (F 4.)

⁷ F 112 - 113.

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became effective, providing for civil penalty liability. 15 U.S.C. § 1681s(a)(2). Trans Union ceased selling those products for use other than firm offers of credit because of potential civil penalty liability for violations of the FCRA under the new amendments.⁸ Trans Union's caution there seems to conflict with its perseverance in this case. There would be no such risk if the products being sold to target marketers were not consumer reports.

Four weeks prior to trial in this matter, Trans Union revised its target marketing database,⁹ involving data on bank cards, finance trades, dollar amounts and open dates. In late-January 1998 Trans Union created a separate database (known as PerformanceBase or RelationBase) for dollar amounts, open and closed dates, loan types, home equity, and SOLO.¹⁰ The data on PerformanceBase is now available only for firm offers of credit. These revisions do not vitiate the charges in the complaint.¹¹

Trans Union's target marketing product is the Master File.¹² Until January 1998, when Master File was changed to comply with the October 1, 1997 changes to the FCRA, the Master File required at least two open tradelines, one of which must have

⁸ F 114.

⁹ F 32, 33, 112.

¹⁰ F 116. CX 333, 334 and 335 set out the contents and quantities for the List Master file (CX 333), the "pre-approved file (in RelationBase)" (CX 334), and a comparison of the two (CX 335).

¹¹ Trans Union continues to sell data for target marketing from its Master File (F 25, 115), and has not argued abandonment. Because of the possibility of recurrence, abandonment of a practice is not a basis to avoid entry of a Commission order. *Official Airline Guides v. FTC*, 630 F.2d 920, 928 (2d Cir. 1980).

¹² This database was referred to by the Court of Appeals as the "base list." *Trans Union*, 81 F.3d at 229, 232, 234.

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been verified within 12 months.¹³ The January 1998 Master File requires one tradeline.¹⁴

Consumer files in the Master File may have data on a bank card, auto loan, or mortgage, but every file must have at least two (or, as of January 1998, one) qualifying tradelines. The individual consumer information that comes from CRONUS may include the presence, amount, dates, and type of: auto loan, bank card, premium bank card, department (retail) card, upscale retail card, finance loan (mortgage, auto), student loan, and head of household.

In addition to its Master File, Trans Union sells other target marketing products that use consumer credit information from CRONUS. Trans Union sells monthly and weekly lists of persons who have been issued new credit -- in a bank card, mortgage, auto, retail card, upscale retail card, and finance company -- within the last 30 to 90 days. Trans Union also sells its income estimator ("TIE") showing a person's income. SOLO shows 35 credit characteristics; EVAL provides information about home value and home equity; PIC uses data from CRONUS, and external survey data, to predict the likelihood of purchase of such products as mutual funds and IRA accounts.

Trans Union also sells TransLink, a product that "reverse appends" a consumer's name and address to a third-party credit card account number obtained by a merchant at the point of sale and supplied to Trans Union for the purpose of discovering the card account holder's identity and address. Although TIE, E-Val, SOLO and PIC are now available only for firm offers of credit,

¹³ F 28, 31, 126. "Tradeline" refers to information supplied by a credit grantor about a consumer's account: the account number, type of account, date opened, high credit, current balance, payment history. F 22, 28.

¹⁴ F 33.

Trans Union continues to sell its TransLink product to those without a permissible purpose to receive consumer reports.

Each of Trans Union's target marketing products is a consumer report because it discloses information from Trans Union's consumer reporting database that is also used by credit grantors for credit eligibility determinations. This is true of the element common to all Trans Union target marketing products -- existence of tradeline -- as well as the specific elements included in list selects and in Trans Union's specialized products such as SOLO and TIE.

B. Credit "Eligibility" Information

Credit grantors make eligibility determinations on applications submitted by consumers. Credit grantors also seek to increase their business by extending credit to new account holders through their own marketing efforts, including: prescreened offers of credit; non-prescreened offers, known as "invitations to apply"; and in-branch or take-one applications for credit.¹⁵ In each case, credit grantors use their own standards to evaluate the creditworthiness of applicants and other consumers to whom the credit grantor wishes to extend an unsolicited offer of credit. In many cases, credit grantors make use of credit scoring models to assist them in their eligibility determinations. Credit scoring is the most direct evidence that Trans Union itself intended the same elements that it uses in its target marketing lists also to be collected and used for eligibility determinations.

1. Credit Scoring

The Court of Appeals stated that, "on remand, if the FTC wishes to classify existence-of-tradeline information as a consumer report, it must gather evidence that indicates that Trans Union intended the mere existence of a tradeline . . . to serve as a

¹⁵ F 212.

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factor in credit-granting decisions . . .” 81 F.3d at 233. The trial record proves Trans Union's intent because it establishes that credit scoring products developed by Trans Union use number of tradelines in credit scoring based on information from CRONUS.¹⁶ Credit scoring, including Trans Union's own scoring, use factors -- such as presence of bank cards, auto loans and mortgages -- also used by Trans Union in target marketing lists.¹⁷

Credit scoring weighs factors in a credit grantor's decision to approve credit, evaluating the risk posed by each applicant. With computers, credit scoring has become more prevalent. It uses information (from loan applications or credit bureau records) to predict a person's future debt repayment performance.¹⁸

“Custom” scoring helps credit grantors by identifying the “good” and “bad” performing consumer accounts of that company by statistical analysis. Custom scoring also uses information from consumers' applications and credit bureau information.¹⁹

The three national credit bureaus sell credit history scores to help lenders assess risk on loans.²⁰ Credit bureau scoring systems use only credit bureau data.²¹ Credit grantors receive a numerical score for each applicant, based on the individual's credit history. The higher the score, the better the credit risk.²²

¹⁶ F 186.

¹⁷ F 190-191, 211.

¹⁸ F 167.

¹⁹ F 167.

²⁰ F 168-169.

²¹ F 169.

²² F 170.

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Trans Union, in partnership with Fair Isaac Co. (FICO), the leading credit scoring company, developed: EMPIRICA, Trans Union's credit scoring predicting delinquency on a loan or credit; Horizon, predicting bankruptcy; and UniQuote, predicting the likelihood that a mortgage will become delinquent.²³

a. Existence of Tradelines

Trans Union's EMPIRICA, Horizon, and UniQuote scoring models will not score an applicant whose credit file has no tradeline or at least one tradeline updated in the past six months.²⁴ If there is no tradeline, the model cannot calculate a credit score.²⁵ Most credit grantors will not approve an applicant for credit where there is no score at the credit bureau.²⁶ This evidence alone establishes Trans Union's intent that a tradeline is a factor in credit eligibility.

b. Number of Tradelines

Credit scoring involves identifying, by statistical analysis, characteristics in consumers' credit histories that predict credit performance.²⁷ A "characteristic" is information from a

²³ F 167-168, 171. Industry Options, a refinement of EMPIRICA, offers scores for the bank card, personal finance, installment and auto loan industries. Trans Union also offers DELPHI, a bankruptcy model, developed with another modeling company, MDS. F 173.

²⁴ F 186-187; CX 89-S. DELPHI requires at least one qualifying tradeline to score a consumer file. F 185.

²⁵ F 188. An "EMPIRICA NOT SCORED: INSUFFICIENT CREDIT message occurs when a credit file does not contain a tradeline opened for at least six months and a tradeline updated within the last six months." (CX 87-A.)

²⁶ F 189.

²⁷ F 174-177, 179.

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consumer's credit history, such as the number of bank credit cards in a consumer's credit report.²⁸ Variables ("attributes") are assigned weights, based on credit history and statistical analysis.²⁹ For the characteristic "open bank cards," attributes are the number of bank cards, such as "zero," "one," "2-3," "4-6," "7 or more."

The first step in scoring puts a consumer's credit file into a scorecard based on information in the consumer's file. A scorecard is tailored to homogenous people.³⁰ EMPIRICA uses ten scorecards. Each scorecard contains characteristics, attributes and weights.³¹

Scoring assesses the consumer's credit history to gauge the number of tradelines. EMPIRICA's ten scorecards are "each tailored to a distinct consumer group based on their credit behavior."³² As stated in Trans Union's EMPIRICA brochure:³³

EMPIRICA selects one of 10 different scorecards which best reflects the consumer's credit history to calculate the EMPIRICA score. Scorecard selection is based upon such credit information as:

- * Number of tradelines
- * Age of oldest tradeline
- * Age of newest tradeline

²⁸ F 175.

²⁹ F 176, 180.

³⁰ F 178.

³¹ F 181, 183.

³² Id.; CX 88-B.

³³ CX 88-E.

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Of the ten scorecards, two are for applicants with serious delinquency, and one is for applicants with a single tradeline; other applicants have two or more tradelines.³⁴ EMPIRICA distinguishes between consumers who have one tradeline and those who have two or more. It sends the credit files of those consumers who have no serious delinquency and a single tradeline to a different scorecard than consumers who have two or more tradelines. A consumer's credit is scored differently based on number of tradelines and on the age of the oldest and newest tradelines. EMPIRICA will not score an individual with no tradeline. The use of number and age of tradelines in Trans Union scoring products is evidence that Trans Union intended that these elements serve as factors in credit decisions.³⁵

c. Other Characteristics

The characteristics on a scorecard determine the applicant's score. Scorecard predictive characteristics use the same information that Trans Union uses to assemble its target marketing lists.³⁶

EMPIRICA (for auto loans, bank cards, finance and installment loans), Horizon (bankruptcy), and "UniQuote" (mortgage loan) use as predictive characteristics scores:

* [redacted]³⁷

* [redacted]³⁸

³⁴ F 181.

³⁵ Trans Union promotes EMPIRICA for credit decisions, setting credit limits, assigning interest rates, repricing accounts and improving collections. CX 88-C.

³⁶ CX 93, F 190.

³⁷ F 191-194.

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* [redacted]³⁹

* [redacted]⁴⁰

EMPIRICA provides adverse action codes that explain the score. The credit grantor can then supply the reasons to those applicants who are declined for credit. Among the EMPIRICA explanations are: "Lack of recent information on bank card accounts or lack of bankcards" and "lack of recent information on auto loans or lack of auto loans."⁴¹ For Horizon, reason codes include: "No mortgage loans reported."⁴²

Factors used by Trans Union in its target marketing lists are also used in scoring models. Michael Rapaport of FICO and John Coffman of May & Speh, another credit scoring firm,⁴³ testified that they use information that Trans Union makes available in its target marketing lists. Mr. Rapaport testified that these factors include: presence or absence of a retail account, an auto loan, a mortgage loan, as well as a consumer's homeowner status. Scoring models also consider the open date of the newest tradeline, finance loan, and auto loan.⁴⁴ Dr. Coffman testified that

³⁸ F 191, 202-203.

³⁹ F 191, 196-199.

⁴⁰ F 200-201.

⁴¹ CX 87.

⁴² CX 309.

⁴³ Rapaport 672/11-22, 674/12-14; Coffman 3795/20 -- 3796/23, 3798/1-18, 3800/4, 6, 13, 20-21, 3803/13 -- 3804/22.

⁴⁴ F 191.

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number and amount of mortgages are used as predictive attributes in credit risk scoring. He also testified that verified mortgage trades in different loan amounts are given different scores.⁴⁵ Dr. Coffman has seen auto loans used as a predictive characteristic.⁴⁶ He testified that, to calculate credit, scoring models examine the credit limit in a consumer's credit report.⁴⁷ The use of these factors in target marketing lists and in Trans Union credit scoring establishes Trans Union's intent.⁴⁸

In its opinion, the Court of Appeals stated that

On remand, if the FTC wishes to classify existence-of-tradeline information as a consumer report, it must gather evidence that indicates that Trans Union intended . . . or, of course, that someone used or expected [existence-of-tradeline information] to be used [as a factor in credit-granting decisions].

Trans Union, 81 F.3d at 233. The evidence proves that credit grantors consider existence of tradeline (and other factors that Trans Union uses in its target marketing lists) to extend consumer credit. Credit grantors extend credit to new accounts by prescreened offers of credit and invitations to apply.

2. Prescreening

The FCRA requires that consumer reporting agencies furnish consumer reports only to those with a “permissible purpose” to obtain a report; prescreen offers are an exception to the requirement that, for a permissible purpose to exist, the consumer

⁴⁵ F 204-205.

⁴⁶ F 206.

⁴⁷ F 207.

⁴⁸ [redacted]

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must have initiated the transaction. *Trans Union*, 81 F.3d at 234. Prescreening is the process whereby a credit grantor extends credit to consumers who meet credit standards. A prescreened list is a list of consumer reports because it shows that each consumer meets criteria for creditworthiness. The Commission interpreted the FCRA to permit prescreening if the credit grantor agrees in advance that each consumer whose name is on the list after prescreening will receive an offer of credit.⁴⁹

The Court of Appeals, in its opinion remanding this case, indicated that prescreening was reasonable and noted that “prescreening and the guaranteed offers of credit it spawns can only take place through the use of consumer reports” *Trans Union*, 81 F.3d at 234 (emphasis in original). Prescreening is now sanctioned by the FCRA in amendments effective October 1, 1997. Section 604(c), 15 U.S.C. § 1681b(c).

The mail offer of a pre-approved credit card is an unsolicited offer to consumers; the consumer has not applied for credit, and the credit grantor does not have application information. The credit grantor decides upon credit criteria to extend the “firm offer” of credit to creditworthy consumers.⁵⁰ These criteria result in an offer of credit and are “intended . . . to serve as a factor in credit-granting decisions” *Trans Union*, 81 F.3d at 233.

Credit grantors deciding to extend credit in prescreen offers use tradeline information from consumer reporting agencies, including Trans Union.⁵¹ The presence of one or more tradelines

⁴⁹ Commentary on the Fair Credit Reporting Act, 55 Fed. Reg. 18,804, 18,815 (1990).

⁵⁰ F 233.

⁵¹ F 237, 243-245, 258, 278-281, 288, 290, 295.

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is a threshold criterion for prescreens. Consumers without minimum tradelines are not offered credit.⁵²

[redacted]⁵³ [redacted]⁵⁴ [redacted]⁵⁵ [redacted]⁵⁶ [redacted]⁵⁷
[redacted]⁵⁸ [redacted]⁵⁹ [redacted]⁶⁰ [redacted]⁶¹ [redacted]⁶²
[redacted]⁶³ [redacted]⁶⁴ [redacted]⁶⁵ [redacted]⁶⁶ [redacted]⁶⁷
[redacted]⁶⁸ [redacted]⁶⁹ [redacted]⁷⁰ [redacted]⁷¹ [redacted].⁷²

⁵² F 238, 244-245, 258, 276, 287.

⁵³ Northern Trust's Personal Financial Services Marketing division issues consumer loans, including debt consolidation loans, preapproved home equity loans, and automobile loans. (McCoy 493/25-494/6.).

⁵⁴ F 288-290.

⁵⁵ Wachovia Bank Card Services (Wachovia) is a subsidiary of Wachovia Bank of Georgia and is an issuer of MasterCard and Visa credit cards, including bank cards. (Pendleton 351/24-352/6.) Wachovia has 3 million active bank card holders and \$ 5.3 billion outstanding. (Pendleton 410/1-2.).

⁵⁶ F 243.

⁵⁷ F 240, 242.

⁵⁸ F 245.

⁵⁹ F 246.

⁶⁰ F 247, 249-250, 252.

⁶¹ F 248, 251.

⁶² F 253-254.

⁶³ FCC National Bank (First Card) is a division of First Chicago NBD and is an issuer of Visa and MasterCard credit cards. (Koppin 476/5-15.) First Card has 14 million credit card holders, 11 million active credit card holders, and about \$ 17.8 billion outstanding. (Koppin 482/7-11.)

⁶⁴ F. 258.

⁶⁵ F. 268-269.

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There is no single criterion in credit granting that qualifies a consumer for credit.⁷³ In prescreening, each element from a consumer's credit report used by a credit grantor to make a firm offer of credit is a factor in eligibility for credit. The credit grantor does not have a permissible purpose to obtain a consumer report unless every consumer who meets the prescreen criteria is given a firm offer of credit. The 1996 amendments to the FCRA recognize prescreening as a permissible purpose. Congress intended prescreen lists to be treated as "credit reports."⁷⁴ The prescreen criteria are factors in the eligibility for credit.

⁶⁶ Chase Manhattan Bank issues a variety of credit cards and has 20 million credit card holders. (Zancola 662/6-12; 665/9-11.)

⁶⁷ F 278. For purposes of this criterion, there is no requirement that the trade be open -- only the number of trades. CX 280-Z-46; F 281.

⁶⁸ F 276, 278-281. [redacted] F 280.

⁶⁹ F 279, 281.

⁷⁰ F 281.

⁷¹ F 283 [redacted] F 284 [redacted] F 285 [redacted] F 286 [redacted].

⁷² F 282.

⁷³ F 241, 256, 272.

⁷⁴ H. Rep. 103-486, 103rd Cong., 2nd Sess., 32 (1994) ("A prescreened list is a series of credit reports because the consumers whose names appear on the list have been determined, through information in their credit files, to meet credit criteria identified by a credit grantor.")

3. Invitations to Apply

Some banks solicit consumers to apply for credit in “invitations to apply.” The bank mails an application for credit to consumers. This is not a guaranteed offer of credit. The credit grantor decides whether to grant credit on the completed application.⁷⁵ When a consumer responds, the application is scored by the credit grantor;⁷⁶ the decision to grant credit depends on the score.⁷⁷

[redacted]⁷⁸ [redacted]⁷⁹ [redacted]⁸⁰ [redacted]⁸¹ [redacted]⁸²
[redacted]⁸³ [redacted]⁸⁴ [redacted]⁸⁵ [redacted]⁸⁶ [redacted]⁸⁷
[redacted]⁸⁸ [redacted]⁸⁹.

⁷⁵ F 213.

⁷⁶ F 214, 221.

⁷⁷ F 219, 230.

⁷⁸ F 216. [redacted] F 217.

⁷⁹ F 38, 44, 218.

⁸⁰ F 220.

⁸¹ F 221-222.

⁸² F 223.

⁸³ F 226.

⁸⁴ F 227.

⁸⁵ F 228.

⁸⁶ F 38 (high credit), 45, 56 (open date).

⁸⁷ F 229.

⁸⁸ F 231.

⁸⁹ F 230.

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In deciding credit eligibility on invitations to apply, credit grantors use the presence of a tradeline, a bank card, and a mortgage. Credit grantors also use as factors: FICO scores, the number of retail cards, and the open dates and credit limits for tradelines.⁹⁰ Credit grantors have used presence of a student loan in credit eligibility.

Each of these elements, by their use in credit decisions, is a factor in credit eligibility.

C. Trans Union's Target Marketing Lists

1. Target Marketing Databases

The Trans Union target marketing lists come primarily from CRONUS, the company's credit report database.

a. CRONUS

CRONUS is the Trans Union database for individual consumer credit data used to supply consumer credit reports to Trans Union's customers. It contains 600 million records, including 250 million records of previous addresses.⁹¹ A "record" on CRONUS means name and address. Additional consumer information -- account number, open date, account type, payment history -- is known as a tradeline. A record can be created on CRONUS by an inquiry or public record entry alone; having a record on CRONUS does not imply the existence of a tradeline.⁹² CRONUS contains credit data supplied by Trans Union

⁹⁰ F 232.

⁹¹ F 16.

⁹² F 22-23.

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subscribers, public record data (which Trans Union purchases from vendors who gather the information at courthouses and similar public records sources), and demographic information, most of which also comes from Trans Union's credit grantor subscribers.⁹³

About 85,000 subscribers supply data to Trans Union in a form known as the Metro format.⁹⁴ Trans Union updates tradelines on CRONUS nightly, completing a full update of the entire database every week.⁹⁵

b. The Master File Database

Trans Union's database for its target marketing activities is its Master File. The source of individual consumer information for the Master File is CRONUS, and the TransMark database, an intermediate file which is a "snapshot" of CRONUS. The TransMark database is created each month of records from CRONUS; it combines all the CRONUS records on the same name and address. The Master File database is built using the records for each person in the TransMark database.⁹⁶

⁹³ F 17-19.

⁹⁴ F 17-18, 22.

⁹⁵ F 19. There is a second database -- ANCI -- that accumulates information daily -- showing inquiries when a Trans Union customer obtains a credit report on a consumer, and manual changes to a consumer file done in response to a consumer dispute. The information on ANCI is checked whenever a consumer report is delivered, and is used in the update of CRONUS. F 21.

⁹⁶ F 25.

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The Master File uses individual information from CRONUS.⁹⁷ This process rejects CRONUS records that do not have the minimum number of qualifying trades and applies other criteria.⁹⁸ The Master File rejects tradelines in CRONUS reported by collection agencies indicating derogatory information.⁹⁹

Prior to the December 1997 Master file, the minimum requirement for a consumer to be included was two open tradelines, one verified within twelve months.¹⁰⁰ After December 1997, it is either two trades reported in the last six months, or one trade reported in the last six months matched to an outside vendor file.¹⁰¹ If a person meets the minimum requirement in the Master File, the consumer's record is further examined for individual information from CRONUS.¹⁰² The Master File is rebuilt every four months.¹⁰³

⁹⁷ *Id.*

⁹⁸ F 27-30.

⁹⁹ F 29. If a consumer's only tradeline is a collection account, that person will not appear on Trans Union's Master File. The impact is to shield from the list collection accounts denoting less creditworthy individuals. F 200-201.

¹⁰⁰ F 31.

¹⁰¹ F 33.

¹⁰² F 25, 34, 39, 45, 52, 56-58, 60-64, 70-73, 75.

¹⁰³ F 26. List orders are handled by ACXIOM Corporation, a data processing firm in Conway, Arkansas. Trans Union owns an interest in ACXIOM. Trans Union also contracts with ACXIOM to perform computer functions for Trans Union, in Chicago and in Conway. F 35.

c. Characteristics and Attribute File

Trans Union uses over 300 credit attributes from CRONUS. This Attribute File, also known as Standard Characteristics, contains credit information about creditworthiness, i.e., the number of trades with payments over 180 days or the maximum balance owed on all mortgage trades. Standard Characteristics are used by Trans Union in target marketing products such as PIC, P\$ YCLE, SOLO, TIE, and E-Val.¹⁰⁴

Trans Union released characteristics, with names and addresses attached, to its target marketing clients. Trans Union discontinued the disclosure of these characteristics on October 1, 1997.¹⁰⁵ Trans Union's Standard Characteristics are no longer available for use in Trans Union's target marketing business; they are available as part of the PerformanceBase/ RelationBase File only for use in firm offers of credit.¹⁰⁶

2. Promotion and Sale of Trans Union's Target Marketing Products

Trans Union salespeople around the country sell its target marketing lists.¹⁰⁷ They identify prospects by mail solicitation or telemarketing. Trans Union also sells lists to brokers, list mangers, and wholesalers (Metromail, R.L. Polk, ACXIAM and

¹⁰⁴ F 108. The source for the Attribute File is CRONUS. In order to be in the Attribute File, a person must have at least two open tradelines, one of which is verified within 12 months. F 109.

¹⁰⁵ F 110. Among the characteristics are individual level information such as: months since oldest trade opened, and number of personal finance inquiries, finance installment trades opened in 24 months, and bank card trades. *Id.*

¹⁰⁶ F 111.

¹⁰⁷ F 118. PerformanceData employs 46 people including 10 salespersons. PerformanceData had 440 target marketing customers (many of whom are third parties representing other customers) and \$ 34 million in revenue in 1997. F 122.

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Donnelley Marketing), who sell Trans Union lists or information from Trans Union's lists and their own database, to direct marketers. Trans Union provides target marketing lists for one-time use by its customers by rental or license.¹⁰⁸

Trans Union promotes lists by emphasizing the unique source of Trans Union's creditbased consumer data.¹⁰⁹ Trans Union equates target marketing products with credit information by stating, for example, that Trans Union's Standard Characteristics correlate highly with "lending activity," and Trans Union data are "highly predictive . . . especially with financial offers."¹¹⁰

Trans Union salespeople refer to the credit-based character of the target marketing lists. Trans Union's finance list provides persons who have "generally had trouble with their credit in the past and are highly responsive to credit offers" (CX 68-A); for persons on the student loan list, "since credit has been established, one could argue that this list would have higher pass rates through the credit bureaus" (CX 136); and Trans Union's premium bank card list indicates persons "who have been approved for this high credit amount in the past" (CX 64-A).¹¹¹

Trans Union promotes its target marketing lists as providing "deepest access to credit-based information" (CX 61-A) and "this data should not be looked upon as merely credit-based data, but as an individual-level data source unmatched by any other offering" (CX 61-B).¹¹²

¹⁰⁸ F 118-119.

¹⁰⁹ F 123.

¹¹⁰ F 124; CX 263-A and CX 265-A.

¹¹¹ F 124.

¹¹² F 133.

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The requirements for Trans Union's target marketing lists are disclosed to potential customers; Trans Union promotes the fact that each individual in the Master File must have at least two active lines of credit.¹¹³ Trans Union also publicizes that a person who shows no activity within a 12 month period, such as payments or credit use, is dropped from the Master File.¹¹⁴ Trans Union publicizes criteria for lists, such as the premium bank card list which is described as identifying persons who hold a bank card with a credit limit above \$ 9,999.¹¹⁵

The Master File lists chosen by Trans Union's target marketing clients show the specificity which Trans Union provides in individual-level credit information.¹¹⁶ The diversity and source of this credit-based information permits target promotions by credit grantor marketers.¹¹⁷

Trans Union emphasizes that the Master File is “the freshest and most comprehensive” source for data due to its “robust and extensive source of original credit based information,” and that Trans Union's database is the largest database of consumer credit information in the United States.¹¹⁸ Trans Union also promotes the Master File as a unique source for individual-level, observed behavior data. According to a PerformanceData brochure, the

¹¹³ F 126.

¹¹⁴ F 126.

¹¹⁵ F 44, 126.

¹¹⁶ F 127.

¹¹⁷ F 128-130.

¹¹⁸ F 133. Trans Union describes the Master File as the “richest source of individual-level financial data available” (CX 321-F), and that its database is “kept fresh and current by nearly two billion updates supplied by credit grantors every month, and is maintained for accuracy and quality” (CX 72-B).

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Master File is “without equal” and its information is “highly accurate” and is “based on actual behavior -- not self-reported or neighborhood values.”¹¹⁹ Trans Union sellers testified that Trans Union's lists are superior because Master File data is reported by third parties, and is not the self-reported information relied upon by other target marketers, such as Polk, Donnelley, and Metromail, whose target marketing databases contain survey information directly from consumers, who may provide inaccurate information. Trans Union promotes the fact that its data is more objective because it is reported by third-party credit grantors.¹²⁰

Target marketing customers can obtain Trans Union lists with credit information similar to prescreen criteria, such as whether the individual has at least three open tradelines and the types of tradelines, or whether a person has two open tradelines, one open for more than 36 months.¹²¹ Clients may also have certain information from the Master File printed out, permitting target mail and telephone solicitations.¹²²

¹¹⁹ F 135. The Master File is characterized as “living and breathing data,” “the most comprehensive available in terms of observed behavior (not self-reported)” (CX 264-A) and as the “only source of individual-level financial data” that is “behavioral” (CX 78-Z-34).

¹²⁰ F 136.

¹²¹ F 130. Trans Union's Master File has also been used for mailing a “pre-approved” credit offer. F 132.

¹²² F 131. For the September 1997 Master File, “printable” information includes: open dates for the first and second most current auto loans/leases and mortgages, home value ranges, and length of residence. (CX 1-C, J, N, P). Other information is printable upon request, including high credit amounts and loan type for auto loans and mortgages and the aggregate high credit for all student loans (CX 1-B -- C, O -- P, W).

3. Master File Lists Show Detailed Credit Information

Only Trans Union offers target marketing lists based on individual-level credit data. These lists are unique in their source, in the extent of individual information they reveal, and in their use in target mail and telephone promotions.

a. Automobile

Trans Union offers lists indicating the presence and number of open automobile loans, loan type (lease, refinanced loan, equity transfer loan), the open and expiration dates for the lease or loan, and the high credit amount of the lease or loan. Trans Union also offers a “driver” list.¹²³

Other target marketing firms offer automobile lists limited to ownership information and not the range of credit-based data that Trans Union supplies. Other lists obtain data from self-reported survey responses or from the state departments of motor vehicles registration data, not from consumer reporting information.¹²⁴ [redacted].¹²⁵

[redacted]¹²⁶

¹²³ F 38. The source for the Master File “auto expiration date” (CX 1-A), “auto high credit” (CX 1-B), “auto loan type” (CX 1-B), and “auto open date” (CX 1-C), is individual records in CRONUS. A person is a “driver” (CX 1-E) if the CRONUS record for the person shows an auto loan or a tradeline with a business that issues gas cards. When the Master File program examines CRONUS records to determine whether a person has an auto loan, it will not consider the record if the open date is more than five years old. F 39.

¹²⁴ F 40, 134.

¹²⁵ F 41. [redacted] F 43.

¹²⁶ F 42.

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b. Bank Card

Trans Union sells lists that permit target marketing of persons who have an open bank card (including the open date of the most recent bank card) and holders of an open premium bank card (including the open date of the most recent premium bank card). Trans Union defines its premium bank card list as disclosing a bank card with a credit limit of more than \$ 9,999.¹²⁷

Other firms offer bank card lists, with the information at the household level, from self-reported survey responses or from suppliers of credit card information not from consumer credit reporting databases.¹²⁸ This material is not comparable to the range, depth, accuracy or timelines of Trans Union's CRONUS-derived, individual-level credit card information.¹²⁹ [redacted].¹³⁰ Nothing in the self-reported credit card information nor in the information provided by other suppliers shows the open date of the bank cards or premium bank cards.¹³¹ Target marketing lists from other list providers show credit card use; they are not comparable to Trans Union's bank card list because they do not show whether a consumer has a bank card tradeline, nor any of the information about the tradeline that can be gleaned only from a consumer credit reporting database -- open date, open date of

¹²⁷ F 44, 126. To generate the "presence of an open bank card," the Master File looks to the date open of the individual CRONUS record for bank card tradelines. For a person to qualify as a premium bank card holder, the individual CRONUS record must indicate a tradeline with a kind of business, account type, and a credit limit greater than \$ 9,999. F 45.

¹²⁸ F 46.

¹²⁹ F 46-48, 131-146, 148-154, 157-160.

¹³⁰ F 47-48.

¹³¹ F 48.

most recent, and high credit limit; these lists are available only from Trans Union.¹³²

[redacted]¹³³

c. Department Store Card

Trans Union offers a list for presence of an open department store trade, including open date of the most recent department store trade.¹³⁴ Other list providers offer department store card information from self-reported survey responses or from suppliers of credit card information whose source is not obtained from consumer credit reporting databases.¹³⁵ [redacted].

[redacted].¹³⁶

d. Finance Trade

Trans Union offers its customers finance loan lists including presence of an open finance trade (along with the open date of the most recent finance loan), presence of a “30/60/90 day” finance trade, a financial loan identifier (identifying mortgage or auto loans from a finance company), and presence of a closed finance loan trade.¹³⁷ The finance loan lists are promoted by Trans Union,

¹³² F 44, 48-51.

¹³³ F 49.

¹³⁴ F 52. To determine the “presence of an open department store card” (CX 1-E), the Master File looks to the individual CRONUS record. F 52.

¹³⁵ F 53.

¹³⁶ F 54.

¹³⁷ F 55. To determine the “presence of an open finance trade” (CX 1-F), the Master File examines the individual CRONUS record showing whether the subscriber's business is “finance,” the account type is installment, and if the finance trade has an open date. F 56. Trans Union defines a “30/60/90 day” trade where payment is due in 30/60/90 days. F 55. To determine the “presence

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and used by Trans Union list clients, to market to riskier segments of the population, because finance companies historically lend to more marginal credit risks.¹³⁸

e. Head of Household

Trans Union offers a list for head of household, derived from individual CRONUS records, naming the person with the greatest number of trades in a household as the head of household.¹³⁹ No other list provider offers a list showing the person in a household with the greatest number of tradelines.¹⁴⁰

f. Mortgage

Trans Union offers mortgage related lists including: the presence of an open mortgage, presence of a second open mortgage, and the open and closed dates and high credit amounts (stated in range values) of both mortgage trades. Trans Union's list customers can also obtain information about the type of mortgage loan (VA and FHA loans, refinanced and secured mortgages, and secured home improvement loans).¹⁴¹ The lists for presence of mortgages, mortgage high credit range, mortgage closed dates, and mortgage type are derived from individual CRONUS records.¹⁴² The Master File list "Home Value Range"

of a 30/60/90 day finance trade," the Master File examines an individual CRONUS record for the subscriber's kind of business and the account type. A "finance loan closed" also uses individual CRONUS records. F 57.

¹³⁸ F 124, 128, 203.

¹³⁹ F 58.

¹⁴⁰ F 58.

¹⁴¹ F 59.

¹⁴² F 60.

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uses Trans Union's Standard Characteristics, which is CRONUS-derived individual credit information, to calculate a consumer's home value.¹⁴³

List providers other than Trans Union offer mortgage lists. Their information is from self-reported sources such as surveys, and the public record -- including county registrar and tax assessor files.¹⁴⁴ [redacted].¹⁴⁵

[redacted]¹⁴⁶ [redacted].¹⁴⁷

Except when a house is sold, any calculation of home value or equity is an estimate. Trans Union's up-to-date mortgage balance information makes calculations more accurate than extrapolations from deed information, which may be old. [redacted] Polk's internal analysis determined that the Trans Union data were more accurate than the public record data.¹⁴⁸

Trans Union's home equity list uses credit attributes from CRONUS, including presence of a mortgage, the original open date, and the opening mortgage balance, to calculate the current home market value for a house, and then uses the current

¹⁴³ F 61-63. This is the same model used by Trans Union to create E-Val. Among the standard characteristics used by Trans Union for the home value calculation are: months since oldest revolving trade opened, total mortgage high credit/credit limit, maximum balance owed on all mortgage trades, and total balance of all mortgage trades. F 62.

¹⁴⁴ F 65, 66. [redacted] F 66.

¹⁴⁵ F 66.

¹⁴⁶ F 67.

¹⁴⁷ F 69. [redacted]

¹⁴⁸ F 68.

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mortgage balance to calculate the estimated equity available.¹⁴⁹ Knowing the equity in a residence is valuable information to sellers of home equity loans; it permits them to solicit those likely to be qualified to purchase. Using Trans Union's mortgage data, a telemarketer of home equity loans can obtain names of consumers who have multiple mortgages, are homeowners, age 24-55, with home market value \$ 50,000 - \$ 299,000. (CX-24.) Lists can use open dates of loans (e.g., month that a mortgage was taken out);¹⁵⁰ loan types or sources (e.g., mortgages issued by finance companies (CX-40); and types of credit cards (e.g., upscale retail cards (CX-35)).¹⁵¹

g. Length of Residence

Trans Union offers a length of residence list showing the number of years a person has resided at a current address. The Master File length of residence indicator uses individual data from CRONUS, including mortgage open dates.¹⁵²

¹⁴⁹ F 63. The Master File list "home equity actual," the actual dollar amount of estimated equity in an individual's home, and "home equity range," similar information stated as a range value, are calculated by using mortgage high credit and mortgage balance information from CRONUS and subtracting them from the modeled home value. F 64.

¹⁵⁰ Knowing that a homeowner took out a mortgage during a period of high interest rates facilitates telemarketing and other promotions that specifically mention refinancing the prospect's high-interest loan. F 129; CX 19-F.

¹⁵¹ F 127-129.

¹⁵² F 70.

h. Mail Order

Trans Union offers mail order buyer lists; many are based on information purchased from outside vendors. One top seller, however -- Trans Union's "MOB1" -- is based on individual credit information in CRONUS.¹⁵³

i. Singles

Trans Union offers a "singles" list of unmarried consumers, based on tradelines for the person in CRONUS.¹⁵⁴

j. Student Loan

Trans Union offers several student loan lists including presence and open date of a student loan, the aggregate high credit amount of all of a person's student loan, and a closed student loan, all derived from CRONUS individual credit information.¹⁵⁵

k. Upscale Card

Trans Union offers a list for the presence and open date of an open upscale retail card (Neiman Marcus, Saks, Tiffany). To find the upscale retail card and open date, the Master File uses individual CRONUS records, including the specific subscriber number on the individual consumer's tradeline. If the subscriber code matches the code for one of the companies on the National Retail Federation list of upscale stores, the person is named as having an open upscale retail card on the Master File.¹⁵⁶

¹⁵³ F 71. Trans Union sells its lists to mail-order sellers (Spiegel's, L.L. Bean, Eddie Bauer); it examines individual consumer records on CRONUS and identifies as a mail-order buyer on the Master File those consumers who have open tradelines with mail order companies. *Id.*

¹⁵⁴ F 72.

¹⁵⁵ F 73.

¹⁵⁶ F 74-75.

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List providers other than Trans Union do not differentiate their retail card lists to provide an “upscale” list. [redacted].¹⁵⁷

4. September 1997 Master File

a. E-Val

Trans Union offers E-VAL, a scoring system that predicts the amount of equity available in a consumer's home. E-Val is also available on Trans Union's Master File in the form of its “Home Value Ranges,” “Home Equity (Actual),” and “Home Equity Range” lists. E-Val lists were available for sale to target marketing customers prior to October 1, 1997; they are now available only for firm offers.¹⁵⁸

b. PIC

PIC, created by Trans Union and an outside modeling firm, predicts the likelihood that a person owns a financial service. Trans Union used surveys and characteristics from the consumers' CRONUS files in PIC. A PIC score is calculated using individual credit data to predict the likelihood of a person owning an IRA account or certificate of deposit. Until October 1, 1997, Trans Union offered PIC as a Master File select; PIC is now available only for firm offers of credit.¹⁵⁹

¹⁵⁷ F 76.

¹⁵⁸ F 61, 77.

¹⁵⁹ F 78.

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c. P\$ YCLE

P\$ YCLE, created by between Trans Union and Claritas, assigns consumers to one of 42 segments (known as “clusters” or “buckets”). P\$ YCLE uses individual-level Standard Characteristics to calculate an estimate of a person's income producing assets, and assign the person to a P\$ YCLE's “bucket.” Trans Union offered P\$ YCLE for non-firm offers prior to October 1, 1997; P\$ YCLE is now available only for firm offers.¹⁶⁰

[redacted].¹⁶¹

d. SOLO

SOLO puts consumers into groups (“clusters”) based on individual level CRONUS data, including 35 credit characteristics. SOLO is a “sister product” to SILHOUETTE, a Trans Union product identifying people likely to respond to a firm offer of credit and is available only to those with a permissible purpose under the FCRA.¹⁶²

SILHOUETTE's characteristics include “number and types of trades . . . age of trades, credit limits, credit utilization, payment history” According to the SILHOUETTE User's Guide, “assignment to a cluster is based on a credit view of consumers Cluster 8, because of its generally high level of credit activity, might contain consumers who are good candidates for credit offers.” SILHOUETTE distinguishes clusters based on some of the same factors used by Trans Union in its Master File target

¹⁶⁰ F 79.

¹⁶¹ F 80.

¹⁶² F 81.

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marketing list products -- e.g., finance accounts, bank revolving, department store, retail.¹⁶³

SOLO and SILHOUETTE use the same 35 Trans Union Standard Characteristics; SOLO's 41 clusters were developed from SILHOUETTE's 25 clusters. SOLO and SILHOUETTE evaluate individual credit behavior. SOLO is described by Trans Union as "a disguised version of SILHOUETTE for list applications."¹⁶⁴

Trans Union's internal Seller's Guide describes SOLO as "objectively-reported, behavior-based information, rather than self-reported (and therefore inevitably biased) information." It notes that "SOLO is most often used by credit grantors for non-preapproved offers, such as home equity offers or secured card offers."¹⁶⁵ Until October 1, 1997, Trans Union offered SOLO to its target marketing customers; now SOLO is available only for firm offers of credit. Trans Union withdrew SOLO from its target marketing customers because of the FCRA Amendments and because customers had learned that SOLO clusters correlated with how consumers pay their bills.¹⁶⁶ Prior to October 1, 1997, Trans Union attached SOLO codes to a customer's own client lists. Trans Union's internal seller's guide for SOLO states that SOLO

¹⁶³ F 82-83.

¹⁶⁴ F 82, 85; CX 110. "SILHOUETTE provides . . . actual credit data to categorize [sic] individuals. Therefore the FTC requires permissible purpose . . . to use SILHOUETTE. SOLO is also based on credit information; however, when SOLO clusters are reported back, the credit characteristics are masked . . ." F 85; CX 115-Z-49.

¹⁶⁵ F 84-89.

¹⁶⁶ F 86.

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clusters can be used to “profile” one's “best customers.”¹⁶⁷ Trans Union intends that SOLO is used for credit eligibility. The internal Trans Union SOLO seller's guide discusses its use for preapproved offers of credit, and tracking “activation, utilization, retention, and/or profitability” of credit accounts, and use with Trans Union's income estimator, “TIE,” for prescreened offers.¹⁶⁸

Competitors' models similar to Trans Union's SOLO and P\$ YCLE are not comparable because they do not use individual credit information. ACXIAM received SOLO and P\$ YCLE codes from Trans Union until October 1, 1997. The models that ACXIAM uses in place of Trans Union's P\$ YCLE and SOLO (Claritas' Affluence and WealthWise and Experian's P\$ YCLE), do not predict as well as the Trans Union data.¹⁶⁹

e. TIE

TIE, Trans Union's income estimator, calculates an individual consumer's estimated income based on credit data from CRONUS. Prior to October 1, 1997, TIE was offered for target marketing purposes; it is now available only for firm offers.¹⁷⁰ To receive a TIE score, a consumer must have at least two tradelines, one of which must have a credit line greater than zero, and one must have been open for at least twelve months. To calculate a consumer's TIE score, Trans Union uses 23 Standard Characteristics, such as number of tradelines.¹⁷¹

¹⁶⁷ F 87. Until September 30, 1997, Trans Union appended SOLO clusters to TransLink lists. F 88, 105.

¹⁶⁸ F 89.

¹⁶⁹ F 90.

¹⁷⁰ F 91.

¹⁷¹ F 92.

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Trans Union intends TIE to be used in credit granting. A product brochure for TIE states that TIE can be used to “fine tune credit limits and loan conditions on credit applications,” to “Red Flag' applicants whose low income estimate may indicate the need for additional verification,” and to “flag accounts to increase/decrease lines of credit.” Trans Union's internal seller's guide for TIE recommends uses of TIE: credit risk scoring for new or existing accounts; use in prescreen criteria; as a supplement to credit applicant data; and to set initial credit limits.¹⁷²

Competitive list providers offer estimated income developed from public record and self-reported data, subjective information that has not been verified, and household income rather than individual level income. TIE is updated every seven days, whereas the income estimates of other list providers rely on census data updated every ten years.¹⁷³ [redacted] offer an income product, based on self-reported information and census figures. None of that information is individual credit data nor is it from credit reporting agencies.¹⁷⁴

5. Trans Union's Other Target Marketing Lists

a. TransLink

TransLink is Trans Union's reverse append product that associates a name and address with a bank card number. It works as follows: consumers charge purchases at a merchant using credit cards other than the merchant's own credit card; the merchant sends to Trans Union a list of the credit card account numbers;

¹⁷² F 93-94.

¹⁷³ F 95.

¹⁷⁴ F 95-98.

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Trans Union, using individual account information from CRONUS, returns to the merchant the names and addresses of the consumers. The merchant can then send those consumers promotions.¹⁷⁵ The merchant “prints a mailing label and sends [the consumer] a piece of junk mail.” Until September 30, 1997, Trans Union appended SOLO, TIE and age data to TransLink lists.

Trans Union promotes TransLink as a file that is created from consumers who frequently use their MasterCard, Visa, American Express, Discover, Optima and other third party cards. This file contains a consumer's active tradeline number and address . . . Successful address matches can also be linked to Trans Union's Master File for other demographic appends.¹⁷⁶

TransLink is among Trans Union's most profitable list products.¹⁷⁷ Trans Union is the only consumer reporting agency that offers this service.

b. New Issues

The New Issues file is a list of consumers receiving credit in the last 90 days. A Trans Union customer knows the date (30/60/90 days) and type of credit (retail, finance, mortgage or auto loan trades). The New Issues file gets this data from CRONUS. On October 1, 1997, Trans Union discontinued the sale of the New Issues file for target marketing customers and now the file is only available for firm offers of credit.¹⁷⁸

¹⁷⁵ F 99, 101.

¹⁷⁶ CX 58-D.

¹⁷⁷ F 104.

¹⁷⁸ F 106.

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c. Emerging Consumers

The Emerging Consumers file gets from CRONUS names of consumers with one tradeline with a date verified within the last twelve months. Trans Union discontinued the Emerging Consumer file due to concern that it was “communicating information that we shouldn't be communicating.”¹⁷⁹

D. Burden of Proof

Respondent argues that¹⁸⁰ complaint counsel has the burden of proof by “clear and convincing evidence.” The two Commission cases cited by respondent do not support this proposition.¹⁸¹ Respondent also cites *Alioto v. Cowles Communications, Inc.*, 519 F.2d 777, 779 (9th Cir. 1975), which used the clear and convincing standard in a case where the burden of proof requires a showing that a libelous statement was made in reckless disregard of the truth. In general, the clear and convincing burden of proof is used where the Court considers a particular type of claim should be disfavored on policy grounds.¹⁸² No such precedent is cited here, and the preponderance of the evidence standard applies in this case.

¹⁷⁹ F 107.

¹⁸⁰ Brief pp. 17-18.

¹⁸¹ *Id.* p. 18 n.9. *McGraw-Hill Pub. Co.*, 57 F.T.C. 1152 (1960), cited by respondent as requiring “clear and convincing evidence,” specifically used the preponderance of the evidence burden of proof, *id.* at 1171.

¹⁸² TREATISE ON CONSTITUTIONAL LAW, ROTUNDA, Vol. 3 at p. 168 (1986).

E. Trans Union Target Marketing Products As Consumer Reports

1. FCRA

The FCRA defines “consumer report” to mean any written, oral, or other communication of any information by a consumer reporting agency bearing on a consumer's credit worthiness, credit standing, credit capacity, character, general reputation, personal characteristics, or mode of living which is used or expected to be used or collected in whole or in part for the purpose of serving as a factor in establishing the consumer's eligibility for:

- (A) credit or insurance to be used primarily for personal, family, or household purposes;
- (B) employment purposes; or
- (C) any other purpose authorized under section 604.

15 U.S.C. § 1681a(d).

In the context of this litigation, as framed by the Court of Appeals, to qualify as the sort of “information” that can constitute a consumer report, then, an entry on a Trans Union mailing list must (A) “bear[] on” at least one of the seven factors and (B) be used, expected to be used, or collected for one of three types of purposes.

The first element does not seem very demanding, and we do not understand Trans Union to even contest the proposition that a person's having two tradelines “bear[s]” on one or more of the seven enumerated factors...

In addressing the next factor, whether information in the lists is “used or expected to be used or collected in whole or in part for the purpose of serving as a factor in establishing the

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consumer's eligibility" for various benefits, the Commission considered only credit eligibility, and we follow suit.

Trans Union, 81 F.3d at 231.

The issue here is whether information that Trans Union conveys in its target marketing lists is also information that is used by credit grantors in eligibility determinations. The Court of Appeals indicated that to be "a factor," information should play a role in the credit decision but that it need not be the decisive factor. *Id.* at 233. Thus, the Court of Appeals noted that on remand the FTC could show that Trans Union used or expected existence-of-tradeline information to be used as a factor in credit-granting decisions by demonstrating "that credit decisions could be made, even in part, on such 'existence' information." *Id.*

Under the language of the statute, existence-of-tradeline information could constitute a consumer report because it serves as "a factor" in credit grantors' decisions to grant credit. Trans Union's credit scoring and the criteria they use for prescreen and invitation to apply offers, show that the presence of a tradeline may be a factor in determining whether a consumer is eligible for credit. Other factors used by credit grantors, including presence, type and date of tradelines, are used in Trans Union's target marketing lists. Trans Union's lists may be consumer reports because the information is "used ... or collected in whole or in part for the purpose of serving as a factor in establishing the consumer's eligibility for ... credit." 15 U.S.C. 1681a(d)(1).

2. Facts

The factors that Trans Union uses in target marketing products are also used by credit grantors deciding credit.¹⁸³ That makes

¹⁸³ Respondent called witnesses who testified that data from the Master List File could not be used in part to determine credit eligibility. Respondent's witnesses were not credible on this issue. Dr. Coffman, who works with Trans

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them “consumer reports.” 15 U.S.C. 1681a(d)(1). *Trans Union*, 81 F.3d at 233.

Every name on Trans Union's target marketing lists must have at least one qualifying tradeline.¹⁸⁴ This is also required in Trans Union's credit scoring, and in credit grantors' decisions to make firm offers of credit in prescreen promotions.¹⁸⁵ When Trans Union sells a target marketing list, it is selling a list of people who have at least one tradeline; a list of people who have one tradeline is a series of consumer reports, and the recipient of the list must have a “permissible purpose” in order for Trans Union lawfully to furnish the list.¹⁸⁶ The Court of Appeals has already held that target marketing is not a “legitimate business purpose under the Act.” *Trans Union*, 81 F.3d at 233-34. Therefore, Trans Union's sales of target marketing lists constitute furnishing consumer reports to those who do not have a permissible purpose to receive them, in violation of Sections 604 and 607(a) of the FCRA. 15 U.S.C. §§ 1681b, 1681e(a).

Union on predictive models, showed bias when he testified, inconsistently, that a post office box may be part of eligibility because some creditors will not mail to a post office box. (Tr. 3840.) Furthermore, Dr. Coffman testified that based on his experience with credit risk scoring models he has seen the number of mortgages and their amounts, the number of auto loans, the number of open bank cards, and the age of the oldest trade and credit limits used as predictive attributes in scoring models. (F 195, 204-07; Coffman 3862/5-17; 3868/16 -- 3869/10; 3869/6 -- 3871/4; 3876/14 -- 3877/20; 3882/7 -- 3884/4.) Another respondent witness, Kenneth Scott, president of a direct marketing advertising agency, has experience in marketing credit cards, not in eligibility determinations. (Scott 2608/23 -- 2609/18; 2614/17 -- 2616/16; 2622/23 -- 2624/1.)

¹⁸⁴ F 28-31, 33, 92, 106-107, 109, 126.

¹⁸⁵ F 185-188, 243-245, 258, 278-282, 288, 290.

¹⁸⁶ Age of newest and oldest tradeline is also an eligibility factor. F 117, 196, 198-199, 228; 18 F.T.C. at 841-42.

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Trans Union's target marketing customers can get a list of consumers who have an open bank card tradeline.¹⁸⁷ The same criterion is used by credit grantors in their eligibility decisions,¹⁸⁸ based on consumer reports, and, Trans Union's sale of such a list to a target marketer who has no permissible purpose to receive the consumer reports is a violation of the FCRA. Similarly, Trans Union's SOLO and TIE use credit eligibility factors.¹⁸⁹ They are marketed by Trans Union for both target marketing and credit eligibility.¹⁹⁰

F. Trans Union's Constitutional Rights

Trans Union asserts First Amendment and Equal Protection arguments in its defense. The Commission, in its September 28, 1994 opinion, rejected Trans Union's constitutional arguments. 118 F.T.C. at 879-890. The Court of Appeals did not reach Trans Union's First Amendment claim, but signaled its views. The Court stated:

Trans Union raises a serious First Amendment claim with respect to the Act's application. Its target marketing list competitors who aren't consumer reporting agencies under the Act can use any information they gather -- including credit information -- in the preparation of their lists. In fact, because of its interpretation of "collected ... for the purpose ..." in the Act, the Commission would evidently permit Trans Union to sell its target marketing lists if the data were "separately obtained for target marketing purposes."

¹⁸⁷ F 44.

¹⁸⁸ *E.g.*, F 216, 224, 248-252.

¹⁸⁹ F 82, 85, 92, 108.

¹⁹⁰ F 87-89, 93-94.

Trans Union, 81 F.3d at 235.

Trans Union argues that it has been denied equal protection rights by the Commission's enforcement action,¹⁹¹ but any difference in treatment between Trans Union and its list competitors who aren't consumer reporting agencies is attributable to the FCRA, not to the Commission's enforcement policy. The FCRA was designed to stop unfair information practices in the credit reporting industry that were harming consumers and undermining confidence in the banking system.¹⁹²

¹⁹¹ The Commission has not been unfairly discriminatory in applying the FCRA to the sale of target marketing information by competing credit reporting firms. Trans Union's practices go beyond the activity allowed by the TRW consent order. (F 357.)

Respondent argues that credit grantors disseminate information about their customers for target marketing though it is just as invasive of privacy as anything done by PerformanceData. E.g., to a lesser degree, TRW used credit attributes from its consumer reporting database, aggregated to a nine digit zip code. (F 360.) Administrative agencies, however, have the prosecutorial discretion to go after one law breaker at a time. *Moog Industries, Inc. v. FTC*, 355 U.S. 411, 413 (1958); *FTC v. Universal-Rundle Corp.*, 387 U.S. 244 (1967). This implies the right to shape remedies, to some extent, to meet the eccentricities of negotiated settlement of litigation. (F 360.)

Respondent also decries that its competitors in the sale of target marketing lists obtain their data from public records such as telephone books ("separately obtained" information). The record in this case shows that the target marketing lists from that information is not as effective as the lists sold by respondent which are from the credit report database.

¹⁹² The Congressional purpose in the FCRA is that "the banking system is dependent upon fair and accurate credit reporting. Inaccurate credit reports directly impair the efficiency of the banking system, and unfair credit reporting methods undermine the public confidence which is essential to the continued functioning of the banking system." 15 U.S.C. § 1681(a)(1).

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1. PerformanceData Lists Are Commercial Speech

Complaint counsel argue that PerformanceData lists are a product, not speech, and are not protected by the First Amendment. But the lists are part of commercial transactions, providing “information of import to significant issues” serving as a vital part of the process to “inform the public of the availability, nature, and prices of products and services,” and performing “an indispensable role in the allocation of resources in a free enterprise system.” *Bates v. State Bar of Arizona*, 433 U.S. 350, 364 (1977).

Target marketing lists are the means by which direct and telemarketers tell consumers about their business. Information on home sales and mortgages are found in these lists (Tr. 2657-59), as is information on automobile ownership, F 38, bank cards, F 44, department store cards, F 52, finance loans, F 55, mail order buyers, F 71, student loans, F 10, and upscale retail credit cards, F 74. Target marketing lists are as much a part of the process of speech as loudspeakers, *Saia v. New York*, 334 U.S. 558 (1948); public sidewalks, *United States v. Grace*, 461 U.S. 171 (1983); or free standing newsracks used to distribute free magazines, *City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410 (1993). Target marketing lists involve information taken from the database gathered and used in the sale of credit reports. They constitute commercial speech.¹⁹³

¹⁹³ PerformanceData has provided a list to a wholesaler whose client was the National Republican Committee, which used the list to solicit consumers to make campaign contributions (CX 22; Tr. 308-09); the predominant use of the lists, however, is for commercial purposes. TU 171-73, TU 175; TU. 307-08, TU-315-19, TU-1317-21.

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2. Commercial Speech Law

The sale of consumer reports receives limited First Amendment protection as “commercial speech.” *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 762, n.8 (1985). “Commercial speech [enjoys] a limited measure of protection, commensurate with its subordinate position in the scale of First Amendment values,’ and is subject to modes of regulation that might be impermissible in the realm of noncommercial expression.” *Board of Trustees of State Univ. of N.Y. v. Fox*, 492 U.S. 469, 477 (1989). Restrictions on truthful commercial speech will be upheld if the government asserts a substantial interest, the regulation directly advances that interest, and the regulation is narrowly drawn. *Florida Bar v. Went For It, Inc.*, 515 U.S. 618, 623 (1995); *Central Hudson Gas & Electric Corp., v. Public Serv. Comm'n of N.Y.*, 447 U.S. 557, 564 (1980).¹⁹⁴

a. Privacy Interest in the FCRA

The FCRA protects consumers' privacy by prohibiting consumer reporting agencies from communicating information covered by the Act to marketers for impermissible purposes. Protecting the privacy of consumers may be a “substantial” governmental interest. *Florida Bar v. Went For It Inc.*, 515 U.S. at

¹⁹⁴ Though not yet explicitly overruled, the *Central Hudson* test for commercial speech must be used with some apprehension. *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484 (1996) held a state ban on price advertising of alcoholic beverages to be impermissible under the First Amendment, and the varying opinions of the Court show minority support for the *Central Hudson* test and adumbrate change. Sean P. Costello, *Strange Brew: The State of Commercial Speech Jurisprudence Before and After 44 Liquormart, Inc. v. Rhode Island*, 47 CASE W. RES. L. REV. 681, 685 (1997). Nevertheless, *Central Hudson* continues in use. *International Dairy Food Ass'n v. Amestoy*, 92 F.3d 67, 72 (2d Cir. 1996); *Anheuser-Busch, Inc. v. Schmoke*, 101 F.3d 325, 327, 330 (4th Cir. 1996); *Miller v. Stuart*, 117 F.3d 1376, 1382 (11th Cir. 1997), *cert. denied*, 139 L.E. 2d 753, 118 S.Ct. 852.

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621 (substantial government interest in protecting the privacy of personal injury victims against invasive contact by lawyers).

Trans Union sells information from its consumer credit database to target marketers who engage in the direct promotion. Trans Union invades consumers' privacy when it sells consumers' credit histories to third-party marketers without consumers' knowledge or consent; that privacy interest is substantial.¹⁹⁵

The FCRA is based on "a need to insure that consumer reporting agencies exercise their grave responsibilities with fairness, impartiality and a respect for the consumer's right to privacy." Section 602 of the FCRA, 15 U.S.C. § 1681. Congress aimed at the risks to privacy from unregulated use of personal information;¹⁹⁶ the dissemination of credit reports for purposes other than granting credit was the problem.¹⁹⁷

¹⁹⁵ F 316-19, 325, 353-55. In *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447, 465 n.25 (1978), the Court held that an in-person solicitation by an attorney visiting a potential client in her hospital bed recovering from an accident was intimidating and invaded her privacy. In *Shapiro v. Kentucky Bar Ass'n*, 486 U.S. 466, 476 (1988), the Court held that there was no invasion of the potential client's privacy by a lawyer's solicitation letter, but the Court stated that the invasion of privacy, if any, occurred when the lawyer discovered the recipient's legal affairs, not when he confronts the recipient with the discovery. In this case, the invasion of privacy occurs when respondent takes information from the credit report database, puts it in the target marketing lists, and sells the lists to direct and telemarketers.

¹⁹⁶ Alan Westin, *PRIVACY AND FREEDOM* 163-165 (Athenaeum 1967).

¹⁹⁷ F 325-26. Fair Credit Reporting Hearings on H.R. 16340 Before the Subcomm. on Consumer Affairs of the House Comm. On Banking and Currency, 91st Cong., 2nd Sess. 31 (1970) at 109; Hearings on S. 823 before the Subcomm. On Financial Institutions Of The Senate Banking and Currency Comm., 91st Cong., 1st Sess. 92 (1969) at 359, 433.

b. Public Confidence in Credit Reporting

Congress also intended to assure the integrity of the credit reporting system and the public's confidence in the credit reporting system.¹⁹⁸ Credit reporting is vital to the United States economy and to consumers, and “unfair credit reporting methods undermine the public confidence which is essential to the continued functioning of the banking system.” Section 602 of the FCRA, 15 U.S.C. § 1681.

c. Citizens' Concerns

Citizens worry about “secondary” uses of their personal information. (F 316-18, 325-26.) In 1996, Congress narrowed disclosure of credit report information for “legitimate business need” by adding that a “business transaction” must be consumer-initiated. Section 604(a)(3)(F)(I). A permissible purpose to obtain a consumer report without the consent of the consumer exists only for firm offers of credit or insurance and only with notice and an “opt-out” privacy safeguard.¹⁹⁹ A firm offer of credit is needed to make a prescreen offer permissible.²⁰⁰ Congress deleted the proposed Senate language authorizing credit report information to be used in target marketing.²⁰¹

¹⁹⁸ F 325.

¹⁹⁹ F 331.

²⁰⁰ F 329. A prescreen (“firm offer”) is only permissible if the consumer reporting agency offers the consumer an election to be excluded from marketing lists of potential borrowers and publicizes this option to consumers. Section 604(c) and Section 604(e)(1) and (5). The statute now limits the type of information that may be disclosed to the credit or insurance grantor (Section 604(c)(2)) and requires that the solicitation disclose that information contained in the consumer's consumer report was used and inform the consumer of the right and procedure to opt-out. Section 615(d).

²⁰¹ F 367.

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d. Government Interest Directly Advanced

The Order here must advance an interest “in a direct and material way.” *Florida Bar*, 515 U.S. at 625-6. There, the Court relied on a survey of the effects of lawyer advertising on public opinion, to show that Florida's 30-day ban on solicitation directly advanced the interests of consumer privacy. *Id.* at 625. This record contains uncontradicted evidence of consumer privacy interests supporting limitation on uses of consumer credit information beyond those “permissible” uses specified in the Act.²⁰² Consumers have a privacy interest in the use of information from CRONUS for compiling target marketing lists.²⁰³

The FCRA and the Order entered here directly advance the governmental interest in protecting consumers' right not to have covered information communicated by consumer reporting agencies to target marketers without a permissible purpose. *Trans Union*, 118 F.T.C. at 884-85; 81 F.3d at 230.²⁰⁴ Consumer reporting agencies warrant special restrictions because of their unique position as comprehensive repositories of consumer information and their critical role for the nation's economy.²⁰⁵

²⁰² F 316-319.

²⁰³ F 318.

²⁰⁴ “We find no resemblance between target marketing and [the Act's permissible] purposes: extension of credit, employment, underwriting of insurance, and license eligibility ... If Trans Union's provision of lists derived from its 'base list' for target marketing is to be lawful under the Act, it must be because the information is not so sensitive as to rise to the level of a consumer report.” *Trans Union*, 81 F.3d at 234.

²⁰⁵ F 6-12, 16-19, 21, 325-26.

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The Order must be narrowly tailored to achieve its goal. *Florida Bar*, 515 U.S. at 632. Since the Order follows the statute, the issue is whether the statute is tailored to achieve its goal. Further, the opt-out procedure required by the FCRA does not cure the problem. While the right to opt-out theoretically allows the consumers to request their names to be removed from target marketing lists (F 334), most consumers are unaware of this procedure (F 336). Although Trans Union complies with the notice requirement for opt-out under the FCRA (F 342), there is no credible, direct evidence of the success rate of opt-out actually stopping direct mail or telemarketing calls (F 343, 348).

In enacting the FCRA Congress addressed consumers' concern that the information in their credit histories be protected from misuse. The FCRA is reasonably tailored to achieve the governmental interest in consumer privacy. The FCRA emphasizes controls on the use of credit report information rather than controls on collection of data. Recipients must have a "permissible purpose" to obtain the information.

The FCRA does not outlaw the secondary use of credit information for target marketing; it merely requires credit reporting agencies to include consumers in the decision to use their information.²⁰⁶ The limitation on secondary use of credit information imposed by the Act is no more extensive than necessary to serve the substantial government interest in protecting consumers from impermissible uses of their credit information.

F. Summary

Trans Union's target marketing lists are "consumer reports" as defined in the Fair Credit Reporting Act. A tradeline in a consumer's credit file used in Trans Union's target marketing lists is collected by Trans Union "to serve as a factor in credit-granting

²⁰⁶ F 328-29, 331.

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decisions.” Credit grantors “used or expected it to be used for the purpose.” *Trans Union*, 81 F.3d 228 at 233. Other elements from individual consumer credit files, used by Trans Union in its target marketing lists, also are used in credit grantors' decisions to grant credit, including tradelines by type (bank card, finance company, mortgage, automobile loan), open date of tradelines, high credit limit, current mortgage balance, and estimated individual income.²⁰⁷

The same elements from credit files at Trans Union are used as factors in credit grantors' decisions to grant credit to consumers. Target marketing lists assembled from these elements are “consumer reports.” Target marketing is not a permissible purpose for furnishing a consumer report; sale by Trans Union of its target marketing lists thus violates the FCRA.²⁰⁸ *Trans Union*, 81 F.3d at 234.

The Fair Credit Reporting Act complies with First Amendment commercial free speech and equal protection standards: the FCRA protects a substantial government interest in the privacy of individual consumer information in credit bureau files; the law directly advances that governmental interest in protecting consumer privacy and provides a reasonable fit to serve the governmental interest. The record shows substantial citizen concern over the privacy of the individual information collected, stored, and sold by credit bureaus. The FCRA affords privacy protection tailored to the sensitive nature of the data collected by

²⁰⁷ Certain data from the consumer files are used for identification rather than as an element in credit determination (name, telephone number, mother's maiden name, address, zip code, year of birth, age, any generational designation, social security number). (F 357; *but see* F 360.)

²⁰⁸ On October 1, 1997 -- the first day that it would face potential civil penalty liability for violations of the FCRA -- Trans Union reduced the information from its consumer credit database that it makes available through its target marketing lists.

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consumer reporting agencies and their unique status as repositories of the data.

III. CONCLUSIONS OF LAW

1. The Federal Trade Commission has jurisdiction over the subject matter of this proceeding and over the respondent, Trans Union Corporation.

2. Trans Union is a corporation doing business under the laws of the state of Delaware, with its office located at 555 West Adams Street, Chicago, Illinois 60661.

3. Trans Union assembles information on consumers to furnish consumer reports to subscribers and consumers. Trans Union furnishes these consumer reports in interstate commerce.

4. Trans Union is a consumer reporting agency. Section 603(f) of the Fair Credit Reporting Act (FCRA), 15 U.S.C. § 1681a(f).

5. Trans Union's target marketing lists are consumer reports. Section 603(d)(1) of the FCRA, 15 U.S.C. § 1681a(d)(1). *Trans Union Corp. v. FTC*, 81 F.3d 228 (D.C. Cir. 1996).

6. Trans Union furnishes consumer report information in target marketing lists to persons who do not have a permissible purpose under Section 604 of the FCRA, 15 U.S.C. § 1681b; *Trans Union Corp. v. FTC*, 81 F.3d 228, 233-34 (D.C. Cir. 1996).

7. By this conduct, Trans Union violates Section 604 and Section 607(a) of the FCRA. 15 U.S.C. §§ 1681b, 1681e(a).

8. An appropriate Order follows.

ORDER

IT IS HEREBY ORDERED that respondent, Trans Union Corporation:

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- a) Cease and desist from distributing or selling consumer reports in the form of target marketing lists to any person unless respondent has reason to believe that such person either intends to make a firm offer of credit to all consumers on the lists or to use such lists for purposes authorized under Section 604 of the FCRA.
- b) Maintain for at least five (5) years from the date of service of this Order and upon request make available to the Federal Trade Commission for inspection and copying, all records and documents necessary to demonstrate fully its compliance with this Order.
- c) Deliver a copy of this Order to all present and future management officials having administrative, sales, advertising, or policy responsibilities with respect to the subject matter of this Order.
- d) For the five (5) year period following the entry of this Order, notify the Commission at least thirty (30) days prior to any proposed change in respondent such as dissolution, assignment, or sale resulting in the emergence of a successor corporation, the creation or dissolution of subsidiaries, or any other change in the corporation that might affect compliance obligations arising out of this Order.
- e) Within one hundred and eighty (180) days of service of this Order, deliver to the Commission a report, in writing, setting forth the manner and form in which it has complied with this Order as of the date.

Dissenting Statement

**DISSENTING STATEMENT OF COMMISSIONER
SHEILA F. ANTHONY**

I oppose the issuance of a stay in this matter. Administrative tribunals such as the Commission “may properly stay their own orders when they have ruled on an admittedly difficult legal question and when the equities of the case suggest that the status quo should be maintained.” *Washington Metropolitan Area Transit Comm’n v. Holiday Tours, Inc.*, 559 F.2d 841, 844-45 (D.C. Cir. 1977). In the present case, however, Trans Union has failed to make an adequate showing on any of the relevant factors. To begin with, Trans Union’s arguments on the merits, which simply repeat arguments made previously, do not convince me that the issues in this case are close or difficult, much less that Trans Union has a substantial chance of success on appeal.

Nor are the equities in Trans Union’s favor. Quite to the contrary, Trans Union has failed to make any plausible showing that it will suffer irreparable injury. Trans Union is first and foremost a credit reporting agency, and it makes no claim that compliance with our order will interfere with its principal activity, that of selling credit reports. Even with respect to its target marketing activities, moreover, our order does nothing more than require Trans Union to comply with the law, in the same manner that all credit reporting agencies must. Furthermore, Trans Union’s attempt to equate its economic and speech interests with those that have justified stays in wholly dissimilar cases is grossly unpersuasive. Merely invoking constitutional arguments in support of its business activities does not entitle Trans Union to an automatic stay pending appeal.

Finally, even if I were to assume that Trans Union stands to suffer some level of injury, I would still conclude that the equities strongly weigh against a stay, in light of the vital interests of consumers and the general public at stake here. Trans Union has a legal obligation to comply with the FCRA by furnishing consumer credit reports only to those with a legally permissible purpose to

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receive them. Conforming its target marketing business to comply with the FCRA and our order will protect consumers' substantial privacy interests in their financial transactions. Moreover, once Trans Union exploits consumers' confidential financial information, it is extremely difficult to compensate for such an invasion of privacy. Therefore, the public interest weighs in favor of halting this violative behavior and effectuating the Commission's order at the earliest possible date. Accordingly, in my view, Trans Union has not met its burden in demonstrating the necessity of a stay.

Complaint

IN THE MATTER OF

FIDELITY NATIONAL FINANCIAL, INC., ET AL.

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

Docket C-3929; File No. 991 0298
Complaint, February 17, 2000 – Decision, February 17, 2000

This consent order addresses Fidelity National Financial Inc.'s ("Fidelity") acquisition of the common stock of Chicago Title Corporation ("Chicago Title"). The consent order requires Fidelity to divest or sell copies of the pre-acquisition title plant interests of either Fidelity or Chicago Title in five of the identified local jurisdictions to a buyer or buyers approved by the Commission. The consent order also requires Fidelity to divest the pre-acquisition interests of Fidelity or Chicago Title in a jointly owned title plant in San Luis Obispo County, California, or, alternatively, to relinquish any additional voting rights in the joint plant that Fidelity may have accrued post-acquisition while obtaining a new owner of the joint plant.

Participants

For the Commission: *Daniel J. Silver, Jacqueline Tapp, and Michael E. Antalics.*

For the Respondents: *John A. Herfort, Gibson, Dunn & Crutcher, and John C. Christie, Jr., Hale and Dorr.*

COMPLAINT

The Federal Trade Commission ("Commission"), having reason to believe that Respondent, Fidelity National Financial, Inc. ("FNF"), a corporation subject to the jurisdiction of the Commission, has agreed to acquire the common stock of Chicago Title Corporation ("CT"), a corporation subject to the jurisdiction of the Commission, in violation of Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18, and Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45, and it appearing to the Commission that a proceeding in respect thereof would be in

Complaint

the public interest, hereby issues its Complaint, stating its charges as follows:

I. DEFINITIONS

1. "Title plant" means a privately owned collection of records and/or indices regarding the ownership of and interests in real property. The term includes such collections that are regularly maintained and updated by obtaining information or documents from the public records, as well as such collections of information that are not regularly updated.

2. "Title information services" means providing selected information contained in a title plant to a customer or user or permitting a customer or user to have access to information contained in a title plant.

3. "Acquisition Agreement" means the agreement between FNF and CT for FNF's proposed acquisition of the common stock of CT pursuant to the Agreement and Plan of Merger dated August 1, 1999.

4. "Respondent" means FNF.

II. RESPONDENT

5. Respondent FNF is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware, with its executive offices located at 17911 Von Karman Avenue, Irvine, California 92614-6253. Respondent, among other things, is engaged in the sale of title insurance and the provision of title information services.

6. Pursuant to the Merger Agreement, Respondent will purchase the common stock of CT.

Complaint

7. Respondent is, and at all times relevant herein has been, engaged in commerce, as “commerce” is defined in Section 1 of the Clayton Act, as amended, 15 U.S.C. § 12, and is a corporation whose business is in, or affects, commerce, as “commerce” is defined in Section 4 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 44.

III. THE ACQUIRED COMPANY

8. CT is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware, with its executive offices located at 171 North Clark Street, Chicago, Illinois 60601. CT is engaged, among other things, in the sale of title insurance and the provision of title information services.

IV. THE ACQUISITION

9. On August 1, 1999, FNF and CT entered into an Acquisition Agreement under which FNF is to acquire the common stock of CT for an amount valued, at the time of entering into the Acquisition Agreement, at approximately \$1.2 billion (“Acquisition”).

V. THE RELEVANT MARKETS

10. For the purposes of this Complaint, the relevant line of commerce in which to analyze the effects of the Acquisition is the provision of title information services.

11. For the purposes of this Complaint, the relevant geographic areas in which to analyze the effects of the Acquisition in the relevant line of commerce are the following counties or other local jurisdictions in the United States: San Luis Obispo County, California; Tehama County, California; Napa County, California; Merced County, California; Yolo County, California; and San Benito County, California.

Complaint

VI. THE STRUCTURE OF THE MARKETS

12. The markets for title information services in the geographic areas listed under Paragraph 11 are highly concentrated.

VII. BARRIERS TO ENTRY

13. Entry into the market for providing title information services is unlikely and would not occur in a timely manner to deter or counteract the adverse competitive effects described in Paragraph 14, because of, among other things, the time and expense necessary to develop effective data collection technology and the time necessary to develop historical data, and the importance of an established reputation for accuracy.

VIII. EFFECTS OF THE ACQUISITION

14. The effects of the Acquisition, if consummated, may be substantially to lessen competition and to tend to create a monopoly in the relevant markets in violation of Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18, and Section 5 of the FTC act, as amended, 15 U.S.C. § 45, in the following ways, among others:

- a. by eliminating actual, direct and substantial competition between Respondent and CT in the relevant markets;
- b. by increasing the likelihood of collusion or coordinated interaction in the relevant markets.

IX. VIOLATIONS CHARGED

15. The Acquisition Agreement described in Paragraph 9 constitutes a violation of Section 5 of the FTC Act, as amended, 15 U.S.C. § 45.

16. The Acquisition described in Paragraph 9, if consummated, would constitute a violation of Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18, and Section 5 of the FTC Act, as amended, 15 U.S.C. § 45.

WHEREFORE, THE PREMISES CONSIDERED, the Federal Trade Commission on this seventeenth day of February, 2000, issues its Complaint against said Respondent.

By the Commission.

DECISION AND ORDER

The Federal Trade Commission ("Commission"), having initiated an investigation of the acquisition by respondent Fidelity National Financial, Incorporated ("FNF") of Chicago Title Corporation ("CT"), and respondent having been furnished thereafter with a copy of a draft of complaint that the Bureau of Competition presented to the Commission for its consideration and which, if issued by the Commission, would charge respondent with violation of Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45, and of Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18; and

Respondent, its attorneys, and counsel for the Commission having thereafter executed an agreement containing a consent order ("Consent Agreement"), containing an admission by respondent of all the jurisdictional facts set forth in the aforesaid

Decision and Order

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 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 thirty (30) days for the receipt and consideration of public comments, now in further conformity with the procedure described in Commission Rule 2.34, 16 C.F.R. § 2.34, the Commission hereby issues its complaint, makes the following jurisdictional findings and issues the following order:

1. Respondent FNF is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware, with its executive offices located at 17911 Von Karman Avenue, Irvine, California 92614-6253.

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

ORDER**I.**

IT IS ORDERED that, as used in this order, the following definitions shall apply:

Decision and Order

- A. “Respondent” or “FNF” means Fidelity National Financial, Incorporated, its directors, officers, employees, agents, representatives, predecessors, successors, and assigns; its subsidiaries, divisions, groups and affiliates controlled by FNF, and the respective directors, officers, employees, agents, representatives, successors, and assigns of each.
- B. “CT” means Chicago Title Corporation, its directors, officers, employees, agents, representatives, predecessors, successors, and assigns; its subsidiaries, divisions, groups and affiliates controlled by CT, and the respective directors, officers, employees, agents, representatives, successors, and assigns of each.
- C. “Commission” means the Federal Trade Commission.
- D. “Title plant” means a privately owned collection of records and/or indices regarding the ownership of and interests in real property. The term includes such collections that are regularly maintained and updated by obtaining information or documents from the public records, as well as such collections of information that are not regularly updated.
- E. “Acquisition” means FNF’s proposed acquisition of the common stock of CT pursuant to the Agreement and Plan of Merger dated August 1, 1999.
- F. “Copy” means a reproduction of a title plant that will enable an acquirer to use the reproduction in a qualitatively similar way to the original. A Copy will reproduce all of the information contained in the original and enable the information to be accessed no less quickly and no less conveniently than it could be using the original.

Decision and Order

II.**IT IS FURTHER ORDERED** that:

- A. Within four (4) months from the date the Consent Agreement is signed by Respondent, Respondent shall, for each of the following counties or local jurisdictions listed below, either (1) divest at no minimum price, absolutely and in good faith, either the rights, title, and interest held by FNF prior to the Acquisition or the rights, title, and interest held by CT prior to the Acquisition in all title plants serving such county or local jurisdiction, or (2) sell at no minimum price or otherwise permanently transfer, absolutely and in good faith, a Copy of all title plants serving such county or local jurisdiction in which FNF prior to the Acquisition held rights, title, and interest or a Copy of all title plants serving such county or local jurisdiction in which CT prior to the Acquisition held rights, title, and interest:

Merced County, California
Napa County, California
San Benito County, California
Tehama County, California
Yolo County, California.

- B. Within four (4) months from the date the Consent Agreement is signed by Respondent, Respondent shall either (1) divest at no minimum price, absolutely and in good faith, the rights, title, and interest, other than the right, subject to the approval of the Commission, to a copy of the joint title plant's data covering the period prior to divestiture, held by FNF or CT prior to the Acquisition in the San Luis Obispo Joint Title Plant ("San Luis Obispo JTP") to an entity that is not currently an owner of San Luis Obispo JTP ("New Owner"); or (2) relinquish all of

Decision and Order

the voting rights held by FNF prior to the Acquisition or all of the voting rights held by CT prior to the Acquisition in the San Luis Obispo JTP, and obtain the admission to full participating ownership in the San Luis Obispo JTP of a New Owner, which New Owner shall have (i) the equivalent voting rights in the San Luis Obispo JTP after the admission of the New Owner to those retained by Respondent or CT, (ii) an ownership share no less than that of the other owners, and (iii) no greater financial responsibilities with respect to the San Luis Obispo JTP than those of the other owners.

- C. Respondent shall divest the properties or sell or otherwise permanently transfer the Copies specified in Paragraphs II. A. and II. B. of this order only to an acquirer or acquirers that receive the prior approval of the Commission and only in a manner that receives the prior approval of the Commission. Respondent shall obtain the admission to ownership specified in Paragraph II. B. of this order only by a New Owner 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, sale, transfer, or obtaining admission to ownership pursuant to Paragraphs II. A. and II. B. of this order is to ensure the continued use of the divested or copied title plants as ongoing, viable title plants used in the production and/or sale of title information, and to remedy the lessening of competition resulting from the Acquisition as alleged in the Commission's complaint.
- D. Pending divestiture, sale, or transfer of the properties as specified in Paragraphs II. A. and II. B. of this order, Respondent shall take such actions as are necessary to maintain the viability and marketability of such properties and to prevent the destruction, removal, wasting, deterioration, or impairment of any of the properties. FNF shall comply with the following requirements with respect to all title plants serving the counties or other local

Decision and Order

jurisdictions listed in Paragraphs II. A. and II. B. of this order in which either FNF or CT has any rights, title or interest, during the period prior to the completion of the actions required by Paragraphs II. A. and II. B. of this order:

1. FNF shall cause the title plants to be maintained, including but not limited to updating the records and/or indices contained in the title plants, to the extent and in the manner maintained prior to the Acquisition.
2. FNF shall cause to be maintained in good faith all contracts or agreements for access to the title plants subject to the terms, conditions and stipulations of those contracts, and will refrain from taking any action toward terminating those contracts other than that which would be commercially reasonable under the terms of such contracts or agreements.
3. FNF shall cause access to the title plants to continue to be provided to accessors whose contracts or agreements for access to the title plants expire by their terms prior to the completion of the actions required by Paragraphs II. A. and II. B. of this order, in good faith on terms, conditions and stipulations identical to those set forth in such contracts or agreements.

III.

IT IS FURTHER ORDERED that:

- A. If FNF has not, within four (4) months from the date the Consent Agreement is signed by Respondent, divested, sold, or otherwise permanently transferred, absolutely and in good faith and with the Commission's prior approval, all

Decision and Order

of the properties specified in Paragraphs II. A. and II. B. of this order or not obtained the admission to ownership specified in Paragraph II. B. of this order, the Commission may appoint a trustee to accomplish the actions specified in Paragraphs II. A. and Paragraph II. B. of this order. In the event that the Commission or the Attorney General brings an action pursuant to § 5(l) of the Federal Trade Commission Act, 15 U.S.C. § 45(l), or any other statute enforced by the Commission, FNF shall consent to the appointment of a trustee in such action. Neither the appointment of a trustee nor a decision not to appoint a trustee under this Paragraph shall preclude the Commission or the Attorney General from seeking civil penalties or any other relief available to it, including a court-appointed trustee, pursuant to § 5(l) of the Federal Trade Commission Act, or any other statute enforced by the Commission, for any failure by the Respondent to comply with this order.

- B. If a trustee is appointed by the Commission or a court pursuant to Paragraph III. A. of this order, Respondent shall consent to the following terms and conditions regarding the trustee's powers, duties, authority, and responsibilities:
 1. The Commission shall select the trustee, subject to the consent of Respondent, which consent shall not be unreasonably withheld. The trustee shall be a person with experience and expertise in acquisitions and divestitures. If Respondent has not opposed, in writing, including the reasons for opposing, the selection of any proposed trustee within ten (10) days after notice by the staff of the Commission to Respondent of the identity of any proposed trustee, Respondent shall be deemed to have consented to the selection of the proposed trustee.

Decision and Order

2. Subject to the prior approval of the Commission, the trustee shall have the exclusive power and authority to accomplish the actions specified in Paragraphs II. A. and II. B of this order with respect to the properties or rights that have not been divested or sold or transferred by FNF, including the authority, subject to the approval of the Commission, with respect to any of the listed counties or local jurisdictions as to which divestiture or sale or transfer has not been completed by FNF, to determine whether to divest, sell, or transfer the rights, title and interest held by FNF prior to the Acquisition or the rights, title and interest held by CT prior to the Acquisition in title plants serving such county or local jurisdiction, and to determine, subject to the approval of the Commission, whether to accomplish the relief specified in Paragraph II. A. of this order through divestiture or sale of a Copy and whether to accomplish the relief specified in Paragraph II. B. of this order through divestiture or by obtaining a New Owner under the terms and conditions specified in Paragraph II. B. of this order, provided that if the trustee determines to accomplish the relief specified in Paragraph II. A. or Paragraph II. B. of this order through divestiture, Respondent may retain a copy of the divested assets, subject to the approval of the Commission.
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 accomplish the actions specified in Paragraphs II. A. and II. B. of this order.

Decision and Order

4. The trustee shall have twelve (12) months from the date the Commission or a court approves the trust agreement described in Paragraph III. B. 3. to accomplish the actions specified in Paragraphs II. A. and II. B. of this order, which shall be subject to the prior approval of the Commission. If, however, at the end of the twelve-month period, the trustee has submitted a plan to accomplish the specified actions or believes that the specified actions can be accomplished within a reasonable time, the period to accomplish the specified actions may be extended by the Commission, or, in the case of a court-appointed trustee, by the court; provided, however, the Commission may extend this period only two (2) times.
5. The trustee shall have full and complete access to the personnel, books, records and facilities related to the properties or rights specified in Paragraphs II. A. and II. B. that have not been divested, sold, or transferred by FNF, and to any other relevant information as the trustee may request. Respondent shall develop such financial or other information as such trustee may request and shall cooperate with the trustee. Respondent shall take no action to interfere with or impede the trustee's accomplishment of the specified actions. Any delays caused by Respondent in accomplishing the specified actions shall extend the trustee's period for accomplishing the specified actions under this Paragraph in an amount equal to the delay, as determined by the Commission or, for a court-appointed trustee, by the court.
6. The trustee shall use his or her best efforts to negotiate expeditiously the most favorable price and terms available in each contract that is submitted to the Commission, subject to Respondent's absolute and unconditional obligation to divest or sell at no minimum price. The transactions shall be made in the

Decision and Order

manner and with the acquirer or acquirers as set out in Paragraph II. of this order; provided, however, if the trustee receives bona fide offers from more than one acquiring entity, and if the Commission determines to approve more than one such acquiring entity, the trustee shall enter into transactions with the acquiring entity or entities selected by Respondent from among those approved by the Commission; provided, however, that Respondent shall select such entity within five (5) business days of receiving notification of the Commission's approval.

7. The trustee shall serve, without bond or other security, at the cost and expense of Respondent, on such reasonable and customary terms and conditions as the Commission or a court may set. The trustee shall have the authority to employ, at the cost and expense of Respondent, such consultants, accountants, attorneys, investment bankers, business brokers, appraisers, and other representatives and assistants as are necessary to carry out the trustee's duties and responsibilities. The trustee shall account for all monies derived from the transactions 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 completing the actions specified by Paragraphs II. A. and II. B. of this order with respect to the properties specified therein that have not been divested or sold or transferred by FNF.

Decision and Order

8. Respondent shall indemnify the trustee and hold the trustee harmless against any losses, claims, damages, liabilities, or expenses arising out of, or in connection with, the performance of the trustee's duties, including all reasonable fees of counsel and other expenses incurred in connection with the preparation for or defense of any claim, whether or not resulting in any liability, except to the extent that such losses, claims, damages, liabilities, or expenses result from misfeasance, gross negligence, willful or wanton acts, or bad faith by the trustee.
9. If the trustee ceases to act or fails to act diligently, a substitute trustee shall be appointed in the same manner as provided in Paragraph III. A. of this order.
10. The Commission or, in the case of a court-appointed trustee, the court, may on its own initiative or at the request of the trustee issue such additional orders or directions as may be necessary or appropriate to accomplish the relief required by this order.
11. The trustee shall have no obligation or authority to operate or maintain the properties specified in Paragraphs II. A. and II. B.
12. The trustee shall report in writing to Respondent and the Commission every sixty (60) days concerning the trustee's efforts to accomplish divestiture.

IV.**IT IS FURTHER ORDERED** that:

- A. 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

Decision and Order

otherwise:

1. Acquire any stock, share capital, equity or other interest in any concern, corporate or non-corporate, that has any direct or indirect ownership interest in a title plant serving any county or other local jurisdiction specified in Paragraphs II. A. and II. B., where at the time of the acquisition the Respondent has a direct or indirect ownership interest in any title plant serving the same county or local jurisdiction; or
2. Acquire any assets (other than in the ordinary course of business) or ownership interest in a title plant serving any county or other local jurisdiction specified in Paragraphs II. A. and II. B., where at the time of the acquisition the Respondent has a direct or indirect ownership interest in any title plant serving the same county or local jurisdiction.

Notification is not required to be made pursuant to this Paragraph IV. with respect to any acquisition by Respondent of a copy of title records or other information from a person or entity which thereafter retains the original information in its ownership and control, and where competition in the ordinary course between the parties is not otherwise restrained.

- B. Notification pursuant to this Paragraph shall be given on the Notification and Report Form set forth in the Appendix to Part 803 of Title 16 of the Code of Federal Regulations, as amended (hereinafter referred to as "the Notification"), and shall be prepared and transmitted in accordance with the requirements of that part, except that no filing fee will be required for any such notification, notification shall be filed with the Secretary of the Commission, notification need not be made to the United States Department of

Decision and Order

Justice, and notification is required only of Respondent and not of any other party to the transaction. In addition to the information required to be supplied on such Notification and Report Form pursuant to the above-referenced regulation, Respondent shall submit the following supplemental information in Respondent's possession or reasonably available to Respondent:

1. The name of each county or local jurisdiction to which the terms of Paragraph IV. A. 1. or 2. are applicable;
 2. A description of the title plant assets or interests that are being acquired; and
 3. With respect to each title plant serving each county or local jurisdiction to which the terms of Paragraph IV. A. 1. or 2. are applicable (including title plants in which the Respondent has a direct or indirect ownership interest as well as other title plants known to the Respondent), the names of all persons or entities who hold any direct or indirect ownership interest in the title plant and the percentage interest held by each; the time period covered by each category of title records contained in the title plant; whether the respective categories of title records are regularly being updated; the indexing system or systems used with respect to each category of title records; and the names of all persons, including but not limited to title insurers or agents, who have access to the title plant.
- C. Respondent shall provide the Notification to the Commission at least thirty (30) 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 C.F.R. § 803.20), Respondent shall not consummate the transaction until twenty (20)

Decision and Order

days after submitting such additional information or 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 shall not be required by this paragraph for a transaction for which notification is required to be made, and has been made, pursuant to Section 7A of the Clayton Act, 15 U.S.C. § 18a.

V.

IT IS FURTHER ORDERED that:

- A. Within thirty (30) days after the date this order becomes final and every thirty (30) days thereafter until Respondent has fully complied with the provisions of Paragraphs II. and III. of this order, Respondent shall submit to the Commission a verified written report setting forth in detail the manner and form in which it intends to comply, is complying, and has complied with Paragraphs II. and III. of this order. Respondent shall include in its compliance reports, among other things that are required from time to time, a full description of the efforts being made to comply with Paragraphs II. and III. of this order, including a description of all substantive contacts or negotiations for accomplishing the specified actions 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 accomplishment of the specified actions.
- B. One (1) year from the date this order becomes final, annually for the next nine (9) years on the anniversary of the date this order becomes final, and at other times as the

Decision and Order

Commission may require, Respondent shall file a verified written report with the Commission setting forth in detail the manner and form in which it has complied and is complying with Paragraph IV. of this order.

VI.

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

VII.

IT IS FURTHER ORDERED that, for the purpose of determining or securing compliance with this order, upon written request, Respondent shall permit any duly authorized representative of the Commission:

- A. Access, during office hours and in the presence of counsel, to inspect and copy all books, ledgers, accounts, correspondence, memoranda and other records and documents in the possession or under the control of Respondent relating to any matters contained in this order; and
- B. Upon five (5) days' notice to Respondent and without restraint or interference from it, to interview officers, directors, or employees of Respondent.

VIII.

IT IS FURTHER ORDERED that this order shall terminate ten (10) years after the actions required by Paragraphs II. A. and II. B. of this order have been accomplished.

Analysis to Aid Public Comment

By the Commission.

**ANALYSIS OF PROPOSED CONSENT ORDER TO AID
PUBLIC COMMENT**

The Federal Trade Commission has accepted, subject to final approval, an agreement containing a proposed Consent Order from Fidelity National Financial, Inc. ("FNF"), which is designed to remedy the anticompetitive effects arising from FNF's acquisition of the common stock of Chicago Title Corporation ("CT"). Under the terms of the agreement, FNF will be required to divest or sell copies of certain assets known as "title plants" in six California counties. Title plants are privately owned collections of records and/or indices that are used by abstractors, title insurers, title insurance agents, and others to determine ownership of and interests in real property in connection with the underwriting and issuance of title insurance policies and for other purposes.

The proposed Consent Order has been placed on the public record for 30 days so that the Commission may receive comments from interested persons. Comments received during this period will become part of the public record. After 30 days, the Commission will again review the agreement and the comments received, and will decide whether it should withdraw from the agreement or make final the agreement's proposed order.

On August 1, 1999, FNF entered into an agreement to acquire the common stock of CT for an amount valued at the time of entering into the acquisition agreement at approximately \$1.2 billion. The proposed Complaint alleges that the acquisition, if consummated, would constitute a violation of Section 7 of the

Analysis to Aid Public Comment

Clayton Act, as amended, 15 U.S.C. §18, and Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45, in local markets for title information services in the following counties or local jurisdictions in the United States: San Luis Obispo County, California; Tehama County, California; Napa County, California; Merced County, California; Yolo County, California; and San Benito County, California.

Title plants are privately-owned collections of title information obtained from public records that can be used to conduct title searches or otherwise ascertain information concerning ownership of or interests in real property. Title plants typically contain summaries or copies of public records or documents (often in a format that is comparatively easily to store and readily retrievable), as well as indices to facilitate locating relevant records that pertain to a particular property. Title plants permit users to obtain real property ownership information with significantly greater speed and efficiency than by consulting the original public records, which may be located in a number of separate public offices (e.g., offices of the county recorder, tax authorities, and state and federal courts), may be stored in an inconvenient form, and may be indexed in a fashion that makes it difficult to readily research a particular property. Because of the county-specific way in which title information is generated and collected and the highly local character of the real estate markets in which the title plant services are used, geographic markets for title information services are highly localized, consisting of the county or local jurisdiction embraced by the real property information contained in the title plant.

In each of the local jurisdictions named in the Complaint, the market for title information services is highly concentrated, and FNF and CT are direct competitors in the sale or provision of title information services. In each of the local jurisdictions named, there are no commercially reasonable substitutes for title information services. For a number of reasons, including the relatively large fixed costs associated with building and maintaining title plants, entry into the market for title information

Analysis to Aid Public Comment

services in each of the local jurisdictions named is difficult or unlikely to occur at a sufficient scale to deter or counteract the effects of the acquisition. For these reasons, the Complaint alleges that in each of the named local jurisdictions the effects of the acquisition may be substantially to lessen competition by, among other things, eliminating direct actual competition between FNF and CT in title information services and increasing the likelihood of collusion or coordinated interaction among competing providers of title information services.

The Consent Order requires FNF to divest or sell copies of the pre-acquisition title plant interests of either FNF or CT in five of the identified local jurisdictions to a buyer or buyers approved by the Commission. The Order also requires FNF to divest the pre-acquisition interests of FNF or CT in a jointly owned title plant in San Luis Obispo County, California, or, alternatively, to relinquish any additional voting rights in the joint plant that FNF may have accrued post-acquisition while obtaining a new owner of the joint plant. The specified relief is required to be completed within four months after the respondent signs the Consent Order agreement. In the period prior to divestiture, the respondent is required to maintain the viability and marketability of the properties, including updating the title plants in the same fashion as before the acquisition and maintaining in effect all user contracts and relationships.

The Consent Order includes a provision permitting the Commission to appoint a trustee to accomplish the divestitures, sales of copies, or obtaining new ownership if the specified relief is not accomplished by the respondent within the four-month period. The Consent Order also includes a requirement that for ten years the respondent provide the Commission with prior notice of future title plant acquisitions by the respondent in the counties where the specified actions are required if, at the time of any such acquisition, the respondent continues to have an interest in a title plant serving the county. A prior notice provision is appropriate in

Analysis to Aid Public Comment

this matter because the small transaction size of most individual title plant acquisitions is below the threshold of reportability under the Hart-Scott-Rodino Act (Clayton Act § 7A, 15 U.S.C. § 18a, as amended) and because there is a credible risk that the respondent will, but for an order to the contrary, engage in otherwise unreportable, anticompetitive mergers.¹

The purpose of this analysis is to facilitate public comment on the proposed Consent Order, and it is not intended to constitute an official interpretation of the agreement and proposed Consent Order or to modify in any way their terms.

¹ See Statement of FTC Policy Concerning Prior Approval and Prior Notice Provisions, 4 Trade Reg. Rep. (CCH) ¶ 13,241 (June 21, 1995).

Complaint

IN THE MATTER OF

MEMTEK PRODUCTS, INC.CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATIONS OF
SEC. 5 OF THE FEDERAL TRADE COMMISSION ACT

*Docket C-3927; File No. 9923114
Complaint, February 17, 2000--Decision, February 17, 2000*

This consent order prohibits Respondent, Memtek Products, Inc., from misrepresenting the time in which any cash rebate, or rebate in the form of credit towards purchases will be mailed to purchasers. It also prohibits Respondent from failing to provide any offered rebate within the promised time specified, or if no time is specified, within thirty days. The consent order also prohibits Respondent from violating the Commission's Mail Order Rule which also prohibits marketers from failing to provide rebates in the form of merchandise or service for products within specified time or, if time is not specified, within thirty days unless they offer consumers the option of consenting to the delay and receiving compensation for the offered rebate.

Participants

For the Commission: *Michael Dershowitz, Michael Ostheimer, Mark Eichorn, C. Lee Peeler, and BE.*

For the Respondents: *Robert A. Padway, Bullivant Houser Bailey.*

COMPLAINT

The Federal Trade Commission, having reason to believe that Memtek Products, Inc., 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:

Complaint

1. Respondent Memtek Products, Inc., is a California corporation with its principal office or place of business at 10100 Pioneer Blvd., Santa Fe Springs, CA 90670.

2. Respondent has repackaged, advertised, labeled, offered for sale, sold, and distributed products to the public, including Memorex computer diskettes and blank audiotapes and videotapes.

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 labeling and rebate coupons for packages of Memorex computer diskettes, including but not necessarily limited to the attached Exhibits A and B. The labeling and rebate coupons contain the following statements:

A.	" \$15 REBATE With Proof of Purchase"	"Please allow 12 weeks for delivery."
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(Exhibit A, front of label attached to packages of Memorex computer diskettes).

(Exhibit A, back of label attached to packages of Memorex computer diskettes)

B.	"29. ⁹⁹ Rebate by Mail on specially marked 100 Pack Diskettes Purchased at Staples"	(Exhibit B, front of rebate coupon for
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Complaint

Memorex computer
diskettes). . . .

Please allow 12 weeks for
delivery."

"Buy a Memorex MXR 100
Pack Diskettes
(Part#3210-5430) and Bulk
100 Pack Diskettes
(Part# 3210-5400)

(Exhibit B, back of rebate
coupon for Memorex
computer diskettes).

5. Through the means described in Paragraph 4, respondent has represented, expressly or by implication, that purchasers of packages of Memorex computer diskettes would receive cash rebates within 12 weeks of respondent's receipt of their requests.

6. In truth and in fact, in numerous instances, purchasers of packages of Memorex computer diskettes did not receive cash rebates within 12 weeks of respondent's receipt of their requests. In many instances, consumers experienced delays of one to two months in receiving their cash rebates. Therefore, the representation set forth in Paragraph 5 was, and is, false or misleading.

7. Respondent has disseminated or has caused to be disseminated labeling for packages of blank Memorex audiotapes and videotapes, including but not necessarily limited to the attached Exhibit C. The labeling contains the following statements:

C.
"BUY THIS
MEMOREX PRODUCT
AND RECEIVE A \$10
Best Buy Gift Check
(by mail)

Good for purchase at
Best Buy of any pre-
recorded video tape or
music CD."

Complaint

(Exhibit C, front of label attached to packages of blank Memorex audiotapes and videotapes).

"Please allow 8 weeks for delivery."

(Exhibit C, back of label attached to packages of blank Memorex audiotapes and videotapes).

8. Through the means described in Paragraph 7, respondent has represented, expressly or by implication, that purchasers of packages of blank Memorex audiotapes and videotapes would receive \$10 Best Buy gift checks, entitling them to a \$10 discount off a future purchase from Best Buy retail stores of any pre-recorded videotape or music CD, within 8 weeks of respondent's receipt of their requests.

9. In truth and in fact, in numerous instances, purchasers of packages of blank Memorex audiotapes and videotapes did not receive \$10 Best Buy gift checks within 8 weeks of respondent's receipt of their requests. In many instances, consumers experienced delays of one to three months in receiving their \$10 Best Buy gift checks. Therefore, the representation set forth in Paragraph 8 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 in or affecting commerce in violation of Section 5(a) of the Federal Trade Commission Act.

Complaint

THEREFORE, the Federal Trade Commission this seventeenth day of February, 2000, has issued this complaint against respondent.

By the Commission.

Complaint Exhibits

Exhibit A



BUY: A specially marked Memorex 50 Pack (UPC 034707-004146, 036887 037143).

MAIL: 1) UPC symbol cut from the package. 2) Original cash register receipt with date and purchase price circled. 3) This original rebate sticker from front of package. 4) Print your name, address and zip code on a 3"x5" card.

SEND TO: Memorex 50 Pack Rebate Offer, P.O. BOX 52945, Dept. 5672, Phoenix, Arizona 85072-2945.

ADDITIONAL TERMS OF OFFER: Limit 2 refunds per name, household or address. Offer void where prohibited by law, taxed, licensed or restricted. Please allow 12 weeks for delivery. Offer good only in the U.S.A. Request must be postmarked within 30 days of date of purchase. This offer not to be used in conjunction with any other offer. Offer good while supplies last.

53953920

Exhibit A, enlarged

Complaint Exhibits

Exhibit B

\$29.99 Rebate by Mail

**on specially
marked
100 Pack Diskettes
Purchased at Staples**

Must complete purchase between 1/11/98 thru 1/18/98
Limit 1 request per name, household or address.
Request must be post marked 2/1/98

Here's How To Receive Your Memorex Rebate:

1. Buy a Memorex MPX 100 Pack Diskettes (Part#3210-5430) and Bulk 100 Pack Diskettes (Part#3210-5400)
2. Mail the UPC symbol from the original package and the Staples cash register receipt as proof of purchase. Please show date and purchase price.
3. Mail these required items, along with this completed request, to:
Memorex MPX 100 Pack Diskettes and Bulk 100 Pack Diskettes Rebate
P.O. BOX 52665, Dept#17524, Phoenix, AZ 85072-2665
4. In order to properly redeem your request please print the following information:

Name _____
 Address _____
 City _____ State _____ Zip _____

Additional Terms of Offer:

Must complete purchase by 1/18/98. Request must be postmarked by 2/1/98. This completion form must accompany request and may receive additional reproduction limit 1 request per name, household or address. Please allow 12 weeks for delivery. Void where prohibited by law, taxed, licensed or restricted. Staples and Memorex rebates will not be honored if they conflict with the USA. Not responsible for age or misdirected mail. Incomplete redemption requests will not be honored. This offer not to be used in conjunction with any other offer. Offer good while supplies last.
 For questions regarding the status of your rebate, please call 1-888-354-4155

P0028

Complaint Exhibits

Exhibit C



BUY: A specially marked HS 7 129 9-pt, dBS-90 25-pt, or CD2-110 10-pt (UPCA/071809-181917 -320200, 411106)

MAIL: 1) UPC symbol cut from the outside package wrap; 2) Original cash register receipt (or copy) from Best Buy with date and purchase price circled; 3) This original rebate sticker from front of package; 4) Print your name, address and zip code on a 3x5 card.

SEND TO: \$10 Best Buy Gift Check Offer
P.O. BOX 8864, Young America, MN 55551

ADDITIONAL TERMS OF OFFER: Offer good on purchases made through 6/30/99. Requests must be postmarked by 7/15/99. Limit 3 refunds per name, household or address. Offer void where prohibited by law, taxed, licensed or restricted. Please allow 8 weeks for delivery. Offer good only in the U.S.A. Not responsible for lost or misdirected mail. Incomplete redemption requests will not be honored. This offer not to be used in conjunction with any other offer. Offer good while supp'ns last. S00018

Exhibit C, enlarged

Decision and Order

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 thirty (30) days, now in further conformity with the procedure prescribed in § 2.34 of its Rules, the Commission hereby issues its complaint, makes the following jurisdictional findings and enters the following order:

1. Respondent Memtek Products, Inc. is a California corporation with its principal office or place of business at 10100 Pioneer Boulevard, Santa Fe Springs, CA 90670.

Decision and Order

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. "Rebate" shall mean cash, credit towards future purchases, merchandise, services, or any other consideration offered by respondent to consumers who purchase products or services from respondent, which is provided subsequent to the purchase.
2. Unless otherwise specified, "respondent" shall mean Memtek Products, Inc., a corporation, its successors and assigns and its officers, agents, representatives, and employees.
3. "Mail Order Rule" shall mean the Federal Trade Commission's Trade Regulation Rule Concerning Mail or Telephone Order Merchandise, 16 C.F.R. Part 435, or as the Rule may hereafter be amended.
4. "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 respondent's manufacturing, labeling, advertising, promotion, offering for sale, sale, or distribution of any product or service in or affecting commerce, shall not:

Decision and Order

- A. misrepresent, in any manner, expressly or by implication, the time in which any rebate in the form of cash or credit towards future purchases will be mailed, or otherwise provided to purchasers;
- B. fail to provide any rebate in the form of cash within the time specified, or, if no time is specified, within thirty days;
- C. fail to provide any rebate in the form of credit towards future purchases within the time specified, or, if no time is specified, within thirty days;
- D. in connection with any rebate in the form of merchandise, violate any provision of the Mail Order Rule, including failing to provide the rebate within the time specified, or, if no time is specified, within thirty days, unless respondent offers to the purchaser the option of either:
 - 1. consenting to the delay; or
 - 2. canceling the rebate request and promptly receiving reasonable cash compensation instead of the rebate originally offered; or
- E. fail to provide any rebate in the form of services or any other consideration (other than cash, credit towards future purchases, or merchandise) within the time specified, or, if no time is specified, within thirty days, unless respondent offers to the purchaser the option of either:
 - 1. consenting to the delay; or
 - 2. canceling the rebate request and promptly receiving reasonable cash compensation instead of the rebate originally offered.

Decision and Order

II.

IT IS FURTHER ORDERED that respondent Memtek Products, Inc., 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 respondent's advertisements and promotional materials containing such representation;
- B. All materials that were relied upon by respondent in disseminating such representation; and
- C. All tests, reports, studies, surveys, demonstrations, or other evidence in their possession or control that contradict, qualify, or call into question the representation, or the basis relied upon for the representation, including complaints and other communications with consumers or with governmental or consumer protection organizations.

III.

IT IS FURTHER ORDERED that respondent Memtek Products, Inc., and its successors and assigns shall deliver a copy of this order to all current and future principals, officers, directors, and managers, and to all current and future employees, agents, and representatives having responsibilities with respect to the subject matter of this order. Respondent shall deliver this order to current personnel within thirty (30) days after the date of service of this order, and to future personnel within thirty (30) days after the person assumes such position or responsibilities.

Decision and Order

IV.

IT IS FURTHER ORDERED that respondent Memtek Products, Inc., and its successors and assigns shall notify the Commission at least thirty (30) days prior to any change in the corporation that may affect compliance obligations arising under this order, including, but not limited to, a dissolution, assignment, sale, merger, or other action that would result in the emergence of a successor corporation; the creation or dissolution of a subsidiary, parent, or affiliate that engages in any acts or practices subject to this order; the proposed filing of a bankruptcy petition; or a change in the corporate name or address. Provided, however, that, with respect to any proposed change in the corporation about which 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, 600 Pennsylvania Avenue, N.W., Washington, D.C. 20580.

V.

IT IS FURTHER ORDERED that respondent Memtek Products, Inc., and its successors and assigns shall, within sixty (60) days after service of this order, and at such other times as the Federal Trade Commission may require, file with the Commission a report, in writing, setting forth in detail the manner and form in which they have complied with this order.

VI.

This order will terminate on February 17, 2020, 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

Analysis to Aid Public Comment

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.

By the Commission.

Analysis of Proposed Consent Order to Aid Public Comment

The Federal Trade Commission has accepted, subject to final approval, an agreement containing a consent order from respondent Memtek Products, Inc. ("Memtek").

The proposed consent order has been placed on the public record for thirty (30) days for reception of comments by interested persons. Comments received during this period will become part of the public record. After thirty (30) days, the Commission will again review the agreement and the comments received and will

Analysis to Aid Public Comment

decide whether it should withdraw from the agreement or make final the agreement's proposed order.

Memtek repackages, advertises, labels and sells, among other products, "Memorex" brand computer diskettes, and blank audiotapes and videotapes. This matter concerns allegedly deceptive rebate advertising claims made in conjunction with the sale of these products. The Commission's proposed complaint alleges that Memtek falsely represented that purchasers of its package of 100 computer diskettes would receive a \$29.99 cash rebate within 12 weeks of Memtek's receipt of purchasers' rebate requests. The complaint alleges that in many instances purchasers received their rebates one to two months late. The complaint also alleges that Memtek falsely represented that purchasers of its blank audiotapes and videotapes would receive a \$10 Best Buy Gift Check within 8 weeks of Memtek's receipt of purchasers' gift check requests. The \$10 Gift Check could then be used at any Best Buy retail store to obtain \$10 off the purchase of any pre-recorded videotape or music CD. The complaint alleges that in many instances purchasers received their \$10 Gift Checks one to three months late.

The proposed consent order contains provisions designed to prevent respondent from engaging in similar acts and practices in the future.

Part I of the proposed order prohibits respondent from misrepresenting the time in which any cash rebate, or rebate in the form of credit towards future purchases, will be mailed to consumers. It also prohibits respondent from failing to provide such rebates within the time specified, or if no time is specified, within thirty days.

Part I of the proposed order also prohibits respondent from violating any provision of the FTC's Mail Order Rule in connection with rebates in the form of merchandise. Among other

Analysis to Aid Public Comment

things, the Mail Order Rule prohibits marketers from failing to provide rebates in the form of merchandise within the time they specify for delivery, or if no time is specified, within thirty days, unless they offer consumers the option of consenting to a delay or canceling the rebate request and promptly receiving reasonable cash compensation instead of the merchandise originally offered. Finally, Part I of the proposed order similarly prohibits respondent from failing to provide rebates in the form of services or any other consideration (other than cash, credit towards future purchases, or merchandise) within the time it specifies for delivery, or if no time is specified, within thirty days, unless it offers consumers the option of consenting to a delay or canceling the rebate request and promptly receiving reasonable cash compensation instead of the rebate originally offered.

Part II of the proposed order requires respondent to maintain copies of all materials relied upon in making any representation covered by this order.

Part III of the proposed order requires respondent to distribute copies of the order to various officers, agents and employees of respondent.

Part IV of the proposed order requires respondent to notify the Commission of any changes in corporate structure that might affect compliance with the order.

Part V of the proposed order requires respondent to file with the Commission one or more reports detailing compliance with the order.

Part VI of the proposed order is a “sunset” provision, dictating that the order will terminate twenty years from the date it is issued or twenty years after a complaint is filed in federal court, by either the United States or the FTC, alleging any violation of the order.

Analysis to Aid Public Comment

The purpose of this analysis is to facilitate public comment on the proposed order. It is not intended to constitute an official interpretation of the agreement and proposed order or to modify in any way their terms.

Complaint

IN THE MATTER OF

UMAX TECHNOLOGIES, INC.CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATIONS OF
SEC. 5 OF THE FEDERAL TRADE COMMISSION ACT*Docket C-3928; File No. 9923242
Complaint, February 17, 2000--Decision, February 17, 2000*

This consent order prohibits Respondent, UMAX Technologies, Inc., from misrepresenting the time in which any cash rebate, or rebate in the form of credit towards purchases will be mailed to purchasers. It also prohibits Respondent from failing to provide any offered rebate within the promised time specified, or if no time is specified, within thirty days. The consent order also prohibits Respondent from violating the Commission's Mail Order Rule which also prohibits marketers from failing to provide rebates in the form of merchandise or service for products within specified time or, if time is not specified, within thirty days unless they offer consumers the option of consenting to the delay and receiving compensation for the offered rebate.

Participants

For the Commission: *Michael Dershowitz, Michael Ostheimer, C. Lee Peeler, and BE.*

For the Respondents: *Joe Q. Kaufman, UMAX Technologies, Inc.*

COMPLAINT

The Federal Trade Commission, having reason to believe that UMAX Technologies, Inc., 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 UMAX Technologies, Inc., is a California corporation with its principal office or place of business at 3561 Gateway Boulevard, Fremont, California 94538.

Complaint

2. Respondent has advertised, labeled, offered for sale, sold, and distributed products to the public, including computer scanners.

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 labeling and rebate coupons for computer scanners, including but not necessarily limited to the attached Exhibits A and B. The labeling and rebate coupons contain the following statements:

A. "Astra 1220P \$30 Rebate"

"Please allow 10 to 12 weeks to receive your rebate."

(Exhibit A, label attached to packaging of Astra 1220P scanners).

B.

" UMAX
Astra 1220S
\$50 Rebate"

"Please allow 10 to 12
weeks to receive your
rebate."

(Exhibit B, front of rebate
coupon for Astra 1200S
scanners).

(Exhibit B, back of rebate
coupon for Astra 1200S
scanners).

5. Through the means described in Paragraph 4, respondent has represented, expressly or by implication, that purchasers of UMAX scanners would receive cash rebates within 12 weeks of respondent's receipt of their requests.

Complaint

6. In truth and in fact, in numerous instances, purchasers of UMAX scanners did not receive cash rebates within 12 weeks of respondent's receipt of their requests. In many instances, consumers experienced delays of one to five months in receiving their cash rebates. Therefore, the representation set forth in Paragraph 5 was, and is, false or misleading.

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

THEREFORE, the Federal Trade Commission this seventeenth day of February, 2000, has issued this complaint against respondent.

By the Commission.

Complaint Exhibits

Exhibit A

EXHIBIT A

PEEL OFF	
<h1>Astra 1220P \$30 Rebate</h1>	
<p>To receive your rebate you must mail in:</p> <ul style="list-style-type: none"> *Complete original bar code *Label out out of your scanner box. *A copy of your sales receipt *This completed claim coupon. 	
<p>Mail to:</p> <p>UMAX Astra 1220P Rebate Department 0463 1421 S. Beltline Rd. Ste. 400 Coppell, TX 75019</p> <p>If you have not received your rebate or have questions please call the rebate hotline at: 1-800-724-9273</p> <p>wmn.UMAX.com</p>	<p>Name _____</p> <p>Address _____</p> <p>City _____ State _____ ZIP _____</p> <p>Tel: _____</p> <p><small>Rebate applies to the Astra 1220P scanner only. Purchase must be made between October 1, 1998 and February 28, 1999. All requests MUST be postmarked by March 15, 1999. Offer not valid with any other offers, rebates or promotions. Offer valid in US and Canada only. Good for actual purchases by end users; excludes resellers and distributors of UMAX products and their families. Please allow 30 to 12 weeks to receive your rebate. All rebates will be made in US Dollars. UMAX is not responsible for lost or misdirected mail and illegible entries. UMAX logo and product names are trademarks of UMAX. Fraudulent submission of multiple requests could result in federal prosecution under the US Mail Fraud Statutes (18 U.S.C. Section 1341 & 1342). Keep a copy of your submission for your future reference. UMAX reserves the right to record and/or change promotional offer at any time.</small></p> <p style="text-align: right;">UMAX</p>

Complaint Exhibits

Exhibit B

EXHIBIT B

	
<h2>Astra 1200S \$50 Rebate</h2>	
<p>Purchase an Astra 1200S-DLX or an Astra 1200s-LE between October 1, 1998 and December 31, 1998 and become eligible for a \$50 mail-in rebate from UMAX.</p> <p>See complete rules and regulations on back.</p>	
<p>See the reverse side of this coupon for complete details on how to submit your claim. Mail all required claim information to:</p>	<p>If you have not received your rebate or have questions please call the rebate hotline at: 1-888-724-9273</p>
<div style="border: 1px solid black; padding: 2px;"> <p>UMAX 1200S Rebate Department # 462 2924 N. Skyway Circle Irving, TX. 75038</p> </div>	<p style="text-align: center;">www.UMAX.com</p>
(FRONT)	

 <h2>Astra 1200S-DLX & LE \$50 Rebate</h2>	
<p>Mail this completed coupon along with a copy of your receipt and the UPC/Serial Number label cut from the side of your scanner box to become eligible for a \$50 Mail-in rebate.</p>	<div style="border: 1px solid black; padding: 5px;"> <p>Name _____</p> <p>Address _____</p> <p>City _____ State _____ ZIP _____</p> <p>tel: _____</p> </div>
<p>Select the UMAX product purchased:</p> <p><input type="checkbox"/> Astra 1200S-DLX valid UPC is 785461134005</p> <p><input type="checkbox"/> Astra 1200s-LE valid UPC is 785461133985</p> <p>Please check one selection</p>	<p><small>Rebate applies to the Astra 1200S-DLX and 1200s-LE scanner only. Purchase MUST be made between October 1, 1998 and December 31, 1998. All requests MUST be postmarked by January 15, 1999. Offer not valid with any other offers or promotions. Offer valid in US and Canada only. Good for actual purchases by end users; excludes resellers and distributors of UMAX products and their families. Please allow 10 to 12 weeks to receive your rebate. All rebates will be made in US Dollars. UMAX is not responsible for lost or misdirected mail and illegible entries. UMAX logo and product names are trademarks of UMAX. Fraudulent submission of multiple requests could result in federal prosecution under the U.S. Mail Fraud Statutes (18 USC Section 1341 & 1342). Keep a copy of your submission for your future reference. UMAX reserves the right to rescind and/or change promotional offer at any time.</small></p>
<p>www.UMAX.com</p>	
(BACK)	

Decision and Order

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 thirty (30) days, now in further conformity with the procedure prescribed in § 2.34 of its Rules, the Commission hereby issues its complaint, makes the following jurisdictional findings and enters the following order:

1. Respondent UMAX Technologies, Inc. is a California corporation with its principal office or place of business at 3561 Gateway Boulevard, Fremont, California 94538.

Decision and Order

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. "Rebate" shall mean cash, credit towards future purchases, merchandise, services, or any other consideration offered to consumers who purchase products or services from respondent, which is provided subsequent to the purchase.
2. Unless otherwise specified, "respondent" shall mean UMAX Technologies, Inc., a corporation, its successors and assigns and its officers, agents, representatives, and employees.
3. "Mail Order Rule" shall mean the Federal Trade Commission's Trade Regulation Rule Concerning Mail or Telephone Order Merchandise, 16 C.F.R. Part 435, or as the Rule may hereafter be amended.
4. "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 any product or service in or affecting commerce, shall not:

- A. misrepresent, in any manner, expressly or by implication, the time in which any rebate in the form of cash or credit

Decision and Order

towards future purchases will be mailed, or otherwise provided to purchasers;

- B. fail to provide any rebate in the form of cash within the time specified, or, if no time is specified, within thirty days;
- C. fail to provide any rebate in the form of credit towards future purchases within the time specified, or, if no time is specified, within thirty days;
- D. in connection with any rebate in the form of merchandise, violate any provision of the Mail Order Rule, including failing to provide the rebate within the time specified, or, if no time is specified, within thirty days, unless respondent offers to the purchaser the option of either:
 - 1. consenting to the delay; or
 - 2. canceling the rebate request and promptly receiving reasonable cash compensation instead of the rebate originally offered; or
- E. fail to provide any rebate in the form of services or any other consideration (other than cash, credit towards future purchases, or merchandise) within the time specified, or, if no time is specified, within thirty days, unless respondent offers to the purchaser the option of either:
 - 1. consenting to the delay; or
 - 2. canceling the rebate request and promptly receiving reasonable cash compensation instead of the rebate originally offered.

Decision and Order

II.

IT IS FURTHER ORDERED that respondent UMAX Technologies, Inc., 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 their possession or control that contradict, qualify, or call into question the representation, or the basis relied upon for the representation, including complaints and other communications with consumers or with governmental or consumer protection organizations.

III.

IT IS FURTHER ORDERED that respondent UMAX Technologies, Inc., and its successors and assigns shall deliver a copy of this order to all current and future principals, officers, directors, and managers, and to all current and future employees, agents, and representatives having responsibilities with respect to the subject matter of this order. Respondent shall deliver this order to current personnel within thirty (30) days after the date of service of this order, and to future personnel within thirty (30) days after the person assumes such position or responsibilities.

Decision and Order

IV.

IT IS FURTHER ORDERED that respondent UMAX Technologies, Inc., and its successors and assigns shall notify the Commission at least thirty (30) days prior to any change in the corporation that may affect compliance obligations arising under this order, including, but not limited to, a dissolution, assignment, sale, merger, or other action that would result in the emergence of a successor corporation; the creation or dissolution of a subsidiary, parent, or affiliate that engages in any acts or practices subject to this order; the proposed filing of a bankruptcy petition; or a change in the corporate name or address. Provided, however, that, with respect to any proposed change in the corporation about which 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, 600 Pennsylvania Avenue, N.W., Washington, D.C. 20580.

V.

IT IS FURTHER ORDERED that respondent UMAX Technologies, Inc., and its successors and assigns shall, within sixty (60) days after service of this order, and at such other times as the Federal Trade Commission may require, file with the Commission a report, in writing, setting forth in detail the manner and form in which they have complied with this order.

VI.

This order will terminate on February 17, 2020, 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

Analysis to Aid Public Comment

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.

By the Commission.

Analysis of Proposed Consent Order to Aid Public Comment

The Federal Trade Commission has accepted, subject to final approval, an agreement containing a consent order from respondent UMAX Technologies, Inc. ("UMAX").

The proposed consent order has been placed on the public record for thirty (30) days for reception of comments by interested persons. Comments received during this period will become part of the public record. After thirty (30) days, the Commission will

Analysis to Aid Public Comment

again review the agreement and the comments received and will decide whether it should withdraw from the agreement or make final the agreement's proposed order.

UMAX advertises, labels and sells various types of computer scanners. This matter concerns allegedly deceptive rebate advertising claims made in conjunction with the sale of computer scanners. The Commission's proposed complaint alleges that UMAX falsely represented that purchasers of its Astra 1220P scanner, for example, would receive a \$30.00 cash rebate, and that purchasers of its Astra 1220S scanner, for example, would receive a \$50.00 cash rebate, within 12 weeks of UMAX's receipt of purchasers' rebate requests. The complaint alleges that in many instances purchasers received their rebates one to five months late.

The proposed consent order contains provisions designed to prevent respondent from engaging in similar acts and practices in the future.

Part I of the proposed order prohibits respondent from misrepresenting the time in which any cash rebate, or rebate in the form of credit towards future purchases, will be mailed to consumers. It also prohibits respondent from failing to provide such rebates within the time specified, or if no time is specified, within thirty days.

Part I of the proposed order also prohibits respondent from violating any provision of the FTC's Mail Order Rule in connection with rebates in the form of merchandise. Among other things, the Mail Order Rule prohibits marketers from failing to provide rebates in the form of merchandise within the time they specify for delivery, or if no time is specified, within thirty days, unless they offer consumers the option of consenting to a delay or canceling the rebate request and promptly receiving reasonable cash compensation instead of the merchandise originally offered.

Analysis to Aid Public Comment

Finally, Part I of the proposed order similarly prohibits respondent from failing to provide rebates in the form of services or any other consideration (other than cash, credit towards future purchases, or merchandise) within the time it specifies for delivery, or if no time is specified, within thirty days, unless it offers consumers the option of consenting to a delay or canceling the rebate request and promptly receiving reasonable cash compensation instead of the rebate originally offered.

Part II of the proposed order requires respondent to maintain copies of all materials relied upon in making any representation covered by this order.

Part III of the proposed order requires respondent to distribute copies of the order to various officers, agents and employees of respondent.

Part IV of the proposed order requires respondent to notify the Commission of any changes in corporate structure that might affect compliance with the order.

Part V of the proposed order requires respondent to file with the Commission one or more reports detailing compliance with the order.

Part VI of the proposed order is a "sunset" provision, dictating that the order will terminate twenty years from the date it is issued or twenty years after a complaint is filed in federal court, by either the United States or the FTC, alleging any violation of the order.

The purpose of this analysis is to facilitate public comment on the proposed order. It is not intended to constitute an official interpretation of the agreement and proposed order or to modify in any way their terms.

Complaint

IN THE MATTER OF

DBC FINANCIAL, INC.CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATIONS OF
SEC. 5 OF THE FEDERAL TRADE COMMISSION ACT AND
SECTION 7 OF THE CLAYTON ACT

*Docket C-3931; File No. 9923228
Complaint, March 13, 2000--Decision, March 13, 2000*

This consent order prohibits Respondent DBC Financial, Inc. in connection with the advertising or sale of Delaware Bank Card or any back card or related services from making and misrepresentations or material omissions regarding the costs, benefits, or conditions of a bank card or related services including that 1) that the card has no up-front fees if there is an Account set-up fee or other initial charge, 2) that the card provides over-draft protection free of charge if there is an over-draft protection fee. The consent order also prohibits respondent from making misrepresentations in connection with the advertising and sale of bank card or related services of any connection or affiliation with any United States government agency, institution, or program. The consent order also requires that Respondent conspicuously disclose in connection, in connection with any representation about the availability of electronic fund transfers from any government entity "NOTICE: The [Delaware Bank Card or Name of Bank Card] is NOT affiliated in any way with any federal government agency or program". The order requires Respondent to pay \$250,000.00 for a redress program and administrative costs.

Participants

For the Commission: *Rolando Berrelez, Michelle Chua,
Jessica Rich, David Medine.*

For the Respondents: *Sylvia Kochler, Nelson Mullins Riley &
Scarborough, LLP.*

Complaint

COMPLAINT

The Federal Trade Commission, having reason to believe that DBC Financial, Inc., a corporation (“respondent” or “DBC Financial”), 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 DBC Financial is a Delaware corporation with its principal office or place of business at 75 Piedmont Ave., Suite #202, Atlanta, GA 30303.
2. Respondent has advertised, offered for sale, sold, and distributed automated teller machine (“ATM”) bank card services to the public, including the Delaware Bank Card. The Delaware Bank Card is a direct deposit ATM bank card.
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 and promotional materials for the Delaware Bank Card in direct mailings and on television, including but not necessarily limited to the attached Exhibits A and B. These advertisements contain the following statements:
 - A. “Because you receive a Government Benefits Check, here is your **PRE-APPROVED** Delaware Bank Card: The Card that puts **CASH** in your hands. With this card, you get the following benefits: Automatic Deposit of Your Check! . . . \$1,000 Overdraft Protection per Year! With the Delaware Bank Card you have access to Extra Cash when you need it (even when your account balance is \$0.00)”
 - B. “Best of all, because you are Pre-Approved, there are **no up front fees** required to take advantage of this offer.”

Complaint

C. "If you receive social security, SSI or VA benefits, you are preapproved to receive the Delaware Bank Card. The card that puts cash in your hands. With the Delaware Bank Card, your money gets direct deposited automatically on checkday. No waiting for the mailman. Instant access to your money at thousands of ATM's. With the card you also get a thousand dollars per year of overdraft protection. Call 1-800-784-2600 to sign up today. Guaranteed approval. No upfront Fees. It's simple, it's fast, it's that easy."

5. Through the means described in Paragraph 4, respondent has represented, expressly or by implication, that:

A. Use of the Delaware Bank Card requires no upfront fees.

B. The Delaware Bank Card is affiliated with a United States government agency, institution or program.

C. Use of the Delaware Bank Card automatically provides free overdraft protection services of up to \$1,000 a year.

6. In truth and in fact:

A. Use of the Delaware Bank Card requires an "Account Set-Up Fee" of \$19.95, as well as a monthly service fee in the amount of \$9.95.

B. The Delaware Bank Card is not affiliated with any United States government agency, institution or program.

C. The Delaware Bank Card charges an overdraft protection fee of \$19.95 for every month in which the consumer's account is overdrawn by up to \$80.00. Therefore, the representations set forth in Paragraph 5 were, and are, false or misleading.

Decision and Order

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

THEREFORE, the Federal Trade Commission this thirteenth day of March, 2000, has issued this complaint against respondent.

By the Commission.

DECISION AND ORDER

The Federal Trade Commission (the "Commission") having initiated an investigation of certain acts and practices of respondent DBC Financial, Inc., incorporated in Delaware ("DBC Financial"), named in the caption hereof, and the respondent having been furnished thereafter with a copy of a draft complaint that the Bureau of Consumer Protection proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge respondent DBC Financial with violation of Section 5 of the Federal Trade Commission Act, 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 the jurisdictional facts set forth in the complaint, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by 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

Decision and Order

The Commission having thereafter considered the matter and having determined that it has reason to believe that respondent DBC Financial has violated the said Act, and that a complaint should issue stating its charges in that respect, and having thereupon accepted the executed consent agreement and placed such agreement on the public record for thirty (30) days, now in further conformity with the procedure described in § 2.34 of its Rules, the Commission hereby issues its complaint, makes the following jurisdictional findings, and enters the following order:

1. Respondent DBC Financial, Inc. is a Delaware corporation, with its principal office or place of business located at 75 Piedmont Avenue, Suite 1200, Atlanta, Georgia 30303.
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. "Account" shall mean a demand deposit (checking), savings, or other consumer asset account (other than an occasional or incidental credit balance in a credit plan) held directly or indirectly by a financial institution, and established primarily for personal, family, or household purposes.
2. "Account Set-up Fee" shall mean any fee charged by respondent to any customer to open or activate a Delaware Bank Card Account.

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3. "Bank card" or "Bank card-related service or product" shall mean any form of direct deposit bank card service offered by or through respondent, including but not limited to any card, code, or other means of access to an Account, or any combination thereof, that may be used by the consumer to initiate electronic fund transfers.
4. "Clearly and prominently" shall mean as follows:
 - A. In an advertisement communicated through an electronic medium (such as television, video, radio, and interactive media such as the Internet and online services), the disclosure shall be presented simultaneously in both the audio and video portions of the advertisement. Provided, however, that in any advertisement presented solely through video or audio means, the disclosure may be made through the same means in which the ad is presented. The audio disclosure shall be delivered in a volume and cadence and location sufficient for an ordinary consumer to hear and comprehend it, prior to purchase of the service or product. The videodisclosure shall be of a size and shade, and shall appear on the screen for a duration and in a location, sufficient for an ordinary consumer to read and comprehend it, prior to purchase of the service or product.
 - B. In a print advertisement, promotional material, or instructional manual, the disclosure shall be in a type size and location sufficiently noticeable for an ordinary consumer to read and comprehend it, prior to purchase of the service or product, in print that contrasts with the background against which it appears. In multi-page documents, the disclosure shall appear on the cover or first page.

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The disclosure shall be in understandable language and syntax. Nothing contrary to, inconsistent with, or in mitigation of the disclosure shall be used in any advertisement.

5. "Current Eligible Customers" shall mean all customers who, as of the Effective Date of this order, have an open Delaware Bank Card Account, and whose Accounts have been charged an Account Set-up Fee.
6. Unless otherwise specified, "DBC" or "Respondent" shall mean DBC Financial, Inc., and each of its successors and assigns, and officers, agents, representatives, and employees.
7. "Electronic Fund Transfer" shall mean any transfer of funds that is initiated through an electronic terminal, telephone, computer, or magnetic tape for the purpose of ordering, instructing, or authorizing a financial institution to debit or credit an account. The term includes, but is not limited to:
 - a. point-of-sale transfers;
 - b. automated teller machine transfers;
 - c. direct deposits or withdrawals of funds;
 - d. transfers initiated by telephone; and
 - e. transfers resulting from debit card transactions, whether or not initiated through an electronic terminal.
8. "ETA" shall mean the U.S. Treasury-designated electronic transfer account made available by a federally-insured financial institution acting as a Financial Agent in accordance with the requirements set out in 31 C.F.R. Section 208.5

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9. "Overdraft Protection Fee" shall mean any fee charged by respondent to any customer for overdraft protection services.
10. "Past Eligible Customers" shall mean all customers who had an open Delaware Bank Card Account on August 31, 1999, and who were charged an Account Set-up Fee, but who, between August 31, 1999 and the Effective Date of this Order, have closed their Delaware Bank Card Account.

I.

IT IS ORDERED that respondent DBC, a corporation, its successors and assigns, and its officers, agents, representatives, and employees, directly or through any corporate or other device, in connection with the advertising, promotion, offering for sale, sale, or distribution of the Delaware Bank Card or any Bank Card or Bank Card-related service or product in or affecting commerce, shall not, orally or otherwise, directly or indirectly, make any misrepresentation or material omission concerning the costs, benefits, or conditions of the Bank Card or Bank Card-related service or product, including but not limited to the following:

- A. That use of the Bank Card requires no up-front fees, if in fact DBC is charging an Account Set-up Fee or any other initial fee; and
- B. That use of the Bank Card provides free of charge any overdraft protection services, if in fact DBC is charging an overdraft protection fee.

II.

IT IS FURTHER ORDERED that respondent DBC, its successors and assigns, and its officers, agents, representatives, and employees, directly or through any corporate or other device, in connection with the advertising, promotion, offering for sale,

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sale, or distribution of the Delaware Bank Card or any Bank Card or Bank Card-related service or product, shall not, orally or otherwise, directly or indirectly, make any misrepresentation that DBC or any of its Bank Card or Bank Card-related services or products are affiliated in any way with any United States governmental agency, institution, or program.

III.

IT IS FURTHER ORDERED that respondent DBC, its successors and assigns, and its officers, agents, representatives, and employees, directly or through any corporate or other device, in connection with the advertising, promotion, offering for sale, sale, or distribution of the Delaware Bank Card or any Bank Card or Bank Card-related service or product, shall not make any representation, in any manner, expressly or by implication, about the availability of electronic transfer of funds from any government entity, including but not limited to social security payments, unless DBC discloses, clearly and prominently, and in close proximity to the representation, the following:

"NOTICE: The [Delaware Bank Card or Name of Bank Card] is **NOT** affiliated in any way with any federal government agency or program"

Provided, however, that to the extent DBC is advertising or promoting the ETA, as defined herein, on behalf of a financial institution that is offering that product, the above disclosure shall not be required.

IV.

IT IS FURTHER ORDERED that respondent, its successors and assigns, jointly and severally, shall pay redress to consumers in the amount of \$ 250,000.00 (U.S. Dollars) ("Redress Fund"). Respondent shall wire transfer the sum of \$ 250,000.00 into an

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escrow account designated by the Commission, on or before five (5) days after the date of issuance of this Order. This sum shall be used to (1) provide redress to all Current Eligible Customers and Past Eligible Customers, as those terms are defined herein; and (2) pay any attendant expenses of administration. The Redress Fund shall be used to provide all Current Eligible Customers and Past Eligible Customers a full refund of the Account Set-up Fee of \$19.95, and a one-time partial refund of the Overdraft Protection Fee. The FTC shall determine, in its sole discretion, which consumers are eligible for redress as well as the amounts to be paid.

- A. Within 10 (ten) business days after the date of issuance of this order, DBC shall deliver to both the Commission and an independent agent designated by the Commission, on magnetic tape or some other electronic medium, the following data concerning all Current Eligible Customers and Past Eligible Customers: Name, Last Known Mailing Address, Bank Routing Number, and Bank Account Number.
- B. Respondent shall also provide, within ten (10) business days of receiving a written request, any additional information that the independent agent reasonably needs to carry out the redress program described herein. DBC shall deliver all data and information described in this paragraph to the independent agent in a clean format compatible with the independent agent's computers.
- C. Within ten (10) days of the date of issuance of this order, DBC shall send by first class mail the letter, attached as Appendix A hereto, informing all Current Eligible Customers concerning consumer redress.
- D. The independent agent, in administering the redress fund to Past Eligible Customers, shall send the letter, attached as Appendix B hereto, informing all Past Eligible Customers concerning consumer redress.

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If the Commission determines, in its sole discretion, that redress to consumers is wholly or partially impracticable, any funds not so used shall be deposited into the United States Treasury. Respondent shall be notified as to how funds are disbursed, but shall have no right to contest the manner of distribution chosen by the Commission.

Notwithstanding any other provision of this Order, Respondent agrees that if it fails to meet the payment obligations set forth in Section IV of this Order, respondent shall pay the costs and attorneys fees incurred by the Commission and its agents in any attempts to collect amounts due pursuant to this Order. Respondent further agrees that the facts as alleged in this Complaint filed in this action shall be taken as true in any subsequent litigation filed by the Commission to enforce its rights pursuant to this Order, including but not limited to, a nondischargeability complaint in any subsequent bankruptcy proceeding.

V.

DBC hereby further represents, covenants, and agrees that it has waived and will waive and will not charge the Account Set-up Fee of \$19.95 for any Delaware Bank Card account opened between August 31, 1999 and January 31, 2000.

VI.

IT IS FURTHER ORDERED that, within five days after the date of issuance of this order, DBC's President shall submit to the Commission a truthful sworn statement reaffirming and attesting that, to the best knowledge and information of DBC and its President, the list of Current Eligible Customers and Past Eligible Customers, which list shall have been previously submitted to the Commission, is true, accurate and complete. The Commission's

Decision and Order

tentative approval of this settlement is expressly premised upon the truthfulness, accuracy, and completeness of DBC's list of customers enumerated in this Paragraph, which contain material information upon which the Commission relied in negotiating and agreeing to this tentative settlement. The sworn statement required by this Paragraph shall be sent by certified mail to the Associate Director, Division of Enforcement, Bureau of Consumer Protection, Federal Trade Commission, 600 Pennsylvania Avenue, N.W., Washington, D.C. 20580.

VII.

IT IS FURTHER ORDERED that respondent DBC, a corporation, and its successors and assigns, shall, for three (3) years from the date of entry of this order, maintain and upon request immediately make available to the Federal Trade Commission for inspection and copying, all documents demonstrating compliance with this order.

VIII.

IT IS FURTHER ORDERED that respondent DBC Financial, Inc., and its successors and assigns, shall, for a period of three (3) years following the date of service of this order, deliver a copy of this order to all current and future principals, officers, directors, and managers, and to all current and future agents, representatives, and management employees having responsibility with respect to the subject matter of this order, as well as any independent contractor retained to market the DBC Bank Card or similar Bank Card products and services, and shall secure from each such person a signed statement acknowledging receipt of the order. Respondent shall maintain and make available upon request by representatives of the Federal Trade Commission copies of said signed statements. Respondent shall deliver this order to current personnel within thirty (30) days after the date of service of this order, and to future personnel within thirty (30) days after the person assumes such position or responsibilities.

Decision and Order

IX.

IT IS FURTHER ORDERED that respondent DBC Financial, Inc., and its successors and assigns, shall notify the Commission at least thirty (30) days prior to any change in the corporation that may affect compliance obligations arising under this order, including but not limited to a dissolution, assignment, sale, merger, or other action that would result in the emergence of a successor corporation; the creation or dissolution of a subsidiary, parent, or affiliate that engages in any acts or practices subject to this order; the proposed filing of a bankruptcy petition; or a change in the corporate name or address. Provided, however, that, with respect to any 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, 600 Pennsylvania Avenue, N.W., Washington, D.C. 20580.

X.

IT IS FURTHER ORDERED that respondent DBC Financial, Inc., a corporation, its successors and assigns, and its officers, shall, within one hundred and eighty (180) days of the date of 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 they have complied with this order.

XI.

This order will terminate on March 13, 2020, 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

Analysis to Aid Public Comment

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 (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 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.

By the Commission.

Analysis of Proposed Consent Order to Aid Public Comment

The Federal Trade Commission has accepted, subject to final approval, an agreement to a proposed consent order from DBC Financial, Inc. ("DBC Financial"). The agreement would settle a complaint by the Federal Trade Commission that DBC Financial engaged in deceptive acts or practices in violation of Section 5(a) of the Federal Trade Commission Act.

Analysis to Aid Public Comment

The proposed consent order has been placed on the public record for thirty (30) days for receipt of comments by interested persons. Comments received during this period will become part of the public record. After thirty (30) days, the Commission will again review the agreement and the comments received and will decide whether it should withdraw from the agreement or make final the agreement's proposed order.

This matter concerns representations made by DBC Financial in its advertising of the Delaware Bank Card, an automated teller machine ("ATM") bank card that offers direct deposit services with an affiliated bank. The administrative complaint alleges that DBC Financial violated the FTC Act by falsely representing: (1) that use of the Delaware Bank Card requires no upfront fees, when, in fact, use of the card requires an account setup fee of \$19.95, as well as a monthly service fee of \$9.95; (2) that the Delaware Bank Card is affiliated with a United States government agency, institution, or program, when in fact it is not; and (3) that use of the Delaware Bank Card automatically provides free overdraft protection services of up to \$1,000 a year, when in fact the card charges an overdraft protection fee of \$19.95 for every month in which the consumer's account is overdrawn by up to \$80.00.

To remedy the violations charged and to prevent respondent from engaging in similar acts and practices in the future, the proposed order contains injunctive provisions and a consumer redress program. Part I of the order prohibits respondent, in connection with the advertising or sale of the Delaware Bank Card or any Bank Card or Bank Card-related service or product, from making any misrepresentation or material omission concerning the costs, benefits, or conditions of the Bank Card or Bank Card-related service or product, including the following: (1) that use of the Bank Card requires no up-front fees, if in fact DBC Financial is charging an Account Set-up fee or any other initial fee; and (2) that use of the Bank Card provides free of charge any

Analysis to Aid Public Comment

overdraft protection services, if in fact DBC Financial is charging an overdraft protection fee.

Part II of the order prohibits respondent, in connection with the advertising or sale of the Delaware Bank Card or any Bank Card or Bank Card-related service or product, from misrepresenting that DBC Financial or any of its Bank Card or Bank Card-related services or products are affiliated in any way with any United States governmental agency, institution, or program.

Part III of the order requires respondent to clearly and conspicuously disclose, in connection with any representation about the availability of electronic transfer of funds from any government entity, the following: "NOTICE: The [Delaware Bank Card or Name of Bank Card] is NOT affiliated in any way with any federal government agency or program." This disclosure is not required, however, to the extent that respondent is promoting a U.S. Treasury-designated ETA on behalf of a financial institution that is participating in the government ETA program.

Part IV of the order requires respondent to pay \$250,000.00 for the redress program and administrative costs. The redress program applies to certain consumers who, as of August 31, 1999, had an active Delaware Bank Card account and who were charged an account set-up fee. In addition, Part V of the order requires respondent to waive the account set-up fee of \$19.95 for all Delaware Bank Card accounts opened between August 31, 1999 and January 31, 2000.

The proposed order also contains provisions regarding distribution of the order, record-keeping, notification of changes in corporate status, termination of the order, and the filing of a compliance report.

Analysis to Aid Public Comment

The purpose of this analysis is to facilitate public comment on the proposed order, and it is not intended to constitute an official interpretation of the agreement and the proposed order or to modify their terms in any way.

Complaint

IN THE MATTER OF
CERIDIAN CORPORATIONCONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATIONS OF
SEC. 5 OF THE FEDERAL TRADE COMMISSION ACT AND
SECTION 7 OF THE CLAYTON ACT*Docket C-3933; File No. 9810030*
Complaint, April 5, 2000--Decision, April 5, 2000

This consent order addresses the acquisition by Respondent Ceridian Corporation of NTS Corporation and Trendar Corporation. The order requires Respondent to grant fleet card issuers access to Comdata's Trendstar fuel purchase desk automation system and to grant fuel purchase desk automation systems suppliers the right to process Comdata's fleet cards. The order also requires Comdata, for a period of three years, to grant a ten-year license to effect transactions on the Trendar system to any company providing, or seeking to provide, fleet card services. Comdata is required to promptly disseminate the software to all truck stops on the Trendar network. Comdata is further required to provide licensees with equal access to any upgrades or modifications to the Trendar system, and is prohibited from basing any transaction fees charged to truck stops for processing the Comdata card, as well as access to the Comdata card, on whether such truck stops accept any other firm's fleet cards. The order requires Comdata, for a period of three years, to grant a ten-year license to all incumbent suppliers of fuel purchase desk automation systems, and to the first three new system providers that request a license.

Participants

For the Commission: *Michael R. Moiseyev, Yolanda R. Gruendel, Andrew J. Topps, Robert R. Pickett, Sylvia M. Brooks, Ann Malester, Daniel P. Ducore, Christopher Garmon, Jeffrey Fischer, and Gregory Vistnes.*

For the Respondents: *Jeane Thomas and Randy Smith, Crowell & Moring, R. Dale Grimes, Bass, Berry & Sims, and Joe Warren, Michael Crimmens, and Joe Kattan, Gibson, Dunn & Crutcher.*

Complaint

COMPLAINT

The Federal Trade Commission ("Commission"), having reason to believe that Respondent, Ceridian Corporation ("Ceridian"), a corporation subject to the jurisdiction of the Commission, has acquired, through its wholly owned subsidiary Comdata Network, Inc., substantially all of the assets of NTS, Inc. ("NTS"), a corporation subject to the jurisdiction of the Commission, from First Data Corporation ("First Data"), and, through its wholly owned subsidiary Comdata Holdings Corporation, has acquired Trendar Corporation ("Trendar"), a corporation subject to the jurisdiction of the Commission, in violation of Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18, and Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45, and it appearing to the Commission that a proceeding in respect thereof would be in the public interest, hereby issues its Complaint, stating its charges as follows:

I. RESPONDENT

1. Respondent Ceridian is a corporation organized, existing, and doing business under and by virtue of the laws of Delaware with its office and principal place of business located at 8100 34th Avenue, South, Minneapolis, Minnesota 55425.
2. Respondent is engaged in, among other things, the provision of fleet card services to over the road trucking companies and the development, manufacture and sale of truck stop fuel desk automation systems.
3. Respondent is, and at all times relevant herein has been, engaged in commerce as "commerce" is defined in Section 1 of the Clayton Act, as amended, 15 U.S.C. § 12, and is a corporation whose business is in or affects commerce as "commerce" is defined in Section 4 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 44.

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II. THE ACQUIRED COMPANIES

4. First Data is a corporation organized, existing, and doing business under and by virtue of the laws of Delaware, with its office and principal place of business located at 901 Hackensack Avenue, Hackensack, New Jersey 07601.

5. NTS, a subsidiary of First Data, was, until the time of its acquisition by Respondent, engaged in, among other things, the business of providing fleet card services to over the road trucking companies.

6. First Data was at all times relevant herein engaged in commerce as "commerce" is defined in Section 1 of the Clayton Act, as amended, 15 U.S.C. § 12, and is a corporation whose business is in or affects commerce as "commerce" is defined in Section 4 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 44.

7. Trendar was, until the time it was acquired by Respondent, a corporation organized, existing, and doing business under and by virtue of the laws of Tennessee, with its office and principal place of business located at Murfreesboro Road, Nashville, Tennessee.

8. Trendar was, until the time of its acquisition by Respondent, engaged in, among other things, the design, manufacture and sale of truck stop fuel desk automation systems.

9. Trendar was at all times relevant herein engaged in commerce as "commerce" is defined in Section 1 of the Clayton Act, as amended, 15 U.S.C. § 12, and is a corporation whose business is in or affects commerce as "commerce" is defined in Section 4 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 44.

Complaint

III. THE ACQUISITIONS

10. In January, 1998, Respondent Ceridian, through its wholly owned subsidiary Comdata Network, Inc., acquired substantially all of the assets of NTS from First Data Corporation in exchange for certain Ceridian assets and businesses and \$50 million.

11. In March, 1995, Comdata Holdings Corporation, a subsidiary of Respondent Ceridian, acquired Trendar Corporation, for approximately \$14.2 million.

IV. THE RELEVANT MARKETS

12. For purposes of this Complaint, the relevant lines of commerce in which to analyze the effects of the Acquisitions are the provision of fleet card services to over the road trucking companies and the development, manufacture and sale of truck stop fuel desk automation systems.

13. For purposes of this Complaint, the United States is the relevant geographic area in which to analyze the effects of the Acquisitions in the relevant lines of commerce.

V. STRUCTURE OF THE MARKET

14. The market for the provision of fleet card services for over the road trucking companies is highly concentrated as a result of the acquisition of NTS by Ceridian. At the time of its acquisition, NTS was Ceridian's closest and most significant competitor in the market for fleet card services for over the road trucking companies.

15. The market for fuel desk automation systems is highly concentrated. At the time of its acquisition by Respondent, Trendar was the leading supplier of truck stop fuel desk automation systems in the United States. Trendar remains the

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leading supplier of truck stop fuel desk automation systems in the United States.

VI. BARRIERS TO ENTRY

16. The relevant markets described in Paragraphs 12 and 13 are characterized by high barriers to entry. Prospective entrants into the market for the provision of fleet card services to over the road trucking companies must be accepted onto Ceridian's Trendar fuel desk automation system and must establish a nationwide network of truck stop locations that accept their cards. Potential entrants into the truck stop fuel desk automation system market must be able to process Ceridian's fleet cards in order to be viable options for truck stops. Entry into the relevant markets would not occur in a timely manner to deter or counteract the adverse competitive effects described in Paragraph 17 because of these high barriers.

VII. EFFECTS OF THE ACQUISITIONS

17. The effects of the Acquisitions may be substantially to lessen competition and to tend to create a monopoly in the relevant markets in violation of Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18, and Section 5 of the FTC Act, as amended, 15 U.S.C. § 45, in the following ways, among others:

- (a) by increasing the likelihood that customers of fleet card services to over the road trucking companies will pay higher prices; and
- (b) by increasing the likelihood that customers of truck stop fuel desk automation systems will pay higher prices; and
- (c) by raising barriers to entry into the market for fleet card services to over the road trucking companies; and
- (d) by raising barriers to entry into the market for truck stop fuel desk automation systems.

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VIII. VIOLATIONS CHARGED

18. The Acquisitions described in Paragraphs 10 and 11 constitute violations of Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18, and Section 5 of the FTC Act, as amended, 15 U.S.C. § 45.

WHEREFORE, THE PREMISES CONSIDERED, the Federal Trade Commission on this fifth day of April, 2000, issues its Complaint against said respondent.

By the Commission.

DECISION AND ORDER

The Federal Trade Commission having initiated an investigation of the acquisition by Comdata Network, Inc., a wholly-owned subsidiary of respondent, of substantially all of the assets of NTS, Inc., and the acquisition by Comdata Holdings Corporation, a wholly-owned subsidiary of respondent, of Trendar Corporation, and the respondent having been furnished thereafter with a copy of a draft of Complaint that the Bureau of Competition presented to the Commission for its consideration and which, if issued by the Commission, would charge respondent with violations of Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18, and Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45; and

Respondent, its attorneys, and counsel for the Commission having thereafter executed an Agreement Containing Consent Order, an admission by respondent of all the jurisdictional facts

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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 respondents have violated the said Acts, and that a Complaint should issue stating its charges in that respect, and having thereupon accepted the executed Consent Agreement and placed such Agreement on the public record for a period of sixty (60) days, and having duly considered the comments filed thereafter by interested persons pursuant to § 2.34 of its Rules, and having modified the Consent Order in certain respects, now in further conformity with the procedure described in § 2.34 of its Rules, the Commission hereby issues its Complaint, makes the following jurisdictional findings and enters the following Order:

1. Respondent Ceridian Corporation is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Delaware, with its office and principal place of business located at 8100 34th Avenue South, Minneapolis, Minnesota 55425.

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 (where appropriate, words in the singular include the plural, and words in the plural include the singular):

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- A. “Acquisitions” means the acquisition of substantially all of the assets of NTS, Inc. by Comdata Network, Inc., a wholly-owned subsidiary of Ceridian, and the purchase of Trendar Corporation by Comdata Holdings Corporation, a wholly-owned subsidiary of Ceridian.
- B. “Comdata” means Comdata Network, Inc., a Maryland corporation and wholly-owned subsidiary of Ceridian, with its office and principal place of business located at 5301 Maryland Way, Brentwood, Tennessee 37027.
- C. “Comdata Business” means any division or entity within or controlled by Respondent that is engaged in, among other things, the development, issuance, distribution, sale or licensing of the Comdata Cards.
- D. “Comdata Cards” means all of Comdata’s current and future proprietary, private label Comchek®, TIC, NTS, EDS or other Fleet Cards, however named, issued by Comdata, either directly or indirectly through an approved third-party designated by Comdata, to Trucking Companies or truck drivers who use such cards to effect Transactions at Fueling Locations approved by Comdata; provided, however, that Comdata Cards shall not include cards for which Respondent does not have final authority to determine which POS Systems are permitted to effect diesel fuel purchases or data capture transactions for those cards. For the purposes of this Order, Comdata Cards shall be included as one type or kind of Fleet Card, as hereinafter defined.

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- E. “Comdata Confidential Information” means any information not in the public domain disclosed by Respondent to a Designated POS System Provider or Fleet Card Issuer, as applicable, in its capacity as the provider of the Comdata Cards or Trendar Services, respectively. Comdata Confidential Information shall not include: (1) information that falls within the public domain through no act, error, or omission by the Designated POS System Provider or Fleet Card Issuer, as applicable; (2) information that becomes known to the Designated POS System Provider or Fleet Card Issuer, as applicable, from a third party not in breach of a confidentiality or non-disclosure agreement with respect to such information; (3) information already known to the Designated POS System Provider or Fleet Card Issuer, as applicable, prior to requesting a license pursuant to Paragraph II. or III., respectively; and (4) information independently developed by the Designated POS System Provider or Fleet Card Issuer, as applicable, without reference to or use of any Comdata Confidential Information.
- F. “Commission” means the Federal Trade Commission.
- G. “Designated POS System Providers” means New System Providers that have received Commission approval and Incumbent System Providers.
- H. “Fleet Card” means any card issued to cardholders who are authorized to use such cards to effect data capture Transactions or Transactions funded by the Fleet Card Issuer.
- I. “Fleet Card Issuer” means any Person who (1) issues or seeks to engage in the business of issuing Fleet Cards to Trucking Companies, truck drivers, or other cardholders who may use such Fleet Cards to effect Transactions, provided that a Fleet Card Issuer must

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have, or seek to have, issued at least one thousand (1,000) Fleet Cards; or (2) develops a Fleet Card for the purpose of having it issued by third-parties, provided that the Fleet Card Issuer must have, or seek to have, third-parties issue at least one thousand (1,000) Fleet Cards.

- J. "Fueling Location" means any truck stop, gasoline service station, fueling service center, Terminal Fueling Facility, cardlock, or unattended fueling site.
- K. "Incumbent System Provider" means any Person who is authorized by Respondent on the date Respondent signs this Order to effect all Transactions using any one (1) Fleet Card issued by Respondent.
- L. "Injunctive Relief" means: (1) a permanent injunction obtained on or after January 1, 1994; (2) a temporary restraining order or preliminary injunction obtained on or after January 1, 1994 that is in effect; or (3) a temporary restraining order or preliminary injunction obtained on or after January 1, 1994 that has expired or terminated due to mootness, and was not obtained in an ex parte proceeding.
- M. "New System Provider" means any Person not affiliated with Respondent who manufactures, markets, sells, deploys, maintains or has developed a POS System used by Fueling Locations to effect Transactions, and whose POS System has been operational at 25 Fueling Locations for a period of not less than six (6) months. The term "New System Provider" does not include any Incumbent System Provider.

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- N. “Non-Public Fleet Card Information” means any information not in the public domain disclosed by any Fleet Card Issuer (other than Ceridian) to Respondent in its capacity as the provider of Trendar Services. Non-Public Fleet Card Information shall not include: (1) information that falls within the public domain through no violation of this Order by Respondent; (2) information that becomes known to Respondent from a third party not in breach of a confidentiality or non-disclosure agreement with respect to such information; (3) information already known to Respondent on the date it signs the Agreement Containing Consent Order; and (4) information independently developed by Respondent without reference to or use of any Non-Public Fleet Card Information.
- O. “Non-Public Point of Sale Information” means any information not in the public domain disclosed by any Designated POS System Provider (other than Ceridian) to Respondent in its capacity as provider of the Comdata Cards. Non-Public Point of Sale Information shall not include: (1) information that falls within the public domain through no violation of this Order by Respondent; (2) information that becomes known to Respondent from a third party not in breach of a confidentiality or non-disclosure agreement with respect to such information; (3) information already known to Respondent on the date it signs the Agreement Containing Consent Order; and (4) information independently developed by Respondent without reference to or use of any Non-Public Point of Sale Information.
- P. “Non-Public Programming Information” means any information not in the public domain disclosed by any Fleet Card Issuer (other than Ceridian) to the Third-Party Developer. Non-Public Programming Information shall not include: (1) information that falls

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within the public domain through no violation of this Order by Respondent; (2) information that becomes known to the Third-Party Developer from a third party not in breach of a confidentiality or non-disclosure agreement with respect to such information; (3) information already known to the Third-Party Developer on the date Respondent signs the Agreement Containing Consent Order; and (4) information independently developed by the Third-Party Developer without reference to or use of any Non-Public Programming Information.

- Q. "Person" means any individual, corporation, partnership, limited liability partnership, joint venture, association, joint-stock company, limited liability company, trust or unincorporated organization.
- R. "POS Standards" means the following standards that a Designated POS System Provider must maintain: (1) its POS System complies with the same Comdata Card functional specifications as the Trendar System; (2) it promptly disseminates Comdata Card specification changes or updates that have been implemented on the Trendar System; (3) it provides twenty-four (24) hour support for its POS System; (4) its POS System is Year 2000 compliant; and (5) it maintains the confidentiality of all Comdata Confidential Information.
- S. "POS System" means a point of sale purchase authorization system comprised of hardware, software, communications networks and related components used by Fueling Locations for any or all of the following purposes: (1) to obtain authorization for Transactions; (2) to capture and compile information related to such Transactions for themselves and others;

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and (3) to execute ancillary services related thereto as may be made available from time to time in connection with such POS System.

- T. "Respondent" or "Ceridian" means Ceridian Corporation, its directors, officers, employees, agents, representatives, predecessors, successors and assigns, subsidiaries, divisions, groups and affiliates controlled by Ceridian Corporation, and the respective directors, officers, employees, agents, representatives, successors, and assigns of each.
- U. "Terminal Fueling Facility" means any fueling facility owned or operated by or on behalf of a Trucking Company.
- V. "Third-Party Developer" means the Person designated by Respondent to perform the functions described in Paragraph III.C. of this Order.
- W. "Transactions" means any diesel fuel purchase, cash advance, data capture, or any other type of transaction effected by a Fleet Card holder with the Fleet Card Issuer either: (1) by use of a Fleet Card; or (2) based on information, numbers, or data obtained from a Fleet Card. Transactions shall not include transactions that are not authorized by the Fleet Card Issuer.
- X. "Transaction Fee" means the fee per transaction that a Fleet Card Issuer may charge to: (1) Fueling Locations authorized to accept the Fleet Card Issuer's Fleet Card; or (2) cardholders authorized to use the Fleet Card Issuer's Fleet Card.
- Y. "Trendar Business" means any division or entity within or controlled by Respondent that is engaged in, among other things, the development, sale or licensing of the Trendar System or Trendar Services.

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- Z. “Trendar Facility” means any Fueling Location that has purchased or leased a Trendar System.
- AA. “Trendar Services” means all services provided by Respondent that allow Fleet Card Transactions to be effected through the Trendar System, including, but not limited to: (1) reading the Fleet Card; (2) recognizing the Fleet Card's functions; (3) prompting for information required to execute Transactions; (4) transmitting information about Transactions; (5) communicating with the appropriate Fleet Card Issuer to seek authorization for Transactions; and (6) printing receipts with the requisite transaction information.
- BB. “Trendar System” means all versions of the proprietary POS System developed, marketed, deployed or maintained by Respondent.
- CC. “Trucking Companies” means companies and their employees and agents that operate trucks to haul their own products or provide trucking services to other Persons.

II.

IT IS FURTHER ORDERED that for the purpose of ensuring that Designated POS System Providers may effect Transactions originated by Comdata Cards, and to remedy the lessening of competition resulting from the Acquisitions as alleged in the Commission's complaint, Respondent shall:

- A. Except as otherwise provided in this Order, for a period of three (3) years beginning on the date this Order becomes final, grant a ten (10) year unrestricted non-exclusive royalty-free license to effect

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Transactions originated by Comdata Cards to each Incumbent System Provider who notifies Comdata in writing after this Order is issued; provided, however, that Respondent may require the licensee to enter into a license agreement containing the Comdata Card License Conditions attached as Appendix I hereto;

- B. Except as otherwise provided in this Order, for a period of three (3) years beginning on the date this Order becomes final, grant a ten (10) year unrestricted non-exclusive royalty-free license to effect Transactions originated by Comdata Cards to three (3) New System Providers. The licenses shall be granted, subject to the prior approval of the applicants by the Commission, to the first three (3) New System Providers who apply in writing by facsimile to the Federal Trade Commission's Bureau of Competition, Mergers I Division at (202) 326-2655 after this Order is issued, provided they subsequently become certified pursuant to Paragraph II.G. of this Order. The New System Provider applicants shall promptly notify Respondent in writing of their intent to seek a license under this Order. Paragraph II.B. of this Order is subject to the following conditions:
1. If any one of the New System Providers fails to be certified, the license shall be granted to another New System Provider in the manner set forth in this Paragraph II.B., and that is certified pursuant to Paragraph II.G.;
 2. Any such license may be transferred by the New System Provider to any Person that meets the definition of a New System Provider and that is certified pursuant to Paragraph II.G. of this Order; and

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3. Respondent may require the licensee to enter into a license agreement containing the Comdata Card License Conditions attached as Appendix I hereto;
- C. Make available to any Person requesting a license: (1) a description of the procedures for obtaining a license; and (2) a copy of this Order;
 - D. Make available to any Person who so requests a list of the New System Providers that obtain a license to effect Transactions originated by Comdata Cards under Paragraph II.B. of this Order;
 - E. Within ten (10) days of receipt of a written request by a Designated POS System Provider, provide to the Designated POS System Provider any and all information or assistance necessary to enable the Designated POS System Provider to effect on its POS System the same Transactions originated by Comdata Cards on the Trendar System, including, but not limited to, specifications (including, as applicable but not limited to, transaction set information specifications, card track or other card identification specifications, pre- and post-authorization specifications, settlement specifications, and receipt and report format specifications), protocols, programming, know-how, test accounts, site numbers, and host telephone numbers;
 - F. Include in each license with each Designated POS System Provider a provision that requires the Designated POS System Provider to provide the Monitor Trustee with any information or access requested by the Monitor Trustee relating to Comdata Cards for the purpose of determining whether

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Respondent is complying with Paragraph II. of this Order;

- G. Within thirty (30) days of receipt of a written request by a New System Provider, either: (1) grant a written certification that such New System Provider's POS System successfully executes Comdata Card Transactions in conformance with the POS Standards and has a right to do so; (2) deny certification in the event the New System Provider's POS System fails to execute Comdata Card Transactions in conformance with the POS Standards, and that failure is solely a result of the New System Provider's act or omission; or (3) extend, upon mutual written consent with the New System Provider, the time within which the New System Provider may obtain certification through testing of the New System Provider's POS System;
- H. Have the right to monitor processing of Comdata Cards by the POS System of the Designated POS System Provider to ensure continuing compliance with the POS Standards, provided that Respondent shall bear any cost associated with such monitoring; provided, however, that Respondent shall not terminate the license and may only suspend the license for the period that any Designated POS System Provider fails to comply with the POS Standards, provided that Comdata has furnished written notice, including an enumeration of all claimed deficiencies, ten (10) days in advance of suspension and the Designated POS System Provider has failed to cure the deficiencies within that time;
- I. Not Charge the Designated POS System Provider any fee for the license to effect Transactions originated by Comdata Cards or for certification of the Designated POS System Provider's POS System; provided, however, that Respondent may charge a Transaction

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Fee to approved Comdata Card holders; provided, further, however, that nothing herein shall require Respondent to pay any Designated POS System Provider a fee for processing Comdata Card Transactions;

- J. Not charge any Transaction Fee that is based upon which POS System a Fueling Location has purchased, leased, or otherwise acquired;
- K. Not condition the availability of the Comdata Card or related services to any Fueling Location on whether such Fueling Location has purchased, leased, or otherwise acquired any POS System other than the Trender System;
- L. Provide all of the Designated POS System Providers that may process Comdata Card Transactions in accordance with the terms of this Order with equal access to Comdata Cards, including, but not limited to, all Comdata Card functions, changes, modifications, upgrades, or new card developments with sufficient notice and assistance so that the Designated POS System Providers may introduce such changes no later than they are introduced by Respondent; and
- M. Notwithstanding any provision in this Paragraph, Respondent shall not be required to license (or continue to license) or provide any information under this Paragraph II. to any Person or an entity controlled by any such Person against whom Comdata or its predecessors have obtained Injunctive Relief to prevent the misuse, misappropriation, unauthorized use or improper disclosure or distribution of Comdata Cards, Comdata Card Transactions, Comdata equipment, data, information or other materials.

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III.

IT IS FURTHER ORDERED that for the purpose of ensuring that Fleet Card Issuers may effect Fleet Card Transactions through the Trender System, and to remedy the lessening of competition resulting from the Acquisitions as alleged in the Commission's complaint, Respondent shall:

- A. Except as otherwise provided in this Order, for a period of three (3) years beginning on the date this Order becomes final, grant a ten (10) year unrestricted non-exclusive royalty-free license to the Trender Services to any Fleet Card Issuer who notifies Comdata in writing after this Order is issued, provided it subsequently receives certification from the Third-Party Developer pursuant to Paragraph III.C. of this Order or becomes qualified pursuant to Paragraph III.D. of this Order; provided, however, that Respondent may charge a one-time access fee not to exceed US\$30,000; provided, further, however, that Respondent may require the licensee to enter into a license agreement containing the Trender License Conditions attached hereto as Appendix II;
- B. Make available to any Person requesting a license: (1) a description of the procedures for obtaining a license, including, but not limited to, obtaining programming and certification services from the Third-Party Developer; and (2) a copy of this Order;
- C. By the date this Order becomes final, enter into a contract, subject to the prior approval of the Commission, with an independent Third-Party Developer to perform all programming and certification services for Fleet Card Issuers relating to the provision of Trender Services that is subject to the following terms and conditions:

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1. Respondent shall provide to the Third-Party Developer all assistance, specifications, protocols, programming codes, interfaces, and any other information used to effect Fleet Card Transactions, and necessary to enable the Fleet Card Issuer to effect Fleet Card Transactions through the Trendar System;
2. Respondent shall not receive either directly or indirectly any compensation for such programming and certification services;
3. The contract between Respondent and the Third-Party Developer shall provide that the Third-Party Developer shall:
 - a. Render such programming and certification services to any Fleet Card Issuer that notifies Comdata pursuant to Paragraph III. A. of this Order;
 - b. Certify any Fleet Card that is able to execute Transactions on the Trendar System;
 - c. Notify Comdata (which, in turn, shall notify the Commission and the Monitor Trustee if one has been appointed) of any request by a Fleet Card Issuer for programming and certification services;
 - d. Notify Comdata (which, in turn, shall notify the Commission and the Monitor Trustee if one has been appointed) within ten (10) days of denying certification, including any grounds for any denials;

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- e. Provide the Monitor Trustee, if one has been appointed, with access to the personnel performing such programming and certification services, and the books, records and other relevant materials relating to the provision of (or inability to provide) such programming and certification services; and
 - f. Charge the Fleet Card Issuer a fee for such programming and certification services according to the schedule set forth in the contract between the Third-Party Developer and Respondent;
4. If the Third-Party Developer ceases to act or fails to act diligently, a substitute Third-Party Developer may be designated in the same manner as provided in this Paragraph III.C.;
- D. In the event the Third-Party Developer fails to provide to any Fleet Card Issuer programming and certification described in Paragraph III.C. in a timely manner, provide, within a reasonable time period, or cause to be provided, to the Fleet Card Issuer all assistance, specifications, protocols, programming codes, interfaces, and any other information used to effect Fleet Card Transactions, and necessary to enable the Fleet Card Issuer to effect Fleet Card Transactions through the Trendar System;
- E. Not terminate the license and may only suspend the license for the period that any Fleet Card Issuer fails to pay any amounts due to Respondent or the Third-Party Developer or fails to maintain the confidentiality of Comdata Confidential Information, provided that Comdata has furnished written notice, including an enumeration of all claimed deficiencies, ten (10) days in advance of suspension and the Fleet Card Issuer has failed to cure the deficiencies within that time;

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- F. Provide to every Trendar Facility designated by the Fleet Card Issuer all programming used to effect the Fleet Card Issuer's Fleet Card Transactions in the next regular quarterly release if such programming is completed at least thirty (30) days prior to such quarterly release or within three (3) months of the date such programming is completed, whichever is earlier;
- G. Not charge any Transaction Fee to any approved Fueling Location that is based upon, or in any way related to, whether such Fueling Location accepts any Fleet Cards other than the Comdata Card;
- H. Not condition the availability of the Comdata Card or related services to any Fueling Location on whether such Fueling Location accepts any Fleet Card other than the Comdata Card;
- I. Provide all of the Fleet Card Issuers with equal access to the Trendar Services, including, but not limited to, all new developments, changes, modifications or upgrades relating to the Trendar Services with sufficient notice so that the Fleet Card Issuer may introduce such changes, if such Fleet Card Issuer elects to do so, no later than they are made available on the Trendar System; provided, however, that this provision shall not prevent Respondent from undertaking technological and other modifications to the Trendar System and/or its hardware, software, communications networks, and related components, including modifications that require changes to Fleet Cards processed through the Trendar System;
- J. Have the right to discontinue the Trendar System should Ceridian reasonably determine the System is no longer commercially viable; and

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- K. Notwithstanding any provision in this Paragraph, Respondent shall not be required to license (or continue to license) or provide any information under this Paragraph III. to any Person or an entity controlled by any such Person against whom Comdata or its predecessors have obtained Injunctive Relief to prevent the misuse, misappropriation, unauthorized use or improper disclosure or distribution of the Trendar System, Trendar Services, or any other Comdata equipment, data, information or other materials.

IV.**IT IS FURTHER ORDERED** that:

- A. Respondent shall not, absent the prior written consent of the proprietor of Non-Public Point of Sale Information, provide, disclose, or otherwise make available to any individual acting for the Trendar Business any Non-Public Point of Sale Information. Respondent shall use any Non-Public Point of Sale Information only in Respondent's capacity as a provider of the Comdata Cards or as otherwise provided by this Order, absent the prior written consent of the proprietor of Non-Public Point of Sale Information.
- B. Respondent shall not, absent the prior written consent of the proprietor of Non-Public Fleet Card Information, provide, disclose, or otherwise make available to any individual acting for the Comdata Business any Non-Public Fleet Card Information. Respondent shall use any Non-Public Fleet Card Information only in Respondent's capacity as a provider of Trendar Services or as otherwise provided by this Order, absent the prior written consent of the proprietor of Non-Public Fleet Card Information.

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- C. Respondent shall not, absent the prior written consent of the proprietor of Non-Public Programming Information, obtain or seek to obtain, directly or indirectly, any Non-Public Programming Information. Respondent shall use any Non-Public Programming Information only in Respondent's capacity as a provider of Trendar Services or as otherwise provided by this Order, absent the prior written consent of the proprietor of Non-Public Programming Information.

V.**IT IS FURTHER ORDERED** that:

- A. After the date this Order becomes final, the Commission may appoint a Monitor Trustee to monitor any disputes, claims or controversies under this Order as outlined in Paragraph V.B.4. below.
- B. If a Monitor Trustee is appointed by the Commission, Respondent shall consent to the following terms and conditions regarding the Monitor Trustee's powers, duties, authority and responsibilities:
1. The Commission shall select the Monitor Trustee, the identity of the Monitor Trustee being subject to the consent of Respondent, which consent shall not be unreasonably withheld. If Respondent has not opposed, in writing, including the reasons for opposing, the selection of any proposed Monitor Trustee within ten (10) days after notice by the staff of the Commission to Respondent of the identity of the proposed Monitor Trustee, Respondent shall be deemed to have consented to the selection of the proposed Monitor Trustee;

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2. Within ten (10) days after appointment of the Monitor Trustee, Respondent shall execute a Trust Agreement, subject to the prior approval of the Commission, that authorizes and permits the Monitor Trustee to perform the duties set forth in this Order;
3. The Monitor Trustee shall have the rights, duties, or powers necessary to perform the duties enumerated in Paragraph V.B.4. herein;
4. The Monitor Trustee shall prepare a written report and recommendation, if appropriate, which may include a finding of fault, with respect to each dispute or controversy arising out of: (a) each failure to grant certification or suspension of certification pursuant to Paragraph II. of this Order; (b) each instance when the Fleet Card Issuer alleges that the Third-Party Developer has failed to provide programming and certification services in a timely manner pursuant to Paragraph III. of this Order; (c) each failure to grant certification pursuant to Paragraph III. of this Order; or (d) Respondent's compliance with this Order;
5. If the Monitor Trustee elects to prepare a written report and recommendation, the Monitor Trustee shall issue such report and recommendation to the Commission within ninety (90) days after notification that a dispute or controversy exists;
6. The Monitor Trustee shall maintain the confidentiality of all confidential or proprietary information of Respondent, Designated POS System Providers, Fleet Card Issuers, and the Third-Party Developer, except that the Monitor Trustee may disclose to the Commission any confidential and proprietary information when reporting to the Commission on any matter bearing on compliance with the Trust

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Agreement and Order or bearing on the Monitor Trustee's performance of his duties;

7. The Monitor Trustee shall serve pursuant to the Trust Agreement from the time it is approved by the Commission for the term of the Order;
8. Respondent shall give the Monitor Trustee full and complete access to the personnel, facilities, computers, books, and records related to the performance of his duties under this Order. The Monitor Trustee shall attempt to schedule any access or requests for information in such a manner as will not unreasonably interfere with Respondent's operations;
9. The Monitor Trustee shall serve without bond or other security and shall use his best judgment in performing his duties hereunder. The Monitor Trustee shall be exempt from personal liability, to the extent permitted by law, for any action or decision not to act taken or made in good faith, except that the Monitor Trustee may be liable for misfeasance in performing under this Agreement or to the extent the loss, claim, damage or liability results from the Monitor Trustee's gross negligence, willful or wanton acts, or bad faith;
10. The Monitor Trustee shall have the authority to retain at the cost and expense of Respondent, and at reasonable fees, such employees, agents, consultants, or any other third party the Monitor Trustee determines to be reasonably necessary to assist in performing his duties hereunder;
11. The Monitor Trustee shall be compensated by Respondent for the reasonable value of his services as provided in the Trust Agreement. In addition to such

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compensation, Respondent shall compensate the Monitor Trustee for reasonable expenses and costs (including travel, lodging, meals and incidental items) incurred by the Monitor Trustee in connection with the discharge of his duties and efforts under the Trust Agreement;

12. The Monitor Trustee may recover his costs of collection, including reasonable attorneys fees, if Respondent fails to pay compensation pursuant to Paragraphs V.B.10. and 11. herein; and
13. If the Monitor Trustee ceases to act or fails to act diligently, a substitute Monitor Trustee may be appointed by the Commission in the same manner as provided in this Paragraph.

VI.**IT IS FURTHER ORDERED** that:

- A. Within sixty (60) days after the date this Order becomes final and every sixty (60) days thereafter for one (1) year, Respondent shall submit to the Commission a verified written report setting forth in detail the manner and form in which it intends to comply, is complying, and has complied with this Order. Respondent shall include in its compliance reports, among other things that are required from time to time: (a) a list of Designated POS System Providers that have applied for licenses to effect Transactions originated by Comdata Cards; (b) the state of certification (granted, denied, or pending) of the POS System of each such Designated POS System Provider; (c) a list of Fleet Card Issuers that have applied for licenses to effect Fleet Card Transactions through the Trendar System; (d) the state of certification (granted, denied, or pending) of the Fleet

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Card of each such Fleet Card Issuer; and (e) a full description of the efforts being made to comply with Paragraphs II. through V. of this Order.

- B. One (1) year from the date this Order becomes final, annually until this Order has terminated, and at other times as the Commission may require, Respondent shall file a verified written report with the Commission setting forth in detail the manner and form in which it has complied and is complying with this Order.

VII.

IT IS FURTHER ORDERED that Respondent shall notify the Commission at least thirty (30) days prior to any proposed change in the 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 this Order.

VIII.

IT IS FURTHER ORDERED that, for the purpose of determining or securing compliance with this Order, upon written request, 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

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

IX.

IT IS FURTHER ORDERED that this Order shall terminate upon the later of: (a) April 5, 2003; or (b) the expiration of all licenses required by this Order.

By the Commission.

APPENDIX IComdata Card License Conditions

Respondent may require each Person licensed pursuant to Paragraph II. of this order to:

- 1) Comply with the POS Standards;
- 2) Permit Respondent to audit the licensee's POS System through an independent third-party that is subject to a confidentiality agreement prohibiting disclosure of the licensee's information that is not in the public domain to Respondent or any other Person;
- 3) Make available the services to be performed by the licensee to effect all Transactions through the licensee's POS system no less than 99.8% of the time (exclusive of down-time for maintenance) during every consecutive three (3) month period;
- 4) For any third-party products supplied to licensee by Respondent, comply with the licenses between Respondent and the third-party, return any third-party products supplied by

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- Respondent in good working order upon expiration of the license or upon Respondent's written request, and hold Respondent harmless for any damages incurred in connection with the use of third-party products;
- 5) Consent to a provision under which Respondent and licensee each indemnify the other for any third-party claims resulting from any breach;
 - 6) Consent to a provision prohibiting both the licensee and Respondent from disclosing the other party's confidential information as defined in the Order;
 - 7) Consent to a provision under which Respondent and licensee shall hold each other harmless for any failure to perform due to force majeure;
 - 8) Promptly pay any amounts due to Respondent relating to the license agreement;
 - 9) Not be insolvent or in bankruptcy;
 - 10) Cease processing Comdata Cards and using Comdata Confidential Information upon expiration or suspension of the license pursuant to Paragraph II.H. of this Order;
 - 11) Consent to a provision under which Respondent and the licensee each acknowledge that the other has not obtained any right to the trademarks, trade names, service marks or logos belonging to the other through the license agreement; provided, however, that the licensee may display the Comdata Card name and/or logo in advertising and promotional information;
 - 12) Consent that assignment of the license shall be only: (a) in accordance with Paragraph II.B. of the Order; or (b) in connection with the acquisition of the licensee's truck stop POS System business;
 - 13) Consent to reasonable notice requirements pertaining to any notices required under the license agreement;
 - 14) Consent to a provision under which Respondent and the licensee agree to comply with applicable laws and regulations;

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- 15) Consent to a provision requiring that any legal action arising out of the license agreement be brought in the appropriate judicial forum located in Nashville, Davidson County, TN;
- 16) Consent to a provision requiring that the license agreement be governed by the laws of the State of Tennessee; and
- 17) Consent to a provision under which Respondent and licensee agree not to contest the license agreement on the ground of insufficiency or lack of consideration.

APPENDIX IITrendar License Conditions

Respondent may require each Person licensed pursuant to Paragraph III. of this Order to:

- 1) Promptly pay any amounts due to Respondent or the Third-Party Developer relating to the license agreement;
- 2) Consent to a provision that states that Respondent is the exclusive owner of any programming performed by the Third-Party Developer relating to the Trendar System;
- 3) Identify which Fueling Locations accept the licensee's Fleet Card;
- 4) Consent to a provision prohibiting both the licensee and Respondent from disclosing the other party's confidential information as defined in the Order;
- 5) Consent to a provision under which Respondent and licensee each indemnify the other for any third-party claims resulting from any breach;
- 6) Consent to a provision under which Respondent and licensee shall hold the other harmless for any failure to perform due to force majeure;

Statement of the Commission

- 7) Cease use of the Trendar System and any Comdata Confidential Information upon expiration or suspension of the license pursuant to Paragraph III.E. of this Order;
- 8) Consent to a provision under which Respondent and the licensee each acknowledge that the other has not obtained any right to the trademarks, trade names, service marks or logos belonging to the other through the license agreement; provided, however, that the licensee may display the Trendar name and/or logo in advertising and promotional information;
- 9) Consent to reasonable notice requirements pertaining to any notices required under the license agreement;
- 10) Not be insolvent or in bankruptcy;
- 11) Consent that assignment of the license shall be only in connection with the acquisition of the licensee's trucking Fleet Card business;
- 12) Consent to a provision under which Respondent and the licensee agree to comply with applicable laws and regulations;
- 13) Consent to a provision requiring that any legal action arising out of the license agreement be brought in the appropriate judicial forum located in Nashville, Davidson County, TN;
- 14) Consent to a provision requiring that the license agreement be governed by the laws of the State of Tennessee; and
- 15) Consent to a provision under which Respondent and licensee agree not to contest the license agreement on the ground of insufficiency or lack of consideration.

STATEMENT OF THE COMMISSION

The Commission has determined to issue, with certain modifications, a final consent order against Ceridian Corporation in connection with its acquisitions of NTS, Inc. and Trendar Corporation. We reached this decision after careful and thorough

Analysis to Aid Public Comment

consideration of the public comments received and discussions with industry representatives.

Based on the evidence currently before us, we believe that this order provides the most appropriate relief available. The investigation that led to this order began after the two transactions were consummated and Ceridian had already integrated its networks and the acquired businesses. Consequently, in lieu of some alternative form of relief, we chose to accept the current order -- which requires that Ceridian provide access and licensing to its networks -- to offset the loss of competition occasioned by the acquisitions.

We remain concerned, however, about the complexity of the behavioral remedy required in this case. Thus, we will review the effectiveness of the remedy over the next few years in light of evolving industry conditions and, as we do for all of our orders, we will carefully monitor Ceridian's compliance with this order.

Analysis of Proposed Consent Order to Aid Public Comment

The Federal Trade Commission ("Commission") has accepted, subject to public comment, an agreement containing a proposed Consent Order from Ceridian Corporation ("Ceridian"), which is designed to remedy the anticompetitive effects resulting from Ceridian's acquisitions of NTS Corporation and Trendar Corporation. Under the terms of the agreement, Ceridian will grant licenses to providers of truck stop fuel desk automation systems to process transactions originated by Ceridian's fleet cards, and will grant licenses to fleet card issuers to have their cards processed through Ceridian's Trendar fuel desk automation system.

Analysis to Aid Public Comment

The proposed Consent Order has been placed on the public record for sixty (60) days for reception of comments by interested persons. Comments received during this period will become part of the public record. After sixty (60) days, the Commission will again review the proposed Consent Order and the comments received, and will decide whether it should withdraw from the proposed Consent Order or make final the proposed Order.

Pursuant to an asset exchange agreement executed in January, 1998, Ceridian, through its wholly owned subsidiary Comdata Network, Inc. ("Comdata"), acquired substantially all of the assets of NTS. In March, 1995, Comdata Holdings Corporation, a subsidiary of Ceridian, acquired Trendar Corporation. Because the price of Trendar was below \$15 million, it was not reportable under the Hart-Scott-Rodino Antitrust Improvements Act. The proposed Complaint alleges that these two acquisitions violated Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18, and Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45, in the market for the provision of fleet card services to over-the-road trucking companies and the market for truck stop fuel desk automation systems.

Fleet Card Services for Over-the-Road Trucking Companies

The services provided by fleet card issuers are of critical importance to over-the-road trucking companies. Fleet cards physically resemble traditional credit cards in that they are plastic laminated cards with embossed numbers on the front and a magnetic stripe on the back. Fleet cards are similar to traditional credit cards in that they provide a means by which cardholders can make purchases at retail locations that accept the card. Fleet cards issued on behalf of trucking companies provide additional services that go beyond the capabilities of traditional credit cards, allowing trucking companies to control the type, volume and frequency of their drivers' purchases, and capture important information relating to the transactions, such as drivers' odometer

Analysis to Aid Public Comment

readings and vehicle identification numbers. Because of the specialized features of these fleet cards, traditional credit cards and other types of fleet cards are not acceptable substitutes. Comdata is the largest provider of fleet card services to over-the-road trucking companies in the United States. At the time Ceridian acquired NTS, NTS and Comdata were substantial, actual competitors in that market.

Fuel Purchase Desk Automation Systems

Fuel purchase desk automation systems are the means by which most truck stops process fleet card transactions. Fuel purchase desk automation systems used by truck stops can process multiple card issuers' fleet cards with a single device, thereby minimizing the physical space truck stops must allocate to point of sale ("POS") equipment and the training required for fuel purchase desk attendants. Such systems report transactions data and other information to the fleet card issuer, process the approval or rejections of requested transactions, and interface with fueling pumps. Comdata's fuel purchase desk automation system, Trendar, is the dominant means by which truck stops process fleet card transactions.

Fleet cards and fuel purchase desk automation systems are complementary products, and both products exhibit strong network effects. Demand for a fleet card rises with the number of truck stops that accept the card, which in turn depends on the number of fuel purchase desk automation systems that accept the card. Similarly, demand for a fuel purchase desk automation system rises with the number of fleet cards that can use the system. Effective entry into either market alleged in the complaint would be difficult, time consuming and unlikely to be successful without access to a substantial portion of the other market.

Analysis to Aid Public Comment

Effects of the Acquisitions

The acquisitions of NTS and Trendar resulted in Comdata's having a dominant position in both the fleet card services market and the fuel purchase desk automation systems market. In addition, the acquisitions raised barriers to entry in both markets, because effective entry into either market now requires Comdata's acquiescence. In the absence of the two acquisitions, Comdata would have had strong incentives to ensure that its fleet card was accepted on as many fuel purchase desk automation systems as possible, and Trendar would have maximized its value by accepting as many fleet cards as possible. With the acquisitions, however, these incentives became skewed: Comdata now must consider the impact on its Trendar system of allowing a competing fuel purchase desk automation system to process its card, and the impact on its fleet card business of allowing a rival fleet card to be processed on the Trendar system.

The market for the provision of fleet card services for over-the-road trucking companies is highly concentrated. Comdata controls the majority of that market and, with its acquisition of NTS, is more than five times larger than its nearest competitor. At the time of its acquisition, NTS was Comdata's closest competitor in the market for fleet card services for over-the-road trucking companies. The market for fuel purchase desk automation systems is also highly concentrated. At the time of its acquisition by Comdata, Trendar was the leading supplier of truck stop fuel purchase desk automation systems in the United States. Trendar remains the nation's leading supplier of truck stop fuel purchase desk automation systems.

Ceridian's acquisitions of NTS and Trendar have given Comdata the power to control new entry into, and expansion by incumbent providers in, both the market for the provision of fleet card services to over-the-road trucking companies and the market for truck stop fuel purchase desk automation systems. By

Analysis to Aid Public Comment

acquiring Trendar, Comdata gained control of the predominant means by which fleet cards are processed by truck stops. Comdata therefore has the ability to preclude or delay new entry into the fleet card market, and to discipline or disadvantage new entrants or incumbent providers of fleet cards who seek to compete effectively with Comdata, by denying them access to Trendar's POS system or by granting access only on discriminatory terms. The investigation revealed evidence that Comdata has delayed or denied some fleet card competitors access to Trendar and Comdata has increased the fees to other firms for Trendar access. Similarly, by acquiring NTS, Comdata enhanced its control over the means by which over-the-road trucking companies purchase fuel.

In addition, both acquisitions increased the difficulty of entry into the fuel purchase desk automated system market. Comdata can defend Trendar's dominant position in that market by denying new entrants access to the fleet card protocols needed to process Comdata and NTS cards, or by granting access only on discriminatory terms. The investigation revealed evidence that Comdata has sought to impede entry. Given Comdata's dominance in the fleet card market, truck stop operators are unlikely to accept a POS system that cannot process Comdata's fleet cards. Because of the complementary nature of the fleet card and fuel purchase desk automation systems products, a new entrant that is unable to secure access to Comdata's products would have to enter both markets simultaneously. Such entry would be time consuming and costly, and is much less likely to be successful.

The Proposed Consent Order

While litigation with a goal of forcing the divestiture of NTS and Trendar was an alternative considered by the Commission, the proposed Consent Order effectively remedies the competitive effects of the two acquisitions without the delay and expenditure of resources that would be incurred with litigation. The proposed Consent Order requires Ceridian to grant fleet card issuers access

Analysis to Aid Public Comment

to Comdata's Trendar fuel purchase desk automation system, and to grant fuel purchase desk automation systems suppliers the right to process Comdata's fleet cards. While access to the Trendar network and the NTS card could also have been accomplished through divestiture, the Commission concluded that divestiture was not necessary to resolve the competitive concerns raised by the two transactions, in part because numerous firms have indicated that they intend to take advantage of the terms of the proposed Consent Order to enter or expand their presence in the two markets.

In order to remedy the concerns in the fleet card services market, the Consent Order requires Comdata, for a period of three years, to grant a ten-year license to effect transactions on the Trendar system to any company providing, or seeking to provide, fleet card services. The order requires Comdata to refer any requests for such a license to a third-party developer approved by the Commission, that will perform all programming or other services necessary to enable the licensee to process transactions on the Trendar system. Once such programming services are completed by the third-party developer, Comdata is required to promptly disseminate the software to all truck stops on the Trendar network. Comdata is further required to provide licensees with equal access to any upgrades or modifications to the Trendar system, and is prohibited from basing any transaction fees charged to truck stops for processing the Comdata card, as well as access to the Comdata card, on whether such truck stops accept any other firm's fleet cards.

In order to remedy concerns in the fuel purchase desk automation systems market, the Consent Order requires Comdata, for a period of three years, to grant a ten-year license to all incumbent suppliers of fuel purchase desk automation systems, and to the first three new system providers that request a license. The license awarded to new system providers shall be

Analysis to Aid Public Comment

transferrable, ensuring that if a better positioned entrant emerges in the future, it will be able to acquire a license.

In order to qualify for a license, new system providers must meet certain established criteria. Under the Consent Order, Comdata is required to promptly provide all licensees with all information or assistance necessary to enable the licensee to effect Comdata card transactions in a manner comparable to the way in which those transactions are processed on the Trendar system. The Order permits Comdata to certify that a licensee's system is capable of processing Comdata card transactions using criteria set forth in the Consent Order, and, if Comdata denies such certification, it must provide a complete enumeration for the reasons for such denial. The Order further requires Comdata to grant licensees complete and equal access to all Comdata card functions, upgrades and new developments. Finally, the Order provides that Comdata may not discriminate against any supplier of fuel purchase desk automation systems by charging transaction fees to truck stops that are based on which fuel purchase desk automation system the truck stop uses.

The Consent Order contains additional provisions that are designed to prevent the flow of confidential information obtained from Comdata's competitors between Comdata's fleet card and fuel purchase desk automation system businesses. Under the Order, Comdata is prohibited from providing any non-public information obtained from fuel purchase desk automation system providers to its Trendar business. Likewise, the Order prohibits Comdata from providing any non-public information obtained from fleet card issuers to its Comdata card business.

In order to ensure Comdata's compliance with the terms of the Order, the Commission is allowed to appoint a trustee to monitor any disputes, claims or controversies arising under the Order. The order specifically permits the monitor-trustee to prepare a report for the Commission relating to any failure by Comdata to certify either a fuel purchase desk automation system or a new fleet card and any failure by the third-party developer to provide

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programming and certification services to fleet card issuers in a timely manner. The trustee is also permitted, where appropriate, to report to the Commission regarding Ceridian's compliance with the Order.

The purpose of this analysis is to facilitate public comment on the proposed Order, and it is not intended to constitute an official interpretation of the agreement and proposed Order or to modify their terms in any way.

Complaint

IN THE MATTER OF

SHAW'S SUPERMARKETS, INC., ET AL.CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATIONS OF
SEC. 7 OF THE CLAYTON ACT AND SEC. 5 OF THE
FEDERAL TRADE COMMISSION ACT*Docket C-3934; File No. 991 0075
Complaint, April 5, 2000--Decision, April 5, 2000*

This consent addresses the \$490 million acquisition by Shaw's Supermarkets, Inc., a wholly owned subsidiary of J Sainsbury plc, of Star Market Holdings, Inc., the second and third largest supermarket chains, respectively, operating in the Greater Boston area. The complaint alleges that the proposed acquisition would substantially lessen competition in the markets for the retail sale of food and grocery items in supermarkets in the relevant geographic market. The consent order requires Shaw's to divest ten supermarkets, which represent all of either the Shaw's or Star supermarkets in the relevant market areas to buyers who do not currently operate supermarkets in these markets.

*Participants*For the Commission: *Jessica D. Gray and David von Nirschl*For the Respondents: *Carrie M. Anderson and Steven A. Newborn, Rogers & Wells; and John Herfort and Malcolm Pfunder, Gibson, Dunn & Crutcher.***COMPLAINT**

Pursuant to the provisions of the Federal Trade Commission Act, and by virtue of the authority vested in it by said Act, the Federal Trade Commission ("Commission"), having reason to believe that respondent J Sainsbury plc ("J Sainsbury") and respondent Shaw's Supermarkets, Inc. ("Shaw's"), a wholly-owned subsidiary of respondent J Sainsbury's, have entered into an agreement to acquire all of the outstanding shares of respondent Star Markets Holdings, Inc. ("Star Markets"), all subject to the jurisdiction of the Commission, in violation of Section 5 of the Federal Trade Commission Act, as amended, 15

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U.S.C. § 45, that such acquisition, if consummated, would violate Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18, and Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45, and that a proceeding in respect thereof would be in the public interest, hereby issues its complaint, stating its charges as follows:

Definition

1. For the purposes of this complaint:

“Supermarket” means a full-line retail grocery store with annual sales of at least \$2 million that carries a wide variety of food and grocery items in particular product categories, including bread and dairy products; refrigerated and frozen food and beverage products; fresh and prepared meats and poultry; produce, including fresh fruits and vegetables; shelf-stable food and beverage products, including canned and other types of packaged products; staple foodstuffs, which may include salt, sugar, flour, sauces, spices, coffee, and tea; and other grocery products, including nonfood items such as soaps, detergents, paper goods, other household products, and health and beauty aids.

J Sainsbury plc

2. Respondent J Sainsbury is a corporation organized, existing, and doing business under and by virtue of the laws of England, with its office and principal place of business located at Stamford House, Stamford Street, London SE 19LL, England.
3. Respondent J Sainsbury, through its wholly-owned domestic subsidiary, Shaw's is, and at all times relevant herein has been, engaged in the operation of supermarkets in Massachusetts, Connecticut, Maine, New Hampshire, Rhode Island, and Vermont. J Sainsbury and Shaw's operate 126 supermarkets in

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these states under the "Shaw's" trade name. J Sainsbury had \$2.8 billion in total sales in the United States for fiscal year 1998.

4. Respondent J Sainsbury 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.

Star Markets Holdings, Inc.

5. Respondent Star Markets is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Massachusetts, with its office and principal place of business located at 625 Mt. Auburn Street, Cambridge, Massachusetts 02138.

6. Respondent Star Markets is, and at all times relevant herein has been, engaged in the operation of supermarkets in Massachusetts. Star Markets operates 53 supermarkets under the "Star Markets" and "Wild Harvest" trade names. Star Markets had \$1.034 billion in total sales for the fiscal year ending January 31, 1998.

7. Respondent Star Markets is, and at all times relevant herein has been, engaged in commerce as "commerce" is defined in Section 1 of the Clayton Act, as amended, 15 U.S.C. § 12, and is a corporation whose business is in or affecting commerce as "commerce" is defined in Section 4 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 44.

Acquisition

8. On November 25, 1998, J Sainsbury plc and Star Markets entered into a Stock Purchase Agreement. J Sainsbury through its Shaw's subsidiary will acquire all of the outstanding voting securities of Star Markets for approximately \$490 million.

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Trade and Commerce

9. The relevant line of commerce (*i.e.*, the product market) in which to analyze the acquisition described herein is the retail sale of food and grocery products in supermarkets.

10. Supermarkets provide a distinct set of products and services for consumers who desire to one-stop shop for food and grocery products. Supermarkets carry a full line and wide selection of both food and nonfood products (typically more than 10,000 different stock-keeping units ("SKUs")) as well as a deep inventory of those SKUs. In order to accommodate the large number of food and nonfood products necessary for one-stop shopping, supermarkets are large stores that typically have at least 10,000 square feet of selling space.

11. Supermarkets compete primarily with other supermarkets that provide one-stop shopping for food and grocery products. Supermarkets primarily base their food and grocery prices on the prices of food and grocery products sold at nearby supermarkets. Supermarkets do not regularly price-check food and grocery products sold at other types of stores and do not significantly change their food and grocery prices in response to prices at other types of stores. Most consumers shopping for food and grocery products at supermarkets are not likely to shop elsewhere in response to a small price increase by supermarkets.

12. Retail stores other than supermarkets that sell food and grocery products, such as neighborhood "mom & pop" grocery stores, convenience stores, specialty food stores (*e.g.*, seafood markets, bakeries, etc.), club stores, military commissaries, and mass merchants, do not effectively constrain prices at supermarkets because they operate significantly different retail formats. None of these stores offers a supermarket's distinct set

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of products and services that enable consumers to one-stop shop for food and grocery products.

13. The relevant sections of the country (*i.e.*, the geographic markets) in which to analyze the acquisition described herein are the county or counties that include the following incorporated cities and towns in Massachusetts:

- a) Waltham area that includes Waltham, Auburndale, Watertown, Newton, West Newton, Weston, and Lexington;
- b) Quincy-Dorchester area that includes Quincy, N. Quincy, Milton, Dorchester, Boston, S. Boston, Braintree, and Weymouth;
- c) Norwood area that includes Norwood, Walpole, Westwood, Dedham, Wrentham, and Sharon;
- d) Milford area that includes Milford, Hopedale, Mendon, and Upton;
- e) Salem-Lynn area that includes Salem, Lynn, Peabody, Swampscott, Danvers, Nahant, and Marblehead;
- f) Norwell area that includes Norwell, Hanover, Rockland, Pembroke, Hanson, Scituate, Halifax, Hingham, Weymouth, Cohasset, and Hull;
- g) Hudson-Stow area that includes Stow, Hudson, Sudbury, Marlborough, and Bolton; and
- h) Saugus-Melrose-Stoneham area that includes Saugus, Melrose, Stoneham, and Wakefield.

Complaint

Market Structure

14. The relevant markets are highly concentrated, whether measured by the Herfindahl-Hirschman Index (commonly referred to as "HHI") or by two-firm and four-firm concentration ratios. The acquisition would substantially increase concentration in each market. Shaw's and Star Markets would have a combined market share that ranges from 29 percent to 64 percent in each geographic market. The post-acquisition HHIs in the geographic markets range from 2205 points to 5136 points.

Entry Conditions

15. Entry would not be timely, likely, or sufficient to prevent anticompetitive effects in the relevant sections of the country.

Actual Competition

16. J Sainsbury through its Shaw's subsidiary and Star Markets are actual and direct competitors in the relevant markets.

Effects

17. The effect of the acquisition, if consummated, may be substantially to lessen competition in the relevant line of commerce in the relevant sections of the country in violation of Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18, and Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45, in the following ways, among others:

- a) by eliminating direct competition between supermarkets owned or controlled by J Sainsbury and supermarkets owned and controlled by Star Markets;
- b) by increasing the likelihood that J Sainsbury will unilaterally exercise market power; and

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- c) by increasing the likelihood of, or facilitating, collusion or coordinated interaction,

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

Violations Charged

18. The Stock Purchase Agreement between J Sainsbury and Star Markets to acquire all of the outstanding voting stock of Star Markets violates Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45, and the proposed acquisition 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.

WHEREFORE, THE PREMISES CONSIDERED, the Federal Trade Commission on this fifth day of April, 2000, issues its complaint against said respondents.

By the Commission, Commissioner Leary not participating.

DECISION AND ORDER

The Federal Trade Commission ("Commission") having initiated an investigation of the proposed acquisition of Star Markets Holdings, Inc. ("Star Markets") by J Sainsbury plc and its wholly-owned subsidiary Shaw's Supermarkets, Inc. ("Shaw's") (collectively, "Respondents"), and Respondents having been furnished with a copy of a draft complaint that the Bureau of Competition proposed to present to the Commission for its

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consideration, and which, if issued by the Commission, would charge Respondents with violation of Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45, and Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18; and

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

The Commission having thereafter considered the matter and having determined that it had reason to believe that the Respondents have violated the said Acts, and that complaint should issue stating its charges in that respect, and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of sixty (60) days, and having duly considered the comments received, and having modified the consent order in certain respects, 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 J Sainsbury is a corporation organized, existing, and doing business under and by virtue of the laws of England, with its office and principal place of business located at Stamford House, Stamford Street, London SE 19LL, England.
2. Respondent Shaw's, a wholly-owned subsidiary of J Sainsbury, is a corporation organized, existing, and doing business under and by virtue of the laws of the Commonwealth of Massachusetts, with its office and principal place of business

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located at 140 Laurel Street, P.O. Box 600, East Bridgewater, Massachusetts 02333.

3. Respondent Star Markets is a corporation organized, existing, and doing business under and by virtue of the laws of the Commonwealth of Massachusetts, with its office and principal place of business located at 625 Mt. Auburn Street, Cambridge, Massachusetts 02138.

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

ORDER**I.**

IT IS ORDERED that, as used in this Order, the following definitions shall apply:

A. "J Sainsbury" means J Sainsbury plc, its directors, officers, employees, agents, representatives, predecessors, successors, and assigns; its subsidiaries (including but not limited to Shaw's), divisions, groups, and affiliates controlled by J Sainsbury, and the respective directors, officers, employees, agents, representatives, successors, and assigns of each. J Sainsbury, after consummation of the Acquisition, includes Star Markets.

B. "Shaw's" means Shaw's Holdings Inc., its directors, officers, employees, agents, representatives, predecessors, successors, and assigns; its subsidiaries, divisions, groups, and affiliates controlled by Shaw's, and the respective directors, officers, employees, agents, representatives, successors, and assigns of each.

C. "Star Markets" means Star Markets Holdings, Inc., its directors, officers, employees, agents, representatives, predecessors, successors, and assigns; its subsidiaries, divisions, groups, and affiliates controlled by Star Markets, and the

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respective directors, officers, employees, agents, representatives, successors, and assigns of each.

D. "Respondents" means J Sainsbury, Shaw's, and Star Markets, individually and collectively.

E. "Commission" means the Federal Trade Commission.

F. "Acquirer" means Victory and Foodmaster and/or any other entity or entities approved by the Commission to acquire the Assets To Be Divested pursuant to this Order, individually and collectively.

G. "Acquisition" means J Sainsbury's proposed acquisition of Star Markets pursuant to the Stock Purchase Agreement dated November 25, 1998.

H. "Assets To Be Divested" means the Schedule A Assets, Schedule B Assets, Schedule C Assets, and Schedule D Assets.

I. "Applicable Consent Decree" means a consent decree in an action commenced by the Commonwealth of Massachusetts, under which decree Respondents will divest all or part of the Schedule A Assets, Schedule B Assets, Schedule C Assets, and Schedule D Assets.

J. "Schedule A Assets" means the Supermarkets identified in Schedule A of this Order and all assets, leases, properties, government permits (to the extent transferable), customer lists, businesses and goodwill, tangible and intangible, related to or utilized in the Supermarket business operated at those locations, but shall not include those assets consisting of or pertaining to any of the Respondents' trade marks, trade dress, service marks, or trade names.

K. "Schedule B Assets" means the Supermarkets identified in Schedule B of this Order and all assets, leases, properties,

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government permits (to the extent transferable), customer lists, businesses and goodwill, tangible and intangible, related to or utilized in the Supermarket business operated at those locations, but shall not include those assets consisting of or pertaining to any of the Respondents' trade marks, trade dress, service marks, or trade names.

L. "Schedule C Assets" means the Supermarkets identified in Schedule C of this Order and all assets, leases, properties, government permits (to the extent transferable), customer lists, businesses and goodwill, tangible and intangible, related to or utilized in the Supermarket business operated at those locations, but shall not include those assets consisting of or pertaining to any of the Respondents' trade marks, trade dress, service marks, or trade names.

M. "Schedule D Assets" means the Supermarket identified in Schedule D of this Order and all assets, leases, properties, government permits (to the extent transferable), customer lists, businesses and goodwill, tangible and intangible, related to or utilized in the Supermarket business operated at that location, but shall not include those assets consisting of or pertaining to any of the Respondents' trade marks, trade dress, service marks, or trade names.

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

O. "Victory" means Victory Super Markets, a corporation organized, existing and doing business under and by virtue of the

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laws of the Commonwealth of Massachusetts, with its principal place of business located at 75 North Main Street, Leominster, MA 01453.

P. "Foodmaster" means Foodmaster Super Markets, Inc., a corporation organized, existing and doing business under and by virtue of the laws of the Commonwealth of Massachusetts, with its principal place of business located at 100 Everett Avenue, Unit 12, Chelsea, MA 02150.

Q. "Victory Agreement" means the Purchase Agreement between Shaw's Holdings Inc., Shaw's Supermarkets, Inc. and Victory executed on May 27, 1999, for the divestiture by Respondents to Victory of the Schedule A Assets.

R. "Foodmaster Agreement" means the Agreement of Purchase and Sale of Assets and Assignments of Leases between Shaw's Holdings Inc. and Foodmaster Super Markets, Inc. executed on May 26, 1999, along with amended provisions as set forth in the June 9, 1999, letter from Verne Powell, Shaw's Holdings, Inc. to Lawrence A. Sperber, Attorney for Foodmaster Supermarkets, Inc., and the two letters from Verne Powell to John A. DeJesus, Foodmaster Super Market, Inc., dated June 14, 1999, for the divestiture by Respondents to Foodmaster of the Schedule B Assets.

S. "Relevant Areas" means the county or counties that include the following incorporated cities and towns in Massachusetts:

1. Waltham area that includes Waltham, Auburndale, Watertown, Newton, West Newton, Weston, and Lexington;
2. Quincy-Dorchester that includes Quincy, N. Quincy, Milton, Dorchester, Boston, S. Boston, Braintree, and Weymouth;

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3. Norwood area that includes Norwood, Walpole, Westwood, Dedham, Wrentham, and Sharon;
4. Milford area that includes Milford, Hopedale, Mendon, and Upton;
5. Salem-Lynn area that includes Salem, Lynn, Peabody, Swampscott, Danvers, Nahant, and Marblehead;
6. Norwell area that includes Norwell, Hanover, Rockland, Pembroke, Hanson, Scituate, Halifax, Hingham, Weymouth, Cohasset, and Hull; and
7. Hudson-Stow area that includes Stow, Hudson, Sudbury, Marlborough, and Bolton.

T. "Third Party Consents" means all consents from any other person, including all landlords, that are necessary to effect the complete transfer to the Acquirer(s) of the Assets To Be Divested.

II.**IT IS FURTHER ORDERED** that:

A. Respondents shall divest, absolutely and in good faith, the Schedule A Assets to Victory, in accordance with the Victory Agreement (which agreement shall not be construed to vary or contradict the terms of this Order), no later than:

1. twenty (20) days after the date on which the Acquisition is consummated, or
2. four (4) months after the date on which Respondents sign the Agreement Containing Consent Order,

whichever is earlier.

Provided, however, that if Respondents have divested the Schedule A Assets to Victory pursuant to the Victory Agreement prior to the date the Order becomes final, and if, at the time the Commission determines to make the Order final, the Commission

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notifies Respondents that Victory is not an acceptable Acquirer or that the Victory Agreement is not an acceptable manner of divestiture, then Respondents shall immediately rescind the transaction with Victory and shall divest the Schedule A Assets within three (3) months of the date the Order becomes final, absolutely and in good faith, at no minimum price, to an Acquirer that receives the prior approval of the Commission and only in a manner that receives the prior approval of the Commission.

B. Respondents shall divest, absolutely and in good faith, the Schedule B Assets to Foodmaster, in accordance with the Foodmaster Agreement (which agreement shall not be construed to vary or contradict the terms of this Order), within ten (10) days of the date on which the Order becomes final.

Provided, however, that if Respondents have divested the Schedule B Assets to Foodmaster pursuant to the Foodmaster Agreement prior to the date the Order becomes final, and if, at the time the Commission determines to make the Order final, the Commission notifies Respondents that Foodmaster is not an acceptable Acquirer or that the Foodmaster Agreement is not an acceptable manner of divestiture, then Respondents shall immediately rescind the transaction with Foodmaster and shall divest the Schedule B Assets within three (3) months of the date the Order becomes final, absolutely and in good faith, at no minimum price, to an Acquirer that receives the prior approval of the Commission and only in a manner that receives the prior approval of the Commission.

C. Respondents shall obtain all required Third Party Consents prior to the closing of each of the respective divestiture agreements, or any other agreement pursuant to which the Assets To Be Divested are divested to an Acquirer.

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D. The purpose of the divestitures is to ensure the continuation of the Schedule A Assets and Schedule B Assets as ongoing viable enterprises engaged in the Supermarket business and to remedy the lessening of competition resulting from the Acquisition alleged in the Commission's complaint.

III.

IT IS FURTHER ORDERED that:

A. Respondents shall divest either the Schedule C or Schedule D Assets to an Acquirer, only in a manner that receives the prior approval of the Commission, absolutely and in good faith and at no minimum price, within three (3) months from the date on which Respondents sign the Agreement Containing Consent Order.

B. The purpose of the divestiture is to ensure the continuation of the divested supermarket(s) as ongoing viable enterprises engaged in the Supermarket business and to remedy the lessening of competition resulting from the Acquisition alleged in the Commission's complaint.

IV.

IT IS FURTHER ORDERED that:

A. If Respondents have not divested the Assets To Be Divested within the time periods required by Paragraphs II and III of this Order, absolutely and in good faith and with the Commission's prior approval, the Commission may appoint a trustee to divest those assets that Respondents have failed to divest. In the event that the Commission or the Attorney General brings an action pursuant to Section 5(l) of the Federal Trade Commission Act, 15 U.S.C. § 45(l), or any other statute enforced by the Commission, Respondents shall consent to the appointment of a trustee in such action. Neither the appointment of a trustee nor a decision not to appoint a trustee under this Paragraph shall preclude the Commission or the Attorney General from seeking

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civil penalties or any other relief available to it, including a court-appointed trustee, pursuant to Section 5(*I*) of the Federal Trade Commission Act, or any other statute enforced by the Commission, for any failure by the Respondents to comply with this Order.

B. If a trustee is appointed by the Commission or a court pursuant to Paragraph IV.A. of this Order, Respondents shall consent to the following terms and conditions regarding the trustee's powers, duties, authority, and responsibilities:

1. The Commission shall select the trustee, subject to the consent of Respondents, which consent shall not be unreasonably withheld. The trustee shall be a person with experience and expertise in acquisitions and divestitures. If Respondents have not opposed, in writing, including the reasons for opposing, the selection of any proposed trustee within ten (10) days after receipt of written notice by the staff of the Commission to Respondents of the identity of any proposed trustee, Respondents shall be deemed to have consented to the selection of the proposed trustee.
2. Subject to the prior approval of the Commission, the trustee shall have the exclusive power and authority to divest the Assets To Be Divested.
3. Within ten (10) days after appointment of the trustee, Respondents shall execute a trust agreement that, subject to the prior approval of the Commission and, in the case of a court-appointed trustee, of the court, transfers to the trustee all rights and powers necessary to permit the trustee to effect each divestiture required by this Order.

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4. The trustee shall have twelve (12) months from the date the Commission or court approves the trust agreement described in Paragraph IV.B.3. to accomplish the divestitures, which shall be subject to the prior approval of the Commission. If, however, at the end of the twelve-month period, the trustee has submitted a plan of divestiture or believes that divestiture can be achieved within a reasonable time, the divestiture period may be extended by the Commission, or, in the case of a court-appointed trustee, by the court; provided, however, the Commission may extend the period for no more than two (2) additional periods.
5. The trustee shall have full and complete access to the personnel, books, records, and facilities related to the Assets To Be Divested or to any other relevant information, as the trustee may request. Respondents shall develop such financial or other information as such trustee may reasonably request and shall cooperate with the trustee. Respondents shall take no action to interfere with or impede the trustee's accomplishment of the divestitures. Any delays in divestiture caused by Respondents shall extend the time for divestiture under this Paragraph in an amount equal to the delay, as determined by the Commission or, for a court-appointed trustee, by the court.
6. The trustee shall use his or her best efforts to negotiate the most favorable price and terms available in each contract that is submitted to the Commission, subject to Respondents' absolute and unconditional obligation to divest expeditiously at no minimum price. The divestitures shall be made to an Acquirer or Acquirers that receive Commission approval and in a manner approved by the Commission; provided, however, if the trustee receives bona fide offers for an asset to be divested from more than one acquiring entity, and if the Commission determines to approve more than one

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such acquiring entity, the trustee shall divest such asset to the acquiring entity or entities selected by J Sainsbury from among those approved by the Commission; provided further, however, that J Sainsbury shall select such entity within five (5) days of receiving notification of the Commission's approval.

7. The trustee shall serve, without bond or other security, at the cost and expense of Respondents, on such reasonable and customary terms and conditions as the Commission or a court may set. The trustee shall have the authority to employ, at the cost and expense of Respondents, such consultants, accountants, attorneys, investment bankers, business brokers, appraisers, and other representatives and assistants as are necessary to carry out the trustee's duties and responsibilities. The trustee shall account for all monies derived from the divestitures 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 J Sainsbury, and the trustee's power shall be terminated. The trustee's compensation shall be based at least in significant part on a commission arrangement contingent on the trustee's divesting the Assets To Be Divested.
8. Respondents shall indemnify the trustee and hold the trustee harmless against any losses, claims, damages, liabilities, or expenses arising out of, or in connection with, the performance of the trustee's duties, including all reasonable fees of counsel and other expenses incurred in connection with the preparation for or defense of any claim, whether or not resulting in any

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liability, except to the extent that such losses, claims, damages, liabilities, or expenses result from misfeasance, gross negligence, willful or wanton acts, or bad faith by the trustee.

9. If the trustee ceases to act or fails to act diligently, a substitute trustee shall be appointed in the same manner as provided in Paragraph IV.A. of this Order.
10. The Commission or, in the case of a court-appointed trustee, the court, may on its own initiative or at the request of the trustee issue such additional orders or directions as may be necessary or appropriate to accomplish each divestiture required by this Order.
11. In the event that the trustee determines that he or she is unable to divest the Assets To Be Divested in a manner consistent with the Commission's purpose as described in Paragraphs II and III, the trustee may divest additional ancillary assets of Respondents and effect such arrangements as are necessary to satisfy the requirements of this Order.
12. The trustee shall have no obligation or authority to operate or maintain the Assets To Be Divested.
13. The trustee shall report in writing to Respondents and the Commission every sixty (60) days concerning the trustee's efforts to accomplish each divestiture required by this Order.

V.

IT IS FURTHER ORDERED that Respondents shall maintain the viability, marketability, and competitiveness of the Assets To Be Divested pending their divestiture, and shall not cause the wasting or deterioration of the Assets To Be Divested, nor shall they cause the Assets To Be Divested to be operated in a manner inconsistent with applicable laws, nor shall they sell, transfer, encumber or otherwise impair the viability, marketability

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or competitiveness of the Assets To Be Divested. Respondents shall comply with the terms of this Paragraph until such time as Respondents have divested the Assets To Be Divested pursuant to the terms of this Order. Respondents shall conduct or cause to be conducted the business of the Assets To Be Divested in the regular and ordinary course and in accordance with past practice (including regular repair and maintenance efforts) and shall use their best efforts to preserve the existing relationships with suppliers, customers, employees, and others having business relations with the Assets To Be Divested in the ordinary course of business and in accordance with past practice. Respondents shall not terminate the operation of any of the Assets To Be Divested. Respondents shall continue to maintain the inventory of each of the Assets To Be Divested at levels and selections (*e.g.*, stock-keeping units) consistent with those maintained by such Respondent(s) at such Supermarket in the ordinary course of business consistent with past practice. Respondents shall use best efforts to keep the organization and properties of each of the Assets To Be Divested intact, including current business operations, physical facilities, working conditions, and a work force of equivalent size, training, and expertise associated with the Supermarket. Included in the above obligations, Respondents shall, without limitation:

1. maintain operations and departments and not reduce hours at each of the Assets To Be Divested;
2. not transfer inventory from any of the Assets To Be Divested other than in the ordinary course of business consistent with past practice;
3. make any payment required to be paid under any contract or lease when due, and otherwise pay all liabilities and satisfy all obligations, in each case in a manner consistent with past practice;

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4. maintain the books and records of each of the Assets To Be Divested;
5. not display any signs or conduct any advertising (*e.g.*, direct mailing, point-of-purchase coupons) that indicates that any Respondent is moving its operations to another location, or that indicates any of the Assets To Be Divested will close;
6. not remove the trade marks, trade dress, service marks, or trade names of Respondents at any of the Assets To Be Divested;
7. not conduct any “going out of business,” “close-out,” “liquidation” or similar sales or promotions at or relating to any of the Assets To Be Divested; and
8. not change or modify in any material respect the existing advertising practices, programs and policies for any of the Assets To Be Divested, other than changes in the ordinary course of business consistent with past practice for Supermarkets of the Respondents not being closed or relocated.

VI.

IT IS FURTHER ORDERED that, for a period of ten (10) years from the date this Order becomes final, J Sainsbury shall not, directly or indirectly, through subsidiaries, partnerships, or otherwise, without providing advance written notification to the Commission:

A. Acquire any ownership or leasehold interest in any facility that has operated as a Supermarket, within six (6) months prior to the date of such proposed acquisition, in the county or counties that include the Relevant Areas.

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

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Supermarket within six (6) months prior to such proposed acquisition, in the county or counties that include the Relevant Areas.

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

Said notification shall be given on the Notification and Report Form set forth in the Appendix to Part 803 of Title 16 of the Code of Federal Regulations as amended (hereinafter referred to as "the Notification"), and shall be prepared and transmitted in accordance with the requirements of that part, except that no filing fee will be required for any such notification, notification shall be filed with the Secretary of the Commission, notification need not be made to the United States Department of Justice, and notification is required only of J Sainsbury and not of any other party to the transaction. J Sainsbury shall provide the Notification to the Commission at least thirty (30) days prior to consummating any such transaction (hereinafter referred to as the "first waiting period"). If, within the first waiting period, representatives of the Commission make a written request for additional information or documentary material (within the meaning of 16 C.F.R. § 803.20), J Sainsbury shall not consummate the transaction until twenty (20) days after substantially complying with such request. Early termination of the waiting periods in this Paragraph may be requested and, where appropriate, granted by letter from the Bureau of Competition. Provided, however, that prior notification shall not be required by this Paragraph for a transaction for which notification is required to be made, and has been made, pursuant to Section 7A of the Clayton Act, 15 U.S.C. § 18a.

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VII.

IT IS FURTHER ORDERED that, for a period of ten (10) years from the date this Order becomes final:

A. J Sainsbury shall neither enter into nor enforce any agreement that restricts the ability of any person (as defined in Section 1(a) of the Clayton Act, 15 U.S.C. § 12(a)) that acquires any Supermarket, any leasehold interest in any Supermarket, or any interest in any retail location used as a Supermarket on or after January 1, 1998, in the county or counties that include the Relevant Areas to operate a Supermarket at that site if such Supermarket was formerly owned or operated by J Sainsbury.

B. J Sainsbury shall not remove any fixtures or equipment from a property owned or leased by J Sainsbury in the county or counties that include the Relevant Areas that is no longer in operation as a Supermarket, except (1) prior to and as part of a sale, sublease, assignment, or change in occupancy of such Supermarket; or (2) to relocate such fixtures or equipment in the ordinary course of business to any other Supermarket owned or operated by J Sainsbury.

VIII.

IT IS FURTHER ORDERED that:

A. Within thirty (30) days after the date Respondents signed the Agreement Containing Consent Order and every thirty (30) days thereafter until Respondents have fully complied with the provisions of Paragraphs II, III, and IV of this Order, Respondents shall submit to the Commission verified written reports setting forth in detail the manner and form in which they intend to comply, are complying, and have complied with Paragraphs II, III, and IV of this Order. Respondents shall include in their compliance reports, among other things that are required from time to time, a full description of the efforts being made to comply with Paragraphs II, III, and IV of the Order, including a description of all substantive contacts or negotiations for

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divestitures and the identity of all parties contacted. Respondents shall include in their compliance reports copies of all written communications to and from such parties, all internal memoranda, and all reports and recommendations concerning divestiture.

B. One (1) year from the date this Order becomes final, annually for the next nine (9) years on the anniversary of the date this Order becomes final, and at other times as the Commission may require, J Sainsbury shall file verified written reports with the Commission setting forth in detail the manner and form in which it has complied and is complying with this Order.

IX.

IT IS FURTHER ORDERED that Respondents shall notify the Commission at least thirty (30) days prior to any proposed change in the corporate Respondents, such as dissolution, assignment, sale resulting in the emergence of a successor corporation, or the creation or dissolution of subsidiaries or any other change in Respondents that may affect compliance obligations arising out of the Order.

X.

IT IS FURTHER ORDERED that, for the purpose of determining or securing compliance with this Order, upon written request with five (5) days' notice to Respondents, Respondents shall permit any duly authorized representative of the Commission:

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

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B. Without restraint or interference from Respondents, to interview officers, directors, or employees of Respondents in the presence of counsel.

XI.

IT IS FURTHER ORDERED, that if (i) Respondents have fully complied with all terms of Paragraphs VI through X of this Order; (ii) Respondents within forty-five (45) days after final issuance of this Order by the Commission have submitted a complete application in support of the divestiture of the Assets To Be Divested pursuant to Paragraphs II and III of this Order, as the case may be (including the buyer, manner of divestiture and all other matters subject to Commission approval); and (iii) the Commission has approved the divestiture and has not withdrawn its acceptance; but (iv) Respondents have certified to the Commission within ten (10) days after the Commission's approval of the divestiture that the Commonwealth of Massachusetts, notwithstanding timely and complete application by Respondents to the Commonwealth of Massachusetts, has failed to approve the divestiture under an Applicable Consent Decree of the particular assets or businesses whose divestiture is also required under this Order, then with respect to the particular divestiture that remains unconsummated, the time in which the divestiture is required under this Order to be completed shall be extended for sixty (60) days. During such sixty (60) day period, Respondents shall exercise utmost good faith and best efforts to resolve the concerns of the Commonwealth of Massachusetts.

By the Commission, Commissioner Leary not participating.

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Schedule A

The Schedule A Assets consist of all assets, leases, properties, government permits, customer lists, businesses and goodwill, tangible and intangible, related to or utilized in the Supermarket business operated at the following locations in eastern Massachusetts, excluding the trade marks, trade dress, service marks, or trade names of Respondents:

J Sainsbury store No. 193, operating under the "Shaw's Supermarket" trade name, located at 836 Main Street, Waltham, MA 02154;

J Sainsbury store No. 196, operating under the "Shaw's Supermarket" trade name, located at 475 Hancock Street, North Quincy, MA 02171;

J Sainsbury store No. 122, operating under the "Shaw's Supermarket" trade name, located at 435 Walpole Street, Route 1A, Norwood, MA 02062;

Star Markets store No. 169, operating under the "Star Markets" trade name, located at 7 Medway Road, Milford, MA 01757; and

Star Markets store No. 128, operating under the "Star Markets" trade name, located at 4 Washington Street and Pond Road, Norwell, MA 02106.

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Schedule B

The Schedule B Assets consist of all assets, leases, properties, government permits, customer lists, businesses and goodwill, tangible and intangible, related to or utilized in the Supermarket business operated at the following locations in eastern Massachusetts, excluding the trade marks, trade dress, service marks, or trade names of Respondents:

Star Markets store No. 144, operating under the "Star Markets" trade name, located at 50 Boston Street, Lynn, MA 01904 and

Star Markets store No. 129, operating under the "Star Markets" trade name, located at 38 Paradise Road, Swampscott, MA 01907.

Schedule C

The Schedule C Assets consist of all assets, leases, properties, government permits, customer lists, businesses and goodwill, tangible and intangible, related to or utilized in the Supermarket business operated at the following locations in eastern Massachusetts, excluding the trade marks, trade dress, service marks, or trade names of Respondents:

Star Markets store No. 152, operating under the "Star Markets" trade name, located at 155 Great Road, Route 117, Stow, MA 01775 and

Star Markets store No. 118, operating under the "Star Markets" trade name, located at 3509 Boston Post Road, Route 20, Sudbury, MA 01776.

Analysis to Aid Public Comment

Schedule D

The Schedule D Assets consist of all assets, leases, properties, government permits, customer lists, businesses and goodwill, tangible and intangible, related to or utilized in the Supermarket business operated at the following location in eastern Massachusetts, excluding the trade marks, trade dress, service marks, or trade names of Respondents:

J Sainsbury store No. 338, operating under the "Shaw's Supermarket" trade name, located at 10 Technology Drive, Route 85, Hudson, MA 01749.

Analysis of the Draft Complaint and Proposed Consent Order to Aid Public Comment**I. Introduction**

The Federal Trade Commission ("Commission") has accepted for public comment from J Sainsbury plc, owner of Shaw's Supermarkets, Inc. ("Shaw's") and Star Markets Holdings, owner of Star Markets Company ("Star") (collectively "the Proposed Respondents") an Agreement Containing Consent Order ("the proposed consent order"). The Proposed Respondents have also reviewed a draft complaint contemplated by the Commission. The proposed consent order is designed to remedy likely anticompetitive effects arising from Shaw's proposed acquisition of all of the outstanding voting stock of Star.

Analysis to Aid Public Comment

II. Description of the Parties and the Proposed Acquisition

Shaw's Supermarkets, Inc., a Massachusetts corporation headquartered in Bridgewater, Massachusetts, is a wholly owned subsidiary of J Sainsbury plc, a United Kingdom company. Shaw's operates 126 supermarkets in Connecticut, Maine, Massachusetts, New Hampshire, Rhode Island, and Vermont. All of Shaw's supermarkets operate under the "Shaw's" trade name. Shaw's total sales for its 1998 fiscal year were approximately \$2.8 billion. Shaw's is the second largest supermarket chain operating in Greater Boston. After the merger, Shaw's will become the number one supermarket chain in Greater Boston, controlling almost 40% of all supermarket sales.

Star is a Massachusetts corporation headquartered in Cambridge, Massachusetts. Star operates 53 supermarkets in Massachusetts, forty-nine under the "Star" trade name and four under the "Wild Harvest" trade name. Star also operates a wholesale food business that serves mostly small independent supermarket customers throughout New England and New York State. Star's wholesale customer base includes 11 supermarkets that contractually use the "Star Markets" trade name though Star has no ownership interest in them. Star's revenues for fiscal year 1998 are more than \$1 billion, \$966 million of which are from its retail operations. With its 53 supermarkets, Star is the third largest supermarket chains operating in Greater Boston. On November 25, 1998, J Sainsbury plc, Star Markets Holdings, Inc., Star Markets Company, Inc. and certain stockholders of Star Markets Holdings Inc., entered into a Stock Purchase Agreement for J Sainsbury plc to acquire all of the outstanding voting securities of Star Markets Holdings, Inc. The value of the transaction is approximately \$490 million.

III. The Draft Complaint

The draft complaint alleges that the relevant line of commerce (*i.e.*, the product market) is the retail sale of food and grocery items in supermarkets. Supermarkets provide a distinct set of products and services for consumers who desire to one-stop shop for food and grocery products. Supermarkets carry a full line and wide selection of both food and nonfood products (typically more than 10,000 different stock-keeping units ("SKUs")), as well as an

Analysis to Aid Public Comment

extensive inventory of those SKUs in a variety of brand names and sizes. In order to accommodate the large number of nonfood products necessary for one-stop shopping, supermarkets are large stores that typically have at least 10,000 square feet of selling space.

Supermarkets compete primarily with other supermarkets that provide one-stop shopping for food and grocery products.

Supermarkets base their food and grocery prices primarily on the prices of food and grocery products sold at nearby supermarkets.

Most consumers shopping for food and grocery products at supermarkets are not likely to shop elsewhere in response to a small price increase by supermarkets.

Retail stores other than supermarkets that sell food and grocery products, such as neighborhood "mom & pop" grocery stores, limited assortment stores, convenience stores, specialty food stores (*e.g.*, seafood markets, bakeries, etc.), club stores, military commissaries, and mass merchants, do not effectively constrain prices at supermarkets. The retail format and variety of items sold at these other stores are significantly different than that of supermarkets. None of these other retailers offer a sufficient quantity and variety of products to enable consumers to one-stop shop for food and grocery products.

The draft complaint alleges that the relevant sections of the country (*i.e.*, the geographic markets) in which to analyze the acquisition are the areas in or near the following incorporated cities or towns in Massachusetts: a) Waltham area that includes Waltham, Auburndale, Watertown, Newton, West Newton, Weston, and Lexington; b) Quincy-Dorchester area that includes Quincy, N. Quincy, Milton, Dorchester, Boston, S. Boston, Braintree, and Weymouth; c) Norwood area that includes Norwood, Walpole, Westwood, Dedham, Wrentham, and Sharon; d) Milford area that includes Milford, Hopedale, Mendon, and Upton; e) Salem-Lynn area that includes Salem, Lynn, Peabody, Swampscott, Danvers, Nahant, and Marblehead; f) Norwell area that includes Norwell, Hanover, Rockland, Pembroke, Hanson,

Analysis to Aid Public Comment

Scituate, Halifax, Hingham, Weymouth, Cohasset, and Hull; g) Hudson-Stow area that includes Stow, Hudson, Sudbury, Marlborough, and Bolton; and h) Saugus-Melrose-Stoneham area that includes Saugus, Melrose, Stoneham, and Wakefield.

J Sainsbury through its Shaw's subsidiary and Star Markets are actual and direct competitors in the all of the relevant markets. The draft complaint alleges that the post-merger markets would all be highly concentrated, whether measured by the Herfindahl-Hirschman Index (commonly referred to as "HHI") or four-firm concentration ratios. The acquisition would substantially increase concentration in each market. The post-acquisition HHIs in the geographic markets range from 2205 points to 5136 points.

The draft complaint further alleges that entry is difficult and would not be timely, likely, or sufficient to prevent anticompetitive effects in the relevant geographic markets.

The draft complaint also alleges that Shaw's acquisition of all of the outstanding voting securities of Star, if consummated, may substantially lessen competition in the relevant line of commerce in the relevant markets in violation of Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18, and Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45, by eliminating direct competition between supermarkets owned or controlled by Shaw's and supermarkets owned and controlled by Star; by increasing the likelihood that Shaw's will unilaterally exercise market power; and by increasing the likelihood of, or facilitating, collusion or coordinated interaction among the remaining supermarket firms. Each of these effects increases the likelihood that the prices of food, groceries or services will increase, and the quality and selection of food, groceries or services will decrease, in the geographic markets alleged in the complaint.

IV. The terms of the Agreement Containing Consent Order ("the proposed consent order")

The proposed consent order will remedy the Commission's competitive concerns about the proposed acquisition. Under the terms of the proposed consent order Shaw's and Star must divest ten supermarkets, seven stores operating under the "Star Markets" trade name and three under the "Shaw's" trade name.

Analysis to Aid Public Comment

In the eight relevant markets, the Proposed Respondents will divest either all of the Shaw's or Star supermarkets to buyers who do not currently operate supermarkets in these markets. Divesting all of one party's assets in a particular market achieves the goals that the proposed consent order is designed to achieve -- ensuring that the merger will not increase concentration in any relevant market and maintaining the number of firms in the market that existed before the merger.

Seven of the supermarkets to be divested are being sold to two experienced up-front buyers, firms that the Commission has pre-evaluated for their competitive and financial viability. The Commission's evaluation process consisted of analyzing the financial condition of the proposed acquirers and the locations of their current supermarkets to ensure that divestitures to them would not increase concentration or decrease competition in the relevant markets, as well as, determining that these purchasers are well qualified to operate the divested stores. The remaining three supermarkets are to be divested by the Proposed Respondents within three months of the date on which they signed the proposed consent agreement, to an acquirer approved by the Commission and in a manner approved by the Commission. Public comments may address the suitability of the designated up-front buyers to acquire supermarkets under the proposed consent order.

The following is a discussion of the two up-front buyers, Victory Super Markets ("Victory") and Foodmaster Super Markets, Inc. ("Foodmaster"). Victory, headquartered in Massachusetts and founded by the DiGeronimo family in 1923, will acquire five supermarkets from Shaw' -- Shaw's Supermarket stores No. 193 in Waltham, No. 196 in North Quincy, and No. 122 in Norwood; and Star Markets stores No. 169 in Milford, and No. 128 in Norwell, MA. Foodmaster, headquartered in Chelsea, Massachusetts, will acquire two supermarkets from Shaw's -- Star Markets No. 144 in Lynn and No. 129 in Swampscott.

The proposed consent order further requires Shaw's and Star to divest three additional supermarkets, Star Markets No. 152 in

Analysis to Aid Public Comment

Stow, Star markets No. 118 in Sudbury, and Star Markets No. 173 in Saugus to a proposed buyer that will be selected by Shaw's and approved by the Commission within three months of the date on which the Proposed Respondents sign the proposed consent agreement.

Paragraph II.A. of the proposed consent order requires that the divestiture to Victory must occur no later than the earlier of (1) 20 days from when the merger is consummated, or (2) four months after the Commission accepts the agreement for public comment.⁽¹⁾ Paragraph II. B. of the proposed consent agreement requires that Shaw's divest the two supermarkets to Foodmaster within ten days of the date on which the proposed consent order becomes final. If Shaw's consummates the divestitures to Victory and Foodmaster during the public comment period, and if, at the time the Commission decides to make the order final, the Commission notifies Shaw's that Victory or Foodmaster is not an acceptable acquirer or that the asset purchase agreement with Victory or Foodmaster is not an acceptable manner of divestiture, then Shaw's must immediately rescind the transaction in question and divest those assets to another buyer within three months of the date the order becomes final. At that time, Shaw's must divest those assets only to an acquirer that receives the prior approval of the Commission and only in a manner that receives the prior approval of the Commission. In the event that any Commission-approved buyer is unable to take or keep possession of any of the supermarkets identified for divestiture, a trustee that the Commission may appoint has the power to divest any assets that have not been divested to satisfy the requirements of the proposed consent order.

The proposed consent order also enables the Commission to appoint a trustee to divest any supermarkets or sites identified in the order that Shaw's and Star have not divested to satisfy the requirements of the proposed consent order. In addition, the proposed order enables the Commission to seek civil penalties against Shaw's for non-compliance with the proposed consent order.

Among other requirements related to maintaining operations at the supermarkets identified for divestiture, the proposed consent

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order also specifically requires the Proposed Respondents to: (1) maintain the viability, competitiveness and marketability of the assets to be divested; (2) not cause the wasting or deterioration of the assets to be divested; (3) not sell, transfer, encumber, or otherwise impair their marketability or viability; (4) maintain the supermarkets consistent with past practices; (5) use best efforts to preserve existing relationships with suppliers, customers, and employees; and (6) keep the supermarkets open for business and maintain the inventory at levels consistent with past practices.

The proposed consent order also prohibits Shaw's from acquiring, without providing the Commission with prior notice, any supermarkets, or any interest in any supermarkets, located in the county or counties that include the incorporated cities and towns in Massachusetts: Waltham, Auburndale, Watertown, Newton, West Newton, Weston, Lexington, Quincy, N. Quincy, Milton, Dorchester, Boston, S. Boston, Braintree, Hopedale, Mendon, Upton, Salem, Lynn, Peabody, Swampscott, Danvers, Nahant, Marblehead, Norwell, Hanover, Rockland, Pembroke, Hanson, Scituate, Halifax, Hingham, Cohasset, Hull, Stow, Hudson, Sudbury, Marlborough, Bolton, Saugus, Melrose, Wakefield, and Stoneham for ten years. These are the areas for which the supermarkets to be divested draw customers. The provisions regarding prior notice are consistent with the terms used in prior Orders. The proposed consent order does not, however, restrict the Proposed Respondents from constructing new supermarkets in the above listed areas; nor does it restrict the Proposed Respondents from leasing facilities not operated as supermarkets within the previous six months.

The proposed consent also prohibits Shaw's, for a period of ten years, from entering into or enforcing any agreement that restricts the ability of any person acquiring any location used as a supermarket, or interest in any location used as a supermarket on or after January 1, 1998, to operate a supermarket at that site if that site was a formerly owned or operated by Shaw's or Star Markets in any of the areas listed in the paragraph above. In

Analysis to Aid Public Comment

addition, the Proposed Respondents are prohibited from removing fixtures or equipment from a store or property owned or leased by Shaw's in any of the cities or town listed above that is no longer operated as a supermarket, except (1) prior to a sale, sublease, assignment, or change in occupancy or (2) to relocate such fixtures or equipment in the ordinary course of business to any other supermarket owned or operated by the Proposed Respondents.

The Proposed Respondents are required to file compliance reports with the Commission, the first of which is due within thirty days of the date on which Proposed Respondents signed the proposed consent, and every thirty days thereafter until the divestitures are completed, and annually for ten years.

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The proposed consent order also has a provision relating to the settlement agreement negotiated by the State of Massachusetts. If the State of Massachusetts fails to approve any divestiture that has not been completed, even though the parties are in compliance with the other provisions of the proposed consent agreement, the time period in which the divestiture must be completed will be extended 60 days during which the parties must exercise utmost good faith and best efforts to resolves the concerns of that particular state.

V. Opportunity for Public Comment

The proposed consent order has been placed on the public record for 60 days for receipt of comments by interested persons.

Comments received during this period will become part of the public record. After 60 days, the Commission will again review the proposed consent order and the comments received and will decide whether it should withdraw from the agreement or make the proposed consent order final.

By accepting the proposed consent order subject to final approval, the Commission anticipates that the competitive problems alleged in the complaint will be resolved. The purpose of this analysis is to invite public comment on the proposed consent order, including the proposed sale of supermarkets to Victory and Foodmaster, in order to aid the Commission in its determination of whether to make the proposed consent order final. This analysis is not intended to constitute an official interpretation of the proposed consent order nor is it intended to modify the terms of the proposed consent order in any way.

1. Acceptance of the proposed consent agreement for public comment terminates the HSR waiting period and enables Shaw's to immediately acquire all of the outstanding voting securities of Star Markets.

Complaint

IN THE MATTER OF

NINE WEST GROUP INC.CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATIONS OF
SEC. 5 OF THE FEDERAL TRADE COMMISSION ACT

*Docket C-3937; File No. 9810386
Complaint, April 11, 2000--Decision, April 11, 2000*

This consent order prohibits Respondent Nine West Group Inc. from fixing controlling or maintaining the retail price of women's footwear. It also prohibits Respondent from pressuring, or coercing any dealer to adhere, adopt, or maintain any set retail price. Respondent is also prohibited from securing any commitments or assurances regarding the resale price. For a period of ten years, Respondent is also prohibited from notifying a dealer in advance that they are subject to a temporary or partial suspension of supply if the dealer sells Nine West shoes below a designated price. Respondent must also, for a period of five years, display conspicuously on any list, book, catalogue, advertising, or promotional material where it has suggested a retail price to a dealer a required statement explaining that while it may suggest a price, dealers remain free to determine at which price to advertise and sell Nine West products. Respondent must also send a letter to dealers with a similar explanation.

Participants

For the Commission: *Alan B. Loughnan, Theodore Zang, Ann Weintraub, Barbara Anthony, Daniel P. Ducore, Kenneth Kelly, and Gregory Vistnes.*

For the Respondents: *Ron Rolfe, Cravath, Swaine & Moore, and Kevin Arquit, Rogers & Wells.*

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act (15 U.S.C. § 41 *et seq.*), and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that Nine West Group Inc. (hereinafter "Respondent" or "Nine West"), has violated the provisions of Section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45, and it appearing

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to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues this complaint stating its charges as follows:

RESPONDENT

1. Respondent Nine West Group Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware, with its principal place of business located at Nine West Plaza, 1129 Westchester Avenue, White Plains, New York 10604-3529, and includes its parent, Jones Apparel Group, Inc., and their affiliates, subsidiaries, divisions and organizational units of any kind, their successors and assigns and their present officers, directors, employees, agents, representatives and other persons acting on their behalf.

2. Respondent is now, and for some time has been, engaged in the offering for sale, sale, and distribution of women's footwear to retail dealers located throughout the United States, including many of the nation's largest retail chains.

JURISDICTION

3. Respondent is a "corporation" within the meaning of Section 4 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 44.

4. Respondent maintains and has maintained a substantial course of business, including the acts or practices alleged in the complaint, which are in or affecting commerce within the meaning of Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45.

Complaint

**RESPONDENT'S ACTS IN COMBINATION WITH
CERTAIN OF ITS DEALERS**

5. In connection with the sale and distribution of Nine West branded products, Respondent, in combination, agreement and understanding with certain of its dealers, beginning in January 1988 and continuing thereafter until at least July 31, 1999, engaged in unlawful contracts, combinations, or agreements, in unreasonable restraint of interstate trade and commerce.

6. The combinations and contracts consisted of continuing agreements, understandings or concert of action among Respondent and certain of its dealers, the substantial terms of which were to fix, raise, maintain or stabilize the retail prices at which Nine West products were advertised and sold to the consuming public.

7. For the purpose of forming, effectuating and furthering the unlawful contracts, combinations or agreements, the Respondent and certain of its dealers did, among other things, the following:

a. Various Nine West divisions adopted pricing policies governing the retail sale of Nine West products and distributed "off limits" or "non-promote" lists of shoes, including shoes that could not be promoted outside of defined periods of time, called "clearance windows" or "breakdates." In doing so, Nine West did seek acquiescence in and threatened and initiated enforcement actions to enforce those policies. Retailers communicated to Nine West their agreement to adhere to these pricing policies.

b. Nine West shared revisions of its pricing policies, such as updated "off limits" or "non-promote" lists, with certain of its dealers prior to implementation of such revised policies for the purpose of soliciting input as to shoes that should, or should not, be included on the revised lists.

c. Nine West added or removed shoes from the coverage of its pricing policies at the request of its dealers.

Complaint

d. Nine West added/extended or removed/limited “clearance windows” or “breakdates” for shoes covered by its pricing policies at the request of its dealers.

e. Nine West negotiated individualized exemptions from the coverage of its pricing policies for certain of its dealers. Nine West often conditioned its agreement in these cases on the condition that the dealer would not advertise the newly-negotiated retail price.

f. Nine West received complaints from dealers regarding other dealers’ violation of Nine West’s pricing policies. Nine West responded to violations of its pricing policies by some of its dealers in a number of different ways. For example, Nine West suspended shipments to violating dealers for a limited period, with the tacit understanding that shipments would resume if Nine West discovered no further violation of the policy in the interim, or if the dealer promised not to violate the policy again in the future. Dealers communicated to Nine West their acquiescence to Nine West’s pricing policies.

EFFECTS

8. The purpose, effect, tendency, or capacity of the acts and practices described in Paragraphs 5, 6, and 7 has been to restrain trade unreasonably and to hinder competition in the sale of women’s footwear in the United States, and to deprive consumers of the benefits of competition in the following ways, among others:

- a. Prices to consumers of Nine West products have been increased, or have been prevented from falling; and

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- b. Price competition among retail dealers with respect to the sale of Nine West products has been restricted.

VIOLATION ALLEGED

9. The aforesaid acts and practices constitute unfair methods of competition in or affecting commerce in violation of Section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45. These acts and practices are continuing and will continue in the absence of the relief requested.

IN WITNESS THEREOF, the Federal Trade Commission on this eleventh day of April, 2000, issues its complaint against said Respondent.

By the Commission.

DECISION AND ORDER

The Federal Trade Commission having initiated an investigation of certain acts and practices of Nine West Group Inc., hereinafter sometimes referred to as Respondent, and Respondent having been furnished thereafter with a copy of a draft of Complaint that the Northeast Regional Office presented to the Commission for its consideration and which, if issued by the Commission, would charge Respondent with violations of Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45; and

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Respondent, its attorneys, and counsel for the Commission having thereafter executed an Agreement Containing Consent Order ("Consent Agreement"), containing an admission by Respondent of all the jurisdictional facts set forth in the aforesaid draft of Complaint, a statement that the signing of said Consent Agreement is for settlement purposes only and does not constitute an admission by Respondent that the law has been violated as alleged in such Complaint, or that the facts as alleged in such Complaint, other than jurisdictional facts, are true, and waivers and other provisions as required by the Commission's Rules; and

The Commission having thereafter considered the matter and having determined that it had reason to believe that the Respondent has violated the said Act, and that a Complaint should issue stating its charges in that respect, and having thereupon accepted the executed Consent Agreement and placed such Agreement on the public record for a period of thirty (30) days for the receipt and consideration of public comments, now in further conformity with the procedure described in Commission Rule 2.34, 16 C.F.R. § 2.34, the Commission hereby makes the following jurisdictional findings and issues the following Order:

1. Respondent Nine West Group Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware. The mailing address and principal place of business of Respondent Nine West Group is Nine West Plaza, 1129 Westchester Avenue, White Plains, New York 10604-3529.
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.

Decision and Order

ORDER

I.

IT IS ORDERED that for the purpose of this order, the following definitions shall apply:

(A) "*Nine West*" means Nine West Group Inc., its parent, Jones Apparel Group, Inc., and their affiliates, subsidiaries, divisions and other organizational units of any kind, that sold or sell Nine West Products as defined herein, their successors and assigns and their present officers, directors, employees, agents, representatives and other persons acting on their behalf. As used herein, "Nine West" shall not be construed to bring within the terms of this order any product that bears or is marketed in packaging that bears a trademark owned by Jones Apparel Group, Inc. or any of its predecessors, subsidiaries, units, divisions or affiliates other than Nine West Group Inc.

(B) "*Respondent*" means Nine West.

(C) "*Nine West Products*" means all women's footwear sold under brand labels owned by Nine West, including, but not limited to, the following: Amalfi, Bandolino, Calico, Capezio, cK/Calvin Klein, Easy Spirit, Enzo Angiolini, Evan-Picone, Joyce, Nine West, Pappagallo, Selby, Westies, and 9 & Co., that are offered for sale to consumers located in the United States of America and U.S. territories and possessions, or to dealers, by Nine West.

(D) "*Dealer*" means any person, corporation or entity not owned by Nine West, or by any entity owned or controlled by Nine West, that in the course of its business sells any Nine West Products in or into the United States of America.

(E) "*Resale price*" means any price, price floor, minimum price, maximum discount, price range, or any mark-up formula or margin of profit used by any dealer for pricing any product.

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"Resale price" includes, but is not limited to, any suggested, established, or customary resale price.

II.

IT IS FURTHER ORDERED that Nine West, directly or indirectly, or through any corporation, subsidiary, division or other device, in connection with the manufacturing, offering for sale, sale or distribution of any Nine West Products in or into the United States of America in or affecting "commerce," as defined by the Federal Trade Commission Act, forthwith cease and desist from:

(A) Fixing, controlling, or maintaining the resale price at which any dealer may advertise, promote, offer for sale or sell any Nine West Products.

(B) Requiring, coercing, or otherwise pressuring any dealer to maintain, adopt, or adhere to any resale price.

(C) Securing or attempting to secure any commitment or assurance from any dealer concerning the resale price at which the dealer may advertise, promote, offer for sale or sell any Nine West Products.

(D) For a period of ten (10) years from the date on which this order becomes final, adopting, maintaining, enforcing or threatening to enforce any policy, practice or plan pursuant to which Respondent notifies a dealer in advance that: (1) the dealer is subject to warning or partial or temporary suspension or termination if it sells, offers for sale, promotes or advertises any Nine West Products below any resale price designated by Respondent; and (2) the dealer will be subject to a greater sanction if it continues or renews selling, offering for sale, promoting or advertising any Nine West Products below any such

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designated resale price. As used herein, the phrase "partial or temporary suspension or termination" includes but is not limited to any disruption, limitation, or restriction of supply: (1) of some, but not all, Nine West Products; or (2) to some, but not all, dealer locations or businesses; or (3) for any delimited duration. As used herein, the phrase "greater sanction" includes but is not limited to a partial or temporary suspension or termination of greater scope or duration than the one previously implemented by Respondent, or a complete suspension or termination.

PROVIDED that nothing in this order shall prohibit Nine West from announcing resale prices in advance and unilaterally refusing to deal with those who fail to comply. PROVIDED FURTHER that nothing in this order shall prohibit Nine West from establishing and maintaining cooperative advertising programs that include conditions as to the prices at which dealers offer Nine West Products, so long as such advertising programs are not a part of a resale price maintenance scheme and do not otherwise violate this order.

III.

IT IS FURTHER ORDERED that, for a period of five (5) years from the date on which this order becomes final, Nine West shall clearly and conspicuously state the following on any list, advertising, book, catalogue, or promotional material where it has suggested any resale price for any Nine West Products to any dealer:

ALTHOUGH NINE WEST MAY SUGGEST RESALE PRICES FOR PRODUCTS, RETAILERS ARE FREE TO DETERMINE ON THEIR OWN THE PRICES AT WHICH THEY WILL ADVERTISE AND SELL NINE WEST PRODUCTS.

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IV.

IT IS FURTHER ORDERED that, within thirty (30) days after the date on which this order becomes final, Nine West shall mail by first class mail the letter attached as Exhibit A, together with a copy of this order, to each director, officer, dealer, distributor, agent, and sales representative engaged in the sale of any Nine West Products in or into the United States of America.

V.

IT IS FURTHER ORDERED that, for a period of two (2) years after the date on which this order becomes final, Nine West shall mail by first class mail the letter attached as Exhibit A, together with a copy of this order, to each new director, officer, dealer, distributor, agent, and sales representative engaged in the sale of any Nine West Products in or into the United States of America, within ninety (90) days of the commencement of such person's employment or affiliation with Nine West.

VI.

IT IS FURTHER ORDERED that Nine West shall notify the Commission at least thirty (30) days prior to any proposed changes in Nine West such as dissolution, assignment or sale resulting in the emergence of a successor corporation, or the creation or dissolution of subsidiaries or any other change in the corporation which may affect compliance obligations arising out of the order.

VII.

IT IS FURTHER ORDERED that, within sixty (60) days after the date this order becomes final, and at such other times as the Commission or its staff shall request, Nine West shall file with the

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Commission a verified written report setting forth in detail the manner and form in which Nine West has complied and is complying with this order.

VIII.

IT IS FURTHER ORDERED that this order shall terminate on April 11, 2020.

By the Commission.

EXHIBIT A

[NINE WEST LETTERHEAD]

Dear Retailer:

The Attorneys General of [x number] of States, and the Federal Trade Commission have conducted investigations into Nine West Group Inc.'s sales policies. To expeditiously resolve the investigations and to avoid disruption to the conduct of its business, Nine West Group Inc. has agreed, without admitting any violation of the law, to the entry of a Consent Order by the Federal Trade Commission and a Final Judgment and Consent Decree by the States prohibiting certain practices relating to resale prices. Copies of the Consent Order and the Final Judgment and Consent Decree are enclosed. This letter and the accompanying Orders are being sent to all of our dealers, sales personnel and representatives.

The Orders spell out our obligations in greater detail, but we want you to know and understand the following. Under both orders you can advertise and sell our products at any price you choose. While we may send materials to you which may contain

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our suggested retail prices, you remain free to sell and advertise those products at any price you choose.

We look forward to continuing to do business with you in the future.

Sincerely yours,

President of Sales and Marketing
Nine West Group Inc.

**STATEMENT OF COMMISSIONERS ORSON SWINDLE
AND THOMAS B. LEARY**

We have voted to accept the consent agreement for public comment because we have reason to believe that the conduct engaged in by Nine West falls outside the limited zone of protection afforded by the *Colgate* doctrine,¹ and thus is per se illegal under current law. We do not mean to indicate agreement, however, with the artificial analysis mandated by the *Colgate* doctrine or with the overbroad per se condemnation of minimum resale price maintenance (“RPM”), which the *Colgate* doctrine mitigates to some degree.

We do not know what conclusion we might have reached had Nine West’s behavior been analyzed under the rule of reason, because that question did not arise. Nevertheless, one can easily posit instances of minimum RPM that involve a mixture of

¹ *United States v. Colgate & Co.*, 250 U.S. 300 (1919).

Analysis to Aid Public Comment

procompetitive and anticompetitive effects, like any other vertical restraint, and undercut the continuing validity of the per se rule against the practice. Several years ago, the Supreme Court took the beneficial step of reexamining and overruling the doctrine that condemned maximum RPM as per se illegal.² When an appropriate case arises, we believe that the Court should continue this healthy trend by reassessing the even hoarier per se treatment of minimum RPM.³

Analysis of Proposed Consent Order to Aid Public Comment

The Federal Trade Commission (“the Commission”) has accepted, subject to final approval, an agreement from Nine West Group Inc. (“Nine West”) to a proposed consent order. The agreement settles charges by the Commission that Nine West violated Section 5 of the Federal Trade Commission Act by entering into vertical agreements that restricted retail price competition in the sale of women’s shoes. Nine West is a major manufacturer and seller of women’s shoes and sells shoes under the “Easy Spirit,” “Enzo Angiolini,” “Bandolino,” “cK/Calvin Klein,” “Pappagallo,” “Selby,” “Amalfi,” “Calico,” “Evan-Picone,” “Westies” “Capezio,” “Joyce,” and “9 & Co.” labels. Jones Apparel Group, Inc., purchased Nine West in July of 1999, and is a signatory to the consent agreement, but none of the conduct alleged in the complaint occurred after the purchase.

² *State Oil Co. v. Khan*, 522 U.S. 3 (1997), overruling *Albrecht v. Herald Co.*, 390 U.S. 145 (1968).

³ *Dr. Miles Medical Co. v. John D. Park & Sons Co.*, 220 U.S. 373 (1911).

Analysis to Aid Public Comment

The proposed consent order has been placed on the public record for thirty days for receipt of comments by interested persons. Comments received during this period will become part of the public record. After thirty days, the Commission will again review the agreement and the comments received and will decide whether it should withdraw from the agreement or make final the agreement's proposed order.

The purpose of this analysis is to invite public comment on the proposed order. This analysis is not intended to constitute an official interpretation of the agreement and proposed order or to modify their terms in any way. Further, the proposed consent order has been entered into for settlement purposes only and does not constitute an admission by Nine West that the law has been violated as alleged in the complaint.

The Complaint

Nine West Group is a Delaware corporation with its principal place of business in White Plains, New York. Nine West sells women's footwear to retail outlets throughout the United States, including many of the nation's largest department stores.

The complaint alleges that beginning in January 1988 and continuing until at least July 31, 1999, Nine West entered into agreements with certain retailers that fixed, raised, and stabilized retail prices to consumers. Nine West adopted pricing policies that determined which shoes the retailer could not discount or promote outside of specified times. Nine West did not merely announce these policies and terminate a retailer that did not adhere to them, which would have been lawful, but instead Nine West sought agreement from these dealers on future pricing. For example, Nine West suspended shipments and said it would resume them only if the dealer promised not to violate the policy again. Nine West also coerced compliance by threatening to

Analysis to Aid Public Comment

withhold discounts or advertising funds if the dealer refused to comply with a pricing policy. Retailers communicated to Nine West that they would adhere to the pricing policies.

The Proposed Consent Order

The proposed consent order is designed to prevent Nine West from agreeing with its dealers to set prices. Paragraph II of the order prohibits Nine West from fixing, controlling, or maintaining the retail price of women's footwear. It also prohibits Nine West from coercing or pressuring any dealer to maintain, adopt, or adhere to any resale price. Nine West also may not secure or attempt to secure commitments or assurances from any dealer concerning resale prices. Finally, Paragraph II prohibits Nine West, for a period of ten years, from notifying a dealer in advance that the dealer is subject to a temporary suspension of supply (e.g., no shoes shipped for six months) or a partial suspension (e.g., no orders of Easy Spirit loafers) if the dealer sells Nine West shoes below a designated price.

Paragraph III of the order requires that for a period of five years from the date on which the order becomes final, Nine West shall clearly and conspicuously include a statement on any list, advertising, book, catalogue, or promotional material where it has suggested any resale price for any Nine West product to any dealer. The required statement explains that while Nine West may suggest resale prices for its products, dealers remain free to determine on their own the prices at which they will sell and advertise Nine West's products.

Paragraph IV of the order requires Nine West to mail a letter (see attachment A) to its retailers with a copy of the Commission's order. The letter states that while Nine West may send materials to them with suggested retail prices, they are free to sell and advertise at a price they chose. Paragraph V requires that the same letter with a copy of the Commission's order be sent to new employees of Nine West.

Analysis to Aid Public Comment

Paragraph VI of the order requires Nine West to notify the Commission at least thirty days prior to any proposed changes in the corporation, such as dissolution or sale. Paragraph VII consists of standard Commission reporting and compliance procedures. Finally, Paragraph VIII contains a standard “sunset provision,” under which the terms of the order terminate twenty years after the date of issuance.

Complaint

IN THE MATTER OF

**MICHAEL T. BERKLEY, D.C., AND MARK A.
CASSELLIUS, D.C.**

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

*Docket C-3936; File No. 9910278
Complaint, April 11, 2000--Decision, April 11, 2000*

This consent order addresses practices used by Respondents Michael T. Berkley, D.S. and Mark A. Cassellius, two chiropractors with a principle practice in La Crosse, Wisconsin. The order prohibits Respondents from fixing prices for any chiropractic services. The order also prohibits Respondents from: (1) engaging in collective negotiations on behalf of any chiropractors; (2) orchestrating concerted refusals to deal; or (3) fixing prices, or any other terms, on which chiropractors deal. In addition, they are prohibited from encouraging, advising, or pressuring any person to engage in any action that would be prohibited if the person were subject to the order. Respondents may engage in conduct that is reasonably necessary to operate (a) any "qualified risk-sharing joint arrangement," or, (b) any "qualified clinically integrated joint arrangement

Participants

For the Commission: *Nicholas J. Franczyk, David A. O'Toole, Evan Siegel, Daniel P. Ducore, Elizabeth Schneirov, J. Elizabeth Callison, and Gregory S. Vistnes.*

For the Respondents: *Beth J. Kushner, von Briesen Purtell & Roper, S.C., Jon Axelrod, DeWitt, Ross & Stevens, and Joseph J. Connell, Parke O'Flaherty.*

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, as amended, 15 U.S.C. § 41 et seq., and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that the individuals named above, hereinafter "Respondents," have violated and are violating Section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45, and it appearing to the Commission that a proceeding by it in respect

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thereof would be in the public interest, hereby issues this complaint, stating its charges as follows:

RESPONDENTS

PARAGRAPH ONE: Respondent Michael T. Berkley, D.C., is a chiropractor licensed and doing business under and by virtue of the laws of the State of Wisconsin, with his principal place of business at 322 Cameron Avenue, La Crosse, Wisconsin 54601. At all times during which the acts and practices described in Paragraphs Ten through Thirteen below took place, respondent Berkley was a member of the board of directors of the Wisconsin Chiropractic Association (“WCA”).

PARAGRAPH TWO: Respondent Mark A. Cassellius, D.C., is a chiropractor licensed and doing business under and by virtue of the laws of the State of Wisconsin, with his principal place of business at 2045 32nd Street South, La Crosse, Wisconsin 54601. At all times during which the acts and practices described in Paragraphs Ten through Thirteen below took place, respondent Cassellius was the president of the Southwest District of the WCA.

JURISDICTION

PARAGRAPH THREE: The acts and practices of respondents, including those herein alleged, are in or affect commerce within the meaning of Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45.

THE MARKET FOR CHIROPRACTIC SERVICES

PARAGRAPH FOUR: Except to the extent that competition has been restrained as alleged herein, the respondents have been, and are now, in competition among themselves and with other

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providers of chiropractic goods and services in and around La Crosse, Wisconsin.

PARAGRAPH FIVE: Professional services performed by chiropractors include, among other things, spinal and extra spinal manipulations. Prior to January 1, 1997, chiropractors generally billed for these services using a single billing code (A2000 for Medicare and 97260 for most private insurance) regardless of the number of spinal or extra spinal regions adjusted. Beginning on January 1, 1997, the Health Care Financing Administration and many private insurance companies began accepting four new chiropractic manipulative treatment (“CMT”) codes (98940, 98941, 98942, and 98943) in place of the old single billing code. The new CMT codes reflected more detailed or precise descriptions of the manipulation services: 98940 (adjustment of 1-2 regions); 98941 (adjustment of 3-4 regions); 98942 (adjustment of 5 regions); and 98943 (adjustment of at least one extra spinal region).

PARAGRAPH SIX: Chiropractors often contract with health insurance firms and other third-party payers. Such contracts typically establish the terms and conditions under which the chiropractors will render services to the subscribers of the third-party payers, including terms and conditions of compensation and of cost containment. In many cases, chiropractors entering into such contracts agree to reductions in their compensation and to various cost containment procedures, including procedures for reviewing the utilization of medical resources by chiropractors and for dealing with chiropractors who have overutilized such resources. By lowering their costs in this manner, third-party payers are able to reduce the cost of medical care for their subscribers. The extensive use of such methods of lowering costs can be described as “managed care.”

PARAGRAPH SEVEN: Absent agreements among competing chiropractors on the price and other terms upon which they will provide services to third-party payers, competing chiropractors decide individually whether to enter into contracts

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with third-party payers, and on the terms and conditions under which they are willing to enter into such contracts.

THE WCA TRAINING SEMINARS

PARAGRAPH EIGHT: The WCA organized and conducted seminars at eight different locations throughout the State of Wisconsin, including La Crosse, Wisconsin, to train chiropractors and their staffs on the new CMT codes (the "CMT Seminars"), including how to price the codes, and urged chiropractors not to make any decisions on their fees for the new CMT codes before attending one of the training seminars.

PARAGRAPH NINE: During the CMT Seminars, the WCA, through its Executive Director, Russell A. Leonard: (1) told the chiropractors that the new CMT codes had the same values as osteopathic manipulative treatment ("OMT ") codes; (2) represented that the market place expected the prices for the new CMT codes to be about the same as the prices for the OMT codes; (3) provided current statewide price data for the OMT codes and urged the chiropractors to call osteopaths in their own areas to determine their local charges; (4) urged chiropractors to question any third-party payer that reimbursed a lesser amount for the CMT codes than for the OMT codes and to notify the WCA; and (5) during at least some of the seminars, represented that it had surveyed numerous chiropractors and determined that private insurance companies were paying CMT code claims at the prices the chiropractors chose to charge.

ANTICOMPETITIVE CONDUCT

PARAGRAPH TEN: Beginning in late January 1997, and continuing until at least June 1997, respondents and other unnamed persons conspired to fix prices for chiropractic services and to conduct a boycott of the Gundersen Lutheran Health Plan

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("Gundersen"), a third-party payer doing business in and around La Crosse County, Wisconsin, to obtain higher reimbursement for chiropractic services.

PARAGRAPH ELEVEN: In furtherance of the conspiracy described in Paragraph Ten:

A. Respondents organized at least two meetings of La Crosse County area chiropractors on or about February 13, 1997 and May 15, 1997. During these meetings the chiropractors discussed their displeasure with Gundersen's reimbursement rates for chiropractic services and the fact that they had learned at the WCA seminars that the new CMT codes presented an opportunity to charge significantly more for their services. Respondents surveyed the attendees to determine their average billed charges for the new CMT codes. The chiropractors agreed to negotiate reimbursement rates equal to at least 85% of average billed charges for services provided to Gundersen, significantly more than Gundersen's reimbursement rates. The chiropractors voted and determined that the majority of them were willing to terminate their agreements with Gundersen if it did not address their demands.

B. Respondent Berkley, acting on behalf of the La Crosse County area chiropractors, notified Gundersen that the chiropractors had met to discuss their displeasure with Gundersen's reimbursement, determined that the majority of them were willing to terminate their agreements with Gundersen if it did not address their concerns, and proposed that Gundersen increase its reimbursement rates to reflect at least 85% of average billed charges. Inherent in these negotiations was the threat that if Gundersen did not agree to the terms and conditions acceptable to the area chiropractors, Gundersen would be unable to obtain agreements with them.

PARAGRAPH TWELVE: On or about June 17, 1997, Gundersen, fearing the loss of a significant number of its chiropractic providers, acceded to the chiropractors' demands and

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revised its fee schedule to reflect a 20% increase on all fee schedule procedures effective July 1, 1997.

PARAGRAPH THIRTEEN: The respondents have not integrated their businesses in any economically significant way, nor have they created any efficiencies that might justify the acts and practices described in Paragraphs Ten through Twelve.

ANTICOMPETITIVE EFFECTS

PARAGRAPH FOURTEEN: The acts and practices of the respondents as described in this complaint have had the purpose, tendency, effect, and capacity to restrain trade unreasonably and hinder competition in the provision of chiropractic goods and services in and around La Crosse County, Wisconsin, in the following ways, among others:

- A. to restrain competition among chiropractors;
- B. to deprive consumers of the benefits of competition among chiropractors;
- C. to fix or increase the prices that consumers pay for chiropractic services;
- D. to fix the terms and conditions upon which chiropractors would deal with third- party payers, including terms of chiropractic compensation, thereby raising the price to consumers of medical insurance coverage issued by third-party payers; and
- E. to deprive consumers of the benefits of managed care.

PARAGRAPH FIFTEEN: The aforesaid acts and practices of the respondents are to the prejudice and injury of the public and constitute unfair methods of competition in or affecting commerce

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in violation of Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45. The acts and practices of the respondents, as herein alleged, are continuing and will continue or recur in the absence of the relief requested.

WHEREFORE, THE PREMISES CONSIDERED, the Federal Trade Commission on this eleventh day of April, 2000 , issues its complaint against said respondents.

By the Commission.

DECISION AND ORDER

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

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

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The Commission having thereafter considered the matter and having determined that it had reason to believe that the respondents have violated the said Act, and that a complaint should issue stating its charges in that respect, and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of thirty (30) days, the Commission hereby issues its complaint, makes the following jurisdictional findings and enters the following order:

1. Respondent Michael T. Berkley, D.C., is a chiropractor licensed and doing business under and by virtue of the laws of the State of Wisconsin, with his principal place of business located at 322 Cameron Avenue, La Crosse, Wisconsin 54601.

2. Respondent Mark A. Cassellius, D.C., is a chiropractor licensed and doing business under and by virtue of the laws of the State of Wisconsin, with his principal place of business located at 2045 32nd Street South, La Crosse, Wisconsin 54601.

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

ORDER**I.**

IT IS ORDERED that, for the purposes of this order, the following definitions shall apply:

A. "Payer" means any person that purchases, reimburses for, or otherwise pays for all or part of any health care services for itself or for any other person. "Payer" includes, but is not limited to, any health insurance company; preferred provider organization; prepaid hospital, medical, or other health service

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plan; health maintenance organization; government health benefits program; employer or other person providing or administering self-insured health benefits programs; and patients who purchase health care for themselves.

B. "Person" means both natural persons and artificial persons, including, but not limited to, corporations, unincorporated entities, partnerships, and governments.

C. "Provider" means any person that supplies health care services to any other person, including, but not limited to, chiropractors, physicians, hospitals, and clinics.

D. "Reimbursement" means any payment, whether cash or non-cash, or other benefit received for the provision of chiropractic goods and services.

E. "Qualified risk-sharing joint arrangement" means an arrangement to provide physician services in which: (1) all physicians participating in the arrangement share substantial financial risk from their participation in the arrangement through: (a) the provision of services to payers at a capitated rate, (b) the provision of services for a predetermined percentage of premium or revenue from payers, (c) the use of significant financial incentives (e.g., substantial withholds) for its participating physicians, as a group, to achieve specified cost-containment goals, or (d) the provision of a complex or extended course of treatment that requires the substantial coordination of care by physicians in different specialties offering a complementary mix of services, for a fixed, predetermined payment, where the costs of that course of treatment for any individual patient can vary greatly due to the individual patient's condition, the choice, complexity, or length of treatment, or other factors; (2) any agreement on prices or terms of reimbursement entered into by the arrangement is reasonably necessary to obtain significant efficiencies through the joint arrangement; and (3) the arrangement does not restrict the ability, or facilitate the refusal,

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of physicians participating in the arrangement to deal with payers individually or through any other arrangement.

F. “Qualified clinically integrated joint arrangement” means an arrangement to provide physician services in which: (1) all physicians participating in the arrangement participate in active and ongoing programs of the arrangement to evaluate and modify the practice patterns of, and create a high degree of interdependence and cooperation among, the physicians participating in the arrangement, in order to control costs and ensure quality of the services provided through the arrangement; (2) any agreement on prices or terms of reimbursement entered into by the arrangement is reasonably necessary to obtain significant efficiencies through the joint arrangement; and (3) the arrangement does not restrict the ability, or facilitate the refusal, of physicians participating in the arrangement to deal with payers individually or through any other arrangement.

II.

IT IS FURTHER ORDERED that each respondent, directly or indirectly, or through any corporate or other device, in connection with the provision of chiropractic goods and services in or affecting commerce, as “commerce” is defined in Section 4 of the Federal Trade Commission Act, 15 U.S.C. § 44, forthwith cease and desist from:

- A. Entering into, adhering to, participating in, maintaining, organizing, implementing, enforcing, or otherwise facilitating any combination, conspiracy, agreement, or understanding, express or implied, with any person or among any persons, to fix, establish, raise, stabilize, maintain, adjust, or tamper with any fee, fee schedule, price, pricing formula, discount, or other aspect or term of

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the fees charged or to be charged for any chiropractic goods or services.

- B. Entering into, adhering to, participating in, maintaining, organizing, implementing, enforcing, or otherwise facilitating any combination, conspiracy, agreement, or understanding to:
1. Negotiate on behalf of any other chiropractor with any payer or provider;
 2. Deal or refuse to deal with, boycott or threaten to boycott, any payer or provider; or
 3. Determine any terms, conditions, or requirements upon which chiropractors deal with any payer or provider, including, but not limited to, terms of reimbursement.
- C. Encouraging, advising, pressuring, inducing, or attempting to induce any person to engage in any action that would be prohibited if the person were subject to this order.

PROVIDED that nothing in this order shall be construed to prohibit any agreement or conduct by any respondent that is reasonably necessary to form, facilitate, manage, operate, or participate in:

- (a) A qualified risk-sharing joint arrangement; or
- (b) A qualified clinically integrated joint arrangement, if the applicable respondent has provided the prior notification(s) as required by this paragraph (b). Such prior notification must be filed with the Secretary of the Commission at least thirty (30) days prior to forming; facilitating; managing; operating; participating in; or taking any action, other than planning, in furtherance of any joint arrangement requiring such notice ("first waiting period"), and shall include for such arrangement the

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identity of each participant, the location or area of operation, a copy of the agreement and any supporting organizational documents, a description of its purpose or function, a description of the nature and extent of the integration expected to be achieved and the anticipated resulting efficiencies, an explanation of the relationship of any agreement on reimbursement to furthering the integration and achieving the expected efficiencies, and a description of any procedures proposed to be implemented to limit possible anticompetitive effects resulting from such agreement(s). If, within the first waiting period, a representative of the Commission makes a written request for additional information, the applicable respondent shall not form; facilitate; manage; operate; participate in; or take any action, other than planning, in furtherance of such joint arrangement until thirty (30) days after substantially complying with such request for additional information or shorter waiting period as may be granted by letter from the Bureau of Competition.

III.

IT IS FURTHER ORDERED that each respondent shall:

- A. Within thirty (30) days after the date this order becomes final, distribute a dated and signed notification letter in the form set forth in Appendix A to this order along with a copy of the complaint and order in this matter to each current agent, representative, or employee of the respondent whose activities are affected by this order, or who has responsibilities with respect to the subject matter of this order.

Decision and Order

- B. For a period of five (5) years after the date this order becomes final, and within thirty (30) days of the date the person assumes such position, distribute a dated and signed notification letter in the form set forth in Appendix A to this order along with a copy of the complaint and order in this matter to each new agent, representative, or employee of the respondent whose activities are affected by this order, or who has responsibilities with respect to the subject matter of this order.

IV.

IT IS FURTHER ORDERED that each respondent shall, for a period of ten (10) years after the date this order becomes final:

- A. Notify the Commission within thirty (30) days of the discontinuance of his present business or employment and of each affiliation with a new business or employment. Each notice of affiliation with any new business or employment shall include his new business address and telephone number, current home address, and a statement describing the nature of the business or employment and the duties and responsibilities.
- B. Provide a copy of the complaint and order in this matter to each new employer within seven (7) days of his employment where the duties and responsibilities of such employment are subject to the provisions of this order.

V.

IT IS FURTHER ORDERED that each respondent shall, within thirty (30) days after the date on which this order becomes final, distribute by first-class mail a copy of this order and the accompanying complaint to each payer or provider who, at any time since January 1, 1997, has communicated any desire, willingness, or interest in contracting for chiropractic goods and services with the respondent.

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VI.**IT IS FURTHER ORDERED** that:

A. Within sixty (60) days after the date this order becomes final, each respondent shall submit to the Commission a verified written report setting forth in detail the manner and form in which he intends to comply, is complying, and has complied with Paragraphs II, III and V of this order.

B. One (1) year from the date this order becomes final, annually for the next five (5) years on the anniversary of the date this order becomes final, and at other times as the Commission may require, each respondent shall file a verified written report with the Commission setting forth in detail the manner and form in which he has complied and is complying with Paragraphs II through IV of this order.

VII.

IT IS FURTHER ORDERED that, for the purpose of determining or securing compliance with this order, upon written request, each respondent shall permit any duly authorized representative of the Commission:

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

Decision and Order

- B. Upon five business days' notice to a respondent, and without restraint or interference from that respondent, to interview that respondent or any employee or representative of that respondent.

VIII.

IT IS FURTHER ORDERED that this order shall terminate on April 11, 2020.

By the Commission.

Appendix A

[Michael T. Berkley, D.C./Mark A. Cassellius, D.C., Letterhead]

Dear Agent, Representative, Employee, or Third Party Payer:

[Michael T. Berkley, D.C./Mark A. Cassellius, D.C.] has entered into an agreement with the Federal Trade Commission to settle charges that he and other unnamed persons conspired to fix prices for chiropractic services and to conduct a boycott of the Gundersen Lutheran Health Plan to obtain higher reimbursement for chiropractic manipulation services. As part of the settlement agreement, Dr. [Berkley/Cassellius] is required to send this notification letter and a copy of the complaint and order to each of his agents, representatives, and employees who have responsibilities with respect to the subject matter of the order, and to each third-party payer who, at any time since January 1, 1997, has communicated any desire, willingness, or interest in contracting for chiropractic goods and services with Dr. [Berkley/Cassellius]. The agreement is for settlement purposes only and does not constitute an admission by Dr. [Berkley/Cassellius] that the law has been violated as alleged in

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the complaint, or that the facts as alleged in the complaint, other than jurisdictional facts, are true.

Under the terms of the order, Dr. [Berkley/Cassellius] is prohibited from:

- Fixing prices or encouraging others to fix prices for any chiropractic goods and services.
- Organizing, participating in, or enforcing any agreement (1) to negotiate on behalf of any chiropractor with any payer or provider; (2) to deal or refuse to deal with, boycott or threaten to boycott, any payer or provider; and (3) to determine the terms or conditions upon which chiropractors will deal with any payer or provider.
- Encouraging or assisting any person to take any action that, if taken by Dr. [Berkley/Cassellius], would violate the order.

A copy of the complaint and order is enclosed.

/s/
[Michael T. Berkley, D.C./Mark A.
Cassellius, D.C.]

Enclosures

Analysis to Aid Public Comment

Analysis of Proposed Consent Order to Aid Public Comment

The Federal Trade Commission has accepted, subject to final approval, an agreement from Michael T. Berkley, D.C., and Mark A. Cassellius, D.C, to a proposed consent order. The agreement settles charges by the Federal Trade Commission that Drs. Berkley and Cassellius have violated Section 5 of the Federal Trade Commission Act by conspiring between themselves and with other chiropractors to fix prices for chiropractic services and to boycott the Gundersen Lutheran Health Plan (“Gundersen”) to obtain higher reimbursement rates for services. The proposed consent order has been placed on the public record for thirty days for reception of comments by interested persons. Comments received during this period will become part of the public record. After thirty days, the Commission will review the agreement and the comments received, and will decide whether it should withdraw from the agreement or make the agreement and proposed order final.

The purpose of this analysis is to facilitate public comment on the proposed order. The analysis is not intended to constitute an official interpretation of the agreement and proposed order or to modify in any way their terms. Further, the proposed consent order has been entered into for settlement purposes only and does not constitute an admission by Drs. Berkley and Cassellius that the law has been violated as alleged in the complaint.

The Complaint

Drs. Berkley and Cassellius are chiropractors with their principal places of business in La Crosse, Wisconsin. Except to the extent that competition has been restrained as alleged in the complaint, Drs. Berkley and Cassellius have been, and are now, in competition with each other and with other chiropractors in and around La Crosse, Wisconsin.

Analysis to Aid Public Comment

Since at least January 1997, and continuing until at least June 1997, Drs. Berkley and Cassellius conspired among themselves and with other chiropractors to fix prices for chiropractic services and to boycott Gundersen, a third-party payer doing business in and around La Crosse County, Wisconsin. The purpose of the boycott was, among other things, to obtain higher reimbursement from Gundersen for chiropractic services. Drs. Berkley and Cassellius organized at least two meetings of La Crosse area chiropractors to discuss their concerns about Gundersen. A central concern raised at these meetings was Gundersen's purportedly low reimbursement rates. During these meetings, the chiropractors agreed that Gundersen should increase its reimbursement rates and determined that a majority of the chiropractors were willing to leave the Gundersen network if it did not address their concerns. Dr. Berkley, acting on behalf of the group of chiropractors, communicated to Gundersen the chiropractors' concerns and the implicit threat of a boycott. The threatened boycott was successful: Gundersen, fearing the loss of a substantial number of chiropractic providers and the disruption of its network, acceded to the chiropractors' demands and increased its reimbursement rates by 20%.

Drs. Berkley and Cassellius and the other unnamed chiropractors have not integrated their practices in any economically significant way, nor have they created any efficiencies that might justify this conduct. Had they done either of these, under some circumstances, the agreement on price might not have been unlawful. Their actions have harmed consumers by increasing the prices that are paid for chiropractic services and by depriving consumers of the benefits of competition among chiropractors.

Analysis to Aid Public Comment

The Proposed Consent Order

The proposed consent order is designed to prevent the illegal concerted action alleged in the complaint. Paragraph II.A prohibits Drs. Berkley and Cassellius from fixing prices for any chiropractic goods or services. Paragraph II.B prohibits them from: (1) engaging in collective negotiations on behalf of any chiropractors; (2) orchestrating concerted refusals to deal; or (3) fixing prices, or any other terms, on which chiropractors deal. Paragraph II.C prohibits Drs. Berkley and Cassellius from encouraging, advising, or pressuring any person to engage in any action that would be prohibited if the person were subject to the order.

Paragraph II. includes a proviso allowing Drs. Berkley and Cassellius to engage in conduct (including collectively determining reimbursement and other terms of contracts with payers) that is reasonably necessary to operate (a) any “qualified risk-sharing joint arrangement,” or, provided Drs. Berkley and Cassellius have complied with the order’s prior notification requirements, (b) any “qualified clinically integrated joint arrangement.”

For the purposes of the order, a “qualified risk-sharing joint arrangement” must satisfy three conditions. First, all physicians participating in the arrangement must share substantial financial risk from their participation in the arrangement. The order lists ways in which physicians might share financial risk, tracking the types of financial risk sharing set forth in the *Statements of Antitrust Enforcement Policy in Health Care, Statement 8 on Physician Network Joint Ventures* issued jointly by the FTC and the Department of Justice on August 28, 1996 (4 Trade Reg. Rep. (CCH) ¶ 13,153 at 20,814). For example, physician participants can agree to provide services to a health plan at a “capitated” rate (a fixed payment per enrollee regardless of the amount of services provided to an enrollee). Second, any agreement on prices or terms of reimbursement entered into by the arrangement must be reasonably necessary to obtain significant efficiencies through the

Analysis to Aid Public Comment

joint arrangement. For example, a joint arrangement for billing services alone would not be sufficient, because the agreement on prices would not be necessary to achieve the benefits of the billing services. Third, the arrangement must be non-exclusive, i.e., physicians can also deal with payers individually or through other arrangements.

For purposes of the order, a “qualified clinically integrated joint arrangement” is one in which physicians undertake cooperative activities to achieve efficiencies in the delivery of clinical services without necessarily sharing substantial financial risk. The cooperation may include:

- (1) establishing mechanisms to monitor and control utilization of health care services that are designed to control costs and assure quality of care;
- (2) selectively choosing network physicians who are likely to further these efficiency objectives;
- and (3) the significant investment of capital, both monetary and human, in the necessary infrastructure and capability to realize the claimed efficiencies.

Id. at 20,817.

In order for a qualified clinically integrated joint arrangement formed by Drs. Berkley and Cassellius to fall within the proviso, they must comply with the order's requirements for prior notification. The prior notification mechanism will allow the Commission to evaluate a specific proposed arrangement and assess its likely competitive impact. This requirement will help guard against the recurrence of acts and practices that have restrained competition and consumer choice.

Paragraph III. requires that Drs. Berkley and Cassellius distribute a notification letter and copies of the complaint and order to all current and future agents, representatives, and

Analysis to Aid Public Comment

employees whose activities are affected by the order, or who have responsibilities with respect to the subject matter of the order. Paragraph IV. requires that Drs. Berkley and Cassellius notify the Commission of any change in their employment and would require them to provide copies of the complaint and consent order to any new employer for which their new duties and responsibilities are subject to any provisions in the order.

Paragraph V. requires that Drs. Berkley and Cassellius distribute a copy of the complaint and order to each payer or provider who, at any time since January 1, 1997, has communicated any desire, willingness, or interest in contracting for chiropractic goods and services with either of them.

Paragraphs VI. and VII. consist of standard Commission reporting and compliance procedures. Finally, Paragraph VIII. contains a standard twenty year "sunset" provision under which the terms of the order terminate twenty years after the date of issuance.

Complaint

IN THE MATTER OF

RHODIA, ET AL.

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

*Docket C-3930; File No. 9910237
Complaint, March 13, 2000--Decision, April 18, 2000*

This consent order addresses the acquisition by Respondents Rhodia, of Albright & Wilson PLC, a wholly owned subsidiary of Donau Chemie AG. Respondent is required to divest to Potash Corporation of Saskatchewan A&W's United States pure phosphoric acid business, including A&W's interest in the Joint Venture, as well as joint venture manufacturing assets, including the Aurora pure phosphoric acid plant and the Cincinnati plant. The order also requires Respondents to provide PCS with technology A&W has developed for manufacturing pure phosphoric acid and for using it in certain applications. The order also requires respondents to divest other assets related to A&W's pure phosphoric acid business, including customer lists, contracts, and other intangible assets. The Order to Maintain Assets requires that respondents preserve the A&W assets they are required to divest as a viable and competitive operation until those assets are transferred, and to conduct the A&W pure phosphoric acid business in the ordinary course of business. Furthermore, the Order to Maintain Assets includes an obligation on respondents to build and maintain a sufficient inventory of pure phosphoric acid to ensure there is no shortage of supply during the period that the business is being transferred.

Participants

For the Commission: *Robert S. Tovsky, Randall Conner, Gorav Jindal, Jeanine Balbach, Steven Wilensky, Emily Byers, Morris A. Bloom, John O'Hara Horsley, Richard Liebeskind, Daniel P. Ducore, Thomas R. Isso, Louis Silva, and Gregory Vistnes.*

Complaint

For the Respondents: *Michael N. Sohn and Cathy A. Hoffman, Arnold & Porter, Steven C. Sunshine, Shearman & Sterling, George S. Cary, Cleary, Gottlieb, Steen & Hamilton, and Raymond A. Jacobsen and Joel R. Grosberg, McDermott, Will & Emery.*

COMPLAINT

The Federal Trade Commission ("Commission"), having reason to believe that Rhodia has entered into an agreement to acquire Albright & Wilson PLC, a wholly-owned subsidiary of Donau Chemie AG, and that the acquisition, if consummated, would result in a violation of Section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45, and Section 7 of the Clayton Act, 15 U.S.C. § 18, 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:

A. THE RESPONDENTS

1. Respondent Rhodia is a corporation organized, existing, and doing business under and by virtue of the laws of France, with its executive offices located at 26, quai Alphonse Le Gallo, 92512 Boulogne-Billancourt Cédex, France. Rhodia, among other things, engages in the development, manufacture and sale of pure phosphoric acid and phosphate salts, primarily in Europe and North America.

2. Respondent Donau Chemie AG is a corporation organized, existing and doing business under and by virtue of the laws of Austria, with its office and principal place of business located at Am Heumarkt 10, A-1037, Vienna, Austria. In April 1999, Donau acquired Albright & Wilson through a cash tender offer valued at approximately \$720 million.

3. Respondent Albright & Wilson PLC is a corporation organized, existing and doing business under and by virtue of the laws of the United Kingdom, with its office and principal place of

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business located at 210-222 Hagley Road West, Oldbury, West Midlands, B68 ONN, England. Albright & Wilson, among other things, engages in the worldwide development, manufacture and sale of pure phosphoric acid and phosphate salts.

4. At all times relevant herein, Respondents Rhodia, Donau and Albright & Wilson have been and are now engaged in commerce, as “commerce” is defined in Section 1 of the Clayton Act, 15 U.S.C. § 12, and are corporations whose business is in or affecting commerce as “commerce” is defined in Section 4 of the Federal Trade Commission Act, 15 U.S.C. § 44.

B. THE PROPOSED ACQUISITIONS

5. On March 30, 1999, Rhodia and Donau executed two agreements, including a Heads of Agreement and a Call Option Agreement. Pursuant to these agreements, Donau acquired, through a cash tender offer supported by Rhodia, all of the outstanding voting securities of Albright & Wilson, and granted Rhodia an option to acquire from Donau the ownership of the Albright & Wilson voting securities. Rhodia currently intends to exercise its option to acquire Albright & Wilson, for an aggregate exercise price exceeding \$700 million.

C. RELEVANT MARKET

6. The relevant line of commerce in which to analyze the effects of Rhodia’s proposed acquisition of Albright & Wilson is the manufacture, marketing and sale of pure phosphoric acid. There are no economic substitutes for pure phosphoric acid.

7. Pure phosphoric acid is a syrupy tribasic acid that is used in a wide variety of applications. It is used in food applications, such as cola beverages and pet food, and in technical applications, such as cleaning compounds, metal surface treatments, and water

Complaint

treatment products. Pure phosphoric acid is sold directly to end users, and also is used as an input to create phosphate salts, such as sodium tripolyphosphate.

8. Pure phosphoric acid is produced in the United States primarily by two different methods. The older method is the thermal process, in which producers add water to elemental phosphorus. The newer method is the solvent extraction process, in which producers use solvents to remove impurities from impure, or "green," phosphoric acid. The solvent extraction process has a cost advantage over the thermal process because it is much less energy-intensive.

9. A small but significant and non-transitory price increase would not affect the current level of consumption of pure phosphoric acid in any of the significant end-use applications.

10. The relevant geographic market in which to analyze the effects of Rhodia's proposed acquisition of Albright & Wilson is the United States. The level of imports of pure phosphoric acid has been small compared to the overall market, and has not been highly responsive to changes in United States prices. In fact, prices in the United States have historically been much higher than prices in other parts of the world.

11. There are several reasons why imports of pure phosphoric acid into the United States have been limited. One reason is that transportation costs account for a significant portion of the delivered cost of phosphoric acid. Another reason is that many of the overseas producers employ the older, higher-cost thermal process to produce pure phosphoric acid. Other reasons why imports have been limited include access to distribution and the cost of terminal storage for product imported from overseas. In addition, agreements between producers in the United States and various overseas producers have had the effect of limiting the level of competition from these overseas producers.

Complaint

12. The overseas producers that have been most active in making sales of pure phosphoric acid in the United States have been those that employ the solvent extraction process. Nevertheless, the level of sales by these companies has been low. Moreover, these overseas producers of pure phosphoric acid have faced significant duties that have limited their ability to sell pure phosphoric acid in the United States. These duties have increased costs for the overseas producers, and also have chilled sales by the overseas producers in the United States.

D. MARKET STRUCTURE

13. The United States market for pure phosphoric acid is highly concentrated. Four manufacturers, including Rhodia, Albright & Wilson, FMC and Solutia, currently account for approximately 95% of the local production capacity that can supply United States customers, and 95% of sales of pure phosphoric acid. Albright & Wilson's share of direct sales to customers is close to 28%, and Rhodia's share is approximately 11%. The proposed acquisition would increase the Herfindahl-Hirschman Index for United States sales of pure phosphoric acid by over 630 points, from over 2300 to over 2940.

14. Rhodia produces pure phosphoric acid using the solvent extraction process at a plant in Geismar, Louisiana, which has an annual capacity of approximately 100,000 metric tons. It produces pure phosphoric acid via the thermal process at plants in Nashville, Tennessee and Morrisville, Pennsylvania. The Nashville plant has an annual capacity of over 38,000 metric tons and the Morrisville plant has an annual capacity of over 100,000 metric tons. Rhodia utilizes the production capacity of the Geismar plant at a much higher rate than the two thermal acid plants. Rhodia also produces phosphate salts in several different plants. Rhodia sells purified phosphoric acid directly to end-customers, and also uses it in the manufacture of phosphate salts.

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15. In 1998, Rhodia had total sales to customers in the United States of over 50 million pounds of pure phosphoric acid. Rhodia also consumes large amounts of pure phosphoric acid internally in the manufacture of phosphate salts.

16. Albright & Wilson produces pure phosphoric acid via the solvent extraction process at one plant in the United States, in Aurora, North Carolina, which is part of a joint venture with Potash Corporation of Saskatchewan ("PCS"). The capacity of this plant is approximately 155,000 metric tons per year. It produces pure phosphoric acid via the thermal acid process at a plant in Charleston, South Carolina, which has a capacity of approximately 14,000 metric tons per year. Albright & Wilson also produces pure phosphoric acid at a plant in Mexico, which has a capacity of approximately 180,000 metric tons per year. A&W utilizes the production capacity of the Aurora plant at a higher rate than the capacity of the Charleston thermal acid plant.

17. In 1998, Albright & Wilson had total sales to customers in the United States of over 150 million pounds of pure phosphoric acid. Its North American sales of pure phosphoric acid totaled over 400 million pounds. Albright & Wilson also consumed large amounts of its pure phosphoric acid production internally, to produce a wide range of phosphate salts.

18. Besides Rhodia, Albright & Wilson, FMC and Solutia, two other companies that produce pure phosphoric acid in North America for sale in the United States are Earth Sciences and Simplot. Earth Sciences and Simplot have each been producing pure phosphoric acid for the last two to three years, using processes to manufacture pure phosphoric acid different from the other North American producers. Both of these companies have very limited production capacity and sales compared to the other four producers, and are unlikely to grow their sales substantially in the foreseeable future.

Complaint

E. CONDITIONS OF ENTRY

19. *De novo* entry or fringe expansion into the relevant market would require a substantial sunk investment and a significant period of time, such that new entry would be neither timely, likely, nor sufficient.

20. The minimum viable scale of a pure phosphoric acid production facility likely precludes new entry. The prevailing pure phosphoric acid technology demands large-scale production, relative to market size, in order to operate efficiently. This technology has but a single use -- the production of pure phosphoric acid. It cannot economically be shifted toward another use. Therefore, all returns on investment must be derived from pure phosphoric acid sales. Because economic entry would require that a new producer capture a significant market share from existing producers, and because the costs of such entry would be sunk, such entry is inherently risky.

F. MARKET CHARACTERISTICS THAT FACILITATE COORDINATED INTERACTION

21. The characteristics of the market for pure phosphoric acid facilitate coordinated interaction among producers, to the detriment of the purchasers of this product. Among such characteristics are:

- a. The United States market for pure phosphoric acid is highly concentrated;
- b. Pure phosphoric acid is a highly homogeneous product that is purchased primarily on the basis of price;

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- c. Reliable pricing information is available from customers, and from other producers due to the practice of publicly announcing price increases in advance of their implementation;
- d. There is a strong tendency toward coordination among producers of pure phosphoric acid. Producers recognize the market to be an oligopoly in which competitive rivalry is low; and
- e. Producers tend to refrain from bidding against their competitors at accounts that they recognize to be important to the other producers, and, furthermore, undertake strategic retaliation at specific accounts as a means to discipline and deter future competition.

G. EFFECTS OF THE PROPOSED ACQUISITION

22. The effect of the acquisition may be substantially to lessen competition and to tend to create a monopoly in the relevant market in violation of Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18, and Section 5 of the FTC Act, as amended, 15 U.S.C. § 45, in the following ways, among others:

- a. It will substantially increase concentration in the market for pure phosphoric acid;
- b. It will significantly enhance the likelihood of coordinated interaction in the relevant market among the competitors in the manufacture and sale of pure phosphoric acid;
- c. It will increase the likelihood that purchasers of pure phosphoric acid in the relevant geographic market will be forced to pay higher prices. In fact, Rhodia's documents project higher pure phosphoric acid prices as a result of the proposed acquisition of Albright & Wilson.

Order to Maintain Assets

H. VIOLATIONS CHARGED

23. The acquisition agreements between Rhodia and Donau, as described in Paragraph 5, violate Section 5 of the FTC Act, as amended, 15 U.S.C. § 45.

24. The acquisition of Albright & Wilson by Rhodia, if consummated, would violate Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45, and Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18.

WHEREFORE, THE PREMISES CONSIDERED, the Federal Trade Commission on this thirteenth day of March, 2000, issues its complaint against said Respondents.

By the Commission, Commissioner Thompson dissenting.

ORDER TO MAINTAIN ASSETS

The Federal Trade Commission ("Commission"), having initiated an investigation of the proposed acquisition by Rhodia of Albright & Wilson PLC, a subsidiary of Donau Chemie AG, hereinafter referred to as "Respondents," and Respondents having been furnished thereafter with a copy of a draft of Complaint that the Bureau of Competition presented to the Commission for its consideration and which, if issued by the Commission, would charge Respondents with violations of Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18, and Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45; and

Order to Maintain Assets

Respondents, their attorneys, and counsel for the Commission having thereafter executed an Agreement Containing Consent Order ("Consent Agreement"), containing an admission by Respondents of all the jurisdictional facts set forth in the aforesaid draft of Complaint, a statement that the signing of said Agreement is for settlement purposes only and does not constitute an admission by Respondents that the law has been violated as alleged in such Complaint, or that the facts as alleged in such Complaint, other than jurisdictional facts, are true, and waivers and other provisions as required by the Commission's Rules; and

The Commission having thereafter considered the matter and having determined that it had reason to believe that Respondents have violated the said Acts, and that a Complaint should issue stating its charges in that respect, and having determined to accept the executed Agreement Containing Consent Orders and to place such Agreement on the public record for a period of thirty (30) days, the Commission hereby issues its Complaint, makes the following jurisdictional findings and issues this Order to Maintain Assets:

1. Rhodia is a corporation organized, existing and doing business under and by virtue of the laws of France, with its office and principal place of business located at 26, quai Alphonse Le Gallo, 92512 Boulogne-Billancourt Cédex, France.
2. Donau is a corporation organized, existing and doing business under and by virtue of the laws of Austria, with its office and principal place of business located at Am Heumarkt 10, A-1037, Vienna, Austria.
3. Albright & Wilson is a corporation organized, existing and doing business under and by virtue of the laws of the United Kingdom, with its office and principal place of business located at 210-222 Hagley Road West, Oldbury, West Midlands, B68 ONN, England.

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

ORDER**I.**

IT IS ORDERED that, as used in this Order to Maintain Assets, the following definitions shall apply:

- A. "Rhodia" means Rhodia, its directors, officers, employees, agents, representatives, successors, and assigns; its subsidiaries, divisions, groups, and affiliates controlled by Rhodia, and the respective directors, officers, employees, agents, representatives, successors, and assigns of each.
- B. "Albright & Wilson" means Albright & Wilson PLC, its directors, officers, employees, agents, representatives, successors, and assigns; its subsidiaries, divisions, groups, and affiliates controlled by Albright & Wilson, and the respective directors, officers, employees, agents, representatives, successors, and assigns of each.
- C. "Donau" means Donau Chemie AG, its directors, officers, employees, agents, representatives, successors, and assigns; its subsidiaries, divisions, groups, and affiliates controlled by Donau, and the respective directors, officers, employees, agents, representatives, successors, and assigns of each.
- D. "Commission" means the Federal Trade Commission.
- E. "Respondents" means Rhodia, Albright & Wilson, and Donau, respectively and collectively.

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- F. "Acquisition" means the Proposed Acquisition by Rhodia of Albright & Wilson as described in the March 30, 1999 Heads of Agreement and March 30, 1999 Call Option Agreement between Rhodia and Donau.
- G. "PCS" means Potash Corporation of Saskatchewan Inc., its subsidiaries, divisions, groups, and affiliates controlled by PCS, including, but not limited to, PCS Phosphate Company, Inc.
- H. "Purified Acid Joint Venture" or "Joint Venture" means the joint venture between Albright & Wilson and PCS, established pursuant to the July 29, 1988, General Partnership Agreement between Albright & Wilson Americas Inc. and Texasgulf, Inc., as amended.
- I. "Aurora Plant" means the Joint Venture's plant in Aurora, North Carolina which manufactures purified phosphoric acid.
- J. "Cincinnati Plant" means the Joint Venture's manufacturing plant in Cincinnati, Ohio which manufactures phosphate salts and blends of phosphoric acid.
- K. "Joint Venture Phosphoric Acid" means the phosphoric acid that is produced at the Aurora Plant and sold by the Purified Acid Joint Venture, including all grades and types of phosphoric acid that are or have been produced and sold by the Joint Venture.
- L. "Cincinnati Products" means the phosphoric acid blends and phosphate salts produced at the Cincinnati Plant.
- M. "Albright & Wilson Phosphate Salts" means phosphate salts that currently are or have been manufactured and/or sold by Albright & Wilson.
- N. "Joint Venture Products" Means Joint Venture Phosphoric Acid and Cincinnati Products.

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- O. "Albright & Wilson Interest" means the interest in the Purified Acid Joint Venture that is owned or controlled by Albright & Wilson.
- P. "PCS Divestiture Agreement" means the agreements between Rhodia, Albright & Wilson, PCS and the Joint Venture by which Albright & Wilson has agreed to sell and PCS has agreed to acquire the Assets To Be Divested.
- Q. "Intellectual Property" means any form of intellectual property relating to the research, development, manufacture or sale of Joint Venture Products, including, but not limited to, trademarks, patents, trade secrets, research materials, technical information, management information systems, software, inventions, test data, technological know-how, licenses, registrations, submissions, approvals, technology, specifications, designs, drawings, processes, recipes, protocols, formulas, customer lists, vendor lists, catalogs, sales promotion literature, advertising materials, quality control data, books, records, and files.
- R. "Assets To Be Divested" means the assets, properties, business and goodwill, tangible and intangible, of the Joint Venture or of Albright & Wilson that relate to Joint Venture Products, including, but not limited to:
1. the Albright & Wilson Interest;
 2. the Aurora Plant and the Cincinnati Plant, including all machinery, furniture, fixtures, tools and other tangible personal property;
 3. all other assets, properties, business and goodwill, tangible and intangible, owned, leased or possessed by Albright &

Order to Maintain Assets

Wilson relating to Joint Venture Phosphoric Acid, including, but not limited to:

- a. a royalty-free, non-exclusive license to all rights, title, and interest in and to Intellectual Property;
- b. all rights, title, and interest in and to inventories of products, raw materials (to the extent requested by the acquirer), supplies and parts, including work-in-process and finished goods, relating to the research, design, development, manufacture, marketing or sale of Joint Venture Phosphoric Acid;
- c. all rights, title, and interest in and to agreements, express or implied, relating to the research, design, development, manufacture, distribution, marketing or sale of Joint Venture Phosphoric Acid, regardless of whether such agreements relate exclusively to such purposes, including, but not limited to, warranties, guarantees, and contracts with joint venture partners, suppliers, sales representatives, distributors, agents, personal property lessors, personal property lessees, licensors, licensees, consignors, consignees, and customers; provided that, to the extent that any agreements relating to the sale of Joint Venture Phosphoric Acid also relate to the sale of phosphate salts, Respondents are not required to divest those portions of such agreements that relate to the sale of Albright & Wilson Phosphate Salts;
- d. all rights, title and interest in and to permits and approvals relating to the research, design, development, manufacture, distribution, marketing or sale of Joint Venture Phosphoric Acid, regardless of whether such permits and approvals relate exclusively to such purposes, to the extent permitted by law;

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- e. all customer and vendor lists, catalogs, sales promotion literature and advertising materials relating to the research, design, development, manufacture, distribution, marketing, or sale of Joint Venture Phosphoric Acid;
 - f. all equipment, vehicles and transportation facilities related to Joint Venture Phosphoric Acid, except to the extent that such assets relate exclusively to the marketing or sale of Albright & Wilson Phosphate Salts;
 - g. all storage capacity related to Joint Venture Phosphoric Acid;
 - h. all rights, title and interest in and to owned or leased real property, together with appurtenances, licenses and permits related to Joint Venture Phosphoric Acid;
 - i. all rights under warranties and guarantees, express or implied, related to Joint Venture Phosphoric Acid;
 - j. all books, records, and files related to Joint Venture Phosphoric Acid; and
 - k. all items of prepaid expense related to Joint Venture Phosphoric Acid;
4. all other assets, properties, business and goodwill, tangible and intangible, owned, leased or possessed by Albright & Wilson relating to Cincinnati Products, including, but not limited to:
- a. a royalty-free, non-exclusive license to all rights, titles, and interest in and to Intellectual Property;

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- b. all rights, title, and interest in and to inventories of products, raw materials (to the extent requested by the Acquirer), supplies and parts, including work-in-process and finished goods, relating to the research, design, development or manufacture of Cincinnati Products; provided, however, that Respondents are not required to divest inventories of finished and packaged Albright & Wilson Phosphate Salts;
- c. all rights, title, and interest in and to agreements, express or implied, relating to the research, design, development or manufacture of Cincinnati Products, regardless of whether such agreements relate exclusively to such purposes, including, but not limited to, warranties, guarantees, and contracts with joint venture partners, suppliers, sales representatives, distributors, agents, personal property lessors, personal property lessees, licensors, licensees, consignors, consignees, and customers;
- d. all rights, title and interest in and to permits and approvals relating to the research, design, development or manufacture of Cincinnati Products, regardless of whether such permits and approvals relate exclusively to such purposes, to the extent permitted by law;
- e. all equipment, vehicles and transportation facilities related to Cincinnati Products, except to the extent that such assets are used exclusively in the marketing or sale of Albright & Wilson Phosphate Salts;
- f. all storage capacity related to Cincinnati Products, except to the extent that such assets are used exclusively in the marketing or sale of Albright & Wilson Phosphate Salts;

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- g. all rights, titles and interests in and to owned or leased real property, together with appurtenances, licenses and permits related to Cincinnati Products, except to the extent that such assets are used exclusively in the marketing or sale of Albright & Wilson Phosphate Salts;
 - h. all rights under warranties and guarantees, express or implied, related to Cincinnati Products;
 - i. all books, records, and files related to Cincinnati Products, except to the extent that such assets are used exclusively in the marketing or sale of Albright & Wilson Phosphate Salts; and
 - j. all items of prepaid expense related to Cincinnati Products.
- S. "Support Services" means those services provided by Albright & Wilson to the Assets To Be Divested, as requested by the Commission-approved acquirer, including, but not limited to, accounting and administrative Support Services, customer order entry, freight and transportation scheduling, information services, product storage and handling services, and product support.

II.**IT IS FURTHER ORDERED** that:

- A. The purpose of this Order is to: (i) preserve the Assets To Be Divested as a viable, competitive, and ongoing business; (ii) assure that no material confidential information is exchanged between the respective businesses of Rhodia and Albright & Wilson; and (iii) prevent interim harm to competition.

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- B. Respondents shall take such actions as are necessary to maintain the viability, competitiveness, and marketability of the Assets To Be Divested; Respondents shall not sell, transfer, or encumber the Assets To Be Divested or other assets related to the Assets To Be Divested; and Respondents shall not cause or permit the destruction, removal, wasting, or deterioration, or otherwise impair the viability, competitiveness, or marketability of the Assets To Be Divested or other assets related to the Assets To Be Divested, except for ordinary wear and tear.
- C. Respondents shall conduct or cause to be conducted the business of the Assets To Be Divested in the regular and ordinary course and in accordance with past practice (including regular repair and maintenance efforts) and shall use their best efforts to preserve existing relationships with suppliers, customers, employees, and others having business relations with the Assets to Be Divested.
- D. Prior to the transfer of the Assets To Be Divested, Respondents shall ensure that a sufficient inventory of Joint Venture Phosphoric Acid is maintained and built up, consistent with past and/or projected demand, so as to assure that no shortages of such products occur at any time.
- E. Except as required by law, and except to the extent necessary information is exchanged in the course of evaluating the Acquisition, defending investigations or litigation, obtaining legal advice, negotiating agreements to divest assets, or complying with the Decision & Order or this Order to Maintain Assets, Rhodia shall not receive or have access to any competitively sensitive or proprietary information that relates to the Assets To Be Divested, including, but not limited to, customer lists, price lists, marketing methods, patents, technologies, processes or other trade secrets, not independently known to Rhodia from sources other than Albright & Wilson.

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III.

IT IS FURTHER ORDERED that Respondents shall maintain facilities and a work force sufficient to provide Support Services to the Assets To Be Divested. Such Support Services shall be equivalent to those currently supplied by Albright & Wilson to the Joint Venture. Respondents shall provide all employees providing Support Services as of January 1, 2000, to the Assets To Be Divested with incentives to continue in their employment positions and shall not terminate them (except for cause) or transfer them to other duties during the period covered by this Order to Maintain Assets. Such incentives shall include, but not be limited to:

- A. continuation of all employee benefits offered by Albright & Wilson until the transfer of functions provided for in the Commission-approved divestiture agreement is completed; and
- B. a bonus, equal to five (5) percent of the employee's annual salary (including any other bonuses except for the portion of any bonus payable solely as a result of Albright & Wilson's guaranteed bonus program) as of the date this Order to Maintain Assets is issued by the Commission to those Albright & Wilson employees identified in Schedule A of this Order to Maintain Assets, hereto attached, that continue their employment with Albright & Wilson until the completion of the transfer of functions provided for in the Commission-approved divestiture agreement described in the Consent Agreement and Decision and Order.

Provided, however, that Respondents' obligations under this Paragraph III shall cease as to any employee or Support Service upon notice from the buyer of the Assets To Be

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Divested that an employee or a Support Service is no longer required.

IV.**IT IS FURTHER ORDERED** that:

- A. Respondents shall not make employment offers to any individual listed in Schedule A to the Decision & Order for a period of one (1) year after this Order has been issued if such individual has accepted an employment offer from the Commission-approved acquirer. Respondents may make employment offers fifteen (15) days after this Order to Maintain Assets has been issued to any individual listed in Schedule A of the Decision & Order who has not accepted an employment offer from the Commission-approved acquirer.
- B. Respondents shall not interfere with the employment by the Commission-approved acquirer of the individuals listed in Schedule A to the Decision & Order; shall not offer any incentive to such employees to decline employment with the Commission-approved acquirer or to accept other employment with the Respondents; and shall remove any impediments that may deter such employees from accepting employment with the Commission-approved acquirer, including, but not limited to, any non-compete or confidentiality provisions of employment or other contracts with the Respondents that would affect the ability of those individuals to be employed by the Commission-approved acquirer. Provided, however, that any such waiver is limited to employment with the Commission-approved acquirer.
- C. No later than the date on which a divestiture agreement is signed with the proposed acquirer, Respondents shall provide the proposed acquirer with a complete list of all non-clerical employees of Albright & Wilson who have been or were engaged in the research, development, manufacture or sale of Joint Venture Phosphoric Acid, or the research, development

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or manufacture of Cincinnati Products, at any time during the period from January 1, 1999, until the date of such divestiture agreement. Such list shall state each such individual's name, position, address, current or last known business telephone number and a description of the duties and work performed by the individual in connection with Joint Venture Products.

- D. Respondents shall provide the proposed acquirer the opportunity to enter into employment contracts with those non clerical employees described in Paragraph IV.C., above, and shall remove any impediments that may deter such employees from accepting employment with the Commission-approved acquirer, including, but not limited to, any non-compete or confidentiality provisions of employment or other contracts with the Respondents that would affect the ability of those individuals to be employed by the Commission-approved acquirer. Provided, however, that any such waiver is limited to employment with the Commission-approved acquirer.

V.

IT IS FURTHER ORDERED that Respondents shall notify the Commission at least thirty (30) days prior to any proposed change in Respondents, such as dissolution, assignment, or sale resulting in the emergence of a successor corporation, or the creation or dissolution of subsidiaries or any other change in the corporation, that may affect compliance obligations arising out of this order.

VI.

IT IS FURTHER ORDERED that for the purposes of determining or securing compliance with this Order to Maintain Assets, and subject to any legally recognized privilege, and upon written request with reasonable notice to Respondents made to

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their principal United States offices, Respondents shall permit any duly authorized representatives of the Commission:

- A. Access, during office hours of Respondents and in the presence of counsel, to all facilities, and access 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 Respondents relating to compliance with this Order to Maintain Assets; and
- B. Upon five (5) days' notice to Respondents and without restraint or interference from Respondents, to interview officers, directors, or employees of Respondents, who may have counsel present, regarding such matters.

VII.

IT IS FURTHER ORDERED that this Order to Maintain Assets shall terminate on the earlier of:

- A. Three (3) business days after the Commission withdraws its acceptance of the Consent Agreement pursuant to the provisions of Commission Rule 2.34, 16 C.F.R. § 2.34; or
- B. When the Assets To Be Divested have been divested and the transition period provided for in the Commission-approved divestiture agreement has been completed.

By the Commission, Commissioner Thompson dissenting.

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DECISION AND ORDER

The Federal Trade Commission having initiated an investigation of the proposed acquisition by Respondent Rhodia of Albright & Wilson PLC (“Albright & Wilson”) from Donau Chemie AG (“Donau”), and Respondents having been furnished thereafter with a copy of a draft of Complaint that the Bureau of Competition presented to the Commission for its consideration and which, if issued by the Commission, would charge Respondents with violations of Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18, and Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45; and

Respondents, their attorneys, and counsel for the Commission having thereafter executed an Agreement Containing Consent Orders (“Consent Agreement”), containing an admission by Respondents of all the jurisdictional facts set forth in the aforesaid draft of Complaint, a statement that the signing of said Consent Agreement is for settlement purposes only and does not constitute an admission by Respondents that the law has been violated as alleged in such Complaint, or that the facts as alleged in such Complaint, other than jurisdictional facts, are true, and waivers and other provisions as required by the Commission’s Rules; and

The Commission, having thereafter considered the matter and having determined that it had reason to believe that Respondents have violated the said Acts, and that a Complaint should issue stating its charges in that respect, and having thereupon issued its Complaint and an Order to Maintain Assets, and having accepted the executed Consent Agreement and placed such Consent Agreement on the public record for a period of thirty (30) days for the receipt and consideration of public comments, now in further conformity with the procedure described in Commission Rule 2.34, 16 C.F.R. § 2.34, the Commission hereby makes the following jurisdictional findings and issues the following Order:

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1. Rhodia is a corporation organized, existing and doing business under and by virtue of the laws of France, with its office and principal place of business located at 26, quai Alphonse Le Gallo, 92512 Boulogne-Billancourt Cédex, France.
2. Donau is a corporation organized, existing and doing business under and by virtue of the laws of Austria, with its office and principal place of business located at Am Heumarkt 10, A-1037, Vienna, Austria.
3. Albright & Wilson is a corporation organized, existing and doing business under and by virtue of the laws of the United Kingdom, with its office and principal place of business located at 210-222 Hagley Road West, Oldbury, West Midlands, B68 ONN, England.
4. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of Respondents, and the proceeding is in the public interest.

ORDER**I.**

IT IS ORDERED that, as used in this Order, the following definitions shall apply:

- A. "Rhodia" means Rhodia, its directors, officers, employees, agents, representatives, successors, and assigns; its subsidiaries, divisions, groups, and affiliates controlled by Rhodia, and the respective directors, officers, employees, agents, representatives, successors, and assigns of each.
- B. "Albright & Wilson" means Albright & Wilson PLC, its directors, officers, employees, agents, representatives, successors, and assigns; its subsidiaries, divisions, groups, and affiliates controlled by Albright & Wilson, and the

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respective directors, officers, employees, agents, representatives, successors, and assigns of each.

- C. "Donau" means Donau Chemie AG, its directors, officers, employees, agents, representatives, successors, and assigns; its subsidiaries, divisions, groups, and affiliates controlled by Donau, and the respective directors, officers, employees, agents, representatives, successors, and assigns of each.
- D. "Commission" means the Federal Trade Commission.
- E. "Respondents" means Rhodia, Albright & Wilson, and Donau, respectively and collectively.
- F. "Acquisition" means the Acquisition by Rhodia of Albright & Wilson as described in the March 30, 1999, Heads of Agreement and March 30, 1999, Call Option Agreement between Rhodia and Donau.
- G. "PCS" means Potash Corporation of Saskatchewan Inc., its subsidiaries, divisions, groups, and affiliates controlled by PCS, including, but not limited to, PCS Phosphate Company, Inc.
- H. "Purified Acid Joint Venture" or "Joint Venture" means the joint venture between Albright & Wilson and PCS, established pursuant to the July 29, 1988, General Partnership Agreement between Albright & Wilson Americas Inc. and Texasgulf, Inc., as amended.
- I. "Aurora Plant" means the Joint Venture's plant in Aurora, North Carolina which manufactures Joint Venture Phosphoric Acid.

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- J. "Cincinnati Plant" means the Joint Venture's manufacturing plant in Cincinnati, Ohio.
- K. "Joint Venture Phosphoric Acid" means the phosphoric acid that is produced at the Aurora Plant and sold by the Purified Acid Joint Venture, including all grades and types of phosphoric acid that are or have been produced and sold by the Joint Venture.
- L. "Cincinnati Products" means the phosphoric acid blends and phosphate salts produced at the Cincinnati Plant.
- M. "Albright & Wilson Phosphate Salts" means phosphate salts that currently are or have been manufactured and/or sold by the Joint Venture or Albright & Wilson.
- N. "Joint Venture Products" means Joint Venture Phosphoric Acid and Cincinnati Products.
- O. "Albright & Wilson Interest" means the interest in the Purified Acid Joint Venture that is owned or controlled by Albright & Wilson.
- P. "PCS Divestiture Agreement" means the agreements between Rhodia, Albright & Wilson, PCS and the Joint Venture by which Albright & Wilson has agreed to sell and PCS has agreed to acquire the Assets To Be Divested.
- Q. "Intellectual Property" means any form of intellectual property relating to the research, development, manufacture or sale of Joint Venture Products, including, but not limited to, trademarks, patents, trade secrets, research materials, technical information, management information systems, software, inventions, test data, technological know-how, licenses, registrations, submissions, approvals, technology, specifications, designs, drawings, processes, recipes, protocols, formulas, customer lists, vendor lists, catalogs, sales promotion

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literature, advertising materials, quality control data, books, records, and files.

- R. "Assets To Be Divested" means the assets, properties, business and goodwill, tangible and intangible, of the Joint Venture or of Albright & Wilson that relate to Joint Venture Products, including, but not limited to:
1. the Albright & Wilson Interest;
 2. the Aurora Plant and the Cincinnati Plant, including all machinery, furniture, fixtures, tools and other tangible personal property;
 3. all other assets, properties, business and goodwill, tangible and intangible, owned, leased or possessed by Albright & Wilson relating to Joint Venture Phosphoric Acid, including, but not limited to:
 - a. a royalty-free, non-exclusive license to all rights, title, and interest in and to Intellectual Property;
 - b. all rights, title, and interest in and to inventories of products, raw materials (to the extent requested by the acquirer), supplies and parts, including work-in-process and finished goods, relating to the research, design, development, manufacture, marketing or sale of Joint Venture Phosphoric Acid;
 - c. all rights, title, and interest in and to agreements, express or implied, relating to the research, design, development, manufacture, distribution, marketing or sale of Joint Venture Phosphoric Acid, regardless of whether such agreements relate

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exclusively to such purposes, including, but not limited to, warranties, guarantees, and contracts with joint venture partners, suppliers, sales representatives, distributors, agents, personal property lessors, personal property lessees, licensors, licensees, consignors, consignees, and customers; provided that, to the extent that any agreements relating to the sale of Joint Venture Phosphoric Acid also relate to the sale of phosphate salts, Respondents are not required to divest those portions of such agreements that relate to the sale of Albright & Wilson Phosphate Salts;

- d. all rights, title and interest in and to permits and approvals relating to the research, design, development, manufacture, distribution, marketing or sale of Joint Venture Phosphoric Acid, regardless of whether such permits and approvals relate exclusively to such purposes, to the extent permitted by law;
- e. all customer and vendor lists, catalogs, sales promotion literature and advertising materials relating to the research, design, development, manufacture, distribution, marketing, or sale of Joint Venture Phosphoric Acid;
- f. all equipment, vehicles and transportation facilities related to Joint Venture Phosphoric Acid, except to the extent that such assets relate exclusively to the marketing or sale of Albright & Wilson Phosphate Salts;
- g. all storage capacity related to Joint Venture Phosphoric Acid;

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- h. all rights, title and interest in and to owned or leased real property, together with appurtenances, licenses and permits related to Joint Venture Phosphoric Acid;
 - i. all rights under warranties and guarantees, express or implied, related to Joint Venture Phosphoric Acid;
 - j. all books, records, and files related to Joint Venture Phosphoric Acid; and
 - k. all items of prepaid expense related to Joint Venture Phosphoric Acid;
2. all other assets, properties, business and goodwill, tangible and intangible, owned, leased or possessed by Albright & Wilson relating to Cincinnati Products, including, but not limited to:
- a. a royalty-free, non-exclusive license to all rights, title, and interest in and to Intellectual Property;
 - b. all rights, title, and interest in and to inventories of products, raw materials (to the extent requested by the acquirer), supplies and parts, including work-in-process and finished goods, relating to the research, design, development or manufacture of Cincinnati Products; provided, however, that Respondents are not required to divest inventories of finished and packaged Albright & Wilson Phosphate Salts;

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- c. all rights, title, and interest in and to agreements, express or implied, relating to the research, design, development or manufacture of Cincinnati Products, regardless of whether such agreements relate exclusively to such purposes, including, but not limited to, warranties, guarantees, and contracts with joint venture partners, suppliers, sales representatives, distributors, agents, personal property lessors, personal property lessees, licensors, licensees, consignors, consignees, and customers;
- d. all rights, title and interest in and to permits and approvals relating to the research, design, development or manufacture of Cincinnati Products, regardless of whether such permits and approvals relate exclusively to such purposes, to the extent permitted by law;
- e. all equipment, vehicles and transportation facilities related to Cincinnati Products, except to the extent that such assets relate exclusively to the marketing or sale of Albright & Wilson Phosphate Salts;
- f. all storage capacity related to Cincinnati Products, except to the extent that such assets are used exclusively in the marketing or sale of Albright & Wilson Phosphate Salts;
- g. all rights, titles and interests in and to owned or leased real property, together with appurtenances, licenses and permits related to Cincinnati Products, except to the extent that such assets are used exclusively in the marketing or sale of Albright & Wilson Phosphate Salts;
- h. all rights under warranties and guarantees, express or implied, related to Cincinnati Products;

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- i. all books, records, and files related to Cincinnati Products, except to the extent that such assets are used exclusively in the marketing or sale of Albright & Wilson Phosphate Salts; and
 - j. all items of prepaid expense related to Cincinnati Products.
- S. "Trustee" means a trustee appointed pursuant to Paragraph III.A. of this Order.

II.**IT IS FURTHER ORDERED** that:

- A. Respondents shall divest the Assets To Be Divested to PCS pursuant to the PCS Divestiture Agreement no later than ten (10) days after Rhodia's consummation of the Acquisition. The purpose of the divestiture is to ensure the continued use of the Assets To Be Divested in the same business in which they were engaged at the time of the Acquisition and to remedy the lessening of competition resulting from the Acquisition as alleged in the Commission's complaint. Failure by Respondents to perform the divestiture agreement shall also constitute a violation of this Order.

Provided, however, that, if at that time the Commission determines to issue the Order, the Commission notifies Respondents that PCS is not an acceptable acquirer or that the PCS Divestiture Agreement is not an acceptable manner of divestiture, the Respondents shall, within one-hundred and twenty (120) days from the date on which this Order is issued by the Commission, divest the Assets To Be Divested to an

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acquirer that is approved by the Commission, and in a manner approved by the Commission.

- B. No later than the date on which a divestiture agreement is signed with the proposed acquirer, Respondents shall provide the proposed acquirer with a complete list of all non-clerical employees of Albright & Wilson who have been or were engaged in the research, development, manufacture or sale of Joint Venture Phosphoric Acid, or the research, development or manufacture of Cincinnati Products, at any time during the period from January 1, 1999, until the date of such divestiture agreement. Such list shall state each such individual's name, position, address, current or last known business telephone number and a description of the duties and work performed by the individual in connection with Joint Venture Products.
- C. Respondents shall provide the proposed acquirer the opportunity to enter into employment contracts with the non-clerical employees described in Paragraph II.B.
- D. Respondents shall provide the proposed acquirer with an opportunity to inspect the personnel files and other documentation relating to all non-clerical employees who have been engaged in the research, development, manufacture or sale of Joint Venture Phosphoric Acid or the research, development or manufacture of Cincinnati Products, to the extent permissible under applicable laws, at the request of the proposed acquirer no later than the date of the execution of the related divestiture agreement.
- E. Respondents shall provide the individuals identified in Schedule A of this Order, hereto attached, with financial incentives to accept employment with the Commission-approved acquirer at the time of the divestiture. Such incentives shall include, but not be limited to:

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1. a bonus equal to fifteen (15) percent of the employee's annual salary (including any other bonuses except for the portion of any bonus payable solely as a result of Albright & Wilson's guaranteed bonus program) as of the date this Order is issued by the Commission for any individual who agrees to accept an offer of employment from the Commission-approved acquirer, payable by Respondents, as follows: 1) a ten (10) percent bonus upon the beginning of the employee's employment with the Commission-approved acquirer; and 2) a five (5) percent bonus upon the employee's completion of one year of employment with the Commission-approved acquirer; and
 2. the severance payment to which Albright & Wilson employees would be entitled upon termination if, less than twelve (12) months after the date on which such employee commences employment with the Commission-approved acquirer, the Commission-approved acquirer terminates the employment of such employee for reasons other than cause. The amount of such severance payment shall be equal to the payment that such employee would have received had he or she remained in the employ of Albright & Wilson and been terminated at such time, less any severance payment actually paid by the Commission-approved acquirer.
- F. Respondents shall not make employment offers to any individual listed in Schedule A of this Order for a period of one (1) year after this Order has been issued if such individual has accepted an employment offer from the Commission-approved acquirer. Respondents may make employment offers fifteen (15) days after this Order has been issued to any individual listed in Schedule A who has

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not accepted an employment offer from the Commission-approved acquirer.

- G. Respondents shall not interfere with the employment by the Commission-approved acquirer of the individuals listed in Schedule A; shall not offer any incentive to such employees to decline employment with the Commission-approved acquirer or to accept other employment with the Respondents; and shall remove any impediments that may deter such employees from accepting employment with the Commission-approved acquirer, including, but not limited to, any non-compete or confidentiality provisions of employment or other contracts with the Respondents that would affect the ability of those individuals to be employed by the Commission-approved acquirer. Provided, however, that any such waiver is limited to employment with the Commission-approved acquirer.

III.**IT IS FURTHER ORDERED** that:

- A. If Respondents have not divested, absolutely and in good faith and with the Commission's prior approval, the Assets To Be Divested in accordance with Paragraph II.A. of this Order, the Commission may appoint a trustee to divest the Assets To Be Divested. In the event that the Commission or the Attorney General brings an action pursuant to § 5(l) of the Federal Trade Commission Act, 15 U.S.C. § 45(l), or any other statute enforced by the Commission, Respondents shall consent to the appointment of a trustee in such action. Neither the appointment of a trustee nor a decision not to appoint a trustee under this Paragraph shall preclude the Commission or the Attorney General from seeking civil penalties or any other relief available to it, including a court-appointed trustee, pursuant to § 5(l) of the Federal Trade Commission Act, or any other statute

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enforced by the Commission, for any failure by the Respondents to comply with this Order.

- B. If a trustee is appointed by the Commission or a court pursuant to Paragraph III.A. of this Order, Respondents shall consent to the following terms and conditions regarding the trustee's powers, duties, authority, and responsibilities:
1. The Commission shall select the trustee, subject to the consent of Respondents, which consent shall not be unreasonably withheld. The trustee shall be a person with experience and expertise in acquisitions and divestitures. If Respondents have not opposed, in writing, including the reasons for opposing, the selection of any proposed trustee within ten (10) days after notice by the staff of the Commission to Respondents of the identity of any proposed trustee, Respondents shall be deemed to have consented to the selection of the proposed trustee.
 2. Subject to the prior approval of the Commission, the trustee shall have the exclusive power and authority to divest the Assets To Be Divested.
 3. Within ten (10) days after appointment of the trustee, Respondents shall execute a trust agreement that, subject to the prior approval of the Commission and, in the case of a court-appointed trustee, of the court, transfers to the trustee all rights and powers necessary to permit the trustee to effect the divestiture required by this Order.

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4. The trustee shall have twelve (12) months from the date the Commission approves the trust agreement described in Paragraph III.B.3. to accomplish the divestiture, which shall be subject to the prior approval of the Commission. If, however, at the end of the twelve-month period, the trustee has submitted a plan of divestiture or believes that divestiture can be achieved within a reasonable time, the divestiture period may be extended by the Commission, or, in the case of a court-appointed trustee, by the court; provided, however, the Commission may extend this period only two (2) times.
5. The trustee shall have full and complete access to the personnel, books, records and facilities related to the Assets To Be Divested or to any other relevant information, as the trustee may request. Respondents shall develop such financial or other information as such trustee may request and shall cooperate with the trustee. Respondents shall take no action to interfere with or impede the trustee's accomplishment of the divestiture. Any delays in divestiture caused by Respondents shall extend the time for divestiture under this Paragraph in an amount equal to the delay, as determined by the Commission or, for a court-appointed trustee, by the court.
6. The trustee shall use his or her best efforts to negotiate the most favorable price and terms available in each contract that is submitted to the Commission, subject to Respondents' absolute and unconditional obligation to divest expeditiously at no minimum price. The divestiture shall be made in the manner and to the acquirer as set out in Paragraph II. of this Order; provided, however, if the trustee receives bona fide offers from more than one acquiring entity, and if the Commission determines to approve more than one such acquiring entity, the trustee shall divest to the

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acquiring entity selected by Respondents from among those approved by the Commission; provided further, however, that Respondents shall select such entity within five (5) business days of receiving notification of the Commission's approval.

7. The trustee shall serve, without bond or other security, at the cost and expense of Respondents, on such reasonable and customary terms and conditions as the Commission or a court may set. The trustee shall have the authority to employ, at the cost and expense of Respondents, such consultants, accountants, attorneys, investment bankers, business brokers, appraisers, and other representatives and assistants as are necessary to carry out the trustee's duties and responsibilities. The trustee shall account for all monies derived from the divestiture and all expenses incurred. After approval by the Commission and, in the case of a court-appointed trustee, by the court, of the account of the trustee, including fees for his or her services, all remaining monies shall be paid at the direction of the Respondents, and the trustee's power shall be terminated. The trustee's compensation shall be based at least in significant part on a commission arrangement contingent on the trustee's divesting the Assets To Be Divested.
8. Respondents shall indemnify the trustee and hold the trustee harmless against any losses, claims, damages, liabilities, or expenses arising out of, or in connection with, the performance of the trustee's duties, including all reasonable fees of counsel and other expenses incurred in connection with the preparation for, or defense of, any claim, whether or not resulting in any liability, except to the extent that such losses, claims,

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damages, liabilities, or expenses result from misfeasance, gross negligence, willful or wanton acts, or bad faith by the trustee.

9. If the trustee ceases to act or fails to act diligently, a substitute trustee shall be appointed in the same manner as provided in Paragraph III.A. of this Order.
10. The Commission or, in the case of a court-appointed trustee, the court, may on its own initiative or at the request of the trustee issue such additional orders or directions as may be necessary or appropriate to accomplish the divestiture required by this Order.
11. The trustee shall have no obligation or authority to operate or maintain any assets relating to the research, development, manufacture or sale of Joint Venture Phosphoric Acid, or the research, development or manufacture of Cincinnati Products.
12. The trustee shall report in writing to Respondents and the Commission every sixty (60) days concerning the trustee's efforts to accomplish divestiture.

IV.

IT IS FURTHER ORDERED that within thirty (30) days of the date this Order is issued and every thirty (30) days thereafter until Respondents have fully complied with the provisions of Paragraphs II. or III. of this Order, Respondents shall submit to the Commission a verified written report setting forth in detail the manner and form in which they intend to comply, are complying, and have complied with Paragraphs II. and III. of this Order. Respondents shall include in their compliance reports, among other things that are required from time to time, a full description of the efforts being made to comply with Paragraphs II. and III. of this Order, including a description of all substantive contacts or negotiations for divestiture and the identity of all parties

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contacted. Respondents shall include in their compliance reports copies of all written communications to and from such parties, all internal memoranda, all reports and recommendations concerning divestiture, and all transition services required to be rendered pursuant to the agreement approved by the Commission.

V.

IT IS FURTHER ORDERED that Respondents shall notify the Commission at least thirty (30) days prior to any proposed change in the corporate Respondents such as dissolution, assignment, or sale resulting in the emergence of a successor corporation, or the creation or dissolution of subsidiaries or any other change in the corporation that may affect compliance obligations arising out of this Order.

VI.

IT IS FURTHER ORDERED that for the purposes of determining or securing compliance with this Order, and subject to any legally recognized privilege, and upon written request with reasonable notice to Respondents made to their principal United States offices, Respondents shall permit any duly authorized representatives of the Commission:

- A. Access, during office hours of Respondents and in the presence of counsel, to all facilities, and access 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 Respondents relating to compliance with this Order; and
- B. Upon five (5) days' notice to Respondents and without restraint or interference from Respondents, to interview

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officers, directors, or employees of Respondents, who may have counsel present, regarding such matters.

VII.

IT IS FURTHER ORDERED that this Order shall terminate after Respondents have complied with the requirements of Paragraphs II. and III. of this Order.

By the Commission, Commissioner Thompson dissenting.

[Confidential Schedule A Redacted From Public Version]

**DISSENTING STATEMENT OF COMMISSIONER
MOZELLE W. THOMPSON**

The Commission has determined to issue a final consent order in connection with Rhodia's acquisition of Albright & Wilson plc from Donau Chemie AG. The complaint narrowly defines the relevant market for pure phosphoric acid (PPA) as within the boundaries of the United States, and, consequently, the consent order does not require Rhodia to divest a PPA plant located in Mexico. For the following reasons, I disagree.

The North American PPA market has operated in an oligopolistic manner for the past twenty years or more. The major North American competitors have successfully engineered the highest PPA prices in the world through a variety of actions, including signaling prices, retaliating selectively to enforce high prices, controlling imports through agreements with a foreign

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supplier, and eliminating domestic competitors through acquisition. Rhodia, a significant member of the North American oligopoly, now proposes to acquire Albright & Wilson. I believe such an acquisition would allow Rhodia to:

- (1) Reinforce its world-wide dominant position among phosphates producers;
- (2) Protect PPA prices and market share in North America; and
- (3) Position itself to have the capacity to enforce market discipline in the North American market.

Evidence of Rhodia's view of the acquisition's impact on the North American market alone leads me to believe that the geographic scope of the PPA product market extends to all of North America, thus including Albright & Wilson's Mexican plant in the market. Other evidence, however, also demonstrates that North America is the relevant market. Accordingly, the Commission should have fully considered ordering the sale of Albright & Wilson's interests in both of its North American PPA plants to Potash Corporation and/or another purchaser not saddled with the incentives and history Rhodia carries.

Shipment Decisions and the Scope of the Geographic Market

The complaint apparently limits the scope of the geographic market because Albright & Wilson, the owner of a Mexican PPA plant and part owner of a North Carolina plant, does not currently ship Mexican PPA into the United States even though the evidence convinces me that the Mexican capacity could be used to supply customers in the United States. Although this private business decision from a multi-plant supplier creates a shipment

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pattern that superficially supports finding a United States PPA market, one principle of geographic market analysis is that competition among geographically differentiated producers may be linked indirectly by the customers they can economically serve.

Despite the decision not to ship PPA into the United States from the Mexican plant, North American capacity is competitively linked — and North American PPA suppliers compete — because the Mexican plant's PPA is sold to customers in Mexico and Canada that U.S. domestic plants would otherwise supply. Moreover, Albright & Wilson's joint venture plant, as well as other competitors' U.S. plants, undoubtedly serve customers that Albright & Wilson's Mexican plant would otherwise serve, but for Albright & Wilson's decision concerning which of its plants would serve which North American customers.

Divestiture Policy and the Adequacy of the Ordered Relief

As a routine starting point, the Commission's ongoing policy concerns about merger relief generally leads us to consider requiring the complete divestiture of either one of the merging parties' overlapping businesses in the relevant market. This divestiture policy limits the potential adverse market consequences by maintaining the pre-acquisition market structure and by maximizing the potential that the purchaser would be viable and competitive.

I am concerned that we have not adhered to this policy here, where there is significant evidence that the market is acting noncompetitively, as well as compelling evidence supporting a challenge of the proposed acquisition. Rhodia is the dominant phosphates producer in the world, and it will become — even taking into account the majority's relief — the leader in the North American PPA market. Thus, Rhodia, through this acquisition, would gain additional North American capacity that could be used to enforce higher prices.

Dissenting Statement

Although the relief set forth in the consent order — which requires Rhodia to sell the current Albright & Wilson joint venture interest in the North Carolina plant — does limit the potential adverse market impact, I still am concerned that the relief does not go far enough. In looking forward, if we allow Rhodia to acquire the Mexican plant and become the competitor controlling the greatest amount of capacity in North America, it could leverage the Mexican plant's capacity to discipline competitors' pricing. Thus, a settlement that allows Rhodia to become the North American market leader by acquiring Albright & Wilson's interest in either of its two North American plants should be fully and cautiously scrutinized by the Commission to determine whether further relief is warranted. By alleging a United States geographic market here, the majority has unfortunately isolated itself from a full consideration of the appropriate divestiture and, when evaluating future possible PPA plant acquisitions, the Commission would face the additional burden of justifying a market redefinition.

One could argue that Rhodia's ownership of the Mexican plant, while providing it the capacity to attain the leading position in North America, ironically may well slightly improve the market concentration data. But the limited evidence before me suggests that the majority neither fully explored nor evaluated the consequences of this concentration data or the options available to the Commission. These options include ordering the sale of all of the Albright & Wilson assets to Potash, a North American-only competitor, or ordering the sale of the joint venture interest in the North Carolina plant to Potash and the Mexican plant to another independent purchaser. These options — when evaluated with the limited information presented to the Commission — appear no worse than allowing Rhodia to own the Mexican plant, and, in fact, either of these options might prove superior to the majority's relief.

Analysis to Aid Public Comment

Thus, by basing a complaint on a narrow United States market and avoiding direct confrontation of the issue whether Rhodia should be allowed to purchase the Mexican plant, the majority permits Rhodia to acquire additional North American capacity and perhaps ensures that the PPA market will act noncompetitively in the future. In my view, the majority's unwillingness to make a minor correction now could squander a valuable opportunity to protect North American PPA consumers.

Analysis to Aid Public Comment

The Federal Trade Commission ("Commission") has accepted, subject to final approval, an Agreement Containing Consent Orders ("Consent Agreement") from Rhodia, Donau Chemie AG ("Donau"), and Albright & Wilson PLC ("A&W") (collectively "respondents"). The Consent Agreement is intended to resolve anticompetitive effects stemming from Rhodia's proposed acquisition of A&W. The Consent Agreement includes a proposed Decision and Order (the "Order"), that would require Rhodia to divest A&W's pure phosphoric acid business to Potash Corp. of Saskatchewan ("PCS"). For the last several years, A&W and PCS have been partners in a phosphates manufacturing joint venture (the "Joint Venture"), which includes, among other assets, a pure phosphoric acid production facility in Aurora, North Carolina, and a phosphates manufacturing plant in Cincinnati, Ohio. The Consent Agreement also includes an Order to Maintain Assets that requires respondents to preserve the assets they are required to divest as a viable, competitive, and ongoing operation until the divestiture is achieved.

The Order, if finally issued by the Commission, would settle charges that Rhodia's proposed acquisition of A&W may have substantially lessened competition in the United States market for pure phosphoric acid. The Commission has reason to believe that

Analysis to Aid Public Comment

Rhodia's proposed acquisition of A&W would have violated Section 7 of the Clayton Act and Section 5 of the Federal Trade Commission Act. The proposed complaint, described below, relates the basis for this belief.

The proposed Order has been placed on the public record for thirty (30) days for reception of comments by interested persons. Comments received during this period will become part of the public record. After thirty (30) days, the Commission will review the agreement and comments received and decide whether to withdraw its acceptance of the Consent Agreement or make final the proposed Order.

According to the Commission's proposed complaint, the relevant line of commerce in which to analyze the effects of Rhodia's proposed acquisition of A&W is pure phosphoric acid, and the relevant geographic market is the United States. Pure phosphoric acid is used as an input into a wide variety of consumer and industrial products, ranging from cola beverages to cleaning compounds and metal treatments. The proposed complaint alleges that the pure phosphoric acid market in the United States already is highly concentrated, and that the proposed acquisition of A&W by Rhodia would increase concentration in that market, as measured by the Herfindahl-Hirschman Index, by over 600 points, to a level close to 3000. The Commission's complaint further notes that Rhodia and A&W currently employ the low-cost solvent extraction process to produce pure phosphoric acid.

The proposed complaint also alleges that entry into the relevant market would not be timely, likely, or sufficient to deter or offset adverse effects of the acquisition on competition. Entry is difficult in this market because of the length of time it would take to build new construction facilities and enter the market; and because of the large minimum efficient scale of new production

Analysis to Aid Public Comment

facilities, which would require a new entrant to sell large volumes of pure phosphoric acid into the North American market, driving down market prices to a level that would render new entry unprofitable. Significant expansion by smaller producers also is unlikely.

The proposed complaint alleges that Rhodia's proposed acquisition of A&W would lessen competition by making coordinated interaction among the remaining producers more likely. The complaint describes how Rhodia's documents project that the combination of Rhodia and Albright & Wilson would lead to higher prices for pure phosphoric acid.

The proposed Order is designed to remedy the anticompetitive effects of the acquisition in the United States market for pure phosphoric acid, as alleged in the complaint, by requiring the divestiture to PCS of A&W's United States pure phosphoric acid business, including A&W's interest in the Joint Venture, as well as joint venture manufacturing assets, including the Aurora pure phosphoric acid plant and the Cincinnati plant. The Order would also require respondents to provide PCS with technology A&W has developed for manufacturing pure phosphoric acid and for using it in certain applications. PCS would be able to use that technology to build pure phosphoric acid plants both within and outside of the United States, and to license the technology to other firms that sought to build pure phosphoric acid plants. The proposed Order would also require respondents to divest other assets related to A&W's pure phosphoric acid business, including customer lists, contracts, and other intangible assets. The proposed divestiture does not require divestiture of A&W's pure phosphoric acid plant in Mexico, which does not export pure phosphoric acid to customers in the United States. A&W's Mexican plant produces pure phosphoric acid used primarily in home laundry detergents in Mexico, an application that no longer exists in the United States.

Analysis to Aid Public Comment

PCS, based in Saskatoon, Saskatchewan, is the world's third-largest producer of phosphoric acid for fertilizer. It also produces other fertilizer materials such as nitrogen and potash. PCS entered the phosphates business in 1995, through its acquisition of Texasgulf. A publicly-traded Canadian company, PCS in 1998 had an operating income of \$446 million and a net income of \$261 million on sales of \$2.3 billion. PCS mines phosphate rock at Aurora, North Carolina, and also produces "green" phosphoric acid at that site. Slightly over 10% of PCS' green acid production at Aurora is used as a feedstock for the manufacture of pure phosphoric acid.

If the Commission, at the time that it accepts the Order for public comment, notifies respondents that it does not approve of the proposed divestiture to PCS, or the manner of the divestiture, the proposed Order provides that respondents would have 120 days to divest the A&W pure phosphoric acid business to a different acquirer. If respondents did not complete the divestiture in that period, a trustee would be appointed.

The proposed Order to Maintain Assets that is also included in the Consent Agreement requires that respondents preserve the A&W assets they are required to divest as a viable and competitive operation until those assets are transferred to the Commission-approved acquirer. It requires the respondents to maintain the viability and competitiveness of the assets, and to conduct the A&W pure phosphoric acid business in the ordinary course of business. Furthermore, the Order to Maintain Assets includes an obligation on respondents to build and maintain a sufficient inventory of pure phosphoric acid to ensure there is no shortage of supply during the period that the business is being transferred to the Commission-approved acquirer. The Order to Maintain Assets also requires respondents to provide necessary support services and maintain an adequate workforce for the A&W pure phosphoric acid business.

Analysis to Aid Public Comment

The Consent Agreement requires respondents to provide the Commission, within thirty (30) days of the date the Agreement is signed, with an initial report setting forth in detail the manner in which respondents will comply with the provisions relating to the divestiture of assets. The proposed Order further requires respondents to provide the Commission with a report of compliance with the Order within thirty (30) days following the date the Order becomes final and every thirty (30) days thereafter until they have complied with the terms of the Order.

The purpose of this analysis is to facilitate public comment on the proposed Consent Agreement and the proposed Order. This analysis is not intended to constitute an official interpretation of the Consent Agreement or the proposed Order or in any way to modify the terms of the Consent Agreement or the proposed Order.

Complaint

IN THE MATTER OF

MCCORMICK & COMPANYCONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATIONS OF
SECTION 7 OF THE CLAYTON ACT AND SECTION 2 OF THE
ROBINSON-PATMAN ACT

*Docket C-3939; File No. 9610050
Complaint, April 27, 2000--Decision, April 27, 2000*

This consent order requires Respondent McCormick & Company to cease and desist from price discrimination within the meaning of Section 2(a) of the Robinson-Patman Act, by selling its product at a net higher price than it does to any competing purchaser, where the discrimination may cause competitive harm. The order also makes available the statutory defenses provided in the Act and requires that for each instance that Respondent wishes to raise the provided defense, it must contemporaneously document all information that it believes entitles it to the defense.

Participants

For the Commission: *Patrick J. Roach, F. Martin Dajani, David Conn, Dana F. Abrahamsen, Cecelia M. Waldeck, Mark D. Peterson, Ara Jabagchourian, Dennis C. Harketts, Stephanie Langley, Veronica G. Kayne, Daniel P. Ducore, and BE.*

For the Respondents: *Lewis Noonberg and Kenneth Starling, Piper Marbury Rudnick & Wolfe, LLP.*

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 these Acts, the Federal Trade Commission, having reason to believe that McCormick & Company, Incorporated, a corporation (sometimes referred to as "respondent" or "McCormick"), has violated the provisions of these Acts, and it appearing to the

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Commission that a proceeding would be in the public interest, hereby issues its complaint, stating its charges as follows:

Definitions

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

a. "Core spice line" means a retail product line of basic spices, herbs, and blends of spices, herbs and other food products that are sold in similar packaging with the same brand or trade name. Generally, the product line is composed of 40 or more items or products.

b. "Gourmet spice line" means a retail product line of basic spices, herbs and blends of spices, herbs and other food products with the same brand or trade name that are generally of a higher ingredient grade than a core spice line. Gourmet spice lines are commonly packed in same-size glass jars.

c. "Dry seasoning mixes" means retail products consisting of blends of spices, herbs and other food products with the same brand or trade name that are used to prepare a specific dish, such as meatloaf or tacos, or to prepare gravy or other sauce. Dry seasoning mixes are generally sold in foil or paper packets and typically, the entire packet is used for one average-size dish.

d. "Competitive seasonings" means retail products other than dry seasoning mixes, such as meat tenderizers, monosodium glutamate (MSG), and garlic and other spice blends that are not part of a core or gourmet spice line. Competitive seasonings are frequently marketed by suppliers that do not offer complete core spice lines or gourmet spice lines.

e. "Full Line" means the McCormick product line or offering comprising the products described above in

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subparagraphs a through d.

f. "Net Price" means the list price of McCormick Products less advances, allowances, discounts, rebates, deductions, free goods and other financial benefits provided by McCormick and related to such products.

The Respondent

2. Respondent McCormick & Company, Incorporated., is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Maryland, with its principal office and place of business at 18 Loveton Circle, Sparks, Maryland 21152.

3. Respondent is now and has been engaged for many years in the production, distribution and sale of spice and seasoning products for resale, including the products that make up its Full Line. Respondent sells these products under the brand names McCormick, Schilling, Fifth Seasons, Spice Classics, Select Seasons, Mojave, Spice Trend, Royal Trading, Crescent, McCormick Schilling, La Cochina De McCormick, McCormick Collection and Old Bay, among others.

4. Respondent has manufacturing facilities in Hunt Valley, Maryland and Salinas, California. The Maryland facility generally serves customers in the Eastern portion of the United States, while the California facility generally serves customers in the West. In the course and conduct of its business, respondent has engaged and is now engaging in commerce, as defined in the Federal Trade Commission Act and the Clayton Act, by selling, distributing, shipping, or causing to be shipped spice and seasoning products produced in some states of the United States to customers located in other states and in the District of Columbia.

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5. With 1998 retail sales of \$623.7 million in the Americas, respondent is the largest supplier of spice and seasoning products in the United States. Respondent claims to be “the world’s largest spice company.”

6. Among firms supplying core or gourmet spice lines for sale in supermarkets in the United States, McCormick is by far the leading firm, accounting for the majority of such sales nationally. During the period pertinent to this complaint, McCormick faced competition in such sales from only one other national firm, Burns Philp Food Incorporated, and several much smaller independent regional or local firms. These circumstances, combined with the superior brand recognition of McCormick products, mean that supermarkets that purchase McCormick products have relatively few alternative sources for equivalent products from other suppliers at equivalent prices and terms.

McCormick's Pricing

7. During the period pertinent to this complaint, McCormick had a single national price list for its product lines sold to its direct customers, whether retail or wholesale. McCormick commonly referred to this price list as the "A" List. This list specified separate prices for each individual product or SKU. McCormick modified this price list from time to time, to reflect changes in McCormick's costs to manufacture particular products, among other reasons.

8. Relatively few McCormick customers paid the “A” list price. Instead, McCormick commonly entered into written or unwritten supply agreements with customers that provided substantial discounts off the “A” list prices. These discounts have taken a variety of forms, including cash payments at the commencement of the agreement, free goods, off-invoice discounts, cash rebates, performance funds and other financial benefits that effectively reduced the Net Price of McCormick's products. In addition, McCormick supply agreements have included payments for

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advertising and other promotional activities designed to help customers resell McCormick products. McCormick commonly referred to the aggregate percentage of discounts and benefits provided to a particular customer as the "allowance offer" or "deal rate." McCormick's aggregate discounts and benefits to some customers were substantially greater than to others.

9. Typically, McCormick individually negotiated with particular customers the amount of discounts and promotional payments. The discounts and promotional payments typically were for all or a substantial part of the existing McCormick product line and typically were not incentives to accept new McCormick products.

10. In its supply agreements with customers, McCormick has commonly included provisions that, much as is sometimes seen with slotting allowances, restrict the ability of customers to deal in the products of competing spice suppliers. Such provisions typically demand that the customer allocate the large majority of the space devoted to spice products -- in some cases 90% of all shelf space devoted to packaged spices, herbs, seasonings and flavorings of the kinds offered by McCormick -- to McCormick.

Discrimination in Price

11. Each of the spice and seasoning products that make up McCormick's Full Line is a commodity within the meaning of Section 2(a) of the Robinson-Patman Act amendments to the Clayton Act, 15 U.S.C. § 13(a).

12. In the course and conduct of its business in commerce in the period from at least 1994 to the present, McCormick has in no fewer than five instances discriminated in price by providing different deal rates consisting of preferential up-front "slotting"-type payments or allowances, discounts, rebates, deductions, free goods, or other financial benefits to some purchasers of

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McCormick products including, but not limited to, McCormick's core spice line, gourmet spice line, dry seasoning mixes and competitive seasonings. In these instances, through such discriminatory terms of sale, McCormick has sold McCormick products to some purchasers (the "favored purchasers") at a lower Net Price than to other purchasers (the "disfavored purchasers").

13. The favorable prices and terms McCormick provided to the favored purchasers were not justified by a good faith attempt to meet the equally low price of a competitor, nor were the favorable prices justified by cost savings associated with doing business with the favored retailer.

14. In each instance, McCormick engaged in contemporaneous sales of McCormick products of like grade and quality to the favored and disfavored purchasers.

15. In each instance, the disfavored purchaser competed with the favored purchaser who resold respondent's products at the same level of distribution.

16. In each instance, at least one of the discriminatory sales by McCormick involved commodities that crossed state lines.

17. Each instance involved a substantial price difference over a substantial period of time between competing purchasers in markets where profit margins are low and competition is keen.

18. In each instance, the disfavored purchaser had few, if any, alternative sources from which to purchase comparable goods at prices and terms equivalent to those McCormick provided to the favored purchaser.

19. The effect of these discriminatory acts and practices has been or may be substantially to lessen competition in the line or lines of commerce in which favored and disfavored purchasers are engaged, or to injure, destroy or prevent competition between favored and disfavored purchasers.

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20. The acts and practices of the respondent set forth in Paragraphs 11-19 above constitute unlawful price discrimination in violation of Section 2(a) of the Robinson-Patman Act amendments to the Clayton Act, 15 U.S.C. § 13(a), and unfair methods of competition in violation of Section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45, and will continue in the absence of the relief herein requested.

WHEREFORE, the Federal Trade Commission on this twenty-seventh day of April, 2000 issues its complaint against said respondent.

By the Commission, Commissioner Swindle and Commissioner Leary dissenting.

DECISION AND ORDER

The Federal Trade Commission ("Commission"), having initiated an investigation of certain acts and practices of McCormick & Company, Incorporated and the respondent having been furnished thereafter with a copy of a draft of complaint which the Bureau of Competition proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge the respondent with violation of the Federal Trade Commission Act and the Robinson-Patman Act Amendments to the Clayton Act; and

The respondent and counsel for the Commission having thereafter executed an Agreement Containing Consent Order, an admission by respondent of all the jurisdictional facts set forth in

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

The Commission having thereafter considered the matter and having determined that it had reason to believe that the respondent has violated the said Acts, and that a complaint should issue stating its charges in that respect, and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of thirty (30) days, and having duly considered the comment filed thereafter by an interested person pursuant to Section 2.34 of its Rules, now in further conformity with the procedure 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. McCormick & Company, Incorporated., is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Maryland, with its principal office and place of business at 18 Loveton Circle, Sparks, Maryland 21152.
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 PURPOSES OF THIS ORDER, the following definitions shall apply:

- A. "McCormick" or "Respondent" means McCormick & Company, Incorporated, its directors, officers, employees, agents, representatives, predecessors, successors, assigns,

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direct and indirect parents, subsidiaries, divisions, groups, joint ventures and affiliates controlled by or under common control with McCormick, and the respective directors, officers, employees, agents, representatives, successors, and assigns of each.

- B. "Product" means any spice, seasoning, sauce or gravy mix, marinade sauce, spice blend, meat tenderizer, monosodium glutamate, seasoning sold with cooking bags, or other product used to season or flavor foods, packaged for retail sale to consumers; provided, however, that "Product" does not include products that are packaged for sale to food service or industrial customers.
- C. "Purchaser" means any person or entity that purchases McCormick Products for resale.
- D. "Net Price" means the list price of McCormick Products less advances, allowances, discounts, rebates, deductions, free goods and other financial benefits provided by McCormick and related to such products.
- E. "Commission" means the Federal Trade Commission.

II.

IT IS ORDERED that Respondent, in connection with the sale of Products in commerce, as "commerce" is defined in the Clayton Act, shall cease and desist from discriminating, within the meaning of Section 2(a) of the Robinson Patman Act amendments to the Clayton Act, 15 U.S.C. § 13(a), in the price of any Product of like grade and quality by selling such Product to any Purchaser at a Net Price higher than the Net Price charged to any competing Purchaser where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in

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any line of commerce or to injure, destroy, or prevent competition.

PROVIDED, that nothing herein shall prohibit respondent from discriminating in price where to do so would be lawful by reason of any of the defenses established in Sections 2(a) or (b) of the Robinson Patman Act amendments to the Clayton Act, 15 U.S.C. §§ 13(a) or (b).

III.

IT IS FURTHER ORDERED that for each instance in which Respondent wishes to avail itself of the meeting competition defense as set forth in Section 2(b) of the Robinson Patman Act amendments to the Clayton Act, 15 U.S.C. § 13(b), Respondent, for a period of ten (10) years from the date this Order becomes final, shall contemporaneously document all information on which it bases its entitlement to the defense, within the meaning of such provision. For each such instance for which Respondent wishes to avail itself of the meeting competition defense, Respondent shall retain such documentation in its files for five (5) years after the lower price made to meet competition is no longer effective. Neither the presence nor absence of documentation of any specific information shall in itself be deemed to be dispositive of Respondent's compliance with Part II of this Order.

IV.

IT IS FURTHER ORDERED that Respondent shall, within sixty (60) days after service upon it of this Order, distribute a copy of this Order to each of its operating divisions involved in the sale of any Product to any Purchaser and to all current officers, employees, brokers, and agents of these divisions; and shall distribute a copy of this Order to any officer, employee, broker, or agent of these divisions within thirty (30) days of the commencement of such person's employment or affiliation with any such division.

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V.

IT IS FURTHER ORDERED that Respondent shall notify the Commission at least thirty (30) days prior to any proposed change in the Respondent which may affect compliance obligations arising out of the Order, such as dissolution, assignment or sale resulting in the emergence of a successor corporation, the creation or dissolution of subsidiaries, or any other such change.

VI.

IT IS FURTHER ORDERED that Respondent shall, within sixty (60) days after this Order becomes final, and thereafter annually for a period of five (5) years on the anniversary date of the Order, and at such other times as the Commission may by written notice to respondent require, file with the Commission a written report verified by an officer of Respondent setting forth in detail the manner and form in which Respondent has complied and is complying with this Order.

VII.

IT IS FURTHER ORDERED that this Order shall terminate on April 27, 2020.

By the Commission, Commissioner Swindle and Commissioner Leary dissenting.

Statement of the Commission

**STATEMENT OF CHAIRMAN ROBERT PITOFSKY AND
COMMISSIONERS SHEILA F. ANTHONY AND
MOZELLE W. THOMPSON**

The Analysis to Aid Public Comment fully describes the Commission action in this matter. Some comments by our dissenting colleagues, however, require a brief response.

The Commission has entered a final order in which McCormick & Company Inc. (“McCormick”) has agreed to cease and desist granting discounts (partly in the form of up-front shelf-allocation payments) to large chains without making comparable payments available to other chains and independents that compete with the favored chains. Under the Supreme Court’s controlling decision in *FTC v. Morton Salt Co.*,¹ injury to competition at the retailer (i.e., “secondary”) level can be inferred where substantial and durable price discrimination exists between competing purchasers who operate in a market with low profit margins and keen competition.

McCormick is far and away the largest manufacturer and supplier of full lines of spices to grocery stores in the United States. In the early 1990s, it found itself in a price war with Burns-Philp Food Inc. (“Burns-Philp”), its only full-line competitor. Substantial discriminatory discounts were granted to favored chains, often accounting for many individual stores, and not to competing retailers.

In examining McCormick’s discounts, the Commission did not simply apply the *Morton Salt* presumption in finding injury to competition, but examined other factors, including the market power of McCormick and the fact that discounts to favored chains were conditioned on an agreement to devote all or a substantial portion of shelf space to the McCormick line of products. Our dissenting colleagues applaud the fact that the Commission is

¹ 334 U.S. 37 (1948) (*Morton Salt*).

Statement of the Commission

willing to examine injury to competition by looking at factors beyond those narrowly described in the *Morton Salt* approach, but conclude that those factors do not justify a secondary-line price discrimination case here. We do not find their arguments persuasive.

1. The dissenting Commissioners observe that the discriminatory discounts were granted in the midst of, and possibly because of, a price war. But the Robinson-Patman Act limits on discriminatory pricing - including the rule that a seller can meet but not exceed prices offered by a competitor² - are not suspended during price wars.

2. Our colleagues suggest that this is a primary-line case (i.e., injury at the producer level) masquerading as a secondary line (injury at the retailer level) enforcement action. But that kind of distinction between primary-line and secondary-line anti-competitive effects is unduly rigid and mechanical -- particularly in light of the facts of this matter. It is true that part of the injury at the secondary level occurred because McCormick's behavior injured its only full-line competitor. But that is just one part of the secondary-line case. The fact remains that favored chain store buyers received from a dominant seller substantially better discounts than disfavored buyers, and they were injured, and competition at the secondary line was injured, as a result. Moreover, with Burns-Philp out of the picture as an aggressive competitor, chain stores and other retailers at the secondary level will be denied benefits of future competition.

² See *Falls City Indus. v. Vanco Beverage, Inc.*, 460 U.S. 428, 446 (1983) ("a seller's response must be defensive, in the sense that the lower price must be calculated and offered in good faith to 'meet not beat' the competitor's low price.")

Statement of the Commission

3. The Commission was influenced in the decision to enforce the Robinson-Patman Act here because McCormick is a dominant seller. Our colleagues' conclusion -- that market dominance by the discriminating seller should be irrelevant to secondary-line price discrimination -- flies in the face of commentary by leading scholars such as Herbert Hovenkamp suggesting that the dominance of the seller is exactly the factor that should be examined in the exercise of prosecutorial discretion.³

The essential feature of Commission action here should not be lost in a quarrel over particular facts. As the Analysis to Aid Public Comment points out, there will be circumstances in which the *Morton Salt* presumption is appropriate and dispositive. There may be other market settings in which it makes sense for the Commission, as a matter of prosecutorial discretion, or the Commission and Courts, in the process of considering whether there has been a violation, to look past the *Morton Salt* factors to a broader range of market conditions to determine whether there has been real injury to competition. Taking those additional factors into account, the majority concluded that there was injury not just to the disfavored buyers, but to secondary-line competition generally.

³ See, e.g., Herbert Hovenkamp, *Market Power and Secondary-Line Differential Pricing*, 71 Geo. L.J. 1157, 1170 (1983) ("Systematic, long-term price discrimination can be achieved only by a seller with market power. If the seller does not have market power, purchasers asked to pay the higher price will purchase from another seller willing to sell at a more competitive price.")

Dissenting Statement

**DISSENTING STATEMENT OF COMMISSIONERS
ORSON SWINDLE AND THOMAS B. LEARY**

We respectfully dissent from the Commission's decision to issue a final order to resolve allegations that McCormick & Company, Inc. ("McCormick") violated the Robinson-Patman Act. We recognize that the majority sincerely believes that this case will clarify a controversial statute and properly circumscribe its application. We are concerned, however, that this case will have precisely the opposite effect.

McCormick is the largest American supplier of spices to grocery stores, with more than 2,000 contracts¹ that account for a majority of spice sales in the United States. (Complaint ¶ 5). During the past decade, McCormick's main competitor has been Burns Philp Food Incorporated ("Burns Philp"). In the early 1990s, Burns Philp commenced a price war in which both it and McCormick offered increased discounts and other payments to try to win the business of grocery stores.² When the price war ended, McCormick remained the dominant spice supplier in the United States, and Burns Philp's ability to compete may have been impaired.³

¹ See McCormick & Company, Inc., Press Release, *McCormick Signs Settlement Agreement with the Federal Trade Commission* at 2 (Feb. 3, 2000), (McCormick has "more than 2,200 customer contracts").

² Anthony Hughes, *Burns Philp Was Inept, Says ASIC*, *The Age* at 2 (Mar. 11, 1999).

³ *Id.* ("Inadequate financial reporting to the board of directors and its failure to question overstated valuations were largely behind the near-collapse of the food group Burns Philp & Co., a report by the Australian Securities and Investments Commission has found.").

Dissenting Statement

A supplier may violate Section 2(a) of the Robinson-Patman Act amendments to the Clayton Act, 15 U.S.C. § 13(a), if it engages in price discrimination that causes so-called “primary-line” injury. Primary-line injury under the statute occurs when a difference in price causes harm to competition between *suppliers*. A case predicated on primary-line injury to Burns Philp or other suppliers of spices would require proof that the discriminatory prices that McCormick charged grocery stores were below cost and that McCormick had a reasonable prospect of recouping its losses. See *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209 (1993). In other words, primary-line injury to suppliers is actionable only when there is a threat of ultimate injury to buyers. The Commission’s complaint does not allege that McCormick engaged in price discrimination that caused primary-line injury to suppliers such as Burns Philp.

Instead, after more than three years of investigation and the commitment of substantial resources, the majority of the Commission has alleged that McCormick engaged in price discrimination that caused “secondary-line” injury, *i.e.*, harm to competition between *buyers*. Specifically, out of McCormick’s more than 2,000 contracts, the complaint alleges that in five instances McCormick charged higher prices to certain grocery stores than it charged to their competitors. (Complaint ¶ 12). The higher prices that the disfavored grocery stores paid McCormick for spices allegedly harmed their ability to compete against other grocery stores for customers. (*Id.* ¶ 19).

The majority statement conveys the impression that there was actual secondary-line injury in this case. But the Commission does not rely on direct evidence of secondary-line injury to the disfavored grocery stores. Rather, the Commission relies on the so-called “*Morton Salt* inference” of competitive harm. (*Id.* ¶ 17). For more than 50 years, courts have used the *Morton Salt* inference that “injury to competition is established *prima facie* by proof of a substantial price discrimination between competing

Dissenting Statement

purchasers over time.”⁴ In essence, the *Morton Salt* inference permits a court to infer injury to a disfavored purchaser from a persistent and substantial discriminatory price in a market where profit margins are low and competition is keen, and then to infer injury to competition from the injury to the disfavored purchaser.

We question whether the facts in this case support the application of the *Morton Salt* inference. The Robinson-Patman Act was primarily intended to prevent price discrimination in favor of large buyers at the expense of small buyers.⁵ When a small buyer pays more than a large buyer for an item in an industry with low profit margins and keen competition, the *Morton Salt* inference may make sense. In such circumstances, it is reasonable to infer that the purchasing power of the large buyer will cause the price discrimination to be repeated across many items, with consequent competitive injury to the small buyer.

The complaint does not allege that the favored grocery stores were larger than the disfavored grocery stores⁶ or that they purchased more spices from McCormick. Since the favored stores here were not necessarily purchasing larger quantities of spices than the disfavored stores, it is unlikely that McCormick

⁴ *Falls City Indus., Inc. v. Vanco Beverage, Inc.*, 460 U.S. 428, 435 (1983) (citing *Federal Trade Commission v. Morton Salt Co.*, 334 U.S. 37, 46, 50-51 (1948)).

⁵ In enacting the Robinson-Patman amendments, the Congress addressed the concern that large buyers could secure a competitive advantage over small buyers solely because of the large buyers' quantity purchasing ability. H.R. Rep. No. 2287, 74th Cong., 2d Sess. 7 (1936); S. Rep. No. 1502, 74th Cong., 2d Sess. 4-6 (1936).

⁶ To the extent that the majority tries to suggest that the disfavored stores are “mom-and-pop” operations, in fact only one of the disfavored stores could be so characterized; the rest of the disfavored stores are all large or relatively large grocery store chains.

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granted lower prices to the favored grocery stores because of their buying power. In fact, the most plausible explanation for the lower prices granted in the five instances alleged in the complaint is that they were the almost fortuitous and incidental result of McCormick's responses during its price war with Burns Philp. If the favored stores were not accorded lower spice prices because of their buying power, there is little reason to believe that the favored stores generally would receive lower prices from the suppliers of the thousands of products sold in the typical grocery store. It follows that it is unlikely that the ability of the disfavored grocery stores to compete with favored stores would be harmed – the underlying rationale for use of the *Morton Salt* inference.

The Commission is not relying on the *Morton Salt* inference *by itself* to support bringing a case. The use of the *Morton Salt* inference in this case is considered to be particularly appropriate because McCormick is the largest supplier of spices in the United States and because the company typically demanded that grocery stores allocate to McCormick a large majority of the shelf space they devoted to spices. See Complaint ¶¶ 6, 10, 18. Although we share the majority's apparent view that the public interest generally would be better served if the Commission did not bring Robinson-Patman cases based only on the *Morton Salt* inference, the majority has not identified additional facts that warranted bringing this case.

McCormick's alleged market power as a supplier and its alleged discriminatory prices may have harmed the ability of Burns Philp and other suppliers to compete with McCormick. But this does not make it any more plausible that McCormick's alleged discriminatory prices harmed the ability of the *disfavored grocery stores* to compete with the *favored grocery stores*.

In the long run, if McCormick's pricing has harmed the ability of Burns Philp or other suppliers to compete, the loss of alternative suppliers would harm *both* the disfavored grocery stores *and* the favored grocery stores (once their present contracts with McCormick expire). A loss of alternative suppliers is a

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classic consequence of primary-line injury, but such a loss does not necessarily have a *differential* impact on buyers that will cause secondary-line injury -- the relevant level of commerce in this case.⁷

We recognize that there has been much controversy over the years concerning the use of the *Morton Salt* inference and that the inference has not been uniformly applied.⁸ Overall, the concern has been that the inference makes violations too easy to prove.⁹ It is laudable that the majority has tried to limit the use of the *Morton Salt* inference. We do not believe, however, that evidence of *supplier* market power justifies bringing cases in which the *Morton Salt* inference is used as the basis to prove competitive harm among *buyers*.¹⁰ Because the majority has no other basis on which to show secondary-line competitive injury in this case, we dissent.¹¹

⁷ We do not suggest that market power of the supplier is irrelevant in a Robinson-Patman Act case – in fact, it is likely to be present in all cases of economic price discrimination. However, supplier market power is not dispositive of whether secondary-line injury is likely to have occurred. Our agreement with the majority that McCormick is the dominant spice seller does not overcome the lack of proof of secondary-line injury in this case.

⁸ See ABA Section of Antitrust Law, *Antitrust Law Developments* 450-51 (4th ed. 1997).

⁹ See, e.g., LaRue, *Robinson-Patman Act in the Twenty-First Century: Will the Morton Salt Rule Be Retired?*, 48 S.M.U.L. Rev. 1917 (1995).

¹⁰ As noted above, McCormick's alleged discriminatory prices were offered during a price war with its main competitor. We assume without deciding that a "meeting competition" defense under the Robinson-Patman Act would not have insulated McCormick from liability.

¹¹ We do recognize that the narrowly circumscribed order would be appropriate in a proper secondary-line case.

Analysis to Aid Public Comment

Analysis of Proposed Consent Order To Aid Public Comment

The Federal Trade Commission has accepted, subject to final approval, an agreement containing a proposed Consent Order from McCormick & Company, Incorporated ("McCormick"), the world's largest spice company, that is designed to resolve claims, set forth in the accompanying Complaint, that McCormick discriminated in the pricing of its products to certain competing supermarket purchasers in violation of Section 2(a) of the Robinson-Patman Act amendments to the Clayton Act, 15 U.S.C. § 13(a). The Consent Order requires McCormick to refrain from unlawfully discriminating in the prices at which it sells its products to competing purchasers in the supermarket channel. In addition, in those instances in which McCormick believes that its pricing is lawful because its prices were offered to meet competition from a competing supplier, the Consent Order requires McCormick, for a period of ten years, to contemporaneously document the information on which it bases its entitlement to the statutory "meeting competition" defense.

The proposed Consent Order has been placed on the public record for 30 days so that the Commission may receive comments from interested persons. Comments received during this period will become part of the public record. After 30 days, the Commission will again review the agreement and the comments received, and will decide whether it should withdraw from the agreement or make final the agreement's proposed Consent Order.

McCormick's Business. McCormick, with its principal office and place of business in Sparks, Maryland, has been engaged for many years in the production, distribution and sale of spice and seasoning products for resale. Its products sold through supermarkets include core and gourmet spice lines, dry seasoning mixes, and so-called "competitive seasonings" such as meat tenderizers, monosodium glutamate (MSG), and garlic and other spice blends. Respondent sells these products under the brand names McCormick, Schilling, Fifth Seasons, Spice Classics, Select Seasons, Mojave, Spice Trend, Royal Trading, Crescent,

Analysis to Aid Public Comment

McCormick Schilling, La Cochina De McCormick, McCormick Collection and Old Bay, among others. With 1998 retail sales of \$623.7 million in the Americas, McCormick is the largest supplier of spice and seasoning products in the United States, and claims to be “the world’s largest spice company.”

Among those firms that supply core or gourmet spice lines for sale in supermarkets in the United States, McCormick is by far the leading firm, accounting for the majority of such sales nationally. Since the early 1990’s, McCormick has faced competition in such sales from only one other national firm, Burns Philp Food Incorporated, and several much smaller independent regional or local firms. These circumstances, combined with the superior brand recognition of McCormick products, mean that supermarkets that purchase McCormick products have relatively few alternative sources for equivalent products from other suppliers at comparable prices and terms.

McCormick’s Pricing. During the period pertinent to the Complaint, McCormick had a single national price list for its products sold to direct customers, whether retail supermarkets or wholesalers reselling to independent supermarkets. McCormick modified this price list from time to time, to reflect changes in McCormick’s costs to manufacture particular products, among other reasons. However, relatively few McCormick customers paid the list price. Instead, McCormick commonly entered into written or unwritten supply agreements with customers that provided substantial discounts off the list prices. These discounts took a variety of forms, including cash payments at the commencement of the supply agreement, free goods, off-invoice discounts, cash rebates, performance funds and other financial benefits that effectively reduced the net price of McCormick’s products. Typically, McCormick individually negotiated with particular customers the amount of discounts and payments; the aggregate percentage of discounts and benefits provided to a

Analysis to Aid Public Comment

particular customer was commonly known as the “allowance offer” or the “deal rate.” McCormick’s aggregate discounts and financial benefits to some customers were substantially greater than to some other competing customers.

Frequently the McCormick discounts included up-front cash payments that resembled the payments sometimes called “slotting allowances” in the supermarket industry. However, the McCormick discounts and payments typically were for all or a substantial part of the existing McCormick product line and typically were not incentives to accept new McCormick products. McCormick’s supply agreements with customers commonly include provisions that, as is sometimes seen with slotting allowances, restrict supermarket customers’ ability to deal in the products of competing spice suppliers. Such provisions commonly require that the customer allocate to McCormick the large majority (as much as 90%) of the shelf space devoted to spice products.

Price Discrimination. The Complaint alleges that in the period from at least 1994 to the present, McCormick has on no fewer than five instances discriminated in price by providing different deal rates consisting of preferential up-front “slotting”-type payments or allowances, discounts, rebates, deductions, free goods, or other financial benefits. Through such discriminatory terms of sale, McCormick sold its products to the favored purchasers at a lower net price than to the disfavored purchasers, in violation of Section 2(a) of the Robinson-Patman Act amendments to the Clayton Act, 15 U.S.C. § 13(a).

The Complaint alleges that, in each instance of discrimination, McCormick made contemporaneous sales of McCormick products of like grade and quality to a favored and a disfavored purchaser; the disfavored purchaser competed with the favored purchaser which resold respondent’s products at the same level of distribution; and at least one of the discriminatory sales by McCormick involved commodities that crossed state lines. The Complaint also alleges that each of the spice and seasoning

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products that make up McCormick's product line is a commodity within the meaning of the statute.

The Complaint alleges that McCormick's price discrimination threatened injury at the "secondary line" level of competition, that is, at the level of the favored and disfavored purchasers. It alleges that each instance of discrimination involved a substantial price difference over a substantial period of time between competing purchasers in markets where profit margins are low and competition is keen. These circumstances give rise to an inference of competitive harm within the meaning of the statute, pursuant to the reasoning of the Supreme Court in Federal Trade Commission v. Morton Salt Co., 334 U.S. 37, 50-51 (1948), and subsequent cases. While that inference may not be sufficient, by itself, in some circumstances to warrant bringing a case, in this instance the inference is strengthened by McCormick's position as the largest supplier of spice and seasoning products in the United States and by the fact that McCormick typically demanded that customers allocate to McCormick the large majority of the space devoted to spice products -- in some cases 90% of all shelf space devoted to packaged spices, herbs, seasonings and flavorings of the kinds offered by McCormick. As alleged in the Complaint, disfavored purchasers consequently had few, if any, alternative sources from which to purchase comparable goods at prices and terms equivalent to those which McCormick provided to the favored purchasers.

The Complaint also alleges that the favorable prices and terms McCormick provided to the favored purchasers were not justified by good faith attempts to meet the equally low price of a competitor; nor were the favorable prices justified by cost savings associated with doing business with the favored retailer. The instances of price discrimination were therefore not within the scope of either the statutory "meeting competition" or "cost justification" defenses established by Sections 2(a) and (b) of the

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Robinson-Patman Act amendments to the Clayton Act, 15 U.S.C. § 13(a) and (b).

The Order Provisions. The Consent Order provides relief for the violations alleged in the Complaint. The Order applies to McCormick's sale of products, broadly defined to include spices, seasonings and other products used to season or flavor foods, packaged for sale to consumers. The Consent Order does not apply to products packaged for sale to food service or industrial customers, which are beyond the scope of the conduct at issue in the Complaint. Order, ¶ I.B. The Order applies to McCormick's sales to persons or entities that purchase McCormick products for resale. Order, ¶ I.C.

The principal relief is contained in Paragraph II of the Consent Order, which requires that McCormick cease and desist from price-discriminating, within the meaning of Section 2(a) of the Robinson-Patman Act, by selling its products to any purchaser at a net price higher than that charged to any competing purchaser, where the discrimination may cause competitive harm as contemplated by the statutory language. "Net Price" is defined as the list price of McCormick Products less advances, allowances, discounts, rebates, deductions, free goods and other financial benefits provided by McCormick and related to such products. Order, ¶ I.D.

The inclusion of competitive harm language in Paragraph II ensures that the remedy established by the Consent Order is not over-broad and does not enjoin instances of price discrimination otherwise lawful under the statute. This paragraph also includes a proviso that makes applicable under the Order the statutory defenses set forth in Sections 2(a) and (b) of the Robinson-Patman Act, thus accomplishing explicitly what otherwise would be implicit pursuant to the Supreme Court's decision in Federal Trade Commission v. Ruberoid Co., 343 U.S. 470, 475-78 (1952).

As further relief, Paragraph III orders that for each instance in which McCormick wishes to avail itself of the "meeting

Analysis to Aid Public Comment

competition” defense of Section 2(b) of the Robinson Patman Act,¹ McCormick is required to contemporaneously document all information on which it bases its entitlement to the defense, and to retain such documentation in its files for five years after the lower price made to meet competition is no longer effective. This provision is “fencing-in” relief² that should ensure the existence of a reliable evidentiary basis in future instances where McCormick invokes the defense.

In addition to these principal relief provisions, the Consent Order requires that McCormick distribute a copy of the Order to all officers, employees, brokers, and agents of its operating divisions involved in the sale of products covered by the order, and in the future to new employees, brokers, and agents. Order, ¶ IV. McCormick is required to inform the Commission of corporate changes that may affect its compliance obligations under the Order (Order, ¶ V), and to file reports concerning its compliance under the Order (*id.*, ¶ VI). The term of the Order is twenty years (*id.*, ¶ VII); the obligations under ¶ III to document the “meeting competition” defense and under ¶ VI to file annual compliance reports extend for ten and five years, respectively.

The purpose of this analysis is to facilitate public comment on the proposed Consent Order, and it is not intended to constitute an official interpretation of the agreement and proposed Consent Order or to modify in any way their terms.

¹ Section 2(b) of the Robinson-Patman Act permits a seller to rebut a prima-facie case of price discrimination by showing that his lower price “was made in good faith to meet an equally low price of a competitor.” 15 U.S.C. §13(b).

² See Federal Trade Commission v. National Lead Co., 352 U.S. 419, 430 (1957).

Complaint

IN THE MATTER OF

MOTOR UP CORPORATION, INC., ET AL.CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATIONS OF
SEC. 5 OF THE FEDERAL TRADE COMMISSION ACT

*Docket D-9291; File No. 9723034
Complaint, April 8, 1999--Decision, May 3, 2000*

This consent order addresses representations by Respondents Motor Up Corporation, Inc., Motor Up America, Inc, and Kyle Burns, individually and as an officer of Motor Up Corporation, Inc. Regarding its products ability to improve performance over just motor oil. The order prohibits Respondent from making any engine treatment, fuel treatment, motor oil, grease, transmission fluid, or break fluid, and any additive intended to be used with or substituted for any of these products, unless they can support the claim with competent and reliable evidence. Respondent is also prohibited from misrepresenting in advertising the existence, contents, validity, results, conclusions, or interpretations of any studies on its product and its performance. In addition, Respondent is prohibited from providing false demonstrations, pictures, experiments, illustrations, or tests of an engine oil additive or similar product.

Participants

For the Commission: *Edwin Rodriguez, Jonathan Cowen, Robert M. Frisby, Mary K. Engle, Elaine D. Kolish, Keith B. Anderson, Gerard R. Butters, and Paul A. Pautler.*

For the Respondents: *Steven Fellman and Ira Kasdan, Galland, Kharasch, Morse & Garfinkle, and Edward Glynn, Venable, Baetjer, Howard & Civiletti.*

COMPLAINT

The Federal Trade Commission, having reason to believe that Motor Up Corporation, Inc. and Motor Up America, Inc., corporations, and Kyle Burns, individually and as an officer of Motor Up Corporation, Inc. ("respondents"), have violated the provisions of the Federal Trade Commission Act, and it appearing

Complaint

to the Commission that this proceeding is in the public interest, alleges:

1. Respondent Motor Up Corporation, Inc. is a Pennsylvania corporation with its principal office or place of business at 1530 Chestnut Street, Philadelphia, Pennsylvania 19102.
2. Respondent Motor Up America, Inc. is a Pennsylvania corporation with its principal office or place of business at 759 Federal Highway, Suite 312, Stuart, Florida 34994. Motor Up America, Inc. is a wholly owned subsidiary of Motor Up Corporation, Inc.
3. Respondent Kyle Burns is president of Motor Up Corporation, Inc. Individually or in concert with others, he formulates, directs, or controls the policies, acts, or practices of the corporate respondents, including the acts or practices alleged in this complaint. His principal office or place of business is the same as that of Motor Up Corporation.
4. Respondents have advertised, labeled, offered for sale, sold and distributed products to the public, including Motor Up No Oil Change Engine Treatment Concentrate ("Motor Up"), a motor oil additive.
5. The acts and practices of respondents alleged in this complaint have been in or affecting commerce, as "commerce" is defined in Section 4 of the Federal Trade Commission Act.
6. Respondents have disseminated or have caused to be disseminated advertisements for Motor Up, including but not necessarily limited to the attached Exhibits A through D. These advertisements contain the following statements, demonstrations, and other visual depictions:

Complaint

A. A program-length television advertisement for Motor Up, entitled "Motor Up" (Exhibit A):

(1) Host: "COMPARED TO A LEADING MOTOR OIL, MOTOR UP HAS ELEVEN TIMES THE ANTI-WEAR AGENTS, AND ARE YOU READY FOR THIS, SEVENTY TIMES MORE EXTREME PRESSURE AGENTS WHICH DRAMATICALLY REDUCE WEAR AND TEAR UNDER SEVERE CONDITIONS." (p.5)

(2) "Settling/Adherence" Demonstration

Host: "WATCH WHAT HAPPENS WHEN WE ADD MOTOR UP!"

[Host pours Motor Up into transparent container filled with water and at the bottom of which lies a metal plate. Motor Up settles to the bottom of the container. Host removes the metal plate. Some of the product adheres to the plate.]

"IT ACTUALLY PENETRATES THE WATER. WHILE THE OTHERS ARE STILL FLOATING THERE ON THE SURFACE... TAKE A LOOK AT THIS ... HA, MOTOR UP NOT ONLY PENETRATES THROUGH THE WATER TO THE METAL, LOOK RIGHT HERE! IT'S PHYSICALLY BONDED ITSELF TO THE METAL EVEN THROUGH THE WATER...

IT'S THIS SLIPPERY BARRIER THAT PROTECTS YOUR ENGINE PARTS FROM CORROSION DAMAGE. NO WATER CAN GET TO THE METAL SO NO CORROSION DAMAGE CAN OCCUR.

Complaint

AND IT'S THIS SAME BARRIER THAT PROTECTS YOUR ENGINE DURING COLD STARTS WHEN IT SITS OVER NIGHT AND ALL THE OIL DRAINS OFF THE PARTS..." (p. 6)

- (3) Host: "WE WANTED SCIENTIFIC PROOF THAT MOTOR UP REDUCES WEAR AND TEAR ON ENGINE PARTS... IN FACT, ONE STUDY HAS SHOWN THAT MOTOR UP REDUCES WEAR AND TEAR IN YOUR ENGINE BY UP TO FIFTY PERCENT" (p. 9)
- (4) Host: "MOTOR UP REDUCES WEAR AND TEAR ON YOUR ENGINE. PROLONGING ITS LIFE.. YOU'RE ACTUALLY ADDING MILES TO THE LIFE OF YOUR CAR...

ONE TREATMENT, ONE TIME, WILL STAY IN YOUR ENGINE, EVEN BETWEEN OIL CHANGES BECAUSE MOTOR UP BONDS TO THE METAL INSIDE ... IT WONT (SIC) DRAIN OUT" (p. 9)

- (5) Announcer: "MOTOR UP . . . REDUCE[s] WEAR AND TEAR ON ENGINE PARTS, PROTECT[s] DURING COLD START UPS AND MUCH MORE." (p. 16, repeated at pp. 24-25)
- (6) Announcer: "ONE TREATMENT ... ONE TIME PROTECTS YOUR ENGINE FOR UP TO 50,000 MILES ... GUARANTEED! (p. 16)

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(7) "Disaster Strikes: Lost Oil Pan and Oil"
Demonstration

Announcer: "YOU'LL WITNESS UNBELIEVABLE HOME VIDEO TO **PROVE** THAT MOTOR UP CAN HELP PREVENT BREAKDOWNS." (p. 2)

Host: "IT'S ACTUAL HOME VIDEO THAT WAS SHOT FOR THE PRODUCERS AND WRITERS TO PREPARE FOR THIS PROGRAM. HOWEVER, IT BEST ILLUSTRATES HOW MOTOR UP CAN PROTECT YOU IF DISASTER STRIKES." (p. 19)

[A car raised up on a hydraulic car lift is in an automotive garage. The oil is drained from the car and the oil pan is removed. The car is started and allowed to run. Water is then sprayed on the exposed engine parts from beneath, and the engine continues to run.]

Participant: "LOOK AT THIS... THE ENGINE HAS NO OIL AND THESE GUYS CAN'T EVEN GET MOTOR UP OFF THE ENGINE PARTS BY SPRAYING IT WITH WATER... THIS ENGINE SHOULD HAVE BROKEN DOWN LONG AGO... BUT IT'S STILL RUNNING AFTER TREATING IT WITH MOTOR UP." (p. 20)

Participant: "GIVE IT ANOTHER BLAST OF WATER! IT DOESN'T GET MUCH WORSE THAN THAT ... I'D SAY THAT, THAT MOTOR UP IS CLINGING TO THE ENGINE! UNBELIEVABLE!" (p. 21)

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- (8) Host: "I'VE TOLD YOU HOW IT PREVENTS CORROSION IN YOUR ENGINE" (p. 29)
- (9) Announcer: "YOU'VE HEARD FROM THE LEADING PROFESSIONAL'S (SIC) HOW MOTOR UP . . . REDUCES WEAR AND TEAR ON ENGINE PARTS. PROTECTS DURING COLD START UPS! AND MUCH MORE." (p. 30)
- (10) Announcer: "UNLIKE OTHER ENGINE TREATMENTS, YOU JUST POUR MOTOR UP IN ANYTIME, AND IT WON'T DRAIN OUT. EVEN AFTER AN OIL CHANGE." (p. 31)

B. Motor Up Bottle Labeling (Exhibit B):

- (1) UNIQUE CHEMISTRY EXTENDS ENGINE LIFE
- (2) Gives your vehicle's engine deep penetrating protection against friction, wear and damage.
- (3) Won't wear off or drain out when you change oil.

C. Brochure sent to retail distributors (Exhibit C):

- (1) MotorUp Cuts Adhesive Wear As Much As 90.17%.
- (2) MotorUp Prolongs Engine Life.
- (3) MotorUp Protects Against Wear Even Without Oil.

D. Motor Up Web site on the Internet (Exhibit D):

Complaint

- (1) Prolongs Engine Life.
- (2) MotorUp . . . won't drain out even when you change the oil.
- (3) Scientific Proof. Extensive product testing in the U.S. and Europe shows that MotorUp reduces friction and wear by as much as 50%.
- (4) Ideal for newer engines (sic) too! Keep your car running great and protect it from power-robbing wear and tear - the leading cause of engine repairs.

7. Through the means described in Paragraph 6, respondents have represented, expressly or by implication, that:

A. Compared to motor oil alone, Motor Up:

- (1) Reduces engine wear;
- (2) Reduces engine wear by up to 50 percent;
- (3) Reduces adhesive engine wear by up to 90.17 percent;
- (4) Reduces engine wear during cold starts;
- (5) Provides more protection against engine wear in cold temperatures;
- (6) Extends the duration of engine life; and
- (7) Helps prevent engine breakdowns; and

B. Motor Up:

- (1) Prevents corrosion in engines;

Complaint

- (2) Will not drain out from the engine even when the oil is changed;
- (3) Protects engines for up to 50,000 miles; and
- (4) Protects against engine wear even without motor oil.

8. Through the means described in Paragraph 6, respondents have represented, expressly or by implication, that at the time they made the representations set forth in Paragraph 7, respondents possessed and relied upon a reasonable basis that substantiated such representations.

9. In truth and in fact, at the time they made the representations set forth in Paragraph 7, respondents did not possess and rely upon a reasonable basis that substantiated such representations. Therefore, the representation set forth in Paragraph 8 was, and is, false or misleading.

10. Through the means described in Paragraph 6, respondents have represented, expressly or by implication, that tests prove that, compared to motor oil alone, Motor Up reduces engine wear by up to 50 percent.

11. In truth and in fact, tests do not prove that, compared to motor oil alone, Motor Up reduces engine wear by up to 50 percent. Therefore, the representation set forth in Paragraph 10 was, and is, false or misleading.

12. Through the means described in Paragraph 6, respondents have represented, expressly or by implication, that:

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- A. The "settling/adherence" demonstration referred to in Paragraph 6, Subsection A.(2), proves, demonstrates or confirms that Motor Up prevents corrosion in engines; and
- B. The "disaster strikes" demonstration referred to in Paragraph 6, Subsection A.(7), proves, demonstrates or confirms that, compared to motor oil alone, Motor Up reduces engine wear and helps prevent engine breakdowns.

13. In truth and in fact:

- A. The "settling/adherence" demonstration referred to in Paragraph 6, Subsection A.(2), does not prove, demonstrate or confirm that Motor Up prevents corrosion in engines; and
- B. The "disaster strikes" demonstration referred to in Paragraph 6, Subsection A.(7), does not prove, demonstrate or confirm that, compared to motor oil alone, Motor Up reduces engine wear and helps prevent engine breakdowns.

Therefore, the representations set forth in Paragraph 12 were, and are, false or misleading.

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

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NOTICE

Notice is hereby given to each of the respondents hereinbefore named that the eleventh day of May, 1999, at 10:00 o'clock A.M., or such later date as determined by an Administrative Law Judge of the Federal Trade Commission, is hereby fixed as the time and the Federal Trade Commission, 600 Pennsylvania Avenue, N.W., Washington, D.C. as the place when and where a hearing will be had before an Administrative Law Judge of the Federal Trade Commission, on the charges set forth in this complaint, at which time and place you will have the right under said Act to appear and show cause why an order should not be entered requiring you to cease and desist from the violations of law charged in the complaint.

You are notified that the opportunity is afforded you to file with the Commission an answer to this complaint on or before the twentieth (20th) day after service of it upon you. An answer in which the allegations of the complaint are contested shall contain a concise statement of the facts constituting each ground of defense; and specific admission, denial, or explanation of each fact alleged in the complaint or, if you are without knowledge thereof, a statement to that effect. Allegations of the complaint not thus answered shall be deemed to have been admitted.

If you elect not to contest the allegations of fact set forth in the complaint, the answer shall consist of a statement that you admit all of the material allegations to be true. Such an answer shall constitute a waiver of hearings as to the facts alleged in the complaint, and together with the complaint will provide a record basis on which the Administrative Law Judge shall file an initial decision containing an appropriate order disposing of the proceeding. In such answer you may, however, reserve the right to submit proposed findings and conclusions and the right to appeal

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the initial decision to the Commission under Section 3.52 of the Commission's Rules of Practice for Adjudicative Proceedings.

Failure to answer within the time above provided shall be deemed to constitute a waiver of your right to appear and contest the allegations of the complaint and shall authorize the Administrative Law Judge, without further notice to you, to find the facts to be as alleged in the complaint and to enter an initial decision containing such findings, appropriate conclusions and order.

The following is the form of order which the Commission has reason to believe should issue if the facts are found to be as alleged in the complaint. If, however, the Commission should conclude from the record facts developed in any adjudicative proceedings in this matter that the proposed order provisions as to Motor Up Corporation, Inc. and Motor Up America, Inc., corporations, and Kyle Burns, individually and as an officer of Motor Up Corporation, Inc., might be inadequate to fully protect the consuming public, the Commission may order such other relief as it finds necessary or appropriate.

Moreover, the Commission has reason to believe that, if the facts are found as alleged in the complaint, it may be necessary and appropriate for the Commission to seek relief to redress injury to consumers, or other persons, partnerships or corporations, in the form of restitution and refunds for past, present, and future consumers and such other types of relief as are set forth in § 19(b) of the Federal Trade Commission Act. The Commission will determine whether to apply to a court for such relief on the basis of the adjudicative proceedings in this matter and such other factors as are relevant to consider the necessity and appropriateness of such action.

Complaint

ORDER

DEFINITIONS

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

- 1. "Motor Up" shall mean Motor Up No Oil Change Engine Treatment Concentrate.**
- 2. "Competent and reliable scientific evidence" shall mean tests, analyses, research, studies, or other evidence based on the expertise of professionals in the relevant area, that has been conducted and evaluated in an objective manner by persons qualified to do so, using procedures generally accepted in the profession to yield accurate and reliable results.**
- 3. Unless otherwise specified, "respondents" shall mean Motor Up Corporation, Inc. and Motor Up America, Inc., corporations, their successors and assigns and their officers; Kyle Burns, individually and as an officer of Motor Up Corporation, Inc.; and each of the above's agents, representatives, and employees.**
- 4. "Commerce" shall mean as defined in Section 4 of the Federal Trade Commission Act, 15 U.S.C. § 44.**

I.

IT IS ORDERED that respondents, directly or through any corporation, subsidiary, division, or other device, in connection with the labeling, advertising, promotion, offering for sale, sale, or distribution of Motor Up or any other product for use in a

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motor vehicle, in or affecting commerce, shall not make any representation, in any manner, expressly or by implication:

- A. that, compared to motor oil alone, use of such product:
 - (1) Reduces engine wear;
 - (2) Reduces engine wear up to 50 percent or by any other quantity;
 - (3) Reduces adhesive engine wear by up to 90.17 percent or by any other quantity;
 - (4) Reduces engine wear during cold starts;
 - (5) Provides more protection against engine wear in cold temperatures;
 - (6) Extends the duration of engine life; or
 - (7) Helps prevent engine breakdowns; or
- B. that such product:
 - (1) Prevents corrosion in engines;
 - (2) Will not drain out from the engine even when the oil is changed;
 - (3) Protects engines for up to 50,000 miles; or
 - (4) Protects against engine wear even without motor oil; or
- C. regarding the performance, benefits, efficacy, attributes, or use of such product,

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unless, at the time the representation is made, respondents possess and rely upon competent and reliable evidence, which when appropriate must be competent and reliable scientific evidence, that substantiates the representation.

II.

IT IS FURTHER ORDERED that respondents, directly or through any corporation, subsidiary, division, or other device, in connection with the labeling, advertising, promotion, offering for sale, sale, or distribution of Motor Up or any other product for use in a motor vehicle, in or affecting commerce, shall not misrepresent, in any manner, expressly or by implication, the existence, contents, validity, results, conclusions, or interpretations of any test or study.

III.

IT IS FURTHER ORDERED that respondents, in connection with the manufacturing, advertising, labeling, packaging, offering for sale, sale, or distribution of Motor Up or any other product, in or affecting commerce, shall not misrepresent, in any manner, expressly or by implication, that any demonstration, picture, experiment, illustration or test proves, demonstrates or confirms any material quality, feature or merit of such product, or the superiority or comparability of the product in a material respect relative to any other product.

IV.

IT IS FURTHER ORDERED that respondents Motor Up Corporation, Inc. and Motor Up America, Inc., and their successors and assigns, and respondent Kyle Burns shall, for five (5) years after the last date of dissemination of any representation

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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 their possession or control that contradict, qualify, or call into question the representation, or the basis relied upon for the representation, including complaints and other communications with consumers or with governmental or consumer protection organizations.

V.

IT IS FURTHER ORDERED that respondents Motor Up Corporation, Inc. and Motor Up America, Inc., and their successors and assigns, and respondent Kyle Burns shall deliver a copy of this order to all current and future principals, officers, directors, and managers, and to all current and future employees, agents, and representatives having responsibilities with respect to the subject matter of this order, and shall secure from each such person a signed and dated statement acknowledging receipt of the order. Respondents shall deliver this order to current personnel within thirty (30) days after the date of service of this order, and to future personnel within thirty (30) days after the person assumes such position or responsibilities.

VI.

IT IS FURTHER ORDERED that respondents Motor Up Corporation, Inc. and Motor Up America, Inc., and their 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

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limited to a dissolution, assignment, sale, merger, or other action that would result in the emergence of a successor corporation; the creation or dissolution of a subsidiary, parent, or affiliate that engages in any acts or practices subject to this order; the proposed filing of a bankruptcy petition; or a change in the corporate name or address. Provided, however, that, with respect to any proposed change in the corporation about which respondents learn less than thirty (30) days prior to the date such action is to take place, respondents shall notify the Commission as soon as is practicable after obtaining such knowledge. All notices required by this Part shall be sent by certified mail to the Associate Director, Division of Enforcement, Bureau of Consumer Protection, Federal Trade Commission, Washington, D.C. 20580.

VII.

IT IS FURTHER ORDERED that respondent Kyle Burns, for a period of ten (10) years after the date of issuance of this order, shall notify the Commission of the discontinuance of his current business or employment, or of his affiliation with any new business or employment. The notice shall include respondent's new business address and telephone number and a description of the nature of the business or employment and his duties and responsibilities. All notices required by this Part shall be sent by certified mail to the Associate Director, Division of Enforcement, Bureau of Consumer Protection, Federal Trade Commission, Washington, D.C. 20580.

VIII.

IT IS FURTHER ORDERED that respondents Motor Up Corporation, Inc. and Motor Up America, Inc., and their successors and assigns, and respondent Kyle Burns 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

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with the Commission a report, in writing, setting forth in detail the manner and form in which they have complied with this order.

Complaint

IX.

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

- A. Any Part in this order that terminates in less than twenty (20) years;
- B. This order's application to any respondent that is not named as a defendant in such complaint; and
- C. This order if such complaint is filed after the order has terminated pursuant to this Part.

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

IN WITNESS WHEREOF, the Federal Trade Commission has caused its complaint to be signed by its Secretary and its official seal to be hereto affixed at Washington, D.C. this eighth day of April, 1999.

By the Commission.

Complaint Exhibits

Exhibits

Exhibit A

"MOTOR UP"

TRT: 28.30

Complaint Exhibits

"MOTOR-UP"

INFOMERCIAL SCRIPT
TRANSCRIBED FINAL 3/6/96

*CONTENTS:

A. PAID DISCLAIMER:

THE FOLLOWING PROGRAM IS A PAID ADVERTISEMENT FOR MOTOR UP
BROUGHT TO YOU BY NATIONAL MEDIA CORPORATION

B. TEASE:

MALE V.O.:

WHAT IF YOU COULD IMPROVE THE WAY YOUR OLD POOR RUNNING
ENGINE SOUNDS IN JUST MINUTES'

AND WHAT IF IT WAS SO EASY THAT OVER ONE MILLION PEOPLE WITH
CARS JUST LIKE YOURS HAD (ALREADY DONE IT'

TESTIMONIAL MALE: ED SHELIG/DAUGHTER

"THE VALVES QUIETED DOWN, THE SLUGGISHNESS WENT AWAY. THE
HESITATION I MEAN IT'S LIKE DRIVING A NEW VEHICLE"

MALE V.O.:

AND WHAT IF ALL YOU HAD TO DO WAS SIMPLY POUR THIS POWERFUL
PRODUCT INTO YOUR ENGINE

THEN WATCH AND LISTEN TO IT TRANSFORM YOUR CAR'S MOTOR RIGHT
BEFORE YOUR EYES!

NO MORE SHAKING, KNOCKING OR HESITATION

Complaint Exhibits

TESTIMONIAL FEMALE:

"IT DOESN'T HAVE THAT KNOCKING SOUND, LIKE THE WHOLE ENGINE IS MOVING ... HA, HA"

MALE V.O.:

AND WOULDN'T IT BE GREAT IF THIS PRODUCT DID SOMETHING SO AMAZING TO PROTECT ENGINE PARTS THAT IT LEFT THE COMPETITION BEHIND.

WELL DON'T CHANGE THAT CHANNEL BECAUSE THIS PRODUCT IS FINALLY HERE INTRODUCING MOTOR UP THE NO OIL CHANGE ENGINE TREATMENT! AND TODAY YOU'LL SEE DEFINITE REASONS WHY YOUR NEW OR USED CAR NEEDS IT

YOU'LL EVEN SEE IF MOTOR UP CAN HELP THESE NASTY JUNKYARD ENGINES RUN BETTER'

TESTIMONIAL MALE 1: (JUNKYARD GUY)

"I'VE NEVER SEEN ANYTHING LIKE THAT WORK BEFORE . I'D LIKE TO SEE YOU DO IT"

TESTIMONIAL MALE 2: (JUNKYARD GUY)

"NOT IF THERE HERE IN THE JUNKYARD I DON'T THINK THERE GOING TO RUN ANY BETTER THAN THEY DID ON THE ROAD"

MALE V.O.:

YOU'LL WITNESS UNBELIEVABLE HOME VIDEO TO PROVE THAT MOTOR UP CAN HELP PREVENT BREAKDOWNS

AND YOU'LL HAVE A FRONT ROW SEAT TO SEE IF MOTOR UP CAN START AN ENGINE FROZEN IN A SOLID BLOCK OF ICE.

TESTIMONIAL MALE: (FREEZER)

Complaint Exhibits

"I TELL YOU MY CAR SPENDS ALL WINTER OUTSIDE ... I'M GOING TO LOOK INTO THIS".

MALE V.O.:

YOU'LL DISCOVER HOW MOTOR UP WILL MAKE YOUR OLD CAR SOUND LIKE NEW AND YOUR NEW CAR SOUND EVEN BETTER

TESTIMONIAL MALE:

"DON'T ASK ME HOW IT WORKS ... I DON'T KNOW ... ALL I'M TELLING YOU IS IT WORKS ... I'M NOT BEING PAID FOR THIS ... ALL I'M TELLING YOU IT WORKS"

MALE V.O.:

ALL NEXT ... ON MOTOR UP AMERICA

C. SEGMENT #1:

C. SHOW OPEN:, *HOST WELCOMES VIEWERS TO PROGRAM FROM GARAGE STUDIO SET

JIM HOWARD ON CAMERA/ON SET:

HELLO EVERYBODY AND WELCOME TO MOTOR-UP AMERICA, I'M JIM HOWARD ... NOW, IF YOU DRIVE A CAR WITH OVER 15 000 MILES ON IT ... IT MAY HAVE LOST ITS PEP ... MAYBE IT RUNS POORLY OR HOT, ... YOU MIGHT HEAR A SLIGHT KNOCKING SOUND ... OR MAYBE YOUR CAR IS JUST PLAIN TOUGH TO START

WHAT IF I TOLD YOU ... I'VE GOT A PRODUCT THAT WILL IMPROVE ALL OF THOSE CONDITIONS ... YOU ONLY HAVE TO USE IT ONE TIME ... AND ITS AS EASY TO USE AS POURING YOURSELF A GLASS OF WATER

BUT WAIT A MINUTE, LETS SAY YOU DRIVE A NEWER CAR, WOULDN'T IT BE GREAT IF YOU COULD KEEP IT SOUNDING JUST LIKE THE DAY YOU BOUGHT IT ... WELL ... NOW YOU CAN

Complaint Exhibits

BEFORE YOU DO ANYTHING ELSE TO YOUR CAR INTRODUCE YOUR ENGINE TO MOTOR UP ... **THE #1 ADVANCED ENGINE TREATMENT CONCENTRATE** THAT WORKS INSTANTLY AND KEEPS ON WORKING ..NO OIL CHANGE, NO MESS AND NO MECHANIC. MOTOR UP IS TOMORROWS ENGINE TREATMENT TODAY!

TO PROVE OUR POINT WE Poured MOTOR UP INTO THE POOREST RUNNING ENGINES WE COULD FIND AND GUARANTEED INSTANT IMPROVEMENTS. WATCH AND LISTEN TO WHAT AN ENGINE SOUNDS LIKE BEFORE ADDING MOTOR UP AND AFTER ADDING MOTOR UP

• **BEFORE AND AFTER RESULTS:**
SPLIT SCREEN OF BEFORE/AFTERS WITH LIVE SOUND

TESTIMONIAL MALE: BRIAN OAKLEY

"IT'S AMAZING HOW SOMETHING SO NEXPENSIVE CAN MAKE AN IMPROVEMENT SO QUICK AFTER TWO MECHANICS DO A CARBURETOR AND A TRANSMISSION HA HA HA"

• **BEFORE AND AFTER RESULTS:**
SPLIT SCREEN OF BEFORE/AFTERS WITH LIVE SOUND

TESTIMONIAL FEMALE: LORI STONEBACK

"IT SOUND REALLY GOOD IT'S NOT SHAKING THAT'S WHAT'S AMAZING ME IT'S NOT SHAKING ANYMORE.

COMMENTATOR V.O.

"AND DO YOU KNOW WHO FIXED IT?"

TESTIMONIAL FEMALE: LORI STONEBACK

"I DID". HA, HA, HA

• **BEFORE AND AFTER RESULTS:**
SPLIT SCREEN OF BEFORE/AFTERS WITH LIVE SOUND

TESTIMONIAL MALE: ROBERT RUMMEL

Complaint Exhibits

"LISTEN TO THAT MOTGR SHE'S PURRING LIKE A KITTEN NOW. BEFORE THERE WAS LIKE A LITTLE MISS SOUND TO IT. ACTUALLY IT SEEMS LIKE IT'S GETTING QUIETER AS IT'S RUNNING THERE"

• **BEFORE AND AFTER RESULTS:**

SPLIT SCREEN OF BEFORE/AFTERS WITH LIVE SOUND

TESTIMONIAL FEMALE: SHARON McCRACKEN

"IT OVERHEATS ALL THE TIME WHEN I STOP AT A RED LIGHT IT UMM IT THE STARTS **GETTING** HIGHER AND WHEN I GET IN A TRAFFIC JAM I GET REAL SCARED LIKE LETS MOVE, LETS **MOVE!** CAUSE IT GOES DOWN **AS** SOON AS I START DRIVING YOU KNOW SO ITS NOT DOING IT NOW HA HA"

TESTIMONIAL MALE: ROBERT RUMMEL

"WHAT IS THE THE NAME IS MOTOR-UP IT SHOULD BE UNBELIEVABLE MOTOR-UP"

JIM HOWARD ON CAMERA/ON SET:

IT'S NOT UNBELIEVABLE IT'S MOTOR UP AND IT WORKS THAT FAST WE PROVED IT TO THOSE PEOPLE IN LESS THAN FIVE MINUTES. COMPARED TO A LEADING MOTOR OIL, MOTOR-UP HAS ELEVEN TIMES THE ANTI-WEAR AGENTS, AND ARE YOU READY FOR THIS, SEVENTY TIMES MORE EXTREME PRESSURE AGENTS WHICH DRAMATICALLY REDUCE WEAR AND TEAR UNDER SEVERE CONDITIONS

CORROSION DEMO:

NOW I WANT TO SHOW YOU WHY MOTOR UP IS THE #1 CONCENTRATE AVAILABLE TODAY

IT WAS SPECIFICALLY DEVELOPED TO BE HEAVIER THAN WATER. WATER GETS INTO YOUR ENGINE THROUGH CONDENSATION AND WATER IS THE MAIN REASON FOR CORROSION ON YOUR ENGINE PARTS. (HOLDS UP PIECE OF METAL)

Complaint Exhibits

NOW WATCH THIS THE LEADING ENGINE TREATMENT ISN'T DESIGNED TO BE HEAVIER THAN WATER. SO IT ACTUALLY FLOATS ON THE SURFACE..SLICK 50.. THE SAME IT FLOATS.. RIGHT THERE ON TOP'

WATCH WHAT HAPPENS WHEN WE ADD MOTOR UP'

IT ACTUALLY PENETRATES THE WATER WHILE THE OTHERS ARE STILL FLOATING THERE ON THE SURFACE TAKE A LOOK AT THIS HA MOTOR UP NOT ONLY PENETRATES THROUGH THE WATER TO THE METAL LOOK RIGHT HERE! IT'S PHYSICALLY BONDED ITSELF TO THE METAL EVEN THROUGH THE WATER..

IT'S THIS SLIPPERY BARRIER THAT PROTECTS YOUR ENGINE PARTS FROM CORROSION DAMAGE NO WATER CAN SET TO THE METAL SO NO CORROSION DAMAGE CAN OCCUR

AND IT'S THIS SAME BARRIER THAT PROTECTS YOUR ENGINE DURING COLD STARTS WHEN IT SITS OVER N GHT AND ALL THE OIL DRAINS OFF THE PARTS

TESTIMONIAL MALE: LCU WHELLER

"YOU KNOW IT USED TO BE I'D GO OUT AN A AFTER I GET THE CAR CHISELED OFF AND SCRAPED OFF I'M READY TO GO . YOU KNOW. YOU JUMP IN AND A YOU TURN THE KEY AND THERE'S ALWAYS THAT MOMENT OF HESITATION IS IT GONNA GO?"

WELL, SINCE I PUT MOTOR UP IN A YAT THOUGHT DOESN'T ENTER MY MIND I TURN THE KEY SHE CRANKS RIGHT OVER AND AWAY WE GO'

TESTIMONIAL MALE: RALPH CHRISTMAN

"I HAD . BEFORE I USED TO HAVE TROUBLE STARTING THE CARS IN THE MORNING AND NOW I DON'T EVER SINCE I HAD MOTOR UP, THIS IS THE SECOND YEAR AND THIS SECOND YEAR I'VE HAD NO PROBLEM"

TESTIMONIAL MALE: JUNIOR BURNET

"THERE IT IS' ONE CRANK BEFORE I HAD TO KEEP GIVING IT GAS BEFORE IT STARTED AND ONE CRANK AND IT STARTED RIGHT AWAY' SO

Complaint Exhibits

THAT'S PRETTY GOOD AT LEAST I'M SEEING RESULTS ALREADY FROM THAT STUFF YOU PUT IN!

TESTIMONIAL FEMALE: JUDITH EBERHARDT

"YEAH. IT'S NOT GONNA WAKE UP THE NEIGHBORS ANYMORE!, HA, HA, HA"

JIM HOWARD: ON CAMERA ON SET

NOW, UNLIKE THESE OTHER ADDITIVES WHERE YOU HAVE TO WAIT FOR AN OIL CHANGE ... WITH MOTOR UP, YOU JUST POUR IT IN AND IT WORKS INSTANTLY, IT'S LIKE A MECHANIC IN A BOTTLE.

MOTOR UP WORKS WITH ANY TYPE OF ENGINE GAS OR DIESEL IT WORKS WITH ALL THE TYPES OF OIL YOU ALREADY USING IN YOUR CAR REGULAR OR SYNTHETIC! IT EVEN WORKS IF YOU'VE ALREADY TRIED ONE OF THESE ENGINE TREATMENTS

NOW LOOK. ANY PROFESSIONAL WILL TELL YOU IF YOU CAN REDUCE FRICTION YOUR ENGINE WILL RUN SMOOTHER. QUIETER AND COOLER.

MALE V.O.:

SO WE ASKED LEADING PROFESSIONALS TO PROVE TO US THAT "MOTOR UP" PERFORMS INSIDE YOUR ENGINE

FIRST, WE ASKED THE MECHANIC OF THE YEAR TO PROVE THAT MOTOR UP WILL HELP A!! ENGINE RUN COOLER! HERE ARE THE RESULTS..

BEFORE MOTOR-UP. THE ENGINE TEMPERATURE WAS 122 DEGREES... AFTER ADDING MOTOR UP THE ENGINE TEMPERATURE DROPPED BY NINETEEN DEGREES!

TESTIMONIAL MALE: ED WATSON

"AND THE TEMPERATURE ACTUALLY DROPS IT'S RUNNING A LOT COOLER, THE TRUCK HAS A LITTLE BIT MORE HORSEPOWER. I'M RUNNING REGULAR GAS NOW, I DON'T HAVE TO RUN HIGH TEST IN IT ANYMORE

TESTIMONIAL MALE: ANTHONY ALTIER

Complaint Exhibits

"IT'S NOT, IT'S NOT OVER HEATED BY NOW IT WOULD OF OH THE TEMPERATURE WOULD HAVE BEEN UP AND THE THERMOSTAT WOULD HAVE PROBABLY BLOWN BY NOW' 'HEY ALL RIGHT' IT WORKS!"

MALE V.O.:

NEXT, WE ASKED THIS RACE CAR ENGINE TESTING FACILITY TO PROVE THAT MOTOR UP INCREASES THE HORSEPOWER OF THIS ENGINE.

AFTER POURING MOTOR UP IN, THE ENGINE SHOWED A DRAMATIC INCREASE IN HORSEPOWER.

TESTIMONIAL MALE: SANDY SHAMLIN

"I'VE BEEN DYNOING ENGINES FOR TWENTY TWO YEARS BUT I'VE NEVER SEEN AN INCREASE LIKE THIS"

COMMENTATOR V.O.:

WHAT DO YOU THINK?"

TESTIMONIAL MALE: KEN HESS

'OH YEAH, DEFINITELY' 'EXCELLENT' DEFINITELY, OH YEAH! A LOT MORE HORSEPOWER I CAN FEEL IT'

TESTIMONIAL FEMALE: LORETTA MIMCTE

THE PICK UP WAS, WAS THERE, IT WAS QUIET! IT WAS JUST LIKE A BRAND NEW CAR THAT I HAD! I DIDN'T EVEN KNOW I HAD A HUNDRED THOUSAND MILES ON IT!"

JIM HOWARD: OFF CAMERA

"SO HOW DID IT FEEL?"

TESTIMONIAL MALE: BOB HANLEY

'WELL THE ACCELERATION IS OUTSTANDING' REAL SMOOTH ALL THE WAY THROUGH THE TACK"

Complaint Exhibits

MALE V.O.:

FINALLY, WE WANTED SCIENTIFIC PROOF THAT MOTOR UP REDUCES WEAR AND TEAR ON ENGINE PARTS . IN FACT ONE STUDY HAS SHOWN THAT MOTOR UP REDUCES WEAR AND TEAR IN YOUR ENGINE BY UP TO FIFTY PERCENT ...

JIM HOWARD: ON CAMERA, ON SET

REDUCING WEAR AND TEAR, ISN'T THAT WHAT IT'S ALL ABOUT ... NOW. TAKE FOR INSTANCE THIS SNEAKER WOULDN'T IT BE GREAT IF THERE WAS A PRODUCT THAT YOU COULD PUT ON IT THAT WOULD PREVENT IT FROM WEARING OUT AND PROLONG IT'S LIFE . WOULDN'T YOU WANT IT ? I KNOW I WOULD.

MOTOR UP REDUCES WEAR AND TEAR ON YOUR ENGINE . PROLONGING ITS LIFE . YOU'RE ACTUALLY ADDING MILES TO THE LIFE OF YOUR CAR .

ONE TREATMENT . ONE TIME . WILL STAY IN YOUR ENGINE, EVEN BETWEEN OIL CHANGES . BECAUSE MOTOR UP BONDS TO THE METAL INSIDE . IT WON'T DRAIN OUT . AND THERE'S ABSOLUTELY NO RISK TO USING MOTOR UP . IF AN ENGINE FAILURE OCCURS IN AN ENGINE THAT'S BEEN TREATED WITH MOTOR UP . FOR UP TO THREE YEARS OR 50,000 MILES . WE'LL PAY FOR THE REPAIR UP TO \$10,000.00 .

JIM-HOWARD: VOICE OVER

LESS FRICTION MEANS LESS DAMAGING HEAT . A SMOOTHER, QUIETER RUNNING ENGINE AND SUPERIOR PROTECTION DURING COLD STARTS!

JIM HOWARD: ON CAMERA, ON SET!

WHAT WE DID NEXT GAVE COLD STARTS AN ENTIRELY NEW MEANING . WE TOOK TWO IDENTICAL RUNNING ENGINES . TREATED ONE WITH MOTOR UP AND THEN WE DID THE UNEXPECTED . WE FROZE THEM!

JIM HOWARD: IN FREEZER WITH AUDIENCE!

Complaint Exhibits

NOW, THIS THING SAYS PNEENN DEGREES BELOW ZERO RIGHT THAT'S JUST A NUMBER, THAT'S JUST A NUMBER LET ME SEE IF I CAN SHOW YOU HOW COLD IT REALLY IS. YOU GUYS GETTING THIS?

YOU GOTTA WATCH THIS THIS IS HOW COLD IT IS IN THIS ROOM!

IT JUST SHATTERED, THIS IS SOLID ICE! THESE ENGINES HAVE BEEN LOCKED IN THIS ICE FOR OVER TWENTY FOUR YOURS AND NOW WERE HERE FOR THE MOMENT OF TRUTH. NOW ITS TIME TO ACTUALLY START CHIPPING AWAY, FREE THE FAN AND FREE THE FAN BELT.

JIM HOWARD: V.0

AS THEY STARTED CHIPPING AWAY AT THE THE SOLID ICE, I WAS CURIOUS TO FIND WHAT THE CROWD TYOUGH!

TESTIMONIAL MALE:

"I USED TO LIVE IN MAINE IT HAD TWENTY BELOW TEMPERATURES AND I REMEMBER ONE MORNING WITH MY BROTHER WE SPENT HOURS ON IT AND WE NEVER DID GET IT STARTED TILL IT WARMED UP THAT DAY AND IT WAS TWENTY BELOW THAT DAY AND THAT THERMOMETER OVER THERE TELLS ME ITS SIMILAR IN HERE .SO IT'S NOT GOING TO START "

JIM HOWARD: OFF CAMERA

WHAT DO YOU THINK SIR IS THIS GOING TO WORK?

TESTIMONIAL MALE:

"NO, NO! I'VE, I'VE NEVER HAD TO DO THAT TO MY ENGINE AND I ALWAYS HAVE TROUBLE WITH IT STARTING IN THE WINTER TIME"

TESTIMONIAL FEMALE:

"I'VE HAD JUST PLAIN OLD SNOW MAKE MINE NOT RUN! SO THIS ICE NO WAY!"

TESTIMONIAL MALE:

Complaint Exhibits

"THIS IS A TEST . . . THIS IS A TEST!" JIM HOWARD OFF CAMERA "IT'S TOO COLD!"

TESTIMONIAL FEMALE:

"IT'S WAY TOO COLD .. WAY TO COLD!"

TESTIMONIAL MALE:

"IT WONT START..THE THING CAN'T EVEN TURN"

TESTIMONIAL FEMALE:

"IT'S COAGULATED' (STUCK)"

TESTIMONIAL MALE:

NO WAY"

JIM HOWARD:

IT'S COAGULATED(STUCK)

*GROUP LAUGHTER

JIM HOWARD:

IT LOOKS LIKE THESE GUYS ARE ABOUT READY HOW ABOUT IT? KEVIN IS IT FREE?

KEVIN ICEMAN:

"YES SIR IT'S READY TO ROLL"

JIM HOWARD:

ALL RIGHT LETS GIVE IT A SHOT THEN, WHAT WE NEED IS SOME BODY TO START THIS

TESTIMONIAL MALE:

Complaint Exhibits

"I'LL TELL YOU WHAT THAT ENGINE WON'T EVEN CRANK AND NEITHER WILL THAT ONE. IT WON'T EVEN GO ROAD,RRR!"

JIM HOWARD:

COME HERE, COME HERE, YOU'RE GOING PUT IT TO THE TEST! YOUR FROM MAINE YOU HAVE EXPERIENCE ON THIS HERE'S WHAT I WANT YOU TO DO!

TURN THAT KEY TO THE RIGHT AND PUSH THAT STARTER BUTTON

TESTIMONIAL MALE:

"DO THAT NOW?"

JIM HOWARD:

RIGHT NOW! GO AHEAD!

TESTIMONIAL MALE:

"RED LIGHTS ON ... WELL. IT CRANKED MORE THAN I THOUGHT IT WOULD."

JIM HOWARD:

KEEP CRANKING! WE'LL GIVE IT WE'LL IT A WHOLE CHANCE ... YOU KEEP CRANKING! YOU KEEP COME HERE FROM WYOMING COME HERE! YOU'RE ALSO EXPERIENCED AT THIS JUST TURN THAT KEY TO THE RIGHT AND PUSH THAT STARTER BUTTON HERE WE GO!

TESTIMONIAL FEMALE:

"ANYTIME?"

JIM HOWARD:

EVERYBODY HOLD YOUR BREATH!

GROUP EXHILARATION!

Complaint Exhibits

JIM HOWARD:

THERE IT IS INCREDIBLE' DO YOU BELIEVE THAT'

TESTIMONIAL FEMALE:

"I'M BUYING THAT STUFF AND I'M GIVING IT TO MY WHOLE FAMILY"

JIM HOWARD:

FIRST TIME, ISN'T THAT AMAZING! DO YOU BELIEVE THIS'

TESTIMONIAL FEMALE:

"I DON'T BELIEVE IT"

TESTIMONIAL MALE:

'I JUST DON'T BELIEVE THIS'

JIM HOWARD:

FROZEN IN A SOLID BLOCK OF ICE' IS THAT INCREDIBLE?

TESTIMONIAL MALE:

"THAT'S INCREDIBLE, I CAN'T BELIEVE IT!"

JIM HOWARD:

COME IN HERE YOU DIDN'T BELIEVE IT YOU WERE A SKEPTIC!

TESTIMONIAL MALE:

"YES, YES, NOT FROZEN IN ICE"

JIM HOWARD:

YOU NEVER BELIEVE ANY OF THIS STUFF'

Complaint Exhibits

TESTIMONIAL MALE:

"NO, NO, NO WAY!"

JIM HOWARD:

THIS IS THE FIRST TIME YOU'VE EVER SEEN SOMETHING'

TESTIMONIAL MALE:

"THIS IS, THIS IS INCREDIBLE, I MEAN I DON'T EVEN KNOW WHAT TO SAY"

TESTIMONIAL MALE:

"UNBELIEVABLE!"

JIM HOWARD:

YOU'RE SITTING HERE CRANKING THIS ENGINE GETTING NOWHERE

TESTIMONIAL MALE:

"IT DIED, IT DIED, ABSOLUTELY!"

JIM HOWARD:

IT DIED, YOU LOST POWER YOU COULDN'T EVEN CRANK IT ANYMORE!

TESTIMONIAL MALE:

"I COULDN'T DO ANYTHING WITH IT!"

JIM HOWARD:

AND ONE TURN RIGHT'

TESTIMONIAL FEMALE:

"YOU BETCHA' I WAS SURPRISED I WISHED I'D OF HAD IT IN MY TRUCK
LAST YEAR IT WOULD HAVE SAVED ME A CASE OF FROST BITE'

Complaint Exhibits

JIM HOWARD:

I HAVEN'T HEARD YOU SAY ANYTHING YOU'VE BEEN SITTING HERE
KEEPING YOUR HANDS WARM WHAT DO YOU THINK ABOUT IT!

TESTIMONIAL MALE:

"UNBELIEVABLE, I SAW IT WITH MY OWN EYES AND I STILL DON'T BELIEVE
IT, IT'S INCREDIBLE!"

JM HOWARD:

YOU SAW IT AND YOU STILL DON'T BELIEVE IT?

TESTIMONIAL MALE:

"I STILL DON'T BELIEVE IT!"

JIM HOWARD:

EVEN THOUGH IT HAPPENED RIGHT NOW!

TESTIMONIAL MALE:

"NO. NO! I TELL YOU, MY CAR SPENDS ALL WINTER OUTSIDE, I'M GOING TO
LOOK INTO THIS!"

JIM HOWARD: VOICE OVER

THE MOTOR UP ENGINE STARTED ON THE FIRST TURN WHILE THE OTHER
JUST DIED BUT I WASN'T FINISHED YET'

JIM HOWARD:

THE PRODUCER GOING TO KILL ME DRAIN THE OIL FROM THIS THING'
LETS DO IT!

D. CTA #1: COMMERCIAL INSERT

WHEN YOU WANNA GO? DOES YOUR CAR SAY NO'

Complaint Exhibits

THEN YOU NEED MOTOR UP THE NO OIL CHANGE ENGINE TREATMENT THAT PUTS THE GET UP AND GO BACK IN YOUR RIDE

MOTOR UP PERFORMS IN CARS, TRUCKS, BOATS, RV's NEW OR USED GIVING THEM A SMOOTHER, QUIETER, COOLER RUNNING ENGINE IN JUST MINUTES.

WHEN ADDING THESE ENGINE TREATMENTS ... YOU HAVE TO WAIT FOR AN OIL CHANGE AND SPEND MORE MONEY ... BUT WITH **MOTOR UP**, YOU SIMPLY POUR IT IN AND YOU'RE DONE ... SAVING YOU TIME, MONEY AND PROTECTING YOUR INVESTMENT INSTANTLY.

AND BECAUSE MOTOR UP SCIENTIFICALLY PENETRATES **THEN** BONDS TO THE METAL INSIDE YOUR ENGINE ... IT SIGNIFICANTLY REDUCES FRICTION AND HEAT

THE RESULT IS INCREASED HORSEPOWER, REDUCED WEAR AND TEAR ON ENGINE PARTS, PROTECTION DURING COLD START UPS, AND MUCH MORE

HEY, DON'T BE EMBARRASSED BY YOUR NOISY CLUNKER ... MAKE IT SOUND LIKE NEW AGAIN WITH MOTOR UP ... GET QUICK RESULTS LIKE THIS

***BEFORE AND AFTER RESULTS: "AUDIO FREQUENCY"**

TESTIMONIAL MALE: ED SCPELIG

"NO SMOKING, NO HESITATION ... IT STARTED RIGHT UP, IT DRIVES LIKE A BRAND NEW CAR!"

MALE V.O.:

MOTOR UP IS THE NEW GENERATION OF ENGINE TREATMENTS AND OVER ONE MILLION LUCKY PEOPLE HAVE ALREADY USED IT!

ONE TREATMENT ... ONE TIME PROTECTS YOUR ENGINE FOR UP TO 50,000 MILES **GUARANTEED!**

IN FACT ... WHEN YOU ORDER MOTOR UP YOU'LL RECEIVE THIS 50,000 MILES/3 YEAR LIMITED WARRANTY CERTIFICATE.

Complaint Exhibits

IF YOU HAVE A **BREAKDOWN** MOTOR UP WILL PAY FOR THE COVERED REPAIR UP TO **\$10,000** NOW THAT'S ENDURANCE INSURANCE

ACT NOW AND RECEIVE LUBE IT UP SPRAY ... TO SOLVE ALL YOUR STUCK AND RUSTY PROBLEMS..

TAKE THE SQUEAK OUT WITH JUST ONE SPRAY AS LUBE IT UP PROTECTS METAL SURFACES IN YOUR CAR, BOAT AND ALL AROUND YOUR HOUSE

HAS A LEAKY RADIATOR GOT YOU **HOT** .. DON'T SWEAT IT!

WE'LL INCLUDE **RESTORE RADIATOR** TREATMENT JUST POUR IT IN TO LUBRICATE AND CONDITION YOUR COOLING SYSTEM PREVENT CORROSION DAMAGE AND STOP RADIATOR LEAKS WHEN THEY HAPPEN

HEY, DON'T WAIT FOR A LEAK AND BE STRANDED LET RESTORE SEAL IT SO YOU CAN KEEP ON TRUCKEN

ARE YOUR WINDSHIELD WIPERS SKIPPING, CHATTERING AND STREAKING DON'T BUY NEW ONES BECAUSE YOU ALSO GET 303 WINDSHIELD WIPER TREATMENT TO MAKE YOUR WINDSHIELD WIPERS WORK LIKE NEW AGAIN

303 RECONDITIONS HARDENING RUBBER BLADES YOU'LL SEE CLEARER IN THE RAIN, MESSY SNOW AND ICE WON'T STICK TO YOUR BLADES. AND THEY'LL LAST LONGER

THIS AN EXCLUSIVE TV OFFER AND IT'S NOT AVAILABLE IN STORES!

YOU MAY EXPECT TO PAY OVER 70.00 DOLLARS BUT YOU WONT! YOU WONT PAY \$60.00 OR EVEN FIFTY DOLLARS YOU GET IT ALL FOR THE SPECIAL INTRODUCTORY PRICE OF JUST **\$29.95.**

AND MOTOR UP COMES WITH THIS PROMISE...

POUR THE ENTIRE **BOTTLE** INTO YOUR ENGINE IF IT DOESN'T RUN SMOOTHER OR SOUND QUIETER JUST RETURN THE COMPLETE PACKAGE AND WE'LL REFUND THE PURCHASE PRICE

Complaint Exhibits

AND WHEN YOU CALL ASK THE OPERATOR ABOUT THE SPECIAL *2
PRICE OFFER ON A SECOND BOTTLE OF MOTOR LIP

SO BEFORE YOU START IT UP ... JUST POUR IN MOTOR UP!

SPOT TIME: 00:02:47:25

TAG MALE V.O.

"PER NATIONAL MEDIA CUSTOMIZATION INSTRUCTIONS"

TAG TIME: 00:00:20:01

TRT COMMERCIAL 0003 0726

E. SHOW SEGMENT #2:

TESTIMONIAL FEMALE:

"THIS PRODUCT IS GREAT I WOULD DEFINITELY RECOMMEND THIS TO ALL
THE SURROUNDING AMBULANCE SERVICES"

TESTIMONIAL MALE:

"WHEN I REVVED IT UP I HAD A LITTLE KNOCK IN IT I COULDN'T FIGURE
OUT WHAT IT WAS IT WASN'T IN THERE BEFORE I DON'T EVEN HEAR IT
NOW! I DON'T HEAR IT AT ALL!"

TESTIMONIAL MALE:

"BUT TO JUST PUT IN ONE BOTTLE, AND ONE DAY LATER TO HAVE SUCH A
MARKED IMPROVEMENT I WOULD NOT HAVE BELIEVED THAT!"@

JIM HOWARD: ON CAMERA, ON SET:

WELCOME BACK TO MOTOR UP AMERICA YOU KNOW OUT ON THE
HIGHWAY DANGER CAN STRIKE IN AN INSTANT AND HELP CAN BE VERY
FAR AWAY NOW IF YOU CAN AFFORD ONE OF THESE EXPENSIVE
CELLULAR PHONES AND CALL FOR YELP YOU MIGHT BE OK BUT THE
PROBLEM STILL EXISTS WHY NOT REDUCE THE CHANCE OF PROBLEMS
AND HELP PROTECT YOURSELF AND YOUR FAMILY FROM BREAKDOWNS

Complaint Exhibits

NOW, WHAT YOU'RE ABOUT TO SEE WAS NOT INTENDED TO BE AIRED ON NATIONAL TELEVISION IT'S ACTUAL HOME VIDEO THAT WAS SHOT FOR THE PRODUCERS AND WRITERS TO PREPARE FOR THIS PROGRAM HOWEVER, IT BEST ILLUSTRATES HOW MOTOR UP CAN PROTECT YOU IF DISASTER STRIKES

JIM HOWARD: VOICE OVER

LISTEN TO THE ENGINE BEFORE ADDING *MOTOR UP!*

COMMENTATOR OFF CAMERA #1:

NOW THIS IS THE CAR, IT JUST STARTED UP AND WERE POINTING OUT AH NOTICE, HOW THAT ENGINES LIKE KINDA TREMORING THERE AH

I WOULD HAVE TO SORT OF OBJECTIVELY SAY THAT THE ENGINE IS RUNNING 'WELL NOT TREMBLING AS MUCH' AS YOU SEE

COMMENTATOR OFF CAMERA #2:

IT'S DEFINITELY RUNNING BETTER'

COMMENTATOR OFF CAMERA #1:

THE GENTLEMEN HERE HAVE DRIVEN IT FOR ABOUT TWENTY MINUTES' TO MAKE SURE THAT THE CAR IS COMPLETELY COVERED AND SATURATED NUMBER ONE IS WERE GOING TO DRAIN THE OIL AND A

COMMENTATOR OFF CAMERA #2:

THERE'S THE INSIDE OF THE ENGINE'

COMMENTATOR OFF CAMERA #1:

SO WHAT YOUR SEEING IS THE GUTS OF AN ENGINE RUNNING, WITH NO OIL AND NO OIL PAN NOTHING BUT MOTOR UP CLINGING TO THE METAL

COMMENTATOR OFF CAMERA #2:

WOW!

Complaint Exhibits

COMMENTATOR OFF CAMERA #1:

WERE GOING TO SPRAY THE UNDERNEATH OF THIS CAR WITH A BLAST OF WATER! ANYTIME YOU'RE READY'

COMMENTATOR OFF CAMERA #3:

THIS WON'T WORK | KNOW THAT'

COMMENTATOR OFF CAMERA #1:

GO FOR IT!

COMMENTATOR OFF CAMERA #2:

THATS UNBELIEVABLE 'VE NEVER SEEN ANYTHING LIKE T YOU WANT ME TO SPRAY IT WITH WATER?

COMMENTATOR OFF CAMERA #1:

GO AHEAD GO FOR IT'

COMMENTATOR OFF CAMERA #2:

ALL RIGHT!

COMMENTATOR OFF CAMERA #1:

NOW THE UNDERSIDE OF THIS CAR IS BEING DRENCHED'

JIM HOWARD: VOICE OVER

LOOK AT THIS THE ENGINE HAS NO OIL AND THESE GUYS CAN'T EVEN GET MOTOR UP OFF THE ENGINE PARTS BY SPRAYING IT WITH WATER THIS ENGINE SHOULD HAVE BROKEN DOWN LONG AGO BUT IT'S STILL RUNNING AFTER TREATING IT WITH MOTOR UP

COMMENTATOR OFF CAMERA #1:

Complaint Exhibits

GIVE IT ANOTHER BLAST OF WATER. IT DOESN'T GET MUCH WORSE THAN THAT ... I'D SAY THAT. THAT MOTOR UP IS CLINGING TO THE ENGINE! UNBELIEVABLE!

COMMENTATOR OFF CAMERA #2:

THESE ARE THE CONNECTING RODS, NORMALLY YOU WOULDN'T BE ABLE TO TOUCH THESE. YOU'RE RUNNING WITHOUT OIL THEY START TO CEASE. THEY GET UP HOT ENOUGH TO MELT THE METAL. TURN THE BEARING BLUE AND SPIT IT RIGHT OUT THE SIDE. LOOK AT THIS WE JUST SHUT IT OFF AND I'M NOT BURNING MYSELF ON ANYTHING'

JIM HOWARD: ON CAMERA, ON SET

PROTECTION LIKE THAT IS WHY MOTOR UP IS THE #1 ADVANCED ENGINE TREATMENT CONCENTRATE. HOW YOU PROTECT YOUR CAR TODAY WILL PREVENT IT FROM HAVING PROBLEMS TOMORROW.

MOTOR UP CONTAINS NO HARMFUL SOLIDS LIKE PTFES AND GRAPHITE THAT CAN BUILD UP AND CLOG YOUR OIL FILTER CAUSING EXPENSIVE REPAIRS.

JIM HOWARD: VOICE OVER

NOW THROUGHOUT THE PROGRAM I'VE SHOWN YOU HOW MOTOR UP REDUCES WEAR AND TEAR AND SAVES YOU MONEY, HOW IT INCREASES HORSEPOWER AND WHY ITS BETTER THAN THE COMPETITION. YOU'VE ALSO SEEN AND HEARD THE IMPROVEMENTS IN AN ENGINE AFTER ADDING MOTOR UP.

JIM HOWARD: ON CAMERA, ON SET

BUT WE WANTED TO GIVE MOTOR UP THE ULTIMATE BEFORE AND AFTER TEST. SO WE WENT LOOKING FOR THE WORST RUNNING ENGINES WE COULD FIND. AND YOU KNOW WHERE WE FOUND THEM? IN A JUNKYARD.

JIM HOWARD: VOICE OVER

SO WE TOLD THESE GUYS MOTOR UP WOULD MAKE THEIR JUNKYARD CARS SOUND LIKE NEW AGAIN.

Complaint Exhibits

TESTIMONIAL MALE: ED WATSON

"I DON'T I'VE NEVER SEEN ANYTHING LIKE THAT WORK BEFORE I'D LIKE TO SEE YOU DO IT"

COMMENTATOR OFF CAMERA:

HOW ABOUT YOU GUY WHAT DO YOU THINK'

TESTIMONIAL MALE: TOM WASHER

"NO DAMN WAY NO DAMNWAY"

TESTIMONIAL MALE: JOSEPH GIORDANO

"I DON'T THINK SO EITHER NOT IF= THERE HERE IN THE JUNKYARD I DON'T THINK THERE GOING TO RUN ANY BETTER THAN THEY DID ON THE ROAD' WE'LL SEE BUT THIS LITTLE BOTTLE YOUR TELLING ME IS GOING TO DO IT HUH' WE'LL SEE WHAT HAPPENS IF WE POUR IT IN THERE '

"WE'LL GIVE IT A SHOT SEE WHAT IT SOUNDS LIKE. MOTOR UP HUH"

BEFORE AND AFTER: LIVE SOUND SPLIT SCREEN*TESTIMONIAL MALE: JOSEPH GIORDANO**

"SOUNDS MUCH BETTER. I'M SURPRISED I CAN'T BELIEVE IT!"

TESTIMONIAL MALE: ED WATSON

"YEAH. LET'S TRY ANOTHER LET'S TRY ANOTHER ONE"

COMMENTATOR OFF CAMERA:

ARE YOU SATISFIED WITH THIS ONE'

TESTIMONIAL MALE: ED WATSON

"AHH WE'LL SEE I GOT ANOTHER ONE FOR YOU TO CHECK OUT"

Complaint Exhibits

TESTIMONIAL MALE: JOSEPH GIORDANO

"THIS CAR SHAKES, RATTLES AND ROLLS IT COULDN'T SET OUT OF ITS OWN WAY A BICYCLE COULD BEAT IT!"

***BEFORE AND AFTER: LIVE SOUND SPLIT SCREEN**

TESTIMONIAL MALE: JOSEPH GIORDANO

"IT ACTUALLY REVS WITHOUT STALLING OUT HOLY BEEP THATS AMAZING THE CAR ALWAYS STALLS OUT EVERY TIME I GIVE IT GAS!

NOW THAT YOU PUT THAT TREATMENT IN IT'S NOT STALLING OUT NO MORE"

TESTIMONIAL MALE: ED WATSON

"IT KEEPS RUNNING WHEN YOU SHUT IT OFF ITS GOT BAD BAD TIMING AND A BAD PRE-IGNITION

ENGINES OLD AND WORN CUT'

TESTIMONIAL MALE: TOM WASHER

"THIS BEEP GOOD MAN THIS BEEP GOOD'

COMMENTATOR OFF CAMERA:

WHAT ARE YOU SAYING OVER THERE?

TESTIMONIAL MALE: JOSEPH GIORDANO

"EVERYDAY, I GET GASSED OUT BY THIS CAR CARBON. I MEAN I ALMOST PASS OUT FROM THE SMELL AND IT DIDN'T DO IT THIS TIME!"

COMMENTATOR OFF CAMERA:

WHAT HAPPENS WHEN YOU TURN IT OFF?

TESTIMONIAL MALE: JOSEPH GIORDANO

Complaint Exhibits

"OFF IT JUST KEEPS RUNNING AND RUNNING ON BY ITSELF CHO CHO CHO CHO CHO CHO IT TAKES LIKE ABOUT TWENTY MINUTES TO SHUT OFF IT NEVER SHUT OFF LIKE THAT BEFORE

TESTIMONIAL MALE: ED WATSON

"I'VE NEVER SEEN ANYTHING LIKE THIS YOU POUR IT IN AND ALL OF A SUDDEN IT-AUTOMATICALLY STARTS WORKING NEVER SEEN ANYTHING LIKE IT BEFORE]

THIS MOTOR IS SO QUIET NOW, I'M NOT ASHAMED TO SELL IT RIGHT NOW .NO'"

JIM HOWARD: ON CAMERA, ON SET

WHETHER YOU HAVE AN OLD CAR OR A NEW CAR YOU CAN MAKE IT RUN BETTER BY ORDERING MOTOR UP RIGHT NOW THIS IS YOUR OPPORTUNITY DON'T MISS IT

F. CTA #2: COMMERCIAL INSERT

WHEN YCU WANNA GO? DOES YOUR CAR SAY NO'

THEN YOU NEED MOTOR UP THE **NO OIL CHANGE** ENGINE TREATMENT THAT PUTS THE **CET** UP AND GO BACK IN YOUR RIDE

MOTOR UP PERFORMS IN CARS TRUCKS BOATS RV's NEW OR USED GIVING THEM A SMOOTHER QUIETER COOLER RUNNING ENGINE IN JUST MINUTES

WHEN ADDING THESE ENGINE TREATMENTS YOU HAVE TO WAIT FOR AN OIL CHANGE AND SPEND MORE MONEY BUT WITH MOTOR UP YOU SIMPLY POUR IT IN AND YOUR DONE SAVING YOU TIME MONEY AND PROTECTING YOUR INVESTMENT INSTANTLY

AND BECAUSE MOTOR UP SCIENTIFICALLY PENETRATES THEN BONDS TO THE METAL INSIDE YOUR ENGINE IT SIGNIFICANTLY REDUCES FRICTION AND HEAT

Complaint Exhibits

THE RESULT IS INCREASED HORSEPOWER, REDUCED WEAR AND TEAR ON ENGINE PARTS, PROTECTION DURING COLD START UPS, AND MUCH MORE.

HEY, DON'T BE EMBARRASSED BY YOUR NOISY CLUNKER. MAKE IT SOUND LIKE NEW AGAIN WITH MOTOR UP. GET QUICK RESULTS LIKE THIS:

'BEFORE AND AFTER RESULTS: "AUDIO FREQUENCY"

TESTIMONIAL MALE: ED SCHELIG

"NO SMOKING, NO HESITATION, IT STARTED RIGHT UP. IT DRIVES LIKE A BRAND NEW CAR!"

MALE V.O.:

MOTOR UP IS THE NEW GENERATION OF ENGINE TREATMENTS AND OVER ONE MILLION LUCKY PEOPLE HAVE ALREADY USED IT.

ONE TREATMENT, ONE TIME ~~PROTECTS~~ YOUR ENGINE FOR UP TO 50,000 MILES. GUARANTEED!

IN FACT, WHEN YOU ORDER MOTOR UP YOU'LL RECEIVE THIS 50,000 MILES/3 YEAR LIMITED WARRANTY CERTIFICATE.

IF YOU HAVE A BREAKDOWN, MOTOR UP WILL PAY FOR THE COVERED REPAIR UP TO \$10,000. NOW THAT'S ENDURANCE INSURANCE.

ACT NOW AND RECEIVE LUBE IT UP **SPRAY** TO SOLVE ALL YOUR STUCK AND RUSTY PROBLEMS.

TAKE THE SQUEAK OUT WITH JUST ONE SPRAY AS LUBE IT UP PROTECTS METAL SURFACES IN YOUR CAR, BOAT AND ALL AROUND YOUR HOUSE.

HAS A LEAKY RADIATOR GET YOU HOT? DON'T SWEAT IT!

WE'LL INCLUDE RESTORE RADIATOR TREATMENT. JUST POUR IT IN TO LUBRICATE AND CONDITION YOUR COOLING SYSTEM. PREVENT CORROSION DAMAGE AND STOP RADIATOR LEAKS WHEN THEY HAPPEN.

Complaint Exhibits

HEY, DON'T WAIT FOR A LEAK AND BE STRANDED. LET RESTORE SEAL IT
SO YOU CAN KEEP ON TRUCKEN

ARE YOUR WINDSHIELD WIPERS SKIPPING CHATTERING AND
STREAKING...DON'T BUY NEW ONES. BECAUSE YOU ALSO GET 303
WINDSHIELD WIPER TREATMENT TO MAKE YOUR WINDSHIELD WIPERS
WORK LIKE NEW AGAIN

303 RECONDITIONS HARDENING RUBBER BLADES YOU'LL SEE CLEARER
IN THE RAIN, MESSY SNOW AND ICE WON'T STICK TO YOUR BLADES.. AND
THEY'LL LAST LONGER.

THIS AN EXCLUSIVE TV OFFER, AND IT'S NOT AVAILABLE IN STORES'

YOU MAY EXPECT TO PAY OVER 100 DOLLARS BUT YOU WON'T! YOU
WOIN'T PAY \$60.00 OR ~~EVEN~~ FIFTY DOLLARS YOU GET IT ALL FOR THE
SPECIAL INTRODUCTORY PRICE OF JUST \$29.95

AND MOTOR UP COMES WITH THIS PROMISE

POUR THE ENTIRE BOTTLE INTO YOUR ENGINE IF IT DOESN'T RUN
SMOOTHER OR SOUND QUIETER JUST RETURN THE COMPLETE PACKAGE
AND WE'LL REFUND THE PURCHASE PRICE

AND WHEN YOU CALL ASK THE OPERATOR ABOUT THE SPECIAL 1/2 PRICE
OFFER ON A SECOND BOTTLE OF MOTOR UP!

SO BEFORE YOU START IT UP JUST POUR IN MOTOR UP!

SPOT TIME: 00 02 47 25

TAG MALE V.O.

"PER NATIONAL MEDIA CUSTOMIZATION INSTRUCTIONS"

TAG TIME: 00:00:20:01

TRT COMMERCIAL: 00 C3 07 25

G. SEGMENT #3:

Complaint Exhibits

TESTIMONIAL MALE:

"THE CAR ACTUALLY RUNS OUT OF CHARACTER' IT REALLY RUNS' I'M REALLY AMAZED I WISH I COULD PUT THE CAMERA IN TYE CAR AND RUN IT UP THE HILL AND SHOW YOU' ITS JUST GREAT'

TESTIMONIAL FEMALE:

IT'S CALM...ITS HAPPY, IT PURRING, CAN I KEEP THIS?

JIM HOWARD: (INFREEZER),

WELCOME BACK TO MOTOR UP AMERICA WELL AGAINST MY BETTER JUDGMENT BUT AT THE INSISTENCE OF THESE PEOPLE IN THE [REDACTED] WITH ME WE HAVE ACTUALLY DRAINED THE MOTOR OIL FROM THIS ENGINE ENCASED IN ICE NOW ARE YOU READY JEFF

JEFF OFF CAMERA:

"READY!"

TESTIMONIAL FEMALE:

"READY!"

JIM HOWARD:

ALL RIGHT TURN THE KEY ON

TESTIMONIAL FEMALE:

"CONTACT!"

'GROUP REACTS EXHILARATION

JIM HOWARD:

THERE IT IS INCREDIBLE'

Complaint Exhibits

TESTIMONIAL FEMALE:

"WOW AMAZING!"

JIM HOWARD:

IT HAS NO OIL IN IT IT'S ENCASED IN SOLID ICE LOOK AT THAT DO YOU BELIEVE THAT'

TESTIMONIAL FEMALE:

"I CAN'T BELIEVE IT, IT'S AMAZING!"

JIM HOWARD:

"YOU DIDN'T THINK IT WOULD WORK DID YOU?"

TESTIMONIAL MALE:

'NO I DIDN'T I CAN'T BELIEVE THIS YOU LEFT IT IN HERE OVERNIGHT IT'S TWENTY BELOW IN HERE AND THE THING STARTS RIGHT UP YOU DRAIN THE OIL @UTAND IT JUST KEEPS RUNNING ITS UNREAL"

JIM HOWARD:

EXACTLY HOW ABOUT YOU KEVIN?

KEVIN THE ICEMAN:

"I'M IMPRESSED"

JIM HOWARD:

DID YOU LAY ANOTHER SIDE BET ON THIS ONE ?

KEVIN THE ICE MAN:

"NO ,NO NO I TOOK THE ATTITUDE I'MFROM MISSOURI SHOW ME AND YOU GUYS YOU DID IT'

Complaint Exhibits

JIM HOWARD:

HOW ABOUT YOU MAM!

TESTIMONIAL FEMALE:

"I CAN'T BELIEVE WHAT I'M SEEING RIGHT NOW' I THOUGHT IT WAS IMPOSSIBLE!"

JIM HOWARD:

THAT'S THE LIFE BLOOD OF YOUR ENGINE HE'S JUST DRAINED IT OFF IN A BUCKET! THE ONLY THING PROTECTING THAT ENGINE RIGHT NOW IS MOTOR UP!

TESTIMONIAL MALE:

I'D PUT IT IN IN A SECOND I TELL YOU THIS STUFF IS ABSOLUTELY AMAZING FIRST IT STARTS AND THE OTHER DOESN'T AND NOW IT STARTS WITHOUT THE OIL JUST FASCINATING

JIM HOWARD:

INCREDIBLE, FOLKS, YOU HAVE SEEN AND HEARD HOW MOTOR UP INSTANTLY IMPROVE YOUR CARS PERFORMANCE

YOU'VE HEARD, YOU'VE HEARD HOW IT REDUCES WEAR AND TEAR.

I'VE SHOWN YOU HOW IT REDUCES FRICTION AND INCREASES YOUR HORSEPOWER

I'VE TOLD YOU HOW IT PREVENTS CORROSION IN YOUR ENGINE AND BONDS WITH METAL SURFACES ALL OF WHICH WILL SAVE YOU HUNDREDS IN REPAIR BILLS AND PROTECT YOUR ENGINE SIMPLY BY POURING IT IN

LOOK IF YOU WATCHING THIS SHOW RIGHT NOW YOU PROBABLY DON'T HAVE MOTOR UP IN YOUR CAR BUT HERE'S HOW YOU CAN GET IT

DO YOURSELF A FAVOR BEFORE YOU START IT UP MOTOR UP

Complaint Exhibits

H. SHOW RECAP END TAG CLOSE:

MALE V.O.:

THIS IS YOUR FINAL OPPORTUNITY TO HAVE MOTOR UP THE NO OIL CHANGE ENGINE TREATMENT DELIVERED DIRECTLY TO YOUR DOOR FOR JUST \$29.95'

THIS IS AN EXCLUSIVE TV ONLY OFFER AND IS NOT AVAILABLE IN STORES'

WHY WAIT ... ACT NOW. BECAUSE EVERYDAY YOU TURN THE KEY TO START YOUR ENGINE, 365 A DAY YOUR CAR GOES WITHOUT THE PROTECTION AND BENEFITS MOTOR UP DELIVERS

TODAY YOU'VE WATCHED MOTOR UP HELP CLUNKING JUNKYARD ENGINES RUN BETTER'

YOU'VE HEARD FROM THE LEADING PROFESSIONALS HOW MOTOR UP INCREASES HORSEPOWER REDUCES WEAR AND TEAR ON ENGINE PARTS PROTECTS DURING COLD START UPS' AND MUCH MORE

TESTIMONIAL MALE: ED SHELIG

"THE SLUGGISHNESS WENT AWAY THE HESITATION I MEAN ITS LIKE DRIVING A NEW VEHICLE"

MALE V.O.:

AND RIGHT HERE ON THIS PROGRAM YOU'VE EVEN SEEN MOTOR UP START AN ENGINE FROZEN IN A SOLID BLOCK OF ICE

ENGINE START CROWD REACTION

JIM HOWARD:

THERE IT IS INCREDIBLE'

MALE V.O.:

Complaint Exhibits

CHANCES ARE YOUR VEHICLE IS ONE OF THE MOST IMPORTANT INVESTMENTS YOU'LL EVER MAKE! SO PROTECT IT WITH MOTOR UP TODAY! AND DON'T FORGET TO ASK THE OPERATOR ABOUT THE SPECIAL HALF PRICE OFFER ON A SECOND BOTTLE OF MOTOR UP!

UNLIKE OTHER ENGINE TREATMENTS YOU JUST POJR MOTOR UP IN ANYTIME AND IT WON'T DRAIN OUT EVEN AFTER AN OIL CHANGE

CALL THE NUMBER ON YOUR SCREEN NOW AND FOR JUST \$29.95 WE'LL SEND MOTOR UP TO YOUR HOUSE! MOTOR UP IS TOMORROW'S ENGINE TREATMENT YOU CAN GET TODAY!

OUR OPERATORS ARE READY TO HELP YOU! IF YOUR CAR COULD MAKE A PHONE CALL IT WOULD BE DIALING RIGHT NOW! SO ORDER MOTOR UP TODAY!

TESTIMONIAL MALE: JOSEPH GIORDANO

"IF YOU GUYS COULD SHOW ME ON THIS CAR CAUSE THIS CAR RUNS LIKE BEEP I MEAY THIS CAR IS THE BIGGEST PIECE OF BEEP IN THE YARD I DRIVE THIS CAR ALL THE TIME"

TESTIMONIAL MALE TOM SYASHER

"SOUNDS A HELL OF A LOT BETTER"

TESTIMONIAL MALE: JOSEPH GIORDANO

"IT SOUNDS MUCH BETTER! THE ENGINES NOT SHAKING AND CHOKING OUT LIKE IT USUALLY DOES"

TESTIMONIAL MALE: ED WATSON

"THERE'S A BIG DIFFERENCE IN THIS CAR THE MINUTE YOU PUT IT IN. IT'S SO MUCH MORE QUIETER"

TESTIMONIAL MALE: JOSEPH GIORDANO

Complaint Exhibits

"WELL, PROTECTION IS THE MOST IMPORTANT THING WHEN IT COMES TO AN ENGINE. SO I WOULD BUY ONE OF THOSE BOTTLE AND PUT IT IN THERE AND YOU'LL SEE A LOT LONGER LIFE IN YOUR MOTOR!"

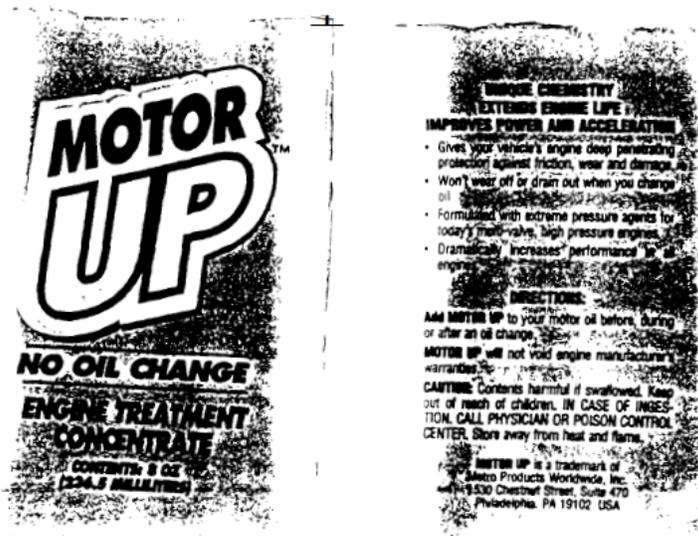
1. PAID ADVERTISEMENT DISCLAIMER:**MALEV.O.:**

THE PRECEDING PROGRAM WAS A PAID ADVERTISEMENT FOR MOTOR UP BROUGHT TO YOU BY NATIONAL MEDIA CORPORATION

TRT: 28:30

Complaint Exhibits

Exhibit B



Complaint Exhibits

Exhibit C

**MotorUp Has Mastered The Science Of Lubrication.**

Lubrication has a profound effect on wear. It separates the surfaces as they move relative to each other with a film of lubricant that can be sheared with low resistance without causing any damage to the surface. MotorUp has mastered the science of lubrication and produced a product that provides maximum protection against friction and wear and virtually eliminates the heat which is a byproduct of these functions. A summary of selected test results follows.

MotorUp Cuts Adhesive Wear As Much As 90.17%.

Gamma Wear Test: This test is designed to evaluate the adhesive wear experienced by test parts in a controlled environment. The dimension of the surface profile of a journal is measured to determine the extent of adhesive wear. The results are measured in "teeth advanced" or the number of positions that the equipment advances due to adhesive wear under gradually increasing loads.

At a load of 50 pounds, the addition of MotorUp to base oil decreased the number of teeth advanced by 90.17%, at 100 pounds MotorUp decreased the teeth advanced by 53.97% and at 150 pounds the teeth advanced was decreased by 60.64%. These loads are far in excess of any that might occur in everyday automotive engine use.

MotorUp Prolongs Engine Life.

Another astonishing result of the Gamma Wear Test is the extension of service life provided by MotorUp. Service Life Index (SLI) is the average length of time a component can be expected to operate effectively without diminished performance. At 50 pounds MotorUp increased SLI by 10.17 times, at 100 pounds MotorUp increased SLI by 2.17 times and at 150 pounds MotorUp extended SLI by 2.54 times. That means that at 150 pounds, a component with an average SLI of one year would last for 2.54 years.

Thick Film Gamma Test: This test is similar to the Gamma test, except that the wear to the journal assembly is represented by weight loss instead of gear teeth advanced. The weight loss without MotorUp was determined to be 2,190 ug, whereas the weight loss with MotorUp was found to be 1,860 ug. Therefore, the use of MotorUp produced 15.07% less weight loss, a significant reduction.

MotorUp Protects Against Wear Even Without Oil.

Film Affinity Retention: This test determines the degree of wear protection that the MotorUp film on the surface of engine parts can provide when the lubrication system loses the base lubricating oil. In other words, how much the journal assembly is protected by the residual MotorUp fluid film on the component surface rather than a continuous lubricating oil stream.

A test with plain oil and oil with MotorUp was conducted. When the base oil was drained and only residual oil was left, 206 teeth were advanced at 100 pounds over a period of ten minutes. With MotorUp, when the treated oil was drained, only 1 tooth was advanced at the same load in the same period of time.

Listen To What Users Are Saying About MotorUp:

"Although I was somewhat skeptical at first, I have found MotorUp to be a very good product. Thanks for a great product."
Frank T., New York, NY

"Approximately a month ago I purchased a quart of your product. I am now back to buy a gallon. The reason is simple: your product works! I have an '83 Chevy pickup with a 305 engine and the engine starts much easier. It turns over much faster and runs much smoother."
Samuel G., Dallas, TX

"My motorcycle has a clutch that chattered considerably when starting from a dead start and the operating temperature would peg the needle when sitting at a stop light. I rode from San Leandro to Pleasanton in fourth gear running 10,500 on the tach. Not only did the temperature stay steady, but the engine ran better. I would strongly recommend MotorUp to anyone considering your product."
Ron E., San Leandro, CA

"After 313,000 miles of using your product the motor still performs like new without any mechanical problems. While turning the engine over to start it, it spins at very slow temperatures just as fast as if it were a summer day."
George J., San Antonio, TX

"After 100,000 miles of driving my 1979 Honda Civic, I can only say that MotorUp definitely works. Even my wife remarked how smooth the engine runs now."
Paul H., San Antonio, TX

"I have a 1979 Honda Civic. This car had problems with valves and 107,000 engine miles. It appeared to be running well, but I was told to change the oil. I like this car and neither choice was very attractive to me. After 100,000 miles of driving, the car now has 132,000 miles on it and the car is still not in shape."
Paul H., San Antonio, TX

"I have a 1979 Honda Civic. This car had problems with valves and 107,000 engine miles. It appeared to be running well, but I was told to change the oil. I like this car and neither choice was very attractive to me. After 100,000 miles of driving, the car now has 132,000 miles on it and the car is still not in shape."
Paul H., San Antonio, TX

Complaint Exhibits

Exhibit D



[ORDER MotorUp](#)

[MotorUp Technical Specs](#)

[MotorUp Home Page](#)

MotorUp Performance Promise
Satisfaction Guaranteed or your Money Back

Prolongs Engine Life	Increases Horsepower	Requires No Oil Change	Not PTFE Based
Smoothes			



[Frequently Asked Questions](#)



[Some Quick Facts](#)



[What Users Are Saying](#)



[How to Order MotorUp](#)

Why spend thousands of dollars on engine repairs? Treat your engine to MotorUp now!

More than one million clunkers all over the U.S. have had their performance restored by MotorUp, the "No Oil Change" Engine Treatment. Just one bottle of MotorUp quiets engine noise and smooths out rough running.

There's no need to change your oil!

Just add MotorUp to your crankcase and go. After that just follow the manufacturer's recommended oil change schedule and you'll see an immediate improvement.

Here's how MotorUp works.

MotorUp penetrates the metal parts in your engine - even through dirty oil. It seeks out and bonds to the metal inside your engine and won't drain out even when you change the oil.

Scientific Proof.

Extensive product testing in the U.S. and Europe shows that MotorUp reduces friction wear by as much as 50%.

Decision and Order

DECISION AND ORDER

The Federal Trade Commission having issued its complaint charging the respondents named in the caption hereof with violation of Section 5(a) of the Federal Trade Commission Act, as amended, and the respondents having been served with a copy of that complaint, together with a notice of contemplated relief; and

The respondents, their attorneys, and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the respondents of all the jurisdictional facts set forth in the complaint, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondents of facts, other than jurisdictional facts, or of violations of law as alleged in the complaint issued by the Commission.

The Secretary of the Commission having thereafter withdrawn this matter from adjudication in accordance with § 3.25(c) of its Rules; and

The Commission having considered the matter and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of thirty (30) days, now in further conformity with the procedure prescribed in § 3.25(f) of its Rules, the Commission hereby makes the following jurisdictional findings and enters the following order:

1. Respondent Motor Up Corporation, Inc. is a Pennsylvania corporation with its principal office or place of business at 123 South Broad Street, Philadelphia, Pennsylvania 19102.

2. Respondent Motor Up America, Inc. is a Pennsylvania corporation with its principal office or place of business at 759 Federal Highway, Suite 312, Stuart, Florida 34994. Motor Up America, Inc. is a wholly owned subsidiary of Motor Up Corporation, Inc.

Decision and Order

3. Respondent Kyle Burns is president of Motor Up Corporation, Inc. Individually or in concert with others, he formulates, directs, or controls the policies, acts, or practices of the corporate respondents, including the acts or practices alleged in this complaint. His principal office or place of business is the same as that of Motor Up Corporation.

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

ORDER**DEFINITIONS**

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

1. "Motor Up" shall mean Motor Up No Oil Change Engine Treatment Concentrate.

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

3. Unless otherwise specified, "respondents" shall mean Motor Up Corporation, Inc. and Motor Up America, Inc., corporations, their successors and assigns and their officers; Kyle Burns, individually and as an officer of Motor Up Corporation, Inc.; and each of the above's agents, representatives, and employees.

Decision and Order

4. "Commerce" shall mean as defined in Section 4 of the Federal Trade Commission Act, 15 U.S.C. § 44.

I.

IT IS ORDERED that respondents, directly or through any corporation, subsidiary, division, or other device, in connection with the labeling, advertising, promotion, offering for sale, sale, or distribution of any engine treatment, fuel treatment, motor oil, grease, transmission fluid, or brake fluid, and any additive intended for use with or as a substitute for such products, in or affecting commerce, shall not make any representation, in any manner, expressly or by implication:

A. that, compared to motor oil alone, use of such product:

- (1) Reduces engine wear;
- (2) Reduces engine wear up to 50 percent or by any other quantity;
- (3) Reduces adhesive engine wear by up to 90.17 percent or by any other quantity;
- (4) Reduces engine wear during cold starts;
- (5) Provides more protection against engine wear in cold temperatures;
- (6) Extends the duration of engine life; or
- (7) Helps prevent engine breakdowns; or

B. that such product:

- (1) Prevents corrosion in engines;
- (2) Will not drain out from the engine even when the oil is changed;
- (3) Protects engines for up to 50,000 miles; or
- (4) Protects against engine wear even without motor oil, grease, transmission fluid or brake fluid; or

C. regarding the performance, benefits, efficacy, attributes, or use of such product,

Decision and Order

unless, at the time the representation is made, respondents possess and rely upon competent and reliable evidence, which when appropriate must be competent and reliable scientific evidence, that substantiates the representation.

II.

IT IS FURTHER ORDERED that respondents, directly or through any corporation, subsidiary, division, or other device, in connection with the labeling, advertising, promotion, offering for sale, sale, or distribution of Motor Up or any other product for use in a motor vehicle, in or affecting commerce, shall not misrepresent, in any manner, expressly or by implication, the existence, contents, validity, results, conclusions, or interpretations of any test or study.

III.

IT IS FURTHER ORDERED that respondents, in connection with the manufacturing, advertising, labeling, packaging, offering for sale, sale, or distribution of Motor Up or any other product for use in a motor vehicle, in or affecting commerce, shall not misrepresent, in any manner, expressly or by implication, that any demonstration, picture, experiment, illustration or test proves, demonstrates or confirms any material quality, feature or merit of such product, or the superiority or comparability of the product in a material respect relative to any other product.

IV.

IT IS FURTHER ORDERED that respondents Motor Up Corporation, Inc. and Motor Up America, Inc., and their successors and assigns, and respondent Kyle Burns shall, for five (5) years after the last date of dissemination of any representation

Decision and Order

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 their possession or control that contradict, qualify, or call into question the representation, or the basis relied upon for the representation, including complaints and other communications with consumers or with governmental or consumer protection organizations.

V.

IT IS FURTHER ORDERED that respondents Motor Up Corporation, Inc. and Motor Up America, Inc., and their successors and assigns, and respondent Kyle Burns shall deliver a copy of this order to all current and future principals, officers, directors, and managers, and to all current and future employees, agents, and representatives having responsibilities with respect to the subject matter of this order, and shall secure from each such person a signed and dated statement acknowledging receipt of the order. Respondents shall deliver this order to current personnel within thirty (30) days after the date of service of this order, and to future personnel within thirty (30) days after the person assumes such position or responsibilities.

Decision and Order

VI.

IT IS FURTHER ORDERED that respondents Motor Up Corporation, Inc. and Motor Up America, Inc., and their 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 respondents learn less than thirty (30) days prior to the date such action is to take place, respondents shall notify the Commission as soon as is practicable after obtaining such knowledge. All notices required by this Part shall be sent by certified mail to the Associate Director, Division of Enforcement, Bureau of Consumer Protection, Federal Trade Commission, Washington, D.C. 20580.

VII.

IT IS FURTHER ORDERED that respondent Kyle Burns, for a period of ten (10) years after the date of issuance of this order, shall notify the Commission of the discontinuance of his current business or employment, or of his affiliation with any new business or employment. The notice shall include respondent's new business address and telephone number and a description of the nature of the business or employment and his duties and responsibilities. All notices required by this Part shall be sent by certified mail to the Associate Director, Division of Enforcement, Bureau of Consumer Protection, Federal Trade Commission, Washington, D.C. 20580.

Decision and Order

VIII.

IT IS FURTHER ORDERED that respondents Motor Up Corporation, Inc. and Motor Up America, Inc., and their successors and assigns, and respondent Kyle Burns shall, within sixty (60) days after the date of service of this order, and at such other times as the Federal Trade Commission may require, file with the Commission a report, in writing, setting forth in detail the manner and form in which they have complied with this order.

IX.

This order will terminate on May 3, 2020, 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

Analysis to Aid Public Comment

later of the deadline for appealing such dismissal or ruling and the date such dismissal or ruling is upheld on appeal.

By the Commission.

Analysis of Proposed Consent Order to Aid Public Comment

The Federal Trade Commission has accepted, subject to final approval, an agreement to a proposed consent order from Motor Up Corporation, Inc, Motor Up America, Inc., and Kyle Burns, the principal who controls these corporations (referred to collectively as "Motor Up"). The agreement would settle a complaint by the Federal Trade Commission that Motor Up engaged in unfair or deceptive acts or practices in violation of Section 5(a) of the Federal Trade Commission Act.

The proposed consent order has been placed on the public record for thirty (30) days for reception of comments by interested persons. Comments received during this period will become part of the public record. After thirty (30) days, the Commission will again review the agreement and the comments received and will decide whether it should withdraw from the agreement or make final the agreement's proposed order.

This matter concerns representations made about Motor Up No Oil Change Engine Treatment Concentrate, an engine oil additive, in advertising. The administrative complaint alleged that Motor Up violated the FTC Act by disseminating ads that made unsubstantiated performance claims about the oil additive. The Complaint alleged that the respondents represented that, compared to motor oil alone, Motor Up: (1) reduces engine wear; (2) reduces engine wear by up to 50 percent; (3) reduces adhesive engine wear by up to 90.17 percent; (4) reduces engine wear during cold starts; (5) provides more protection against engine

Analysis to Aid Public Comment

wear in cold temperatures (6) extends the duration of engine life; and (7) helps prevent engine breakdowns. The Complaint also alleged that respondents represented that Motor Up: (1) prevents corrosion in engines; (2) will not drain out from the engine even when the oil is changed; (3) protects engines for up to 50,000 miles; and (4) protects against engine wear even without motor oil. The Complaint alleged that respondents represented that they had a reasonable basis for making these claims, but in fact did not possess competent evidence supporting the claims. The Complaint alleged that respondents claimed that tests prove that, compared to motor oil alone, Motor Up reduces engine wear by up to 50 percent without possessing tests that prove the claim. The Complaint also alleged that respondents represented that product demonstrations in their advertising proved, demonstrated, or confirmed that Motor Up prevents corrosion in engines and that, compared to motor oil alone, Motor Up helps prevent breakdowns and reduces engine wear, when in fact the demonstrations do not prove, demonstrate, or confirm these product attributes.

The proposed consent order contains provisions designed to prevent Motor Up from engaging in similar acts and practices in the future. Part I of the proposed consent order prohibits Motor Up from making any claims about any engine treatment, fuel treatment, motor oil, grease, transmission fluid, or brake fluid, and any additive intended for use with or as a substitute for these products, unless Motor Up can support the claims with competent and reliable evidence. Part I specifies certain specific claims and states that these and all other claims must be supported by evidence. It also states that the evidence required to support claims may be competent and reliable scientific evidence.

Analysis to Aid Public Comment

Parts II prohibits Motor Up from misrepresenting in advertising the existence, contents, validity, results, conclusions, or interpretations of any test or study dealing with the Motor Up engine oil additive or any other motor vehicle product.

Part III prohibits Motor Up from using false demonstrations. It prohibits Motor Up from representing that any demonstration, picture, experiment, illustration or test of the Motor Up engine oil additive or any other motor vehicle product proves, demonstrates or confirms the product's attributes unless the demonstration, picture, experiment, illustration or tests does in fact prove, demonstrate, or confirm the attributes. This provision applies to all demonstrations of product attributes, including comparisons with other products.

The proposed order also contains provisions regarding distribution of the order, record-keeping, notification of changes in corporate status, termination of the order, and the filing of a compliance report.

The purpose of this analysis is to facilitate public comment on the proposed order, and it is not intended to constitute an official interpretation of the agreement and the proposed order or to modify their terms in any way.

Complaint

IN THE MATTER OF

DURA LUBE CORPORATION, ET AL.CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATIONS OF
SEC. 5 OF THE FEDERAL TRADE COMMISSION ACT

*Docket D-9292; File No. 962 3146
Complaint, April 29, 1999--Decision, May 3, 2000*

This consent order addresses Dura Lube Corporation's dissemination of advertisements making unsubstantiated claims regarding Super Dura Lube Engine Treatment and Advanced Dura Lube Engine Treatment ("Dura Lube"). Respondents represented that, compared to motor oil alone or oil treated with any other product, Dura Lube: (1) reduces engine wear; (2) reduces engine wear by more than 50%; (3) prolongs engine life; (4) reduces emissions; (5) reduces the risk of serious engine damage when oil pressure is lost; (6) improves gas mileage; and (7) improves gas mileage by up to 35%. Respondents also represented that product demonstrations in their advertising proved, demonstrated, or confirmed that, (a) compared to motor oil alone, Dura Lube reduces the risk of serious engine damage when oil pressures is lost, and (b) without Dura Lube, motor oil fails to protect automobile engines under hot running conditions, when in fact the demonstrations do not prove, demonstrate, or confirm these product attributes. Finally, the Complaint alleged that Respondents represented that former astronaut Charles "Pete" Conrad had endorsed the product based on a valid exercise of his expertise in the evaluation of automobile engine lubricants, when in fact Mr. Conrad did not have expertise in the evaluation and testing of automobile engine lubrication. The consent order requires Dura Lube Corporation, et al., to pay \$2 million in consumer redress and prohibits Respondents from making unsubstantiated representations regarding the performance, benefits, efficacy, attributes or use of any product for use in an automobile, or from misrepresenting the results of any study.

Participants

For the Commission: *Joel Brewer, Jonathan Cowen, Lemuel Dowdy, and Robert M. Frisby.*

Complaint

For the Respondents: *Lewis Rose, Arent Fox Kintner Plotkin & Kahn.*

COMPLAINT

The Federal Trade Commission, having reason to believe that Dura Lube Corporation, American Direct Marketing, Inc, Howe Laboratories, Inc, Crescent Manufacturing, Inc, The Media Group, Inc, and National Communications Corporation, corporations; Herman S. Howard, individually and as an officer and director of the corporations; and Scott Howard, individually and as an officer and director of the corporations hereinafter sometimes referred to as "respondents"), have violated the provisions of the Federal Trade Commission Act, and it appearing to the Commission that this proceeding is in the public interest, alleges:

1. Respondent Dura Lube Corporation ("DLC") is a New York corporation with its principal office or place of business at 102-3 Hamilton Avenue, Stamford, Connecticut 06902. DLC coordinates the activities of the other corporate respondents herein, which include the manufacture, promotion and sale of Super Dura Lube Engine Treatment and Advanced Dura Lube Engine Treatment ("Dura Lube"), both purported automobile engine treatment products.

2. Respondent American Direct Marketing, Inc. ("ADM") is a Delaware corporation with its office and principal place of business located at 300 McCann Street, Nashville, Tennessee 37210. ADM is responsible for the direct marketing of Dura Lube.

3. Respondent Howe Laboratories, Inc. ("Howe") is a Delaware Corporation with its office and principal place of business located at 102-3 Hamilton Avenue, Stamford, Connecticut 06902. Howe is responsible for the distribution of Dura Lube to retailers.

Complaint

4. Respondent Crescent Manufacturing, Inc. (“Crescent”) is a New York corporation with its office and principal place of business located at 8800 South Main Street, Eden, New York 14057. Crescent manufactures and packages Dura Lube.

5. Respondent The Media Group, Inc. (“Media Group”) is a New York corporation with its office and principal place of business located at 102-3 Hamilton Avenue, Stamford, Connecticut 06902. Media Group provides advertising services for Dura Lube.

6. National Communications Corporation (“National”) is a Delaware corporation with its office and principal place of business located at 102-3 Hamilton Avenue, Stamford, Connecticut 06903. National provides advertising services for Dura Lube.

7. Respondent Herman S. Howard is or was at relevant times herein an officer of the corporate respondents. Individually or in concert with others, he has formulated, directed, or controlled the acts and practices of the corporate respondents, including the acts or practices alleged in this complaint. His principal office or place of business is the same as that of DLC.

8. Respondent Scott Howard is or was at relevant times herein an officer of the corporate respondents. Individually or in concert with others, he has formulated, directed, or controlled the acts and practices of the corporate respondents, including the acts or practices alleged in this complaint. His principal office or place of business is the same as that of DLC.

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

Complaint

10. Respondents have manufactured, advertised, promoted, labeled, offered for sale, sold, and distributed to the public various aftermarket motor oil additives (sometimes referred to as engine treatments) known by the product name Super Dura Lube Engine Treatment and Dura Lube Advanced Engine Treatment. These products consist of chlorinated paraffin and other chemicals suspended in motor oil.

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

12. Respondents have disseminated or have caused to be disseminated advertisements and labeling for Dura Lube, including but not necessarily limited to the attached Exhibits A through E. These advertisements contain the following statements, demonstrations, and other depictions:

A. A program-length television advertisement for Dura Lube-branded products (Exhibit A):

(1) **Host:** ...thousands of testimonials in writing...from people all across the country stat[e] how great Dura Lube really is. For instance, Minnesota. Newspaperman Gerald Snyder boosts his mileage and avoids a hundred dollar transmission repair by treating his car with Dura Lube. Los Angeles. Johnny Ishibashi's '68 Pontiac had flunked California's tough emissions test. But after just one bottle of Dura Lube, it passed with flying colors.... (Exhibit A, p. 2)

(2) **Video:** Mechanics manipulating remote controls of running automobile engine.

Host: We added Dura Lube to the oil of a huge race car engine and then drained all the oil out including the Dura Lube. Dura Lube works even if all your oil is gone.... Should the engine have

Complaint

seized already? Under normal circumstances. Severe engine damage would have happened by now.... Then, with no oil pressure we started revving that 500 horsepower engine up under full load. Got any load yet?

Mechanic: Oh, we've got a lot of load, Jim. Up to 120 horsepower, 160, 224, 254, 260, 292...

Excited Mechanic: I was ready to leave the building. I thought we were going to see the Fourth of July today and parts flying through that wall.

Mechanic: 302, 348...

Superscript: NO OIL PRESSURE!

Excited Mechanic: I was ready to run.

Mechanic: ...409, 453, 473

Second Excited Mechanic: I'm still speechless.

Mechanic: ...482, 520, 525.

Third Excited Mechanic: Oh, no. Unbelievable. I don't believe it. Oh, my God.

Superscript: A 500 HP Dura-Lube treated race car engine just ran successfully with no oil pressure under full load and high RPM...Unrehearsed!

Host: That test left professional mechanics shaking. But even with no oil at all, even with that big torture run up, the bearings in the Dura Lube-treated engine looked as good as new, as you can see for yourself. (Exhibit A, pp. 3-4)

(3) **Video:** Spectators around automobile engine mounted in open field; fire engine in background.

Host: You know, Dura Lube really is a miracle, and we're going to prove it again. We're going to empty all the oil out. Now, you would expect that, right? Guess what we're going to do next? We're going to take all the water out. No oil. No coolant in the engine.... When we told the authorities what

Complaint

kind of test we were planning, they insisted that we have a fire truck standing by. They didn't think any engine could withstand the kind of torture we had in mind. First, we started up a big six-cylinder engine. Then we drained out all the oil and that engine just kept humming along. No problem. But we wanted to top ourselves.... We drained that radiator dry as a bone and the engine just purred right along. All right. The oil's gone. Water's gone or just about gone. Why is this still running?

Superscript: Floyd Stivik—Lubrication Specialist

Floyd Stivik: Dura Lube. The quality of Dura Lube's what's happening, Jim. Dura Lube actually stays up there and does the lubrication for you. It doesn't leave your engine.

Host: So it's not treating the oil, it's treating the metal.

Stivik: That's exactly right. It's treating the metal....

Host (to Spectator): Do you know anything about engines?

Spectator: No, just put oil in when the little oil light goes on.

Host: Well, you always worry that one day you're going to come home from work and the wife tells you that she meant to tell you for the last three days the red light is on in the car. And the next thing you know, you've got major problems, major cost factors. With this you wouldn't have that problem. (Exhibit A, pp. 5-8)

(4) **Video:** Scenes of outer space; graphic illustrations of moving parts in automobile engine.

Announcer: Introducing Dura Lube. The world's first space age all-purpose lubricant that virtually eliminates friction like nothing on earth. In space there is no friction, but inside your engine friction drags on every moving component generating heat,

Complaint

wear and tear, causing poor fuel economy, more pollution, even engine breakdown.

Superscript: FRICTION CAUSES: Heat! Wear! Poor Fuel Economy! More Pollution! Engine Breakdown!

Announcer: Dura Lube radically reduces friction by penetrating metal surfaces to create a nonfriction shield that gives you a more efficient engine. With Dura Lube you'll have a cooler running engine and get more miles per gallon, more horsepower with less pollution and a quieter ride.

Superscript: DURALUBE Cooler Engine! More MPG! More Horsepower! Less Pollution! Quieter Ride! Much Less Wear!

Announcer: You'll eliminate the damage caused by cold starts saving you hundreds if not thousands of dollars.

Superscript: DURALUBE You'll save hundreds of dollars, if not thousands!

Announcer: Nothing compares to Dura Lube because it treats the metal, not the oil.

Superscript: Treats the metal, not the oil.

Announcer: In fact, the higher the temperature and pressure the better it performs. Dura Lube eats the heat and saves the engine.

Superscript: Eats the heat! Saves the engine. Protects up to 50,000 miles!

Announcer: Just one bottle added to your engine's oil protects for up to 50,000 miles. (Exhibit A, pp. 15-16)

- (5) **Host:** ...Now, that was a torture test, not something we recommend. But NASCAR driver Steve Hansen experienced exactly that. He didn't mean to.

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Steve Hansen didn't intend to completely lose his oil pump in the middle of a big race, but it happened.

Superscript: It happened on August 7, 1993!

Video: Cars circling racetrack.

Hansen: During the feature race, I started right up front, second car on the outside, green light went on, floored the car wide open. My oil pressure dropped down to nothing. I had no oil pressure.

Superscript: Elko Minnesota September 11, 1993.

Hansen: At that time I thought to myself, well, I'm done. I'll pull off the track. But the motor still was running good. So I went for it. I figured if it's going to blow up, it's going to blow up. I continued to race strong. The oil light got brighter and brighter.... It wasn't knocking. It wasn't ticking. It was running strong. I finished a 15-lap race which isn't bad considering I had no oil and the motor was still running.... (Exhibit A, pp. 19-20)

- (6) **Host:** That's what Dura Lube can do in emergencies. Let's see what it's doing for folks day after day.

First Consumer Endorser: The car was overheating a lot and running hot and I put it right in the motor with the oil and not a problem since.

Superscript: Cools the engine!

Second Consumer Endorser: I used to have this exhaust problem, there would be this little cloud of smoke that was behind my car all the time. After I used Dura Lube it disappeared completely.

Superscript: Cleaner emissions!

Third Consumer Endorser: I used it in my own personal vehicle and I've noticed almost 40 to 45 percent increase in my fuel.

Superscript: More MPG!

Host: Oh, come on.

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Third Endorser: Really. Really. I usually fuel up once a week and now I'm doing it every two weeks. And I only go like five miles a day round trip.

Host: So you've got a routine.

Third Endorser: I've got a routine. Believe me, I've got a routine. Let me tell you. I can honestly say without a word of a lie that I've almost doubled the amount of time I can go on a tank of gas in my truck. (Exhibit A, pp. 20-21).

- (7) **Host:** How can one product do so much? Breakthrough technology. And no one knows that better than astronaut Pete Conrad. You probably know him from his famous walk on the moon. But to Pete that's old news. Just recently he flight managed our nation's latest breakthrough, the Delta Clipper, the rocket ship blasts off and then it stops in mid-air. Now, this is like something out of Buck Rogers. Then it moves sideways. And then it lands, ready to take off again.

Superscript: Pete Conrad

Conrad: With Delta Clipper you have an old idea using today's technology that will allow low cost access to space. With Dura Lube, what can I say? I knew it was a real advance in engine lubrication. Now everyone knows it. Sure there were skeptics. Just like there were plenty of skeptics regarding the Delta Clipper idea, but now we know they're both winners. (Exhibit A, p. 22)

- (8) **Host:** Just how is Dura Lube able to do all those things? Well, recently we got together with our lubrication specialist, Floyd Stivik. He showed me a simple demonstration of the secret to Dura Lube's success....

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Stivik: Dura Lube will actually go in and relieve that heat and pressure. That's saving oil, saving maintenance on the car, saving those engines, Jim.

Host: Especially the small cars.

Stivik: Especially small cars, Jim. Let me show you what we're going to do here. We have a piece of sheet metal. We're going to simulate an engine.

Host: I see this is flat.... What are you going to do?

Superscript: Perfectly level.

Stivik: We're going to...put in oil. Hand me some oil, Jim.

Host: Now, do you care which one?

Stivik: It doesn't make any difference. Dura Lube is completely compatible with all oil, Jim. Synthetics, naturals, it doesn't make any difference....

Video: Untreated oil heated on piece of sheet metal.

Stivik: ...We're going to see that actually it's going to start cooking down and it will actually move away from the flames.

Host: You can certainly see that it is spreading out.

Stivik: Spreading out and you can see it's starting to cook a little along this edge and moving away from the heat over here.... Now I'm going to pour some Dura Lube in here and we're going to see what happened.... Look at how it's going to travel. It's traveling towards that heat. Jim, it goes to the heat. That's what's really important. Dura Lube eats the heat and saves those engines. Look at that. Look at that moving to the heat. Isn't it amazing? Look what it's doing. It's going to come in and marry up to that old oil and do the lubrication job that's necessary on that engine. (Exhibit A, pp. 23-25)

- (9) **Announcer:** Just look at this heat and pressure test conducted by the Falex Corporation. Now, this

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independent laboratory found premium oil failing at 1,250 pounds. STP hit the failure mark and 1,750 pounds. Slick 50 fared a little bit better, but it too failed at 2,250 pounds. Now look at Dura Lube. It ran in the optimal temperature zone the whole day. Dura Lube ran off the chart.

Superscript: NO FAILURE

Superscript: Pete Conrad

Conrad: I insisted that they run that test. They did it and it passed with flying colors. (Exhibit A, pp. 25-26)

- (10) Host: You're cruising to the grocery store or something and your oil light comes on. Middle of the night, what are you going to do? Are you going to sit there and walk? If you have Dura Lube in your car, you're going to make it to your destination. (Exhibit A, p. 27)

B. Dura Lube Advanced Engine Treatment Container Box Labeling (Exhibit B)

- (1) Tested #1. Dura Lube Advanced Engine Treatment for gas and diesel engines saves fuel, improves performance, protects engine at start up, prolongs engine life. (Exhibit B, front panel)

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(2) **Pictured:** Conrad in space suit with NASA logo.

Text: Dura-Lube is the best lubricant I've ever seen. It's absolutely amazing! -- Charles "Pete" Conrad, International Dura-Lube spokesman.

- Captain United States Navy (retired)
 - Skylab 1: Commander; 1973
 - *Apollo XII: Commander; 1969
 - Gemini XI: Commander Pilot, 1966
 - Gemini V: Pilot, 1965
- *Executed the second lunar landing

(Exhibit B, side panel).

(3) **Pictured:** Chart of Falex Pin & V-Block test results. Text of caption explains chart as comparing results for "a leading motor oil," "a leading synthetic oil," Slick 50 and Dura Lube. All but the Dura Lube results show failure when load is increased.

Text: Dura-Lube dramatically reduces friction and wear, increases gas mileage and horsepower, makes starting easier, improves performance, and extends engine life.

Dura-Lube's micro-thin layer of bonded protection, however, safeguards vital engine components during these critical (cold start) periods, allowing engine parts to glide effortlessly against each other, reducing wear by more than 50%!

Dura-Lube contains none of the potentially harmful solid particles such as lead, silicone, molybdenum disulfide, PTFE, or graphite, which are found in other lubrication products. These ingredients can present a hazard to the environment

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and some can change tolerance in your vehicle's engine.

Dura-Lube's amazing formulation is the choice of professionals worldwide. It is used by taxi companies, police departments, and utilities to reduce fuel and maintenance costs, and to prolong engine life. Professional drivers choose Dura-Lube to protect their engines through the extreme conditions of auto racing, and because Dura-Lube increases horsepower, torque, compression, and fuel economy.

Dura-Lube contains NO chlorinated solvents, NO chlorinated esters, and NO ingredients listed as halogenated hazardous wastes by the U.S. E.P.A. (Exhibit B, back panel)

(4) **Headline:** Some Facts You Should Know

Text: Added to the engine of any car or truck, Dura-Lube dramatically reduces friction and wear, increases gas mileage and horsepower, makes starting easier, improves performance, and extends engine life.

[Dura-Lube] dramatically reduces friction and wear and allows your vehicle's engine to run smoother and cleaner.

Q: Can I use Dura-Lube if I've already treated my engine oil with another product?

A. Yes. You should notice an immediate improvement.

Q: Who tested Dura-Lube?

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A. Tests on Dura-Lube have been performed by the Falex Corporation, the world's largest manufacturer of friction and wear test equipment; by approved test facilities in the United States by numerous testing facilities in Europe, and by satisfied drivers all over the world who have traveled millions of trouble free miles using Dura-Lube.

Q: How long does Dura-Lube last?

A. Dura-Lube protects your vehicle's engine for up to 50,000 miles of normal driving.

C. Dura Lube Advanced Engine Treatment Bottle Labeling
(Exhibit C)

Dura-Lube Engine Treatment dramatically reduces friction and wear, increases gas mileage and horse power, makes starting easier, improves performance, and extends engine life. Dura Lube Engine Treatment protects engine up to 50,000 miles of normal driving.

D. Dura Lube Print Advertising (Exhibit D):

- (1) **Headline:** Save up to \$25 per month on gas...or it's free!
- (2) **Pictured:** Chart titled "Metal against metal pressure test." Caption explains chart as comparing results of extreme pressure tests for "Penzoil" [sic], "Quaker State," "Slick 50," "Marvel" and "STP." All but the Dura Lube results show failure when pressure up to 40 pounds is applied.
- (3) **Text:** Duralube will save you up to 35% on gasoline! -- and add thousands of miles to the life of your car's engine -- in just one treatment!

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- (4) Our new product actually saves you money on gas by improving the efficiency of your engine and increasing your gas mileage by 15, 25, even 35%.
- (5) The experts agree. We knew we'd have doubters, but we have proof on our side. In tests performed by the U.S. Government's Environmental Protection Agency DuraLube clearly increased gas mileage and cut down on harmful emissions. But we knew some people still wouldn't be convinced, so we contracted with another independent testing laboratory, and then another, and all agreed that DuraLube works.

E. Dura Lube Direct Response Advertising (Exhibit E)

(1) **Inset:** Picture of Conrad

Picture caption with quote: Charles "Pete" Conrad, Jr., International Dura Lube Spokesperson, Research and Development Specialist. "It's absolutely amazing! DURA LUBE passed the tests with flying colors."

- (2) **Text:** Dura Lube dramatically reduces friction and wear by penetrating metal surfaces to create a non friction shield and give you a better running engine. You'll get a smoother ride while eliminating the damage caused by cold engine starts.... In independent lab tests, 3 of the most popular lubricants failed, but DURA LUBE ran off the chart. The engineers couldn't get it to fail!

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(3) We've even test-raced DURA LUBE in a 500 horsepower engine without any oil and found that DURA LUBE's state of the art protection kept on working because DURA LUBE treats the metal, not the oil. DURA LUBE *eats the heat and saves the engine*. Just one bottle added to your engine's oil protects for up to 50,000 miles so your motor will run smoother and last longer. This means less maintenance, less breakdowns, and less repairs! DURA LUBE's secret formula contains no solids of any kind.

(4) **Pictured:** Graph comparing result of Falex Pin & V-Block test showing Dura Lube passing and other lubricants failing.

13. Through the means described in Paragraph 12, respondents have represented, expressly or by implication, that:

- A. Dura Lube does not contain any chlorinated compound.
- B. Dura Lube has been tested by the U.S. Environmental Protection Agency.

14. In truth and in fact:

- A. Dura Lube contains chlorinated paraffin, a chlorinated compound.
- B. Dura Lube has not been tested by the U.S. Environmental Protection Agency.

Therefore, the representations set forth in Paragraph 13 were, and are, false or misleading.

15. Through the means described in Paragraph 12, respondents have represented, expressly or by implication, that:

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- A. Compared to motor oil alone or motor oil treated with any other product, using Dura Lube:
 - 1. Reduces engine wear.
 - 2. Reduces engine wear by more than 50%.
 - 3. Prolongs engine life.
 - 4. Reduces emissions.
 - 5. Reduces the risk of serious engine damage when oil pressure is lost.
 - 6. Improves gas mileage.
 - 7. Improves gas mileage by up to 35%.
- B. One treatment of Dura Lube continues to protect the engine for up to 50,000 miles.

16. Through the means described in Paragraph 12, respondents have represented, expressly or by implication, that at the time they made the representations set forth in Paragraphs 13 and 15, respondents possessed and relied upon a reasonable basis that substantiated such representations.

17. In truth and in fact, at the time they made the representations set forth in Paragraphs 13 and 15, respondents did not possess and rely upon a reasonable basis that substantiated such representations. Therefore, the representation set forth in Paragraph 16 was, and is, false or misleading.

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18. Through the means described in Paragraph 12, respondents have represented, expressly or by implication, that tests prove that:

- A. Compared to motor oil alone, using Dura Lube:
 - 1. Improves gas mileage.
 - 2. Improves gas mileage by up to 35%.
 - 3. Reduces emissions.
 - 4. Prolongs engine life.
 - 5. Reduces engine wear.
 - 6. Reduces the risk of serious engine damage when oil pressure is lost.
- B. One treatment of Dura Lube continues to protect the engine for up to 50,000 miles.

19. In truth and in fact, tests do not prove that:

- A. Compared to motor oil alone, using Dura Lube:
 - 1. Improves gas mileage.
 - 2. Improves gas mileage by up to 35%.
 - 3. Reduces emissions.
 - 4. Prolongs engine life.
 - 5. Reduces engine wear.
 - 6. Reduces the risk of serious engine damage when oil pressure is lost.

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- B. One treatment of Dura Lube continues to protect the engine for up to 50,000 miles.

Therefore, the representations set forth in Paragraph 18 were, and are, false or misleading.

20. Through the means described in Paragraph 12, including, but not necessarily limited to, the demonstrations in Exhibit A, respondents have represented, expressly or by implication, that:

- A. The demonstration consisting of running an automobile engine after draining the motor oil treated with Dura Lube, proves, demonstrates or confirms that, compared to motor oil alone, Dura Lube reduces the risk of serious engine damage when oil pressure is lost.
- B. The demonstration consisting of heating untreated oil on sheet metal and then treating it with Dura Lube proves, demonstrates or confirms that, without Dura Lube, motor oil fails to protect automobile engines under hot running conditions.

21. In truth and in fact:

- A. The demonstration referred to in Paragraph 20.A does not prove, demonstrate or confirm that, compared to motor oil alone, Dura Lube reduces the risk of serious engine damage when oil pressure is lost.
- B. The demonstration referred to in Paragraph 20.B does not prove, demonstrate or confirm that, without Dura Lube, motor oil fails to protect automobile engines under hot running conditions.

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Therefore, the representations set forth in Paragraph 20 were, and are, false or misleading.

22. Through the means described in Paragraph 12, including, but not necessarily limited to, the advertisements, labeling and promotional materials attached as Exhibits A-B and E, respondents have represented, expressly or by implication, that Charles "Pete" Conrad ("Conrad"), a former Naval aviator and NASA astronaut, has expertise in the evaluation and testing of automobile engine lubrication, and has conferred his endorsement of Dura Lube on the basis of an independent, objective and valid evaluation or test using procedures generally accepted in the field of automobile engine lubrication to yield accurate and reliable results.

23. In truth and in fact, Conrad does not have expertise in the evaluation and testing of automobile engine lubrication, and has not conferred his endorsement of Dura Lube on the basis of an independent, objective, and valid evaluation or test using procedures generally accepted in the field of automobile engine lubrication to yield accurate and reliable results. Therefore, the representations as set forth in Paragraph 22 were, and are, false and misleading.

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

NOTICE

Notice is hereby given to each of the respondents hereinbefore named that the third day of June, 1999, at 10:00 a.m. o'clock, or such later date as determined by an Administrative Law Judge of the Federal Trade Commission, is hereby fixed as the time, and Room 532, Federal Trade Commission Building, 600 Pennsylvania Avenue, N.W., Washington, D.C. 20580 as the

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place when and where a hearing will be had before an Administrative Law Judge of the Federal Trade Commission, on the charges set forth in this complaint, at which time and place you will have the right under the Federal Trade Commission Act to appear and show cause why an order should not be entered requiring you to cease and desist from the violations of law charged in this complaint.

You are notified that the opportunity is afforded you to file with the Commission an answer to this complaint on or before the twentieth (20th) day after service of it upon you. An answer in which the allegations of the complaint are contested shall contain a concise statement of the facts constituting each ground of defense; and specific admission, denial, or explanation of each fact alleged in the complaint or, if you are without knowledge thereof, a statement to that effect. Allegations of the complaint not thus answered shall be deemed to have been admitted.

If you elect not to contest the allegations of fact set forth in the complaint, the answer shall consist of a statement that you admit all of the material allegations to be true. Such an answer shall constitute a waiver of hearings as to the facts alleged in the complaint, and together with the complaint will provide a record basis on which the Administrative Law Judge shall file an initial decision containing appropriate findings and conclusions and an appropriate order disposing of the proceeding. In such answer you may, however, reserve the right to submit proposed findings and conclusions and the right to appeal the initial decision to the Commission under Section 3.52 of the Commission's Rules of Practice for Adjudicative Proceedings.

Failure to answer within the time above provided shall be deemed to constitute a waiver of your right to appear and contest the allegations of the complaint and shall authorize the Administrative Law Judge, without further notice to you, to find

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the facts to be as alleged in the complaint and to enter an initial decision containing such findings, appropriate conclusions and order.

The following is the form of order which the Commission has reason to believe should issue if the facts are found to be as alleged in the complaint. If, however, the Commission should conclude from record facts developed in any adjudicative proceedings in this matter that the proposed order provisions as to Dura Lube Corporation, American Direct Marketing, Inc., Howe Laboratories, Inc., Crescent Manufacturing, Inc., and The Media Group, Inc., corporations; Herman S. Howard, individually and as an officer and director of the said corporations; and Scott Howard, individually and as an officer and director of the said corporations, might be inadequate to fully protect the consuming public, the Commission may order such other relief as it finds necessary or appropriate, including corrective advertising or other affirmative disclosure.

Moreover, the Commission has reason to believe that, if the facts are found as alleged in the complaint, it may be necessary and appropriate for the Commission to seek relief to redress injury to consumers, or other persons, partnerships or corporations, in the form of restitution and refunds for past, present, and future consumers and such other types of relief as are set forth in Section 19(b) of the Federal Trade Commission Act. The Commission will determine whether to apply to a court for such relief on the basis of the adjudicative proceedings in this matter and such other factors as are relevant to consider the necessity and appropriateness of such action.

ORDER

Definitions

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

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“Dura Lube” shall mean the aftermarket motor oil additive known as Super Dura Lube Engine Treatment, Advanced Dura Lube Engine treatment, or any product of substantially similar composition marketed as a motor oil product.

“Motor oil product” shall mean a product for use in conjunction with or in place of fully formulated motor oil.

“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.

Unless otherwise specified, “respondents” shall mean Dura Lube Corporation, American Direct Marketing, Inc., Howe Laboratories, Inc., Crescent Manufacturing, Inc., The Media Group, Inc., and National Communications Corporation, corporations, their successors and assigns, and their officers, agents, attorneys, representatives, and employees; and Herman S. Howard and Scott Howard, individually and as officers of the corporations, whether acting directly or through any corporation, subsidiary, division, trust or other device, or any of them.

“Commerce” shall be as defined in Section 4 of the Federal Trade Commission Act, 15 U.S.C. § 44.

I.

IT IS ORDERED that respondents, in connection with the manufacturing, advertising, labeling, packaging, offering for sale, sale, or distribution of Dura Lube, in or affecting commerce, shall not misrepresent, in any manner, expressly or by implication, that:

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- A. Dura Lube contains no chlorinated compound or any harmful component.
- B. Dura Lube has been tested by the U.S. Environmental Protection Agency or meets the specifications, requirements or standards of any governmental or standard setting organization.

II.

IT IS FURTHER ORDERED that respondents, in connection with the manufacturing, advertising, labeling, packaging, offering for sale, sale, or distribution of any product for use in any motor vehicle, in or affecting commerce, do forthwith cease and desist from:

- A. Making any representation, in any manner, expressly or by implication, that:
 - 1. Compared to motor oil alone or motor oil treated with any other product, using such product:
 - a. Reduces engine wear;
 - b. Reduces engine wear by any percentage, dollar or other figure;
 - c. Prolongs engine life;
 - d. Reduces emissions;
 - e. Reduces the risk of serious engine damage when oil pressure is lost;
 - f. Improves gas mileage;
 - g. Improves gas mileage by any percentage, miles per gallon, dollar, or other figure;

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2. One or any other number of treatments of such product reduces wear for 50,000 or any other number of miles; or,
 3. Regarding the performance, benefits, efficacy, attributes or use of such product, unless, at the time of making such representation, respondents possess and rely upon competent and reliable evidence, which when appropriate must be competent and reliable scientific evidence, that substantiates the representation.
- B. Misrepresenting, in any manner, expressly or by implication, the existence, contents, validity, results, conclusions, or interpretations of any test or study.

III.

IT IS FURTHER ORDERED that respondents, in connection with the manufacturing, advertising, labeling, packaging, offering for sale, sale, or distribution of any product, in or affecting commerce, shall not misrepresent, in any manner, expressly or by implication, that any demonstration, picture, experiment, illustration or test proves, demonstrates or confirms any material quality, feature or merit of such product, or the superiority or comparability of the product in a material respect relative to any other product.

IV.

IT IS FURTHER ORDERED that, respondents, in connection with the manufacturing, advertising, labeling, packaging, offering for sale, sale, or distribution of any product, in or affecting commerce, shall cease and desist from representing, directly or by

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implication, that such product has been endorsed by a person, group or organization that is an expert with respect to the endorsement message, unless:

- A. The endorser's qualifications give the endorser the expertise that the endorser is represented as possessing with respect to the endorsement; and
- B. The endorsement is supported by an objective and valid evaluation or test using procedures generally accepted by experts in that science or profession to yield accurate and reliable results.

V.

IT IS FURTHER ORDERED that, for five (5) years after the last date of dissemination of any representation covered by this order, respondents shall maintain and upon request make available to the Federal Trade Commission for inspection and copying:

- A. All labeling, packaging, advertisements and promotional materials setting forth any representation covered by this order;
- B. All materials that were relied upon to substantiate any representation covered by this order; and
- C. All tests, reports, studies, surveys, demonstrations or other evidence in their possession or control, or of which they have knowledge, that contradict, qualify, or call into question such representation, or the basis relied upon for the representation, including complaints and other communications with consumers, third-party dispute mediators, or governmental or consumer protection organizations.

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VI.

IT IS FURTHER ORDERED that:

- A. The corporate respondents and their successors and assigns shall notify the Federal Trade Commission at least thirty (30) days prior to any change in the corporate respondents that may affect compliance obligations arising under this order, including but not limited to dissolution, assignment, sale, merger or other action that would result in the emergence of a successor corporation, the creation or dissolution of a subsidiary, parent, or affiliate that engages in any acts or practices subject to this order, the proposed filing of a bankruptcy petition, or a change in the corporate name or address. *Provided, however,* that with respect to any proposed change in the corporation about which respondents learn less than thirty (30) days prior to the date such action is to take place, respondents shall notify the Commission as soon as practicable after obtaining such knowledge.

- B. Each of the individual respondents, for a period of ten (10) years after the date of issuance of this order, shall notify the Federal Trade Commission of the discontinuance of his current business or employment, or his affiliation with any new business or employment. The notice shall include the respondent's new business address and telephone number and a description of the nature of the business or employment and his duties and responsibilities.

All notices required by this Part shall be sent by certified mail to the Associate Director for Enforcement, Bureau of Consumer Protection, Federal Trade Commission, Washington, D.C. 20580.

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VII.

IT IS FURTHER ORDERED that the corporate respondents and their successors and assigns and the individual respondents shall deliver a copy of this order to all current and future principals, officers, directors, and managers, and to all current and future employees, agents, and representatives having responsibilities with respect to the subject matter of this order, and shall secure from each such person a signed and dated statement acknowledging receipt of this order. Respondents shall deliver this order to current personnel within thirty (30) days after the service of this order, and to future personnel within thirty (30) days after the person assumes such position and responsibilities.

VIII.

IT IS FURTHER ORDERED that respondents shall:

- A. Within thirty (30) days after the date of service of this order, send notice of this order by first class certified mail, return receipt requested, to each purchaser for resale of Dura Lube with which respondents have done business since January 1, 1994. The mailing shall not include any other documents;
- B. In the event that respondents receive any information that subsequent to its receipt of notice of this order any purchaser for resale is using or disseminating any advertisement or promotional material that contains any representation prohibited by this order, respondents shall immediately notify the purchaser for resale that respondents will terminate the use of said purchaser for resale if it continues to use such advertisements or promotional materials; and
- C. Terminate the use of any purchaser for resale about which respondents receive any information that such purchaser for resale has continued to use any representation

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prohibited by this order after receipt of the notice required by subparagraph B of this part.

IX.

IT IS FURTHER ORDERED that respondents shall, for five (5) years after the last correspondence to which they pertain, maintain and upon request make available to the Federal Trade Commission for inspection and copying:

- A. Copies of all signed statements obtained from persons or entities pursuant to part VII of this order;
- B. Copies of all notification letters sent to purchasers for resale pursuant to subparagraph A of part VIII of this order; and
- C. Copies of all communications with purchasers for resale pursuant to subparagraphs B and C of part VIII of this order.

X.

IT IS FURTHER ORDERED that respondents shall, within sixty (60) days after service of this order, file with the Federal Trade Commission a report, in writing, setting forth in detail the manner and form in which they have complied or intend to comply with this order.

XI.

IT IS FURTHER ORDERED that this order will terminate twenty (20) years from the date of its issuance, or twenty years from the most recent date that the United States or the Federal Trade Commission files a complaint (with or without an

Complaint

accompanying consent decree) in federal court alleging any violation of the order, whichever later occurs; *provided, however*, that the filing of such 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 had never been filed, except that the order will not terminate between the date such complaint is filed and the later of the deadline for appealing such dismissal or ruling and the date such dismissal or ruling is upheld on appeal.

IN WITNESS WHEREOF, the Federal Trade Commission has caused this complaint to be signed by its Secretary and its official seal to be hereto affixed at Washington, D.C. this twenty-ninth day of April, 1999.

By the Commission.

Complaint Exhibits

Complaint Exhibits

EXHIBIT A

1 //
2 //
3 //
4 //

5 The following program is a paid advertisement brought
6 to you by The Media Group.

7 Is there a breakthrough the oil companies may not
8 want you to know about? Magic in a bottle that could save
9 you hundreds of dollars on oil and gasoline?

10 This is unbelievable.

11 What do you think?

12 I wouldn't believe it if I didn't see it myself.

13 It's amazing. You drive through a puddle and your
14 car stalls. And this is a whole fire hose on it.

15 What do you think of it?

16 I can't believe it. I really can't believe it.

17 They're flooding this engine. It shouldn't be running.

18 I was amazed. I couldn't believe it.

19 I'm waiting for it to conk out. It just wouldn't.

20 [Clapping] If I didn't see it, I wouldn't believe it.

21 If I wasn't here, I wouldn't have believed it.

22 I wouldn't believe it if I didn't see it.

FEDERAL TRADE COMMISSION DECISIONS
VOLUME 129

Complaint Exhibits

1 I wouldn't believe it if I didn't see it. If I've heard
2 that line once, I've heard it a thousand times. Hi there, folks,
3 I'm Jim Caldwell. You know, since we went on the air with our
4 first show talking about Dura Lube, hundreds of thousands of you
5 have started adding it to your engine oil, your transmission
6 fluid, your power steering, your differential. Everywhere there's
7 a moving part, people are using Dura Lube.

8 Now, we knew that Dura Lube was truly a breakthrough
9 product, but we had no idea of the thousands of testimonials in
10 writing that we would receive from people all across the country
11 stating how great Dura Lube really is.

12 For instance, Minnesota. Newspaper man, Gerald
13 Snyder boost his mileage and avoids a hundred dollar
14 transmission repair by treating his car with Dura Lube.

15 Los Angeles. Johnny Ishibashi's '68 Pontiac had flunked
16 California's tough emissions test. But after just one bottle of
17 Dura Lube, it passed with flying colors.

18 New York. Barbara Wreck was ready to junk her whole car
19 when it kept stalling in the rain. But after using Dura Lube
20 spray, the problem absolutely disappeared. That one bottle ended
21 up saving her thousands of dollars.

22 Now, all this probably sounds a little bit too good to be
23 true doesn't it? If something was so good, wouldn't one of the
24 big oil companies come out with it? Well, think about it. Would

Complaint Exhibits

1 a big oil company want to put something on the market that would
2 save you so much money on gas and oil, plus make all of their
3 existing products obsolete? Would any big oil company want to
4 put something on the market that would allow an engine to run
5 without oil?

6 Well, if you saw our last show, you know that's exactly what
7 Dura Lube can do. We added Dura Lube to the oil in a huge race
8 car engine and then drained all the oil out including the Dura
9 Lube. Dura Lube works even if all your oil is gone. It's not
10 like other additives. It's a genuine breakthrough in
11 lubrication. Should the engine have seized already? Under
12 normal circumstances severe engine damage would have happened by
13 now. Already.

14 The Dura Lube obviously has attached itself to the engine
15 components and still protecting it.

16 Then with no oil pressure we started revving that 500
17 horsepower engine up under full load.

18 Got any load yet?

19 Oh, we've got a lot of load, Jim.

20 Up to 120 horsepower, 160, 224, 254, 260, 292.

21 I was ready to leave the building. I thought we were going
22 to see the Fourth of July today and parts flying through that
23 wall.

24 302, 348.

Complaint Exhibits

1 I was ready to run.
2 [Superscript: No oil pressure!]
3 409, 453, 473.
4 I'm still speechless.
5 482, 520, 525. Oh, no. Unbelievable. I don't believe it.
6 Oh, my God.
7 [Superscript: A 500 HP Dura-Lube treated race car engine just
8 ran successfully with no oil pressure under full load and high
9 rpm -- unrehearsed!]
10 That test left professional mechanics shaking. But even
11 with no oil at all, even with that big torture run up, the
12 bearings in the Dura Lube treated engine looked as good as new,
13 as you can see for yourself.
14 I saw it with my own eyes and there's more I can say about
15 that.
16 Logically, it's not possible to do what was just done.
17 It doesn't seem to be not when you think that the bearings
18 of the engine are suspended in oil and you just took away that
19 suspension totally from that crankshaft and that thing stayed
20 together.
21 Ever since that show, Dura Lube has been accepted around the
22 world, from England to France to Australia and Japan, no matter
23 what the people are using, no matter what kind of oil, whether

Complaint Exhibits

1 it's regular, premium or synthetic, Dura Lube simply turns it
2 into a super lubricant. Tomorrow's technology today.

3 But, you know, people got so excited about that big race
4 car-engine demonstration that they kind of missed the fact that
5 there is a Dura Lube formulated specifically for your
6 transmission. This will give you phenomenally smooth and easy
7 shifts and save you hundreds of dollars in costly repairs.

8 Now, check this out- Dura Lube spray. This does things that
9 no other lubricant even claims to do. It will protect your
10 electrical system against any kind of stall due to rain or
11 puddles or snow or ice. And of course, it will work on all those
12 little nooks and crannies like your roller blades. Let's say you
13 want them to spin faster. Or your door locks are frozen or maybe
14 your door hinges or you name it. This product works fantastic.

15 You know Dura Lube really is a miracle, and we're going to
16 prove it again. We're going to top ourselves folks. We're going
17 to take an engine and we're going to empty all the oil out. Now,
18 you would expect that, right? Guess what we're going to do
19 next? We're going to take all the water out. No oil. No
20 coolant in the engine. Then we're going to take this little
21 product right here, Dura Lube spray and we're going to do
22 something that they wouldn't even let us do unless there's a fire
23 engine standing by. In fact, it's exactly why people are saying
24 I wouldn't believe it -if I didn't see it. Watch this. We

Complaint Exhibits

1 gathered a bunch of folks in Suffolk County, Long Island,
2 mechanics, a few long time Dura Lube users, and some folks who'd
3 never even heard of the product. When we told the authorities
4 what kind of test we were planning, they insisted that we have a
5 fire truck standing by. They didn't think any engine could
6 withstand the kind of torture we had in mind.

7 First, we started up a big six cylinder engine. Then we
8 drained out all the oil and that engine just kept humming along.
9 No problem.

10 But we wanted to top ourselves. So we said we'd drain out
11 all the water as well.

12 Can you imagine? Now, your radiator's designed to cool the
13 engine, right? Well, sir, what's going to happen if you take the
14 water out of the radiator and you've already taken the oil out.
15 What do you think's going to happen?

16 I think it would seize, blow up, seize up, never run again.

17 Do you think Dura Lube works?

18 We're going to find out I think.

19 We drained that radiator dry as a bone and the engine just
20 purred right along.

21 All right. The oil's gone. Water's gone or just about gone.
22 Why is this still running?

23 [Superscript: Floyd Stevik -- Lubrication Specialist]

Complaint Exhibits

1 Dura Lube. The quality of Dura Lube's what's happening,
2 Jim. Dura Lube actually stays up there and does the lubrication
3 for you. It doesn't leave your engine.
4 So it's not treating the oil, it's treating the metal.
5 That's exactly right. It's treating the metal.
6 You guys get that? Stan, what do you think of that?
7 It's amazing. The push rods are still spinning round.
8 Nothing's seizing up. There's no noise coming from any place.
9 It's got me baffled so far, but I'm watching. I'm watching. I
10 want to see more of this.
11 What else do you want to see?
12 I just want to see how much longer this is going to run
13 before it starts clicking and before I hear some bearings
14 rapping.
15 This test, I mean, you can't deny the test. I mean, I saw
16 it for myself.
17 If I wasn't here, I wouldn't have believed it. Not at all.
18 Do you know anything about engines?
19 No, just put oil in when the little oil light goes on.
20 Well, you always worry that one day you're going to come
21 home from work and the wife tells you that she meant to tell you
22 for the last three days the red light is on in the car. And the
23 next thing you know you've got major problems, major cost
24 factors. With this you wouldn't have that problem.

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Complaint Exhibits

1 No coolant, no oil pressure. No problems. But you folks
2 ain't seen nothing yet.

3 This is nothing but pure old, good old drinking water. It
4 didn't come from Tennessee but it's great water. I'm going to
5 pour this in the distributor cap.

6 Now, wait a minute. Have you treated this with Dura Lube
7 yet?

8 Oh, it's a good idea. Wow.

9 Small detail.

10 I tell you what -

11 Now, what would have happened if you had not treated that?

12 I wouldn't have started.

13 Let me ask you what would happen if you took that
14 distributor, sir, and soaked it with water?

15 Never would have been able to start it up.

16 Why not?

17 Because you can't get water in there, electrical system.

18 What's wrong with getting water in the electrical system?

19 Electrical and water don't mix.

20 Electrical and water don't mix unless -- I'm sorry --

21 Your electricity bounces around instead of going through the
22 ignition wire to the spark plug. It would be like an explosion
23 instead of a pin point.

Complaint Exhibits

1 An explosion? Well, then here's a real test of Dura Lube's
2 protection.

3 Okay, what I'm going to do is I'm going to spray this cap
4 first.

5 Yep.

6 With protectant, with Dura Lube.

7 Get in here Paul. Let's get some witnesses to exactly what
8 he's doing.

9 Okay?

10 Okay.

11 Now I'm going to pour this cup of water in here.

12 Now, did you put enough in there?

13 I think so. Pour a cup of water in here, okay?

14 Hold it. Now, look at this. Can we have a drink of that?

15 Well, I wouldn't touch that one, but, yeah, it's just pure
16 water. Pure water. We're going to put that cap back on and see
17 if we can start this engine.

18 You're going to dump it out. Okay, so that thing is loaded,
19 just loaded with water.

20 All right. We're going to start it up now, Jim, with all
21 that water in the distributor cap.

22 Do you think this is going to start?

23 I'm skeptical.

24 No way.

Complaint Exhibits

1 No way?

2 It's not going to start.

3 Why not?

4 Too much water in there.

5 You'd think so wouldn't you? Just go around there and stand

6 there and wait. We're going to get your camera on the engine

7 here. Let's see what we're going to do, Jack. Oh, man. It

8 wants to turn over.

9 Oh, my. What do you think of that? What do you think of

10 that?

11 Fantastic, fantastic, unbelievable. I had an engine. As a

12 matter of fact, a guy sold me a car. Because every time it would

13 rain, the car wouldn't stop. This is unbelievable.

14 What do you think?

15 I wouldn't believe it if I didn't see it myself.

16 What do you think?

17 It's incredible.

18 Did you expect that to happen?

19 No oil, no water. I didn't expect that to happen.

20 Distributor cap full of moisture. What do you think, sir?

21 It's unbelievable to see how it repels all that water from

22 getting it into the electrical system like that.

23 That's exactly the word. It repelled. It repelled the

24 water. You're amazed, aren't you? What do you think?

Complaint Exhibits

1 No oil, no water, water in the distributor cap.
2 Next thing you'll be telling us you don't need gasoline to
3 run the thing.
4 Let's make sure that everybody here knows we're not just
5 talking about the crank case. Dura Lube. We've got a
6 transmission conditioner. The all purpose spray.
7 Yeah?
8 Can we spray the engine a little bit?
9 Oh, my gosh. Now, wait a minute. Hold it.
10 Should we leave the valve cover on or off? What do you
11 think?
12 Leave it off.
13 Yeah, leave it off.
14 You want to put water in the valve cover?
15 It'll work.
16 Oh, my gosh. I don't know what to say, folks.
17 Maybe I better put a little protection.
18 Yeah, just put a little something here. Come on. Come on.
19 We've got to give it a little hope here. You're going to spray
20 this with water. What do you think should happen?
21 I think the engine's going to die. I really do.
22 Is the engine going to die, Wayne?
23 I would say it would die almost instantly. I keep

Complaint Exhibits

1 looking around for an external oil source or water source. I
2 can't find it. I can't believe what's going on.
3 This is a heck of a legitimate test, isn't it?
4 It's 100 percent legitimate.
5 You're blown away aren't you?
6 I can't believe it. Like I said, I'm still looking for an
7 external oil source and more water from somewhere, but I can't
8 find it anywhere.
9 You think we're faking this?
10 No, it's not a fake, but I wouldn't believe it if I
11 didn't see it. It's amazing.
12 It's good stuff. All right. I guess we've got to try this. I
13 didn't know they were going to do this too. Here we go, folks.
14 Watch it. Here we go. Watch Floyd. Get the electrical. It's
15 still running. What do we think of this?
16 It's amazing. It's amazing.
17 Frank, get over here. I've got to get a couple of comments
18 from people.
19 It's amazing. You drive through a puddle and your car
20 stalls. And this is a whole fire hose.
21 What do you think of this?
22 I can't believe it. I really can't believe it. They're
23 flooding this engine. It shouldn't be running. It just
24 shouldn't be running.

Complaint Exhibits

1 What do you think, sir?

2 A little common sense, seeing is believing. I can't believe
3 it myself. I'm amazed. I'm still looking.

4 They're putting water down through the head, through the
5 cylinder heads, past the push rods, going into the oil. So
6 the oil should be in the pan and this thing is still running.
7 Water is a lubricant for cooling, but not as far as, not as far
8 as keepin' an engine running.

9 But for everyone who really believes in a product, there's
10 always someone who thinks you're trying to pull a fast one.

11 Can you pull the coil wire out to stall it? Just to see.

12 It will stop. It will kill it.

13 If you pull the coil wire, of course it's going to stop.

14 Right. It will stop. I just want to see if that's the
15 distributor.

16 I can hear his challenge. He wants you to prove that's
17 really the distributor cap. Can you do something here without
18 shocking yourself? What can you do?

19 I'd have to stop it, wouldn't I, to pull that coil?

20 Wayne, you're the expert. He wants -

21 It's going to run up the side, isn't it?

22 It should die right out, right.

23 You're not going to hurt yourself, right Floyd?

24 All right, folks. Proof's in the pudding. Are you sold?

Complaint Exhibits

1 Yes, I'm sold.

2 Oh, now watch. He's going to start it up again. He's going
3 to start it up again, folks.

4 Can other spray lubricants protect an engine from so much
5 moisture? No way. Just look at these independent tests. [Chart
6 inset] Dura Lube spray was one-third more effective than a
7 competing product, One Lube, when it came to moisture protection.
8 WD-40 did even worse. It was only one-eighth as effective as Dura
9 Lube spray. And that's why only Dura Lube spray can offer this
10 amazing guarantee. Your car will go in rain or snow or Dura Lube
11 will pay the tow. [Superscript: Dura-Lube Guarantee. Your car
12 will go in rain or snow or Dura-Lube will pay the tow! \$35 per
13 occurrence. Subject to terms and conditions.] That's a
14 guarantee. Dura Lube can protect a distributor cap full of
15 moisture. Only Dura Lube can stand up to a fire hose. The
16 others don't even make such claims.

17 You're pumping water up there and it's still running. It
18 shouldn't be. It shouldn't be. Does he walk on water too?
19 What's the story here? This is like the next best thing to
20 sliced bread. Really. Where did you find this stuff?

21 Introducing Dura Lube. The world's first space age all
22 purpose lubricant that virtually eliminates friction like nothing
23 on earth. In space there is no friction, but inside your engine
24 friction drags on every moving component generating heat, wear

Complaint Exhibits

1 and tear, causing poor fuel economy, more pollution, even engine
2 breakdown. [Superscript: Friction causes: Heat! Wear! Poor Fuel
3 Economy! More pollution! Engine breakdown!] Dura Lube
4 radically reduces friction by penetrating metal surfaces to
5 create a non-friction shield that gives you a more efficient
6 engine. With Dura Lube you'll have a cooler running engine and
7 get more miles per gallon, more horsepower with less pollution
8 and a quieter ride. [Superscript: DURALUBE Cooler engine! More
9 MPG. More horsepower! Less pollution! Quieter ride! Much less
10 wear!] You'll eliminate the damage caused by cold starts saving
11 you hundreds if not thousands of dollars. [Superscript: DURALUBE
12 You'll save hundreds of dollars, if not thousands!] Nothing
13 compares to Dura Lube because it treats the metal, not the oil.
14 [Superscript: Treats the metal, not the oil.] In fact, the
15 higher the temperature and pressure the better it performs.
16 [Insert: chart of torque pressure tests.] Dura Lube eats the
17 heat and saves the engine. [Superscript: Eats the heat! Saves
18 the engine!] Just one bottle added to your engine's oil protects
19 for up to 50,000 miles. [Superscript: Protects for up to 50,000
20 miles!]

21 And introducing Dura Lube spray. Has this ever happened to
22 you? A rainstorm -- even a small puddle stops you instantly.
23 But even a fire hose can't stop an engine once it has Dura Lube
24 protection. That's why you'll get this guarantee. Use Dura Lube

Complaint Exhibits

1 spray as directed, and if you ever get stuck in rain or snow,
2 Dura Lube will pay your tow.
3 And it does so much more. It protects anywhere you need
4 lubrication, door hinges, roller skates, power tools, anywhere
5 there's metal to metal contact. [Superscript: Protects anywhere
6 you need lubrication. Door hinges. Roller skates. Power tools.
7 Metal to metal contact.] And only one can of Dura Lube-spray
8 replaces these ten cans of the leading competition. So why
9 accept anything else? Order now and you'll receive Dura Lube
10 engine treatment. [Superscript: Engine] One bottle protects for
11 up to 15,000 miles. Dura Lube transmission treatment
12 [Superscript: Transmission.] to guard against fluid breakdown
13 and Dura Lube spray [Superscript: Spray], newly formulated, to
14 also protect against your electrical system -- guaranteed. Get
15 all the protection your car needs for only \$29.95. And if you'll
16 order now, we'll also include these blue shield sunglasses, a \$20
17 value, yours absolutely free. [Superscript: Free -- with order]
18 But wait. If you order two Dura Lube kits during this special TB
19 promotion, you'll receive this fabulous car care kit absolutely
20 free. [Superscript: Free -- with order] With color match --
21 covers scratches with the best shine in your car's own color.
22 Dura Shield to protect and restore leather and vinyl.
23 [Superscript: Protects and restores leather.] Glass shield for
24 clear vision through any weather. [Superscript: Clear vision

Complaint Exhibits

1 through any weather.] And fog shield, the fog eliminator.
2 [Superscript: The fog eliminator.] Another \$20 value, yours
3 free when you order two kits. [Superscript: Not available in
4 stores!] Dura Lube tomorrow's technology today. Here's how to
5 order. [Superscript: The program you are watching is a paid
6 advertisement for Dura-Lube.]

7 To order your Dura Lube system, have your credit card ready
8 and call 1-800-215-1500. Or send your check or money order for
9 \$29.95 plus \$6.99 for shipping and handling to Dura Lube, 300
10 McCann Street, Nashville, Tennessee 37210. Dura Lube provides
11 unequalled protection for your car's engine. So call now 1-800-
12 215-1500, and order today.

13 Welcome back. You know, I want you take a look at a
14 moment from our last show. [Superscript: July 1992].

15 If any oil or oil additive company can step forward and
16 prove through the same test that they have a better product than
17 Dura Lube, the Dura Lube Corporation will write a check for
18 \$100,000.

19 You know what's amazing about that challenge? Nobody
20 stepped forward to claim \$100,000. [Superscript: The challenge
21 ran over a year!] Oh, sure. A few of the big oil companies
22 asked for all the details of the test, but that's the last we
23 heard of them. We absolutely shut the competition down.

Complaint Exhibits

1 One test in our \$100,000 challenge was how long an engine
2 could run without any oil. Now, that was a torture test, not
3 something we recommend. But NASCAR driver Steve Hansen
4 experienced exactly that. He didn't mean to. Steve Hansen
5 didn't intend to completely lose his oil pump in the middle of a
6 big race, but it happened. [Superscript: It happened on August
7 7, 1993!]

8 During the feature race [Superscript: Elko, Minnesota
9 September 11, 1993], I started right up front, second car on the
10 outside, green light went on, floored the car wide open, my oil
11 pressure dropped down to nothing. I had no oil pressure. At
12 that time I thought to myself, well, I'm done. I'll pull off the
13 track, but the motor still was running good. So I went for it.
14 I figured if it's going to blow up, it's going to blow up. I
15 continued to race strong. The oil light got brighter and
16 brighter. I couldn't believe it. I kept going. The motor, it
17 wasn't knocking. I was figuring after three or four laps I could
18 start hearing a knock and it wasn't. It wasn't knocking. It
19 wasn't ticking. It was running strong. I finished a 15 lap race
20 which isn't bad considering I had no oil and the motor was still
21 running. I pulled into the pits. I could see that my pit crew -
22 - Cory, he was discouraged. He thought that I blew up the
23 engine.

Complaint Exhibits

1 I thought he was nuts, you know, I was getting mad because
2 he wasn't pulling off or nothing. But I guess he knew what he
3 was doing.

4 Cory just shook his head and I told him, I said, well, Dura
5 Lube did its job.

6 That's what Dura Lube can do in emergencies.

7 Let's see what it's doing for folks day after day.

8 The car was over heating a lot and running hot and I put it
9 right in the motor with the oil and not a problem since.

10 [Superscript: Cools the engine]

11 I used to have this exhaust problem, there would be this
12 little cloud of smoke that was behind my car all the time. After
13 I used Dura Lube it disappeared completely. [Superscript:
14 Cleaner emissions!]

15 I used it in my own personal vehicle and I've noticed almost 40
16 to 45 percent increase in my fuel. [Superscript: More MPG!]

17 Oh, come on.

18 Really. Really. I usually fuel up once a week and now I'm
19 doing it every two weeks. And I only go like five miles a day
20 round trip.

21 So you've got a routine.

22 I've got a routine. Believe me, I've got a routine. Let me
23 tell you. I can honestly say without a word of a lie that I've

Complaint Exhibits

1 almost doubled the amount of time I can go on a tank of gas in my
2 truck.

3 I had first gotten Dura Lube just before that big winter
4 storm we had that hit the whole East Coast. [Superscript:
5 Prevents stalls.]

6 The storm of the century?

7 The storm of the century is what they called it, yeah. And
8 I had some calls that were really far away. People really in
9 emergency situations that needed cab rides. A lot of cars
10 stalled out, but I just kept going. I made it through everything,
11 all kinds of puddles. I would go through the puddle saying here
12 we go, this is it. This is the end. And it just kept going.

13 I think it's fantastic because I had a car and in January
14 when we had the rainy season, every time it would rain, the car
15 would stay there for a week because it wouldn't move and I'd have
16 to wait for the sun to come out. [Superscript: Saves you money!]
17 All right. Now I see they had all this water poured on the car.
18 I could have saved thousands of dollars because I went out and
19 bought another car.

20 I lost an engine similar to this one because the oil filter
21 came off. [Superscript: Saves your engine] I lost the oil. The
22 light came on, but it was too late. The engine was gone. It
23 cost me a couple thousand dollars to get a new engine.

24 So Dura Lube can definitely save you money.

Complaint Exhibits

1 Yeah, it can save you a lot of money.

2 How can one product do so much? Breakthrough technology.

3 And no one knows that better than Astronaut Pete Conrad. You

4 probably know him from his famous walk on the moon. But to Pete

5 that's old news. Just recently he flight managed our nation's

6 latest break through, the DeltaClipper, the rocket ship blasts

7 off and then it stops in mid-air. Now, this is like something

8 out of Buck Rogers. Then it moves sideways. And then it lands,

9 ready to take off again. [Superscript: Pete Conrad]

10 With Delta Clipper, you have an old idea using

11 today's technology that will allow low cost access to space.

12 With Dura Lube, can I say? I knew it was a real advance in

13 engine lubrication. Now everyone knows it. Sure there were

14 skeptics. Just like there were plenty of skeptics regarding the

15 Delta Clipper idea, but now we know they're both winners.

16 Just how is Dura Lube able to do all those things? Well,

17 recently we got together with our lubrication specialist Floyd

18 Stevik. He showed me a very simple demonstration of the secret

19 to Dura Lube's success.

20 Everything's metal in an engine, Jim.

21 Right.

22 And this metal heats up. Every time it meets, it heats.

23 And it actually creates heat and wear inside an engine.

24 All right.

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1 Dura Lube will actually go in and relieve that heat and
2 pressure. That's saving oil, saving maintenance on the car,
3 saving those engines, Jim.
4 Especially the small cars.
5 Especially small cars, Jim. Let me show you what we're
6 going to do here. We have a piece of sheet metal. We're going
7 to stimulate an engine.
8 I see this is flat here. [Superscript: Perfectly level]
9 Let's remove that. What are you going to do?
10 We're going to put some heat in here. We're actually going
11 to put in oil. Hand me some oil over there, Jim.
12 Now, do you care which one?
13 It doesn't make any difference. Dura Lube is completely
14 compatible with all oil, Jim. Synthetics, naturals, it doesn't
15 make any difference.
16 Here you go.
17 We're going to put a little bit of this oil right here in
18 the front, right over the top of that burner.
19 You want that right under the oil?
20 Yes, right-under the oil.
21 Right under the oil. It is now officially under.
22 There we go.
23 Is that high enough? You want it a little higher?
24 Put a little heat to it, Jim.

Complaint Exhibits

1 That is really going against that metal now. Okay, cooking.

2 We're going to watch that Jim. We're going to see that

3 actually it's really going to start cooking down and it will

4 actually move away from the flames.

5 You can certainly see that it is spreading out.

6 Spreading out and you can see it's starting to cook a little

7 along this edge and moving away from that heat over here.

8 Okay.

9 Now, I'm going to pour some Dura Lube in here and we're

10 going to see what happened. Now, you know this is perfectly

11 level.

12 Right.

13 Look at how it's going to travel. It's traveling towards

14 that heat. Jim, it goes to the heat. That's what's really

15 important. Dura Lube eats the heat and saves those engines.

16 Look at that. Look at that moving to that heat. Isn't that

17 amazing? Look what it's doing. It's going to come in and marry

18 up to that oil and do the lubrication job that's necessary on

19 that engine. Look at that. Look at that, Jim. Look at it --

20 it's still moving toward....

21 Now, let's take a look at that again. Look at the hot spot,

22 the-circle directly above the flame. The oil moves away from the

23 hot spot. You can see the circle it's leaving. But on this

24 totally level surface, Dura Lube goes towards the heat. It likes

Complaint Exhibits

1 heat. Dura Lube eats the heat. That's Dura Lube's secret.
2 Look, it's going right into the hot spot. Dura Lube eats the
3 heat caused by friction. Just look at this heat and pressure
4 test conducted by the Falex Corporation. [Insert: chart of
5 torque-pressure tests] Now, this independent laboratory found
6 premium oil failing at 1,250 pounds. STP hit the failure mark at
7 1,750 pounds. Slick 50 fared a little bit better, but it too
8 failed at 4,250 pounds. Now look at Dura Lube. It ran in the
9 optimal temperature zone the whole way. It never failed. Dura
10 Lube ran off the chart. [Superscript: No Failure]
11 I insisted that they run that test. [Superscript: Pete
12 Conrad] They did it and it passed with flying colors.
13 Then we decided to try a similar test ourselves, this time
14 pitting Dura Lube spray against three popular competitors.
15 First, a silicone spray made by Gunk.
16 Okay, we turn it. It's rotating now. We're going to put the
17 pressure on.
18 It was stopped dead at only five pounds of pressure as
19 measured on a simple scale. Then we tried the Teflon spray One
20 Lube made by Slick 50.
21 I believe that's probably plenty.
22 All right, let's try that.
23 We're going to do the same thing, Jim.

Complaint Exhibits

1 The result? Exactly the same, five pounds once again as you
2 can see. Now, you'd think WD-40 would outperform the rest.

3 We're going to apply the pressure again.

4 What have we got? The same place. In fact, it's a little
5 less. About four, four-and-one-half pounds, virtually the same
6 as the other two. Then came Dura Lube spray. We couldn't even
7 get it to stop. It ran right off the scale. That's just one
8 reason everybody's talking about Dura Lube. [**Superscript: Actual**
9 **elapsed time 46 seconds**]

10 You're cruising to the grocery store or something and your
11 oil light comes on. Middle of the night, what are you going to
12 do? Are you going to sit there and walk? If you have Dura Lube
13 in your car, you're going to make it to your destination.

14 Introducing Dura Lube. The space age lubricant that
15 radically reduces friction by penetrating metal surfaces to
16 create a non-friction shield. With Dura Lube your engine will
17 run cooler and get more miles per gallon, more horsepower with
18 less pollution and a quieter ride. [**Superscript: DURALUBE**
19 **Cooler engine! More mpg. More horsepower! Less pollution!**
20 **Quieter ride! Much less wear!**] And introducing Dura Lube spray.
21 Has this ever happened to you? A rainstorm, even a small puddle
22 stops you instantly. But even a fire hose can't stop an engine
23 once it has Dura Lube protection. That's why you'll get this
24 guarantee. Use Dura Lube spray as directed, and if you ever get

Complaint Exhibits

1 stuck in rain or snow, Dura Lube will pay your tow.
2 [Superscript: Dura-Lube Guarantee. Your car will go in rain or
3 snow or Dura-Lube will pay the tow! \$35 per occurrence. Subject
4 to terms and conditions.]
5 And it does so much more. It protects anywhere you need
6 lubrication, door hinges, roller skates, power tools, anywhere
7 there's metal to metal contact. [Superscript: Protects anywhere
8 you need lubrication. Door hinges. Roller skates. Power tools.
9 Metal to metal contact.] And only one can of Dura Lube spray
10 replaces these ten cans of the leading competition. So why
11 accept anything else? Order now and you'll receive Dura Lube
12 engine treatment. One bottle protects for up to 15,000 miles.
13 [Superscript: Dura-Lube contains no chlorinated solvents or
14 esters and no ingredients listed as halogenated wastes by USEPA.
15 CONTAINS NO SOLIDS!]
16 Dura Lube transmission treatment to guard against fluid
17 breakdown and Dura Lube spray, newly formulated, to also protect
18 your electrical system guaranteed. Get all the protection your
19 car needs for only \$29.95. And if you order now, we'll also
20 include these blue shield sunglasses, a \$20 value, yours
21 absolutely free. But wait. If you order two Dura Lube kits
22 during this special TV promotion, you'll receive this fabulous
23 car care kit absolutely free. With Color Match covers scratches
24 with the best shine in your car's own color. Dura Shield to

Complaint Exhibits

1 protect and restore leather and vinyl. [Superscript: Protects
2 and restores leather.] Glass Shield for clear vision through any
3 weather. [Superscript: Clear vision through any weather.] And
4 Fog Shield, the fog eliminator. [Superscript: The fog
5 eliminator.] Another \$20 value, yours free when you order two
6 kits. Dura Lube. Tomorrow's technology today. Here's how to
7 order. [Superscript: The program you are watching is a paid
8 advertisement for Dura-Lube]

9 To order your Dura Lube system, have your credit card ready
10 and call 1-800-215-1500. Or send your check or money order for
11 \$29.95 plus \$6.95 for shipping and handling to Dura Lube, 300
12 McCann Street, Nashville, Tennessee 37210. Dura Lube provides
13 unequalled protection for your car's engine. So call now. 1-800-
14 215-1500, and order today.

15 Get the electrical.

16 It's still running. What do you think of this?

17 It's amazing. It's amazing.

18 A little common sense, seeing is believing.

19 The preceding program was a paid advertisement for Dura Lube
20 sponsored by the Media Group.

21 //

22 //

23 //

24

Complaint Exhibits

Exhibit B



ADM001273

Complaint Exhibits

Exhibit C



Decision and Order

DECISION AND ORDER

The Federal Trade Commission having issued its complaint charging the respondents named in the caption hereof with violation of Section 5(a) of the Federal Trade Commission Act, as amended, and the respondents having been served with a copy of that complaint, together with a notice of contemplated relief; and

The respondents, their attorneys, and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the respondents of all the jurisdictional facts set forth in the complaint, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondents of facts, other than jurisdictional facts, or of violations of law as alleged in the complaint issued by the Commission; and

The Secretary of the Commission having thereafter withdrawn this matter from adjudication in accordance with § 3.25(c) of its Rules; and

The Commission having considered the matter and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of thirty (30) days, now in further conformity with the procedure prescribed in § 3.25(f) of its Rules, the Commission hereby makes the following jurisdictional findings and enters the following order:

1.a. Respondent Dura Lube Corporation (“DLC”) is a New York corporation with its principal office or place of business at 102-3 Hamilton Avenue, Stamford, Connecticut 06902.

1.b. Respondent American Direct Marketing, Inc. (“ADM”) is a Delaware corporation with its office and principal place of business located at 1000 Apex Street, Nashville, Tennessee 37210.

Decision and Order

1.c. Respondent Howe Laboratories, Inc. ("Howe") is a Delaware corporation with its office and principal place of business located at 102-3 Hamilton Avenue, Stamford, Connecticut 06902.

1.d. Respondent Crescent Manufacturing, Inc. ("Crescent") is a New York corporation with its office and principal place of business located at 8800 South Main Street, Eden, New York 14057.

1.e. Respondent The Media Group, Inc. ("Media Group") is a New York corporation with its office and principal place of business located at 102-3 Hamilton Avenue, Stamford, Connecticut 06902.

1.f. National Communications Corporation ("National") is a Delaware corporation with its office and principal place of business located at 102-3 Hamilton Avenue, Stamford, Connecticut 06902.

1.g. Respondent Herman S. Howard is or was at relevant times herein an officer of the corporate respondents. Individually or in concert with others, he has formulated, directed, or controlled the acts and practices of the corporate respondents, including the acts or practices alleged in this complaint. His principal office or place of business is the same as that of DLC, Howe, Media Group, and National.

1.h. Respondent Scott Howard is or was at relevant times herein an officer of the corporate respondents. Individually or in concert with others, he has formulated, directed, or controlled the acts and practices of the corporate respondents, including the acts or practices alleged in this complaint. His principal office or place of business is the same as that of DLC, Howe, Media Group, and National.

Decision and Order

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:

“Dura Lube” shall mean the aftermarket motor oil additive known as Super Dura Lube Engine Treatment, Advanced Dura Lube Engine treatment, or any product of substantially similar composition marketed as a motor oil product.

“Motor oil product” shall mean a product for use in conjunction with or in place of fully formulated motor oil.

“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.

Unless otherwise specified, “respondents” shall mean Dura Lube Corporation, American Direct Marketing, Inc., Howe Laboratories, Inc., Crescent Manufacturing, Inc., The Media Group, Inc., and National Communications Corporation, corporations, their successors and assigns, and their officers, agents, attorneys, representatives, and employees; and Herman S. Howard and Scott Howard, individually and as officers of the corporations, whether acting directly or through any corporation, subsidiary, division, trust or other device, or any of them.

Decision and Order

“Commerce” shall be as defined in Section 4 of the Federal Trade Commission Act, 15 U.S.C. § 44.

I.

IT IS ORDERED that respondents, in connection with the manufacturing, advertising, labeling, packaging, offering for sale, sale, or distribution of Dura Lube, in or affecting commerce, shall not represent, in any manner, expressly or by implication, that:

- A. Dura Lube contains no chlorinated compound unless such is the case;
- B. Dura Lube has been tested by the U.S. Environmental Protection Agency unless such is the case; or
 - 1. Dura Lube meets the specifications, requirements or standards of any governmental or standard setting organization, unless, at the time of making such representation, respondents possess and rely upon competent and reliable evidence, which when appropriate must be competent and reliable scientific evidence, that substantiates the representation.

II.

IT IS FURTHER ORDERED that respondents, in connection with the manufacturing, advertising, labeling, packaging, offering for sale, sale, or distribution of any product for use in any motor vehicle, in or affecting commerce, do forthwith cease and desist from:

- A. Making any representation, in any manner, expressly or by implication:

Decision and Order

1. That, compared to motor oil alone or motor oil treated with any other product, using such product:
 - a. Reduces engine wear;
 - b. Reduces engine wear by any percentage, dollar or other figure;
 - c. Prolongs engine life;
 - d. Reduces emissions;
 - e. Reduces the risk of serious engine damage when oil pressure is lost;
 - f. Improves gas mileage;
 - g. Improves gas mileage by any percentage, miles per gallon, dollar, or other figure;
2. That one or any other number of treatments of such product reduces wear for 50,000 or any other number of miles; or,
3. Regarding the performance, benefits, efficacy, attributes or use of such product,

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

- B. Misrepresenting, in any manner, expressly or by implication, the existence, contents, validity, results, conclusions, or interpretations of any test or study.

Decision and Order

III.

IT IS FURTHER ORDERED that respondents, in connection with the manufacturing, advertising, labeling, packaging, offering for sale, sale, or distribution of any product, in or affecting commerce, shall not misrepresent, in any manner, expressly or by implication, that any demonstration, picture, experiment, illustration or test proves, demonstrates or confirms any material quality, feature or merit of such product, or the superiority or comparability of the product in a material respect relative to any other product.

IV.

IT IS FURTHER ORDERED that, respondents, in connection with the manufacturing, advertising, labeling, packaging, offering for sale, sale, or distribution of any product for use in any motor vehicle, in or affecting commerce, shall cease and desist from representing, directly or by implication, that such product has been endorsed by a person, group or organization that is an expert with respect to the endorsement message, unless:

- A. The endorser's qualifications give the endorser the expertise that the endorser is represented as possessing with respect to the endorsement; and
- B. The endorsement is supported by an objective and valid evaluation or test using procedures generally accepted by experts in that science or profession to yield accurate and reliable results.

Decision and Order

V.

IT IS FURTHER ORDERED that, for five (5) years after the last date of dissemination of any representation covered by this order, respondents shall maintain and upon request make available to the Federal Trade Commission for inspection and copying:

- A. All labeling, packaging, advertisements and promotional materials setting forth any representation covered by this order;
- B. All materials that were relied upon to substantiate any representation covered by this order; and
- C. All tests, reports, studies, surveys, demonstrations or other evidence in their possession or control, or of which they have knowledge, that contradict, qualify, or call into question such representation, or the basis relied upon for the representation, including complaints and other communications with consumers, third-party dispute mediators, or governmental or consumer protection organizations.

VI.

IT IS FURTHER ORDERED that:

- A. The corporate respondents and their successors and assigns shall notify the Federal Trade Commission at least thirty (30) days prior to any change in the corporate respondents that may affect compliance obligations arising under this order, including but not limited to 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

Decision and Order

which respondents learn less than thirty (30) days prior to the date such action is to take place, respondents shall notify the Commission as soon as practicable after obtaining such knowledge.

- B. Each of the individual respondents, for a period of ten (10) years after the date of issuance of this order, shall notify the Federal Trade Commission of the discontinuance of his current business or employment, or his affiliation with any new business or employment. The notice shall include the respondent's new business address and telephone number and a description of the nature of the business or employment and his duties and responsibilities.

All notices required by this Part shall be sent by certified mail to the Associate Director for Enforcement, Bureau of Consumer Protection, Federal Trade Commission, Washington, D.C. 20580.

VII.

IT IS FURTHER ORDERED that the corporate respondents and their successors and assigns and the individual respondents shall deliver a copy of this order to all current and future principals, officers, directors, and managers, and to all current and future employees, agents, and representatives having responsibilities with respect to the subject matter of this order, and shall secure from each such person a signed and dated statement acknowledging receipt of this order. Respondents shall deliver this order to current personnel within thirty (30) days after the service of this order, and to future personnel within thirty (30) days after the person assumes such position and responsibilities.

Decision and Order

VIII.

IT IS FURTHER ORDERED that respondents shall:

- A. Within fifteen (15) days after the date of service of this order, send by first class certified mail, return receipt requested, to each purchaser for resale of Dura Lube with which respondents have done business since January 1, 1994, notice of this order in the form attached as Attachment A. The mailing shall not include any other documents;
- B. By May 15, 2000, send a representative to all facilities operated by each purchaser for resale to which respondents sent Attachment A to replace the Dura Lube labels and packaging with labels and packaging that comply with this order.
- C. In the event that respondents receive any information that subsequent to its receipt of notice of this order any purchaser for resale is using or disseminating any advertisement or promotional material specified in Attachment A, respondents shall: (1) immediately send such purchaser for resale a letter requesting that it stop using or disseminating any item specified in Attachment A and notifying it that the respondents will report its use or dissemination of any item specified in Attachment A to the Commission; and (2) within thirty (30) days notify the Associate Director for Enforcement, Bureau of Consumer Protection, Federal Trade Commission, in writing, of such purchaser for resale's identity and its use or dissemination of any item specified in Attachment A.

Decision and Order

IX.

IT IS FURTHER ORDERED that respondents shall, for five (5) years after the last correspondence to which they pertain, maintain and upon request make available to the Federal Trade Commission for inspection and copying:

- A. Copies of all signed statements obtained from persons or entities pursuant to part VII of this order;
- B. Copies of all notification letters sent to purchasers for resale pursuant to subparagraph A of part VIII of this order; and
- C. Copies of all communications with purchasers for resale pursuant to subparagraph C of part VIII of this order.

X.

IT IS FURTHER ORDERED that:

- A. Not later than five (5) days after the date this Order becomes final, respondents shall deposit by electronic funds transfer into an escrow account to be established by the Federal Trade Commission for the purpose of receiving the payment due under the provisions of this order, the sum of two million dollars (\$2,000,000). In the event of any default on any obligation to make payment under this Part, interest, computed pursuant to 28 U.S.C. § 1961(a) shall accrue from the date of default to the date of payment. In the event of default, respondents shall be jointly and severally liable for the two million dollar (\$2,000,000) payment required by this paragraph and any interest on such payment.

Decision and Order

- B. The funds paid by respondents pursuant to subpart A above, together with accrued interest, less any amount necessary to pay the costs of administering the redress program herein, shall be used by the Federal Trade Commission or a Redress Administrator designated by the Federal Trade Commission to provide refunds to Dura Lube purchasers. Payment to such persons represents redress and is intended to be compensatory in nature, and no portion of such payment shall be deemed a payment of any fine, penalty, or punitive assessment. A consumer shall have the right to participate in the redress distribution only upon signing a waiver of rights and release of all claims against respondents. The Federal Trade Commission has sole discretion to determine how any redress funds are administered and distributed. Respondents shall be notified as to how the funds are disbursed, but shall have no right to contest the manner of distribution chosen by the Federal Trade Commission. The Federal Trade Commission, or its designated Redress Administrator, shall in its sole discretion select the escrow agent.
- C. Respondents relinquish all dominion, control and title to the funds paid into the escrow account, and all legal and equitable title to the funds shall vest in the Treasurer of the United States unless and until such funds are disbursed to the designated purchasers of Dura Lube. Respondents shall make no claim to or demand for the return of the funds, directly or indirectly, through counsel or otherwise; and in the event of bankruptcy of any respondent, respondents acknowledge that the funds are not part of the debtor's estate, nor does the estate have any claim or interest therein.
1. Not later than the date this Order becomes final, respondents shall, to the extent available, provide to the Federal Trade Commission, in computer readable form (standard MS-DOS diskettes or IBM-mainframe

Decision and Order

compatible tape) and in computer print-out form, a list of the name and address of all consumers in the United States who purchased Dura Lube from January 1, 1994, to December 31, 1999.

- D. The Redress Administrator shall destroy all records relating to this matter six (6) years after the transfer of any remaining redress funds to the U.S. Treasury or the closing of the account from which such funds were disbursed, whichever is earlier, provided that no records shall be destroyed unless and until a representative of the Federal Trade Commission has received and approved the Administrator's final accounting report. Records shall be destroyed in accordance with disposal methods and procedures to be specified by the Federal Trade Commission. The Federal Trade Commission may, in its sole discretion, require that such records, in whole or in part, be transferred, in lieu of destruction, to the Federal Trade Commission.

XI.

IT IS FURTHER ORDERED that respondents shall, within sixty (60) days after service of this order, file with the Federal Trade Commission a report, in writing, setting forth in detail the manner and form in which they have complied or intend to comply with this order.

XII.

IT IS FURTHER ORDERED that this order will terminate on May 3, 2020, 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 later occurs;

Decision and Order

provided, however, that the filing of such 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 had never been filed, except that the order will not be terminated 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.

By the Commission.

ATTACHMENT A

BY CERTIFIED MAIL, RETURN RECEIPT REQUESTED

[To be printed on respondents' letterhead]

[date]

Dear [purchaser for resale]:

Decision and Order

As you may be aware, on April 29, 1999, the Federal Trade Commission ("FTC") issued a complaint against Dura Lube Corporation, American Direct Marketing, Inc., Howe Laboratories, Inc., Crescent Manufacturing, Inc., National Communications Corporation, The Media Group, Inc., Herman S. Howard, and Scott Howard.

In its complaint, the FTC alleged that advertisements for Dura Lube Engine Treatment have made unsubstantiated claims that, compared to motor oil alone or motor oil treated with any other product, using Dura Lube Engine Treatment: (1) Reduces engine wear; (2) Reduces engine wear by more than 50%; (3) Prolongs engine life; (4) Reduces emissions; (5) Reduces the risk of serious engine damage when oil pressure is lost; (6) Improves gas mileage; and (7) Improves gas mileage by up to 35%. In addition, the FTC alleged that Dura Lube Engine Treatment advertisements made an unsubstantiated claim that one treatment of Dura Lube Engine Treatment continues to protect the engine for up to 50,000 miles.

Further, the FTC alleged that Dura Lube Engine Treatment advertisements falsely claimed that tests prove that, compared to motor oil alone, using Dura Lube Engine Treatment: (1) Improves gas mileage; (2) Improves gas mileage by up to 35%; (3) Reduces emissions; (4) Prolongs engine life; (5) Reduces engine wear; and (6) Reduces the risk of serious engine damage when oil pressure is lost. The FTC also alleged that Dura Lube Engine Treatment advertisements falsely claimed that tests prove that one treatment of Dura Lube Engine Treatment continues to protect the engine for up to 50,000 miles. Finally, the FTC alleged that Dura Lube Engine Treatment advertisements set forth two deceptive demonstrations and a deceptive expert endorsement.

Decision and Order

The FTC also alleged that advertisements for Dura Lube Engine Treatment have made false and unsubstantiated claims that: (1) Dura Lube Engine Treatment does not contain any chlorinated compound; and (2) Dura Lube Engine Treatment has been tested by the U.S. Environmental Protection Agency.

On [date] the FTC issued a consent order to cease and desist which prohibits certain claims for Dura Lube Engine Treatment. We consented to the issuance of the order for settlement purposes only and without admitting any of the FTC's allegations that we violated the law. The order requires us to request that our distributors and wholesalers stop using or distributing advertisements or promotional materials containing claims challenged by the FTC. As one of our distributors or wholesalers, we are required to send [purchaser for resale] this letter.

Specifically, the FTC order prohibits us in the future from making false claims that Dura Lube Engine Treatment (1) contains no chlorinated compound; and (2) has been tested by the U.S. Environmental Protection Agency. The order also requires that we have a reasonable basis for any performance claims we make for Dura Lube Engine Treatment or any other product for use in a motor vehicle. Finally, the order prohibits us from disseminating (1) any deceptive demonstrations regarding Dura Lube Engine Treatment or any other product, or (2) any expert endorsements regarding Dura Lube Engine Treatment or any other product for use in a motor vehicle.

We request your assistance by asking you to discontinue using, distributing, or relying on any of your advertising or promotional material for Dura Lube Engine Treatment received from us prior to January 1, 2000. Please also notify any of your customers who resell these products and who may have such materials to discontinue using those promotional materials. Under separate cover, we will be sending you replacement promotional material that you will be able to use. You do not need to dispose of your existing inventory of Dura Lube Engine Treatment because we will send someone to your facility to replace the Dura

Analysis to Aid Public Comment

Lube Engine Treatment labels and packaging with labels and packaging that comply with the FTC order shortly. If we receive information that you are continuing to use materials that do not comply with the FTC order, we are required to notify the FTC of your failure to comply with this request.

Thank you very much for your assistance.

Sincerely,

[name]
President
[respondents]

**Analysis of Proposed Consent Order to Aid Public
Comment**

The Federal Trade Commission has accepted, subject to final approval, an agreement for entry of a consent order from Dura Lube Corporation, Inc., American Direct Marketing, Inc., Howe Laboratories, Inc., Crescent Marketing, Inc. (d/b/a Crescent Manufacturing, Inc.), National Communications Corporation, The Media Group, Inc., and Herman S. Howard and Scott Howard, the principals who control these corporations (referred to collectively as "Respondents"). The agreement would settle a complaint by the Federal Trade Commission that Respondents engaged in unfair or deceptive acts or practices in violation of Section 5(a) of the Federal Trade Commission Act.

Analysis to Aid Public Comment

The proposed consent order has been placed on the public record for thirty (30) days for receipt of comments by interested persons. Comments received during this period will become part of the public record. After thirty (30) days, the Commission will again review the agreement and the comments received and will decide whether it should withdraw from the agreement or make final the agreement's proposed order.

This matter concerns advertising representations made about Super Dura Lube Engine Treatment and Advanced Dura Lube Engine Treatment (referred to collectively as "Dura Lube"), engine oil additives. The administrative complaint alleged that Respondents violated the FTC Act by disseminating ads that made unsubstantiated performance claims about Dura Lube. The Complaint alleged that Respondents represented that, compared to motor oil alone or oil treated with any other product, Dura Lube: (1) reduces engine wear; (2) reduces engine wear by more than 50%; (3) prolongs engine life; (4) reduces emissions; (5) reduces the risk of serious engine damage when oil pressure is lost; (6) improves gas mileage; and (7) improves gas mileage by up to 35%. The Complaint alleged that one treatment continues to protect engines for up to 50,000 miles. The Complaint alleged that Respondents represented that they had a reasonable basis for making these claims, but in fact did not possess competent evidence supporting them.

The Complaint also challenged, as false, claims that tests prove that, compared to motor oil alone, Dura Lube: (1) reduces engine wear; (2) prolongs engine life; (3) reduces emissions; (4) reduces the risk of serious engine damage when oil pressure is lost; (5) improves gas mileage; and (6) improves gas mileage by up to 35%. The Complaint also challenged as false claims that tests prove that one treatment continues to protect engines for up to 50,000 miles. Additionally, the Complaint challenged, as false, claims that Dura Lube: (a) has been tested by the U.S. Environmental Protection Agency; and (b) contains no chlorinated compound.

Analysis to Aid Public Comment

The Complaint alleged that Respondents represented that product demonstrations in their advertising proved, demonstrated, or confirmed that, (a) compared to motor oil alone, Dura Lube reduces the risk of serious engine damage when oil pressures is lost, and (b) without Dura Lube, motor oil fails to protect automobile engines under hot running conditions, when in fact the demonstrations do not prove, demonstrate, or confirm these product attributes. Finally, the Complaint alleged that Respondents represented that former astronaut Charles "Pete" Conrad had endorsed the product based on a valid exercise of his expertise in the evaluation of automobile engine lubricants, when in fact Mr. Conrad did not have expertise in the evaluation and testing of automobile engine lubrication.

The Complaint gave notice that the Commission had reason to believe that a proceeding under Section 19 of the FTC Act for consumer redress ultimately might be appropriate, depending upon the adjudicative record and other relevant factors.

The proposed consent order contains provisions designed to prevent Respondents from engaging in acts and practices similar to those alleged in the complaint in the future. Part I of the proposed consent order prohibits Respondents from falsely claiming that Dura Lube contains no chlorinated compound or that it has been tested by the Environmental Protection Agency. It also prohibits them from claiming that Dura Lube meets the requirements or standards of any governmental or standard setting organization unless they possess competent and reliable evidence, which when appropriate must be competent and reliable scientific evidence, substantiating the claim.

Part II of the proposed consent order prohibits Respondents from making unsubstantiated representations regarding the performance, benefits, efficacy, attributes or use of any product for use in an automobile, or from misrepresenting the results of

Analysis to Aid Public Comment

any study. It specifically prohibits unsubstantiated claims that, compared to motor oil alone or oil treated with any other product, the product reduces engine wear or reduces it by any percentage, dollar or other figure; prolongs engine life; reduces emissions; reduces the risk of serious engine damage when oil pressure is lost; or improves gas mileage or improves it by any percentage, miles per gallon, dollar or other figure. It also prohibits unsubstantiated claims that one treatment reduces engine wear for 50,000 or any other number of miles. The evidence required to substantiate such claims includes competent and reliable evidence, which when appropriate must be competent and reliable scientific evidence.

Part III of the proposed consent order prohibits Respondents from using misleading demonstrations in the sale of any product.

Part IV of the proposed consent order prohibits Respondents from representing that any endorser of any product for use in a motor vehicle is an expert unless the endorser possesses the expertise he or she is represented to have and the endorsement is adequately supported by evidence that would be accepted by experts in the area.

Part X of the proposed consent order requires Respondents to pay \$2 million in consumer redress. The Federal Trade Commission would administer and distribute the redress as the Commission, in its sole discretion, deemed appropriate. Respondents would be required to provide the Commission with the identities of consumers known to have purchased Dura Lube between January 1, 1994, and December 31, 1999. Consumers electing to accept the redress would release any claims against Respondents.

The remainder of the proposed consent order also contains provisions regarding distribution of the order, replacement of product packaging and labeling with compliant packaging and labeling, record-keeping, notification of changes in corporate

Analysis to Aid Public Comment

status, termination of the order, and the filing of a compliance report.

The purpose of this analysis is to facilitate public comment on the proposed order, and it is not intended to constitute an official interpretation of the agreement and the proposed order or to modify their terms in any way.

Complaint

IN THE MATTER OF

DUKE ENERGY CORPORATION, ET AL.CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATIONS OF
SEC. 5 OF THE FEDERAL TRADE COMMISSION ACT AND
SECTION 7 OF THE CLAYTON ACT*Docket C-3932; File No. 0010080
Complaint, March 13, 2000--Decision, May 5, 2000*

This consent order addresses the merger of natural gas interests by Respondents Duke Energy Corporation and Phillips Petroleum Company into Duke Energy Field Services L.L.C., a company that will be majority owned by Duke Energy, and Respondent Duke Energy's acquisition of certain gas gathering and processing assets owned by Conoco, Inc. and Mitchell Energy and Development Corporation. The order requires Duke to divest pipeline in seven relevant markets where anticompetitive increases in gather costs would likely occur.

Participants

For the Commission: *Kristin L. Malmberg, Gary D. Kennedy, James R. Golder, Debra H. Spears, Elizabeth A. Piotrowski, Geary A. Gessler, Louis Silvia, and Gregory S. Vistnes.*

For the Respondents: *Paul L. Yde, Cathy A. Lewis, Robert S. Field, and Joseph E. Hunsader, Vinson & Elkins, Brent L. Backes, Duke Energy Corporation, William J. Kolasky, Eric J. Mahr, and Janet D. Ridge, Wilmer, Cutler & Pickering, Neal F. Lehman, Phillips Petroleum Company, Rufus Oliver, Baker Botts, Thomas D. Carmel, Conoco, Inc., Joseph Krause, Hogan & Hartson, John S. Hathaway, Mitchell Energy & Development Corporation, Brian Mohr, Skadden, Arps, Slate, Meagher & Flom, and John Walter, Western Gas Resources.*

Complaint

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 Respondents Duke Energy Corporation (“Duke”), Phillips Petroleum Company (“Phillips”), and Duke Energy Field Services L.L.C. (“DEFS”) have entered into an agreement that Duke and Phillips would merge certain of their assets into DEFS and that Respondent Duke and Conoco Inc. (“Conoco”) and Mitchell Energy & Development Corporation (“Mitchell”) have entered into an agreement that Duke would acquire certain assets jointly owned by Conoco and Mitchell, in violation of Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18, and Section 5 of the Federal Trade Commission Act (“FTC Act”), as amended, 15 U.S.C. § 45, and it appearing to the Commission that a proceeding in respect thereof would be in the public interest, hereby issues its Complaint pursuant to Section 11 of the Clayton Act, as amended, 15 U.S.C. § 21, and Section 5(b) of the FTC Act, as amended, 15 U.S.C. § 45(b), stating its charges as follows:

Duke

1. Duke is a corporation organized, existing and doing business under and by virtue of the laws of the State of North Carolina, with its office and principal place of business located at 526 South Church Street, Charlotte, North Carolina 28202.

2. Duke is one of the largest natural gas gatherers and marketers in the United States as well as one of the largest producers and marketers of electric power. In 1998, Duke had revenues of over \$17.5 billion and had assets totaling almost \$27 billion.

Complaint

3. At all times relevant herein, Respondent Duke has been and is now 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.

Phillips

4. Phillips 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 The Phillips Building, 4th and Keeler, Bartlesville, Oklahoma 74004.

5. Phillips is an integrated oil and gas company that is also engaged in the manufacturing and sale of chemicals and plastics and the development of technology. In 1998, the company had revenues of \$11.8 billion and had assets of \$10.2 billion.

6. At all times relevant herein, Respondent Phillips has been and is now 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.

DEFS

7. DEFS is a limited liability company 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 370 17th Street, Suite 900, Denver, Colorado 80202.

8. DEFS was created to own, operate and manage the natural gas gathering assets of Duke and Phillips. Once DEFS acquires these assets, the company will have assets of approximately \$6 billion.

Complaint

9. At all times relevant herein, Respondent DEFS has been and is now 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.

The Proposed Merger and Acquisition

10. Pursuant to a Letter Agreement among Duke, Phillips, and DEFS, dated December 16, 1999 (hereinafter referred to as the “Merger Agreement”), Duke and Phillips agreed to merge certain of their assets consisting of natural gas pipelines, compressors and related appurtenances, natural gas processing plants and other facilities into DEFS (hereinafter referred to as the “Duke/Phillips Asset Merger”). DEFS will be seventy (70) percent owned and controlled by Duke and thirty (30) percent owned by Phillips.

11. Pursuant to a Letter Agreement dated December 21, 1999, Duke agreed to acquire certain assets jointly owned by Conoco and Mitchell consisting of natural gas pipelines, compressors and related appurtenances, natural gas processing plants and other facilities (hereinafter referred to as the “Conoco/Mitchell Asset Acquisition”).

Count One – Westana Area of Northwestern Oklahoma

12. One relevant line of commerce is natural gas gathering, *i.e.*, the transportation, for oneself or for other persons, of natural gas from the wellhead or producing area to a natural gas transmission pipeline or a natural gas processing plant.

Complaint

13. One relevant section of the country is the Westana Area of Northwestern Oklahoma that contains portions of Alfalfa, Blaine, Dewey, Harper, Major, Woods and Woodward Counties.

14. At the time of the Merger Agreement, Duke held a 50 percent ownership interest in Westana Gathering Company ("Westana"), an Oklahoma general partnership. Westana owns and operates natural gas gathering systems which gather natural gas in various areas in the Westana Area of Northwestern Oklahoma, including Alfalfa, Blaine, Dewey, Harper, Major, Woods and Woodward Counties.

15. Respondent Phillips owns and operates natural gas gathering systems which gather natural gas in various areas in the Westana Area of Northwestern Oklahoma, including Alfalfa, Blaine, Dewey, Harper, Major, Woods and Woodward Counties

16. Respondent Duke, through its partnership in Westana, and Phillips were direct and substantial competitors in the business of natural gas gathering in the relevant section of the country set out in Complaint Paragraph 13.

17. The business of natural gas gathering in the relevant section of the country set out in Complaint Paragraph 13 is highly concentrated. The Duke/Phillips Asset Merger would have significantly increased concentration in portions of this relevant section of the country. In this relevant section of the country as a whole, the Duke/Phillips Asset Merger would have increased the Herfindahl-Hirschman Index (commonly referred to as "HHI") by over 1600 to over 3400. In certain portions of this relevant section of the country, the Duke/Phillips Asset Merger would have increased the HHI to 10,000.

18. The effect of the proposed Duke/Phillips Asset Merger, if consummated, may have been substantially to lessen competition or tend to create a monopoly in the gathering of natural gas in the relevant section of the country set out in Complaint Paragraph 13, in violation of Section 7 of the Clayton

Complaint

Act, as amended, 15 U.S.C. § 18, and Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45, in the following ways, among others:

a. the Duke/Phillips Asset Merger would have eliminated actual and potential competition between Duke and Phillips to provide natural gas gathering services to existing gas wells in this relevant section of the country;

b. the Duke/Phillips Asset Merger would have eliminated actual and potential competition between Duke and Phillips to provide natural gas gathering services for new natural gas wells in this relevant section of the country;

c. the Duke/Phillips Asset Merger would have increased concentration in the gathering of natural gas in this relevant section of the country, therefore increasing the likelihood of collusion;

d. DEFS would have been likely to exact anticompetitive price increases from producers in this relevant section of the country for performance of natural gas gathering in this relevant section of the country; and

e. producers may have been less likely to do exploratory and developmental drilling for new natural gas in this relevant section of the country than prior to the Duke/Phillips Asset Merger.

19. Entry would not have been timely, likely, or sufficient to prevent anticompetitive effects in the relevant section of the country set out in Complaint Paragraph 13.

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Count Two – Austin Chalk Area of Central Texas

20. One relevant line of commerce is natural gas gathering, *i.e.*, the transportation, for oneself or for other persons, of natural gas from the wellhead or producing area to a natural gas transmission pipeline or a natural gas processing plant.

21. One relevant section of the country is the Austin Chalk Area of Central Texas that contains Brazos, Burleson, Grimes, Lee and Washington Counties.

22. Respondent Duke holds a 55 percent ownership interest in a Texas joint venture with Mitchell named Ferguson-Burleson County Gas Gathering System (“Ferguson-Burleson”). Ferguson-Burleson owns and operates natural gas gathering systems which gather natural gas in various areas in the Austin Chalk Area of Central Texas, including Brazos, Burleson, Grimes, Lee and Washington Counties.

23. Respondent Phillips owns and operates natural gas gathering systems which gather natural gas in various areas in the Austin Chalk Area of Central Texas, including Brazos, Burleson, Grimes, Lee and Washington Counties.

24. Respondent Duke, through its partnership in Ferguson-Burleson, and Phillips are direct and substantial competitors in the business of natural gas gathering in the relevant section of the country set out in Complaint Paragraph 21.

25. The business of natural gas gathering in the relevant section of the country set out in Complaint Paragraph 21 is highly concentrated. The Duke/Phillips Asset Merger will significantly increase concentration in portions of this relevant section of the country. In this relevant section of the country as a whole, the Duke/Phillips Asset Merger would increase the HHI by over 750 to over 4800.

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26. The effect of the Duke/Phillips Asset Merger, if consummated, may be substantially to lessen competition or tend to create a monopoly in the gathering of natural gas in the relevant section of the country set out in Complaint Paragraph 21, in violation of Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18, and Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45, in the following ways, among others:

a. the Duke/Phillips Asset Merger will eliminate actual and potential competition between Duke and Phillips to provide natural gas gathering services to existing gas wells in this relevant section of the country;

b. the Duke/Phillips Asset Merger will eliminate actual and potential competition between Duke and Phillips to provide natural gas gathering services for new natural gas wells in this relevant section of the country;

c. the Duke/Phillips Asset Merger will increase concentration in the gathering of natural gas in this relevant section of the country, therefore increasing the likelihood of collusion;

d. DEFS is likely to exact anticompetitive price increases from producers in this relevant section of the country for performance of natural gas gathering services in this relevant section of the country; and

e. producers may be less likely to do exploratory and developmental drilling for new natural gas in this relevant section of the country than prior to the Duke/Phillips Asset Merger.

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27. Entry would not be timely, likely, or sufficient to prevent anticompetitive effects in the relevant section of the country set out in Complaint Paragraph 21.

Count Three – Texas/Cimarron Counties, Oklahoma Area

28. One relevant line of commerce is natural gas gathering, *i.e.*, the transportation, for oneself or for other persons, of natural gas from the wellhead or producing area to a natural gas transmission pipeline or a natural gas processing plant.

29. One relevant section of the country is the Texas/Cimarron Counties, Oklahoma Area that contains portions of Texas and Cimarron Counties, Oklahoma and portions of Morton County, Kansas.

30. Respondent Duke owns and operates natural gas gathering systems which gather natural gas in various areas in the Texas/Cimarron Counties, Oklahoma Area, including Texas and Cimarron Counties, Oklahoma, and Morton County, Kansas.

31. Respondent Phillips owns and operates natural gas gathering systems which gather natural gas in various areas in the Texas/Cimarron Counties, Oklahoma Area, including Texas and Cimarron Counties, Oklahoma, and Morton County, Kansas.

32. Respondent Duke and Respondent Phillips are direct and substantial competitors in the business of natural gas gathering in the relevant section of the country set out in Complaint Paragraph 29.

33. The business of natural gas gathering in the relevant section of the country set out in Complaint Paragraph 29 is highly concentrated. The Duke/Phillips Asset Merger will significantly increase concentration in portions of this relevant section of the country. In this relevant section of the country as a whole, the Duke/Phillips Asset Merger would increase the HHI by over 350 to over 2200. In one portion of this relevant section of the

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country, the Duke/Phillips Asset Merger would increase the HHI by over 3700 to over 9400. In another portion of this relevant section of the country, the Duke/Phillips Asset Merger would increase the HHI by over 1000 to over 2900.

34. The effect of the Duke/Phillips Asset Merger, if consummated, may be substantially to lessen competition or tend to create a monopoly in the gathering of natural gas in the relevant section of the country set out in Complaint Paragraph 29, in violation of Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18, and Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45, in the following ways, among others:

a. the Duke/Phillips Asset Merger will eliminate actual and potential competition between Duke and Phillips to provide natural gas gathering services to existing gas wells in this relevant section of the country;

b. the Duke/Phillips Asset Merger will eliminate actual and potential competition between Duke and Phillips to provide natural gas gathering services for new natural gas wells in this relevant section of the country;

c. the Duke/Phillips Asset Merger will increase concentration in the gathering of natural gas in this relevant section of the country, therefore increasing the likelihood of collusion;

d. DEFS is likely to exact anticompetitive price increases from producers in this relevant section of the country for performance of natural gas gathering services in this relevant section of the country; and

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e. producers may be less likely to do exploratory and developmental drilling for new natural gas in this relevant section of the country than prior to the Duke/Phillips Asset Merger.

35. Entry would not be timely, likely, or sufficient to prevent anticompetitive effects in the relevant section of the country set out in Complaint Paragraph 29.

Count Four – Eastern Panhandle Area

36. One relevant line of commerce is natural gas gathering, *i.e.*, the transportation, for oneself or for other persons, of natural gas from the wellhead or producing area to a natural gas transmission pipeline or a natural gas processing plant.

37. One relevant section of the country is the Eastern Panhandle Area that contains portions of Beaver County, Oklahoma, and portions of Seward, Meade, and Clark Counties, Kansas.

38. Respondent Duke owns and operates natural gas gathering systems which gather natural gas in various areas in the Eastern Panhandle Area, including Beaver County, Oklahoma, and Seward, Meade, and Clark Counties, Kansas.

39. Respondent Phillips owns and operates natural gas gathering systems which gather natural gas in various areas in the Eastern Panhandle Area, including Beaver County, Oklahoma, and Seward, Meade, and Clark Counties, Kansas.

40. Respondent Duke and Respondent Phillips are direct and substantial competitors in the business of natural gas gathering in the relevant section of the country set out in Complaint Paragraph 37.

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41. The business of natural gas gathering in the relevant section of the country set out in Complaint Paragraph 37 is highly concentrated. The Duke/Phillips Asset Merger will significantly increase concentration in portions of this relevant section of the country. In this relevant section of the country as a whole, the Duke/Phillips Asset Merger would increase the HHI by over 1500 to over 3200. In one portion of this relevant section of the country, the Duke/Phillips Asset Merger would increase the HHI by over 2500 to over 7200. In another portion of this relevant section of the country, the Duke/Phillips Asset Merger would increase the HHI by over 1800 to over 6800.

42. The effect of the Duke/Phillips Asset Merger, if consummated, may be substantially to lessen competition or tend to create a monopoly in the gathering of natural gas in the relevant section of the country set out in Complaint Paragraph 37, in violation of Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18, and Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45, in the following ways, among others:

- a. the Duke/Phillips Asset Merger will eliminate actual and potential competition between Duke and Phillips to provide natural gas gathering services to existing gas wells in this relevant section of the country;
- b. the Duke/Phillips Asset Merger will eliminate actual and potential competition between Duke and Phillips to provide natural gas gathering services for new natural gas wells in this relevant section of the country;
- c. the Duke/Phillips Asset Merger will increase concentration in the gathering of natural gas in this relevant section of the country, therefore increasing the likelihood of collusion;

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d. DEFS is likely to exact anticompetitive price increases from producers in this relevant section of the country for performance of natural gas gathering services in this relevant section of the country; and

e. producers may be less likely to do exploratory and developmental drilling for new natural gas in this relevant section of the country than prior to the Duke/Phillips Asset Merger.

43. Entry would not be timely, likely, or sufficient to prevent anticompetitive effects in the relevant section of the country set out in Complaint Paragraph 37.

Count Five – Western Oklahoma Area

44. One relevant line of commerce is natural gas gathering, *i.e.*, the transportation, for oneself or for other persons, of natural gas from the wellhead or producing area to a natural gas transmission pipeline or a natural gas processing plant.

45. One relevant section of the country is the Western Oklahoma Area that contains portions of Dewey, Roger Mills, Ellis, and Woodward Counties.

46. Respondent Duke owns and operates natural gas gathering systems which gather natural gas in various areas in the Western Oklahoma Area, including Dewey, Roger Mills, Ellis, and Woodward Counties.

47. Respondent Phillips owns and operates natural gas gathering systems which gather natural gas in various areas in the Western Oklahoma Area, including Dewey, Roger Mills, Ellis, and Woodward Counties.

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48. Respondent Duke and Respondent Phillips are direct and substantial competitors in the business of natural gas gathering in the relevant section of the country set out in Complaint Paragraph 45.

49. The business of natural gas gathering in the relevant section of the country set out in Complaint Paragraph 46 is highly concentrated. The Duke/Phillips Asset Merger will significantly increase concentration in portions of this relevant section of the country. In this relevant section of the country as a whole, the Duke/Phillips Asset Merger would increase the HHI by over 1600 to over 3800. In one portion of this relevant section of the country, the Duke/Phillips Asset Merger would increase the HHI by over 3300 to over 6800. In another portion of this relevant section of the country, the Duke/Phillips Asset Merger would increase the HHI by over 4500 to over 9700.

50. The effect of the Duke/Phillips Asset Merger, if consummated, may be substantially to lessen competition or tend to create a monopoly in the gathering of natural gas in the relevant section of the country set out in Complaint Paragraph 45, in violation of Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18, and Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45, in the following ways, among others:

a. the Duke/Phillips Asset Merger will eliminate actual and potential competition between Duke and Phillips to provide natural gas gathering services to existing gas wells in this relevant section of the country;

b. the Duke/Phillips Asset Merger will eliminate actual and potential competition between Duke and Phillips to provide natural gas gathering services for new natural gas wells in this relevant section of the country;

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c. the Duke/Phillips Asset Merger will increase concentration in the gathering of natural gas in this relevant section of the country, therefore increasing the likelihood of collusion;

d. DEFS is likely to exact anticompetitive price increases from producers in this relevant section of the country for performance of natural gas gathering services in this relevant section of the country; and

e. producers may be less likely to do exploratory and developmental drilling for new natural gas in this relevant section of the country than prior to the Duke/Phillips Asset Merger.

51. Entry would not be timely, likely, or sufficient to prevent anticompetitive effects in the relevant section of the country set out in Complaint Paragraph 45.

Count Six – Oklahoma City Area of Oklahoma

52. One relevant line of commerce is natural gas gathering, *i.e.*, the transportation, for oneself or for other persons, of natural gas from the wellhead or producing area to a natural gas transmission pipeline or a natural gas processing plant.

53. One relevant section of the country is the Oklahoma City Area of Oklahoma that contains portions of Kingfisher, Logan, Oklahoma, Canadian, Grady, and Cleveland Counties.

54. Respondent Duke owns and operates natural gas gathering systems which gather natural gas in various areas in the Oklahoma City Area of Oklahoma, including Kingfisher, Logan, Oklahoma, Canadian, and Grady Counties.

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55. Respondent Phillips owns and operates natural gas gathering systems which gather natural gas in various areas in the Oklahoma City Area of Oklahoma, including Kingfisher, Logan, Oklahoma, Canadian, Grady, and Cleveland Counties.

56. Conoco and Mitchell, through a variety of general partnerships and joint ventures, jointly own and operate natural gas gathering systems which gather natural gas in various areas in the Oklahoma City Area of Oklahoma, including Kingfisher, Logan, Oklahoma, Canadian, Grady, and Cleveland Counties.

57. Respondent Duke, Respondent Phillips, and Conoco and Mitchell, through their jointly owned assets, are direct and substantial competitors in the business of natural gas gathering in the relevant section of the country set out in Complaint Paragraph 53.

58. The business of natural gas gathering in the relevant section of the country set out in Complaint Paragraph 53 is highly concentrated. The Duke/Phillips Asset Merger and the Conoco/Mitchell Asset Acquisition will significantly increase concentration in portions of this relevant section of the country. In this relevant section of the country as a whole, the Duke/Phillips Asset Merger and the Conoco/Mitchell Asset Acquisition would increase the HHI by over 3400 to over 5900. In one portion of this relevant section of the country, the Duke/Phillips Asset Merger and the Conoco/Mitchell Asset Acquisition would increase the HHI by over 6100 to over 9400. In another portion of this relevant section of the country, the Duke/Phillips Asset Merger and the Conoco/Mitchell Asset Acquisition would increase the HHI by over 3600 to over 9600.

59. The effect of the Duke/Phillips Asset Merger and Conoco/Mitchell Asset Acquisition, if consummated, may be substantially to lessen competition or tend to create a monopoly in

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the gathering of natural gas in the relevant section of the country set out in Complaint Paragraph 53, in violation of Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18, and Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45, in the following ways, among others:

a. the Duke/Phillips Asset Merger and Conoco/Mitchell Asset Acquisition will eliminate actual and potential competition between Duke, Phillips and Conoco and Mitchell to provide natural gas gathering services to existing gas wells in this relevant section of the country;

b. the Duke/Phillips Asset Merger and Conoco/Mitchell Asset Acquisition will eliminate actual and potential competition between Duke, Phillips and Conoco and Mitchell to provide natural gas gathering services for new natural gas wells in this relevant section of the country;

c. the Duke/Phillips Asset Merger and Conoco/Mitchell Asset Acquisition will increase concentration in the gathering of natural gas in this relevant section of the country, therefore increasing the likelihood of collusion;

d. DEFS is likely to exact anticompetitive price increases from producers in this relevant section of the country for performance of natural gas gathering services in this relevant section of the country; and

e. producers may be less likely to do exploratory and developmental drilling for new natural gas in this relevant section of the country than prior to the Duke/Phillips Asset Merger and Conoco/Mitchell Asset Acquisition.

60. Entry would not be timely, likely, or sufficient to prevent anticompetitive effects in the relevant section of the country set out in Complaint Paragraph 53.

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Count Seven – Northeast Logan County, Oklahoma Area

61. One relevant line of commerce is natural gas gathering, *i.e.*, the transportation, for oneself or for other persons, of natural gas from the wellhead or producing area to a natural gas transmission pipeline or a natural gas processing plant.

62. One relevant section of the country is the Northeast Logan County, Oklahoma Area that contains portions of Payne, Lincoln, and Logan Counties.

63. Respondent Duke owns and operates natural gas gathering systems which gathers natural gas in the Northeast Logan County, Oklahoma Area, including Payne, Lincoln, and Logan Counties.

64. Conoco and Mitchell, through a variety of general partnerships and joint ventures, jointly own and operate natural gas gathering systems which gather natural gas in the Northeast Logan County, Oklahoma Area, including Payne, Lincoln, and Logan Counties.

65. Respondent Duke and Conoco and Mitchell, through their jointly owned assets, are direct and substantial competitors in the business of natural gas gathering in the relevant section of the country set out in Complaint Paragraph 62.

66. The business of natural gas gathering in the relevant section of the country set out in Complaint Paragraph 62 is highly concentrated. The Conoco/Mitchell Asset Acquisition will significantly increase concentration in portions of this relevant section of the country. In this relevant section of the country as a whole, the Conoco/Mitchell Asset Acquisition would increase the HHI by over 4600 to 10,000.

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67. The effect of the Conoco/Mitchell Asset Acquisition, if consummated, may be substantially to lessen competition or tend to create a monopoly in the gathering of natural gas in the relevant section of the country set out in Complaint Paragraph 62, in violation of Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18, and Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45, in the following ways, among others:

a. the Conoco/Mitchell Asset Acquisition will eliminate actual and potential competition between Duke and Conoco and Mitchell to provide natural gas gathering services to existing gas wells in this relevant section of the country;

b. the Conoco/Mitchell Asset Acquisition will eliminate actual and potential competition between Duke and Conoco and Mitchell to provide natural gas gathering services for new natural gas wells in this relevant section of the country;

c. the Conoco/Mitchell Asset Acquisition will increase concentration in the gathering of natural gas in this relevant section of the country, therefore increasing the likelihood of collusion;

d. DEFS is likely to exact anticompetitive price increases from producers in this relevant section of the country for performance of natural gas gathering services in this relevant section of the country; and

e. producers may be less likely to do exploratory and developmental drilling for new natural gas in this relevant section of the country than prior to the Conoco/Mitchell Asset Acquisition.

68. Entry would not be timely, likely, or sufficient to prevent anticompetitive effects in the relevant section of the country set out in Complaint Paragraph 62.

Order to Maintain Assets

Violations Charged

69. The proposed merger and acquisition described in Complaint Paragraphs 10 and 11 herein, 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.

WHEREFORE THE PREMISES CONSIDERED, the Federal Trade Commission, on this thirtieth day of March, 2000, issues its Complaint against said Respondents.

By the Commission, Commissioner Leary recused.

ORDER TO MAINTAIN ASSETS

The Federal Trade Commission ("Commission"), having initiated an investigation of the proposed merger of certain assets of Duke Energy Corporation and Phillips Petroleum Company into Duke Energy Field Services L.L.C. and of the proposed acquisition by Duke Energy Corporation of certain assets of Conoco Inc. and Mitchell Energy & Development Corporation; and

Duke Energy Corporation, Phillips Petroleum Company, and Duke Energy Field Services L.L.C. (collectively, "respondents") having been furnished thereafter with a draft of Complaint that the Southwest Region presented to the Commission for its consideration and which, if issued by the Commission, would charge the respondents with violations of Section 7 of the Clayton

Order to Maintain Assets

Act, as amended, 15 U.S.C. § 18, and Section 5 of the Federal Trade Commission. as amended, 15 U.S.C. § 45; and

Respondents, their attorneys, and counsel for the Commission having thereafter executed an Agreement Containing Consent Orders (“Consent Agreement”), containing an admission by respondents of all the jurisdictional facts set forth in the aforesaid draft of Complaint, a statement that the signing of said Consent Agreement is for settlement purposes only and does not constitute an admission by respondents that the law has been violated as alleged in such Complaint, or that the facts as alleged in such Complaint, other than jurisdictional facts, are true, and waivers and other provisions as required by the Commission’s Rules; and

The Commission having thereafter considered the matter and having determined that it had reason to believe that respondents have violated the said Acts, and that a Complaint should issue stating its charges in that respect, and having determined to accept the executed Consent Agreement and to place such Consent Agreement on the public record for a period of thirty (30) days, the Commission hereby issues its Complaint, makes the following jurisdictional findings and issues this Order to Maintain Assets:

1. Duke Energy Corporation is a corporation organized, existing and doing business under and by virtue of the laws of the State of North Carolina, with its office and principal place of business located at 526 South Church Street, Charlotte, North Carolina 28202.
2. Phillips Petroleum Company is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware, with its office and principal place of business located at The Phillips Building, 4th and Keeler, Bartlesville, Oklahoma 74004.
3. Duke Energy Field Services L.L.C. is a limited liability company organized, existing and doing business under and by virtue of the laws of the State of Delaware, with its office and

Order to Maintain Assets

principal place of business located at 370 17th Street, Suite 900, Denver, Colorado 80202.

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

ORDER**I.**

IT IS ORDERED that, as used in this Order, the following definitions shall apply:

- A. “Duke” means Duke Energy Corporation, its directors, officers, employees, agents, representatives, predecessors, successors, and assigns; its joint ventures, subsidiaries, divisions, groups and affiliates controlled by Duke Energy Corporation, and the respective directors, officers, employees, agents, representatives, successors, and assigns of each.
- B. “Phillips” means Phillips Petroleum Company, its directors, officers, employees, agents, representatives, predecessors, successors, and assigns; its joint ventures, subsidiaries, divisions, groups and affiliates controlled by Phillips Petroleum Company, and the respective directors, officers, employees, agents, representatives, successors, and assigns of each.
- C. “DEFS” means Duke Energy Field Services L.L.C., its members, managers, employees, agents, representatives, predecessors, successors, and assigns; its joint ventures, subsidiaries, divisions, groups and affiliates controlled by Duke Energy Field Services L.L.C., and the respective

Order to Maintain Assets

directors, officers, employees, agents, representatives, successors, and assigns of each.

- D. "Consent Agreement" means the Agreement Containing Consent Orders, including the proposed Decision and Order accompanying that agreement.
- E. "Respondents" means Duke, Phillips, and DEFS.
- F. "Commission" means the Federal Trade Commission.
- G. "Schedule A Assets" means all of the assets listed in Schedule A of the Consent Agreement.
- H. "Schedule B Assets" means all of the assets listed in Schedule B of the Consent Agreement.
- I. "Schedule C Assets" means all of the assets listed in Schedule C of the Consent Agreement.
- J. "Schedule D Assets" means all of the assets listed in Schedule D of the Consent Agreement.
- K. "Schedule E Assets" means all of the assets listed in Schedule E of the Consent Agreement.
- L. "Schedule F Assets" means all of the assets listed in Schedule F of the Consent Agreement.
- M. "Schedule G Assets" means all of the assets listed in Schedule G of the Consent Agreement.
- N. "Schedule H Assets" means all of the assets listed in Schedule H of the Consent Agreement.
- O. "Schedule I Assets" means all of the assets listed in Schedule I of the Consent Agreement.

Order to Maintain Assets

- P. "Schedule J Assets" means all of the assets listed in Schedule J of the Consent Agreement.
- Q. "Schedule CC Assets" means all of the assets listed in Schedule CC of the Consent Agreement.
- R. "Schedule DD Assets" means all of the assets listed in Schedule DD of the Consent Agreement.
- S. "Schedule EE Assets" means all of the assets listed in Schedule EE of the Consent Agreement.
- T. "Schedule FF Assets" means all of the assets listed in Schedule FF of the Consent Agreement.
- U. "Schedule GG Assets" means all of the assets listed in Schedule GG of the Consent Agreement.
- V. "Schedule HH Assets" means all of the assets listed in Schedule HH of the Consent Agreement.
- W. "Schedule II Assets" means all of the assets listed in Schedule II of the Consent Agreement.
- X. "Schedule JJ Assets" means all of the assets listed in Schedule JJ of the Consent Agreement.
- Y. "Assets To Be Divested" means the Schedule A Assets, the Schedule B Assets, the Schedule C Assets, the Schedule D Assets, the Schedule E Assets, the Schedule F Assets, the Schedule G Assets, the Schedule H Assets, the Schedule I Assets, and the Schedule J Assets.

Order to Maintain Assets

- Z. "Substitute Assets To Be Divested" means the Schedule CC Assets, the Schedule DD Assets, the Schedule EE Assets, the Schedule FF Assets, the Schedule GG Assets, the Schedule HH Assets, the Schedule II Assets, and the Schedule JJ Assets.

II.**IT IS FURTHER ORDERED** that:

- A. Respondents shall maintain the viability, marketability, and competitiveness of the Assets To Be Divested and the Substitute Assets To Be Divested, and shall not cause the wasting or deterioration of the Assets To Be Divested or the Substitute Assets To Be Divested, nor shall they cause the Assets To Be Divested or the Substitute Assets To Be Divested to be operated in a manner inconsistent with applicable laws, nor shall they sell, transfer, encumber or otherwise impair the viability, marketability or competitiveness of the Assets To Be Divested or the Substitute Assets To Be Divested. Respondents shall conduct or cause to be conducted the business of the Assets To Be Divested and the Substitute Assets To Be Divested in the regular and ordinary course and in accordance with past practice (including regular repair and maintenance efforts) and shall use their best efforts to preserve the existing relationships with suppliers, customers, employees, and others having business relations with the Assets To Be Divested and the Substitute Assets To Be Divested in the ordinary course of business and in accordance with past practice.
- B. Respondents shall comply with the terms of Paragraph II.A.:
1. with respect to the Schedule A Assets, until the Schedule A Assets have been divested pursuant to the terms of the Consent Agreement or until this Order to

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Maintain Assets is terminated pursuant to Paragraph VI.A., whichever comes first;

2. with respect to the Schedule B Assets, until the Schedule B Assets have been divested pursuant to the terms of the Consent Agreement or until this Order to Maintain Assets is terminated pursuant to Paragraph VI.A., whichever comes first;
3. with respect to the Schedule C Assets and the Schedule CC Assets, until the Schedule C Assets or the Schedule CC Assets have been divested pursuant to the terms of the Consent Agreement or until this Order to Maintain Assets is terminated pursuant to Paragraph VI.A., whichever comes first;
4. with respect to the Schedule D Assets and the Schedule DD Assets, until the Schedule D Assets or the Schedule DD Assets have been divested pursuant to the terms of the Consent Agreement or until this Order to Maintain Assets is terminated pursuant to Paragraph VI.A., whichever comes first;
5. with respect to the Schedule E Assets and the Schedule EE Assets, until the Schedule E Assets or the Schedule EE Assets have been divested pursuant to the terms of the Consent Agreement or until this Order to Maintain Assets is terminated pursuant to Paragraph VI.A., whichever comes first;
6. with respect to the Schedule F Assets and the Schedule FF Assets, until the Schedule F Assets or the Schedule FF Assets have been divested pursuant to the terms of the Consent Agreement or until this Order to Maintain

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Assets is terminated pursuant to Paragraph VI.A., whichever comes first;

7. with respect to the Schedule G Assets and the Schedule GG Assets, until the Schedule G Assets or the Schedule GG Assets have been divested pursuant to the terms of the Consent Agreement or until this Order to Maintain Assets is terminated pursuant to Paragraph VI.A., whichever comes first;
8. with respect to the Schedule H Assets and the Schedule HH Assets, until the Schedule H Assets or the Schedule HH Assets have been divested pursuant to the terms of the Consent Agreement or until this Order to Maintain Assets is terminated pursuant to Paragraph VI.A., whichever comes first;
9. with respect to the Schedule I Assets and the Schedule II Assets, until the Schedule I Assets or the Schedule II Assets have been divested pursuant to the terms of the Consent Agreement or until this Order to Maintain Assets is terminated pursuant to Paragraph VI.A., whichever comes first; and
10. with respect to the Schedule J Assets and the Schedule JJ Assets, until the Schedule J Assets or the Schedule JJ Assets have been divested pursuant to the terms of the Consent Agreement or until this Order to Maintain Assets is terminated pursuant to Paragraph VI.A., whichever comes first.

III.

IT IS FURTHER ORDERED that:

- A. Respondents shall offer to purchase, gather, transport, treat, and process gas from wells connected to Respondents' assets and located within five miles from

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any Assets To Be Divested on the same terms and conditions that Respondents had agreed to with respect to the gas from such wells as of March 1, 2000.

- B. If a producer, operator, or shipper executes a waiver of its rights under Paragraph III.A., Respondents may contract on such other terms and conditions as they may deem appropriate.
- C. Respondents shall comply with the terms of Paragraph III.A.:
 - 1. with respect to gas from wells located within five (5) miles of any Schedule A Assets, until thirty (30) days after the Schedule A Assets have been divested pursuant to the terms of the Consent Agreement or until this Order to Maintain Assets is terminated pursuant to Paragraph VI.A., whichever comes first;
 - 2. with respect to gas from wells located within five (5) miles of any Schedule B Assets, until thirty (30) days after the Schedule B Assets have been divested pursuant to the terms of the Consent Agreement or until this Order to Maintain Assets is terminated pursuant to Paragraph VI.A., whichever comes first;
 - 3. with respect to gas from wells located within five (5) miles of any Schedule C Assets, until thirty (30) days after the Schedule C Assets or the Schedule CC Assets have been divested pursuant to the terms of the Consent Agreement or until this Order to Maintain Assets is terminated pursuant to Paragraph VI.A., whichever comes first;

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4. with respect to gas from wells located within five (5) miles of any Schedule D Assets, until thirty (30) days after the Schedule D Assets or the Schedule DD Assets have been divested pursuant to the terms of the Consent Agreement or until this Order to Maintain Assets is terminated pursuant to Paragraph VI.A., whichever comes first;
5. with respect to gas from wells located within five (5) miles of any Schedule E Assets, until thirty (30) days after the Schedule E Assets or the Schedule EE Assets have been divested pursuant to the terms of the Consent Agreement or until this Order to Maintain Assets is terminated pursuant to Paragraph VI.A., whichever comes first;
6. with respect to gas from wells located within five (5) miles of any Schedule F Assets, until thirty (30) days after the Schedule F Assets or the Schedule FF Assets have been divested pursuant to the terms of the Consent Agreement or until this Order to Maintain Assets is terminated pursuant to Paragraph VI.A., whichever comes first;
7. with respect to gas from wells located within five (5) miles of any Schedule G Assets, until thirty (30) days after the Schedule G Assets or the Schedule GG Assets have been divested pursuant to the terms of the Consent Agreement or until this Order to Maintain Assets is terminated pursuant to Paragraph VI.A., whichever comes first;
8. with respect to gas from wells located within five (5) miles of any Schedule H Assets, until thirty (30) days after the Schedule H Assets or the Schedule HH Assets have been divested pursuant to the terms of the Consent Agreement or until this Order to Maintain

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Assets is terminated pursuant to Paragraph VI.A., whichever comes first;

9. with respect to gas from wells located within five (5) miles of any Schedule I Assets, until thirty (30) days after the Schedule I Assets or the Schedule II Assets have been divested pursuant to the terms of the Consent Agreement or until this Order to Maintain Assets is terminated pursuant to Paragraph VI.A., whichever comes first; and
10. with respect to gas from wells located within five (5) miles of any Schedule J Assets, until thirty (30) days after the Schedule J Assets or the Schedule JJ Assets have been divested pursuant to the terms of the Consent Agreement or until this Order to Maintain Assets is terminated pursuant to Paragraph VI.A., whichever comes first.

IV.

IT IS FURTHER ORDERED that Respondents shall notify the Commission at least thirty (30) days prior to any proposed change in the Respondents such as dissolution, assignment, sale resulting in the emergence of a successor corporation or company, or the creation or dissolution of subsidiaries or any other change in the corporation that may affect compliance obligations arising out of this Order to Maintain Assets.

V.

IT IS FURTHER ORDERED that for the purposes of determining or securing compliance with this Order to Maintain Assets, and subject to any legally recognized privilege, and upon written request with reasonable notice to Respondents,

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Respondents shall permit any duly authorized representatives of the Commission:

- A. Access, during office hours of Respondents and in the presence of counsel, to all facilities, and access to inspect and copy all books, ledgers, accounts, correspondence, memoranda, and all other records and documents in the possession or under the control of Respondents relating to compliance with this Order to Maintain Assets; and
- B. Upon five (5) days' notice to Respondents and without restraint or interference from Respondents, to interview officers, directors, or employees of Respondents, who may have counsel present, regarding such matters.

VI.

IT IS FURTHER ORDERED that this Order to Maintain Assets shall terminate at the earlier of:

- A. three (3) business days after the Commission withdraws its acceptance of the Consent Agreement pursuant to the provisions of Commission Rule 2.34, 16 C.F.R. § 2.34; or
- B. all Assets To Be Divested or corresponding Substitute Assets To Be Divested have been divested pursuant to the terms of the Consent Agreement.

By the Commission, Commissioner Leary recused.

Decision and Order

DECISION AND ORDER

The Federal Trade Commission (“Commission”), having initiated an investigation of the proposed merger of certain assets of Duke Energy Corporation and Phillips Petroleum Company into Duke Energy Field Services L.L.C. and of the proposed acquisition by Duke Energy Corporation of certain assets of Conoco Inc. and Mitchell Energy & Development Corporation; and

Duke Energy Corporation, Phillips Petroleum Company, and Duke Energy Field Services L.L.C. (collectively, “respondents”) having been furnished thereafter with a draft of Complaint that the Southwest Region presented to the Commission for its consideration and which, if issued by the Commission, would charge the respondents with violations of Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18, and Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45; and

The respondents, their attorneys, and counsel for the Commission having thereafter executed an Agreement Containing Consent Orders (“Consent Agreement”), containing an admission by the respondents of all the jurisdictional facts set forth in the aforesaid draft of Complaint, a statement that the signing of said Consent Agreement is for settlement purposes only and does not constitute an admission by the respondents that the law has been violated as alleged in such Complaint, or that the facts as alleged in such Complaint, other than jurisdictional facts, are true, and waivers and other provisions as required by the Commission’s Rules; and

The Commission having thereafter considered the matter and having determined that it had reason to believe that the respondents have violated the said Acts, and that a Complaint should issue stating its charges in that respect, and having

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thereupon issued its Complaint and an Order to Maintain Assets, and having accepted the executed Consent Agreement and placed such Agreement on the public record for a period of thirty (30) days for the receipt and consideration of public comments, now in further conformity with the procedure described in Commission Rule 2.34, 16 C.F.R. § 2.34, the Commission hereby makes the following jurisdictional findings and issues the following Order:

1. Duke Energy Corporation is a corporation organized, existing and doing business under and by virtue of the laws of the State of North Carolina, with its office and principal place of business located at 526 South Church Street, Charlotte, North Carolina 28202.
2. Phillips Petroleum Company is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware, with its office and principal place of business located at The Phillips Building, 4th and Keeler, Bartlesville, Oklahoma 74004.
3. Duke Energy Field Services L.L.C. is a limited liability company 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 370 17th Street, Suite 900, Denver, Colorado 80202.
4. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondents, and the proceeding is in the public interest.

ORDER

I.

IT IS ORDERED that, as used in this Order, the following definitions shall apply:

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“Duke” means Duke Energy Corporation, its directors, officers, employees, agents, representatives, predecessors, successors, and assigns; its joint ventures, subsidiaries, divisions, groups and affiliates controlled by Duke Energy Corporation, and the respective directors, officers, employees, agents, representatives, successors, and assigns of each.

“Phillips” means Phillips Petroleum Company, its directors, officers, employees, agents, representatives, predecessors, successors, and assigns; its joint ventures, subsidiaries, divisions, groups and affiliates controlled by Phillips Petroleum Company, and the respective directors, officers, employees, agents, representatives, successors, and assigns of each.

“DEFS” means Duke Energy Field Services L.L.C., its members, managers, employees, agents, representatives, predecessors, successors, and assigns; its joint ventures, subsidiaries, divisions, groups and affiliates controlled by Duke Energy Field Services L.L.C., and the respective directors, officers, employees, agents, representatives, successors, and assigns of each.

“Respondents” means Duke, Phillips, and DEFS.

“Duke-Phillips Transaction Date” means the date, if any, on which Duke or Phillips first transfers any assets into DEFS pursuant to a letter agreement between Duke and Phillips, dated December 16, 1999.

“Public Record Date” means the date, if any, that the Agreement Containing Consent Order is placed on the public record by the Commission pursuant to Commission Rule 2.32, 16 C.F.R. § 2.32.

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“Commission” means the Federal Trade Commission.

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

"Relevant Geographic Areas" means:

Clark, Meade, Morton, and Seward Counties of Kansas;

Alfalfa, Beaver, Blaine, Canadian, Cleveland, Cimarron, Dewey, Ellis, Grady, Harper, Kingfisher, Lincoln, Logan, Major, Oklahoma, Payne, Roger Mills, Texas, Woods, and Woodward Counties of Oklahoma; and

Brazos, Burleson, Grimes, Lee, and Washington Counties of Texas.

"Schedule A Assets" means all of the assets listed in Schedule A of this Order.

"Schedule B Assets" means all of the assets listed in Schedule B of this Order.

"Schedule C Assets" means all of the assets listed in Schedule C of this Order.

"Schedule D Assets" means all of the assets listed in Schedule D of this Order.

"Schedule E Assets" means all of the assets listed in Schedule E of this Order.

"Schedule F Assets" means all of the assets listed in Schedule F of this Order.

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"Schedule G Assets" means all of the assets listed in Schedule G of this Order.

"Schedule H Assets" means all of the assets listed in Schedule H of this Order.

"Schedule I Assets" means all of the assets listed in Schedule I of this Order.

"Schedule J Assets" means all of the assets listed in Schedule J of this Order.

"Schedule CC Assets" means all of the assets listed in Schedule CC of this Order.

"Schedule DD Assets" means all of the assets listed in Schedule DD of this Order.

"Schedule EE Assets" means all of the assets listed in Schedule EE of this Order.

"Schedule FF Assets" means all of the assets listed in Schedule FF of this Order.

"Schedule GG Assets" means all of the assets listed in Schedule GG of this Order.

"Schedule HH Assets" means all of the assets listed in Schedule HH of this Order.

"Schedule II Assets" means all of the assets listed in Schedule II of this Order.

"Schedule JJ Assets" means all of the assets listed in Schedule JJ of this Order.

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“Assets To Be Divested” means the Schedule A Assets, the Schedule B Assets, the Schedule C Assets, the Schedule D Assets, the Schedule E Assets, the Schedule F Assets, the Schedule G Assets, the Schedule H Assets, the Schedule I Assets, and the Schedule J Assets.

“Substitute Assets To Be Divested” means the Schedule CC Assets, the Schedule DD Assets, the Schedule EE Assets, the Schedule FF Assets, the Schedule GG Assets, the Schedule HH Assets, the Schedule II Assets, and the Schedule JJ Assets.

“Western Gas” means Western Gas Resources - Oklahoma, Inc. and Western Gas Resources, Inc.

“Western Agreement” means the Partnership Interest Purchase Agreement between Western Gas and Panhandle Gathering Company, a wholly-owned indirect subsidiary of Duke, executed on February 24, 2000, for the divestiture by Duke to Western Gas of the Schedule A Assets.

“Mitchell” means Mitchell Gas Services L.P. and Mitchell Energy & Development Corporation.

“Mitchell Agreement” means the Exchange Agreement between Mitchell and Duke executed on March 10, 2000, which provides, in part, for the divestiture by Duke to Mitchell of the Schedule B Assets.

“Gas Gathering” means pipeline transportation, for oneself or other persons, of natural gas over any part or all of the distance between a well and a gas transmission pipeline or gas processing plant.

“Processing” means the separation of natural gas liquids, including propane, ethane, butanes, and pentanes-plus, from methane.

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II.

IT IS FURTHER ORDERED that:

Respondents shall divest, absolutely and in good faith, the Schedule A Assets to Western Gas, in accordance with the Western Agreement (which agreement shall not be construed to vary or contradict the terms of this Order), no later than twenty (20) days after the Duke-Phillips Transaction Date or twenty (20) days after the Public Record Date, whichever comes first. Failure by Respondents to comply with the Western Agreement shall also constitute a violation of this Order.

Respondents shall divest, absolutely and in good faith, the Schedule B Assets to Mitchell, in accordance with the Mitchell Agreement (which agreement shall not be construed to vary or contradict the terms of this Order), no later than twenty (20) days after the Duke-Phillips Transaction Date or twenty (20) days after the Public Record Date, whichever comes first. Failure by Respondents to comply with those provisions in the Mitchell Agreement relating to the divestiture of the Schedule B Assets shall also constitute a violation of this Order.

Respondents shall divest absolutely, in good faith, and at no minimum price, the Schedule C Assets to a single acquirer no later than one hundred twenty (120) days after the Public Record Date.

Respondents shall divest absolutely, in good faith, and at no minimum price, the Schedule D Assets to a single acquirer no later than one hundred twenty (120) days after the Public Record Date.

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Respondents shall divest absolutely, in good faith, and at no minimum price, the Schedule E Assets to a single acquirer no later than one hundred twenty (120) days after the Public Record Date.

Respondents shall divest absolutely, in good faith, and at no minimum price, the Schedule F Assets to a single acquirer no later than one hundred twenty (120) days after the Public Record Date.

Respondents shall divest absolutely, in good faith, and at no minimum price, the Schedule G Assets to a single acquirer no later than one hundred twenty (120) days after the Public Record Date.

Respondents shall divest absolutely, in good faith, and at no minimum price, the Schedule H Assets to a single acquirer no later than one hundred twenty (120) days after the Public Record Date.

Respondents shall divest absolutely, in good faith, and at no minimum price, the Schedule I Assets to a single acquirer no later than one hundred twenty (120) days after the Public Record Date. Provided that, if for any reason Respondents do not fully own and control any Schedule I Assets at any time within thirty (30) days after the Public Record Date and before the Schedule I Assets are to be divested pursuant to this Paragraph, then Respondents shall, for purposes of complying with the requirements of this Paragraph, substitute the Schedule II Assets for the Schedule I Assets.

Respondents shall divest absolutely, in good faith, and at no minimum price, the Schedule J Assets to a single acquirer no later than one hundred twenty (120) days after the Public Record Date.

Respondents shall divest the Assets To Be Divested or the Substitute Assets To Be Divested pursuant to Paragraphs

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II.C. II.D., II.E., II.F., II.G., II.H., II.I., and II.J., only to acquirers that receive the prior approval of the Commission and only in a manner that receives the prior approval of the Commission.

At the time Respondents apply to the Commission for approval of the divestiture of the Schedule E Assets, the Schedule F Assets, the Schedule G Assets, the Schedule H Assets, and the Schedule I Assets pursuant to Paragraphs II.D., II.E., II.F., II.G., II.H., and II.I., Respondents shall certify to the Commission that all interconnecting pipe specified in such schedule has been installed. If Respondents fail to install all interconnecting pipe specified in a schedule prior to one hundred twenty (120) days after the Public Record Date, then with the approval of the Commission the trustee may substitute for the assets in such schedule the corresponding Substitute Assets To Be Divested pursuant to Paragraph III.A.

The purpose of Paragraphs II.A., II.B., II.C. II.D., II.E., II.F., II.G., II.H., II.I., II.J., II.K., and II.L. is to ensure the continuation of the Assets To Be Divested or the Substitute Assets To Be Divested as, or as part of, ongoing viable enterprises engaged in the natural gas gathering and processing business and to remedy the lessening of competition resulting from the merger and acquisitions alleged in the Commission's complaint.

III.

IT IS FURTHER ORDERED that:

If Respondents have not divested, absolutely and in good faith and with the Commission's prior approval, the Assets To Be Divested or the Substitute Assets To Be Divested within the

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time and in the manner required by Paragraph II of this Order, the Commission may appoint a trustee to divest those assets; provided, however, that the trustee may, subject to the approval of the Commission, substitute the following assets for the assets described in the applicable paragraph or paragraphs: (1) in connection with Paragraph II.C., the Schedule CC Assets, (2) in connection with Paragraph II.D., the Schedule DD Assets, (3) in connection with Paragraph II.E., the Schedule EE Assets, (4) in connection with Paragraph II.F., the Schedule FF Assets, (5) in connection with Paragraph II.G., the Schedule GG Assets, (6) in connection with Paragraph II.H., the Schedule HH Assets, (7) in connection with Paragraph II.I., the Schedule II Assets, and (8) in connection with Paragraph II.J., the Schedule JJ Assets.

In the event that the Commission or the Attorney General brings an action pursuant to Section 5(l) of the Federal Trade Commission Act, 15 U.S.C. § 45(l), or any other statute enforced by the Commission, Respondents shall consent to the appointment of a trustee in such action. Neither the appointment of a trustee nor a decision not to appoint a trustee under this Paragraph shall preclude the Commission or the Attorney General from seeking civil penalties or any other relief available to it, including a court-appointed trustee, pursuant to Section 5(l) of the Federal Trade Commission Act, or any other statute enforced by the Commission, for any failure by Respondents to comply with this Order.

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Within sixty (60) days after Respondents have been notified by the Commission that it has approved pursuant to Paragraph III.A. the divestiture by the trustee of any Substitute Assets To Be Divested, Respondents shall install any and all interconnecting pipe specified in the schedule or schedules for such Substitute Assets To Be Divested.

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

The Commission shall select the trustee, subject to the consent of Respondents, which consent shall not be unreasonably withheld. The trustee shall be a person with experience and expertise in acquisitions and divestitures. If Respondents have not opposed, in writing, including the reasons for opposing, the selection of any proposed trustee within ten (10) days after receipt of written notice by the staff of the Commission to Respondents of the identity of any proposed trustee, Respondents shall be deemed to have consented to the selection of the proposed trustee.

Subject to the prior approval of the Commission, the trustee shall have the exclusive power and authority to divest the Assets To Be Divested or the corresponding Substitute Assets To Be Divested.

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

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The trustee shall have twelve (12) months from the date the Commission or court approves the trust agreement described in Paragraph III.C.3. to accomplish the divestitures, which shall be subject to the prior approval of the Commission, and in a manner, and pursuant to an agreement, that receive the prior approval of the Commission. If, however, at the end of the twelve-month period, the trustee has submitted a plan of divestiture or believes that divestiture can be achieved within a reasonable time, the divestiture period may be extended by the Commission, or, in the case of a court-appointed trustee, by the court; provided, however, the Commission may extend the period for no more than two (2) additional periods.

The trustee shall have full and complete access to the personnel, books, records, and facilities related to the Assets To Be Divested, to the Substitute Assets To Be Divested, or to any other relevant information, as the trustee may request. Respondents shall develop such financial or other information as such trustee may reasonably request and shall cooperate with the trustee. Respondents shall take no action to interfere with or impede the trustee's accomplishment of the divestitures. Any delays in divestiture caused by Respondents shall extend the time for divestiture under this Paragraph in an amount equal to the delay, as determined by the Commission or, for a court-appointed trustee, by the court.

The trustee shall use his or her best efforts to negotiate the most favorable price and terms available in each contract that is submitted to the Commission, subject to Respondents' absolute and unconditional obligation to divest expeditiously at no minimum price. The divestitures shall be made only in a manner that receives the prior approval of the Commission, and only to an acquirer or acquirers that receives the prior approval of the Commission, as set out in Paragraph II of this Order; provided, however, if the trustee receives bona fide offers for an asset to be divested from more than one acquiring entity, and if the Commission determines to approve more than one such acquiring entity, the trustee shall

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divest such asset to the acquiring entity or entities selected unanimously by Respondents from among those approved by the Commission; provided further, however, that Respondents shall unanimously select such entity within five (5) days of receiving notification of the Commission's approval.

The trustee shall serve, without bond or other security, at the cost and expense of Duke and DEFS, 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 Duke and DEFS, 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 divestitures 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 Duke and DEFS, and the trustee's power shall be terminated. The trustee's compensation shall be based at least in significant part on a commission arrangement contingent on the trustee's divesting the Assets To Be Divested or the corresponding Substitute Assets To Be Divested.

Duke and DEFS 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

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

Duke and DEFS shall each be jointly and severally liable for all financial obligations accruing from Paragraphs III.C.7. and III.C.8.

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

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

In the event that the trustee determines that he or she is unable to divest the Assets To Be Divested or the Substitute Assets To Be Divested in a manner consistent with the Commission's purpose as described in Paragraph II.M., the trustee may divest additional ancillary assets of Respondents and effect such arrangements as are necessary to satisfy the requirements of this Order.

The trustee shall have no obligation or authority to operate or maintain the Assets To Be Divested or the Substitute Assets To Be Divested.

The trustee shall report in writing to Respondents and the Commission every sixty (60) days concerning the trustee's efforts to accomplish each divestiture required by this Order.

IV.

IT IS FURTHER ORDERED that, for a period of ten (10) years from the date this Order becomes final, Respondents shall not,

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without prior notification to the Commission, directly or indirectly:

Acquire any of the Assets To Be Divested or the Substitute Assets To Be Divested after their divestiture pursuant to this Order;

Acquire any stock, share capital, equity, or other interest in any person engaged in, or in any assets used in, gas gathering within the Relevant Geographic Areas at any time within the two years preceding such acquisition; or

Enter into any agreements or other arrangements with any person, within any 18 month period, that would confer direct or indirect ownership or control of more than five (5) miles of pipeline previously used for gas gathering and suitable for use for gas gathering within the Relevant Geographic Areas.

V.

IT IS FURTHER ORDERED that the prior notifications required by Paragraph IV of this Order shall be given on the Notification and Report Form set forth in the Appendix to Part 803 of Title 16 of the Code of Federal Regulations as amended (hereinafter referred to as "the Notification"), and shall be prepared and transmitted in accordance with the required Part 803, except that no filing fee will be required for any such notification, notification shall be filed with the Secretary of the Commission, notification need not be made to the United States Department of Justice, and notification is required only of Respondents. In lieu of furnishing (1) documents filed with the Securities and Exchange Commission, (2) annual reports, (3) annual audit reports, (4) regularly prepared balance sheets, or (5) Standard Industrial Code (SIC) information in response to certain items in the

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Appendix to Part 803 of Title 16 of the Code of Federal Regulations, Respondents shall provide a map showing the location of the pipeline whose acquisition is proposed and other pipelines used for gas gathering in the Relevant Geographic Area and a statement showing, for the most recent 12 month period for which volume information is available, the quantity of gas that flowed through the pipeline whose acquisition is proposed. Respondents shall provide the Notification to the Commission at least thirty days prior to consummating any such transaction (hereinafter referred to as the "first waiting period"). If, within the first waiting period, representatives of the Commission make a written request for additional information (within the meaning of 16 C.F.R. § 803.20), Respondents shall not consummate the transaction until twenty days after substantially complying with such request for additional information. Early termination of the waiting periods in this Paragraph may be requested and, where appropriate, granted by letter from the Bureau of Competition. Provided, however, that prior notification shall not be required by Paragraph IV of this Order for a transaction for which notification is required to be made, and has been made, pursuant to Section 7A of the Clayton Act, 15 U.S.C. 18a, and that nothing in this Order shall be construed to relieve Respondents of their obligation to comply with any notification requirement of that statute.

VI.

IT IS FURTHER ORDERED that:

Within sixty (60) days after the date this Order becomes final and every sixty (60) days thereafter until having fully complied with its obligations under Paragraphs II or III of this Order, each Respondent shall each submit to the Commission a verified written report setting forth in detail the manner and form in which it intends to comply, is complying, and has complied with Paragraphs II and III of this Order and with the Order to Maintain Assets.

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Respondents shall include in such compliance reports, among other things that are required from time to time, a full description of the efforts being made to comply with Paragraphs II and III of the Order, including a description of all substantive contacts or negotiations for the divestiture and the identity of all parties contacted. Respondents shall include in their compliance reports copies of all written communications to and from such parties, all internal memoranda, and all reports and recommendations concerning divestiture.

One (1) year from the date this Order becomes final, annually for the next nine (9) years on the anniversary of the date this Order is entered, and at such other times as the Commission may require, each Respondent shall file a verified written report with the Commission setting forth in detail the manner and form in which it has complied and is complying with this Order.

Decision and Order

VII.

IT IS FURTHER ORDERED that each Respondent shall notify the Commission at least thirty (30) days prior to any proposed change in the Respondent, such as dissolution, assignment, sale resulting in the emergence of a successor corporation, or the creation or dissolution of subsidiaries or any other change that may affect compliance obligations arising out of this Order.

VIII.

IT IS FURTHER ORDERED that, for the purpose of determining or securing compliance with this Order, upon written request, Respondents shall permit any duly authorized representative of the Commission:

**Access, during office hours and in the presence of counsel, to all facilities and access to inspect and copy all books, ledgers, accounts, correspondence, memoranda and other records and documents in the possession or under the control of Respondents relating to any matters contained in this Order;
and**

Upon five (5) days' notice to Respondents and without restraint or interference from it, to interview officers, directors, employees, agents or independent contractors of Respondents, who may have counsel present, relating to any matters contained in this Order.

IX.

IT IS FURTHER ORDERED that this Order will terminate on May 5, 2010.

Schedules

By the Commission, Commissioner Leary recused.

Schedule A**Westana Area (Oklahoma)**

Duke's interest in the Westana Gathering Company, which has been divested pursuant to the Western Agreement.

Schedule B**Austin Chalk Area (Texas)**

All interests held by Duke or DEFS prior to the Duke-Phillips Transaction Date in assets

1. located in Brazos, Burleson, Grimes, Lee, or Washington Counties in Texas, and

2. used in natural gas gathering, treating, or processing,

except those specifically excluded by this schedule. The following assets are excluded from this schedule: (a) the North Fayette Treater in Fayette County, Texas, and the gas gathering assets connecting that treater to the seven gas wells closest to it, (b) the Bryan Plant in Brazos County, Texas, and (c) the A & M Plant in Burleson County, Texas.

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Schedule C

SCHEDULE C

TEXAS/CIMARRON COUNTIES, OK AREA

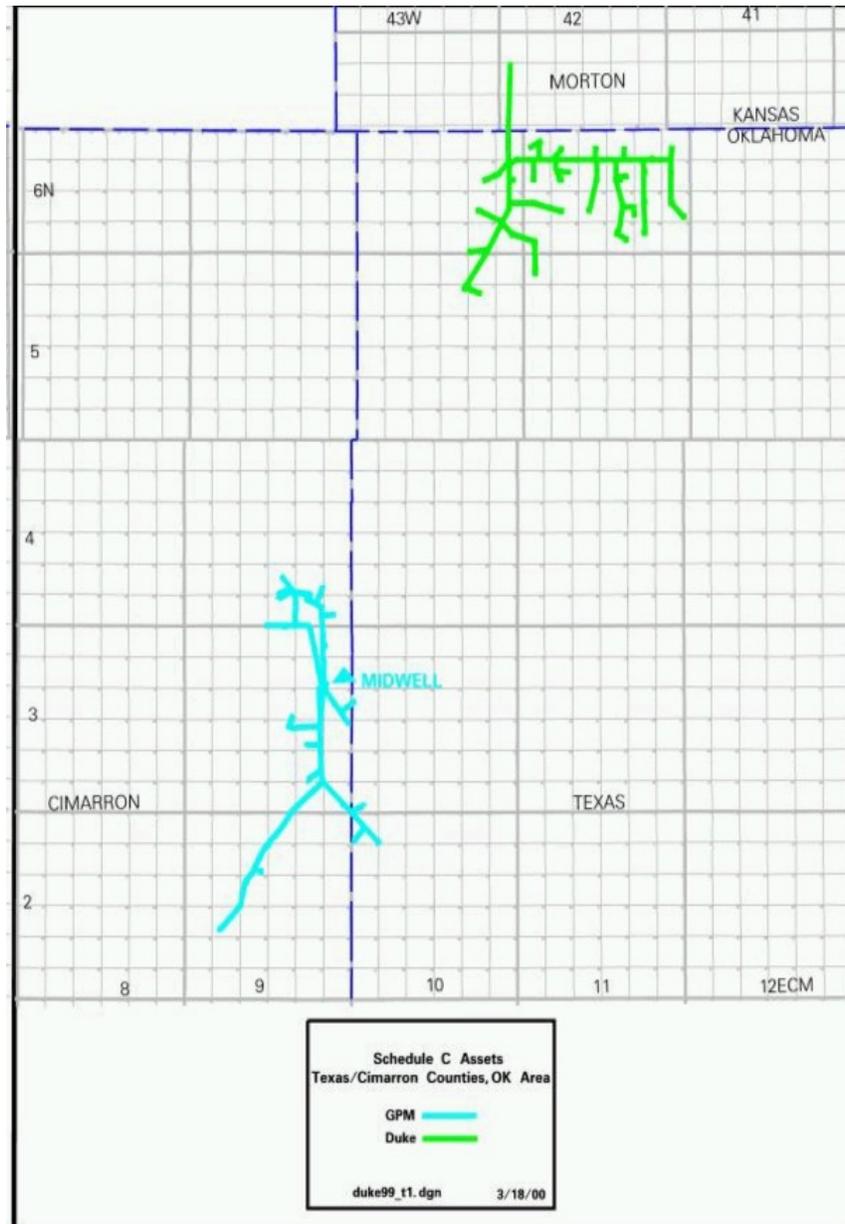
Key No.	GATHERER	LINE NO.	PIPELINE ID	SEC	TWP	RNG	COUNTY	PIPE LENGTH (ft)	PIPE DESCR (diam. in inches)
DEFS									
1		1302 0012 0004 04			5N	10ECM	TEXAS, OK	1080	4
2		1302 0012 0006 04			6N	10ECM	TEXAS, OK	2783	4
3		1402 0012 0002 04			6N	10ECM	TEXAS, OK	484	4
4		1402 0012 0006 04			5N	10ECM	TEXAS, OK	2879	4
5		1402 0012 0022 04			6N	10ECM	TEXAS, OK	709	4
6		1402 0012 0023 04			6N	10ECM	TEXAS, OK	219	4
7		1402 0012 0062 04			6N	10ECM	TEXAS, OK	2981	4
8		1402 0012 0038 04			6N	10ECM, 11ECM	TEXAS, OK	5673	4
9		1602 0012 0001 06			6N	10ECM, 11ECM	TEXAS, OK	8993	6
10		1302 0012 0008 04			6N	11ECM	TEXAS, OK	2288	4
11		1402 0012 0003 04			6N	11ECM	TEXAS, OK	3481	4
12		1402 0012 0007 04			6N	11ECM	TEXAS, OK	3153	4
13		1402 0012 0008 04			6N	11ECM	TEXAS, OK	3768	4
14		1402 0012 0010 04			6N	11ECM	TEXAS, OK	5633	4
15		1402 0012 0011 04			6N	11ECM	TEXAS, OK	2051	4
16		1402 0012 0012 04			6N	11ECM	TEXAS, OK	1927	4
17		1402 0012 0014 04			6N	11ECM	TEXAS, OK	2028	4
18		1402 0012 0015 04			6N	11ECM	TEXAS, OK	3526	4
19		1402 0012 0016 04			6N	11ECM	TEXAS, OK	212	4
20		1402 0012 0019 04			6N	11ECM	TEXAS, OK	236	4
21		1402 0012 0020 04			6N	11ECM	TEXAS, OK	7939	4
22		1402 0012 0021 04			6N	11ECM	TEXAS, OK	10555	4
23		1402 0012 0024 04			6N	11ECM	TEXAS, OK	5538	4
24		1402 0012 0027 04			6N	11ECM	TEXAS, OK	1776	4
25		1402 0012 0032 03			6N	11ECM	TEXAS, OK	5033	4
26		1402 0012 0033 04			6N	11ECM	TEXAS, OK	5548	4
27		1402 0012 0035 04			6N	11ECM	TEXAS, OK	3328	4
28		1402 0012 0039 04			6N	11ECM	TEXAS, OK	3371	4
29		1402 0012 0051 04			6N	11ECM	TEXAS, OK	1948	4
30		1402 0012 0059 04			6N	11ECM	TEXAS, OK	2408	4
31		1402 0012 0060 04			6N	11ECM	TEXAS, OK	2144	4
32		1402 0012 0061 04			6N	11ECM	TEXAS, OK	3879	4
33		1602 0012 0002 06			6N	11ECM	TEXAS, OK	21910	6
34		1602 0012 0003 06			6N	11ECM	TEXAS, OK	2110	6
35		1602 0013 0002 08			6N, 5N	10ECM, 11ECM	TEXAS, OK	28436	8
36		1603 0129 0037 08			35S	42W	MORTON, KS	10000	8
36A		1402 0012 0028 04			6N	11ECM	TEXAS, OK	4000	4
36B		1402 0012 0031 04			5N, 6N	11ECM	TEXAS, OK	5000	4

Schedules

Total Pipe Length (DEF'S)					179027	
GPM						
37	RR-2-2-6 EXT	2N	9ECM	CIMARRON, OK	6847	4.5
38	RR-2-2-6-2	2N	9ECM	CIMARRON, OK	10179	3.5
39	RR-2-2-6-2-1	2N	9ECM	CIMARRON, OK	37	3.5
40	RR-2-2-6-3	2N	9ECM	CIMARRON, OK	1365	3.5
41	RR-2-2 EXT	2N	10ECM	CIMARRON, OK	20184	6.625
42	RR-2-2-12	2N	10ECM	TEXAS, OK	2778	3.5
43	RR-2-1	3N	9ECM	CIMARRON, OK	13881	6.625
44	RR-2-1-1	3N	9ECM	CIMARRON, OK	1792	4.5
45	RR-2-1-4	3N	9ECM	CIMARRON, OK	2197	6.625
46	RR-2-2	3N	9ECM	CIMARRON, OK	14280	6.625
47	RR-2-2-1	3N	9ECM	CIMARRON, OK	3374	4.5
48	RR-2-2-10	3N	9ECM	CIMARRON, OK	5907	4.5
49	RR-2-2-10-1	3N	9ECM	CIMARRON, OK	1779	4.5
50	RR-2-2-13	3N	9ECM	CIMARRON, OK	176	3.5
51	RR-2-2-2	3N	9ECM	CIMARRON, OK	2499	3.5
52	RR-2-2-6	3N	9ECM	CIMARRON, OK	15785	6.625
53	RR-2-3	3N	9ECM	CIMARRON, OK	7467	4.5
54	RR-2-3-1	3N	9ECM	CIMARRON, OK	538	4.5
55	RR-2-3-2	3N	9ECM	CIMARRON, OK	3040	2.375
56	RR-2-5	3N	9ECM	CIMARRON, OK	7336	6.625
57	RR-2-5-1	3N	9ECM	CIMARRON, OK	19017	6.625
58	RR-2-2-8	3N	10ECM	TEXAS, OK	2775	3.5
59	RR-2-1-3	4N	9ECM	CIMARRON, OK	3175	4.5
60	RR-2-1-3-1	4N	9ECM	CIMARRON, OK	3168	4.5
61	RR-2-1-3-2	4N	9ECM	CIMARRON, OK	4782	4.5
62	RR-2-1-3-2-1	4N	9ECM	CIMARRON, OK	2687	3.5
63	RR-2-1-3-2-1-1	4N	9ECM	CIMARRON, OK	1085	4.5
64	RR-2-1-3-2-1-1-1	4N	9ECM	CIMARRON, OK	1180	4.5
65	RR-2-1-3-2-1-1-1-1	4N	9ECM	CIMARRON, OK	20	2.375
66	RR-2-1-5	4N	9ECM	CIMARRON, OK	7251	4.5
67	RR-2-5-1-1	4N	9ECM	CIMARRON, OK	9175	6.625
68	RR-2-5-1-2	4N	9ECM	CIMARRON, OK	187	4.5
Total Pipe Length (GPM)					175943	

Compression: Divesting Midwell Compressor Station, located in section 12, Township 3N, Range 9ECM Cimarron, Oklahoma. The Compressor unit has a 3 stage Joy WB14 compressor and a 520 Horsepower Superior 8G825 driver, compressor throughout capacity is 2000 mcf with a 5 psig suction and 500 psig discharge. The station has inlet gas separation equipment, water and slop oil storage and purchased power.

Schedules



Schedules

Schedule D

SCHEDULE D

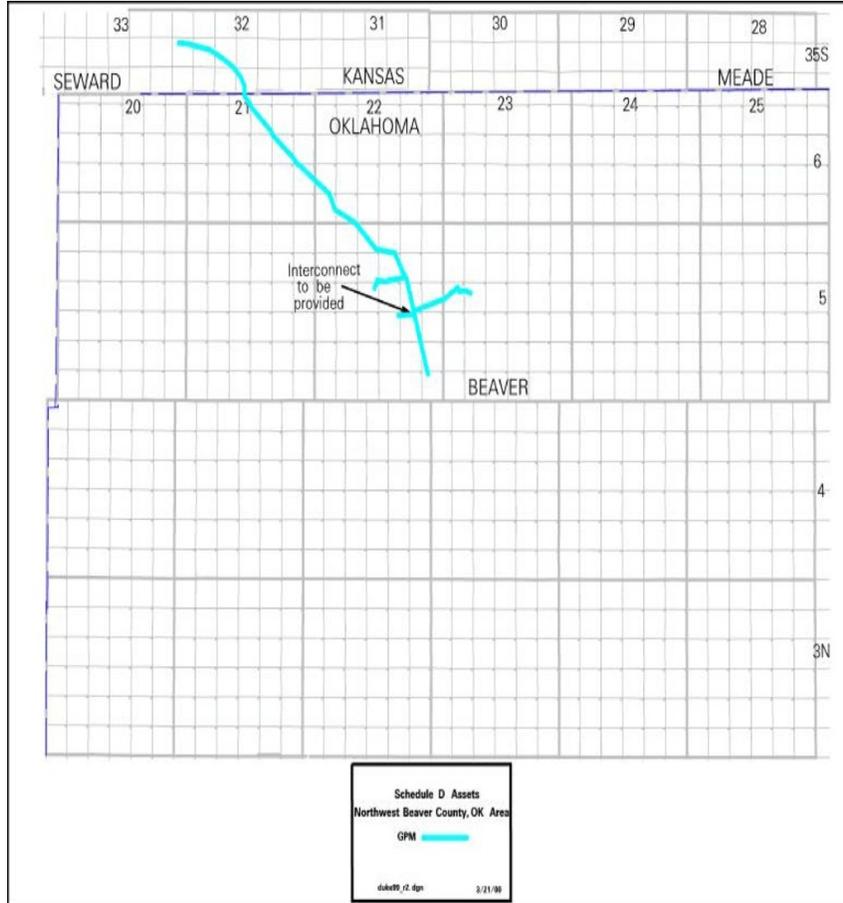
NORTHWEST BEAVER COUNTY, OK AREA

Key No.	GATHERER	LINE NO.	PIPELINE ID	SEC	TWP	RNG	COUNTY	PIPE LENGTH (ft)	PIPE DESCR (diam. in inches)
GPM									
1		OG26801		23	5N	22ECM	BEAVER, OK	7097	4.5
2		OG40301		14	5N	22ECM	BEAVER, OK	11652	6.625
3		OG36801		11	5N	22ECM	BEAVER, OK	53718	6.625
4		OG26801J		23	5N	22ECM	BEAVER, OK	3461	4.5
5		OG26801D		11	5N	22ECM	BEAVER, OK	6672	4.5
6		OG36801A		4	5N	22ECM	BEAVER, OK	840	4.5
7		OG26801A2A		18	5N	23ECM	BEAVER, OK	2747	4.5
8		KG68601B		16	3S5	32W	SEWARD, KS	659	3.5
9		KG68601		15	3S5	32W	SEWARD, KS	641	6.625
10		KG68601A		15	3S5	32W	SEWARD, KS	18094	6.625
Total Pipe Length								105581	

Interconnects: All interconnects will be done to DEFS's usual specification
 All layovers will be completed with steel pipe to DEFS's usual specification:

Pipes Involved	Section	Township	Range	Type	Distance (mi.)	Comments
GPM/GPM	23	5	22	layover	0.02	Tie 4" GPM steel to 6" GPM steel

Schedules



Schedules

Schedule E

SCHEDULE E

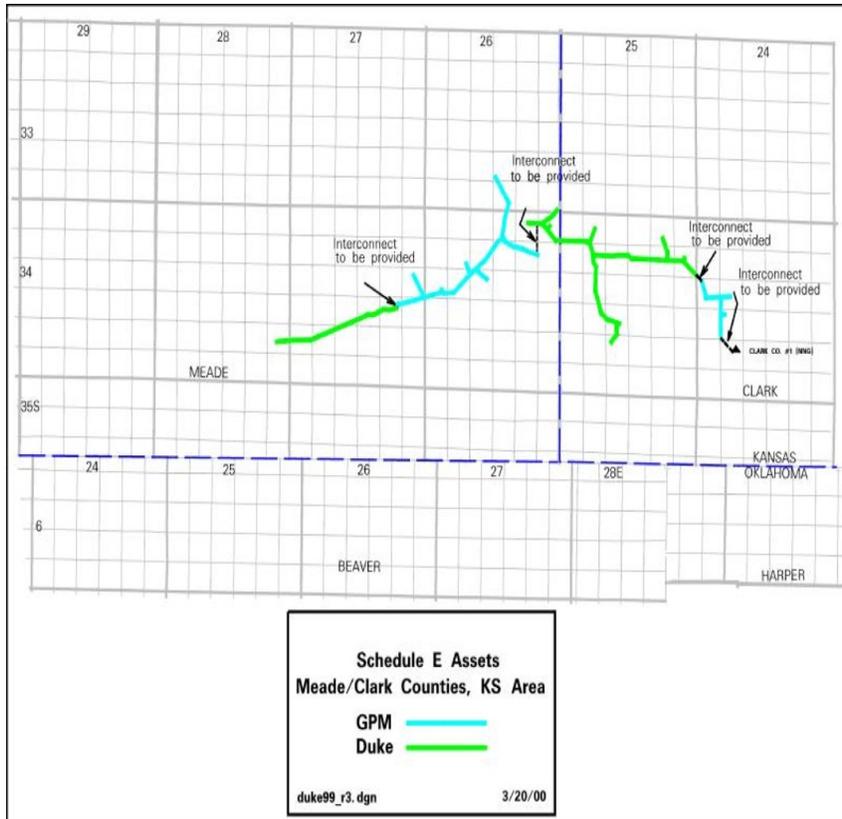
MEADE/CLARK COUNTIES, KS AREA

Key No.	GATHERER	LINE NO.	PIPELINE ID	SEC	TWP	RNG	COUNTY	PIPE LENGTH (ft)	PIPE DESCR (diam. in Inches)
DEFS									
1				6	34S	25W	CLARK, KS	27000	4
2				5	34S	25W	CLARK, KS	3000	2
3				8	34S	25W	CLARK, KS	28500	4
4				2	34S	26W	MEADE, KS	13500	4
5				25	34S	28W	MEADE, KS	25500	2
Total Pipe Length (DEFS)								97500	
GPM									
6	KG12701			11	34S	26W	MEADE, KS	9013	6.625
7	KG12801			20	34S	24W	CLARK, KS	7323	6.625
8	KG12801C			17	34S	24W	CLARK, KS	2126	4.5
9	KG12801A			18	34S	24W	CLARK, KS	3461	4.5
10	KG12801A1			18	34S	24W	CLARK, KS	3062	4.5
11	KG12801D			20	34S	24W	CLARK, KS	923	4.5
12	KG12801A1 M/R			18	34S	24W	CLARK, KS	13	2.5
13	KG12701E			3	34S	26W	MEADE, KS	6642	4.5
14	KG12701E1			34	33S	26W	MEADE, KS	5487	4.5
15	KG51401			3	34S	26W	MEADE, KS	28397	6.625
16	KG51401B			18	34S	26W	MEADE, KS	512	4.5
17	KG51401F			17	34S	26W	MEADE, KS	2140	4.5
18	KG51401G			16	34S	26W	MEADE, KS	3143	4.5
19	KG51401H			13	34S	27W	MEADE, KS	4656	4.5
Total Pipe Length (GPM)								76898	

Interconnects: All interconnects will be done to DEFS's usual specifications.
All layovers will be completed with steel pipe to DEFS's usual specifications.

Pipes Involved	Section	Township	Range	Type	Distance (mi.)	Comments
DEFS/GPM	23	34	27	layover	0.1	Tie GPM 4" steel to DEFS 2" steel
DEFS/GPM	11	34	26	layover	1.33	Tie DEFS 4" steel to GPM 6" steel
DEFS/GPM	18	34	24	layover	0.66	Tie DEFS 4" steel to GPM 4" steel
GPM/WNG	20-20	34	24	layover	1	Lay 4" steel pipe to, and interconnection with Northern's Clark Co. No. 1 compression station.

Schedules



Schedules

Schedule F

SCHEDULE F

ELLIS/WOODWARD COUNTIES, OK AREA

Key No.	GATHERER	LINE NO.	PIPELINE ID	SEC	TWP	RNG	COUNTY	PIPE LENGTH (ft)	PIPE DESCR (diam. in inches)
DEF8									
1		C14-02-060-39-4"			21N	21W	WOODWARD	1065	4.5
2		16-02-060-3-6"			21N	22W	WOODWARD	11418	6.6
3		16-02-060-6-4"			21N	22W	WOODWARD	5155	4.5
4		16-02-060-7-4"			21N	22W	WOODWARD	3762	4.5
5		14-02-060-21-4"			21N	22W	WOODWARD	4731	4.5
6		14-02-060-18-3"			21N	22W	WOODWARD	36	3.5
7		19-02-060-19-3"			21N	22W	WOODWARD	30	3.5
8		14-02-060-26-4"			21N	22W	WOODWARD	2442	4.5
9		14-02-060-35-4"			21N	22W	WOODWARD	2380	4.5
10		14-02-060-15-4"			21N	22W	WOODWARD	30	4.5
11		C14-02-060-40-4"			21N	22W	WOODWARD	3796	4.5
12		C14-02-060-41-4"			21N	22W	WOODWARD	2202	4.5
13		C14-02-60-38-4"			21N	22W	WOODWARD	1759	4.5
14		16-02-060-5-4"			21N	22W	WOODWARD	4711	4.5
15		16-02-060-5-4" EXT.			21N	22W	WOODWARD	2485	4.5
16		14-02-060-17-3"			21N	22W	WOODWARD	33	3.5
17		19-02-060-20-3"			21N	22W	WOODWARD	25	3.5
18		C16-02-060-3-8"			21N,22N	21W,22W	WOODWARD	46935	8.6

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19	16-02-059-07-10"		21N,22N	23W	ELLIG	48935	10
19A	43-02-061-01-12"		19, 20, 21N	23W	ELLIG	60416	12.7
Total Pipe Length (DEF9)						141630	
GPM							
20	OG-28901-H2	2009282	NE15	19N	23W	ELLIG	4564 4.5
21	OG-28901-J1	2009284	NE18/NW07 19N 23W	19N	23W	ELLIG	4582 4.5
22	OG-28901-H1	2009281	NW14	19N	23W	ELLIG	4201 4.5
23	OG-28901-H	2009280	NW16	19N	23W	ELLIG	11034 6.625
24	OG-28901-J	2009283	NW16	19N	23W	ELLIG	7093 6.625
25	OG-28901-J2	2009285	NW17	19N	23W	ELLIG	564 4.5
26	OG-28901 EXT	2009242	8W21	19N	23W	ELLIG	14090 6.625
27	OG-29701-F1B	2009371	NE9/NE10	21N	22W	WOODWARD	3918 4.5
28	OG-29701-F12	2009358	NE/NE16	21N	22W	WOODWARD	5 4.5
29	OG-29701-F1A	2009370	NW8/NE18	21N	22W	WOODWARD	7724 4.5
30	OG-29701-F1	2009369	NW9/NE8	21N	22W	WOODWARD	9963 4.5
31	OG-29701-F2	2009372	8E21	21N	22W	WOODWARD	1874 4.5
32	OG-29701-L	2009379	8E4	21N	22W	WOODWARD	4 4.5
33	OG-29501-D1	2009345	NE3/NW2	21N	23W	ELLIG	2713 4.5
34	OG-29501-D2	2009346	NE4	21N	23W	ELLIG	1844 4.5
35	OG-28801-A1 EXT 3	2009332	NW26/0W23	21N	23W	ELLIG	3313 4.5
36	OG-28801-A1 EXT 2	2009331	NW27/NW26	21N	23W	ELLIG	5491 4.5
37	OG-28801-A2	2009329	8W28	21N	23W	ELLIG	93 4.5
38	OG-28801-A1 EXT	2009330	8W28/NW27	21N	23W	ELLIG	228 4.5

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39	OG-28801-A1 EXT	2009330	8W28/NW27	21N	23W	ELLIS	4835	4.5
40	OG-28801-A	2009328	8W29	21N	23W	ELLIS	5221	4.5
41	OG-28801-F	2009139	8W29	21N	23W	ELLIS	65	4.5
42	OG-29701-F	2009367	8W34	22N	22W	WOODWARD	20678	4.5
52	OG-28401-E1	2010324	NE/NW4	22N	23W	ELLIS	1884	4.5
53	OG-28401-J1A	2010331	NE18	22N	23W	ELLIS	2327	4.5
54	OG-28401	2010315	NE28	22N	23W	ELLIS	22877	12.75
55	OG-28401	2010315	NE28	22N	23W	ELLIS	6986	10.75
56	OG-28401	2010315	NE28	22N	23W	ELLIS	21185	8.625
57	OG-28401	2010315	NE28	22N	23W	ELLIS	3151	8.625
58	OG-28401	2010315	NE28	22N	23W	ELLIS	14800	6.625
59	OG-29501-F	2009347	NE31	22N	23W	ELLIS	1985	4.5
60	OG-28401-E	2010323	NW3	22N	23W	ELLIS	2425	4.5
61	OG-29501-B	2009341	NW32	22N	23W	ELLIS	2	4.5
62		8	21N	22N	WOODWARD/ELLIS	15903	4	
		36	22N	23W				
63	OG-28401-J1	2010329	8E5	22N	23W	ELLIS	4399	6.625
64	OG-28401-J1 EXT	2010330	8E8/NE18	22N	23W	ELLIS	6120	4.5
65	OG-28401-J	2010328	8W3	22N	23W	ELLIS	16623	6.625
66	OG-28401-J	2010328	8W3	22N	23W	ELLIS	4193	6.625
67	OG-29501-A	2009339	8W31	22N	23W	ELLIS	49	4.5
68	OG-29501-A1	2009340	8W31	22N	23W	ELLIS	4	4.5
69	OG-29501-C	2009342	8W32	22N	23W	ELLIS	2045	4.5
70	OG-28801-E	2009337	8W33	22N	23W	ELLIS	8	4.5
71	OG-29501-D	2009343	8W33	22N	23W	ELLIS	8809	6.625
72	OG-29501-E	2009344	8W33	22N	23W	ELLIS	1489	4.5
73	OG-29501	2009338	8W33/8W31	22N	23W	ELLIS	1618	6.625
74	OG-29501	2009338	8W33/8W31	22N	23W	ELLIS	3228	6.625
75	OG-29501	2009338	8W33/8W31	22N	23W	ELLIS	5586	4.5
76	OG-29501 EXT	2009453	8W31/8W36	22N	24W	ELLIS	6629	4.5
77	OG-29501 EXT	2009453	8W31/8W36	22N	24W	ELLIS	34	3.5
78	OG-28401-K1	2010338	NE15	23N	22W	WOODWARD	2713	4.5
79	OG-28401-K1A	2010339	8E10	23N	22W	WOODWARD	2639	4.5
80	OG-28501-A	2010346	8E30	23N	22W	WOODWARD	28	4.5
81	OG-28401-K1A1	2010340	8W11	23N	22W	WOODWARD	2594	4.5
82	OG-28401-K1A2	2010373	8W11	23N	22W	WOODWARD	6358	4.5
83	OG-49801-A1	2010374	8W12	23N	22W	WOODWARD	283	4.5
84	OG-28501-1	2010345	8W30	23N	22W	WOODWARD	4	4.5
85	OG-28501-B1	2010348	8W31	23N	22W	WOODWARD/ELLIS	11705	4.5
86	OG-28401-L	2010341	NE14	23N	23W	ELLIS	90	4.5
87	OG-28401-D	2010320	NE2	23N	23W	ELLIS	656	4.5
88	OG-28401-D1	2010321	NE2	23N	23W	ELLIS	4011	4.5
89	OG-28601-L	2010370	NE21	23N	23W	ELLIS	671	4.5
90	OG-28601-H1	2010367	NE32	23N	23W	ELLIS	2609	4.5
91	OG-28601-H1A	2010369	NE32	23N	23W	ELLIS	4198	4.5
92	OG-28501-B	2010347	NE36	23N	23W	WOODWARD/ELLIS	2482	4.5
93	OG-28501-B	2010347	NE36	23N	23W	WOODWARD/ELLIS	2192	4.5
94	OG-28401-D1A	2010322	NW1	23N	23W	ELLIS	4843	4.5
95	OG-28401-D1A	2010322	NW1	24N	22W	WOODWARD	2376	4.5
96	OG-28401-H1	2010327	NW10	23N	23W	ELLIS	1119	4.5

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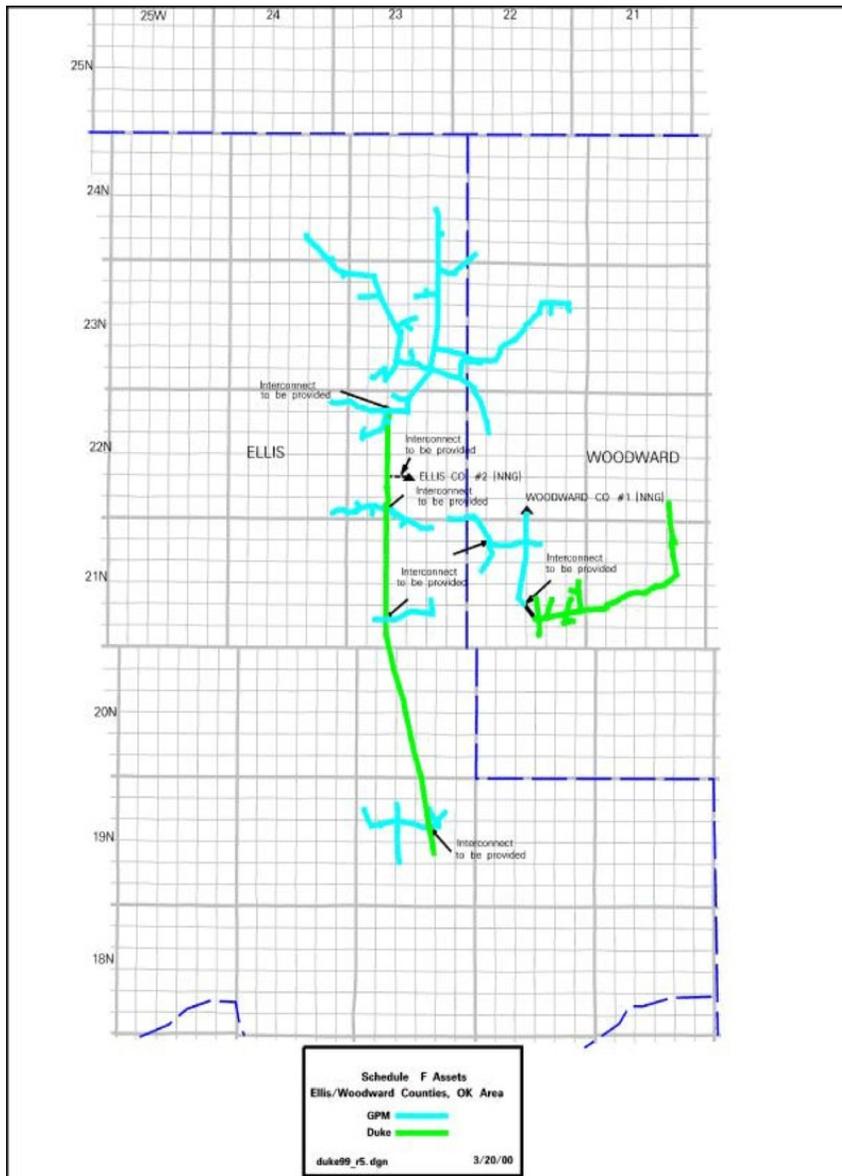
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97	OG-28601-B	2010359	NW21	23N	23W	ELLIS	72	4.5
98	OG-28601-G	2010363	NW21	23N	23W	ELLIS	5812	4.5
99	OG-28401-K	2010337	NW26	23N	23W	WOODWARD/ELLIS	9151	6.625
100	OG-28401-K	2010337	NW26	23N	23W	WOODWARD/ELLIS	6939	6.625
101	OG-28401-K	2010337	NW26	23N	23W	WOODWARD/ELLIS	12573	6.625
102	OG-28401-K	2010337	NW26	23N	23W	WOODWARD/ELLIS	5725	6.625
103	OG-28601-G1	2010364	SE16	23N	23W	ELLIS	19	4.5
104	OG-28601-G2	2010365	SE16	23N	23W	ELLIS	2423	4.5
105	OG-28601 EXT	2010357	SE21	23N	23W	ELLIS	11983	6.625
106	OG-28601-C	2010360	SE8	23N	23W	ELLIS	27	4.5
107	OG-28601-D	2010361	SE8	23N	23W	ELLIS	5357	4.5
108	OG-28601-J	2010368	SE8	23N	23W	ELLIS	5136	4.5
109	OG-28401-H	2010326	SW11	23N	23W	ELLIS	5798	4.5
110	OG-28501	2010344	SW26	23N	23W	WOODWARD/ELLIS	17272	4.5
111	OG-28601	2010349	SW26	23N	23W	ELLIS	14676	6.625
112	OG-28601-F	2010362	SW27	23N	23W	ELLIS	3014	4.5
113	OG-28601-A	2010358	SW28	23N	23W	ELLIS	319	4.5
114	OG-28601-H	2010366	SW28	23N	23W	ELLIS	5704	4.5
115	OG-55301	2010371	SW5	23N	23W	ELLIS	1401	4.5
116	OG-55301	2010371	SW5	23N	23W	ELLIS	9662	4.5
117	OG-27801-B3	2010278	NW1	23N	24W	ELLIS	997	4.5
118	OG-55301-A	2010372	SW1	23N	24W	ELLIS	950	4.5
119	OG-28401-G	2010325	SW23	24N	23W	ELLIS	26	4.5
120	OG-28401-A	2010319	SW26	24N	23W	ELLIS	1020	4.5
121	OG-27801-H	2010288	NE34	24N	24W	ELLIS	1410	4.5
122	OG-27801-B	2010276	NW35	24N	24W	ELLIS	2706	4.5
123	OG-27801-B EXT	2010277	NW35	24N	24W	ELLIS	6717	4.5
124	OG-27801-H1	2010289	SE27	24N	24W	ELLIS	4	4.5
125	OG-27801-B4	2010279	SE35	24N	24W	ELLIS	314	4.5
Total Pipe Length (GPM)							468928	

Interconnects: All interconnects will be done to DEFS's usual specifications.
All layovers will be completed with steel pipe to DEFS's usual specifications.

Area	Pipes Involved	Section	Township	Range	Type	Distance (mi)	Comments
Ellis	DEFS/OPM	4	22	23	crossover		Tie 6" line, steel-steel
Ellis	DEFS/Northern	28	22	23	lay over	0.95	Lay steel 6.58" line to, and interconnection with, Northern's Ellis County No. 2 compression station, tie steel-steel
Ellis	DEFS/OPM	33	22	23	crossover		Tie 6" line, steel-steel
Ellis	DEFS/OPM	29	21	23	crossover		Tie 4" line, steel-steel
Ellis	DEFS/OPM	15	19	23	crossover		Tie 4" line, steel-steel
Woodward	GPM/OPM	8	21	22	crossover		Tie 4" line, steel-steel
Woodward	DEFS/OPM	21-27	21	22	lay over	0.75	Lay 4.12" O.D. steel pipe
Woodward	GPM/Northern	34	22	22	existing		Connection exists to Northern's Woodward No. 1 compressor station.

Schedules



Schedules

Schedule G

SCHEDULE G

DEWEY/ROGER MILLS COUNTIES, OK AREA

Key No.	GATHERER	LINE NO.	PIPELINE ID	SEC	TWP	RNG	COUNTY	PIPE LENGTH (ft)	PIPE DEGR (diam. in inches)
DEFS									
1		16-02-051-1-10'			17N	18W, 19W	DEWEY	32450	10.6
2		14-02-051-4-4"			17N	19W	DEWEY	3080	4.5
3		14-02-051-5-4"			17N	19W	DEWEY	2950	4.5
4		14-02-051-6-4"			17N	19W	DEWEY	1802	4.5
5		14-02-051-16-4"			17N	19W	DEWEY	3872	4.5
6		14-02-051-22-4"			17N	19W	DEWEY	3023	4.5
7		14-02-051-12-4" (retired)			17N	19W	DEWEY	1634	4.5
8		14-02-051-17-4" (retired)			17N	19W	DEWEY	4719	4.5
9		W. FARMER0 3" (scaled)			17N	19W	DEWEY	2500	3.5
10		W. FARMER0 3" (scaled)			17N	19W	DEWEY	5100	3.5
11		W. FARMER0 3" (scaled)			17N	19W	DEWEY	4300	3.5
12		16-02-051-9-8"			17N	19W, 20W	DEWEY	11028	8.6
13		14-02-051-36-4"			17N	20W	DEWEY	86	4.5
14		14-02-051-42-4"			17N	20W	DEWEY	23733	4.5
15		C14-02-051-70-4"			17N	20W	DEWEY	2880	4.5
16		16-02-051-3-6"			17N, 18N	19W	DEWEY	9957	6.6
17		W. FARMER0 4" (scaled)			17N, 18N	19W	DEWEY	4700	4.5
18		W. FARMER0 4" (scaled)			17N, 18N	19W	DEWEY	4200	4.5
19		16-02-051-18-4"			17N, 18N	19W, 20W	DEWEY	11912	4.5
20		14-02-051-56-4"			18N	19W	DEWEY	5570	4.5
21		14-02-051-49-4"			18N	19W	DEWEY	4525	4.5
22		14-02-051-7-4"			18N	19W	DEWEY	1069	4.5
23		14-02-051-8-4"			18N	19W	DEWEY	2699	4.5
24		14-02-051-13-4" (retired)			18N	19W	DEWEY	1942	4.5
25		C16-02-051-74-6"			18N	19W	DEWEY	1894	6.6
26		W. FARMER0 3" (scaled)			18N	19W	DEWEY	6600	3.5
27		W. FARMER0 2" (scaled)			18N	19W	DEWEY	3000	2.4
28		W. FARMER0 3" (scaled)			18N	19W	DEWEY	3000	3.5
29		W. FARMER0 6" (scaled)			18N	19W	DEWEY	8500	6.6
30		14-02-051-58-6"			18N	19W, 20W	DEWEY	11973	6.6
31		19-02-051-62-3"			18N	20W	DEWEY	31	3.5
Total Pipe Length (DE)								184728	
GPM									
101	CM-3 EXT	2001459	17	17N	21W/22W		DEWEY/ROGER MILLS	16697	4.5
102	CM-3 EXT	2001459	30	17N	22W		DEWEY/ROGER MILLS	33273	4.5
103	CM-3 EXT	2001459	NE16	17N	20W		DEWEY/ROGER MILLS	12	4.5
104	CM-3-2-1	2001479	4	16N	22W		ROGER MILLS	2077	3.5
105	CM-3-2-1	2001479	4	16N	22W		ROGER MILLS	2185	3.5
106	CM-3-2-1	2001479	4	16N	22W		ROGER MILLS	6	4.5
107	CM-3-2-1	2001479	4	16N	22W		ROGER MILLS	8	2.37

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108	CM-3-2-2	2001484	9	16N	22W	ROGER MILLS	547	3.5
109	CM-3-2-2	2001484	9	16N	22W	ROGER MILLS	3	4.5
110	CM-3-2-2	2001484	9	16N	22W	ROGER MILLS	5	2.37
111	CM-3-2-3	2001485	9	16N	22W	ROGER MILLS	342	4.5
112	CM-3-2-3	2001485	9	16N	22W	ROGER MILLS	9	4.5
113	CM-3-2-3	2001485	9	16N	22W	ROGER MILLS	35	2.37
114	CM-3-2-3 EXT	2001486	9	16N	22W	ROGER MILLS	1699	3.5
115	CM-3-2-3 EXT	2001486	9	16N	22W	ROGER MILLS	12	4.5
116	CM-3-2-3 EXT	2001486	9	16N	22W	ROGER MILLS	10	2.37
117	CM-3-2-6	2001492	9&10	16N	22W	ROGER MILLS	3747	3.5
118	CM-3-2-6	2001492	9&10	16N	22W	ROGER MILLS	8	4.5
119	CM-3-2	2001478	8E 25'	17N	22W	ROGER MILLS	111	8.62
120	CM-3-2	2001478	16'	16N	22W	ROGER MILLS	4	10.75
121	CM-3-2	2001478	16'	16N	22W	ROGER MILLS	18315	8.62
122	CM-3-2	2001478	16'	16N	22W	ROGER MILLS	2762	8.62
123	CM-3-2	2001478	16'	16N	22W	ROGER MILLS	6678	6.62
124	CM-3-2	2001478	16'	16N	22W	ROGER MILLS	8	4.5
125	CM-3-2	2001478	NW 16'	16N	22W	ROGER MILLS	19	2.37
126	CM-3-2-4	2001487	16	16N	22W	ROGER MILLS	629	3.5
127	CM-3-2-4	2001487	16	16N	22W	ROGER MILLS	3	4.5
128	CM-3-2-4	2001487	16	16N	22W	ROGER MILLS	16	2.37
129	CM-3-2-10	2001480	NW10	16N	22W	ROGER MILLS	373	4.5
130	CM-3-2-10	2001480	NW10	16N	22W	ROGER MILLS	26	4.5
131	CM-3-2-12	2001482	8E/8W09	16N	22W	ROGER MILLS	743	4.5
132	CM-3-2-12	2001482	8E/8W09	16N	22W	ROGER MILLS	19	4.5
133	CM-3-2-6-1	2001493	8E9	16N	22W	ROGER MILLS	2	3.5
134	CM-3-2-6-1	2001493	8E9	16N	22W	ROGER MILLS	832	4.5
135	CM-3-2-6-1	2001493	8E9	16N	22W	ROGER MILLS	6	4.5
136	CM-3-2-11	2001481	8W03/NE10	16N	22W	ROGER MILLS	286	6.62
137	CM-3-2-11	2001481	8W03/NE10	16N	22W	ROGER MILLS	1365	6.62
138	CM-3-2-11	2001481	8W03/NE10	16N	22W	ROGER MILLS	20	3.5
139	CM-3-6-1-2	2001514	NE/NW10	17N	20W	DEWEY	659	4.5
140	CM-3-6-1-2	2001514	NE/NW10	17N	20W	DEWEY	18	4.5
141	CM-3-6-2	2001524	NE/8E 18	17N	20W	DEWEY	1224	6.62
142	CM-3-6-2	2001524	NE/8E 18	17N	20W	DEWEY	35	4.5
143	CM-3-6-3	2001525	NE/8E 18	17N	20W	DEWEY	931	4.5
144	CM-3-6-3	2001525	NE/8E 18	17N	20W	DEWEY	29	4.5
145	CM-3-1-4-1-1 EXT	2001470	NE/8W 18	17N	20W	DEWEY	1946	4.5
146	CM-3-1-4-1-1 EXT	2001470	NE/8W 18	17N	20W	DEWEY	42	4.5
147	CM-3-1-4-1-1 EXT 2	2001471	NE/8W 18	17N	20W	DEWEY	1932	4.5
148	CM-3-1-4-1-1 EXT 2	2001471	NE/8W 18	17N	20W	DEWEY	38	4.5
149	CM-3-4-2	2001505	NE10	17N	20W	DEWEY	82	4.5
150	CM-3-4-2	2001505	NE10	17N	20W	DEWEY	22	4.5
151	CM-3-6-1-3-3	2001521	NE11	17N	20W	DEWEY	95	6.62
152	CM-3-6-1-3-3	2001521	NE11	17N	20W	DEWEY	12	3.5
153	CM-3-6-1-3-3	2001521	NE11	17N	20W	DEWEY	9	3.5
154	CM-3-12	2001477	NE16-NW34	17N	20W	DEWEY	124	6.62
155	CM-3-12	2001477	NE16-NW34	17N	20W	DEWEY	4	8.62
156	CM-3-12	2001477	NE16-NW34	17N	20W	DEWEY	1	8.62
157	CM-3-12	2001477	NE16-NW34	17N	20W	DEWEY	1	8.62

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158	CM-3-12	2001477 NE16-NW34	17N	20W	DEWEY	14	6.62
159	CM-3-12	2001477 NE16-NW34	17N	20W	DEWEY	10526	6.62
160	CM-3-12	2001477 NE16-NW34	17N	20W	DEWEY	90	6.62
161	CM-3-12	2001477 NE16-NW34	17N	20W	DEWEY	860	6.62
162	CM-3-12	2001477 NE16-NW34	17N	20W	DEWEY	4474	6.62
163	CM-3-12	2001477 NE16-NW34	17N	20W	DEWEY	90	6.62
164	CM-3-12	2001477 NE16-NW34	17N	20W	DEWEY	174	6.62
165	CM-3-12	2001477 NE16-NW34	17N	20W	DEWEY	135	6.62
166	CM-3-12	2001477 NE16-NW34	17N	20W	DEWEY	2138	6.62
167	CM-3-12	2001477 NE16-NW34	17N	20W	DEWEY	3	3.5
168	CM-3-12	2001477 NE16-NW34	17N	20W	DEWEY	4	3.5
169	CM-3-1-2	2001462 NE16	17N	20W	DEWEY	589	3.5
170	CM-3-1-2	2001462 NE16	17N	20W	DEWEY	8	4.5
171	CM-3-1-2	2001462 NE16	17N	20W	DEWEY	10	2.37
172	CM-3-4	2001503 NE16-NW10	17N	20W	DEWEY	58	6.62
173	CM-3-4	2001503 NE16-NW10	17N	20W	DEWEY	3	10.75
174	CM-3-4	2001503 NE16-NW10	17N	20W	DEWEY	6679	6.62
175	CM-3-4	2001503 NE16-NW10	17N	20W	DEWEY	6	4.5
176	CM-3-6-1	2001511 NE16-NW10	17N	20W	DEWEY	4534	6.62
177	CM-3-6-1	2001511 NE16-NW10	17N	20W	DEWEY	10	4.5
178	CM-3-5	2001506 NE16-NW15	17N	20W	DEWEY	1045	4.5
179	CM-3-5	2001506 NE16-NW15	17N	20W	DEWEY	23	4.5
180	CM-3-1	2001460 NE16-OW09	17N	20W	DEWEY	3535	6.62
181	CM-3-1	2001460 NE16-OW09	17N	20W	DEWEY	8	4.5
182	CM-3-1	2001460 NE16-OW09	17N	20W	DEWEY	4	2.37
183	CM-3-6-1-3-1	2001519 NW12	17N	20W	DEWEY	439	6.62
184	CM-3-6-1-3-1	2001519 NW12	17N	20W	DEWEY	4	3.5
185	CM-3-6-1-3-1	2001519 NW12	17N	20W	DEWEY	9	3.5
186	CM-3-6	2001507 NW16-NW18	17N	20W	DEWEY	16205	6.62
187	CM-3-6	2001507 NW16-NW18	17N	20W	DEWEY	3	4.5
188	CM-3-6	2001507 NW16-NW18	17N	20W	DEWEY	16	4.5
189	CM-3-6 EXT	2001508 14	17N	21W	DEWEY/ROGER MILLS	476	6.62
190	CM-3-6 EXT	2001508 14	17N	21W	DEWEY/ROGER MILLS	10467	6.62
191	CM-3-6 EXT	2001508 14	17N	21W	DEWEY/ROGER MILLS	3	3.5
192	CM-3-6 EXT	2001508 14	17N	21W	DEWEY/ROGER MILLS	12	3.5
193	CM-3-1-4-1-1	2001469 SE/OW18	17N	20W	DEWEY	1151	4.5
194	CM-3-1-4-1-1	2001469 SE/OW18	17N	20W	DEWEY	20	4.5
195	CM-3-1-1	2001461 SE09/NE16	17N	20W	DEWEY	1101	3.5
196	CM-3-1-1	2001461 SE09/NE16	17N	20W	DEWEY	7	4.5
197	CM-3-1-1	2001461 SE09/NE16	17N	20W	DEWEY	10	2.37
198	CM-3-4-1	2001504 SE10	17N	20W	DEWEY	6	4.5
199	CM-3-4-1	2001504 SE10	17N	20W	DEWEY	839	4.5
200	CM-3-4-1	2001504 SE10	17N	20W	DEWEY	3	4.5
201	CM-3-4-1	2001504 SE10	17N	20W	DEWEY	9	4.5
202	CM-3-1-4 MR 2	2001466 SE17	17N	20W	DEWEY	7	4.5
203	CM-3-1-4-1	2001467 NW17-SE18	17N	20W	DEWEY	1	4.5
204	CM-3-1-4-1	2001467 NW17-SE18	17N	20W	DEWEY	3745	4.5
205	CM-3-1-4-1	2001467 NW17-SE18	17N	20W	DEWEY	23	4.5
206	CM-3-6-1-3	2001515 SE2/OW2	17N	20W	DEWEY	3703	6.62
207	CM-3-6-1-3	2001515 SE2/OW2	17N	20W	DEWEY	28	4.5

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208	CM-3-6-1-3 EXT	2001516	0E2-NW12	17N	20W	DEWEY	13	4.5
209	CM-3-6-1-3 EXT	2001516	0E2-NW12	17N	20W	DEWEY	7980	6.62
210	CM-3-6-1-3 EXT	2001516	0E2-NW12	17N	20W	DEWEY	7	3.5
211	CM-3-6-1-3 EXT	2001516	0E2-NW12	17N	20W	DEWEY	8	3.5
212	CM-3-8-6	2001578	0E29-0E28	17N	20W	DEWEY	6276	6.62
213	CM-3-8-6	2001578	0E29-0E28	17N	20W	DEWEY	2	4.5
214	CM-3-8-6	2001578	0E29-0E28	17N	20W	DEWEY	6	4.5
215	CM-3-6-1 EXT	2001512	0W2-0W10	17N	20W	DEWEY	4504	6.62
216	CM-3-6-1 EXT	2001512	0W2-0W10	17N	20W	DEWEY	4	4.5
217	CM-3-6-1 EXT	2001512	0W2-0W10	17N	20W	DEWEY	25	4.5
218	CM-3-1-3-1	2001464	0W9-0W16	17N	20W	DEWEY	30	3.5
219	CM-3-1-3-1	2001464	0W9-0W16	17N	20W	DEWEY	8	3.5
220	CM-3-6-1-3-5	2001523	0W2**	17N	20W	DEWEY	3	6.62
221	CM-3-6-1-3-5	2001523	0W2	17N	20W	DEWEY	5722	6.62
222	CM-3-6-1-3-5	2001523	0E34	18N	20W	DEWEY	7	3.5
223	CM-3-1-4	2001465	0W9-NW9	17N	20W	DEWEY	6235	4.5
224	CM-3-1-4	2001465	0W9-NW9	17N	20W	DEWEY	44	4.5
225	CM-3-1-3	2001463	0W9-NW16	17N	20W	DEWEY	1162	3.5
226	CM-3-1-3	2001463	0W9-NW16	17N	20W	DEWEY	13	3.5
227	CM-3-6-8	2001529	13	17N	21W	ROGER MILLS	701	4.5
228	CM-3-6-8	2001529	13	17N	21W	ROGER MILLS	10	3.5
229	CM-3-2-5	2001488	NE25-NE26	17N	22W	ROGER MILLS	7629	4.5
230	CM-3-2-5	2001488	NE25-NE26	17N	22W	ROGER MILLS	10	4.5
231	CM-3-6-5	2001526	NW14	17N	21W	ROGER MILLS	453	4.5
232	CM-3-6-5	2001526	NW14	17N	21W	ROGER MILLS	6	3.5
233	CM-3-6-5	2001526	NW14	17N	21W	ROGER MILLS	7	3.5
234	CM-3-6 EXT 2	2001509	NW14/0W11	17N	21W	ROGER MILLS	1	8.62
235	CM-3-6 EXT 2	2001509	NW14/0W11	17N	21W	ROGER MILLS	2607	6.62
236	CM-3-6 EXT 2	2001509	NW14/0W11	17N	21W	ROGER MILLS	3	3.5
237	CM-3-6 EXT 2	2001509	NW14/0W11	17N	21W	ROGER MILLS	10	3.5
238	CM-3-3-1-1	2001500	NE19	17N	21W	ROGER MILLS	3598	6.62
239	CM-3-3-1-1	2001500	NE19	17N	21W	ROGER MILLS	7	3.5
240	CM-3-3-1-1	2001500	NE19	17N	21W	ROGER MILLS	8	3.5
241	CM-3-3	2001498	NW30-NW29	17N	21W	ROGER MILLS	6387	8.62
242	CM-3-3	2001498	NW30-NW29	17N	21W	ROGER MILLS	4	10.75
243	CM-3-3	2001498	NW30-NW29	17N	21W	ROGER MILLS	1609	8.62
244	CM-3-3	2001498	NW30-NW29	17N	21W	ROGER MILLS	28	4.5
245	CM-3-3	2001498	NW30-NW29	17N	21W	ROGER MILLS	11	3.5
246	CM-3-3-1	2001499	NW29-0W17	17N	21W	ROGER MILLS	8060	6.62
247	CM-3-3-1	2001499	NW29-0W17	17N	21W	ROGER MILLS	18	4.5
248	CM-3-6-7	2001528	0E10-NW3	17N	21W	ROGER MILLS	9652	6.62
249	CM-3-6-7	2001528	0E10-NW3	17N	21W	ROGER MILLS	4	3.5
250	CM-3-6-7	2001528	0E10-NW3	17N	21W	ROGER MILLS	8	3.5
251	CM-3-6 EXT 3	2001510	0W11/0E10	17N	21W	ROGER MILLS	2284	6.62
252	CM-3-6 EXT 3	2001510	0W11/0E10	17N	21W	ROGER MILLS	14	3.5
253	CM-3-6 EXT 3	2001510	0W11/0E10	17N	21W	ROGER MILLS	1	3.5
254	CM-3-6-6	2001527	0W14-NW23	17N	21W	ROGER MILLS	3450	6.62
255	CM-3-6-6	2001527	0W14-NW23	17N	21W	ROGER MILLS	5	4.5
256	CM-3-2-7	2001494	35	17N	22W	ROGER MILLS	4325	4.5
257	CM-3-2-7	2001494	35	17N	22W	ROGER MILLS	5	4.5

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258	CM-3-2-7	2001494	35	17N	22W	ROGER MILLS	8	2.37
259	CM-3-11-1	2001476	NE24	17N	22W	ROGER MILLS	594	6.62
260	CM-3-11-1	2001476	NE24	17N	22W	ROGER MILLS	10	4.5
261	CM-3-3-2	2001501	NE25	17N	22W	ROGER MILLS	860	3.5
262	CM-3-3-2	2001501	NE25	17N	22W	ROGER MILLS	34	3.5
263	CM-3-2-5-1	2001489	NW25	17N	22W	ROGER MILLS	230	4.5
264	CM-3-2-5-1	2001489	NW25	17N	22W	ROGER MILLS	4	4.5
265	CM-3-2-7 EXT	2001495	NW35	17N	22W	ROGER MILLS	1850	3.5
266	CM-3-2-7 EXT	2001495	NW35	17N	22W	ROGER MILLS	5	2.37
267	CM-3-2-9	2001497	NW36	17N	22W	ROGER MILLS	1440	3.5
268	CM-3-2-5-3 EXT	2010545	0E22	17N	22W	ELLIS	6856	4.5
269	CM-3-2-5-3 EXT	2010545	0E22	17N	22W	ELLIS	37	3.5
270	CM-3-2-5-3	2001491	0E22/NE27	17N	22W	ROGER MILLS	2	4.5
271	CM-3-2-5-3	2001491	0E22/NE27	17N	22W	ROGER MILLS	48	6.62
272	CM-3-2-5-3	2001491	0E22/NE27	17N	22W	ROGER MILLS	2501	6.62
273	CM-3-2-5-3	2001491	0E22/NE27	17N	22W	ELLIS	2754	6.62
274	CM-3-11	2001475	0E25-NE13	17N	22W	ROGER MILLS	17	6.62
275	CM-3-11	2001475	0E25-NE13	17N	22W	ROGER MILLS	2	6.62
276	CM-3-11	2001475	0E25-NE13	17N	22W	ROGER MILLS	35	8.62
277	CM-3-11	2001475	0E25-NE13	17N	22W	ROGER MILLS	11159	8.62
278	CM-3-11	2001475	0E25-NE13	17N	22W	ROGER MILLS	2	4.5
279	CM-3-11	2001475	0E25-NE13	17N	22W	ROGER MILLS	14	4.5
280	CM-3-2-8	2001496	0E25	17N	22W	ROGER MILLS	1136	3.5
281	CM-3-3-3	2001502	0E25	17N	22W	ROGER MILLS	3	8.62
282	CM-3-3-3	2001502	0E25	17N	22W	ROGER MILLS	5	10.75
283	CM-3-3-3	2001502	0E25	17N	22W	ROGER MILLS	18	8.62
284	CM-3-2-13	2001483	0E36	17N	22W	ROGER MILLS	1409	6.62
285	CM-3-2-13	2001483	0E36	17N	22W	ROGER MILLS	13	3.5
286	CM-3-2-13	2001483	0E36	17N	22W	ROGER MILLS	9	3.5
287	CM-3-6-1-1	2001513	0W10	17N	20W	DEWEY	70	6.62
288	CM-3-6-1-1	2001513	0W10	17N	20W	DEWEY	6	4.5
289	CM-3-6-1-3-2	2001513	12	17N	20W	DEWEY	2000	4.5
Total Pipe Length (0P)							288488	

*from 0E25-17N thru 16-16N

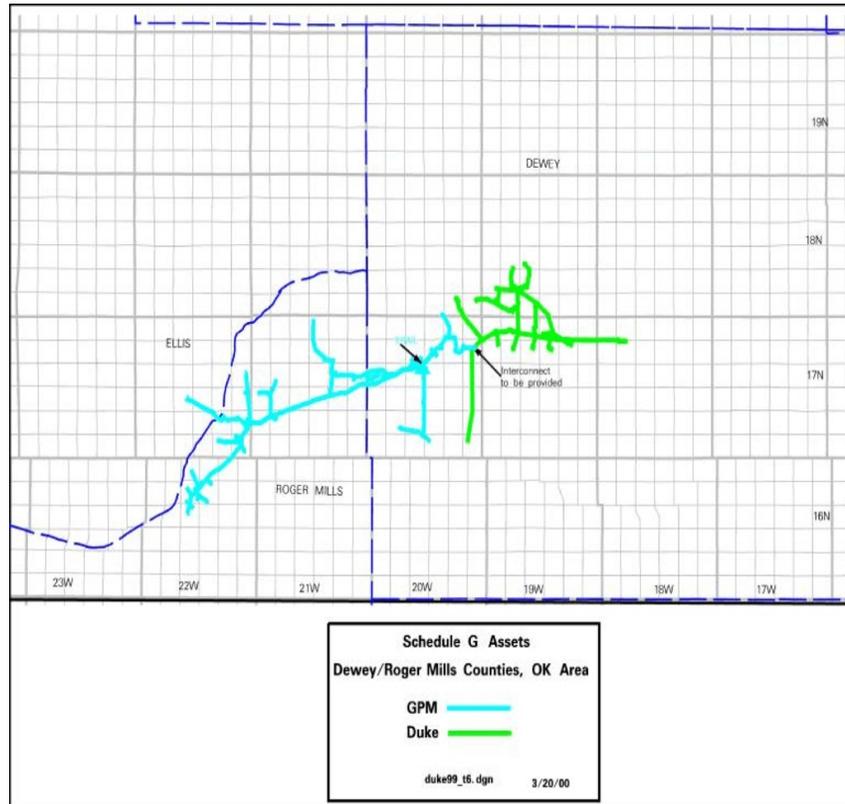
**from 0W0-17N thru 0E04-16N

Compression: Divesting Trail Compressor Station in Section 16, Township 17N, Range 20W, Dewey County, Oklahoma. The station has one compressor unit. Unit is three-staged Joy WB-14 compressor with 580 horsepower Waukesha L-7042 driver. Station throughput capacity is approximately 1,800 mcf/d with a 5 psig suction and 700 psig discharge. The station has inlet gas separation equipment, water and stop oil storage and purchased power available.

Interconnects: All interconnects will be done to DEFS's usual spec

Involved	Section	Township	Range	Type	Comments
DEFS/GPM	12	17	20	crossover	Tie 4" DEFS steel to GPM steel

Schedules



Schedules

Schedule H

SCHEDULE H

SOUTHERN OKLAHOMA CITY AREA

Key No.	GATHERER	LINE NO.	PIPELINE ID	SEC	TWP	RNG	COUNTY	PIPE LENGTH (ft)	PIPE DESCR (diam. in inches)
CONOCO									
1				1	10N	5W	CANADIAN	5280	6"8
2				2	10N	5W	CANADIAN	10560	6"8
3				3/10	10N	5W	CANADIAN	5280	6"8
4				4/9	10N	5W	CANADIAN	5280	6"8
5				8	10N	5W	CANADIAN	10560	6"8
6				8	10N	5W	CANADIAN	1320	12"8
7				10	10N	5W	CANADIAN	9240	3"8
8				16	10N	5W	CANADIAN	200	4"8
9				17	10N	5W	CANADIAN	6600	4"8
10				17	10N	5W	CANADIAN	3000	6"8
11				18	10N	5W	GRADY	3000	6"8
12				18	10N	5W	CANADIAN	5280	12"8
13				19	10N	5W	GRADY	2640	6"8
14				7	10N	6W	GRADY	1320	4"8
15				8	10N	6W	GRADY	1320	4"8
16				13	10N	6W	CANADIAN	5280	12"8
17				14	10N	6W	CANADIAN	5280	12"8
18				15	10N	6W	GRADY	500	6"8
19				17	10N	6W	GRADY	3960	6"8
20				18	10N	6W	GRADY	6600	4"8
21				18	10N	6W	GRADY	2000	4"8
22				19	10N	6W	GRADY	1320	6"8
23				19	10N	6W	GRADY	200	3"8
24				20	10N	6W	GRADY	5280	6"8
25				20	10N	6W	GRADY	6600	6"8
26				20	10N	6W	GRADY	3960	4"8
27				21	10N	6W	GRADY	5280	6"8
28				22	10N	6W	GRADY	11000	6"8
29				23	10N	6W	GRADY	5500	6"8
30				23	10N	6W	GRADY	1320	6"8
31				24	10N	6W	GRADY	6600	6"8
32				26	10N	6W	GRADY	3000	6"8
33				27	10N	6W	GRADY	2640	6"8
34				28	10N	6W	GRADY	3960	6"8
35				29	10N	6W	GRADY	10560	6"8
36				29	10N	6W	GRADY	3960	4"8
37				30	10N	6W	GRADY	9240	6"8
38				30	10N	6W	GRADY	6600	6"8
39				31	10N	6W	GRADY	5280	6"8
40				32	10N	6W	GRADY	5000	6"8

Schedules

41		32	10N	8W	GRADY	1320	3'8	
42		33	10N	8W	GRADY	500	8'8	
43		33	10N	8W	GRADY	1320	3'8	
44		4	9N	8W	GRADY	2640	8'8	
45		4	9N	8W	GRADY	2640	4'8	
46		5	9N	8W	GRADY	7920	8'8	
47		5	9N	8W	GRADY	1320	4'P	
48		6	9N	8W	GRADY	1320	8'8	
49		6	9N	8W	GRADY	8600	8'8	
50		7	9N	8W	GRADY	9240	8'8	
51		7	9N	8W	GRADY	1320	4'8	
52		7	9N	8W	GRADY	1320	4'P	
53		9	9N	8W	GRADY	2640	4'8	
54		17	9N	8W	GRADY	8600	8'8	
55		17	9N	8W	GRADY	1320	4'P	
56		17	9N	8W	GRADY	200	4'8	
57		17	9N	8W	GRADY	200	3'8	
58		18	9N	8W	GRADY	3960	8'8	
59		18	9N	8W	GRADY	5280	8'8	
60		18	9N	8W	GRADY	500	4'P	
61		19	9N	8W	GRADY	1320	8'8	
62		20	9N	8W	GRADY	3960	8'8	
63		29	9N	8W	GRADY	1320	8'8	
64		34	10 N	7W	GRADY	1320	4'8	
65		1	9N	7W	GRADY	2640	8'8	
66		2	9N	7W	GRADY	5280	8'8	
67		2	9N	7W	GRADY	1320	4'8	
68		2	9N	7W	GRADY	1320	3'P	
69		3	9N	7W	GRADY	3000	8'8	
70		3	9N	7W	GRADY	2640	4'8	
71		10	9N	7W	GRADY	1000	8'8	
72		10	9N	7W	GRADY	1000	4'8	
73		11	9N	7W	GRADY	8600	8'8	
74		11	9N	7W	GRADY	2640	4'8	
75		12	9N	7W	GRADY	8600	8'8	
76		12	9N	7W	GRADY	1320	4'P	
77		12	9N	7W	GRADY	1000	3'8	
78		15	10N	8W	CANADIAN	2460	12'8	
79		15	10N	8W	CANADIAN	2640	4'8	
80		7	9N	8W	GRADY	8600	8'8	
Total Pipe Length (Con)						30950		
GPM								
100	N-81-1-2-2 EXT	2008011	4,5,8,9	9N	5W	GRADY	2	6.82
101	N-81-1-2-2 EXT	2008011	4,5,8,9	9N	5W	GRADY	5285	6.82
102	N-81-1-2-2 EXT	2008011	4,5,8,9	9N	5W	GRADY	28	4.5
103	N-81-1-2-4 EXT	2008014	NW/SWB	9N	5W	GRADY	1881	6.82
104	N-81-1-2-4 EXT	2008014	NW/SWB	9N	5W	GRADY	630	6.825
105	N-81-1-2-4 EXT	2008014	NW/SWB	9N	5W	GRADY	10	3.5

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106	N-81-1-2-4 EXT	2008014	NWSWR	9N	SW	GRADY	20	3.5
107	N-81-1-2-1	2008005	NW04	9N	SW	GRADY	1758	8.82
108	N-81-1-2-1	2008005	NW04	9N	SW	GRADY	8	4.5
109	N-81-1-2 EXT	2008004	NW06/C05 C04	9N	SW	GRADY	13175	8.82
110	N-81-1-2 EXT	2008004	NW06/C05 C04	9N	SW	GRADY	12	3.5
111	N-81-1-2-3	2008012	NW4	9N	SW	GRADY	1359	8.82
112	N-81-1-2-3	2008012	NW4	9N	SW	GRADY	11	3.5
113	N-81-1-2-2	2008010	8W4	9N	SW	GRADY	912	8.82
114	N-81-1-2-2	2008010	8W4	9N	SW	GRADY	22	3.5
115	N-81-1-2-2	2008010	8W4	9N	SW	GRADY	8	3.5
116	N-81-1-2-4	2008013	8W5	9N	SW	GRADY	2	8.82
117	N-81-1-2-4	2008013	8W5	9N	SW	GRADY	3372	8.82
118	N-81-1-2-4	2008013	8W5	9N	SW	GRADY	34	4.5
119	N-81-1-2-5	2008515	8W8	9N	SW	GRADY	1150	8.82
120	N-81-1-2-5	2008515	8W8	9N	SW	GRADY	23	3.5
121	N-59-1-4-1-1-2	2009630	NW7	10N	4W	CLEVELAND	74	3.5
122	N-59-1-4	2009623	1	10N	SW	CANADIAN	1685	8.82
123	N-59-1-4	2009623	1	10N	SW	CANADIAN	12	3.5
124	N-59-1-4	2009623	1	10N	SW	CANADIAN	8	3.5
125	N-59-1-4 EXT	2009624	1	10N	SW	CANADIAN	1383	8.82
126	N-59-1-4 EXT	2009624	1	10N	SW	CANADIAN	19	3.5
127	N-59-1-4 EXT	2009624	1	10N	SW	CANADIAN	14	3.5
128	N-59-1-4-1	2009625	1	10N	SW	CANADIAN	4392	8.82
129	N-59-1-4-1	2009625	1	10N	SW	CANADIAN	20	3.5
130	N-59-1-4-1	2009625	1	10N	SW	CANADIAN	11	3.5
131	N-59-1-4-1-2	2009631	1	10N	SW	CANADIAN	719	8.82
132	N-59-1-4-1-2	2009631	1	10N	SW	CANADIAN	11	3.5
133	N-59-1-4-1-1	2009628	12	10N	SW	CLEVELAND	2815	8.82
134	N-59-1-4-1-1	2009628	12	10N	SW	CLEVELAND	9	3.5
135	N-81-1-2-1-1	2008008	28	10N	SW	GRADY	1825	8.82
136	N-81-1-2-1-1	2008008	28	10N	SW	GRADY	37	3.5
137	N-81-1-2-1-1	2008008	28	10N	SW	GRADY	5	3.5
138	N-81-1	2005988	31	10N	SW	GRADY	1881	10.75
139	N-81-1	2005988	31	10N	SW	GRADY	2088	8.82
140	N-81-1	2005988	31	10N	SW	GRADY	108	8.82
141	N-81-1	2005988	31	10N	SW	GRADY	12	10.75
142	N-81-1	2005988	31	10N	SW	GRADY	8345	8.82
143	N-81-1	2005988	31	10N	SW	GRADY	12	3.5
144	N-81-1-2	2008003	31	10N	SW	GRADY	8307	8.82
145	N-81-1-2	2008003	31	10N	SW	GRADY	2	3.5
146	N-81-1-2	2008003	31	10N	SW	GRADY	5	3.5
147	N-59-1-4-1-3	2009632	NE11	10N	SW	CANADIAN	4891	4.5
148	N-59-1-4-1-3	2009632	NE11	10N	SW	CANADIAN	9	3.5
149	N-59-1-4-1 EXT 1	2009628	NE12	10N	SW	CANADIAN	2191	8.82
150	N-59-1-4-1 EXT 1	2009628	NE12	10N	SW	CANADIAN	17	8.82
151	N-81-1-2-1 EXT	2008006	NW33	10N	SW	GRADY	8096	8.82
152	N-81-1-2-1 EXT	2008006	NW33	10N	SW	GRADY	8	3.5
153	N-81-1-2-1 EXT 2	2008007	NW33	10N	SW	GRADY	2284	8.82
154	N-81-1-2-1 EXT 2	2008007	NW33	10N	SW	GRADY	5	3.5
155	N-81-1-2-1-2	2008009	NW33	10N	SW	GRADY	1325	8.82

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156	N-81-1-2-1-2	2008009	NW33	10N	5W	GRADY	45	6.82
157	N-81-1-2-1-2	2008009	NW33	10N	5W	GRADY	456	6.82
158	N-81-1-2-1-2	2008009	NW33	10N	5W	GRADY	9	3.5
159	N-59-1-4-1 EXT 2	2009627	SW12	10N	5W	CANADIAN	2740	6.82
160	N-59-1-4-1 EXT 2	2009627	SW12	10N	5W	CANADIAN	6	3.5
161	N-81-1-3	2008015	SW30	10N	5W	GRADY	2085	6.82
162	N-81-1-3	2008015	SW30	10N	5W	GRADY	11	3.5
163	N-59-3-2	2009641	20	11N	4W	OKLAHOMA	1061	6.82
164	N-59-3-2	2009641	20	11N	4W	OKLAHOMA	17	3.5
165	N-59-3-3	2009642	20	11N	4W	OKLAHOMA	11	3.5
166	N-59-3-3	2009642	20	11N	4W	OKLAHOMA	14	3.5
167	N-59-3-4	2009643	20	11N	4W	OKLAHOMA	3	4.5
168	N-59-3-4	2009643	20	11N	4W	OKLAHOMA	3	4.5
169	N-59-4-1	2009664	20	11N	4W	OKLAHOMA	1022	6.82
170	N-59-4-1	2009664	20	11N	4W	OKLAHOMA	9	4.5
171	N-59-3 EXT	2009639	21	11N	4W	OKLAHOMA	3954	12.75
172	N-59-3 EXT	2009639	21	11N	4W	OKLAHOMA	1110	6.82
173	N-59-3 EXT	2009639	21	11N	4W	OKLAHOMA	10	3.5
174	N-59-3-1	2009640	21	11N	4W	OKLAHOMA	1216	6.82
175	N-59-3-1	2009640	21	11N	4W	OKLAHOMA	11	4.5
176	N-59-3-5	2009644	21	11N	4W	OKLAHOMA	9652	12.75
177	N-59-3-5	2009644	21	11N	4W	OKLAHOMA	1782	12.75
178	N-59-3-5	2009644	21	11N	4W	OKLAHOMA	261	6.82
179	N-59-3-5	2009644	21	11N	4W	OKLAHOMA	8	2.37
180	N-59-3-5-1	2009650	21	11N	4W	OKLAHOMA	2674	6.82
181	N-59-3-5-1	2009650	21	11N	4W	OKLAHOMA	6	3.5
182	N-59-3-5-1	2009650	21	11N	4W	OKLAHOMA	12	3.5
183	N-59-3-5-1-1	2009652	21	11N	4W	OKLAHOMA	906	6.82
184	N-59-3-5-1-1	2009652	21	11N	4W	OKLAHOMA	12	3.5
185	N-59-4 EXT	2009663	21	11N	4W	OKLAHOMA	7563	4.5
186	N-59-4 EXT	2009663	21	11N	4W	OKLAHOMA	22	4.5
187	N-59-3-5-3	2009659	22	11N	4W	OKLAHOMA	10	6.82
188	N-59-3-5-3	2009659	22	11N	4W	OKLAHOMA	383	6.825
189	N-59-3-5-3	2009659	22	11N	4W	OKLAHOMA	8	3.5
191	N-59-3-5-2	2009653	23	11N	4W	OKLAHOMA	2743	6.82
192	N-59-3-5-2	2009653	23	11N	4W	OKLAHOMA	13	3.5
193	N-59-1	2009619	30	11N	4W	OKLAHOMA	6158	12.75
194	N-59-1	2009619	30	11N	4W	OKLAHOMA	6746	12.75
195	N-59-1	2009619	30	11N	4W	OKLAHOMA	8	3.5
196	N-59-1	2009619	30	11N	4W	OKLAHOMA	3	3.5
197	N-59-1-1	2009620	30	11N	4W	OKLAHOMA	160	4.5
198	N-59-1-1	2009620	30	11N	4W	OKLAHOMA	4	3.5
199	N-59-1-1	2009620	30	11N	4W	OKLAHOMA	12	3.5
200	N-59-3	2009636	20	11N	4W	OKLAHOMA	14729	12.75
201	N-59-3-6	2009660	30	11N	4W	OKLAHOMA	683	6.82
202	N-59-3-6	2009660	30	11N	4W	OKLAHOMA	26	4.5
203	N-59-3-6	2009660	30	11N	4W	OKLAHOMA	4	4.5
204	N-59-4	2009662	30	11N	4W	OKLAHOMA	410	6.82
205	N-59-4	2009662	30	11N	4W	OKLAHOMA	7479	6.825
206	N-59-4	2009662	30	11N	4W	OKLAHOMA	15	4.5

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207	N-50-4	2009662	30	11N	4W	OKLAHOMA	6	4.5
208	N-50-4-2	2009665	30	11N	4W	OKLAHOMA	668	6.62
209	N-50-4-2	2009665	30	11N	4W	OKLAHOMA	42	4.5
210	N-50-4-2	2009665	30	11N	4W	OKLAHOMA	4	4.5
211	N-50-1-3	2009622	31	11N	4W	OKLAHOMA	393	6.62
212	N-50-1-3	2009622	31	11N	4W	OKLAHOMA	3	3.5
213	N-50-1-3	2009622	31	11N	4W	OKLAHOMA	3	3.5
214	N-50-3-7	2009661	NW21	11N	4W	OKLAHOMA	1001	4.5
215	N-50-3-7	2009661	NW21	11N	4W	OKLAHOMA	15	3.5
216	N-50-3-7	2009661	NW21	11N	4W	OKLAHOMA	2	3.5
217	N-50-3-8	2009626	NE30SE19	11N	4W	OKLAHOMA	80	6.625
218	N-50-3-8	2009626	NE30SE19	11N	4W	OKLAHOMA	389	6.625
219	N-50-3-8	2009626	NE30SE19	11N	4W	OKLAHOMA	23	3.5
220	N-50-1-5 MR	2009634	NW31	11N	4W	OKLAHOMA	30	3.5
221	N-50-1-5 MR	2009634	NW31	11N	4W	OKLAHOMA	3	3.5
222	N-50-1-5-1	2010507	SW31	11N	4W	OKLAHOMA	63	4.5
223	N-50-1-5-1	2010507	SW31	11N	4W	OKLAHOMA	26	4.5
224	N-50-1-6	2009635	SW31	11N	4W	OKLAHOMA	59	6.62
225	N-50-1-6	2009635	SW31	11N	4W	OKLAHOMA	1959	6.62
226	N-50-1-6	2009635	SW31	11N	4W	OKLAHOMA	552	6.62
227	N-50-1-6	2009635	SW31	11N	4W	OKLAHOMA	3	4.5
228	N-50-1-5	2009633	31	11N	4W	CANADIAN	59	4.5
229	N-50-1-5	2009633	31	11N	4W	CANADIAN	2968	4.5
230	N-50-1-5	2009633	31	11N	4W	CANADIAN	7	3.5
231	N-50-1-8	2010506	SE36	11N	5W	CANADIAN	426	4.5
232	N-50-1-8	2010506	SE36	11N	5W	CANADIAN	23	3.5
232A	N-50-4-3	2010506	30	11N	4W	OKLAHOMA	14	6.62
Total Pipe Length (GPM)							163470	

Compression:

Western Compressor Station, Township 9N, Range 6W, section 7.

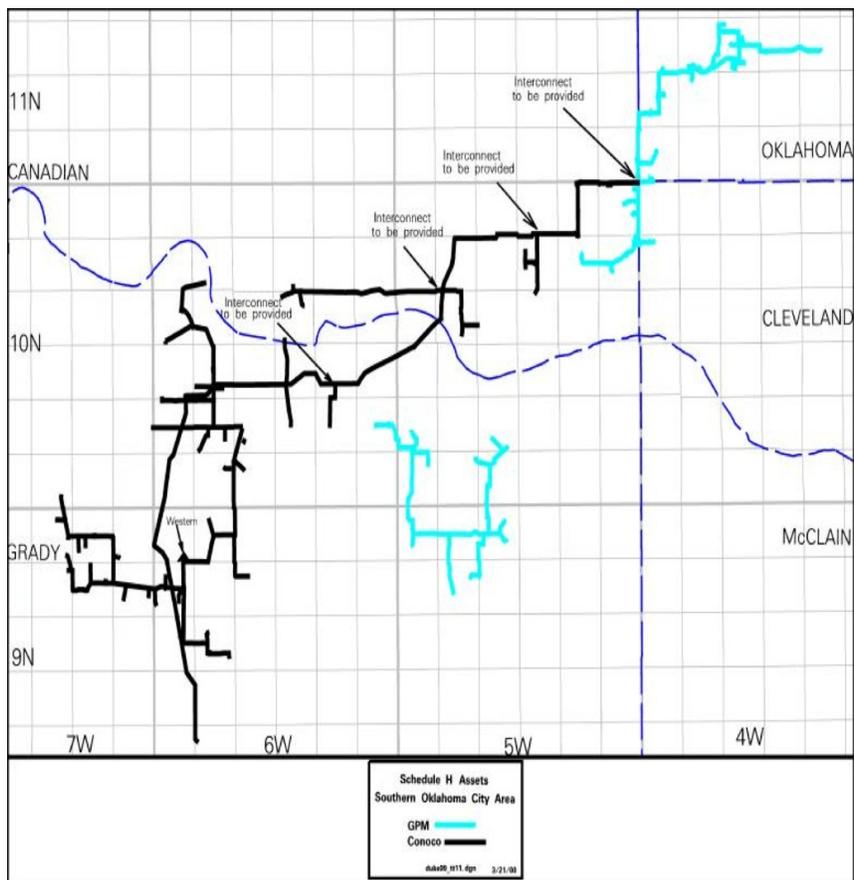
This site consists of below and above ground piping and valves, 1 fiberglass tank, and 3 rental compressor units.

There are 2 - CAT 3360's - 145 hp each and 1 - CAT 3406 - 215 hp.

Interconnects: All interconnects will be done to DEFS's usual specifications.

<u>Pipes Involved</u>	<u>Section</u>	<u>Township</u>	<u>Range</u>	<u>Type</u>	<u>Distance (mi.)</u>	<u>Comments</u>
GPM/Conoco	1	10	5	crossover		Tie 4" line steel to 6" Conoco Steel
Conoco/Conoco	3	10	5	crossover		Tie 3" poly to 6" steel
Conoco/Conoco	17	10	5	crossover		Tie 6" steel to west 12" steel & east 6" steel
Conoco/Conoco	23	10	6	crossover		Tie 6" steel to 6" poly

Schedules



FEDERAL TRADE COMMISSION DECISIONS
VOLUME 129

Schedules

Schedule I

SCHEDULE I

NORTHERN OKLAHOMA CITY AREA

Key No.	GATHERER	LINE NO.	PIPELINE ID	SEC	TWP	RNG	COUNTY	PIPE LENGTH (ft)	PIPE DESCR (diam in Inches)
CONOCO									
1				5	13N	4W	OKLAHOMA	5280	8"Ø
2				8	13N	4W	OKLAHOMA	5280	8"Ø
3				9	13N	4W	OKLAHOMA	5280	8"Ø
4				10	13N	4W	OKLAHOMA	5280	8"Ø
5				11	13N	4W	OKLAHOMA	3960	8"Ø
6				11	13N	4W	OKLAHOMA	1320	4"Ø
7				12	13N	4W	OKLAHOMA	2640	4"Ø
8				14	13N	4W	OKLAHOMA	5500	6"Ø
9				23	13N	4W	OKLAHOMA	1320	6"Ø
10				4/5	14N	4W	OKLAHOMA	5280	8"Ø
11				8/9	14N	4W	OKLAHOMA	5280	8"Ø
12				16/17	14N	4W	OKLAHOMA	5280	8"Ø
13				20/21	14N	4W	OKLAHOMA	5280	8"Ø
14				28/29	14N	4W	OKLAHOMA	5280	8"Ø
15				32/33	14N	4W	OKLAHOMA	5280	8"Ø
16				5	15N	4W	LOGAN	5280	8"Ø
17				6	15N	4W	LOGAN	1000	4"Ø
18				8	15N	4W	LOGAN	5280	8"Ø
19				17	15N	4W	LOGAN	5280	8"Ø
20				20	15N	4W	LOGAN	5280	8"Ø
21				29	15N	4W	LOGAN	5280	8"Ø
22				32	15N	4W	LOGAN	6600	8"Ø
23				19	16N	4W	LOGAN	1000	4"Ø
24				20	16N	4W	LOGAN	5280	8"Ø
25				20	16N	4W	LOGAN	9240	4"Ø
26				20	16N	4W	LOGAN	2640	2"Ø
27				21	16N	4W	LOGAN	2320	4"Ø
28				28	16N	4W	LOGAN	6600	4"Ø
29				28	16N	4W	LOGAN	2640	3"Ø
30				29	16N	4W	LOGAN	5280	8"Ø
31				29	16N	4W	LOGAN	3960	4"Ø
32				30	16N	4W	LOGAN	10560	4"Ø
33				31	16N	4W	LOGAN	100	4"Ø
34				32	16N	4W	LOGAN	5280	8"Ø
35				32	16N	4W	LOGAN	16000	4"Ø
36				33	16N	4W	LOGAN	500	4"Ø
Total Pipe Length (Conc)								172840	
DEF8									
37				2	13N	4W	OKLAHOMA	5300	4.5

Schedules

38	2	13N	4W	OKLAHOMA	1600	2.375		
39	11	13N	4W	OKLAHOMA	2100	4.5		
42	6	14N	4W	OKLAHOMA	5300	3.5		
43	7	14N	4W	OKLAHOMA	11400	3.5		
46	14	14N	4W	OKLAHOMA	500	6.625		
48	23	14N	4W	OKLAHOMA	6100	6.625		
49	23	14N	4W	OKLAHOMA	4500	2.375		
50	25	14N	4W	OKLAHOMA	1100	4.5		
51	26	14N	4W	OKLAHOMA	7800	4.5		
52	26	14N	4W	OKLAHOMA	7900	6.625		
53	27	14N	4W	OKLAHOMA	7600	4.5		
54	28	14N	4W	OKLAHOMA	4600	4.5		
55	35	14N	4W	OKLAHOMA	7900	6.625		
56	35	14N	4W	OKLAHOMA	100	4.54		
58	36	14N	4W	OKLAHOMA	3200	4.5		
59	10	14N	5W	CANADIAN	200	3.5		
60	11	14N	5W	CANADIAN	6600	3.5		
61	12	14N	5W	CANADIAN	5300	3.5		
62	15	14N	5W	CANADIAN	2400	3.5		
63	7	15N	4W	LOGAN	4800	4.5		
64	7	15N	4W	LOGAN	300	3.5		
66	31	15N	4W	LOGAN	5200	3.5		
Total Pipe Length (DEF1)					101800			
GPM								
69	N-8-3 EXT	2007472	10/14/15	14N	5W	CANADIAN	1956	4.5
70	N-8-3 EXT	2007472	10/14/15	14N	5W	CANADIAN	1513	4.5
71	N-8-3 EXT	2007472	10/14/15	14N	5W	CANADIAN	35	4.5
72	N-8-7-1-1	2007487	4	14N	5W	CANADIAN	144	4.5
73	N-8-7-1-1	2007487	4	14N	5W	CANADIAN	13	3.5
74	N-8-1-1	2006321	5/8	14N	5W	CANADIAN	868	4.5
75	N-8-1-1	2006321	5/8	14N	5W	CANADIAN	18	4.5
76	N-8-1-1	2006321	5/8	14N	5W	CANADIAN	8	4.5
77	N-8-7	2007484	5	14N	5W	CANADIAN	119	4.5
78	N-8-7	2007484	5	14N	5W	CANADIAN	1590	4.5
79	N-8-7	2007484	5	14N	5W	CANADIAN	2	4.5
80	N-8-7	2007484	5	14N	5W	CANADIAN	49	4.5
81	N-8-7 EXT	2007485	5	14N	5W	CANADIAN	240	4.5
82	N-8-7 EXT	2007485	5	14N	5W	CANADIAN	879	4.5
83	N-8-7 EXT	2007485	5	14N	5W	CANADIAN	180	4.5
84	N-8-7 EXT	2007485	5	14N	5W	CANADIAN	584	4.5
85	N-8-7 EXT	2007485	5	14N	5W	CANADIAN	225	4.5
86	N-8-7 EXT	2007485	5	14N	5W	CANADIAN	217	4.5
87	N-8-7 EXT	2007485	5	14N	5W	CANADIAN	275	4.5
88	N-8-7 EXT	2007485	5	14N	5W	CANADIAN	9	4.5
89	N-8-7-1	2007486	5	14N	5W	CANADIAN	2	4.5
90	N-8-7-1	2007486	5	14N	5W	CANADIAN	188	4.5
91	N-8-7-1	2007486	5	14N	5W	CANADIAN	91	4.5

Schedules

92	N-8-7-1	2007486	5	14N	SW	CANADIAN	261	4.5
93	N-8-7-1	2007486	5	14N	SW	CANADIAN	144	4.5
94	N-8-7-1	2007486	5	14N	SW	CANADIAN	121	4.5
95	N-8-7-1	2007486	5	14N	SW	CANADIAN	17	4.5
96	N-8-7-2	2007488	5	14N	SW	CANADIAN	2003	4.5
97	N-8-7-2	2007488	5	14N	SW	CANADIAN	1124	4.5
98	N-8-7-3	2007491	28	15N	SW	CANADIAN	232	4.5
99	N-8-7-3	2007491	28	15N	SW	CANADIAN	1126	4.5
100	N-8-7-3	2007491	33/28	15N	SW	CANADIAN	8242	4.5
101	N-8-7-3	2007491	33	15N	SW	CANADIAN	3420	4.5
102	N-8-7-3	2007491	28	15N	SW	CANADIAN	3	4.5
103	N-8-7-3	2007491	28	15N	SW	CANADIAN	22	4.5
104	N-8-1-1-1	2006322	8	14N	SW	CANADIAN	2	4.5
105	N-8-1-1-1	2006322	8	14N	SW	CANADIAN	1817	4.5
106	N-8-1-1-1	2006322	8	14N	SW	CANADIAN	487	4.5
107	N-8-1-1-1	2006322	8	14N	SW	CANADIAN	90	4.5
108	N-8-1-1-1	2006322	8	14N	SW	CANADIAN	252	4.5
109	N-8-1-1-1	2006322	8	14N	SW	CANADIAN	2	4.5
110	N-8-1-1-1	2006322	8	14N	SW	CANADIAN	7	4.5
111	N-8-1-1-1	2006322	8	14N	SW	CANADIAN	1	2.37
112	N-8-1-1-1-1	2006323	8	14N	SW	CANADIAN	1	4.5
113	N-8-1-1-1-1	2006323	8	14N	SW	CANADIAN	4069	4.5
114	N-8-1-1-1-1	2006323	8	14N	SW	CANADIAN	20	4.5
115	N-8-1-1-1-1	2006323	8	14N	SW	CANADIAN	5	4.5
116	N-8-1-1-1-1-1	2006324	9	14N	SW	CANADIAN	427	4.5
117	N-8-1-1-1-1-1	2006324	9	14N	SW	CANADIAN	4	4.5
118	N-8-9-2	2007511	9	14N	SW	CANADIAN	2	4.5
119	N-8-9-2	2007511	9	14N	SW	CANADIAN	15059	6.62
120	N-8-9-2	2007511	9	14N	SW	CANADIAN	4	4.5
121	N-8-9-2	2007511	9	14N	SW	CANADIAN	16	4.5
122	N-8-9-2-4	2007518	9	14N	SW	CANADIAN	3236	6.62
123	N-8-9-2-4	2007518	9	14N	SW	CANADIAN	2	4.5
124	N-8-9-2-4	2007518	9	14N	SW	CANADIAN	15	4.5
125	N-8-3 EXT	2007473	10	14N	SW	CANADIAN	9	4.5
126	N-8-3 EXT	2007473	10	14N	SW	CANADIAN	4751	4.5
127	N-8-3 EXT	2007473	10	14N	SW	CANADIAN	23	4.5
128	N-8-3 EXT	2007473	10	14N	SW	CANADIAN	39	4.5
129	N-8-9-2-1	2007512	15	14N	SW	CANADIAN	833	6.62
130	N-8-9-2-1	2007512	15	14N	SW	CANADIAN	24	4.5
131	N-8-9-2-1	2007512	15	14N	SW	CANADIAN	5	4.5
132	N-8-9-2-1 EXT	2007513	15	14N	SW	CANADIAN	2938	6.62
133	N-8-9-2-1 EXT	2007513	15	14N	SW	CANADIAN	5	3.5
134	N-8-9-2-1-1	2007515	15	14N	SW	CANADIAN	1252	6.62
135	N-8-9-2-1-1	2007515	15	14N	SW	CANADIAN	8	3.5
136	N-8-9-2-1-1	2007515	15	14N	SW	CANADIAN	9	3.5
137	N-8-9-2-4-1	2007519	16	14N	SW	CANADIAN	559	6.62
138	N-8-7-3 RR	2010518	NE05	14N	SW	CANADIAN	362	4.5
139	N-8-3-2	2007477	NE14	14N	SW	CANADIAN	1774	4.5
140	N-8-3-2	2007477	NE14	14N	SW	CANADIAN	10	3.5
141	N-8-3-2	2007477	NE14	14N	SW	CANADIAN	2	3.5

Schedules

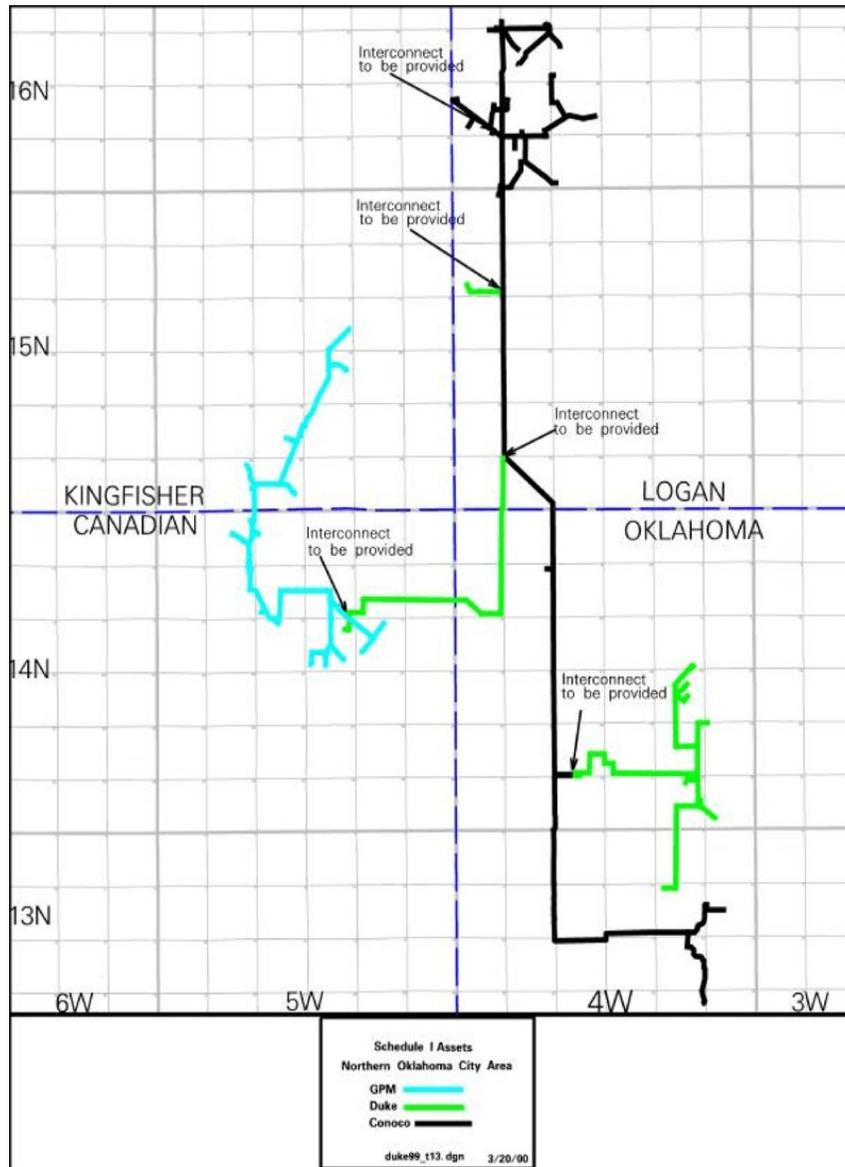
142	N-8-3-3	2007478	NE15	14N	5W	CANADIAN	122	4.5
143	N-8-3-3	2007478	NE15	14N	5W	CANADIAN	8	3.5
144	N-8-7-3-1-1	2007493	NE22	15N	5W	KINGFISHER	1925	4.5
145	N-8-7-3-1-1	2007493	NE22	15N	5W	KINGFISHER	10	3.5
146	N-8-7-3-1-1	2007493	NE22	15N	5W	KINGFISHER	27	3.5
147	N-8-7-3-1	2007492	"	15N	5W	KINGFISHER	11386	6.62
148	N-8-7-3-1	2007492	"	15N	5W	KINGFISHER	4	4.5
149	N-8-7-3-1	2007492	"	15N	5W	KINGFISHER	20	4.5
150	N-8-7-3-3	2007495	NE32	15N	5W	KINGFISHER	1421	4.5
151	N-8-7-3-3	2007495	NE32	15N	5W	KINGFISHER	226	4.5
152	N-8-7-3-3	2007495	NE32	15N	5W	KINGFISHER	449	4.5
153	N-8-7-3-3	2007495	NE32	15N	5W	KINGFISHER	5	4.5
154	N-8-7-3-3	2007495	NE32	15N	5W	KINGFISHER	3	4.5
155	N-8-9-2-3	2007517	NW15	14N	5W	KINGFISHER	2	4.5
156	N-8-9-2-3	2007517	NW15	14N	5W	KINGFISHER	2	4.5
157	N-8-7-3-4	2007496	SE28	15N	5W	KINGFISHER	83	4.5
158	N-8-7-3-4	2007496	SE28	15N	5W	KINGFISHER	2	4.5
159	N-8-7-3-4	2007496	SE28	15N	5W	KINGFISHER	31	4.5
160	N-8-7-3-2	2007494	SE28	15N	5W	KINGFISHER	1117	4.5
161	N-8-7-3-2	2007494	SE28	15N	5W	KINGFISHER	3	4.5
162	N-8-7-3-2	2007494	SE28	15N	5W	KINGFISHER	5	4.5
163	N-8-7-3-5	2007497	SE32	15N	5W	KINGFISHER	200	4.5
164	N-8-7-3-5	2007497	SE32	15N	5W	KINGFISHER	6	3.5
165	N-8-7-3-6	2007498	SE33	15N	5W	KINGFISHER	2012	4.5
166	N-8-7-3-6	2007498	SE33	15N	5W	KINGFISHER	7	3.5
167	N-8-7-3-6	2007498	SE33	15N	5W	KINGFISHER	10	3.5
168	N-8-3-1	2007476	SW14	14N	5W	CANADIAN	1845	4.5
169	N-8-3-1	2007476	SW14	14N	5W	CANADIAN	1	4.5
170	N-8-3-1	2007476	SW14	14N	5W	CANADIAN	12	4.5
171	N-8-9-2-1 MR	2007514	SW15	14N	5W	CANADIAN	26	4.5
172	N-8-9-2-1 MR	2007514	SW15	14N	5W	CANADIAN	8	4.5
174	N-8-7-3-7		5	14N	5W	KINGFISHER/	3850	4.5
			32	15N	5W	CANADIAN		
Total Pipe Length (GPM)							88888	

*NE28/NW27/SW22/NW22/SW/SE15 15N 05W

Interconnects: All interconnects will be done to DEFS's usual specifications.

Pipes Involved	Section	Township	Range	Type	Distance (mi.)	Comments
DEFS/Conoco	28	14	4	crossover		Tie 4" DEFS steel to 8" Conoco Steel
DEFS/Conoco	31	15	4	crossover		Tie 3" DEFS poly to 8" Conoco Steel
DEFS/Conoco	8	15	4	crossover		Tie 4" DEFS poly to 8" Conoco Steel
Conoco/Conoco	30	16	4	crossover		Tie 8" Conoco steel to Conoco 4" poly
DEFS/GPM	10	14	5	crossover		Tie 3" DEFS poly to GPM poly

Schedules



Schedules

Schedule JSCHEDULE J
NORTHEAST LOGAN COUNTY, OK AREA

Key No.	GATHERER	LINE NO.	PIPELINE ID	SEC	TWP	RNG	COUNTY	PIPE LENGTH (ft)	PIPE DESCR (diam. in inches)
DEFS									
1				2	16N	1E	LOGAN	6300	6.625
2				3	16N	1E	LOGAN	4500	4.5
3				4	16N	1E	LOGAN	2700	4.5
4				11	16N	1E	LOGAN	4500	6.625
5				11	16N	1E	LOGAN	2500	8.625
6				12	16N	1E	LOGAN	3700	8.625
7				12	16N	1E	LOGAN	4500	6.625
8				13	16N	1E	LOGAN	2000	8.625
9				14	16N	1E	LOGAN	9200	8.625
10				22	16N	1E	LOGAN	5400	8.625
11				23	16N	1E	LOGAN	1200	8.625
12				27	16N	1E	LOGAN	4200	8.625
13				27	16N	1E	LOGAN	4700	4.5
14				28	16N	1E	LOGAN	3200	6.625
15				28	16N	1E	LOGAN	1300	8.625
16				33	16N	1E	LOGAN	3200	8.625
17				34	16N	1E	LOGAN	4200	4.5
18				7	16N	2E	LINCOLN	5300	6.625
19				8	16N	2E	LINCOLN	6300	6.625
Key No.	GATHERER	LINE NO.	PIPELINE ID	SEC	TWP	RNG	COUNTY	PIPE LENGTH (ft)	PIPE DESCR (diam. in inches)
20				8	16N	2E	LINCOLN	1300	4.5
21				16	17N	1E	LOGAN	3700	6.625
22				16	17N	1E	LOGAN	1300	4.5
24				20	17N	1E	LOGAN	3700	4.5
25				21	17N	1E	LOGAN	5300	4.5
26				21	17N	1E	LOGAN	5200	6.625
27				22	17N	1E	LOGAN	7900	6.625
28				23	17N	1E	LOGAN	7100	4.5
29				24	17N	1E	LOGAN	13200	4.5
30				25	17N	1E	LOGAN	600	4.5
31				26	17N	1E	LOGAN	8500	6.625
32				27	17N	1E	LOGAN	1900	4.5
33				27	17N	1E	LOGAN	700	3.5
34				34	17N	1E	LOGAN	5400	4.5
35				35	17N	1E	LOGAN	5300	6.625
36				35	17N	1E	LOGAN	3000	4.5
37				7	17N	2E	PAYNE	600	6.625
38				8	17N	2E	PAYNE	4200	6.625
39				18	17N	2E	PAYNE	6200	6.625
40				19	17N	2E	LINCOLN	900	6.625
41				19	17N	2E	LINCOLN	9000	4.5
Total Pipe Length								173900	

Schedules

Schedule CC**SCHEDULE CC**
TEXAS/CIMARRON COUNTIES, OK AREA

Key No.	GATHERER	LINE NO	PIPELINE ID	SEC	TWP	RNG	COUNTY	PIPE LENGTH (ft)	PIPE DESCR (diam. in inches)
GPM									
1		RR-2-2-6 EXT			2N	9ECM	CIMARRON, OK	6847	4.5
2		RR-2-2-6-2			2N	9ECM	CIMARRON, OK	10189	3.5
3		RR-2-2-6-2-1			2N	9ECM	CIMARRON, OK	37	3.5
4		RR-2-2-6-3			2N	9ECM	CIMARRON, OK	1385	3.5
5		RR-2-2 EXT 1			2N	10ECM	TEXAS, OK	20184	6.625
6		RR-2-2-12			2N	10ECM	TEXAS, OK	2778	3.5
7		RR			4N	10ECM	TEXAS, OK	10500	8.625
8		RR-2-2-6			3N	9ECM	CIMARRON, OK	15785	6.625
9		RR-2-1			3N	9ECM	CIMARRON, OK	13881	6.625
10		RR-2-1-1			3N	9ECM	CIMARRON, OK	1792	4.5
11		RR-2-2			3N	9ECM	CIMARRON, OK	14280	6.625
12		RR-2-2-1			3N	9ECM	CIMARRON, OK	3374	4.5
13		RR-2-2-10			3N	9ECM	CIMARRON, OK	5907	4.5
14		RR-2-2-10-1			3N	9ECM	CIMARRON, OK	1779	4.5
15		RR-2-2-13			3N	9ECM	CIMARRON, OK	176	3.5
16		RR-2-2-2			3N	9ECM	CIMARRON, OK	2499	3.5
17		RR-2-3			3N	9ECM	CIMARRON, OK	7467	4.5
18		RR-2-3-1			3N	9ECM	CIMARRON, OK	538	4.5
19		RR-2-3-2			3N	9ECM	CIMARRON, OK	3040	2.375
20		RR-2-4			3N	9ECM	CIMARRON, OK	3495	6.625
21		RR-2-5			3N	9ECM	CIMARRON, OK	7336	6.625
22		RR-2-5-1			3N	9ECM	CIMARRON, OK	19017	6.625
23		RR-2-2-8			3N	10ECM	TEXAS, OK	2775	3.5
24		RR-3-3-4 EXT			4N	8ECM	CIMARRON, OK	631	4.5
25		RR-3-3-4-1			4N	8ECM	CIMARRON, OK	4339	3.5
26		RR-3-3-5-1-1			4N	8ECM	CIMARRON, OK	7796	3.5
27		RR-3-3-5-1-2			4N	8ECM	CIMARRON, OK	10942	3.5
28		RR-2-1-3			4N	9ECM	CIMARRON, OK	3175	4.5
29		RR-2-1-3-1			4N	9ECM	CIMARRON, OK	3168	4.5
30		RR-2-1-3-2			4N	9ECM	CIMARRON, OK	4782	4.5
31		RR-2-1-3-2-1			4N	9ECM	CIMARRON, OK	2667	3.5
32		RR-2-1-3-2-1-1			4N	9ECM	CIMARRON, OK	1085	4.5
33		RR-2-1-3-2-1-1-1			4N	9ECM	CIMARRON, OK	1180	4.5
34		RR-2-1-3-2-1-1-1-1			4N	9ECM	CIMARRON, OK	20	2.375
35		RR-2-1-4			4N	9ECM	CIMARRON, OK	2197	6.625
36		RR-2-1-5			4N	9ECM	CIMARRON, OK	7251	4.5
37		RR-2-4 EXT			4N	9ECM	CIMARRON, OK	17842	6.625
38		RR-2-4-3			4N	9ECM	CIMARRON, OK	4702	4.5
39		RR-2-5-1-1			4N	9ECM	CIMARRON, OK	9175	6.625

Schedules

Key No.	GATHERER	LINE NO.	PIPELINE ID	SEC	TWP	RNG	COUNTY	PIPE LENGTH (ft)	PIPE DESCR (diam. in inches)
40		RR-2-5-1-2			4N	9ECM	CIMARRON, OK	187	2.375
41		RR-3-1			4N	9ECM	CIMARRON, OK	2049	4.5
42		RR-3-1-1			4N	9ECM	CIMARRON, OK	627	3.5
43		RR-3-1-1 EXT			4N	9ECM	CIMARRON, OK	2601	3.5
44		RR-3-1-2			4N	9ECM	CIMARRON, OK	579	3.5
45		RR-3-1-3			4N	9ECM	CIMARRON, OK	339	3.5
46		RR-3-1-4			4N	9ECM	CIMARRON, OK	11804	4.5
47		RR-3-2			4N	9ECM	CIMARRON, OK	3146	3.5
48		RR-3-2-1			4N	9ECM	CIMARRON, OK	163	4.5
49		RR-3-3			4N	9ECM	CIMARRON, OK	4759	6.625
50		RR-3-3-1			4N	9ECM	CIMARRON, OK	471	4.5
51		RR-3-3-1-1			4N	9ECM	CIMARRON, OK	2113	4.5
52		RR-3-3-2			4N	9ECM	CIMARRON, OK	4520	3.5
53		RR-3-3-2-1			4N	9ECM	CIMARRON, OK	101	3.5
54		RR-3-3-2-2			4N	9ECM	CIMARRON, OK	2	3.5
55		RR-3-3-3			4N	9ECM	CIMARRON, OK	514	3.5
56		RR-3-3-4			4N	9ECM	CIMARRON, OK	7491	4.5
57		RR-3-3-5			4N	9ECM	CIMARRON, OK	3361	4.5
58		RR-3-3-5-1			4N	9ECM	CIMARRON, OK	19889	3.5
59		RR-3-4			4N	9ECM	CIMARRON, OK	15557	6.625
60		RR-3-4-1			4N	9ECM	CIMARRON, OK	192	6.625
61		RR-3-4-2			4N	9ECM	CIMARRON, OK	1335	6.625
62		RR-2-4-1			4N	10ECM	TEXAS, OK	611	4.5
63		RR-2-4-1-1			4N	10ECM	TEXAS, OK	155	4.5
64		RR-2-4-2			4N	10ECM	TEXAS, OK	4407	4.5
65		RR-2-4-2-1			4N	10ECM	TEXAS, OK	216	4.5
66		RR-2-4-4			4N	10ECM	TEXAS, OK	3895	6.625
67		RR-2-4-4 EXT			4N	10ECM	TEXAS, OK	812	6.625
68		RR-2-4-4-1			4N	10ECM	TEXAS, OK	5690	6.625
69		RR-2-4-4-1-2			4N	10ECM	TEXAS, OK	3967	3.5
70		RR-2-4-4-1-3			4N	10ECM	TEXAS, OK	1124	4.5
71		RR-2-4-4-1-3-1			4N	11ECM	TEXAS, OK	4161	4.5
							TEXAS, OK		
72		RR-2-4-4-2			4N	10ECM	CIMARRON, OK	5244	3.5
73		RR-2-4-4-3			4N	10ECM	TEXAS, OK	39	3.5
74		RR-3			4N	10ECM	TEXAS, OK	31779	4.5
75		RR-4-1			4N	10ECM	TEXAS, OK	7036	4.5
76		RR-4-1 EXT			4N	10ECM	TEXAS, OK	174	4.5
77		RR-4-1-1			4N	10ECM	TEXAS, OK	150	4.5
78		RR-6-2-2			4N	10ECM	TEXAS, OK	6906	4.5
79		RR-6-2-2-1			4N	10ECM	TEXAS, OK	2015	4.5
80		RR-6-1-2			4N	10ECM	TEXAS, OK	423	4.5
							TEXAS, OK		
81		RR-16			5N	9ECM	CIMARRON, OK	7205	4.5
82		RR-16-1			5N	9ECM	CIMARRON, OK	3476	4.5

FEDERAL TRADE COMMISSION DECISIONS
VOLUME 129

Schedules

Key No.	GATHERER	LINE NO.	PIPELINE ID	SEC	TWP	RNG	COUNTY	PIPE LENGTH (ft)	PIPE DESCR (diam. in inches)
83		R-6 EXT			5N	10ECM	TEXAS, OK	2739	3.5
84		R-6-10			5N	10ECM	TEXAS, OK	2624	3.5
85		R-6-11-1			5N	10ECM	TEXAS, OK	152	3.5
86		R-6-13			5N	10ECM	TEXAS, OK	1022	3.5
87		R-6-7-1			5N	10ECM	TEXAS, OK	701	3.5
88		R-6-8-1-1 EXT			5N	10ECM	TEXAS, OK	1077	4.5
89		R-6-8-1-1-1			5N	10ECM	TEXAS, OK	51	4.5
90		R-6-8-1-1-2			5N	10ECM	TEXAS, OK	3301	4.5
91		R-7-5-1-1-1-1			5N	10ECM	TEXAS, OK	313	4.5
92		R-7-5-1-1-1-1-1			5N	10ECM	TEXAS, OK	837	3.5
93		R-7-5-1-1-3-1			5N	10ECM	TEXAS, OK	36	3.5
94		RR-17			5N	10ECM	TEXAS, OK	5120	4.5
95		R-4-8-2			5N	11ECM	TEXAS, OK	81	3.5
96		R-4-8-2-1			5N	11ECM	TEXAS, OK	29	3.5
97		R-4-8-3			5N	11ECM	TEXAS, OK	1799	4.5
98		R-4-8-3-1			5N	11ECM	TEXAS, OK	3223	4.5
99		R-4-8-4			5N	11ECM	TEXAS, OK	9767	6.625
100		R-4-8-4-1			5N	11ECM	TEXAS, OK	6164	3.5
101		R-4-8-5			5N	11ECM	TEXAS, OK	10130	6.625
102		R-4-8-6			5N	11ECM	TEXAS, OK	17820	6.625
103		R-7-5-1			5N	11ECM	TEXAS, OK	9866	4.5
104		R-7-5-1-1			5N	11ECM	TEXAS, OK	11653	4.5
105		R-7-5-1-1-1			5N	11ECM	TEXAS, OK	15252	4.5
106		R-7-5-1-1-1 MR 2			4N	10ECM	TEXAS, OK	30	3.5
107		R-7-5-1-1-2			5N	11ECM	TEXAS, OK	9433	3.5
108		R-7-5-1-1-2-1			5N	11ECM	TEXAS, OK	1434	4.5
109		R-7-5-1-1-3			5N	11ECM	TEXAS, OK	7207	3.5
110		R-7-5-1-2			5N	11ECM	TEXAS, OK	24	2.375
111		R-10-1-1			6N	9ECM	CIMARRON, OK	5978	3.5
112		R-10-2			6N	9ECM	CIMARRON, OK	5120	4.5
113		R-10			6N	10ECM	CIMARRON, OK	2673	6.625
114		R-5 EXT			6N	10ECM	TEXAS, OK	5213	6.625
115		R-5-4-3			6N	11ECM	TEXAS, OK	293	4.5
116		R-5-5			6N	10ECM	TEXAS, OK	1819	3.5
117		R-5-5-1			6N	10ECM	TEXAS, OK	1999	4.5
118		R-5-6			6N	10ECM	TEXAS, OK	1381	4.5
119		R-5-6 LOOP			6N	10ECM	TEXAS, OK	1377	6.625
120		R-5-7			6N	10ECM	TEXAS, OK	226	3.5
121		R-5-8			6N	10ECM	TEXAS, OK	7327	6.625
122		R-6-11			6N	10ECM	TEXAS, OK	2022	3.5
123		R-6-12			6N	10ECM	TEXAS, OK	1659	6.625
124		R-6-12 EXT			6N	10ECM	TEXAS, OK	5197	4.5
125		R-6-2			6N	10ECM	TEXAS, OK	3136	4.5
126		R-6-2-1			6N	10ECM	TEXAS, OK	42	3.5
127		R-6-2-2			6N	10ECM	TEXAS, OK	29	3.5

Schedules

Key No.	GATHERER	LINE NO.	PIPELINE ID	SEC	TWP	RNG	COUNTY	PIPE LENGTH (ft)	PIPE DESCR (diam. in inches)
128		R-6-3			6N	10ECM	TEXAS, OK	4423	6.625
129		R-6-3 LOOP			6N	10ECM	TEXAS, OK	4468	4.5
130		R-6-4			6N	10ECM	TEXAS, OK	206	3.5
131		R-6-5			6N	10ECM	TEXAS, OK	184	3.5
132		R-6-6			6N	10ECM	TEXAS, OK	116	3.5
133		R-6-7			6N	10ECM	TEXAS, OK	7857	3.5
134		R-6-8			6N	10ECM	TEXAS, OK	3215	6.625
135		R-6-8 EXT			6N	10ECM	TEXAS, OK	3908	4.5
136		R-6-8-1			6N	10ECM	TEXAS, OK	5538	6.625
137		R-6-8-1-1			6N	10ECM	TEXAS, OK	25717	4.5
138		R-6-8-1-1-3			6N	10ECM	TEXAS, OK	3216	3.5
139		R-6-9			6N	10ECM	TEXAS, OK	2183	6.625
140		R-6			6N	10ECM	TEXAS, OK	8933	6.625
141		R-6-1			6N	10ECM	TEXAS, OK	3240	4.5
142		R-6-2			6N	10ECM	TEXAS, OK	191	3.5
143		R-6-3			6N	10ECM	TEXAS, OK	1500	4.5
144		R-6-3-1			6N	10ECM	TEXAS, OK	28	3.5
145		R-6-4			6N	10ECM	TEXAS, OK	734	3.5
146		R-6-5			6N	10ECM	TEXAS, OK	4805	4.5
147		R-10-1			6N	9ECM	CIMARRON, OK	6554	3.5
148		R-14			6N	11ECM	TEXAS, OK	23459	6.625
149		R-4 REPLACEMENT			6N	11ECM	TEXAS, OK	29664	12.75
150		R-4-1			6N	11ECM	TEXAS, OK	1734	1692
151		R-4-10			6N	11ECM	TEXAS, OK	1994	4.5
152		R-4-10-1			6N	11ECM	TEXAS, OK	1733	3.5
153		R-4-11			6N	11ECM	TEXAS, OK	1105	4.5
154		R-4-12			6N	11ECM	TEXAS, OK	1421	4.5
155		R-4-13			6N	11ECM	TEXAS, OK	4326	6.625
156		R-4-14			6N	11ECM	TEXAS, OK	337	6.625
157		R-4-2			6N	11ECM	TEXAS, OK	1116	3.5
158		R-4-3			6N	11ECM	TEXAS, OK	451	3.5
159		R-4-4			6N	11ECM	TEXAS, OK	2401	3.5
160		R-4-4-1			6N	11ECM	TEXAS, OK	1998	3.5
161		R-4-4-1-1			6N	11ECM	TEXAS, OK	3708	4.5
162		R-4-4-1-1-1			6N	11ECM	TEXAS, OK	1653	6.625
163		R-4-5			6N	11ECM	TEXAS, OK	40	3.5
164		R-4-5-1			6N	11ECM	TEXAS, OK	25	3.5
165		R-4-6			6N	11ECM	TEXAS, OK	2217	4.5
166		R-4-7			6N	11ECM	TEXAS, OK	7933	3.5
167		R-4-7-1			6N	11ECM	TEXAS, OK	1818	3.5
168		R-4-8			6N	11ECM	TEXAS, OK	30060	6.625
169		R-4-8-1			6N	11ECM	TEXAS, OK	668	4.5
170		R-4-9			6N	11ECM	TEXAS, OK	22219	4.5
171		R-5			6N	11ECM	TEXAS, OK	21467	10.75
172		R-5 LOOP			6N	11ECM	TEXAS, OK	6194	6.625

FEDERAL TRADE COMMISSION DECISIONS
VOLUME 129

Schedules

Key No.	GATHERER	LINE NO.	PIPELINE ID	SEC	TWP	RNG	COUNTY	PIPE LENGTH (ft)	PIPE DESCR (diam. in inches)
173		R-5 LOOP EXT			6N	11ECM	TEXAS, OK	10120	8.625
174		R-5-1			6N	11ECM	TEXAS, OK	71	3.5
175		R-5-10			6N	11ECM	TEXAS, OK	3666	8.625
176		R-5-2			6N	11ECM	TEXAS, OK	253	3.5
177		R-5-3			6N	11ECM	TEXAS, OK	17	3.5
178		R-5-4			6N	11ECM	TEXAS, OK	5200	3.625
179		R-5-4 LOOP			6N	11ECM	TEXAS, OK	2088	4.5
180		R-5-4-1			6N	11ECM	TEXAS, OK	40	3.5
181		R-5-4-2			6N	11ECM	TEXAS, OK	1426	3.5
182		R-5-9			6N	11ECM	TEXAS, OK	1562	4.5
183		R-6			6N	11ECM	TEXAS, OK	14659	8.625
184		R-6 LOOP			6N	11ECM	TEXAS, OK	14686	10.75
185		R-6-1			6N	11ECM	TEXAS, OK	421	3.5
186		R-6-3-4			6N	11ECM	TEXAS, OK	670	3.5
187		R-7			6N	11ECM	TEXAS, OK	9755	6.625
188		R-7 LOOP			6N	11ECM	TEXAS, OK	3695	6.625
189		R-7-1			6N	11ECM	TEXAS, OK	153	3.5
190		R-7-2			6N	11ECM	TEXAS, OK	2537	3.5
191		R-7-3			6N	11ECM	TEXAS, OK	456	3.5
192		R-7-4			6N	11ECM	TEXAS, OK	366	3.5
193		R-7-5			6N	11ECM	TEXAS, OK	9676	4.5
194		R-7-5-2			6N	11ECM	TEXAS, OK	7826	4.5
195		R-5-11			35S	43W	MORTON, KS	13831	6.625
196		R-5-11-1			35S	43W	MORTON, KS	2437	3.5
197		RR			4N	10ECM	TEXAS, OK	71960	6
							CIMARRON, OK		
198		RR-2 Loop			3N	9ECM	TEXAS, OK	15174	4
199		RR-2			3N	9ECM	CIMARRON, OK	15174	4
200		R-EXT			6N	11ECM	TEXAS, OK	36960	6
201		R-11			6N	10ECM	CIMARRON, OK	9000	3.5
202		R-11-1			6N	10ECM	CIMARRON, OK	300	3.5
203		R-44-11			6N	11ECM	TEXAS, OK	800	4.5
204		RR-21			5N	10ECM	TEXAS, OK	100	4.5
Total Pipe Length (Crown Jewel Assets)								1067750	

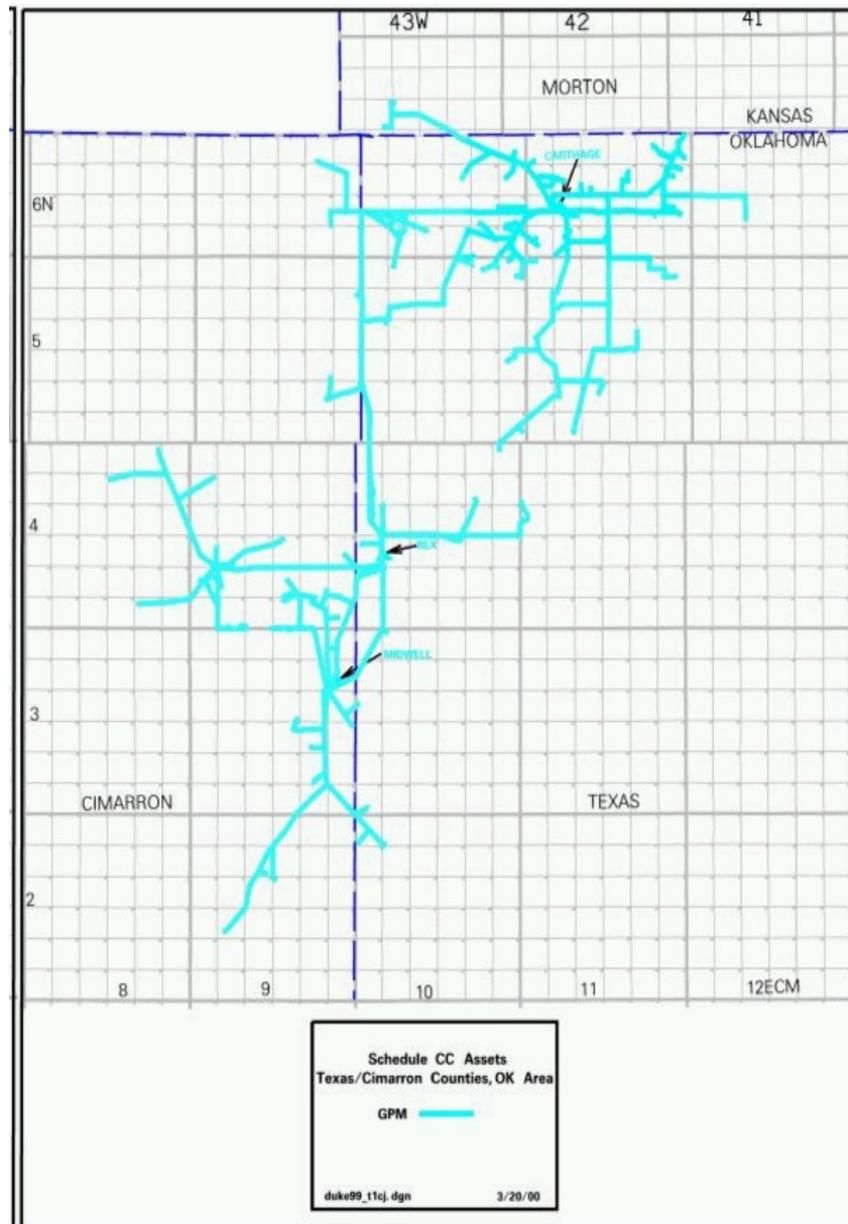
Compression: Divesting Midwell Compressor Station, located in section 12, Township 3N, Range 9ECM Cimarron Co., Ok.
The Compressor unit has a 3 stage Joy WB14 compressor and a 520 Horsepower Superior 8G825 driver, compressor throughout capacity is 2000 mcf/d with a 5 psig suction and 500 psig discharge.
The station has inlet gas separation equipment, water and slop oil storage and purchased power available.

Schedules

Key No.	GATHERER	LINE NO.	PIPELINE ID	SEC	TWP	RNG	COUNTY	PIPE LENGTH (ft)	PIPE DESCR (diam. in inches)
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Additional Compression:						
Router	PBF	Driver	HP	Compressor	Capacity	Suction
Rox	168924	Caterpillar G342	166	Joy WB12	900 MMSCFD	6
Rox	168361	Caterpillar G342	166	Joy WB12	600 MMSCFD	6
Carthage	168050	White #G425	520	Joy WB14	2 MMSCFD	6
Carthage	168253	Waushara 7042	520	Joy WB14	2 MMSCFD	6
Carthage	168307	Waushara 7042	520	Joy WB14/7-4	2 MMSCFD	6

Schedules



Schedules

Schedule DD

SCHEDULE DD

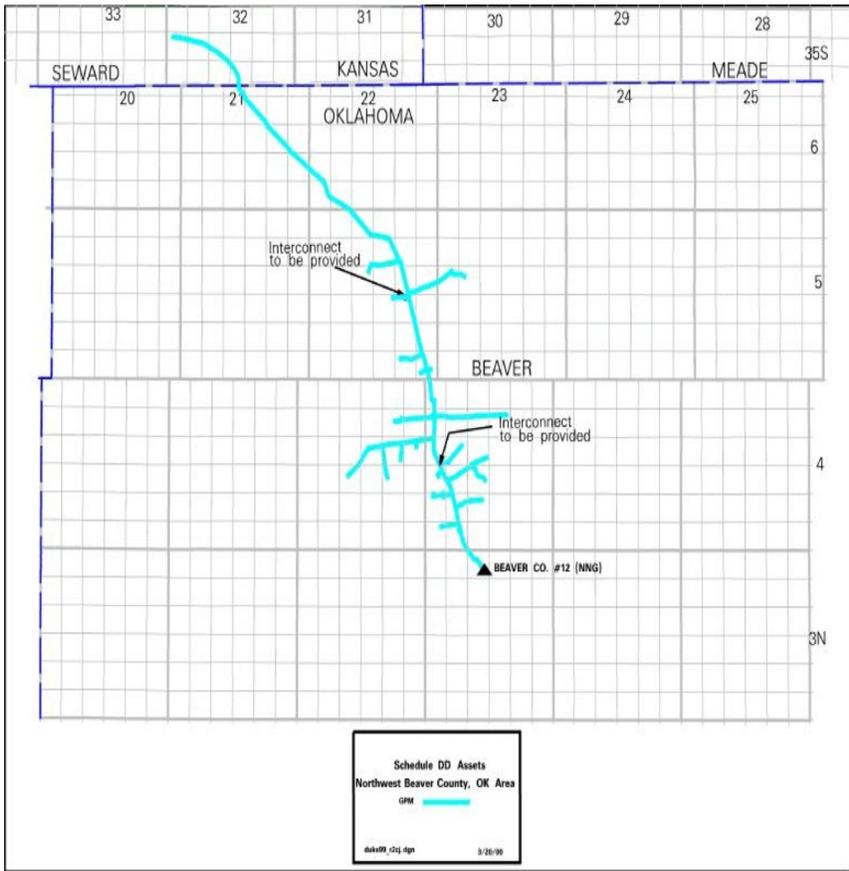
NORTHWEST BEAVER COUNTY, OK AREA

Key No.	GATHERER	LINE NO.	PIPELINE ID	SEC	TWP	RNG	COUNTY	PIPE LENGTH (ft)	PIPE DESCR (diam. in inches)
GPM									
1		OG21801A		13	4N	22ECM	BEAVER, OK	967	4.5
2		OG21801B		15	4N	22ECM	BEAVER, OK	6257	4.5
3		OG21801D		15	4N	22ECM	BEAVER, OK	6740	4.5
4		OG21801E		14	4N	22ECM	BEAVER, OK	3169	4.5
5		OG21401		10	4N	23ECM	BEAVER, OK	51072	6.625
6		OG21401A		18	4N	23ECM	BEAVER, OK	2202	4.5
7		OG21401K		7	4N	23ECM	BEAVER, OK	122	4.5
8		OG21401N		19	4N	23ECM	BEAVER, OK	1482	4.5
9		OG21401P1		29	4N	23ECM	BEAVER, OK	5542	4.5
10		OG21401P1 EXT		30	4N	23ECM	BEAVER, OK	4693	4.5
11		OG21401P1A		30	4N	23ECM	BEAVER, OK	1368	4.5
12		OG21401Q		29	4N	23ECM	BEAVER, OK	6845	4.5
13		OG21401R		29	4N	23ECM	BEAVER, OK	524	4.5
14		OG21401S		9	4N	23ECM	BEAVER, OK	374	4.5
15		OG21401U		8	4N	23ECM	BEAVER, OK	251	6.625
16		OG21401V		17	4N	23ECM	BEAVER, OK	4488	4.5
17		OG21401X		32	4N	23ECM	BEAVER, OK	572	4.5
18		OG21601		7	4N	23ECM	BEAVER, OK	3157	6.625
19		OG21601A1A		6	4N	23ECM	BEAVER, OK	3175	4.5
20		OG21601B		6	4N	23ECM	BEAVER, OK	2707	4.5
21		OG21701		7	4N	23ECM	BEAVER, OK	9451	6.625
22		OG21801		18	4N	23ECM	BEAVER, OK	16161	6.625
23		OG23101A		20	4N	23ECM	BEAVER, OK	11398	4.5
26		OG23101D		21	4N	23ECM	BEAVER, OK	4394	4.5
27		OG26801		23	5N	23ECM	BEAVER, OK	27357	4.5
30		OG26801B		36	5N	22ECM	BEAVER, OK	1784	4.5
31		OG26801C		36	5N	22ECM	BEAVER, OK	3342	4.5
32		OG26801C1		35	5N	22ECM	BEAVER, OK	2841	4.5
33		OG26801D		11	5N	22ECM	BEAVER, OK	6672	4.5
34		OG26801E		25	5N	22ECM	BEAVER, OK	6882	4.5
35		OG26801E1		27	5N	22ECM	BEAVER, OK	8309	4.5
36		OG26801J		23	5N	22ECM	BEAVER, OK	3461	4.5
37		OG39801		11	5N	22ECM	BEAVER, OK	53718	6.625
38		OG39801A		4	5N	22ECM	BEAVER, OK	840	4.5
39		OG40301		14	5N	22ECM	BEAVER, OK	11652	6.625
40		OG26801A2A		18	5N	23ECM	BEAVER, OK	2747	4.5
43		KG68601		15	35S	32W	SEWARD, KS	641	6.625
44		KG68601A		15	35S	32W	SEWARD, KS	18094	6.625
45		KG68601B		16	35S	32W	SEWARD, KS	659	3.5
Total Pipe Length (Crown Jewel Aas								<u>296110</u>	

Schedules

Interconnects: All interconnects will be done to DEFS's usual specifications.
All layovers will be completed with steel pipe to DEFS's usual specifications.

Pipes Involved	Section	Township	Range	Type	Distance (mi.)	Comments
GPM/GPM	23	5	22	lay over	0.02	Tie 4" GPM steel to 6" GPM st
GPM/GPM	18	4	23	crossover		Tie GPM 4" steel to 8" GPM st
GPM/Northern	4	3	23	existing		Connection exists to Northern's Beaver County No. 12 compressor station



Schedules

Schedule EE

SCHEDULE EE

MEADE/CLARK COUNTIES, KS AREA

Key No.	GATHERER	LINE NO.	PIPELINE ID	SEC	TWP	RNG	COUNTY	PIPE LENGTH (ft)	PIPE DESCR (diam. In Inches)
GPM									
1		OG48101		18	6N	26ECM	BEAVER, OK	8733	4.5
2		OG48101A		17	6N	26ECM	BEAVER, OK	2554	4.5
3		LA-452-04138		24	6N	27ECM	BEAVER, OK	14330	4.5
4		LA-452-04139		21	6N	27ECM	BEAVER, OK	13085	4.5
5		LA-452-04163		20	6N	27ECM	BEAVER, OK	509	4.5
6		LA-452-04178		20	6N	27ECM	BEAVER, OK	2151	4.5
7		LA-452-04190		20	6N	27ECM	BEAVER, OK	2508	4.5
8		LA-452-04213		20	6N	27ECM	BEAVER, OK	2173	4.5
9		LA-452-04219		24	6N	27ECM	BEAVER, OK	13075	4.5
10		OG38101		15	6N	28ECM	BEAVER, OK	3995	6.625
11		OG38101 EXT		10	6N	28ECM	BEAVER, OK	1957	6.625
12		OG38101C		10	6N	28ECM	BEAVER, OK	2507	4.5
13		OG38101D		15	6N	28ECM	BEAVER, OK	4330	6.625
15		LA-452-04220		17	6N	28ECM	BEAVER, OK	91	4.5
16		LA-452-04221		17	6N	28ECM	BEAVER, OK	3039	4.5
17		LA-452-04222		8	6N	28ECM	BEAVER, OK	51	4.5
18		LA-452-04223		17	6N	28ECM	BEAVER, OK	259	4.5
19		LA-452-04273		17	6N	28ECM	BEAVER, OK	949	4.5
20		LA-452-04274		17	6N	28ECM	BEAVER, OK	1460	4.5
21		LA-452-04275		17	6N	28ECM	BEAVER, OK	2276	4.5
22		LA-452-0616		16	6N	28ECM	BEAVER, OK	8538	6.625
23		LA-452-04276		16	6N	28ECM	BEAVER, OK	608	4.5
24		LA-452-04277		16	6N	28ECM	BEAVER, OK	2782	4.5
25		LA-452-04278		16	6N	28ECM	BEAVER, OK	2515	4.5
26		LA-452-04279		16	6N	28ECM	BEAVER, OK	264	4.5
27		LA-452-04280		16	6N	28ECM	BEAVER, OK	84	4.5
28		LA-452-04281		17	6N	28ECM	BEAVER, OK	349	4.5
29		LA-452-04289		17	6N	28ECM	BEAVER, OK	791	4.5
30		LA-452-04290		17	6N	28ECM	BEAVER, OK	3367	4.5
31		LA-452-04291		21	6N	28ECM	BEAVER, OK	1387	4.5
32		KG17901		33	35S	25W	CLARK, KS	10698	6.625
33		KG17501I		5	35S	27W	MEADE, KS	11206	4.5
34		KG12801		20	34S	24W	CLARK, KS	7323	6.625
35		KG12801C		17	34S	24W	CLARK, KS	2126	4.5
36		KG12801A		18	34S	24W	CLARK, KS	3461	4.5
37		KG12801A1		18	34S	24W	CLARK, KS	3062	4.5
38		KG12801D		20	34S	24W	CLARK, KS	923	4.5
39		KG12801A1 M/R		18	34S	24W	CLARK, KS	13	2.5
40		KG12701		11	34S	24W	CLARK, KS	60453	8.625
41		KG12701L		29	34S	24W	CLARK, KS	98	3.5
42		KG75301		29	34S	24W	CLARK, KS	17681	8.625
43		KG75301A		19	34S	24W	CLARK, KS	793	4.5

FEDERAL TRADE COMMISSION DECISIONS
VOLUME 129

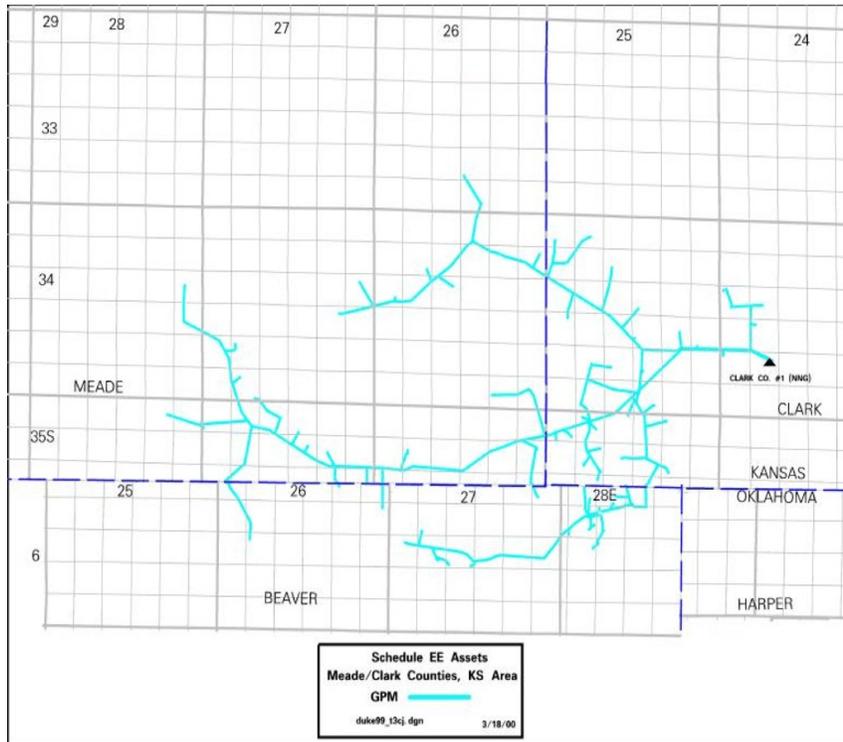
Schedules

44	KG12701A	23	34S	25W	CLARK, KS	2629	4.5
45	KG12701B	7	34S	25W	CLARK, KS	2678	4.5
46	KG12701B1	7	34S	25W	CLARK, KS	8482	4.5
47	KG12701B2	7	34S	25W	CLARK, KS	3517	4.5
48	KG12701F	22	34S	25W	CLARK, KS	404	4.5
49	KG12701G	21	34S	25W	CLARK, KS	4400	4.5
50	KG12701J	18	34S	25W	CLARK, KS	3986	4.5
51	KG12701K	24	34S	25W	CLARK, KS	320	4.5
52	KG14101	27	34S	25W	CLARK, KS	7748	4.5
53	KG14101A	27	34S	25W	CLARK, KS	291	4.5
54	KG14101B	34	34S	25W	CLARK, KS	5799	4.5
55	KG14101B1	34	34S	25W	CLARK, KS	1688	4.5
CLARK, KS/ MEADE, KS							
56	KG17501	29	34S	25W	CLARK, KS	113571	6.625
57	KG17901C	34	34S	25W	CLARK, KS	2438	4.5
58	KG17901G	34	34S	25W	CLARK, KS	2223	4.5
59	KG18601	17	34S	25W	CLARK, KS	7827	6.625
60	KG55901B	32	34S	25W	CLARK, KS	6869	4.5
61	KG55901B1	32	34S	25W	CLARK, KS	4735	4.5
62	KG55901B2	29	34S	25W	CLARK, KS	3584	4.5
63	KG12701E	3	34S	26W	MEADE, KS	6642	4.5
64	KG12701E1	34	34S	26W	MEADE, KS	5487	4.5
65	KG51401	3	34S	26W	MEADE, KS	28397	6.625
66	KG51401B	18	34S	26W	MEADE, KS	512	4.5
67	KG51401F	17	34S	26W	MEADE, KS	2140	4.5
68	KG51401G	16	34S	26W	MEADE, KS	3143	4.5
69	KG12701H	12	34S	26W	MEADE, KS	3164	4.5
70	KG55501A1	36	34S	26W	MEADE, KS	6717	4.5
71	KG51401H	13	34S	27W	MEADE, KS	4656	4.5
72	KG17501M	32	34S	27W	MEADE, KS	1710	4.5
73	KG17501S	30	34S	27W	MEADE, KS	2780	4.5
74	KG17501 EXT	24	34S	28W	MEADE, KS	3592	4.5
75	KG17501P	5	35S	25W	CLARK, KS	5071	4.5
76	KG17501P1	5	35S	25W	CLARK, KS	1658	4.5
77	KG17501P2	8	35S	25W	CLARK, KS	4146	4.5
78	KG17501P2A	8	35S	25W	CLARK, KS	2574	4.5
79	KG17501P2B	8	35S	25W	CLARK, KS	2058	4.5
80	KG17501P2C	8	35S	25W	CLARK, KS	1501	4.5
81	KG17501V	6	35S	25W	CLARK, KS	1984	4.5
82	KG17501W	6	35S	25W	CLARK, KS	1188	4.5
83	KG17901D	10	35S	25W	CLARK, KS	4349	6.625
84	KG17901D1	10	35S	25W	CLARK, KS	3170	6.625
85	KG17901E	3	35S	25W	CLARK, KS	4581	4.5
86	KG17901F	10	35S	25W	CLARK, KS	4560	4.5
87	KG55901	5	35S	25W	CLARK, KS	3468	6.625
88	KG55901C	5	35S	25W	CLARK, KS	63	4.5
89	KG55901D	5	35S	25W	CLARK, KS	1543	4.5
MEADE, KS/ BEAVER, OK							
90	KG17501C	7	35S	26W	MEADE, KS	6450	4.5
91	KG17501T	7	35S	26W	MEADE, KS	3516	4.5

Schedules

92	KG17501U	12	35S	26W	MEADE, KS	3193	4.5
93	KG17501U1	12	35S	26W	MEADE, KS	5550	4.5
94	KG17501U1A	13	35S	26W	MEADE, KS/ BEAVER, OK	2759	4.5
95	KG55501A	1	35S	26W	MEADE, KS	8044	4.5
96	KG17501A	11	35S	27W	MEADE, KS	2155	4.5
97	KG17501B	11	35S	27W	MEADE, KS	1891	4.5
98	KG17501B1	14	35S	27W	MEADE, KS/ BEAVER, OK	1412	4.5
99	KG17501J	10	35S	27W	MEADE, KS	1150	4.5
100	KG17501K	10	35S	27W	MEADE, KS	2023	4.5
101	KG17501L	4	35S	27W	MEADE, KS	2794	4.5
102	KG17501L1	4	35S	27W	MEADE, KS	2734	4.5
103	KG17501L1A	4	35S	27W	MEADE, KS	3202	4.5
104	KG17501N	12	35S	27W	MEADE, KS	2307	4.5
105	KG17501Q	5	35S	27W	MEADE, KS	15671	6.625
106	KG17501Q1	1	35S	28W	MEADE, KS	1043	4.5
Total Pipe Length (Crown Jewel Assets)						578491	

Note: The crown jewel asset package includes an existing connection to Northern's Clark County No. 1 compressor station in 34S/24W, Section 29.



FEDERAL TRADE COMMISSION DECISIONS
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Schedules

Schedule FF

SCHEDULE FF

ELLISWOODWARD COUNTIES, OK AREA

Key No.	GATHERER	LINE NO.	PIPELINE ID	SEC	TWP	RNG	COUNTY	PIPE LENGTH (ft)	PIPE DESC (diam. in Inches)
DEFS									
1		43-02-061-01-12"			19, 20, 21N	29W	ELLIS	60418	12.7
2		C14-02-06-02-30-4"			19N	29W	ELLIS	12093	4.5
3		14-02-062-23-4"			19N	29W	ELLIS	5827	4.5
4		14-02-062-14-4"			19N	29W	ELLIS	3606	4.5
5		14-02-062-21-4"			19N	29W	ELLIS	10368	4.5
6		C14-02-060-43-4"			20N	29W	ELLIS	3688	4.5
7		C14-02-060-44-4"			20N	29W	ELLIS	10900	4.5
8		C14-02-060-45-4"			20N	29W	ELLIS	4127	4.5
9		16-02-060-08-6"			21N	22W	WOODWARD	1196	6.6
10		16-02-059-08-6" EXT			21N	22W	WOODWARD	4143	6.6
11		14-02-060-4-4"			21N	22W	WOODWARD	2879	4.5
12		16-02-060-14-6" & EXT.			20N, 21N	22W	WOODWARD	35017	6.6
13		16-02-060-10-4"			21N	22W	WOODWARD	611	4.5
14		14-02-060-30-4"			21N	29W	ELLIS	1088	4.5
15		14-02-060-02-4"			21N	29W	ELLIS	92	4.5
16		16-02-060-03-6"			21N	29W	ELLIS	40597	6.6
17		14-02-060-10-4"			21N	29W	ELLIS	2282	4.5
18		14-02-060-12-4"			21N	29W	ELLIS	2060	4.5
19		14-02-059-41-4"			21N	29W	ELLIS	1377	4.5
20		14-02-059-40-4"			21N	29W	ELLIS	4957	4.5
21		16-02-060-08-6"			21N	29W,22W	ELLISWOOD	23488	6.6
22		16-02-060-02-6"			21N	29W,24W	ELLIS	13824	6.6
23		14-02-060-05-4"			21N	24W	ELLIS	98	4.5
24		16-02-059-07-10"			21N,22N	29W	ELLIS	48935	10.8
25		16-02-059-01-10"			21N,22N	29W	ELLIS	48862	10.8
26		14-02-059-48-4"			22,23N	24W	ELLIS	5950	4.5
27		16-02-058-2-6"			22,23N	22W	WOODWARD	15598	6.6
28		16-02-058-3-6" & EXT.			22N	22W	WOODWARD	17581	6.6
29		16-02-058-3-6" EXT.			22N	22W	WOODWARD	2855	6.6
30		14-02-058-17-4"			22N	22W	WOODWARD	95	4.5
31		14-02-058-16-4"			22N	22W	WOODWARD	117	4.5
32		14-02-059-03-4"			24N	29W	ELLIS	2171	4.5
33		14-02-059-30-4"			22N	29W	ELLIS	1461	4.5
34		14-02-059-24-4"			22N	29W	ELLIS	4198	4.5
35		14-02-059-07-4"			22N	29W	ELLIS	7260	4.5
36		C14-02-059-73-4"			22N	29W	ELLIS	1922	4.5
37		C14-02-059-74-4"			22N	29W	ELLIS	1500	4.5
38		14-02-059-05-4"			22N	29W	ELLIS	1906	4.5
39		14-02-059-06-4"			22N	29W	ELLIS	94	4.5
40		14-02-059-22-4"			22N	29W	ELLIS	3080	4.5

Schedules

41	14-02-059-23-4"	22N	29W	ELLIS	119	4.5
42	14-02-058-14-4"	22N	29W	ELLISWOOD	3523	4.5
43	14-02-058-20-4"	22N	29W	ELLISWOOD	42	4.5
44	14-02-058-13-4"	22N	29W	ELLISWOOD	161	4.5
45	14-02-058-2-4"	22N	22W	WOODWARD	2297	4.5
46	14-02-058-22-4"	22N	22W	WOODWARD	2034	4.5
47	14-02-058-26-4"	22N	22W	WOODWARD	14476	4.5
48	16-02-058-1-8"	22N	23W,22W	ELLISWOOD	29519	6.6
49	14-02-058-43-6"	22N	23N,24W	ELLIS	20003	6.6
50	14-02-058-44-6"	22N	24W	ELLIS	4099	6.6
51	14-02-059-52-6"	22N	24W	ELLIS	5290	6.6
52	14-02-059-51-6"	22N	24W	ELLIS	5771	6.6
53	14-02-059-57-4"	22N	24W	ELLIS	7701	4.5
54	14-02-059-71-4"	22N	24W	ELLIS	1500	4.5
55	14-02-058-24-4"	22N	24W	ELLIS	1473	4.5
56	14-02-059-45-4"	22N	24W	ELLIS	4056	4.5
57	C14-02-059-76-4"	22N	24W	ELLIS	2607	4.5
58	C14-02-059-75-4"	22N	24W	ELLIS	150	4.5
59	14-02-059-13-4"	22N,23N	29W	ELLIS	9591	4.5
60	16-02-059-1-8" EXT.	22N,23N	29W	ELLIS	122696	6.6
61	14-02-058-10-4"	23N	22W	WOODWARD	12737	4.5
62	C14-02-058-31-4"	23N	22W	WOODWARD	9800	4.5
63	C14-02-058-28-4"	23N	22W	WOODWARD	12908	4.5
64	C14-02-058-30-3"	23N	22W	WOODWARD	125	3.5
65	C14-02-058-29-3"	23N	22W	WOODWARD	113	3.5
66	C14-02-058-32-4"	23N	22W	WOODWARD	335	4.5
67	14-02-059-37-4"	23N	29W	ELLIS	4140	4.5
68	14-02-059-15-4"	23N	29W	ELLIS	216	4.5
69	16-02-059-6-6"	23N	29W	ELLIS	6023	6.6
70	C14-02-059-62-4"	23N	29W	ELLIS	5367	4.5
71	14-02-059-96-4"	23N	24W	ELLIS	2659	4.5
72	14-02-059-36-4"	23N	24W	ELLIS	10716	4.5
73	C14-02-059-86-6"	23N	24W	ELLIS	5400	6.6
74	16-02-059-5-4"	23N	24W	ELLIS	13316	4.5
75	14-02-059-38-4"	23N	24W	ELLIS	3800	4.5
76	14-02-017-127-4"	23N	24W	ELLIS	2654	4.5
77	14-02-059-29-4"	23N	24W	ELLIS	1600	4.5
78	C14-02-059-88-4"	23N,24N	24W	ELLIS	6500	4.5
79	14-02-059-32-4"	24N	29W	ELLISHARPER	2253	4.5
80	14-02-059-46-6"	24N	23W,24W	ELLIS	11343	6.6
81	14-02-059-54-4"	24N	23W,24W	ELLIS	4183	4.5
82	16-02-059-0-4"	24N	24W	ELLIS	6397	4.5
83	C14-02-059-73-4"	24N	24W	ELLIS	500	4.5
84	16-02-059-8-6"	24N	24W	ELLIS	18631	6.6
85	C14-02-059-85-4"	24N	24W	ELLIS	3200	4.5
86	16-02-059-4-4" & EXT.	24N	24W	ELLIS	5649	4.5
87	16-02-059-10-4"	24N	24W	ELLIS	4248	4.5
88	C14-02-059-70-4"	24N	24W,25W	ELLISHARPER	5000	4.5
89	16-02-059-10-4" 4XT.	24N	24W,25W	ELLISHARPER	7314	4.5
90	14-02-059-34-4"	24N,25N	29W	ELLISHARPER	1832	4.5

FEDERAL TRADE COMMISSION DECISIONS
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Schedules

91	16-02-050-34"	24N,25N	23W,24W	ELLISHARPER	2656	4.5
92	14-02-050-34"	25N	23W	HARPER	1802	4.5
93	14-02-050-40"	25N	23W	HARPER	1011	4.5
94	C14-02-050-64-3"	25N	24W	HARPER	2122	3.5
95	C14-02-050-63-3"	25N	24W	HARPER	1154	3.5
96	C14-02-060-30-4"	21N	21W	WOODWARD	1065	4.5
97	16-02-060-54"	21N	22W	WOODWARD	11418	6.6
98	16-02-060-64"	21N	22W	WOODWARD	5155	4.5
99	16-02-060-74"	21N	22W	WOODWARD	3782	4.5
100	14-02-060-21-4"	21N	22W	WOODWARD	4731	4.5
101	14-02-060-16-3"	21N	22W	WOODWARD	36	3.5
102	16-02-060-16-3"	21N	22W	WOODWARD	30	3.5
103	14-02-060-26-4"	21N	22W	WOODWARD	2442	4.5
104	14-02-060-35-4"	21N	22W	WOODWARD	2380	4.5
105	14-02-060-15-4"	21N	22W	WOODWARD	30	4.5
106	C14-02-060-40-4"	21N	22W	WOODWARD	3796	4.5
107	C14-02-060-41-4"	21N	22W	WOODWARD	2202	4.5
108	C14-02-060-38-4"	21N	22W	WOODWARD	1759	4.5
109	16-02-060-54"	21N	22W	WOODWARD	4711	4.5
110	16-02-060-54" EXT.	21N	22W	WOODWARD	2485	4.5
111	14-02-060-17-3"	21N	22W	WOODWARD	33	3.5
112	16-02-060-20-3"	21N	21W	WOODWARD	25	3.5
113	C16-02-060-3-8"	21N,22N	21W,22W	WOODWARD	4636	6.6
Total Pipe Length (Crown Jewel Assets)					93671	

Interconnects: All interconnects will be done to DEFS's usual specifications.
All layovers will be completed with steel pipe to DEFS's usual specifications.

Area	Pipes Involved	Section	Township	Range	Type	Distance (mi)	Comments
Ellis	DEFS/Northern	26	22	25	layover	0.95	Lay steel 6.58" line to, and interconnection with, Northern's Ellis County No. 2 compression station, tie steel-steel

Compression:

Rooster Site	Unit #	Compressor	Cylinders	Driver	HP Rated	HP Gas	County	Leads	Section	Discharge	Volume
Gage	U-166	WBED1STG	4/12.0 ⁶	W.S. 8G-825	800	690	Ellis	21N-23W-29	30	180	4000
Gage	U-167	WBED1STG	4/12.0 ⁶	W.S. 8G-825	800	690	Ellis	21N-23W-29	30	180	4000

Other Equipment: ESDS System, Natural Gas Liquids Tank - 210 bbl pressurized, Residue Tank - 40 bbl (2 each), Dehydrator System, Methanol Storage Tank, Glycol Storage Tank (2 each), Engine Oil Storage Tank

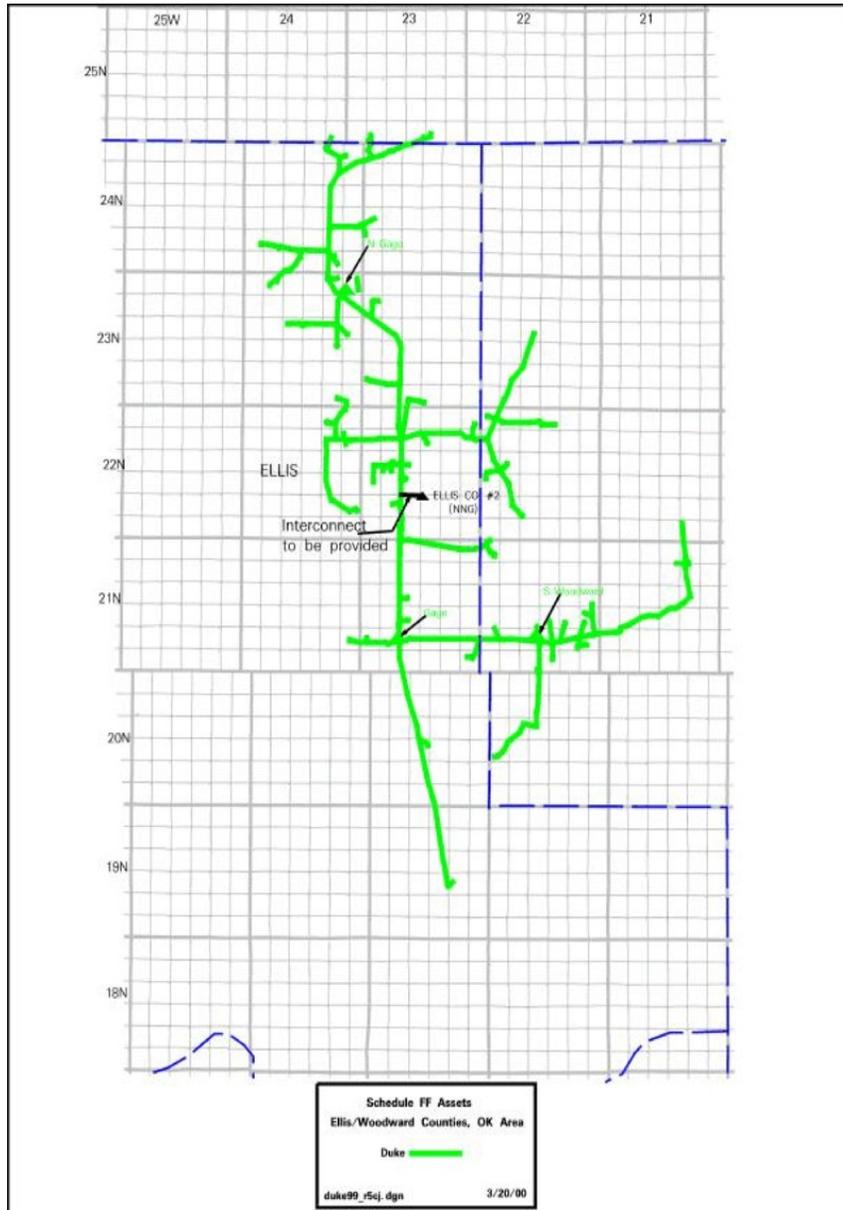
N. Gage	U-409	OFB-M-4 STG	21.0-14.5*10	WALK L7042G	896	771	Ellis	23N-24W-11	25	180	4000
N. Gage	U-408	OFB-M-4 STG	21.0-14.5*10	WALK L7042G	896	771	Ellis	23N-24W-11	25	180	4000

Other Equipment: ESDS System, Natural Gas Liquids Tank - 200 bbl pressurized, Residue Tank - 40 bbl, Engine Oil Storage Tank - 50 bbl

S. Woodward	U-430	WOR OF5-HU/2	15.5-0.25*5	CAT0698NA	410	303	Woodward	21N-22W-27	13	170	1000
				28TG							

Other Equipment: Natural Gas Liquids Tank - 210 bbl pressurized, (2 each) Residue Tank - 40 bbl, Methanol Storage Tank, Engine Oil Storage Tank, No ESDS System

Schedules



Schedules

Schedule GG

SCHEDULE GG

DEWEY/ROGER MILLS COUNTIES, OK AREA

Key No.	GATHERER	LINE NO.	PIPELINE ID	SEC	TWP	RNG	COUNTY	PIPE LENGTH (ft)	PIPE DEBOR (diam. in inches)
DEFS									
1		14-02-051-4-4"			17N	19W	DEWEY	3080	4.5
2		14-02-051-5-4"			17N	19W	DEWEY	2950	4.5
3		14-02-051-6-4"			17N	19W	DEWEY	1802	4.5
4		14-02-051-16-4"			17N	19W	DEWEY	3872	4.5
5		14-02-051-23-4"			17N	19W	DEWEY	3023	4.5
6		16-02-051-3-6"			17N, 18N	19W	DEWEY	9957	6.6
7		14-02-051-12-4" (retired)			17N	19W	DEWEY	1634	4.5
8		14-02-051-17-4" (retired)			17N	19W	DEWEY	4719	4.5
9		16-02-051-16-4"			17N, 18N	19W, 20W	DEWEY	11912	4.5
10		19-02-051-63-3"			18N	20W	DEWEY	31	3.5
11		14-02-051-56-6"			18N	19W, 20W	DEWEY	11973	6.6
12		16-02-051-6-6"			17N	19W, 20W	DEWEY	11026	6.6
13		14-02-051-36-4"			17N	20W	DEWEY	86	4.5
14		14-02-051-43-4"			17N	20W	DEWEY	23733	4.5
15		C14-02-051-70-4"			17N	20W	DEWEY	2880	4.5
16		14-02-051-56-4"			18N	19W	DEWEY	5570	4.5
17		14-02-051-40-4"			18N	19W	DEWEY	4625	4.5
18		14-02-051-7-4"			18N	19W	DEWEY	1069	4.5
19		14-02-051-8-4"			18N	19W	DEWEY	2699	4.5
20		14-02-051-13-4" (retired)			18N	19W	DEWEY	1942	4.5
21		C16-02-051-74-6"			18N	19W	DEWEY	1894	6.6
22		W. FARMERS 3" (scaled)			18N	19W	DEWEY	6600	3.5
23		W. FARMERS 2" (scaled)			18N	19W	DEWEY	3000	2.4
24		W. FARMERS 3" (scaled)			18N	19W	DEWEY	3000	3.5
25		W. FARMERS 6" (scaled)			18N	19W	DEWEY	6500	6.6
26		W. FARMERS 4" (scaled)			17N, 18N	19W	DEWEY	4700	4.5
27		W. FARMERS 4" (scaled)			17N, 18N	19W	DEWEY	4200	4.5
28		W. FARMERS 3" (scaled)			17N	19W	DEWEY	2500	3.5
29		W. FARMERS 3" (scaled)			17N	19W	DEWEY	5100	3.5
30		W. FARMERS 3" (scaled)			17N	19W	DEWEY	4300	3.5
31		16-02-051-1-10"			17N	18W, 19W	DEWEY	53351	10.6
32		C14-02-051-62-4"			17N	18W	DEWEY	1726	4.5
33		C14-02-051-81-4"			17N	18W	DEWEY	330	4.5
34		C14-02-047-13-6"			17N	18W	DEWEY	9438	6.6
35		C14-2-041-176-4"			17N	18W	DEWEY	3302	4.5
36		C14-02-047-19-4"			17N	18W	DEWEY	2489	4.5
37		C14-02-047-22-4"			17N	18W	DEWEY	1927	4.5
38		C14-02-047-20-4"			17N	18W	DEWEY	2210	4.5
39		C14-02-047-14-4"			17N	18W	DEWEY	441	4.5
40		C14-02-047-21-4"			17N	18W	DEWEY	3381	4.5
41		C14-02-047-16-4"			17N	18W	DEWEY	500	4.5
42		C14-02-047-10-4"			17N	18W	DEWEY	1707	4.5

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43	16-02-047-1-8"			17N	17W,18W	DEWEY	8300	8.8
44	16-02-047-1-8"EXT.			17N	17W,18W	DEWEY	17384	8.8
45	16-02-051-2-8"			17N	18W	DEWEY	4668	6.8
46	14-02-051-18-4"			17N	18W	DEWEY	2850	4.5
47	14-02-051-18-4"			17N	18W	DEWEY	151	4.5
48	14-02-051-48-4"			17N	18W	DEWEY	3208	4.5
49	14-02-051-48-4"EXT			17N	18W	DEWEY	11448	4.5
50	14-02-051-43-4"			17N	18W	DEWEY	3131	4.5
51	14-02-051-25-4"			17N	18W	DEWEY	6246	4.5
52	14-02-051-01-4"			17N	18W	DEWEY	4740	4.5
53	14-02-051-80-4"			17N	18W	DEWEY	250	4.5
54	C14-02-047-15-8"			17N	18W	DEWEY	1800	6.8
55	14-02-051-48-4"			17N	18W	DEWEY	1048	4.5
56	14-02-051-48-4"EXT			17N	18W	DEWEY	2875	4.5
57	C14-02-051-71-4"			17N	18W	DEWEY	4340	4.5
58	W. FARMERS 8" (scaled)			17N	18W	DEWEY	6000	6.8
59	W. FARMERS 3" (scaled)			17N	18W	DEWEY	7000	3.5
60	W. FARMERS 4" (scaled)			17N	18W	DEWEY	18500	4.5
61	W. FARMERS 3" (scaled)			17N	18W	DEWEY	5500	3.5
62	W. FARMERS 3" (scaled)			17N	18W	DEWEY	5000	3.5
63	W. FARMERS 3" (scaled)			17N	18W	DEWEY	300	3.5
64	W. FARMERS 3" (scaled)			17N	18W	DEWEY	2000	3.5
65	W. FARMERS 3" (scaled)			17N	18W	DEWEY	5500	3.5
66	W. FARMERS 3" (scaled)			17N	18W	DEWEY	4500	3.5
Total Pipe Length (DEFS)							359612	
GPM								
101	CM-3 EXT	2001459	17	17N	21W/22W	DEWEY/ROGER MILLS	18897	4.5
102	CM-3 EXT	2001459	30	17N	22W	DEWEY/ROGER MILLS	33273	4.5
103	CM-3 EXT	2001459	30	17N	21W	ROGER MILLS	12	4.5
104	CM-3-2-1	2001479	4	18N	22W	ROGER MILLS	2077	3.5
105	CM-3-2-1	2001479	4	18N	22W	ROGER MILLS	2185	3.5
106	CM-3-2-1	2001479	4	18N	22W	ROGER MILLS	8	4.5
107	CM-3-2-1	2001479	4	18N	22W	ROGER MILLS	8	2.37
108	CM-3-2-2	2001484	9	18N	22W	ROGER MILLS	547	3.5
109	CM-3-2-2	2001484	9	18N	22W	ROGER MILLS	3	4.5
110	CM-3-2-2	2001484	9	18N	22W	ROGER MILLS	5	2.37
111	CM-3-2-3	2001485	9	18N	22W	ROGER MILLS	342	4.5
112	CM-3-2-3	2001485	9	18N	22W	ROGER MILLS	9	4.5
113	CM-3-2-3	2001485	9	18N	22W	ROGER MILLS	35	2.37
114	CM-3-2-3 EXT	2001486	9	18N	22W	ROGER MILLS	1899	3.5
115	CM-3-2-3 EXT	2001486	9	18N	22W	ROGER MILLS	12	4.5
116	CM-3-2-3 EXT	2001486	9	18N	22W	ROGER MILLS	10	2.37
117	CM-3-2-6	2001492	9	18N	22W	ROGER MILLS	3747	3.5
118	CM-3-2-6	2001492	9	18N	22W	ROGER MILLS	8	4.5
119	CM-3-2	2001478	16	18N	22W	ROGER MILLS	111	8.82
120	CM-3-2	2001478	16	18N	22W	ROGER MILLS	4	10.75
121	CM-3-2	2001478	16	18N	22W	ROGER MILLS	18315	8.82
122	CM-3-2	2001478	16	18N	22W	ROGER MILLS	2782	8.82
123	CM-3-2	2001478	16	18N	22W	ROGER MILLS	6678	8.82

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124	CM-3-2	2001478	16	16N	22W	ROGER MILLS	8	4.5
125	CM-3-2	2001478	16	16N	22W	ROGER MILLS	19	2.37
126	CM-3-2-4	2001487	16	16N	22W	ROGER MILLS	629	3.5
127	CM-3-2-4	2001487	16	16N	22W	ROGER MILLS	3	4.5
128	CM-3-2-4	2001487	16	16N	22W	ROGER MILLS	16	2.37
129	CM-3-2-10	2001480	NW10	16N	22W	ROGER MILLS	373	4.5
130	CM-3-2-10	2001480	NW10	16N	22W	ROGER MILLS	28	4.5
131	CM-3-2-12	2001482	SE/SW09	16N	22W	ROGER MILLS	743	4.5
132	CM-3-2-12	2001482	SE/SW09	16N	22W	ROGER MILLS	19	4.5
133	CM-3-2-6-1	2001493	SE9	16N	22W	ROGER MILLS	2	3.5
134	CM-3-2-6-1	2001493	SE9	16N	22W	ROGER MILLS	832	4.5
135	CM-3-2-6-1	2001493	SE9	16N	22W	ROGER MILLS	6	4.5
136	CM-3-2-11	2001481	SW03NE10	16N	22W	ROGER MILLS	286	6.62
137	CM-3-2-11	2001481	SW03NE10	16N	22W	ROGER MILLS	1365	6.62
138	CM-3-2-11	2001481	SW03NE10	16N	22W	ROGER MILLS	20	3.5
139	CM-3-6-1-2	2001514	NE/NW10	17N	20W	DEWEY	659	4.5
140	CM-3-6-1-2	2001514	NE/NW10	17N	20W	DEWEY	18	4.5
141	CM-3-6-2	2001524	NE/SE 18	17N	20W	DEWEY	1224	6.62
142	CM-3-6-2	2001524	NE/SE 18	17N	20W	DEWEY	35	4.5
143	CM-3-6-3	2001525	NE/SE 18	17N	20W	DEWEY	631	4.5
144	CM-3-6-3	2001525	NE/SE 18	17N	20W	DEWEY	29	4.5
145	CM-3-1-4-1-1 EXT	2001470	NE/SW 18	17N	20W	DEWEY	1946	4.5
146	CM-3-1-4-1-1 EXT	2001470	NE/SW 18	17N	20W	DEWEY	42	4.5
147	CM-3-1-4-1-1 EXT 2	2001471	NE/SW 18	17N	20W	DEWEY	1932	4.5
148	CM-3-1-4-1-1 EXT 2	2001471	NE/SW 18	17N	20W	DEWEY	38	4.5
149	CM-3-4-2	2001505	NE10	17N	20W	DEWEY	82	4.5
150	CM-3-4-2	2001505	NE10	17N	20W	DEWEY	22	4.5
151	CM-3-6-1-3-3	2001521	NE11	17N	20W	DEWEY	95	6.62
152	CM-3-6-1-3-3	2001521	NE11	17N	20W	DEWEY	12	3.5
153	CM-3-6-1-3-3	2001521	NE11	17N	20W	DEWEY	9	3.5
154	CM-3-12	2001477	NE16	17N	20W	DEWEY	124	6.62
155	CM-3-12	2001477	NE16	17N	20W	DEWEY	4	6.62
156	CM-3-12	2001477	NE16	17N	20W	DEWEY	1	6.62
157	CM-3-12	2001477	NE16	17N	20W	DEWEY	1	6.62
158	CM-3-12	2001477	NE16	17N	20W	DEWEY	14	6.62
159	CM-3-12	2001477	NE16	17N	20W	DEWEY	10526	6.62
160	CM-3-12	2001477	NE16	17N	20W	DEWEY	90	6.62
161	CM-3-12	2001477	NE16	17N	20W	DEWEY	860	6.62
162	CM-3-12	2001477	NE16	17N	20W	DEWEY	4474	6.62
163	CM-3-12	2001477	NE16	17N	20W	DEWEY	90	6.62
164	CM-3-12	2001477	NE16	17N	20W	DEWEY	174	6.62
165	CM-3-12	2001477	NE16	17N	20W	DEWEY	135	6.62
166	CM-3-12	2001477	NE16	17N	20W	DEWEY	2138	6.62
167	CM-3-12	2001477	NE16	17N	20W	DEWEY	3	3.5
168	CM-3-12	2001477	NE16	17N	20W	DEWEY	4	3.5
169	CM-3-1-2	2001482	NE16	17N	20W	DEWEY	589	3.5
170	CM-3-1-2	2001482	NE16	17N	20W	DEWEY	8	4.5
171	CM-3-1-2	2001482	NE16	17N	20W	DEWEY	10	2.37
172	CM-3-4	2001503	NE16	17N	20W	DEWEY	58	6.62
173	CM-3-4	2001503	NE16	17N	20W	DEWEY	3	10.75

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174	CM-3-4	2001503	NE16	17N	20W	DEWEY	8679	6.82
175	CM-3-4	2001503	NE16	17N	20W	DEWEY	6	4.5
176	CM-3-6-1	2001511	NE16	17N	20W	DEWEY	4534	6.82
177	CM-3-6-1	2001511	NE16	17N	20W	DEWEY	10	4.5
178	CM-3-5	2001506	NE16/NW15	17N	20W	DEWEY	1045	4.5
179	CM-3-5	2001506	NE16/NW15	17N	20W	DEWEY	23	4.5
180	CM-3-1	2001480	NE16/SW09	17N	20W	DEWEY	3535	6.82
181	CM-3-1	2001480	NE16/SW09	17N	20W	DEWEY	8	4.5
182	CM-3-1	2001480	NE16/SW09	17N	20W	DEWEY	4	2.37
183	CM-3-6-1-3-1	2001519	NW12	17N	20W	DEWEY	439	6.82
184	CM-3-6-1-3-1	2001519	NW12	17N	20W	DEWEY	4	3.5
185	CM-3-6-1-3-1	2001519	NW12	17N	20W	DEWEY	9	3.5
186	CM-3-6	2001507	NW18	17N	20W	DEWEY	16205	6.82
187	CM-3-6	2001507	NW18	17N	20W	DEWEY	3	4.5
188	CM-3-6	2001507	NW18	17N	20W	DEWEY	16	4.5
189	CM-3-6 EXT	2001508	14	17N	21W	DEWEY/ROGER MILLS	476	6.82
190	CM-3-6 EXT	2001508	14	17N	21W	DEWEY/ROGER MILLS	10467	6.82
191	CM-3-6 EXT	2001508	14	17N	21W	DEWEY/ROGER MILLS	3	3.5
192	CM-3-6 EXT	2001508	14	17N	21W	DEWEY/ROGER MILLS	12	3.5
193	CM-3-1-4-1-1	2001489	SE/SW18	17N	20W	DEWEY	1151	4.5
194	CM-3-1-4-1-1	2001489	SE/SW18	17N	20W	DEWEY	20	4.5
195	CM-3-1-1	2001481	SE09NE16	17N	20W	DEWEY	1101	3.5
196	CM-3-1-1	2001481	SE09NE16	17N	20W	DEWEY	7	4.5
197	CM-3-1-1	2001481	SE09NE16	17N	20W	DEWEY	10	2.37
198	CM-3-4-1	2001504	SE10	17N	20W	DEWEY	6	4.5
199	CM-3-4-1	2001504	SE10	17N	20W	DEWEY	839	4.5
200	CM-3-4-1	2001504	SE10	17N	20W	DEWEY	3	4.5
201	CM-3-4-1	2001504	SE10	17N	20W	DEWEY	9	4.5
202	CM-3-1-4 MR 2	2001486	SE17	17N	20W	DEWEY	7	4.5
203	CM-3-1-4-1	2001487	SE18	17N	20W	DEWEY	1	4.5
204	CM-3-1-4-1	2001487	SE18	17N	20W	DEWEY	3745	4.5
205	CM-3-1-4-1	2001487	SE18	17N	20W	DEWEY	23	4.5
206	CM-3-6-1-3	2001515	SE2	17N	20W	DEWEY	3703	6.82
207	CM-3-6-1-3	2001515	SE2	17N	20W	DEWEY	28	4.5
208	CM-3-6-1-3 EXT	2001516	SE2	17N	20W	DEWEY	13	4.5
209	CM-3-6-1-3 EXT	2001516	SE2	17N	20W	DEWEY	7080	6.82
210	CM-3-6-1-3 EXT	2001516	SE2	17N	20W	DEWEY	7	3.5
211	CM-3-6-1-3 EXT	2001516	SE2	17N	20W	DEWEY	8	3.5
212	CM-3-6-6	2001578	SE29	17N	20W	DEWEY	6276	6.82
213	CM-3-6-6	2001578	SE29	17N	20W	DEWEY	2	4.5
214	CM-3-6-6	2001578	SE29	17N	20W	DEWEY	6	4.5
215	CM-3-6-1 EXT	2001512	SW11	17N	20W	DEWEY	4504	6.82
216	CM-3-6-1 EXT	2001512	SW11	17N	20W	DEWEY	4	4.5
217	CM-3-6-1 EXT	2001512	SW11	17N	20W	DEWEY	25	4.5
218	CM-3-1-3-1	2001484	SW16	17N	20W	DEWEY	30	3.5
219	CM-3-1-3-1	2001484	SW16	17N	20W	DEWEY	8	3.5
220	CM-3-6-1-3-5	2001523	SW2	17N	20W	DEWEY	3	6.82
221	CM-3-6-1-3-5	2001523	SW2	17N	20W	DEWEY	5722	6.82
222	CM-3-6-1-3-5	2001523	SW2	17N	20W	DEWEY	7	3.5
223	CM-3-1-4	2001485	SW9	17N	20W	DEWEY	6235	4.5

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224	CM-3-1-4	2001485	SW9	17N	20W	DEWEY	44	4.5
225	CM-3-1-3	2001483	SWNWY18	17N	20W	DEWEY	1182	3.5
226	CM-3-1-3	2001483	SWNWY18	17N	20W	DEWEY	13	3.5
227	CM-3-6-8	2001520	13	17N	21W	ROGER MILLS	701	4.5
228	CM-3-6-8	2001520	13	17N	21W	ROGER MILLS	10	3.5
229	CM-3-2-5	2001488	NE28	17N	21W	ROGER MILLS	7829	4.5
230	CM-3-2-5	2001488	NE28	17N	21W	ROGER MILLS	10	4.5
231	CM-3-6-5	2001526	NW14	17N	21W	ROGER MILLS	453	4.5
232	CM-3-6-5	2001526	NW14	17N	21W	ROGER MILLS	6	3.5
233	CM-3-6-5	2001526	NW14	17N	21W	ROGER MILLS	7	3.5
234	CM-3-6 EXT 2	2001500	NW14/SW11	17N	21W	ROGER MILLS	1	8.82
235	CM-3-6 EXT 2	2001500	NW14/SW11	17N	21W	ROGER MILLS	2807	8.82
236	CM-3-6 EXT 2	2001500	NW14/SW11	17N	21W	ROGER MILLS	3	3.5
237	CM-3-6 EXT 2	2001500	NW14/SW11	17N	21W	ROGER MILLS	10	3.5
238	CM-3-3-1-1	2001500	NW20	17N	21W	ROGER MILLS	3598	8.82
239	CM-3-3-1-1	2001500	NW20	17N	21W	ROGER MILLS	7	3.5
240	CM-3-3-1-1	2001500	NW20	17N	21W	ROGER MILLS	8	3.5
241	CM-3-3	2001498	NW29	17N	21W	ROGER MILLS	6387	8.82
242	CM-3-3	2001498	NW29	17N	21W	ROGER MILLS	4	10.75
243	CM-3-3	2001498	NW29	17N	21W	ROGER MILLS	1809	8.82
244	CM-3-3	2001498	NW29	17N	21W	ROGER MILLS	28	4.5
245	CM-3-3	2001498	NW29	17N	21W	ROGER MILLS	11	3.5
246	CM-3-3-1	2001490	NW29	17N	21W	ROGER MILLS	8060	8.82
247	CM-3-3-1	2001490	NW29	17N	21W	ROGER MILLS	18	4.5
248	CM-3-6-7	2001528	SE10	17N	21W	ROGER MILLS	9652	8.82
249	CM-3-6-7	2001528	SE10	17N	21W	ROGER MILLS	4	3.5
250	CM-3-6-7	2001528	SE10	17N	21W	ROGER MILLS	8	3.5
251	CM-3-6 EXT 3	2001510	SW11/SE10	17N	21W	ROGER MILLS	2284	8.82
252	CM-3-6 EXT 3	2001510	SW11/SE10	17N	21W	ROGER MILLS	14	3.5
253	CM-3-6 EXT 3	2001510	SW11/SE10	17N	21W	ROGER MILLS	1	3.5
254	CM-3-6-6	2001527	SW14	17N	21W	ROGER MILLS	3450	8.82
255	CM-3-6-6	2001527	SW14	17N	21W	ROGER MILLS	5	4.5
256	CM-3-2-7	2001494	35	17N	22W	ROGER MILLS	4325	4.5
257	CM-3-2-7	2001494	35	17N	22W	ROGER MILLS	5	4.5
258	CM-3-2-7	2001494	35	17N	22W	ROGER MILLS	8	2.37
259	CM-3-11-1	2001478	NE24	17N	22W	ROGER MILLS	504	8.82
260	CM-3-11-1	2001478	NE24	17N	22W	ROGER MILLS	10	4.5
261	CM-3-3-2	2001501	NE25	17N	22W	ROGER MILLS	860	3.5
262	CM-3-3-2	2001501	NE25	17N	22W	ROGER MILLS	34	3.5
263	CM-3-2-5-1	2001480	NW25	17N	22W	ROGER MILLS	230	4.5
264	CM-3-2-5-1	2001480	NW25	17N	22W	ROGER MILLS	4	4.5
265	CM-3-2-7 EXT	2001495	NW35	17N	22W	ROGER MILLS	1850	3.5
266	CM-3-2-7 EXT	2001495	NW35	17N	22W	ROGER MILLS	5	2.37
267	CM-3-2-9	2001497	NW38	17N	22W	ROGER MILLS	1440	3.5
268	CM-3-2-5-3 EXT	2010545	SE22	17N	22W	ELLIS	8856	4.5
269	CM-3-2-5-3 EXT	2010545	SE22	17N	22W	ELLIS	37	3.5
270	CM-3-2-5-3	2001491	SE22/NE27	17N	22W	ROGER MILLS	2	4.5
271	CM-3-2-5-3	2001491	SE22/NE27	17N	22W	ROGER MILLS	48	8.82
272	CM-3-2-5-3	2001491	SE22/NE27	17N	22W	ROGER MILLS	2501	8.82
273	CM-3-2-5-3	2001491	SE22/NE27	17N	22W	ELLIS	2754	8.82

Schedules

274	CM-3-11	2001475	8E25	17N	22W	ROGER MILLS	17	8.82
275	CM-3-11	2001475	8E25	17N	22W	ROGER MILLS	2	8.82
276	CM-3-11	2001475	8E25	17N	22W	ROGER MILLS	35	8.82
277	CM-3-11	2001475	8E25	17N	22W	ROGER MILLS	11159	8.82
278	CM-3-11	2001475	8E25	17N	22W	ROGER MILLS	2	4.5
279	CM-3-11	2001475	8E25	17N	22W	ROGER MILLS	14	4.5
280	CM-3-2-8	2001498	8E25	17N	22W	ROGER MILLS	1138	3.5
281	CM-3-3-3	2001502	8E25	17N	22W	ROGER MILLS	3	8.82
282	CM-3-3-3	2001502	8E25	17N	22W	ROGER MILLS	5	10.75
283	CM-3-3-3	2001502	8E25	17N	22W	ROGER MILLS	18	8.82
284	CM-3-2-13	2001483	8E38	17N	22W	ROGER MILLS	1409	8.82
285	CM-3-2-13	2001483	8E38	17N	22W	ROGER MILLS	13	3.5
286	CM-3-2-13	2001483	8E38	17N	22W	ROGER MILLS	9	3.5
287	CM-3-6-1-1	2001513	10	17N	20W	DEWEY	70	8.82
288	CM-3-6-1-1	2001513	10	17N	20W	DEWEY	8	4.5
289	CM-3-6-1-3-2	2001513	12	17N	20W	DEWEY	2000	4.5
Total Pipe Length (GPM)							289498	
Total Pipe Length (Crown Jewel Assets)							649110	

Compression:

Trail Compressor Station is located in Section 16, Township 17N, Range 20W, Dewey County, Oklahoma.

The station has one compressor unit. Unit is three-staged Joy WB-14 compressor with 580 horsepower Waukesha L-7042 driv

Station throughput capacity is approximately 1,800 mcf/d with a 5 psig suction and 700 psig discharge.

The station has inlet gas separation equipment, water and slop oil storage and purchased power available.

Lenora Booster Station, located in Section 1, Township 17N, Range 18W, Dewey C

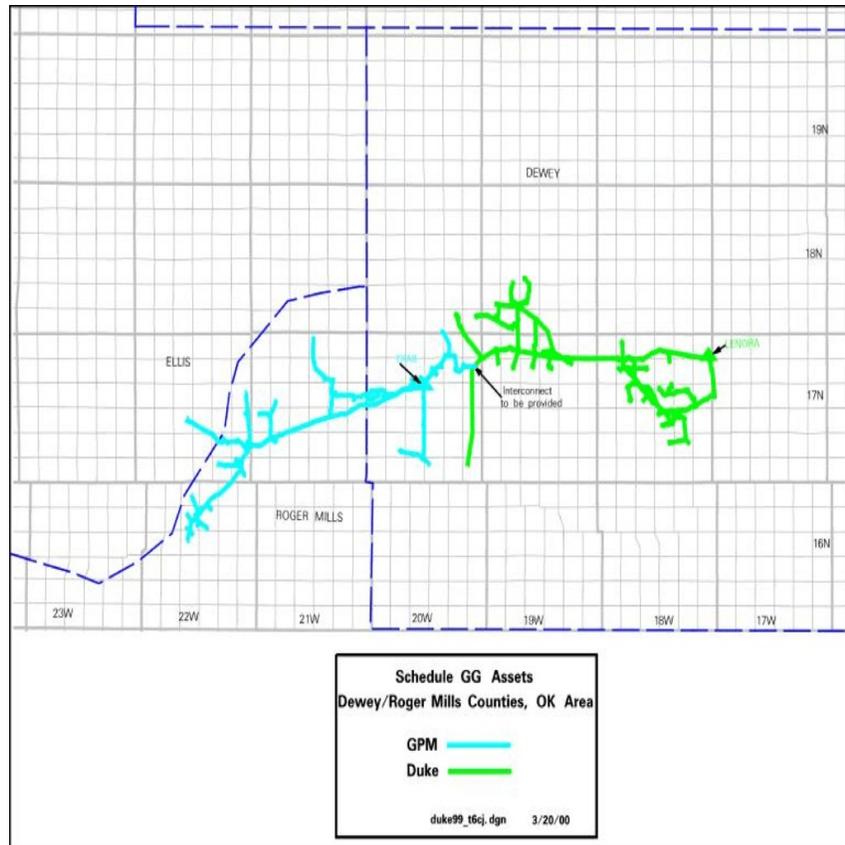
Unit #	Compressor	Cylinders	Driver	HP Rated	HP Gas
U-260	W-6445TG	23 0-15.75 - W.S. 80-825	800	802	
		10.25-6.5"6			
U-255	W-6445TG	23 0-15.75 - W.S. 80-825	800	802	
		10.25-6.5"6			
U-177	OFB M-4/38TG	2/14 5-14.5- WALK	806	725	
		10.75"6 L7042GU			

Other Equipment: ESDS System, Natural Gas Liquids Tank - 210 bbl pressurized (3 each), Residue Tank - 40 bbl, Methanol Storage Tank, Engine Oil Storage Tank

Interconnects: All interconnects will be done to DEFS's usual specifications.

Pipes Involved	Section	Township	Range	Type	Distance (mi.)	Comments
DEFS/GPM	12	17N	20W	crossover		Tie 4" DEFS steel to GPM steel

Schedules



Schedules

Schedule HH

SCHEDULE HH

SOUTHERN OKLAHOMA CITY AREA

Key No.	GATHERER	LINE NO.	PIPELINE ID	SEC	TWP	RNG	COUNTY	PIPE LENGTH (ft)	PIPE DESCR (diam. in inches)
CONOCO									
1				1	10N	SW	CANADIAN	5280	8"8
2				2	10N	SW	CANADIAN	10560	8"8
3				3/10	10N	SW	CANADIAN	5280	8"8
4				4/9	10N	SW	CANADIAN	5280	8"8
5				8	10N	SW	CANADIAN	10560	8"8
6				8	10N	SW	CANADIAN	1320	12"8
7				10	10N	SW	CANADIAN	9240	3"8
8				16	10N	SW	CANADIAN	200	4"8
9				17	10N	SW	CANADIAN	6600	4"8
10				17	10N	SW	CANADIAN	3000	8"8
11				18	10N	SW	GRADY	3000	8"8
12				18	10N	SW	CANADIAN	5280	12"8
13				19	10N	SW	GRADY	2640	8"8
14				7	10N	SW	GRADY	1320	4"8
15				8	10N	SW	GRADY	1320	4"8
16				13	10N	SW	CANADIAN	5280	12"8
17				14	10N	SW	CANADIAN	5280	12"8
18				15	10N	SW	CANADIAN	500	8"8
19				17	10N	SW	GRADY	3960	8"8
20				18	10N	SW	GRADY	6600	4"8
21				18	10N	SW	GRADY	2000	4"8
22				19	10N	SW	GRADY	1320	8"8
23				19	10N	SW	GRADY	200	3"8
24				20	10N	SW	GRADY	5280	8"8
25				20	10N	SW	GRADY	6600	8"8
26				20	10N	SW	GRADY	3960	4"8
27				21	10N	SW	GRADY	5290	8"8
28				22	10N	SW	GRADY	11000	8"8
29				23	10N	SW	GRADY	5500	8"8
30				23	10N	SW	GRADY	1320	8"8
31				24	10N	SW	GRADY	6600	8"8
32				26	10N	SW	GRADY	3000	8"8
33				27	10N	SW	GRADY	2640	8"8
34				28	10N	SW	GRADY	3960	8"8
35				29	10N	SW	GRADY	10560	8"8
36				29	10N	SW	GRADY	3960	4"8
37				30	10N	SW	GRADY	9240	8"8
38				30	10N	SW	GRADY	6600	8"8
39				31	10N	SW	GRADY	5280	8"8
40				32	10N	SW	GRADY	5000	8"8

FEDERAL TRADE COMMISSION DECISIONS
VOLUME 129

Schedules

41	32	10N	6W	GRADY	1320	3'S
42	33	10N	6W	GRADY	500	8'S
43	33	10N	6W	GRADY	1320	3'S
44	4	9N	6W	GRADY	2640	8'S
45	4	9N	6W	GRADY	2640	4'S
46	5	9N	6W	GRADY	7920	8'S
47	5	9N	6W	GRADY	1320	4'P
48	6	9N	6W	GRADY	1320	8'S
49	6	9N	6W	GRADY	6600	8'S
50	7	9N	6W	GRADY	9240	8'S
51	7	9N	6W	GRADY	1320	4'S
52	7	9N	6W	GRADY	1320	4'P
53	9	9N	6W	GRADY	2640	4'S
54	17	9N	6W	GRADY	6600	8'S
55	17	9N	6W	GRADY	1320	4'P
56	17	9N	6W	GRADY	200	4'S
57	17	9N	6W	GRADY	200	3'S
58	18	9N	6W	GRADY	3960	8'S
59	18	9N	6W	GRADY	5280	8'S
60	18	9N	6W	GRADY	500	4'P
61	19	9N	6W	GRADY	1320	8'S
62	20	9N	6W	GRADY	3960	8'S
63	29	9N	6W	GRADY	1320	8'S
64	34	10N	7W	GRADY	1320	4'S
65	1	9N	7W	GRADY	2640	8'S
66	2	9N	7W	GRADY	5280	8'S
67	2	9N	7W	GRADY	1320	4'S
68	2	9N	7W	GRADY	1320	3'P
69	3	9N	7W	GRADY	3000	8'S
70	3	9N	7W	GRADY	2640	4'S
71	10	9N	7W	GRADY	1000	8'S
72	10	9N	7W	GRADY	1000	4'S
73	11	9N	7W	GRADY	6600	8'S
74	11	9N	7W	GRADY	2640	4'S
75	12	9N	7W	GRADY	6600	8'S
76	12	9N	7W	GRADY	1320	4'P
77	12	9N	7W	GRADY	1000	3'S
78	15	10N	6W	CANADIAN	2460	12'S
79	15	10N	6W	CANADIAN	2640	4'S
80	7	9N	6W	GRADY	6600	8'S
81	4	10N	4W	CLEVELAND	2412	6
82	4	10N	4W	CLEVELAND	544	8
83	5	10N	4W	CLEVELAND	2	8
84	5	10N	4W	CLEVELAND	131	4
85	5	10N	4W	CLEVELAND	1369	6
86	5	10N	4W	CLEVELAND	3773	8
87	6	10N	4W	CLEVELAND	53	6
88	6	10N	4W	CLEVELAND	5193	10
89	6	10N	4W	CLEVELAND	223	2
90	6	10N	4W	CLEVELAND	2116	4

Schedules

91	6	10N	4W	CLEVELAND	8098	8
92	6	10N	4W	CLEVELAND	4447	8
93	1	10N	5W	CANADIAN	5588	10
94	1	10N	5W	CANADIAN	5628	8
95	2	10N	5W	CANADIAN	2321	4
96	2	10N	5W	CANADIAN	4565	8
97	2	10N	5W	CANADIAN	1507	8
98	2	10N	5W	CANADIAN	2984	10
99	2	10N	5W	CANADIAN	592	20
100	2	10N	5W	CANADIAN	3326	8
101	5	10N	5W	CANADIAN	5495	8
102	5	10N	5W	CANADIAN	5282	10
103	8	10N	5W	CANADIAN	100	8
104	10	10N	5W	CANADIAN	5871	3
105	11	10N	5W	CANADIAN	6962	3
106	11	10N	5W	CANADIAN	8382	6
107	12	10N	5W	CANADIAN	2707	8
108	13	10N	5W	CANADIAN	3955	6
109	14	10N	5W	CANADIAN	9404	3
110	14	10N	5W	CANADIAN	7548	8
111	15	10N	5W	CANADIAN	4581	3
112	23	10N	5W	GRADY	5059	8
113	24	10N	5W	GRADY	5060	6
114	26	10N	5W	GRADY	4184	4
115	26	10N	5W	GRADY	8807	6
116	6	11N	4W	OKLAHOMA	1775	8
117	6	11N	4W	OKLAHOMA	2010	4
118	6	11N	4W	OKLAHOMA	1407	8
119	7	11N	4W	OKLAHOMA	3135	4
120	7	11N	4W	OKLAHOMA	1487	6
121	7	11N	4W	OKLAHOMA	16047	4
122	7	11N	4W	OKLAHOMA	5370	6
123	7	11N	4W	OKLAHOMA	10	8
124	17	11N	4W	OKLAHOMA	1181	6
125	18	11N	4W	OKLAHOMA	109	4
126	18	11N	4W	OKLAHOMA	8734	6
127	18	11N	4W	OKLAHOMA	4017	4
128	18	11N	4W	OKLAHOMA	7619	6
129	18	11N	4W	OKLAHOMA	2604	8
130	32	11N	4W	OKLAHOMA	2	8
131	32	11N	4W	OKLAHOMA	5489	4
132	32	11N	4W	OKLAHOMA	3198	6
133	32	11N	4W	OKLAHOMA	8322	8
134	33	11N	4W	OKLAHOMA	1848	4
135	33	11N	4W	OKLAHOMA	695	6
136	33	11N	4W	OKLAHOMA	3136	6
137	33	11N	4W	OKLAHOMA	1285	4
138	33	11N	4W	OKLAHOMA	2275	8
139	34	11N	4W	OKLAHOMA	1201	4
140	34	11N	4W	OKLAHOMA	1249	8

Schedules

141	1	11N	SW	CANADIAN	564	8
142	1	11N	SW	CANADIAN	2988	8
143	1	11N	SW	CANADIAN	471	8
144	2	11N	SW	CANADIAN	228	4
145	2	11N	SW	CANADIAN	4858	8
146	2	11N	SW	CANADIAN	5338	8
147	2	11N	SW	CANADIAN	978	4
148	3	11N	SW	CANADIAN	3096	4
149	3	11N	SW	CANADIAN	8219	8
150	3	11N	SW	CANADIAN	5482	8
151	3	11N	SW	CANADIAN	4412	10
152	3	11N	SW	CANADIAN	88	4
153	3	11N	SW	CANADIAN	238	8
154	4	11N	SW	CANADIAN	557	4
155	4	11N	SW	CANADIAN	3574	8
156	4	11N	SW	CANADIAN	2522	8
157	4	11N	SW	CANADIAN	581	4
158	4	11N	SW	CANADIAN	2719	8
159	8	11N	SW	CANADIAN	5522	4
160	8	11N	SW	CANADIAN	7193	8
161	9	11N	SW	CANADIAN	653	4
162	9	11N	SW	CANADIAN	8998	8
163	9	11N	SW	CANADIAN	5442	8
164	9	11N	SW	CANADIAN	379	4
165	10	11N	SW	CANADIAN	812	4
166	10	11N	SW	CANADIAN	5183	8
167	10	11N	SW	CANADIAN	2709	8
168	10	11N	SW	CANADIAN	5290	10
169	10	11N	SW	CANADIAN	1123	4
170	10	11N	SW	CANADIAN	735	4
171	10	11N	SW	CANADIAN	2173	8
172	11	11N	SW	CANADIAN	1154	4
173	11	11N	SW	CANADIAN	4878	8
174	11	11N	SW	CANADIAN	2776	12
175	12	11N	SW	CANADIAN	488	4
176	12	11N	SW	CANADIAN	5888	8
177	12	11N	SW	CANADIAN	2540	12
178	12	11N	SW	CANADIAN	2983	8
179	12	11N	SW	CANADIAN	5363	8
180	13	11N	SW	CANADIAN	2500	4
181	13	11N	SW	CANADIAN	4811	8
182	13	11N	SW	CANADIAN	2827	12
183	13	11N	SW	CANADIAN	5285	8
184	14	11N	SW	CANADIAN	2514	4
185	14	11N	SW	CANADIAN	149	8
186	14	11N	SW	CANADIAN	10545	12
187	15	11N	SW	CANADIAN	3771	4
188	15	11N	SW	CANADIAN	789	8
189	15	11N	SW	CANADIAN	1310	8
190	15	11N	SW	CANADIAN	10444	10

Schedules

191	15	11N	SW	CANADIAN	5481	4
192	15	11N	SW	CANADIAN	1969	6
193	15	11N	SW	CANADIAN	2588	8
194	16	11N	SW	CANADIAN	1541	4
195	16	11N	SW	CANADIAN	6607	6
196	16	11N	SW	CANADIAN	10808	8
197	16	11N	SW	CANADIAN	2886	4
198	17	11N	SW	CANADIAN	1510	6
199	18	11N	SW	CANADIAN	2073	4
200	18	11N	SW	CANADIAN	2676	6
201	21	11N	SW	CANADIAN	2874	4
202	21	11N	SW	CANADIAN	6174	6
203	21	11N	SW	CANADIAN	5819	8
204	21	11N	SW	CANADIAN	2803	10
205	21	11N	SW	CANADIAN	3240	8
206	22	11N	SW	CANADIAN	2180	4
207	22	11N	SW	CANADIAN	6299	6
208	22	11N	SW	CANADIAN	2640	10
209	22	11N	SW	CANADIAN	25	12
210	22	11N	SW	CANADIAN	5476	8
211	23	11N	SW	CANADIAN	6287	6
212	23	11N	SW	CANADIAN	10302	12
213	23	11N	SW	CANADIAN	5875	8
214	24	11N	SW	CANADIAN	2878	6
215	24	11N	SW	CANADIAN	2065	8
216	26	11N	SW	CANADIAN	3388	6
217	26	11N	SW	CANADIAN	3279	10
218	26	11N	SW	CANADIAN	3308	18
219	26	11N	SW	CANADIAN	1969	4
220	26	11N	SW	CANADIAN	366	12
221	27	11N	SW	CANADIAN	47	3
222	27	11N	SW	CANADIAN	6725	4
223	27	11N	SW	CANADIAN	16366	6
224	27	11N	SW	CANADIAN	6138	10
225	27	11N	SW	CANADIAN	133	12
226	27	11N	SW	CANADIAN	4243	18
227	27	11N	SW	CANADIAN	3056	12
228	28	11N	SW	CANADIAN	5410	4
229	28	11N	SW	CANADIAN	5054	6
230	28	11N	SW	CANADIAN	2446	6
231	28	11N	SW	CANADIAN	2590	10
232	28	11N	SW	CANADIAN	4499	6
233	28	11N	SW	CANADIAN	2387	6
234	29	11N	SW	CANADIAN	5352	6
235	32	11N	SW	CANADIAN	5180	6
236	32	11N	SW	CANADIAN	3462	10
237	34	11N	SW	CANADIAN	3474	4
238	34	11N	SW	CANADIAN	6796	6
239	34	11N	SW	CANADIAN	36	6
240	34	11N	SW	CANADIAN	2672	6

FEDERAL TRADE COMMISSION DECISIONS
VOLUME 129

Schedules

241			35	11N	SW	CANADIAN	9531	4
242			35	11N	SW	CANADIAN	812	8
243			35	11N	SW	CANADIAN	7370	8
244			35	11N	SW	CANADIAN	5402	10
245			35	11N	SW	CANADIAN	5405	18
246			35	11N	SW	CANADIAN	817	8
247			38	10N	SW	GRADY	5000	8 ⁷ / ₈
248			22	10N	SW	GRADY	2640	4 ⁷ / ₈
249			27	10N	SW	GRADY	7000	4 ⁷ / ₈
250			28	10N	SW	GRADY	1320	4 ⁷ / ₈
251			34	10N	SW	GRADY	8600	4 ⁷ / ₈
252			34	10N	SW	GRADY	2000	8 ⁷ / ₈
253			35	10N	SW	GRADY	2000	4 ⁷ / ₈
254			3	9N	SW	GRADY	8600	8 ⁷ / ₈
255			3	9N	SW	GRADY	1000	4 ⁷ / ₈
Total Pipe Length (Conoco)							953479	
GPM								
300	N41-1-2-2	2008010	4	9N	SW	GRADY	912	8.82
301	N41-1-2-2	2008010	4	9N	SW	GRADY	22	3.5
302	N41-1-2-2	2008010	4	9N	SW	GRADY	8	3.5
303	N41-1-2-1	2008005	NW4	9N	SW	GRADY	1758	8.82
304	N41-1-2-1	2008005	NW4	9N	SW	GRADY	8	4.5
305	N41-1-2-3	2008012	NW4	9N	SW	GRADY	1359	8.82
306	N41-1-2-3	2008012	NW4	9N	SW	GRADY	11	3.5
307	N41-1-2-2 EXT	2008011	4,5,8,9	9N	SW	GRADY	2	8.82
308	N41-1-2-2 EXT	2008011	4,5,8,9	9N	SW	GRADY	5285	8.82
309	N41-1-2-2 EXT	2008011	4,5,8,9	9N	SW	GRADY	28	4.5
310	N41-1-2-4	2008013	SW5	9N	SW	GRADY	2	8.82
311	N41-1-2-4	2008013	SW5	9N	SW	GRADY	3372	8.82
312	N41-1-2-4	2008013	SW5	9N	SW	GRADY	34	4.5
313	N41-1-2-5	2008515	SW8	9N	SW	GRADY	1150	8.82
314	N41-1-2-5	2008515	SW8	9N	SW	GRADY	23	3.5
315	N41-1-2 EXT	2008004	NW6/C5	9N	SW	GRADY	13175	8.82
316	N41-1-2 EXT	2008004	NW6/C5	9N	SW	GRADY	12	3.5
317	N41-1-2-4 EXT	2008014	NW5W8	9N	SW	GRADY	1881	8.82
318	N41-1-2-4 EXT	2008014	NW5W8	9N	SW	GRADY	830	8.825
319	N41-1-2-4 EXT	2008014	NW5W8	9N	SW	GRADY	10	3.5
320	N41-1-2-4 EXT	2008014	NW5W8	9N	SW	GRADY	20	3.5
321	N59-1-4	2009823	1	10N	SW	CANADIAN	1885	8.82
322	N59-1-4	2009823	1	10N	SW	CANADIAN	12	3.5
323	N59-1-4	2009823	1	10N	SW	CANADIAN	8	3.5
324	N59-1-4 EXT	2009824	1	10N	SW	CANADIAN	1383	8.82
325	N59-1-4 EXT	2009824	1	10N	SW	CANADIAN	19	3.5
326	N59-1-4 EXT	2009824	1	10N	SW	CANADIAN	14	3.5
327	N59-1-4-1	2009825	1	10N	SW	CANADIAN	4302	8.82
328	N59-1-4-1	2009825	1	10N	SW	CANADIAN	20	3.5
329	N59-1-4-1	2009825	1	10N	SW	CANADIAN	11	3.5
330	N59-1-4-1-2	2009831	1	10N	SW	CANADIAN	719	8.82

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331	N59-1-4-1-2	2009631	1	10N	5W	CANADIAN	11	3.5
332	N59-1-4-1-1-2	2009630	NW7	10N	4W	CLEVELAND	74	3.5
333	N59-1-4-1-3	2009632	NE11	10N	5W	CANADIAN	4891	4.5
334	N59-1-4-1-3	2009632	NE11	10N	4W	CANADIAN	9	3.5
335	N59-1-4-1 EXT 1	2009628	NE12	10N	5W	CANADIAN	2191	8.82
336	N59-1-4-1 EXT 1	2009628	NE12	10N	5W	CANADIAN	17	8.82
337	N59-1-4-1 EXT 2	2009627	SW12	10N	5W	CANADIAN	2749	8.82
338	N59-1-4-1 EXT 2	2009627	SW12	10N	5W	CANADIAN	6	3.5
339	N59-1-4-1-1	2009628	12	10N	5W	CLEVELAND	2815	8.82
340	N59-1-4-1-1	2009628	12	10N	5W	CLEVELAND	9	3.5
341	N41-1-2-1-1	2008008	28	10N	5W	GRADY	1825	8.82
342	N41-1-2-1-1	2008008	28	10N	5W	GRADY	37	3.5
343	N41-1-2-1-1	2008008	28	10N	5W	GRADY	5	3.5
344	N41-1-3	2008015	SW30	10N	5W	GRADY	2085	8.82
345	N41-1-3	2008015	SW30	10N	5W	GRADY	11	3.5
346	N41-1	2005988	31	10N	5W	GRADY	1861	10.75
347	N41-1	2005988	31	10N	5W	GRADY	2088	8.82
348	N41-1	2005988	31	10N	5W	GRADY	108	8.82
349	N41-1	2005988	31	10N	5W	GRADY	12	10.75
350	N41-1	2005988	31	10N	5W	GRADY	6345	8.82
351	N41-1	2005988	31	10N	5W	GRADY	12	3.5
352	N41-1-2	2008003	31	10N	5W	GRADY	8307	8.82
353	N41-1-2	2008003	31	10N	5W	GRADY	2	3.5
354	N41-1-2	2008003	31	10N	5W	GRADY	5	3.5
355	N41-1-2-1 EXT	2008006	NW33	10N	5W	GRADY	6098	8.82
356	N41-1-2-1 EXT	2008006	NW33	10N	5W	GRADY	8	3.5
357	N41-1-2-1 EXT 2	2008007	NW33	10N	5W	GRADY	2264	8.82
358	N41-1-2-1 EXT 2	2008007	NW33	10N	5W	GRADY	5	3.5
359	N41-1-2-1-2	2008009	NW33	10N	5W	GRADY	1325	8.82
360	N41-1-2-1-2	2008009	NW33	10N	5W	GRADY	45	8.82
361	N41-1-2-1-2	2008009	NW33	10N	5W	GRADY	458	8.82
362	N41-1-2-1-2	2008009	NW33	10N	5W	GRADY	9	3.5
363	N59-3-5-2-2	2009657	W2 SE14 14	11N	4W	OKLAHOMA	9993	10.75
364	N59-3-5-2-2	2009657	W2 SE14 14	11N	4W	OKLAHOMA	19722	10.75
365	N59-3-5-2-2	2009657	W2 SE14 14	11N	4W	OKLAHOMA	47	3.5
366	N59-3-5-2-1	2009655	14	11N	4W	OKLAHOMA	535	8.82
367	N59-3-5-2-1	2009655	14	11N	4W	OKLAHOMA	10	4.5
368	N59-3-5-2-1 EXT	2009656	14	11N	4W	OKLAHOMA	2678	8.82
369	N59-3-5-2-1 EXT	2009656	14	11N	4W	OKLAHOMA	1200	8.82
370	N59-3-5-2-1 EXT	2009656	14	11N	4W	OKLAHOMA	8	3.5
371	N59-3-5-2 MR	2009654	NE14	11N	4W	OKLAHOMA	28	3.5
372	N59-3-5-2 MR	2009654	NE14	11N	4W	OKLAHOMA	12	3.5
373	N59-3-2	2009643	S14	11N	4W	OKLAHOMA	8021	8.82
374	N59-3-2	2009641	20	11N	4W	OKLAHOMA	1061	8.82
375	N59-3-2	2009641	20	11N	4W	OKLAHOMA	17	3.5
376	N59-3-3	2009642	20	11N	4W	OKLAHOMA	11	3.5
377	N59-3-3	2009642	20	11N	4W	OKLAHOMA	14	3.5
378	N59-3-4	2009643	20	11N	4W	OKLAHOMA	3	4.5
379	N59-3-4	2009643	20	11N	4W	OKLAHOMA	3	4.5
380	N59-4-1	2009664	20	11N	4W	OKLAHOMA	1022	8.82

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381	N-50-4-1	2009684	20	11N	4W	OKLAHOMA	9	4.5
382	N-50-3 EXT	2009639	21	11N	4W	OKLAHOMA	3964	12.75
383	N-50-3 EXT	2009639	21	11N	4W	OKLAHOMA	1110	6.62
384	N-50-3 EXT	2009639	21	11N	4W	OKLAHOMA	10	3.5
385	N-50-3-1	2009640	21	11N	4W	OKLAHOMA	1218	8.62
386	N-50-3-1	2009640	21	11N	4W	OKLAHOMA	11	4.5
387	N-50-3-5	2009644	21	11N	4W	OKLAHOMA	9962	12.75
388	N-50-3-5	2009644	21	11N	4W	OKLAHOMA	1782	12.75
389	N-50-3-5	2009644	21	11N	4W	OKLAHOMA	261	6.62
390	N-50-3-5	2009644	21	11N	4W	OKLAHOMA	8	2.37
391	N-50-3-5-1	2009650	21	11N	4W	OKLAHOMA	2674	8.62
392	N-50-3-5-1	2009650	21	11N	4W	OKLAHOMA	6	3.5
393	N-50-3-5-1	2009650	21	11N	4W	OKLAHOMA	12	3.5
394	N-50-3-5-1-1	2009652	21	11N	4W	OKLAHOMA	908	6.62
395	N-50-3-5-1-1	2009652	21	11N	4W	OKLAHOMA	12	3.5
396	N-50-4 EXT	2009663	21	11N	4W	OKLAHOMA	7583	4.5
397	N-50-4 EXT	2009663	21	11N	4W	OKLAHOMA	22	4.5
398	N-50-3-7	2009661	NW21	11N	4W	OKLAHOMA	1001	4.5
399	N-50-3-7	2009661	NW21	11N	4W	OKLAHOMA	15	3.5
400	N-50-3-7	2009661	NW21	11N	4W	OKLAHOMA	2	3.5
401	N-50-3-5-3	2009659	22	11N	4W	OKLAHOMA	10	6.62
402	N-50-3-5-3	2009659	22	11N	4W	OKLAHOMA	383	6.625
403	N-50-3-5-3	2009659	22	11N	4W	OKLAHOMA	8	3.5
404	N-50-3-5-2	2009653	23	11N	4W	OKLAHOMA	4836	8.62
405	N-50-3-5-2	2009653	23	11N	4W	OKLAHOMA	2743	8.62
406	N-50-3-5-2	2009653	23	11N	4W	OKLAHOMA	13	3.5
407	N-50-1	2009619	30	11N	4W	OKLAHOMA	6158	12.75
408	N-50-1	2009619	30	11N	4W	OKLAHOMA	6746	12.75
409	N-50-1	2009619	30	11N	4W	OKLAHOMA	6	3.5
410	N-50-1	2009619	30	11N	4W	OKLAHOMA	3	3.5
411	N-50-1-1	2009620	30	11N	4W	OKLAHOMA	160	4.5
412	N-50-1-1	2009620	30	11N	4W	OKLAHOMA	4	3.5
413	N-50-1-1	2009620	30	11N	4W	OKLAHOMA	12	3.5
414	N-50-3	2009638	20	11N	4W	OKLAHOMA	14729	12.75
415	N-50-3-6	2009660	30	11N	4W	OKLAHOMA	683	6.62
416	N-50-3-6	2009660	30	11N	4W	OKLAHOMA	26	4.5
417	N-50-3-6	2009660	30	11N	4W	OKLAHOMA	4	4.5
418	N-50-4	2009662	30	11N	4W	OKLAHOMA	410	6.62
419	N-50-4	2009662	30	11N	4W	OKLAHOMA	7479	6.625
420	N-50-4	2009662	30	11N	4W	OKLAHOMA	15	4.5
421	N-50-4	2009662	30	11N	4W	OKLAHOMA	6	4.5
422	N-50-4-2	2009665	30	11N	4W	OKLAHOMA	668	6.62
423	N-50-4-2	2009665	30	11N	4W	OKLAHOMA	42	4.5
424	N-50-4-2	2009665	30	11N	4W	OKLAHOMA	4	4.5
425	N-50-3-8	2009828	NE30/SE10	11N	4W	OKLAHOMA	80	6.625
426	N-50-3-8	2009828	NE30/SE19	11N	4W	OKLAHOMA	369	6.625
427	N-50-3-8	2009828	NE30/SE19	11N	4W	OKLAHOMA	23	3.5
428	N-50-1-3	2009622	31	11N	4W	OKLAHOMA	393	6.62
429	N-50-1-3	2009622	31	11N	4W	OKLAHOMA	3	3.5
430	N-50-1-3	2009622	31	11N	4W	OKLAHOMA	3	3.5

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431	N-50-1-5 MR	2009634	NW31	11N	4W	OKLAHOMA	30	3.5
432	N-50-1-5 MR	2009634	NW31	11N	4W	OKLAHOMA	3	3.5
433	N-50-1-5-1	2010507	SW31	11N	4W	OKLAHOMA	93	4.5
434	N-50-1-5-1	2010507	SW31	11N	4W	OKLAHOMA	26	4.5
435	N-50-1-6	2009635	SW31	11N	4W	OKLAHOMA	59	8.82
436	N-50-1-6	2009635	SW31	11N	4W	OKLAHOMA	1959	8.82
437	N-50-1-6	2009635	SW31	11N	4W	OKLAHOMA	552	8.82
438	N-50-1-6	2009635	SW31	11N	4W	OKLAHOMA	3	4.5
439	N-50-1-5	2009633	31	11N	4W	CANADIAN	59	4.5
440	N-50-1-5	2009633	31	11N	4W	CANADIAN	2968	4.5
441	N-50-1-5	2009633	31	11N	4W	CANADIAN	7	3.5
442	N-50-1-8	2010506	SE36	11N	5W	CANADIAN	428	4.5
443	N-50-1-8	2010506	SE36	11N	5W	CANADIAN	23	3.5
444	N-50-3-5-2-3-1	2009658	SW35	12N	4W	OKLAHOMA	213	8.82
445	N-50-3-5-2-3-1	2009658	SW35	12N	4W	OKLAHOMA	54	3.5
446	N-50-3-5-2-3-1	2009658	SW35	12N	4W	OKLAHOMA	54	3.5
446A	N-50-4-3		30	11N	4W	OKLAHOMA	14	8.82
Total Pipe Length (GPM)							20883	
Total Pipe Length (Crown Jewel Assets)							1182362	

Compression:

Western Compressor Station, Township 0N, Range 8W, section 7

This site consists of below and above ground piping and valves, 1 fiberglass tank, and 3 rental compressor units.

There are 2 - CAT 3380's - 145 hp each and 1 - CAT 3405 - 215 hp.

South Mustang Compress Station, Township 10N, Range 5W, section 2.

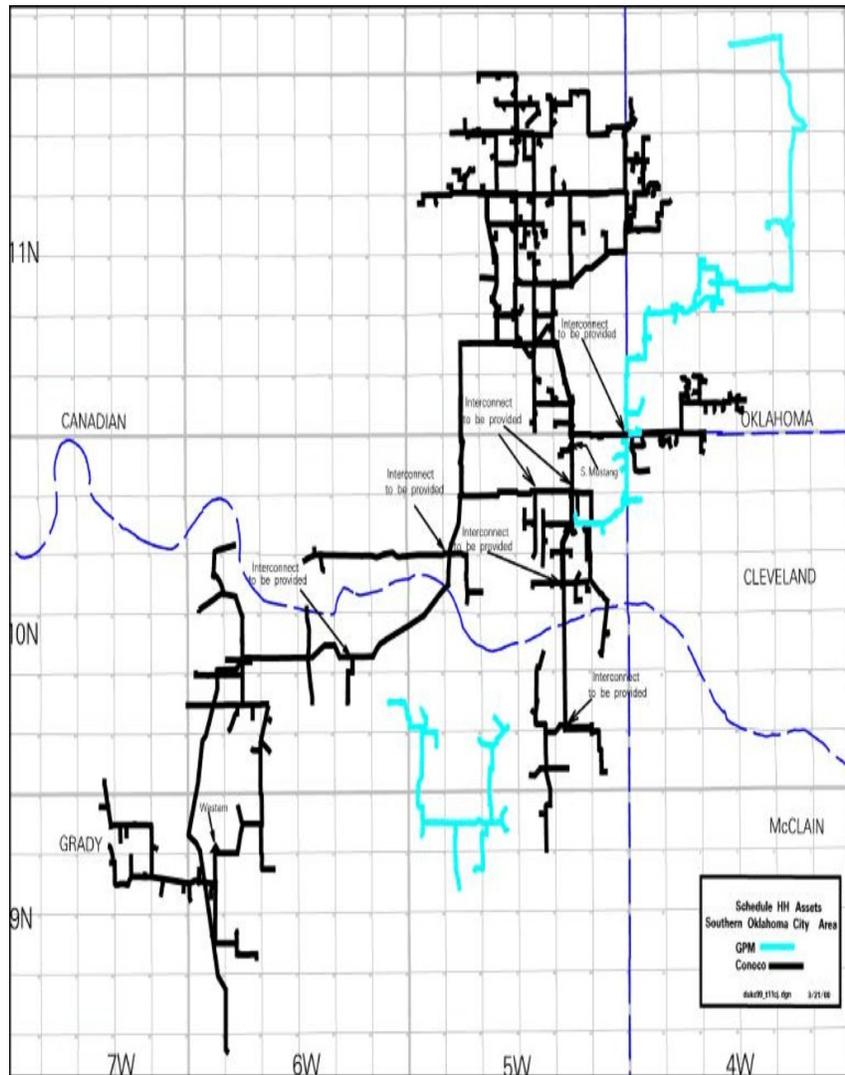
This site consists of several vessels (Scrubbers, tanks, Pigging facilities, etc), empty compressor pads, idle duty skid, and buildings.

There is also 1 rental compressor unit which is a White 60825 approximately 600 hp.

Interconnects: All interconnects will be done to DEFS's usual specifications.

Pipes Involved	Section	Township	Range	Type	Distance (mi.)	Comments
Conoco/Conoco	2	10	5	crossover		Tie 6" steel to 6" steel
Conoco/Conoco	14	10	5	crossover		Tie 6" steel to 6" steel
Conoco/Conoco	26	10	5	crossover		Tie 6" steel to 6" steel
GPM/Conoco	1	10	5	crossover		Tie 4" line steel to 6" Conoco steel
Conoco/Conoco	3	10	5	crossover		Tie 3" poly to 6" steel
Conoco/Conoco	17	10	5	crossover		Tie 6" steel to west 12" steel & east 6" steel
Conoco/Conoco	23	10	6	crossover		Tie 6" steel to 6" poly

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Schedule II

SCHEDULE II

NORTHERN OKLAHOMA CITY AREA

Key No.	GATHERER	LINE NO.	PIPELINE ID	SEC	TWP	RNG	COUNTY	PIPE LENGTH (ft)	PIPE DEGR (diam in inches)
CONOCO									
1				5	13N	4W	OKLAHOMA	5280	8"Ø
2				8	13N	4W	OKLAHOMA	5280	8"Ø
3				9	13N	4W	OKLAHOMA	5280	8"Ø
4				10	13N	4W	OKLAHOMA	5280	8"Ø
5				11	13N	4W	OKLAHOMA	3960	8"Ø
6				11	13N	4W	OKLAHOMA	1320	4"Ø
7				12	13N	4W	OKLAHOMA	2640	4"Ø
8				14	13N	4W	OKLAHOMA	5500	6"Ø
9				23	13N	4W	OKLAHOMA	1320	6"Ø
10				4/5	14N	4W	OKLAHOMA	5280	8"Ø
11				8/9	14N	4W	OKLAHOMA	5280	8"Ø
12				16/17	14N	4W	OKLAHOMA	5280	8"Ø
13				20/21	14N	4W	OKLAHOMA	5280	8"Ø
14				28/29	14N	4W	OKLAHOMA	5280	8"Ø
15				32/33	14N	4W	OKLAHOMA	5280	8"Ø
16				5	15N	4W	LOGAN	5280	8"Ø
17				6	15N	4W	LOGAN	1000	4"Ø
18				8	15N	4W	LOGAN	5280	8"Ø
19				17	15N	4W	LOGAN	5280	8"Ø
20				20	15N	4W	LOGAN	5280	8"Ø
21				29	15N	4W	LOGAN	5280	8"Ø
22				32	15N	4W	LOGAN	6600	8"Ø
23				19	16N	4W	LOGAN	1000	4"Ø
24				20	16N	4W	LOGAN	5280	8"Ø
25				20	16N	4W	LOGAN	9240	4"Ø
26				20	16N	4W	LOGAN	2640	2"Ø
27				21	16N	4W	LOGAN	2320	4"Ø
28				28	16N	4W	LOGAN	6600	4"Ø
29				28	16N	4W	LOGAN	2640	3"Ø
30				29	16N	4W	LOGAN	5280	8"Ø
31				29	16N	4W	LOGAN	3960	4"Ø
32				30	16N	4W	LOGAN	10560	4"Ø
33				31	16N	4W	LOGAN	100	4"Ø
34				32	16N	4W	LOGAN	5280	8"Ø
35				32	16N	4W	LOGAN	16000	4"Ø
36				33	16N	4W	LOGAN	500	4"Ø
Total Pipe Length (Conoco)								172840	
DEFS									
37				5	13N	3W	OKLAHOMA	7000	8.6
38				6	13N	3W	OKLAHOMA	300	8.6

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39	8	13N	3W	OKLAHOMA	2000	8.6
40	8	13N	3W	OKLAHOMA	5300	4.5
45	17	13N	3W	OKLAHOMA	5600	4.5
46	20	13N	3W	OKLAHOMA	5500	4.5
51	29	13N	3W	OKLAHOMA	900	4.5
52	30	13N	3W	OKLAHOMA	1800	4.5
53	31	14N	3W	OKLAHOMA	7800	8.6
54	5	14N	4W	OKLAHOMA	1600	8.6
55	5	14N	4W	OKLAHOMA	4200	6.6
56	8	14N	4W	OKLAHOMA	7400	8.6
57	16	14N	4W	OKLAHOMA	6600	8.6
57A	3	14N	4W	OKLAHOMA	15600	4.5
58	21	14N	4W	OKLAHOMA	2500	8.6
59	22	14N	4W	OKLAHOMA	2600	6.6
60	22	14N	4W	OKLAHOMA	3200	8.6
62	23	14N	4W	OKLAHOMA	8700	6.6
63	24	14N	4W	OKLAHOMA	1200	6.6
64	25	14N	4W	OKLAHOMA	6000	8.6
65	25	14N	4W	OKLAHOMA	400	4.5
66	17	15N	4W	LOGAN	4800	8.5
67	17	15N	4W	LOGAN	6900	4.5
68	17	15N	4W	LOGAN	4200	6.6
69	18	15N	4W	LOGAN	8500	4.5
70	19	15N	4W	LOGAN	5500	4.5
71	20	15N	4W	LOGAN	6300	4.5
72	20	15N	4W	LOGAN	2400	6.6
73	20	15N	4W	LOGAN	2600	8.6
76	29	15N	4W	LOGAN	8000	6.6
78	32	15N	4W	LOGAN	5300	8.6
79	12	15N	5W	KINGFISHER	1200	4.5
80	13	15N	5W	KINGFISHER	5400	4.5
37a	2	13N	4W	OKLAHOMA	5300	4.5
38a	2	13N	4W	OKLAHOMA	1600	2.375
39a	11	13N	4W	OKLAHOMA	2100	4.5
42a	6	14N	4W	OKLAHOMA	5300	3.5
43a	7	14N	4W	OKLAHOMA	11400	3.5
46a	14	14N	4W	OKLAHOMA	500	6.625
48a	23	14N	4W	OKLAHOMA	6100	6.625
49a	23	14N	4W	OKLAHOMA	4500	2.375
50a	25	14N	4W	OKLAHOMA	1100	4.5
51a	26	14N	4W	OKLAHOMA	7800	4.5
52a	26	14N	4W	OKLAHOMA	7900	6.625
53a	27	14N	4W	OKLAHOMA	7600	4.5
54a	28	14N	4W	OKLAHOMA	4600	4.5
55a	35	14N	4W	OKLAHOMA	7900	6.625
56a	35	14N	4W	OKLAHOMA	100	4.54
58a	36	14N	4W	OKLAHOMA	3200	4.5
59a	10	14N	5W	CANADIAN	200	3.5
60a	11	14N	5W	CANADIAN	6600	3.5
61a	12	14N	5W	CANADIAN	5300	3.5

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62a		15	14N	5W	CANADIAN	2400	3.5	
63a		7	15N	4W	LOGAN	4800	4.5	
64a		7	15N	4W	LOGAN	300	3.5	
66a		31	15N	4W	LOGAN	5200	3.5	
Total Pipe Length (DEFB)						269100		
GPM								
81	N-9-3 EXT	2007472	10/14/15	14N	5W	CANADIAN	1956	4.5
82	N-9-3 EXT	2007472	10/14/15	14N	5W	CANADIAN	1513	4.5
83	N-9-3 EXT	2007472	10/14/15	14N	5W	CANADIAN	35	4.5
84	N-9-7-1-1	2007487	4	14N	5W	CANADIAN	144	4.5
85	N-9-7-1-1	2007487	4	14N	5W	CANADIAN	13	3.5
86	N-9-1-1	2006321	5	14N	5W	CANADIAN	868	4.5
87	N-9-1-1	2006321	5	14N	5W	CANADIAN	18	4.5
88	N-9-1-1	2006321	5	14N	5W	CANADIAN	8	4.5
89	N-9-7	2007484	5	14N	5W	CANADIAN	119	4.5
90	N-9-7	2007484	5	14N	5W	CANADIAN	1590	4.5
91	N-9-7	2007484	5	14N	5W	CANADIAN	2	4.5
92	N-9-7	2007484	5	14N	5W	CANADIAN	49	4.5
93	N-9-7 EXT	2007485	5	14N	5W	CANADIAN	240	4.5
94	N-9-7 EXT	2007485	5	14N	5W	CANADIAN	879	4.5
95	N-9-7 EXT	2007485	5	14N	5W	CANADIAN	180	4.5
96	N-9-7 EXT	2007485	5	14N	5W	CANADIAN	584	4.5
97	N-9-7 EXT	2007485	5	14N	5W	CANADIAN	225	4.5
98	N-9-7 EXT	2007485	5	14N	5W	CANADIAN	217	4.5
99	N-9-7 EXT	2007485	5	14N	5W	CANADIAN	275	4.5
100	N-9-7 EXT	2007485	5	14N	5W	CANADIAN	9	4.5
101	N-9-7-1	2007486	5	14N	5W	CANADIAN	2	4.5
102	N-9-7-1	2007486	5	14N	5W	CANADIAN	188	4.5
103	N-9-7-1	2007486	5	14N	5W	CANADIAN	91	4.5
104	N-9-7-1	2007486	5	14N	5W	CANADIAN	251	4.5
105	N-9-7-1	2007486	5	14N	5W	CANADIAN	144	4.5
106	N-9-7-1	2007486	5	14N	5W	CANADIAN	121	4.5
107	N-9-7-1	2007486	5	14N	5W	CANADIAN	17	4.5
108	N-9-7-2	2007488	5	14N	5W	CANADIAN	2003	4.5
109	N-9-7-2	2007488	5	14N	5W	CANADIAN	1124	4.5
110	N-9-7-3	2007491	28	15N	5W	CANADIAN	232	4.5
111	N-9-7-3	2007491	28	15N	5W	CANADIAN	1126	4.5
112	N-9-7-3	2007491	33/28	15N	5W	CANADIAN	8242	4.5
113	N-9-7-3	2007491	33	15N	5W	CANADIAN	3420	4.5
114	N-9-7-3	2007491	28	15N	5W	CANADIAN	3	4.5
115	N-9-7-3	2007491	28	15N	5W	CANADIAN	22	4.5
116	N-9-7-3 RR	2010518	NE5	14N	5W	CANADIAN	362	4.5
117	N-9-1-1-1	2006322	8	14N	5W	CANADIAN	2	4.5
118	N-9-1-1-1	2006322	8	14N	5W	CANADIAN	1817	4.5
119	N-9-1-1-1	2006322	8	14N	5W	CANADIAN	487	4.5
120	N-9-1-1-1	2006322	8	14N	5W	CANADIAN	90	4.5
121	N-9-1-1-1	2006322	8	14N	5W	CANADIAN	252	4.5
122	N-9-1-1-1	2006322	8	14N	5W	CANADIAN	2	4.5

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123	N-8-1-1-1	2006322	8	14N	5W	CANADIAN	7	4.5
124	N-8-1-1-1	2006322	8	14N	5W	CANADIAN	1	2.37
125	N-8-1-1-1-1	2006323	8	14N	5W	CANADIAN	1	4.5
126	N-8-1-1-1-1	2006323	8	14N	5W	CANADIAN	4069	4.5
127	N-8-1-1-1-1	2006323	8	14N	5W	CANADIAN	20	4.5
128	N-8-1-1-1-1	2006323	8	14N	5W	CANADIAN	5	4.5
129	N-8-1-1-1-1-1	2006324	9	14N	5W	CANADIAN	427	4.5
130	N-8-1-1-1-1-1	2006324	9	14N	5W	CANADIAN	4	4.5
131	N-8-9-2	2007511	9	14N	5W	CANADIAN	2	4.5
132	N-8-9-2	2007511	9	14N	5W	CANADIAN	15059	6.62
133	N-8-9-2	2007511	9	14N	5W	CANADIAN	4	4.5
134	N-8-9-2	2007511	9	14N	5W	CANADIAN	16	4.5
135	N-8-9-2-4	2007518	9	14N	5W	CANADIAN	3236	6.62
136	N-8-9-2-4	2007518	9	14N	5W	CANADIAN	2	4.5
137	N-8-9-2-4	2007518	9	14N	5W	CANADIAN	15	4.5
138	N-8-3 EXT	2007473	10	14N	5W	CANADIAN	9	4.5
139	N-8-3 EXT	2007473	10	14N	5W	CANADIAN	4751	4.5
140	N-8-3 EXT	2007473	10	14N	5W	CANADIAN	23	4.5
141	N-8-3 EXT	2007473	10	14N	5W	CANADIAN	39	4.5
142	N-8-3-2	2007477	NE14	14N	5W	CANADIAN	1774	4.5
143	N-8-3-2	2007477	NE14	14N	5W	CANADIAN	10	3.5
144	N-8-3-2	2007477	NE14	14N	5W	CANADIAN	2	3.5
145	N-8-3-1	2007476	SW14	14N	5W	CANADIAN	1845	4.5
146	N-8-3-1	2007476	SW14	14N	5W	CANADIAN	1	4.5
147	N-8-3-1	2007476	SW14	14N	5W	CANADIAN	12	4.5
148	N-8-9-2-1	2007512	15	14N	5W	CANADIAN	833	6.62
149	N-8-9-2-1	2007512	15	14N	5W	CANADIAN	24	4.5
150	N-8-9-2-1	2007512	15	14N	5W	CANADIAN	5	4.5
151	N-8-9-2-1 EXT	2007513	15	14N	5W	CANADIAN	2938	6.62
152	N-8-9-2-1 EXT	2007513	15	14N	5W	CANADIAN	5	3.5
153	N-8-9-2-1-1	2007515	15	14N	5W	CANADIAN	1252	6.62
154	N-8-9-2-1-1	2007515	15	14N	5W	CANADIAN	8	3.5
155	N-8-9-2-1-1	2007515	15	14N	5W	CANADIAN	9	3.5
156	N-8-3-3	2007478	NE15	14N	5W	CANADIAN	122	4.5
157	N-8-3-3	2007478	NE15	14N	5W	CANADIAN	8	3.5
158	N-8-9-2-3	2007517	NW15	14N	5W	CANADIAN	2	4.5
159	N-8-9-2-3	2007517	NW15	14N	5W	CANADIAN	2	4.5
160	N-8-9-2-1 MR	2007514	SW15	14N	5W	CANADIAN	26	4.5
161	N-8-9-2-1 MR	2007514	SW15	14N	5W	CANADIAN	8	4.5
162	N-8-9-2-4-1	2007519	16	14N	5W	CANADIAN	559	6.62
163	N-8-7-3-1	2007492	*	15N	5W	KINGFISHER	11386	6.62
164	N-8-7-3-1	2007492	**	15N	5W	KINGFISHER	4	4.5
165	N-8-7-3-1	2007492	***	15N	5W	KINGFISHER	20	4.5
166	N-8-7-3-1-1	2007493	NE22	15N	5W	KINGFISHER	1926	4.5
167	N-8-7-3-1-1	2007493	NE22	15N	5W	KINGFISHER	10	3.5
168	N-8-7-3-1-1	2007493	NE22	15N	5W	KINGFISHER	27	3.5
169	N-8-7-3-4	2007496	SE28	15N	5W	KINGFISHER	83	4.5
170	N-8-7-3-4	2007496	SE28	15N	5W	KINGFISHER	2	4.5
171	N-8-7-3-4	2007496	SE28	15N	5W	KINGFISHER	31	4.5
172	N-8-7-3-2	2007494	SE28	15N	5W	KINGFISHER	1117	4.5

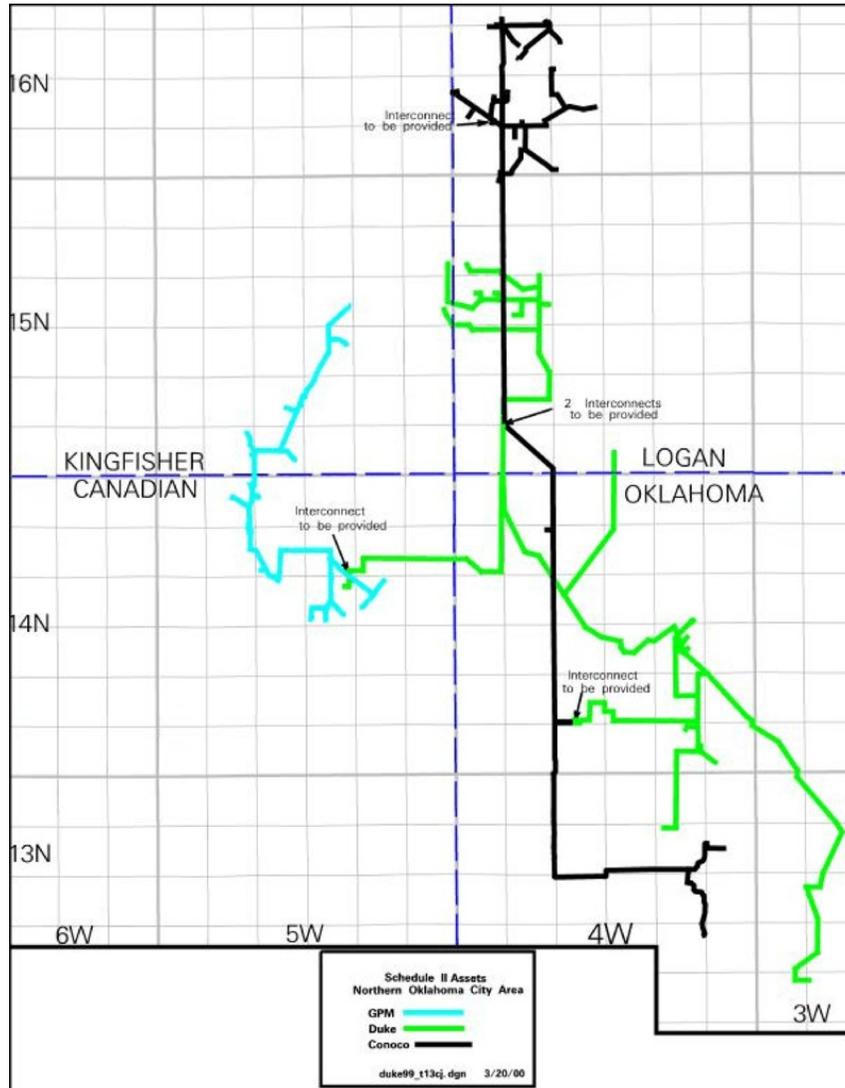
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173	N-8-7-3-2	2007494	0E28	15N	5W	KINGFISHER	3	4.5
174	N-8-7-3-2	2007494	0E28	15N	5W	KINGFISHER	5	4.5
175	N-8-7-3-3	2007495	NE32	15N	5W	KINGFISHER	1421	4.5
176	N-8-7-3-3	2007495	NE32	15N	5W	KINGFISHER	226	4.5
177	N-8-7-3-3	2007495	NE32	15N	5W	KINGFISHER	449	4.5
178	N-8-7-3-3	2007495	NE32	15N	5W	KINGFISHER	5	4.5
179	N-8-7-3-3	2007495	NE32	15N	5W	KINGFISHER	3	4.5
180	N-8-7-3-5	2007497	0E32	15N	5W	KINGFISHER	200	4.5
181	N-8-7-3-5	2007497	0E32	15N	5W	KINGFISHER	6	3.5
182	N-8-7-3-6	2007498	0E33	15N	5W	KINGFISHER	2012	4.5
183	N-8-7-3-6	2007498	0E33	15N	5W	KINGFISHER	7	3.5
184	N-8-7-3-6	2007498	0E33	15N	5W	KINGFISHER	10	3.5
185	N-8-7-3-7	2007498	5	14N	5W	KINGFISHER/	3850	4.5
			32	15N	5W	CANADIAN		
Total Pipe Length (GPM)							88868	
Total Pipe Length (Crown Jewel Assets)							432040	
* NE28/NW27/SW22/NW22/SW/0E15								
** NE28/NW27/SW22/NW22/SW/0E16								
*** NE28/NW27/SW22/NW22/SW/0E17								

Interconnects: All interconnects will be done to DEFS's usual specifications.

<u>Pipes Involved</u>	<u>Section</u>	<u>Township</u>	<u>Range</u>	<u>Type</u>	<u>Distance (mi.)</u>	<u>Comments</u>
DEFS/Conoco	31	15	4	crossover		Tie 6" DEFS steel to Conoco 8" steel
DEFS/Conoco	28	14	4	crossover		Tie 4" DEFS steel to 8" Conoco steel
DEFS/Conoco	31	15	4	crossover		Tie 3" DEFS poly to 8" Conoco steel
Conoco/Conoco	30	16	4	crossover		Tie 8" Conoco steel to Conoco 4" poly
DEFS/GPM	10	14	5	crossover		Tie 3" DEFS poly to GPM poly

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Schedules

Schedule JJ

SCHEDULE JJ

NORTHEAST LOGAN COUNTY, OK AREA

Key No.	GATHERER	LINE NO.	PIPELINE ID	SEC	TWP	RNG	COUNTY	PIPE LENGTH (ft)	PIPE DESC (diam. in inches)
DEFs									
1				2	16N	1E	LOGAN	6300	6.625
2				3	16N	1E	LOGAN	4900	4.5
3				4	16N	1E	LOGAN	2700	4.5
4				11	16N	1E	LOGAN	4900	6.625
5				11	16N	1E	LOGAN	2900	8.625
6				12	16N	1E	LOGAN	3700	8.625
7				12	16N	1E	LOGAN	4900	6.625
8				13	16N	1E	LOGAN	2000	8.625
9				14	16N	1E	LOGAN	9200	8.625
10				22	16N	1E	LOGAN	5400	8.625
11				23	16N	1E	LOGAN	1200	8.625
12				27	16N	1E	LOGAN	4200	8.625
13				27	16N	1E	LOGAN	4700	4.5
14				28	16N	1E	LOGAN	3200	6.625
15				28	16N	1E	LOGAN	1300	8.625
16				33	16N	1E	LOGAN	3200	8.625
17				34	16N	1E	LOGAN	4200	4.5
18				7	16N	2E	LINCOLN	5300	6.625
19				8	16N	2E	LINCOLN	6300	6.625
20				8	16N	2E	LINCOLN	1300	4.5
21				16	17N	1E	LOGAN	3700	6.625
22				16	17N	1E	LOGAN	1300	4.5
24				20	17N	1E	LOGAN	3700	4.5
25				21	17N	1E	LOGAN	5300	4.5
26				21	17N	1E	LOGAN	5200	6.625
27				22	17N	1E	LOGAN	7900	6.625
28				23	17N	1E	LOGAN	7100	4.5
29				24	17N	1E	LOGAN	13200	4.5
30				25	17N	1E	LOGAN	600	4.5
31				26	17N	1E	LOGAN	8500	6.625
32				27	17N	1E	LOGAN	1900	4.5
33				27	17N	1E	LOGAN	700	3.5
34				34	17N	1E	LOGAN	5400	4.5
35				35	17N	1E	LOGAN	5300	6.625
36				35	17N	1E	LOGAN	3000	4.5
37				7	17N	2E	PAYNE	600	6.625
38				8	17N	2E	PAYNE	4200	6.625
39				18	17N	2E	PAYNE	6200	6.625
40				19	17N	2E	LINCOLN	900	6.625
41				19	17N	2E	LINCOLN	9000	4.5
Total Pipe Length (DEFs)								179800	

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CONOCO						
42	1	15N	2E	LINCOLN	6600	4 th
43	2	16N	2E	LINCOLN	3960	3 rd
44	2	16N	2E	LINCOLN	1320	6 th
45	3	16N	2E	LINCOLN	5280	8 th
46	3	16N	2E	LINCOLN	5280	6 th
47	3	16N	2E	LINCOLN	2640	4 th
48	10	16N	2E	LINCOLN	5280	8 th
49	10	16N	2E	LINCOLN	2640	4 th
50	10	16N	2E	LINCOLN	2640	6 th
51	11	16N	2E	LINCOLN	5280	6 th
52	11	16N	2E	LINCOLN	2000	4 th
53	11	16N	2E	LINCOLN	2640	3 rd
54	12	16N	2E	LINCOLN	6600	6 th
55	14	16N	2E	LINCOLN	2640	4 th
56	14	16N	2E	LINCOLN	1320	3 rd
57	15	16N	2E	LINCOLN	6000	8 th
58	15	16N	2E	LINCOLN	2640	6 th
59	15	16N	2E	LINCOLN	2640	4 th
60	22	16N	2E	LINCOLN	6600	12 th
61	22	16N	2E	LINCOLN	2640	6 th
62	22	16N	2E	LINCOLN	1320	6 th
63	22	16N	2E	LINCOLN	2000	4 th
64	23	16N	2E	LINCOLN	6600	6 th
65	23	16N	2E	LINCOLN	1320	3 rd
66	23	16N	2E	LINCOLN	1320	4 th
67	23	16N	2E	LINCOLN	1320	3 rd
68	23	16N	2E	LINCOLN	1320	3 rd
69	25	16N	2E	LINCOLN	3960	4 th
70	25	16N	2E	LINCOLN	1320	6 th
71	25	16N	2E	LINCOLN	1320	3 rd
72	25	16N	2E	LINCOLN	1320	3 rd
73	26	16N	2E	LINCOLN	6600	12 th
74	26	16N	2E	LINCOLN	3960	4 th
75	27	16N	2E	LINCOLN	2640	12 th
76	36	16N	2E	LINCOLN	6600	4 th
77	36	16N	2E	LINCOLN	1320	12 th
78	5	16N	3E	LINCOLN	1320	6 th
79	6	16N	3E	LINCOLN	8000	6 th
80	7	16N	3E	LINCOLN	5280	6 th
93	22	17N	2E	LINCOLN	8000	4 th
94	22	17N	2E	LINCOLN	5500	8 th
95	27	17N	2E	LINCOLN	5280	8 th
96	34	17N	2E	LINCOLN	6000	8 th
97	34	17N	2E	LINCOLN	2640	4 th
98	35	17N	2E	LINCOLN	2640	3 rd
100 (former A1)	4	16N	2E	LINCOLN	5280	6 th
101 (former A2)	5	16N	2E	LINCOLN	2640	6 th
102 (former A3)	5	16N	2E	LINCOLN	2640	4 th

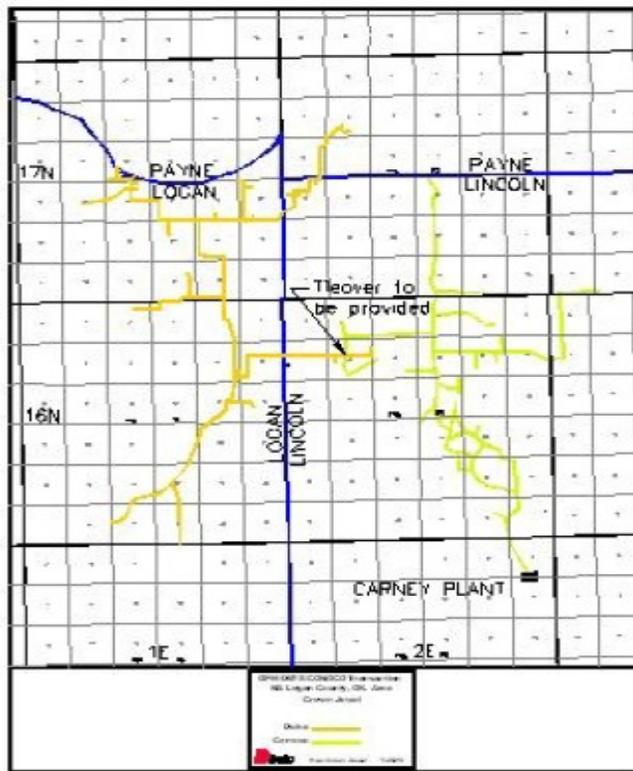
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103	(former A4)	8	16N	2E	LINCOLN	8000	4"Ø
104	(former A5)	8	16N	2E	LINCOLN	2640	3"Ø
Total Pipe Length (Conoco)						10640	
Total Pipe Length (Crown Jewel Assets)						36048	

Inferroconnects: All interconnects will be done to DEFS's usual specifications.

Pipes Involved	Section	Township	Range	Type	Distance (mi.)	Comments
DEFS/Conoco	8	16	2	crossover		Tie 6" DEFS poly to 4" Conoco Steel

Note: Conoco's Carney Plant (including refrigeration compression) is also included in the crown jewel asset package. This cryogenic plant is located in 15N/2E, Section 15, in Lincoln County, Oklahoma. The plant's processing capacity is 18 MMcfd. The plant's storage capacity is 1,140 barrels of NGL mix.



Analysis to Aid Public Comment

**Analysis to Aid Public Comment on the Provisionally
Accepted Consent Order**

The Federal Trade Commission ("Commission") has accepted for public comment from Duke Energy Corporation ("Duke"), Phillips Petroleum Company ("Phillips"), and Duke Energy Field Services L.L.C. ("DEFS") an agreement containing Consent Order designed to remedy the anticompetitive effects resulting from: (1) Duke and Phillips' proposed merger of all of their natural gas gathering and processing businesses into DEFS; and (2) Duke's proposed acquisition of certain gas gathering and processing assets in central Oklahoma currently jointly owned by Conoco Inc. ("Conoco") and Mitchell Energy & Development Corporation ("Mitchell"). The Consent Order requires Duke to divest approximately 2780 miles of gas gathering pipeline in Kansas, Oklahoma, and Texas.

This agreement has been placed on the public record for thirty (30) days for the receipt of comments from interested persons. Comments received during this period will become part of the public record. After thirty (30) days, the Commission will again review the agreement and the comments received, and will decide whether it should withdraw from the agreement or make final the agreement's Order.

On December 16, 1999, Duke and Phillips signed a letter agreement to transfer their natural gas gathering and processing businesses to DEFS. Duke will be the majority owner of DEFS. The value of this transaction is approximately \$6 billion. On December 21, 1999, Duke agreed to acquire Conoco and Mitchell's jointly held central Oklahoma gas gathering and processing assets. Gas gathering is the pipeline transportation of natural gas from a wellhead or central delivery point to a gas transmission pipeline or gas processing plant. The Commission found that the merger and acquisition may create competitive problems in counties in Kansas, Oklahoma, and Texas. The Commission's complaint alleges that Duke, Phillips, and DEFS' merger agreement and Duke's acquisition agreement with Conoco

Analysis to Aid Public Comment

and Mitchell violate Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45, and the merger and acquisition, if consummated, would violate Section 5 of the Federal Trade Commission Act and Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18.

Seven relevant markets were identified where gas producers could only turn to the parties or, at most, to one other gas gatherer, for gas gathering services. In these areas, the proposed merger and acquisition would reduce competition in the provision of gas gathering services and would likely lead to anticompetitive increases in gathering rates and an overall reduction in gas drilling and production. It is unlikely that the competition eliminated by the proposed merger and acquisition would be replaced by new entry into the gas gathering market in these areas.

The proposed Consent Order requires Duke to divest pipeline systems in these markets areas, eliminating any overlap between Duke's current holdings and what it will acquire from Phillips and the Conoco/Mitchell joint venture. The gas gathering assets to be divested are listed in Schedules A-J, with maps depicting the assets listed in Schedules C-J. Of the 2,780 miles to be divested under this Consent Order, 2,250 miles will be divested to Duke's joint venture partners for these assets. On February 28, 2000, Duke divested its interest in the Schedule A assets, 800 miles of pipe in the Westana area of Oklahoma, to Western, co-owner of the Westana Gathering Company. Duke has agreed to divest its interest in the Schedule B assets, 1,450 miles of pipe in the Austin Chalk area of Texas, to Mitchell, co-owner of Ferguson-Burleson County Gas Gathering System. The remaining 530 miles will be sold to Commission-approved buyers. The purposes of the divestitures are to ensure the continued use of the assets as gas gathering assets and to remedy the lessening of competition resulting from the acquisition.

Analysis to Aid Public Comment

Duke must divest the assets within 120 days of final acceptance of the Consent Order by the Commission. The Consent Order provides that if Duke fails to sell the 530 miles of pipe that currently does not have an identified buyer, it must offer additional assets for sale ("crown jewels"). If Duke fails to divest these assets, or if the sale to Mitchell is not completed, by the deadline, the Commission may appoint a trustee to sell the assets. Duke has entered into an Asset Maintenance Agreement, in which it has agreed to maintain the assets that are being divested (as well as the "crown jewel" assets) in their current condition and provide gas gathering services on the same terms and conditions available to customers on March 1, 2000, until the assets are sold.

The purpose of this analysis is to invite public comment concerning the consent order. This analysis is not intended to constitute an official interpretation of the agreement and order or to modify their terms in any way.

Complaint

IN THE MATTER OF

FMC CORPORATION, ET AL.CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATIONS OF
SEC. 5 OF THE FEDERAL TRADE COMMISSION ACT AND
SECTION 7 OF THE CLAYTON ACT

*Docket C-3935; File No. 9910218
Complaint, April 5, 2000--Decision, May 15, 2000*

This consent order requires Respondents FMC Corporation, Solutia Inc., and Astaris LLC to divest to Societe Chimique Prayon-Rupel Solutia's Inc.'s phosphates plant in Augusta, Georgia, and divest to Peak Investments LLC FMC's phosphorous pentasulfide plant in Lawrence, Kansas. The divestitures are required to remedy anticompetitive effects from the joint venture of Respondents phosphates and phosphorous derivatives. The order also requires Respondents to provide Prayon with technologies that Solutia has used for manufacturing phosphates, and divest other assets from the Augusta plant, such as customer lists, contacts, and other tangible assets. In addition, Respondents are required to provide Peak with technologies that FMC has used for manufacturing phosphorous pentasulfide, and divest other assets from the Lawrence plant, such as customer lists, contacts, and other tangible assets. An accompanying Order to Hold Separate and Maintain Assets requires the respondent to preserve the business as a viable, competitive, and ongoing operation and maintain inventories until the divestiture is achieved

Participants

For the Commission: *Robert S. Tovsky, Randall Conner, Gorav Jindal, Jeanine Balbach, Steven Wilensky, Emily Byers, Morris A. Bloom, John O'Hara Horsley, Richard Liebeskind, Daniel P. Ducore, Thomas R Isso, Louis Silvia, and Gregory S. Vistnes.*

For the Respondents: *Raymond A. Jacobsen and Joel R. Grosberg, McDermott, Will & Emery, and Barry Pupkin, Squire, Sanders & Dempsey.*

Complaint

COMPLAINT

The Federal Trade Commission (“Commission”), having reason to believe that FMC Corporation (“FMC”) and Solutia Inc. (“Solutia”) have entered into an agreement to form Astaris LLC (“Astaris”), a phosphates joint venture limited liability company, and that the joint venture, if consummated, would result in a violation of Section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45, and Section 7 of the Clayton Act, 15 U.S.C. § 18, 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:

A. THE RESPONDENTS

1. Respondent FMC is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Delaware, with its principal place of business located at 200 East Randolph Drive, Chicago, Illinois 60601. FMC, among other things, engages in the development, manufacture and sale of elemental phosphorus, pure phosphoric acid, phosphate salts and phosphorus derivatives, primarily in North America and Europe.

2. Respondent Solutia is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware, with its principal place of business located at 575 Maryville Centre Drive, St. Louis, Missouri 63141. Solutia, among other things, engages in the development, manufacture and sale of elemental phosphorus, pure phosphoric acid, phosphate salts and phosphorus derivatives, primarily in North America.

3. Respondent Astaris is a corporation organized and existing under and by virtue of the laws of the State of Delaware, with its principal place of business located at 575 Maryville Centre Drive, St. Louis, Missouri 63141.

Complaint

4. At all times relevant herein, Respondents FMC and Solutia have been and are now engaged in commerce, as “commerce” is defined in Section 1 of the Clayton Act, 15 U.S.C. § 12, and are corporations whose business is in or affecting commerce as “commerce” is defined in Section 4 of the Federal Trade Commission Act, 15 U.S.C. § 44.

B. THE PROPOSED JOINT VENTURE

5. On April 29, 1999, FMC and Solutia executed an agreement to combine most of their respective phosphates and phosphorus derivatives businesses into a joint venture company. The joint venture, which FMC and Solutia have named Astaris, would be owned equally by each company. According to FMC and Solutia, the joint venture company would have combined sales of approximately \$600 million.

C. RELEVANT MARKETS

6. One relevant line of commerce in which to analyze the effects of the proposed joint venture between FMC and Solutia is the manufacture, marketing and sale of pure phosphoric acid. Pure phosphoric acid is a syrupy tribasic acid that is used in disparate applications. It is used in food applications, such as cola beverages and pet food, and in technical applications, such as cleaning compounds, metal surface treatments, and water treatment products. Pure phosphoric acid is sold directly to end-users, and also is reacted with inorganic chemicals to create phosphate salts, such as sodium tripolyphosphate.

7. There are no economic substitutes for pure phosphoric acid. A small but significant and non-transitory price increase would not affect the current level of consumption of pure phosphoric acid in any of the significant end-use applications.

Complaint

8. Another relevant line of commerce in which to analyze the effects of the proposed joint venture is the manufacture, marketing and sale of phosphorus pentasulfide. Phosphorus pentasulfide, which is typically sold in a solid, flake form to customers, is used primarily in the manufacture of chemical additives for engine lubricating oils, and also is used to a smaller extent in the manufacture of different types of insecticides.

9. There are no economic substitutes for phosphorus pentasulfide, due to the fact that other products would not be nearly as effective as phosphorus pentasulfide in its major applications. Moreover, even attempting to find alternative products to substitute for this product would require lengthy product development efforts followed by extensive product testing. For these reasons, a small but significant and non-transitory price increase would not affect the current level of consumption of phosphorus pentasulfide in any of the significant end-use applications.

10. The relevant geographic market in which to analyze the effects of the proposed joint venture in pure phosphoric acid is the United States. The level of imports of pure phosphoric acid has been low compared to the overall market, and has not been highly responsive to changes in United States prices. Producers in the United States recognize that prices in the United States have historically been much higher than prices in other parts of the world.

11. There are several reasons why imports of pure phosphoric acid into the United States have been limited. One reason is that many of the overseas producers employ the older, higher-cost thermal process to produce pure phosphoric acid. In addition, transportation costs account for a significant portion of the delivered cost of phosphoric acid. Other reasons why imports have been limited include access to distribution, and the cost of terminal storage for product imported from overseas.

Complaint

12. The overseas producers that have been most active in making sales of pure phosphoric acid in the United States have been those that employ the low-cost solvent extraction process. Nevertheless, the level of United States sales even by these companies has been low. These overseas producers of pure phosphoric acid have faced significant countervailing and antidumping duties that have limited their ability to sell pure phosphoric acid in the United States. These duties have increased costs for the overseas producers, and also chilled sales by the overseas producers in the United States. In addition, agreements between producers in the United States and various overseas producers have had the effect of limiting the level of competition from these overseas producers.

13. The relevant geographic market in which to assess the effects of the proposed joint venture between FMC and Solutia in phosphorus pentasulfide is the United States. Imports of phosphorus pentasulfide into the United States are virtually non-existent, and are limited by difficulties in handling this material in ocean shipping. Phosphorus pentasulfide is a hazardous material which emits deadly gases when exposed to moisture, and therefore requires specialized and expensive containers even for inland transportation. Furthermore, FMC's documents indicate that overseas producers have higher production costs than producers in the United States.

D. MARKET STRUCTURE

14. The United States market for pure phosphoric acid is highly concentrated. Four manufacturers, including Rhodia, Albright & Wilson, FMC and Solutia, currently account for approximately 95% of the local production capacity that can supply United States customers, and 95% of sales of pure phosphoric acid. FMC's share of current net sales (which includes sales among producers of pure phosphoric acid, and also

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excludes purchases of the product by producers) is over 20%, and Solutia's share is close to 11%. The proposed joint venture would increase the Herfindahl-Hirschman Index for United States sales by over 450 points, from over 2070 to over 2500.

15. FMC produces pure phosphoric acid via the thermal process in the United States at plants in Lawrence, Kansas and Carteret, New Jersey. FMC has also announced that it is in the process of building a plant in Idaho that will produce pure phosphoric acid via the solvent-extraction process. FMC also produces phosphate salts at the Lawrence and Carteret plants, and also at a plant in Green River, Wyoming.

16. FMC sells pure phosphoric acid directly to end-customers, and also uses it in the manufacture of phosphate salts. FMC's sales of phosphate salts included products such as sodium tripolyphosphate, sodium hexametaphosphate, sodium acid pyrophosphate, and tetrapotassium phosphate.

17. Solutia produces pure phosphoric acid via the thermal process at plants in Carondolet, Missouri and Trenton, Michigan. Solutia also has a pure phosphoric acid plant in Augusta, Georgia, but is not currently operating the plant. The plant has been mothballed since the beginning of 1998. Solutia also produces phosphate salts at its plants in Carondolet, Trenton and Augusta.

18. Solutia sells pure phosphoric acid directly to end-customers, and also uses it internally in the production of phosphate salts. Solutia's sales of phosphate salts included products such as sodium tripolyphosphate, sodium hexametaphosphate, sodium acid pyrophosphate, dicalcium phosphate and tetrapotassium phosphate.

19. FMC and Solutia manufacture and sell pure phosphoric acid in direct competition with each other, and also manufacture and sell phosphate salts in direct competition with each other.

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20. Besides FMC, Solutia, Rhodia, and Albright & Wilson, two other companies that produce pure phosphoric acid in North America for sale in the United States are Earth Sciences and Simplot. Earth Sciences and Simplot have each been producing pure phosphoric acid for the last two to three years, using processes to manufacture pure phosphoric acid different from the other North American producers. Both of these companies have very limited production capacity and sales compared to the other four producers, and are unlikely to grow their sales substantially in the foreseeable future.

21. The United States market for phosphorus pentasulfide is highly concentrated. Three manufacturers, FMC, Solutia and Rhodia, currently account for all of the sales of this product in the United States. FMC produces phosphorus pentasulfide at its plant in Lawrence, Kansas, and Solutia produces phosphorus pentasulfide at its plant in Sauget, Illinois. Rhodia, the smallest producer, has announced that it is exiting the phosphorus pentasulfide market, and is in the process of closing the facility in Morrisville, Pennsylvania where it manufactured this product.

22. FMC and Solutia together accounted for over 85% of United States sales of phosphorus pentasulfide in 1998. Solutia had a share of over 67% of sales and FMC had a share of close to 18% of sales. As measured by 1998 sales, the proposed joint venture would increase the Herfindahl-Hirschman Index for United States sales by over 2500 points, from approximately 5100 to over 7600. With Rhodia's announced exit, moreover, the proposed joint venture would establish a monopoly in this product.

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E. CONDITIONS OF ENTRY

23. *De novo* entry or fringe expansion into the pure phosphoric acid market would require a substantial sunk investment and a significant period of time, such that new entry would be neither timely, likely, nor sufficient.

24. The minimum viable scale of a pure phosphoric acid production facility likely precludes new entry. The prevailing pure phosphoric acid technology demands large-scale production, relative to market size, in order to operate efficiently. This technology has but a single use -- the production of pure phosphoric acid. It cannot economically be shifted toward another use. Therefore, all returns on investment must be derived from pure phosphoric acid sales. Because economic entry would require that a new producer capture a significant market share from existing producers, and because the costs of such entry would be sunk, such entry is inherently risky.

25. *De novo* entry or fringe expansion into the phosphorus pentasulfide market would require a substantial sunk investment and a significant period of time, such that new entry would be neither timely, likely, nor sufficient.

26. The minimum viable scale of a phosphorus pentasulfide production facility likely precludes new entry. A new plant would need to be built at a scale that either would be as large as the entire market, or would account for a large proportion of total market size, in order to operate efficiently. This technology has but a single use -- the production of phosphorus pentasulfide. It cannot economically be shifted toward another use. Therefore, all returns on investment must be derived from sales of phosphorus pentasulfide. Because economic entry would require that a new producer capture a significant market share from existing producers, in a market that is enjoying no growth in demand, and because the costs of such entry would be sunk, such entry is inherently risky.

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27. Some firms produce phosphorus pentasulfide for captive use in the manufacture of insecticides. However, these firms have limited available capacity, and would need additional investments, in manufacturing, product development and marketing, in order to compete to make sales against FMC and Solutia. They would also need to establish that their products can meet the end-use requirements of the major customers in lubricant additives. Primarily for these reasons, these firms are unlikely to divert their production to making external sales, even in response to significant price increases.

F. MARKET CHARACTERISTICS WHICH FACILITATE COORDINATED INTERACTION IN PURE PHOSPHORIC ACID

28. The characteristics of the market for pure phosphoric acid facilitate coordinated interaction among producers, to the detriment of the purchasers of this product. Among such characteristics are:

- a. The United States market for pure phosphoric acid is highly concentrated;
- b. Pure phosphoric acid is a highly homogeneous product that is purchased primarily on the basis of price;
- c. Reliable pricing information is available from customers, and from other producers due to the practice of publicly announcing price increases in advance of their implementation;
- d. Producers have made pricing decisions independently of industry operating rates;
- e. Producers undertake retaliation at specific accounts as a means to discipline and deter future competition.

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29. An agreement that limits competition is a January 1, 1998 agreement between Solutia and Emaphos, S.A. ("Emaphos"), a Moroccan producer which added a substantial amount of low-cost pure phosphoric acid capacity that came onstream in the beginning of 1998. Under the terms of the contract, Emaphos became a significant supplier of pure phosphoric acid to Solutia, which qualified and used the Emaphos acid in manufacturing different types of phosphate salts.

30. In addition to providing for supply from Emaphos to Solutia, the agreement between Solutia and Emaphos made Solutia the exclusive distributor in the United States for pure phosphoric acid produce by Emaphos, and therefore restricted Emaphos from selling pure phosphoric acid to direct customers in competition with Solutia. The only direct sales Emaphos was allowed to make under the terms of this agreement were sales to the other current large producers of pure phosphoric acid. This provision of the contract reduced Emaphos' impact as a direct and independent competitor.

G. EFFECTS OF THE PROPOSED JOINT VENTURE

31. The effect of the joint venture may be substantially to lessen competition and to tend to create a monopoly in the relevant markets in violation of Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18, and Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45, in the following ways, among others:

- a. It will substantially increase concentration in the market for pure phosphoric acid;
- b. It will significantly enhance the likelihood of coordinated interaction among the competitors in the manufacture and sale of pure phosphoric acid;

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- c. It will increase the likelihood that purchasers of pure phosphoric acid in the relevant geographic market will be forced to pay higher prices;
- d. It will substantially increase concentration in the market for phosphorus pentasulfide, leading to a monopoly;
- e. It will significantly enhance the likelihood of a unilateral exercise of market power by the joint venture in phosphorus pentasulfide market;
- f. It will increase the likelihood that purchasers of phosphorus pentasulfide in the relevant geographic market will be forced to pay higher prices.

H. VIOLATIONS CHARGED

32. The joint venture agreement between FMC and Solutia, as described in Paragraph 5, violates Section 5 of the FTC Act, as amended, 15 U.S.C. § 45.

33. The joint venture between FMC and Solutia, if consummated, would violate Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45, and Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18.

WHEREFORE, THE PREMISES CONSIDERED, the Federal Trade Commission on this fifth day of April, 2000, issues its complaint against said Respondents.

By the Commission.

DECISION AND ORDER

The Federal Trade Commission (“Commission”), having initiated an investigation of the proposed joint venture between Respondent FMC Corporation (“FMC”) and Respondent Solutia Inc. (“Solutia”) to form Respondent Astaris LLC (“Astaris”), and Respondents having been furnished thereafter with a copy of a draft of Complaint that the Bureau of Competition presented to the Commission for its consideration and which, if issued by the Commission, would charge Respondents with violations of Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18, and Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45; and

Respondents, their attorneys, and counsel for the Commission having thereafter executed an Agreement Containing Consent Orders (“Consent Agreement”), containing an admission by Respondents of all the jurisdictional facts set forth in the aforesaid draft of Complaint, a statement that the signing of said Consent Agreement is for settlement purposes only and does not constitute an admission by Respondents that the law has been violated as alleged in such Complaint, or that the facts as alleged in such Complaint, other than jurisdictional facts, are true, and waivers and other provisions as required by the Commission’s Rules; and

The Commission having thereafter considered the matter and having determined that it had reason to believe that Respondents have violated the said Acts, and that a Complaint should issue stating its charges in that respect, and having thereupon issued its Complaint and an Order to Maintain Assets, and having accepted the executed Consent Agreement and placed such Consent Agreement on the public record for a period of thirty (30) days for the receipt and consideration of public comments, now in further conformity with the procedure described in Commission Rule 2.34, 16 C.F.R. § 2.34, the Commission hereby makes the following jurisdictional findings and issues the following Order:

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1. FMC 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 200 East Randolph Drive, Chicago, Illinois 60601.
2. Solutia 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 575 Maryville Centre Drive, St. Louis, Missouri 63141.
3. Astaris is a limited liability company organized and existing under and by virtue of the laws of the State of Delaware, with its office and principal place of business located at 575 Maryville Centre Drive, St. Louis, Missouri 63141.
4. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of Respondents, and the proceeding is in the public interest.

ORDER**I.**

IT IS ORDERED that, as used in this Order, the following definitions shall apply:

- A. "FMC" means FMC Corporation, its directors, officers, employees, agents, representatives, successors, and assigns; its subsidiaries, divisions, groups, and affiliates controlled by FMC, its joint ventures, including the Joint Venture, and the respective directors, officers, employees, agents, representatives, successors, and assigns of each.

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- B. "Solutia" means Solutia Inc., its directors, officers, employees, agents, representatives, successors, and assigns; its subsidiaries, divisions, groups, and affiliates controlled by Solutia, its joint ventures, including the Joint Venture, and the respective directors, officers, employees, agents, representatives, successors, and assigns of each.
- C. "Astaris" means Astaris LLC, its directors, officers, employees, agents, representatives, successors, and assigns; its subsidiaries, divisions, groups, and affiliates controlled by Astaris, its joint ventures, and the respective directors, officers, employees, agents, representatives, successors, and assigns of each.
- D. "Commission" means the Federal Trade Commission.
- E. "Respondents" means FMC, Solutia and Astaris, respectively and collectively.
- F. "Joint Venture" means the Joint Venture Between FMC and Solutia, as described in the April 29, 1999, Joint Venture Agreement Between FMC and Solutia.
- G. "Prayon" means Societe Chimique Prayon-Rupel S.A., its subsidiaries, divisions, groups, and affiliates controlled by Prayon.
- H. "Peak" means Peak Investments, L.L.C., its subsidiaries, divisions, groups, and affiliates controlled by Peak.
- I. "Emaphos" means Emaphos, S.A., its parents, subsidiaries, divisions, groups, and affiliates controlled by Emaphos.

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- J. "Augusta Assets To Be Divested" means the assets, properties and business, tangible and intangible, of the Augusta Plant, including, but not limited to:
1. all machinery, furniture, fixtures, tools and other tangible personal property at the Augusta Plant;
 2. a royalty-free, non-exclusive license to all rights, titles, and interest in and to Augusta Intellectual Property;
 3. all rights, title, and interest in and to inventories of raw materials (to the extent requested by the acquirer), supplies and parts for the Augusta Plant;
 4. all rights, title, and interest in and to the service contracts dedicated to the operations of the Augusta Plant and the customer contracts listed in Confidential Appendix A, attached hereto;
 5. all rights, title and interest in and to transferable governmental permits and approvals relating to the operation of the Augusta Plant, to the extent permitted by law;
 6. lists of the customers served by and service contracts used for the Augusta Plant;
 7. all equipment, vehicles and transportation facilities used since January 1, 1999 at the Augusta Plant;
 8. all storage capacity located at the Augusta Plant;
 9. all rights, titles, and interests in and to the owned real property on which the Augusta Plant is located;

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10. all rights under any third-party warranties and guarantees, express or implied, for the Augusta Plant; and
 11. all books, records, and files regarding operating procedures and policies at the Augusta Plant; provided, however, that Respondents may retain a copy of such books, records, and files solely for financial, tax reporting, legal, health, safety and environmental purposes.
- K. “Augusta Intellectual Property” means any form of intellectual property relating to the manufacture of products at the Augusta Plant, including, but not limited to, trade secrets, technical information, inventions, test data, technological know-how, licenses, specifications, designs, drawings, processes, formulas, customer lists, lists of significant current vendors, and quality control data, books, records, and files; provided, however, that Augusta Intellectual Property does not include proprietary information of other parties which Respondents are prevented from disclosing due to the existence of secrecy agreements.
- L. “Augusta Plant” means the Solutia manufacturing plant in Augusta, Georgia, which manufactures phosphate salts and has manufactured phosphoric acid.
- M. “Augusta Products” means the grades and types of phosphate salts that are and have been produced at the Augusta Plant since January 1, 1999.
- N. “Emaphos Phosphoric Acid Agreement” means the agreement dated January 1, 1998, between Solutia Inc. and Emaphos S.A. pursuant to which Solutia agreed to purchase, and Emaphos agreed to sell, specified volumes of phosphoric acid.

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- O. "Lawrence Plant" means FMC's plant in Lawrence, Kansas, which is used to manufacture phosphoric acid, phosphate salts and phosphorus derivatives, and includes the Lawrence P₂S₅ Plant.
- P. "Lawrence Plant Facilities" means all Lawrence Plant facilities used for the operation of the Lawrence P₂S₅ Plant, whether or not used exclusively in the manufacture of P₂S₅.
- Q. "Lawrence Plant Services" means the plant services and functions supplied by Respondents for operation of the Lawrence P₂S₅ Plant.
- R. "Lawrence P₂S₅" means the grades and types of P₂S₅ that are and have been produced at the Lawrence P₂S₅ Plant since January 1, 1997.
- S. "Lawrence P₂S₅ Plant" means the P₂S₅ manufacturing unit located at the Lawrence Plant.
- T. "Lawrence P₂S₅ Intellectual Property" means any form of intellectual property relating to the research, development, manufacture or sale of products at the Lawrence P₂S₅ Plant, including, but not limited to, trademarks (except "FMC," "Solutia" and "Astaris," and associated trademarks), patents, trade secrets, research materials, technical information, management information systems, software, inventions, test data, technological know-how, licenses, registrations, submissions, approvals, technology, specifications, designs, drawings, processes, recipes, protocols, formulas, customer lists, vendor lists, catalogs, sales promotion literature, advertising materials, quality control data, books, records, and files; provided,

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however, that Lawrence P₂S₅ Intellectual Property does not include non-transferable software licenses.

- U. “Non-Public P₂S₅ Information” means Lawrence P₂S₅ Intellectual Property, and any information not in the public domain furnished to Respondents by the acquirer of the P₂S₅ Assets to Be Divested, or learned by Respondents as suppliers of products, services or facilities to the acquirer, and (1) if written information, designated in writing by the acquirer as proprietary information by an appropriate legend, marking, stamp, or positive written identification on the face thereof, or (2) if oral, visual or other information, identified as proprietary information in writing by the acquirer prior to the disclosure or within thirty (30) days after such disclosure. Non-Public P₂S₅ Information shall not include: (i) information already known to Respondents; (ii) information which subsequently falls within the public domain through no violation of this Order by Respondents; (iii) information which subsequently becomes known to Respondents from a third party not in breach of a confidential disclosure agreement; (iv) information after six (6) years from the date of such disclosure of such Non-Public P₂S₅ Information to Respondents, or such other period as agreed to in writing by Respondents and the provider of the information; or (v) information which Respondents develop independently.
- V. “Peak Divestiture Agreement” means the December 8, 1999, and December 20, 1999, agreements between FMC and Peak by which FMC has agreed to sell and Peak has agreed to acquire the P₂S₅ Assets to Be Divested, attached hereto as Confidential Appendix 1.
- W. “Prayon Divestiture Agreement” means the December 8, 1999, and January 31, 2000, agreements between Solutia and Prayon by which Solutia has agreed to sell

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and Prayon has agreed to acquire the Augusta Assets To Be Divested, attached hereto as Confidential Appendix 2.

- X. "P₂S₅ Assets to Be Divested" means:
1. the Lawrence P₂S₅ plant, including all machinery, furniture, fixtures, tools and other tangible personal property dedicated to the manufacture and sale of P₂S₅ at the Lawrence Plant;
 2. all rights, title, and interest in and to Lawrence P₂S₅ Intellectual Property dedicated to the research, development, manufacture and sale of Lawrence P₂S₅, and a non-exclusive, perpetual, royalty-free transferable license for Lawrence P₂S₅ Intellectual Property not dedicated to the research, development, manufacture or sale of Lawrence P₂S₅; provided that the acquirer has rights to transfer such license only to any person to whom it is transferring its entire interest in the P₂S₅ Assets to Be Divested, or from whom it has agreed to purchase elemental phosphorus for use in the manufacture of P₂S₅;
 3. all rights, title, and interest in and to inventories of products that are useable and saleable in the ordinary course of business, raw materials (to the extent requested by the acquirer), supplies and parts, or the part thereof, dedicated to the manufacture or sale of Lawrence P₂S₅, including work-in-process and finished goods;
 4. all rights, title, and interest in and to agreements, express or implied, necessary for the manufacture or sale of Lawrence P₂S₅, including, but not limited to,

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contracts with joint venture partners, suppliers, sales representatives, distributors, agents, personal property lessors, personal property lessees, licensors, licensees, consignors, consignees, and customers;

5. all rights, title and interest in and to transferable permits and approvals dedicated to the research, design, development, manufacture, distribution, marketing or sale of Lawrence P₂S₅, regardless of whether such permits and approvals relate exclusively to such purposes, to the extent permitted by law;
6. all customer and vendor lists relating to Lawrence P₂S₅, including, without limitation, correspondence with customers, customer files and account history (including, without limitation, receivable and collection history), sales literature and promotional material used in the manufacture and sale of P₂S₅;
7. all equipment, vehicles and transportation facilities, dedicated to the manufacture and sale of Lawrence P₂S₅;
8. all storage capacity at the Lawrence P₂S₅ Plant;
9. all of FMC's rights, title and interest under each of the personal property leases for tangible assets (other than office equipment) and property leased by FMC, which leases are dedicated to the manufacture and sale of Lawrence P₂S₅;
10. all rights under any third-party warranties and guarantees, express or implied, for the manufacture and sale of Lawrence P₂S₅; and
11. all books, records, and files regarding operating procedures and policies at the Lawrence P₂S₅ Plant; provided, however, that Respondents may retain a

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copy of such books, records and files as appropriate for operation of the Lawrence Plant, for provision of Lawrence Plant Services or P₂S₅ Technical Services, and for financial, tax reporting, legal, health, safety and environmental purposes.

- Y. “P₂S₅ Construction Project” means construction of new facilities or modification of the Lawrence P₂S₅ Plant for purposes of creating access to the Lawrence P₂S₅ Plant, receiving raw materials for use in the Lawrence P₂S₅ Plant, or manufacturing or transporting Lawrence P₂S₅.
- Z. “P₂S₅ Nameplate Level” means the rated nameplate capacity of the Lawrence P₂S₅ Plant.
- AA. “P₂S₅ Technical Services” means research and development and laboratory analysis relating to Lawrence P₂S₅, whether conducted by Respondents at the Lawrence Plant or at other facilities, in the form of personnel time, access to equipment and materials, or otherwise.
- BB. “Trustee” means a trustee appointed pursuant to Paragraph VII.A. of this Order.
- CC. “Assets To Be Divested” means the Augusta Assets To Be Divested and the P₂S₅ Assets to Be Divested.

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II.**IT IS FURTHER ORDERED** that:

- A. Respondents shall divest the Augusta Assets To Be Divested to Prayon pursuant to the Prayon Divestiture Agreement no later than six (6) months after the Commission accepts the Consent Agreement for public comment. The purpose of the divestiture is to ensure the continued use of the Augusta Assets To Be Divested in the same business in which they were engaged at the time of the Joint Venture and to remedy the lessening of competition resulting from the Joint Venture as alleged in the Commission's complaint. Failure by Respondents to perform the divestiture agreement shall also constitute a violation of this Order.

Provided, however, that, if at the time the Commission issues the Order, the Commission notifies Respondents that Prayon is not an acceptable acquirer or that the Prayon Divestiture Agreement is not an acceptable manner of divestiture, the Respondents shall, within five (5) months of the date on which this Order is issued by the Commission, divest the Augusta Assets To Be Divested only to an acquirer that is approved by the Commission, and divest these assets only in a manner approved by the Commission.

- B. Within thirty (30) days of the date that this Order is accepted by the Commission for public comment, Respondents shall provide Prayon with a complete list of all non-clerical employees of Solutia employed at the Augusta Plant. If Respondents divest the Augusta Assets to Be Divested to an acquirer other than Prayon, then Respondents shall provide such list to the acquirer no later than the date on which a divestiture agreement is signed with such acquirer. Such list shall

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state each such individual's name, position, address, current or last known business telephone number and a description of the duties and work performed by the individual in connection with the Augusta Products.

- C. Respondents shall provide Prayon with an opportunity to inspect the personnel files and other documentation relating to all non-clerical employees at the Augusta Plant, to the extent permissible under applicable laws, at the request of Prayon, within sixty (60) days of the date that this Order is accepted by the Commission for public comment. If the Augusta Assets to Be Divested are divested to an acquirer other than Prayon, then Respondents shall provide such opportunity no later than the date on which the divestiture agreement is signed with such acquirer.
- D. Respondents shall provide the proposed acquirer the opportunity to enter into employment contracts with the non-clerical employees described in Paragraph II.B.
- E. Respondents shall provide the Commission-approved acquirer with the opportunity to enter into employment contracts with up to two (2) sales and marketing employees (including business directors, managers, and technical services employees) who are currently or have been employed by Solutia or FMC within the last two (2) years, and who, within thirty days after the date that the Consent Agreement is accepted by the Commission for public comment, have not received offers, or who have decided not, to become employees of Astaris, and shall not interfere with the employment by the Commission-approved acquirer of such individuals; shall not offer any incentive to such

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employees to decline employment with the Commission-approved acquirer or to accept other employment with the Respondents; and shall remove any impediments that may deter such employees from accepting employment with the Commission-approved acquirer, including, but not limited to, any non-compete or confidentiality provisions of employment or other contracts with the Respondents that would affect the ability of those individuals to be employed by the Commission-approved acquirer.

- F. Respondents shall not make employment offers to any individual described in Paragraphs II.D. and II.E., above, who accepts employment with the acquirer of the Augusta Assets To Be Divested, for a period of one (1) year after this Order has been issued if such individual has accepted an employment offer from the Commission-approved acquirer.

III.**IT IS FURTHER ORDERED** that:

- A. Respondents shall divest the P₂S₅ Assets To Be Divested to Peak pursuant to the Peak Divestiture Agreement no later than thirty (30) days after the parties form the Joint Venture. The purpose of the divestiture is to ensure the continued use of the P₂S₅ Assets To Be Divested in the same business in which they were engaged at the time of the Joint Venture and to remedy the lessening of competition resulting from the Joint Venture as alleged in the Commission's complaint. Failure by Respondents to perform the divestiture agreement shall also constitute a violation of this Order.

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Provided, however, that, if at that time the Commission issues the Order, the Commission notifies Respondents that Peak is not an acceptable acquirer or that the Peak Divestiture Agreement is not an acceptable manner of divestiture, the Respondents shall, within five (5) months of the date on which this Order is issued by the Commission, divest the P₂S₅ Assets to Be Divested only to an acquirer that is approved by the Commission, and divest these assets only in a manner approved by the Commission.

- B. Respondents shall provide and make available to the acquirer of the P₂S₅ Assets To Be Divested, all Lawrence Plant Services, all P₂S₅ Technical Services and access to all Lawrence Plant Facilities that are requested by the acquirer up to a level sufficient to allow the acquirer to practicably operate the P₂S₅ Assets To Be Divested at the P₂S₅ Nameplate Level. Such services and facilities shall be provided and made available at the times requested by the acquirer, except to the extent that such delivery is inconsistent with the safe and orderly operation of the Lawrence Plant, but the provision of such services or the availability of access to such facilities shall be no less timely than was normal during the period beginning January 1, 1999 and ending December 31, 1999.
- C. Respondents shall provide the acquirer of the P₂S₅ Assets To Be Divested with continuing access to all Lawrence Plant Facilities requested by the acquirer to receive raw materials and other supplies to support the operation of the Lawrence P₂S₅ Plant and to transport finished products from the Lawrence P₂S₅ Plant. Such access shall be provided at the times requested by the acquirer, except to the extent that such delivery is

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inconsistent with the safe and orderly operation of the Lawrence Plant, but such provision or availability shall be no less timely than was normal during the period beginning January 1, 1999 and ending December 31, 1999.

- D. Respondents shall provide, at the request of the acquirer of the P₂S₅ Assets To Be Divested, an ongoing supply of elemental phosphorus to support the acquirer's business of the manufacture and sale of P₂S₅, for a period of no less than ten (10) years from the time that this Order is issued by the Commission, unless Respondents cease the manufacture or purchase of elemental phosphorus.
- E. Respondents shall allow the acquirer of the P₂S₅ Assets To Be Divested, upon timely notice to Respondents, access to Lawrence Plant Facilities to provide any Lawrence Plant Service which Respondents have failed to provide, except to the extent that such access would be inconsistent with the safe and orderly operation of the Lawrence Plant.
- F. Respondents shall allow the acquirer of the P₂S₅ Assets To Be Divested to initiate and undertake, in a manner consistent with its access rights to the Lawrence Plant, P₂S₅ Construction Projects to replace any Lawrence Plant Facility or Lawrence Plant Service or to purchase elemental phosphorus from any source other than the Joint Venture.

Provided, however, that Respondents may take steps in conjunction with such P₂S₅ Construction Projects to ensure that the projects do not unreasonably interfere with continuing commercial operations at the Lawrence Plant.

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- G. Respondents shall allow the acquirer of the P₂S₅ Assets To Be Divested to initiate and undertake, in a manner consistent with its access rights to the Lawrence Plant, P₂S₅ Construction Projects to create separate access to the Lawrence Plant Facilities. In the event that the acquirer undertakes such a P₂S₅ Construction Project, Respondents shall maintain no continuing control or influence over access through such facility to the Lawrence P₂S₅ Plant, except to the extent necessary to maintain orderly and safe operation of the areas of the Lawrence Plant that are not dedicated to the manufacture of P₂S₅.

Provided, however, that Respondents may take steps in conjunction with such P₂S₅ Construction Projects to ensure that the projects do not unreasonably interfere with continuing commercial operations at the Lawrence Plant.

- H. Respondents shall provide access to the facilities used at the Lawrence Plant in connection with the manufacture and sale of P₂S₅ to all individuals invited by the acquirer, provided that such access does not unreasonably interfere with the continuing commercial operations of the Lawrence Plant.
- I. Respondents shall, for a period of two (2) years from the date that this Order is issued by the Commission, pay the acquirer of the P₂S₅ Assets To Be Divested for damages to the extent proximately caused by failures by Respondents to provide the acquirer of the P₂S₅ Assets To Be Divested with Lawrence Plant Services or P₂S₅ Technical Services, to provide access to Lawrence Plant Facilities, to provide elemental phosphorus pursuant to a supply agreement, or to comply with the requirements of Paragraph IV, below.

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- J. Respondents shall provide the acquirer of the P₂S₅ Assets To Be Divested with the rights to sell or transfer the P₂S₅ Assets To Be Divested, together with all rights obtained by the acquirer in connection with the divestiture, to any third person that is financially and technically capable of operating such assets on a commercial basis in compliance with safety, health, environmental and legal requirements.
- K. Respondents shall not interfere with the employment of the individuals listed in Confidential Appendix B attached to this Decision and Order, by the Commission-approved acquirer; shall not offer any incentive to such employees to decline employment with the Commission-approved acquirer or to accept other employment with the Respondents; and shall remove any impediments that may deter such employees from accepting employment with the Commission-approved acquirer, including, but not limited to, any non-compete or confidentiality provisions of employment or other contracts with the Respondents that would affect the ability of the those individuals to be employed by the Commission-approved acquirer. Provided, however, that any such waiver may be limited to employment with the Commission-approved acquirer or persons to whom the acquirer transfers the Lawrence P₂S₅ Plant.

IV.**IT IS FURTHER ORDERED** that:

- A. Respondents shall not, absent the prior written consent of the acquirer of the P₂S₅ Assets To Be Divested, obtain, provide, disclose, or use any Non-Public P₂S₅ Information for purposes other than facilitating the P₂S₅ acquirer's business at the Lawrence Plant or

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complying with Respondents' financial, tax reporting, legal, health, safety and environmental obligations.

- B. Respondents shall establish and enforce procedures to prevent the transmission of any Non-Public P₂S₅ Information to any of Respondents' employees with responsibilities concerning Respondents' P₂S₅ business.

V.

IT IS FURTHER ORDERED that Respondents, for a period of ten (10) years, shall not seek to enforce any provisions in the Emaphos Phosphoric Acid Agreement or any other agreement which directly or indirectly provide that sales of phosphoric acid in the United States by Emaphos or Prayon be made exclusively to Respondents, and shall not enter into any other agreements which directly or indirectly provide that sales of phosphoric acid in the United States by Emaphos or Prayon be made exclusively to Respondents.

VI.

IT IS FURTHER ORDERED that:

- A. At any time after Respondents sign the Agreement Containing Consent Orders in this matter, the Commission may appoint an Interim Trustee to ensure that Respondents expeditiously perform their responsibilities as required by Paragraphs III and IV of this Order and the divestiture agreement approved by the Commission. Respondents shall consent to the following terms and conditions regarding the powers, duties, authorities, and responsibilities of the Interim Trustee appointed pursuant to this Paragraph VI.:

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1. The Commission shall select the Interim Trustee, subject to the consent of Respondents, which consent shall not be unreasonably withheld. If Respondents have not opposed, in writing, including the reasons for opposing, the selection of any proposed trustee within ten (10) days after receipt of notice by the staff of the Commission to Respondents of the identity of any proposed trustee, Respondents shall be deemed to have consented to the selection of the proposed trustee.
2. The Interim Trustee shall have the power and authority to monitor Respondents' compliance with the terms of this order and with the terms of the divestiture agreement.
3. Within ten (10) days after appointment of the Interim Trustee, Respondents shall execute a trust agreement (in the form attached) 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 Respondents' compliance with the terms of this order and with the divestiture agreement.
4. The Interim Trustee shall serve for a term of two (2) years from the date the Interim Trustee and the trustee agreement are approved by the Commission. The term of the Interim Trustee may be extended up to an additional two (2) years at the option of the Commission.
5. The Interim Trustee shall have full and complete access to Respondents' personnel, books, records, documents, facilities and technical information used for the research, manufacture, marketing, distribution and sale of P₂S₅ and relating to the Lawrence Plant Services, the Lawrence Plant Facilities, the P₂S₅

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Technical Services, and the supply of elemental phosphorus, 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 are used for the manufacture of P_2S_5 , and all documents and records kept in the normal course of business that relate to the Lawrence Plant Services, Lawrence Plant Facilities, and the P_2S_5 Technical Services. Respondents shall cooperate with any reasonable request of the Interim Trustee. Respondents shall take no action to interfere with or impede the Interim Trustee's ability to monitor Respondents' compliance with Paragraphs III. and IV. of this Order and the divestiture agreement.

6. The Interim Trustee shall serve, without bond or other security, at the expense of Respondents, on such reasonable and customary terms and conditions as the Commission may set. The Interim Trustee shall have authority to employ, at the expense of Respondents, 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. Respondents 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

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extent that such losses, claims, damages, liabilities or expenses result from misfeasance, gross negligence, willful or wanton acts, or bad faith by the Interim Trustee.

8. If the Commission determines that the Interim Trustee has ceased to act or failed to act diligently, the Commission may appoint a substitute trustee in the same manner as provided in Paragraph VI.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.
- B. The Interim Trustee shall report to the Commission in writing, concerning compliance by Respondents with the provisions of Paragraph VI. within ten (10) days from the date the Peak Divestiture Agreement is approved and every sixty (60) days thereafter.

VII.**IT IS FURTHER ORDERED** that:

- A. If Respondents have not divested, absolutely and in good faith and with the Commission's prior approval, the Assets To Be Divested in accordance with Paragraphs II.A. and III.A. of this Order, the Commission may appoint a trustee to divest the Assets To Be Divested. In the event that the Commission or the Attorney General brings an action pursuant to ' 5(l) of the Federal Trade Commission Act, 15 U.S.C. ' 45(l), or any other statute enforced by the Commission, Respondents shall consent to the appointment of a trustee in such action. Neither the

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appointment of a trustee nor a decision not to appoint a trustee under this Paragraph shall preclude the Commission or the Attorney General from seeking civil penalties or any other relief available to it, including a court appointed trustee, pursuant to ' 5(l) of the Federal Trade Commission Act, or any other statute enforced by the Commission, for any failure by the Respondents to comply with this Order.

- B. If a trustee is appointed by the Commission or a court pursuant to Paragraph VII.A. of this Order, Respondents shall consent to the following terms and conditions regarding the trustee's powers, duties, authority, and responsibilities:
1. The Commission shall select the trustee, subject to the consent of Respondents, which consent shall not be unreasonably withheld. The trustee shall be a person with experience and expertise in acquisitions and divestitures. If Respondents have not opposed, in writing, including the reasons for opposing, the selection of any proposed trustee within ten (10) days after notice by the staff of the Commission to Respondents of the identity of any proposed trustee, Respondents shall be deemed to have consented to the selection of the proposed trustee.
 2. Subject to the prior approval of the Commission, the trustee shall have the exclusive power and authority to divest the Assets To Be Divested.
 3. Within ten (10) days after appointment of the trustee, Respondents shall execute a trust agreement that, subject to the prior approval of the Commission and, in the case of a court-appointed trustee, of the court,

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transfers to the trustee all rights and powers necessary to permit the trustee to effect the divestiture required by this Order.

4. The trustee shall have twelve (12) months from the date the Commission approves the trust agreement described in Paragraph VII.B.3. to accomplish the divestiture, which shall be subject to the prior approval of the Commission. If, however, at the end of the twelve-month period, the trustee has submitted a plan of divestiture or believes that divestiture can be achieved within a reasonable time, the divestiture period may be extended by the Commission, or, in the case of a court-appointed trustee, by the court; provided, however, the Commission may extend this period only two (2) times.
5. The trustee shall have full and complete access to the personnel, books, records and facilities related to the Assets To Be Divested or to any other relevant information, as the trustee may request. Respondents shall develop such financial or other information as such trustee may request and shall cooperate with the trustee. Respondents shall take no action to interfere with or impede the trustee's accomplishment of the divestiture. Any delays in divestiture caused by Respondents shall extend the time for divestiture under this Paragraph in an amount equal to the delay, as determined by the Commission or, for a court-appointed trustee, by the court.
6. The trustee shall use his or her best efforts to negotiate the most favorable price and terms available in each contract that is submitted to the Commission, subject to Respondents' absolute and unconditional obligation to divest expeditiously at no minimum price. The divestitures shall be made in the manner and to the acquirer as set out in Paragraphs II and III of this

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Order; provided, however, if the trustee receives bona fide offers from more than one acquiring entity, and if the Commission determines to approve more than one such acquiring entity, the trustee shall divest to the acquiring entity selected by Respondents from among those approved by the Commission; provided further, however, that Respondents shall select such entity within five (5) business days of receiving notification of the Commission's approval.

7. The trustee shall serve, without bond or other security, at the cost and expense of Respondents, on such reasonable and customary terms and conditions as the Commission or a court may set. The trustee shall have the authority to employ, at the cost and expense of Respondents, such consultants, accountants, attorneys, investment bankers, business brokers, appraisers, and other representatives and assistants as are necessary to carry out the trustee's duties and responsibilities. The trustee shall account for all monies derived from the divestiture and all expenses incurred. After approval by the Commission and, in the case of a court-appointed trustee, by the court, of the account of the trustee, including fees for his or her services, all remaining monies shall be paid at the direction of the Respondents, and the trustee's power shall be terminated. The trustee's compensation shall be based at least in significant part on a commission arrangement contingent on the trustee's divesting the Assets To Be Divested.
8. Respondents shall indemnify the trustee and hold the trustee harmless against any losses, claims, damages, liabilities, or expenses arising out of, or in connection with, the performance of the trustee's duties, including

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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 losses, claims, damages, liabilities, 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 VII.A. of this Order.
10. The Commission or, in the case of a court-appointed trustee, the court, may on its own initiative or at the request of the trustee issue such additional orders or directions as may be necessary or appropriate to accomplish the divestiture required by this Order.
11. The trustee shall have no obligation or authority to operate or maintain any assets relating to the research, development, manufacture or sale of Augusta Products or Lawrence P₂S₅.
12. The trustee shall report in writing to Respondents and the Commission every sixty (60) days concerning the trustee's efforts to accomplish divestiture.

VIII.

IT IS FURTHER ORDERED that for a period of ten (10) years from the date this Order becomes final, Respondents shall not, without the prior approval of the Commission, directly or indirectly, through subsidiaries, partnerships, or otherwise:

- A. Acquire more than 2% of the stock, share capital, equity or other interest in any concern, corporate or non-corporate, that owns or controls the Augusta

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Assets to Be Divested or the P₂S₅ Assets to Be Divested; or

- B. Acquire all or part of the Augusta Assets to Be Divested or the P₂S₅ Assets to Be Divested.

IX.

IT IS FURTHER ORDERED that:

- A. Within thirty (30) days of the date this Order is issued and every thirty (30) days thereafter until Respondents have obtained Commission approval for the acquirers and the manner of divestitures required by Paragraphs II. and III. of this Order, Respondents shall submit to the Commission a verified written report setting forth in detail the manner and form in which they intend to comply, are complying, and have complied with Paragraphs II. and III. of this Order. Respondents shall include in their compliance reports, among other things that are required from time to time, a full description of the efforts being made to comply with Paragraphs II. and III. of this Order, including a description of all substantive contacts or negotiations for divestiture and the identity of all parties contacted. Respondents shall include in their compliance reports copies of all written communications to and from such parties, all internal memoranda, all reports and recommendations concerning divestiture, and all transition services required to be rendered pursuant to the agreement approved by the Commission.
- K. One year from the date this Order becomes final and annually for the next nine (9) years on the anniversary of the date that this Order becomes final, and at other

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times that the Commission may require, Respondents shall file a verified written report setting forth in detail the manner in which they have complied and are complying with this Order.

X.

IT IS FURTHER ORDERED that Respondents shall notify the Commission at least thirty (30) days prior to any proposed change in the corporate Respondents such as dissolution, assignment, or sale resulting in the emergence of a successor corporation, or the creation or dissolution of subsidiaries or any other change in the corporation that may affect compliance obligations arising out of this Order.

XI.

IT IS FURTHER ORDERED that for the purposes of determining or securing compliance with this Order, and subject to any legally recognized privilege, and upon written request with reasonable notice to Respondents made to their principal United States offices, Respondents shall permit any duly authorized representatives of the Commission:

- A. Access, during office hours of Respondents and in the presence of counsel, to all facilities, and access 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 Respondents relating to compliance with this Order; and
- B. Upon five (5) days' notice to Respondents and without restraint or interference from Respondents, to interview officers, directors, or employees of Respondents, who may have counsel present, regarding such matters.

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XII.

IT IS FURTHER ORDERED that this Order shall terminate on May 15, 2020.

By the Commission.

[Confidential Appendices A, B, 1 and 2 Redacted From
Public Record Version of Decision & Order]

**STATEMENT OF CHAIRMAN ROBERT PITOFSKY AND
COMMISSIONERS SHEILA F. ANTHONY, MOZELLE W.
THOMPSON, ORSON SWINDLE,
AND THOMAS B. LEARY**

We believe that the divestitures and other relief mandated by the Commission order should restore the competition lost through the joint venture between FMC Corporation and Solutia Inc. Nevertheless, we recognize that both divestitures are somewhat out of the ordinary.

When remedying a Clayton Section 7 violation, the Commission usually orders a complete divestiture of one merging party's assets that produce the relevant product. In the pure phosphoric acid ("PPA") market, though, the Commission requires the divestiture to Prayon of a plant that manufactures phosphate salts but not PPA. And in the phosphorus pentasulfide

Analysis to Aid Public Comment

market, the Commission orders the divestiture to Peak of what is essentially a “plant within a plant.” Due to the novelty of the relief, the Commission will monitor closely the respondents’ compliance with their obligations under the order and will ascertain whether the relief ordered in this case effectively restores competition in each of the markets.

Analysis to Aid Public Comment

The Federal Trade Commission (“Commission”) has accepted, subject to final approval, an Agreement Containing Consent Orders (“Consent Agreement”) from FMC Corp. (“FMC”), Solutia Inc. (“Solutia”), and Astaris LLC (“Astaris”). The Consent Agreement is intended to resolve anticompetitive effects stemming from the proposed joint venture between FMC and Solutia to combine their respective phosphates and phosphorus derivatives businesses. The Consent Agreement includes a proposed Decision and Order (the “Order”), which would require FMC and Solutia to divest to Societe Chimique Prayon-Rupel (“Prayon”) the portion of Solutia’s phosphates business based in Augusta, Georgia, and to divest to Peak Investments, L.L.C. (“Peak”) FMC’s phosphorus pentasulfide business based in Lawrence, Kansas. The Consent Agreement also includes an Order to Maintain Assets which requires respondents to preserve the assets they are required to divest as viable, competitive, and ongoing operations until the divestitures are achieved.

The Order, if issued by the Commission, would settle charges that the proposed joint venture between FMC and Solutia may have substantially lessened competition in the United States markets for pure phosphoric acid and phosphorus pentasulfide. The Commission has reason to believe that the proposed joint venture would have violated Section 7 of the Clayton Act and Section 5 of the Federal Trade Commission Act. The

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Commission's complaint, described below, relates the basis for this belief.

The proposed Order has been placed on the public record for thirty (30) days for reception of comments by interested persons. Comments received during this period will become part of the public record. After thirty (30) days, the Commission will review the agreement and comments received and decide whether to withdraw its acceptance of the agreement or make the Order final.

According to the Commission's complaint, one relevant line of commerce in which to analyze the effects of the proposed joint venture between FMC and Solutia is pure phosphoric acid, and the relevant geographic market for this product is the United States. Pure phosphoric acid is used as an input into a wide variety of consumer and industrial products, ranging from cola beverages to cleaning compounds and metal treatments. The complaint describes FMC's and Solutia's production and sale of pure phosphoric acid, and further describes how each of the companies sells pure phosphoric acid directly to end-customers and uses it internally in the manufacture of different types of phosphate salts. According to the Commission's complaint, FMC and Solutia compete with each other in the manufacture and sale of pure phosphoric acid directly to end-customers, and in the manufacture and sale of phosphate salts.

The complaint alleges that the pure phosphoric acid market in the United States already is highly concentrated, and that the proposed joint venture would increase concentration in that market, as measured by the Herfindahl-Hirschman Index, by over 450 points, to a level over 2500. Furthermore, according to the complaint, new entry into this market is not likely.

Analysis to Aid Public Comment

The Commission's complaint further states that the market for pure phosphoric acid is conducive to coordination, that producers already price independently of industry operating rates, and that producers target competitors' customers in retaliation against aggressive bidding as a means of deterring future competition. Furthermore, according to the complaint, prices for pure phosphoric acid are already the highest in the world. The complaint also describes how Solutia's agreement to purchase pure phosphoric acid from Emaphos, S.A. ("Emaphos"), a new producer of pure phosphoric acid in Morocco, makes Solutia the exclusive distributor in North America for Emaphos' pure phosphoric acid and restricts Emaphos from selling pure phosphoric acid to end-customers. According to the complaint, this provision of Solutia's agreement with Emaphos reduced the impact of potential competition from Emaphos in the United States market.

According to the Commission's complaint, another line of commerce in which to analyze the effects of the proposed joint venture is phosphorus pentasulfide. Phosphorus pentasulfide, which is typically sold in a solid, flake form to customers, is used primarily in the manufacture of chemical additives for engine lubricating oils, and also is used to a smaller extent in the manufacture of different types of insecticides. The complaint alleges that the only three companies that manufacture and sell phosphorus pentasulfide in the United States are Solutia, FMC and Rhodia, and Rhodia has announced that it is exiting the market. Therefore, the proposed joint venture would create a monopoly in this line of commerce. The complaint also states that the entry of new producers into this market is not likely. The complaint therefore alleges that the proposed joint venture would likely be able to exercise market power on a unilateral basis.

The proposed Order is designed to remedy the alleged anticompetitive effects of the joint venture in the United States markets for pure phosphoric acid and phosphorus pentasulfide, by requiring the divestiture to Prayon of Solutia's phosphates plant in

Analysis to Aid Public Comment

Augusta, Georgia, and the divestiture to Peak of FMC's phosphorus pentasulfide plant in Lawrence, Kansas.

The Order would require respondents to divest the Augusta plant to Prayon within six months of the date that the Consent Agreement was accepted by the Commission. The Order would also require the respondents to provide Prayon with technology Solutia has used for manufacturing phosphates at the Augusta plant, and to divest other assets relating to the Augusta plant, including customer lists, contracts, and other intangible assets.

Prayon, based in Belgium, is one of the world's leading and lowest-cost producers of pure phosphoric acid. It operates two low-cost solvent-extraction plants to produce pure phosphoric acid in Belgium, and also is a partner in Emaphos, which operates a new low-cost solvent-extraction plant in Morocco. Prayon currently imports small volumes of pure phosphoric acid into the United States. With the acquisition of Solutia's Augusta plant, Prayon's presence in the United States would become much stronger, providing it with a base from which to expand its sales of pure phosphoric acid. Its competitive presence will also be enhanced by the Order's requirement that respondents revise the existing contract between Solutia and Emaphos so as to remove the restrictions that prevent Emaphos from selling pure phosphoric acid to end-customers. Emaphos' expansion in the United States through acquisition of the Augusta plant, and by virtue of the other provisions in the Order, will offset the loss of competition that would otherwise occur as a result of the joint venture.

The Order would also require respondents to divest FMC's phosphorus pentasulfide plant in Lawrence, Kansas to Peak within 30 days of the date that the joint venture is formed. The Order would require the respondents to provide Peak with technology FMC has used for manufacturing phosphorus pentasulfide at the

Analysis to Aid Public Comment

Lawrence plant, and to divest other assets relating to the Lawrence plant, including customer lists, contracts, and other intangible assets. Because Peak will operate the phosphorus pentasulfide plant in Lawrence as part of a larger site that the joint venture will continue to own, and because Peak will rely on the joint venture for certain facilities and services, the proposed Order also contains several provisions designed to safeguard Peak's competitive position, in part by providing Peak with the opportunity to provide for itself the services and facilities it needs to operate the phosphorus pentasulfide plant. The proposed Order also contains a provision requiring the appointment of an interim trustee who would, for a period of two years, monitor the relationship at Lawrence to ensure that Peak has fair and full access to the services and facilities needed to operate the phosphorus pentasulfide plant.

If the Commission, at the time that it issues the Order, notifies respondents that it does not approve of the manner of either divestiture, or of either Prayon or Peak as purchasers of the Assets To Be Divested, the proposed Order provides that respondents would have five months to divest either the Augusta plant or the phosphorus pentasulfide business to a different acquirer. If respondents do not complete such divestiture in that period, a trustee would be appointed.

The Order to Maintain Assets that is also included in the Consent Agreement requires that respondents preserve the Assets To Be Divested as viable and competitive operations until they are transferred to the Commission-approved acquirers. It requires the respondents to maintain the viability and competitiveness of the Assets To Be Divested, and to conduct the businesses to be divested in the ordinary course of business. Furthermore, it includes an obligation on respondents to build and maintain inventories of products at the Augusta and Lawrence plants consistent with regular business practice. The Order to Maintain Assets also requires respondents to provide certain support to Prayon in advance of the divestiture of the Augusta plant, including agreements to toll produce phosphates at Augusta, to

Analysis to Aid Public Comment

allow Prayon to maintain an engineer at the Augusta site, and to provide certain information to Prayon regarding the Augusta operations.

The Consent Agreement requires respondents to provide the Commission, within thirty (30) days of the date the Agreement is signed, with an initial report setting forth in detail the manner in which respondents will comply with the provisions relating to the divestiture of assets. The proposed Order requires respondents to provide the Commission with a report of compliance with the Order within thirty (30) days following the date the Order becomes final and every thirty (30) days thereafter until they have complied with the divestiture requirements of the Order, and also requires annual compliance reports for 10 years.

The purpose of this analysis is to facilitate public comment on the proposed Order. This analysis is not intended to constitute an official interpretation of the Consent Agreement or the proposed Order or in any way to modify the terms of the Consent Agreement or the proposed Order.

Complaint

IN THE MATTER OF**CMO DISTRIBUTION CENTERS OF AMERICA, INC.,
ET AL.****CONSENT ORDER, ETC., IN REGARD TO ALLEGED
VIOLATIONS OF SEC. 5 AND 12 OF THE FEDERAL TRADE
COMMISSION ACT**

*Docket C-3942; File No. 9823180
Complaint, May 16, 2000--Decision, May 16, 2000*

This consent order prohibits Respondents CMO Distribution Centers and Kalon Samluonis from making any representation that CMO or any similar product: (1) is effective in the mitigation, treatment, prevention, or cure of arthritis; (2) provides significant relief from symptoms of arthritis, including pain, swelling, impaired mobility, or deformity; (3) is as effective as, or superior to, prescription medications for the treatment of arthritis or the relief of arthritis symptoms; (4) is effective in the treatment of multiple sclerosis, leukemia, lupus, emphysema, cancer, benign prostate hyperplasia, silicone breast disease, asthma, fibromyalgia, or scleroderma; or (5) is safe or has no adverse side effects, unless, at the time the representation is made, respondents possess and rely upon competent and reliable scientific evidence that substantiates the representation. The order also prohibits proposed respondents from making any representations about the performance, safety, efficacy, or health benefits of CMO or any other food, dietary supplement, or drug, or using the name "cmocure," using the word "cure", unless the respondents possess and rely upon competent, reliable scientific evidence substantiating the representation unless the claims are substantiated by competent and reliable scientific evidence. In addition, the order prohibits the proposed respondents from misrepresenting that a product or program is endorsed or approved by any governmental, professional, or private organization or association, or complies with standards or guidelines established by such organization or association, or the existence, contents, validity, results, conclusions, or interpretations of any test, study, or research, or the experience represented by any user testimonial or endorsement of any product or program represents the typical or ordinary experience of members of the public who use the product or program.

Participants

For the Commission: *Judith A. Shepherd, John Hoagland,
Mike Eichorn, and BE.*

Complaint

For the Respondents: *Kirkpatrick Dilling, Dilling and Dilling,*
and *George W. Burditt.*

COMPLAINT

The Federal Trade Commission, having reason to believe that CMO Distribution Centers of America, Inc. and Kalon Samulonis, individually and as an officer of the corporation, have violated the provisions of the Federal Trade Commission Act, and it appearing to the Commission that this proceeding is in the public interest, alleges:

1. Respondent CMO Distribution Centers of America, Inc. is incorporated in the States of Florida and Michigan and maintains its principal place of business at 6479 Parkland Drive, Sarasota, FL 34243.
2. Respondent Kalon Samulonis is the President of the corporate respondent. He formulates, directs, and controls the acts and practices of the corporate respondent, including the acts and practices alleged in this complaint. His principal office or place of business is the same as that of the corporate respondent.
3. Respondents have promoted, offered for sale, sold, and distributed to the public products containing a substance described as cetylmyristoleate, cerasomal-cis-9-cetylmyristoleate, cetyl myristoleate, or CMO, including products identified with the name "CMO™" [hereinafter referred to collectively as "CMO"]. These products are "foods" and/or "drugs" within the meaning of Sections 12 and 15 of the Federal Trade Commission Act.
4. The acts and practices of respondents alleged in this complaint have been in or affecting commerce, as "commerce" is defined in Section 4 of the Federal Trade Commission Act.

Complaint

5. Respondents have disseminated or have caused to be disseminated advertisements or promotional materials for products containing CMO, including but not necessarily limited to the attached Exhibits A and B. Advertisements for respondents' CMO products have been disseminated through, among other media, a web site on the Internet. These advertisements and promotional materials contain the following statements:

* * *

**A. Arthritis Treatment
Breakthrough
[Depiction of
Product
Container]**

The purpose of this web site is to give you the opportunity to learn about the arthritis treatment breakthrough called CMO™. It is being hailed by doctors, the media and its users as the cure for arthritis. It has taken 26 years to develop CMO™ and make it available to the public. We urge you to explore this site and learn about this revolutionary new substance.

* * *

CMO. . . THE DISCOVERY

In 1971, the predecessor of CMO™ capsules, was first discovered by a researcher at the National Institutes of Health. . . Eventually he discovered that when this substance was injected near the joints of lab animals it protected them from arthritis. Many years later he contracted arthritis himself. After his doctor could provide no further relief through conventional medicine, he successfully injected himself to permanently reverse his arthritic condition.

* * *

Complaint

**[Depiction of
Scientist]**

The San Diego Clinic did the first clinical study on CMO™. That study proved CMO™ to be of great benefit to osteo, rheumatoid and reactive arthritis. Subsequent data proves its value for nearly all other forms of arthritis except gouty arthritis.

* * *

HOW IT WORKS

In their October 28, 1996 issue, Time magazine reported on the three most promising developments in arthritis research. The scientists participating in all three projects are intensely focused on intervening in the immune system's involvement in the arthritic process. According to doctors, that is exactly what CMO™ does. It corrects the disease at the source in the immune system. Dr. Len Sands the director of the San Diego Clinic says: "Unlike everything else made for arthritis, you don't have to take it over and over again. CMO™ is not a pain reliever, anti-inflammatory, cortisone or other steroid. CMO™ is an immunomodulator, it regulates your immune system. There's never been anything like it before for arthritis. Instead of treating the symptoms of pain and inflammation, CMO™ capsules act directly against the

Complaint

cause of arthritis, the memory T-cells in your immune system that create the attacks against your joints. Once the error in your immune system is corrected by CMO™, the attacks on your joints stop and the pain and inflammation should be relieved forever. Once the problems are corrected, they stay corrected and you no longer need CMO™ or other arthritis remedies.”

WHY IT IS DIFFERENT

CMO™ is not a conventional product. There’s never been anything like it before. It’s not a pain reliever, herb or anti-inflammatory. CMO™ is a natural immunomodulator. It has the unique ability to normalize the immune system. CMO™ acts directly to regulate and normalize the malfunctioning immune system and stop the arthritic process itself. Once that occurs, the destruction stops, and the pain and inflammation are automatically relieved. Your body then has a chance to heal itself and return to normal.

* * *

CMO is:

FAST

LASTING RELIEF IS JUST A FEW DAYS AWAY

Most users report significant relief in two weeks or less. Even in severe cases it rarely takes longer than 21 days.

EASY

ONLY ONE SET OF ORAL CAPSULES

Take three capsules in the morning and then again at night for 16 days, then say goodbye to the problems of arthritis. Only one bottle is all that is needed in most cases.

Complaint

SAFE

NO SIDE EFFECTS

CMO™ is not like the many medicines for arthritis that are toxic. CMO™ is not even like the several types of vitamins that are toxic at high levels. CMO™ has been tested and shown to have no ill effects whatsoever. To date thousands upon thousands of people have used CMO™ to relieve the symptoms of arthritis and there are no reported ill effects from anyone.

EFFECTIVE

IT WORKS FOR ALMOST EVERYONE

It works for both osteoarthritis and rheumatoid arthritis. It works for all other types of arthritis except gouty arthritis. CMO™ has been effective on nearly everyone that does not have severe liver damage. CMO™ almost always provides relief of pain, swelling and return of mobility. In the clinical studies they found a few cases that only received 70% to 100% relief. Relief provided by CMO™ was invaluable and the subjects were able to return to a normal life.

NATURAL

DRUG FREE PAIN RELIEF

CMO™ is the commercial name for cerasomal-cis-9-cetylmyristoleate. It is naturally derived from beef. Similar substances have long been used in common foods including cheese and chocolate. This treatment is accepted by the modern medical community. It is natural, drug free and non-toxic.

Complaint

PERMANENT**TAKE CMO™ ONLY ONCE**

One bottle of capsules is all you should ever need for relief from the symptoms of arthritis for the rest of your life. Most affected persons need to take CMO™ for only a couple of weeks. No further treatment or medicines are needed, not even CMO™. Once CMO™ has done its work stopping arthritis the benefits continue for long periods of time as your body repairs and reverses the damage done by arthritis.

* * *

What do doctors say about CMO?

Dr. Douglas wrote in his newsletter: “A New Miracle Cure for Arthritis ...now we have a new star on the horizon that promises as much (or more) than the old sure-cures.”

Dr. Muller of Ferndale, Mich. says there’s a cure. He knows, he’s taken it. Dr. Muller had osteoarthritis for 30 years. Bravely he forged ahead into the naturopathic remedy and tried CMO™. Dr. Muller is no longer troubled by arthritis.

Dr. Hunt was so impressed by CMO™ he wrote a book called “Boom, You’re Well”. In that book he says: “...rheumatoid arthritis damages tissues, causes extreme suffering, and premature death. ...If you have rheumatoid arthritis, or you know someone who has it, then you know I am reporting a miracle ... A MIRACLE.”

Dr. Sands the director of the San Diego Clinic knows there’s a cure. He’s taken it and now he says, “I was rescued from arthritis”. In fact that is the name of his forthcoming book about CMO™. In that book he says, “The arthritic process can be halted. Arthritis can be reversed. The pain and inflammation can be relieved. And it’s all been done without any harmful side effects.”

Complaint

What is the media saying about CMO?

Books, Television News, Radio Health Talk Shows, Medical Newsletters and Scientific Journals all report CMO™ to be a revolutionary breakthrough!

* * *

What are people saying about CMO?

“It’s a miracle! Ten years with arthritis ... three in a wheelchair ... and now I’ve got a completely normal life again. Just watch me make up for lost time.”

* * *

“Even as a doctor, I find CMO™ miraculous. It cured my knee problems, and it’s performing every bit as well for my patients, too. I’ve seen several ‘miracle cures’ already.”

“After nine years of crippling pain, I can’t believe I’m actually skiing again. CMO™ is truly incredible.”

* * *

“Imagine my agony. I was a professional athlete all my life. CMO™ gave me back my life. Even knee surgery didn’t do that for me. It’s amazing how CMO™ ended up fixing all my joints.”

FREQUENTLY ASKED QUESTIONS

The following questions were answered by the doctors, staff and research associates of the San Diego Clinic:

Complaint

* * *

Will it correct deformities?

Yes. Deformed fingers and toes are often caused by inflammation which swells joints and pushes the bones out of place. Reduction of the swelling alone improves appearance dramatically and often allows the dislocated bones to return to their normal positions. Extreme cases may require some physical therapy.

What about really severe cases?

Even most persons previously confined to bed or to wheelchairs have responded dramatically and are now no longer dependent on others for care. A number of these cases received additional benefit from repeating the treatment one more time...

* * *

Is it expensive?

The cost of the treatment is very modest. Most arthritis victims are already spending more on pain and anti-inflammation medications in just a few months. Since you usually need to take only one set of CMO capsules, it actually saves thousands of dollars in the long run.

* * *

Is CMO used for any other ailments?

Current studies include CMO as a part of therapeutic protocol for other disorders with autoimmune components including multiple sclerosis, leukemia, lupus, emphysema, certain cancers, benign prostrate hyperplasia, silicon breast disease, and especially asthma.

Complaint

* * *

ORDERING

* * *

Toll free in the US: 1-800-909-CURE

* * *

Manufacturers Statement

Modestly speaking, CMO™ is a revolutionary new product. CMO™ is naturally derived, it is sold only as a dietary supplement not intended to treat, cure, or diagnose any disease.

[Exhibit A, <http://home.earthlink.net/~cmocure /cmocure/>]

B. Letter of Introduction

* * *

This site contains exciting information about a naturally derived substance called CMO. It is being hailed by it's users, doctors and the media as the cure for arthritis...

[Depiction of Product Container]

CMO has been clinically tested and found to relieve the symptoms of virtually all forms of arthritis except gouty arthritis. CMO is a one time treatment consisting of 100 capsules taken orally over a period of 16 days. The benefits of CMO should last a lifetime. CMO is reported to be effective on 80% of the people who have used it as a dietary supplement. In clinical studies with a controlled diet, CMO has been reported to be effective on 96% of the people who have used it. CMO can benefit almost everyone who suffers from arthritis with just one treatment. The

Complaint

treatment program is fast, easy, safe and very effective. CMO can halt arthritis and prevent future pain, swelling and stiffness. CMO can rescue someone from the physical damage that a future with arthritis holds.

* * *

The History and Discovery of CMO

With the research concluded, effectiveness improved, medical community acceptance, imposters and counterfeiters in check, the television commercial finished, the books written, and the distribution arranged, CMO can finally finish it's 26 year long journey from the point of discovery to benefit the general public.

* * *

Who says there's a cure for arthritis?**Time Magazine**

As we mentioned earlier in the CMO Information section, in their October 28, 1996 issue, Time magazine reported on the three most promising developments in arthritis research. The scientists participating in all three projects are intensely focused on intervening in the immune system's involvement in the arthritic process.

According to doctors that is exactly what CMO does. It corrects the disease at the source in the immune system and doesn't require a lifetime maintenance program.

* * *

What will cure arthritis?

Dr. Jason Theodosakis' book The Arthritis Cure for gives the impression that glucosamine and chondroitin sulfate are the cure for arthritis. In fact neither of those substances have any effect on arthritis...Even the Arthritis Foundation says The Arthritis Cure is

Complaint

not recommended and they cannot recommend glucosamine and chondroitin sulfate as a treatment for osteoarthritis or any other form of arthritis.

* * *

Speaking of the Arthritis Foundation, they will neither confirm, nor deny that CMO is the cure for arthritis. We are aware of several cases where CMO was presented members of the AF. In turn, they were cured and presented CMO to AF staff. To this day, despite the fact that CMO has cured some of their members, the only official comment the AF has made, was to suggest that when taking CMO, you should consult your physician before reducing steroids or other medications.

According to doctors, clinical studies, users and the media, CMO would certainly seem like the most likely candidate to be given the true title being of a “cure” for arthritis. When asking Dr. Sands if CMO is the only cure for arthritis he replies:

“According to the Journal of Rheumatology (1993; 20:137-140) bone marrow transplants seem to have succeeded in curing two cases of arthritis.”

* * *

Research

CMO Distribution Centers of America in conjunction with the San Diego Clinic act as a clearing house for all the latest information on CMO. With this joint research effort, a network of communication is established between all medical professionals and distributors. This allows for up to the minute information sharing. This will facilitate the application of CMO to uses other than for arthritis. Currently, studies for the use of CMO on other auto-immune diseases are in progress. It is hoped that the Lupus

Complaint

Foundation will conduct one such study. We have offered to fund the protocol.

Current studies of CMO as a part of therapeutic protocol for other diseases include asthma, scleroderma, fibromyalgia, lupus, emphysema, certain cancers, and benign prostrate hyperplasia.

* * *

Case Histories**Condensed Highlights From Case Histories Recorded By The
San Diego Clinic**

* * *

From case history #33

Medical Doctor. Auto wreck ten years earlier damaged hip, caused limp and arthritis. CMO relieved pain permanently in one day for the first time after many years. The limp problem is irreparable. Ordered CMO for his patients.

* * *

From case history #24

Female. Age 50. Family history of arthritis. Pain in shoulders. Severe pain, limited mobility, and gross swelling in hands and fingers. By the third day of CMO, hands were free of pain, mobility had increased immensely, and finger swelling decreased so dramatically she had to have all her rings re-sized. Repeated treatment three weeks later. Totally free of pain and inflammation since. For the first time in many years, she was recently delighted to experience a pain-free skiing holiday.

* * *

From case history #11

Male. Age 58. Ex football player. Clinically obese. Had knee surgery three times about 15 years ago. Had extreme pain upon lying down. Often slept in a recliner chair instead. With his first evening dose of CMO capsules, he slept soundly and arose the

Complaint

next morning completely free of pain. He has enjoyed continuing pain-free remission ever since the first day.

* * *

From case history #32

Female. Age 66. Rheumatoid arthritis rendered hands useless, gnarled, inflexible, agonizingly painful six years ago. Pain relieved and full use of hands restored after five days of CMO.

* * *

Suggested Use

* * *

Methotrxate:

. . .Request that your doctor allow you to discontinue these drugs for at least one week prior to starting CMO. Consult with your physician before making any changes to your current medications.

Steroids:

. . .If you are taking cortisone or other steroids, advise your doctor that it would be better to avoid them or reduce their dosage levels. If not ask him about taking half doses. Then as your pain disappears you may request that he discontinue them completely. Consult with your physician before making any changes in your current medications.

* * *

**Marketing & Sales
Market Information**

* * *

Current studies of CMO as a part of therapeutic protocol for other diseases include asthma, scleroderma, fibromyalgia, lupus,

Complaint

emphysema, certain cancers, and benign prostrate hyperplasia. The CMO Distribution Centers and San Diego Clinic team have dedicated themselves to that research and the results will expand the market potential of CMO to other diseases.

[Exhibit B, <http://home.earthlink.net/~cmocure/cmo/>]

6. Through the use of the web site address “cmocure,” the use of the telephone number “1-800-909-CURE,” and the means described in Paragraph 5, respondents have represented, expressly or by implication, that:

- A. CMO is effective in the mitigation, treatment, prevention, and cure of all forms of arthritis, except gouty arthritis.
- B. CMO relieves all symptoms of arthritis, including pain, impaired mobility, swelling, and deformity.
- C. CMO is as effective as, or superior to, prescription medications for the treatment of arthritis and the relief of arthritis symptoms.
- D. CMO is effective in the treatment of multiple sclerosis, leukemia, lupus, emphysema, cancer, benign prostate hyperplasia, silicone breast disease, asthma, fibromyalgia, and scleroderma.
- E. CMO is completely safe and without harmful side effects, even at extremely high doses.

7. Through the means described in Paragraph 5, respondents have represented, expressly or by implication, that “case histories” and testimonials from consumers appearing in the advertisements or promotional materials for respondents’ CMO products reflect the typical or ordinary experience of members of the public who use the products.

Complaint

8. Through the use of the web site address “cmocure,” the use of the telephone number “1-800-909-CURE,” and the means described in Paragraph 5, respondents have represented, expressly or by implication, that they possessed and relied upon a reasonable basis that substantiated the representations set forth in Paragraphs 6 and 7, at the time the representations were made.

9. In truth and in fact, respondents did not possess and rely upon a reasonable basis that substantiated the representations set forth in Paragraphs 6 and 7, at the time the representations were made. For example, studies have not examined the efficacy of the ingredients in respondents’ CMO products in the prevention or cure of arthritis; or in comparison to prescription medications for the treatment of arthritis or the relief of arthritis symptoms; or in the treatment of multiple sclerosis, leukemia, lupus, emphysema, cancer, benign prostate hyperplasia, silicone breast disease, asthma, fibromyalgia, or scleroderma. In addition, there is insufficient information available to determine the reliability of other purported studies or the applicability of such studies to the respondents’ products. Therefore, the representation set forth in Paragraph 8 was, and is, false or misleading.

10. Through the means described in Paragraph 5, respondents have represented, expressly or by implication, that:

- A. Clinical studies prove that CMO is a safe and effective treatment for virtually all forms of arthritis except gouty arthritis.
- B. CMO is accepted by the medical community.
- C. *Time* magazine reported in its October 28, 1996 issue that CMO™ is one of the most promising developments in arthritis research.

Complaint

- D. The Arthritis Foundation has not commented on CMO, except to suggest that when taking CMO, patients should consult their physicians before reducing steroids or other medications.

11. In truth and in fact,

- A. CMO has not been proved in clinical studies to be a safe and effective treatment for virtually all forms of arthritis except gouty arthritis.
- B. CMO is not accepted by the medical community.
- C. *Time* magazine did not report in its October 28, 1996 issue that CMO™ is one of the most promising developments in arthritis research.
- D. The Arthritis Foundation has not refrained from comment on CMO. In its Public Information Memo, P.I. Memo 97-07 (Oct. 31, 1997), the Arthritis Foundation stated:

The Arthritis Foundation cannot recommend cerasomal-cis-9-cetylmyristoleate and related products as a treatment for any form of arthritis. . . Cerasomal-cis-9-cetylmyristoleate and related products are an unproven remedy. . . People with arthritis should seek proper medical care from their family physician or a rheumatologist. They should check with their doctor before self-treating with unproven remedies claimed to help arthritis. . . People on medications such as corticosteroids or methotrexate should be especially cautious about using cerasomal-cis-9-cetylmyristoleate and related products and consult their physician.

Therefore, the representations set forth in paragraph 10 were, and are, false or misleading.

Complaint

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

THEREFORE, the Federal Trade Commission this sixteenth day of May, 2000, has issued this complaint against respondents.

By the Commission.

Complaint Exhibits

Complaint Exhibits**TRANSCRIPT OF QVC****SEPTEMBER 11, 1997****ON SCREEN:****A-36293****60 Original or Cherry Flavor Cold-Eezers****Lozenges****QVC Price \$18.25****S&H \$3.97****QVC 1-800-345-1515****The Health Connection**

Show Host: See you later, Jill. It's good to see you, honey.

Jill Bauer is coming up following Health Connections. She's got the today's special value at noon. And then all of the jewelry that I have on, if you're interested, coming up at 1:00. All right. Here you go, 1-800-345-1515. We want to talk to you. We want to hear how you're doing with Cold-Eezers. How did it save you last year. How did it save your kids? How do you feel when you take them?

I'd like you to meet someone who's pretty new to QVC, Chuck Phillips, one of the founders of the Cold-Eezers company.

C. Phillips: Good morning, Patricia.

Show Host: So nice to have you here, sir.

C. Phillips: Thank you. Good to be here.

Show Host: Good to see you. Now, we are ready to put Chuck through the paces this morning on the morning show. So, thank you for sticking around, I appreciate it.

C. Phillips: My pleasure, my pleasure.

Show Host: Chuck is back to tell us why Cold-Eezers are so fabulous. Perfect time of year to bring them back because we've got hay fever and allergies combined with an upcoming cold season. Already I'm starting to see lots of sniffles around QVC.

C. Phillips: Yes.

Show Host: And, you know, we're so glad that you came back because I tell you what, whenever the Cold-Eezers come to town, they're gone instantly backstage. People just kind of grab little handfuls --

C. Phillips: They disappear.

Show Host: -- and then sort of scurry off with them. You're going to get lots of them, though. You get 60 for \$18.25. A-36293 is the item number in either the cherry, which you see there in the red wrapper, or the natural flavor, which you

Complaint Exhibits

see in the clear wrapper. So, if you're new to QVC, if you're new to Cold-Eezers, here's why they're so great. Take it away, Chuck.

C. Phillips: Well, it's -- first of all, it's an all-natural, homeopathic product.

Show Host: Right.

C. Phillips: It's a unique product here on QVC. It has been clinically proven to reduce the duration and severity of the common cold. And what we're asking people to do is to take a little more aggressive role in caring for their family.

Show Host: Right.

C. Phillips: To have a strategy to help fight the common cold. The kids are in school. They are there right now.

Show Host: Um-hum.

C. Phillips: And school is one of the most famous places to have --

Show Host: It's a breeding ground for germs.

C. Phillips: It's a breeding ground. Everything they touch -- if the child before had a cold and they touch that spot and they touch their nose, it's off to the races.

Show Host: Sure. That's it.

C. Phillips: So, there's a couple of strategies. One is we can take one a day and try to see if you can beat the cold to what they call prophylactic or a preventive medicine.

Show Host: Excellent.

C. Phillips: Try taking one a day. Or if the child comes home and you see that it's here --

Show Host: Um-hum.

C. Phillips: -- that they have symptoms, start treating the child. Take one every three hours. But everyone in the family should take a couple to prevent picking up that cold.

Show Host: This is safe for kids to take.

C. Phillips: Absolutely.

Show Host: It's certainly safe for adults. It's safe for senior citizens to take. In fact, we got a call the last time I was on the air with Cold-Eezers of a woman whose mom was in a nursing home.

C. Phillips: Yes.

Show Host: And she was taking them one a day as a preventative measure because she was surrounded by lots of other people and lots of other germs. So, it's a great step to take in maintaining your health, and it's also really helpful when you get a cold. In fact, we have someone on the phone who's used Cold-Eezers in the

Complaint Exhibits

past. So, let's say good morning to Renee. Hi, Renee. I'd like you to meet Chuck Phillips.

Caller: Hi. Hi, Chuck.

C. Phillips: Hi, Renee.

Caller: I just wanted you to know I have a granddaughter that's 12 years old, and ever since birth when she gets a cold, it turns into bronchitis.

Show Host: Oh, that's tough.

C. Phillips: Uh-huh.

Caller: And so, I tried these because she was out here visiting from Illinois with me for three months, and it eliminated the cold almost immediately.

C. Phillips: Well, that's really important because we have several customers we know through QVC and other places where they really can't afford to have their children even get a cold because what happens is this exacerbated condition appears.

Show Host: Sure.

C. Phillips: You get bronchitis, pneumonias. And here's an opportunity right in front of us to stop it right now.

Show Host: Right. Exactly.

C. Phillips: Just nail it.

Caller: It -- it worked fantastic.

C. Phillips: Well, I'm glad that you had that.

Show Host: And you saw it work. Hands on experience, right, Renee?

Caller: Yes, I have. Because she was born with a weak lung and weak bronchial tubes.

Show Host: Uh-huh.

Caller: And ever since then, like I say, it goes into bronchitis or pneumonia.

Show Host: She's a little susceptible. Sure.

Caller: And I tried these and the cold just went away.

Show Host: Oh, that is excellent. Good.

C. Phillips: Well, just get a little more aggressive now. Just have her take one during cold season, one a day --

Show Host: Um-hum.

Complaint Exhibits

C. Phillips: -- and that will help to prevent this from even beginning. There's reports out that tell us that over 55 percent of people who get colds end up at the doctors.

Show Host: Ugh.

C. Phillips: So, now you have the doctor's bill --

Show Host: Right.

C. Phillips: -- you have the prescription and you still have the cold and the bronchitis.

Show Host: You have time off from work and you have miserable kids if they're sick, too.

C. Phillips: Absolutely.

Show Host: Well, Renee, I'm so glad it worked for you and for your granddaughter. Thanks for being a part of our show.

Caller: Thank you.

Show Host: You take care.

Caller: And have a great day, both of you.

Show Host: Bye-bye now.

C. Phillips: All right. Thank you, Renee.

Caller: Bye-bye.

C. Phillips: Bye-bye. The other thing is allergies.

Show Host: Yes.

C. Phillips: We have many, many people who have reported to us that their usual choice is to have antihistamines, which make them dopey --

Show Host: Sure.

C. Phillips: -- which make them incapable of functioning, some of them.

Show Host: Right.

C. Phillips: And we suggested they try it. So, we -- they tried it and they take one and they see how long it lasts. It does diminish the symptoms of allergies and --

Show Host: Lots of people have asked exactly how does it work, and we actually have some animation to show you. I'm just showing you, this is what one of the Cold-Eezers looks like up close and personal. Take a look at this. Now --

C. Phillips: Those -- those are purple rhinoviruses.

ON SCREEN: Animation

Complaint Exhibits

- Show Host: Okay.
- C. Phillips: And what they do is in your mouth, they lodge on the cells inside your mouth by, let's say, magnetism, electricity.
- Show Host: Um-hum.
- C. Phillips: Positives and negatives attract.
- Show Host: Um-hum.
- C. Phillips: So, when they lodge, they intrude and replicate themselves, kill the cell, and then you have an irritation. But --
- Show Host: Now, the little blue balls there --
- C. Phillips: That's Cold-Eezer Plus double positive ions. They actually go and coat the areas on the rhinovirus --
- Show Host: Uh-huh.
- C. Phillips: -- that it would normally use to grab on to the cell. Now, they can't because it's an effective blockage to keep them from lodging. So --
- Show Host: So, now, that actual cold cell that -- what gives us a cold, the common cold virus cell, cannot attach itself to our cells.
- C. Phillips: That's right. That's right.
- Show Host: So, it can't dock in and we can't get sick.
- C. Phillips: And that allows the body's natural function, which is mucus --
- Show Host: Um-hum.
- C. Phillips: -- to wash them away. It can happen within eight or nine hours. If you have a rhinovirus enter within eight or nine hours, that process is begun.
- Show Host: How many of these do we have to take, Chuck?
- C. Phillips: You should take one every three to four hours.
- Show Host: Okay.
- C. Phillips: And remember, please, it's medicine. Some -- it tastes good.
- Show Host: It does.
- C. Phillips: It's wonderful. But take one every three hours.
- Show Host: I want to show you some of the people who are able to use this. Airline pilots are allowed to use this. Now, you know that they're not allowed to take decongestants or antihistamines or anything obviously.

Complaint Exhibits

C. Phillips: Exactly. Exactly.

Show Host: School bus drivers can take this. Teachers can take this. Children can absolutely take this. In fact, I've heard how more people will wrap one of these in cheesecloth and let their toddler suck on it so they can get the benefits from it without actually risking choking or anything.

C. Phillips: Um-hum. Yes.

Show Host: Senior citizens can take it. Pregnant ladies can take it. Nursing moms can take it. It's perfectly safe to take. We're going to take a phone call actually.

C. Phillips: Excellent.

Show Host: We're going to head right back to the phones and say good morning to Doris. Hi, Doris. Come on in and meet Chuck Phillips.

Caller: Good morning.

C. Phillips: Good morning, Doris.

Show Host: How are you?

Caller: Just fine. We used these last year. I have a son who goes to college up in Minneapolis.

Show Host: Ah-ha.

Caller: And so, we sent them up there because he has a lot of cold weather and he has allergies.

Show Host: Yeah.

C. Phillips: Uh-huh.

Show Host: Um-hum.

Caller: And I was glad to hear you say something about taking one a day as a preventive. We've never tried that before.

C. Phillips: Yes. Well, now's the time to try it.

Show Host: Yep.

C. Phillips: This is -- this is a strategy that may pay off big-time because it does help block as you saw in the animation. If we can stop the viruses we pick up over the day, they will not have a chance to even start.

Show Host: Perfect.

C. Phillips: Therefore, it will preclude you getting the cold.

Caller: Yes.

Complaint Exhibits

C. Phillips: And it's a good strategy. We highly recommend people try that.

Caller: Well, I'm going to recommend it to him when I send another package to him.

Show Host: Oh, good.

C. Phillips: Good.

Show Host: That's a wonderful care package to get.

Caller: Yeah. It helps us all of us. Since last year, we -- my husband and I have used them and really feel like it does help to keep from getting it any worse than what we do.

Show Host: Right.

C. Phillips: That's good. Well, make sure that you understand that it's got to have what we call ZIGG, zinc gluconate glycine. It is our patented process.

Show Host: Um-hum.

C. Phillips: You're going to see other zincs out in the world, but only Cold-Eezer Plus that has ZIGG in it, zinc gluconate glycine, is the one that's clinically proven, the one that does work.

Show Host: That's the only one.

Caller: Well --

C. Phillips: So, it's -- it's a caution, but you're in the right place and I know they'll get the product to you in a -- quick.

Show Host: Seven to ten days.

Caller: Yeah. Well, we have a few left, but -- and we really like the cherry-flavored ones.

Show Host: Yeah, that's my favorite, too.

Caller: Uh-huh.

Show Host: The other one is -- just for everybody who is watching and wondering, the other one is a little more like a citrus or an orange flavor.

C. Phillips: Um-hum.

Show Host: But I'm with you, I'm a cherry gal all the way.

Caller: Yeah. We are, too.

Show Host: Thanks for calling in and being part of our show.

Caller: Uh-huh. Thank you.

Complaint Exhibits

Show Host: Take care now. Bye-bye.

Caller: Thank you.

C. Phillips: So long.

Show Host: \$18.25. Now, you get 60 lozenges. If you want to do it as a preventative measure, that's going to be a two month supply for you. If you want to stash some in your desk at work, stash some in the glove compartment in your car. Give a couple to your kids at school, because halfway through the day if they start to get that tickle in their throat, by taking one of these, they're already taking steps ahead to prevent getting sicker and to prevent spreading it to the rest of the family. So, these do last you a good long time.

But this is the time of year to stock up. Even if you're not suffering from hay fever and allergies, you know that cold season has pretty much started --

C. Phillips: Oh, it's started.

Show Host: -- or else it's right around the corner.

C. Phillips: It's definitely started.

Show Host: Right back to the phones we go. Chuck --

C. Phillips: Okay.

Show Host: -- this time we're going to say good morning to Alice. Alice, hello. How are you doing?

Caller: Well, good morning to both of you.

Show Host: Good morning.

Caller: And I'm doing great, and, of course, ordering more Cold-Eezers.

C. Phillips: All right.

Show Host: So, you've tried them in the past, have you?

Caller: Oh, absolutely. I wouldn't be without them. I've bought some for my sons who are -- they live kind of close by but they're out of the home, and we all swear by them. And I definitely do. You know, I was kind of skeptical in the beginning about colds --

Show Host: Um-hum.

Caller: -- but they really do -- as soon as you feel you've got a cold, you know, you just put one in your mouth and, oh boy, they are just fantastic. They stop it right away. And like that other lady said, I was delighted to hear this morning that you could take one every day to prevent a cold.

Show Host: Sure.

Complaint Exhibits

Caller: And that's just terrific news. So, I'm going to start doing that right today.

Show Host: Oh, good. Good for you.

C. Phillips: Good. Well, not only that, but zinc is a critical, very important mineral that we all need. A lot of us are deficient in it.

Show Host: Um-hum.

C. Phillips: So, not only are you preventing a cold, but you're getting that zinc which has been proven many times to have a positive effect on many conditions of the body.

Show Host: So you're getting even healthier.

C. Phillips: Absolutely.

Caller: Oh, I think they're wonderful. As a matter of fact, I'm going to order more for my sons. Now that we can take one every day, I'm just going to go back and order some more.

Show Host: Oh, good. Good thinking.

C. Phillips: That's a good idea.

Show Host: Well, Alice, you sit tight on the lines. I'll send you back over to the operators and they can help you out, okay?

Caller: Okay.

Show Host: Take care.

Caller: Thank you very much.

Show Host: Thanks for your call, Alice.

Caller: Bye-bye.

Show Host: Bye-bye now.

Sixty of them, original flavor or cherry flavor for \$18.25. That's a great deal, and that's not a lot of money to spend preventing a cold. Because if you think of it, you go to the drugstore, you're going to spend a \$20 bill getting all the cold medicine and you're going to be out of work for a couple of days. If your kids are sick, you've got to take time off from work. It winds up costing a lot more than \$18.25.

Right back to the phones. Let's see if we can't get in one more quick call. This time we'll say good morning to Rachel. Rachel, how are you this morning?

Caller: Hi. How are you?

Show Host: Great. How are you doing?

Complaint Exhibits

C. Phillips: Hi, Rachel.

Caller: I have to tell you a story and this is honest truth. I have two kids in college.

Show Host: Ah-ha.

C. Phillips: Ahh.

Caller: I gave my son the other flavor, my daughter takes the cherry, and I ran out of it.

Show Host: Uh-oh.

Caller: And she already told me, ma, I think I'm catching a cold.

Show Host: Oh, no. Quick, you got to get her more Cold-Eezers.

Caller: Because -- yeah. Because in college, one person sneezes --

Show Host: Um-hum.

Caller: -- 400, 500 kids, they all catch a cold.

C. Phillips: Oh, yes.

Show Host: You're absolutely right.

C. Phillips: It goes through like lightning.

Show Host: It runs through those dorms.

C. Phillips: Absolutely.

Caller: I wish I had them today. I'm going to go visit her this weekend.

Show Host: Oh.

Caller: But I did two orders again.

Show Host: That is marvelous. And, you know, for you and for everybody else, you can always do our bill to-ship to option. QVC will --

Caller: Yes, that's how I sent it today.

Show Host: Yes. Good for you. We'll do it.

Caller: Yes. Yeah, because they have the cleansing for the face, whatever, when I order from you people.

Show Host: Oh.

Caller: Thank you so much. The most wonderful things with the -- you know, with the zinc and everything.

Show Host: Oh, good.

Complaint Exhibits

Caller: I take it myself.

Show Host: Good.

C. Phillips: Good.

Caller: Because last year I had the worst -- the worst bronchitis.

Show Host: Uh-oh.

Caller: And I didn't have them with me.

Show Host: Oh.

C. Phillips: Ahh.

Show Host: See that?

C. Phillips: Now you know.

Show Host: Well, now you've got them all stocked up for the season. I'm so glad.

Caller: Yes. Yeah, thank you --

Show Host: Good for you.

Caller: -- and have a good day.

Show Host: You, too.

C. Phillips: Thank you.

Show Host: Take care of yourself.

Caller: Thank you again.

Show Host: Bye-bye.

C. Phillips: Bye-bye.

Caller: Bye-bye.

Show Host: If you are sending them to someone you love, family on the other side of the country, kids away in college, use our bill to-ship to. We'll ship them to them, we'll send you the bill. You don't have to worry about it. But be sure to pick some up for yourself.

Sixty of them, two packages. 30 in each package, cherry flavor or original flavor, the Cold-Eezers lozenges, \$18.25.

Chuck Phillips, what a delight to see you. Thanks so much for being a part of our show today.

C. Phillips: Thank you, Patricia.

Complaint Exhibits

Show Host: Good to see you, sir.

C. Phillips: Good to see you.

Show Host: We'll see you back.

C. Phillips: Okay.

(The Cold-Eezers segment was concluded.)

Complaint Exhibits

TRANSCRIPT OF QVC**JANUARY 28, 1997**

Show Host: Please pick up the phone and call us at 1-800-345-1515, if you have used Cold-Eezers and you've knocked out that awful cold and you've taken care of it naturally and healthily because we have Dr. Robert Pollack joining us and we want to get going. We want to get going, we want to hear a story.

R. Pollack: Right, right.

Show Host: Hello, hello.

R. Pollack: Hello.

Show Host: Good morning.

R. Pollack: Nice seeing you again.

Show Host: It's nice to have you back.

R. Pollack: Thank you.

**ON SCREEN:
Dr. Robert Pollack**

Show Host: We're so happy every time you come to town. And I have to tell you every time Dr. Robert is with us, he comes on and he's kind enough to leave a bag or two of the Cold-Eezers up front by the producer's desk and we all kind of pick and choose. Well, the last time you were here, they were gone.

**ON SCREEN:
A-36293
60 Original or Cherry Flavor Cold-Eezers
Lozenges
QVC Price \$18.25
S&H \$3.97
QVC - 1-800-345-1515**

R. Pollack: They were gone.

Show Host: By 9:00 in the morning. Everyone came down and stole them and ran.

R. Pollack: Okay.

Show Host: And that's what happens on air as well. We tend to get these into stock, and the next thing you know, they fly out the door.

R. Pollack: Right, because of the fact that they work.

Complaint Exhibits

Show Host: They sure do.

R. Pollack: They work.

Show Host: We are talking about the Cold-Eezers lozenges, and we have two flavors to choose from, your original, which is sort of a citrusy, kind of an orangy --

R. Pollack: Um-hum.

Show Host: -- and the new cherry flavor. The item number is A-36293. \$18.25, you get two packages of them, so it's 60 lozenges in all.

R. Pollack: Right.

Show Host: And just like Dr. Pollack said, they work. And tell us why they work.

R. Pollack: Well, the fact -- very simply, we've treated the zinc in a certain way, which it is zinc, just normal, natural zinc.

Show Host: Um-hum.

R. Pollack: And it plugs up the viruses, the crevices that attach to the contact points on our cells. There they --

Show Host: Yeah.

ON SCREEN: Animation

R. Pollack: There you see the picture of how the viruses are attaching to the cell.

Show Host: Um-hum.

R. Pollack: You see those little crevices that are in each side.

Show Host: Um-hum.

R. Pollack: They attach onto the cell and that's what causes the cold. They start replicating. Here we have the zinc. Notice how they plug up the crevices and they just can't attach to the cell. It's as simple as that and as effective as that. It's the first treatment that actually treats -- or is effective against the virus that causes the cold --

Show Host: Yes.

R. Pollack: -- not the symptoms, the runny nose or the teary eyes.

Show Host: Right.

R. Pollack: Here, when we eliminate the virus, you eliminate the symptoms, all of them, not just one, the runny nose that you might buy something for, or the cough.

Show Host: Sure, sure.

Complaint Exhibits

R. Pollack: So, you see, that's the difference. And it happens very rapidly.

Show Host: It really does. This cuts down the actual time you spend suffering from a cold. And actually, if you take these on a preventative basis, you might not ever get a cold at all.

R. Pollack: Right. So, there we have the fact that you can see they were plugging them up.

Show Host: Sure. We're going to head off to the phones and take our first phone call of the QVC Morning Show.

Hello, you're live on the air with Dr. Pollack and Patricia. Who's this, please?

Caller: Hello, Pat. This is Alice from (inaudible).

Show Host: Hi. Hi, Alice. How are you doing?

Caller: We're doing fine. How are you?

Show Host: Say hi to Dr. Bob.

R. Pollack: Hi. Hello, Alice.

Caller: Hello.

Show Host: Alice, I --

Caller: We love your cold tablets.

Show Host: Um-hum.

Caller: This is our third order of them. They're very good.

R. Pollack: Well, good, I'm glad that you agree also.

Caller: Yes, we do. We've tried them, both kinds --

Show Host: Um-hum.

Caller: -- and this is the third time we ordered them.

R. Pollack: Um-hum.

Show Host: What kind of results have you seen, Alice?

Caller: Well, as soon as we start getting a runny nose or a sore throat, we take them.

R. Pollack: Um-hum.

Show Host: And does the --

Complaint Exhibits

Caller: They help right away.

Show Host: Yep, they sure do. So, you've made it through this winter season okay, huh?

Caller: Yes, we have.

R. Pollack: Good.

Caller: And I'm 83 years old and I'm doing fine.

R. Pollack: Bless you.

Show Host: Wonderful. That's so wonderful to hear. Alice, thank you very much for your phone call. Thanks for being a part of the morning show.

Caller: Thank you for talking to me.

Show Host: Our pleasure.

Caller: Okay. Bye-bye.

Show Host: Have a great day.

R. Pollack: Bye.

Show Host: Bye-bye.

You know, my own grandma just got over pneumonia.

R. Pollack: Hmm.

Show Host: And I'm sending her these so that she can continue to take them, and as some of the people do, take them on a preventative basis.

R. Pollack: Right. Yes.

Show Host: I know that you have women in nursing homes --

R. Pollack: Right.

Show Host: -- and gentlemen in retirement communities who are taking these.

R. Pollack: Yes. And they find them very effective.

Show Host: They sure do. And we've got --

R. Pollack: Because of all the people together and so on.

Show Host: Well, that's -- that's where you get germs from --

R. Pollack: Right, right.

Complaint Exhibits

Show Host: -- you know, and living in close quarters.

R. Pollack: Right, correct.

Show Host: Sure. We have someone else on the phone, so we'll go ahead right back to the phones and see who else is with us this morning.

Hello. You're on the QVC Morning Show with Patricia and Dr. Robert Pollack and Cold-Eezers. Who's this?

Caller: This is Sandra from Portland, Oregon.

Show Host: Hi.

R. Pollack: Hi, Sandra.

Caller: Good morning.

R. Pollack: Good morning to you.

Caller: I've been -- I've been looking for these for a long time.

Show Host: Um-hum.

Caller: And I just got over a bad cold and I wish I would have had them.

R. Pollack: Ahh.

Show Host: Um-hum.

R. Pollack: Right.

Caller: I recently was -- heard on a national television program that these --

Show Host: Um-hum.

Caller: -- are one of the most effective things in stopping a cold --

R. Pollack: Right.

Caller: -- in about three or four days.

Show Host: Correct.

R. Pollack: Correct. And if you get it right at the beginning --

Show Host: Um-hum.

R. Pollack: -- then it's possible that you would have even greater effect and it would be even less than the three days.

Show Host: Yes.

Complaint Exhibits

R. Pollack: When you get just the first sign and you say to yourself, uh-oh, I got that tickle or I have that --

Show Host: Right.

R. Pollack: -- you know, we know when we're going to get it.

Show Host: Yeah.

R. Pollack: That's the time to have them ready, pop one in your mouth, and it's going to start like that picture you saw, immediately beginning to get an effect.

Caller: Now, what is the action of the zinc? I understand the zinc coats itself to the lining of the nose?

R. Pollack: Well, not quite. We feel that -- have you seen the pictures just before that we had on the air? It appears that the zinc --

ON SCREEN: Animation

Show Host: There you go. There it is.

R. Pollack: There they go.

Show Host: Yeah, um-hum.

R. Pollack: See, here's a virus with the crevices that you see, and they attach onto positively charged projections that are in our -- that line our nose and mouth and throat. Now, here's the zinc. Notice how they plug up the crevices --

Caller: Oh.

R. Pollack: -- and they can't attach to the cell and there is no way then that they're going to replicate and give us the cold.

Caller: Oh.

R. Pollack: That's the whole key. Now, the point is that we were talking before we came on the program --

Show Host: Right.

R. Pollack: -- there are others that are out there that are trying to imitate this, and they say because Cold-Eezer Plus has zinc and ours has zinc, they must be alike.

Show Host: Uh-uh.

R. Pollack: They're not.

Caller: No.

R. Pollack: Because in attempting to flavor them, they tie up the zinc so tightly, they can't

Complaint Exhibits

get down into those crevices that you saw in the picture and they won't work. Only Cold-Eezer Plus will do what you see -- well, here, of course, is where they're attaching again.

ON SCREEN: Animation

Show Host: Um-hum.

R. Pollack: And that's where the cold starts.

Caller: Well, thank you very much for the product. I really appreciate it.

Show Host: You're welcome, Sandra. Thank you for your phone call.

Caller: Thank you very much.

Show Host: Sure. Bye-bye now.

Caller: Bye.

Show Host: Just like Dr. Robert says, these are effective and they work like no others out there, because these don't have other agents in them that prevent the zinc from doing the job they need to do.

Something else that's very important about these, they are non-medicating, they are not -- they will not make you drowsy, they are safe for pregnant ladies, they are safe for babies.

R. Pollack: Right.

Show Host: In fact, your grandson takes these, isn't that right?

R. Pollack: Yes, right. Just like that child there you see.

Show Host: Um-hum.

R. Pollack: It's safe for children, it's safe for adults.

Show Host: Yep.

R. Pollack: You are quite right, there is nothing in Cold-Eezer Plus that will stop any medication from working.

Show Host: Right.

R. Pollack: It doesn't really matter. It's all-natural.

Show Host: Um-hum.

R. Pollack: We need the items anyway, the nutrients that are there.

Show Host: Yes.

Complaint Exhibits

R. Pollack: It's just that we've treated them so that they're effective against the virus. Here you have a pilot -- or a child that is there.

Show Host: Um-hum.

R. Pollack: The mother is putting it in her backpack to take to school.

Show Host: Right, sure.

R. Pollack: And they're beginning to recognize when a child is sucking on something, and there are a lot of colds going around, chances are it's a Cold-Eezer and not just some candy.

Show Host: It's safe for your kids, it's safe for your grandkids, it's safe for --

R. Pollack: There's the pilot.

Show Host: -- pilots and school bus drivers --

R. Pollack: Right, right.

Show Host: -- and anyone who is going to be driving a vehicle at all.

R. Pollack: Oh, right. They are -- they're prevented by law from taking anything that's -- that will sedate them.

Show Host: Absolutely.

R. Pollack: Cold-Eezer Plus is the only thing that they're allowed to take.

Show Host: There you go. We're going to head right back to the phones and see who else is taking Cold-Eezers with us.

Hello. You're on the Morning Show. Who's this, please?

Caller: This is Margie from Philadelphia, Pennsylvania.

Show Host: Hi, Margie. How are you doing?

Caller: I'm fine. How are you both?

Show Host: Great.

R. Pollack: Okay.

Show Host: Are you taking Cold-Eezers, Margie?

Caller: Well, this is the first time we've ever been able to get it.

Show Host: Oh.

Caller: And I'm really excited, because as you just showed, I have a four-year old.

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Show Host: Hmm.

R. Pollack: Right.

Caller: And at school, they kept passing the colds around.

R. Pollack: Right.

Show Host: Yep.

Caller: So, I was really excited that I got through this morning.

R. Pollack: Good, good. Now you don't have to worry about that four-year old cold walking in through the door or the --

Caller: Exactly.

Show Host: Well, you know how it is, they bring you home gifts from school.

R. Pollack: Yeah, right.

Show Host: They bring home a picture they colored and they bring you home a cold all at the same time.

R. Pollack: Right.

Caller: Exactly. That's why I'm so excited. I was afraid to give her the zinc just by itself.

R. Pollack: Right.

Show Host: Right. Um-hum.

Caller: And with this being all-natural, then I'm really excited.

R. Pollack: Okay.

Show Host: Exactly. Well, you know, if Dr. Bob gives it to his grandson, it's got to work and it's definitely safe for kids.

R. Pollack: Right.

Show Host: So, that's super. Well, I'm glad you could get them.

Caller: Thank you.

Show Host: You were very smart to call in early.

Caller: I'm glad we got through. Thanks.

Show Host: They do tend to sell out every time we have them on air.

Complaint Exhibits

Caller: Yes, they do.

Show Host: It's a good thing you called in this morning.

Caller: Yes.

Show Host: Thanks, Margie.

Caller: Thank you.

Show Host: Bye-bye now.

Caller: Bye-bye.

R. Pollack: Bye.

Show Host: You know, this is just about the only place that you can get them.

R. Pollack: Yes. It seems that this is true. And it's so wonderful that we have this national ability to get in touch with people and that they can get this, because you alluded to it before, the amount of money spent on just someone getting a cold is really incredible.

Show Host: Oh, it sure is.

R. Pollack: The wages that are concerned, if you can't get into work.

Show Host: Sure.

R. Pollack: If a child gets a cold, who's going to stay home with that --

Show Host: Mom's got to stay home.

R. Pollack: Right. It's mom that generally is going to be doing that.

Show Host: Sure. And those cold medicines are \$6 and \$7 a bottle.

R. Pollack: Right.

Show Host: And they don't do anything for your cold. They treat your symptoms.

R. Pollack: Exactly.

Show Host: They knock you on your butt. You're sleeping.

R. Pollack: Right.

Show Host: Sure, you're sleeping 12 hours a day, that's great. But they're doing nothing for the actual cold. This is revolutionary because it's actually doing something to prevent the cold virus from locking on to the respiratory cells. That's how we get sick.

Complaint Exhibits

- R. Pollack: And clinically tested. They were actually clinically tested.
- Show Host: Yes.
- R. Pollack: And that's the marvelous part about it.
- Show Host: It sure is. Everyone at QVC has used these. All of the hosts have used them. The last time I had a cold, I used them. My cold was gone, I couldn't even believe it, in about a day and a half. I saw instant results and that was it. And I didn't take lots of them. I took one about, oh, gosh, every maybe four hours or so.
- R. Pollack: Every three -- right. But see, you started early. That was the key.
- Show Host: Yeah, um-hum.
- R. Pollack: Right.
- Show Host: I'm going to unwrap this just so you can see what it looks like. There are two flavors. There's cherry, which is the newer flavor, this is what the cherry one looks like. And then there's your original. And they don't look too different, but I'm just going to hold them up so you can see. It's just a little hard candy, a little lozenge.
- R. Pollack: Right.
- Show Host: And if you've seen Dr. Bob on before and you haven't given these a try, I really encourage you, please don't miss out on them because every time he's on air, we sell out. And we don't know when we can get him back in and get more Cold-Eezers back in.
- R. Pollack: Right, right.
- Show Host: You won't find these in the store probably.
- R. Pollack: Right.
- Show Host: Probably. They either sell out very quickly --
- R. Pollack: Right, correct.
- Show Host: -- if you can get a store that carries them at all.
- R. Pollack: Correct, yes.
- Show Host: What you will find are other zinc products that are not at all like this, that don't work, that actually have ingredients added to them to prevent them from working. I know that sounds crazy, but it's true. This is it, right?
- R. Pollack: Right.
- Show Host: This is what you need to knock out that cold. Thank you so much.

Complaint Exhibits

R. Pollack: Thank you. It's been a pleasure.
Show Host: It's nice to see you again, Dr. Pollack.
R. Pollack: All right.
Show Host: The item number is A-36293. You're going to receive 60 of them -- that's two separate bags -- for \$18.25.
R. Pollack: Right.
Show Host: What a deal.
(The Cold-Eezers segment was concluded.)

Complaint Exhibits

TRANSCRIPT OF QVC**MARCH 31, 1997**

ON SCREEN:
A-36293
60 Original or Cherry Flavor Cold-Eezers
Lozenges
QVC Price \$18.25
S&H \$3.97
QVC - 1-800-345-1515

Show Host: All right. We're going to continue on. This is the final product we'll have an opportunity to get to. I want to ask you, if you're already using the Cold-Eezers Plus, to give us a quick call. I'd love to talk with you, I'd love to hear your comments and what you think about these. The Cold-Eezers, you've probably read all the articles, you've been listening to television and radio news reports on the concept of zinc. The Cold-Eezer Plus is exclusive to QVC. Plus meaning more zinc in the mix. So, this configuration of the Cold-Eezer Plus you will only find here. There are other products out on the market. Those are available at retail. The Plus is only available at QVC.

We are offering you 60 lozenges. You choose the cherry flavor or the original flavor for \$18.25. If you're thinking, oh, well, cold season is over, we're already into April 1st, let me tell you, many, many, many of our viewers and studies will prove that the Cold-Eezers Plus are also effective on airborne allergies. If you are just about to get into ragweed season in your part of the country, if you are constantly dealing with allergic reactions to all of the pollen, if you have to deal with sinus infections because you're just breathing in the junk, this is the alternative.

ON SCREEN: Animation

Show Host: What does Cold-Eezers Plus do? Well, it's the zinc. The zinc that's included within this product literally prohibits the virus or the airborne allergies from adhering to the tissue inside your nose. What you're seeing right there is an animation that shows the virus, that big cube thing, but then you see the Cold-Eezer Plus zinc filling up the spaces where it would adhere, and it literally bounces off the surface of the skin much like a ball would bounce off a hard surface. It cannot adhere. If it can't adhere, it can't make you sick.

This is a perfect way also to take care of yourself in a preventive measure. Are you about to take a long airplane trip? And I want to say this off the top, I know that a lot of airlines are doing more and more to improve the quality of the air within the jets and whatnot, but as we all know, at this point, you still have recirculated air. And if you're going overseas, if you're going to Italy, if you're going to Germany, boy, you're going to be on that plane for six to eight hours. You better get ready. You're going to be breathing in everything that everyone has brought on on that plane, every cold, every allergy, every sinus infection. Everything is being recirculated.

Even if you don't have a tinge of a sore throat yet, even if you're not sneezing,

Complaint Exhibits

even if your nose is not itching, pop one of these in your mouth before you get on that airplane. These are preventive measures as well.

Let's say hello to Nadine. How are you?

Caller: Hi, Lisa.

Show Host: Hi. Nice to have you with us today.

Caller: My mother got me started on these --

Show Host: She did?

Caller: -- maybe last year.

Show Host: Okay.

Caller: And I was very skeptical about them.

Show Host: Right.

Caller: And they looked like candy to me. And -- but I figured, okay, mom uses them, so fine, I'll try it.

Show Host: Sure.

Caller: And then this year, I ordered some myself --

Show Host: Okay.

Caller: -- in the cherry. Very good.

Show Host: Yes, they are.

Caller: And I just -- I have not really had a cold this year.

Show Host: And what part of the country do you live in?

Caller: Iowa.

Show Host: Wow. So, you've had your share of tumultuous weather to say the least.

Caller: We have. Yes, I --

Show Host: You really have.

Caller: Yes, I'm really ready for spring, you know.

Show Host: Yes. Well, and this is also going to help -- from what the information has told us and what from viewers tell us, this is going to help during your allergy season, because you guys have a lot of beautiful flowering plants out that way. So, this is going to help if you are ever subject to allergy attacks.

Complaint Exhibits

Caller: Well, you know, I hadn't thought about that.

Show Host: But it will. This will work just as well in that allergy scenario for you as well as the cold.

Caller: Really?

Show Host: Yes. Isn't that great?

Caller: Now, I hadn't thought about that. My son has allergies.

Show Host: Absolutely.

Caller: I hadn't thought about that.

Show Host: Yes. It's the zinc, and if the zinc is in your system, it will not allow any of the -- the bad stuff to adhere to the nasal passages and to the skin. It just won't allow it to happen. So, the same way it helps prevent the cold, it will help with all the post-nasal drip, with the stuffy nose, with all of the junk that's associated with allergy attacks.

Caller: Well, I'll have to remember that.

Show Host: Please do. And it was nice to have spoken with you.

Caller: Well, very nice to have spoken to you.

Show Host: Thank you now.

Caller: Thanks for speaking to me, Lisa.

Show Host: My pleasure. Bye-bye.

Caller: Bye now.

Show Host: When you also think about the alternative, many of us when we have a cold or an allergy attack or a sinus infection, we medicate the whole body. It makes you drowsy. It's not always good for you. And if you can avoid that, especially if you're behind the wheel of a car all day or you're a school teacher or you just don't like that drugged out feeling, this is the alternative.

Hi, Lillian. What do you think?

Caller: I think it's great.

Show Host: You already use these?

Caller: Yes.

Show Host: Tell me your experiences with Cold-Eezers Plus.

Caller: Well, my husband and I both have been using it. We get the beginning of a cold, the burning watery eyes --

Complaint Exhibits

Show Host: Yeah.

Caller: -- and runny nose and all that --

Show Host: Uh-huh.

Caller: -- and start taking them, and by the next evening, we have no signs of it.

Show Host: It's amazing, isn't it?

Caller: Yes, it is.

Show Host: Well, you know, from what the information tells us, people have known for centuries that zinc was the way to go. The problem was it was so terrible to taste.

Caller: Yeah.

Show Host: So, now -- you know what I'm saying? It just -- it was unpalatable.

Caller: I know. We've tried the ones around here.

Show Host: Yeah, exactly.

Caller: They're powdery weird stuff.

Show Host: Exactly.

Caller: And taste terrible.

Show Host: They taste horrible.

Caller: Yes, they do. We still have them.

Show Host: So, what was -- yeah. What was great about this product is the zinc is in there, but it's just like a little very tasty lozenge.

Caller: Yeah.

Show Host: Absolutely. I'm glad it's worked so well for you. I really appreciate you taking a few minutes to call us.

Caller: That's good.

Show Host: And stay well.

Caller: We will. We've ordered more.

Show Host: Good. Thanks now. Take care.

Caller: Uh-huh. Bye-bye.

Show Host: Bye-bye.

Complaint Exhibits

I realize tomorrow is April the 1st and I know a lot of people think, ah, cold season is behind us. Actually, the spring cold can be the worst cold. When you think about the changing temperatures. Philadelphia is a perfect example. Yesterday, it was 70. Today, there's snow on the ground and blowing snow. It's freezing cold.

Where you may be living there may be a lot of change in the weather as well. There could be children that are home on spring break giving each other colds -- spring colds and taking them right back to the family. This is the kind of preventive measure you need to keep in your pocketbook, keep one at the office, keep one at Sunday school, keep one wherever, in the car as you're travelling, because you're going to save so much money, you know, by not missing work, by not having to go to the doctor all of the time, you just feel better.

Hi, there. Is it Vicky or Nicky?

Caller: Yeah, it's Vicky.

Show Host: Hi. How are you?

Caller: Hi. Good. How are you?

Show Host: I'm doing great. It's nice to talk with you today.

Caller: Nice to talk with you.

Show Host: Well, what are your thoughts on the Cold-Eezers Plus?

Caller: Well, my son's had a chronic sinus infection, so I'm hoping that these will help him a little bit.

Show Host: It should help a bit, and maybe more than a bit. The whole concept of the zinc, if it has anything to do with the nose and the nasal passages and all of that part of the head --

Caller: Um-hum.

Show Host: -- it's going to help.

Caller: Oh, great.

Show Host: Now, does he have severe problems?

Caller: Yes, he does. He's actually missed several days of school.

Show Host: Oh, my goodness.

Caller: Yeah.

Show Host: You know what I would suggest, and of course you're going to do the best for him as his mother, visit with his pediatrician or his physician.

Caller: Uh-huh.

Complaint Exhibits

Show Host: But I'll bet you a dollar they'll say it can't hurt and it may even really help.

Caller: I'll certainly do that.

Show Host: Please do. And let us know -- I'd love to know if it works out for his situation as well.

Caller: Okay.

Show Host: Thank you for calling.

Caller: Thank you.

Show Host: Take care.

Caller: Bye-bye.

Show Host: Bye-bye.

The cold season, the allergy season, for post-nasal drip, for sinusitis, it's zinc. The Cold-Eezers Plus, more zinc, you can only get here. You can't get it anywhere else. Only at QVC.

Hey, it's been fun this Problem Solvers. I'm glad you spent a little bit of time with us. Colors of Gold coming up next and then Collectible Dolls at 5:00. See you right around the corner.

Complaint Exhibits

TRANSCRIPT OF QVC (Q2)

FEBRUARY 5, 1997

ON SCREEN: 1-800-345-1331
Fast Fun QVC Shopping

Show Host: Yee-ha, yeah, \$18.25, A-36293. It can work for you as well. You've probably heard all about these on the news. Let's check them out with Rick Joe Meyer.

(Brief pause)

ON SCREEN:
A-36293
60 Original or Cherry Flavor Cold-Eezers
Lozenges
QVC Price \$18.25
S&H \$3.97
QVC - 1-800-345-1515

R. Pollack: Now's the season for office parties and the kids coming together and where the viruses just love, we're giving them a ball, you know, this opportunity.

Show Host: Yeah, I'm telling you, if you don't have them yet, you got to have them. But wait a minute, they're lozenges, what's the big deal? What is the big deal, my friend?

R. Pollack: The zinc. The ionic zinc that is going to react with the virus, inactivate it and then there's no cold. We'll see that later on in the show.

Show Host: What was the problem in the past with the zinc? Not a good flavor.

R. Pollack: Right.

Show Host: Well, not anymore. These are delicious. They are -- you have your choice of the original, which I'm going to have, or the cherry.

R. Pollack: Or the cherry.

Show Host: If you happen to be a construction worker, an airline pilot.

R. Pollack: Right, yeah.

Show Host: If you're a school bus driver or if you're working as a teacher, if you work at a keyboard in an office with a lot of other people saying hello to you and germs passing all day long.

R. Pollack: Right.

Show Host: What happens is you pop one of these, about how often?

R. Pollack: One every three hours.

Complaint Exhibits

Show Host: That's it?

R. Pollack: Yeah, that's it. That's it. Nothing else to do.

Show Host: What are we looking at here, Dr. Bob? We're going to take a look at a little animation.

ON SCREEN: Animation

R. Pollack: Oh. Those are the viruses that are attaching on to the human cell and that's when we get all of the symptoms of the common cold, the sneezing and the sniffing and the coughing and so on. And then, what we're going to see now, there are the zinc ions that are plugging up the virus. They're not able to attach on to the human cell, no cold, and that's what it is. When we get that first feeling, that tickle, that uh-oh, we're headed for it, that's what's going to happen by the next morning, no cold.

Show Host: Hi. You're live on the air. What's your name and where are you calling from?

Caller: Hi. My name is Judy and I'm calling from Niceville, Florida.

R. Pollack: Yes?

Show Host: Judy?

Caller: Yes.

Show Host: You got a cold or not?

Caller: Not yet.

R. Pollack: Right.

Show Host: Because of the Cold-Eezers?

Caller: Yes. I did call about the Cold-Eezers.

Show Host: Wow, that's great. You're getting these for yourself?

Caller: For me and my husband, I sure am.

Show Host: Oh, that's --

Caller: We read about them in the local newspaper.

R. Pollack: Um-hum.

Show Host: I'm telling you, you read about them in the newspaper, I've seen articles on ABC News, NBC News, CBS News, articles on, you know, do they really work.

R. Pollack: Yeah.

Show Host: Some of those consumer reporting kind of TV articles.

Complaint Exhibits

R. Pollack: Right.

Show Host: And you know what everybody says time and time and time again? You know what, we were skeptical --

R. Pollack: Right.

Show Host: -- but they work.

R. Pollack: This morning on This America -- what's that show?

Show Host: Good Morning America.

R. Pollack: Right. This morning.

Show Host: You're kidding?

R. Pollack: Right, right. I was just told while I was sitting in the green room.

Show Host: That's another one. Add it to the list.

R. Pollack: There you go, right.

Show Host: And add you to the list, too. Congratulations.

Caller: Thank you.

Show Host: Okay.

R. Pollack: Right.

Show Host: Bye-bye.

Caller: Bye-bye.

Show Host: It's becoming a national phenomenon. You're surprised -- I mean, amazed at just how big this has gotten.

R. Pollack: And it's --

Show Host: Because -- yeah, nobody realized.

R. Pollack: No.

Show Host: And guess what? They debuted right here on QVC.

R. Pollack: Right. Correct.

Show Host: Cold-Eezers. The Cold-Eezer Plus with just a little more zinc in them --

R. Pollack: Right.

Show Host: -- for even more powerful protection.

Complaint Exhibits

R. Pollack: For more powerful protection, correct.

(Brief pause)

Show Host: Now, I like the all-natural, Bonnie Johnson likes the cherry. But I'm telling you something, I'm always sick. November of every year, I get strep throat, tonsillitis, I always get some sort of horrible throat ailment. And, you know, this year, I didn't get it and I really am a firm believer in these. I think that they're preventing me from getting sick.

So, there you have it, folks. A-36293. And they must be working because they've sold out before and you can't get them in any stores anymore. So, get them with us. For \$18.25, you're getting two bags in your choice of the natural or the cherry. 1-800-345-1331.

(The Cold-Eezers segment was concluded.)

Complaint Exhibits

TRANSCRIPT OF QVC

OCTOBER 2, 1997

- Show Host: We're going to start off our Health Connection with something that, I guess, a lot of us -- a lot of us hopefully -- I'm actually fighting one right now.
- C. Phillips: Oh.
- Show Host: So, I'm going to start taking mine since you're here.
- C. Phillips: Excellent. Start right now at the first sign.
- Show Host: Chuck Phillips is joining us to talk about Cold-Eezers. Thanks so much for joining us.
- C. Phillips: Sure.
- Show Host: We're just kind of meeting right here. So, we're going to jump in. You are, in fact -- you are the founder of the Quigley Corporation who brings us Cold-Eezers.
- C. Phillips: One of the founders.
- Show Host: One of the founders.
- C. Phillips: Right.
- Show Host: And this is something -- and if you have it, please give us a call, because many of you have used Cold-Eezers in the past. Maybe if you had the summer cold, you used them this summer. But I know the moms out there really want to hear about this.
- ON SCREEN:**
A-36293
60 Original or Cherry Flavor Cold-Eezers
Lozenges
QVC Price \$18.25
S&H \$3.97
QVC - 1-800-345-1515
- C. Phillips: Absolutely.
- Show Host: It helps reduce the symptoms of the common cold.
- C. Phillips: Right.
- Show Host: This formula.
- C. Phillips: Moms are waking up right now.

Complaint Exhibits

- Show Host: Um-hum.
- C. Phillips: And they're hearing that little voice --
- Show Host: Um-hum.
- C. Phillips: -- mom, I don't feel so good. Well, what we're going to do this year is get more aggressive, we're going to attack the cold. We're suggesting to moms, get Cold-Eezer Plus in the house.
- Show Host: Um-hum.
- C. Phillips: Have it ready, and at the very first hint of a cold, start applying it. But even before then, try to use it as a preventative measure, so that if you know that the child has had an exposure, which is school, they can take one a day --
- Show Host: Um-hum.
- C. Phillips: -- to try to prevent getting a cold.
- Show Host: And you're talking about schools, I mean, everywhere you go, I mean, other children have it, other adults have it, you're just always exposed.
- C. Phillips: Always exposed, exactly. You touch things.
- Show Host: Um-hum.
- C. Phillips: You touch a doorknob and you go up and you touch your nose, you've got the chance to have it.
- Show Host: Right.
- C. Phillips: So, what we're saying is, point one, if you don't have it in the house, get some in the house so that you have it to use at the very first sign of a cold.
- Show Host: Um-hum.
- C. Phillips: That's the important thing. This year we're saying, have it around and take one a day. Give your child one before he goes to school, that way, it can possibly prevent that child from getting a cold.
- Show Host: Now, what do these contain? How do these work?
- C. Phillips: Well, it contains what we call ZIGG, zinc gluconate glycine.
- Show Host: Um-hum.
- C. Phillips: And it's a patented formula. It is homeopathic, it is all-natural. It's --
- Show Host: Right. That's important I know, especially when we're talking about little ones.
- C. Phillips: Little ones, right. It's non-sedating.
- Show Host: So, anybody -- you're not going to fall asleep on these.

Complaint Exhibits

- C. Phillips: No, you're not.
- Show Host: Which a lot of cold medicines make you fall asleep.
- C. Phillips: They tend to make you drowsy.
- Show Host: Um-hum.
- C. Phillips: And they sort of take the wind out of your sails --
- Show Host: Right.
- C. Phillips: -- and make you feel tired. Cold-Eezer Plus will not do that.
- Show Host: Um-hum.
- C. Phillips: You take one every three hours when you're treating a cold, but as I say, let's get aggressive, let's take one a day to see if we can stop the cold from even coming onto you. Another strategy is if a child comes home, they have a cold, it's very evident, they've started to sneeze --
- Show Host: Um-hum.
- C. Phillips: Everyone in the family should take one or two --
- Show Host: To prevent them --
- C. Phillips: -- to prevent them to be infected by this infection that's now come into the house.
- Show Host: Now, if -- like I said, last Saturday, I woke up with a sore throat.
- C. Phillips: Right.
- Show Host: So, I mean, I -- this, I should take -- you know, I didn't have them in the house, so --
- C. Phillips: Oh, boy.
- Show Host: Now, I have them. I'm going to take one now. But this will help reduce -- if it's too late, if somebody already has gotten the signs of a cold, how does it help to reduce -- what symptoms will it help reduce?
- C. Phillips: It's not too late.
- Show Host: Okay.
- C. Phillips: If you've had a cold for one or two days, it will basically reduce the duration of what's left of the cold nearly in half.
- Show Host: Okay. Oh, really?
- C. Phillips: Sure. So, it's not -- it's never too late.
- Show Host: Um-hum.

Complaint Exhibits

- C. Phillips: The thing is, we want to be quicker, we want to catch it before it starts, and we want to even come before that and become preventative --
- Show Host: Right.
- C. Phillips: -- and try to anticipate things. You know when you've been infected. You've been on an airplane flight. That's recycled air.
- Show Host: Um-hum.
- C. Phillips: And you're breathing it in. It just takes one person on that plane --
- Show Host: To be sick.
- C. Phillips: -- to fill the air.
- Show Host: Um-hum.
- C. Phillips: And you land, take your Cold-Eeze.
- Show Host: Right. Because you have many -- I do that all the time. In fact, when I came back from New York, I was on a train, and I think the trains are similar to the planes with that air.
- C. Phillips: Sure. It's a contained space.
- Show Host: And that's where I think I got my cold Saturday morning.
- C. Phillips: Sure. Cold-Eezer Plus should be taken, you know --
- Show Host: Right when I got off the train, I should have taken one.
- C. Phillips: -- as soon as you're off the train.
- Show Host: Right.
- C. Phillips: Or in the evening at your home and you've had most of the exposure or you've touched everything you're going to touch, you've washed your hands, take a Cold-Eezer Plus.
- Show Host: Now, with this, you're going to get two bags, each contain 30 lozenges and each have 135 grams of the zinc in it, which --
- C. Phillips: Well, each Cold-Eezer Plus lozenge has --
- Show Host: Right.
- C. Phillips: -- 14.2 milligrams of zinc gluconate glycine.
- Show Host: Um-hum.
- C. Phillips: And basically one every three hours to treat the cold.
- Show Host: Um-hum.

Complaint Exhibits

C. Phillips: Or take one a day to try to prevent it.

Show Host: Preventive.

C. Phillips: It's also excellent for allergies.

Show Host: Oh, really?

C. Phillips: Absolutely.

Show Host: We're going to go to the phones and see who's shopping with us this morning. Hi, Geraldine.

Caller: Hi. How are you this morning?

Show Host: I'm great. Now, do you have Cold-Eezers or are you picking them up?

Caller: I'm just buying them.

Show Host: Oh, good.

C. Phillips: Oh, good.

Show Host: Now, why did you decide to pick them up?

Caller: I have a grandson that lives with me that goes to preschool. He brings a cold home every season. My husband and I are sick all winter.

Show Host: Oh, no.

C. Phillips: Oh, boy.

Caller: So, we're hoping that this -- I'm going to try this and hope it will cut down the effects that we usually receive --

Show Host: Um-hum.

Caller: -- from the cold seasons. We haven't ever been this sick in years. But he brings all the fresh, nice, young germs into the house that we can't fight.

Show Host: The new germs.

Caller: Yes.

Show Host: Well, you know -- and as Chuck said, take this as a preventative, too. So, I mean, when he starts the preschool, you know, start taking maybe one a day.

C. Phillips: Right.

Show Host: And then if he brings it home, you're not going to get that.

Caller: Well, here's hoping because my husband moans.

Show Host: Oh.

Complaint Exhibits

Caller: He says, every time this kid goes to school, I'm sick.

Show Host: Um-hum.

C. Phillips: Well, have him take one a day and he will not catch it and have the child, perhaps, take one in the morning before they go to school and --

Caller: Oh, that's a good idea.

C. Phillips: -- to prevent them from even getting the cold. It's preventive medicine. It's an aggressive family strategy to stop this spreading of the cold --

Show Host: Um-hum.

C. Phillips: -- and to help the child out almost instantly.

Show Host: And it's nice, too, because it's all-natural. It's like a homeopathic way to prevent the cold and prevent the symptoms and it's also non-sedating. So, they're not going to go to preschool and be like, you know, snoozing on the side because there's no, you know, medicines in here to really bother you or the little ones.

C. Phillips: They won't become tired. And rest assured, it's a stocking item here at QVC. You can get Cold-Eezer Plus 24 hours a day. You can't run out.

Show Host: Right.

Caller: Well, if they work -- if they work, I guarantee you, you'll have a lifetime member.

C. Phillips: Oh, good.

Show Host: Well, and let us know, Geraldine. Call us back after you try them and let us know how they do work for you. Okay?

Caller: I certainly will.

Show Host: Thank you so much.

Caller: And thank you for talking to me, and you have a real nice day.

Show Host: You, too.

C. Phillips: You, too. Bye-bye.

Caller: Bye-bye.

Show Host: I want to let everyone know, too, because a lot of people think zinc, they think bad taste. You've really helped that out a lot. You have two flavors to choose from, original or cherry. I love the cherry.

C. Phillips: Yes. Well, zinc -- you can take zinc --

Show Host: Um-hum.

Complaint Exhibits

- C. Phillips: -- gluconate lozenges, just tablets and let them dissolve, but they actually can make you nauseous.
- Show Host: Um-hum.
- C. Phillips: So, Dr. John Godfrey, the inventor of our formula, found a way to sweeten zinc gluconate -
- Show Host: Um-hum.
- C. Phillips: -- yet release the zinc ions to the mucosal surfaces which does the job.
- Show Host: Um-hum.
- C. Phillips: That's what is stopping the rhinovirus from reproducing, but it's also what we think is perhaps clamping on the nerve endings in here and telling your system that you don't need to have mucus being produced.
- Show Host: Right. I think we have some tape that will show that.
- C. Phillips: Yes, good.
- Show Host: And maybe you can explain it again as we see it.
- ON SCREEN: Animation**
- C. Phillips: Absolutely. It's -- you see that the purple items are your rhinovirus in and around your mouth, and as they come in and touch the walls of the inside of your mouth and nose, they attach themselves.
- Show Host: Um-hum.
- C. Phillips: Boom, you have an infection going. They intrude, they replicate, and they kill the cell and send billions more out there.
- Show Host: Hmm.
- C. Phillips: Now what you see is the blue double positive zinc ions of Cold-Eezer Plus in and around the rhinovirus and they actually plug up the areas that the rhinovirus normally would use to, let's say, magnetically, by forces, positive and negative like a magnet, lodge onto your cells. So, the zinc gluconate glycine is stopping that. The zinc double positive ions are preventing the rhinovirus from even having a chance to get a foothold, and it just gets washed away by the body's normal system of cleaning this area, which is mucus.
- Show Host: Um-hum.
- C. Phillips: So, it works rather well.
- Show Host: And it will help reduce the symptoms and the duration. Not only the symptoms like the coughing --
- C. Phillips: Exactly.

Complaint Exhibits

- Show Host: -- the cough and the stuffy nose and the sore throat and the nasal drip and the sneezing, but also the duration.
- C. Phillips: The duration, which is the most important thing anyway.
- Show Host: Because if you're out of work for three or four days, I mean, that's a long time --
- C. Phillips: Yes.
- Show Host: -- to not get that paycheck or to just be out of work on your back and miserable. I'd be miserable.
- C. Phillips: Well, miserable, the agony, the misery is what you want to get rid of.
- Show Host: I know.
- C. Phillips: Absolutely.
- Show Host: And as Geraldine said, you know, her husband is moaning. I mean, then the agony for everybody in the family.
- C. Phillips: Oh, really, everybody is awake.
- Show Host: And the little ones who wake up and, you know, mom, I don't feel good, you know. This is going to --
- C. Phillips: And then you're into the whole thing. Mom's got to deal with this.
- Show Host: Um-hum.
- C. Phillips: But we can stop that.
- Show Host: And then she gets the cold.
- C. Phillips: We can stop it --
- Show Host: Preventative.
- C. Phillips: -- (inaudible).
- Show Host: Right.
- C. Phillips: Now, there's a word about business in general, if you own a business, whether it's a single proprietor or AT&T.
- Show Host: Um-hum.
- C. Phillips: We suggest they take a good hard look at having Cold-Eezer Plus around for their employees.
- Show Host: Mmm.
- C. Phillips: Now, the United States last year lost \$21 billion from the common cold. We have them here at QVC.

Complaint Exhibits

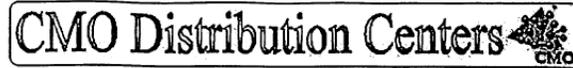
- Show Host: Um-hum.
- C. Phillips: And they're available to most everyone here and we've heard that it works rather well.
- Show Host: My mother picked them up last year for her work.
- C. Phillips: Okay.
- Show Host: And she works -- she has a store, and so, you have, you know, all sorts of people coming in --
- C. Phillips: Sure.
- Show Host: -- and employees as well that you're going to get the cold.
- C. Phillips: Well, of all the people to protect, your employees are very important.
- Show Host: Right.
- C. Phillips: It costs a business approximately \$125 a day for that person to be absent.
- Show Host: Um-hum.
- C. Phillips: Now, if they're there, they're also spreading the cold, right? And so, I mean, it doubles the problem. Why not stop it immediately?
- Show Host: Right.
- C. Phillips: Have it available to the people that work for you. It's -- 55 percent of all colds end up at the doctor. It's amazing. Fifty five percent of everyone who gets a cold gets a condition that the cold began and --
- Show Host: Um-hum.
- C. Phillips: -- now it's gotten worse.
- Show Host: So, take this as a preventative, like once a day, but also, you know, take it -- if you were not able to do the preventative, make sure you take it once it starts and reduce the symptoms and reduce the duration.
- C. Phillips: Right. Real important, too, is the value of zinc. Nearly everyone in the United States is zinc deficient. There's very few places to get natural zinc.
- Show Host: Um-hum.
- C. Phillips: Oysters, things like this, which aren't readily available every day.
- Show Host: No. And some people don't like oysters.
- C. Phillips: Right. And being zinc deficient puts you into various categories that are not good, let's say.
- Show Host: Um-hum.

Complaint Exhibits

- C. Phillips: If you're taking the zinc, it will help aging, it will help immunity, it will help vision. It's good for 26 or 27 conditions of the human body. So, taking one a day, you're getting nearly the daily requirement --
- Show Host: Um-hum.
- C. Phillips: -- but you're also preventing that cold from getting a foothold on you.
- Show Host: Right.
- C. Phillips: And it stops the whole process --
- Show Host: Reducing --
- C. Phillips: -- right in its tracks.
- Show Host: -- the symptoms and the duration of the common cold. We do have cherry flavor or original. You're going to have two bags of 30 lozenges in each one. They're \$18.25. Try them out. They really, really do work. I've used them. My mom has used them. Actually, I have one right now.
- C. Phillips: You have one right now. There's one working right now.
- Show Host: I know. There's one working right now. A-36293, and they do taste great. I like the cherry personally, but there are -- you know, the other flavor is just as good. Both of those, \$18.25.
- Thank you so much, Chuck.
- C. Phillips: Thank you, Bonnie.
- Show Host: Thanks for keeping us healthy.
- C. Phillips: Oh, I'll be glad to.
- Show Host: I'm sorry that you weren't here Saturday morning. But now my cold will go --
- C. Phillips: One a day and you won't have this problem.
- Show Host: That's right. Thanks so much. A-36293.
- (The Cold-Eezers segment was concluded.)**

Complaint Exhibits

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<http://home.earthlink.net/~cmocure/cmo/index.htm>**Home Page**

Welcome to the home page of our Web Site. This site contains information about arthritis, CMO and our company policies. If you would just like an overview of CMO and its effects on arthritis, please go to our other site by clicking [here](#). You will find it only takes a few minutes to view the other site.

CMO is the leader in a new category of nutraceuticals that doctors claim is the cure for arthritis. Being the largest distributor of CMO in the world, we have been privy to almost all of the information available about it. Browse to your heart's content, you will find a wealth of information. Thank you for dropping by!

- [Letter of Introduction](#)
- [CMO Information](#)
- [Arthritis Information](#)
- [Clinical Information](#)
- [Manufacturing & Specifications](#)
- [Marketing & Sales](#)
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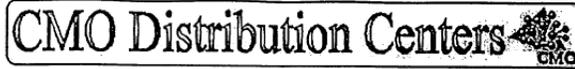
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Exhibit B
CMO Distribution Center

Complaint Exhibits

Letter of Introduction

http://home.earthlink.net/~cmocure/cmo/cm0001.html



Letter of Introduction

Dear Visitor,

This site contains exciting information about a naturally derived substance called CMO. It is being hailed by it's users, doctors and the media as the cure for arthritis. The discovery that lead to the development of CMO was made by a researcher at the US National Institutes of Health. It was introduced to the medical community in December 1995, at the National Medical Conference on Aging. Now it is available to arthritis sufferers.



CMO has been clinically tested and found to relieve the symptoms of virtually all forms of arthritis except gouty arthritis. CMO is a one time treatment consisting of 100 capsules taken orally over a period of 16 days. The benefits of CMO should last a lifetime. CMO is reported to be effective on 80% of the people who have used it as a dietary supplement. In clinical studies with a controlled diet, CMO has been reported to be effective on 96% of the people who have used it. CMO can benefit almost everyone who suffers from arthritis with just one treatment. The treatment program is fast, easy, safe and very effective. CMO can halt arthritis and prevent future pain, swelling and stiffness. CMO can rescue someone from the physical damage that a future with arthritis holds.

If you are interested in even more information about CMO and it's effects on arthritis, there are information pamphlets and an information tape. The cassette tape is an interview with the director of the clinic that conducted the clinical study on CMO. We provide this information at no charge, so feel free to call or email us with your request. You can do this by clicking on the email button at the bottom of this page or by filling out the form in our guestbook. See [Contact Us](#) for more details.

We are always interested in opening new avenues of distribution. If this is an area of interest to you, please drop us a line before you leave the site.

I hope we can be of service to you.

Sincerely,

Kal Samulonis
President
CMO Distribution Centers of America



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Complaint Exhibits

CNO information

<http://home.earthlink.net/~cmocure/cmo/cm00002.html>

CMO Distribution Centers

CMO Information

Welcome to our CMO Information page. Due to the volume of information on this page, we have installed this menu and "Back to Top" buttons to help you navigate this page more effectively.

- [The History and Discovery of CMO](#)
- [How it Works](#)
- [Frequently Asked Questions](#)
- [What do doctors say about CMO?](#)
- [What is the media saying about CMO?](#)
- [What are people saying about CMO?](#)

The History and Discovery of CMO

In 1971, Cetyl myristoleate, which eventually evolved into CMO, was first discovered by a researcher at the National Institutes of Health. He was responsible for testing anti-inflammatory drugs on lab animals. In order for him to achieve this, he first had to artificially induce arthritis in the animals. This was achieved by injecting a heat killed bacterium called Freund's adjuvant. A strange thing happened one day. A particular group of animals called Swiss albino mice, did not get arthritis. After testing the batch of Freund's adjuvant and finding that it was not defective, the researcher then set out to discover exactly what was in Swiss albino mice that protected them from arthritis.



Unable to get his research funded by the National Institutes of Health, he slowly carried on at his own expense. Eventually he discovered four substances that were unique to the Swiss albino mice, one of which was cetyl myristoleate. Testing showed that substance to have protective properties against artificially induced arthritis when injected into lab animals.

The researcher had arthritis. After his doctor could provide no further relief through conventional medicine he injected himself with cetyl myristoleate and successfully reversed his arthritis symptoms. The doctor was so amazed at the results he urged him to publish a report. That researcher is in his 80's now and has not had a recurrence of arthritis.

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In March of 1994, a report about injectable cetyl myristoleate was published in The Journal of Pharmaceutical Sciences. In that report the researcher expressed his hope that other studies would be conducted, "particularly, more extensive tests of cetyl myristoleate analogues".



In late 1994, the San Diego Clinic, with its research partners did exactly what that researcher had hoped for in his report. They conducted extensive testing to find a highly bio-available analogue that could be orally administered. They succeeded in an even greater way than they had expected. They derived an even more effective substance from beef tallow. It is a natural dietary supplement called CMO, which is the trade name for cerasomal-cis-9-cetylmiristoleate.



The San Diego Clinic did the first clinical research on CMO. Dr. Sands the director of the clinic was personally afflicted with arthritis and he tested CMO on himself. After the successful results of that test, they then tested a select group of staff, friends and family before the official clinical study on dose effectiveness began in August of 1995. That study proved CMO to be of great benefit to for osteo, rheumatoid and reactive arthritis. Subsequent data proves its value for nearly all other forms of arthritis except gouty arthritis.

In December 1995, CMO capsules were introduced to the medical community at the National Medical Conference on Aging in Nevada. Five doctors afflicted with a variety of arthritis conditions tried CMO at the conference. All five doctors responded successfully within three days and CMO became the "star" of the conference resulting in hundreds of doctors using CMO on their patients.

After successful results in the medical community CMO became publicly available through local independent distributors in February 1996. Its success rate was so great that it inspired Dr. Douglas Hunt to write a book called "Boom You're Well". The book was independently released in 1996, but only 3,000 copies rolled off the press before the rights to the book were bought and international distribution was arranged for late 1997.

The demand for CMO seemed unlimited and grew exponentially with public awareness even though CMO was only available in a few states. On August 13, 1996 CMO Distribution Centers of America was formed to provide national distribution of CMO and increase public awareness.

In December 1996, contracts to provide CMO with international distribution were signed with a multinational corporation.

By January 1997, the success of the CMO was so awesome, it had inspired several corporate criminals to market the less effective injectable predecessor as an oral liquid. This became quite a problem because they even illegally used the trademark name (CMO). Notices of trademark violation were sent out.

In February 1997, Dr. Sands began writing his book about CMO called "Rescued From Arthritis". He says it will be finished by the end of summer.

March 1997, marked the first delivery of CMO to the multinational corporation. It will be available as part of a complete care package for arthritis. The official national release of their package will in August 1997. The success of CMO in it's prerelease stage has been outstanding.

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Also in March 1997, cease and desist orders were sent to the counterfeiters that failed to respond the trademark violation notices.

On June 10, 1997 a million dollar lawsuit for CMO trademark violation was filed in federal court.

In July 1997, production of the television commercial for Dr. Hunt's revised book about CMO was finished. In the United States, the commercial will air in early fall.

On August 6, 1997 a half million dollar judgement was granted for CMO trademark violation.

With the research concluded, effectiveness improved, medical community acceptance, impostors and counterfeiters in check, the television commercial finished, the books written, and the distribution arranged, CMO can finally finish it's 26 year long journey from the point of discovery to benefit the general public.

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How it Works

In their October 28, 1996 issue, Time magazine reported on the three most promising developments in arthritis research. The scientists participating in all three projects are intensely focused on intervening in the immune system's involvement in the arthritic process.

According to doctors, that is exactly what CMO™ does. It corrects the disease at the source in the immune system. Dr. Len Sands the director of the San Diego Clinic says:

“Unlike everything else made for arthritis, you don't have to take it over and over again. CMO™ is not a pain reliever, anti-inflammatory, cortisone or other steroid. CMO™ is an immunomodulator, it regulates your immune system. There's never been anything like it before for arthritis. Instead of treating the symptoms of pain and inflammation, CMO™ capsules act directly against the cause of arthritis, the memory T-cells in your immune system that create the attacks against your joints. Once the error in your immune system is corrected by CMO™, the attacks on your joints stop and the pain and inflammation should be relieved forever. Once the problems are corrected, they stay corrected and you no longer need CMO™ or other arthritis remedies.”

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Frequently Asked Questions

The following questions were answered by the doctors, staff and research associates of the San Diego Clinic. You can scroll down the page to view them all, or click on specific

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question to view the answer. Use "Back to FAQs" button to return to questions after viewing an answer.

- [What makes CMO different from all the other remedies?](#)
- [Does that mean a person takes CMO only once and that's it?](#)
- [Does it work for both rheumatoid and osteoarthritis?](#)
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- [Does it stop arthritis pain?](#)
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- [Does it work for everyone?](#)
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- [What is CMO? Where does it come from?](#)
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What makes CMO different to other remedies?

CMO is not a pain reliever, nor is it a steroid or anti-inflammatory. It is an immunomodulator. There's never been anything like it before for arthritis. Instead of treating the symptoms of pain and inflammation, CMO act against the cause of arthritis – the erroneously programmed Memory T Cells of your own immune system that cause the attacks against your joints. Once the attacks on your joints are halted the symptom of pain and inflammation is promptly remedied.

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Does that mean a person takes CMO only once and that's it?

Yes. Most afflicted persons need to take the capsules for only a couple of weeks to be free of arthritis symptoms forever. No further medication is ever necessary, not even CMO.

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Does it work for both rheumatoid and osteoarthritis?

Both types respond equally well. It also works for most other types of arthritis such as those

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associated with Ankylosing Spondylitis. Reiter's syndrome. Behcet's syndrome, Sjogren's syndrome and Psoriasis. It has also been found to relieve various types of back pain of undetermined origin (probably arthritis related)

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Does CMO improve joint mobility?

Yes, it can! If the joint can be moved, joint mobility may be improved. But if the bones have fused and grown together, only surgery can help those particular joints.

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Does it stop arthritis pain?

Arthritis pain will disappear completely in almost every instance. In a few extreme cases pain was reduced by only 70% to 90%, which was still of such major benefit that it allowed the persons to function normally again.

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Does CMO reduce inflammation?

Yes, and it does so very effectively. The pressure in the joints caused by the inflammation is the major cause of stiffness and pain.

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How long before it takes effect?

Most people can begin to feel relief within a couple of weeks. Others may need several months.

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Will it correct deformities?

Yes. Deformed fingers and toes are often caused by inflammation which swells joints and

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pushes the bones out of place. Reduction of the swelling alone improves appearance dramatically and often allows the dislocated bones to return to their normal positions. Extreme cases may require some physical therapy.

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What about really severe cases?

Even most persons previously confined to bed or to wheelchairs have responded dramatically and are now no longer dependent on others for care. A number of these cases received additional benefit from repeating the treatment one more time. A few others found that physical therapy or exercise programs also helped.

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What about joints where the cartilage is completely worn away?

Unless the bones have fused together, the usual problem is not lack of mobility, but pain. The majority of such drastic cases have responded favorably resulting in painless movement, even in the knees.

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Does it work for every one?

No. CMO has been able to help many individuals, but not everyone will see an improvement in their arthritic symptoms. We all have different bodies, lifestyles, eating habits, etc., therefore the results will vary. Digestive problems or liver function impairment, can sometimes interfere with success.

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Can I continue with my usual medications while taking CMO?

Yes, but after a few days you probably won't need them. However, it's best to avoid steroids if possible.

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<http://home.earthlink.net/~cmocure/cmo/cm00002.html>**Do I have to go on a special diet?**

Alcohol, chocolate, and tea should be avoided. Some users find that avoiding or limiting other foods helps improve effectiveness. A recommended diet accompanies this product, but it only need be followed for a few weeks. Many people take digestive enzymes with CMO to help them absorb it. Afterwards, there are no restrictions.

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Will I have to exercise?

The absence of pain and return of joint mobility is so profound that normal activities will follow quite naturally. No special exercises are necessary. Actually, the usual tendency is to overindulge in the new found freedom, sometimes temporarily resulting in soreness of muscles previously unused.

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Is it okay to exercise?

Yes. Many people want to lose weight and or rebuild strength once they are free to do so again painlessly. But, as with all sound fitness programs, it's best to do so gradually. Your body will need time to adjust.

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Is it expensive?

The cost of treatment is very modest. Most arthritis victims are already spending more on pain and anti-inflammation medications in just a few months. Since you usually need to take only one set of CMO capsules, it actually saves thousands of dollars in the long run.

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Is age a factor?

Not really. All ages respond well. Although arthritis becomes far more common with advancing age, even very young children are sometimes afflicted.

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What causes arthritis?

The numerous theories about what causes arthritis have filled hundreds of volumes. But one thing we do know is that the arthritic process is regulated by Memory T Cells which have been erroneously programmed, causing attacks on your own joints and cartilage.

In osteoarthritis, this faulty programming usually results from physical damage (like a fall, sports injury, vehicle accident, repeated operation of vibrating machinery, long-term strenuous physical work or sports activities, and continuous repetitive motions of certain joints) etc. The damage results in an immune response involving the memory T cells producing attacks against the affected joints. Unfortunately, there's no stop or end command given and the attack continues against healthy cartilage and joints as well. That's why arthritis is called an autoimmune disease, our own body is attacked by our own immune cells.

Although the various forms of rheumatoid arthritis are usually caused by some ineffective microorganism. Memory T cells is again involved in the same arthritic process. Without CMO it continues to worsen.

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How does CMO work?

CMO corrects the root cause of arthritis by erasing the memory of the badly programmed memory T cells. Once the destruction of your joints is halted, your body can begin its repair process without interference, and joints begin to normalize. Although the major benefits come promptly, minor improvements continue even for several months after finishing CMO. With the pain and inflammation relieved, the joints can function again quite normally. Despite minor physical damage to bones as a result of long affliction, perfectly normal joint function usually returns regardless.

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Is it harmful in any way?

CMO studies began at the US National Institutes of Health more than 20 years ago. Recently, clinical applications studies were conducted in San Diego. No harmful short or long-term effects were ever observed in humans, or in laboratory animals even at extremely high doses. Similar substances have long been used in common foods including cheese and chocolate, and even in medicines and cosmetics. It is a perfectly safe and naturally derived substance.

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What is CMO? Where does it come from?

Cerosomal-cis-9-cetylmyristoleate is the biomedical name. CMO is the trade name. It is a completely natural substance found in certain animals such as cows, beavers, mice, and whales. As supplied in capsules, it is a naturally derived, highly purified and refined waxy ester prepared for oral administration.

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Is CMO used for any other ailments?

Current studies include CMO as a part of therapeutic protocol for other disorders with autoimmune components including multiple sclerosis, leukemia, lupus, emphysema, certain cancers, benign prostrate hyperplasia, silicon breast disease, and especially asthma. It also works for dogs, cats, horses and other animals.

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What do doctors say about CMO?

Dr. Douglass wrote in his newsletter: "A New Miracle Cure for Arthritis ...now we have a new star on the horizon that promises as much (or more) than the old sure-cures."

Dr. Muller of Ferndale, Mich. says there's a cure. He knows, he's taken it. Dr. Muller had osteoarthritis for 30 years. Bravely he forged ahead into the naturopathic remedy and tried CMO™. Dr. Muller is no longer troubled by arthritis.

Dr. Hunt was so impressed by CMO™ he wrote a book called "Boom, You're Well". In that book he says: "...rheumatoid arthritis damages tissues, causes extreme suffering, and premature death. ...If you have rheumatoid arthritis, or you know someone who has it, then you know I am reporting a miracle ... A MIRACLE."

Dr. Sands the director of the San Diego Clinic knows there's a cure. He's taken it and now he says, "I was rescued from arthritis". In fact that is the name of his forthcoming book about CMO™. In that book he says, "The arthritic process can be halted. Arthritis can be reversed. The pain and inflammation can be relieved. And it's all been done without any harmful side effects."

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What is the media saying about CMO?

Books, Television News, Radio Health Talk Shows, Medical Newsletters and Scientific Journals all report CMO™ to be a revolutionary breakthrough!

Quotes extracted from: The Mark Scot Show, WXYT Radio Detroit, December 1996:
"Hang on folks because if you haven't heard this before, it certainly is going to be an eye opener for you. ...Amazing is not the word for it. ...CMO™ gets to the source of the problem, it actually stops the arthritic process."

Quotes extracted from: The Don Bodenbach Show, KCEO Radio San Diego, August 1996
"...It may be what we consider almost a miracle cure for arthritis, and the form of arthritis doesn't matter. ...What is more impressive is once you undergo the appropriate treatment ...you are in most cases free from arthritis symptoms forever."

Quotes extracted from: The Nature of Health Magazine, Stop Arthritis Now! The Amazing Story of CMO™, September 1996 "CMO™ is a natural substance and is considered an immunomodulator. The reason for the enormous interest is the effect of CMO™ on both rheumatoid and osteoarthritis... The results of CMO™ are so impressive that nothing that mainstream or natural medicine has to offer can come close to the dramatic reversals in arthritis that have been observed. The link between CMO™ and arthritis was discovered at the National Institutes of Health... Standard medical treatment is aimed at symptomatic relief of pain and inflammation and has shown to actually accelerate the disease process... In contrast, the CMO™ protocol works rapidly and does not need to be continued in the vast majority of cases."

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What are people saying about CMO?

"It's a miracle! Ten years with arthritis ... three in a wheelchair ... and now I've got a completely normal life again. Just watch me make up for lost time."

"As crippled as I was, I hadn't worn out a pair of shoes in seven years. Now I'm out shopping for them again all by myself. My whole life has made a complete about face."

"Even as a doctor, I find CMO™ miraculous. It cured my knee problems, and it's performing every bit as well for my patients, too. I've seen several 'miracle cures' already."

"After nine years of crippling pain, I can't believe I'm actually skiing again. CMO™ is truly incredible."

"After two years in a wheelchair, I just can't believe that I'm taking care of myself and my family again."

"I am a trophy winning martial arts competitor and I had to quit three years ago because of my arthritis. I'm 100% now that I tried CMO™. I look forward to going to Australia next year to compete again."

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"I couldn't even put on my own socks. My wife had to do it. Now after seven years of excruciating pain, I'm out golfing again."

"Before, I needed two hands just to lift a cup of coffee. Now I find myself rearranging furniture all by myself. Last week I even changed a flat tire on the car."

"I didn't even realize CMO™ had worked for me till I found myself moving a bunch of heavy junk out of the garage. The change was so smooth and natural I just took it for granted."

"Imagine my agony. I was a professional athlete all my life. CMO™ gave me back my life. Even knee surgery didn't do that for me. It's amazing how CMO™ ended up fixing all my joints."

"... The pain and stiffness in my hands kept me from performing even simple office surgery. CMO gradually returned my ability for fine control."

"... CMO alters the immune response ... I'm really impressed with the reports I'm getting from my colleagues. This may well be the cure we have been looking for ... it's going to cost you ... to find out [if it works for you]. But I think it's worth the investment ..." Dr. William C. Douglass, MD."

"... rheumatoid arthritis damages tissues, causes extreme suffering, and premature death. And so do many of the other diseases that CMO reverses ... If you have rheumatoid arthritis ... then you know I am reporting a miracle ... A MIRACLE." Dr. Douglas Hunt, MD.

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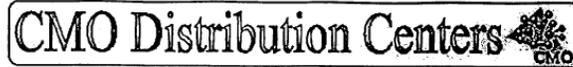


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Arthritis Information

<http://home.carthlink.net/~cmocure/cmo/cm0003.html>



Arthritis Information

Welcome to our Arthritis Information page. Due to the volume of information on this page, we have installed this menu and "Back to Top" buttons to help you navigate this page more effectively.

- [What is arthritis?](#)
- [Who has arthritis and how does that affect us?](#)
- [What causes arthritis?](#)
- [Who says there's a cure for arthritis?](#)
- [What will cure arthritis?](#)

What is arthritis?

There are so many forms of arthritis that they can't all be presented here. According to the Arthritis Foundation, arthritis refers to more than 100 different diseases that cause pain, swelling and limited movement in joints and connective tissue throughout the body. It is usually chronic, meaning that it lasts a lifetime. The disease process also varies depending on the form of arthritis.

The three most prevalent forms are osteoarthritis (OA), fibromyalgia and rheumatoid arthritis (RA). Osteoarthritis is a degenerative joint disease in which the cartilage that covers the ends of bones in the joint deteriorates, causing pain and loss of movement as bone begins to rub against bone. In fibromyalgia, widespread pain affects the muscles and attachments to the bone. In rheumatoid arthritis the joint lining becomes inflamed as part of the body's immune system activity. The chronic inflammation causes deterioration of the joint and the pain and limited movement. You should be aware that osteoarthritis or degenerative joint disease is the most common. CMO is effective on all forms of arthritis except gouty arthritis. The following is what the Arthritis Foundation of New York has to say about osteoarthritis:

Osteoarthritis or Degenerative Joint Disease

Arthritis refers to inflammation of the joint space. Osteoarthritis also known as degenerative joint disease (DJD) is a slow and progressive form of degenerative arthritis that is seen most commonly in the elderly. Joints that have been previously injured (fractured or severely sprained), or subject to chronic stress (obesity or repetitive overuse syndrome) can also lead to premature degenerative changes in the younger patient.

The joints are lined with a material known as cartilage, which provides a smooth surface over which the joint can "glide" without difficulty. Degenerative arthritis causes destruction of the cartilage, predominantly in the

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Arthritis Information

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weight bearing (high stress) joints of the body.

The main joints affected by DJD are the hands, hips, knees, cervical (neck) spine, and the lumbar (lower back) spine. Almost all patients over the age of 60 have some degree of DJD in one or more of these locations.

Common symptoms and the appearance of degenerative arthritis include a long history (over years) of episodic joint pain with occasional mild swelling to the joints. DJD does not necessarily produce the remarkable joint swelling, warmth, and tenderness as that of septic arthritis or rheumatoid arthritis. Overweight patients tend to have more low back, hip, and knee problems.

Cervical (or lumbar) degenerative joint disease will commonly result in progressive neck (or back) pain and stiffness. More advanced cases can result in impingement (compression) of exiting nerve roots, giving rise to numbness, tingling, or weakness to the upper (or lower) extremities.

Evaluation will include a history and physical examination. X-rays of the involved joints will show characteristic changes associated with DJD. Serologic tests (rheumatoid factor) may be performed to exclude the possibility of rheumatoid arthritis. Magnetic resonance scanning of the neck or back will be performed in cases where nerve root compression is suspected.

Treatment includes aspirin or nonsteroidal anti-inflammatory agents (ibuprofen) for acute attacks and long-term symptomatic management. Chiropractic manual manipulation and acupuncture are recognized alternatives. In cases of obesity, weight reduction should be considered part of the treatment. Physical therapy to strengthen muscles can take stress off the joints and will have a dramatic effect on decreasing the arthritic pain (and progression of the disease).

Artificial joint replacement has been used successfully for advanced disease in the knees (knee arthroplasty), hips (hip arthroplasty), shoulders, elbows, and joints of the hand and wrist. An Orthopedic Surgeon is the expert in the management of this common problem. Cases involving nerve compression will require referral to a Neurosurgeon.

Note: The last 2 paragraphs list what were the most common remedies available to victims of arthritis before the development of CMO. Given the choice of surgery, a life time of pain pills or taking CMO only once, it is easy to see why CMO is so popular.

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Who has arthritis and how does that affect us?

There are nearly 40 million Americans with arthritis that could benefit from CMO. World wide the figures are far more than double. With the examples of DHEA, melatonin, glucosimine sulfate, chondroitin sulfate, shark cartilage and home remedy books, the public in general has shown it is ready for CMO. The Arthritis Foundation publishes this general

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information about arthritis:

- Arthritis is the #1 crippling disease in the U.S.
- Nearly 40 million Americans have arthritis
- One in seven Americans have arthritis
- Nearly two-thirds of those with arthritis are women
- Nearly 23 million women of all ages have arthritis
- By the year 2020, 59.6 million Americans will have arthritis unless steps are taken now to limit its impact
- Arthritis limits everyday activities -- such as dressing, climbing stairs, getting in and out of bed or walking -- for about 7 million Americans
- \$54.6 billion financial impact nationwide each year
- Arthritis causes \$133 billion in lost wages and productivity annually
- 427 million work days each year are lost to arthritis

The number of people with arthritis is staggering and there are 500,000 new cases each year. Take one of our less populated states like Tennessee. The Arthritis Foundation publishes this about their Tennessee chapter:

- 823,000 people with arthritis
- One in seven people
- 364,589 people with osteoarthritis
- 130,034 people with rheumatoid arthritis
- 1,481 children with arthritis

It is no wonder that arthritis has become one of the top headline news stories in all forms of mass media. The public response to CMO has been overwhelming. News broadcasts and talk shows bring record numbers of callers to sponsoring stations.

In San Diego when a local radio station interviewed Dr. Sands they got so many calls their switchboard overloaded! The host of that show wrote in *The Nature of Health* magazine: "On August 3, 1996, I interviewed Dr. Len Sands on my radio program... Our topic of discussion was cerasomal-cis-9-cytlmyristoleate or CMO. That one hour program generated more calls than any show I've ever done and in fact was the largest response ever for a single show in the history of the radio station."

In Detroit the response was so heavy that the show's host canceled all other guests and extended the interview for 2 hours. The traffic on local telephone circuits for that station's exchange were so heavily taxed that callers to that area could only get a circuit busy signal.

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What causes arthritis?

Dr. Sands the Director of the San Diego Clinic explains it by saying: "The numerous theories about what causes arthritis have filled hundreds of volumes. But one thing we do know is that the arthritic process is regulated by "Memory T-cells" which have been erroneously programmed, causing attacks on your own joints and cartilage. In osteoarthritis, this faulty programming usually results from physical damage (like a fall, sports injury, vehicle accident, long-term strenuous physical work or sports activities, or any frequent jarring or shocking of the joints, etc.).

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The damage results in an immune response involving the memory T-cells, producing attacks against the affected joints. Unfortunately, there's no 'stop button' or 'end program' command in the memory T-cells and the attack continues against healthy cartilage and joints as well. That's why we call arthritis an autoimmune disease - because your body is attacked by your own immune cells. Although the various forms of rheumatoid arthritis are usually caused by some infective microorganism, memory T-cells are again involved in the same arthritic process. Without CMO, it continues to worsen."

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Who says there's a cure for arthritis?

Time Magazine

As we mentioned earlier in the CMO Information section, in their October 28, 1996 issue, Time magazine reported on the three most promising developments in arthritis research. The scientists participating in all three projects are intensely focused on intervening in the immune system's involvement in the arthritic process.

According to doctors that is exactly what CMO does. It corrects the disease at the source in the immune system and doesn't require a lifetime maintenance program.

Rescued From Arthritis

Rescued From Arthritis, the book by Dr. Len Sands, answers most questions you would have about the clinical research on CMO at the San Diego Clinic. It also recounts several case histories as well as Dr. Sands personal recovery from arthritis with CMO.

"Two years ago I was a closet cripple; bone-on-bone in my knees. Then CMO gave me back a normal life... Following eight years of excruciating pain from bone grinding against bone in my knees, I find it hard to believe that I'm still 95% pain free two years after taking CMO... The arthritic process can be halted. Arthritis can be reversed. The pain and inflammation can be relieved. And it's all been done without any harmful side effects."

Boom, You're Well

The book *Boom, You're Well*, by Dr. Hunt, documents his observations of over 40 patients that recovered from arthritis with the use of CMO. The following is just one

...Robin already had a long history of severe arthritis, including back surgery ten years earlier when she had the misfortune of being shot. The bullet entered through her left shoulder and exploded into her chest cavity. Surgery left her with a titanium rod in her arm from her shoulder to her elbow. Her doctors told her that arthritis would surely follow. It did _ in just four months.

Then Robin found CMO... The next day she was able to move her arm somewhat _ and she had more flexibility in her back. On the fourth day her back was so improved, she was actually able to curl up in a ball for the first

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time in ten years. As she says, "without any pain or clicking."

Second Opinion

Second Opinion is a newsletter published by Dr. William Douglass. This newsletter enjoys a readership of over 100,000 informed doctors, health professionals and health conscious readers. Dr. Douglas describes CMO as a "miracle cure.

"A New "Miracle Cure" for Arthritis ...now we have a new star on the horizon that promises as much (or more) than the old sure-cures. Again, I'm skeptical _ been through this so many times that I believe in the power of negative thinking _ but it does indeed look promising. ...a 40-year employee of the [U.S. Government] National Institutes of Health (NIH) reports: "Four years ago, I had arthritis so bad I could hardly walk and it was in my hands, too." He is 84 now and remarkably improved from treating himself with a compound I am still trying to learn to pronounce. It's called Cerasomal-cis-9-Cetyl Myristoleate. The trade name is CMO™, so that's what we'll call it.

[One] study involved 48 subjects of both sexes ranging in age from 29 to 82. ...Most patients had a 70 to 100 percent return of joint mobility and a 70 to 100 percent reduction in pain. The initial response time is two to seven days and maximum response time is from seven to 21 days."

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What will cure arthritis?

Dr. Jason Theodosakis' book *The Arthritis Cure* for gives the impression that glucosamine and chondroitin sulfate are the cure for arthritis. In fact neither of those substances have any effect on arthritis. What glucosamine sulfate and chondroitin sulfate do have an effect on is cartilage growth. To term these compounds as a "cure" is like saying you can cure a disease with continuous treatment of the symptoms and not permanently treating the cause. Even the Arthritis Foundation says *The Arthritis Cure* is not recommended and they cannot recommend glucosamine and chondroitin sulfate as a treatment for osteoarthritis or any other form of arthritis.

Glucosamine sulfate, chondroitin sulfate, cartilage, natural unflavored gelatin, or similar compounds are the building blocks for cartilage growth. Once the arthritic process is stopped they are much more beneficial.

Speaking of the Arthritis Foundation, they will neither confirm, nor deny that CMO is the cure for arthritis. We are aware of several cases where CMO was presented members of the AF. In turn, they were cured and presented CMO to AF staff. To this day, despite the fact that CMO has cured some of their members, the only official comment the AF has made, was to suggest that when taking CMO, you should consult your physician before reducing steroids or other medications.

According to doctors, clinical studies, users and the media, CMO would certainly seem like the most likely candidate to be given the true title being of a "cure" for arthritis. When asking Dr. Sands if CMO is the only cure for arthritis he replies:

"According to the *Journal of Rheumatology* (1993; 20:137-140) bone marrow

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Arthritis Information

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transplants seem to have succeeded in curing two cases of arthritis."

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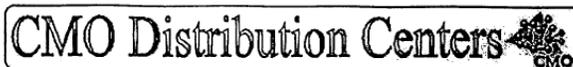


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Clinical Information

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Clinical Information

Welcome to our Clinical Information page. Due to the volume of information on this page, we have installed this menu and "Back to Top" buttons to help you navigate this page more effectively.

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Research

CMO Distribution Centers of America in conjunction with the San Diego Clinic act as a clearing house for all the latest information on CMO. With this joint research effort, a network of communication is established between all medical professionals and distributors. This allows for up to the minute information sharing. This will facilitate the application of CMO to uses other than for arthritis. Currently, studies for the use of CMO on other auto-immune diseases are in progress. It is hoped that the Lupus Foundation will conduct one such study. We have offered to fund the protocol.

Current studies of CMO as a part of therapeutic protocol for other diseases include asthma, scleroderma, fibromyalgia, lupus, emphysema, certain cancers, and benign prostrate hyperplasia. CMO Distribution Centers of America and The San Diego Clinic team have dedicated themselves to that research and the results will expand the potential of CMO to other diseases. These CMO pages will reflect any progress we make. In the near future, a user BBS will be added for public access to the latest data base information posted by medical professionals.

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Clinical Study

A Study on Dose Effectiveness and Patient Response Conducted by the San Diego Clinic

Welcome to the Clinical Study section of our page. Due to the volume of information in this study, we have installed this menu, "Back to Top" and "Back to Study" buttons to help you navigate this page more effectively.

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The Purpose

The effectiveness and nontoxicity of CMO (cerasomal-cis-9-cetylmystoleate) for arthritis symptoms of pain, inflammation, and impaired mobility having been previously established, the purpose of the present study was:

- 1.) to determine optimum dosage levels for various types of arthritis,
- 2.) to determine if different dosage levels would be required relative to the severity of each type of arthritis,
- 3.) to observe response time required for initial and partial relief of symptoms,
- 4.) to observe response time required for complete relief of symptoms, and
- 5.) to determine factors influencing subjects who may not respond to the protocol.

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The Subjects

Subjects were volunteers treated as outpatients. They presented with osteoarthritis,

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rheumatoid arthritis, and other forms of reactive arthritis.

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The Study

The study involved 48 subjects. Female subjects (28) ranged from 33 to 82 years of age. Male subjects (20) ranged from 29 to 74 years of age. All races and many ethnic backgrounds were represented. Age, gender, race, and ethnological background appeared to be irrelevant to patient response in this study.

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The Protocol

CMO was administered orally in the form of 75mg capsules each morning and evening. The number of capsules and duration of treatment varied for each group of subjects. Subjects were advised to take capsules on an empty stomach with water only; and to avoid tea, chocolate, alcohol, coffee, cola, and other caffeinated drinks for five hours after taking the capsules. Subjects were advised to completely avoid chocolate and alcohol during the entire trial period of two to four weeks duration. With a few exceptions for subjects who could not function without them, steroids were also prohibited. Otherwise diet was not controlled in any way. Subjects were permitted to continue taking their customary pain and non-steroidal anti-inflammatory medications until they were no longer needed. Subjects were asked to visit or call in to report progress at least twice weekly.

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The Results

Only two subjects failed to show marked or complete relief of all symptoms of pain and limited mobility normally associated with arthritis. Both of these non-responding subjects had suffered prior hepatic problems: one from alcohol abuse resulting in cirrhosis of the liver; the other, a former professional athlete, presented with considerable liver damage from steroid abuse. Further studies are necessary to determine the role of liver function capacity with respect to this protocol. Liver damage resulting from steroids previously prescribed for arthritis may also prove to be a factor affecting patient response.

Two other subjects showed less than a 75% return of articular mobility. The balance of all

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subjects reported 80% to 100% return of articular mobility as well as a 70% to 100% decrease of pain. Relief of inflammation frequently resulted in at least partial correction of some deformities. Informal independent trials at clinics, by individual medical doctors, and other health practitioners appear to have brought approximately the same results.

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GROUP # 1**Mild to moderately severe osteoarthritis & reactive psoriatic arthritis**

In Group #1, eleven subjects presenting with mild to moderately severe osteoarthritis and one with reactive psoriatic arthritis were supplied with 16 capsules, two 75mg capsules to be taken each morning and evening for four days. Nine reported about 20% to 30% improvement in articulation and inflammation and about 40% to 50% relief of arthritic pain within 36 hours. In these nine subjects improvement continued rapidly for the next 60 hours, reaching a 70% to 80% overall improvement by the end of the four days. Two of the three latter subjects continued to improve over the following week despite the fact that they were no longer taking the capsules. However, about half of this group experienced the return of some mild arthritic symptoms after about three to five weeks. (Although not included as part of this study, all of the subjects in this group were treated again and their symptoms have not returned.) The patient with reactive psoriatic arthritis also experienced an almost complete reversal of his associated very severe psoriatic skin condition affecting about 20% of his total skin area.

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GROUP # 2**Severe to crippling rheumatoid arthritis**

In Group #2, nine subjects presenting with severe to crippling rheumatoid arthritis were supplied with 50 capsules to be taken in two series, two 75mg capsules each morning and evening for seven days, with a seven day interval before repeating the same dosage for 5-1/2 more days. Four of these subjects were unable to walk and were accustomed to being transported by wheelchairs. One, her femur being fused at the hip, was unable to achieve a sitting position for wheelchair transport. She could, however, move about slowly on crutches as long as she was accompanied by someone to aid her in maintaining her balance. Otherwise she could only stand or lie down. The remaining four could move about with canes or walkers. All nine subjects presented with pain, inflammation, and marked deformation of nearly all proximal interphalangeal and large joints. Five presented with limited lumbar flexion and pain in the vertebral column. All had difficulty grasping and manipulating common objects.

Within three days of treatment six subjects in the group reported a 30% to 50% decrease in pain and 20% to 30% increase in joint mobility, and three subjects reported little change. Within seven days five subjects reported a 70% to 90% decrease in pain and 70% to 80%

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increase in joint mobility. Three subjects reported to be totally free of pain with almost complete return of joint mobility and marked improvement in joint deformation. One patient reported no perceptible change.

On the fourteenth day, at the end of the one week interval without treatment, six subjects reported minor continuing improvement; two reported maintaining their improved status, and one continued to show no improvement. Treatment was resumed on the fifteenth day for 5-1/2 more days.

By the end of the treatment period all but two subjects reported to be 90% free of pain with return of 70% to 100% mobility. The fused hip joint remained fused, of course, but with a return of over 70% mobility in other joints the subject felt hip surgery now to be worth consideration. The one nonresponsive subject proved to have cirrhosis of the liver, which may have been the reason for her inability to respond to treatment. Further investigation is necessary to determine the role of liver function in this protocol.

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GROUP # 3

Mild to moderately severe rheumatoid arthritis

In Group #3, fourteen subjects presenting with mild to moderately severe rheumatoid arthritis were supplied with 24 capsules, two 75mg capsules to be taken each morning and evening for six days. After three days of treatment eleven reported about 20% to 30% improvement in articulation and inflammation, and about 40% to 50% relief of arthritic pain. In these eleven subjects improvement continued rapidly over the next four days, approaching the 80% to 100% level. The remaining three subjects reported similar improvements by the end of the fourth day, with an overall improvement of 70% to 80% after seven days.

Most of the subjects continued to report minor additional improvement for one week or more even though they were no longer under treatment. However, six in this group began to experience the return of some mild arthritic symptoms after about three to four weeks. (Although not included as part of this study, all of the subjects in this group were treated again and their level of improvement has subsequently stabilized).

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GROUP # 4

Severe to crippling osteoarthritis

In Group #4, fourteen subjects presenting with severe to crippling osteoarthritis were supplied with 50 capsules to be taken in two series, two 75mg capsules each morning and evening for seven days, with a seven day interval before repeating the same dosage for 5-1/2 more days. Three of these subjects were unable to walk and were accustomed to being

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transported by wheelchairs. The other eleven could move about with crutches, walkers, or canes. All presented with pain, inflammation, and marked deformation of nearly all interphalangeal and large joints. Four presented with limited lumbar flexion and pain in the vertebral column. Ten had difficulty grasping and manipulating common objects.

After four days of treatment ten in this group reported 30% to 50% improvement in articulation and inflammation and about 40% to 60% relief of arthritic pain. In these ten subjects improvement continued rapidly over the next three days, reaching 80% to 100% by the end of seven days. One reported no perceptible change.

On the fourteenth day, at the end of the one week interval without treatment, nine subjects reported continuing minor improvement, four reported maintaining their improved status, and one continued to show no improvement. Treatment was resumed on the fifteenth day for 5-1/2 more days.

By the end of the treatment period eleven subjects reported 80% to 100% relief of pain with a return of 80% to 100% mobility. Two subjects reported 70% to 80% return of articular mobility with a 70% to 90% reduction of arthritic pain. The one non-responsive subject proved to have previous liver damage as a result of sports-related steroid abuse. Further studies are necessary to determine the role of liver function in this protocol.

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Summary

The results of this study lead to several conclusions regarding its five principal objectives:

- 1.) Optimum dosage levels appear to be equal for all three types of arthritis investigated: osteoarthritis, rheumatoid arthritis, and reactive psoriatic arthritis. This is evidenced by the gradual return of minor arthritis symptoms in several of those treated with only 16 or 24 capsules, and no regression in those treated with 50 capsules in two series separated by one week without treatment.
- 2.) Dosage level requirements appear to be equal irrespective of the severity of the subject's condition.
- 3.) Initial response time for minor improvement appears to vary from two to seven days irrespective of the severity of the subject's condition.
- 4.) The time for maximum attainable response appears to vary from seven to twenty-one days, resulting in 70% to 100% overall improvement. (Apart from this study, three of the most severely afflicted subjects were treated again after a five week interval, resulting in an additional 10% to 20% overall improvement.)
- 5.) The two non-responding subjects both proved to have suffered previous damage to the liver from steroid or alcohol abuse, indicating that impaired liver function may preclude success with this protocol.

In addition, it was evident that for many subjects the relief of inflammation resulted in marked improvement in joint deformation.

*(This study was conducted at several different sites
after the model prepared by the developers of CMO.)*

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Case Histories

Condensed Highlights From Case Histories Recorded By The San Diego Clinic

From case history #38:
Medical Doctor. Pain and stiffness in hands for several years. Unable to perform simple office surgery. One day of CMO brought relief. Dexterity and fine surgical ability returned gradually. Ordered CMO for his patients.

From case history #39:
Male. Medical Doctor/psychiatrist. This physician complained of persistent pains along his spine and in his feet. He became completely free of pain in both the spine and feet within two days of starting CMO capsules. Remission continues.

From case history # 33:
Medical Doctor. Auto wreck ten years earlier damaged hip, caused limp and arthritis. CMO relieved pain permanently in one day for the first time after many years. The limp problem is irreparable. Ordered CMO for his patients.

From case history # 06:
Female. Age 45. Arthritis attack worsened rapidly over a period of only seven months. Required a wheelchair to be moved about. Frequently unable to leave bed in mornings because of debilitating pain. Seeking relief, she worked with a personal trainer. She was incapable of holding a five pound weight, unable to make a fist. Saw immediate improvement with CMO in just three days. Two weeks after the first, she took a second course of CMO. She is now able to perform a full workout, has no difficulty making a fist, wakes in the mornings free of pain, and has resumed a normal active life.

From case history # 29:
Female. Age 63. Despite devoted adherence to a truly natural diet, suffered severe osteoarthritis in most joints for over ten years. Woke to agonizing pain. Even simple chores were arduous. CMO brought total relief in ten days.

From case history # 24:
Female. Age 50. Family history of arthritis. Pain in shoulders. Severe pain, limited mobility, and gross swelling in hands and fingers. By the third day of CMO, hands were free of pain, mobility had increased immensely, and finger swelling decreased so dramatically she had to have all her rings re-sized. Repeated treatment three weeks later. Totally free of pain and inflammation since. For the first time in many years, she was recently delighted to experience a pain-free skiing holiday.

From case history # 22:
Female. Clinically obese. Arthritis in neck and spinal column resulting in joint mobility limitations. Despite impaired liver function which frequently inhibits the benefits of CMO, her range of motion increased by 100% within one week. A repeat course of CMO two weeks later has resulted in even greater and continuing improvement.

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<http://home.earthlink.net/~cmocure/cmo/cm00004.html>**From case history # 03:**

Male. Age 32. Rheumatoid arthritis at age 25. Family history of arthritis. Seven years of pain in hands, shoulders, legs, and ankles. Although subject saw substantial improvement after taking CMO for three days, he did not experience complete relief with continuing remission for about two weeks. He has subsequently enjoyed skiing holidays and has been able to return to playing golf without the discomfort of any pain

From case history # 17:

Female. Age 60. Physician. Relentless pain from hip injury one year prior. Diverse treatments and medicines brought little relief. With CMO and massages to reduce edema and improve muscle activity, her pain gradually diminished in two weeks. Now remains completely free of pain.

From case history # 15:

Lifelong athlete. Arthritic pain and/or stiffness in hands, feet, knees, neck, and shoulders especially with exposure to the cold. With three days of CMO, was totally free of pain with dramatically increased articulation in the joints. Further improved mobility came with a repeat set of CMO three weeks later. He now enjoys skiing and other activities with the vigor and delight he lost so many years ago.

From case history # 11:

Male. Age 58. Ex football player. Clinically obese. Had knee surgery three times about 15 years ago. Had extreme pain upon lying down. Often slept in a recliner chair instead. With his first evening dose of CMO capsules, he slept soundly and arose the next morning completely free of pain. He has enjoyed continuing pain-free remission ever since the first day.

From case history # 08:

Male. Medical Doctor/psychiatrist. Pains in feet daily for over five years. With CMO almost constant pain disappeared within a day. Ordered CMO for his patients.

From case history #32:

Female. Age 66. Rheumatoid arthritis rendered hands useless, gnarled, inflexible, agonizingly painful six years ago. Pain relieved and full use of hands restored after five days of CMO.

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Suggested Use

Suggested Use:

Take three (3) capsules in the morning, and three (3) capsules at night (bedtime), until you finish all the capsules. Do not drink anything but water for two hours before and one hour after taking your CMO capsules. Very Important: Do not take CMO with alcohol, caffeine or chocolate. This may render your CMO capsules totally ineffective. Following the recommended diet and suggested nutrients will improve effectiveness.

Recommended Diet:

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The golden rule while taking CMO:

To improve effectiveness, abstain from the use of alcohol, caffeine and chocolate during the entire period while taking CMO and for two weeks after taking your final capsules. This includes non-alcohol beer, coffee (even decaffeinated), black tea, colas or other caffeine containing substances. Consult your doctor before making radical changes to your diet.

Additional hints to improve effectiveness while taking CMO:

Minimize or avoid eating Nightshades (tomatoes, potatoes, green, red and yellow bell peppers, and eggplant). Some users find it also helps to reduce the consumption of fats, oils, beans, lentils, and all forms of wheat, rye, corn and barley during the protocol. You should remain on this diet for the entire period of protocol and the following two weeks for optimum results. Consult your doctor before making radical changes to your diet.

A diet for anyone with arthritis:

As with all arthritis sufferers, it is best to avoid the "nightshade" group of vegetables whether you are taking CMO or not. Nightshades have been found to aggravate the arthritic condition. You can check with your local Arthritis Foundation for more information or ask them about the Help Yourself Cookbook, the cookbook for people with arthritis. Cookbook toll-free number: 1-800-454-4662. We are not affiliated with the AF or the makers of the cookbook. We only provide this information in response to the many request we get for type of information. Consult your doctor before making radical changes to your diet.

Medications:

CMO does not interfere with any known medications or alter there effects. Medications do not interfere with the effects of CMO except in two cases, methotrexate and steroids.

Methotrxate:

The prescription drug methotrexate or (Rheumatrex) will completely block the effects of CMO. Methotrexate is an immune suppressant, CMO is a an immune modulator, to two actions are contradictory and the effects of CMO are blocked. Request that your doctor allow you to discontinue these drugs for at least one week prior to starting CMO. Consult with your physician before making any changes in your current medications.

Steroids:

In some cases, cortisone or other steroids, have hindered the benefits of CMO. Because your liver is so busy processing them, you can't absorb the full benefits of CMO. If you are taking cortisone or other steroids, advise your doctor that it would be better to avoid them or reduce their dosage levels. If not ask him about taking half doses. Then as your pain disappears you may request that he discontinue them completely. Consult with your physician before making any changes in your current medications.

Pain Medications: After taking CMO, you may find you no longer need pain medications. If

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wish to discontinue taking your pain medications, consult with your physician.

Nutritional Supplements: CMO does not interfere with the effects of nutritional supplements. Nutritional supplements do not interfere with the effects of CMO, except in some cases they may actually improve it's effectiveness. In most cases there is no need for additional supplements. However, in a few cases, users report they have found the following protocols to help boost the effects of CMO when they felt they were receiving below average benefits. According to users, digestive enzymes are the single most popular way to help your body absorb CMO. Consult your physician before making radical changes to your diet or adding nutritional supplements.

Digestive Enzymes: CMO may be taken with digestive enzymes to improve it's effectiveness. They seem to aid in the assimilation of CMO through the digestive track. Consult your doctor before making radical changes to your diet.

Enzyme mixtures that contain lipase, protease and amylase are recommended. Avoid combinations containing hydrochloric acid (HCL) or pancreatin. It is not necessary to take enzymes with meals, only with your CMO capsules. Consult your physician before making radical changes to your diet or adding nutritional supplements.

Whey Protein: Although the general rule is to take CMO on an empty stomach with water, CMO capsules may also be taken with a whey protein drink and digestive enzymes to further improve it's effectiveness. This is a new protocol developed by a doctor who says that he has been getting very good results. Consult your physician before making radical changes to your diet or adding nutritional supplements.

Cartilage Supplements: Glucosamine sulfate, chondroitin sulfate, cartilage, natural unflavored gelatin, or similar substances may help to promote the regeneration of joint cartilage during and after CMO use. They may be taken during the CMO protocol as well as afterwards. This may promote the healing of your cartilage. Consult your physician before making radical changes to your diet or adding nutritional supplements.

Fish Oils: Natural fish oil supplements have been highly recommended by Dr. Hunt in his book "Boom You're Well." They can act as a lubricant to reduce wear and tear on your healing joints. Many user report to us that within a week, they can feel the benefits of fish oil. This may be taken during the CMO protocol as well as afterwards. Consult your physician before making radical changes to your diet or adding nutritional supplements.

Liver Cleansers: Users report that using a natural liver cleansing product several days before starting CMO capsules may improve it's effectiveness. This is especially true among moderate to heavy users of alcohol and those on strong medications. Such cleansers among others include milk thistle extract (active ingredient selenium) and phosphatidylcholine. Consult your physician before making radical changes to your diet or adding nutritional supplements.

Note: All of these products are available at your local health and nutrition stores where the sales people are generally very helpful. These products are inexpensive and easy to use. Simply follow the instructions that come with them. Consult your physician before making radical changes to your diet or adding nutritional supplements.

Detoxification: Some persons who have been ill for many years may sometimes experience the effects of a "detoxification reaction". This can occur when the body is unable to eliminate large amounts of newly cleansed toxins fast enough. If after a few days of taking CMO, feelings of nausea and or weakness appear, feel free to stop taking the capsules until the body cleanses and the symptoms are gone. This generally takes only a couple of days. Then continue with your CMO capsules as before. Since the beneficial effects are cumulative, any temporary interruptions will not affect the final outcome. Although rare, a

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few people with rheumatoid arthritis have felt a short-term, temporary worsening of their symptoms. This has lasted for a few days after which their progress has then continued normally. Sometimes it may appear that the full benefits of CMO have occurred early in the treatment. However it is advised to take all 100 capsules to assure the complete, long lasting benefits of CMO.

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Complaint Exhibits

Manufacturing & Specifications

<http://home.earthlink.net/~cmocure/cmo/cm00005.html>**CMO Distribution Centers** **Manufacturing & Specifications**

CMO is produced and bottled in the USA. The production facilities are state of the art and inspected by the state Food and Drug Branch of Health Services. CMO is bottled in a state of the art facility with cleanrooms and air lock doors.



- [Method of Manufacture](#)
- [Quality Control](#)
- [Specifications](#)
- [Packaging & Labeling](#)
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Method of Manufacture

- **Premises:** All manufacturing is conducted in a plant which is a facility approved for food products and is licensed for the manufacture of therapeutic products.
- **General:** All manufacturing is conducted in cleanrooms provided with filtered air. Entry to the manufacturing area is through air locks.
- **Quality Control:** The raw material CMO (cerasomal-cis-9-cetylmyristoleate) powders derived from beef tallow, the calcium phosphate, and silicon dioxide are tested and approved by Quality Control and weighed into clean, dry plastic buckets.
- **Weighing:** The weighing of each ingredient is checked by at least two workers who must each initial the manufacturing batch record.
- **Mixing:** Depending on the size of the batch, the powders are transferred to a ribbon blender or a drum mixer which was first inspected for cleanliness and dryness. The mixing time is strictly controlled according to manufacturing instructions and must be entered into the manufacturing batch book.
- **Filling:** The resulting mix is transferred to a semiautomatic encapsulator machine by means of plastic buckets. At predetermined times during the filling process, samples of the capsules are evaluated by Quality Control for proper weight of mix. If it is determined that any problem exists, all capsules filled since the previous check are destroyed.
- **Bottling:** The filled capsules are placed in a semiautomatic bottling machine which dispenses the proper amount of capsules into each bottle.
- **Labeling:** A semiautomatic labeling machine is used to apply supplied labels and print batch numbers and expiration dates or a separate batch number.

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Manufacturing & Specifications

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Quality Control

The strictest quality control is maintained. Lots are analyzed and a specifications sheet is generated (see below). Batch records are logged and must be signed by both parties inspecting the run. Should an error in the fill weight be detected, all product since the last check is removed and destroyed. Each capsule of CMO has been checked 3 times. Content, quality and quantity (fill weight) are checked at three different points during the manufacturing process.

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Specifications

This is a copy of one of the specification sheets: Document NO: CMO 863 effective August 3, 1996, the specifications are as follows:

- Product: CMO (cerasomal-cis-9-cetylmyristoleate)
- Description: Nutritional / dietary supplement consisting of white crystalline powder encapsulated in size 00 white capsules.
- Containers: 125 ml or 225 ml white polypropylene bottle with safety seal, a white plastic screw cap, and a white shrink-wrap seal around top of bottle neck. Packaged twelve (12) per case.
- Fill Weight: 770 mg per capsule, one hundred (100) capsules per bottle.
- Formula:
 - CMO cerasomal-cis-9-cetylmyristoleate derived from natural bovine tallow in a mix of related natural tallow-derived waxes.....50%
 - Calcium Phosphate.....48%
 - Silicon Dioxide......02%
- Identification: Mixed ester, alcohol, tallow-acid wax.
- Melting Point: 34-39°C
- Differential Thermal Analysis (DTA): Minimum between 50-60°C with thermogram structure depending on scan rate and packing sample tube. Matches standards.
- Infrared Spectrum: Neat on NaCl plates. Matches standards.
- Microbial Testing: Plate count <10cfu per gram. E. Coli: Negative. Salmonella: Negative.
- Certification: CMO is a substance naturally derived from natural bovine tallow in a mix of naturally derived bovine tallow waxes, containing only naturally derived ingredients.

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Packaging & Labeling

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CMO comes in units of 100 capsules per bottle. The 225 ml white polypropylene bottles with safety seals, white plastic screw caps, and white shrink-wrap seals around top of bottle necks, come packaged 12 per case. The cases are standard #8 shipping cartons. Batch numbers are applied to the bottom of the bottle. Distributors labels are applied to the side of the bottle. Labels are supplied by the distributor for application at the bottling facility. Distributors labels must be supplied to CMO Distribution Centers of America Inc. 7 days prior to ordering to allow time for shipment to the bottling facility. There is no charge for label application on orders of 1,000 or more.

Labels supplied for application at the bottling facility should be pressure sensitive and on rolls of 2,500 to 3,500. If you wish to print the labels in California, Hunter Pacific (714-975-1331) is close to the bottling plant and familiar with our requirements.

- Label Dimensions : 2 1/8 inches by 5 1/2 inches, Horizontal
- Maximum Roll Size: 9 inches (2,500 - 3,500 average)
- Core Dimensions: 3 inches V Orientation: Right to Left

Standard 2 inch by 4 inch labels will be supplied by CMO Distribution Centers of America Inc. for orders of less than 1,000 units. These labels must be applied by the distributor. Labels will include distributors name and all other standard label information. Custom labels are available.

Standard Suggested Use pamphlets will be supplied by CMO Distribution Centers of America Inc. for orders of less than 1,000 units. These pamphlets must be folded by the distributor. Pamphlets will include distributors name and all other standard use information. Custom pamphlets are available. Special inserts, mailing containers, product boxes and other materials can be supplied by distributor for assembly, insertion or application. Price is bid per job.

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Supply

We are currently able to manufacture 40,000 units (100 capsule bottles) of CMO per week. Provisions have been made to produce over 100,00 units per week. That would be over 7 million units per year or over 500,000 units per month.

- 5 million units of raw materials on hand.
- 220,000 units of finished product on hand.
- 66,000 units of finished product in bottling plant at all times.

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Ordering Policy

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Manufacturing & Specifications

<http://home.earthlink.net/~cmocure/cmo/cm00005.html>

Retail orders must be paid in full at time of order. Orders will arrive within 2 weeks from the time we receive payment. Rush orders can be arranged.

Wholesale orders of 1,000 units or more require 50% upon order, net upon delivery. Orders of less than 1,000 units must be paid in full at time of order. Orders must be placed at least:

- 10 days prior to FOB pick up from plant in Anaheim, California.
- 14 days prior to FOB pick up from our offices in Sarasota, Florida.
- 18 days prior to air express shipment.
- 21 days prior to land carrier shipment.

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Shipping

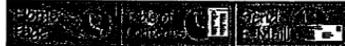
- 5 lbs and under: N/C
- Over 5 lbs: FOB

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Guarantee

CMO Distribution Centers of America Inc. guarantees that the product we ship meets all the above specifications.

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<http://home.earthlink.net/~cmocure/cm000006.html>

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Market Information

The following is not intended as a projected market share. It is provided only as an overview of the potential market size for CMO as applied to arthritis. An accurate market potential for CMO as applied to arthritis is impossible to project. The following figures were based on the statistics of 50 million Americans with arthritis, 500,000 new cases each year and CMO retailing for \$295.00 per bottle.

The gross retail value of the U.S. market for CMO as applied to arthritis is 14.75 billion dollars. The reoccurring gross annual new market in the U.S. is 147.5 million dollars. If you were to speculate that a 5% market share were possible, then the gross retail value of the U.S. market would be 737.5 million dollars. Even if you did cure everyone with arthritis in America, the annual figures for new buyers, based on 5% of the new cases of arthritis each year, would be a gross retail value of 7.37 million dollars. No matter how you look at it, the figures are staggering.

Furthermore, the effects of CMO on other autoimmune diseases is still under study. Current studies of CMO as a part of therapeutic protocol for other diseases include asthma, scleroderma, fibromyalgia, lupus, emphysema, certain cancers, and benign prostrate hyperplasia. The CMO Distribution Centers and San Diego Clinic team have dedicated themselves to that research and the results will expand the market potential of CMO to other diseases.

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Domestic Market

- Over 50 million Americans have arthritis.
- Over 40 million individuals list arthritis as a cause for visiting their doctors each year.
- CMO benefits all types of arthritis except gouty arthritis.
- Over 500,000 Americans with new cases of arthritis every year.

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International Market

CMO has a certificate of Free Trade and is available for export. The full potential of the international market for CMO should be more than double that of the US market. However, a world wide market is impossible to project without first answering these questions:

- What is the true scope of effectiveness for CMO on other autoimmune related diseases?
- How will price positioning effect foreign markets?

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Current Market

Last year independent distributors sales of CMO expanded at a rate of approximately 20% per month. Orders for this coming year exceed 100,000 units..

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Counterfeit & Inferiort

With the success of CMO in the marketplace, counterfeit, inferior and legally questionable products are rapidly appearing. Already two such impostors have been forced to comply with cease and desist orders and a third that refused to comply was sued resulting in a half million dollar judgement. Various companies are marketing cetylmyristoleate as CMO. This is very deceptive because CMO is not cetylmyristoleate. This is also illegal since a trademark registration for CMO was filed and those rights were assigned to CMO Distribution Centers of America Inc. Our investigations reveal only three manufacturers of cetylmyristoleate. All of their end products can be identified as liquid, 48 capsule or 60 capsule units. Though cetylmyristoleate was effective as an injectable compound, it is not nearly as effective as an orally administered agent. CMO is cerasomal-cis-9-cetylmyristoleate a highly bio-available analogue that is designed to be orally administered and is over 90% effective. Only CMO has been tested clinically. CMO is naturally derived from beef and may be sold directly to the public without regulatory intervention.

Synthetic cetylmyristoleate appears to be in the market without clinical study or the proper regulatory approval. This synthetic version of the original injectable compound is being sold as an orally administered product. Reports of it's effectiveness have not been favorable. In fact, it has been so ineffective the mere association of this product with CMO is about to inspire legal action. This high failure rate can be explained by the manufacturer's own words. Published in the Journal of Pharmaceutical Sciences he said that cetylmyristoleate was most effective when injected near the site of the arthritis. We agree with that observation completely. That's why we formulated an orally administered analogue.

There is a very odd collection of characters with uncertain backgrounds that were trying to market cetylmyristoleate and other substances as CMO. They have been forced to comply with a cease and desist order. They are hard to keep track of because they collectively have several corporations that

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change names frequently. They are easy to identify because no matter what corporation they operate behind, their literature claims that their cetylmyristoleate comes from "vegetable sources". This claim has our biochemist feeling a little bit confused, because there are no adequate vegetable sources for cetylmyristoleate. This brings to mind the question of exactly what is the source of their product? We have done some investigation and find that many of it's users complain of intense nausea and diarrhea to the point where they cannot continue the protocol. We suspect the presence of noxious or toxic substances. It is our moral duty to protect the potential victims of this product and we plan to fund the costly chemical analysis. It is of course our hope that this is not the case. We have addressed two of the three forms of cetylmyristoleate that are available on the market. The third is hardly worth mentioning. This product contains whale spermaceti. Cows, beavers, whales and Swiss albino mice contain cetylmyristoleate. However, injecting these creatures will not be of very much benefit to the arthritis sufferer. Neither will this product. In mentioning inferior products, we cannot overlook glucosamine sulfate and chondroitin sulfate. These compounds help the body repair cartilage at an accelerated rate so long as you continue to take them and the disease doesn't progress to the point where arthritis is removing cartilage faster than your body can rebuild it. The down side of glucosamine sulfate and chondroitin sulfate is that you have to continually take it for the rest of your life to maintain any kind of relief and you have to accompany it with the 9 point program and stringent diet outlined in Dr. Theodosakis' book. It is a similar protocol to pain killers, anti-inflammatory drugs and steroids. While you take them your arthritis will not bother you as much, but once you stop you're soon back to square one again. Even the Arthritis Foundation cannot recommend glucosamine and chondroitin sulfate as a treatment for osteoarthritis or any other form of arthritis.

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Unique

CMO is in a totally different category than the 9 point program, glucosamine sulfate, chondroitin sulfate, cartilage and natural unflavored gelatin. We have always acknowledged the potential benefits of these substances and mention them in our suggested use pamphlets under Nutrients .

CMO is in a totally different category than cetylmyristoleate. CMO is:

- Naturally derived from beef
- Legally sold directly to the public
- Backed by clinical study
- Supported by ongoing research
- Developed for oral administration
- Highly effective
- Beneficial to all types of arthritis except gouty arthritis
- Manufactured by a reliable and reputable company
- Protected by trademark registration

As you can see, we have a unique product and we have moved swiftly to protect it's reputation from counterfeiters and imitators. We have been working on securing the status of CMO in the market place through a consumer awareness campaign. The next page reflects just one of the ideas that may be used in health trade journals.

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<http://home.carthlink.net/~cmocure/cmo/cm00006.html>

Promotion

Target Market

With 85% of Americans over 65 years old and 40% of Americans over 40 years old being afflicted with arthritis, the target market is plain to see. All senior and adult health related media is prime launch ground for any campaign and has brought at least a 2 to 1 return. Detroit metropolitan areas are generating 3 to 1 returns in senior oriented newspaper print media. Television advertising is untested at this point. Radio advertising response has been varied. Direct mail has been approached with several methods and a variety of results. Mailings to seniors organizations have brought less than a 1% return, but direct mail test marketing to seniors in Southfield, Michigan brought a staggering 7% return.

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Print

This approach to print ads keep any claims about the product itself from falling under regulatory agency scrutiny. Currently all distributors are modifying their approach to parallel this one. Ad placement has proven crucial to the response rate from print advertising. Classified ads barely brought a 1 to 1. Home Living, Senior Living and Health and Fitness magazine inserts proved to be very responsive. Responses of 3 to 1 are achieved through these type of placements as well as standard placement in news sections carrying health related articles. Display ads have been anywhere from 2 to 5 column inches on the average. The ad on this page is a typical 4 column inch size.

Currently all advertising is geared to generate a mailing. All product information pamphlets should contain something similar to this statement: "CMO is naturally derived. It is sold only as a dietary supplement not intended to treat, cure, or diagnose any disease. Therefore, it is available mail order without prescription." Response to requested mailings are better than 10%.

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Radio

Radio health talk shows have proven to generate an overwhelming response. Both Dr. Sands and Dr. Muller are available for interviews. In Detroit the response to the Mark Scott Show with both Dr. Sands and Dr. Muller generated sales of over 80 bottles per week for over 5 weeks running. Zerbo's Health Foods in Livonia Michigan ran only 2 radio ads during the Mark Scott Show and they are selling about a dozen bottles per week. Their sales have not trickled off as would be expected.

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Television

Being that CMO is a consumable, we feel that the best suggested approach to marketing through television is to promote the product through a mini infomercial. The book by Dr. Sands will be available

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very soon. An interview style infomercial with Dr. Sands about the book and how CMO is the cure for arthritis would be the key to get people to call. Then when callers reach an operator, they are converted to purchase CMO as well. This approach keeps any claims about the product itself from falling under regulatory scrutiny. This is the same approach that was used for shark cartilage and it proved to be very effective. We do not have the official facts and figures from shark cartilage sales, but we are told that sales reached 10,000 per week using this technique.

In the meantime, television advertising could be limited to the same technique as print advertising using the "Who Says There's A Cure For Arthritis" slogan and mailing out free information pamphlets and tapes. This could be done very economically with the shortest available spots targeted at the senior and adult health interest shows.

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CMO In The Media

Quotes extracted from: *BOOM You're Well*, by Dr. Douglas Hunt

"Let me give you a feel for the scope of this nutrient, and a sense of how many lives it will improve. ARTHRITIS: It is 98% "effective", I mean it will either cure the disease outright, or at least leave the recipient greatly improved. There are over 50,000,000 Americans with osteoarthritis and another 6,000,000 with rheumatoid arthritis... There are 6 billion people on earth, most of whom are going to get arthritis someday."

Quotes extracted from: *The Nature of Health* KCEO Radio San Diego, August 1996 (see attached tape)

"...It may be what we consider almost a miracle cure for arthritis, and the form of arthritis doesn't matter. ...What is more impressive is once you undergo the appropriate treatment... you are in most cases free from arthritis symptoms forever."

Quotes extracted from: *The Mark Scott Show* WXYT Radio Detroit, December 1996 (see attached tape)

"Hang on folks because if you haven't heard this before, it certainly is going to be an eye opener for you. ...Amazing is not the word for it. ...CMO gets to the source of the problem, it actually stops the arthritic process."

Quotes extracted from: *Rescued From Arthritis*, by Dr. Len Sands (see attached manuscript)

"This book reports on a substance discovered years ago... It is already available now and has already succeeded in that magical immunological intervention for thousands of grateful ex-arthritic individuals... it's best known by its trademarked name of CMO"

Quotes extracted from: *Second Opinion*, May, 1996. Newsletter by Dr. William Campbell Douglass (see attached)

Now we have a new star on the horizon that promises as much (or more) than the old sure-cures... The trade name is CMO, so that's what we'll call it."

Quotes extracted from: *Journal of Pharmaceutical Sciences*, Vol. 83, No 3, March, 1994.

"It is to be hoped that our very promising but preliminary results will stimulate other investigators to repeat and extend our studies with larger test groups and more exact protocols with respect to dosages

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<http://home.earthlink.net/~cmocure/cmo/cm00006.html>

and length of trials and, particularly, more extensive tests of cetyl myristoleate analogues."

Quotes extracted from: *The Nature of Health Magazine*, September, 1996.

"On August 2, 1996, I interviewed Dr. Len Sands on my radio program... Our topic of discussion was cerasomal-cis-9-cetylmyristoleate or CMO. That one hour program generated more calls than any other show I've ever done and in fact was the largest response ever for a single show in the history of the radio station. CMO is a natural substance and is considered an immunomodulator. The reason for the enormous interest is the effect of CMO on both rheumatoid and osteoarthritis. The results of CMO are so impressive that nothing that mainstream or natural medicine has to offer can come close to the dramatic reversals in arthritis that have been observed. The link between CMO and arthritis was discovered at the National Institutes of Health... It is estimated that arthritis affects approximately 50 million people in the United States alone. Standard medical treatment is aimed at symptomatic relief of pain and inflammation and has shown to actually accelerate the disease process... In contrast, the CMO protocol works rapidly and does not need to be continued in the vast majority of cases. The rest of this article is devoted to the most commonly asked questions regarding the potential benefits of CMO ...

Does CMO stop arthritis pain? Arthritis pain will disappear completely in almost every instance. In a few extreme cases pain was reduced by only 70% to 90%, which was still of such major benefit that it allowed the persons to function normally again.

Does CMO improve joint mobility? Absolutely! If the joint can be moved just slightly, by the afflicted person or even by someone else, joint mobility can usually be restored. But if the bones have fused and grown together only surgery can help those particular joints.

Can it correct deformities? Yes. Deformed fingers and toes are often caused by inflammation which swells joints and pushes the bones out of place. Reduction of the swelling alone improves appearance dramatically and often allows the dislocated bones to return to their normal positions. Extreme cases may require some physical therapy."

Does it work for both rheumatoid and osteoarthritis? Both types of arthritis respond equally well to CMO. It also works for most other types of arthritis such as those associated with ankylosing spondylitis, Reiter's syndrome, Sjogren's syndrome, Behçet's syndrome, and psoriasis. It has also been found to relieve various types of back pain of undetermined origin, which is more than likely arthritis related.

What about really severe cases? Most people previously confined to bed or to wheelchairs are no longer dependent on others for care. A number of these cases received an additional benefit from repeating the treatment one more time. A few others found that physical therapy or exercise programs also helped.

Does it work for everyone? So far CMO has been able to help everyone who has not suffered from digestive problems or liver function impairment, which usually results from disease, alcohol or steroid abuse.

Is age a factor? Not really. All ages respond well. Although arthritis becomes far more common with advancing age, even young children are sometimes afflicted."

RESOURCES Services CMO Distribution Centers's entire staff is at your disposal. There are also graphic artists, copy writers, market analysts and attorneys who are completely familiar with this project and they are available on a free-lance basis.

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Personnel There are dozens of doctors available to help promote CMO. There is a multitude of

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<http://home.earthlink.net/~cmocure/cm0/cm00006.html>

ex-arthritis sufferers that would like to help spread the word. The list of people available for media appearances grows daily. Just to mention a few familiar names:

Dr. Sands is available for telephone interviews or on location interviews. As director of the San Diego Clinic that developed CMO he will provide all the help he can from his location. He is an experienced advertising campaign manager and copywriter. His work with Pontiac, Bendix, AAMCO, AC Spark plugs, and Michigan International Speedway was notable. You will find an example of his personable approach in the attached live radio interviews. Dr. Muller is a walking testimonial to the effectiveness of CMO. His personal experience with arthritis and being cured with CMO makes an incredible first hand report. He is more than willing to appear in person for television, radio, newspaper and magazine interviews.

Dr. Hunt, the author of the book (Boom You're Well), has assured us of his interest and cooperation in connection with promotional appearances. He is a published author with 2 books available through Warner publishing. As an ex-disc jockey from his college days, this multi-talented doctor presents himself smoothly and is very articulate. His enthusiasm for CMO is reflected not only in his writings, but also in his actions. He was motivated to publish the book because he felt that the public needed to know about this revolutionary new substance. The book is very informative. It is easy to read and is based on Dr. Hunt's personal observations about CMO. There were more than 40 patients studied to provide the material for the book. Many of their case histories are contained within.

NOTE: The rights to Dr. Hunt's book were recently purchased for international distribution. All promotional appearances must be approved by the proprietary rights holder.

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Materials CMO Distribution Centers of America Inc. has the most comprehensive graphic and print resources available on CMO. All these resource in the form of master art are available at no charge. Master art for our brochures, press releases, print ads, information pamphlets, stationary and business cards are all available to you. We will even type set your company name and logo into our existing material at no expense.

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World Wide Web Our web site is currently under construction. We invite you to visit us at <http://home.earthlink.net/~cmocure/>. CMO Distribution Centers of America Inc. will list all distributors and their contact information on the web site. We will list any additional services related to arthritis that distributors offer. In addition to the existing web site, there will soon be 24 hour support through a private access site for ordering, downloading latest press releases, a doctors data base and a marketing data base. The marketing database will be updated with information requests from yet another site called the Arthritis Information Net. This site will have the capability to process forms. There will be a section for visitors to fill out information request forms. Access to the information requests will be segmented and relayed according to distributors territorial regions.

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Research CMO Distribution Centers of America Inc. in conjunction with the San Diego Clinic act as a clearing house for all the latest information on CMO. With this joint research effort a network of

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<http://home.earthlink.net/~cmocure/cmo/cm00006.html>

communication is established between all medical professionals and distributors. This allows for up to the minute information sharing. This will facilitate the expansion of the market for CMO to uses other than for arthritis.

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Counterfeit & Inferior Warning

<http://home.earthlink.net/~cmocure/cmo/cm0007.html>

Counterfeit & Inferior Warning

There are a lot of people out there now claiming to have a "cure" for arthritis. I'm afraid that we are responsible for starting all this ruckus. Unfortunately for the consumer, those other people are mostly doing nothing but making "claims". We've been too busy taking care of the research end of arthritis to get involved in any shouting match. Now our product name has been imitated. This has caused a lot of unsatisfied consumers to come to us and ask us to correct the problem. You'll be pleased to know that those imitators have been stopped. Only CMO™ is naturally derived from beef tallow and backed by clinical research. Please look for the TM symbol and accompanying graphic to make sure the product you purchase is authentic.

Counterfeit & Inferior

With the success of CMO in the marketplace, counterfeit, inferior and legally questionable products are rapidly appearing. Already two such impostors have been forced to comply with cease and desist orders and a third that refused to comply was sued resulting in a half million dollar judgment. Various companies are marketing cetylmyristoleate as CMO. This is very deceptive because CMO is not cetylmyristoleate. This is also illegal since a trademark registration for CMO was filed and those rights were assigned to SKF Marketing Inc. Our investigations reveal only three manufacturers of cetylmyristoleate. All of their end products can be identified as liquid, 48 capsule or 60 capsule units. Though cetylmyristoleate was effective as an injectable compound, it is not nearly as effective as an orally administered agent. CMO is cerasomal-cis-9-cetylmyristoleate a highly bio-available analogue that is designed to be orally administered and is over 90% effective. Only CMO has been tested clinically. CMO is naturally derived from beef and may be sold directly to the public without regulatory intervention. Synthetic cetylmyristoleate appears to be in the market without clinical study or the proper regulatory approval. This synthetic version of the original injectable compound is being sold as an orally administered product. Reports of its effectiveness have not been favorable. In fact, it has been so ineffective the mere association of this product with CMO is about to inspire legal action. This high failure rate can be explained by the manufacturer's own words. Published in the Journal of Pharmaceutical Sciences he said that cetylmyristoleate was most effective when injected near the site of the arthritis. We agree with that observation completely. That's why we formulated an orally administered analogue. There is a very odd collection of characters with uncertain backgrounds that were trying to market cetylmyristoleate and other substances as CMO. They have been forced to comply with a cease and desist order. They are hard to keep track of because they collectively have several corporations that change names frequently. They are easy to identify because no matter what corporation they operate behind, their literature claims that their cetylmyristoleate comes from "vegetable sources". This claim has our biochemist feeling a little bit confused, because there are no adequate vegetable sources for cetylmyristoleate. This brings to mind the question of exactly what is the source of their product? We have done some investigation and find that many of its users complain of intense nausea and diarrhea to the point where they cannot continue the protocol. We suspect the presence of noxious or toxic substances. It is our moral duty to protect the potential victims of this product and we plan to fund the costly chemical analysis. It is of course our hope that this is not the case. We have addressed two of the three forms of cetylmyristoleate that are available on the market. The third is hardly worth mentioning. This product contains whale spermaceti. Cows, beavers, whales and Swiss albino mice contain cetylmyristoleate. However, ingesting these creatures will not be of very much benefit to the arthritis sufferer. Neither will this product. In mentioning inferior products, we cannot overlook glucosamine sulfate and chondroitin sulfate. These compounds help the body repair cartilage at an accelerated rate so long as you continue to take them and the disease doesn't progress to the point where arthritis is removing cartilage faster than your body can rebuild it. The down side of glucosamine sulfate

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counterfeit & Inferior Warning

<http://home.earthlink.net/~cmocure/cmo/cm00007.html>

and chondroitin sulfate is that you have to continually take it for the rest of your life to maintain any kind of relief and you have to accompany it with the 9 point program and stringent diet outlined in Dr. Theodosakis' book. It is a similar protocol to pain killers, anti-inflammatory drugs and steroids. While you take them your arthritis will not bother you as much, but once you stop you're soon back to square one again. Even the Arthritis Foundation cannot recommend glucosamine and chondroitin sulfate as a treatment for osteoarthritis or any other form of arthritis.

Unique CMO is in a totally different category than the 9 point program, glucosamine sulfate, chondroitin sulfate, cartilage and natural unflavored gelatin. We have always acknowledged the potential benefits of these substances and mention them in our suggested use pamphlets under Nutrients .

CMO is in a totally different category than cetylmyristoleate. CMO is:

* Naturally derived from beef * Legally sold directly to the public * Backed by clinical study * Supported by ongoing research * Developed for oral administration * Highly effective * Beneficial to all types of arthritis except gouty arthritis * Manufactured by a reliable and reputable company * Protected by trademark registration

As you can see, we have a unique product and we have moved swiftly to protect it's reputation from counterfeiters and imitators. We have been working on securing the status of CMO in the market place through a consumer awareness campaign.

MEMORANDUM - CMOTM, CM Pure, CM Plus, Cetylmyristoleate, et al.

The marketplace seems to be sprouting new CMO counterfeit impersonators every day. Consumers, distributors, nutritionists, scientists, physicians, and other health care professionals are confused and dizzy from the spin put on these phony products. We hope to clarify and differentiate between as many of these various fraudulent impostors as best we can. However, we may not be able to keep up with all the new ones as fast as they appear. Still, you should be able to apply many of the points here to other products as well. First and foremost, let me emphasize that we are the one and only producer of CMOTM. It is strictly our own proprietary product. There is no other. And it is the only naturally derived product of its kind on the market. As such it contains many beneficial closely related trace substances which aid in its effectiveness -- just as the bioflavonoids accompanying vitamin C aid in its effectiveness.

HERE ARE SOME FACTS FOR YOU TO DIGEST:

1. CMOTM is the only naturally derived immunomodulator marketed in the world. There is no other.
2. CMO is the one and only effective orally administered immunomodulator marketed in the world.
3. CMO is the only product of its kind derived from cows. (MOOOve over, impostors.)
4. The biochemical name for CMO is cerasomal-cis-9-cetylmyristoleate. It is not cetylmyristoleate. It is an analog of cetylmyristoleate produced by a complex proprietary process.
5. CMOTM is our proprietary trademarked designation for cerasomal-cis-9-cetylmyristoleate. We are the only manufacturer of CMO. There is no other. Products called CMO by other manufacturers are counterfeits that have virtually no effect on the arthritic process.
6. Cetylmyristoleate is not CMO. Cetylmyristoleate is an injectable. In his own journal article, the discoverer of cetylmyristoleate himself states that it works best when it is injected at or near the site of the arthritic inflammation. It has a very low bioavailability level in oral administration.
7. Myristoleic acid is absolutely essential to make cetylmyristoleate. Myristic acid cannot be used to synthesize cetylmyristoleate or any of its analogs. Any that claim to be phonies.

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Counterfeit & Inferior Warning

<http://home.earthlink.net/~cmocure/cmo/cm00007.html>

8. There is no vegetable source for myristoleic acid. Coconut and a few other vegetable oils do yield myristic acid. Products made from myristic acid do not function as immunomodulators.
9. It is virtually impossible to convert cetylmyristoleate (an oil) into a powder for capsules. Any capsule containing powder is not cetylmyristoleate. It's probably spermaceti or some myristic acid product, both of which have absolutely no immunomodulating properties whatsoever.
10. Spermaceti is a synthetic imitation of a natural compound found in sperm whale oil. It has a molecular structure somewhat like cetylmyristoleate, but it has no effect on the arthritic process. Bottles of spermaceti capsules fraudulently labeled "CMO" keep turning up here and there.
11. Any real cetylmyristoleate that may be available is synthetic and lacks the associated beneficial complexes that occur with our naturally derived CMO. (Refer back to items 4 and 6.) Cetylmyristoleate is a thick oily substance with a very low level of bioavailability when administered orally. It cannot be capsuled without significant leakage.
12. The product called "Myristin" appears to be synthetic (injectable) cetylmyristoleate being marketed as an oral product. But the maker is putting out contradictory information. First, the compound myristin can be found in the Merck Chemical Index as a synonym for glyceryl trimyristate. It seems odd to choose a name which indicates that it could not possibly be cetylmyristoleate. Second, the claims are that the product is derived from vegetable source oils. Perhaps they're just trying to confuse any possible imitators. If it's really cetylmyristoleate, it sure confuses us.
13. Analysis of a sample of the "CM Protocol" product reveals that it contains about 63% propylene glycol – which seems to indicate that the raw materials used are not meant for human consumption! CM Protocol is made by Draco International and is being distributed by private labeling entities as well (e.g. Advanced Labs). Draco also uses the "CM" designation for several other products. Who knows what an analysis of those will show. They first tried calling their products "CMO" but dropped the "O" when we applied proper legal recourse.
14. In checking out the "CM Pure" product (from Biosynergy?) we find that it is based on myristic acid which is not in any way even close to being an immunomodulator. Nor can myristic acid even be used to synthesize cetylmyristoleate. Remember, that requires myristoleic (not myristic) acid.
15. Any product described as being white, tasteless, and odorless (like "CM Pure") could not possibly contain CMO, cetylmyristoleate, or any of its analogs because these are all unpleasant tasting, yellowish in color, and have a strong odor. (Employees hate it when we run CMO at the plant.)
16. Remember, there is no vegetable source for myristoleic acid. Thus, anyone claiming to have an effective product derived from vegetable sources is either terribly mistaken or blatantly lying.
17. When someone claims to have "eliminated the esters" from their product, you can be sure it is not an immunomodulator of any sort.
18. There are an awful lot of incompetent biochemists and unscrupulous crooks out there.
19. We have the one and only CMO. There is no other.

We will try to keep you posted on any relevant new products as we become aware of them. Please advise us of any that come to your attention.

We would be most happy to conference call with any prospective dealer or distributor, or with anyone from any laboratory, research, or medical facility. We would also be delighted to debate representatives from any so-called "competitive" manufacturer.

Complaint Exhibits

Counterfeit & Inferior Warning

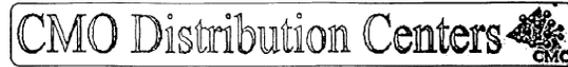
<http://home.earthlink.net/~cmocure/cm/cm00007.html>



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Complaint Exhibits

Notices, Memos & Info Links

<http://home.earthlink.net/~cmocure/cm0/cm00008.htm>

Notices, Memos & Info Links

NOTICES Copyright & Trademark The information, data and graphics embodied in this business presentation are copyrighted and may not be used without the prior written consent from an officer of SKF Marketing Inc. in Florida. CMO and the accompanying graphic is trademarked. For the convenience of the reader we have omitted the TM symbol in most of our titles and body text. However, the omission of the TM symbol for CMO in our text does not release our proprietary claim to it's exclusive use.

Legal Memorandum The following presentation represents management's best current estimate of the potential of the business, the estimated current business transacted, market sizes, history and future. It is recognized that no presentation of this size can be completely free of errors. Therefore investors, partners and contractors should be aware that all business ventures have inherent risks that must be evaluated, discussed with management and experts capable of interpreting the information prior to making any legal commitments. The materials in this presentation are not intended to be, nor offered as, a prospectus to be used as an investment tool or guide. No representations set forth herein should be inferred or implied as projections on a return of investment. The materials in this presentation have not been reviewed or authorized by any local, state or federal governmental agency.

Manufacturers Statement Modestly speaking, CMO™ is a revolutionary new product. CMO™ is naturally derived, it is sold only as a dietary supplement not intended to treat, cure, or diagnose any disease. Therefore it is available mail order without prescription. CMO™ is produced and bottled in the USA. The production facilities are state of the art and inspected by the California State Food and Drug Branch of Health Services.



Last Update: 09/01/97

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Complaint Exhibits

tp://home.earthlink.n...mocure/cmo/cm00009.html

http://home.earthlink.net/~cmocure/cmo/cm00009.html

Contact Us

To learn more about us or CMO, you can call or email us with your questions All of our information services are free of charge.

Web sites: [Consumer Information \(http://home.earthlink.net/~cmocure/cmocure\)](http://home.earthlink.net/~cmocure/cmocure)

Toll Free: (800) 909-CURE (800) 909-2873 Phone: (941) 954- 2100

AOL email: cmocenter@aol.com ("CMO Center" from within AOL) Internet email: cmocure@earthlink.net

Postal: CMO Distribution Centers of America 5726 Cortez Road West # 202 Bradenton, FL 34210



Name:
City/State/Country:
Email Address:

Guest Book Comments:

Order Form

To:
Subject:
Name:
E-mail Addr:
Company:
Address:
Address:
Address:
City: State: Postal:
Country:
Home Phone:

FEDERAL TRADE COMMISSION DECISIONS
VOLUME 129

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<http://home.earthlink.net/~cmocure/cm00009.html>

<http://home.earthlink.net/~cmocure/cm00009.html>

Home Fax:
Work Phone:
Work Fax:

Item Descriptions:

Name On Card:

VISA/MasterCard #:

Expiration Date:

(submit this order) (clear this order)

Decision and Order

DECISION AND ORDER

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

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

The Commission having thereafter considered the matter and having determined that it had reason to believe that the respondents have violated the Act, and that a complaint should issue stating its charges in that respect, and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of thirty (30) days, now in further conformity with the procedure prescribed in § 2.34 of its Rules, the Commission hereby issues its complaint, makes the following jurisdictional findings and enters the following order:

Decision and Order

1. Respondent CMO Distribution Centers of America, Inc., is a Michigan and Florida corporation with its principal office or place of business at 6479 Parkland Drive, Sarasota, FL 34243.
2. Respondent Kalon Samulonis is the President of the corporate respondent. Individually or in concert with others, he formulates, directs, or controls the policies, acts, or practices of the corporation. His principal office or place of business is the same as that of the corporate respondent.
3. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondents, and the proceeding is in the public interest.

ORDER

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. "CMO" shall mean any product or substance that contains or purports to contain cetylmyristoleate (also known as cetyl myristoleate) or "CMO," any analogue of cetylmyristoleate, or any formulation of cetyl alcohol and myristoleic acid, including but not limited to CMO™.
3. Unless otherwise specified, "respondents" shall mean CMO Distribution Centers of America, Inc. ("CDC"), its successors and assigns; Kalon Samulonis, individually and as an officer of the

Decision and Order

corporation; and each of their agents, representatives and employees.

4. "Clearly and prominently" shall mean as follows:
 - A. In an advertisement communicated through an electronic medium (such as television, video, radio, and interactive media such as the Internet and online services), the disclosure shall be presented simultaneously in both the audio and video portions of the advertisement. Provided, however, that in any advertisement presented solely through video or audio means, the disclosure may be made through the same means in which the ad is presented. The audio disclosure shall be delivered in a volume and cadence sufficient for an ordinary consumer to hear and comprehend it. The video disclosure shall be of a size and shade, and shall appear on the screen for a duration, sufficient for an ordinary consumer to read and comprehend it. In addition to the foregoing, in interactive media the disclosure shall also be unavoidable and shall be presented prior to the consumer incurring any financial obligation.
 - B. In a print advertisement, promotional material, or instructional manual, the disclosure shall be in a type size and location sufficiently noticeable for an ordinary consumer to read and comprehend it, in print that contrasts with the background against which it appears.
 - C. On a product label, the disclosure shall be in a type size and location sufficiently noticeable for an ordinary consumer to read and comprehend it, in print that contrasts with the background against which it appears.

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The disclosure shall be in understandable language and syntax. Nothing contrary to, inconsistent with, or in mitigation of the disclosure shall be used in any advertisement or on any label.

5. "Purchaser" shall mean any transferee of any product covered by this order who purchased such product from respondents or any of respondents' distributors for personal use or for the use of a member of the purchaser's family.

6. "Commerce" shall mean as defined in Section 4 of the Federal Trade Commission Act, 15 U.S.C. § 44.

I.

IT IS ORDERED that respondents, directly or through any partnership, corporation, subsidiary, division, or other device, including franchisees, licensees or distributors, in connection with the manufacturing, labeling, advertising, promotion, offering for sale, sale, or distribution of CMO or any substantially similar product, in or affecting commerce, shall not represent, in any manner, expressly or by implication, that such product:

- A. Is effective in the mitigation, treatment, prevention and cure of arthritis;
- B. Provides significant relief from symptoms of arthritis, including pain, swelling, impaired mobility, or deformity;
- C. Is as effective as, or superior to, prescription medications for the treatment of arthritis or the relief of arthritis symptoms;
- D. Is effective in the treatment of multiple sclerosis, leukemia, lupus, emphysema, cancer, benign prostate hyperplasia, silicone breast disease, asthma, fibromyalgia, or scleroderma; or
- E. Is safe or has no harmful side effects;

Decision and Order

unless, at the time the representation is made, respondents possess and rely upon competent and reliable scientific evidence that substantiates the representation.

II.

IT IS FURTHER ORDERED that respondents, directly or through any partnership, corporation, subsidiary, division, or other device, including franchisees, licensees or distributors, in connection with the manufacturing, labeling, advertising, promotion, offering for sale, sale, or distribution of CMO products or any other food, dietary supplement or drug, as “food” and “drug” are defined in Section 15 of the Federal Trade Commission Act, or program, in or affecting commerce, shall not make any representation, in any manner, expressly or by implication, about the performance, safety, efficacy or health benefits of any such product or program, unless, at the time the representation is made, respondents possess and rely upon competent and reliable scientific evidence that substantiates the representation.

III.

IT IS FURTHER ORDERED that respondents, directly or through any partnership, corporation, subsidiary, division, or other device, including franchisees, licensees or distributors, in connection with the manufacturing, labeling, advertising, promotion, offering for sale, sale, or distribution of CMO products or any other food, dietary supplement or drug, as “food” and “drug” are defined in Section 15 of the Federal Trade Commission Act, or program, in or affecting commerce, shall not use the name “cmocure,” use the word “cure” in an address or telephone number, or use any other name, address, or telephone number that represents expressly or by implication, that the

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product will cure any disease or health-related condition, unless, at the time the representation is made, respondents possess and rely upon competent and reliable scientific evidence that substantiates the representation.

IV.

IT IS FURTHER ORDERED that respondents, directly or through any partnership, corporation, subsidiary, division, or other device, including franchisees, licensees, or distributors, in connection with the advertising, promotion, offering for sale, sale, or distribution of any product or program in or affecting commerce, shall not misrepresent, in any manner, expressly or by implication, that such product or program is endorsed or approved by any governmental, professional, or private organization or association, or complies with or meets standards or guidelines for such products or programs established by any such organization or association.

V.

IT IS FURTHER ORDERED that respondents, directly or through any partnership, corporation, subsidiary, division, or other device, including franchisees, licensees, or distributors, in connection with the advertising, promotion, offering for sale, sale, or distribution of any product or program in or affecting commerce, shall not misrepresent, in any manner, expressly or by implication, the existence, contents, validity, results, conclusions or interpretations of any test, study, or research.

VI.

IT IS FURTHER ORDERED that respondents, directly or through any partnership, corporation, subsidiary, division, or other device, including franchisees, licensees or distributors, in connection with the manufacturing, labeling, advertising, promotion, offering for sale, sale, or distribution of any product or program in or affecting commerce, shall not represent, in any

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manner, expressly or by implication, that the experience represented by any user testimonial or endorsement of the product or program represents the typical or ordinary experience of members of the public who use the product or program, unless:

- A. At the time it is made, respondents possess and rely upon competent and reliable scientific evidence that substantiates the representation; or
- B. Respondents disclose, clearly and prominently, and in close proximity to the endorsement or testimonial, either:
 - 1. What the generally expected results would be for users of the product or program; or
 - 2. The limited applicability of the endorser's experience to what consumers may generally expect to achieve, that is, that consumers should not expect to experience similar results.

For purposes of this Part, "endorsement" shall mean as defined in 16 C.F.R. § 255.0(b).

VII.

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

Decision and Order

VIII.

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

IX.

IT IS FURTHER ORDERED that:

- A. Respondents shall not disseminate to any distributor any material containing any representations prohibited by this order.
- B. Respondents shall not, directly or indirectly, authorize any distributor to make any representations prohibited by this order.
- C. Within thirty (30) days after service of this order, respondents shall send by first class mail, with postage prepaid, two exact copies of the notice attached hereto as Attachment A to each distributor with whom respondents have done business between January 1, 1996, and the date of service of this order, to the extent that such distributor is known to respondents through a diligent search of their records, including but not limited to computer files, sales records, and inventory lists. The mailing shall not include any other documents. For purposes of this mailing, respondents shall treat as a distributor any person:
 1. Who purchased a CMO product from respondents for resale;

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2. Who purchased a CMO product from respondents at a discounted or wholesale price unavailable to the general public at the time of the purchase; or
3. Who purchased more than twelve (12) bottles or packages of CMO products from respondents within any twelve (12) month period.

Respondents shall require each distributor with whom they did business between January 1, 1996, and the date of service of this order, to execute and return a copy of Attachment A as a condition of remaining or once again becoming a distributor of CDC.

- D. For a period of three (3) years following service of this order, respondents shall provide two exact copies of the notice attached hereto as Attachment B to each new distributor with whom respondents do business after the service of this order. Such notice shall be sent with the first shipment of respondents' products or programs. Respondents shall require each new distributor to execute and return a copy of the letter as a condition of being a distributor of CDC.
- E. Respondents shall require distributors to submit to respondents all advertising and promotional materials and claims for any products or programs covered by this order for review prior to their dissemination and publication. Respondents shall not authorize distributors to disseminate these materials and claims unless they are in compliance with this order.

Respondents may also comply with the obligations set forth above in this Subpart by:

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1. disseminating to distributors marketing materials that comply with this order; and
 2. requiring those distributors to submit for review all advertising and promotional materials for a particular product or program covered by this order that contain representations that are not substantially similar to the representations for the same product or program contained in the advertising and promotional materials most recently forwarded to the distributors by respondents.
- F. Respondents shall use reasonable efforts to monitor distributors' advertising and promotional activities. In the event that respondents receive any information that, subsequent to receipt of Attachment A or Attachment B pursuant to Subparts C and D of this Part, any distributor is using or disseminating any advertisement or promotional material or making any oral statement that contains any representation prohibited by this order, respondents shall immediately terminate said distributor's right to market respondents' products or programs, and immediately provide, by certified mail, all relevant information, including name, address, and telephone number of the company at issue, the nature of the violation, and any relevant materials used or disseminated, to the Associate Director, Division of Enforcement, Federal Trade Commission, Washington, D.C. 20580.

X.

IT IS FURTHER ORDERED that respondents shall refund the full purchase price of their CMO products, including shipping and handling and applicable taxes, to each eligible purchaser who requests a refund, under the following terms and conditions:

Decision and Order

- A. Within thirty (30) days after service of this order, respondents shall send by first class mail, with postage prepaid, an exact copy of the notice attached hereto as Attachment C, showing the date of mailing to each purchaser other than a distributor as defined in Part IX, who purchased respondents' CMO products between January 1, 1996, and the date respondents executed this order, to the extent that such purchaser is known to respondents through a diligent search of their records, including but not limited to computer files, sales records, and inventory lists. The mailing shall not include any other documents.

- B. If any purchaser other than a distributor as defined in Part IX, within one hundred and twenty (120) days of the service of this order, makes a request for a refund substantially in the form of the request contained in Attachment C, and respondents' diligent inquiry and examination of the corporate respondent's books and records reasonably substantiates the purchaser's claim of purchase or the purchaser provides proof of purchase, including but not limited to any of the following: return of goods or packaging, canceled check(s), credit card invoice(s) or receipt(s), the refund shall be paid within fifteen (15) business days of respondents' receipt of the refund request.

XI.

IT IS FURTHER ORDERED that respondent CDC and its successors and assigns, and respondent Kalon Samulonis shall, no later than one hundred eighty (180) days after the date of service of this order, send by certified mail a monitoring report, in the form of a sworn affidavit executed on behalf of respondents, to the Associate Director, Division of Enforcement, Bureau of

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Consumer Protection, Federal Trade Commission, Washington, D.C. 20580. This report shall specify the steps respondents have taken to comply with the terms of Part X of this order and shall state, without limitation:

- A. The name and address of each purchaser from whom respondents received a refund request;
- B. The date on which each request was received, the amount of the refund request, and the amount of the refund provided by respondents to each such purchaser;
- C. The status of any disputed refund request and the identification of each purchaser whose refund request is disputed, by name, address, and amount of the claim; and
- D. The total amount of refunds paid by respondents.

XII.

IT IS FURTHER ORDERED that respondent CDC and its successors and assigns, and respondent Kalon Samulonis shall, for five (5) years after the last correspondence to which they pertain, maintain and upon request make available to the Federal Trade Commission for inspection and copying: Copies of all notification letters sent to distributors, communications between respondents and distributors referring or relating to the requirements of Part IX, and any other materials created pursuant to Parts IX or X of this order.

XIII.

IT IS FURTHER ORDERED that respondent CDC and its successors and assigns, and respondent Kalon Samulonis 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:

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- A. All advertisements and promotional materials containing the representation;
- B. All materials that were relied upon in disseminating the representation; and
- C. All tests, reports, studies, surveys, demonstrations, or other evidence in their possession or control that contradicts, qualifies, or calls 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.

XIV.

IT IS FURTHER ORDERED that respondent CDC and its successors and assigns, and respondent Kalon Samulonis shall deliver a copy of this order to all current and future principals, officers, directors, and managers, and to all current and future employees, agents, and representatives having responsibilities with respect to the subject matter of this order, and shall secure from each such person a signed and dated statement acknowledging receipt of the order. Respondents shall deliver this order to current personnel within thirty (30) days after the date of service of this order, and to future personnel within thirty (30) days after the person assumes such position or responsibilities.

XV.

IT IS FURTHER ORDERED that respondent CDC and its successors and assigns, and respondent Kalon Samulonis shall notify the Commission at least thirty (30) days prior to any change

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in the corporation(s) that may affect compliance obligations arising under this order, including but not limited to dissolution, assignment, sale, merger, or other action that would result in the emergence of a successor corporation; the creation or dissolution of a subsidiary, parent, or affiliate that engages in any acts or practices subject to this order; the proposed filing of a bankruptcy petition; or a change in the corporate name or address. Provided, however, that, with respect to any proposed change in the corporation about which respondents learn less than thirty (30) days prior to the date such action is to take place, respondents shall notify the Commission as soon as is practicable after obtaining such knowledge. All notices required by this Part shall be sent by certified mail to the Associate Director, Division of Enforcement, Bureau of Consumer Protection, Federal Trade Commission, Washington, D.C. 20580.

XVI.

IT IS FURTHER ORDERED that respondent CDC and its successors and assigns, and respondent Kalon Samulonis shall, within sixty (60) days after the date of service of this order, and at such other times as the Federal Trade Commission may require, file with the Commission a report, in writing, setting forth in detail the manner and form in which they have complied with this order.

XVII.

This order will terminate on May 16, 2020, 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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- 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.

By the Commission.

Decision and Order

ATTACHMENT A**LETTER TO DISTRIBUTORS WITH WHOM RESPONDENTS
HAVE DONE BUSINESS PRIOR TO SERVICE OF THIS
ORDER**

[To be printed on letterhead of CMO Distribution Centers of
America, Inc.]

[Name and address of recipient]

[Date]

Dear [recipient's name]

It is against the law to make false claims about any product or to make any health-related claims about any product of CMO Distribution Centers of America, Inc., which are not substantiated by competent and reliable scientific evidence. Competent and reliable scientific evidence is defined as tests, 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. Anecdotal evidence and consumer testimonials are not considered competent and reliable scientific evidence.

The Federal Trade Commission has determined that it has reason to believe that claims that CMO Distribution Centers of America, Inc.'s cetyl myristoleate ("CMO") products are effective in the treatment, relief, mitigation, prevention, or cure of arthritis and other health conditions are not substantiated by competent and reliable scientific evidence. As a result of this determination, CMO Distribution Centers of America, Inc., has agreed to send this letter to its current and former distributors and institute certain procedures, described below.

Decision and Order

CMO Distribution Centers of America, Inc., intends to abide by the law and demands that its distributors do the same. Therefore, as a condition of your future purchase of CMO Distribution Centers of America, Inc.'s products intended for distribution, or resale, or recommendation to others in the context of a professional or commercial relationship, you must agree not to use, rely on, or distribute any advertising or promotional materials containing false or unsubstantiated claims. You must further agree not to make false or unsubstantiated oral representations with regard to any product or program of CMO Distribution Centers of America, Inc. You must also notify your customers who purchase the products for redistribution to do the same. If you or those customers use such materials or make such representations we will stop doing business with you.

In order that CMO Distribution Centers of America, Inc., may assure itself that you are in compliance with the aforesaid requirements, you must, as a condition of distributing the Company's products, agree to submit to CMO Distribution Centers of America, Inc., in advance and prior to use, dissemination, or publication, all advertisements or promotional materials that you intend to use, publish, or disseminate with regard to any CMO Distribution Centers of America, Inc., product or program. In addition, you must furnish us with the URL (Internet address) of any web site you intend to use in connection with the marketing or promotion of our products. You must further agree not to use, disseminate, or publish any such advertisement or promotional materials without our prior approval. We may, in our discretion, send you materials you are authorized to use in your advertising.

Should you fail or refuse to comply with the terms of this letter, we will not do business with you. Furthermore, if CMO Distribution Centers of America, Inc., has reason to believe that you have misrepresented or made claims with respect to any of

Decision and Order

our products that are false or not substantiated by competent and reliable scientific evidence, CMO Distribution Centers of America, Inc., will report your violation to the Federal Trade Commission. Please sign, date, and return the enclosed copy of this letter to CMO Distribution Centers of America, Inc., 6479 Parkland Drive, Sarasota, FL 34243, acknowledging your receipt of this letter and your agreement to the terms set forth herein.

Thank you very much for your cooperation.

Sincerely,

Kalon Samulonis
President

ACKNOWLEDGMENT AND AGREEMENT

The undersigned acknowledges receipt of this letter and hereby agrees to its terms and conditions.

Date

Signature

Title

Decision and Order

ATTACHMENT B

LETTER TO DISTRIBUTORS WITH WHOM RESPONDENTS
HAVE DONE BUSINESS SINCE RESPONDENTS
EXECUTED THIS ORDER

[To be printed on letterhead of CMO Distribution Centers of
America, Inc.]

[Name and address of recipient] [Date]

Dear [recipient's name]

It is against the law to make false claims about any product or to make any health-related claims about any product of CMO Distribution Centers of America, Inc., which are not substantiated by competent and reliable scientific evidence. Competent and reliable scientific evidence is defined as tests, 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. Anecdotal evidence and consumer testimonials are not considered competent and reliable scientific evidence.

The Federal Trade Commission has determined that it has reason to believe that claims made in the past that CMO Distribution Centers of America, Inc.'s CMO products are effective in the treatment, relief, mitigation, prevention, or cure of arthritis and other health conditions are not substantiated by competent and reliable scientific evidence. As a result of this determination, CMO Distribution Centers of America, Inc., has agreed to send this letter to its customers who purchase the Company's product for distribution or resale.

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CMO Distribution Centers of America, Inc., intends to abide by the law and demands that its distributors do the same. Therefore, as a condition of your purchase of CMO Distribution Centers of America, Inc.'s products intended for distribution, or resale, or recommendation to others in the context of a professional or commercial relationship, you must agree not to use, rely on, or distribute any advertising or promotional materials containing false or unsubstantiated claims. You must further agree not to make false or unsubstantiated oral representations with regard to any product or program of CMO Distribution Centers of America, Inc. You must also notify your customers who purchase the products for redistribution to do the same. If you or those customers use such materials or make such representations, we will stop doing business with you.

In order that CMO Distribution Centers of America, Inc., may assure itself that you are in compliance with the aforesaid requirements, you must, as a condition of distributing the Company's products, agree to submit to CMO Distribution Centers of America, Inc., in advance and prior to use, dissemination, or publication, all advertisements or promotional materials that you intend to use, publish, or disseminate with regard to any product of CMO Distribution Centers of America, Inc. In addition, you must furnish us with the URL (Internet address) of any web site you intend to use in connection with the marketing or promotion of our products. You must further agree not to use, disseminate, or publish any such advertisement or promotional materials without our prior approval. We may, in our discretion, send you materials you are authorized to use in your advertising.

Should you fail or refuse to comply with the terms of this letter, we will not do business with you. Furthermore, if CMO Distribution Centers of America, Inc., has reason to believe that you have misrepresented or made claims with respect to any of our products that are false or not substantiated by competent and reliable scientific evidence, CMO Distribution Centers of

Decision and Order

America, Inc., will report your violation to the Federal Trade Commission.

Please sign, date, and return the enclosed copy of this letter to CMO Distribution Centers of America, Inc., 6479 Parkland Drive, Sarasota, FL 34243, acknowledging your receipt of this letter and your agreement to the terms set forth herein.

Thank you very much for your cooperation.

Kalon Samulonis
President

ACKNOWLEDGMENT AND AGREEMENT

The undersigned acknowledges receipt of this letter and hereby agrees to its terms and conditions.

Date

Signature

Title

Decision and Order

ATTACHMENT C**LETTER TO CUSTOMERS (OTHER THAN DISTRIBUTORS)
WITH WHOM RESPONDENTS HAVE DONE BUSINESS
PRIOR TO EXECUTING THIS ORDER**

[To be printed on letterhead of CMO Distribution Centers of
America, Inc.]

[Name and address of recipient] [Date]

Dear [recipient's name]

The Federal Trade Commission has determined that it has reason to believe that claims made in the past that CMO Distribution Centers of America, Inc.'s cetyl myristoleate ("CMO") products are effective in the treatment, relief, mitigation, prevention, or cure of arthritis and other health conditions are not substantiated by competent and reliable scientific evidence. As a result of this determination, CMO Distribution Centers of America, Inc., has agreed to send this letter to its retail customers and former customers and institute the refund program described below.

If your purchase of CMO Distribution Centers of America, Inc., CMO products was intended for the personal use of you or your family and not for distribution, or resale, or for recommendation to others in the context of a professional or commercial relationship, you may be entitled to a refund of the purchase price, together with any shipping and handling charges and applicable sales taxes. As part of its agreement with the Federal Trade Commission, CMO Distribution Centers of America, Inc., has agreed to offer refunds to certain customers who verify that they purchased CMO Distribution Centers of America, Inc.'s CMO products for their own use or the use of their families and did not offer the products for resale, and that they are not satisfied with the purchase.

Decision and Order

To claim a refund, please complete the attached form, or a copy of it, and return it to the indicated address within ninety (90) days of the date of this letter. If possible, please indicate on the form the price you paid for the products you purchased, including any shipping or handling charges or sales taxes; and you may submit copies of any documentation substantiating the expense. If you do not supply this information, we will calculate your refund from our records.

We will honor all eligible, undisputed claims within fifteen (15) business days after receiving them.

Sincerely,

Kalon Samulonis
President

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To apply for a refund:

Complete the form below, or make a copy of it. Please print legibly.

Return the form to CMO Distribution Centers of America, Inc., 6479 Parkland Drive, Sarasota, FL 34243, no later than ninety (90) days after the date of this letter.

To: CMO Distribution Centers of America, Inc., 6479 Parkland Drive, Sarasota, FL 34243

From: _____ (Name)

_____ (Mailing Address)

_____ (City, State, and Zip Code)

_____ (Telephone Number)

I purchased one or more cetyl myristoleate (CMO) products made or distributed by your company, for my personal use or the use of persons in my family. I am not satisfied with the purchase.

Please refund my purchase price of \$_____ (amount, if known), together with the amounts I was charged for shipping and handling \$_____ (amount, if known) and sales tax \$_____ (amount, if known).

Date

Signature

Analysis to Aid Public Comment

Analysis of Proposed Consent Order to Aid Public Comment

The Federal Trade Commission has accepted, subject to final approval, an agreement to a proposed Consent Order (“proposed order”) from CMO Distribution Centers of America, Inc., and Kalon Samulonis, individually and as an officer of CMO Distribution Centers of America, Inc.

The proposed consent order has been placed on the public record for thirty (30) days for the reception of comments by interested persons. Comments received during this period will become part of the public record. After thirty (30) days, the Commission will again review the agreement and will decide whether it should withdraw from the agreement or make final the agreement’s proposed order.

This matter concerns advertisements on the Internet for a product called “CMO,” described as a form of cetylmyristoleate, said to be derived from beef. CMO is purportedly useful in the treatment or cure of arthritis and other diseases. According to the proposed respondents’ advertising, CMO affects the human immune system in one or two courses of treatment, each lasting less than three weeks. The proposed respondents claimed their product permanently relieves the symptoms of osteoarthritis and rheumatoid arthritis and reverses the effects of the disease. CMO was also claimed to be useful for the treatment, mitigation, prevention, and cure of most forms of arthritis and a number of other diseases.

The Commission’s complaint charges that the proposed respondents engaged in deceptive advertising in violation of Sections 5 and 12 of the FTC Act by making unsubstantiated claims that their CMO products: (1) are effective in the mitigation, treatment, prevention, and cure of all forms of arthritis, except gouty arthritis; (2) relieve all symptoms of

Analysis to Aid Public Comment

arthritis, including pain, impaired mobility, swelling, and deformity; (3) are as effective as, or superior to, prescription medications for the treatment of arthritis and the relief of arthritis symptoms; (4) are effective in the treatment of multiple sclerosis, leukemia, lupus, emphysema, cancer, benign prostate hyperplasia, silicone breast disease, asthma, fibromyalgia, and scleroderma; and (5) are completely safe and without harmful side effects, even at extremely high doses.

The complaint further alleges that the proposed respondents made false claims that: (1) clinical studies prove that CMO is a safe and effective treatment for virtually all forms of arthritis except gouty arthritis; (2) CMO is accepted by the medical community; (3) *Time* magazine reported in its October 28, 1996 issue that CMO™ is one of the most promising developments in arthritis research; and (4) the Arthritis Foundation has not commented on CMO, except to suggest that when taking CMO, patients should consult their physicians before reducing steroids or other medications.

The proposed order contains provisions designed to remedy the violations charged and to prevent proposed respondents from engaging in similar acts in the future.

Paragraph I of the proposed order prohibits proposed respondents from making any representation that CMO or any similar product: (1) is effective in the mitigation, treatment, prevention, or cure of arthritis; (2) provides significant relief from symptoms of arthritis, including pain, swelling, impaired mobility, or deformity; (3) is as effective as, or superior to, prescription medications for the treatment of arthritis or the relief of arthritis symptoms; (4) is effective in the treatment of multiple sclerosis, leukemia, lupus, emphysema, cancer, benign prostate hyperplasia, silicone breast disease, asthma, fibromyalgia, or scleroderma; or (5) is safe or has no adverse side effects, unless, at the time the representation is made, respondents possess and rely upon competent and reliable scientific evidence that substantiates the representation.

Analysis to Aid Public Comment

Paragraph II of the proposed order prohibits proposed respondents from making any representations about the performance, safety, efficacy, or health benefits of CMO or any other food, dietary supplement, or drug, unless the claims are substantiated by competent and reliable scientific evidence.

Paragraph III of the proposed order prohibits proposed respondents from using the name “cmocure,” using the word “cure” in an address or telephone number, or using any other name, address, or telephone number in marketing a food, dietary supplement, drug, or program, to represent a cure for any disease or health-related condition, unless the respondents possess and rely upon competent, reliable scientific evidence substantiating the representation.

Paragraph IV of the proposed order prohibits the proposed respondents from misrepresenting that a product or program is endorsed or approved by any governmental, professional, or private organization or association, or complies with standards or guidelines established by such organization or association.

Paragraph V of the proposed order prohibits proposed respondents from misrepresenting the existence, contents, validity, results, conclusions, or interpretations of any test, study, or research.

Paragraph VI of the proposed order prohibits proposed respondents from representing that the experience represented by any user testimonial or endorsement of any product or program represents the typical or ordinary experience of members of the public who use the product or program, unless the representation is true, and competent and reliable scientific evidence substantiates that claim, or respondents clearly and prominently disclose either: (1) what the generally expected results would be

Analysis to Aid Public Comment

for users or the product or program; or (2) the limited applicability of the endorser's experience to what consumers may generally expect to achieve, that is, that consumers should not expect to experience similar results.

Paragraph VII of the proposed order provides that proposed respondents are not prohibited from making representations which are specifically permitted by regulations of the Food and Drug Administration pursuant to the Nutrition Labeling and Education Act of 1990. Paragraph VIII of the proposed order provides that proposed respondents are not prohibited from making representations for a drug that are permitted under tentative final or final standards issued by the Food and Drug Administration or under any new drug application approved by that agency.

Paragraph IX of the proposed order requires that proposed respondents: (1) not disseminate to any distributor any material containing any representations prohibited by the order; (2) not authorize any distributor to make any representations prohibited by the order; (3) send a required notice to each distributor with whom proposed respondents have done business since January 1, 1996, requesting that the distributor cease using any advertising or promotional materials containing unsubstantiated claims for CMO, requesting distributors not to make unsubstantiated oral representations, informing the distributor of this settlement, and not including any other documents in the mailing; (4) for a period of three (3) years following service of the order, send the required notice to each distributor who has not previously received the notice; the notices shall be sent with the first shipment of respondents' products to the distributor; (5) require distributors to submit to proposed respondents all advertising and promotional materials and claims for any products or programs covered by the order for review prior to their dissemination and publication, and not authorize distributors to disseminate materials and claims unless they comply with the order; alternatively, proposed respondents must furnish to distributors marketing materials that comply with the order and require the distributors to submit for review all advertising and promotional materials for a particular

Analysis to Aid Public Comment

product covered by the order that contain representations that are not substantially similar to the representations for the same product or program contained in the marketing materials most recently provided to the distributors by proposed respondents; and (6) use reasonable efforts to monitor distributors' advertising and promotional activities, immediately terminate the right of any distributor who disseminates advertisements or marketing material or makes oral representations prohibited by the order, and immediately provide information to the Federal Trade Commission about any such distributor and the materials used. "Distributor" is defined in the proposed order to mean any person who purchased a product covered by the order from the respondents for resale or at a discounted or wholesale price unavailable to the general public at the time of the purchase, or who has purchased more than twelve bottles or packages of a covered product from respondents within a twelve-month period.

Paragraph X of the proposed order requires the proposed respondents to send a prescribed notice to each person, other than a distributor, who purchased respondents' CMO products and can be identified through a diligent search of respondents' records. The notice offers a refund of the purchase price and any shipping or handling charges to customers who purchased respondents' CMO product for personal use or the use of a family member and who make a request for a refund within ninety days of the date of the notice. Paragraph XI of the proposed order requires the proposed respondents to submit a report to the Federal Trade Commission specifying the actions they have taken to comply with the provisions of Paragraph X. Paragraph XII of the proposed order requires proposed respondents to retain for five years after the last correspondence to which they pertain and to make available to the Federal Trade Commission on request, copies of notification letters, communications with distributors, and other materials relating to the requirements of Paragraph IX and Paragraph X.

Analysis to Aid Public Comment

Paragraph XIII of the proposed order contains record keeping requirements for materials that substantiate, qualify, or contradict covered claims and requires proposed respondents to keep and maintain all advertisements and promotional materials containing any representation covered by the proposed order. In addition, Paragraph XIV requires distribution of a copy of the consent decree to current and future officers and agents. Further, Paragraph XV requires the filing of a compliance report. Paragraph XVI of the proposed order requires the respondents to notify the Federal Trade Commission in advance of any change in the corporation that may affect compliance obligations arising under the order.

Finally, Paragraph XVII of the proposed order provides for the termination of the order after twenty years under certain circumstances.

The purpose of this analysis is to facilitate public comment on the proposed order, and it is not intended to constitute an official interpretation of the agreement and proposed order, or to modify in any way their terms.

Complaint

IN THE MATTER OF

EHP PRODUCTS, INC., ET AL.CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATIONS OF
SEC. 5 OF THE FEDERAL TRADE COMMISSION ACT AND
SECTION 7 OF THE CLAYTON ACT

*Docket C-3940; File No. 9823181
Complaint, May 16, 2000--Decision, May 16, 2000*

This consent order prohibits Respondents EPH Products Incorporated and Elaine H. Parrish from making any representation that CMO or any similar product: (1) is effective in the mitigation, treatment, prevention, or cure of arthritis; (2) provides significant relief from symptoms of arthritis, including pain, swelling, impaired mobility, or deformity; (3) is as effective as, or superior to, prescription medications for the treatment of arthritis or the relief of arthritis symptoms; (4) is effective in the treatment of multiple sclerosis, leukemia, lupus, emphysema, cancer, benign prostate hyperplasia, silicone breast disease, asthma, fibromyalgia, or scleroderma; or (5) is safe or has no adverse side effects, unless, at the time the representation is made, respondents possess and rely upon competent and reliable scientific evidence that substantiates the representation. The order also prohibits respondents from making any representations about the performance, safety, efficacy, or health benefits of CMO or any other food, dietary supplement, or drug, unless the respondents possess and rely upon competent, reliable scientific evidence substantiating the representation unless the claims are substantiated by competent and reliable scientific evidence. In addition, the order prohibits the respondents from misrepresenting that the issuance of a patent proves the safety or efficacy of any product or program, the existence, contents, validity, results, conclusions, or interpretations of any test, study, or research, or that the experience represented by any user testimonial or endorsement of any product or program represents the typical or ordinary experience of members of the public who use the product or program.

Participants

For the Commission: *Judith A. Shepherd, John Hoagland,
Mike Eichorn, and BE.*

Complaint

For the Respondents: *Jonathan Emord, Emord & Associates.*

COMPLAINT

The Federal Trade Commission, having reason to believe that EHP Products, Inc., and Elaine H. Parrish, individually and as an officer of the corporation, have violated the provisions of the Federal Trade Commission Act, and it appearing to the Commission that this proceeding is in the public interest, alleges:

1. Respondent EHP Products, Inc. is a Kentucky corporation with its principal place of business at 8 Kenton Furnace Drive, Ashland, Kentucky 41105. Respondent Elaine H. Parrish is the sole shareholder, President, and Secretary-Treasurer of the corporate respondent. She formulates, directs, and controls the acts and practices of the corporate respondent, including the acts and practices alleged in this complaint. Her principal office or place of business is the same as that of the corporate respondent.
2. Respondents have promoted, offered for sale, sold, and distributed to the public products containing a substance described as cetylmyristoleate, cetyl myristoleate, or CMO, including products identified with the name "Myristin®," [hereinafter sometimes referred to collectively as "CMO."] 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 respondents alleged in this complaint have been in or affecting commerce, as "commerce" is defined in Section 4 of the Federal Trade Commission Act.
4. Respondents have disseminated or have caused to be disseminated advertisements or promotional materials for products containing cetylmyristoleate, including but not necessarily limited to the attached Exhibits A (respondents' Internet web site) through D. These advertisements and promotional materials contain the following statements:

Complaint

- A. Patented relief for arthritis pain
Myristin® Dietary Supplement
brand of cetyl myristoleate

* * *

Myristin® Dietary Supplement is a naturally occurring protective dietary factor which has been shown in laboratory experiments to promote resistance to swelling, tenderness, and pain in joints.

* * *

[depiction of a safety cross]

Safety Manufacture

Safety of Myristin®

A national certified testing laboratory tested safety in accordance with Federal regulations. Myristin® was administered to a group of test animals to evaluate its toxicity in accordance with Federal requirements as listed in 16 CFR 1500.3. . . .There were no abnormalities observed in any of the animals' tissues or organs.

* * *

RESEARCH

* * *

Mr. Diehl pursued the scientific fact that mice do not get arthritis and discovered cetyl myristoleate through his investigations and analyses. He began his research in 1962, and by 1964 had determined that there was a substance in the mice which must protect them from arthritis. After countless experiments, reactions, and

Complaint

purifications, the immunity factor was identified as cetyl myristoleate

* * *

Mr. Diehl observed in scientific studies that arthritis induced in lab animals injected with an arthritis-producing solution could be resolved by cetyl myristoleate, and that animals given cetyl myristoleate in advance of being injected with the arthritis-producing solution were protected against the development of arthritis. Mr. Diehl suffered from osteoarthritis in his hands, and osteoarthritis in his heels and knees made it difficult for him to walk. He was very willing to try this protective factor, cetyl myristoleate, on himself. To his great satisfaction, his hands, heels, and knees stopped hurting between three and six weeks after using cetyl myristoleate. That was in 1991.

* * *

TESTIMONIALS

* * *

From a healthcare professional: “. . . . Being an RN and seeing first hand what the long-term effects of arthritis are, I knew I had to try it. The results have been life-altering. My knee pain is gone as well as headaches that I believe were also weather related. After my second regimen, my range of motion which had been severely restricted in my neck since an injury in 1979 improved at least 50%. I feel better than I have in a long time.”

From a Physician's wife: “MYRISTIN helped my arthritic shoulder. For about three years, I could not lift my right arm much above my waist. . . . After taking it, I could not believe the results. In a couple of weeks, there was dramatic improvement. I could move my arm in a full range of motion without pain. I felt like a new person. I was so happy to get back to normal after being restricted

Complaint

by my condition for so long. I'm now pain-free and able to do what I want to with my right arm. . . ."

* * *

"I had been having back and hip pain for several months that just kept getting worse and worse. An orthopedist told me I had spinal stenosis and a bulging disc. . . . To make a long story short, I took MYRISTIN and within two weeks all my back pain and hip pain were totally gone. . . . That was three months ago, and my back and hip are still pain free."

* * *

"The pain and swelling are gone from my left foot and hands from the rheumatoid arthritis. Three years ago I was found to have hepatitis C, an inflammation of the liver. I took your breakthrough cetyl myristoleate about 5 months ago. Then I had a regular blood screen taken, and I was told the remarkable news that not only is my liver count back in normal range, but there is no sign of the hepatitis C. . . ."

* * *

"For Father's Day and my 66th birthday, my daughter gave me MYRISTIN as a gift. She hoped this dietary supplement would reduce the arthritic pain I have suffered with for many years. My 'stiffness' upon awakening has subsided since taking the first four capsules. When I went back to my doctor on July 19th, my blood sugar level had dropped from 163 to 113, my cholesterol count was down, and he took me off a medication I had been taking for two years for high blood pressure, because that was now normal!"

Complaint

“I tried the cetyl myristoleate. . . . The first area of significance was the stiffness and pain to my neck and shoulder which had developed following an auto accident. . . . [T]he condition is gone! Furthermore, other recurring ailments have completely disappeared. For example, fever blisters are no more. Colds and bouts of flu that would normally transpire during winter do not. Not only all of this but also allergies that were starting up as I approach middle age are also gone.”

* * *

From a healthcare professional: “I checked a patient’s lung capacity on the day she began to take cetyl myristoleate, and again today, 10 days later. She has emphysema-type chronic obstructive lung disease. Her lung function has improved measurably in the three areas commonly measured: volume, flow rate, and force of flow. . . . She has arthritis in her neck, which has improved considerably. I also took [some] myself. I had a chronic right shoulder arthritis, which prevented me from being able to sleep on my right side or from keeping my arm on the back of a chair for more than a few minutes. These painful symptoms were gone [quickly].”

* * *

From an emphysema sufferer: “There is no doubt in my mind that MYRISTIN helped my breathing. My fingers are no longer blue but are a nice pink. Also, my nose and bronchial tubes are clear, allowing me to breathe. My sleep is much better and this is all without using the inhalers I had to use so much. . . .”

From an eczema sufferer: “I have been fortunate enough to apply MYRISTIN to my hands and forearms, and miracle of miracles, my eczema has cleared. I have been under the care of a dermatologist for eczema for 18 years. . . . I applied MYRISTIN to my hands over a three week

Complaint

period, and my eczema was totally gone! I still can't believe it. I am now so proud of my hands."

* * *

USE

* * *

For many people, but not all, these 51 capsules of **Myristin**[®] will take care of their needs for several years or more. . . .

* * *

Myristin[®] has worked for a high percentage of customers who have used it. Based on their experience, there is a good chance **Myristin**[®] will work for you.

[Exhibit A, <http://www.cetylmyristoleate.com/>]

B. **ARTHRITIS SUFFERERS**

Life is Precious

Why waste a moment with arthritis problems?
MYRISTIN[®] dietary supplement can make a difference for you.

* * *

MYRISTIN[®] is a natural product which has been patented for both rheumatoid and osteoarthritis. . . .

* * *

Complaint

WHAT DOES IT DO? **MYRISTIN**® has been shown in laboratory experiments and clinical usage to promote resistance to pain, swelling, and tenderness in joints caused by arthritis.

WHO HAS USED IT? Taken in just one or two courses over a two to four week period, thousands of arthritis sufferers have used **MYRISTIN**®. The product is a safe natural compound which can be taken right along with your prescription medicines and other supplements and vitamins. Most people only need one or two courses every one or two years.

[Exhibit B, *Vital Times*, March, 1998, p. 30]

C. *It's a Natural for Arthritis.*

[A footnote in smaller type states, "The FDA has not evaluated this statement. The product is not intended to diagnose, treat, cure or prevent disease."]

* * *

THE PROOF IS IN THE PATENT.

* * *

MYRISTIN®, **MYRIST-AID**™, our joint nutrient/synergistic capsule, and **MYRISTIN**™ TF lotion are used in one or two courses of 17 days each. After this, most of your patients will not need any more **MYRISTIN**® for one to two years. . . .

[Exhibit C, *Dynamic Chiropractic*, March 23, 1998, p. C-4]

Complaint

D. *It's a Natural for Arthritis.*

[A footnote in smaller type states, "The FDA has not evaluated this statement. The product is not intended to diagnose, treat, cure or prevent disease."]

* * *

Most people only need to use one 17 day course of MYRISTIN® dietary supplement. MYRISTIN® is available as a package with the synergistic capsule MYRIST-AID™, and the topical lotion MYRISTIN® TF. Try it. It could be the answer you're looking for.

* * *

THE PROOF IS IN THE PATENT.

[Exhibit D, *Alternative Medicine Digest*, Issue 22, p. 98]

5. Respondents have disseminated or have caused to be disseminated advertisements for products containing cetylmyristoleate by means of an Internet Web site containing terms ("metatags") embedded in the Web site source code that are used by one or more Internet search engines to index Web sites for the purpose of selecting Web sites responsive to an Internet search request. These metatags, appearing only in the source code and not on a Web page visible to the consumer, include but are not limited to the following:

arthritis pain relief, arthritis cure, miracle cure, medical breakthrough, arthritis relief, arthritis treatment, psoriasis, joint pain, bone pain, fibromyalgia, tendonitis, systemic lupus erythematosus (SLE), scleroderma, low back pain, bursitis, aching feet, aching legs, aching back, tennis elbow, temporomandibular joint disease, chronic obstructive pulmonary disease (COPD), gout, gouty

Complaint

arthritis, emphysema, arthralgia, arthropathy, rheumatism, osteitis, osteochondritis, osteomalacia, osteomyelitis.

6. Through the means described in Paragraphs 4 and 5 taken together, respondents have represented, expressly or by implication, that:

- A. Respondents' CMO products are safe and effective in the mitigation, treatment, prevention, and cure of most forms of arthritic conditions, including rheumatoid arthritis and osteoarthritis.
- B. Respondents' CMO products significantly relieve pain, swelling, and tenderness caused by arthritis.
- C. Respondents' CMO products are effective in the mitigation, treatment, and cure of hepatitis C, emphysema, obstructive lung disease, spinal stenosis, eczema, psoriasis, aches and pains of the back and extremities, fibromyalgia, tendinitis, systemic lupus erythematosus, scleroderma, bursitis, temporomandibular joint disease, gout, arthropathy, osteitis, osteochondritis, osteomalacia, and osteomyelitis.
- D. Respondents' CMO products are effective in the prevention of fever blisters, colds, flu, and allergy symptoms.
- E. Respondents' CMO products effectively lower cholesterol, blood pressure, and blood sugar levels.

7. Through the means described in Paragraph 4, respondents have represented, expressly or by implication, that testimonials from consumers appearing in the advertisements or promotional materials for respondents' CMO products reflect the typical or ordinary experience of members of the public who use the products.

Complaint

8. Through the means described in Paragraphs 4 and 5, respondents have represented, expressly or by implication, that they possessed and relied upon a reasonable basis that substantiated the representations set forth in Paragraphs 6 and 7, at the time the representations were made.

9. In truth and in fact, respondents did not possess and rely upon a reasonable basis that substantiated the representations set forth in Paragraphs 6 and 7 at the time the representations were made. For example, studies have not examined the efficacy of the ingredients in respondents' CMO products in the prevention or cure of arthritis, hepatitis C, emphysema, obstructive lung disease, spinal stenosis, eczema, psoriasis, fibromyalgia, tendonitis, systemic lupus erythematosus, scleroderma, temporomandibular joint disease, arthropathy, rheumatism, osteitis, osteochondritis, osteomalacia, or osteomyelitis; or in the prevention of fever blisters, colds, flu, or allergy symptoms; or in lowering cholesterol, blood pressure, or blood sugar levels. In addition, there is insufficient information available to determine the reliability of other purported studies or the applicability of such studies to the respondents' products. Therefore, the representation set forth in Paragraph 8 was, and is, false or misleading.

10. Through the means described in Paragraph 4, respondents have represented, expressly or by implication, that:

- A. The issuance of U.S. patents 4,049,824 and 5,569,676 proves that respondents' CMO products are effective in treating and alleviating the symptoms of rheumatoid arthritis and osteoarthritis.
- B. Laboratory tests prove that respondents' CMO products promote resistance to pain, swelling, and tenderness caused by arthritis.

Complaint

11. In truth and in fact,

- A. The issuance of U.S. patents does not prove that respondents' CMO products are effective in treating or alleviating the symptoms of rheumatoid arthritis and osteoarthritis.
- B. Laboratory tests do not prove that respondents' CMO products promote resistance to pain, swelling, and tenderness caused by arthritis.

Therefore, the representations set forth in Paragraph 10 were, and are, false or misleading.

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

THEREFORE, the Federal Trade Commission this sixteenth day of May, 2000, has issued this complaint against respondents.

By the Commission.

Complaint Exhibits

Exhibit A

Products

EHP Products

Box 1306
16061329-9229

Ashland KY 41105
FAX (606) 325-8569



Patented relief for arthritis pain
Myristin® Dietary Supplement
brand of cetyl myristoleate
U.S. Patent 5,569,676

EHP Products, Inc. markets Myristin® Dietary Supplement in the United States and internationally.

Myristin® Dietary Supplement is a naturally occurring protective dietary factor which has been shown in laboratory experiments to promote resistance to swelling, tenderness, and pain in joints.

EHP Products, Inc. was founded in 1995 by Elaine Parrish, daughter of the discoverer of cetyl myristoleate, Harry W. Diehl. Mr. Diehl (pronounced "deal") wanted to assure a way for this groundbreaking discovery to reach the public in his original oil formula, and Elaine was willing to form a company to distribute his formula of cetyl myristoleate, which EHP Products Inc. tradenamed

Myristin®. Mr. Diehl received a U.S. Patent on cetyl myristoleate for osteoarthritis in 1996 (U.S. Patent 5,569,676), which he assigned to EHP Products, Inc. He had previously patented cetyl myristoleate for rheumatoid arthritis in 1977 (U.S. Patent 4,049,824).

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use| safety| research

This site has been accessed  times since October 24, 1997.

Exhibit A
EHP Products

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Direct questions or comments to myristin@www.net.

To print pages located within a frame, just click inside that frame and then choose print.

3/17/98

<http://www.cetylmyristoleate.com/EHP.htm>

Complaint Exhibits

EHP ProductsP.O. Box 1306
Phone (606) 329-9279Ashland KY 41105
FAX (606) 325-8569

Safety

Manufacture

Safety of Myristin®

A national certified testing laboratory tested safety in accordance with Federal regulations. Myristin® was administered to a group of test animals to evaluate its toxicity in accordance with Federal requirements as listed in 16 CFR 1500.3. A single oral dose of 5 grams per kilogram of body weight was given and the animals were observed for 14 days thereafter. Any and all behavioral/clinical abnormalities would have been observed and recorded, but none were noted. All animals appeared normal throughout the study period and no mortalities occurred. Animals were sacrificed at the conclusion of the study. There were no abnormalities observed in any of the animals' tissues or organs.

Manufacture of Myristin®

While cetyl myristoleate is a naturally occurring material found in mice, beavers, and sperm whale oil, no animals are used in its manufacture. Myristin® is made in the United States by a fine organics chemical company using purified ingredients.

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Complaint Exhibits

EHP ProductsP.O. Box 1306
Phone (606) 329-9229Ashland KY 41105
FAX (606) 325-8569DiscoveryResearch

Discovery



Mr. Diehl, who retired after 40 years of service at the National Institutes of Health in the Laboratory of Chemistry of the National Institute of Arthritis, Metabolic, and Digestive Diseases, was led to the discovery of cetyl myristoleate through his concern in 1953 of a neighbor's pain and disability from arthritis. An award winning researcher, Mr. Diehl developed over 500 new compounds, several of which were patented by the U.S. Patent Office. Mr. Diehl was recognized in 1958 for developing a new method of preparing 2-deoxy-d-ribose, a sugar found in deoxyribonucleic acid. This sugar is of vital importance to much basic research, and was used by Jonas Salk, M.D., as a culture medium to grow the Salk polio vaccine virus. Mr. Diehl pursued the scientific fact that mice do not get arthritis and discovered cetyl myristoleate through his investigations and analyses. He began his research in 1962, and by 1964 had determined that there was a substance in the mice which must protect them from arthritis. After countless experiments, reactions, and purifications, the immunity factor was identified as cetyl myristoleate through gas chromatography and mass spectrophotometry. Mr. Diehl later discovered that cetyl myristoleate also occurs naturally in male beavers and sperm whale oil. Historically, sperm whale oil has been used in the manufacture of margarine and soaps. A nineteenth century physician, Lacedpe, swore by its medicinal properties, and proclaimed it effective for catarrh, pulmonary ulcers, and renal colic. It was also recommended to soothe, cleanse, and promote the closing of open wounds.

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Research

Mr. Diehl observed in scientific studies that arthritis induced in lab animals injected with an arthritis-

<http://www.cetylmyristoleate.com/research.htm>

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Complaint Exhibits

producing solution could be resolved by cetyl myristoleate, and that animals given cetyl myristoleate in advance of being injected with the arthritis-producing solution were protected against the development of arthritis. Mr. Diehl suffered from osteoarthritis in his hands, and osteoarthritis in his heels and knees made it difficult for him to walk. He was very willing to try this protective factor, cetyl myristoleate, on himself. To his great satisfaction, his hands, heels, and knees stopped hurting between three and six weeks after using cetyl myristoleate. That was in 1991.

Next, Mr. Diehl worked with one of his fellow researchers who is now a researcher at the Department of Pharmacology at the Medical College of Virginia, to develop a scientific paper on cetyl myristoleate which was published in the Journal of Pharmaceutical Sciences. This paper reports that ten normal mice were injected in the tail with Freund's adjuvant (an arthritis-producing material). In a period of 10-20 days, no noticeable swelling developed in the legs or paws. Mice in a second group were injected with Freund's adjuvant in the left hind paw. Again, after 10-20 days, no swelling was detected as determined by comparison of the measurements of paws at the time of injection. These attempts to introduce arthritis in mice failed. Then, a group of rats were injected with cetyl myristoleate, and 48 hours later, they were given the arthritis-inducing agent (Freund's adjuvant). A control group of rats were given Freund's adjuvant only. Both groups of rats were observed for a total of 58 days with respect to weight change, hind and front leg swelling, and general well-being. All rats receiving only Freund's adjuvant developed severe swelling of the front and hind legs, lagged in weight gain, and were lethargic and morbid. Those receiving cetyl myristoleate before receiving Freund's adjuvant grew an average of 5.7 times as much and had little if any evidence of swelling or other symptoms of polyarthritis. The authors concluded that it was apparent that cetyl myristoleate gave virtually complete protection against adjuvant-induced arthritis in rats.

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Direct questions or comments to myristin@www.net.

Complaint Exhibits

EHP Products

P.O. Box 1306
Phone (606) 329-9229

Ashland KY 41105
FAX (606) 325-8569



Order Now via the World Wide Web
(Visa, MasterCard & American Express Only)



Order Now Toll Free
1-888-EHP-0100
FAX - (606) 325-8569



Order via Email
myristin@wwd.net



Order via USPS
EHP Products, Inc.
P.O. Box 1306
Ashland, Kentucky 41105-1306

Please fill out the form below and click on the "Submit" button. All fields in **bold** are required.

Order Details

Quantity	Product	Description	Price
<input type="checkbox"/>	Myristin® Kit	51 Myristin Capsules, 136 Myrist-Aid capsules, and 1 oz Myristin-TF lotion	\$149.50
<input type="checkbox"/>	Myristin-TF 1oz lotion	1 oz Myristin-TF Lotion	\$27.00
<input type="checkbox"/>	Myristin-TF 2oz lotion	2 oz Myristin-TF Lotion	\$49.50
<input type="checkbox"/>	Myrist-Aid	136 Myrist-Aid Capsules	\$35.00
<input type="checkbox"/>	Heprotase Capsules	60 Heprotase Capsules	\$20.00

Shipping and Contact Information

First Name: **Last Name:**
Street Address:
City: **State:** **Zip:**
Phone: () -

<http://www.cetylmyristoleate.com/cfm/order.cfm>

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Complaint Exhibits

Fax: () -

E-mail:

Notify When Shipped: No Yes By Email Other

Comments:

Payment Details

VISA MasterCard American Express

Name on Credit Card:

Credit Card #:

Expiration Date: Example: 9/99

Calculate Order Reset Form

Send mail to myristin@wwd.net with questions or comments about this web site.
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Last modified: September 29, 1997

Complaint Exhibits

Myristin Testimonials

Page 1 of 4

EHP ProductsP.O. Box 1306
Phone (606) 329-9229Ashland KY 41105
FAX (606) 325-8569

Many people have taken cetyl myristoleate as a dietary supplement. These testimonials are strictly for informational purposes, and no claims of health benefits are made or implied by EHP Products as a consequence of these users documenting their experiences. All letters are on file in EHP offices.

From a healthcare professional: "For the last five years both of my knees ached for hours on end with every weather front that occurred. I had taken Lodine for the last three years, which gave me relief from the pain but had begun to cause me such severe edema and stomach discomfort that I had to stop taking it. Many nights I just paced the floor until the hurting stopped. I really worried about what I was going to do for pain relief...when you told me about MYRISTIN. Being an RN and seeing first hand what the long-term effects of arthritis are, I knew I had to try it. The results have been life-altering. My knee pain is gone as well as headaches that I believe were also weather related. After my second regimen, my range of motion which had been severely restricted in my neck since an injury in 1979 improved at least 50%. I feel better than I have in a long time."

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From a Physician's wife: "MYRISTIN helped my arthritic shoulder. For about three years, I could not lift my right arm much above my waist. My orthopedist injected it four times with a cortisone-type drug, and my husband, who is a physician, also injected it. While the injections gave me some relief, there were many side effects. I couldn't take any more injections, and nothing else helped much. I didn't know what I was going to do. Then, you told me about Myristin. After taking it, I could not believe the results. In a couple of weeks, there was dramatic improvement. I could move my arm in a full range of motion without pain. I felt like a new person. I was so happy to get back to normal after being restricted by my condition for so long. I'm now pain-free and able to do what I want to with my right arm. I am going to recommend Myristin to all my friends and family members who have arthritis. It is truly a wonderful thing to be free of arthritis pain, and I want everyone to know about Myristin."

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"Our friends were sharing with us that Mr. Harry Diehl had come up with a cure for arthritis and I became very interested. Later, we were privileged to interview Mr. Harry himself. After that I was ready to try his remedy. After taking the first round of Myristin, I felt much better. My whole body seemed to loosen up. Walking, stooping, turning my head, and even the sinus drainage and coughing were much improved. During and after the second round of Myristin, I was still more improved in all ways. Many thanks to Mr. Diehl and our Lord and Saviour for supplying the knowledge and wisdom to get accomplished a remedy that will help so many hurting people."

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<http://www.cetylmyristoleate.com/testim.htm>

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Myristin Testimonials

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"I am a licensed nail technician. I use my right hand heavily everyday in my work. Several years ago, I noticed a stinging sensation in my fingers. It has persisted all this time, and seemed to be getting worse. It was the wear-and-tear type or arthritis. All I know for sure is that my hand was really bothering me. It really made it hard to get through the day. I decided to try your dietary supplement, Myristin, and it worked great. After several weeks, the pain was gone and I could use my fingers and hand normally. I was so pleased with the results that I bought some for my mother. I was really pleased with the results both my mother and I obtained from taking Myristin."

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"I had been having back and hip pain for several months that just kept getting worse and worse. An orthopedist told me I had spinal stenosis and a bulging disc. He said he could order physical therapy for me, but if that didn't help, I would have to have back surgery. I didn't like the sound of that at all. So I decided just to suffer and take my pain pills. To make a long story short, I took MYRISTIN and within two weeks all my back pain and hip pain were totally gone. I couldn't believe it. I kept waiting to wake up to find my pain had returned, but it didn't. That was three months ago, and my back and hip are still pain free."

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"I've got great news. The pain and swelling are gone from my left foot and hands from the rheumatoid arthritis. Three years ago I was found to have hepatitis C, an inflammation of the liver. I took your breakthrough cetyl myristoleate about 5 months ago. Then I had a regular blood screen taken, and I was told the remarkable news that not only is my liver count back in normal range, but there is no sign of the hepatitis C. Could this [cetyl myristoleate] be for more than just arthritis? Well, I think so."

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"I am writing this letter to describe the progress with my arthritis since trying your immunity factor in December. Up until about a week after trying the cetyl myristoleate, I used aspirin and Orudis 400 mg or Lodine 400 mg for quite some time. These medicines make the pain in my hands slightly more tolerable, but did not alleviate much of it. I still suffered. My work depends on using my arms and hands, and prior to cetyl myristoleate, I sometimes had to leave work in pain. There were times when I could not return for a couple of days, the pain was so bad. Since December, the pain is gone. I sure hope that it doesn't wear off because my life is so much better."

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"I wanted to let you know how well your cetyl myristoleate has healed me. I had blood work done to see what type of arthritis I have. It came out to be osteoarthritis. But the drugs my doctor put me on I could not take. I feel great all over in many ways. Haven't had a cold at all this winter."

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Complaint Exhibits

Myristin Testimonials

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"When I began taking your product, I had pain in both hips at night and found I had to do a lot of 'shifting'. However, now I have a much more comfortable night with no hip pains. Also, I have had considerable pain with my right shoulder and decided to get therapy. The more therapy I had the more uncomfortable I was, so now with MYRISTIN I feel I am improving."

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"For Father's Day and my 66th birthday, my daughter gave me MYRISTIN as a gift. She hoped this dietary supplement would reduce the arthritic pain I have suffered with for many years. My 'stiffness' upon awakening has subsided since taking the first four capsules. When I went back to my doctor on July 19th, my blood sugar level had dropped from 163 to 113, my cholesterol count was down, and he took me off a medication I had been taking for two years for high blood pressure, because that was now normal!"

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"I tried the cetyl myristoleate. The first time, it took about six weeks to realize the relief I now take for granted. The first area of significance was the stiffness and pain to my neck and shoulder which had developed following an auto accident. Although my condition was undiagnosed, Rheumatoid Arthritis is hereditary in my family. In any case, the condition is gone! Furthermore, other recurring ailments have completely disappeared. For example, fever blisters are no more. Colds and bouts of flu that would normally transpire during winter do not. Not only all of this but also allergies that were starting up as I approach middle age are also gone."

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"The osteoarthritis I had for many was what I called "traveling" arthritis, as it moved from joint to joint throughout my body. Sometime in 1994 my right hip started bothering me. I learned of MYRISTIN in 1996, and my first course was taken in June. There was gradual improvement. However, in July, the pain worsened to the point that I used a cane. What I was experiencing was what is called "breakthrough" pain. It lasted a couple of days. The second course was taken in late July. [About a week later], I went to get something from my suitcase on the floor and I suddenly realized there was no pain in my hip. I shouted 'hallelujah' and immediately told the friends I was with, 'Praise the Lord, there is no pain in my hip.' Now, I am going through the process of trying not to favor the hip. It had hurt so bad that it caused me to limp. Flexibility is returning to the joints. Instead of walking the stairs one foot ahead of the other, I am walking normally. To be without pain is such a relief. It makes me feel like a different person."

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From a healthcare professional: "I checked a patient's lung capacity on the day she began to take cetyl myristoleate, and again today, 10 days later. She has emphysema-type chronic obstructive lung disease. Her lung function has improved measurably in the three areas commonly measured: volume, flow rate, and force of flow. The lung volume increased by 7%; the flow rate went from a reading

<http://www.cetylmyristoleate.com/testim.htm>

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Complaint Exhibits

Myristin Testimonials

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typical of obstruction to being normal, and her expiratory force also went from being depressed to within the normal range for her gender and age. She has arthritis in her neck, which has improved considerably. I also took [some] myself. I had a chronic right shoulder arthritis, which prevented me from being able to sleep on my right side or from keeping my arm on the back of a chair for more than a few minutes. These painful symptoms were gone [quickly]."

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"I must tell you that I could feel an improvement after taking the first capsule. It just amazes me how much better I am, and how much improvement I have realized to date. I have had rheumatoid arthritis for many years, and the past few years I have been having more pain and swelling in the joints of my hands and feet. In fact, I have had severe pain in my feet for a long time. This is where I can tell the greatest improvement. When I used to get out of bed in the morning there was instant pain in my feet. That is almost totally gone! I can hardly believe it. My hands are much better also, and from the first day others noticed that the swelling was better."

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From an emphysema sufferer: "There is no doubt in my mind that MYRISTIN helped my breathing. My fingers are no longer blue but are a nice pink. Also, my nose and bronchial tubes are clear, allowing me to breathe. My sleep is much better and this is all without using the inhalers I had to use so much. I have chronic emphysema and have been on an oxygen concentrator for five years. But thanks to MYRISTIN, I am able to do more cooking and cleaning than just a few months ago."

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From an eczema sufferer: "I have been fortunate enough to apply MYRISTIN to my hands and forearms, and miracle of miracles, my eczema has cleared. I have been under the care of a dermatologist for eczema for 18 years. Sometimes it was so bad that I was afraid my fingernails would fall off. Most recently, I have been on Lidex, a steroid which helped, but did not cure it. Then I applied MYRISTIN to my hands over a three week period, and my eczema was totally gone! I still can't believe it. I am now so proud of my hands."

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[use](#) | [safety](#) | [research](#)

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Direct questions or comments to myristin@world.net.

Complaint Exhibits

Use of Myristin

PAGE 1001

EHP ProductsP.O. Box 1306
PHONE (606) 329-9229Ashtand KY 41105
FAX (606) 325-8569

USE

Use of Myristin®Helping the EffectsMyrist-Aid™Other Information

Use of Myristin® as a Dietary Supplement

As a dietary supplement Myristin® is used over a seventeen day course. Three capsules are taken daily for seventeen days with a small amount of water on an empty stomach, about 30-45 minutes before meals. Two Myrist-Aid™ capsules are taken with each Myristin® capsule.

For many people, but not all, these 51 capsules of Myristin® will take care of their needs for several years or more. Some people may need to repeat the full course of 51 capsules much sooner due to their individual metabolism, joint usage, and other factors.

Our customers ask, "Does Myristin® work for everyone?" We answer, "No, it does not," but then neither does anything else. Myristin® has worked for a high percentage of customers who have used it. Based on their experience, there is a good chance Myristin® will work for you.

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Myrist-Aid

Myrist-Aid™ is a synergistic capsule which is taken with Myristin®. As a fatty acid ester, Myristin® needs certain enzymes to help it absorption. These enzymes, lipase and lecithin, are contained in Myrist-Aid. In addition, Myrist-Aid contains dietary supplements with cartilage-building and anti-inflammatory properties. Each capsule of Myrist-Aid contains glucosamine sulfate, 200 mg; methylsulfonylmethane (MSM), 200mg; ascorbic acid, 100 mg; bromelain, 10 mg; manganese, 2.5 mg; turmeric, 25 mg; lecithin, 100 mg; and lipase, 1,800 units. When taken with Myristin®, two Myrist-Aid capsules are taken with each Myristin® capsule, and two at bedtime, for a total of eight Myrist-Aid capsules daily. For best effects, Myrist-Aid should be taken for 3-6 months after the course of Myristin® to help build cartilage and control re-occurrence of inflammation. In continuation use, two Myrist-Aid capsules are taken with each meal and two at bedtime, for a total of eight capsules daily.

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Helping the Effects, Absorption, and Distribution of Myristin®

While Myristin® and Myrist-Aid™ are all the dietary supplementation needed by most people for relief of joint pain, inflammation, and swelling, some individuals would benefit from further supplementation while using Myristin®. Taking one 1,000 mg. capsule of fish oil (omega-3 type) at <http://www.cetylmyristoleate.com/use.htm>

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Complaint Exhibits

Use of Myristin

Page 6 of 11

breakfast and dinner and one 400 unit capsule of Vitamin E at breakfast for thirty days while taking **Myristin®** adds to the likelihood of success. Omega-3 type fish oil and vitamin E capsules are readily available at local health food stores.

Some people have liver congestion from the accumulated years of the liver cleansing out the countless materials ingested into the body. Anyone with possible liver congestion would benefit from a liver cleansing with milk thistle before taking **Myristin®**. Ten days before using **Myristin®**, anyone with a congested liver should reduce intake of fats substantially if not altogether. Two tablets of Heprotase three times a day with meals for ten days is recommended. After this, the liver is setup to handle the ingestion of **Myristin®** more efficiently. Bottles of 60 Heprotase tablets are available from EHP Products at \$20.00 per bottle.

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Other Information about Myristin®

Capsule Content	Time for Effects	Packaging
Children	Use During Pregnancy	Breakthrough Pain
Price	Comparison Shopping	A Note from Dr. Diehl
Seeking Medical Advice	FDA Information	

Capsule Content

Each capsule contains 260 milligrams of cetyl myristoleate and 260 milligrams of cetyl oleate. **Myristin®** contains no sodium, sugar, cholesterol or food coloring.

[top of page other information](#)

Time for Effects

Myristin® supplement needs up to thirty days for its effects to be felt. Some individuals may notice improvement within two weeks, while others may not notice any effects until well after the 30 day course is finished.

[top of page other information](#)

Packaging

Myristin® is available in bottles of 51 capsules. **Myristin®** is an oil. It is encapsulated in softgel capsules. The bottles are protected by a tamper-evident inner seal, and the caps are not child-proof.

[top of page other information](#)

Children

<http://www.cetylmyristoleate.com/use.htm>

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Complaint Exhibits

Use of Myristin

Myristin® dietary supplement may be given to children only on the advice of a qualified healthcare professional, and in the amounts specified by the healthcare professional

[top of page](#) [other information](#)

Use During Pregnancy or with Medical Conditions

As with any supplement or substance, pregnant women or nursing mothers should use Myristin® only after consulting their healthcare professional. The effects of cetyl myristoleate, if any, on a developing fetus have not been studied. Individuals with impaired liver function or asthma should also consult their healthcare professionals before using Myristin®.

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Breakthrough Pain

About 3-5% of users will experience what is called "breakthrough pain" (BTP) BTP may occur after several days of diminution of pain or it may deepen existing pain. BTP may occur anytime from three or four days after use of Myristin® up to several weeks after. BTP may also occur after the second course as well as the first course. Whenever it occurs, BTP is a positive sign that Myristin® is working. BTP occurs because the products of inflammation which have accumulated in and around the joints are being affected and the body is reacting to that. BTP typically lasts two or three days, or as long as six to seven days, and is followed by relief.

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Price

Myristin® capsules are sold as a package with Myrist-Aid™ which contains the digestive enzymes needed for absorption of Myristin®, and Myristin®-TF, a topical lotion. A fifty-one capsule bottle of Myristin®, 136 Myrist-Aid capsules, and a one ounce bottle of Myristin®-TF lotion is \$149.50. If bought separately, the Myrist-Aid is \$35.00 and Myristin-TF is \$27.00, a savings of \$12.00 when included in the package with Myristin® capsules.

[top of page](#) [other information](#)

Comparison Shopping for Best Value

Myristin® is the original oil formula, which is the natural state of cetyl myristoleate. There are other products on the market which offer cetyl myristoleate under various names with much less potency. Some of the products are capsules which contain a powder material with 75 mg of cetyl myristoleate per capsule. They are sold for \$250.00 for 100 capsules, which gives 7.5 grams of cetyl myristoleate, or \$33.33 per gram. If there are other prices posted, you can calculate the price per gram. If the distributor will not tell you how much cetyl myristoleate is in each capsule, or if the label does not state the amount, beware! Myristin's 260 mg per capsule means that fifty-one capsules yields 13.25 grams of cetyl myristoleate per bottle, which costs \$7.50 per gram. Few people would want to take 100 capsules when 51 capsules would provide what they want at a lower price.

Other products are a liquid with propylene glycol used as a volume expander. Most natural product

<http://www.cetylmyristoleate.com/use.htm>

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Complaint Exhibits

Use of Myristin

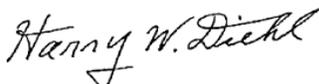
users would probably prefer to avoid consumption of proylene glycol, if given an alternative

Other products contain cetyl myristate, not cetyl myristoleate, so be sure you are buying genuine cetyl myristoleate. Several distributors claim that their product is from a vegetable source. At the present time there are no vegetable-derived commodities or articles of commerce that contain commercially viable concentrations of myristoleic acid, a necessary ingredient in manufacture of cetyl myristoleate. As a practical matter, cetyl myristoleate is made by using myristoleic acid from bovine sources, which are generally available and contain sufficient amounts of myristoleic acid. Anyone buying a cetyl myristoleate product claimed to be from a vegetable source should demand incontrovertible proof of the vegetable source, if one of the reasons for the purchase is the alleged vegetable source.

[top of page](#) [other information](#)

A Note from Dr. Harry W. Diehl, Discoverer of Cetyl Myristoleate

"In purchasing dietary supplements, I've learned to be careful of what I buy. Things are not always delivered as they are advertised. With Myristin®, you can be confident that you are getting the real cetyl myristoleate that I discovered and researched. EHP Products, Inc. and its licensees are the only companies I allow to use my name and patent in their marketing. I've checked their cetyl myristoleate, and it is just like I would make it."



Harry W. Diehl

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Seeking Medical Advice

Anyone with medical questions about Myristin® or questions about whether they should use it should consult a physician. Nothing in this web site is intended as nor should be construed as medical advice. Only a licensed physician or other healthcare professional can give medical advice.

[top of page](#) [other information](#)

FDA Information

None of the statements in these webpages have been evaluated by the Food and Drug Administration. This product is not intended to diagnose, treat, cure, or prevent any disease.

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[use](#) | [safety](#) | [research](#)

This page last updated on November 01, 1997

<http://www.cetylmystoleate.com/use.htm>

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Complaint Exhibits

Exhibit B

30 Vital Times March 1998

Your Mother's famous



**ARTHRITIS
SUFFERERS**

Life Is Precious

Why waste a moment with arthritis problems? **MYRISTIN**[®] dietary supplement can make a difference for you.

WHAT IS MYRISTIN[®]? A brand of cetyl-myristoleate, **MYRISTIN**[®] is a natural product which has been patented for both rheumatoid and osteoarthritis. It is sold as a package with **MYRIST-AID**[™], a synergistic formula containing glucosamine sulfate, MSM[®], and other joint healthy nutrients, and **MYRISTIN**[®] TF, a topical lotion of beneficial fatty acids and **MYRISTIN**[®].

WHAT DOES IT DO? **MYRISTIN**[®] has been shown in laboratory experiments and clinical usage to promote resistance to pain, swelling, and tenderness in joints caused by arthritis.

WHO HAS USED IT? Taken in just one or two courses over a two to four week period, thousands of arthritis sufferers have used **MYRISTIN**[®]. The product is a safe natural compound which can be taken right along with your prescription medicines and other supplements and vitamins. Most people only need one or two courses every one or two years.

WHAT DOES IT COST? Regularly \$149.50 for the package of **MYRISTIN**[®], **MYRIST-AID**[™], and **MYRISTIN**[®] TF lotion, readers of *Vital Times* can purchase one package at the regular price of \$149.50, or two packages for a total price of \$199.00, a savings of \$100.00. And, it's **GUARANTEED**. If not completely satisfied, return any unused **MYRISTIN**[®] capsules, and we will cheerfully refund a pro-rata amount of your purchase price.

HOW CAN I OBTAIN THE MYRISTIN[®] PACKAGE? Direct from family of the discoverer of this marvelous product, Harry W. Diehl, by calling toll free 1-888-347-0100. Or, call for a free information packet to be mailed to you.

EHP Products, Inc. • P.O. Box 1306 • Ashland, KY 41105
Toll Free: 1-888-347-0100 Customer Service 606-329-9339
www.cetylmyristoleate.com e-mail myristin@wwd.net

Exhibit B
EHP Products

Complaint Exhibits

Exhibit C

March 23, 1998

It's a Natural for Arthritis'
MYRISTIN®
Brand of Cetyl Myristoleate

UNION STATES PATENT
5,559,876
THE PRODUCT IS IN THE PRESENT

"If you use MYRISTIN®, you'll know you're getting my formula of cetyl myristoleate."
Harry W. Diehl

MYRISTIN®, MYRIST-AID®, our joint nutrient/synergistic capsule, and MYRISTIN™ TF lotion are used in one or two courses of 17 days each. After this, most of your patients will not need any more MYRISTIN® for one to two years. With the product receiving such positive media attention and being the focus of numerous publications, your patients will be receptive to MYRISTIN®, and you'll like the MYRIST-AID™ formula which includes glucosamine and MSM.* EHP has special volume pricing for health care professionals.

From the family of Harry W. Diehl
EHP PRODUCTS, INC
P.O. BOX 1306, ASHLAND, KY 41105
www.cetylmyristoleate.com
myristin@wwd.net

*The MSM has not received the approval, the product is not marketed in Europe, and, used in several states.

For a free information packet and pricing, call us toll-free at (888) EHP-0100.
EHP

1-888-EHP-0100 • fax 606-325-8569 • Customer Service 606-329-9339

Dynamic Chiropractic
California Forum

My Experience As a Managed Care Chiropractor
Cont'd from C-2

Exhibit C
EHP Products

all. Since we know that between 10-25 percent of the population will go to chiropractors, we know we are selling a product that is misleading by promising benefits which we cannot pay for. Therefore, we will deny most claims not on their merit, but because we have to make money.

What they say:
"The premiums for a plan that pays 30 visits a year with a \$20 co-pay is \$1.01 per month (\$12.12 per year)."

What they mean:
Do you really think we can pay for 30 chiropractic visits a year for only \$12.12 in premiums? We also have some interesting land deals you might be interested in.

What they say:
"The effective management of neuromusculoskeletal conditions includes (insurance company name) thorough evaluation and review of all presenting conditions and proposed treatment plans, which allows the identification of conditions proven to be treated effectively with chiropractic."

What they mean:

chased.
What they say:
"We place an emphasis on quality improvement, and quality is ensured by conducting quality audits and monitoring the care rendered by providers."

What they mean:
We reserve the right to retroactively review claims that somehow got paid, on the chance that we can overrule the original decision and charge back the doctor.

What they say:
"We provide services that are sensitive to our clients' needs for quality: cost-efficient chiropractic care that is also accessible and appropriate."

What they mean:
We expect you to be able to get good chiropractic care for about 60 days before the doctor realizes that we won't pay his bill. The doctor's contract prevents him from charging you for what we do not pay, so you'll never get stuck with an unpaid claim. The doctor's contract also prevents him from suing us for the money. You have total access to our

Complaint Exhibits

Enlarged Exhibit C

It's a Natural for Arthritis¹
MYRISTIN[®]
 Brand of Cetyl Myristoleate

UNITED STATES PATENT
 5,569,676
 THE PROOF IS IN THE PATENT



"If you use MYRISTIN,[®] you'll know you're getting my formula of cetyl myristoleate."

Harry W. Diehl

MYRISTIN,[®] MYRIST-AID,[™] our joint nutrient/synergistic capsule, and MYRISTIN[™] TF lotion are used in one or two courses of 17 days each. After this, most of your patients will not need any more MYRISTIN[®] for one to two years. With the product receiving such positive media attention and being the focus of numerous publications, your patients will be receptive to MYRISTIN[®] and you'll like the MYRIST-AID[™] formula which includes glucosamine and MSM.[®] EHP has special volume pricing for health care professionals.



For a free information packet and pricing, call us toll-free at (888) EHP-0100.
3 4 7

From the family of Harry W. Diehl

EHP PRODUCTS, INC
 P.O. BOX 1306, ASHLAND, KY 41105
www.cetylmyristoleate.com
myristin@wwd.net



¹The FDA has not evaluated this statement. The product is not intended to diagnose, treat, cure or prevent disease.

For more information call 1-888-EHP-0100 • fax 606-325-8569 • Customer Service 606-329-9339

Complaint Exhibits



March 23, 1998

My Experience As a Managed Care Chiropractor

Cont'd from C-2

 Exhibit C
 EHP Products

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chased.

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What they say:

"We provide services that are sensitive to our clients' needs for quality: cost-efficient chiropractic care that is also accessible and appropriate."

What they mean:

We expect you to be able to get good chiropractic care for about 60 days before the doctor realizes that we won't pay his bill. The doctor's contract prevents him from charging you for what we do not pay, so you'll never get stuck with an unpaid claim. The doctor's contract also prevents him from suing us for the money. You have total access to our

Complaint Exhibits

Exhibit D

★ SupraPak 1 ★

Contains **50 NUTRIENTS**, including 30 high-potency, high-quality vitamins & minerals, PLUS...

Bilberry 100mg Citrus Bioflavonoids 200mg CoQ10 50mg
DHA 480mg EPA 720mg FOS 1,000mg Garlic 500mg
Ginger 200mg Ginkgo 80mg GLA 260mg Grape Seed 50mg
Glutamine 1,000mg Glutathione 50mg Green Tea 300mg
Lipoic Acid 50mg Milk Thistle 200mg NAC 250mg
NAG 250mg Red Grape Skin 200mg Turmeric 300mg
Probiotics 500 million each of *L. acidophilus* & *B. bifidum*

Amazing, but true! All of this in one product!

SupraPak 1 is equal to 20 bottles of supplements! Convenient, and saves money, too. There is *nothing* that comes close.

SupraHealth, Inc. 301 N. Harrison St., Suite 303
 Princeton, NJ 08540
 Call toll free 888-716-9186 <http://home.att.net/~suprahealth>

Reader Service #71

It's a Natural for Arthritis!

MYRISTIN
 Brand of Cetyl Myristoleate

"If you use MYRISTIN you'll know you're getting my formula of cetyl myristoleate."*

Harry W. Diehl

Most people only need to use one 17 day course of MYRISTIN* dietary supplement. MYRISTIN* is available as a package with the synergistic capsule MYRIST-AID*, and the topical lotion MYRISTIN* TE. Try it. It could be the answer you're looking for.

From the family of Harry W. Diehl!

EHP PRODUCTS, INC.
 P.O. BOX 1306, ASHLAND, KY 41105
www.wwd.net/myristin myristin@wwd.net

The FDA has not evaluated this statement. This product is not intended to diagnose, treat, cure or prevent disease.

Reader Service #72

"60 Minutes" was POSITIVE on our REAL WILLARD WATER -- Call for a FREE "60 Minutes" Transcript!

See How "The Water" **BOOSTS WEIGHT LOSS PRODUCTS & Other Food Supplements!**

Super user reports on our REAL WILLARD WATER for ACHING BACKS; ARTHRITIS; DIGESTIVE PROBLEMS; ENERGY; BLOOD PRESSURE; PAIN OF ALL KINDS, SKIN CONDITIONS; MIGRAINES; STRESS; CONSTIPATION; MUCH MORE! Also FREE INFO on Super WEIGHT LOSS, Fighting AGING, and MORE!

Call For FREE Info or to Order!
1-800-447-4793
 (Outside U.S.A. & Canada 218-236-9783)

Nutrition Coalition, Inc.
 Previously "Dakota Providers"
 P.O. Box 8023, Fargo, ND 58109-8023

Reader Service #73

portive measures such as bodywork and chiropractic adjustments.

Generally during the middle of the two-week intensive period (days 4-8), I recommend using one teaspoon of ground flaxseed with each drink of UltraClear. If the patient feels hungry, I advise adding steamed vegetables and/or nuts and seeds to the program.

In the middle of the intensive phase of her detoxification, Florrie remarked that "this is a process. It doesn't happen overnight. It is a gradual change in lifestyle." When it was over, she said: "I felt as if somebody had taken a vacuum cleaner through my insides and cleaned it all out. My taste buds suddenly felt alive again, for the first time in years. I started 'craving' foods that were good for me, such as broccoli and okra."

These events took place two years ago. Since that time, Florrie has gone through four more detoxification programs, spaced about six months apart. She has clearly developed a commitment to her health. She reports feeling better than she ever has; she has dropped 60 pounds and two dress sizes and has grown leaner in terms of body fat. Now that she is symptom-free, she feels more positive about her life.

Florrie continues with several of the program's key supplements, such as vitamin C, UltraClear Sustain, digestive enzymes, and Cal Apatite (a mineral supplement including calcium, phosphorus, vitamin D3, magnesium, zinc, copper, and manganese). Her food choices are primarily fresh vegetables, some fruits, fish, chicken, eggs, and a limited use of certain grains.

Reversing a lifetime of indolence, Florrie began a regular exercise program (which also helps eliminate toxins from the body) in the form of lunchtime walks with her co-workers. In fact, this year Florrie walked the 26-mile Los Angeles marathon, and next year she intends to *run* it. ■

DECISION AND ORDER

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

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

The Commission having thereafter considered the matter and having determined that it had reason to believe that the respondents have violated the Act, and that a complaint should issue stating its charges in that respect, and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of thirty (30) days, now in further conformity with the procedure prescribed in § 2.34 of its Rules, the Commission hereby issues its complaint, makes the following jurisdictional findings and enters the following order:

1. Respondent EHP Products, Inc., is a Kentucky corporation with its principal office or place of business at 8 Kenton Furnace Drive, Ashland, KY 41105.

Decision and Order

2. Respondent Elaine H. Parrish is the President of the corporate respondent. Individually or in concert with others, she formulates, directs, or controls the policies, acts, or practices of the corporation. Her principal office or place of business is the same as that of the corporate respondent.
3. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondents, and 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. "CMO" shall mean any product or substance that contains or purports to contain cetylmyristoleate (also known as cetyl myristoleate) or "CMO," any analog of cetylmyristoleate, or any formulation of cetyl alcohol and myristoleic acid, including but not limited to Myristin®.
3. "Metatags" shall mean any terms embedded in the source code of a Web site that may be used by an Internet search engine in indexing Web sites for the purpose of selecting sites in response to an Internet user's search request.

Decision and Order

4. Unless otherwise specified, "respondents" shall mean EHP Products, Inc. ("EHP"), its successors and assigns; Elaine H. Parrish, individually and as an officer of EHP; and each of their agents, representatives and employees.
5. "Clearly and prominently" shall mean as follows:
 - A. In an advertisement communicated through an electronic medium (such as television, video, radio, and interactive media such as the Internet and online services), the disclosure shall be presented simultaneously in both the audio and video portions of the advertisement. Provided, however, that in any advertisement presented solely through video or audio means, the disclosure may be made through the same means in which the ad is presented. The audio disclosure shall be delivered in a volume and cadence sufficient for an ordinary consumer to hear and comprehend it. The video disclosure shall be of a size and shade, and shall appear on the screen for a duration, sufficient for an ordinary consumer to read and comprehend it. In addition to the foregoing, in interactive media the disclosure shall also be unavoidable and shall be presented prior to the consumer incurring any financial obligation.
 - B. In a print advertisement, promotional material, or instructional manual, the disclosure shall be in a type size and location sufficiently noticeable for an ordinary consumer to read and comprehend it, in print that contrasts with the background against which it appears.
 - C. On a product label, the disclosure shall be in a type size and location sufficiently noticeable for an ordinary consumer to read and comprehend it, in print that contrasts with the background against which it appears.

Decision and Order

The disclosure shall be in understandable language and syntax. Nothing contrary to, inconsistent with, or in mitigation of the disclosure shall be used in any advertisement or on any label.

6. "Commerce" shall mean as defined in Section 4 of the Federal Trade Commission Act, 15 U.S.C. § 44.

I.

IT IS ORDERED that respondents, directly or through any partnership, corporation, subsidiary, division, or other device, including franchisees, licensees or distributors, in connection with the manufacturing, labeling, advertising, promotion, offering for sale, sale, or distribution of CMO products or any substantially similar products, in or affecting commerce, shall not represent, by means of metatags, testimonials, or in any other manner, expressly or by implication, that such products:

- A. Are safe or effective in the mitigation, treatment, prevention, or cure of arthritic conditions, including rheumatoid arthritis and osteoarthritis;
- B. Significantly relieve pain, swelling, or tenderness caused by arthritis;
- C. Are effective in the mitigation, treatment, or cure of hepatitis C, emphysema, obstructive lung disease, spinal stenosis, eczema, psoriasis, aches and pains of the back and extremities, fibromyalgia, tendonitis, systemic lupus erythematosus, scleroderma, bursitis, temporomandibular joint disease, gout, arthropathy, rheumatism, osteitis, osteochondritis, osteomalacia, or osteomyelitis;
- D. Are effective in the prevention of fever blisters, colds, flu, or allergy symptoms; or

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- E. Effectively lower cholesterol, blood pressure, or blood sugar levels,

unless, at the time the representation is made, respondents possess and rely upon competent and reliable scientific evidence that substantiates the representation.

II.

IT IS FURTHER ORDERED that respondents, directly or through any partnership, corporation, subsidiary, division, or other device, including franchisees, licensees or distributors, in connection with the manufacturing, labeling, advertising, promotion, offering for sale, sale, or distribution of CMO products or any other food, dietary supplement or drug, as “food” and “drug” are defined in Section 15 of the Federal Trade Commission Act, or program, in or affecting commerce, shall not make any representation, in any manner, expressly or by implication, about the performance, safety, efficacy or health benefits of any such product or program, unless, at the time the representation is made, respondents possess and rely upon competent and reliable scientific evidence that substantiates the representation.

III.

IT IS FURTHER ORDERED that respondents, directly or through any partnership, corporation, subsidiary, division, or other device, including franchisees, licensees, or distributors, in connection with the advertising, promotion, offering for sale, sale, or distribution of any product or program, in or affecting commerce, shall not misrepresent, in any manner, expressly or by implication, that the issuance of a patent proves the safety or efficacy of such product or program.

Decision and Order

IV.

IT IS FURTHER ORDERED that respondents, directly or through any partnership, corporation, subsidiary, division, or other device, including franchisees, licensees, or distributors, in connection with the advertising, promotion, offering for sale, sale, or distribution of any product or program, in or affecting commerce, shall not misrepresent, in any manner, expressly or by implication, the existence, contents, validity, results, conclusions or interpretations of any test, study, or research.

V.

IT IS FURTHER ORDERED that respondents, directly or through any partnership, corporation, subsidiary, division, or other device, including franchisees, licensees or distributors, in connection with the manufacturing, labeling, advertising, promotion, offering for sale, sale, or distribution of any product or program, in or affecting commerce, shall not represent, in any manner, expressly or by implication, that the experience represented by any user testimonial or endorsement of the product or program represents the typical or ordinary experience of members of the public who use the product or program, unless:

- A. At the time it is made, respondents possess and rely upon competent and reliable scientific evidence that substantiates the representation; or
- B. Respondents disclose, clearly and prominently, and in close proximity to the endorsement or testimonial, either:
 1. What the generally expected results would be for users of the product or program; or

Decision and Order

2. The limited applicability of the endorser's experience to what consumers may generally expect to achieve, that is, that consumers should not expect to experience similar results.

For purposes of this Part, "endorsement" shall mean as defined in 16 C.F.R. § 255.0(b).

VI.

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

VII.

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

VIII.

IT IS FURTHER ORDERED that:

- A. Respondents shall not disseminate to any distributor any material containing any representations prohibited by this order.
- B. Respondents shall not, directly or indirectly, authorize any distributor to make any representations prohibited by this order.

Decision and Order

- C. Within thirty (30) days after service of this order, respondents shall send by first class mail, with postage prepaid, two exact copies of the notice attached hereto as Attachment A to each distributor with whom respondents have done business between January 1, 1996, and the date of service of this order, to the extent that such distributor is known to respondents through a diligent search of their records, including but not limited to computer files, sales records, and inventory lists. The mailing shall not include any other documents. For purposes of this mailing, respondents shall treat as a distributor any person:
1. Who purchased a CMO product from respondents for resale;
 2. Who purchased a CMO product from respondents at a discounted or wholesale price unavailable to the general public at the time of the purchase; or
 3. Who purchased more than twelve (12) bottles or packages of CMO products from respondents within any twelve (12) month period.

Respondents shall require each distributor with whom they did business between January 1, 1996, and the date of service of this order, to execute and return a copy of Attachment A as a condition of remaining or once again becoming a distributor of EHP Products, Inc.

- D. For a period of three (3) years following service of this order, respondents shall provide two exact copies of the notice attached hereto as Attachment B to each new distributor with whom respondents do business after the service of this order. Such notice shall be sent with the first shipment of respondents' products or programs.

Decision and Order

Respondents shall require each new distributor to execute and return a copy of the letter as a condition of being a distributor of EHP Products, Inc.

- E. Respondents shall require distributors to submit to respondents all advertising and promotional materials and claims for any products or programs covered by this order for review prior to their dissemination and publication. Respondents shall not authorize distributors to disseminate these materials and claims unless they are in compliance with this order.

Respondents may also comply with the obligations set forth above in this Subpart by:

1. disseminating to distributors marketing materials that comply with this order; and
 2. requiring those distributors to submit for review all advertising and promotional materials for a particular product or program covered by this order that contain representations that are not substantially similar to the representations for the same product or program contained in the advertising and promotional materials most recently forwarded to the distributors by respondents.
- F. Respondents shall use reasonable efforts to monitor distributors' advertising and promotional activities. In the event that respondents receive any information that, subsequent to receipt of Attachment A or Attachment B pursuant to Subparts C and D of this Part, any distributor is using or disseminating any advertisement or promotional material or making any oral statement that contains any representation prohibited by this order, respondents shall immediately terminate said distributor's right to market respondents' products or programs, and immediately provide, by certified mail, all relevant

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information, including name, address, and telephone number of the company at issue, the nature of the violation, and any relevant materials used or disseminated, to the Associate Director, Division of Enforcement, Federal Trade Commission, Washington, D.C. 20580.

IX.

IT IS FURTHER ORDERED that respondents shall refund the full purchase price of their Myristin[®] capsules, plus the sum of three dollars and fifty cents (\$3.50) for reimbursement of shipping and handling charges, to each eligible purchaser, as set forth below in Subpart B, whose initial request for a refund is received by respondents within one hundred and twenty (120) days after the date of service of this order, under the following terms and conditions:

- A. Within thirty (30) days after service of this order, respondents shall send by first class mail, with postage prepaid, an exact copy of the notice attached hereto as Attachment C, showing the date of mailing, to each purchaser other than a distributor as defined in Part VIII, who has not previously claimed a refund pursuant to respondents' guarantee of satisfaction and who purchased respondents' CMO capsules between June 30, 1997, and the date respondents executed this order, to the extent that such purchaser is known to respondents through a diligent search of their records, including but not limited to computer files, sales records, and inventory lists. The mailing shall not include any other documents.
- B. If any purchaser other than a distributor as defined in Part VIII, within one hundred and twenty (120) days of the service of this order, makes an initial request for a refund and respondents' diligent inquiry and examination of the

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corporate respondent's books and records reasonably substantiates the purchaser's claim of purchase or the purchaser provides proof of purchase, including but not limited to any of the following: return of goods or packaging, canceled check(s), credit card invoice(s), or receipt(s), or a signed declaration, the refund shall be paid within thirty (30) days of respondents' receipt of the refund request.

Provided, however, that if any request for a refund from a single purchaser is for greater than three bottles of a product covered by this Part, respondents may, within fifteen (15) business days of receipt of the request for refund, notify the purchaser that a prompt refund will be provided for all unopened packages of CMO capsules returned within fifteen (15) business days of receipt of the notice. The respondents shall provide each such purchaser with a prepaid means of return. The refund shall be paid within fifteen (15) business days of the return of the unopened merchandise.

X.

IT IS FURTHER ORDERED that respondent EHP and its successors and assigns, and respondent Elaine H. Parrish shall, no later than one hundred eighty (180) days after the date of service of this order, send by certified mail a monitoring report, in the form of a sworn affidavit executed on behalf of respondents, to the Associate Director, Division of Enforcement, Bureau of Consumer Protection, Federal Trade Commission, Washington, D.C. 20580. This report shall specify the steps respondents have taken to comply with the terms of Part IX of this order and shall state, without limitation:

- A. The name and address of each purchaser from whom respondents received a refund request;

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- B. The date on which each request was received, the amount of the refund request, and the amount of the refund provided by respondents to each such purchaser;
- C. The status of any disputed refund request and the identification of each purchaser whose refund request is disputed, by name, address, and amount of the claim; and
- C. The total amount of refunds paid by respondents.

XI.

IT IS FURTHER ORDERED that respondent EHP and its successors and assigns, and respondent Elaine H. Parrish shall, for five (5) years after the last correspondence to which they pertain, maintain and upon request make available to the Federal Trade Commission for inspection and copying: Copies of all notification letters sent to distributors and other purchasers, communications between respondents and distributors referring or relating to the requirements of Part VIII, and all other materials created pursuant to Parts VIII or IX of this order.

XII.

IT IS FURTHER ORDERED that respondent EHP and its successors and assigns, and respondent Elaine H. Parrish 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;

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- B. All materials that were relied upon in disseminating the representation; and
- C. All tests, reports, studies, surveys, demonstrations, or other evidence in their possession or control that contradicts, qualifies, or calls 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.

XIII.

IT IS FURTHER ORDERED that respondent EHP and its successors and assigns, and respondent Elaine H. Parrish shall deliver a copy of this order to all current and future principals, officers, directors, and managers, and to all current and future employees, agents, and representatives having responsibilities with respect to the subject matter of this order, and shall secure from each such person a signed and dated statement acknowledging receipt of the order. Respondents shall deliver this order to current personnel within thirty (30) days after the date of service of this order, and to future personnel within thirty (30) days after the person assumes such position or responsibilities.

XIV.

IT IS FURTHER ORDERED that respondent EHP and its successors and assigns, and respondent Elaine H. Parrish 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 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,

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however, that, with respect to any proposed change in the corporation about which respondents learn less than thirty (30) days prior to the date such action is to take place, respondents shall notify the Commission as soon as is practicable after obtaining such knowledge. All notices required by this Part shall be sent by certified mail to the Associate Director, Division of Enforcement, Bureau of Consumer Protection, Federal Trade Commission, Washington, D.C. 20580.

XV.

IT IS FURTHER ORDERED that respondent EHP and its successors and assigns, and respondent Elaine H. Parrish shall, within sixty (60) days after the date of service of this order, and at such other times as the Federal Trade Commission may require, file with the Commission a report, in writing, setting forth in detail the manner and form in which they have complied with this order.

XVI.

This order will terminate on May 16, 2020, 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

Decision and Order

- 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.

By the Commission.

ATTACHMENT A**LETTER TO DISTRIBUTORS WITH WHOM RESPONDENTS
HAVE DONE BUSINESS PRIOR TO SERVICE OF THIS
ORDER**

[To be printed on letterhead of EHP Products, Inc.]

[Name and address of recipient] [Date]

Dear [recipient's name]

The Federal Trade Commission Act requires advertisers to have adequate substantiation for all objective product claims. It is unlawful to advertise without adequate substantiation. The Federal Trade Commission ("FTC") deems deceptive health-related advertising claims which are not supported by competent and reliable scientific evidence. Competent and reliable scientific evidence is defined as tests, research, studies, or other evidence, based on the expertise of professionals in the relevant area, that

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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. Anecdotal evidence and consumer testimonials are not considered competent and reliable scientific evidence. The granting of a U.S. patent is not considered proof that a product or process is effective for a particular purpose.

The FTC alleges that certain advertising by EHP Products, Inc. ("EHP") includes claims concerning cetyl myristoleate ("CMO") products that lack adequate substantiation. In particular, the FTC alleges claims that CMO products are effective in the treatment, relief, mitigation, prevention, or cure of arthritis and other health conditions are not substantiated by competent and reliable scientific evidence. Rather than contest this matter, EHP and the FTC have agreed to a settlement. Under the terms of the settlement, EHP has agreed to send this letter to its current and former distributors and to institute certain procedures, described below. EHP's agreement with the FTC is for settlement purposes only and does not constitute an admission by EHP that the law has been violated as alleged in the complaint, or that the facts alleged in the complaint, other than the jurisdictional facts, are true.

In its settlement agreement with the FTC, EHP agreed to certain conditions concerning the sale of its products to its distributors and concerning distributor advertising. In accordance with that agreement, as a condition to your future purchase of EHP products intended for distribution, or resale, or recommendation to others in the context of a professional or commercial relationship, you must not use, rely on, or distribute any advertising or promotional materials containing false or unsubstantiated claims. Further, you must not make false or unsubstantiated oral representations concerning any EHP product. You must also notify your customers who purchase the products for redistribution to do the same. If you or those customers use

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such materials or make such representations we are obliged to, and we will, stop doing business with you.

In its settlement agreement with the FTC, EHP has agreed to review distributor advertising before it is disseminated to ensure its compliance with substantiation requirements. Accordingly, as a condition of distributing EHP's products, you must submit to EHP, in advance and prior to use, dissemination, or publication, all advertisements or promotional materials that you intend to use, publish, or disseminate with regard to any EHP product or program. In addition, you must furnish us with the URL (Internet address) of any Web site you intend to use in connection with the marketing or promotion of our products. You must not use, disseminate, or publish any such advertisement or promotional materials without our prior approval. We may, in our discretion, send you materials you are authorized to use in your advertising.

In accordance with its settlement agreement with the FTC, EHP shall not do business with any distributor who fails to comply with the terms of this letter. Moreover, EHP is obligated to, and will, report to the FTC any instance of a claim made for its products that is false or unsubstantiated. Please sign, date, and return the enclosed copy of this letter to EHP Products, Inc., P.O. Box 1306, Ashland, KY 41105-1306, acknowledging your receipt of this letter and your agreement to the terms set forth herein.

Thank you very much for your cooperation.

Sincerely,

Elaine H. Parrish
President

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ACKNOWLEDGMENT AND AGREEMENT

The undersigned acknowledges receipt of this letter and hereby agrees to its terms and conditions.

Date

Signature

Title

ATTACHMENT B

LETTER TO DISTRIBUTORS WITH WHOM RESPONDENTS
HAVE DONE BUSINESS FOLLOWING SERVICE OF THIS
ORDER

[To be printed on letterhead of EHP Products, Inc.]

[Name and address of recipient]

[Date]

Dear [recipient's name]

The Federal Trade Commission Act requires advertisers to have adequate substantiation for all objective product claims. It is unlawful to advertise without adequate substantiation. The Federal Trade Commission ("FTC") deems deceptive health-related advertising claims which are not supported by competent and reliable scientific evidence. Competent and reliable scientific

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evidence is defined as tests, 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. Anecdotal evidence and consumer testimonials are not considered competent and reliable scientific evidence. The granting of a U.S. patent is not considered proof that a product or process is effective for a particular purpose.

The FTC alleges that certain advertising by EHP Products, Inc. ("EHP") includes claims concerning cetyl myristoleate ("CMO") products that lack adequate substantiation. In particular, the FTC alleges claims that CMO products are effective in the treatment, relief, mitigation, prevention, or cure of arthritis and other health conditions are not substantiated by competent and reliable scientific evidence. Rather than contest this matter, EHP and the FTC have agreed to a settlement. Under the terms of the settlement, EHP has agreed to send this letter to its customers who purchase EHP's products for distribution or resale and to institute certain procedures, described below. EHP's agreement with the FTC is for settlement purposes only and does not constitute an admission by EHP that the law has been violated as alleged in the complaint, or that the facts alleged in the complaint, other than the jurisdictional facts, are true.

In its settlement agreement with the FTC, EHP agreed to certain conditions concerning the sale of its products to its distributors and concerning distributor advertising. In accordance with that agreement, as a condition to your future purchase of EHP products intended for distribution, or resale, or recommendation to others in the context of a professional or commercial relationship, you must not use, rely on, or distribute any advertising or promotional materials containing false or unsubstantiated claims. Further, you must not make false or unsubstantiated oral representations concerning any EHP product. You must also notify your customers who purchase the products for redistribution to do the same. If you or those customers use

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such materials or make such representations we are obliged to, and we will, stop doing business with you.

In its settlement agreement with the FTC, EHP has agreed to review distributor advertising before it is disseminated to ensure its compliance with substantiation requirements. Accordingly, as a condition of distributing EHP's products, you must submit to EHP, in advance and prior to use, dissemination, or publication, all advertisements or promotional materials that you intend to use, publish, or disseminate with regard to any EHP product or program. In addition, you must furnish us with the URL (Internet address) of any Web site you intend to use in connection with the marketing or promotion of our products. You must not use, disseminate, or publish any such advertisement or promotional materials without our prior approval. We may, in our discretion, send you materials you are authorized to use in your advertising.

In accordance with its settlement agreement with the FTC, EHP shall not do business with any distributor who fails to comply with the terms of this letter. Moreover, EHP is obligated to, and will, report to the FTC any instance of a claim made for its products that is false or unsubstantiated. Please sign, date, and return the enclosed copy of this letter to EHP Products, Inc., P.O. Box 1306, Ashland, KY 41105-1306, acknowledging your receipt of this letter and your agreement to the terms set forth herein.

Thank you very much for your cooperation.

Sincerely,

Elaine H. Parrish
President

Decision and Order

ACKNOWLEDGMENT AND AGREEMENT

The undersigned acknowledges receipt of this letter and hereby agrees to its terms and conditions.

Date

Signature

Title

ATTACHMENT C

LETTER TO CUSTOMERS (OTHER THAN DISTRIBUTORS)
WITH WHOM RESPONDENTS HAVE DONE BUSINESS
PRIOR TO EXECUTING THIS ORDER

[To be printed on letterhead of EHP Products, Inc.]

[Name and address of recipient]

[Date]

Dear [recipient's name]

The Federal Trade Commission ("FTC") alleges certain advertising claims that cetyl myristoleate ("CMO") products are effective in the treatment, relief, mitigation, prevention, or cure of

Decision and Order

arthritis and other health conditions are not substantiated by competent and reliable scientific evidence. Rather than contest this matter, EHP Products, Inc. (“EHP”) and the FTC have agreed to a settlement. Under the terms of the settlement, EHP has agreed to send this letter to its retail customers and former customers and institute the refund program described below.

If your purchase of an EHP CMO product was intended for your personal use or that of your family and not for distribution, or resale, or recommendation to others, you may be entitled to a refund of the purchase price for the CMO (or “Myristin®”) capsules, together with \$3.50 to reimburse shipping and handling charges. As part of its settlement agreement with the FTC, EHP has agreed to offer refunds to certain customers who sign the verification below: (1) that they purchased EHP’s CMO capsules for their own use or the use of their family, (2) that they are dissatisfied with the purchase, (3) that they did not distribute, offer the products for resale, or recommend the products to others outside their family, and (4) that they have not made a previous request for a refund from EHP.

To claim a refund, complete the attached form, or a copy of it, and return it to the indicated address within ninety (90) days of the date of this letter. You may indicate on the form the price you paid for the capsules you purchased; and you may submit copies of any documentation substantiating the expense. If you do not supply this information, we will calculate your refund from our records.

Please Note: If any request for a refund from a single purchaser is for more than three bottles of CMO capsules, we reserve the right to provide a refund only upon receipt of all unopened packages of the CMO capsules. Such returns will be made at the expense of EHP, as we will provide you with a prepaid means of return.

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We will honor all eligible, undisputed claims within thirty days after receiving them.

Sincerely,

Elaine H. Parrish
President

To apply for a refund:

Complete the form below, or make a copy of it. Please print legibly.

Return the form to EHP Products, Inc., P.O. Box 1306, Ashland, KY 41105-1306, no later than ninety (90) days after the date of this letter.

To: EHP Products, Inc., P.O. Box 1306, Ashland, KY 41105

From: _____ (Name)

_____ (Mailing Address)

_____ (City, State, and Zip Code)

_____ (Telephone Number)

I confirm: (1) that I purchased cetyl myristoleate (CMO) capsules made or distributed by EHP Products, Inc., for my personal use or that of persons in my family; (2) that I have not distributed, offered for resale, or recommended the CMO to others outside my family; (3) that I am dissatisfied with the purchase; and (4) that I

Analysis to Aid Public Comment

have not made a previous request for a refund from EHP. Please refund my purchase price of \$_____ (amount, if known), together with \$3.50 to reimburse me for shipping and handling.

I understand that the refund amount will be equal to the value of the CMO capsules that I purchased, plus \$3.50 to reimburse me for shipping and handling, and will not include the value of any other products that I may have purchased from EHP.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct to the best of my knowledge.

Date

Signature

Name (printed)

Analysis of Proposed Consent Order to Aid Public Comment

The Federal Trade Commission has accepted, subject to final approval, an agreement to a proposed Consent Order (“proposed order”) from EHP Products, Inc., and Elaine H. Parrish, individually and as an officer of EHP Products, Inc.

The proposed consent order has been placed on the public record for thirty (30) days for the reception of comments by interested persons. Comments received during this period will become part of the public record. After thirty (30) days, the

Analysis to Aid Public Comment

Commission will again review the agreement and will decide whether it should withdraw from the agreement or make final the agreement's proposed order.

This matter concerns advertisements on the Internet and print advertisements provided to consumers and prospective distributors, for a product called cetyl myristoleate ("CMO"), purportedly useful in the treatment, prevention, or cure of arthritis and other diseases. Purportedly, the substance, in one or two courses of treatment, each lasting four weeks or less, provides long term relief from the symptoms of osteoarthritis and rheumatoid arthritis. CMO is also claimed to be useful for the treatment, mitigation, prevention, and cure of most forms of arthritis and a number of other diseases.

The Commission's complaint charges that the proposed respondents engaged in deceptive advertising in violation of Sections 5 and 12 of the FTC Act by making unsubstantiated claims that their CMO products: (1) are safe and effective in the mitigation, treatment, prevention, and cure of most forms of arthritic conditions, including rheumatoid arthritis and osteoarthritis; (2) significantly relieve pain, swelling, and tenderness caused by arthritis; (3) are effective in the mitigation, treatment, and cure of hepatitis C, emphysema, obstructive lung disease, spinal stenosis, eczema, psoriasis, aches and pains of the back and extremities, fibromyalgia, tendonitis, systemic lupus erythematosus, scleroderma, bursitis, temporomandibular joint disease, gout, arthropathy, osteitis, osteochondritis, osteomalacia, and osteomyelitis; (4) are effective in the prevention of fever blisters, colds, flu, and allergy symptoms; and (5) effectively lower cholesterol, blood pressure, and blood sugar levels.

The complaint further alleges that the proposed respondents made false claims that (1) the issuance of two patents proves that the respondents' products are effective in treating and alleviating the symptoms of rheumatoid arthritis and osteoarthritis; and that (2) laboratory tests prove that respondents' CMO products

Analysis to Aid Public Comment

promote resistance to pain, swelling, and tenderness caused by arthritis.

The proposed order contains provisions designed to remedy the violations charged and to prevent proposed respondents from engaging in similar acts in the future.

Paragraph I of the proposed order prohibits proposed respondents from making any representation that CMO or any similar product: (1) is safe or effective in the mitigation, treatment, prevention, or cure of arthritic conditions, including rheumatoid arthritis and osteoarthritis; (2) significantly relieves pain, swelling, or tenderness caused by arthritis; (3) is effective in the mitigation, treatment, or cure of hepatitis C, emphysema, obstructive lung disease, spinal stenosis, eczema, psoriasis, aches and pains of the back and extremities, fibromyalgia, tendonitis, systemic lupus erythematosus, scleroderma, bursitis, temporomandibular joint disease, gout, arthropathy, rheumatism, osteitis, osteochondritis, osteomalacia, or osteomyelitis; (4) is effective in the prevention of fever blisters, colds, flu, or allergy symptoms; or (5) effectively lowers cholesterol, blood pressure, or blood sugar levels, unless, at the time the representation is made, respondents possess and rely upon competent and reliable scientific evidence that substantiates the representation.

Paragraph II of the proposed order prohibits proposed respondents from making any representations about the performance, safety, efficacy, or health benefits of CMO or any other food, drug, dietary supplement, or program, unless the claims are substantiated by competent and reliable scientific evidence.

Paragraph III of the proposed order prohibits proposed respondents from misrepresenting that the issuance of a patent proves the safety or efficacy of any product or program.

Analysis to Aid Public Comment

Additionally, Paragraph IV of the proposed order prohibits proposed respondents from misrepresenting the existence, contents, validity, results, conclusions, or interpretations of any test, study, or research.

Paragraph V of the proposed order prohibits proposed respondents from representing that the experience represented by any user testimonial or endorsement of any product or program represents the typical or ordinary experience of members of the public who use the product or program, unless the representation is true, and competent and reliable scientific evidence substantiates that claim, or respondents clearly and prominently disclose either: (1) what the generally expected results would be for users or the product or program; or (2) the limited applicability of the endorser's experience to what consumers may generally expect to achieve, that is, that consumers should not expect to experience similar results.

Paragraph VI of the proposed order provides that proposed respondents are not prohibited from making representations which are specifically permitted by regulations of the Food and Drug Administration pursuant to the Nutrition Labeling and Education Act of 1990. Paragraph VII of the proposed order provides that proposed respondents are not prohibited from making representations for a drug that are permitted under tentative final or final standards issued by the Food and Drug Administration or under any new drug application approved by that agency.

Paragraph VIII of the proposed order requires that proposed respondents: (1) not disseminate to any distributor any material containing any representations prohibited by the order; (2) not authorize any distributor to make any representations prohibited by the order; (3) send a required notice to each distributor with whom proposed respondents have done business since January 1, 1996, requesting that the distributor cease using any advertising or promotional materials containing unsubstantiated claims for CMO, requesting distributors not to make unsubstantiated oral representations, informing the distributor of this settlement, and

Analysis to Aid Public Comment

not including any other documents in the mailing; (4) for a period of three (3) years following service of the order, send the required notice to each distributor who has not previously received the notice; the notices shall be sent with the first shipment of respondents' products to the distributor; (5) require distributors to submit to proposed respondents all advertising and promotional materials and claims for any products or programs covered by the order for review prior to their dissemination and publication, and not authorize distributors to disseminate materials and claims unless they comply with the order; alternatively, proposed respondents must furnish to distributors marketing materials that comply with the order and require the distributors to submit for review all advertising and promotional materials for a particular product covered by the order that contain representations that are not substantially similar to the representations for the same product or program contained in the marketing materials most recently provided to the distributors by proposed respondents; and (6) use reasonable efforts to monitor distributors' advertising and promotional activities, immediately terminate the right of any distributor who disseminates advertisements or marketing material or makes oral representations prohibited by the order, and immediately provide information to the Federal Trade Commission about any such distributor and the materials used. "Distributor" is defined in the proposed order to mean any person who purchased a product covered by the order from proposed respondents for resale or at a discounted or wholesale price unavailable to the general public at the time of the purchase, or who has purchased more than twelve bottles or packages of a covered product from respondents within a twelve-month period.

Paragraph IX of the proposed order requires proposed respondents to send a prescribed notice to each person, other than a distributor, who purchased respondents' CMO products and can be identified through a diligent search of respondents' records. The notice offers a refund of the purchase price of the CMO

Analysis to Aid Public Comment

products and an allowance for shipping and handling charges to customers who purchased respondents' CMO product for personal use or the use of a family member and who make an initial request for a refund within ninety days of the date of the notice. The notice further provides that, if any refund request from a single purchaser is for greater than three bottles of a product covered by the order, the purchaser may be required to return all unopened bottles of the product, at the expense of respondents, to receive a refund. Paragraph X of the proposed order requires proposed respondents to submit a report to the Federal Trade Commission specifying the actions they have taken to comply with the provisions of Paragraph IX. Paragraph XI of the proposed order requires proposed respondents to retain for five years after the last correspondence to which they pertain and to make available to the Federal Trade Commission on request, copies of notification letters, communications with distributors, and other materials relating to the requirements of Paragraph VIII and Paragraph IX.

Paragraph XII of the proposed order contains record keeping requirements for materials that substantiate, qualify, or contradict covered claims and requires proposed respondents to keep and maintain all advertisements and promotional materials containing any representation covered by the proposed order. In addition, Paragraph XIII requires distribution of a copy of the consent decree to current and future officers and agents. Paragraph XIV of the proposed order requires the respondents to notify the Federal Trade Commission in advance of any change in the corporation that may affect compliance obligations arising under the order. Further, Paragraph XV requires the filing of a compliance report.

Finally, Paragraph XVI of the proposed order provides for the termination of the order after twenty years under certain circumstances.

The purpose of this analysis is to facilitate public comment on the proposed order, and it is not intended to constitute an official

Analysis to Aid Public Comment

interpretation of the agreement and proposed order, or to modify in any way their terms.

Complaint

IN THE MATTER OF

MICHAEL D. MILLERCONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATIONS OF
SEC. 5 AND 12 OF THE FEDERAL TRADE COMMISSION ACT*Docket C-3941; File No. 9923225
Complaint, May 16, 2000--Decision, May 16, 2000*

This consent order prohibits Respondent Natural Heritage Enterprises from making representations, without competent and reliable scientific evidence, that any Essiac product, service, or program, or any other food, drug, or dietary supplement is effective in the treatment, prevention, mitigation, or cure of certain enumerated diseases, or regarding the health benefits, performance, safety or efficacy of any such product or service. The order also prohibits Respondent from misrepresenting the connection between their website and other website or the existence, contents, validity, result conclusions, or interpretation of any test, study, or research. In addition the order prohibits Respondent from representing that the experience represented by any user testimonial or endorsement of the product, service, or program represents the typical or ordinary experience of members of the public who use the product, service, or program, unless the representation is substantiated or Miller discloses, clearly and prominently, in close proximity to the endorsement or testimonial, either what the generally expected results would be for users of the product, or the limited applicability of the endorser's experience to what consumers may generally expect to achieve. Respondent is required to provide a list of consumers who ordered the product after September 15, 1996 and send to each of them, by first class mail a notice regarding the scientific research of their products. Respondent must also pay \$17,500 redress to be paid in redress to consumers. Any representations allowed by the Food and Drug Administration in a final or tentative standard are not prohibited by the order.

*Participants*For the Commission: *L. Mark Eichorn, C. Lee Peeler, and BE.*For the Respondents: *Jonathan Emord, Emord and Associates.*

Complaint

COMPLAINT

The Federal Trade Commission, having reason to believe that Michael D. Miller ("respondent"), individually and doing business as Natural Heritage Enterprises, 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 Michael D. Miller is a resident of Colorado. His principal office or place of business is 183 Bellevue Overlook, Crestone, Colorado 81131. Individually or in concert with others, he formulates, directs, or controls the policies, acts, or practices of the business operating under the trade name "Natural Heritage Enterprises."
2. Respondent has manufactured, advertised, labeled, offered for sale, sold, and distributed products to the public, including "Rene Caisse's Original Herbal Tea Remedy," including by means of three Internet Web sites, www.essiacsource.com, www.cancerinformation.org, and www.remedies.net, which provide product and purchase information. "Rene Caisse's Original Herbal Tea Remedy" is also described as "Rene Caisse's Essiac Tea" or "Essiac Tea," and is referenced herein as "Essiac Tea." Essiac Tea is a mixture of four herbs (burdock root, sheep sorrel, rhubarb root, and slippery elm bark) sold either alone or in combination with additional herbs. Essiac Tea is either a "food" or a "drug" 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.

Complaint

4. Respondent has disseminated or has caused to be disseminated, via the Internet among other means, advertisements for Essiac Tea, including but not necessarily limited to the attached Exhibits A through H. These advertisements contain the following statements:

- A. "I got into this business in 1992 when I found out that the herbal remedy, an Ojibway herbal tea, really did help sick people. . . . As time went on, we were also pleasantly surprised to find out that our herbal tea also works for other immune system related illnesses such as lupus, leukemia, chronic fatigue syndrome, multiple sclerosis, diabetes, lymphoma, Hiv & Aids [sic], etc. . . .

One of the things that we have learned from our customers is that our herbal tea also works on pets. Dogs and cats with cancer and tumors have been cured. Feline leukemia too. Any illness which is effected by a lowered or weakened immune system seems to respond well to our herbal remedy. . . . An exciting part of our business is hearing from our customers that a terminal illness has been conquered. Yes, we hear an amazing litany of stories about people and pets making complete comebacks."

Excerpt of Advertisement on Linked Web Site Page
[Exhibit A]

- B. "What To Do For a Cancerous Condition in the Prostate

If your prostate is already cancerous, you may wish to consider a holistic alternative medicine using an herbal remedy. For additional information about this herbal approach: Click Here to Learn About This Herbal Approach." [hyperlinks to www.essiacsource.com> homepage]

Excerpt of Advertisement on Linked Web Site Page
[Exhibit B]

Complaint

- C. "For some 60 years Essiac has been known to be an effective natural herbal remedy and therapy."

Excerpt of Advertisement on Linked Web Site Page [Exhibit C]

- D. "Testimonials From Essiac Users

I began taking Essiac for severe arthritis and severe fatigue. The results are unbelievable! . . . The results are wonderful. The results were also immediate. . . .

My Brother-in law gave me a bottle of Essiac. I enjoyed the taste, soon realized a 20 year stomach problem was gone. . . . My nephew in Wisconsin learned that he had cancer. . . . He takes the tea faithfully, and one year later all is in remission. . . .

I took Essiac for prostate cancer. Under doctor's orders I was given chemotherapy. I also took Essiac, and as a result the PSA rating went down below zero (0). I took the combination for 16 months and when it held below zero I quit the chemotherapy. . . .

I had ovarian cancer which was diagnosed as widespread. . . . I had found an article about Essiac and told the doctors I was going to try it. Well the results have been remarkable. I had lost over sixty-two pounds, and have now gained over sixteen back. . . . I do not believe that I would be alive now if it had not been for Essiac. . . .

I had breast cancer. I started taking Essiac 3 weeks prior to my first chemotherapy session. Every side effect that was predicted I would have were so-o-o diminished that I hardly noticed them. My blood work, both chemistry and

Complaint

hemo[] were, I was told, FANTASTIC for a chemotherapy patient. . . .”

Excerpt of Advertisement on Linked Web Site Page [Exhibit D]

- E. “What kind of Clinical Trials or Tests have been done on Rene Caisse’s Essiac Tea?

In 1937, Rene Caisse presented her Ojibway herbal formula to the Royal Cancer Commission in Canada. After a thorough study, their report stated that ‘Essiac is a cure for cancer’. In the 1950s, Dr. Charles Brusck (John F. Kennedy’s personal physician) conducted trials in his clinic at Cambridge, Massachusetts. After studying Essiac tea for a number of years, he reported ‘Essiac is a cure for cancer, period’. . . .

Will your herbal remedy cure xxxxxxxx illness?

[This question always places us in a difficult position. In meetings with FDA officials, we have been specifically told that we cannot in any way tell anyone that our herbal remedies will cure any specific disease or illness. For instance, we cannot even mention that Essiac is a remedy for cancer, much less state that it cures cancer in some people. . . .]”

Excerpt of Advertisement on Web Site Frequently Asked Questions Page [Exhibit E]

- F. “Important Information for All who are Interested in facts about HIV and AIDS

. . . In 1993 Dr. Gary Glum of Los Angeles worked with a Los Angeles AIDS project. The project had sent 179 AIDS patients home to die. They had pneumocystis carini and histoplasmosis. Their weight was down and their cell counts were less than ten.

The project gave Dr. Glum five of these patients to work with. He took them off AZT and put them on a protocol of taking 2 ounces of Essiac herbal remedy tea three times a day. By February of 1994 all of the other 174 patients had died. Dr. Glum’s five patients were still alive. They

Complaint

were exercising, eating three meals a day, and their weights were back to normal, and they had no appearance of illness.

Does this sound preposterous? Many cannot believe that there are simple herbal remedies which do help HIV and AIDS patients. If you dare. If you have the intellectual courage. If you really want the truth, please check out the herbal remedy Essiac Tea.”

Excerpt of Advertisement on Linked Web Site Page [Exhibit F]

- G. “Essiac tea has not been approved by the United States FDA, and we are therefore not able to comment about any specific illness. But there are websites on the internet which do not sell Essiac, and are therefore able to more directly address questions about specific illnesses. On the left sidebar are several websites which we recommend [sic] which may be able to assist you if you seek such answers. If, after reading about this famous indian [sic] herbal remedy, you decide to buy some of Rene Caisse’s herbal tea, I hope that you will remember us, and will return to this website to buy your herbal remedy.”

Excerpt of Advertisement on Web Site Homepage [Exhibit G]

- H. “<meta NAME=“Keywords”

CONTENT=“cancer, cancer treatments, Essiac ESSIAC Essiac essiac essiac TEA tea tea tea CANCER CANCER Cancer cancer CURES Cures cures cures information, brain tumors, lymphoma help, essiac, ESSIAC teas, natural colon treatments, natural remedies remedies REMEDIES remedies remedies REMEDY Remedy remedy remedy HERBAL HERBAL herbal Herbal HERBS Herbs herbs herbs thyroid fibromyalgia, brain tumors, Brain Tumors, natural colon cures, colon remedies, lymphoma information, diabetes, information, ovarian treatments, herbal remedies, herbal remedy, herbal

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teas, remedy, immune systems remedy, immune system, breast, fatigue, help thyroid, lupus teas, breast cancer, breast solutions, prostate answers, prostate prostate solutions lung liver healing lymphoma diabetes ovarian chronic lung immune systems liver leukemia solutions lung therapy liver cures leukemia leukemia leukemia cures books herbs books rene caisse diabetes healing Rene Caisse arthritis holistic options holistic answers holistic arthritis Rene caisse,">"

Keyword Metatags from www.essiacsource.com Web Site [Exhibit H]

5. In addition to the representations detailed above, respondent has embedded specific disease references in the "metatags" of respondent's Internet Web site, www.essiacsource.com. A metatag is a word or words embedded in an Internet Web site, which are not normally displayed visually to the consumer, that may be used by an Internet search engine for the purpose of selecting sites in response to an Internet user's search request. Disease references appearing only in the metatags and not in the Web pages displayed visually to the consumer include, among others, the following terms: "natural colon treatments," "thyroid," "fibromyalgia," "natural colon cures," and "colon remedies."

Respondent's use of these metatag references increases the likelihood that consumers who research the topics of fibromyalgia and cures for illnesses relating to the colon on the Internet will find information about Essiac Tea.

6. Furthermore, in the descriptions of the image files that pop up on the viewer's screen when a consumer rolls the mouse over an image on the www.essiacsource.com site ("mouseover text"), the following descriptions appear:

- "breast, colon, cancer cures. chronic fatigue syndrome, HIV AIDS, lung liver cancer."
- "Cures cancer, leukemia, lymphoma. Cures lupus, breast, prostate cancer."
- "Essiac. tea. cures brain cancer.gif"

Complaint

- "Essiac tea cures diabetes, bone, liver, colon, brain cancer, tumors, ovarian cancer."

Respondent thus used mouseover text as an additional means to communicate representations to the consumer viewing the www.essiacsource.com Web site.

7. Through the means described in Paragraphs 4, 5, and 6, taken together, respondent has represented, expressly or by implication, that Essiac Tea is effective in the treatment or cure of cancer, leukemia, brain tumors, lymphoma, bone cancer, ovarian cancer, breast cancer, prostate cancer, diseases of the colon, thyroid conditions, fibromyalgia, diabetes, lupus, chronic fatigue syndrome, multiple sclerosis, HIV and AIDS, arthritis, diseases affecting the lungs and liver, any illness which is affected by a lowered or weakened immune system, and certain pets' illnesses, including cancer, tumors, and feline leukemia.

8. Through the means described in Paragraphs 4, 5, and 6, taken together, respondent has represented, expressly or by implication, that he possessed and relied upon a reasonable basis that substantiated the representations set forth in Paragraph 7, 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 Paragraph 7, at the time the representations were made. For example, there are no competent and reliable clinical studies demonstrating that Essiac Tea is effective in the treatment or cure of cancer, leukemia, brain tumors, lymphoma, bone cancer, ovarian cancer, breast cancer, prostate cancer, diseases of the colon, thyroid conditions, fibromyalgia, diabetes, lupus, chronic fatigue syndrome, multiple sclerosis, HIV and AIDS, arthritis, diseases affecting the lungs and liver, any illness which is affected by a lowered or weakened immune system, or certain pets' illnesses, including cancer, tumors, and feline leukemia. Therefore, the representation set forth in Paragraph 8 was, and is, false or misleading.

10. Through the means described in Paragraph 4, respondent has represented, expressly or by implication, that scientific proof, including clinical trials and tests, demonstrates that Essiac Tea is

Complaint

effective in the mitigation, treatment, prevention, and cure of cancer.

11. In truth and in fact, scientific proof, including clinical trials and tests, does not demonstrate that Essiac Tea is effective in the mitigation, treatment, prevention, and cure of cancer. Therefore, the representation set forth in Paragraph 10 was, and is, false or misleading.

12. Through the means described in Paragraph 4, respondent has represented, expressly or by implication, that testimonials from consumers appearing in the advertisements for Essiac Tea represent the typical or ordinary experience of members of the public who use the product.

13. In truth and in fact, testimonials from consumers appearing in the advertisements for Essiac Tea do not represent the typical or ordinary experience of members of the public who use the product. Therefore, the representation set forth in Paragraph 12 was, and is, false or misleading.

14. Through the means described in Paragraph 4, respondent has represented, expressly or by implication, that Web sites to which the homepage (www.essiacsource.com) site links are independent sites not materially connected with respondent.

15. In truth and in fact, certain Web sites to which the homepage (www.essiacsource.com) site links are not independent sites but are materially connected with (and created by) respondent. Therefore, the representation set forth in Paragraph 14 was, and is, false or misleading.

16. 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.

THEREFORE, the Federal Trade Commission this sixteenth day of May, 2000, has issued this complaint against respondent.

By the Commission.

Complaint Exhibits

Exhibit A

Pets cancer dogs cats tumors Essi...feline leukemia Aids [Anonymized]://anon.free.anonymizer.com/http://bonuspages.com/essiac/pets.htm



Is Your Dog, Cat or Other Pet Sick?

I Have a Natural Herbal Remedy Which Heals Many

My name is Michael Miller and I own a small company which makes and sells a brand of herbal remedy which is widely known as "Essiac" tea. I got into this business in 1992 when I found out that the herbal remedy, an Ojibway herbal tea, really did help sick people. Our business has grown, and most of our new business has come from word-of-mouth. As you know, word-of-mouth advertising only works if your product works! As time went on, we were also pleasantly surprised to find out that our herbal tea also works for other immune system related illnesses such as lupus, leukemia, chronic fatigue syndrome, multiple sclerosis, diabetes, lymphoma, Hiv & Aids, etc..

How did we find out? Our customers told us! Our customers have been a great source of knowledge and feedback. You see, there are only 3 people in our company. We all share taking telephone orders, and we are friends with our customers. Sometimes we teach them, sometimes they teach us!

We Learned That Essiac Also Heals Pets

One of the things that we have learned from our customers is that our herbal tea also works on pets. Dogs and cats with cancer and tumors have been cured. Feline leukemia too. Any illness which is effected by a lowered or weakened immune system seems to respond well to our herbal remedy. One of the tea's effects is that it builds the immune system, another is that it detoxifies the body. These result in the herbal tea assisting the body to recover from a wide range of illnesses.

We have had customers successfully use our tea on cats, dogs, horses, and a ferret. One race horse owner gave our remedy to his horse a case (12 bottles) at a time. It worked. Some of our customers tell us that they take our tea along with their pets.

Is Your Pet Terminal?

It may not be too late. An exciting part of our business is hearing from our customers that a terminal illness has been conquered. Yes, we hear an amazing litany of stories about people and pets making complete comebacks.

Please Check Out Our EssiacWebsite

[Click here for our Essiac Pets Website](#)

[Click here for our Regular Essiac Website](#)

Complaint Exhibits

Exhibit B

Prostate Glands Health Information Cures [Anonymized]

<http://anon.free.anonymizer.com/h...es.com/essiac/prostate.health.htm>

Prostate Health

Information about the Prostate Gland

The prostate: The prostate gland is the largest gland of the male reproductive system. It is located below the bladder. It surrounds the urethra (the tube through which urine and semen flows). The prostate is about the size of a chestnut, and is composed of muscular tissues.

The prostate increases in size up to the age of puberty. At that point it remains a stable size for the rest of the man's life. Sometimes, beginning at about age 45, further enlargement may occur. The reasons why this enlargement occurs are not clearly known or understood. However holistic oriented researchers are giving much credence to the ideas that nutritional deficiencies, mineral deficiencies, toxicity within the body, and emotional factors may play a large role in the health and condition of the prostate gland.

The Function of the Prostate: The purpose of the prostate is to secrete a slightly acidic, milky fluid into the urethra. This fluid contains enzymes which balance the acid levels of the fluids within the urethra (urinary duct), and assist the movement of sperm as it passes through the duct on its important role of recreation. Actually, about 25 percent of the seminal fluid consists of this milky fluid which has been secreted by the prostate gland.

Nutrients for the Prostate

Magnesium, zinc and calcium have been identified by researchers as very important nutrients to the prostate gland and the reproductive system. As an example, few people realize the at least one mg. of zinc is excreted with each ejaculation. For a man with an active sex life, that can add up to a lot of zinc! It won't be long before his body will be zinc-deficient.

Zinc: Zinc is a major component of semen. It plays an important role in the process of fertility, sexual performance, and reproduction. The processes are complicated, but can basically they can be described as assisting the many complicated enzymes and enzymatic reactions which occur during sex and the

Complaint Exhibits

Prostate Glands Health Information Cures [Anonymized]

<http://anon.free.anonymizer.com/h...es.com/essiac/prostate.health.htm>

reproductive process, as well as occurring during many other important body functions.

Magnesium: Magnesium is important in neuromuscular activity. Muscles need a proper level of magnesium in order to contract properly. Both the RNA and the DNA activity of muscles is affected by magnesium. As far as the body as a whole, magnesium is necessary for the proper assimilation of calcium and Vitamin D in the body. In the prostate itself, magnesium is important in order to have the proper level of muscle contraction for an adequate secretion of seminal fluid during the sexual experience.

Calcium: An essential mineral, calcium serves many purposes within the body. Bones, teeth, membrane structures, and other cellular structure functions are dependent upon an adequate level of calcium in the body.

Conclusion: Insuring that your body has an adequate level of zinc, magnesium, and calcium can benefit the health of your prostate.

What To Do For an Enlarged (swollen) Prostate

If your prostate is already swollen and enlarged, there is a herbal remedy which is prepared for the specific purpose of shrinking enlarged and swollen prostates. If you would like additional information about this herbal remedy: [Click Here to Learn How to Shrink Prostates.](#)

What To Do For a Cancerous Condition in the Prostate

If your prostate is already cancerous, you may wish to consider a holistic alternative medicine using an herbal remedy. For additional information about this herbal approach: [Click Here to Learn About This Herbal Approach.](#)

To Visit Our Links Page: [Click Here](#)

This website furnished by
Natural Heritage Enterprises
PO Box 278, 183 Bellevue Overlook
Crestone CO 81131, USA

 8
FastCounter by LinkExchange

Complaint Exhibits

Exhibit C

!Cats cancer cures, Cats Feline T...ukemia, Feline lupus [Anonymizdhttp://anon.free.anonymizer.com/http://www.remedies.net/essiac7.html]



Cat cancer, tumors, feline leukemia reasearch information

Essiac Tea: A Natural Feline Herbal Remedy**A Holistic Therapy For Cats Using Herbs**

For feline leukemia, cancer and tumors in cats

Feline Alternative Medicine; Healing Herbs Cures; Cat Cancer Remedies

Essiac
Tea:
[To Order](#)
[Press Here](#)

Links to
other Essiac
sites below:

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Story:
To Read](#)
[The Essiac
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[Personal
Stories:
Lucy:
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Lynn:
Candy:](#)

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Note: There is a newly expanding awareness of the therapeutic and healing qualities of natural herbal remedies for cats and other pets. It is now widely accepted that strengthening the immune system and building the body's natural defense system is the effective way to combat illness and poor health. Feline leukemia and cancer tumors in cats are cured. A program of natural or alternative feline medicine and diet modification is now recommended by many veterinarians. Feline leukemia and cancer tumors in cats For instance, cat and feline cancer studies indicate that cancer develops when the body's immune system is weakened; therefore a strengthened immune system is important in the fight against cancer.



This website offers information about a natural holistic herbal medicine therapy for cats called Essiac Tea. As explained below, we suggest this herbs formula for feline leukemia and cancer tumors in cats. Consult your veterinarian for specific advice about the use of herbs for your feline pets.

Complaint Exhibits

!Cats cancer cures, Cats Feline T...ukemia, Feline lupus [Anonymizd]p://anon.free.anonymizer.com/http://www.remedies.net/essiac7.html

Vancouver
Sun

Hello,

**Essiac
Websites
You
Should
Visit:
History of
Essiac**

My name is Mike Miller, and I first learned of Essiac in 1992. At that time, few had heard of Essiac Tea, the herbal remedy from Canada. I set out to manufacture and distribute a brand of this herbal tea which we call "Rene Caisse's Original Herbal Tea Remedy". Our goal is to provide the best possible herbal tea at a very fair price. We use only the finest organic herbs in our herbal formula. Our prices are such that everyone can now afford this special herbal remedy. And awareness of our herbal tea has grown so that our business now ships herbal tea all over the world, including to many people for feline leukemia and cancers and tumors in their cats.

**Essiac
Article:**

The story of this herbal tea remedy, widely known as "Essiac Herbal Tea", and how it was found among the Ojibway tribe in 1922, you will find interesting. They made their herbal tea using the herbs Burdock Root, Sheep Sorrel, Rhubarb Root and Slippery Elm Bark. For a more detailed explanation of the Essiac story see the left sidebar which will direct you to other websites which have information about the story of Essiac tea therapy. For specific cases of cat cancer and tumors, and feline leukemia, we are including at the end of our website testimonials of feline leukemia feline lupus, cat cancer and cat tumor success stories.

**Essiac
Article:**

**About The
Herbs:
FREE:
Herbs
Booklet**

**Our Links
Page:
Links to
other sites
of interest**

For some 60 years Essiac has been known to be an effective natural herbal remedy and therapy. We gradually began to discover that our herbal tea helps a wide range of illnesses in felines. Dogs and cats, as well as other animals, respond to this herbal remedy. So now we find that immune system illnesses in dogs, cats, and other pets are successfully treated with our herbal tea. How do we know? Our customers tell us! They report that their dogs and cats recover from cancer, tumors, lupus, infections, feline leukemia, arthritis, etc.

How do you administer the herbal tea to your cat or feline? We suggest that you mix the herbal tea with an equal amount of water, and place it in your feline's water bowl. The cat will drink it when she is thirsty. However many of our customers report that they use a syringe to administer the tea directly into their feline's mouth.

On the left sidebar are several websites which we recommend to give additional general information about Essiac. If, after reading about Essiac, you decide to buy some herbal tea for your cat, I hope that you will remember us, and will return to this website to buy your feline herbal remedy.

Sincerely,

Michael D. Miller

Natural Heritage Enterprises, PO Box 278, 183 Bellevue Overlook, Crestone CO 81131, USA. Tel: 719 256 4876. email: herbs@fone.net

Complaint Exhibits

!Cats cancer cures, Cats Feline T...ukemia, Feline lupus [Anonymizdt]p://anon.free.anonymizer.com/http://www.remedies.net/essiac7.html

About Essiac



How does Essiac herbal tea work? The 8 herbs in Essiac are reported to interact on the body as follows:

Builds the Immune System	Detoxifies The Body	Removes Heavy Metals
Restores Energy Levels	Cleanses the Blood	Promotes Cell Repair

In performing these functions, the herbal formulation in Essiac synergistically enhances and strengthens your cat's body and its natural feline defenses. Thus strengthened, the cat's body is able to better protect and heal itself of illness. For additional information about the herbs in Essiac, you are welcome to print out a free copy of "The Essiac Herbs Book" which is located on the left sidebar.

We want Essiac to do this
for your cat!



Our Products

In Bottles: We sell the herbal tea in 16 oz. bottles, ready to drink. The price per bottle is \$14.50.

In Package of Dried Herbs: We also sell the herbal tea in a package of dried herbs which you brew into herbal tea. Each package contains 1/3 cup of herbs, and brews one-half gallon of herbal tea. The price per package is \$12.00. Brewing instructions are included with each package of dried herbs.

Complaint Exhibits

!Cats cancer cures, Cats Feline T...ukemia, Feline lupus [Anonymized]p://anon.free.anonymizer.com/http://www.remedies.net/essiac7.html

Bonus Program: If you purchase 12 bottles of the liquid tea or 12 packages of the dried herbs, you will receive an additional bonus of 6 for free. Pay for 12 and get 18!

Shipping & Handling: Within the USA the charge is \$3.00 for orders up to \$25.00, and \$5.00 for orders greater than \$25.00. We ship our herbal tea worldwide. For international orders, an extra charge equal to the air delivery shipping rate to your country will be added. Because of the excess weight of bottle we only ship the dried herb packages overseas and to Canada.

ORDER HERE

To Order Herbal Tea: [Click Here](#):

[To Check Out Our Money Back Guarantee: Click Here](#)

[Frequently Asked Questions: Click Here](#)

[For a FREE COPY of the Essiac Herbs Book: Click Here](#)



[Our Links Page](#)



Join our mailing list and receive a FREE monthly copy of the

Natural Cancer Therapies Newsletter!

To join: Enter your email address: then click the 'Join List' button:

[Join List](#)

Subscribe Unsubscribe
A Service of [WebPromote Engage](#)

Complaint Exhibits

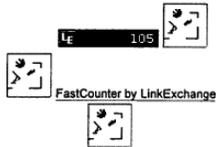
!Cats cancer cures, Cats Feline T...ukemia, Feline lupus [Anonymized]://anon.free.anonymizer.com/http://www.remedies.net/essiac7.html

Natural Heritage Enterprises
PO Box 278, 183 Bellevue Overlook
Crestone CO 81131, USA



Phone: 719 256 4876
Fax: 719 256 4874
email: herbs@fone.net

Clarification: The Canadian nurse Rene Caisse was given her herbal remedy formula in 1922 by an Ojibway medicine man. She later named the herbal remedy Essiac. The name "Essiac" has since been issued as a trademark to an American company. Therefore it should be clearly understood that our herbal formula is not named Essiac. It is named "Rene Caisse's Original Herbal Tea Remedy". The formula which Rene Caisse used was made public when she submitted it to the Royal Cancer Commission in 1937 for evaluation. In addition, many people who worked with Rene Caisse over the years were taught the formula, including the Canadian researcher Sheila Snow. Others, such as Dr. Gary Glum of Los Angeles, were given the formula by her family after her death. We were first given the formula by Dr. Glum. It has since been verified as authentic on two separate occasions by women who actually prepared the herbal tea for Rene Caisse.



For a good reference for illnesses with dogs..cats..horses..leukemia..feline..pets..cancer forum. Also cancer cures
research..cancer committee..cancer information..cancer
studies..dogs..cats..horses..leukemia..feline..pets..cancer..forum..cancer research..cancer cures committee..cancer
information..cancer studies..dogs..cats..horses..leukemia..feline cures..This website offers information about a
natural holistic herbal medicine therapy for cats called Essiac Tea. As explained below, we
suggest this herbs formula for feline leukemia and cancer tumors in cats. Consult your
veterinarian for specific advice about the use of herbs for your feline pets. pets. See our website for
alternative treatments for your dog and cat and pet that work.

1	2	3	4	5
6	7	8	9	10
11	12	13	14	15
16	17	18	19	20

[Jump](#) . [Bug Report](#) . [Help](#)

Complaint Exhibits

Exhibit D

I began taking Essiac for severe ...s and severe fatigue [Anonymized]http://anon.free.anonymizer.com/h...essiacsource.com/testimonials.htm



This webpage is found at <http://bonuspages.com/essiacandbook/testimonials.htm>

Testimonials From Essiac Users

I began taking Essiac for severe arthritis and severe fatigue. The results are unbelievable! I am doing everyday normal things that I haven't been able to accomplish for 10 years; 10 years that have taken a great toll on my life. Since I have been taking Essiac I have felt the years float away, and I have regained the feeling of youth again. I am very happy with the results. My daughter Donna Geary of Alta Loma gave me my first bottle. The results are wonderful. The results were also immediate. Thank you for this wonderful drink.

Lucy Claudine Gibson

Lakewood California

My Brother-in law gave me a bottle of Essiac. I enjoyed the taste, soon realized a 20 year stomach problem was gone. It gives me an all-around better feeling. I am 60 years old, and I work 7 days a week.

My nephew in Wisconsin learned that he had cancer. Sent him the book "Canada's Cancer Cure" about Essiac. He was unable to take Chemo because of other health problems. He takes the tea faithfully, and one year later all is in remission.

Robert W. Heath

Fenwick, Michigan

Complaint Exhibits

I began taking Essiac for severe ...s and severe fatigue [Anonymized]http://anon.free.anonymizer.com/h...essiacsource.com/testimonials.htm

My friend was diagnosed with Lung Cancer. I took it upon myself to give him a book on Essiac. He returned the next day to tell me that he was interested, and I set him up with a supply. They had planned on Chemotherapy but first wanted to monitor the growth rate which consisted of periodic x-rays. The first sets of x-rays showed such slow (almost negligible) growth that they waited for the second set to confirm the situation. After the second set of x-rays, the doctor told Bob that if he had had such success with chemotherapy, he (the doctor) would have been pleased to take the credit for such improvement.

We are both grateful to the people who keep an open mind and heart to give cancer patients hope for cure. I deeply believe Essiac has helped cure Bob, and I'm much more comfortable using it rather than making no effort to stay healthy systemically. If you'd like to share this letter with anyone, you have our blessing.

Greg Krepala
292 Martin Ct.
Aptos CA 95003

I took Essiac for prostate cancer. Under doctor's orders I was given chemotherapy. I also took Essiac, and as a result the PSA rating went down below zero (0). I took the combination for 16 months and when it held below zero I quit the chemotherapy. Since then the PSA readings went like this:

October: 0.15

April: 0.37

October 0.58

April 0.73

I have been continuing to take Essiac.

Paul E. Roche
East Haven, Connecticut

I had ovarian cancer which was diagnosed as widespread. They removed my ovaries and six inches of colon. I was advised afterwards that they could not remove all of the cancer cells and they recommended chemotherapy. I refused because of heart problems (I had two heart surgeries the previous years). I had found an article about Essiac and told the doctors I was going to try it. Well the results have been remarkable. I had lost over sixty-two pounds, and have now gained over sixteen

Complaint Exhibits

I began taking Essiac for severe ...s and severe fatigue [Anonymize:Ⓜ]http://anon.free.anonymizer.com/h...essiacsource.com/testimonials.htm

back. Have been stronger and able to resume my work with ceramics. I do not believe that I would be alive now if it had not been for Essiac. I recommend it to everyone, and I am amazed at how cancer touches so many lives.

Doris Kearns

Porter, Texas

ps: My last exam by the oncologist showed results which were "perfect, perfect". I feel wonderful.

I had breast cancer. I started taking Essiac 3 weeks prior to my first chemotherapy session. Every side effect that was predicted I would have were so-o-o diminished that I hardly noticed them. My blood work, both chemistry and hemo. were, I was told, FANTASTIC for a chemotherapy patient. I play duplicate bridge with as many as 140 people attending a local game. Everyone commented on my appearance and energy level and were amazed. Some started taking Essiac for general health reasons. How do I know that it was Essiac? I went to California after my 5th chemo., and stayed for three weeks. Since we were moving from place to place, I did not take Essiac. Upon returning home I received my 6th and final treatment. I was so very sick: nausea, diarrhea, heartburn so bad that I couldn't sleep, and I was so very tired. I start radiation in a week, and you can bet that I will not be without my Essiac.

June K. Outerson

Phoenix, Maryland

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Complaint Exhibits

Exhibit E

Natur,¹ Herbal Cancer Cures, Questions answered. [Anonymized] <http://anon.free.anonymizer.com/ht...essiacsource.com/essiacteaFAQ.htm>



Frequently Asked Questions

Listed below are the answers to many frequently asked questions about the Rene Caisse herbal tea.

Table of Contents

1. What is the proper dosage?
2. How soon should I see results ?
3. Will the herbal tea conflict with any type of medicines I might be taking?
4. What kind of Clinical Trials or Tests have been done on Rene Caisse's Essiac tea?
5. What is the difference between the Essiac tea which has 4 herbs in it, and the tea which has 8 herbs in it?
6. What does the herbal tea taste like?
7. Does the herbal tea really work?
8. Will your herbal remedy cure xxxxxx illness?

1. What is the proper dosage?

[We are not doctors and are not permitted to diagnose or prescribe. However, Rene Caisse, in her writings, suggested that people with an illness take 2 oz. of tea twice daily on an empty stomach. Many of our customers tell us that they prefer to take their 2 oz. of tea at bedtime, and then again first thing in the morning. These are times when the stomach is normally empty, and when the tea can be absorbed by the body without having to compete with food in the stomach. Rene Caisse also suggested that people without an illness should take 2 oz. of tea once a day on an empty stomach.

Most take the tea cold, as it comes from the refrigerator. Some mix it with a small amount of water. Others choose to heat it, but remember DO NOT MICROWAVE the herbal tea as some of the teas healing powers will be destroyed.

Some of our customers give the herbal tea to their pets. We suggest for both dogs and cats one oz. of herbal tea twice daily on an empty stomach. Another method is to mix the tea half-and-half with water, and place it in the pet's water dish, so that the pet will drink it with his or her water.]

Complaint Exhibits

Natural Herbal Cancer Cures, Questions answered. [Anonymized] <http://anon.free.anonymizer.com/ht...essiacsource.com/essiateaFAQ.htm>

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2. How soon should I see results ?

[Results vary from individual to individual, but most people tell us that they observe some type of results from taking the tea within 2 to 3 weeks.]

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3. Will the herbal tea conflict with any type of medicine I might be taking ?

[Again, we are not doctors, and cannot diagnose or prescribe. However we have never had a customer report any conflict with the herbal tea and their medicine. All of the herbs in the tea are classified as foods.

In her writings, Rene Caisse emphasized that her Essiac tea helped people who were undergoing Radiation or Chemotherapy, and that the tea helped their bodies "undo" the harmful side effects of Radiation and Chemotherapy.]

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4. What kind of Clinical Trials or Tests have been done on Rene Caisse's Essiac tea ?

[In 1937 Rene Caisse presented her Ojibway herbal formula to the Royal Cancer Commission in Canada. After a thorough study, their report stated that "Essiac is a cure for cancer". In the 1950s, Dr. Charles Brusch (John F. Kennedy's personal physician) conducted trials in his clinic at Cambridge, Massachusetts. After studying Essiac tea for a number of years, he reported "Essiac is a cure for cancer, period".

Rene Caisse herself presented stacks of papers about her Essiac tea to the United States Food and Drug Administration, requesting their approval of her tea. The FDA declined to investigate the claims about the herbal tea, stating that it only evaluated drugs.

At present, there is kind of a "catch-22" about evaluating natural healing modalities such as Essiac tea. Large amounts of money are required to conduct the type of trials which would be acceptable to the mainstream medical establishment. Who is going to fund such studies? It is estimated that \$200 million is required to conduct the studies which are required by the FDA for the approval of a new medicine. It is almost as if the rules are written so that only the large pharmaceutical companies can play in this game. Their inducement to study natural medicines, which have no profit potential for them, is not very high.]

Back to Top

5. What is the difference between the Essiac tea which has 4 herbs in it, and the tea which has 8 herbs in it?

[The original formula which Rene Caisse got from the Ojibway Indians has 4 herbs in it: Burdock

Complaint Exhibits

Natural Herbal Cancer Cures, Questions answered. [Anonymized] <http://anon.free.anonymizer.com/ht...essiacsource.com/essiacfaq.htm>

Root, Sheep Sorrel, Rhubarb Root, and Slippery Elm Bark. It was this 4 herb formula which she presented to the Canadian Royal Cancer Commission in 1937. Later, during the 1950s when she worked with Dr. Charles Brusch in Massachusetts, they on occasion added small "potentizing" amounts of 4 other herbs to the formula. Dr. Brusch later presented this "8" herb formula to the public. In our opinion, both formulas are basically the same. In the 4 herb formula Burdock Root and Sheep Sorrel (which Rene Caisse called the "cancer killers") comprise 93 % of the herbs. In the 8 herb formula they comprise 92 % of the herbs. We use the 8 herb formula.]

Back to Top

6. What does the herbal tea taste like?

[It has a mild, earthy taste. Most of our customers tell us that they either like the taste, or that they tolerate the taste..]

Back to Top

7. Does the herbal tea really work?

[Yes. We could not stay in business, given the low costs of our products, if the tea didn't work. As a matter of fact, word-of-mouth sells more herbal tea for us than anything else. We sell more of our "Bonus Buy" (buy 12, get 18) to our established customers than anything else.]

Back to Top

8. Will your herbal remedy cure xxxxxx illness?

[This question always places us in a difficult position. In meetings with FDA officials, we have been specifically told that we cannot in any way tell anyone that our herbal remedies will cure any specific disease or illness. For instance, we cannot even mention that Essiac is a remedy for cancer, much less state that it cures cancer in some people. We cannot even show them written testimonials from others. We are only permitted to state that our herbal remedy has general "therapeutic value". Thus we find ourselves with our hands tied, so to speak, and we cannot freely answer such questions.

What we are permitted to tell people is that Essiac builds the immune system, detoxifies the body, and strengthens the body. If you will "surf" the net and read about the immune system, you will basically find that all illness results when the immune system becomes depleted or weakened. Basically, if you have a strong and healthy immune system, you won't become sick, period. *Our herbal remedy strengthens your immune system.*

We are all aware that modern society causes a lot of toxins, chemicals, and poisons to enter our body. Years of accumulated pesticides, insecticides, chemicals from gas fumes, auto emissions, ingested paint, etc., which have become lodged in our bodies are recognized as a major cause of illness and disease. *Our herbal remedy removes these poisons from your body.*

A strong body is better able to resist illness. Should you become ill, a strong body is better able to fight the illness. *Our herbal remedy helps to make your body strong.*

So, indirectly, we are able to address your question: Our herbal remedy, in building the immune system, detoxifying the body, and strengthening the body, will assist you to overcome all illness.]

Complaint Exhibits

Natural Herbal Cancer Cures, Questions answered. [Anonymized] <http://anon.free.anonymizer.com/ht...essiacsource.com/essiacfaq.htm>

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[Return to Home Page](#)

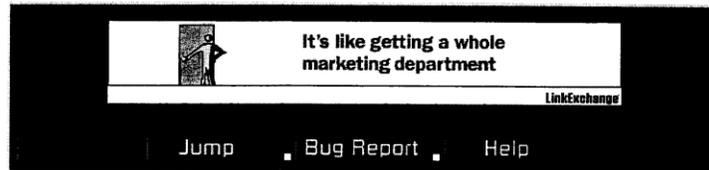
Natural Heritage Enterprises
PO Box 278, 183 Bellevue Overlook
Crestone CO 81131, USA
Tel: 719 256 4876
Fax: 719 256 4874

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Complaint Exhibits

Exhibit F

Essiac Herbal Remedy for HIV, AIDS [Anonymized]

<http://anon.free.anonymizer.com/h...bonuspages.com/essiac/hiv aids.htm>

Important Information for All who are Interested in facts about HIV and AIDS

Truth is truth: Please read this truth. In 1993 Dr. Gary Glum of Los Angeles worked with a Los Angeles AIDS project. The project had sent 179 AIDS patients home to die. They had pneumocystis carini and histoplasmosis. Their weight was down and their cell counts were less than ten.

The project gave Dr. Glum five of these patients to work with. He took them off AZT and put them on a protocol of taking 2 ounces of Essiac herbal remedy tea three times a day. By February of 1994 all of the other 174 patients had died. Dr. Glum's five patients were still alive. They were exercising, eating three meals a day, and their weights were back to normal, and they had no appearance of illness.

Does this sound preposterous? Many cannot believe that there are simple herbal remedies which do help HIV and AIDS patients. If you dare. If you have the intellectual courage. If you really want the truth, please check out the herbal remedy Essiac tea.

[Click Here for Information about Essiac Herbal Remedy](#)

Complaint Exhibits

Essiac Herbal Remedy for HIV, AIDS [Anonymized]

<http://anon.free.anonymizer.com/h...bonuspages.com/essiac/hiv aids.htm>

[Click Here to go to our Essiac Website](#)

This webpage is furnished by Natural Heritage Enterprises

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Complaint Exhibits

Exhibit G

!Essiac tea. FREE Book: Holistic herbal alternative remedy.

<http://www.essiacsource.com>**Essiac Tea: A Natural Herbal Remedy****The Holistic Therapy Using Herbs***Alternative Medicine; Healing Herbs; Remedies***Essiac
Tea:
[To Order](#)
[Press Here](#)****Links to
other Essiac
sites below:****The Essiac
Story:
[To Read](#)
[The Essiac](#)
[Story](#)
[Press](#)****Personal
Stories:
[Lucy](#);
[Kathryn](#);
[Lynn](#);
[Candy](#):**

Note: There is a newly expanding awareness of the therapeutic and healing qualities of natural herbal remedies. It is now widely accepted that strengthening the immune system and building the body's natural defense system is the effective way to combat illness and poor health. A program of natural or alternative medicine and diet modification is now recommended by many physicians. Cancer studies indicate that cancer develops when the body's immune system is weakened; therefore a strengthened immune system is important in the fight against cancer.



This website offers information about a natural alternative holistic medicine therapy called Essiac Tea. It is not yet endorsed by the FDA, and we cannot therefore claim that Essiac cures any disease. Consult your doctor for specific advice.

Hello,

**Newspaper
Articles:
[Vancouver](#)
[Sun](#)****Essiac
websites
You
Should
Visit:****[History of](#)
[Essiac](#)****[Essiac](#)
[Article:](#)****[Essiac](#)
[Article:](#)****About The
Herbs:
[FREE:](#)
[Herbs](#)
[Booklet](#)****Our Links
Page:
[Links to](#)
[other sites](#)
[of interest](#)**

My name is Mike Miller, and I first learned of Essiac in 1992. At that time, few had heard of this herbal tea of the Ojibway Indian tribe which the Canadian nurse Rene Caisse had named Essiac Tea. I set out to manufacture and distribute a brand of this herbal tea which we call "Rene Caisse's Original Herbal Tea Remedy". Our goal is to provide the best possible brand of this herbal tea at a very fair price. We use only the finest organic herbs in our herbal formula. Our prices are such that everyone can now afford this herbal tea. And awareness of this herbal tea remedy has grown so that our business now ships our herbal tea all over the world.

The story of this herbal remedy, widely known as Essiac Herbal Tea, and how it was found among the Ojibway tribe in 1922, you will find interesting. They made their herbal tea remedy using the herbs Burdock Root, Sheep Sorrel, Rhubarb Root and Slippery Elm Bark. For a more detailed explanation of the Essiac story see the left sidebar which will direct you to other websites which have information about the story of Essiac tea therapy.

Essiac tea has not been approved by the United States FDA, and we are therefore not able to comment about any specific illness. But there are websites on the Internet which do not sell Essiac, and are therefore able to more directly address questions about specific illnesses. On the left sidebar are several websites which we recommend which may be able to assist you if you seek such answers. If, after reading about this famous Indian herbal remedy, you decide to buy some of Rene Caisse's herbal tea, I hope that you will remember us, and will return to this website to buy your herbal remedy.

Sincerely,

Michael D. Miller

Exhibit G

Natural Heritage Enterprises, PO Box 278, 183 Bellevue Overlook, Crestone CO 81131,

Complaint Exhibits

!Essiac tea. FREE Book: Holistic herbal alternative remedy.

<http://www.essiacsource.com/>

[of interest](#) Natural Heritage Enterprises, PO Box 278, 183 Bellevue Overlook, Crestone CO 81131, USA; Tel: 719 256 4876 email: herbs@fone.net

[Frequently Asked Questions: Click Here](#)

About Essiac

How does Essiac herbal tea work? The 8 herbs in Essiac are reported to interact on the human body as follows:

- Builds the Immune System**
- Detoxifies The Body**
- Removes Heavy Metals**
- Restores Energy Levels**
- Cleanses the Blood**
- Promotes Cell Repair**

In performing these functions, the herbal formulation in Essiac synergistically enhances and strengthens the body and it's natural defenses. Thus strengthened, the body is able to better protect and heal itself of illness. For additional information about the herbs in Essiac, you are welcome to print out a free copy of "The Essiac Herbs Book" which is located on the left sidebar.

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Bonus Program: If you purchase 12 bottles of the liquid tea or 12 packages of the dried herbs, you will receive an additional bonus of 6 for free. Pay for 12 and get 18!

Shipping & Handling: Within the USA the charge is \$3.00 for orders up to \$25.00, and \$5.00 for orders greater than \$25.00. We ship the Herbal Tea worldwide. For international orders, an extra charge equal to the air delivery shipping rate to your country will be added. Because of the excess weight of bottles, we only ship the dried herb packages overseas and to Canada.

Order

[To Order The Herbal Tea Click Here:](#)

Complaint Exhibits

Exhibit H

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Exhibit H

[Excerpt of Source Code Showing Meta Tags for www.essiacsource.com]

Decision and Order

DECISION AND ORDER

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

The respondent, his attorney, and counsel for 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 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 thirty (30) days, now in further conformity with the procedure prescribed in § 2.34 of its Rules, the Commission hereby issues its complaint, makes the following jurisdictional findings and enters the following order:

1. Respondent Michael D. Miller is a resident of Colorado. His principal office or place of business is 183 Bellevue Overlook, Crestone, Colorado 81131. Individually or in concert

Decision and Order

with others, he formulates, directs, or controls the policies, acts, or practices of the business operating under the trade name "Natural Heritage Enterprises."

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:

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

B. "Commerce" shall mean as defined in Section 4 of the Federal Trade Commission Act, 15 U.S.C. § 44.

C. "Essiac product" shall mean any product for which the term "Essiac" or "Caisse" appears on the product label or on any advertising or promotion, and any product containing burdock root, sheep sorrel, rhubarb root, and slippery elm bark herbs.

D. "Food" and "drug" shall mean "food" and "drug" as defined in Section 15 of the FTC Act, 15 U.S.C. § 55(b)-(c).

E. "Metatags" shall mean any word or words embedded in the source code of an Internet Web site that may be used by an Internet search engine in indexing Web sites for the purpose of selecting sites in response to an Internet user's search request.

Decision and Order

F. “Mouseover text” shall mean any terms, triggered by the movement of the user’s mouse, that are displayed in a dialog box or other similar device.

G. A requirement that respondent “notify the Commission” shall mean that the respondent shall send the necessary information via first-class mail, costs prepaid, to the Associate Director for Division of Enforcement, Federal Trade Commission, 600 Pennsylvania Avenue, N.W., Washington, D.C. 20580. Attention: In the Matter of Michael D. Miller.

H. “Person” shall mean a natural person, organization or other legal entity, including a partnership, corporation, proprietorship, association, cooperative, or any other group acting together as an entity.

I. Unless otherwise specified, “respondent” shall mean Michael D. Miller, individually and doing business as Natural Heritage Enterprises, and his agents, representatives, and employees.

I.

IT IS HEREBY ORDERED that respondent, directly or through any corporation, subsidiary, division, trade name, or other device, in connection with the manufacturing, labeling, advertising, promotion, offering for sale, sale, or distribution of any Essiac product, service, or program, or any other food, drug, or dietary supplement in or affecting commerce, shall not make any representation, in any manner, including by means of metatags or mouseover text, expressly or by implication:

- A. That such product, service, or program is effective in the treatment or cure of cancer, leukemia, brain tumors, lymphoma, bone cancer, ovarian cancer, breast cancer,

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prostate cancer, diseases of the colon, thyroid conditions, fibromyalgia, diabetes, lupus, chronic fatigue syndrome, multiple sclerosis, HIV/AIDS, arthritis, diseases affecting the lungs or liver, any illness which is affected by a lowered or weakened immune system, or pets' illnesses, including cancer, tumors, or feline leukemia;

- B. That such product, service, or program is effective in the mitigation, treatment, prevention, or cure of any disease or illness; or
- I. About the health benefits, performance, safety, or efficacy of any such product, service, or program,

unless, at the time the representation is made, respondent possesses and relies upon competent and reliable scientific evidence that substantiates the representation.

II.

IT IS FURTHER ORDERED that respondent, directly or through any corporation, subsidiary, division, trade name, or other device, in connection with the manufacturing, labeling, advertising, promotion, offering for sale, sale, or distribution of any "Essiac" product, service, or program, or any other food, drug, or dietary supplement in or affecting commerce, shall not misrepresent, in any manner, including by means of metatags or mouseover text, expressly or by implication:

- A. The connection or association between any Web site created and/or maintained by respondent and any other Web site; or
- B. The existence, contents, validity, results, conclusions, or interpretations of any test, study, or research.

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III.

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 "Essiac" product, service, or program, or any other food, drug, or dietary supplement in or affecting commerce, shall not represent, in any manner, including by means of metatags or mouseover text, expressly or by implication, that the experience represented by any user testimonial or endorsement of the product, service, or program represents the typical or ordinary experience of members of the public who use the product, service, or program, unless:

- A. The representation is true and, at the time it is made, respondent possesses and relies upon competent and reliable scientific evidence that substantiates the representation; or
- B. Respondent discloses, clearly and prominently, and in close proximity to the endorsement or testimonial, either:
 1. what the generally expected results would be for users of the product, or
 2. the limited applicability of the endorser's experience to what consumers may generally expect to achieve, that is, that consumers should not expect to experience similar results.

For purposes of this Section, "endorsement" shall mean as defined in 16 C.F.R. § 255.0(b).

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IV.

IT IS FURTHER ORDERED that respondent shall:

- A. Within seven (7) days after service of this Order upon respondent, deliver to the Commission a list, in the form of a sworn affidavit, of all consumers who purchased an Essiac product from respondent on or after September 15, 1996. Such list shall include each consumer's name and address, and, if available, the telephone number and email address of each consumer and the full purchase price, including shipping, handling, and taxes, of any Essiac product purchased from respondent.
- B. Within thirty (30) days after service of this Order upon respondent, send by first class mail, with postage prepaid, an exact copy of the notice attached hereto as Attachment A, showing the date of mailing, to each person who purchased respondent's Essiac product between September 15, 1996, and the date respondent executed this Order. This mailing shall not include any other document.

V.

IT IS FURTHER ORDERED that respondent shall pay to the Federal Trade Commission the sum of seventeen thousand five hundred dollars (\$17,500). This payment shall be made in the following manner:

- A. The payment shall be made by wire transfer or certified or cashier's check made payable to the Federal Trade Commission, the payment to be made no later than the date that this order becomes final.
- B. In the event of any default in payment, which default continues for ten (10) days beyond the due date of payment, the amount due, together with interest, as computed pursuant to 28 U.S.C. 1961 from the date of

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default to the date of payment, shall immediately become due and payable.

- C. The funds paid by respondent, together with any accrued interest, shall, in the discretion of the Commission, be used by the Commission to provide direct redress to purchasers of an Essiac product in connection with the acts or practices alleged in the complaint, and to pay any attendant costs of administration. If the Commission determines, in its sole discretion, that redress to purchasers of this product is wholly or partially impracticable or is otherwise unwarranted, any funds not so used shall be paid to the United States Treasury. Respondent shall be notified as to how the funds are distributed, but shall have no right to contest the manner of distribution chosen by the Commission. No portion of the payment as herein provided shall be deemed a payment of any fine, penalty or punitive assessment.
- D. Respondent relinquishes all dominion, control and title to the funds paid, and all legal and equitable title to the funds vests in the Treasurer of the United States and in the designated consumers. Respondent shall make no claim to or demand for return of the funds, directly or indirectly, through counsel or otherwise; and in the event of bankruptcy of respondent, respondent acknowledges that the funds are not part of the debtor's estate, nor does the estate have any claim or interest therein.

VI.

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

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application approved by the Food and Drug Administration. Nor shall it 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.

VII.

IT IS FURTHER ORDERED that respondent shall, for ten (10) 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 their possession or control that contradict, qualify, or call into question the representation or the basis relied upon for the representation, including complaints and other communications with consumers or with governmental or consumer protection organizations.

VIII.

IT IS FURTHER ORDERED that respondent shall, for a period of ten (10) years after the date of entry of this Order, deliver a copy of this Order to all current and future principals, officers, directors, and managers, and to all current and future employees, agents, and representatives having responsibilities with respect to the subject matter of this Order, and shall secure from each such person a signed and dated statement acknowledging receipt of the Order. Respondent shall deliver this

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Order to current personnel within thirty (30) days after the date of service of this Order, and to future personnel within thirty (30) days after the person assumes such position or responsibilities. Respondent shall maintain and upon request make available to the Commission for inspection and copying each such signed and dated statement for a period of five (5) years after creation.

IX.

IT IS FURTHER ORDERED that for a period of five (5) years from the date of entry of this Order, respondent Miller shall notify the Commission at least thirty (30) days prior to any change with regard to Natural Heritage Enterprises that may affect compliance obligations arising under this Order, including but not limited to its incorporation; 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 business or corporate name or address. Provided, however, that, with respect to any proposed change 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.

X.

IT IS FURTHER ORDERED that respondent, within five (5) days of entry of this Order, shall notify the Commission of (1) his residence address and mailing address; (2) his telephone number(s); (3) the name, address, and telephone number of his employer; (4) the full names of his employer's principals; (5) if applicable, the names of his supervisors, and (6) a description of his employer's activities, and the respondent's duties and responsibilities.

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XI.

IT IS FURTHER ORDERED that respondent, for a period of ten (10) years after the date of entry of this Order, shall notify the Commission of any changes in his residence address or mailing address or business address or mailing address, of the discontinuance of his current business or employment, or of his affiliation with any new business or employment. Notice of changes in employment status shall include: (1) the new employer's name, address and telephone number; (2) the full names of the employer's principals; (3) if applicable, the names of respondent's supervisors, and (4) a description of the employer's activities, and respondent's duties and responsibilities.

XII.

IT IS FURTHER ORDERED that respondent 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 respondent has complied and is complying with this Order.

XIII.

This Order will terminate on May 16, 2020, 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; and
- B. This order if such complaint is filed after the order has terminated pursuant to this Part.

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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.

By the Commission.

ATTACHMENT A**LETTER TO CUSTOMERS (INCLUDING
DISTRIBUTORS) WITH WHOM RESPONDENT HAS
DONE BUSINESS PRIOR TO EXECUTING THIS ORDER**

[To be printed on letterhead of Natural Heritage Enterprises]

[Name and address of recipient] [Date]

Dear [recipient's name]:

I recently entered into a settlement with the Federal Trade Commission regarding advertising claims for Rene Caisse's Original Herbal Tea Remedy, also described as "Rene Caisse's Essiac Tea" or "Essiac Tea" ("Essiac Tea"). The agreement does not constitute an admission by me that I have violated any law. As part of that settlement, I agreed to send you the following message prepared by the FTC about the science on Essiac tea and disease:

Decision and Order

Not much scientific research has been done on Essiac tea. The research that has been done, however, does not demonstrate that Essiac tea is an effective remedy in fighting cancer or any other disease. One group that looked into Essiac tea as a possible cancer remedy, the Canadian Breast Cancer Research Initiative, wrote: "No formal clinical studies demonstrating that any observed positive outcomes in cancer patients can be attributed to the use of Essiac rather than to other therapies or to the natural history of the disease were found." The group assessed the science on cancer and Essiac: "Weak evidence of effectiveness. Little evidence of harm. This is a widely used agent which has been incompletely studied."

If you are interested in the scientific research that has been done on alternative cancer treatments including Essiac, you may want to read a report published by the U.S. Office of Technology Assessment. The report is called, "Unconventional Cancer Treatments," and was published in 1990. Chapter 4 deals with herbal treatments including Essiac. The report collected the available published studies on Essiac tea and other alternative cancer remedies. According to the report, the Memorial Sloan-Kettering Cancer Center in New York conducted tests on Essiac tea in the 1970s and 1980s to see if the tea had any success in shrinking tumors or retarding their growth rate. The tests did not reveal any effect on the tumors. The National Cancer Institute, an agency of the U.S. government, also tested Essiac tea in 1983, and again no antitumor activity was noted. A study conducted by an agency of the Canadian government, based on physicians' reports on patients who were trying Essiac tea, also showed no positive results. According to the Office of Technology Assessment, the Canadian agency "concluded that this review provided no evidence that the progression of cancer in these patients had been altered by taking Essiac."

Even less is known about the effectiveness of Essiac tea in remedying other diseases. There are no formal clinical trials indicating that Essiac tea is effective in alleviating or curing any disease. You should also know that, while most studies don't

Analysis to Aid Public Comment

indicate serious adverse health effects from taking the tea, the studies do note that some people experience nausea, vomiting, or other possible side effects.

If you do take Essiac tea, you should make sure to let your doctor or health professional know because of potential interactions with other treatments.

Sincerely,

Michael D. Miller
Natural Heritage Enterprises

Analysis of Proposed Consent Order to Aid Public Comment

The Federal Trade Commission has accepted an agreement to a proposed consent order from Michael D. Miller, individually and doing business as Natural Heritage Enterprises (“Miller”).

The proposed consent order has been placed on the public record for thirty (30) days for receipt of comments by interested persons. Comments received during this period will become part of the public record. After thirty (30) days, the Commission will again review the agreement and the comments received, and will decide whether it should withdraw from the agreement or make final the agreement’s proposed order.

This matter involves alleged unsubstantiated representations that “Rene Caisse’s Original Herbal Tea Remedy,” also known as “Rene Caisse’s Essiac Tea” or “Essiac Tea” (“Essiac Tea”) is effective for treating or curing a number of diseases including, among others, cancer, leukemia, diabetes, and AIDS/HIV. The

Analysis to Aid Public Comment

complaint alleges that these representations were made through the following means, taken together: the visible portion of Miller's Internet Web sites and in the metatags and mouseover text. In addition, according to the FTC complaint, through the visible portion of his Internet advertisements, Miller falsely represented that clinical evidence proves that Essiac Tea is an effective cancer cure; that "recommended [Web] sites" to which respondent's home page links are independent Web sites not associated with Miller or Natural Heritage; and, impliedly, that the experiences of persons giving testimonials are representative of the typical experience of those using the product.

The proposed consent order contains provisions designed to prevent Miller from engaging in similar acts and practices in the future.

Part I of the order prohibits Miller from representing, without competent and reliable scientific evidence substantiating the representation, that any Essiac product, service, or program, or any other food, drug, or dietary supplement, is effective in the treatment or cure of certain enumerated diseases; that the product, service, or program is effective in the mitigation, treatment, prevention, or cure of any disease or illness; or about the health benefits, performance, safety, or efficacy of any such product, service, or program.

Part II of the order provides that Miller shall not misrepresent the connection or association between any Web site created and/or maintained by Miller and any other Web site, or the existence, contents, validity, results, conclusions, or interpretations of any test, study, or research.

Part III of the order provides that Miller shall not represent that the experience represented by any user testimonial or endorsement of the product, service, or program represents the typical or ordinary experience of members of the public who use the product, service, or program, unless the representation is substantiated or Miller discloses, clearly and prominently, in close

Analysis to Aid Public Comment

proximity to the endorsement or testimonial, either what the generally expected results would be for users of the product, or the limited applicability of the endorser's experience to what consumers may generally expect to achieve.

Parts I, II, and III apply to representations that are either express or implied, and specifically apply to representations communicated in any manner, including claims made by means of meta tags or mouseover text.

Part IV of the order requires respondent to deliver to the Commission a list, in the form of a sworn affidavit, of all consumers who purchased an Essiac product from respondent on or after September 15, 1996, and to send to all such consumers, by first class mail, an exact copy of a notice with information about the scientific research on Essiac tea.

Part V of the order requires respondent to pay seventeen thousand five hundred dollars (\$17,500) in redress. The funds paid by respondent, together with any accrued interest, shall, in the discretion of the Commission, be used by the Commission to provide direct redress to purchasers of an Essiac product in connection with the acts or practices alleged in the complaint, and to pay any attendant costs of administration; or, if the Commission determines, in its sole discretion, that redress to purchasers of this product is wholly or partially impracticable or is otherwise unwarranted, any funds not so used shall be paid to the United States Treasury.

Part VI of the order states that representations for any drug that is permitted in labeling for such drug under any tentative final or final standard promulgated by the Food and Drug Administration, or under any new drug application approved by the Food and Drug Administration, are not prohibited by the order. The order also does not prohibit respondent from making

Analysis to Aid Public Comment

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.

Parts VII-XII of the order require Miller to keep copies of relevant advertisements and materials substantiating or calling into question claims made in the advertisements; to provide copies of the order to certain of its personnel; to notify the Commission of changes in the company that may affect the order; to notify the Commission of his current address and employment status, and any changes in address or in employment status; and to file compliance reports with the Commission. Part XIII provides that the order will terminate after twenty (20) years under certain circumstances.

The purpose of this analysis is to facilitate public comment on the proposed order, and it is not intended to constitute an official interpretation of the agreement and proposed order or to modify in any way their terms.

Complaint

IN THE MATTER OF
THE WISCONSIN CHIROPRACTIC
ASSOCIATION

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

Docket C-3943; File No. 9710117
Complaint, May 18, 2000--Decision, May 18, 2000

This consent order addresses practices used by Respondents, Wisconsin Chiropractic Association and Russell A. Leonard. The order prohibits Respondents from fixing prices for any chiropractic services or other health care goods or services. Respondents are also prohibited from creating, suggesting, or endorsing any proposed fees or conversion factors for any health care goods or services, from engaging in negotiations on behalf of any chiropractor or group of chiropractors or other health care providers, from urging or recommending that any chiropractor or any provider accept or not accept any term or condition of any participation agreement, or from organizing or participating in any meeting or discussion where they expect chiropractors will discuss intentions concerning participation in any health plans and terminating any meeting in which two or more persons make such communications. The order also bans Respondents from initiating, originating, developing, publishing, or circulating any fee survey for any health care goods or services for a period of two years and from conducting or distributing any fee survey unless (1) the data collection and analysis are managed by a third party; (2) the raw fee survey data is retained by the third party and not made available to the respondents; (3) any information that is shared among or is available to providers is more than three months old; and (4) there are at least five providers reporting data upon which each disseminated statistic is based, no individual provider's data represents more than 25 percent on a weighted basis of that statistic, and any information disseminated is sufficiently aggregated that it would not allow respondents or any other recipients to identify the prices charged or compensation paid by any particular provider.

Complaint

Participants

For the Commission: *Nicholas J. Franczyk, David A. O'Toole, Evan Siegel, Daniel P. Ducore, Elizabeth Schneirov, and Gregory S. Vistnes.*

For the Respondents: *Roxane C. Busey, Gardner, Carton & Douglas, and Steven P. Hurley, Hurley, Burish & Milliken.*

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, as amended, 15 U.S.C. § 41 *et seq.*, and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that the Wisconsin Chiropractic Association ("WCA") and Russell A. Leonard ("Leonard") have violated Section 5 of the Federal Trade Commission Act, 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, hereby issues this complaint, stating its charges as follows:

RESPONDENTS

PARAGRAPH ONE: Respondent WCA is a nonprofit corporation organized, existing, and doing business under and by virtue of the laws of the State of Wisconsin, with its principal office and place of business located at 521 E. Washington Avenue, Madison, Wisconsin 53703.

PARAGRAPH TWO: Respondent Leonard is, and at all times relevant to this complaint was, the executive director of respondent WCA. His principal office or place of business is the same as that of respondent WCA.

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JURISDICTION

PARAGRAPH THREE: Respondent WCA exists and operates, and at all times relevant to this complaint existed and operated, in substantial part for the pecuniary benefit of its members. By virtue of its purposes and activities, respondent WCA is a “corporation” within the meaning of Section 4 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 44.

PARAGRAPH FOUR: The acts or practices of respondents WCA and Leonard, and WCA’s members, including those herein alleged, are in or affecting commerce within the meaning of Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45.

WCA’S MEMBERSHIP

PARAGRAPH FIVE: Approximately 900 chiropractors are members of respondent WCA, constituting a substantial majority of the chiropractors licensed to practice in Wisconsin. Its members are generally engaged in the business of providing chiropractic services to patients for a fee.

PARAGRAPH SIX: Except to the extent that competition has been restrained as herein alleged, some or all of the members of respondent WCA have been, and are now, in competition among themselves and with other chiropractors in Wisconsin.

CHIROPRACTIC MANIPULATION SERVICES

PARAGRAPH SEVEN: Professional services performed by chiropractors include, among other things, spinal and extra spinal manipulations. Prior to January 1, 1997, chiropractors generally billed for these services using a single billing code (A2000 for Medicare and 97260 for most private insurance) regardless of the

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number of spinal or extra spinal regions adjusted. Beginning on January 1, 1997, the Health Care Financing Administration and many private insurance companies began accepting four new chiropractic manipulative treatment (“CMT”) codes (98940, 98941, 98942, and 98943) in place of the old single billing code. The new CMT codes reflected more detailed or precise descriptions of the manipulation services: 98940 (adjustment of 1-2 regions); 98941 (adjustment of 3-4 regions); 98942 (adjustment of 5 regions); and 98943 (adjustment of at least one extra spinal region).

PARAGRAPH EIGHT: Wisconsin law provides that a health care insurer (other than a health maintenance organization) must provide a specific methodology, including but not limited to the usual, customary, and reasonable (“UCR”) charges by which it will determine the eligible amount of a provider’s charge. The methodology must be predicated on a database that, among other things, accurately reflects the amounts charged by providers for the procedure, is updated at least every six months, and contains no data that is more than 18 months old at the time of an update. Each health care insurer selects a certain percentile (*e.g.*, 80%) of the charges in the database as its UCR amount. In many instances, health care insurers will provide their insured members an explanation of benefits form notifying the insured members if their health care provider has charged more than the UCR amount for services.

ANTICOMPETITIVE CONDUCT

PARAGRAPH NINE: Respondent Leonard, acting in his capacity as executive director of respondent WCA, and respondent WCA, acting as a combination of its members, and in conspiracy with at least some of its members, and others, have acted to restrain competition by, among other things, encouraging, facilitating, entering into, and implementing agreements, express or implied, among WCA’s members to fix and/or increase the prices paid for chiropractic services and to boycott third-party payers to obtain higher reimbursement for chiropractic services.

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PARAGRAPH TEN: Respondents WCA and Leonard have engaged in acts and practices in furtherance of the combination and conspiracy, including, among other things:

Training Seminars

A. Respondents WCA and Leonard have organized and conducted seminars at eight different locations throughout the State of Wisconsin to train chiropractors and their staffs on the new CMT codes (the "CMT Seminars"), including how to price the codes, and have urged chiropractors to make no decisions on their fees for the new CMT codes before attending one of the training seminars.

B. During the CMT Seminars respondent Leonard, the principal or sole speaker at the seminars:

1. told the approximately 1300 attendees that the new CMT codes had the same values as osteopathic manipulative treatment ("OMT ") codes;
2. represented that the marketplace expected the average prices for the new CMT codes to be about the same as the average prices for the OMT codes, which were significantly higher than the average prices then charged by chiropractors for manipulation services;
3. provided data which showed the average charges for the current chiropractic code (97260) were: \$30.28 (Northeast District); \$28.23 (Northcentral District); \$27.58 (Northwest District); \$31.03 (Southeast District); \$32.20 (Southcentral District); and \$28.96 (Southwest District);

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4. provided data which showed that the current average statewide charges for osteopathic manipulations were: \$40.30 (manipulation of 1-2 regions); \$57.40 (manipulation of 3-4 regions); and \$91.68 (manipulation of 5 or more regions);
5. suggested that the chiropractors call osteopaths in their own areas to determine their local charges;
6. urged chiropractors to question any third-party payer that reimbursed a lesser amount for the CMT codes than for the OMT codes;
7. during at least some of the seminars, represented that the WCA had surveyed numerous chiropractors and determined that private insurance companies were paying CMT code claims at the prices the chiropractors chose to charge;
8. told chiropractors that with the introduction of the new CMT codes, chiropractors could increase their fees without any risk that third-party payers would refuse to pay their new fees, because there was no current database from which to calculate UCR fees; and
9. told chiropractors to increase their fees because their new fees would determine the new UCRs.

Negotiations with Third-Party Payers

C. Respondent Leonard told third-party payers that as a result of the new CMT codes, chiropractors should be paid the same amount that osteopaths are paid by third-party payers for manipulation services; encouraged third-party payers to agree to pay specific sums certain and/or to calculate UCRs in a manner or using a methodology proposed by respondent WCA; and threatened to take legal action against third-party payers in the absence of such agreements.

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Fee Surveys

D. Respondents WCA and Leonard have frequently collected, analyzed, and provided to respondent WCA's members and others current charge data for the new CMT codes, including, but not limited to, the following:

1. Respondent Leonard, during a meeting of respondent WCA's board of directors in late March 1997, and during a series of WCA-sponsored seminars entitled, "Getting Paid For Your CMT Codes," held throughout the State of Wisconsin in early April 1997, provided data which showed current average charges for each of the new CMT codes within each of respondent WCA's six districts as follows:

	98940	98941	98942
<u>District</u>	<u>(1-2 Regions)</u>	<u>(3-4 Regions)</u>	<u>(5 Regions)</u>
Northeast	\$38.45	\$54.51	\$74.46
Northcentral	\$32.72	\$42.87	\$54.51
Northwest	\$33.63	\$46.55	\$62.17
Southeast	\$38.34	\$53.56	\$70.54
Southcentral	\$37.46	\$50.57	\$64.74
Southwest	\$37.25	\$50.77	\$65.56

The data was obtained from a statewide fee survey conducted by respondent WCA during the last week of February 1997.

2. In June 1997, respondent Leonard furnished to a board member of respondent WCA, and other members of respondent WCA's Southwest District, data from a survey which was conducted by respondent WCA less than one month earlier and listed actual current

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charges in nine digit zip code order for the entire Southwest District.

Review of Managed Care Contracts

E. Respondent Leonard reviewed individual contract offers to WCA's members by third-party payers and circulated to respondent WCA's membership memoranda containing adverse comments about the payers' proposed fee schedules for the new CMT codes, encouraged chiropractors to negotiate higher fees, and advised them to exchange and discuss all information they receive with other chiropractors in their area to improve their bargaining position with the third-party payers.

Boycott of Managed Care Plans

F. Respondents WCA and Leonard encouraged, recommended and assisted in the boycott of managed care plans by respondent WCA's members and others, including, but not necessarily limited to, MultiPlan and Gundersen Lutheran Health Plan, to obtain higher reimbursement for chiropractic services.

G. Respondent Leonard, during a meeting of respondent WCA's board of directors in late March 1997: (1) discussed MultiPlan's proposed contract terms, including the fee schedule and a provision that network chiropractors treat worker compensation and auto insurance patients on the same terms as they treat other patients covered by the network arrangement; (2) recommended that chiropractors reject the entire contract and disrupt the MultiPlan network; (3) recommended that chiropractors hold out for a fee schedule based on 85% of the market price; (4) provided data which showed current average charges for the new CMT codes; and (5) encouraged chiropractors to communicate this information to all the other chiropractors.

H. Respondent Leonard, during at least some of the WCA-sponsored seminars entitled, "Getting Paid For Your CMT Codes," held throughout the State of Wisconsin in April 1997: (1)

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discussed MultiPlan's proposed contract terms, including the fee schedule and a provision that network chiropractors treat worker compensation and auto insurance patients on the same terms as they treat other patients covered by the network arrangement; (2) recommended that chiropractors reject the workers compensation and personal injury provisions of the contract; (3) suggested that if enough chiropractors rejected the contract, MultiPlan would be forced to renegotiate the terms; and (4) encouraged chiropractors to discuss the MultiPlan contract with other chiropractors in their area.

I. In April 1997, after MultiPlan revised its fee schedule, respondent Leonard communicated to the chiropractors that the revised fee schedule reflected fair market prices for chiropractic services.

J. In June 1997, respondent Leonard furnished to a board member of respondent WCA, and other members of respondent WCA's Southwest District who were actively engaged in a collective effort to induce Gundersen Lutheran Health Plan to increase its reimbursement rates, a copy of respondent WCA's most current fee survey which was concluded on May 31, 1997, and listed actual current charges in nine digit zip code order for the entire Southwest District.

PARAGRAPH ELEVEN: The members of respondent WCA have not integrated their practices in any economically significant way, nor have they created any efficiencies that might justify the acts or practices described in Paragraphs Nine and Ten.

ANTICOMPETITIVE EFFECTS

PARAGRAPH TWELVE: The acts or practices of the respondents as described in this complaint have had the purpose, tendency, effects, and capacity to restrain trade unreasonably and

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hinder competition in the provision of chiropractic goods and services in Wisconsin in the following ways, among others:

- A. to restrain competition among chiropractors;
- B. to deprive consumers of the benefits of competition among chiropractors;
- C. to fix or increase the prices that consumers pay for chiropractic services;
- D. to fix the terms and conditions upon which chiropractors would deal with third-party payers, including terms of chiropractic compensation, thereby raising the price to consumers of medical insurance coverage issued by third-party payers; and
- E. to deprive consumers of the benefits of managed care.

PARAGRAPH THIRTEEN: The aforesaid acts and practices of the respondents are to the prejudice and injury of the public and constitute unfair methods of competition in or affecting commerce in violation of Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45. The acts or practices of the respondents, as herein alleged, are continuing and will continue or recur in the absence of the relief requested.

WHEREFORE, THE PREMISES CONSIDERED, the Federal Trade Commission on this eighteenth day of May, 2000, issues its complaint against said respondents.

By the Commission.

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

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

The Commission having thereafter considered the matter and having determined that it had reason to believe that the respondents have violated the said Act, and that a complaint should issue stating its charges in that respect, and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of thirty (30) days, and having duly considered the comment filed thereafter by an interested person pursuant to §2.34 of its Rules, now in further conformity with the procedures prescribed in § 2.34 of its Rules, the Commission hereby issues its complaint, makes the following jurisdictional findings and enters the following order:

1. Respondent Wisconsin Chiropractic Association is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Wisconsin, with its principal

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office and place of business located at 521 E. Washington Avenue, Madison, Wisconsin 53703.

2. Respondent Russell A. Leonard is the Executive Director of the WCA. His principal office or place of business is the same as that of respondent WCA.

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

ORDER

I.

IT IS ORDERED that, for the purposes of this order, the following definitions shall apply:

- A. "Wisconsin Chiropractic Association" or "WCA" means Wisconsin Chiropractic Association, its directors, officers, employees, agents and representatives, predecessors, successors, and assigns; its subsidiaries, divisions, groups, and affiliates, controlled by WCA, and the respective directors, officers, employees, agents and representatives, successors, and assigns of each.
- B. "Russell A. Leonard" or "Leonard" means Russell A. Leonard, his representatives, agents, and employees.
- C. "Person" means both natural persons and artificial persons, including, but not limited to, corporations, unincorporated entities, partnerships, and governments.
- D. "Payer" means any person that purchases, reimburses for, or otherwise pays for all or part of any health care services, including, but not limited to, chiropractic services, for itself or for any other person. "Payer" includes, but is not limited to, any health insurance

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company; preferred provider organization; prepaid hospital, medical, or other health service plan; health maintenance organization; government health benefits program; employer or other person providing or administering self-insured health benefits programs; and patients who purchase health care for themselves.

- E. "Provider" means any person that supplies health care services to any other person, including, but not limited to, chiropractors, physicians, hospitals, and clinics.
- F. "Reimbursement" means any payment, whether cash or non-cash, or other benefit received for the provision of chiropractic goods and services.
- G. "Chiropractor" means a person licensed to engage in the practice of chiropractic.
- H. "Participation agreement" means any agreement between a payer and a provider in which the payer agrees to pay the provider for the provision of health care services, and in which the provider agrees to accept payment from the payer for the provision of health care services.

II.

IT IS FURTHER ORDERED that respondent WCA, directly or indirectly, or through any corporation or other device, in or affecting commerce, as "commerce" is defined in Section 4 of the Federal Trade Commission Act, 15 U.S.C. § 44, forthwith cease and desist from:

- A. Requesting, proposing, urging, advising, recommending, advocating, or attempting to persuade in any way any person to fix, establish, raise, stabilize, maintain, adjust, or

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tamper with any fee, fee schedule, price, pricing formula, discount, conversion factor, or other aspect or term or condition of the fees charged or to be charged for any chiropractic goods or services.

- B. Creating, formulating, suggesting, encouraging adherence to, endorsing, or authorizing any list or schedule of fees for any health care goods or services, including, but not limited to, suggested fees, proposed fees, fee guidelines, discounts, discounted fees, standard fees, recommended fees, or conversion factors.
- C. Entering into, adhering to, participating in, maintaining, organizing, implementing, enforcing, or otherwise facilitating any combination, conspiracy, agreement, or understanding:
 - 1. To negotiate on behalf of any chiropractor or group of chiropractors regarding any term, condition, or requirement of dealing with any payer or provider; or
 - 2. To deal or refuse to deal with, boycott or threaten to boycott, any payer or provider.
- D. Requesting, proposing, urging, advising, recommending, advocating, or attempting to persuade in any way any chiropractor to accept or not accept any aspect, term, or condition of any existing or proposed participation agreement, including, but not limited to, the price to be paid for chiropractic goods or services.
- E. Soliciting from, or communicating to, any chiropractor any information concerning any other chiropractor's intention or decision with respect to entering into, refusing to enter into, threatening to refuse to enter into, participating in, threatening to withdraw from, or withdrawing from any existing or proposed participation agreement.

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- F. 1. Organizing, sponsoring, facilitating or participating in any meeting or discussion that respondent WCA expects or reasonably should expect will facilitate communications concerning one or more chiropractors' intentions or decisions with respect to entering into, refusing to enter into, threatening to refuse to enter into, participating in, threatening to withdraw from, or withdrawing from any existing or proposed participation agreement; or
2. Continuing a meeting or discussion where respondent WCA knows or reasonably should know that a person makes communications concerning one or more chiropractors' intentions or decisions with respect to entering into, refusing to enter into, threatening to refuse to enter into, participating in, threatening to withdraw from, or withdrawing from any existing or proposed participation agreement, and respondent WCA fails to eject such person from the meeting or discussion; or
3. Continuing a meeting or discussion where respondent WCA knows or reasonably should know that two or more persons make communications concerning one or more chiropractors' intentions or decisions with respect to entering into, refusing to enter into, threatening to refuse to enter into, participating in, threatening to withdraw from, or withdrawing from any existing or proposed participation agreement.
- G. For a period of two (2) years after the date that this order becomes final, or until December 31, 2001, whichever is earlier, initiating, originating, developing, publishing, or

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circulating the whole or any part of any proposed or existing fee survey for any health care goods or services.

- H. For a period of five (5) years beginning at the expiration of the period in Paragraph II G of this order, initiating, originating, developing, publishing, or circulating the whole or any part of any proposed or existing fee survey for any health care goods or services unless (1) the data collection and analysis are managed by a third party; (2) the raw fee survey data is retained by the third party and not made available to respondent WCA; (3) any information that is shared among or is available to providers is more than three months old; and (4) there are at least five providers reporting data upon which each disseminated statistic is based, no individual provider's data represents more than 25 percent on a weighted basis of that statistic, and any information disseminated is sufficiently aggregated such that it would not allow respondent or any other recipients to identify the prices charged or compensation paid by any particular provider.
- I. Inducing, suggesting, urging, encouraging, or assisting any person to take any action that, if taken by respondent WCA, would violate this order.

Provided, however, that nothing contained in this order shall be construed to prohibit respondent WCA from petitioning any federal or state government executive agency or legislative body concerning legislation, rules, or procedures, or to participate in any federal or state administrative or judicial proceeding, in so far as such activity is protected by the Noerr-Pennington doctrine.

III.

IT IS FURTHER ORDERED that respondent Leonard, directly or indirectly, or through any corporation or other device, in or affecting commerce, as "commerce" is defined in Section 4

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of the Federal Trade Commission Act, 15 U.S.C. § 44, forthwith cease and desist from:

- A. Requesting, proposing, urging, advising, recommending, advocating, or attempting to persuade in any way any person to fix, establish, raise, stabilize, maintain, adjust, or tamper with any fee, fee schedule, price, pricing formula, discount, conversion factor, or other aspect or term or condition of the fees charged or to be charged for any health care goods or services.
- B. Creating, formulating, suggesting, encouraging adherence to, endorsing, or authorizing any list or schedule of fees for any health care goods or services, including, but not limited to, suggested fees, proposed fees, fee guidelines, discounts, discounted fees, standard fees, recommended fees or conversion factors.
- C. Entering into, adhering to, participating in, maintaining, organizing, implementing, enforcing, or otherwise facilitating any combination, conspiracy, agreement, or understanding:
 - 1. To negotiate on behalf of any health care provider or group of health care providers regarding any term, condition, or requirement of dealing with any payer or provider; or
 - 2. To deal or refuse to deal with, boycott or threaten to boycott, any payer or provider.
- D. Requesting, proposing, urging, advising, recommending, advocating, or attempting to persuade in any way any health care provider to accept or not accept any aspect, term, or condition of any existing or proposed

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participation agreement, including, but not limited to, the price to be paid for any health care goods or services.

- E. Soliciting from, or communicating to, any health care provider any information concerning any other health care provider's intention or decision with respect to entering into, refusing to enter into, threatening to refuse to enter into, participating in, threatening to withdraw from, or withdrawing from any existing or proposed participation agreement.
- F.
 1. Organizing, sponsoring, facilitating or participating in any meeting or discussion that respondent Leonard expects or reasonably should expect will facilitate communications concerning one or more health care providers' intentions or decisions with respect to entering into, refusing to enter into, threatening to refuse to enter into, participating in, threatening to withdraw from, or withdrawing from any existing or proposed participation agreement; or
 2. Continuing a meeting or discussion where respondent Leonard knows or reasonably should know that a person makes communications concerning one or more health care providers' intentions or decisions with respect to entering into, refusing to enter into, threatening to refuse to enter into, participating in, threatening to withdraw from, or withdrawing from any existing or proposed participation agreement, and respondent Leonard fails to eject such person from the meeting or discussion; or
 3. Continuing a meeting or discussion where respondent Leonard knows or reasonably should know that two or more persons make communications concerning one or more health care providers' intentions or decisions with respect to entering into, refusing to enter into, threatening to refuse to enter into, participating in,

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threatening to withdraw from, or withdrawing from any existing or proposed participation agreement.

- G. For a period of two (2) years after the date that this order becomes final, or until December 31, 2001, whichever is earlier, initiating, originating, developing, publishing, or circulating the whole or any part of any proposed or existing fee survey for any health care goods or services.
- H. For a period of five (5) years beginning at the expiration of the period in Paragraph III G of this order, initiating, originating, developing, publishing, or circulating the whole or any part of any proposed or existing fee survey for any health care goods or services unless (1) the data collection and analysis are managed by a third party; (2) the raw fee survey data is retained by the third party and not made available to respondent Leonard; (3) any information that is shared among or is available to providers is more than three months old; and (4) there are at least five providers reporting data upon which each disseminated statistic is based, no individual provider's data represents more than 25 percent on a weighted basis of that statistic, and any information disseminated is sufficiently aggregated such that it would not allow respondent or any other recipients to identify the prices charged or compensation paid by any particular provider.
- I. Inducing, suggesting, urging, encouraging, or assisting any person to take any action that, if taken by respondent Leonard, would violate this order.

Provided, however, that nothing contained in this order shall be construed to prohibit respondent Leonard from petitioning any federal or state government executive agency or legislative body concerning legislation, rules, or procedures, or to participate in

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any federal or state administrative or judicial proceeding, in so far as such activity is protected by the Noerr-Pennington doctrine.

Provided further that nothing contained in Paragraph III of this order shall prohibit respondent Leonard, acting as an agent, employee or representative exclusively for a single provider or payer, from providing comments or advice on any matter to such single provider or payer, or determining or negotiating any terms, conditions, or requirements, including the price to be paid for any health care goods or services, upon which such single provider or payer will deal with any person.

IV.

IT IS FURTHER ORDERED that for a period of five (5) years from the date that this order becomes final, respondent WCA shall:

- A. Maintain a copy of each document distributed at each meeting of the WCA's board of directors, WCA district meeting, or seminar or training session sponsored in whole or in part by the WCA for a period of five (5) years from the date of distribution, along with records showing the date of the meeting or seminar at which the document was distributed.
- B. Maintain a copy of each fee survey, or part thereof, distributed to any WCA member or members for a period of five (5) years from the last date of its distribution, along with records showing the date(s) of distribution and each person to whom the fee survey, or part thereof, was distributed.
- C. Maintain a copy of each document relating to any subject that is covered by any provision of this order and which is distributed to any WCA member or members for a period of five (5) years from the last date of its distribution, along

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with records showing the date(s) of distribution and each person to whom the document was distributed.

V.

IT IS FURTHER ORDERED that respondent WCA shall:

- A. Within thirty (30) days after the date that this order becomes final, distribute a dated and signed notification letter in the form set forth in Appendix A of this order along with a copy of the complaint and order in this matter: (1) to each of its current officers and directors, and to each other agent, representative, or employee of the WCA whose activities are affected by this order, or who has responsibilities with respect to the subject matter of this order; (2) to each of its current members; and (3) to the designated registered agent on file with the Wisconsin Office of the Commissioner of Insurance for each payer set forth in Appendix B of this order. The notification letter, complaint and order shall be delivered in a format that does not include any additional communication from respondent WCA or any other person.
- B. For a period of five (5) years after the date that this order becomes final, and within thirty (30) days of the date that the person assumes such position, distribute a dated and signed notification letter in the form set forth in Appendix A of this order, along with a copy of the complaint and order in this matter, to each new officer and director of the WCA, and to each other new agent, representative, or employee of the WCA whose activities are affected by this order, or who has responsibilities with respect to the subject matter of this order. The notification letter, complaint and order shall be delivered in a format that

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does not include any additional communication from respondent WCA or any other person.

- C. For a period of five (5) years after the date that this order becomes final, provide each new member with a dated and signed notification letter in the form set forth in Appendix A of this order, along with a copy of the complaint and order in this matter, within thirty (30) days of the new member's admission to the WCA. The notification letter, complaint and order shall be delivered in a format that does not include any additional communication from respondent WCA or any other person.
- D. Publish a notification letter in the form set forth in Appendix A of this order, along with a copy of this order and the complaint, in an issue of *The Wisconsin Chiropractor* published no later than 60 days after the date that this order becomes final, and annually each year thereafter for a period of five (5) years. The notification letter, order and the complaint shall be published with such prominence as is given to regularly featured articles in *The Wisconsin Chiropractor*.

VI.

IT IS FURTHER ORDERED that respondent WCA shall notify the Commission at least thirty (30) days prior to any proposed change in the respondent, such as dissolution, assignment, sale resulting in the emergence of a successor corporation, or the creation or dissolution of subsidiaries or any other change in the respondent that may affect compliance obligations arising under this order.

VII.

IT IS FURTHER ORDERED that respondent Leonard shall, for a period of five (5) years after the date that this order becomes final:

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- A. Notify the Commission within thirty (30) days of the discontinuance of his present business or employment and of each affiliation with a new business or employment where the duties and responsibilities of such employment are subject to the provisions of this order. Each such notice of affiliation with any new business or employment shall include his new business address and telephone number, current home address, and a statement describing the nature of the business or employment and the duties and responsibilities.
- B. Provide a copy of the complaint and order in this matter to each new employer within seven (7) days of his employment where the duties and responsibilities of such employment are subject to the provisions of this order.

VIII.**IT IS FURTHER ORDERED** that:

- A. Within sixty (60) days after the date that this order becomes final, each respondent shall submit to the Commission a verified written report setting forth in detail the manner and form in which the respondent intends to comply, is complying, and has complied with Paragraphs II through VII of this order.
- B. One (1) year from the date that this order becomes final, annually for the next five (5) years on the anniversary of the date that this order becomes final, and at other times as the Commission may require, each respondent shall file a verified written report with the Commission setting forth in detail the manner and form in which the respondent has

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complied and is complying with Paragraphs II through VII of this order.

IX.

IT IS FURTHER ORDERED that, for the purpose of determining or securing compliance with this order, upon five business days' written notice, each respondent shall permit any duly authorized representative of the Commission:

- A. To obtain access, during normal office hours and in the presence of counsel, to inspect and copy all books, ledgers, accounts, correspondence, memoranda, calendars, and other records and documents in the possession or under the control of respondent relating to any matter contained in this order; and
- B. To interview that respondent or any employee or representative of that respondent in the presence of counsel and without restraint or interference from that respondent.

X.

IT IS FURTHER ORDERED that this order shall terminate on May 18, 2020.

By the Commission.

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APPENDIX A

[Wisconsin Chiropractic Association Letterhead]

Dear Officer, Director, Agent, Representative, Employee,
Member or Third Party Payer:

The Wisconsin Chiropractic Association (“WCA”) and its executive director, Russell A. Leonard, have entered into an agreement with the Federal Trade Commission to settle charges that the WCA, acting through its executive director, violated the antitrust laws by, among other things, conspiring with at least some of the WCA’s members and others to fix or to increase prices paid for chiropractic manipulation services and to boycott third-party payers to raise reimbursement rates for chiropractic manipulation services. As part of the settlement agreement, the WCA is required to send this notification letter and a copy of the complaint and order to each of its officers and directors, its agents, representatives, and employees who have responsibilities with respect to the subject matter of the order, its members, and third-party payers.

Under the terms of the order, the WCA and Russell A. Leonard are prohibited from:

Fixing prices or encouraging others to fix prices for any chiropractic good or service (or, in the case of Mr. Leonard, any health care goods or services);

Creating, suggesting, or endorsing any list or schedule of fees to be charged for any health care good or service;

Organizing, participating in, or enforcing any agreement (1) to negotiate on behalf of any chiropractor or group of chiropractors (or, in the case of Mr. Leonard, any health care provider or group

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of health care providers) regarding any term, condition, or requirement of dealing with any payer or provider; or (2) to deal or refuse to deal with, boycott or threaten to boycott, any payer or provider;

Advising, recommending, advocating, or attempting to persuade in any way any chiropractor (or, in the case of Mr. Leonard, any health care provider) to accept or not accept any aspect, term or condition of any existing or proposed participation agreement;

Soliciting or communicating any chiropractor's (or, in the case of Mr. Leonard, any health care provider's) views, decisions or intentions concerning any participation agreement;

Organizing, sponsoring, facilitating or participating in any meeting or discussion that the WCA or Mr. Leonard expects or reasonably should expect will facilitate communications concerning any chiropractor's intentions pertaining to any participation agreement;

Conducting or distributing any fee survey for any health care good or service for a period of two (2) years after the date the order becomes final, or before December 31, 2001, whichever is earlier. For an additional five (5) year period thereafter, the WCA and Mr. Leonard are permitted to conduct and distribute fee surveys, provided that (a) the data collection and analysis are managed by a third party; (b) the raw fee survey data is retained by the third party and not made available to the WCA or Mr. Leonard; (c) any information that is shared among or is available to providers is more than three months old; and (d) there are at least five providers reporting data upon which each disseminated statistic is based, no individual provider's data represents more than 25 percent on a weighted basis of that statistic, and any information disseminated is sufficiently aggregated that it would not allow respondents or any other recipients to identify the prices charged or compensation paid by any particular provider; and

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Encouraging or assisting any person to take any action that, if taken by the WCA or Mr. Leonard, would violate the order.

In addition, the WCA is required, under the terms of the order, to maintain better records, including, but not limited to, retaining copies of all materials distributed at WCA meetings and seminars. The WCA must also maintain a copy of each fee survey distributed to any WCA member, along with a record of its distribution. Finally, the WCA is required to maintain a copy of each other document relating to any subject that is covered by any provision of the order, along with a record of its distribution.

Nothing in the order prohibits either the WCA or Mr. Leonard from petitioning any federal or state government executive agency or legislative body concerning legislation, rules, or procedures, or from participating in any federal or state administrative or judicial proceeding, in so far as such activity is protected by the Noerr-Pennington doctrine. In addition, the order does not prohibit Mr. Leonard, acting as an agent, employee or representative exclusively for a single provider or payer, from providing comments or advice on any matter to such single provider or payer, or from determining or negotiating any terms, conditions, or requirements, including prices to be paid for any health care goods or services, upon which such single provider or payer will deal with any person.

Copies of the complaint and order are enclosed.

/s/

Michael McMahon, D.C.
President
Wisconsin Chiropractic Association

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APPENDIX B

Aetna Insurance Company of America

American Medical Security

Atrium Health Plan, Inc.

Blue Cross & Blue Shield United of Wisconsin

CNA Insurance

Compcare Health Services Insurance Corp.

Coordinated Care Health Plan of WI

The Dean Health Plan, Inc.

EMPHEYSYS Wisconsin Insurance Company

Employers Health Insurance Company

Equitable Insurance

Family Health Plan Cooperative

Farmers Insurance Group

Federated Mutual Insurance

Greater La Crosse Health Plan, Inc

Group Health Cooperative of Eau Claire

Group Health Cooperative of South Central Wisconsin

Gundersen Lutheran Health Plan, Inc.

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Heritage Mutual Insurance Company

Humana Wisconsin Health Org. Ins. Corp.

Liberty Insurance Corporation

Lutheran Brotherhood

Managed Health Services Ins. Corp.

Medica Health Plans of Wisconsin

The Medical Associates Clinic Health Plan of WI

MercyCare Insurance Company

Mutual of Omaha Insurance Company

Nationwide Mutual Insurance Company

Network Health Plan of WI, Inc.

North Central Health Protection Plan

Physicians Plus Insurance Corp.

Prevea Health Insurance Plan, Inc.

Primerica Insurance Company

PrimeCare Health Plan, Inc.

Rural Mutual Insurance Company

Security Health Plan of WI, Inc.

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Sentry Insurance

Touchpoint Health Plan, Inc.

Travelers Insurance Company

Unity Health Plans Insurance Corp.

Valley Health Plan, Inc.

Wausau Insurance Company

Wisconsin Mutual Insurance Company

Wisconsin Physician Services Insurance Company

WPPN/MultiPlan

Analysis of Proposed Consent Order to Aid Public Comment

The Federal Trade Commission has accepted, subject to final approval, an agreement from the Wisconsin Chiropractic Association (“WCA”) and its executive director, Russell A. Leonard, to a proposed consent order. The agreement settles charges by the Federal Trade Commission that the WCA and Mr. Leonard have violated Section 5 of the Federal Trade Commission Act by conspiring with some of the WCA’s members and others to fix prices for chiropractic services and to boycott third-party payers to obtain higher reimbursement rates for services. The proposed consent order has been placed on the public record for thirty days for reception of comments by interested persons. Comments received during this period will become part of the public record. After thirty days, the Commission will review the

Analysis to Aid Public Comment

agreement and the comments received, and will decide whether it should withdraw from the agreement or make the agreement and proposed order final.

The purpose of this analysis is to facilitate public comment on the proposed order. The analysis is not intended to constitute an official interpretation of the agreement and proposed order or to modify in any way their terms. Further, the proposed consent order has been entered into for settlement purposes only and does not constitute an admission by the WCA or Mr. Leonard that the law has been violated as alleged in the complaint.

The Complaint

The WCA is a professional trade association of chiropractors with its principal place of business in Madison, Wisconsin. The WCA has approximately 900 chiropractor members. A substantial majority of the chiropractors licensed to practice in the state of Wisconsin are members of the WCA. The WCA exists and operates in substantial part for the pecuniary benefit of its members. Mr. Leonard is, and during the time period addressed by the allegations of the complaint was, the executive director of the WCA.

Professional services performed by chiropractors include, among other things, spinal and extra spinal manipulations. Prior to January 1, 1997, chiropractors generally billed for these services using a single billing code regardless of the number of regions adjusted. Osteopathic physicians performing manipulation treatments, by contrast, had been using multiple codes to bill based on the number of regions of the body adjusted. Beginning in January 1997, the federal government and private insurance companies began accepting four new codes for chiropractic manipulations. The new chiropractic manipulative treatment ("CMT") codes reflected more detailed or precise

Analysis to Aid Public Comment

descriptions of the manipulation services and allowed chiropractors, like osteopathic physicians, to bill based on the number of regions adjusted.

Beginning in late 1996, shortly after the new CMT codes were announced, the WCA, acting through its executive director Mr. Leonard, orchestrated an agreement among its members to raise fees for chiropractic manipulation services. In late 1996 and continuing into early 1997, the WCA conducted training seminars on the new codes for members in localities throughout the state. The WCA urged chiropractors not to make any decisions on their fees under the new codes before attending one of these meetings. During the meetings, Mr. Leonard told the chiropractors that the new CMT codes provided them with a unique opportunity to increase their fees. Mr. Leonard advised members that it was important that the new codes for chiropractic manipulation were priced properly, and that the WCA's view was that proper pricing was at the same level that osteopathic physicians billed for spinal manipulation services. He provided detailed data on current osteopathic pricing, and encouraged chiropractors to raise their prices to the osteopathic levels.

At the meetings Mr. Leonard assured members that if they all raised their rates, third-party payers would not reject or reduce these higher charges for the new codes. Under the "UCR" ("usual, customary, and reasonable rate") system of reimbursement that was in general use in Wisconsin's health care industry, price increases by a significant number of chiropractors would raise the UCR level and thereby result in higher reimbursement for chiropractic services. On the other hand, if other members did not raise their prices, UCR levels would not rise, the chiropractor would not receive higher reimbursement, and he or she would be identified to patients as an "outlier" whose fees were far higher than other chiropractors. Each chiropractor's action in conformity with the WCA's pronouncements would be aided by knowledge that other members were taking similar action. Many members left the WCA local meetings with the understanding that they and others at the meeting would raise their prices in accordance with

Analysis to Aid Public Comment

the WCA's request. After the new codes took effect, Mr. Leonard surveyed member pricing in certain localities, and reported back to members that chiropractors in these areas had succeeded in raising reimbursement levels.

As a result of these actions by the WCA and Mr. Leonard, many chiropractors raised their fees to the osteopathic levels. Other chiropractors increased their fees substantially more than they had in previous years. Overall, the effect of these actions was to raise the prices that consumers pay for chiropractic services.

In furtherance of the WCA's efforts to raise chiropractic fees, the WCA and Mr. Leonard regularly provided fee surveys to the WCA's members. At times, these fee surveys reflected insufficiently aggregated data, thus effectively identifying current prices by individual chiropractic offices. Fee survey data were also furnished in connection with boycotts of managed care plans.

In March 1997, the WCA and Mr. Leonard organized a boycott by WCA members of MultiPlan, a preferred provider network. At a board meeting, the WCA directors on Mr. Leonard's recommendation agreed to reject, and to encourage their fellow chiropractors to reject, MultiPlan's proposed contract amendments and new fee schedule. Mr. Leonard recommended that chiropractors demand a fee schedule reflecting 85% of market price, and provided survey data that showed current average charges throughout the state. At training seminars held in early April 1997, Mr. Leonard criticized MultiPlan's proposed amendments and fee schedule, encouraged chiropractors to discuss the contract with others in their area, and reminded them that if enough chiropractors rejected the contract, MultiPlan would be forced to renegotiate the terms. Soon thereafter many of the chiropractic members of the WCA submitted letters of termination to MultiPlan.

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Mr. Leonard routinely reviewed managed care contract offers to the WCA's members and circulated to the WCA's membership memoranda containing adverse comments about these plans' fee schedules for the new CMT codes. In his comments, Mr. Leonard frequently encouraged chiropractors to negotiate higher fees with the plans, and advised them to exchange all information they received with other chiropractors in their area. In so doing, Mr. Leonard reminded the WCA's members that they would be more successful in their fee negotiations with third-party payers if the members continued to negotiate on a united front. In addition, Mr. Leonard, again acting in his capacity as executive director of the WCA, told third-party payers that they should be paying chiropractors the same amount that osteopaths are paid for manipulation services, encouraged third-party payers to agree to pay specific sums certain or to calculate fees in a manner proposed by the WCA, and called third-party payers to follow up on complaints of low reimbursement that he encouraged and received from individual WCA members.

The WCA's members have not integrated their practices in any economically significant way, nor have they created any efficiencies that might justify this conduct. The purpose of this conduct was to secure higher fees and reimbursement. The WCA's actions harmed consumers by increasing the prices for chiropractic services and depriving consumers of the benefits of competition among chiropractors.

The Proposed Consent Order

The proposed consent order is designed to prevent the illegal concerted action alleged in the complaint. Paragraphs II and III of the proposed order contain the key provisions. These two paragraphs are almost identical in their coverage, except that Paragraph II applies to the WCA and Paragraph III applies to Mr. Leonard. Paragraphs II.A and III.A prohibit the WCA and Mr. Leonard from fixing prices for any chiropractic goods or services (or, in the case of Mr. Leonard, any health care goods or services).

Analysis to Aid Public Comment

The broader category including “any health care goods or services” is needed should Mr. Leonard obtain employment with another health care entity outside the chiropractic field.

Paragraphs II.B and III.B prohibit the WCA and Mr. Leonard from creating, suggesting, or endorsing any proposed fees or conversion factors for any health care goods or services. Here, the WCA is also subject to the broader category of “any health care goods or services” since the allegations in the complaint include the WCA’s endorsement of osteopathic fee schedules.

Paragraphs II.C and III.C prohibit the WCA and Mr. Leonard from engaging in negotiations on behalf of any chiropractor or group of chiropractors (or, in the case of Mr. Leonard, any provider or group of providers). In addition, this paragraph prohibits them from orchestrating concerted refusals to deal.

Paragraphs II.D and III.D prohibit the WCA and Mr. Leonard from urging or recommending that any chiropractor (or, in the case of Leonard, any provider) accept or not accept any term or condition of any participation agreement. Paragraphs II.E and III.E prohibit the WCA and Mr. Leonard from soliciting or communicating any chiropractor’s (or, in the case of Leonard, any provider’s) views, decisions or intentions concerning any participation agreement.

Pursuant to Paragraphs II.F and III.F, the WCA and Mr. Leonard are prohibited from organizing or participating in any meeting or discussion where they expect chiropractors (providers) will discuss intentions concerning participation in any health plans. In addition, these paragraphs prohibit the WCA and Mr. Leonard from continuing any meeting where any person makes such a communication unless the person is ejected from the meeting. Finally, this paragraph requires that the WCA and Mr.

Analysis to Aid Public Comment

Leonard terminate any meeting where two or more persons make such communications.

Paragraphs II.G and III.G ban the WCA and Mr. Leonard from initiating, originating, developing, publishing, or circulating any fee survey for any health care goods or services for a period of two years after the date that the order becomes final, or until December 31, 2001, whichever is earlier. The two-year ban on fee surveys is necessitated by the gross misuse of fee surveys alleged in the complaint. In addition, for five years thereafter, Paragraphs II.H and III.H prohibit the WCA and Mr. Leonard from conducting or distributing any fee survey unless (1) the data collection and analysis are managed by a third party; (2) the raw fee survey data is retained by the third party and not made available to the respondents; (3) any information that is shared among or is available to providers is more than three months old; and (4) there are at least five providers reporting data upon which each disseminated statistic is based, no individual provider's data represents more than 25 percent on a weighted basis of that statistic, and any information disseminated is sufficiently aggregated that it would not allow respondents or any other recipients to identify the prices charged or compensation paid by any particular provider. These requirements are identical to the requirements found in the safe harbor provisions of the *Statements of Antitrust Enforcement Policy in Health Care, Statement 5 on Providers' Collective Provision of Fee-Related Information to Purchasers of Health Care Services*, issued jointly by the FTC and the Department of Justice on August 18, 1996 (4 *Trade Reg. Rep. (CCH)* ¶ 13,153 at 20,809).

Paragraphs II.I and III.I prohibit the WCA and Mr. Leonard from encouraging, advising or pressuring any person to engage in any action that would be prohibited if the person were subject to the order.

Analysis to Aid Public Comment

Paragraph II and III contain provisos allowing the WCA and Mr. Leonard to exercise their First Amendment petitioning rights and to solicit competition-restricting government action where protected under the Noerr-Pennington doctrine. In addition, Paragraph III contains a proviso allowing Mr. Leonard to engage in certain acts otherwise prohibited by the order providing he is acting as an agent, employee, or representative exclusively for a single provider or payer.

Paragraph IV. requires that the WCA maintain copies of (1) all documents distributed at meetings and seminars; (2) all fee surveys and a record of their distribution; and (3) all documents relating to any subject that is covered by any provision in the order. Paragraph V. requires that the WCA provide copies of the complaint and order: (1) to all current and future officers, directors, and members; (2) to all current and future agents, representatives, and employees whose activities are affected by the order, or who have responsibilities with respect to the subject matter of the order; and (3) to the third-party payers set forth in Appendix B to the order.

Paragraph VI. requires that the WCA notify the Commission of any change in its corporate structure that may affect compliance obligations. Similarly, Paragraph VII. requires that Mr. Leonard notify the Commission of any change in his employment and would require him to provide copies of the complaint and consent order to any new employer for which his new duties and responsibilities are subject to any provisions in the order.

Paragraphs VIII. and IX. consist of standard Commission reporting and compliance procedures. Finally, Paragraph X. contains a standard twenty-year “sunset” provision under which the terms of the order terminate twenty years after the date of issuance.

Complaint

IN THE MATTER OF

TEXAS SURGEONS, P.A., ET AL.CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATIONS OF
SEC. 5 OF THE FEDERAL TRADE COMMISSION ACT*Docket C-3944; File No. 9810124
Complaint, May 18, 2000--Decision, May 18, 2000*

This consent order addresses practices by Respondents Texas Surgeons, P.A., Austin Surgeons, P.L.L.C., Austin Surgical Clinic Association, P.A., Bruce McDonald & Associates, P.L.L.C., Capital Surgeons Group, P.L.L.C., Central Texas Surgical Associates, P.A., Surgical Associates of Austin, P.A. The order prohibits respondents from entering into or facilitating any agreement: (1) to negotiate physician services on behalf of any physicians with any payer or provider; (2) to deal, refuse to deal, or threaten to refuse to deal with any payer or provider; (3) regarding any term on which any physicians deal, or are willing to deal, with any payer or provider; (4) to restrict the ability, or facilitate the refusal, of any physician to deal with any payer or provider on an individual basis or through any other arrangement; or (5) to convey to any payer or provider, through any Austin area physician, any information concerning actual or potential dealings by any physician with any payer or provider. The order also prohibits respondents from exchanging, transferring, or facilitating the exchange or transfer of information among Austin area physicians concerning: (1) negotiation with any payer or provider regarding reimbursement terms; or (2) actual or contemplated intentions or decisions with respect to any terms, dealings or refusals to deal with any payer or provider. Respondents may participate in arrangements for the provision of physician services that are limited to physicians from the same medical practice group, engage in conduct that is approved and supervised by the State of Texas, so long as that conduct is protected from liability under the federal antitrust laws pursuant to the state action doctrine, and engage in conduct that is reasonably necessary to operate any "qualified risk-sharing joint arrangement" or "qualified clinically-integrated joint arrangement."

Participants

For the Commission: *Alan J. Friedman, George R. Bellack, Richard A. Feinstein, David R. Pender, Elizabeth A. Piotrowski, Geary A. Gessler, Louis Silvia, and Gregory S. Vistnes.*

For the Respondents: *David A. Ettinger, Honigman, Miller, Schwartz & Cohn, and David W. Hilgers, Hilgers & Watkins.*

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COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, as amended, 15 U.S.C. § 41 et seq., and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that the Texas Surgeons, P.A. ("Texas Surgeons"), Austin Surgeons, P.L.L.C. ("AS"), Austin Surgical Clinic Association, P.A. ("ASCA"), Bruce McDonald & Associates, P.L.L.C. ("BM&A"), Capital Surgeons Group, P.L.L.C. ("CSG"), Central Texas Surgical Associates, P.A. ("CTSA"), and Surgical Associates of Austin, P.A. ("SAA"), hereinafter sometimes referred to as "respondents," have violated Section 5 of the Federal Trade Commission Act, 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, hereby issues this complaint stating its charges as follows:

RESPONDENTS

1. Respondent Texas Surgeons is a for-profit professional association organized, existing, and doing business under and by virtue of the laws of the State of Texas, with its office and principal place of business at 4007 Marathon Blvd., Austin, Texas 78756. At all times relevant to this Complaint, the shareholders of respondent Texas Surgeons have included 26 or more general surgeons.

2. Respondent AS is a professional limited liability corporation organized, existing, and doing business under and by virtue of the laws of the State of Texas, with its office and principal place of business at 3901 Medical Parkway, #200, Austin, Texas 78756. At all times relevant to this Complaint, respondent AS has included at least three general surgeon

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shareholders practicing general surgery in the Austin area through respondent AS.

3. Respondent ASCA is a for-profit professional association organized, existing, and doing business under and by virtue of the laws of the State of Texas, with its office and principal place of business at 2911 Medical Arts Street, Austin, Texas 78705. At all times relevant to this Complaint, respondent ASCA has included at least four general surgeon shareholders practicing general surgery in the Austin area through respondent ASCA.

4. Respondent BM&A is a professional limited liability corporation organized, existing, and doing business under and by virtue of the laws of the State of Texas, with its office and principal place of business at 4007 Marathon Blvd., Austin, Texas 78756. At all times relevant to this Complaint, respondent BM&A has included at least three general surgeon shareholders practicing general surgery in the Austin area through respondent BM&A.

5. Respondent CSG is a professional limited liability corporation organized, existing, and doing business under and by virtue of the laws of the State of Texas, with its office and principal place of business at 3705 Medical Parkway, Austin, Texas 78705. At all times relevant to this Complaint, respondent CSG has included at least seven general surgeon shareholders practicing general surgery in the Austin area through respondent CSG.

6. Respondent CTSA is a for-profit professional association organized, existing, and doing business under and by virtue of the laws of the State of Texas, with its office and principal place of business at 2300 Round Rock Avenue, Round Rock, Texas 78681. At all times relevant to this Complaint, respondent CTSA has included at least three general surgeon shareholders practicing general surgery in the Austin area through respondent CTSA.

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7. Respondent SAA is a for-profit professional association organized, existing, and doing business under and by virtue of the laws of the State of Texas, with its office and principal place of business at 1015 East 32nd Street, Austin, Texas 78705. At all times relevant to this Complaint, respondent SAA has included at least four general surgeon shareholders practicing general surgery in the Austin area through respondent SAA.

8. At all times relevant to this Complaint, the general surgeon shareholders of respondents AS, ASCA, BM&A, CSG, CTSA, and SAA ("respondent medical practice groups") have collectively comprised at least 24 of the 26 or more general surgeon shareholders of respondent Texas Surgeons. The few general surgeon shareholders of respondent Texas Surgeons who do not practice within any of the six respondent medical practice groups are solo practitioners.

9. At all times relevant to this Complaint, the shareholders of respondent Texas Surgeons have constituted the majority of general surgeon private practitioners serving the adult population in the Austin area. All such shareholders practice within the counties of Travis and Williamson. For purposes of this Complaint, the "Austin area" is no larger than the counties of Travis, Williamson, Hays, Bastrop, and Caldwell, including about 1,105,000 residents.

10. Except to the extent that competition has been unreasonably restrained as alleged herein, the six respondent medical practice groups, as well as the solo practitioner general surgeons within respondent Texas Surgeons, have been, and are now, in competition with each other and with other general surgeons and medical practice groups that include general surgeons in the Austin area.

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JURISDICTION

11. Each respondent is a “corporation” within the meaning of Section 4 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 44.

12. The acts and practices of the respondents, including those alleged herein, are in or affect commerce within the meaning of Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45.

COMPETITION AMONG PHYSICIANS

13. General surgeons and other physicians often enter into professional service contracts with third-party payers, including health maintenance organization and preferred provider organization plans, that are designed to lower the costs of medical care for subscribers. Such professional service contracts typically establish the terms and conditions under which the physicians will render services to the subscribers of the third-party payers’ health care plans, including terms and conditions of physician compensation. In order to gain contracts with third-party payers and thereby obtain access to their subscribers, physicians frequently agree to reductions in their compensation and to procedures for reviewing the utilization of medical resources. By lowering costs in this manner, third-party payers are able to reduce the cost of medical care for their subscribers.

14. Absent agreements among competing physicians or medical practice groups about the terms they will accept from third-party payers, and absent an arrangement where collective negotiations with third-party payers are reasonably necessary to obtain significant efficiencies through the arrangement, competing physicians and medical practice groups independently decide whether to enter into professional service contracts with third-party payers, and on the terms and conditions they will accept.

THE ACTS AND PRACTICES OF THE RESPONDENTS

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15. Respondent Texas Surgeons, acting as a combination of its general surgeon shareholders and the six respondent medical practice groups, and in conspiracy with such general surgeon shareholders and medical practice groups, has, among other things, facilitated, created, and implemented express or implied agreements among its general surgeon shareholders and the six respondent medical practice groups to: (a) fix prices and other terms of dealing with third-party payers; (b) collectively threaten to refuse to deal with third-party payers; (c) collectively refuse to deal with third-party payers; and (d) deal with third-party payers only on collectively determined terms.

16. In or around June 1995, ten solo practitioner general surgeons in the Austin area formed an independent practice association named Capital Surgeons, P.A. (a predecessor to respondent Texas Surgeons), and, in or around September 1996, seven of these general surgeons formed respondent CSG and the other three formed respondent AS. Capital Surgeons, P.A., changed its name to Texas Surgeons, P.A., soon after Blue Cross Blue Shield of Texas ("Blue Cross") announced general surgery rate reductions in February 1997 (to become effective April 1, 1997). Soon after Blue Cross implemented its general surgery rate reductions on April 1, 1997, all fifteen of the general surgeons practicing through respondents ASCA, BM&A, CTSA, and SAA joined respondent Texas Surgeons as shareholders (two solo practitioner general surgeons joined respondent Texas Surgeons later in 1997).

17. Since the expansion of respondent Texas Surgeons, representatives of the six respondent medical practice groups collectively have comprised respondent Texas Surgeons' board of directors. As described below, respondent Texas Surgeons, including its board of directors, has served as a vehicle for the six respondent medical practice groups (as well as the few solo

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practitioner shareholders of respondent Texas Surgeons) collectively to negotiate higher rates with two major third-party payers in the Austin area -- Blue Cross and United HealthCare of Texas.

18. The collective rate negotiations described below did not involve either significant financial risk sharing or the creation of other significant efficiencies through respondent Texas Surgeons, and therefore were not reasonably necessary to obtain any significant efficiencies.

RESPONDENTS' COLLECTIVE RATE NEGOTIATIONS
WITH BLUE CROSS

19. In February 1997, Blue Cross notified its Austin area physician network that it was converting to a new physician reimbursement system for certain of its health plans. Blue Cross explained in this notice that, as part of this conversion and in order to help it compete for subscribers, it was reducing payment rates for certain physician categories, including general surgeons, effective April 1, 1997, and that payment rates for primary care physicians would increase.

20. In the summer of 1997, respondent Texas Surgeons' president informed Blue Cross about its general surgeon shareholders' collective dissatisfaction with Blue Cross's general surgery rate reductions that went into effect April 1, 1997. Respondent Texas Surgeons' president identified himself as the authorized spokesperson for respondent Texas Surgeons and began negotiating higher rates on behalf of the general surgeon shareholders. During these rate negotiations, which extended to early 1998, respondent Texas Surgeons' president negotiated according to the collective decisions of the: (1) six respondent medical practice groups, made during Texas Surgeons' board of directors meetings or through other mechanisms; and (2) general surgeon shareholders of respondent Texas Surgeons, made during one or more shareholder meetings or through other mechanisms.

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21. Respondent Texas Surgeons' collective negotiations with Blue Cross ultimately led to a rate agreement in February 1998 that increased general surgery rates (on average) more than 29% over the pre-existing rates. At various times during the collective rate negotiations, Blue Cross attempted to negotiate on an individual basis with the six respondent medical practice groups or their shareholders. Each consistently rebuffed, refused, or did not respond to Blue Cross's multiple attempts to initiate individual rate negotiations and indicated that they would only negotiate through respondent Texas Surgeons.

22. Respondent Texas Surgeons sent Blue Cross in September 1997 a package containing contract termination notices for each general surgeon who was at that time a shareholder of respondent Texas Surgeons. Respondent Texas Surgeons' cover letter stated that the contract termination notices were due to Blue Cross's "unacceptable" fee schedule. All 26 of these contract termination notices were on Texas Surgeons' letterhead, had the same date of authorship, and contained identical wording.

23. In November 1997, aware of possible antitrust liability due to its ongoing collective rate negotiations, respondent Texas Surgeons requested that Blue Cross sign a letter waiving Blue Cross's right to file a private antitrust action against either respondent Texas Surgeons or any of its shareholders, regarding the Texas Surgeons-Blue Cross rate negotiations. Because Blue Cross refused to waive its antitrust rights, the six respondent medical practice groups decided to involve a third-party agent in an effort to continue their agreements to collectively negotiate rates and to deal with Blue Cross only on collectively determined terms. The six respondent medical practice groups agreed that their third-party agent would convey to Blue Cross only the highest of the various rate authorizations that he obtained from each of the six respondent medical practice groups, and the third-

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party agent did so. Blue Cross rejected that collective rate proposal.

24. On December 1, 1997, due to dissatisfaction with Blue Cross's rate offers and the perceived pace of collective rate negotiations, the general surgeon shareholders of respondent Texas Surgeons effected their contract terminations as originally noticed to Blue Cross in September 1997. To apply further pressure on Blue Cross, respondents announced the Blue Cross contract terminations of their general surgeon shareholders in a prominent advertisement in the major Austin daily newspaper on December 14, 1997.

25. Thereafter, respondent BM&A advised two solo practitioner general surgeons that the BM&A general surgeons would no longer provide back-up surgical coverage for any of their patients if they continued to deal with Blue Cross. Both had expanded their hours to cover Blue Cross general surgeries and were key performers within Blue Cross's small remaining panel of Austin area general surgeons. In or around early February 1998, both submitted contract resignation notices to Blue Cross in order to preserve their back-up coverage arrangements with respondent BM&A.

26. After Blue Cross's receipt of resignation notices from the two solo practitioners (as described in Paragraph 25), and after some difficulty in securing the timely services of a general surgeon for a Blue Cross emergency room patient, Blue Cross concluded that it needed to reach a rate agreement with respondent Texas Surgeons as soon as possible to avoid inadequate general surgery coverage for Blue Cross subscribers in the Austin area.

27. In or around early 1998, with full knowledge of antitrust prohibitions on competitors engaging in collective rate negotiations, respondent CSG negotiated and completed, on behalf of all six respondent medical practice groups, a collective rate agreement with Blue Cross. The respondent medical practice

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groups completed this collective rate agreement after respondent Texas Surgeons had received notice that its activities were subject to antitrust investigation. After Blue Cross agreed to increase its rates as demanded by the respondents, all of the general surgeon shareholders of respondent Texas Surgeons that had terminated their Blue Cross contracts rejoined the Blue Cross physician panel by early March 1998.

28. The collective rate increases extracted from Blue Cross by respondents caused Blue Cross to extend those increased rates to surgeries usually performed by Austin area physicians other than general surgeons. Blue Cross keeps all surgeons at the same rate levels to enhance provider relations.

RESPONDENTS' COLLECTIVE RATE NEGOTIATIONS WITH UNITED

29. In October 1997, United HealthCare of Texas-Central Texas Region ("United") notified its participating physicians in the Austin area that, effective January 1, 1998, physician fees, including general surgery fees, would be reduced. Fee reductions for surgeries usually performed by physicians other than general surgeons went into effect and remain in effect in the Austin area, but the proposed (and comparable) fee reductions for surgeries usually or frequently performed by general surgeons never went into effect. Instead, as described below, Austin area general surgery fees for United's various plans increased at least 12% to 40% above the rates that United announced in October 1997.

30. In early November 1997, United received a letter from respondent Texas Surgeons stating that, due to United's "unacceptable" fee reductions for 1998, all of the general surgeon shareholders of respondent Texas Surgeons were terminating their individual contracts with United effective January 1, 1998. The

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letter listed the names of all 27 general surgeon shareholders of respondent Texas Surgeons at that time.

31. Also in early November 1997, respondent Texas Surgeons' president and acting vice president told United officials that the general surgeon shareholders of respondent Texas Surgeons would rescind their collective termination notices if United were to increase its general surgery fees at least 20% above United's then current 1997 fee schedule.

32. A United official responded that United preferred to negotiate with the general surgeon shareholders of respondent Texas Surgeons (or their six respondent medical practice groups) on an individual basis. The president and acting vice president of respondent Texas Surgeons rejected that option. When the United official retorted that the general surgeon shareholders were under individual contracts, the Texas Surgeons president responded that he would be willing to produce individual termination letters, if so desired by United.

33. Respondent Texas Surgeons' president further advised United that: (1) the general surgeon shareholders were very interested in announcing through a local newspaper advertisement the collective termination of their United contracts, but that they would hold off if United were to agree to engage in a speedy collective fee negotiation; and (2) he had already told some employees of a large Austin area employer under contract with United that the Texas Surgeons shareholders were planning to drop out of United's network effective January 1, 1998. The respondents knew that United would likely consider public awareness of respondents' collective termination notice as imperiling United's ability to renew the many employer contracts that were expiring beginning in January 1998, and that loss of these contracts would cause heavy subscriber enrollment losses for United.

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34. United explored the possibility of creating a panel of Austin area general surgeons that did not include any general surgeon shareholders of respondent Texas Surgeons. United concluded that: (1) general surgeon shareholders of respondent Texas Surgeons were needed to maintain adequate general surgery coverage; (2) any attempt to negotiate with them on an individual basis would likely fail; and (3) it had no realistic alternative other than to begin collective fee negotiations.

35. Prior to the start of collective fee negotiations on November 19, 1997, respondent Texas Surgeons required United to sign a letter waiving United's right to file a private antitrust action against respondent Texas Surgeons or any of its general surgeon shareholders, regarding the Texas Surgeons-United fee negotiations. Respondent Texas Surgeons' president, who attended and led the collective fee negotiations that day, was in frequent telephone and fax contact, and deliberated collectively, with representatives of the six respondent medical practice groups who were assembled together to facilitate collective fee negotiations with United.

36. At the November 19, 1997 collective fee negotiations, respondents demanded and received an agreement from United to pay substantially higher fees for 1998 and 1999. Thereafter, in December 1997, respondent Texas Surgeons sent United a letter on Texas Surgeons letterhead, on behalf of all of the general surgeon shareholders, revoking their November 1997 collective termination notice.

37. The 1998 fees that the respondents extracted from United under its various plans are at least 12% to 34% higher, and their 1999 fees are at least 27% to 40% higher, than United's originally proposed fee schedule that went into effect in 1998 for (and that continues to apply to) surgeries usually performed by physicians other than general surgeons.

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EFFECTS

38. The acts and practices of the respondents as described herein have had the purpose or effect, or the tendency and capacity, to restrain competition unreasonably in the provision of services by private general surgeon practitioners in the Austin area and to injure consumers in the following ways, among others:

- a. to deprive consumers, including individuals, employers (including the State of Texas Employees Retirement System), and third-party payers, of the benefits of competition;
- b. to fix or increase the payments or co-payments that individual patients, their employers, and third-party payers make for the services of general surgeons, and, in the case of Blue Cross managed care plans, for surgeries performed by physicians other than general surgeons;
- c. to fix the terms and conditions upon which general surgeons would deal with third-party payers, including terms of compensation, and thereby to raise the prices that individuals and employers pay for health plans offered by third-party payers; and
- d. to increase by over one million dollars the amount that Blue Cross, United, their individual subscribers, and employers paid from January 1, 1998 through December 31, 1999 to the six respondent medical practice groups, general surgeon shareholders of respondent Texas Surgeons, and other Austin area physicians.

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VIOLATIONS

39. The acts and practices of the respondents as described above are to the prejudice and injury of the public and constitute unfair methods of competition in violation of Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45. The acts and practices of the respondents, as described above, are continuing and will continue or recur in the absence of the relief requested.

WHEREFORE, THE PREMISES CONSIDERED, the Federal Trade Commission on this eighteenth day of May, 2000, issues its complaint against said respondents.

By the Commission.

DECISION AND ORDER

The Federal Trade Commission ("Commission") having initiated an investigation of certain acts and practices of Texas Surgeons, P.A. ("Texas Surgeons"), Austin Surgeons, P.L.L.C. ("AS"), Austin Surgical Clinic Association, P.A. ("ASCA"), Bruce McDonald & Associates, P.L.L.C. ("BM&A"), Capital Surgeons Group, P.L.L.C. ("CSG"), Central Texas Surgical Associates, P.A. ("CTSA"), and Surgical Associates of Austin, P.A. ("SAA"), hereinafter sometimes referred to as "respondents," and respondents having been furnished thereafter with a copy of a draft of Complaint that the Bureau of Competition presented to the Commission for its consideration and which, if issued by the Commission, would charge respondents with violation of Section

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5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45; and

Respondents, their attorneys, and counsel for the Commission having thereafter executed an Agreement Containing Consent Order (“Consent Agreement”), containing an admission by respondents of all the jurisdictional facts set forth in the aforesaid draft of Complaint, a statement that the signing of said Consent Agreement is for settlement purposes only and does not constitute an admission by respondents that the law has been violated as alleged in such complaint, or that the facts as alleged in such complaint, other than jurisdictional facts, are true, and waivers and other provisions as required by the Commission's Rules; and

The Commission having thereafter considered the matter and having determined that it had reason to believe that respondents have violated the said Act, and that a Complaint should issue stating its charges in that respect, and having accepted the executed Consent Agreement and placed such Consent Agreement on the public record for a period of thirty (30) days for the receipt and consideration of public comments, now in further conformity with the procedure described in Commission Rule 2.34, 16 C.F.R. § 2.34, the Commission hereby issues its complaint, makes the following jurisdictional findings and issues the following Order:

1. Respondent Texas Surgeons is a professional association organized, existing, and doing business under and by virtue of the laws of the State of Texas, with its office and principal place of business at 4007 Marathon Blvd., Austin, Texas 78756.

2. Respondent AS is a professional limited liability corporation organized, existing, and doing business under and by virtue of the laws of the State of Texas, with its office and principal place of business at 3901 Medical Parkway, #200, Austin, Texas 78756.

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3. Respondent ASCA is a professional association organized, existing, and doing business under and by virtue of the laws of the State of Texas, with its office and principal place of business at 2911 Medical Arts Street, Austin, Texas 78705.

4. Respondent BM&A is a professional limited liability corporation organized, existing, and doing business under and by virtue of the laws of the State of Texas, with its office and principal place of business at 4007 Marathon Blvd., Austin, Texas 78756.

5. Respondent CSG is a professional limited liability corporation organized, existing, and doing business under and by virtue of the laws of the State of Texas, with its office and principal place of business at 3705 Medical Parkway, Austin, Texas 78705.

6. Respondent CTSA is a professional association organized, existing, and doing business under and by virtue of the laws of the State of Texas, with its office and principal place of business at 2300 Round Rock Avenue, Round Rock, Texas 78681.

7. Respondent SAA is a professional association organized, existing, and doing business under and by virtue of the laws of the State of Texas, with its office and principal place of business at 1015 East 32nd Street, Austin, Texas 78705.

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

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ORDER

I.

IT IS ORDERED that, for the purposes of this Order, the following definitions shall apply:

- A. "Respondent Texas Surgeons" means Texas Surgeons, P.A., its directors, officers, employees, agents, representatives, predecessors, successors, and assigns; its subsidiaries, divisions, groups, and affiliates controlled by Texas Surgeons, P.A., and the respective directors, officers, employees, agents, representatives, successors, and assigns of each.
- B. "Respondent medical practice groups" means Austin Surgeons, P.L.L.C., Austin Surgical Clinic Association, P.A., Bruce McDonald & Associates, P.L.L.C., Capital Surgeons Group, P.L.L.C., Central Texas Surgical Associates, P.A., and Surgical Associates of Austin, P.A., each of their directors, officers, employees, agents, representatives, predecessors, successors, and assigns; the subsidiaries, divisions, groups, and affiliates controlled by each respondent medical practice group, and the respective directors, officers, employees, agents, representatives, successors, and assigns of each.
- C. "Respondents" means respondent Texas Surgeons and respondent medical practice groups.
- D. "Person" means both natural persons and artificial persons, including, but not limited to, corporations, unincorporated entities, and governments.
- E. "Payer" means any person that purchases, reimburses for, otherwise pays for all or part of, or arranges for the payment of, any health care services for itself or for any

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other person. Payer includes, but is not limited to: any health insurance company; preferred provider organization; prepaid hospital, medical, or other health service plan; health maintenance organization; government health benefits program; employer or other person providing or administering self-insured health benefits programs; and patients who purchase health care for themselves.

- F. "Physician" means a doctor of allopathic medicine (M.D.) or a doctor of osteopathic medicine (D.O.).
- G. "Provider" means any person, including but not limited to any physician, hospital, or clinic, that supplies health care services to any other person.
- H. "Qualified risk-sharing joint arrangement" means an arrangement to provide physician services in which: (1) all participating physicians share substantial financial risk from their participation in the arrangement and thereby create incentives for the participating physicians to jointly control costs and improve quality by managing the provision of physician services, such as risk sharing involving (a) the provision of physician services to payers or providers at a capitated rate, (b) the provision of physician services for a predetermined percentage of premium or revenue from payers or providers, (c) the use of significant financial incentives (e.g., substantial withholds) for its participating physicians, as a group, to achieve specified cost-containment goals, or (d) the provision of a complex or extended course of treatment that requires the substantial coordination of care by physicians in different specialties offering a complementary mix of services, for a fixed, predetermined payment, where the costs of that course of treatment for

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any individual patient can vary greatly due to the individual patient's condition, the choice, complexity, or length of treatment, or other factors; (2) any agreement concerning reimbursement or other terms or conditions of dealing entered into by or within the arrangement is reasonably necessary to obtain significant efficiencies through the joint arrangement; and (3) the arrangement does not restrict the ability, or facilitate the refusal, of physicians participating in the arrangement to deal with payers or providers on an individual basis or through any other arrangement.

- I. "Qualified clinically-integrated joint arrangement" means an arrangement to provide physician services in which: (1) all participating physicians participate in active and ongoing programs of the arrangement to evaluate and modify the practice patterns of, and create a high degree of interdependence and cooperation among, the physicians participating in the arrangement, in order to control costs and ensure the quality of services provided through the arrangement; (2) any agreement concerning reimbursement or other terms or conditions of dealing entered into by or within the arrangement is reasonably necessary to obtain significant efficiencies through the joint arrangement; and (3) the arrangement does not restrict the ability, or facilitate the refusal, of physicians participating in the arrangement to deal with payers or providers on an individual basis or through any other arrangement.
- J. "Reimbursement" means any payment, whether cash or non-cash, or other benefit received for the provision of physician services.
- K. "Austin area physician" means any physician who has active staff privileges at one or more hospitals within any of the Texas counties of Travis, Williamson, Hays, Caldwell, and Bastrop.

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II.

IT IS FURTHER ORDERED that each respondent, directly or indirectly, or through any corporate or other device, in connection with the provision of physician services in or affecting commerce, as "commerce" is defined in Section 4 of the Federal Trade Commission Act, 15 U.S.C. § 44, cease and desist from:

- A. Entering into, adhering to, participating in, maintaining, organizing, implementing, enforcing, or otherwise facilitating any combination, conspiracy, agreement, or understanding:
1. To negotiate on behalf of any physicians with any payer or provider for physician services;
 2. To deal, refuse to deal, or threaten to refuse to deal with, or boycott or threaten to boycott, any payer or provider;
 3. Regarding any term, condition, or requirement upon which any physicians deal, or are willing to deal, with any payer or provider, including, but not limited to, terms of reimbursement;
 4. To restrict the ability, or facilitate the refusal, of any physician to negotiate or deal with any payer or provider on an individual basis or through an arrangement not involving one or more respondents; or
 5. To convey to any payer or provider through any Austin area physician any information (including, but not limited to, any actual or contemplated views,

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intentions, positions, terms, proposals, or decisions) on behalf of any physician concerning:

- a. negotiation of any actual or proposed term, condition, or requirement of dealing with any payer or provider;
 - b. any actual or contemplated intention or decision with respect to:
 - (1) entering into, refusing to enter into, threatening to refuse to enter into, withdrawing from, or threatening to withdraw from any actual or proposed agreement with any payer or provider; or
 - (2) agreeing to, refusing to agree to, or willingness to agree to any actual or proposed term, condition, or requirement of dealing with any payer or provider.
- B. Exchanging, transferring, or facilitating in any manner the exchange or transfer among any Austin area physicians of information (including, but not limited to, any views, intentions, positions, terms, proposals, or decisions) concerning:
1. negotiation with any payer or provider of actual or proposed terms, conditions, or requirements regarding reimbursement;
 2. any Austin area physician's actual or contemplated intention or decision with respect to:
 - a. entering into, refusing to enter into, threatening to refuse to enter into, withdrawing from, or threatening to withdraw from any actual or proposed agreement with any payer or provider; or

Decision and Order

- b. agreeing to, refusing to agree to, or willingness to agree to any actual or proposed term, condition, or requirement of dealing with any payer or provider.
- C. Encouraging, urging, suggesting, requesting, advising, pressuring, assisting, inducing, or attempting to induce any non-governmental person to engage in any action that would be prohibited if the person were subject to this Order.

PROVIDED that nothing in this Order shall prohibit any respondent medical practice group from participating in or furthering any arrangement to provide physician services that is limited to physicians who practice medicine within such respondent as a shareholder, owner, or employee.

PROVIDED FURTHER that nothing in this Order shall prohibit conduct that is approved and supervised by the State of Texas insofar as that conduct is protected from liability under the federal antitrust laws pursuant to the state action doctrine.

PROVIDED FURTHER that nothing in this Order shall prohibit any agreement involving, or conduct by, any respondent that is reasonably necessary to form, participate in, or take any other action in furtherance of a qualified risk-sharing joint arrangement or a qualified clinically-integrated joint arrangement, so long as the notification provisions contained in Paragraph V. of this Order have been satisfied.

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III.**IT IS FURTHER ORDERED** that:

- A. Within thirty (30) days after the date on which this Order becomes final, respondent Texas Surgeons shall distribute by first-class mail a copy of this Order, the accompanying complaint, and the Notice in Attachment A to this Order, to:
1. Each payer or provider listed in Attachment B to this Order;
 2. Each person who, at any time on or after January 1, 1996, has been an officer, director, manager, participating physician, shareholder, or owner of respondent Texas Surgeons;
 3. Each other agent, representative, or employee of respondent Texas Surgeons.
- B. Within thirty (30) days after the date on which this Order becomes final, each respondent medical practice group shall distribute by first-class mail a copy of this Order, the accompanying complaint, and the Notice in Attachment A to this Order, to:
1. Each officer, director, manager, participating physician, shareholder, or owner of such respondent who is not a shareholder of respondent Texas Surgeons;
 2. Each other agent, representative, or employee of such respondent;
 3. Each payer or provider not listed in Attachment B that, at any time from September 1, 1999 to December 31, 1999, has paid such respondent, or any participating

Decision and Order

physician of such respondent, for the provision of physician services under an executed contract.

- C. For a period of five (5) years after the date this Order becomes final, respondent Texas Surgeons shall:
1. Within thirty (30) days of the date the person assumes such position, distribute by first-class mail a copy of this Order and the accompanying complaint to each new officer, director, manager, participating physician, shareholder, or owner of respondent Texas Surgeons, and to each other new agent, representative, or employee of respondent Texas Surgeons;
 2. Annually publish, in an official annual report, newsletter, or memorandum sent to all shareholders, owners, and participating physicians, a copy of this Order and the accompanying complaint with such prominence as is given to official communications or regularly featured articles;
 3. Annually brief shareholders, owners, and participating physicians on the meaning and requirements of this Order and the antitrust laws, including penalties for the violation of this Order.
- D. For a period of five (5) years after the date this Order becomes final, each respondent medical practice group shall:
1. Within thirty (30) days of the date the person assumes such position, distribute by first-class mail a copy of this Order and the accompanying complaint to each new officer, director, manager, participating physician, shareholder, or owner of such respondent (unless such

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person is a shareholder of respondent Texas Surgeons), and to each other new agent, representative, or employee of such respondent;

2. Annually publish, in an official annual report, newsletter, or memorandum sent to all shareholders, owners, and participating physicians of such respondent, a copy of this Order and the accompanying complaint with such prominence as is given to official communications or regularly featured articles;
3. Annually brief shareholders, owners, and participating physicians of such respondent, who are not shareholders of respondent Texas Surgeons, on the meaning and requirements of this Order and the antitrust laws, including penalties for the violation of this Order.

IV.

IT IS FURTHER ORDERED that each respondent shall:

- A. File a verified written report with the Commission within sixty (60) days after this Order becomes final, annually thereafter for five (5) years on the anniversary of the date the Order becomes final, and at such other times as the Commission may by written notice require, setting forth in detail the manner and form in which such respondent intends to comply, is complying, and has complied, with this Order. In addition to any other information that may be necessary to demonstrate compliance, respondent Texas Surgeons shall include in such reports information identifying each payer and provider that has communicated with respondent Texas Surgeons concerning a possible contract for physician services, the proposed terms and conditions of any such contract, and respondent Texas Surgeons' response to such payer or provider.

Decision and Order

- B. Notify the Commission at least thirty (30) days prior to any proposed change in such respondent, such as dissolution, assignment, sale resulting in the emergence of a successor, the creation or dissolution of subsidiaries, or any other change in respondent that may affect compliance obligations arising out of this Order.

V.

IT IS FURTHER ORDERED that, for a period of ten (10) years after the date this Order is entered:

- A. Each respondent shall notify the Commission in writing at least thirty (30) days prior to forming, participating in, or taking any action, other than planning, in furtherance of any:
 - 1. Qualified risk-sharing joint arrangement or qualified clinically-integrated joint arrangement involving two (2) or more Austin area physicians; or
 - 2. Other arrangement that, in dealing or negotiating with any payer or provider, is using, or intends to use, an agent that represents two (2) or more Austin area physicians.
- B. If a representative of the Commission makes a written request for information within thirty (30) days after receipt of a notice pursuant to Paragraph V.A.1. of this Order, respondents shall not form, participate in, or take any action, other than planning, in furtherance of the arrangement until thirty (30) days after substantially complying with such request for information or such

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shorter waiting period as may be granted by letter from the Bureau of Competition.

PROVIDED that no prior notification is required under this Paragraph for action by a respondent medical practice group in furtherance of any arrangement that is limited to physicians who practice medicine within such respondent as a shareholder, owner, or employee.

VI.

IT IS FURTHER ORDERED that, for the purpose of determining or securing compliance with this Order, each 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, correspondences, memoranda, calendars, and other records and documents in the possession or under the control of such respondent relating to any matter contained in this Order; and
- B. Upon five (5) business days' notice, and without restraint or interference, to interview officers, directors, employees, agents, and other representatives of any respondent.

VII.

IT IS FURTHER ORDERED that this Order shall terminate on May 18, 2020.

By the Commission.

Decision and Order

Attachment A

NOTICE

The Order accompanying this Notice, among other provisions, prohibits Texas Surgeons, P.A. (an association of 26 general surgeons in the Austin, Texas, area) (“Texas Surgeons”) and six named medical practice groups (whose physicians comprise almost all of the members of Texas Surgeons) from participating in or facilitating any agreement to:

- * negotiate on behalf of physicians with any health plan or any other purchaser of physician services;
- * deal, refuse to deal, or threaten to refuse to deal with, or boycott or threaten to boycott, any health plan or any other purchaser of physician services;
- * restrict the ability of any physician to negotiate or deal on an independent basis with any health plan or any other purchaser.

Another provision of the Order prohibits Texas Surgeons and the six practice groups from exchanging, or facilitating the exchange of, among any Austin area physicians, certain information relating to negotiations and dealings with health plans and other purchasers of physician services.

The Order permits an arrangement that sets collective price terms or other collective terms and conditions of dealing only if it is a “qualified risk-sharing joint arrangement” or “qualified clinically-integrated joint arrangement” (as defined in the Order). Nothing in the Order prohibits any of the six practice groups from furthering any arrangement to provide physician services that is limited to physicians within the practice group. Further, the Order

Decision and Order

does not prohibit any conduct that is approved and supervised by the State of Texas and is protected from liability under the federal antitrust laws by the state action doctrine.

The Texas Surgeons and the six practice groups may participate in an arrangement in which the individual practice groups or individual physicians convey and receive, through a third party, information, offers, and responses from and to health plans or other purchasers, so long as such negotiations remain individual and do not violate the Order. For additional information about how such negotiations can remain individual, see the August 1996 *Statements of Antitrust Enforcement Policy in Health Care* jointly issued by the Federal Trade Commission and the U.S. Department of Justice, including pages 43-52, 89-92, 125-27, and 138-40. A copy of that publication is available through the Commission's web site: www.ftc.gov.

Attachment B

Aetna U.S. Healthcare
10101 Reunion Place, Suite 200
San Antonio, TX 78216

AmeriHealth of Texas
10711 Burnet Road, Suite 312
Austin, TX 78758

Amil International, Inc.
9229 Waterford Centre Blvd., Suite 500
Austin, TX 78758

Blue Cross Blue Shield of Texas, Inc.
9020 Capital of Texas Hwy. North
Building II, Suite 400

Decision and Order

Austin, TX 78759

Foundation Health Systems, Inc.
9101 Burnet Road, Suite 104
Austin, TX 78758

Healthsource Texas, Inc.
1701 Directors Blvd., Suite 110
Austin, TX 78744

Humana Health Care Plans
8303 N. MoPac Expressway, Suite 450
Austin, TX 78759

NYLCare Health Plans of the Gulf Coast, Inc.
8701 N. MoPac Expressway, Suite 440
Austin, TX 78759

Prudential Health Care Plan, Inc.
7700 Chevy Chase Drive
Building I, Suite 500
Austin, TX 78752

Scott & White Health Plan
One Chisholm Trail, Suite 200
Round Rock, TX 78681

United HealthCare of Texas, Inc.
1250 S. Capital of Texas Highway
Building One, Suite 400
Austin, TX 78746

Vista Health Plan, Inc.
7801 North I-35
Austin, TX 78753

Analysis to Aid Public Comment

**Analysis of Agreement Containing Consent Order to Aid
Public Comment**

The Federal Trade Commission has accepted, subject to final approval, an agreement to a proposed consent order by the Texas Surgeons, P.A. (“Texas Surgeons IPA”) and six medical practice groups comprised of Texas Surgeons IPA members – Austin Surgeons, P.L.L.C.; Austin Surgical Clinic Association, P.A.; Bruce McDonald & Associates, P.L.L.C.; Capital Surgeons Group, P.L.L.C.; Central Texas Surgical Associates, P.A.; and Surgical Associates of Austin, P.A. The agreement settles charges by the Federal Trade Commission that the Texas Surgeons IPA and the six medical practice groups (the “respondents”) violated Section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45, by fixing prices and other terms of dealing with third-party payers; collectively refusing to deal with third-party payers or threatening to do so; and agreeing to deal with third-party payers only on collectively determined terms. The proposed consent order has been placed on the public record for thirty (30) days for reception of comments by interested persons. Comments received during this period will become part of the public record. After thirty (30) days, the Commission will review the agreement and the comments received, and will decide whether it should withdraw from the agreement or make it and the proposed order final.

The purpose of this analysis is to facilitate public comment on the proposed order. The analysis is not intended to constitute an official interpretation of the agreement and proposed order, or to modify in any way their terms. Further, the proposed consent order has been entered into for settlement purposes only and does not constitute an admission by any respondent that the law has been violated as alleged in the complaint.

Analysis to Aid Public Comment

The Complaint

Under the terms of the agreement, a complaint will be issued by the Commission along with the proposed consent order. The allegations in the Commission's proposed complaint are summarized below.

Respondent Texas Surgeons IPA is an association of general surgeons who practice in the Austin, Texas area. Members of the Texas Surgeons IPA are, and at all times relevant to the complaint have been, the majority of general surgeon private practitioners serving the adult population in the Austin area.

Nearly all of the members of the Texas Surgeons IPA belong to one of six general surgery practice groups, which are also respondents in this matter. At all times relevant to the complaint, the Texas Surgeons IPA has been governed by a board of directors composed of representatives from each of the respondent medical practice groups.

The Texas Surgeons IPA has served as a vehicle for the six respondent medical practice groups (and the few solo practitioner members) to engage in actual or threatened concerted refusals to deal, and to negotiate collectively, in order to obtain higher prices from Blue Cross Blue Shield of Texas ("Blue Cross") and United HealthCare of Texas ("United"). The six respondent medical practice groups actively furthered the unlawful conduct through their collective control of the Texas Surgeons IPA board of directors, and through their direct participation in collective fee negotiations between United and the Texas Surgeons IPA.

In April 1997, Blue Cross changed its reimbursement system from one based on historical charges to one based on a Resource Based Relative Value Scale, similar to the system used by the federal government in its Medicare program. The effect of this

Analysis to Aid Public Comment

change was to increase rates paid to primary care physicians, and to reduce rates to all physician specialists, including general surgeons. Soon thereafter, respondents, through the Texas Surgeons IPA, began collectively negotiating higher rates.

Despite multiple attempts by Blue Cross to negotiate individually with the six respondent medical practice groups, those groups insisted on negotiating only through the Texas Surgeons IPA. In September 1997, the Texas Surgeons IPA sent Blue Cross a package of identically worded contract termination notices for each general surgeon member of the Texas Surgeons IPA, with a cover letter stating that the termination notices were due to Blue Cross's "unacceptable" rate reductions. In November 1997, the Texas Surgeons IPA asked Blue Cross to waive its right to bring a private antitrust action regarding the Texas Surgeons IPA's rate negotiations with Blue Cross, but Blue Cross refused to sign the waiver. In December 1997, 26 members of the Texas Surgeons IPA, dissatisfied with Blue Cross's payment offers, collectively effected their resignations from Blue Cross, and jointly announced that action in a prominent advertisement in Austin's major daily newspaper.

In early 1998, Blue Cross experienced difficulty in securing the services of a general surgeon for an emergency room patient. At about the same time, two more general surgeons resigned from Blue Cross. These two general surgeons had been advised by one of the respondent medical practice groups that their inclusion in an arrangement with that practice group regarding back-up surgical coverage would end if they continued to deal with Blue Cross.

After these events, Blue Cross concluded that it needed to reach a rate agreement with the respondents as soon as possible to avoid inadequate general surgery coverage for Blue Cross subscribers in the Austin area. The collective rate agreement between the six respondent medical practice groups and Blue Cross that resulted in early 1998 increased Blue Cross general surgery rates nearly 30% above the April 1997 levels.

Analysis to Aid Public Comment

Respondents began collective price negotiations with United soon after it announced fee reductions for general surgeons and other physicians in October 1997. The new fees went into effect on January 1, 1998 for surgical procedures not usually performed by general surgeons, but comparable proposed fee reductions for general surgeons never went into effect. Instead, respondents caused general surgery fees for United's various plans to increase at least 12% to 40% above the fees that United announced in October 1997.

In early November 1997, United received a written notice from the Texas Surgeons IPA that all of its members would be terminating their contracts with United effective January 1, 1998, due to the proposed fee reductions for 1998. The Texas Surgeons IPA indicated its desire to collectively negotiate higher fees and rejected United's request to negotiate with the six respondent medical practice groups on an individual basis. United explored the possibility of creating a panel of general surgeons that did not include general surgeons from the six respondent medical practice groups, but it concluded that such a panel would not provide adequate general surgery coverage and that it had no realistic alternative to beginning collective fee negotiations with the Texas Surgeons IPA.

Prior to the start of a collective fee negotiation session in November 1997, the Texas Surgeons IPA required United to sign a waiver of its right to bring a private antitrust action against the Texas Surgeons IPA or its members stemming from those fee negotiations. At that collective fee negotiation session, respondents demanded and received an agreement from United to pay higher fees in 1998 and 1999, as described above. Representatives from the six respondent medical practice groups assembled together and collectively participated in this collective

Analysis to Aid Public Comment

fee negotiation session through frequent telephone and fax contact with the Texas Surgeons IPA's lead negotiator.

The Texas Surgeons IPA did not engage in any activity that might justify collective agreements on the prices they would accept for their services. Respondents' actions have restrained competition among general surgeons in the Austin area and thereby have harmed, or tended to harm, consumers (including third-party payers, subscribers, and their employers) by:

- * depriving consumers of the benefits of competition;
- * increasing by over one million dollars the amount that Blue Cross, United, their individual subscribers, and employers (including the State of Texas Employees Retirement System and other self-insured employers that utilize the Blue Cross or United physician network) paid for the services of surgeons during the period from January 1, 1998 to December 31, 1999;
- * fixing the payments or co-payments that individual patients, their employers, and third-party payers make for the services of surgeons;
- * fixing the terms and conditions upon which general surgeons would deal with third-party payers; and
- * raising the prices that individuals and employers pay for health plan coverage offered by third-party payers.

The Proposed Consent Order

The proposed order is designed to prevent recurrence of the illegal concerted actions alleged in the complaint, while allowing respondents to engage in legitimate joint conduct. The Commission notes that in 1999, some time after the investigation of this matter began, the State of Texas enacted legislation that permits the State Attorney General to approve, under certain

Analysis to Aid Public Comment

conditions, joint negotiations between health plans and groups of competing physicians. Texas Senate Bill 1468, 76th Leg., R.S. ch., 1586 (1999). The conduct that gave rise to the investigation and consent agreement predated enactment of the law, and thus was not approved under its terms. Moreover, the conduct described in the complaint would not necessarily have met the conditions for approval set forth in the Act.

Enactment of the statute does not eliminate the need for an order in this matter. The statute permits only collective negotiations that are approved by the Attorney General, imposes conditions under which that approval may be granted, and by its terms expires on September 1, 2003. As is discussed below, the Commission's order does not prohibit future conduct that is approved and supervised by the State of Texas pursuant to its statute and protected from federal antitrust liability under the state action doctrine. It is necessary and appropriate, however, to provide a remedy against future conduct by the respondents that is not approved and supervised by the State of Texas.

The core operative provisions of the proposed order are contained in Section II. Section II.A prohibits respondents from entering into or facilitating any agreement: (1) to negotiate physician services on behalf of any physicians with any payer or provider; (2) to deal, refuse to deal, or threaten to refuse to deal with any payer or provider; (3) regarding any term on which any physicians deal, or are willing to deal, with any payer or provider; (4) to restrict the ability, or facilitate the refusal, of any physician to deal with any payer or provider on an individual basis or through any other arrangement; or (5) to convey to any payer or provider, through any Austin area physician, any information concerning actual or potential dealings by any physician with any payer or provider.

Analysis to Aid Public Comment

The fifth provision listed above (Section II.A.5 of the proposed order) ensures that communications between any respondent and any payer within a “messenger model” arrangement be conveyed by a neutral third party (someone other than a physician with an active practice in the Austin area). In a messenger model arrangement, physicians individually convey and receive, through a third party, information, offers, and responses from and to payers or providers. *See* Statements of Antitrust Enforcement Policy in Health Care, issued jointly by the Federal Trade Commission and the U.S. Department of Justice (August 28, 1996) at 43-52, 89-92, 125-27, 138-40, 4 *Trade Reg. Rep. (CCH)* ¶ 13,153. In addition, Section V.A.2 of the order ensures that any respondent intending to use a messenger model arrangement provide prior notification to the Commission.

Section II.B prohibits respondents from exchanging, transferring, or facilitating the exchange or transfer of information among Austin area physicians concerning: (1) negotiation with any payer or provider regarding reimbursement terms; or (2) actual or contemplated intentions or decisions with respect to any terms, dealings or refusals to deal with any payer or provider. Section II.C prohibits respondents from encouraging, advising, or pressuring any person, other than the government, to engage in any action that would be prohibited if the person were subject to the order.

Section II contains three provisos. The first permits each respondent medical practice group to participate in arrangements for the provision of physician services that are limited to physicians from the same medical practice group. The second proviso, as noted above, permits respondents to engage in conduct that is approved and supervised by the State of Texas, so long as that conduct is protected from liability under the federal antitrust laws pursuant to the state action doctrine. The state action doctrine protects from federal antitrust liability any private conduct that is both: (1) in accordance with a clearly articulated and affirmatively expressed state policy to supplant competition; and (2) actively supervised by the state itself. *See, e.g., FTC v.*

Analysis to Aid Public Comment

Ticor Title Insurance Co., 504 U.S. 621 (1992); *California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. 97, 105 (1980).

The third proviso allows respondents to engage in conduct (including collectively determining reimbursement and other terms of contracts with payers) that is reasonably necessary to operate any “qualified risk-sharing joint arrangement” or “qualified clinically-integrated joint arrangement,” provided respondents comply with the prior notification requirements set forth in Section V of the order. The prior notification mechanism will allow the Commission to evaluate a specific proposed arrangement and assess its likely competitive impact. This requirement will help guard against any recurrence of acts and practices that have restrained competition and injured consumers.

As defined in the order, a “qualified risk-sharing joint arrangement” must satisfy three conditions. First, all physicians participating in the arrangement must share substantial financial risk from their participation in the arrangement. The definition illustrates ways in which physicians might share financial risk, tracking the types of financial risk-sharing set forth in the 1996 FTC/DOJ Statements of Antitrust Enforcement Policy in Health Care. Second, any agreement on prices or terms of reimbursement entered into by the arrangement must be reasonably necessary to obtain significant efficiencies through the joint arrangement. Third, the arrangement must be non-exclusive – *i.e.*, it must not restrict the ability, or facilitate the refusal, of physicians participating in the arrangement to deal with payers individually or through any other arrangement.

A “qualified clinically-integrated joint arrangement” pertains to arrangements in which the physicians undertake cooperative activities to achieve efficiencies in the delivery of clinical services, without necessarily sharing substantial financial risk. As

Analysis to Aid Public Comment

with risk-sharing arrangements, the definition of clinically integrated joint arrangements reflects the analysis contained in the 1996 FTC/DOJ Statements of Antitrust Enforcement Policy in Health Care. According to the order's definition, the participating physicians must have a high degree of interdependence and cooperation through their use of programs to evaluate and modify their clinical practice patterns, in order to control costs and assure the quality of physician services provided through the arrangement. In addition, as with risk-sharing arrangements, the arrangement must be non-exclusive and any agreement on prices or terms of reimbursement entered into by the arrangement must be reasonably necessary to obtain significant efficiencies through the joint arrangement.

Sections III.A and III.B require respondents to distribute the order and complaint to its members and other specified persons, including payers. Sections III.C and III.D require that each respondent, for the next five years: (1) distribute copies of the order and complaint to new members and other specified persons; (2) publish annually to members and owners a copy of the order and complaint; and (3) brief members and owners annually on the meaning and requirements of the order and the antitrust laws.

Sections IV and VI consist of standard Commission reporting and compliance procedures. Section IV specifies that Texas Surgeons IPA must include in its annual reports information identifying each payer or provider that has communicated with Texas Surgeons IPA concerning a possible contract for physician services, the proposed terms of any such contract, and Texas Surgeons IPA's response to the payer or provider.

Finally, Section VII of the proposed order contains a twenty year "sunset" provision under which the order terminates twenty years after the date the order was issued.

Complaint

IN THE MATTER OF

ABBOTT LABORATORIES, ET AL.CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATIONS OF
SEC. 5 OF THE FEDERAL TRADE COMMISSION ACT

*Docket C-3945; File No. 9810395
Complaint, May 22, 2000--Decision, May 22, 2000*

This consent order prohibits Respondents Abbot Laboratories and Geneva Pharmaceuticals, Inc. from entering agreements in which the first company to file an ANDA agrees with the NDA holder not to relinquish its right to the 180-day exclusivity period established under the Hatch-Waxman Act, or agreements where the ANDA first filer from agrees not to develop or market a generic drug product that is not the subject of a patent infringement lawsuit. The order also prohibits agreements involving payments to keep a generic drug off the market during patent infringement litigation brought by an NDA holder, and respondents can only enter these arrangements if specific criteria are met. This prohibition includes agreements made in the context of an interim settlement of a patent infringement action, whereby the NDA holder pays the generic not to enter the market, unless the parties obtain court approval through a process that is designed to enhance the court's ability to assess the competitive implications of the agreement. In addition, the order requires that Respondents notify the Commission 30 days before entering into an agreement in which an ANDA first filer agrees with an NDA holder to refrain from going to market.

Participants

For the Commission: *Karen Bokat, Bradley S. Albert, Daniel Kotchen, Robin Moore, David Narrow, Martha Oppenheim, David Pender, Richard A. Feinstein, William K. Tom, Daniel Ducore, Alan A. Fisher, Roy B. Levy, and Gregory S. Vistnes.*

For the Respondents: *Jeffrey Weinberger, Munger Tolles & Olson, and Wayne Cross, Dewey Ballentine.*

Complaint

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, and by virtue of the authority vested in it by said Act, the Federal Trade Commission ("Commission"), having reason to believe that respondents Abbott Laboratories and Geneva Pharmaceuticals, Inc., have engaged in conduct, as described herein, that violates 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:

The Respondents

1. Respondent Abbott Laboratories ("Abbott") is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Illinois, with its office and principal place of business located at 100 Abbott Park Road, Abbott Park, Illinois 60064. Abbott is engaged principally in the development, manufacture, and sale of a broad line of health care products and services. In 1998, Abbott had net sales of \$12.5 billion worldwide and \$7.7 billion domestically. Among other products, Abbott manufactures and sells the brand-name product Hytrin, a drug that accounts for over 20% of the net sales of Abbott's U.S. pharmaceutical products division.
2. At all relevant times herein, Abbott has been, and is now, a corporation as "corporation" is defined in Section 4 of the Federal Trade Commission Act, 15 U.S.C. § 44.
3. Respondent Geneva Pharmaceuticals, Inc. ("Geneva") is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Colorado, with its office and principal place of business located at 2555 W. Midway Blvd., Broomfield, Colorado 80020. Geneva, an indirect wholly-owned subsidiary of Novartis Corporation, is one of

Complaint

the leading generic drug manufacturers in the United States. Geneva sought and received approval from the United States Food and Drug Administration (“FDA”) to market a generic version of Hytrin.

4. At all relevant times herein, Geneva has been, and is now, a corporation as “corporation” is defined in Section 4 of the Federal Trade Commission Act, 15 U.S.C. § 44.
5. Respondents’ acts and practices, including the acts and practices alleged herein, are in or affect commerce as “commerce” is defined in Section 4 of the Federal Trade Commission Act, 15 U.S.C. § 44.

Federal Regulation of Pharmaceutical Products

6. Under the Federal Food, Drug and Cosmetic Act, 21 U.S.C. § 301 et seq., approval by the United States Food & Drug Administration (“FDA”) is required before a company may market or sell a pharmaceutical product in the United States. Approval for a new or brand name drug is sought by filing a New Drug Application (“NDA”) with the FDA.
7. A generic drug is a product that the FDA has found to be bioequivalent to a brand name drug. Generic drugs are chemically identical to their branded counterparts, but typically are sold at substantial discounts from the branded price. Approval may be sought for a generic version of a brand name drug by filing an Abbreviated New Drug Application (“ANDA”) with the FDA.
8. The FDA maintains a book of Approved Drug Products With Therapeutic Equivalence Evaluations (commonly known as the “FDA Orange Book”), which lists all patents that the brand name manufacturer asserts relate to each brand name drug. If

Complaint

an applicant intends to market a generic product before the expiration of one or more patents relating to a brand name drug, the applicant must certify to the FDA that the patent or patents listed in the FDA Orange Book are either invalid or not infringed by the generic version of the product (a "Paragraph IV Certification"), and must notify the holder of the approved NDA and the owner of the patent or patents of the filing of the ANDA. If neither the patent holder nor the NDA holder files a patent infringement suit against the ANDA filer within 45 days of receipt of notification of a Paragraph IV Certification, the FDA review and approval process may proceed and, upon FDA approval of the ANDA, the generic product may be marketed. If a patent infringement suit is filed against the ANDA filer within the 45-day period, however, FDA approval of the ANDA is automatically stayed until the earliest of: (i) patent expiration; (ii) a final judicial determination of non-infringement or invalidity in the lawsuit; or (iii) the expiration of a 30-month period from the time the patent holder receives Paragraph IV Certification.

9. The Drug Price Competition and Patent Term Restoration Act of 1984, 98 Stat. 1585, 21 U.S.C. § 355 (the "Hatch-Waxman Act"), as currently implemented by the FDA, provides that the first applicant to submit an ANDA with a Paragraph IV Certification for a generic version of a brand name drug ("ANDA first filer") is entitled to a 180-day period of marketing exclusivity ("180-day Exclusivity Period") before the FDA may grant final approval of any other generic manufacturer's ANDA regarding the same brand name drug. This period does not begin to run until either the generic is commercially marketed or a court enters final judgment that the patents subject to the Paragraph IV Certification are invalid or not infringed. No other generic manufacturer may obtain FDA approval to market its product until the ANDA first filer's 180-day Exclusivity Period has expired.

Complaint

Relevant Product and Geographic Market

10. The relevant product market for assessing respondents' anticompetitive conduct is terazosin hydrochloride ("terazosin HCL"). Terazosin HCL is used principally to treat benign prostatic hyperplasia ("BPH" or enlarged prostate) and hypertension. Both hypertension and BPH are chronic conditions that afflict millions of Americans, many of whom are senior citizens. BPH afflicts at least 50% of the men over 60, and results in 1.7 million men each year making office visits to their physicians. Total U.S. sales of terazosin HCL amount to approximately \$540 million per year.
11. Hytrin, which is manufactured and marketed by Abbott, is the pioneer brand name drug in the United States containing terazosin HCL. Hytrin was introduced in 1987. It was the only terazosin HCL product sold in the United States until Geneva introduced such a product on or around August 13, 1999.
12. Other drugs are not effective substitutes for terazosin HCL because they are different in terms of chemical composition, safety, efficacy, and side effects. In addition, there is little price sensitivity between terazosin HCL and non-terazosin HCL products.
13. The relevant geographic market is the United States.

Factual Background

14. Hytrin, which Abbott market in tablet and capsule form, has been one of the company's most important products. Abbott introduced Hytrin tablets in 1987. In 1995, Abbott launched Hytrin capsules, which now account for over 90% of Hytrin sales. In 1998, Abbott's sales of Hytrin amounted to \$542

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million in the United States alone, accounting for 9.41 million prescriptions. For the first 6 months of 1999, Abbott reported \$292 million in U.S. sales of Hytrin, representing over 20% of the net sales of Abbott's pharmaceutical division.

15. Abbott currently holds at least seven patents that relate to terazosin HCL. Abbott's initial patent covering the chemical compound terazosin HCL expired in or around 1994.
16. Geneva filed ANDAs covering a tablet form and a capsule form of generic terazosin HCL. It was the first company to file an ANDA for each form. Geneva submitted its tablet ANDA to the FDA in or around January 1993, and its capsule ANDA was submitted in or around December 1995.
17. In early 1996, Abbott notified the FDA of a new patent ('207 patent) relating to its Hytrin product, and the FDA listed that patent in the FDA Orange Book. In April 1996, Geneva filed a Paragraph IV certification with the FDA, claiming that its generic terazosin HCL tablet and capsule products did not infringe any of Abbott's patents covering terazosin HCL, including Abbott's newly listed '207 patent, and notified Abbott of the Paragraph IV certification.
18. On June 4, 1996, Abbott sued Geneva in the Northern District of Illinois, claiming patent infringement by Geneva's terazosin HCL tablet product. Abbott made no infringement claim against Geneva's terazosin HCL capsule product, even though both of Geneva's products involved the same potential infringement issues.
19. Pursuant to the Hatch-Waxman Act, Abbott's lawsuit triggered a 30-month stay of final FDA approval of Geneva's terazosin HCL tablet ANDA, until December 1998. Because no infringement claim had been filed within the requisite 45-day period, the FDA review and approval process for Geneva's terazosin HCL capsule ANDA could proceed without delay.

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20. By early 1998, Geneva, including particularly its CEO, was confident that it ultimately would prevail in its patent infringement dispute with Abbott.
21. Accordingly, Geneva pushed ahead in early 1998 with plans to bring to market as soon as possible its generic terazosin HCL capsule product, which could have received FDA approval at any time. Preparations to launch this product were proceeding on all fronts: the manufacturing team sought to validate with the FDA its terazosin HCL capsule manufacturing process; the purchasing department instructed its product supplier to manufacture commercial quantities of terazosin HCL active ingredient; sales and marketing personnel were contacting customers to inform them of an impending launch and to enter into distribution contracts; and the legal staff was drafting papers to oppose any effort by Abbott to block Geneva's entry.
22. The FDA granted Geneva final approval to market generic terazosin HCL capsules on March 30, 1998.
23. As the first generic company to submit a Paragraph IV Certification for generic terazosin HCL, Geneva was entitled to the 180-day Exclusivity Period pursuant to the Hatch-Waxman Act, as currently interpreted. Unless and until Geneva's 180-day Exclusivity Period had been triggered and had expired, or Geneva relinquished its entitlement to this period of exclusivity, only Geneva would be approved by the FDA to market a generic terazosin HCL product.

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Anticompetitive Conduct

24. On March 30, 1998, the very day it was granted FDA approval to market its generic terazosin HCL capsules, Geneva contacted Abbott and announced that it would launch its generic terazosin HCL capsules unless it was paid by Abbott not to enter the market. From Abbott's perspective, a launch of Geneva's generic terazosin HCL product would have had a significant adverse impact on Abbott's financial performance. Abbott forecasted that entry of generic terazosin HCL on April 1, 1998 would have eliminated over \$185 million in Hytrin sales in just six months. Because Hytrin was highly profitable, Abbott sought to keep from the market Geneva and all other potential generic competition to Hytrin, until at least February 2000.
25. Over the course of two days, representatives of Abbott and Geneva negotiated the framework for an agreement, whereby Abbott would pay Geneva not to enter the market. Abbott estimated Geneva's revenues from launching generic terazosin HCL at \$1 million to \$1.5 million per month, but was willing to pay Geneva a "premium" over that not to compete.
26. On April 1, 1998, Abbott and Geneva entered into a written agreement ("Agreement"), pursuant to which Geneva agreed not to enter the market with any generic terazosin HCL capsule or tablet product until the earlier of: (1) the final resolution of the patent infringement litigation involving Geneva's terazosin HCL tablets product, including review through the Supreme Court; or (2) entry of another generic terazosin HCL product. Geneva also agreed - at Abbott's insistence - not to transfer, assign, or relinquish its right to a 180-day Exclusivity Period.
27. In exchange, Abbott agreed to pay Geneva \$4.5 million per month in non-refundable payments until a district court judgment in the parties' patent infringement dispute. Respondents agreed that if the district court declared that

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Geneva's tablet product did not or would not infringe any valid and enforceable claim of the '207 patent, Abbott would thereafter pay the \$4.5 million monthly payments into an escrow fund until the final resolution of the litigation. Under the Agreement, the party prevailing in the litigation would receive the money in the escrow fund.

28. The court hearing the patent litigation was not made aware of the respondents' Agreement.
29. In the words of Geneva's CEO at the time the Agreement was signed, this Agreement represented to Geneva the "best of all worlds," because Geneva obtained a risk-free "monetary settlement on an ongoing basis until the litigation was resolved" and still could market its product exclusively for 180 days after the litigation was over.
30. In accordance with the terms of the Agreement, in April 1998, Geneva refrained from entering the market with its generic terazosin HCL capsules, and instead began receiving monthly payments of \$4.5 million from Abbott.
31. On September 1, 1998, the United States District Court for the Northern District of Illinois granted Geneva's motion for summary judgment in its patent tablet litigation with Abbott, invalidating Abbott's patent under the on-sale provision of 35 U.S.C. § 102(b).
32. The district court's decision invalidating Abbott's patent only strengthened Geneva's litigation position. Nonetheless, Geneva, in accordance with the terms of the Agreement, did not enter the generic terazosin HCL market even after the favorable district court decision.

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33. On July 1, 1999, the United States Court of Appeals for the Federal Circuit affirmed, without dissent, the summary judgment in favor of Geneva. Under the Agreement, Geneva still could not enter the generic terazosin HCL market until after the Supreme Court either denied Abbott's petition for certiorari or disposed of the patent infringement litigation. Nonetheless, in August 1999, aware of the Commission's investigation, the respondents canceled their Agreement, and on August 13, 1999, Geneva finally introduced its generic terazosin HCL capsule product to the marketplace. The Supreme Court denied certiorari on January 10, 2000.

The Effects of Respondents' Conduct

34. The acts and practices of the respondents as herein alleged have had the purpose or effect, or the tendency or capacity, to restrain competition unreasonably and to injure competition by preventing or discouraging the entry of competition in the form of generic versions of Hytrin into the relevant market.
35. As a result of respondents' conduct as herein alleged, consumers were deprived of the benefits of new competition from Geneva and other generic competitors. Without this lower-priced generic competition, consumers, pharmacies, hospitals, insurers, wholesalers, government agencies, managed care organizations, and others were forced to purchase Abbott's more expensive Hytrin product.
36. Earlier entry of a generic terazosin HCL product would have had a significant procompetitive impact in the relevant market. Pharmacists generally are permitted, and in some instances required, to substitute generic drugs for their branded counterparts, unless the prescribing physician has directed that the branded product be dispensed. In addition, there is a ready market for generic products because certain third-party payers of prescription drugs (*e.g.*, managed care plans and Medicaid programs) encourage or insist on the use of generic drugs wherever possible. A generic product can quickly and

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efficiently enter the marketplace at substantial discounts, generally leading to a significant erosion of the branded drug's sales within the first year. For example, Abbott's forecasts projected that generic terazosin HCL would capture roughly 70% of Hytrin sales within the first six months alone.

37. The purpose and effect of the \$4.5 million monthly payments from Abbott to Geneva during the term of the Agreement were to ensure that Geneva would not enter the relevant market, and would not take any steps, including giving up its right to a 180-day Exclusivity Period, to permit or facilitate the entry of any other generic manufacturer.
38. By prohibiting Geneva from transferring, assigning, or giving up its right to a 180-day Exclusivity Period until the final resolution of the patent infringement litigation involving Geneva's terazosin HCL tablets product, the Agreement had the purpose and effect of preventing Geneva from relinquishing its eligibility for a 180-day Exclusivity Period under the Hatch-Waxman Act. As of February 1999, at least one other generic manufacturer had satisfied the FDA's requirements for approval and was barred from entering the market because Geneva's 180-day Exclusivity Period had not begun to run.
39. The Agreement is not justified by any countervailing efficiency.

Violations Alleged

40. The Abbott-Geneva Agreement as a whole, and particular provisions such as that described in Paragraphs 37 and 38 above, constitute an unreasonable restraint of trade in violation of Section 5 of the Federal Trade Commission Act, as amended.

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41. Abbott and Geneva acted with the specific intent that Abbott monopolize the relevant market, and engaged in overt acts described in Paragraphs 24-33 above in furtherance of a conspiracy to monopolize the relevant market, in violation of Section 5 of the Federal Trade Commission Act, as amended.
42. Abbott had monopoly power in the relevant market and monopolized that market in violation of Section 5 of the Federal Trade Commission Act, as amended.
43. The acts and practices described above are anticompetitive in nature and tendency and constitute unfair methods of competition in violation of Section 5 of the Federal Trade Commission Act, as amended.

WHEREFORE, THE PREMISES CONSIDERED, the Federal Trade Commission on this twenty-second day of May, 2000, issues its complaint against said respondents.

By the Commission.

DECISION AND ORDER

The Federal Trade Commission ("Commission"), having initiated an investigation of certain acts and practices of Abbott Laboratories (hereinafter referred to as "Respondent Abbott") and Geneva Pharmaceuticals, Inc. ("Geneva"), an indirect wholly-owned subsidiary of Novartis Corporation, and Respondent Abbott having been furnished thereafter with a copy of a draft Complaint which the Bureau of Competition proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge Respondent Abbott with violation of the Federal Trade Commission Act; and

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Respondent Abbott and counsel for the Commission having thereafter executed an Agreement Containing Consent Order, an admission by Respondent Abbott of all the jurisdictional facts set forth in the aforesaid draft Complaint, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by Respondent Abbott that the law has been violated as alleged in such complaint, and waivers and other provisions as required by the Commission's Rules; and

The Commission having thereafter considered the matter and having determined that it had reason to believe that Respondent Abbott has violated the said Act, and that a complaint should issue stating its charges in that respect, and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of thirty (30) days, and having duly considered the comments filed by interested persons pursuant to Section 2.34 of its Rules, 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 Abbott Laboratories is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Illinois, with its office and principal place of business located at 100 Abbott Park Road, Abbott Park, Illinois 60064.

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

ORDER

I.

Decision and Order

IT IS ORDERED that for the purposes of this order, the following definitions shall apply:

- A. “Respondent Abbott” means Abbott Laboratories, its directors, officers, employees, agents and representatives, predecessors, successors, and assigns; its subsidiaries, divisions, groups, and affiliates controlled by Abbott, and the respective directors, officers, employees, agents and representatives, successors, and assigns of each.
- B. “Commission” means the Federal Trade Commission.
- C. “180-day Exclusivity Period” means the period of time established by Section 505(j)(5)(B)(iv) of the Federal Food, Drug, and Cosmetic Act (21 U.S.C. § 355(j) *et seq.*).
- D. “Agreement” means anything that would constitute an agreement under Section 1 of the Sherman Act or Section 5 of the Federal Trade Commission Act.
- E. “ANDA” means an Abbreviated New Drug Application, as defined under 21 U.S.C. § 355(j) *et seq.*
- F. “ANDA First Filer” means the party whom the FDA determines is entitled to, or eligible for, a right to a 180-day Exclusivity Period which has not yet expired.
- G. “Control” means an entity in which Abbott has an interest greater than 50%.
- H. “Drug Product” means a finished dosage form (e.g., tablet, capsule, or solution) that contains a drug substance, generally, but not necessarily, in association with one or more other ingredients, as defined in 21 C.F.R. § 314.3(b).
- I. “FDA” means the United States Food and Drug Administration.

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- J. "NDA" means a New Drug Application, as defined under 21 U.S.C. § 355(b) *et seq.*
- K. "NDA Holder" means: (1) the party that received FDA approval to market a Drug Product pursuant to an NDA; (2) a party owning or controlling enforcement of the patent(s) listed in the Approved Drug Products With Therapeutic Equivalence Evaluations (commonly known as the "FDA Orange Book") in connection with the NDA; or (3) the predecessors, subsidiaries, divisions, groups and affiliates controlled by the entities described in subparagraphs (1) and (2) above, as well as the entities' licensees, successors and assigns.
- L. "Person" means both natural persons and artificial persons, including, but not limited to, corporations, unincorporated entities, and governments.
- M. "Relinquishing" means transferring, selling, assigning, waiving, or relinquishing.

II.

IT IS FURTHER ORDERED that Respondent Abbott cease and desist, either directly or indirectly, in connection with the sale of Drug Products in or affecting commerce, as "commerce" is defined in Section 4 of the Federal Trade Commission Act, 15 U.S.C. § 44, from being a party to any Agreement in which Respondent Abbott is an NDA Holder for a Drug Product(s), any other party is the ANDA First Filer for the Drug Product(s), and:

- A. the ANDA First Filer is prohibited by such Agreement from relinquishing, or is subject to a penalty, forfeiture, or loss of benefit if it relinquishes, its right to the 180-Day Exclusivity Period; or

Decision and Order

- B. the ANDA First Filer agrees to refrain from researching, developing, manufacturing, marketing, or selling any Drug Product that could be approved for sale by the FDA pursuant to the ANDA and that is not the subject of a court action alleging patent infringement.

Provided, however, that nothing in this Paragraph II prohibits any agreement which restricts the ANDA First Filer's right to relinquish any rights under its ANDA except as set forth above.

III.

IT IS FURTHER ORDERED that, in any instance where Respondent Abbott is a party to a patent infringement action in which it is the NDA Holder, it shall cease and desist, either directly or indirectly, in connection with the sale of Drug Products in or affecting commerce, as Acommerce@ is defined in Section 4 of the Federal Trade Commission Act, 15 U.S.C. ' 44, from being a party to any Agreement in which the parties do not agree to dismiss the litigation, and in which the NDA Holder provides anything of value to the alleged infringer and the alleged infringer agrees to refrain during part or all of the course of the litigation from selling the Drug Product at issue, or any Drug Product containing the same chemical entity(ies) at issue. Notwithstanding the above, however, such an Agreement is permissible when entered into in conjunction with a joint stipulation between the parties that the court may enter a preliminary injunction pursuant to Rule 65 of the Federal Rules of Civil Procedure, if: (1) together with the stipulation for a preliminary injunction, Respondent Abbott provides the court with the proposed Agreement, as well as a copy of the Commission=s complaint, order, and Analysis to Aid Public Comment in this matter; (2) Respondent Abbott has provided Notification, as described in Paragraph V below, to the Commission at least thirty (30) days prior to submitting the stipulation for a preliminary injunction; (3) Respondent Abbott does not oppose any effort by the Commission to participate, in

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any capacity permitted by the court, in the court's consideration of any such action for preliminary relief; and (4) the court issues an order which incorporates the terms of the Agreement. Nothing in this Paragraph shall be interpreted to prohibit or restrict the right of Respondent Abbott to unilaterally seek relief from the court, without notice to the Commission, including but not limited to, applying for preliminary injunctive relief or seeking to extend the 30-month stay pursuant to 21 U.S.C. ' 355(j)(4)(B)(iii).

Decision and Order

IV.

IT IS FURTHER ORDERED that Respondent Abbott shall provide Notification as described in Paragraph V below to the Commission at least thirty (30) days before becoming a party to any Agreement made after the date the Agreement Containing Consent Order is signed where it is the NDA Holder and an ANDA First Filer agrees to refrain from selling any Drug Product under its ANDA for any period of time.

V.

The Notification required by Paragraphs III and IV shall be filed with the Secretary of the Commission and shall include the following information, to the extent known and not subject to any legally recognized privilege: (1) identification of the parties involved in the Agreement; (2) identification of all Drug Products involved in the Agreement; (3) identification of all persons who have filed an ANDA with the FDA (including the status of such application) for any Drug Product containing the same chemical entity(ies) as the Drug Product(s) involved in the Agreement; (4) a copy of the proposed Agreement; (5) identification of the court, and a copy of the docket sheet, for any legal action which involves either party to the Agreement and relates to any Drug Product(s) containing the same chemical entity(ies) involved in the Agreement; and (6) all documents which were prepared by or for any officer(s) or director(s) of Respondent Abbott for the purpose of evaluating or analyzing the Agreement.

VI.

IT IS FURTHER ORDERED that Respondent Abbott shall file a verified written report within sixty (60) days after the date this order becomes final, annually thereafter for five (5) years on the anniversary of the date this order becomes final, and at such other times as the Commission may by written notice require, setting forth in detail the manner and form in which Respondent Abbott intends to comply, is complying, and has complied with

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this order. Respondent Abbott 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 this order.

VII.

IT IS FURTHER ORDERED that Respondent Abbott shall notify the Commission at least thirty (30) days prior to any proposed change in Respondent Abbott such as dissolution, assignment, sale resulting in the emergence of a successor corporation, the creation or dissolution of subsidiaries or any other change in Respondent Abbott that may affect compliance obligations arising out of this order.

VIII.

IT IS FURTHER ORDERED that, for the purpose of determining or securing compliance with this order and subject to any legally recognized privilege, and upon written request with reasonable notice to Respondent Abbott, Respondent Abbott shall permit any duly authorized representative of the Commission:

- A. Access, during office hours and in the presence of counsel, to all facilities, and to inspect and copy all books, ledgers, accounts, correspondence, memoranda, calendars, and other records and documents in its possession or under its control relating to compliance with this order; and
- B. To interview officers, directors, employees, agents, and other representatives of Respondent Abbott, who may have counsel present, regarding such compliance issues.

IX.

Statement of the Commission

IT IS FURTHER ORDERED that with respect to any affiliate of Respondent Abbott in which Respondent Abbott owns 50%, but not more than and not less than 50%: (1) Respondent Abbott shall notify all such affiliates of Abbott's obligations under this Order; (2) Respondent Abbott shall not request, solicit, or direct such affiliates to enter into any agreement which, if entered into by Respondent Abbott, would violate the terms of this Order; (3) Respondent Abbott shall not approve any such agreement if it is presented to Respondent Abbott for its approval; (4) Respondent Abbott shall vote against approval if any such agreement is presented to the affiliate's Board of Directors; and (5) in the event any such agreement is not presented to Respondent Abbott or to the affiliate's Board for approval, Respondent Abbott shall notify the Commission if the affiliate enters into any such agreement and Respondent Abbott acquires knowledge thereof.

X.

IT IS FURTHER ORDERED that this order shall terminate on May 22, 2010.

By the Commission.

Statement of the Commission

**STATEMENT OF CHAIRMAN ROBERT PITOFSKY AND
COMMISSIONERS SHEILA F. ANTHONY, MOZELLE W.
THOMPSON, ORSON SWINDLE,
AND THOMAS B. LEARY**

The attached Analysis to Aid Public Comment, which accompanied our acceptance of consent agreements with Geneva Pharmaceuticals, Inc. and Abbott Laboratories, describes the conduct of those two companies in agreeing that Abbott would pay Geneva to refrain from selling a generic version of Hytrin, Abbott's branded version of terazosin hydrochloride. It also describes relevant provisions of the Drug Price Competition and Patent Term Restoration Act of 1984 ("Hatch-Waxman Act"), including particularly the provision that gives the first generic company to seek FDA approval a 180-day period during which it has the exclusive right to market the generic version of a brand name drug.

Pursuant to a private agreement not reviewed by any court, Abbott paid Geneva substantial sums not to enter the market with its generic version of Hytrin, and not to transfer, assign or relinquish its 180-day exclusive marketing right to any other producer of generic products that might compete with Abbott. By not selling its generic version, Geneva prevented the start of the 180-day exclusivity period, with the result that neither Geneva nor any other company could introduce a generic version of Hytrin into the market.

The consent orders that we issue today against Abbott and Geneva represent the first resolution of an antitrust challenge by the government to a private agreement whereby a brand name drug company paid the first generic company that sought FDA approval not to enter the market, and to retain its 180-day period of market exclusivity. Because the behavior occurred in the context of the complicated provisions of the Hatch-Waxman Act,

Analysis to Aid Public Comment

and because this is the first government antitrust enforcement action in this area, we believe the public interest is satisfied with orders that regulate future conduct by the parties. We recognize that there may be market settings in which similar but less restrictive arrangements could be justified, and each case must be examined with respect to its particular facts.

In March we also issued an administrative complaint against two other pharmaceutical companies with respect to conduct that is in some ways similar to the conduct addressed by these consent orders. We anticipate that the development of a full factual record in the administrative proceeding will help to shape further the appropriate parameters of permissible conduct in this area and will guide other companies and their legal advisors.

Pharmaceutical firms should now be on notice, however, that arrangements comparable to those addressed in the present consent orders can raise serious antitrust issues, with a potential for serious consumer harm. Accordingly, in the future, the Commission will consider its entire range of remedies in connection with enforcement actions against such arrangements, including possibly seeking disgorgement of illegally obtained profits.

If firms are uncertain about the limits of permissible behavior under the Hatch-Waxman Act, they may, of course, seek advisory opinions from the staff of this agency.

Analysis to Aid Public Comment

The Federal Trade Commission has accepted for public comment agreements and proposed consent orders with Geneva Pharmaceuticals, Inc. and Abbott Laboratories. The proposed consent orders settle charges that these parties unlawfully agreed

Analysis to Aid Public Comment

that Geneva would refrain from selling its generic version of one of Abbott's drugs, in exchange for payments from Abbott. The proposed consent orders have been placed on the public record for 30 days to receive comments by interested persons. The proposed consent orders have been entered into for settlement purposes only and do not constitute an admission by Abbott or Geneva that they violated the law or that the facts alleged in the complaint, other than the jurisdictional facts, are true.

Background

Abbott Laboratories develops, manufactures, and sells a variety of health care products and services. Based in Abbott Park, Illinois, Abbott's 1998 net sales worldwide were approximately \$ 12.5 billion. Over 20% of Abbott's net sales of pharmaceutical products in the U.S. are for a drug called Hytrin. Hytrin is used to treat two chronic conditions that affect millions of Americans, particularly senior citizens: hypertension (high blood pressure) and benign prostatic hyperplasia (enlarged prostate).

Geneva is one of the leading generic drug manufacturers in the United States. An indirect wholly-owned subsidiary of Novartis Corp., Geneva is based in Broomfield, Colorado. Geneva developed a generic version of Hytrin, and in March 1998 received approval from the U.S. Food and Drug Administration ("FDA") to market that generic product.

A generic drug is a product that the FDA has found to be bioequivalent to a brand name drug. A company seeking FDA approval to market a new drug must file a New Drug Application ("NDA"). In order to market a generic version of a brand name drug, a company must file an Abbreviated New Drug Application ("ANDA") and receive approval from the FDA.

Analysis to Aid Public Comment

Generic drugs are chemically identical to their branded counterparts, but typically are sold at substantial discounts from the branded price. A Congressional Budget Office Report estimates that purchasers saved an estimated \$8-\$10 billion on prescriptions at retail pharmacies in 1994 by purchasing generic drugs instead of the brand name product.¹

Congress enacted the Drug Price Competition and Patent Term Restoration Act of 1984, commonly referred to as “the Hatch-Waxman Act,” to facilitate the entry of generic drugs while maintaining incentives to invest in new drug development. In particular, the Hatch-Waxman Act establishes certain rights and procedures in situations where a company seeks FDA approval to market a generic product prior to the expiration of a patent or patents relating to a brand name drug upon which the generic is based. In such cases, the applicant must: (1) certify to the FDA that the patent in question is invalid or is not infringed by the generic product (known as a “paragraph IV certification”); and (2) notify the patent holder of the filing of the certification. If the holder of patent rights files a patent infringement suit within 45 days, FDA approval to market the generic drug is automatically stayed for 30 months, unless before that time the patent expires or is judicially determined to be invalid or not infringed. This automatic 30-month stay allows the patent holder time to seek judicial protection of its patent rights before a generic competitor is permitted to market its product.

In addition, the Hatch-Waxman Act provides an incentive for generic drug companies to bear the cost of patent litigation that may arise when they challenge invalid patents or design around valid ones. The Act grants the first company to file an ANDA in such cases a 180-day period during which it has the exclusive right to market a generic version of the brand name drug. No other generic manufacturer may obtain FDA approval to market

¹ Congressional Budget Office, *How Increased Competition from Generic Drugs Has Affected Prices and Returns in the Pharmaceutical Industry* at xiii, 13 (July 1998).

Analysis to Aid Public Comment

its product until the first filer's 180-day exclusivity period has expired.

Geneva was the first company to file an ANDA for terazosin hydrochloride ("terazosin HCL"), the generic version of Hytrin. It filed applications covering a tablet form and a capsule form of its generic terazosin HCL. Geneva filed a paragraph IV certification with the FDA stating that these products did not infringe any valid patent held by Abbott covering terazosin HCL. In June 1996, Abbott sued Geneva for patent infringement by Geneva's terazosin HCL tablet product, but due to an oversight failed to make an infringement claim against Geneva's capsule product, although both products raised the same potential infringement issues.

Abbott's lawsuit triggered a 30-month stay of final FDA approval of Geneva's terazosin HCL tablet ANDA, until December 1998. No stay applied to the FDA approval process for Geneva's terazosin HCL capsule ANDA, however, because no infringement claim was filed within the statutory time period required by the Hatch-Waxman Act. The FDA granted Geneva final approval to market generic terazosin HCL capsules on March 30, 1998.

The Challenged Agreement

The complaint challenges an agreement whereby Abbott, following the FDA approval of Geneva's generic terazosin HCL capsule product, paid Geneva not to enter the market during their ongoing patent litigation over the tablet product. According to the complaint, on the day it was granted approval to market its generic terazosin HCL capsules, Geneva contacted Abbott and announced that it would launch its generic terazosin HCL capsules unless it was paid by Abbott not to enter. Two days later, on April 1, 1998, Abbott and Geneva entered into an

Analysis to Aid Public Comment

agreement, pursuant to which Geneva agreed not to enter the market with any generic terazosin HCL capsule or tablet product until the earlier of: (1) the final resolution of the patent infringement litigation involving Geneva's terazosin HCL tablets product, including review through the Supreme Court; or (2) entry of another generic terazosin HCL product.

Geneva also agreed – at Abbott's insistence – not to transfer, assign, or relinquish its 180-day exclusivity right. The effect of this provision was to ensure that no other company's generic terazosin HCL product could obtain FDA approval and enter the market during the term of the agreement, because Geneva's agreement not to launch its product meant that the 180-day exclusivity period would not expire.

In exchange, Abbott agreed to pay Geneva \$4.5 million per month until a district court judgment in the parties' patent infringement dispute, and then (assuming Geneva won in the district court) to pay the \$4.5 million monthly payments into an escrow fund until the final resolution of the litigation, which Geneva would then receive if its district court victory was upheld.

Abbott's payment to Geneva of \$4.5 million a month was well over the \$1 to \$1.5 million per month that, the complaint states, Abbott believed Geneva would forego by staying off the market. The complaint alleges that Abbott was willing to pay Geneva a "premium" to refrain from competing because of the substantial impact that launch of a generic version of Hytrin would have on Abbott's overall financial situation. Abbott forecasted that entry of generic terazosin HCL on April 1, 1998 would eliminate over \$185 million in Hytrin sales in just six months. Accordingly, the complaint charges, Abbott sought to forestall Geneva -- and all other potential generic competition to Hytrin – from entering the market because of the threat they represented to the high profits it was making from Hytrin.

Analysis to Aid Public Comment

The complaint further charges that, in accordance with the terms of the agreement, Geneva did not enter the market with its generic terazosin HCL capsules, even after the district court and the court of appeals upheld Geneva's position that Abbott's patent was invalid. In August 1999, Abbott and Geneva – aware of the Commission's investigation – terminated their agreement (which by its terms would not have ended until disposition of the litigation by the Supreme Court). Geneva finally brought its generic terazosin HCL capsule product to market on August 13, 1999.

Competitive Analysis

The complaint charges that the challenged agreement prevented competition that Abbott's Hytrin product would otherwise have faced from generic products of Geneva and other potential generic competitors. Generic drugs can have a swift marketplace impact, because pharmacists generally are permitted, and in some instances are required, to substitute lower-priced generic drugs for their branded counterparts, unless the prescribing physician directs otherwise. In addition, there is a ready market for generic products because certain third-party payers of prescription drugs (*e.g.*, state Medicaid programs and many private health plans) encourage or insist on the use of generic drugs wherever possible. Abbott's forecasts, the complaint states, projected that generic terazosin HCL would capture roughly 70% of Hytrin sales within the first six months following its launch. The agreement, however, ensured that Geneva would not offer generic terazosin HCL in competition with Hytrin, and would not take action – such as relinquishing exclusivity rights – that would have permitted the entry of any other generic manufacturer.

Analysis to Aid Public Comment

These restraints on generic competition had direct and substantial effects on consumers. Without a lower-priced generic alternative, consumers, government agencies, health plans, pharmacies, hospitals, wholesalers, and others were forced to purchase Abbott's more expensive Hytrin product. Other drugs, the complaint states, are not effective substitutes for terazosin HCL because they are different in terms of chemical composition, safety, efficacy, and side effects. There is little price sensitivity between terazosin HCL and other products. Thus, the complaint alleges that the sale of terazosin HCL in the United States is the relevant market within which to assess the effects of the challenged agreement.

The challenged conduct represents an agreement not to compete between potential horizontal competitors. A firm is a potential competitor if there is evidence that entry by that firm is reasonably probable in the absence of the agreement at issue.² Geneva certified to the FDA that its entry with generic HCL would not infringe a valid patent, and was confident that it ultimately would prevail in its patent infringement dispute with Abbott, the complaint states. In early 1998, Geneva was making preparations to launch its generic terazosin HCL capsule product as soon as possible. After receiving FDA approval for the capsule product, Geneva threatened to launch that product unless Abbott paid it not to do so. The challenged agreement directly restrained competition between these potential competitors.

In addition, the agreement created a bottleneck that prevented any other potential competitors from entering the market, because no other ANDA filer could obtain FDA approval until Geneva's 180 day exclusivity period expired. Other companies were developing generic terazosin HCL products, and at least one other generic manufacturer had satisfied the FDA's requirements for approval by February 1999, but was barred from entering the

² Federal Trade Commission and United States Department of Justice, *Antitrust Guidelines for the Licensing of Intellectual Property* at § 1.1 n.6 (1995).

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market because Geneva's failure to launch its product meant its 180-day exclusivity right had not even begun to run.

The complaint states that the challenged agreement is not justified by any countervailing efficiency. Although the agreement between Abbott and Geneva provided substantial private benefits to both parties, the facts in this matter demonstrate that the broad restraints were not justified by any benefits to competition and consumer welfare. The Commission considered whether the agreement could be considered a procompetitive effort to effectuate a temporary settlement of a patent dispute, akin to a court-ordered preliminary injunction. However, it finds that any legitimate interest in resolving patent disputes cannot justify the harm to consumers imposed by the agreement in this case. The restraint imposed exceeds what likely would be available to the parties under a court-ordered preliminary injunction. For example, it: (1) barred Geneva's entry beyond the pendency of the district court litigation; (2) provided large up-front payments that could be expected to create disincentives for Geneva to enter (in contrast to a court-ordered bond to cover damages actually incurred as a result of the court's injunction); (3) barred Geneva from relinquishing its exclusivity rights; (4) prohibited Geneva from developing or marketing non-infringing generic products. Moreover, the restraints contained in the agreement were entered into without any judicial finding that Abbott was likely to succeed on the merits of its infringement suit, without any consideration of whether Abbott would suffer irreparable injury, and without any weighing of the equities, including any consideration of the public interest.

The complaint also charges that Abbott had a monopoly in the market for terazosin HCL, and, by entering into the agreement with Geneva, Abbott sought to preserve its dominance by delaying the entry of Geneva and other generic companies into the market. As detailed above, there were no countervailing

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justifications for Abbott's conduct. In addition, the complaint alleges that Abbott and Geneva conspired to monopolize the market for terazosin HCL. As stated in the complaint, Abbott and Geneva acted with specific intent that Abbott monopolize the market for terazosin HCL, and entered into a conspiracy to achieve that goal. Finally, the parties' agreement otherwise amounts to an unfair method of competition in violation of Section 5 of the FTC Act.

The Proposed Orders

The proposed orders are designed to remedy the unlawful conduct charged in the complaint. Although the particular agreement challenged in the complaint has been terminated, prospective relief is necessary to prevent a recurrence of similar agreements with respect to other drugs. Private agreements in which the brand name drug company (the NDA holder) pays the first generic to seek FDA approval (the first filer) not to enter the market can substantially delay generic competition and raise serious antitrust issues. Moreover, the FDA, which has expressed concern about such private agreements, has observed that the incentives for companies to enter into such arrangements are becoming greater, as the returns to the brand name company from extending its monopoly increasingly exceed the potential economic gains to the generic applicant from its 180 days of market exclusivity.³

In essence, the proposed orders:

- bar two particular types of agreements between brand name drug companies and potential generic competitors -- restrictions on giving up Hatch-Waxman 180-day exclusivity rights and on entering the market with a non-infringing product;

³ FDA Proposed Rule Regarding 180-Day Generic Drug Exclusivity for Abbreviated New Drug Applications, 64 Fed.Reg. 42873, 42882-83 (August 6, 1999).

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- require that agreements involving payments to the generic company to stay off the market be approved by the court when undertaken in the context of an interim settlement of patent litigation, with notice to the Commission to allow it time to present its views to the court;
- require respondents to give the Commission written notice 30 days before entering into such agreements in other contexts; and
- require that Geneva waive its right to 180-day marketing exclusivity for its generic terazosin HCL tablet product, so that other generic tablet producers can immediately enter the market.

Paragraph II prohibits two kinds of agreements between “an NDA Holder” and “the ANDA First Filer” (that is, the party possessing an unexpired right to Hatch-Waxman 180-day exclusivity). Paragraph II.A. bars agreements in which the first company to file an ANDA agrees with the NDA holder not to relinquish its right to the 180-day exclusivity period established under the Hatch-Waxman Act. Paragraph II.B. prohibits the ANDA first filer from agreeing not to develop or market a generic drug product that is not the subject of a patent infringement lawsuit. The order prohibits restrictions on giving up exclusivity rights and on competing with a non-infringing product because under the circumstances of this case these restraints are not justified.

Paragraph II’s focus on agreements between an NDA holder and the ANDA first filer does not mean that the Commission believes that there is no risk of competitive harm in other contexts. In particular, Abbott or Geneva’s participation in an

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agreement in which a generic company that is not the ANDA first filer is paid by the NDA holder not to market a non-infringing product could raise substantial competitive concerns. Given the variety of circumstances in which the restraints may arise, however, and the possibility that some legitimate justifications might exist in some other contexts, the Commission believes that it is appropriate at this time to limit the flat bans in Paragraph II to agreements between NDA holders and ANDA first filers.

Paragraph III bans private agreements involving payments to keep a generic drug off the market during patent infringement litigation brought by an NDA holder. Abbott and Geneva can enter into such arrangements only if (a) they are presented to the court and embodied in a court-ordered preliminary injunction, and (b) the following other conditions are met: (i) along with any stipulation for preliminary injunction, they provide the court with a copy of the Commission's complaint, order, and this Analysis to Aid Public Comment in this matter, as well as the proposed agreement between the parties; (ii) at least 30 days before submitting the stipulation to the court, they provide written notice to the Commission; and (iii) they do not oppose Commission participation in the court's consideration of the request for preliminary relief.

Thus, the proposed orders bar agreements made in the context of an interim settlement of a patent infringement action, whereby the NDA holder pays the generic not to enter the market, unless the parties obtain court approval through a process that is designed to enhance the court's ability to assess the competitive implications of the agreement. This remedy, in addition to facilitating the court's access to information about the Commission's views, also makes the process public and thereby may prompt other generic drug manufacturers (or other interested parties) to alert the court to potential anticompetitive provisions that could delay their entry into the market. Furthermore, the Commission believes that the requirement that the agreement be filed on the public record with the court will deter Abbott and Geneva from entering into anticompetitive agreements.

Analysis to Aid Public Comment

Paragraph IV addresses certain agreements to stay off the market that are not covered by Paragraph III because they do not involve interim relief in a litigated matter. Such situations would include agreements that are part of a final settlement of the litigation, and situations in which no litigation has been brought. In these circumstances, there is no judicial role in ordering relief agreed to by the parties. The Commission is concerned about such private agreements in which the first filer is paid by the NDA holder not to enter the market, because of the substantial risk of competitive harm that they may create. Thus, the order requires that Abbott and Geneva notify the Commission 30 days before entering into an agreement in which an ANDA first filer agrees with an NDA holder to refrain from going to market. Such notice will assist the Commission in detecting anticompetitive agreements before they have caused substantial injury to consumers. Absent the order, there is no mechanism for the antitrust enforcement agencies to find out about such agreements.

The form of notice that Abbott and Geneva must provide to the Commission under Paragraphs III and IV of the orders is set forth in Paragraph V. In addition to supplying a copy of the proposed agreement, they are required to provide certain other information to assist the Commission in assessing the potential competitive impact of the agreement. Accordingly, the orders require them to identify, among other things, all others who have filed an ANDA for a product containing the same chemical entities as the product at issue, and the court that is hearing any relevant legal proceedings involving either party. In addition, they must provide the Commission with all documents that evaluate the proposed agreement.

In addition, the proposed order against Geneva requires that it waive its 180-day marketing exclusivity period for its generic terazosin HCL tablet product. Although Geneva's exclusivity

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right with respect to the terazosin capsules product has expired, its exclusivity period for the tablet product still remains as a barrier to entry. This provision of the order will therefore open the market to greater generic competition in terazosin HCL products.

The proposed orders also contain certain reporting and other provisions that are designed to assist the Commission in monitoring compliance with the order and are standard provisions in Commission orders.

The orders will expire in 10 years.

Opportunity for Public Comment

The proposed orders have been placed on the public record for 30 days in order to receive comments from interested persons. Comments received during this period will become part of the public record. After 30 days, the Commission will again review the agreements and the comments received and will decide whether it should withdraw from the agreements or make the proposed orders final.

The purpose of this analysis is to facilitate public comment on the agreements. The analysis is not intended to constitute an official interpretation of the agreements, the proposed complaint, or the proposed consent orders, or to modify their terms in any way.

Complaint

IN THE MATTER OF
GENEVA PHARMACEUTICALS, ET AL.
CONSENT ORDER, ETC., IN REGARD TO ALLEGED
VIOLATIONS OF SEC. 5 OF THE FEDERAL TRADE
COMMISSION ACT

Docket C-3946; File No. 9810395
Complaint, May 22, 2000--Decision, May 22, 2000

This consent order prohibits Respondents Abbot Laboratories and Geneva Pharmaceuticals, Inc. from entering agreements in which the first company to file an ANDA agrees with the NDA holder not to relinquish its right to the 180-day exclusivity period established under the Hatch-Waxman Act, or agreements where the ANDA first filer from agrees not to develop or market a generic drug product that is not the subject of a patent infringement lawsuit. The order also prohibits agreements involving payments to keep a generic drug off the market during patent infringement litigation brought by an NDA holder, and respondents can only enter these arrangements if specific criteria are met. This prohibition includes agreements made in the context of an interim settlement of a patent infringement action, whereby the NDA holder pays the generic not to enter the market, unless the parties obtain court approval through a process that is designed to enhance the court's ability to assess the competitive implications of the agreement. In addition, the order requires that Respondents notify the Commission 30 days before entering into an agreement in which an ANDA first filer agrees with an NDA holder to refrain from going to market.

Participants

For the Commission: *Karen Bokat, Bradley S. Albert, Daniel Kotchen, Robin Moore, David Narrow, Martha Oppenheim, David Pender, Richard A. Feinstein, William K. Tom, Daniel Ducore, Alan A. Fisher, Roy B. Levy, and Gregory S. Vistnes.*

For the Respondents: *Jeffrey Weinberger, Munger Tolles & Olson, and Wayne Cross, Dewey Ballentine.*

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COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, and by virtue of the authority vested in it by said Act, the Federal Trade Commission ("Commission"), having reason to believe that respondents Abbott Laboratories and Geneva Pharmaceuticals, Inc., have engaged in conduct, as described herein, that violates 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:

The Respondents

1. Respondent Abbott Laboratories ("Abbott") is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Illinois, with its office and principal place of business located at 100 Abbott Park Road, Abbott Park, Illinois 60064. Abbott is engaged principally in the development, manufacture, and sale of a broad line of health care products and services. In 1998, Abbott had net sales of \$12.5 billion worldwide and \$7.7 billion domestically. Among other products, Abbott manufactures and sells the brand-name product Hytrin, a drug that accounts for over 20% of the net sales of Abbott's U.S. pharmaceutical products division.
2. At all relevant times herein, Abbott has been, and is now, a corporation as "corporation" is defined in Section 4 of the Federal Trade Commission Act, 15 U.S.C. § 44.
3. Respondent Geneva Pharmaceuticals, Inc. ("Geneva") is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Colorado, with its office and principal place of business located at 2555 W. Midway Blvd., Broomfield, Colorado 80020. Geneva, an indirect wholly-owned subsidiary of Novartis Corporation, is one of

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the leading generic drug manufacturers in the United States. Geneva sought and received approval from the United States Food and Drug Administration (“FDA”) to market a generic version of Hytrin.

4. At all relevant times herein, Geneva has been, and is now, a corporation as “corporation” is defined in Section 4 of the Federal Trade Commission Act, 15 U.S.C. § 44.
5. Respondents’ acts and practices, including the acts and practices alleged herein, are in or affect commerce as “commerce” is defined in Section 4 of the Federal Trade Commission Act, 15 U.S.C. § 44.

Federal Regulation of Pharmaceutical Products

6. Under the Federal Food, Drug and Cosmetic Act, 21 U.S.C. § 301 et seq., approval by the United States Food & Drug Administration (“FDA”) is required before a company may market or sell a pharmaceutical product in the United States. Approval for a new or brand name drug is sought by filing a New Drug Application (“NDA”) with the FDA.
7. A generic drug is a product that the FDA has found to be bioequivalent to a brand name drug. Generic drugs are chemically identical to their branded counterparts, but typically are sold at substantial discounts from the branded price. Approval may be sought for a generic version of a brand name drug by filing an Abbreviated New Drug Application (“ANDA”) with the FDA.
8. The FDA maintains a book of Approved Drug Products With Therapeutic Equivalence Evaluations (commonly known as the “FDA Orange Book”), which lists all patents that the brand name manufacturer asserts relate to each brand name drug. If

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an applicant intends to market a generic product before the expiration of one or more patents relating to a brand name drug, the applicant must certify to the FDA that the patent or patents listed in the FDA Orange Book are either invalid or not infringed by the generic version of the product (a "Paragraph IV Certification"), and must notify the holder of the approved NDA and the owner of the patent or patents of the filing of the ANDA. If neither the patent holder nor the NDA holder files a patent infringement suit against the ANDA filer within 45 days of receipt of notification of a Paragraph IV Certification, the FDA review and approval process may proceed and, upon FDA approval of the ANDA, the generic product may be marketed. If a patent infringement suit is filed against the ANDA filer within the 45-day period, however, FDA approval of the ANDA is automatically stayed until the earliest of: (i) patent expiration; (ii) a final judicial determination of non-infringement or invalidity in the lawsuit; or (iii) the expiration of a 30-month period from the time the patent holder receives Paragraph IV Certification.

9. The Drug Price Competition and Patent Term Restoration Act of 1984, 98 Stat. 1585, 21 U.S.C. § 355 (the "Hatch-Waxman Act"), as currently implemented by the FDA, provides that the first applicant to submit an ANDA with a Paragraph IV Certification for a generic version of a brand name drug ("ANDA first filer") is entitled to a 180-day period of marketing exclusivity ("180-day Exclusivity Period") before the FDA may grant final approval of any other generic manufacturer's ANDA regarding the same brand name drug. This period does not begin to run until either the generic is commercially marketed or a court enters final judgment that the patents subject to the Paragraph IV Certification are invalid or not infringed. No other generic manufacturer may obtain FDA approval to market its product until the ANDA first filer's 180-day Exclusivity Period has expired.

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Relevant Product and Geographic Market

10. The relevant product market for assessing respondents' anticompetitive conduct is terazosin hydrochloride ("terazosin HCL"). Terazosin HCL is used principally to treat benign prostatic hyperplasia ("BPH" or enlarged prostate) and hypertension. Both hypertension and BPH are chronic conditions that afflict millions of Americans, many of whom are senior citizens. BPH afflicts at least 50% of the men over 60, and results in 1.7 million men each year making office visits to their physicians. Total U.S. sales of terazosin HCL amount to approximately \$540 million per year.
11. Hytrin, which is manufactured and marketed by Abbott, is the pioneer brand name drug in the United States containing terazosin HCL. Hytrin was introduced in 1987. It was the only terazosin HCL product sold in the United States until Geneva introduced such a product on or around August 13, 1999.
12. Other drugs are not effective substitutes for terazosin HCL because they are different in terms of chemical composition, safety, efficacy, and side effects. In addition, there is little price sensitivity between terazosin HCL and non-terazosin HCL products.
13. The relevant geographic market is the United States.

Factual Background

14. Hytrin, which Abbott markets in tablet and capsule form, has been one of the company's most important products. Abbott introduced Hytrin tablets in 1987. In 1995, Abbott launched Hytrin capsules, which now account for over 90% of Hytrin sales. In 1998, Abbott's sales of Hytrin amounted to \$542

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million in the United States alone, accounting for 9.41 million prescriptions. For the first 6 months of 1999, Abbott reported \$292 million in U.S. sales of Hytrin, representing over 20% of the net sales of Abbott's pharmaceutical division.

15. Abbott currently holds at least seven patents that relate to terazosin HCL. Abbott's initial patent covering the chemical compound terazosin HCL expired in or around 1994.
16. Geneva filed ANDAs covering a tablet form and a capsule form of generic terazosin HCL. It was the first company to file an ANDA for each form. Geneva submitted its tablet ANDA to the FDA in or around January 1993, and its capsule ANDA was submitted in or around December 1995.
17. In early 1996, Abbott notified the FDA of a new patent ('207 patent) relating to its Hytrin product, and the FDA listed that patent in the FDA Orange Book. In April 1996, Geneva filed a Paragraph IV certification with the FDA, claiming that its generic terazosin HCL tablet and capsule products did not infringe any of Abbott's patents covering terazosin HCL, including Abbott's newly listed '207 patent, and notified Abbott of the Paragraph IV certification.
18. On June 4, 1996, Abbott sued Geneva in the Northern District of Illinois, claiming patent infringement by Geneva's terazosin HCL tablet product. Abbott made no infringement claim against Geneva's terazosin HCL capsule product, even though both of Geneva's products involved the same potential infringement issues.
19. Pursuant to the Hatch-Waxman Act, Abbott's lawsuit triggered a 30-month stay of final FDA approval of Geneva's terazosin HCL tablet ANDA, until December 1998. Because no infringement claim had been filed within the requisite 45-day period, the FDA review and approval process for Geneva's terazosin HCL capsule ANDA could proceed without delay.

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20. By early 1998, Geneva, including particularly its CEO, was confident that it ultimately would prevail in its patent infringement dispute with Abbott.
21. Accordingly, Geneva pushed ahead in early 1998 with plans to bring to market as soon as possible its generic terazosin HCL capsule product, which could have received FDA approval at any time. Preparations to launch this product were proceeding on all fronts: the manufacturing team sought to validate with the FDA its terazosin HCL capsule manufacturing process; the purchasing department instructed its product supplier to manufacture commercial quantities of terazosin HCL active ingredient; sales and marketing personnel were contacting customers to inform them of an impending launch and to enter into distribution contracts; and the legal staff was drafting papers to oppose any effort by Abbott to block Geneva's entry.
22. The FDA granted Geneva final approval to market generic terazosin HCL capsules on March 30, 1998.
23. As the first generic company to submit a Paragraph IV Certification for generic terazosin HCL, Geneva was entitled to the 180-day Exclusivity Period pursuant to the Hatch-Waxman Act, as currently interpreted. Unless and until Geneva's 180-day Exclusivity Period had been triggered and had expired, or Geneva relinquished its entitlement to this period of exclusivity, only Geneva would be approved by the FDA to market a generic terazosin HCL product.

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Anticompetitive Conduct

24. On March 30, 1998, the very day it was granted FDA approval to market its generic terazosin HCL capsules, Geneva contacted Abbott and announced that it would launch its generic terazosin HCL capsules unless it was paid by Abbott not to enter the market. From Abbott's perspective, a launch of Geneva's generic terazosin HCL product would have had a significant adverse impact on Abbott's financial performance. Abbott forecasted that entry of generic terazosin HCL on April 1, 1998 would have eliminated over \$185 million in Hytrin sales in just six months. Because Hytrin was highly profitable, Abbott sought to keep from the market Geneva and all other potential generic competition to Hytrin, until at least February 2000.
25. Over the course of two days, representatives of Abbott and Geneva negotiated the framework for an agreement, whereby Abbott would pay Geneva not to enter the market. Abbott estimated Geneva's revenues from launching generic terazosin HCL at \$1 million to \$1.5 million per month, but was willing to pay Geneva a "premium" over that not to compete.
26. On April 1, 1998, Abbott and Geneva entered into a written agreement ("Agreement"), pursuant to which Geneva agreed not to enter the market with any generic terazosin HCL capsule or tablet product until the earlier of: (1) the final resolution of the patent infringement litigation involving Geneva's terazosin HCL tablets product, including review through the Supreme Court; or (2) entry of another generic terazosin HCL product. Geneva also agreed - at Abbott's insistence - not to transfer, assign, or relinquish its right to a 180-day Exclusivity Period.
27. In exchange, Abbott agreed to pay Geneva \$4.5 million per month in non-refundable payments until a district court judgment in the parties' patent infringement dispute. Respondents agreed that if the district court declared that

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Geneva's tablet product did not or would not infringe any valid and enforceable claim of the '207 patent, Abbott would thereafter pay the \$4.5 million monthly payments into an escrow fund until the final resolution of the litigation. Under the Agreement, the party prevailing in the litigation would receive the money in the escrow fund.

28. The court hearing the patent litigation was not made aware of the respondents' Agreement.
29. In the words of Geneva's CEO at the time the Agreement was signed, this Agreement represented to Geneva the "best of all worlds," because Geneva obtained a risk-free "monetary settlement on an ongoing basis until the litigation was resolved" and still could market its product exclusively for 180 days after the litigation was over.
30. In accordance with the terms of the Agreement, in April 1998, Geneva refrained from entering the market with its generic terazosin HCL capsules, and instead began receiving monthly payments of \$4.5 million from Abbott.
31. On September 1, 1998, the United States District Court for the Northern District of Illinois granted Geneva's motion for summary judgment in its patent tablet litigation with Abbott, invalidating Abbott's patent under the on-sale provision of 35 U.S.C. § 102(b).
32. The district court's decision invalidating Abbott's patent only strengthened Geneva's litigation position. Nonetheless, Geneva, in accordance with the terms of the Agreement, did not enter the generic terazosin HCL market even after the favorable district court decision.

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33. On July 1, 1999, the United States Court of Appeals for the Federal Circuit affirmed, without dissent, the summary judgment in favor of Geneva. Under the Agreement, Geneva still could not enter the generic terazosin HCL market until after the Supreme Court either denied Abbott's petition for certiorari or disposed of the patent infringement litigation. Nonetheless, in August 1999, aware of the Commission's investigation, the respondents canceled their Agreement, and on August 13, 1999, Geneva finally introduced its generic terazosin HCL capsule product to the marketplace. The Supreme Court denied certiorari on January 10, 2000.

The Effects of Respondents' Conduct

34. The acts and practices of the respondents as herein alleged have had the purpose or effect, or the tendency or capacity, to restrain competition unreasonably and to injure competition by preventing or discouraging the entry of competition in the form of generic versions of Hytrin into the relevant market.
35. As a result of respondents' conduct as herein alleged, consumers were deprived of the benefits of new competition from Geneva and other generic competitors. Without this lower-priced generic competition, consumers, pharmacies, hospitals, insurers, wholesalers, government agencies, managed care organizations, and others were forced to purchase Abbott's more expensive Hytrin product.
36. Earlier entry of a generic terazosin HCL product would have had a significant procompetitive impact in the relevant market. Pharmacists generally are permitted, and in some instances required, to substitute generic drugs for their branded counterparts, unless the prescribing physician has directed that the branded product be dispensed. In addition, there is a ready market for generic products because certain third-party payers of prescription drugs (*e.g.*, managed care plans and Medicaid programs) encourage or insist on the use of generic drugs wherever possible. A generic product can quickly and

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efficiently enter the marketplace at substantial discounts, generally leading to a significant erosion of the branded drug's sales within the first year. For example, Abbott's forecasts projected that generic terazosin HCL would capture roughly 70% of Hytrin sales within the first six months alone.

37. The purpose and effect of the \$4.5 million monthly payments from Abbott to Geneva during the term of the Agreement were to ensure that Geneva would not enter the relevant market, and would not take any steps, including giving up its right to a 180-day Exclusivity Period, to permit or facilitate the entry of any other generic manufacturer.
38. By prohibiting Geneva from transferring, assigning, or giving up its right to a 180-day Exclusivity Period until the final resolution of the patent infringement litigation involving Geneva's terazosin HCL tablets product, the Agreement had the purpose and effect of preventing Geneva from relinquishing its eligibility for a 180-day Exclusivity Period under the Hatch-Waxman Act. As of February 1999, at least one other generic manufacturer had satisfied the FDA's requirements for approval and was barred from entering the market because Geneva's 180-day Exclusivity Period had not begun to run.
39. The Agreement is not justified by any countervailing efficiency.

Violations Alleged

40. The Abbott-Geneva Agreement as a whole, and particular provisions such as that described in Paragraphs 37 and 38 above, constitute an unreasonable restraint of trade in violation of Section 5 of the Federal Trade Commission Act, as amended.

Decision and Order

41. Abbott and Geneva acted with the specific intent that Abbott monopolize the relevant market, and engaged in overt acts described in Paragraphs 24-33 above in furtherance of a conspiracy to monopolize the relevant market, in violation of Section 5 of the Federal Trade Commission Act, as amended.
42. Abbott had monopoly power in the relevant market and monopolized that market in violation of Section 5 of the Federal Trade Commission Act, as amended.
43. The acts and practices described above are anticompetitive in nature and tendency and constitute unfair methods of competition in violation of Section 5 of the Federal Trade Commission Act, as amended.

WHEREFORE, THE PREMISES CONSIDERED, the Federal Trade Commission on this twenty-second day of May, 2000, issues its complaint against said respondents.

By the Commission.

DECISION AND ORDER

The Federal Trade Commission ("Commission"), having initiated an investigation of certain acts and practices of Abbott Laboratories ("Abbott") and Geneva Pharmaceuticals, Inc. (hereinafter referred to as "Respondent Geneva"), an indirect wholly-owned subsidiary of Novartis Corporation, and Respondent Geneva having been furnished thereafter with a copy of a draft complaint which the Bureau of Competition proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge Respondent Geneva with violation of the Federal Trade Commission Act; and

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Respondent Geneva and counsel for the Commission having thereafter executed an Agreement Containing Consent Order, an admission by Respondent Geneva of all the jurisdictional facts set forth in the aforesaid draft complaint, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by Respondent Geneva that the law has been violated as alleged in such complaint, and waivers and other provisions as required by the Commission's Rules; and

The Commission having thereafter considered the matter and having determined that it had reason to believe that Respondent Geneva has violated the said Act, and that a complaint should issue stating its charges in that respect, and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of thirty (30) days, and having duly considered the comments filed by interested persons pursuant to Section 2.34 of its Rules, 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. Geneva Pharmaceuticals, Inc., an indirect wholly-owned subsidiary of Novartis Corporation, is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Colorado, with its office and principal place of business located at 2555 W. Midway Blvd., Broomfield, Colorado 80020.

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

Decision and Order

ORDER

I.

IT IS ORDERED that for the purposes of this order, the following definitions shall apply:

- A. "Respondent Geneva" means: (1) Geneva Pharmaceuticals, Inc., and its successors and assigns; (2) any entity that the parent of Geneva Pharmaceuticals, Inc. controls and that engages in the manufacture or sale of Drug Products in the United States for which it is, or becomes, an ANDA First Filer; (3) any predecessor, subsidiary, division, group and affiliate controlled by the entities described in subparagraphs (1) and (2) above that engages in the manufacture or sale of Drug Products in the United States for which it is, or becomes, an ANDA First Filer; (4) successors and assigns of the entities described in subparagraphs (2) and (3) above that are or become ANDA first filers; and (5) the respective directors, officers, employees, agents and representatives of each acting in their capacities as such.
- B. "Commission" means the Federal Trade Commission.
- C. "180-day Exclusivity Period" means the period of time established by Section 505(j)(5)(B)(iv) of the Federal Food, Drug, and Cosmetic Act (21 U.S.C. § 355(j) *et seq.*).
- D. "Agreement" means anything that would constitute an agreement under Section 1 of the Sherman Act or Section 5 of the Federal Trade Commission Act.
- E. "ANDA" means an Abbreviated New Drug Application, as defined under 21 U.S.C. § 355(j) *et seq.*

Decision and Order

- F. "ANDA First Filer" means the party whom the FDA determines is entitled to, or eligible for, a right to a 180-day Exclusivity Period which has not yet expired.
- G. "Control" has the same meaning as the definition of the term in 16 C.F.R. § 801.1(b).
- H. "Drug Product" means a finished dosage form (e.g., tablet, capsule, or solution) that contains a drug substance, generally, but not necessarily, in association with one or more other ingredients, as defined in 21 C.F.R. § 314.3(b).
- I. "FDA" means the United States Food and Drug Administration.
- J. "NDA" means a New Drug Application, as defined under 21 U.S.C. § 355(b) *et seq.*
- K. "NDA Holder" means: (1) the party that received FDA approval to market a Drug Product pursuant to an NDA; (2) a party owning or controlling enforcement of the patent(s) listed in the Approved Drug Products With Therapeutic Equivalence Evaluations (commonly known as the "FDA Orange Book") in connection with the NDA; or (3) the predecessors, subsidiaries, divisions, groups and affiliates controlled by the entities described in subparagraphs (1) and (2) above, as well as the entities' licensees, successors and assigns.
- L. "Parent" has the same meaning as "ultimate parent entity" in 16 C.F.R. § 801.1(a).
- M. "Person" means both natural persons and artificial persons, including, but not limited to, corporations, unincorporated entities, and governments.

Decision and Order

- N. "Relinquishing" means transferring, selling, assigning, waiving, or relinquishing.

II.

IT IS FURTHER ORDERED that Respondent Geneva cease and desist, either directly or indirectly, in connection with the sale of Drug Products in or affecting commerce, as "commerce" is defined in Section 4 of the Federal Trade Commission Act, 15 U.S.C. § 44, from being a party to any Agreement in which one party is an NDA Holder for a Drug Product(s), any other party is the ANDA First Filer for the Drug Product(s), and:

- A. the ANDA First Filer is prohibited by such Agreement from relinquishing, or is subject to a penalty, forfeiture, or loss of benefit if it relinquishes, its right to the 180-Day Exclusivity Period; or
- B. the ANDA First Filer agrees to refrain from researching, developing, manufacturing, marketing, or selling any Drug Product that could be approved for sale by the FDA pursuant to the ANDA and that is not the subject of a court action alleging patent infringement.

Provided, however, that nothing in this Paragraph II shall prohibit Agreements involving the complete transfer of rights in a Drug Product.

III.

IT IS FURTHER ORDERED that, in any instance where Respondent Geneva is a party to a patent infringement action in which it is either the NDA Holder or the alleged infringer, it shall cease and desist, either directly or indirectly, in connection with the sale of Drug Products in or affecting commerce, as "commerce" is defined in Section 4 of the Federal Trade Commission Act, 15 U.S.C. § 44, from being a party to any

Decision and Order

Agreement in which the parties do not agree to dismiss the litigation, and in which the NDA Holder provides anything of value to the alleged infringer and the alleged infringer agrees to refrain during part or all of the course of the litigation from selling the Drug Product at issue, or any Drug Product containing the same chemical entity(ies) at issue. *Notwithstanding the above, however*, such an Agreement is permissible when entered into in conjunction with a joint stipulation between the parties that the court may enter a preliminary injunction pursuant to Rule 65 of the Federal Rules of Civil Procedure, if: (1) together with the stipulation for a preliminary injunction, Respondent Geneva provides the court with the proposed Agreement, as well as a copy of the Commission's complaint, order, and Analysis to Aid Public Comment in this matter; (2) Respondent Geneva has provided Notification, as described in Paragraph V below, to the Commission at least thirty (30) days prior to submitting the stipulation for a preliminary injunction; (3) Respondent Geneva does not oppose any effort by the Commission to participate, in any capacity permitted by the court, in the court's consideration of any such action for preliminary relief; and (4) the court issues an order which incorporates the terms of the Agreement. Nothing in this Paragraph shall be interpreted to prohibit or restrict the right of Respondent Geneva to unilaterally seek relief from the court, without notice to the Commission, including, but not limited to, applying for preliminary injunctive relief or seeking to extend the 30-month stay pursuant to 21 U.S.C. § 355(j)(4)(B)(iii).

IV.

IT IS FURTHER ORDERED that Respondent Geneva shall provide Notification as described in Paragraph V below to the Commission at least thirty (30) days before entering into, enforcing, or otherwise participating in any Agreement made after the date the Agreement Containing Consent Order is signed whereby an ANDA First Filer agrees with an NDA Holder to

Decision and Order

refrain from selling any Drug Product under its ANDA for any period of time.IV.

V.

The Notification required by Paragraphs III and IV shall be filed with the Secretary of the Commission and shall include the following information, to the extent known, and not subject to any legally recognized privilege: (1) identification of the parties involved in the Agreement; (2) identification of all Drug Products involved in the Agreement; (3) identification of all persons who have filed an ANDA with the FDA (including the status of such application) for any Drug Product containing the same chemical entity(ies) as the Drug Product(s) involved in the Agreement; (4) a copy of the proposed Agreement; (5) identification of the court, and copy of the docket sheet, for any legal action which involves either party to the Agreement and relates to any Drug Product(s) containing the same chemical entity(ies) involved in the Agreement; and (6) all documents which were prepared by or for any officer(s) or director(s) of Respondent Geneva for the purpose of evaluating or analyzing the Agreement.

VI.

IT IS FURTHER ORDERED that, within ten (10) days of signing the Agreement Containing Consent Order in this matter, Respondent Geneva shall notify the FDA in writing that Respondent Geneva is relinquishing any and all eligibility for, and entitlement or right to, a 180-day Exclusivity Period for ANDA No. 74-315 (terazosin HCL tablets).

VII.

IT IS FURTHER ORDERED that Respondent Geneva shall file a verified written report within sixty (60) days after the date this order becomes final, annually thereafter for five (5) years on the anniversary of the date this order becomes final, and at such other times as the Commission may by written notice require,

Decision and Order

setting forth in detail the manner and form in which Respondent Geneva intends to comply, is complying, and has complied with this order. Respondent Geneva 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 this order.

VIII.

IT IS FURTHER ORDERED that Respondent Geneva shall notify the Commission at least thirty (30) days prior to any proposed change in Respondent Geneva such as dissolution, assignment, sale resulting in the emergence of a successor corporation, the creation or dissolution of subsidiaries or any other change in Respondent Geneva that may affect compliance obligations arising out of this order.

IX.

IT IS FURTHER ORDERED that, for the purpose of determining or securing compliance with this order and subject to any legally recognized privilege, and upon written request with reasonable notice to Respondent Geneva, Respondent Geneva shall permit any duly authorized representative of the Commission:

- A. Access, during office hours and in the presence of counsel, to all facilities, and to inspect and copy all books, ledgers, accounts, correspondence, memoranda, calendars, and other records and documents in its possession or under its control relating to compliance with this order; and

Statement of the Commission

- B. To interview officers, directors, employees, agents, and other representatives of Respondent Geneva, who may have counsel present, regarding such compliance issues.

X.

IT IS FURTHER ORDERED that this order shall terminate on May 22, 2010.

By the Commission.

**STATEMENT OF CHAIRMAN ROBERT PITOFSKY AND
COMMISSIONERS SHEILA F. ANTHONY, MOZELLE W.
THOMPSON, ORSON SWINDLE,
AND THOMAS B. LEARY**

The attached Analysis to Aid Public Comment, which accompanied our acceptance of consent agreements with Geneva Pharmaceuticals, Inc. and Abbott Laboratories, describes the conduct of those two companies in agreeing that Abbott would pay Geneva to refrain from selling a generic version of Hytrin, Abbott's branded version of terazosin hydrochloride. It also describes relevant provisions of the Drug Price Competition and Patent Term Restoration Act of 1984 ("Hatch-Waxman Act"), including particularly the provision that gives the first generic company to seek FDA approval a 180-day period during which it has the exclusive right to market the generic version of a brand name drug.

Pursuant to a private agreement not reviewed by any court, Abbott paid Geneva substantial sums not to enter the market with its generic version of Hytrin, and not to transfer, assign or relinquish its 180-day exclusive marketing right to any other producer of generic products that might compete with Abbott. By

Statement of the Commission

not selling its generic version, Geneva prevented the start of the 180-day exclusivity period, with the result that neither Geneva nor any other company could introduce a generic version of Hytrin into the market.

The consent orders that we issue today against Abbott and Geneva represent the first resolution of an antitrust challenge by the government to a private agreement whereby a brand name drug company paid the first generic company that sought FDA approval not to enter the market, and to retain its 180-day period of market exclusivity. Because the behavior occurred in the context of the complicated provisions of the Hatch-Waxman Act, and because this is the first government antitrust enforcement action in this area, we believe the public interest is satisfied with orders that regulate future conduct by the parties. We recognize that there may be market settings in which similar but less restrictive arrangements could be justified, and each case must be examined with respect to its particular facts.

In March we also issued an administrative complaint against two other pharmaceutical companies with respect to conduct that is in some ways similar to the conduct addressed by these consent orders. We anticipate that the development of a full factual record in the administrative proceeding will help to shape further the appropriate parameters of permissible conduct in this area and will guide other companies and their legal advisors.

Pharmaceutical firms should now be on notice, however, that arrangements comparable to those addressed in the present consent orders can raise serious antitrust issues, with a potential for serious consumer harm. Accordingly, in the future, the Commission will consider its entire range of remedies in connection with enforcement actions against such arrangements, including possibly seeking disgorgement of illegally obtained profits.

Analysis to Aid Public Comment

If firms are uncertain about the limits of permissible behavior under the Hatch-Waxman Act, they may, of course, seek advisory opinions from the staff of this agency.

Analysis to Aid Public Comment

The Federal Trade Commission has accepted for public comment agreements and proposed consent orders with Geneva Pharmaceuticals, Inc. and Abbott Laboratories. The proposed consent orders settle charges that these parties unlawfully agreed that Geneva would refrain from selling its generic version of one of Abbott's drugs, in exchange for payments from Abbott. The proposed consent orders have been placed on the public record for 30 days to receive comments by interested persons. The proposed consent orders have been entered into for settlement purposes only and do not constitute an admission by Abbott or Geneva that they violated the law or that the facts alleged in the complaint, other than the jurisdictional facts, are true.

Background

Abbott Laboratories develops, manufactures, and sells a variety of health care products and services. Based in Abbott Park, Illinois, Abbott's 1998 net sales worldwide were approximately \$ 12.5 billion. Over 20% of Abbott's net sales of pharmaceutical products in the U.S. are for a drug called Hytrin. Hytrin is used to treat two chronic conditions that affect millions of Americans, particularly senior citizens: hypertension (high blood pressure) and benign prostatic hyperplasia (enlarged prostate).

Geneva is one of the leading generic drug manufacturers in the United States. An indirect wholly-owned subsidiary of

Analysis to Aid Public Comment

Novartis Corp., Geneva is based in Broomfield, Colorado. Geneva developed a generic version of Hytrin, and in March 1998 received approval from the U.S. Food and Drug Administration (“FDA”) to market that generic product.

A generic drug is a product that the FDA has found to be bioequivalent to a brand name drug. A company seeking FDA approval to market a new drug must file a New Drug Application (“NDA”). In order to market a generic version of a brand name drug, a company must file an Abbreviated New Drug Application (“ANDA”) and receive approval from the FDA.

Generic drugs are chemically identical to their branded counterparts, but typically are sold at substantial discounts from the branded price. A Congressional Budget Office Report estimates that purchasers saved an estimated \$8-\$10 billion on prescriptions at retail pharmacies in 1994 by purchasing generic drugs instead of the brand name product.¹

Congress enacted the Drug Price Competition and Patent Term Restoration Act of 1984, commonly referred to as “the Hatch-Waxman Act,” to facilitate the entry of generic drugs while maintaining incentives to invest in new drug development. In particular, the Hatch-Waxman Act establishes certain rights and procedures in situations where a company seeks FDA approval to market a generic product prior to the expiration of a patent or patents relating to a brand name drug upon which the generic is based. In such cases, the applicant must: (1) certify to the FDA that the patent in question is invalid or is not infringed by the generic product (known as a “paragraph IV certification”); and (2) notify the patent holder of the filing of the certification. If the

¹ Congressional Budget Office, *How Increased Competition from Generic Drugs Has Affected Prices and Returns in the Pharmaceutical Industry* at xiii, 13 (July 1998).

Analysis to Aid Public Comment

holder of patent rights files a patent infringement suit within 45 days, FDA approval to market the generic drug is automatically stayed for 30 months, unless before that time the patent expires or is judicially determined to be invalid or not infringed. This automatic 30-month stay allows the patent holder time to seek judicial protection of its patent rights before a generic competitor is permitted to market its product.

In addition, the Hatch-Waxman Act provides an incentive for generic drug companies to bear the cost of patent litigation that may arise when they challenge invalid patents or design around valid ones. The Act grants the first company to file an ANDA in such cases a 180-day period during which it has the exclusive right to market a generic version of the brand name drug. No other generic manufacturer may obtain FDA approval to market its product until the first filer's 180-day exclusivity period has expired.

Geneva was the first company to file an ANDA for terazosin hydrochloride ("terazosin HCL"), the generic version of Hytrin. It filed applications covering a tablet form and a capsule form of its generic terazosin HCL. Geneva filed a paragraph IV certification with the FDA stating that these products did not infringe any valid patent held by Abbott covering terazosin HCL. In June 1996, Abbott sued Geneva for patent infringement by Geneva's terazosin HCL tablet product, but due to an oversight failed to make an infringement claim against Geneva's capsule product, although both products raised the same potential infringement issues.

Abbott's lawsuit triggered a 30-month stay of final FDA approval of Geneva's terazosin HCL tablet ANDA, until December 1998. No stay applied to the FDA approval process for Geneva's terazosin HCL capsule ANDA, however, because no infringement claim was filed within the statutory time period required by the Hatch-Waxman Act. The FDA granted Geneva final approval to market generic terazosin HCL capsules on March 30, 1998.

Analysis to Aid Public Comment

The Challenged Agreement

The complaint challenges an agreement whereby Abbott, following the FDA approval of Geneva's generic terazosin HCL capsule product, paid Geneva not to enter the market during their ongoing patent litigation over the tablet product. According to the complaint, on the day it was granted approval to market its generic terazosin HCL capsules, Geneva contacted Abbott and announced that it would launch its generic terazosin HCL capsules unless it was paid by Abbott not to enter. Two days later, on April 1, 1998, Abbott and Geneva entered into an agreement, pursuant to which Geneva agreed not to enter the market with any generic terazosin HCL capsule or tablet product until the earlier of: (1) the final resolution of the patent infringement litigation involving Geneva's terazosin HCL tablets product, including review through the Supreme Court; or (2) entry of another generic terazosin HCL product.

Geneva also agreed – at Abbott's insistence – not to transfer, assign, or relinquish its 180-day exclusivity right. The effect of this provision was to ensure that no other company's generic terazosin HCL product could obtain FDA approval and enter the market during the term of the agreement, because Geneva's agreement not to launch its product meant that the 180-day exclusivity period would not expire.

In exchange, Abbott agreed to pay Geneva \$4.5 million per month until a district court judgment in the parties' patent infringement dispute, and then (assuming Geneva won in the district court) to pay the \$4.5 million monthly payments into an escrow fund until the final resolution of the litigation, which Geneva would then receive if its district court victory was upheld.

Analysis to Aid Public Comment

Abbott's payment to Geneva of \$4.5 million a month was well over the \$1 to \$1.5 million per month that, the complaint states, Abbott believed Geneva would forego by staying off the market. The complaint alleges that Abbott was willing to pay Geneva a "premium" to refrain from competing because of the substantial impact that launch of a generic version of Hytrin would have on Abbott's overall financial situation. Abbott forecasted that entry of generic terazosin HCL on April 1, 1998 would eliminate over \$185 million in Hytrin sales in just six months. Accordingly, the complaint charges, Abbott sought to forestall Geneva -- and all other potential generic competition to Hytrin -- from entering the market because of the threat they represented to the high profits it was making from Hytrin.

The complaint further charges that, in accordance with the terms of the agreement, Geneva did not enter the market with its generic terazosin HCL capsules, even after the district court and the court of appeals upheld Geneva's position that Abbott's patent was invalid. In August 1999, Abbott and Geneva -- aware of the Commission's investigation -- terminated their agreement (which by its terms would not have ended until disposition of the litigation by the Supreme Court). Geneva finally brought its generic terazosin HCL capsule product to market on August 13, 1999.

Competitive Analysis

The complaint charges that the challenged agreement prevented competition that Abbott's Hytrin product would otherwise have faced from generic products of Geneva and other potential generic competitors. Generic drugs can have a swift marketplace impact, because pharmacists generally are permitted, and in some instances are required, to substitute lower-priced generic drugs for their branded counterparts, unless the prescribing physician directs otherwise. In addition, there is a ready market for generic products because certain third-party payers of prescription drugs (*e.g.*, state Medicaid programs and many private health plans) encourage or insist on the use of

Analysis to Aid Public Comment

generic drugs wherever possible. Abbott's forecasts, the complaint states, projected that generic terazosin HCL would capture roughly 70% of Hytrin sales within the first six months following its launch. The agreement, however, ensured that Geneva would not offer generic terazosin HCL in competition with Hytrin, and would not take action – such as relinquishing exclusivity rights – that would have permitted the entry of any other generic manufacturer.

These restraints on generic competition had direct and substantial effects on consumers. Without a lower-priced generic alternative, consumers, government agencies, health plans, pharmacies, hospitals, wholesalers, and others were forced to purchase Abbott's more expensive Hytrin product. Other drugs, the complaint states, are not effective substitutes for terazosin HCL because they are different in terms of chemical composition, safety, efficacy, and side effects. There is little price sensitivity between terazosin HCL and other products. Thus, the complaint alleges that the sale of terazosin HCL in the United States is the relevant market within which to assess the effects of the challenged agreement.

The challenged conduct represents an agreement not to compete between potential horizontal competitors. A firm is a potential competitor if there is evidence that entry by that firm is reasonably probable in the absence of the agreement at issue.² Geneva certified to the FDA that its entry with generic HCL would not infringe a valid patent, and was confident that it ultimately would prevail in its patent infringement dispute with Abbott, the complaint states. In early 1998, Geneva was making preparations to launch its generic terazosin HCL capsule product

² Federal Trade Commission and United States Department of Justice, *Antitrust Guidelines for the Licensing of Intellectual Property* at § 1.1 n.6 (1995).

Analysis to Aid Public Comment

as soon as possible. After receiving FDA approval for the capsule product, Geneva threatened to launch that product unless Abbott paid it not to do so. The challenged agreement directly restrained competition between these potential competitors.

In addition, the agreement created a bottleneck that prevented any other potential competitors from entering the market, because no other ANDA filer could obtain FDA approval until Geneva's 180 day exclusivity period expired. Other companies were developing generic terazosin HCL products, and at least one other generic manufacturer had satisfied the FDA's requirements for approval by February 1999, but was barred from entering the market because Geneva's failure to launch its product meant its 180-day exclusivity right had not even begun to run.

The complaint states that the challenged agreement is not justified by any countervailing efficiency. Although the agreement between Abbott and Geneva provided substantial private benefits to both parties, the facts in this matter demonstrate that the broad restraints were not justified by any benefits to competition and consumer welfare. The Commission considered whether the agreement could be considered a procompetitive effort to effectuate a temporary settlement of a patent dispute, akin to a court-ordered preliminary injunction. However, it finds that any legitimate interest in resolving patent disputes cannot justify the harm to consumers imposed by the agreement in this case. The restraint imposed exceeds what likely would be available to the parties under a court-ordered preliminary injunction. For example, it: (1) barred Geneva's entry beyond the pendency of the district court litigation; (2) provided large up-front payments that could be expected to create disincentives for Geneva to enter (in contrast to a court-ordered bond to cover damages actually incurred as a result of the court's injunction); (3) barred Geneva from relinquishing its exclusivity rights; (4) prohibited Geneva from developing or marketing non-infringing generic products. Moreover, the restraints contained in the agreement were entered into without any judicial finding that Abbott was likely to succeed on the merits of its infringement

Analysis to Aid Public Comment

suit, without any consideration of whether Abbott would suffer irreparable injury, and without any weighing of the equities, including any consideration of the public interest.

The complaint also charges that Abbott had a monopoly in the market for terazosin HCL, and, by entering into the agreement with Geneva, Abbott sought to preserve its dominance by delaying the entry of Geneva and other generic companies into the market. As detailed above, there were no countervailing justifications for Abbott's conduct. In addition, the complaint alleges that Abbott and Geneva conspired to monopolize the market for terazosin HCL. As stated in the complaint, Abbott and Geneva acted with specific intent that Abbott monopolize the market for terazosin HCL, and entered into a conspiracy to achieve that goal. Finally, the parties' agreement otherwise amounts to an unfair method of competition in violation of Section 5 of the FTC Act.

The Proposed Orders

The proposed orders are designed to remedy the unlawful conduct charged in the complaint. Although the particular agreement challenged in the complaint has been terminated, prospective relief is necessary to prevent a recurrence of similar agreements with respect to other drugs. Private agreements in which the brand name drug company (the NDA holder) pays the first generic to seek FDA approval (the first filer) not to enter the market can substantially delay generic competition and raise serious antitrust issues. Moreover, the FDA, which has expressed concern about such private agreements, has observed that the incentives for companies to enter into such arrangements are becoming greater, as the returns to the brand name company from extending its monopoly increasingly exceed the potential

Analysis to Aid Public Comment

economic gains to the generic applicant from its 180 days of market exclusivity.³

In essence, the proposed orders:

- bar two particular types of agreements between brand name drug companies and potential generic competitors -- restrictions on giving up Hatch-Waxman 180-day exclusivity rights and on entering the market with a non-infringing product;
- require that agreements involving payments to the generic company to stay off the market be approved by the court when undertaken in the context of an interim settlement of patent litigation, with notice to the Commission to allow it time to present its views to the court;
- require respondents to give the Commission written notice 30 days before entering into such agreements in other contexts; and
- require that Geneva waive its right to 180-day marketing exclusivity for its generic terazosin HCL tablet product, so that other generic tablet producers can immediately enter the market.

Paragraph II prohibits two kinds of agreements between “an NDA Holder” and “the ANDA First Filer” (that is, the party possessing an unexpired right to Hatch-Waxman 180-day exclusivity). Paragraph II.A. bars agreements in which the first company to file an ANDA agrees with the NDA holder not to relinquish its right to the 180-day exclusivity period established under the Hatch-Waxman Act. Paragraph II.B. prohibits the ANDA first filer from agreeing not to develop or market a generic

³ FDA Proposed Rule Regarding 180-Day Generic Drug Exclusivity for Abbreviated New Drug Applications, 64 Fed.Reg. 42873, 42882-83 (August 6, 1999).

Analysis to Aid Public Comment

drug product that is not the subject of a patent infringement lawsuit. The order prohibits restrictions on giving up exclusivity rights and on competing with a non-infringing product because under the circumstances of this case these restraints are not justified.

Paragraph II's focus on agreements between an NDA holder and the ANDA first filer does not mean that the Commission believes that there is no risk of competitive harm in other contexts. In particular, Abbott or Geneva's participation in an agreement in which a generic company that is not the ANDA first filer is paid by the NDA holder not to market a non-infringing product could raise substantial competitive concerns. Given the variety of circumstances in which the restraints may arise, however, and the possibility that some legitimate justifications might exist in some other contexts, the Commission believes that it is appropriate at this time to limit the flat bans in Paragraph II to agreements between NDA holders and ANDA first filers.

Paragraph III bans private agreements involving payments to keep a generic drug off the market during patent infringement litigation brought by an NDA holder. Abbott and Geneva can enter into such arrangements only if (a) they are presented to the court and embodied in a court-ordered preliminary injunction, and (b) the following other conditions are met: (i) along with any stipulation for preliminary injunction, they provide the court with a copy of the Commission's complaint, order, and this Analysis to Aid Public Comment in this matter, as well as the proposed agreement between the parties; (ii) at least 30 days before submitting the stipulation to the court, they provide written notice to the Commission; and (iii) they do not oppose Commission participation in the court's consideration of the request for preliminary relief.

Analysis to Aid Public Comment

Thus, the proposed orders bar agreements made in the context of an interim settlement of a patent infringement action, whereby the NDA holder pays the generic not to enter the market, unless the parties obtain court approval through a process that is designed to enhance the court's ability to assess the competitive implications of the agreement. This remedy, in addition to facilitating the court's access to information about the Commission's views, also makes the process public and thereby may prompt other generic drug manufacturers (or other interested parties) to alert the court to potential anticompetitive provisions that could delay their entry into the market. Furthermore, the Commission believes that the requirement that the agreement be filed on the public record with the court will deter Abbott and Geneva from entering into anticompetitive agreements.

Paragraph IV addresses certain agreements to stay off the market that are not covered by Paragraph III because they do not involve interim relief in a litigated matter. Such situations would include agreements that are part of a final settlement of the litigation, and situations in which no litigation has been brought. In these circumstances, there is no judicial role in ordering relief agreed to by the parties. The Commission is concerned about such private agreements in which the first filer is paid by the NDA holder not to enter the market, because of the substantial risk of competitive harm that they may create. Thus, the order requires that Abbott and Geneva notify the Commission 30 days before entering into an agreement in which an ANDA first filer agrees with an NDA holder to refrain from going to market. Such notice will assist the Commission in detecting anticompetitive agreements before they have caused substantial injury to consumers. Absent the order, there is no mechanism for the antitrust enforcement agencies to find out about such agreements.

The form of notice that Abbott and Geneva must provide to the Commission under Paragraphs III and IV of the orders is set forth in Paragraph V. In addition to supplying a copy of the proposed agreement, they are required to provide certain other information to assist the Commission in assessing the potential

Analysis to Aid Public Comment

competitive impact of the agreement. Accordingly, the orders require them to identify, among other things, all others who have filed an ANDA for a product containing the same chemical entities as the product at issue, and the court that is hearing any relevant legal proceedings involving either party. In addition, they must provide the Commission with all documents that evaluate the proposed agreement.

In addition, the proposed order against Geneva requires that it waive its 180-day marketing exclusivity period for its generic terazosin HCL tablet product. Although Geneva's exclusivity right with respect to the terazosin capsules product has expired, its exclusivity period for the tablet product still remains as a barrier to entry. This provision of the order will therefore open the market to greater generic competition in terazosin HCL products.

The proposed orders also contain certain reporting and other provisions that are designed to assist the Commission in monitoring compliance with the order and are standard provisions in Commission orders.

The orders will expire in 10 years.

Opportunity for Public Comment

The proposed orders have been placed on the public record for 30 days in order to receive comments from interested persons. Comments received during this period will become part of the public record. After 30 days, the Commission will again review the agreements and the comments received and will decide whether it should withdraw from the agreements or make the proposed orders final.

Analysis to Aid Public Comment

The purpose of this analysis is to facilitate public comment on the agreements. The analysis is not intended to constitute an official interpretation of the agreements, the proposed complaint, or the proposed consent orders, or to modify their terms in any way.

Complaint

**IN THE MATTER OF
ELLERY COLEMAN****CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATIONS OF
SEC. 5 OF THE FEDERAL TRADE COMMISSION ACT**

*Docket C-3948; File No. 0023053
Complaint, June 5, 2000--Decision, June 5, 2000*

This consent order requires Respondent Ellery Coleman to have a reasonable basis substantiating any representation that the users of his S&P futures trading programs can reasonably expect to achieve substantial profits on a consistent basis, that specific trades or investments were actually made and resulted in substantial profits, about the amount of earnings, income, profit, or rate of return that a prospective user of the trading program could reasonably expect to attain, about the percentage, ratio, or number of trades that a prospective user of Respondent's programs could reasonably expect to be profitable, or about any financial or other benefit from any trading programs offered by the Respondent. The order also prohibits Respondent from misrepresenting that users of his trading programs can expect to profit with very little financial risk, that Respondent uses his program on his own behalf, whether trade suggested were actually made or only hypothetical, whether any testimonial or endorsement of the Respondent's program represents the testimonialist's or endorser's actual experience and current opinions, findings, beliefs, or experiences, or from misrepresenting the risk to which users of the trading program are exposed. In addition, the order requires Respondent to disclose, clearly and conspicuously, "FUTURES [or STOCK, CURRENCY, OPTIONS, ETC., as applicable] TRADING involves high risks and YOU can LOSE a lot of money," in close proximity to any representation he makes about the financial benefits of any trading program. Respondent is also prohibited from representing without a reasonable basis that the experience represented by any user, testimonial or endorsement of any trading program represents the typical or ordinary experience of members of the public who use the program; or respondent must disclose either what the generally expected results would be for users of the trading program, or the limited applicability of the endorser's experience to what users may generally expect to achieve, that is, that users should not expect to experience similar results.

Complaint

Participants

For the Commission: *Michael Dershowitz, Jean Sullivan, C. Lee Peeler, and BE.*

For the Respondents: *Charles Cox, Cole & Cox.*

COMPLAINT

The Federal Trade Commission, having reason to believe that Ellery Coleman ("respondent"), individually and doing business as Granite Investments, 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 Ellery Coleman is the sole proprietor of Granite Investments, a Georgia company with its principal office or place of business at 133 Bunkers Trail, Warner Robins, GA 31088. Individually or in concert with others, he formulates, directs, or controls the policies, acts, or practices of the company, including the acts or practices alleged in this complaint.
2. Respondent has advertised, offered for sale, sold, and distributed S&P futures trading computer programs and training to the public. Respondent advises his clients to buy and sell specific S&P futures contracts on a daily basis. Respondent sells "RPM" or "Reliable Pattern Match," "S&P Savvy," and "Choice Daytrades" computer programs. Respondent sells his programs and training through his Internet Website, www.choicedaytrades.com.
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 Internet advertisements for his S&P futures computer trading programs and training, including but not necessarily limited to the

Complaint

attached Exhibits A through G. These advertisements contain the following statements:

A.

“Highly effective daytrading based on a very powerful methodology which has worked for decades
Daytrading systems that consistently identify winning day trades in the stock market.”

. . . .

“RPM delivers a solid \$10,350 profit for June.”

“S&P Savvy up \$40,750 for June99 contract.”

“S&P Savvy up \$44,050 for March99 contract.”

“S&P Savvy up \$62,425 for December98 contract.”

“S&P Savvy has made at least \$25,000 for each contract period for the last three years.”

“Learn to Daytrade the S&P 500 like a pro!”

. . . .

“Are you . . .

Still searching for the holy grail of trading?

Unhappy with the money you made trading last year?

Sick of that empty knot in your stomach because you missed another big trade?

Complaint

Tired of not being among the 10% of traders who win consistently?

Then take a look at our products and training!"

....

"While many of the trades shown were taken in real time with real money, since not all of them were taken:

The CFTC requires that we state: NOTICE:

HYPOTHETICAL OR SIMULATED PERFORMANCE RESULTS HAVE CERTAIN INHERENT LIMITATIONS. UNLIKE AN ACTUAL PERFORMANCE RECORD, SIMULATED RESULTS DO NOT REPRESENT ACTUAL TRADING. ALSO SINCE THE TRADES HAVE NOT ACTUALLY BEEN EXECUTED THE RESULTS MAY HAVE UNDER OR OVER COMPENSATED FOR THE IMPACT, IF ANY, OF CERTAIN MARKET FACTORS, SUCH AS LACK OF LIQUIDITY. SIMULATED TRADING PROGRAMS IN GENERAL ARE ALSO SUBJECT TO THE FACT THAT THEY ARE DESIGNED WITH THE BENEFIT OF HINDSIGHT. NO REPRESENTATION IS BEING MADE THAT ANY ACCOUNT WILL OR IS LIKELY TO ACHIEVE PROFITS OR LOSSES SIMILAR TO THOSE SHOWN. SIMULATED RESULTS DO NOT NECESSARILY IMPLY FUTURE PROFITS. YOU SHOULD THEREFORE CAREFULLY CONSIDER WHETHER SUCH TRADING IS SUITABLE FOR YOU IN LIGHT OF YOUR FINANCIAL CONDITION."

[This notice appears in fine print near the bottom of the Web page attached as Exhibit A.]

Complaint

B.

"I have been a professional trader for many years
After reading most of the books on trading and personally
studying with some of the biggest names in the business, I
subjected these methods to rigorous computer testing and
discovered that most of these methods do not generate the
kinds of profits one might expect, and many do not work
at all. However, the research did uncover the real gems. It
will open your eyes and you will understand what is really
going on.' Ellery Coleman."

. . . .

"Comments from students:

'I can't say enough great things about my visit with you.
The time I spent watching you trade the S&P was
extremely valuable. Your method of trading has provided
me some excellent profits.' L.S. Wisconsin - A former
broker who now trades for a living.

. . . .

'You told me that there would be no reason why I should
not be profitable right from day one. In the first two and a
half weeks of trading your methodology, my expectations
have been completely surpassed.'

'I never thought I could make \$8,500.00 in 13 trading days
just by trading one contract. But I did it.'
(Exhibit B)

C.

"S&P Savvy Up \$154,725 for 1998"

. . . .

Complaint

“S&P Savvy DSP8Z- 09/10/98 - 12/02/98

Performance Summary: All Trades

Total net profit \$ 62425.00 . . .

Gross profit \$ 108425.00 Gross loss \$ -46000.00

Total # of trades 430 Percent profitable 61%

. . . .

Return on account 2041 %”

. . . .

“Take advantage of the markets [sic] volatility. S&P Savvy thrives on it while using tight stops. I thought this was a great system when I developed it for my own use three years ago, and it just keeps getting better. Since I still trade this program, a very limited number of copies will be made available.”

. . . .

[Consumer endorser:] “I made enough my first day trading S&P Savvy to pay for it.”

. . . .

“If you want something that works, this is it!”

. . . .

“While many of the trades shown are taken in real time with real money, since not all of them were taken:

The CFTC requires that we state: NOTICE:

HYPOTHETICAL OR SIMULATED PERFORMANCE
RESULTS HAVE CERTAIN INHERENT LIMITATIONS.
UNLIKE AN ACTUAL PERFORMANCE RECORD,
SIMULATED RESULTS DO NOT REPRESENT ACTUAL

Complaint

TRADING. ALSO SINCE THE TRADES HAVE NOT ACTUALLY BEEN EXECUTED THE RESULTS MAY HAVE UNDER OR OVER COMPENSATED FOR THE IMPACT, IF ANY, OF CERTAIN MARKET FACTORS, SUCH AS LACK OF LIQUIDITY. SIMULATED TRADING PROGRAMS IN GENERAL ARE ALSO SUBJECT TO THE FACT THAT THEY ARE DESIGNED WITH THE BENEFIT OF HINDSIGHT. NO REPRESENTATION IS BEING MADE THAT ANY ACCOUNT WILL OR IS LIKELY TO ACHIEVE PROFITS OR LOSSES SIMILAR TO THOSE SHOWN. SIMULATED RESULTS DO NOT NECESSARILY IMPLY FUTURE PROFITS. YOU SHOULD THEREFORE CAREFULLY CONSIDER WHETHER SUCH TRADING IS SUITABLE FOR YOU IN LIGHT OF YOUR FINANCIAL CONDITION.”

[This notice appears in fine print at the bottom of the Web page attached as Exhibit C.]

D.

“Choice Daytrades

....

\$331,850.00

per 2 contracts in 1998
Day trading S&P 500.”

(Exhibit D)

E.

“Testimonials

....

‘I have meant to tell you for a long time, you’re the greatest. No question about it. Your figures are amazingly close; mind boggling to me.’ W.S. Ohio

Decision and Order

. . . .

'Thank you so much for the training you gave me. For the first time I am making money consistently and not giving it back . . .' M.S. Canada.

We get fan mail like this every day."
(Exhibit E)

F.

"Want Proof?

People are always asking for my account statements to prove that I am really a trader. Would you show your tax returns to strangers? I don't think so. But to demonstrate that I know how to trade, here are two account statements from one of my three accounts."
(Exhibit F)

G.

"RPM makes the S&P as readable as a road map each day. It keeps your risk low because it never holds overnight."

. . . .

[Respondent's RPM program] "was an immediate success because nothing stacks the odds in your favor like RPM."

. . . .

"What RPM can do for you:

Give you precise buy and sell signals with low risk stops
Take the stress out of your trading decisions
Give you the discipline needed for success
Provide you with a complete trading manual showing past recommendations and results
Provide a proven system that takes the doubt and frustration out of your trading"

Complaint

. . . .

“Join our fan club!

‘Your RPM is uncanny in its accuracy. Anyone using this system has to make money.’

‘Wow! You nailed it. I made more money in one trade than I have in a long time.’

‘RPM is very consistent, precise and easy to use. I strongly recommend it.’

‘RPM gives me the extra edge I need to win consistently.’”
(Exhibit G)

5. Through the means described in Paragraph 4, respondent has represented, expressly or by implication, that:
 - a. Users of respondent's S&P futures trading programs can reasonably expect to achieve substantial profits on a consistent basis (*e.g.*, \$25,000 per futures contract).
 - b. The specific trades or investments enumerated in the advertisements were actually made and resulted in the substantial profits stated in the advertisements.
 - c. Testimonials appearing in the advertisements for respondent's S&P futures trading programs reflect the typical or ordinary experience of members of the public who use the programs.

6. Through the means described in Paragraph 4, respondent has represented, expressly or by implication, that he possessed and relied upon a reasonable basis that substantiated the

Decision and Order

representations set forth in Paragraph 5, at the time the representations were made.

7. In truth and in fact, respondent did not possess and rely upon a reasonable basis that substantiated the representations set forth in Paragraph 5, at the time the representations were made. Therefore, the representation set forth in Paragraph 6 was, and is, false or misleading.

8. Through the means described in Paragraph 4, respondent has represented, expressly or by implication, that:

- a. Users of respondent's S&P futures trading programs can reasonably expect to trade profitably with little financial risk.
- b. Testimonials appearing in the advertisements for respondent's S&P futures trading programs reflect the actual experiences of consumers who have used the programs.
- c. Respondent personally uses his S&P futures trading programs to trade profitably on his own behalf.
- d. The trades recommended by respondent's S&P futures trading programs, as enumerated in the advertisements, were actually made in many cases.

9. In truth and in fact,

- a. Users of respondent's S&P futures trading programs cannot reasonably expect to trade with little financial risk.
- b. Testimonials appearing in the advertisements for respondent's S&P futures trading programs do not reflect the actual experiences of consumers who have used the programs.

Complaint

- c. Respondent does not personally use his S&P futures trading programs to trade on his own behalf.
- d. None of the trades recommended by respondent's S&P futures trading programs was actually made.

Therefore, the representations set forth in Paragraph 8 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 in or affecting commerce in violation of Section 5(a) of the Federal Trade Commission Act.

THEREFORE, the Federal Trade Commission this fifth day of June, 2000, has issued this complaint against respondent.

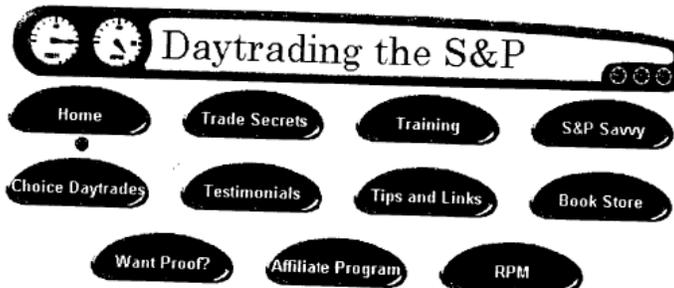
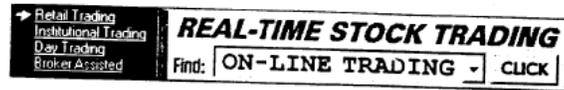
By the Commission.

Complaint Exhibits

Complaint Exhibits

http://www.choicedaytrades.com/stock/index.html Day Trading

EXHIBIT A
Page



Daytrading and technical analysis tools for daytrading the S&P 500. Highly effective daytrading based on a very powerful methodology which has worked for decades. Stocks and options daytrading. Daytrading systems that consistently identify winning day trades in the stock market. Daytrading courses and daytrading software for computerized daytrading. Tradestation and Supercharts daytrading tools.

Last Updated July 31, 1999

Trade Secrets! Free. [Click here.](#)

RPM delivers a solid \$10,350 profit for June.

S&P Savvy up \$40,750 for June99 contract.

S&P Savvy up \$44,050 for March99 contract.

S&P Savvy up \$62,425 for December98 contract.

S&P Savvy has made at least \$25,000 for each contract period for the last three years. [Check it out!](#)



Learn to Daytrade the S&P 500 like a pro!



Complaint Exhibits

Daytrading in S&P 500 futures market- stock Market Day Trading

EXHIBIT A
Page 2

Free daytrading system. Click here to register.



Check out our new Book Store.

Check out our Daytrading Tips page.

Systems and Guidance for Stock Market and Futures Traders.

We are professional S&P 500 Daytraders.

Are you...

Still searching for the holy grail of trading?

Unhappy with the money you made trading last year?

Sick of that empty knot in your stomach because you missed another big trade?

Tired of not being among the 10% of traders who win consistently?

Then take a look at our products and training!

Choice Daytrades

133 Bunkers Trail

Warner Robins, GA 31088

912-922-9019

For questions or comments, mailto: Ellery@ChoiceDaytrades.com

Do you like this site? Tell a friend!

Name

Email

You:

Your Friend:



Complaint Exhibits

...trading in S&P500 futures market, stock market day trading

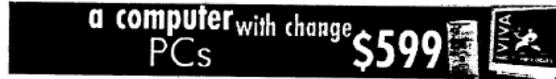
EXHIBIT A
Page 3

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While many of the trades shown were taken in real time with real money, since not all of them were taken:

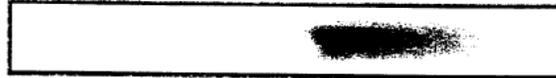
The CFTC requires that we state: NOTICE:

HYPOTHETICAL OR SIMULATED PERFORMANCE RESULTS HAVE CERTAIN INHERENT LIMITATIONS. UNLIKE AN ACTUAL PERFORMANCE RECORD, SIMULATED RESULTS DO NOT REPRESENT ACTUAL TRADING. ALSO SINCE THE TRADES HAVE NOT ACTUALLY BEEN EXECUTED THE RESULTS MAY HAVE UNDER OR OVER COMPENSATED FOR THE IMPACT, IF ANY, OF CERTAIN MARKET FACTORS, SUCH AS LACK OF LIQUIDITY. SIMULATED TRADING PROGRAMS IN GENERAL ARE ALSO SUBJECT TO THE FACT THAT THEY ARE DESIGNED WITH THE BENEFIT OF HINDSIGHT. NO REPRESENTATION IS BEING MADE THAT ANY ACCOUNT WILL OR IS LIKELY TO ACHIEVE PROFITS OR LOSSES SIMILAR TO THOSE SHOWN. SIMULATED RESULTS DO NOT NECESSARILY IMPLY FUTURE PROFITS. YOU SHOULD THEREFORE CAREFULLY CONSIDER WHETHER SUCH TRADING IS SUITABLE FOR YOU IN LIGHT OF YOUR FINANCIAL CONDITION.



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www.choicedaytrades.com/REAL-TIME STOCK TRADING - Stock Market tips - Day Trading

EXHIBIT B
Page 1

REAL-TIME STOCK TRADING

Find: ON-LINE TRADING

Training

Home Trade Secrets Training S&P Savvy

Choice Daytrades Testimonials Tips and Links Book Store

Want Proof? Affiliate Program RPM

Learn from a Pro!

1. Learn to daytrade for a living
2. Increase your winning percentage
3. Reduce your losses
4. Take the fear and stress out of your trading
5. Learn what really works and what doesn't
6. Bring your trading to new levels of profitability
7. Proprietary software
8. Learn which trend you can afford to trade and how
9. Continued mentoring after you leave if needed
10. Manual on the psychology of trading my system
11. Learn to avoid the mistakes 90% of all traders make.
12. Learn to identify when the tops and bottoms are forming, when to enter and when to exit.
13. Learn when it is just too risky to trade.
14. Tax deductible.
15. Guarantee - If you are not happy with what you have learned at the end of the first day, all your money will be refunded.

Special - if you order online on this visit:

\$1795 in advance & \$1795 thirty days after your training, only if you feel it was well worth it.



Complaint Exhibits

Expanding Trading - DAY TRADING - Stock Market Tips - Day Trading

EXHIBIT 1
Page 2



Charge your purchase on our secure server

[Click Here to reserve the next class](#)

We will call you to arrange mutually acceptable training dates.

"I have been a professional trader for many years. Moreover, I have been a computer programmer since the dark ages of 1970. After reading most of the books on trading and personally studying with some of the biggest names in the business, I subjected these methods to rigorous computer testing and discovered that most of these methods do not generate the kinds of profits one might expect, and many do not work at all. However, the research did uncover the real gems. It will open your eyes and you will understand what is really going on."
Ellery Coleman

Three day tutoring session with a maximum of two students taught during live, real time trading.

Whether you are a new trader or experienced, you will be impressed.

Comments from students:

"I can't say enough great things about my visit with you. The time I spent watching you trade the S&P was extremely valuable. Your method of trading has provided me some excellent profits." L.S. Wisconsin - A former broker who now trades for a living.

"I have been trying to earn a living trading the S&P 500 for the past 2 years. I have spent a lot of time and money on courses and people that promised the world. The only thing that this has gotten me is frustration, disappointment and a sense of desperation to the point of almost giving up many times."

"What has been amazing to me, is that you also promised me wonderful things by trading your methodology, and the reality of it is, that you were absolutely, 100% correct."

"You told me that there would be no reason why I should not be profitable right from day one. In the first two and a half weeks of trading your methodology, my expectations have been completely surpassed."

"I never thought that I could make \$8,500.00 in 13 trading days just by trading one contract. But I did it."

"Thanks Ellery, you have finally made it possible for me to earn a

Complaint Exhibits

... living doing what I love."

EXHIBIT E
Page 3

"Now I can finally call myself a trader." M.S. Canada

"I have meant to tell you for a long time, you're the greatest. No question about it. Your figures are amazingly close; mind boggling to me." W.S. Ohio

These unsolicited testimonials are on file in our office for your inspection. See our testimonials page for many more.

Choice Daytrades

133 Bunkers Trail

Warner Robins, GA 31088

912-922-9019

For questions or comments, mailto: Ellery@ChoiceDaytrades.com



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http://www.choicedaytrades.com/daytrading

EXHIBIT C
Page 1

\$62,425.00

per contract for December98 contract

Up \$154,725 for 1998

\$44,050 for March99 contract

\$40,750 for June99 contract

Day trades the S&P 500 using 2 minute charts and \$550 maximum stops. Enters on limit orders to prevent slippage.

Must own Omega Research's TradeStation

Largest drawdown was

\$3775

Only a few more will be

Complaint Exhibits

http://www.choicedaytrades.com/daytrading.htm

EXHIBIT C
Page 1

sold!

Free training included if you buy today!

TradeStation performance summary:

S&P Savvy DSP8Z- 09/10/98 - 12/02/98

Performance Summary: All Trades

Total net profit \$ 62425.00 Open position P/L \$ 0.00

Gross profit \$ 108425.00 Gross loss \$ -46000.00

Total # of trades 430 Percent profitable 61%

Largest winning trade \$ 3100.00 Largest losing trade \$ -625.00

Average winning trade \$ 651.11 Average losing trade \$ -450.75

Ratio avg win/avg loss 1.44 Avg trade(win & loss) \$ 222.37

Max consec. winners 13 Max consec. losers 5

Avg # bars in winners 6 Avg # bars in losers 3

Max intraday drawdown \$ -3775.00

Profit factor 2.27 Max # contracts held 1

Account size required \$ 3775.00 Return on account 2041%

Take advantage of the markets volatility. S&P Savvy thrives on it while using tight stops. I thought this was a great system when I developed it for my own use three years ago, and it just keeps getting better. Since I still trade this program, a very limited number of copies will be made available.

Only \$4995

Today only \$3495

Complaint Exhibits

EXHIBIT C
Page 3

"I am writing to let you know how pleased and satisfied I am with your 'S&P Savvy' software. It is refreshing to deal with someone who is honest, helpful and knowledgeable. I appreciate the promptness of the way you returned my phone inquires and the solutions you provided. I am impressed with the depth and breadth of the knowledge you have demonstrated to me in our dealings."

"I made enough my first day trading S&P Savvy to pay for it."

"Your software package is very easy to use and proved to be very effective for me. I have been trading the S&P for some time now and the S&P Savvy system is a potent tool."

"I am a pleased customer and would recommend your services without reservation. Keep up the good work Ellery." A.V. New York

This offer may be withdrawn at any time.

I am a trader, not a system vendor, so don't ask me for numbers or studies that I don't have time to prepare. If you are interested in fancy brochures, look elsewhere. If you want something that works, this is it!

To order, mail a check for \$4995, or if you can make a decision without a lot of discussion, charge it today for only \$3495.



Sale Price ends July 31, 1999

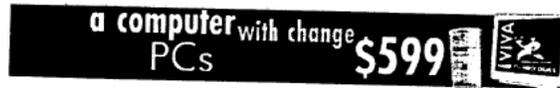
You may charge your purchase on our secure server:

[Click Here for Secure Payment Form](#)

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EXHIBIT C
Page 4

Ellery Coleman
133 Bunkers Trail
Warner Robins, GA 31088
912-922-9019



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Computers, software, peripherals, and training at low prices.
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Top

While many of the trades are taken in real time with real money, since not all of them were taken:

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EXHIBIT D
Page 7

Day trading and technical analysis tools for day trading the S&P 500. Highly effective day trading based on a very powerful methodology which has worked for decades. Stocks and options day trading. Day trading systems that consistently identify winning day trades in the stock market. Day trading courses and day trading software for computerized day trading. Tradestation and Supercharts day trading tools.

\$ 331,850.00

per 2 contracts in 1998

Day trading the S&P 500

Only a limited number of subscribers will be accepted.

Choice day trades are my discretionary trades. I do use my S&P Savvy system as the basis for my decisions but I prefer to use some discretion with it.

Trade signals by AbbottChat for instantaneous signals, if you are online all day, or we have brokers who can trade it for you. Download AbbottChat free from this link.

Special web price: \$995 a quarter, or \$2450 per year.



Special: \$795 for your first quarter, if you charge it on this visit only.

You may charge your purchase on our secure server:

<http://www.choicedaytrades.com/choice.htm>

8/17/99

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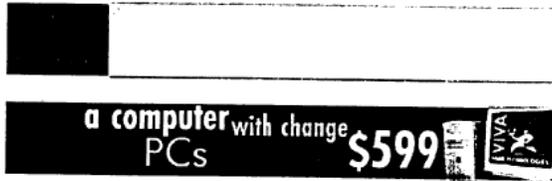
http://www.choicedaytrades.com/choice.htm

EXHIBIT D
Page 7

For your convenience, your credit card will be charged \$995 per quarter after the first unless you ask us to stop.

[Click Here for Secure Payment Form](#)

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133 Bunkers Trail
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Computers, software, peripherals, and training at low prices. Exceptional customer service. Free shipping.

Past performance does not guarantee future profits.

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DAY TRADING Testimonials Day trades

EXHIBIT B
Page 1

Retail Trading
 Institutional Trading
 Day Trading
 Broker Assisted

REAL-TIME STOCK TRADING

Find:

Testimonials

Join our daytrading fan club!

☺ "Thank you for all the great trades this month." M.M. Texas

☺ "I am very impressed by your work." M.M. CTA Oregon

☺ "Excellent job! Excellent results!" E.H. New York

"Are you a wizard of what? I like this.
This is fun." B.P. California



☺

☺ "I would like to thank you for yet another excellent trade." A.P. London

☺ "Thanks for the golden opportunity." R.W. FL

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Choice Daytrades

EXHIBIT E
Page 2

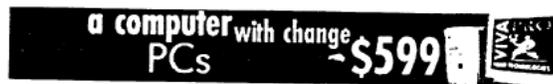
- ☺ "Keep up the good work!" A.R. Missouri
- ☺ "I really appreciate your help. Your newsletter is the best one on the market." G.S. New York
- ☺ "I have meant to tell you for a long time, you're the greatest. No question about it. Your figures are amazingly close; mind boggling to me." W.S. Ohio
- ☺ "I can't say enough great things about my visit with you. The time I spent watching you trade the S&P was extremely valuable. Your method of trading has provided me some excellent profits. My greatest obstacle to overcome is not to second guess the numbers." L.S. Wisconsin (former broker who now trades for a living)
- ☺ "You are a great advisor and trader. Your system works!" M.S. Chicago
- ☺ "Thank you so much for the training you gave me. For the first time I am making money consistently and not giving it back. What you taught me is light-years ahead of the other seminars I have attended." M.S. Canada
- ☺ We get fan mail like this every day. Join our fan club and see the difference our programs make in your trading.
- ☺ All of these unsolicited remarks are on file in our office for your inspection.

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912-922-9019

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EXHIBIT B
Page 3



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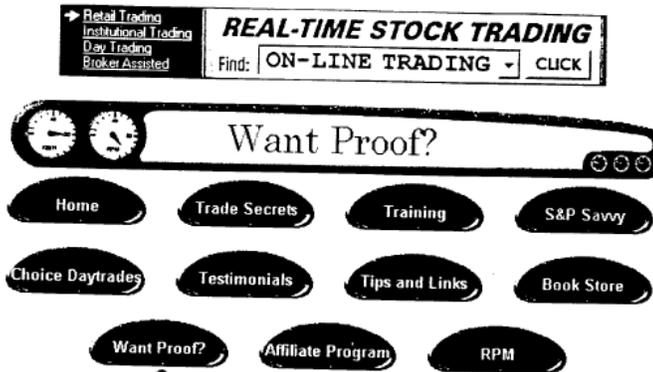
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EXHIBIT F
Page 1



People are always asking to see my account statements to prove that I am re you show your tax returns to strangers? I don't think so. But to silence the here are two account statements from one of my three accounts. The first o 1997 and the second one is for November 5, 1997. I set this particular accou purpose.

This covers a period of seven trading days. Please note that at the beginnin 28 my beginning balance was \$4,071.59 and on November 5 my ending balan That is a profit after commissions and fees of \$13,361.57 in seven days tradi certify that no money was deposited to the account except trading profits fro 500.

These scanned account statements are very large image files, so it will take them. Also, some browsers are unable to handle these large images. If that I will be happy to fax copies to you. Just call me at 912-922-9019.

ED & F MAN INTERNATIONAL INC
TWO WORLD FINANCIAL CENTER
225 LIBERTY STREET, 27TH FLOOR, NEW YORK, NY 10080-6127

OCT 28, 1997

FEDERAL TRADE COMMISSION DECISIONS
VOLUME 129

Complaint Exhibits

EXHIBIT F
PAGE 2

ELLERY G COLEMAN
133 BUNKERS TRAIL
WARNER ROBINS GA 31088

***** CONFIRMATION *****
THE FOLLOWING TRADES HAVE BEEN MADE THIS DAY FOR YOUR ACCOUNT AND RISK.

TRADE	SETTL	AT	BUY	SELL	CONTRACT DESCRIPTION	EX TRADE PRICE	CC
10/28/7	F1		1		DEC 97 IMM S&P 500	16 895.50	US
10/28/7	F1		1*	1*	DEC 97 IMM S&P 500	16 897.00	US
	F1						COMMISSION US
	F1						CLEARING FEES US
	F1						NFA/SEC FEES US
	F1						BROKERAGE US

***** PURCHASE & SALE *****							
TRADE	SETTL	AT	BUY	SELL	CONTRACT DESCRIPTION	EX TRADE PRICE	CC
10/28/7	F1		1		DEC 97 IMM S&P 500	16 895.50	US
10/28/7	F1		1*	1*	DEC 97 IMM S&P 500	16 897.00	US
	F1						GROSS PROFIT OR LOSS US
	F1						NET PROFIT OR LOSS FROM TRADES US

*** U.S. DOLLARS ***	
BEGINNING BALANCE	4,071.59
COMMISSION	12.00DR
CLEARING FEES	1.40DR
BROKERAGE FEES	3.00DR
NFA/SEC FEES	14DR
TOTAL FEES	4.54DR
GROSS PROFIT OR LOSS	790.00
NET PROFIT/LOSS FROM TRADES	733.46
ENDING BALANCE	4,805.05
TOTAL EQUITY	4,805.05
ACCOUNT VALUE AT MARKET	4,805.05
MARGIN DEFICIT/EXCESS	4,805.05

E & O E
RETAIN FOR TAX RECORDS

SUBJECT TO TERMS AND CONDITIONS
ON REVERSE SIDE
CODED SYMBOLS ARE EXPLAINED
ON REVERSE SIDE

PLEASE REPORT ANY DIFFERENCES IMMEDIATELY. THE FAILURE
YOUR RIGHT TO HAVE ERRORS CORRECTED.

Complaint Exhibits

EXHIBIT F
Page 3

F D & F MAN INTERNATIONAL INC
1703 WORLD FINANCIAL CENTER
225 LIBERTY STREET, 27TH FLOOR, NEW YORK, NY 10080-6127

NOV 5 1997

ELLERY G COLEMAN
133 BUNKERS TRAIL
WARNER ROBINS GA 31088

	*** U.S. DOLLARS ***
TOTAL FEES	24.97DR
GROSS PROFIT OR LOSS	2,225.00
NET PROFIT/LOSS FROM TRADES	2,134.03
ENDING BALANCE	17,433.18
OPEN TRADE EQUITY	325.00DR
TOTAL EQUITY	18,808.18
ACCOUNT VALUE AT MARKET	18,808.18
INITIAL MARGIN REQUIREMENT	20,180.00
MAINTENANCE MARGIN REQUIREMENT	17,400.00
MARGIN DEFICIT/EXCESS	4,271.84DR

Complaint Exhibits

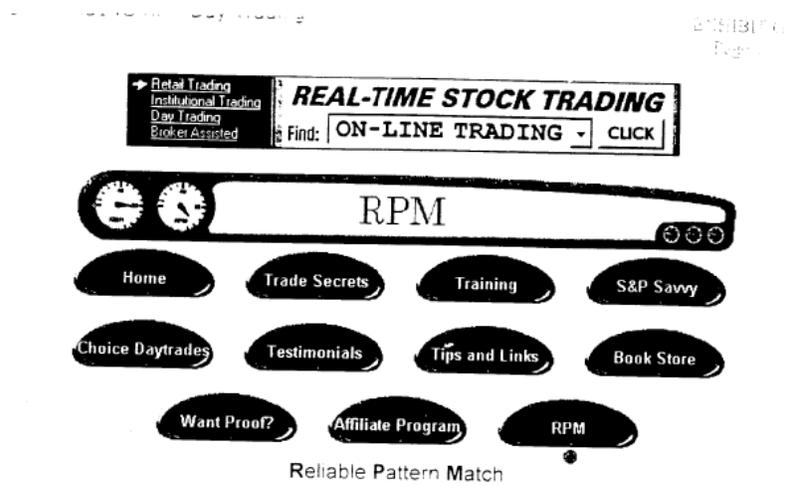
EXHIBIT F
Page 4

E & O E
RETAIN FOR TAX RECORDS

SUBJECT TO TERMS AND CONDITIONS
ON REVERSE SIDE
*CODED SYMBOLS ARE EXPLAINED
ON REVERSE SIDE

PLEASE REPORT ANY DIFFERENCES IMMEDIATELY THE FAILURE
YOUR RIGHT TO HAVE ERRORS CORRECTED WILL BE DENIED.

Complaint Exhibits



A great system for daytrading the S&P 500

Would you like a system for day trading the S&P 500 that does not require you to watch the market during the day? Then RPM is the system for you.

RPM is the result of extensive computer research done by E.G. Coleman, who has been a professional S&P daytrader for many years. As a math major at the University of Georgia in 1970, he wondered, "Wouldn't it be great to predict the direction of the stock market using the computer?" Thus the idea for RPM was born. Mr. Coleman ran his computer day and night testing millions of different parameters with just one thing in mind---

"What combination of factors has the most predictive power for tomorrow?"

The discovery he made is what is now known as the

RPM paradigm.

RPM looks at these same factors every day. It searches through the entire history of the market looking for matches of the RPM paradigm to determine the probable direction of the market the next day. Also, it gives the historic likelihood as a percent that selected support and resistance levels will be touched during the day. RPM makes the S&P as readable as a road map each day. It keeps your risk low because it never holds overnight.

In December of 1994, we began making the RPM trades available to the public by means of a daily fax subscription. The cost of the subscription was initially \$595 per quarter and was later raised to \$995. It was an immediate success because nothing stacks the odds in your favor like RPM.

Complaint Exhibits

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EXHIBIT G

Now you can purchase the RPM software and use it forever for the price of an annual subscription, only \$2,950. Included is complete data on the history of the S&P 500 futures and a trading manual. This software is completely self-contained. No other software is needed. It can use CSI or Metastock data or you can enter daily data yourself. Or try it by fax for 3 months for only \$795.

What RPM can do for you

- Ⓢ Give you precise buy and sell signals with low risk stops
- Ⓢ Take the stress out of your trading decisions
- Ⓢ Give you the discipline needed for success
- Ⓢ Provide you with a complete trading manual showing past recommendations and results
- Ⓢ Provide a proven system that takes the doubt and frustration out of your trading

Just before making RPM available to the public, it was used in a six month national trading contest. The account started with \$50,000 and finished with over \$300,000. This was announced in the March 1995 issue of Stocks and Commodities magazine, where Ellery Coleman, developer of RPM, appears under the caption "Top Guns."

Join our fan club!

- Ⓢ "Your RPM is uncanny in its accuracy. Anyone using this system has to make money. I review your manual weekly." W.S. Ohio
- Ⓢ "Wow! You nailed it. I made more money in one trade than I have in a long time." R.P. CA
- Ⓢ "RPM is very consistent, precise and easy to use. I strongly recommend it." T.C. Professional daytrader California
- Ⓢ "RPM gives me the extra edge I need to win consistently. I cannot picture taking a position without the statistical outlook RPM gives." M.E. Broker Missouri
- Ⓢ "RPM is quite impressive!" D.R. Colorado

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EXHIBIT G
Page 3

We get fan mail like this every day. Join our fan club and see the difference RPM makes in your trading.

Actual Sample of RPM printout

***** R P M *****
*** Reliable Pattern Match of December S&P 500 for 10-15-1998 ***

IF THE OPEN IS GREATER THAN 1023.00 THEN: (12)
There is a 67 % Probability of a Higher Close
Projected Low = Open - 1.86 Projected High = Open +14.02
33 % Chance 1052.87 will be hit - Resistance 4
58 % Chance 1045.40 will be hit - Resistance 3
58 % Chance 1037.93 will be hit - Resistance 2
83 % Chance 1031.15 will be hit - Resistance 1
58 % Chance 1024.37 will be hit - Resistance 1
58 % Chance 1023.00 will be hit - Previous High
42 % Chance 1016.90 will be hit - Opening Resistance
25 % Chance 1010.80 will be hit - ***** Close *****
25 % Chance 1009.43 will be hit - *** Pivot Point ***
25 % Chance 1002.65 will be hit - Opening Support
17 % Chance 995.87 will be hit - Support 1
17 % Chance 994.50 will be hit - Previous Low
17 % Chance 988.40 will be hit - Support
17 % Chance 980.93 will be hit - Support 2
8 % Chance 974.15 will be hit - Support 3
Buy the Open; stop 4.30 points. Cover MOC

IF THE OPEN IS BETWEEN 1010.80 AND 1023.00 THEN: (48)
There is a 56 % Probability of a Higher Close
Projected Low = Open - 1.03 Projected High = Open +11.03
13 % Chance 1045.40 will be hit - Resistance 3
21 % Chance 1037.93 will be hit - Resistance 2
27 % Chance 1031.15 will be hit - Resistance 1
58 % Chance 1024.37 will be hit - Resistance 1
56 % Chance 1023.00 will be hit - Previous High
83 % Chance 1016.90 will be hit - Opening Resistance
92 % Chance 1010.80 will be hit - ***** Close *****
92 % Chance 1009.43 will be hit - *** Pivot Point ***
65 % Chance 1002.65 will be hit - Opening Support
42 % Chance 995.87 will be hit - Support 1
42 % Chance 994.50 will be hit - Previous Low
27 % Chance 988.40 will be hit - Support
17 % Chance 980.93 will be hit - Support 2
6 % Chance 974.15 will be hit - Support 3
Buy the Open; stop 4.30 points. Cover MOC

IF THE OPEN IS BETWEEN 994.50 AND 1010.80 THEN: (45)
There is a 67 % Probability of a Higher Close
Projected Low = Open - 1.88 Projected High = Open +13.21
9 % Chance 1045.40 will be hit - Resistance 3
11 % Chance 1037.93 will be hit - Resistance 2
27 % Chance 1031.15 will be hit - Resistance 1

Complaint Exhibits

4 % Chance 1024 37 will be hit - Resistance 1
 4 % Chance 1023 00 will be hit - Previous High
 33 % Chance 1016 80 will be hit - Opening Resistance
 33 % Chance 1016 80 will be hit - Previous High
 37 % Chance 1009 43 will be hit - *** Pivot Point ***
 75 % Chance 1002 65 will be hit - Opening Support
 53 % Chance 995 87 will be hit - Support 1
 53 % Chance 994 50 will be hit - Previous Low
 31 % Chance 988 40 will be hit - Support
 13 % Chance 980 93 will be hit - Support 2
 4 % Chance 974 15 will be hit - Support 3
Buy the Open: stop 4.30 points: Cover MOC

EXHIBIT C
Page 4

IF THE OPEN IS LESS THAN 994 50 THEN (0)

What happened October 15, 1998? The S&P opened at 1007.00 triggering our long position, and shot up over 20 full points before noon. It is my custom to take profits of 20 points when up that much by noon, so we made \$10,000.00 per 2 contracts very quickly. **This was not a hypothetical trade but was actually taken. And we had no slippage on this trade.** If you had followed the RPM rules however, you would have held until the close at 1064.00 for a profit of a whopping **\$28,250**. We specify profits per 2 contracts since the split of the S&P contract in November and as per 1 contract before that time to be consistent with previous results. Since slippage and commissions vary from person to person, they are not included.

Understanding the RPM printout:

Monitor the opening price of the day session. Take note of the 3 or 4 "if the open is ..." statements. Place a check mark by the scenario that occurs. Use the buy and sell recommendations that are at the bottom of each scenario. The additional information provided is not needed if you simply want to follow the RPM system. The numbers in parenthesis are the number of matches to the RPM paradigm found. If you are an active daytrader, you may wish to use the percentages as an aid in making additional trading decisions. Further information on this is included in the RPM trading manual.

Please note that if you are checking a past trade that the Wall Street Journal quotes the globex open. We do not trade globex. You must use the open of the day session for accurate records.

Results Up \$151,500 per 2 contracts in 1997

Month	Results per 2 contracts
January 1998	\$ 2,550.00
February 1998	\$ 5,550.00
March 1998	\$ -500.00 Loss
April 1998	\$ 3,000.00
May 1998	\$21,600.00
June 1998	\$ 7,350.00

Complaint Exhibits

DAY TRADING RPM Day Trading

CHARTER
2008

July 1998	\$ 5,000.00	
August 1998	\$ 13,000.00	
September 1998	\$ 17,000.00	
October 1998	\$ 3,000.00	
November 1998	\$ 300.00	
December 1998	\$25,600.00	
January 1999	\$30,800.00	
February 1999	\$ 20,150.00	
March 1999	\$ -3,200.00	Loss
April 1999	\$ 10,950.00	
May 1999	\$ -24,400.00	Loss
June 1999	\$ 10,950.00	

Up \$140,750 per 2 contracts in 1998



You may charge your purchase on our secure server:

You will receive a \$250 discount by ordering direct, total \$2700. Your order will be shipped tomorrow. Offer expires July 31, 1999.

[Click Here for Secure Payment Form](#)

Or mail a check for \$2,950 to

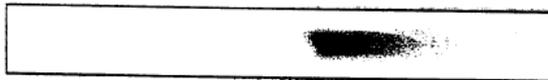
Ellery Coleman
133 Bunkers Trail
Warner Robins, GA 31088

or call 912-922-9019

Or, try it by fax for 3 months for only \$795 for a limited time.

Register for a free trial of RPM.

To see a trade by trade [click here](#).



Complaint Exhibits

DAY TRADING RPM Day Trading

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Page

Computer Software USA

Computers, software, peripherals, and training at low prices. Exceptional customer service. Free shipping.

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Decision and Order

DECISION AND ORDER

The Federal Trade Commission ("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

Respondent, his 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 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 thirty (30) days, now in further conformity with the procedure prescribed in § 2.34 of its Rules, the Commission hereby issues its complaint, makes the following jurisdictional findings and enters the following order:

1. Respondent Ellery Coleman is the sole proprietor of Granite Investments, a Georgia company with its principal office or place of business at 133 Bunkers Trail, Warner Robins, GA

Decision and Order

31088. Individually or in concert with others, he formulates, directs, or controls the policies, acts, or practices of the company.

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. "Clearly and conspicuously" shall mean as follows:
 - A. In an advertisement communicated through an electronic medium (such as television, video, radio, and interactive media such as the Internet and online services), the disclosure shall be presented simultaneously in both the audio and visual portions of the advertisement. *Provided, however,* that in any advertisement presented solely through visual or audio means, the disclosure may be made through the same means in which the ad is presented. The audio disclosure shall be delivered in a volume and cadence sufficient for an ordinary consumer to hear and comprehend it. The visual disclosure shall be of a size and shade, and shall appear on the screen for a duration sufficient for an ordinary consumer to read and comprehend it.
 - B. In a print advertisement, promotional material, or instructional manual, the disclosure shall be in a type size and location sufficiently noticeable for an ordinary consumer to read and comprehend it, in print that contrasts with the background against which it appears.
 - C. On a product label, the disclosure shall be in a type size and location on the principal display panel sufficiently

Decision and Order

noticeable for an ordinary consumer to read and comprehend it, in print that contrasts with the background against which it appears.

The disclosure shall be in understandable language and syntax. Nothing contrary to, inconsistent with, or in mitigation of the disclosure shall be used in any advertisement or on any label.

2. In the case of advertisements disseminated by means of an interactive electronic medium such as the Internet or other online services, "in close proximity" shall mean on the same Web page and proximate to the triggering representation, and not on other portions of the Web site, accessed or displayed through hyperlinks or other means.

3. "Commerce" shall mean as defined in Section 4 of the Federal Trade Commission Act, 15 U.S.C. § 44.

4. "Trading program" shall mean any program, service, course, instruction, system, training, manual, computer software, or other materials involving the purchase or sale of stocks, currencies, commodity futures, options, or other financial instruments or investments.

5. Unless otherwise specified, "respondent" shall mean Ellery Coleman, individually and doing business as Granite Investments, his successors and assigns and each of his officers, agents, representatives, and employees.

I.

IT IS ORDERED that respondent, directly or through any corporation, subsidiary, division, trade name, or other device, in connection with the advertising, promotion, offering for sale, sale,

Decision and Order

or distribution of any trading program, in or affecting commerce, shall not represent, in any manner, expressly or by implication:

- A. That users of respondent's S&P futures trading programs can reasonably expect to achieve substantial profits on a consistent basis;
- B. That specific trades or investments were actually made and resulted in substantial profits;
- C. The amount of earnings, income, profit or the rate of return that a prospective user could reasonably expect to attain;
- D. The percentage, ratio, or number of trades that a prospective user of respondent's S&P futures trading programs could reasonably expect to be profitable; or
- E. Any financial benefit or other benefit of any kind from the purchase or use of such trading program;

unless respondent possesses and relies upon a reasonable basis substantiating the representation at the time it is made.

II.

IT IS FURTHER ORDERED that respondent, directly or through any corporation, subsidiary, division, trade name, or other device, in connection with the advertising, promotion, offering for sale, sale, or distribution of any trading program, in or affecting commerce, shall not misrepresent, in any manner, expressly or by implication:

- A. That users of respondent's trading programs can reasonably expect to trade profitably with little or no financial risk;

Decision and Order

- B. That respondent personally uses his trading programs to trade on his own behalf;
- C. Whether trades recommended by respondent's trading programs were actually made or were hypothetical;
- D. That any testimonial or endorsement of respondent's trading programs or training reflects the actual experience and current opinions, findings, beliefs, or experiences of the testimonialist or endorser; or
- E. The extent of risk to which users of respondent's trading programs are exposed.

III.

IT IS FURTHER ORDERED that respondent, directly or through any corporation, subsidiary, division, trade name, or other device, in connection with the advertising, promotion, offering for sale, sale, or distribution of any trading program, in or affecting commerce, shall not make any representation, in any manner, expressly or by implication, about the financial benefits of such program, unless he discloses, clearly and conspicuously, and in close proximity to the representation,

"FUTURES TRADING [or STOCK, CURRENCY, OPTIONS, ETC., as applicable] involves high risks and YOU can LOSE a lot of money."

Provided, the disclosure required by this Part is in addition to, and not in lieu of, any other disclosure that respondent may be required to make, including but not limited to any disclosure required by state or federal law or by a self-regulatory organization. The requirements of this Part are not intended to,

Decision and Order

and shall not be interpreted to, exempt respondent from making any other disclosure.

IV.

IT IS FURTHER ORDERED that respondent, directly or through any corporation, subsidiary, division, trade name, or other device, in connection with the advertising, promotion, offering for sale, sale, or distribution of any trading program, in or affecting commerce, shall not represent, in any manner, expressly or by implication, that the experience represented by any user, testimonial or endorsement of the trading program represents the typical or ordinary experience of members of the public who use the trading program unless:

- A. Respondent possesses and relies upon a reasonable basis substantiating the representation at the time it is made; or
- B. Respondent discloses, clearly and conspicuously, and in close proximity to the endorsement or testimonial, either:
 - 1. what the generally expected results would be for users of the trading program, or
 - 2. the limited applicability of the endorser's experience to what users may generally expect to achieve, that is, that users should not expect to experience similar results.

For purposes of this Part, "endorsement" shall mean as defined in 16 C.F.R. § 255.0(b).

V.

IT IS FURTHER ORDERED that respondent Ellery Coleman, individually and doing business as Granite Investments, and his successors and assigns, shall, for five (5) years after the last date of dissemination of any representation covered by this order,

Decision and 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 their possession or control that contradict, qualify, or call into question the representation, or the basis relied upon for the representation, including complaints and other communications with consumers or with governmental or consumer protection organizations.

VI.

IT IS FURTHER ORDERED that respondent Ellery Coleman, individually and doing business as Granite Investments, and his successors and assigns, shall deliver a copy of this order to all current and future principals, officers, directors, and managers of Granite Investments, and to all current and future employees, agents, and representatives having responsibilities with respect to the subject matter of this order, and shall secure from each such person a signed and dated statement acknowledging receipt of the order. Respondent shall deliver this order to current personnel within thirty (30) days after the date of service of this order, and to future personnel within thirty (30) days after the person assumes such position or responsibilities. Respondent shall maintain and upon request make available to the Commission for inspection and copying each such signed and dated statement for a period of five (5) years after creation.

Decision and Order

VII.

IT IS FURTHER ORDERED that respondent Ellery Coleman, individually and doing business as Granite Investments, and his successors and assigns shall notify the Commission at least thirty (30) days prior to any change in Granite Investments that may affect compliance obligations arising under this order, including but not limited to the formation of a corporation, the proposed filing of a bankruptcy petition, or a change in the company name or address.

VIII.

IT IS FURTHER ORDERED that respondent Ellery Coleman, for a period of ten (10) years after the date of issuance of this order, shall notify the Commission of the discontinuance of his current business or employment, or of his affiliation with any new business or employment. The notice shall include respondent's new business address and telephone number and a description of the nature of the business or employment and his duties and responsibilities.

IX.

IT IS FURTHER ORDERED that respondent Ellery Coleman, individually and doing business as Granite Investments, and his 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 they have complied with this order.

X.

This order will terminate on June 5, 2020, 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

Decision and Order

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.

XI.

All notices required to be sent to the Commission pursuant to this Order shall be sent by certified mail to the Associate Director, Division of Enforcement, Bureau of Consumer Protection, Federal Trade Commission, 600 Pennsylvania Avenue, N.W., Washington, D.C. 20580. Attn.: In the Matter of Ellery Coleman.

By the Commission.

Analysis to Aid Public Comment

Analysis of Proposed Consent Order to Aid Public Comment

The Federal Trade Commission has accepted, subject to final approval, an agreement containing a consent order from Ellery Coleman, individually and doing business as Granite Investments (“respondent”).

The proposed consent order has been placed on the public record for thirty (30) days for receipt of comments by interested persons. Comments received during this period will become part of the public record. After thirty (30) days, the Commission will again review the agreement and the comments received, and will decide whether it should withdraw from the agreement or make final the agreement's proposed order.

Respondent sells and distributes various computer software programs and training for buying and selling S&P futures contracts on a daily basis. Respondent advertises on his Internet Web site, www.choicedaytrades.com. This matter concerns allegedly deceptive representations of the earnings and profit potential, as well as the extent of risk involved in using respondent's trading methods.

The Commission's proposed complaint alleges that respondent made unsubstantiated claims that users of his S&P futures trading programs can reasonably expect to achieve substantial profits on a consistent basis (*e.g.*, \$25,000 per futures contract); that specific trades or investments enumerated in respondent's advertisements were actually made and resulted in the substantial profits stated in the advertisements; and that testimonials appearing in the advertisements for respondent's S&P futures trading programs reflect the typical or ordinary experience of members of the public who use the programs.

In addition, the complaint alleges that respondent misrepresented that users of his S&P futures trading programs can reasonably expect to trade profitably with little financial risk; that testimonials appearing in the advertisements for his S&P futures

Analysis to Aid Public Comment

trading programs reflect the actual experiences of consumers who have used the programs; that he personally uses his S&P futures trading programs to trade profitably on his own behalf; and that the trades recommended by his S&P futures trading programs, as enumerated in the advertisements, were actually made in many cases.

The proposed consent order contains provisions designed to prevent respondent from engaging in similar acts and practices in the future.

Part I of the proposed order requires respondent to have a reasonable basis substantiating any representation that users of his S&P futures trading programs can reasonably expect to achieve substantial profits on a consistent basis; that specific trades or investments were actually made and resulted in substantial profits; about the amount of earnings, income, profit or the rate of return that a prospective user of any trading program could reasonably expect to attain; about the percentage, ratio, or number of trades that a prospective user of respondent's S&P futures trading programs could reasonably expect to be profitable; or about any financial benefit or other benefit from any trading programs offered by respondent.

Part II of the proposed order prohibits respondent from misrepresenting that users of any trading program can reasonably expect to trade profitably with little or no financial risk; that respondent personally uses his trading programs to trade on his own behalf; whether trades recommended by respondent's trading programs were actually made or were hypothetical; that any testimonial or endorsement of respondent's trading programs or training reflects the testimonialist's or endorser's actual experience and current opinions, findings, beliefs, or experiences; or from misrepresenting the extent of risk to which users of any trading program are exposed.

Analysis to Aid Public Comment

Part III of the proposed order requires respondent to disclose, clearly and conspicuously, "FUTURES TRADING [or STOCK, CURRENCY, OPTIONS, ETC., as applicable] TRADING involves high risks and YOU can LOSE a lot of money," in close proximity to any representation he makes about the financial benefits of any trading program. This disclosure is in addition to, and not instead of, any other disclosure that respondent may be required to make.

Part IV of the proposed order prohibits respondent from representing without a reasonable basis that the experience represented by any user, testimonial or endorsement of any trading program represents the typical or ordinary experience of members of the public who use the program; or respondent must disclose either what the generally expected results would be for users of the trading program, or the limited applicability of the endorser's experience to what users may generally expect to achieve, that is, that users should not expect to experience similar results.

Parts V-XI of the proposed order require respondent to keep copies of relevant advertisements and materials substantiating claims made in the advertisements; to provide copies of the order to certain personnel; to notify the Commission of changes in Granite Investments that may affect the order; to notify the Commission of changes in respondent's employment status for a period of ten years; and to file compliance reports with the Commission. Part X provides that the order will terminate after twenty (20) years under certain circumstances.

The purpose of this analysis is to facilitate public comment on the proposed order. It is not intended to constitute an official interpretation of the agreement and proposed order or to modify in any way their terms.

Complaint

IN THE MATTER OF

COMPUTRADE LLC, ET AL.CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATIONS OF
SEC. 5 OF THE FEDERAL TRADE COMMISSION ACT

*Docket C-3949; File No. 0023085
Complaint, June 5, 2000--Decision, June 5, 2000*

This consent order requires Respondent CompuTrade LLC to have a reasonable basis substantiating any representation that users of respondents' currency trading program can reasonably expect to earn large profits: (1) of \$500 to \$750 or more per day; (2) of as much as six or even seven figures annually (i.e., more than \$1,000,000); or (3) even if they have no previous experience in currency trading, or claims about the amount of earnings, income, or profit that a prospective user of any trading program could reasonably expect to attain, or about any financial benefit or other benefit from any trading program offered by respondents. The order also prohibits respondents from misrepresenting that users of any trading program can reasonably expect to trade with little or no financial risk and from misrepresenting the extent of risk to which users of any such program are exposed. In addition, the order requires Respondent to disclose, clearly and conspicuously, "CURRENCY [or STOCK, FUTURES, OPTIONS, ETC., as applicable] TRADING involves high risks and YOU can LOSE a lot of money," in close proximity to any representation he makes about the financial benefits of any trading program. Respondent is also prohibited from representing without a reasonable basis that the experience represented by any user, testimonial or endorsement of any trading program represents the typical or ordinary experience of members of the public who use the program; or respondent must disclose either what the generally expected results would be for users of the trading program, or the limited applicability of the endorser's experience to what users may generally expect to achieve, that is, that users should not expect to experience similar results.

Participants

For the Commission: *Michael Dershowitz, Jean Sullivan, C. Lee Peeler, and BE.*

For the Respondents: *Bernard Lewis, CompuTrade LLC.*

Complaint

COMPLAINT

The Federal Trade Commission, having reason to believe that CompuTrade LLC, a corporation, and Bernard Lewis, individually and as an officer of the corporation ("respondents"), have violated the provisions of the Federal Trade Commission Act, and it appearing to the Commission that this proceeding is in the public interest, alleges:

1. Respondent CompuTrade LLC is a Nevada corporation with its principal office or place of business at 24591 Del Prado, Dana Point, CA 92629.
2. Respondent Bernard Lewis is an officer of the corporate respondent. Individually or in concert with others, he formulates, directs, or controls the policies, acts, or practices of the corporation, including the acts or practices alleged in this complaint. His principal office or place of business is the same as that of CompuTrade LLC.
3. Respondents have advertised, offered for sale, sold, and distributed a currency trading computer program and training to the public. Respondents advise their clients to buy and sell specific foreign currencies on a daily basis. Respondents sell their program and training through their Internet Web sites, www.computrades.com and www.computrader.net.
4. The acts and practices of respondents alleged in this complaint have been in or affecting commerce, as "commerce" is defined in Section 4 of the Federal Trade Commission Act.
5. Respondents have disseminated or have caused to be disseminated Internet advertisements for their currency trading program and training, including but not necessarily limited to the attached Exhibit A, pages 1 through 8. These advertisements contain the following statements:

Complaint

“Our software signals precisely when to buy and when to sell a particular currency allowing you the opportunity to make money regardless of the market going up or down.”

“Your [currency trading] business does not require much capital to get started, has the potential to make huge profits . . .”

“With the ability to connect to the Internet from just about anywhere, the average individual now has the opportunity to participate in this highly profitable [currency trading] business even if you have no previous experience at all.”

“The potential for profit exists as long as there is movement in the exchange rate (price). One of the sides of the pair is always gaining, and providing the investor picks the right side at the right time, money can ALWAYS be made.”

“What Are My Expected Financial Rewards

Our daily objective is to gain Pips (Points) on our trade . . . 100 Pips @ \$7.50 = \$750.00

As you progress in your trading skills becoming more experienced and skillful, the advanced techniques covered in training and outlined in your manual, will help you to acquire the know how to maximize and increase these amounts considerably.

The potential to make a SIX or SEVEN figure annual income from trading is at the end of your fingertips.”

“What Are My Financial Risks?

Our trading strategy and risk management technique, help you to maximize gains and minimize losses. Your computer and our conservative strategy helps to ensure that GAINS are maximized and losses are minimized.”

[consumer testimonial]

Complaint

“I have to tell you how dramatically the Forex trading system and formula have improved my trading. To give you some idea: I work full time in my contracting business during the day, at night I work with your trading system for a few hours and am averaging more than \$500 a day.”

6. Through the means described in Paragraph 5, respondents have represented, expressly or by implication, that:

- a. Users of respondents' currency trading program can reasonably expect to earn large profits, or as much as six or even seven figures annually (i.e., more than \$1,000,000).
- b. Users of respondents' currency trading program can reasonably expect to earn profits of \$500 to \$750 or more per day.
- c. Users of respondents' currency trading program can reasonably expect to earn huge profits even if they have no previous experience in currency trading.
- d. Testimonials appearing in the advertisements for respondents' currency trading program reflect the typical or ordinary experience of members of the public who use the program.

7. Through the means described in Paragraph 5, respondents have represented, expressly or by implication, that they possessed and relied upon a reasonable basis that substantiated the representations set forth in Paragraph 6, at the time the representations were made.

8. In truth and in fact, respondents did not possess and rely upon a reasonable basis that substantiated the representations set forth in Paragraph 6, at the time the representations were made. Therefore, the representation set forth in Paragraph 7 was, and is, false or misleading.

Complaint

9. Through the means described in Paragraph 5, respondents have represented, expressly or by implication that users of respondents' currency trading program can reasonably expect to trade with little financial risk.

10. In truth and in fact, users of respondents' currency trading program cannot reasonably expect to trade with little financial risk. Therefore, the representation set forth in Paragraph 9 was, and is, false or misleading.

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

THEREFORE, the Federal Trade Commission this fifth day of June, 2000, has issued this complaint against respondents.

By the Commission.

Complaint Exhibits

Complaint Exhibits

CompuTrade Computerized Currency Trading Systems - Forex Market

EXHIBIT A
Page 1

CLICK HERE  **COMPUTRADE** *Computerised Trading Systems*
1-800-525-1090

Menu

CompuTrade are providers of a powerful CURRENCY TRADING software that shows you precisely how to make money Trading Currencies on your Computer.

What's New!

Our software signals precisely when to buy and when to sell a particular currency allowing you the opportunity to make money regardless of the market going up or down. CompuTrade gives you the tools and the know how to go out and *Do It!* Our techniques and strategies will help you take advantage of the profit opportunities that occur every single trading day. Trade from home or from anywhere in the world, all you need is a computer and a connection to the Internet.

Until recently the gates of the LARGEST FINANCIAL MARKET ON THE PLANET have been locked. Never before has the average individual had the opportunity to participate on an equal footing with that small percentage who always made "THE BIG MONEY" day after day, year after year. CompuTrade's software, methods and strategies have now leveled the playing fields.

BBB
A Member of the Better Business Bureau

We are committed to training and showing you how to trade on the worlds LARGEST FINANCIAL MARKET no matter what your background may be and take advantage of what has been billed "The ULTIMATE BUSINESS"

Complaint Exhibits

EXHIBIT A

Page 2

\$

COMPUTRADE *Computerised Trading Systems*
1-800-525-1090

"The Ultimate Business"
There are many questions one could ask when trying to evaluate this statement. If you have owned and operated your own business or have worked for a boss...

Consider The Following and Judge for Yourself:
You can operate your business from home, work, vacation or anywhere in the world; all you need is access to the Internet.

1. You never have to worry about job insecurity, harassment or any other employment related anxiety. **YOU ARE YOUR OWN BOSS!**
2. You never need to worry about employer payroll, strikes, theft, rent increases, health inspectors, lease problems, public liability insurance, being sued etc...
3. Your business does not require much capital to get started, has the potential to make huge profits and will never get billed for fees, licenses nor will you need to worry about complicated sales tax returns and lengthy forms.
4. You don't need to do any selling and of course that means no billing. In fact you don't even need any customers!
5. Your business can operate every single working day of the year. You decide which days you wish to work - You make the decision, take a vacation at a moment's notice and not a soul needs to know!
6. Your business can be registered in a state with attractive tax concessions (or even in a foreign country) and may be operated from your home state or out of the country, taking advantage of some of the out of state or out of country benefits. (This may differ from State to State and Country to Country)

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Complaint Exhibits

Currency Trading

EXHIBIT A
Page 3

http://www.comptrade.com

CLICK HERE  **COMPTRADE** *Computerized Trading Systems* 1-800-525-1090

Currency Trading

Currency day Trading is the process of attempting to take reasonable profits in a very short period of time from the constant price fluctuation of foreign currencies.

Currency Trading

Utilizing the help of your personal computer (PC) and our state of the art computer software, you will be able to determine precisely when to Buy or Sell a particular currency. The objective being to Buy Low/Sell High and Vice Versa = MAKING \$\$\$

With the ability to connect to the Internet from just about anywhere, the average individual now has the opportunity to participate in this highly profitable business even if you have no previous experience at all



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Complaint Exhibits

COMPUTRADE

EXHIBIT A
Page 4

WWW.COMPUTRADE.COM



BREAKING NEWS **COMPUTRADE** *Computerized Trading Systems*
1-800-525-1090

The Advantages of FOREX Trading

- Leverage.
- Open 24 hours
- Liquidity. Easy to buy and easy to sell.
- Two Way Market. Make money no matter if the market goes up or down.
- Information is Readily Available

Why Should I Trade?

- The main advantage of the FOREX market is that there is no bear market. Currencies are traded in pairs, for example Dollar/Yen or Dollar/Swiss Franc. Every position involves the selling of one currency and the buying of another. If one believes the Swiss Franc will appreciate against the Dollar, one can sell Dollars and buy Swiss Francs. Or if one holds the opposite belief, one can buy Dollars for Swiss Francs. The potential for profit exists as long as there is movement in the exchange rate (price). One of the sides of the pair is always gaining, and providing the investor picks the right side at the right time, money can ALWAYS be made.
- The four major currency pairs always have buyers and sellers. Many high-return investments are difficult to sell, once bought. FOREX investors never have to worry about being "stuck" in a position due to a lack of market interest. In this \$1.5 trillion dollar per day market. Major international banks are always willing to provide both a bid (selling) and ask (buying) price. Furthermore, the market is open 24 hours per day. High liquidity and 24 hour trading allow market participants to exit or take a new position regardless of the hour.



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Complaint Exhibits

EXHIBIT A
Page 5

covered in training is captured in detail and layed out for included are our successful training methods and fomulas, Trading software, traders tips, customized forms etc.etc and everything the new trader needs to know about their exciting new business, all clearly spelled out from A-Z.

What Are My Expected Financial Rewards

Our daily objective is to gain Pips (Points) on our trade. Every Pip made represents money. Let's say for example we are trading 4 Lots of British Pound, and we end our trading session making 25 Pips profit per Lot (Each Pip gain on the British Pound is worth \$7.50) That day's trading sheet would be as follows:

4 Lots @ 25 Pips = 100 Pips

100 Pips @ \$7.50 = \$750.00

As you progress in your trading skills becoming more experienced and skillful, the advanced techniques covered in training and outlined in your manual, will help you to acquire the know how to maximize and increase these amounts considerably.

The potential to make a SIX or even SEVEN figure annual income from trading is at the end of your fingertips. Once you have attained the skill it is with you forever – Just like learning to ride a bicycle!

What Are My Financial Risks?

Our trading strategy and risk management techniques help you to maximize gains and minimize losses. Your computer and our conservative strategy helps to ensure that Gains are maximized and losses are minimized!

We shall be delighted to show you our impressive and up to date trading records. We continuously strive to introduce new and progressive trading methods. They are thoroughly researched and back checked. Once we are satisfied with them they are made available to you through our member access web site, which is also filled with trader's tips, helpful links etc.

How Soon Can I Start Trading and Earning \$\$\$?

Complaint Exhibits

9/15/99

EXHIBIT A
Page 9

COMPUTRADE LLC





**Computerised
Trading Systems**
1-800-525-1090

ANALYSIS OF A SWISS FRANC TRADE

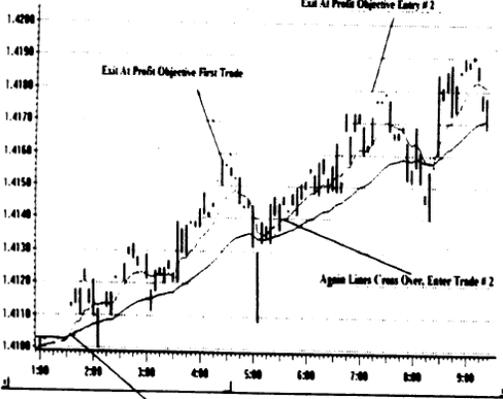
Trade # 1 - Our signal lines cross over, we enter with a profit target of 30 points.

Trade # 2 - An hour after achieving our profit objective the signal lines cross over again to give us entry point # 2. Less than 2 hours later we reach our profit objective.

Trade Summary:
Trade # 1 & 2 - Assuming only 2 Lots traded per trade
= 120 Pips (Points) x \$6.25 = \$750.00

Copyright CompuTrade LLC 1999

Monday 1:00 Swiss Franc / U.S. Spot





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Complaint Exhibits

EXHIBIT A
Page 7





**Computerised
Trading Systems**
1-800-525-1090

Testimonials

What Some Of Our Students Have To Say!

(Originals are on display at our offices)

You were right day trading truly is the ultimate business. No inventory, No employee headaches, No corporate office politics.

In the beginning I was skeptical. However as I became more experienced and confident that the CompuTrade formula really does work, I am now enjoying the success.

I will never forget my first 45 point gain - What a rush!!!! Most importantly, I would like to personally thank you for the continued support and guidance.

Brad E.
Riverside, CA

As you know, for many years now I have been the CEO of a communications company that employs several hundred people. I, of course, started my telecommunications business with the express purpose of earning a substantial income. Little did I know, however, of what I bargained for in the way of expenses and headaches.

Therein lies the beauty of the FOREX market. Huge, huge upside with very limited and controlled risk! ABSOLUTELY the most exceptional business opportunity I have ever seen!

It has been almost six months since you provided training to my group and I would like to express my sincere gratitude for delivering. Not just during training, but more importantly, for being available for each and every question thereafter.

In this day and time of empty promises, it is refreshing to interact with a company that truly delivers what they sell with honesty and sincerity.

Thanks for the pointed instructions. If any of your students will "listen and diligently apply the methods they're taught" they will discover the keys to the vault.

My hats off to you and your crew for a job well done!

Best Regards
JL
FLR Investments, Inc

With utmost confidence, I would like to share my success using CompuTrade's methods and training. As a recent college graduate I found CompuTrade through the process of putting currency schools and professional traders to the test. I interviewed with many others that claimed to have what it takes to turn the average person into a successful trader. I found that most other schools



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Complaint Exhibits

EXHIBIT A
Page 3

and professionals didn't even compare. CompuTrade rose to the top, offering one on one consultation, schooling and most importantly a system for capturing points successfully in a fast paced and exciting market.

It was evident from the beginning that CompuTrade and its staff had years of experience and a winning strategy. From the first transaction of my currency-trading career to my current financial independence, I can testify of real success. The right teaching coupled with a winning technique makes all the difference in the world.

Thank you CompuTrade for the excellent training and winning techniques.

Sincerely,

Rick S.
San Diego, CA

I just wanted to say thank you for all the time and effort you have invested in me over the last few months. I am enjoying the Forex system more than I ever thought was possible. Not only am I enjoying myself, but I love the Global Dealing Station system, too. The orders are executed so quickly that it is absolutely amazing. It's so much fun to watch the profits soar! I love it!

I am looking forward to a very prosperous 1999 and I wish you the same.

M. F.
Santa Fe, NM

P. S. Thanks for the help getting a new computer. It's perfect for trading!

I am very happy to inform you that my trading is going well after taking your day trading course 5 months ago. I was never successful with any other trading method or system until I started trading the Forex system with your powerful trading formula.

I have to tell you how dramatically the Forex trading system and formula have improved my trading. To give you some idea: I work full time in my contracting business during the day, at night I work with your trading system for a few hours and am averaging more than \$500 a day. I just wish that I learned about your trading method years ago. Now I truly do feel like I am on my way to financial freedom. I am also referring a friend to the CompuTrade trading program.

I truly do thank you for teaching me your trading methods, and for your support.

Sincerely,

Louie A. W. (CA)

The service and quality of training at CompuTrade is exceptional. I highly recommend CompuTrade if you are looking to learn more about computerized day trading.

T.A.
LakeForest,CA

Decision and Order

DECISION AND ORDER

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

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

The Commission having thereafter considered the matter and having determined that it had reason to believe that respondents have violated the said Act, and that complaint should issue stating its charges in that respect, and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of thirty (30) days, now in further conformity with the procedure prescribed in § 2.34 of its Rules, the Commission hereby issues its complaint, makes the following jurisdictional findings and enters the following order:

1. Respondent CompuTrade LLC is a Nevada corporation with its principal office or place of business at 24591 Del Prado, Dana Point, CA 92629.

Decision and Order

2. Respondent Bernard Lewis is an officer of the corporate respondent. Individually or in concert with others, he formulates, directs, or controls the policies, acts, or practices of the corporation. His principal office or place of business is the same as that of CompuTrade LLC.

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

ORDER

DEFINITIONS

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

1. "Clearly and conspicuously" shall mean as follows:
 - A. In an advertisement communicated through an electronic medium (such as television, video, radio, and interactive media such as the Internet and online services), the disclosure shall be presented simultaneously in both the audio and visual portions of the advertisement. *Provided, however,* that in any advertisement presented solely through visual or audio means, the disclosure may be made through the same means in which the ad is presented. The audio disclosure shall be delivered in a volume and cadence sufficient for an ordinary consumer to hear and comprehend it. The visual disclosure shall be of a size and shade, and shall appear on the screen for a duration, sufficient for an ordinary consumer to read and comprehend it.

Decision and Order

- B. In a print advertisement, promotional material, or instructional manual, the disclosure shall be in a type size and location sufficiently noticeable for an ordinary consumer to read and comprehend it, in print that contrasts with the background against which it appears.
- C. On a product label, the disclosure shall be in a type size and location on the principal display panel sufficiently noticeable for an ordinary consumer to read and comprehend it, in print that contrasts with the background against which it appears.

The disclosure shall be in understandable language and syntax. Nothing contrary to, inconsistent with, or in mitigation of the disclosure shall be used in any advertisement or on any label.

2. In the case of advertisements disseminated by means of an interactive electronic medium such as the Internet or other online services, "in close proximity" shall mean on the same Web page and proximate to the triggering representation, and not on other portions of the Web site, accessed or displayed through hyperlinks or other means.

3. "Commerce" shall mean as defined in Section 4 of the Federal Trade Commission Act, 15 U.S.C. § 44.

4. "Trading program" shall mean any program, service, course, instruction, system, training, manual, computer software, or other materials involving the purchase or sale of stocks, currencies, commodity futures, options, or other financial instruments or investments.

5. Unless otherwise specified, "respondents" shall mean CompuTrade LLC, a corporation, its successors and assigns and its officers; Bernard Lewis, individually and as an officer of the corporation; and each of the above's agents, representatives, and employees.

Decision and Order

I.

IT IS ORDERED that respondents, directly or through any corporation, subsidiary, division, trade name, or other device, in connection with the advertising, promotion, offering for sale, sale, or distribution of any trading program, in or affecting commerce, shall not represent, in any manner, expressly or by implication:

- A. That users of respondents' currency trading program can reasonably expect to earn large profits, or as much as six or even seven figures annually (i.e., more than \$1,000,000);
- B. That users of respondents' currency trading program can reasonably expect to earn profits of \$500 to \$750 or more per day;
- C. That users of respondents' currency trading program can reasonably expect to earn large profits even if they have no previous experience in currency trading;
- D. The amount of earnings, income, or profit that a prospective user could reasonably expect to attain; or
- E. Any financial benefit or other benefit of any kind from the purchase or use of such trading program;

unless respondents possess and rely upon a reasonable basis substantiating the representation at the time it is made.

Decision and Order

II.

IT IS FURTHER ORDERED that respondents, directly or through any corporation, subsidiary, division, trade name, or other device, in connection with the advertising, promotion, offering for sale, sale, or distribution of any trading program, in or affecting commerce, shall not misrepresent, in any manner, expressly or by implication,

- A. That users of the program can reasonably expect to trade with little or no financial risk; or
- B. The extent of risk to which users of the program are exposed.

III.

IT IS FURTHER ORDERED that respondents, directly or through any corporation, subsidiary, division, trade name, or other device, in connection with the advertising, promotion, offering for sale, sale, or distribution of any trading program, in or affecting commerce, shall not make any representation, in any manner, expressly or by implication, about the financial benefits of such program, unless they disclose, clearly and conspicuously, and in close proximity to the representation,

"CURRENCY [or STOCK, COMMODITY FUTURES, OPTIONS, ETC., as applicable] TRADING involves high risks and YOU can LOSE a lot of money."

Provided, the disclosure required by this Part is in addition to, and not in lieu of, any other disclosure that respondents may be required to make, including but not limited to any disclosure required by state or federal law or by a self-regulatory organization. The requirements of this Part are not intended to, and shall not be interpreted to, exempt respondents from making any other disclosure.

Decision and Order

IV.

IT IS FURTHER ORDERED that respondents, directly or through any corporation, subsidiary, division, trade name, or other device, in connection with the advertising, promotion, offering for sale, sale, or distribution of any trading program, in or affecting commerce, shall not represent, in any manner, expressly or by implication, that the experience represented by any user, testimonial or endorsement of the trading program represents the typical or ordinary experience of members of the public who use the trading program unless:

- A. Respondents possess and rely upon a reasonable basis substantiating the representation at the time it is made; or
- B. Respondents disclose, clearly and conspicuously, and in close proximity to the endorsement or testimonial, either:
 - 1. what the generally expected results would be for users of the trading program, or
 - 2. the limited applicability of the endorser's experience to what users may generally expect to achieve, that is, that users should not expect to experience similar results.

For purposes of this Part, "endorsement" shall mean as defined in 16 C.F.R. § 255.0(b).

V.

IT IS FURTHER ORDERED that respondent CompuTrade LLC, and its successors and assigns, and respondent Bernard Lewis shall, for five (5) years after the last date of dissemination of any representation covered by this order, maintain and upon

Decision and Order

request make available to the Federal Trade Commission for inspection and copying:

- A. All advertisements and promotional materials (including packaging) containing the representation;
- B. All materials that were relied upon in disseminating the representation; and
- C. All tests, reports, studies, surveys, demonstrations, or other evidence in their possession or control that contradict, qualify, or call into question the representation, or the basis relied upon for the representation, including complaints and other communications with consumers or with governmental or consumer protection organizations.

VI.

IT IS FURTHER ORDERED that respondent CompuTrade LLC, and its successors and assigns, and respondent Bernard Lewis shall deliver a copy of this order to all current and future principals, officers, directors, and managers, and to all current and future employees, agents, and representatives having responsibilities with respect to the subject matter of this order, and shall secure from each such person a signed and dated statement acknowledging receipt of the order. Respondents shall deliver this order to current personnel within thirty (30) days after the date of service of this order, and to future personnel within thirty (30) days after the person assumes such position or responsibilities. Respondents shall maintain and upon request make available to the Commission for inspection and copying each such signed and dated statement for a period of five (5) years after creation.

Decision and Order

VII.

IT IS FURTHER ORDERED that respondent CompuTrade LLC, and its successors and assigns shall notify the Commission at least thirty (30) days prior to any change in the corporation that may affect compliance obligations arising under this order, including but not limited to a dissolution 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.

VIII.

IT IS FURTHER ORDERED that respondent Bernard Lewis, for a period of ten (10) years after the date of issuance of this order, shall notify the Commission of the discontinuance of his current business or employment, or of his affiliation with any new business or employment. The notice shall include respondent's new business address and telephone number and a description of the nature of the business or employment and his duties and responsibilities.

IX.

IT IS FURTHER ORDERED that respondent CompuTrade LLC, 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 they have complied with this order.

Decision and Order

X.

This order will terminate on June 5, 2020, 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 effect 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.

XI.

All notices required to be sent to the Commission pursuant to this Order shall be sent by certified mail to the Associate Director, Division of Enforcement, Bureau of Consumer Protection, Federal Trade Commission, 601 Pennsylvania Avenue, N.W., Washington, D.C. 20580. ATTN: In the Matter of CompuTrade LLC.

By the Commission.

Analysis to Aid Public Comment

Analysis of Proposed Consent Order to Aid Public Comment

The Federal Trade Commission has accepted, subject to final approval, an agreement containing a consent order from CompuTrade LLC, a corporation, and Bernard Lewis, individually and as an officer of the corporation (together, “respondents”).

The proposed consent order has been placed on the public record for thirty (30) days for receipt of comments by interested persons. Comments received during this period will become part of the public record. After thirty (30) days, the Commission will again review the agreement and the comments received, and will decide whether it should withdraw from the agreement or make final the agreement's proposed order.

Respondents sell and distribute computer software and training for buying and selling foreign currencies on a daily basis. They advertise on their Internet Web sites, www.computrades.com and www.computrader.net. This matter concerns allegedly deceptive representations of the earnings and profit potential, as well as the extent of risk involved in using respondents' trading methods.

The Commission's proposed complaint alleges that respondents made unsubstantiated claims that users of respondents' currency trading program could reasonably expect to earn large profits of \$500 to \$750 or more per day, and as much as six or seven figures annually (i.e., more than \$1,000,000); that users could reasonably expect to earn huge profits even if they had no previous experience in currency trading; and that testimonials appearing in the advertisements for respondents' currency trading program reflected the typical or ordinary experience of members of the public who use the program. In addition, the complaint alleges that respondents misrepresented

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that users of their currency trading program could reasonably expect to trade with little financial risk.

The proposed consent order contains provisions designed to prevent respondents from engaging in similar acts and practices in the future.

Part I of the proposed order requires respondents to have a reasonable basis substantiating any representation that users of respondents' currency trading program can reasonably expect to earn large profits: (1) of \$500 to \$750 or more per day; (2) of as much as six or even seven figures annually (i.e., more than \$1,000,000); or (3) even if they have no previous experience in currency trading. Part I also requires respondents to possess a reasonable basis substantiating claims about the amount of earnings, income, or profit that a prospective user of any trading program could reasonably expect to attain, or about any financial benefit or other benefit from any trading program offered by respondents.

Part II of the proposed order prohibits respondents from misrepresenting that users of any trading program can reasonably expect to trade with little or no financial risk and from misrepresenting the extent of risk to which users of any such program are exposed.

Part III of the proposed order requires respondents to disclose, clearly and conspicuously, "CURRENCY [or STOCK, COMMODITY FUTURES, OPTIONS, ETC., as applicable] TRADING involves high risks and YOU can LOSE a lot of money," in close proximity to any representation they make about the financial benefits of any trading program. This disclosure is in addition to, and not instead of, any other disclosure that respondents may be required to make.

Part IV of the proposed order prohibits respondents from representing without a reasonable basis that the experience represented by any user, testimonial or endorsement of any

Analysis to Aid Public Comment

trading program represents the typical or ordinary experience of members of the public who use the program; or respondents must disclose either what the generally expected results would be for users of the trading program, or the limited applicability of the endorser's experience to what users may generally expect to achieve, that is, that users should not expect to experience similar results.

Parts V and VI of the proposed order require respondents to keep copies of relevant advertisements and materials substantiating claims made in the advertisements and to provide copies of the order to certain personnel. Part VII requires CompuTrade to notify the Commission of any changes in the corporate structure that might affect compliance with the order. Part VIII requires that the individual respondent notify the Commission of changes in his employment status for a period of ten years. Part IX requires CompuTrade to file compliance reports with the Commission. Part X provides that the order will terminate after twenty (20) years under certain circumstances.

The purpose of this analysis is to facilitate public comment on the proposed order. It is not intended to constitute an official interpretation of the agreement and proposed order or to modify in any way their terms.

Complaint

IN THE MATTER OF**R.N. MOTORS, INC.**

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATIONS OF
SEC. 5 OF THE FEDERAL TRADE COMMISSION ACT AND
THE CONSUMER LENDING ACT

*Docket C-3947; File No. 9923246
Complaint, June 5, 2000--Decision, June 5, 2000*

This consent order prohibits Respondent R.N. Motors, Inc., in any lease advertisement, from making any reference to any charge that is part of the total amount due at lease signing or delivery or that no such charge is required, not including a statement of the periodic payment, unless the advertisement also states with "equal prominence" the total amount due at lease signing or delivery. The order also prohibits Respondent, in any lease, from stating the amount of any payment or that any or no initial payment is required at lease signing or delivery, unless the advertisement also states, clearly and conspicuously, all of the terms required by Regulation M, as amended and as follows: 1) that the transaction advertised is a lease; 2) the total amount due at lease signing or delivery; 3) whether or not a security deposit is required; 4) the number, amounts, and timing of scheduled payments; and 5) that an extra charge may be imposed at the end of the lease term in a lease in which the liability of the consumer at the end of the lease term is based on the anticipated residual value of the vehicle. Respondent is also prohibited from stating a percentage rate in an advertisement or in documents evidencing the lease transaction, unless respondent also states the notice required by Regulation M that "this percentage may not measure the overall cost of financing this lease." All disclosure required in advertising must be made clearly and conspicuously in all forms of advertising in all forms of media.

Participants

For the Commission: *Carole Reynolds, Michelle Chua, Jessica Rich, David Medine, and BE.*

For the Respondents: *James T. Flynn, Flynn, McKenna, Wright, & Karsh.*

Complaint

COMPLAINT

The Federal Trade Commission, having reason to believe that R. N. Motors, Inc., a corporation, and its subsidiary, Red Noland Cadillac, Inc., a corporation, and Nelson B. Noland, individually and as an officer of the corporations, ("respondents"), have violated the provisions of the Federal Trade Commission Act, 15 U.S.C. §§ 45-58, as amended, the Consumer Leasing Act, 15 U.S.C. §§ 1667-1667f, as amended, and its implementing Regulation M, 12 C.F.R. § 213, as amended, and it appearing to the Commission that this proceeding is in the public interest, alleges:

1. Respondent R.N. Motors is a Colorado corporation with its principal office or place of business at 990 Motor City Drive, Colorado Springs, Colorado 80906. Respondent R.N. Motors controls the policies, acts or practices of its wholly-owned subsidiary, Red Noland Cadillac, Inc., including the acts or practices alleged in this complaint.
2. Respondent Red Noland Cadillac, Inc. is a Colorado corporation and a wholly-owned subsidiary of R.N. Motors with its principal office or place of business at 990 Motor City Drive, Colorado Springs, Colorado. Respondent Red Noland Cadillac, Inc. offers automobiles for sale or lease to consumers.
3. Respondent Nelson B. Noland is an officer of the corporate respondents. Individually or in concert with others, he formulates, directs, controls, and participates in the policies, acts, or practices of the corporate respondents, including the acts or practices alleged in this complaint. His principal office or place of business is the same as that of the corporate respondents.

Complaint

4. Respondents have disseminated advertisements to the public that promote consumer leases, as the terms "advertisement" and "consumer lease" are defined in Section 213.2 of Regulation M, 12 C.F.R. § 213.2, as amended.

5. The acts and practices of respondents alleged in this complaint have been in or affecting commerce, as "commerce" is defined in Section 4 of the Federal Trade Commission Act, 15 U.S.C. § 44.

6. Respondents have disseminated or have caused to be disseminated consumer lease advertisements ("lease advertisements") for automobiles, including but not necessarily limited to the attached Red Noland Exhibit A. Red Noland Exhibit A is an electronic advertisement. This lease advertisement contains the following statements:

A.

Current Lease Specials

	1999 Deville	1999 Seville STS	1999 Eldorado
Monthly Payment	\$535	\$649	\$529
# Months	36	36	36
GMAC Smart Lease Rates	2.5%	4.1%	2.6%
Down Payment	\$1,800	\$1,800	\$1,800
Security Deposit	\$575	\$700	\$575

(Red Noland Exhibit A)

Complaint

FEDERAL TRADE COMMISSION ACT VIOLATIONS**COUNT I: Failure to Disclose, and Failure to Disclose Adequately, Lease Terms**

7. In lease advertisements, including but not necessarily limited to Red Noland Exhibit A, respondents have represented, expressly or by implication, that consumers can lease the advertised vehicles at the terms prominently stated in the advertisements, including but not necessarily limited to the monthly payment amount, the downpayment, and the security deposit.

8. These lease advertisements have failed to disclose, and failed to disclose adequately, additional terms pertaining to the lease offer, such as the total amount due at lease inception, including but not limited to whether or not third-party fees, such as taxes, licenses, and registration fees, are required as part of the total amount due at lease inception. This information would be material to consumers in deciding whether to visit respondents' dealerships and/or whether to lease an automobile from respondents. The failure to disclose, and failure to disclose adequately, these additional terms, in light of the representation made, was, and is, a deceptive practice.

9. Respondents' practices constitute deceptive acts or practices in or affecting commerce in violation of Section 5(a) of the Federal Trade Commission Act, 15 U.S.C. § 45(a).

Complaint

**CONSUMER LEASING ACT AND REGULATION M
VIOLATIONS****COUNT II: Failure to Disclose, and Failure to Disclose
Clearly and Conspicuously, Required Lease Information**

10. Respondents' lease advertisements, including but not necessarily limited to Red Noland Exhibit A, state the monthly payment amount, the downpayment, and the security deposit, but fail to disclose, and fail to disclose clearly and conspicuously, certain additional terms required by the Consumer Leasing Act and Regulation M, as amended, including one or more of the following terms:

- a. that the transaction advertised is a lease;
- b. the total amount due prior to or at consummation, or by delivery, if delivery occurs after consummation. This total amount may: (1) exclude third-party fees that vary by state or locality, such as taxes, licenses and registration fees, and disclose that fact, or (2) provide a total that includes third-party fees based on a particular state or locality as long as that fact and the fact that such fees may vary by state or locality are disclosed;
- c. whether or not a security deposit is required;
- d. the number, amounts, and timing of scheduled payments; and
- e. that an extra charge may be imposed at the end of the lease term in a lease where the liability of the consumer is based on the difference between the residual value of the leased property and its realized value at the end of the lease term.

11. Respondents' practices have violated Section 184 of the Consumer Leasing Act, 15 U.S.C. § 1667c, and Section 213.7 of Regulation M, 12 C.F.R. § 213.7, as amended.

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COUNT III: Failure to Disclose, and Failure to Disclose Clearly and Conspicuously, Required Lease Rate Information

12. Respondents' lease advertisements, including but not necessarily limited to Red Noland Exhibit A, state specific lease rates for each of certain advertised vehicles, but fail to disclose, and fail to disclose clearly and conspicuously, the following notice concerning lease rates required by Regulation M:

This percentage may not measure the overall cost of financing this lease.

13. Respondents' practices have violated Section 213.4(s) of Regulation M, 12 C.F.R. § 213.4(s), as amended.

THEREFORE, the Federal Trade Commission this fifth day of June, 2000, has issued this complaint against respondents.

By the Commission.

DECISION AND ORDER

The Federal Trade Commission having initiated an investigation of certain acts and practices of the respondents named in the caption hereof, and the respondents having been furnished thereafter with a copy of a draft complaint that the Bureau of Consumer Protection proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge the respondents with violation of the Consumer Leasing Act, 15 U.S.C. § 1667 *et seq.*, and its

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implementing Regulation M, 12 C.F.R. § 213, and the Federal Trade Commission Act, 15 U.S.C. § 45 et seq.; and

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

The Commission having thereafter considered the matter and having determined that it has reason to believe that the respondents have violated the said Acts and Regulation, 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 thirty (30) 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 R. N. Motors, Inc. is a Colorado corporation with its principal office or place of business at 990 Motor City Drive, Colorado Springs, Colorado 80906.
2. Respondent Red Noland Cadillac, Inc. is a Colorado corporation with its principal office or place of business at 990 Motor City Drive, Colorado Springs, Colorado 80906.
3. Respondent Nelson B. Noland is an officer of the corporate respondents. Individually or in concert with others, he formulates, directs, or controls the policies, acts, or practices of the corporate respondents. His principal office or place of business is the same as that of the corporate respondents.

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

ORDER**DEFINITIONS**

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

1. "Clearly and conspicuously" shall mean as follows:
 - a. In a television, video, radio, or Internet or other electronic advertisement, an audio disclosure shall be delivered in a volume, cadence, and location sufficient for an ordinary consumer to hear and comprehend it. A video disclosure shall be of a size and shade, and shall appear on the screen for a duration and in a location, sufficient for an ordinary consumer to read and comprehend it.
 - b. In a print advertisement, a disclosure shall be in a type size and location sufficient for an ordinary consumer to read and comprehend it, in print that contrasts with the background against which it appears.

The disclosure shall be in understandable language and syntax. Nothing contrary to, inconsistent with, or in mitigation of the disclosure shall be used in any advertisement.

2. "Equal prominence" shall mean as follows:
 - a. In a television, video, radio, or Internet or other electronic advertisement, a video disclosure shall be presented in the

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same or similar format, including but not necessarily limited to type size, shade, contrast, duration, and placement. An audio disclosure shall be delivered in the same or similar manner, including but not necessarily limited to volume, cadence, pace, and placement.

- b. In a print advertisement, a disclosure shall be presented in the same or similar format, including but not necessarily limited to type size, shade, contrast, and placement.

Nothing contrary to, inconsistent with, or in mitigation of the disclosure shall be used in any advertisement.

3. "Total amount due at lease signing or delivery" as used herein shall mean the total amount of any initial payments required to be paid by the lessee on or before consummation of the lease or delivery of the vehicle, whichever is later, as required by Regulation M, 12 C.F.R. § 213, as amended. The total amount due at lease signing or delivery may (1) exclude third-party fees, such as taxes, licenses, and registration fees, and disclose that fact, or (2) provide a total that includes third-party fees based on a particular state or locality, as long as that fact and the fact that such fees may vary by state or locality are disclosed. (Section 213.7 of Regulation M, 12 C.F.R. § 213.7, as amended.)
4. "Commerce" shall mean as defined in Section 4 of the Federal Trade Commission Act, 15 U.S.C. § 44.
5. Unless otherwise specified, "respondents" shall mean R.N. Motors, Inc., and Red Noland Cadillac, Inc., corporations, their successors and assigns and their officers; Nelson B. Noland, individually and as an officer of the corporations; and each of the above's agents, representatives, and employees.

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I.

IT IS ORDERED that respondents, directly or through any corporation, subsidiary, division, or any other device, in connection with any advertisement to promote, directly or indirectly, any consumer lease in or affecting commerce, as "advertisement" and "consumer lease" are defined in Section 213.2 of Regulation M, 12 C.F.R. § 213.2, as amended, shall not, in any manner, expressly or by implication:

- A. Misrepresent, in any manner, directly or by implication, the costs or terms of leasing a vehicle, including but not limited to the total amount due at lease signing or delivery.
- B. Make any reference to any charge that is part of the total amount due at lease signing or delivery or that no such charge is required, not including a statement of the periodic payment, unless the advertisement also states with equal prominence the total amount due at lease signing or delivery.
- C. State the amount of any payment or that any or no initial payment is required at lease signing or delivery, if delivery occurs after consummation, without disclosing clearly and conspicuously all of the terms required by Regulation M, as amended, as follows:
 1. that the transaction advertised is a lease;
 2. the total amount due at lease signing or delivery;
 3. whether or not a security deposit is required;
 4. the number, amounts, and timing of scheduled payments;
and

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- E. that an extra charge may be imposed at the end of the lease term in a lease in which the liability of the consumer at the end of the lease term is based on the anticipated residual value of the vehicle.

(Section 184(a) of the Consumer Leasing Act ("CLA"), 15 U.S.C. § 1667c(a), as amended, and Section 213.7 of Regulation M, 12 C.F.R. § 213.7, as amended.)

For radio advertisements, respondents may also comply with the requirements of this subparagraph by utilizing Section 184(c) of the CLA, 15 U.S.C. § 1667c(C), and Section 213.7(f) of Regulation M, 12 C.F.R. § 213.7(f), as amended. For television advertisements, respondents may also comply with the requirements of this subparagraph by utilizing Section 213.7(f) of Regulation M, as amended.

- F. State a percentage rate in an advertisement or in documents evidencing the lease transaction without stating that "this percentage may not measure the overall cost of financing this lease."

(Section 213.4(s) of Regulation M, 12 C.F.R. § 213.4(s), as amended.)

- G. Fail to comply in any other respect with Regulation M, 12 C.F.R. § 213, as amended, and the CLA, 15 U.S.C. §§ 1667-1667f, as amended.

II.

IT IS FURTHER ORDERED that respondents R. N. Motors, Inc. and Red Noland Cadillac, Inc., and each of their successors and assigns, and respondent Nelson B. Noland, 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 all records

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that will demonstrate compliance with the requirements of this order.

III.

IT IS FURTHER ORDERED that respondents R. N. Motors, Inc. and Red Noland Cadillac, Inc., and each of their successors and assigns, and respondent Nelson B. Noland, shall deliver a copy of this order to all current and future principals, officers, directors, and managers, and to all current and future employees, agents, and representatives having responsibilities with respect to the subject matter of this order, and shall secure from each such person a signed and dated statement acknowledging receipt of the order. Respondents shall deliver this order to such current personnel within thirty (30) days after the date of service of this order, and to such future personnel within thirty (30) days after the person assumes such position or responsibilities.

IV.

IT IS FURTHER ORDERED that respondents R. N. Motors, Inc. and Red Noland Cadillac, Inc., and each of their successors and assigns, shall notify the Commission at least thirty (30) days prior to any change in the corporations that may affect compliance obligations arising under this order, including but not necessarily limited to a dissolution, assignment, sale, merger, or other action that would result in the emergence of a successor corporation; the creation or dissolution of a subsidiary, parent, or affiliate that engages in any acts or practices subject to this order; the proposed filing of a bankruptcy petition; or a change in the corporate name or address. Provided, however, that, with respect to any proposed change in the corporation about which respondents learn less than thirty (30) days prior to the date such action is to take place, respondents shall notify the Commission as soon as is practicable after obtaining such knowledge. All notices required by this Part

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shall be sent by certified mail to the Associate Director, Division of Enforcement, Bureau of Consumer Protection, Federal Trade Commission, Washington, D.C. 20580.

V.

IT IS FURTHER ORDERED that respondent Nelson B. Noland, for a period of ten (10) years after the date of issuance of this order, shall notify the Commission of the discontinuance of his current business or employment, or of his affiliation with any new business or employment involving the advertising and/or extension of a "consumer lease," as that term is defined in the CLA and its implementing Regulation M, as amended. The notice shall include respondent's new business address and telephone number and a description of the nature of the business or employment and his duties and responsibilities. All notices required by this Part shall be sent by certified mail to the Associate Director, Division of Enforcement, Bureau of Consumer Protection, Federal Trade Commission, Washington, D.C. 20580.

VI.

IT IS FURTHER ORDERED that respondents R. N. Motors, Inc. and Red Noland Cadillac, Inc., and each of their successors and assigns, and respondent Nelson B. Noland, shall, within sixty (60) days after the date of service of this order, and at such other times as the Federal Trade Commission may require, file with the Commission a report, in writing, setting forth in detail the manner and form in which they have complied with this order.

VII.

This order will terminate on June 5, 2020, 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

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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 respondents 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.

By the Commission.

Analysis of Proposed Consent Orders to Aid Public Comment

Summary: The Federal Trade Commission has accepted separate agreements, subject to final approval, to proposed consent orders from respondents: 1) R.N. Motors, Inc., Red Noland Cadillac, Inc., and Nelson B. Noland ("Red Noland"); and 2) Simmons Rockwell Ford Mercury, Inc., Simmons Rockwell Autoplaza, Inc., Don Simmons, Inc., and Donald M. Simmons, II and Richard

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L. Rockwell (“Simmons Rockwell”). The persons named in these actions are named individually and as officers of their respective corporations.

The proposed consent orders have been placed on the public record for thirty (30) days for receipt of comments by interested persons. Comments received during this period will become part of the public record. After thirty (30) days, the Commission will again review the agreements and the comments received and will decide whether it should withdraw from the agreements or make final the agreements’ proposed orders.

The Red Noland and Simmons Rockwell complaints allege that these respondents disseminated automobile lease advertisements that violate the Federal Trade Commission Act (“FTC Act”), the Consumer Leasing Act (“CLA”), and Regulation M. The Simmons Rockwell complaint also alleges that it disseminated automobile credit advertisements that violate the Truth in Lending Act (“TILA”) and Regulation Z.

Section 5 of the FTC Act prohibits false, misleading, or deceptive representations or omissions of material information in advertisements. In addition, Congress established statutory disclosure requirements for lease and credit advertising under the CLA and the TILA, respectively, and directed the Federal Reserve Board to promulgate regulations implementing such statutes -- Regulations M and Z respectively. See 15 U.S.C. §1667 et seq; 15 U.S.C. § 1601 et seq; 12 C.F.R. § 213; 12 C.F.R. § 226.

I. The Complaints

A. FTC Act Violations

The Red Noland complaint alleges that, based on the terms prominently stated in their lease advertisements, including but not necessarily limited to the monthly payment amount, the downpayment, and the security deposit, respondent failed to disclose, and failed to disclose adequately, additional terms

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pertaining to the lease offer, such as the total amount due at lease inception, including but not limited to whether third-party fees such as taxes, licenses, and registration fees are required as part of the total amount due at lease inception. The Simmons Rockwell complaint alleges that, based on the terms prominently stated in their lease advertisements, including but not necessarily limited to the monthly payment amount, respondent failed to disclose, and/or failed to disclose adequately, additional terms pertaining to the lease offer, such as the total amount due at lease inception, including but not limited to whether third-party fees, such as taxes, licenses, and registration fees, are required as part of the total amount due at lease inception. The Red Noland and Simmons Rockwell complaints allege that the required information does not appear at all or appears in fine print and/or is illegible in the advertisements and that this information would be material to consumers in deciding whether to visit respondents' dealerships and/or whether to lease an automobile from respondents. These practices, according to both complaints, constitute deceptive acts or practices in violation of Section 5(a) of the FTC Act.

B. CLA and Regulation M Violations

The Red Noland and Simmons Rockwell complaints also allege that respondents' lease advertisements have violated the CLA and Regulation M. The Red Noland complaint alleges that respondent's ads state the monthly payment amount, the downpayment, and the security deposit; the Simmons Rockwell complaint alleges that respondent's ads state the monthly payment amount -- all "triggering" terms under these laws. The Red Noland and Simmons Rockwell complaints allege that respondents failed to disclose, and/or fail to disclose clearly and conspicuously, certain additional "triggered" terms, as applicable and as follows: the total amount due prior to or at consummation, or by delivery, if delivery occurs after consummation, and that

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such amount: 1) excludes third-party fees, such as taxes, licenses and registration fees; and discloses that fact; or 2) includes third-party fees based on a particular state or locality and discloses that fact and the fact that such fees may vary by state or locality; whether or not a security deposit is required; and the number, amounts, and timing of scheduled payments.

According to the complaints, Red Noland's lease disclosures are omitted altogether and are not clear and conspicuous. Simmons Rockwell's lease disclosures, if provided, are not clear and conspicuous because they appear in fine print and/or are illegible.

The Red Noland and Simmons Rockwell complaints, therefore, allege that these practices violate Section 184 of the CLA, 15 U.S.C. § 1667c, as amended, and Section 213.7 of Regulation M, 12 C.F.R. § 213.7, as amended.

In addition, the Red Noland complaint alleges that respondent's lease advertisements state specific lease rates for each of certain advertised vehicles, but fail to disclose, and fail to disclose clearly and conspicuously, the following notice concerning lease rates required by Regulation M: "This percentage may not measure the overall cost of financing this lease."

The Red Noland complaint, therefore, alleges that this practice violates Section 213.4(s) of Regulation M, 12 C.F.R. § 213.4(s).

C. TILA and Regulation Z Violations

The Simmons Rockwell complaint alleges that respondent's credit advertisements have violated the TILA and Regulation Z. It alleges that respondent's credit ads state the number of payments required to finance the transaction and an annual percentage rate (expressed as an "APR"), but failed to disclose, and/or failed to disclose clearly and conspicuously, certain additional terms required by Regulation Z, including the amount

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of the downpayment and the full terms of repayment, such as the amount of the monthly payment.

According to the complaint, Simmons Rockwell's credit disclosures, if provided, are not clear and conspicuous because they appear in blurred print.

The Simmons Rockwell complaint, therefore, alleges that these practices violate Section 144 of the TILA, 15 U.S.C. § 1664, as amended, and Section 226.24(c) of Regulation Z, 12 C.F.R. § 226.24(c), as amended.

II. Proposed Consent Orders

The Red Noland and Simmons Rockwell proposed consent orders contain provisions designed to remedy the violations charged and to prevent the respondents from engaging in similar acts and practices in the future. Specifically, Paragraph I.A. of the Red Noland and Simmons Rockwell proposed orders prohibit respondents, in any lease advertisement, from misrepresenting, in any manner, directly or by implication, the costs or terms of leasing a vehicle, including but not limited to the total amount due at lease signing or delivery.

Paragraph I.B. of the Red Noland and Simmons Rockwell proposed orders prohibit respondents, in any lease advertisement, from making any reference to any charge that is part of the total amount due at lease signing or delivery or that no such charge is required, not including a statement of the periodic payment, unless the advertisement also states with "equal prominence" the total amount due at lease signing or delivery. The "prominence" requirement prohibits respondents from running deceptive advertisements that highlight low amounts due at lease inception with inadequate disclosure of the actual total lease inception fees.

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This "prominence" requirement for lease inception fees is also found in Regulation M.

Paragraph I.C. of the Red Noland and Simmons Rockwell proposed orders prohibit respondents, in any lease, from stating the amount of any payment or that any or no initial payment is required at lease signing or delivery, unless the advertisement also states, clearly and conspicuously, all of the terms required by Regulation M, as amended and as follows: 1) that the transaction advertised is a lease; 2) the total amount due at lease signing or delivery; 3) whether or not a security deposit is required; 4) the number, amounts, and timing of scheduled payments; and 5) that an extra charge may be imposed at the end of the lease term in a lease in which the liability of the consumer at the end of the lease term is based on the anticipated residual value of the vehicle.

Furthermore, Paragraph I.D. of the Red Noland proposed order prohibits this respondent from stating a percentage rate in an advertisement or in documents evidencing the lease transaction, unless respondent also states the notice required by Regulation M that "this percentage may not measure the overall cost of financing this lease."

Paragraph I.D. of the Simmons Rockwell proposed order, and paragraph I.E. of the Red Noland proposed order, prohibit respondents from engaging in any other violation of Regulation M, as amended.

In addition, Paragraph II. A. of the Simmons Rockwell proposed order enjoins respondent, in any credit advertisement, from stating the amount or percentage of any downpayment, the number of payments or period of repayment, the amount of any payment, or the amount of any finance charge, without disclosing, clearly and conspicuously, all of the terms required by Regulation Z, as follows: 1) the amount or percentage of the downpayment; 2) the terms of repayment; and 3) the annual percentage rate, using that term or the abbreviation "APR." If the annual percentage rate may be increased after consummation of the credit

Analysis to Aid Public Comment

transaction, that fact must also be disclosed. Paragraph II.B. of this proposed order also prohibits Simmons Rockwell from stating a rate of finance charge unless respondents state the rate as an "annual percentage rate" or the abbreviation "APR," using that term. Paragraph III.C. of this proposed order also enjoins Simmons Rockwell from engaging in any other violation of Regulation Z, as amended.

The information required by Paragraph I of the Red Noland proposed order (lease advertisements), and Paragraphs I and II of the Simmons Rockwell proposed order (lease and credit advertisements), must be disclosed "clearly and conspicuously." Both proposed orders define the term "clearly and conspicuously" for Red Noland's and Simmons Rockwell's advertisements in all media. In a television, video, radio or Internet or other electronic advertisement, the required disclosures made in the audio portion of the advertisement must be delivered in a volume, cadence, and location sufficient for an ordinary consumer to hear and comprehend.

The required disclosures in the video portion of the advertisement must be of a size and shade, and must appear on the screen for a duration and in a location, sufficient for an ordinary consumer to read and comprehend. In a print advertisement, the required disclosures must be in a type size and location sufficient for an ordinary consumer to read and comprehend, in print that contrasts with the background against which it appears. Additionally, the required disclosures must be in understandable language and syntax. Further, nothing contrary to, inconsistent with, or in mitigation of the required disclosures shall be used in any advertisement.

Analysis to Aid Public Comment

The purpose of this analysis is to facilitate public comment on the proposed orders. It is not intended to constitute an official interpretation of the agreements and proposed orders or to modify in any way their terms.

Complaint

IN THE MATTER OF

**SIMMONS ROCKWELL FORD MERCURY, INC.,
ET AL.**

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATIONS OF
SEC. 5 OF THE FEDERAL TRADE COMMISSION ACT,
THE CONSUMER LEASING ACT, AND THE TRUTH IN LENDING ACT

*Docket C-3950; File No. 9923247
Complaint, June 6, 2000--Decision, June 6, 2000*

This consent order prohibits Respondent Simmons Rockwell Ford Mercury, Inc., in any lease advertisement, from making any reference to any charge that is part of the total amount due at lease signing or delivery or that no such charge is required, not including a statement of the periodic payment, unless the advertisement also states with "equal prominence" the total amount due at lease signing or delivery. The order also prohibits Respondent, in any lease, from stating the amount of any payment or that any or no initial payment is required at lease signing or delivery, unless the advertisement also states, clearly and conspicuously, all of the terms required by Regulation M, as amended and as follows: 1) that the transaction advertised is a lease; 2) the total amount due at lease signing or delivery; 3) whether or not a security deposit is required; 4) the number, amounts, and timing of scheduled payments; and 5) that an extra charge may be imposed at the end of the lease term in a lease in which the liability of the consumer at the end of the lease term is based on the anticipated residual value of the vehicle. The order further enjoins Respondent, in any credit advertisement, from stating the amount or percentage of any downpayment, the number of payments or period of repayment, the amount of any payment, or the amount of any finance charge, without disclosing, clearly and conspicuously, all of the terms required by Regulation Z, as follows: 1) the amount or percentage of the downpayment; 2) the terms of repayment; and 3) the annual percentage rate, using that term or the abbreviation "APR" or stating a rate of finance charge unless respondents state the rate as an "annual percentage rate" or the abbreviation "APR," using that term. All disclosure required in advertising must be made clearly and conspicuously in all forms of advertising in all forms of media.

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Participants

For the Commission: *Carole Reynolds, Michelle Chua, Jessica Rich, David Medine, and BE.*

For the Respondents: *Jeffrey M. Fetter, Scolaro, Schulman, Cohen, Lawler, & Burstein, P.C.*

COMPLAINT

The Federal Trade Commission, having reason to believe that Simmons Rockwell Ford Mercury, Inc., Simmons Rockwell Autoplaza, Inc., and Don Simmons, Inc., corporations, and Donald M. Simmons, II and Richard L. Rockwell, individually and as officers of the corporations, ("respondents") have violated the provisions of the Federal Trade Commission Act, 15 U.S.C. §§ 45-58, as amended, the Consumer Leasing Act, 15 U.S.C. §§ 1667-1667f, as amended, and its implementing Regulation M, 12 C.F.R. § 213, as amended, and the Truth in Lending Act, 15 U.S.C. §§ 1601-1667, as amended, and its implementing Regulation Z, 12 C.F.R. § 226, as amended, and it appearing to the Commission that this proceeding is in the public interest, alleges:

1. Respondent Simmons Rockwell Ford Mercury, Inc. is a New York corporation with its principal office or place of business at 105 Seneca Street, Hornell, New York 14843. Respondent offers automobiles for sale or lease to consumers.
2. Respondent Simmons Rockwell Autoplaza, Inc. is a New York corporation with its principal office or place of business at 784 County Route 64, Elmira, New York 14903. Respondent offers automobiles for sale or lease to consumers.
3. Respondent Don Simmons, Inc. is a Pennsylvania corporation with its principal office or place of business at 300 North Elmira Street, Sayre, Pennsylvania 18840, and 7327 Hammondsport Road, Bath, New York 14810. Respondent offers automobiles for

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sale or lease to consumers.

4. Respondent Donald M. Simmons, II is an officer of the corporate respondents. Individually or in concert with others, he formulates, directs, controls, and participates in the policies, acts, or practices of the corporations, including the acts or practices alleged in this complaint. His principal office or place of business is the same as that of the corporate respondents.

5. Respondent Richard L. Rockwell is an officer of the corporate respondents. Individually or in concert with others, he formulates, directs, controls, and participates in the policies, acts, or practices of the corporations, including the acts or practices alleged in this complaint. His principal office or place of business is the same as that of the corporate respondents.

6. Respondents have disseminated advertisements to the public that promote consumer leases, as the terms "advertisement" and "consumer lease" are defined in Section 213.2 of Regulation M, 12 C.F.R. § 213.2, as amended.

5. Respondents have disseminated advertisements to the public that promote credit sales and other extensions of closed-end credit in consumer credit transactions, as the terms "advertisement," "credit sale," and "consumer credit" are defined in Section 226.2 of Regulation Z, 12 C.F.R. § 226.2, as amended.

6. The acts and practices of respondents alleged in this complaint have been in or affecting commerce, as "commerce" is defined in Section 4 of the Federal Trade Commission Act, 15 U.S.C. § 44.

7. Respondents have disseminated or have caused to be disseminated consumer lease and/or credit advertisements ("lease and/or credit advertisements") for automobiles, including but not

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necessarily limited to the attached Simmons Rockwell Exhibits A and B. Simmons Rockwell Exhibit A is an electronic advertisement. Simmons Rockwell Exhibit B is a print advertisement. These lease and/or credit advertisements contain the following statements:

A.

[Simmons Rockwell Exhibit A states several lease offers, including:]

**'99 SUBARU LEGACY
OUTBACK WAGON AWD**

* * *

**You Pay or Lease For
\$22,399 \$289*/mo.**

[A fine print, illegible disclosure near the bottom of the advertisement states: "* 36 month lease . . . \$1,000 down payment, 1st month payment, security deposit, acquisition, tax, and license fees due at delivery . . .*"]

* * *

**"'99 FORD RANGER 4 DR.
EXT. CAB XLT 4X4 FLARESIDE**

**You pay or Lease for
\$19,999* . . . \$325*/mo."**

[A fine print, illegible disclosure near the bottom of the advertisement states: "*36 month lease, \$1,000 cash or trade equity, 1st mo. security dep., acquisition fee, tax and license due at delivery . . . "]

(Simmons Rockwell Exhibit A)

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B.

[Simmons Rockwell Exhibit B contains the following lease and credit offer:]

**"99 FORD RANGER 4 DR.
EXT. CAB XLT 4X4 FLARESIDE**

...

**2.9%
APR up to
48 mo.**

**YOU PAY OR LEASE FOR
\$18,999* \$209*/MO."**

[A fine print disclosure near the bottom of the advertisement states: "* 48 month lease, \$1,000 cash or trade equity, 1st mo. security dep., acquisition fee, tax and license due at delivery . . ."]

(Simmons Rockwell Exhibit B)

FEDERAL TRADE COMMISSION ACT VIOLATIONS

**COUNT I: Failure to Disclose, and/or Failure to
Disclose Adequately, Lease Terms**

10. In lease advertisements, including but not necessarily limited to Simmons Rockwell Exhibits A and B, respondents have represented, expressly or by implication, that consumers can lease the advertised vehicles at the terms prominently stated in the

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advertisements, including but not necessarily limited to the monthly payment amount.

11. These lease advertisements have failed to disclose, and/or failed to disclose adequately, additional terms pertaining to the lease offer, such as the total amount due at lease inception, including but not limited to whether third-party fees, such as taxes, licenses and registration fees, are required as part of the total amount due at lease inception. This information would be material to consumers in deciding whether to visit respondents' dealerships and/or whether to lease an automobile from respondents. The failure to disclose, and/or failure to disclose adequately, these additional terms, in light of the representation made, was, and is, a deceptive practice.

12. Respondents' practices constitute deceptive acts or practices in or affecting commerce in violation of Section 5(a) of the Federal Trade Commission Act, 15 U.S.C. § 45(a).

**CONSUMER LEASING ACT AND REGULATION M
VIOLATIONS**

**COUNT II: Failure to Disclose, and/or Failure to Disclose
Clearly and Conspicuously, Required Lease Information**

13. Respondents' lease advertisements, including but not necessarily limited to Simmons Rockwell Exhibits A and B, state the monthly payment amount, but fail to disclose, and/or fail to disclose clearly and conspicuously, certain additional terms required by the Consumer Leasing Act and Regulation M, as amended, including one or more of the following terms:

- a. that the transaction advertised is a lease;
- b. the total amount due prior to or at consummation, or by delivery, if delivery occurs after consummation. This total amount may: (1) exclude third-party fees that vary by state or locality, such as taxes, licenses and registration fees,

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and disclose that fact, or (2) provide a total that includes third-party fees based on a particular state or locality as long as that fact and the fact that such fees may vary by state or locality are disclosed;

- c. whether or not a security deposit is required;
- d. the number, amounts, and timing of scheduled payments; and
- e. that an extra charge may be imposed at the end of the lease term in a lease where the liability of the consumer is based on the difference between the residual value of the leased property and its realized value at the end of the lease term.

14. The lease disclosures required by Regulation M, if provided, are not clear and conspicuous because they appear in fine print and/or are illegible.

15. Respondents' practices have violated Section 184 of the Consumer Leasing Act, 15 U.S.C. § 1667c, and Section 213.7 of Regulation M, 12 C.F.R. § 213.7, as amended.

TRUTH IN LENDING ACT AND REGULATION Z VIOLATIONS

COUNT III: Failure to Disclose, and/or Failure to Disclose Clearly and Conspicuously, Required Credit Information

16. In credit advertisements, including but not necessarily limited to Simmons Rockwell Exhibit B, respondents have stated the number of payments required to finance the transaction and an annual percentage rate (expressed as an "APR"), but have failed to disclose, and/or have failed to disclose clearly and conspicuously, certain additional terms required by the Truth in Lending Act and

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Regulation Z, including the amount of the downpayment and the full terms of repayment, such as the amount of the monthly payment.

17. The credit disclosures required by Regulation Z, if provided, are not clear and conspicuous because they appear in blurred print.

18. Respondents' practices have violated Section 144 of the TILA, 15 U.S.C. §§ 1664, and Section 226.24(c) of Regulation Z, 12 C.F.R. §§ 226.24(c), as amended.

THEREFORE, the Federal Trade Commission this sixth day of June, 2000, has issued this complaint against Respondents.

By the Commission.

DECISION AND ORDER

The Federal Trade Commission having initiated an investigation of certain acts and practices of the respondents named in the caption hereof, and the respondents having been furnished thereafter with a copy of a draft complaint that the Bureau of Consumer Protection proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge the respondents with violation of the Consumer Leasing Act, 15 U.S.C. § 1667 et seq., and its implementing Regulation M, 12 C.F.R. § 213, the Truth in Lending Act, 15 U.S.C. § 1601 et seq., and its implementing Regulation Z, 12 C.F.R. § 226, and the Federal Trade Commission Act, 15 U.S.C. § 45 et seq.; and

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

The Commission having thereafter considered the matter and having determined that it has reason to believe that the respondents have violated the said Acts and Regulations, 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 thirty (30) days, now in further conformity with the procedure described in § 2.34 of its Rules, the Commission hereby issues its complaint, makes the following jurisdiction findings and enters the following order:

1. Respondent Simmons Rockwell Ford Mercury, Inc. is a New York corporation with its principal office or place of business at 105 Seneca Street, Hornell, New York 14843.
2. Respondent Simmons Rockwell Autoplaza, Inc. is a New York corporation with its principal office or place of business at 784 County Route 64, Elmira, New York 14903.
3. Respondent Don Simmons, Inc. is a Pennsylvania corporation with its principal office or place of business at 300 North Elmira Street, Sayre, Pennsylvania 18840 and 7327 Hammondsport Road, Bath, New York 14810.

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4. Respondent Donald M. Simmons, II is an officer of the corporate respondents. Individually or in concert with others, he formulates, directs, or controls the policies, acts, or practices of the corporations. His principal office or place of business is the same as those of the corporate respondents.
5. Respondent Richard L. Rockwell is an officer of the corporate respondents. Individually or in concert with others, he formulates, directs, or controls the policies, acts, or practices of the corporations. His principal office or place of business is the same as those of the corporate respondents.
6. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondents, and the proceeding is in the public interest.

ORDER**DEFINITIONS**

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

1. "Clearly and conspicuously" shall mean as follows:
 - a. In a television, video, radio, or Internet or other electronic advertisement, an audio disclosure shall be delivered in a volume, cadence, and location sufficient for an ordinary consumer to hear and comprehend it. A video disclosure shall be of a size and shade, and shall appear on the screen for a duration and in a location, sufficient for an ordinary consumer to read and comprehend it.
 - b. In a print advertisement, a disclosure shall be in a type size and location sufficient for an ordinary consumer to read and comprehend it, in print that contrasts with the background against which it appears.

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The disclosure shall be in understandable language and syntax. Nothing contrary to, inconsistent with, or in mitigation of the disclosure shall be used in any advertisement.

2. "Equal prominence" shall mean as follows:
 - a. In a television, video, radio, or Internet or other electronic advertisement, a video disclosure shall be presented in the same or similar format, including but not necessarily limited to type size, shade, contrast, duration, and placement. An audio disclosure shall be delivered in the same or similar manner, including but not necessarily limited to volume, cadence, pace, and placement.
 - b. In a print advertisement, a disclosure shall be presented in the same or similar format, including but not necessarily limited to type size, shade, contrast, and placement.

Nothing contrary to, inconsistent with, or in mitigation of the disclosure shall be used in any advertisement.

3. "Total amount due at lease signing or delivery" as used herein shall mean the total amount of any initial payments required to be paid by the lessee on or before consummation of the lease or delivery of the vehicle, whichever is later, as required by Regulation M, 12 C.F.R. § 213, as amended. The total amount due at lease signing or delivery may (1) exclude third-party fees, such as taxes, licenses, and registration fees, and disclose that fact, or (2) provide a total that includes third-party fees based on a particular state or locality, as long as that fact and the fact that such fees may vary by state or locality are disclosed. (Section 213.7 of Regulation M, 12 C.F.R. § 213.7, as amended.)

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4. "Commerce" shall mean as defined in Section 4 of the Federal Trade Commission Act, 15 U.S.C. § 44.
5. Unless otherwise specified, "respondents" shall mean Simmons Rockwell Ford Mercury, Inc., Simmons Rockwell Autoplaza, Inc., and Don Simmons, Inc., corporations, their successors and assigns and their officers; Donald M. Simmons, II, and Richard L. Rockwell, individually and as officers of the corporations; and each of the above's agents, representatives, and employees.

I.

IT IS ORDERED that respondents, directly or through any corporation, subsidiary, division, or any other device, in connection with any advertisement to promote, directly or indirectly, any consumer lease in or affecting commerce, as "advertisement" and "consumer lease" are defined in Section 213.2 of Regulation M, 12 C.F.R. § 213.2, as amended, shall not, in any manner, expressly or by implication:

- A. Misrepresent, in any manner, directly or by implication, the costs or terms of leasing a vehicle, including but not limited to the total amount due at lease signing or delivery.
- B. Make any reference to any charge that is part of the total amount due at lease signing or delivery or that no such charge is required, not including a statement of the periodic payment, unless the advertisement also states with equal prominence the total amount due at lease signing or delivery.
- C. State the amount of any payment or that any or no initial payment is required at lease signing or delivery, if delivery occurs after consummation, without disclosing clearly and conspicuously all of the terms required by Regulation M, as amended, as follows:
 1. that the transaction advertised is a lease;

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2. the total amount due at lease signing or delivery;
3. whether or not a security deposit is required;
4. the number, amounts, and timing of scheduled payments;
and
5. that an extra charge may be imposed at the end of the lease term in a lease in which the liability of the consumer at the end of the lease term is based on the anticipated residual value of the vehicle.

(Section 184(a) of the Consumer Leasing Act ("CLA"), 15 U.S.C. § 1667c(a), as amended, and Section 213.7 of Regulation M, 12 C.F.R. § 213.7, as amended.)

For radio advertisements, respondents may also comply with the requirements of this subparagraph by utilizing Section 184(c) of the CLA, 15 U.S.C. § 1667c(C), and Section 213.7(f) of Regulation M, 12 C.F.R. § 213.7(f), as amended. For television advertisements, respondents may also comply with the requirements of this subparagraph by utilizing Section 213.7(f) of Regulation M, as amended.

- B. Fail to comply in any other respect with Regulation M, 12 C.F.R. § 213, as amended, and the CLA, 15 U.S.C. §§ 1667-1667f, as amended.

II.

IT IS FURTHER ORDERED that respondents, directly or through any corporation, subsidiary, division, or any other device, in connection with any advertisement to promote, directly or indirectly, any extension of consumer credit in or affecting

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commerce, as "advertisement" and "consumer credit" are defined in Section 226.2 of Regulation Z, 12 C.F.R.

§ 226.2, as amended, shall not, in any manner, expressly or by implication:

- A. State the amount or percentage of any downpayment, the number of payments or period of repayment, the amount of any payment, or the amount of any finance charge, without disclosing clearly and conspicuously all of the terms required by Regulation Z, as follows:
1. the amount or percentage of the downpayment;
 2. the terms of repayment; and
 3. the annual percentage rate, using that term or the abbreviation "APR." If the annual percentage rate may be increased after consummation of the credit transaction, that fact must also be disclosed.

(Section 144(d) of the TILA, 15 U.S.C. §1664(d), as amended, and Section 226.24(c) of Regulation Z, 12 C.F.R. § 226.24(c), as amended.)

- B. State a rate of finance charge without stating the rate as an "annual percentage rate" or the abbreviation "APR," using that term.

(Section 144(c) of the TILA, 15 U.S.C. § 1664(c), as amended, and Section 226.24(b) of Regulation Z, 12 C.F.R. § 226.24(b), as amended.)

- C. Fail to comply in any other respect with Regulation Z, 12 C.F.R. § 226, as amended, and the TILA, 15 U.S.C. §§ 1601-1667, as amended.

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III.

IT IS FURTHER ORDERED that respondents Simmons Rockwell Ford Mercury, Inc., Simmons Rockwell Autoplaza, Inc., and Don Simmons, Inc., and each of their successors and assigns, and respondents Donald M. Simmons, II and Richard L. Rockwell, 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 all records that will demonstrate compliance with the requirements of this order.

IV.

IT IS FURTHER ORDERED that respondents Simmons Rockwell Ford Mercury, Inc., Simmons Rockwell Autoplaza, Inc., and Don Simmons, Inc., and each of their successors and assigns, and respondents Donald M. Simmons, II and Richard L. Rockwell, shall deliver a copy of this order to all current and future principals, officers, directors, and managers, and to all current and future employees, agents, and representatives having responsibilities with respect to the subject matter of this order, and shall secure from each such person a signed and dated statement acknowledging receipt of the order. Respondents shall deliver this order to such current personnel within thirty (30) days after the date of service of this order, and to such future personnel within thirty (30) days after the person assumes such position or responsibilities.

V.

IT IS FURTHER ORDERED that respondents Simmons Rockwell Ford Mercury, Inc., Simmons Rockwell Autoplaza, Inc., and Don Simmons, Inc., and each of their successors and assigns, shall notify the Commission at least thirty (30) days prior

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to any change in the corporations that may affect compliance obligations arising under this order, including but not necessarily limited to a dissolution, assignment, sale, merger, or other action that would result in the emergence of a successor corporation; the creation or dissolution of a subsidiary, parent, or affiliate that engages in any acts or practices subject to this order; the proposed filing of a bankruptcy petition; or a change in the corporate name or address. Provided, however, that, with respect to any proposed change in the corporation about which respondents learn less than thirty (30) days prior to the date such action is to take place, respondents shall notify the Commission as soon as is practicable after obtaining such knowledge. All notices required by this Part shall be sent by certified mail to the Associate Director, Division of Enforcement, Bureau of Consumer Protection, Federal Trade Commission, Washington, D.C. 20580.

VI.

IT IS FURTHER ORDERED that respondents Donald M. Simmons, II and Richard L. Rockwell, for a period of ten (10) years after the date of issuance of this order, shall notify the Commission of the discontinuance of each of their current business or employment, or of their affiliation with any new business or employment involving the advertising and/or extension of a "consumer lease," as that term is defined in the CLA and its implementing Regulation M, as amended, or the advertising and/or extension of "consumer credit," as that term is defined in the TILA and its implementing Regulation Z. The notice shall include respondents' new business address and telephone number and a description of the nature of the business or employment and each of their duties and responsibilities. All notices required by this Part shall be sent by certified mail to the Associate Director, Division of Enforcement, Bureau of Consumer Protection, Federal Trade Commission, Washington, D.C. 20580.

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VII.

IT IS FURTHER ORDERED that respondents Simmons Rockwell Ford Mercury, Inc., Simmons Rockwell Autoplaza, Inc., and Don Simmons, Inc., and each of their successors and assigns, and respondents Donald M. Simmons, II and Richard L. Rockwell, shall, within sixty (60) days after the date of service of this order, and at such other times as the Federal Trade Commission may require, file with the Commission a report, in writing, setting forth in detail the manner and form in which they have complied with this order.

VIII.

This order will terminate on June 6, 2020, 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 respondents 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

Analysis to Aid Public Comment

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.

By the Commission.

Analysis of Proposed Consent Orders to Aid Public Comment

Summary: The Federal Trade Commission has accepted separate agreements, subject to final approval, to proposed consent orders from respondents: 1) R.N. Motors, Inc., Red Noland Cadillac, Inc., and Nelson B. Noland ("Red Noland"); and 2) Simmons Rockwell Ford Mercury, Inc., Simmons Rockwell Autoplaza, Inc., Don Simmons, Inc., and Donald M. Simmons, II and Richard L. Rockwell ("Simmons Rockwell"). The persons named in these actions are named individually and as officers of their respective corporations.

The proposed consent orders have been placed on the public record for thirty (30) days for receipt of comments by interested persons. Comments received during this period will become part of the public record. After thirty (30) days, the Commission will again review the agreements and the comments received and will decide whether it should withdraw from the agreements or make final the agreements' proposed orders.

The Red Noland and Simmons Rockwell complaints allege that these respondents disseminated automobile lease advertisements that violate the Federal Trade Commission Act ("FTC Act"), the Consumer Leasing Act ("CLA"), and Regulation M. The Simmons Rockwell complaint also alleges that it disseminated automobile credit advertisements that violate the Truth in Lending Act ("TILA") and Regulation Z.

Analysis to Aid Public Comment

Section 5 of the FTC Act prohibits false, misleading, or deceptive representations or omissions of material information in advertisements. In addition, Congress established statutory disclosure requirements for lease and credit advertising under the CLA and the TILA, respectively, and directed the Federal Reserve Board to promulgate regulations implementing such statutes -- Regulations M and Z respectively. See 15 U.S.C. §1667 et seq; 15 U.S.C. § 1601 et seq; 12 C.F.R. § 213; 12 C.F.R. § 226.

I. The Complaints

A. FTC Act Violations

The Red Noland complaint alleges that, based on the terms prominently stated in their lease advertisements, including but not necessarily limited to the monthly payment amount, the downpayment, and the security deposit, respondent failed to disclose, and failed to disclose adequately, additional terms pertaining to the lease offer, such as the total amount due at lease inception, including but not limited to whether third-party fees such as taxes, licenses, and registration fees are required as part of the total amount due at lease inception. The Simmons Rockwell complaint alleges that, based on the terms prominently stated in their lease advertisements, including but not necessarily limited to the monthly payment amount, respondent failed to disclose, and/or failed to disclose adequately, additional terms pertaining to the lease offer, such as the total amount due at lease inception, including but not limited to whether third-party fees, such as taxes, licenses, and registration fees, are required as part of the total amount due at lease inception. The Red Noland and Simmons Rockwell complaints allege that the required information does not appear at all or appears in fine print and/or is illegible in the advertisements and that this information would be material to consumers in deciding whether to visit respondents' dealerships and/or whether to lease an automobile from

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respondents. These practices, according to both complaints, constitute deceptive acts or practices in violation of Section 5(a) of the FTC Act.

B. CLA and Regulation M Violations

The Red Noland and Simmons Rockwell complaints also allege that respondents' lease advertisements have violated the CLA and Regulation M. The Red Noland complaint alleges that respondent's ads state the monthly payment amount, the downpayment, and the security deposit; the Simmons Rockwell complaint alleges that respondent's ads state the monthly payment amount -- all "triggering" terms under these laws. The Red Noland and Simmons Rockwell complaints allege that respondents failed to disclose, and/or fail to disclose clearly and conspicuously, certain additional "triggered" terms, as applicable and as follows: the total amount due prior to or at consummation, or by delivery, if delivery occurs after consummation, and that such amount: 1) excludes third-party fees, such as taxes, licenses and registration fees; and discloses that fact; or 2) includes third-party fees based on a particular state or locality and discloses that fact and the fact that such fees may vary by state or locality; whether or not a security deposit is required; and the number, amounts, and timing of scheduled payments.

According to the complaints, Red Noland's lease disclosures are omitted altogether and are not clear and conspicuous. Simmons Rockwell's lease disclosures, if provided, are not clear and conspicuous because they appear in fine print and/or are illegible.

The Red Noland and Simmons Rockwell complaints, therefore, allege that these practices violate Section 184 of the CLA, 15 U.S.C. § 1667c, as amended, and Section 213.7 of Regulation M, 12 C.F.R. § 213.7, as amended.

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In addition, the Red Noland complaint alleges that respondent's lease advertisements state specific lease rates for each of certain advertised vehicles, but fail to disclose, and fail to disclose clearly and conspicuously, the following notice concerning lease rates required by Regulation M: "This percentage may not measure the overall cost of financing this lease."

The Red Noland complaint, therefore, alleges that this practice violates Section 213.4(s) of Regulation M, 12 C.F.R. § 213.4(s).

C. TILA and Regulation Z Violations

The Simmons Rockwell complaint alleges that respondent's credit advertisements have violated the TILA and Regulation Z. It alleges that respondent's credit ads state the number of payments required to finance the transaction and an annual percentage rate (expressed as an "APR"), but failed to disclose, and/or failed to disclose clearly and conspicuously, certain additional terms required by Regulation Z, including the amount of the downpayment and the full terms of repayment, such as the amount of the monthly payment.

According to the complaint, Simmons Rockwell's credit disclosures, if provided, are not clear and conspicuous because they appear in blurred print.

The Simmons Rockwell complaint, therefore, alleges that these practices violate Section 144 of the TILA, 15 U.S.C. § 1664, as amended, and Section 226.24(c) of Regulation Z, 12 C.F.R. § 226.24(c), as amended.

Analysis to Aid Public Comment

II. Proposed Consent Orders

The Red Noland and Simmons Rockwell proposed consent orders contain provisions designed to remedy the violations charged and to prevent the respondents from engaging in similar acts and practices in the future. Specifically, Paragraph I.A. of the Red Noland and Simmons Rockwell proposed orders prohibit respondents, in any lease advertisement, from misrepresenting, in any manner, directly or by implication, the costs or terms of leasing a vehicle, including but not limited to the total amount due at lease signing or delivery.

Paragraph I.B. of the Red Noland and Simmons Rockwell proposed orders prohibit respondents, in any lease advertisement, from making any reference to any charge that is part of the total amount due at lease signing or delivery or that no such charge is required, not including a statement of the periodic payment, unless the advertisement also states with "equal prominence" the total amount due at lease signing or delivery. The "prominence" requirement prohibits respondents from running deceptive advertisements that highlight low amounts due at lease inception with inadequate disclosure of the actual total lease inception fees. This "prominence" requirement for lease inception fees is also found in Regulation M.

Paragraph I.C. of the Red Noland and Simmons Rockwell proposed orders prohibit respondents, in any lease, from stating the amount of any payment or that any or no initial payment is required at lease signing or delivery, unless the advertisement also states, clearly and conspicuously, all of the terms required by Regulation M, as amended and as follows: 1) that the transaction advertised is a lease; 2) the total amount due at lease signing or delivery; 3) whether or not a security deposit is required; 4) the number, amounts, and timing of scheduled payments; and 5) that an extra charge may be imposed at the end of the lease term in a lease in which the liability of the consumer at the end of the lease term is based on the anticipated residual value of the vehicle.

Analysis to Aid Public Comment

Furthermore, Paragraph I.D. of the Red Noland proposed order prohibits this respondent from stating a percentage rate in an advertisement or in documents evidencing the lease transaction, unless respondent also states the notice required by Regulation M that "this percentage may not measure the overall cost of financing this lease."

Paragraph I.D. of the Simmons Rockwell proposed order, and paragraph I.E. of the Red Noland proposed order, prohibit respondents from engaging in any other violation of Regulation M, as amended.

In addition, Paragraph II. A. of the Simmons Rockwell proposed order enjoins respondent, in any credit advertisement, from stating the amount or percentage of any downpayment, the number of payments or period of repayment, the amount of any payment, or the amount of any finance charge, without disclosing, clearly and conspicuously, all of the terms required by Regulation Z, as follows: 1) the amount or percentage of the downpayment; 2) the terms of repayment; and 3) the annual percentage rate, using that term or the abbreviation "APR." If the annual percentage rate may be increased after consummation of the credit transaction, that fact must also be disclosed. Paragraph II.B. of this proposed order also prohibits Simmons Rockwell from stating a rate of finance charge unless respondents state the rate as an "annual percentage rate" or the abbreviation "APR," using that term. Paragraph III.C. of this proposed order also enjoins Simmons Rockwell from engaging in any other violation of Regulation Z, as amended.

The information required by Paragraph I of the Red Noland proposed order (lease advertisements), and Paragraphs I and II of the Simmons Rockwell proposed order (lease and credit advertisements), must be disclosed "clearly and conspicuously." Both proposed orders define the term "clearly and conspicuously"

Analysis to Aid Public Comment

for Red Noland's and Simmons Rockwell's advertisements in all media. In a television, video, radio or Internet or other electronic advertisement, the required disclosures made in the audio portion of the advertisement must be delivered in a volume, cadence, and location sufficient for an ordinary consumer to hear and comprehend. The required disclosures in the video portion of the advertisement must be of a size and shade, and must appear on the screen for a duration and in a location, sufficient for an ordinary consumer to read and comprehend. In a print advertisement, the required disclosures must be in a type size and location sufficient for an ordinary consumer to read and comprehend, in print that contrasts with the background against which it appears. Additionally, the required disclosures must be in understandable language and syntax. Further, nothing contrary to, inconsistent with, or in mitigation of the required disclosures shall be used in any advertisement.

The purpose of this analysis is to facilitate public comment on the proposed orders. It is not intended to constitute an official interpretation of the agreements and proposed orders or to modify in any way their terms.

Complaint

IN THE MATTER OF

MICHAEL G. CHRISMAN, ET AL.CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATIONS OF
SEC. 5 OF THE FEDERAL TRADE COMMISSION ACT

*Docket C-3951; File No. 0023113
Complaint, June 7, 2000--Decision, June 7, 2000*

This consent order requires Respondents Michael G. Chrisman and Michelle R. Chrisman individually and doing business as DayTrading International to have a reasonable basis substantiating any representation about the percentage, ratio, or number of trades that a user of any trading program could reasonably expect to be profitable; the amount of earnings, income, or profit that a user of any trading program could reasonably expect to attain; the rate of return that a user of any trading program could reasonably expect to attain or the length of time over which such a rate of return could reasonably be expected; or the past performance of a trading program, or claims about any financial benefit or other benefit from any trading program. The order also prohibits Respondents from misrepresenting that since January 1996, respondents' "Daily Picks Newsletter" program has returned an average of 167 percent annually or that during 1996 and 1997, respondents' "Hot Small Caps Newsletter" program returned an average annual return of 214 percent, or that users of any trading program can reasonably expect to trade with little or no financial risk and from misrepresenting the extent of risk to which users of any such program are exposed. In addition, the order requires Respondent to disclose, clearly and conspicuously, "DAY TRADING involves high risks and YOU can LOSE a lot of money," in close proximity to any representation he makes about the financial benefits of any trading program.

Participants

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

For the Respondents: *Lora A. Brzezynski, McKenna & Cuneo, L.L.P.*

Complaint

COMPLAINT

The Federal Trade Commission, having reason to believe that Michael G. Chrisman and Michelle R. Chrisman ("respondents"), individually and doing business as DayTrading International, have violated the provisions of the Federal Trade Commission Act, and it appearing to the Commission that this proceeding is in the public interest, alleges:

1. Respondents Michael G. Chrisman and Michelle R. Chrisman are the co-owners of DayTrading International, a Missouri company with its principal office or place of business at 113 West Porter Street, Kirksville, MO 63501. Individually or in concert with others, they formulate, direct, or control the policies, acts, or practices of the company, including the acts or practices alleged in this complaint. Their address is the same as that of the company.
2. Respondents have advertised, offered for sale, sold, and distributed products or services to the public, including recommendations for trading stock. Respondents sell these products or services through their Internet Web site, <www.daytradingintl.com>. Stock trading products or services sold by respondents include the "Live Interactive Trading Room," the "Daily Picks Newsletter," and the "Hot Small Caps Newsletter." The "Live Interactive Trading Room" is an Internet chat room where respondents provide "live" day trading advice during the day on when to buy and sell stocks. The "Daily Picks Newsletter," and the "Hot Small Caps Newsletter" are in the form of e-mails delivered once per day which contain advice for stock trading.
3. The acts and practices of respondents alleged in this complaint have been in or affecting commerce, as "commerce" is defined in Section 4 of the Federal Trade Commission Act.

Complaint

4. Respondents have disseminated or have caused to be disseminated advertisements for their trading programs, including but not necessarily limited to the attached Exhibits A and B. These advertisements contain the following statements:

- A. "Our daily and intra-day stock picks produce substantial profits within very short periods of time. *Imagine the advantages you will have, trading with professionals that make their entire livelihood from the equity markets. Sign up now! View our services for more information and prices.*" (emphasis in original).

(Exhibit A, The home page of respondent's Web site, <www.daytradingintl.com>).

B. "Live Interactive Trading Room"

The Trading Room provides live intra-day plays to our members. These trades produce fractional gains in a very short period of time. If you are looking to make 1/4's, 3/8's, 1/2's, or even points, perhaps on several occasions though out [sic] the day, then this is where you should be. These calls are made by our traders that have over 18 years of trading experience and are profitable more than 85% of the time when managed correctly. This forum allows us to alert all of our members instantaneously of breaking news stocks [sic] on the verge of exploding upwards.

. . . In order to take full advantage of this service, you should have sufficient capital to buy between 500 and 1000 shares or more, have access to real time quotes as well as a good broker with fast execution. This style of trading can be most profitable of all, because 1/4 point on

Complaint

2000 shares is \$500. Two or three of those each day, adds up pretty nicely.

The Trading Room will provide you with plenty of those 3, 4, and 5 point winners you always dream about. Just one decent trade pays for this service for an entire year. We do all the research for our own trading, sharing it with our members in real time helps everyone involved.”

(Exhibit B, Page of respondents’ Web site devoted to their services <www.daytradingintl.com/SignUp/Services>).

C. “The Daily Picks Newsletter

. . . . These plays are short-term which are usually held only 1 to 5 days to produce gains of between 2% and 10% per trade. This compounds very rapidly. Since inception in January 1996, this service has returned an average of 167% annually. This strategy is . . . the perfect opportunity for the individual trader.”

(Exhibit B, Page of respondents’ Web site devoted to their services <www.daytradingintl.com/SignUp/Services>).

D. “Hot Small Caps Newsletter

. . . . This has become our fastest growing service, as well as our best performer. During 1996 and 1997 the small cap recommendations returned an average annual return of 214%. As you can see, small caps stocks, or should I say, the RIGHT small cap stocks can score remarkable gains.”

(Exhibit B, Page of respondents’ Web site devoted to their services <www.daytradingintl.com/SignUp/Services>).

5. Through the means described in Paragraph 4, respondents have represented, expressly or by implication, that:

Complaint

- A. Users of respondents' trading programs can reasonably expect to trade stocks profitably with little or no risk.
 - B. Since January 1996, respondents' "Daily Picks Newsletter" program has returned an average of 167 percent annually.
 - C. During 1996 and 1997, respondents' "Hot Small Caps Newsletter" program returned an average annual return of 214 percent.
6. In truth and in fact:
- A. Users of respondents' trading programs cannot reasonably expect to trade stocks profitably with little or no risk.
 - B. Since January 1996, respondents' "Daily Picks Newsletter" program has not returned an average of 167 percent annually. Respondents did not begin to offer the "Daily Picks Newsletter" until 1998.
 - C. During 1996 and 1997, respondents' "Hot Small Caps Newsletter" program did not return an average annual return of 214 percent. Respondents did not begin to offer the "Hot Small Caps Newsletter" program until 1998.

Therefore, the representations set forth in Paragraph 5 were, and are, false or misleading.

7. Through the means described in Paragraph 4, respondents have represented, expressly or by implication, that:
- A. Users of respondents' "Live Interactive Trading Room" program can reasonably expect to achieve profits on their trades more than 85 percent of the time.

Complaint

B. Users of respondents' "Live Interactive Trading Room" program can reasonably expect to achieve substantial profits on a consistent basis (e.g., \$500 per trade, two or three times each day).

C. Users of respondents' "Daily Picks Newsletter" program can reasonably expect to make short term trades, held one to five days, that achieve a rate of return of between two percent and ten percent per trade.

8. Through the means described in Paragraph 4, respondents have represented, expressly or by implication, that they possessed and relied upon a reasonable basis that substantiated the representations set forth in Paragraph 7, at the time the representations were made.

9. In truth and in fact, respondents did not possess and rely upon a reasonable basis that substantiated the representations set forth in Paragraph 7, at the time the representations were made. Therefore, the representation set forth in Paragraph 8 was, and is, false or misleading.

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

THEREFORE, the Federal Trade Commission this seventh day of June, 2000, has issued this complaint against respondents.

By the Commission.

Complaint Exhibits

Complaint Exhibits

... WE CAN HELP YOU AS A SHORT-TERM TRADER:

Services

- Trading Hours/Access
- Chart Pack
- Trading System
- Custom Start Page
- IP Center
- Stock Alerts
- Upgrade/Downgrade

Welcome to the fastest growing trading site on the web today. We specialize in the short-term trading of equities that are listed on the NYSE, AMEX and Nasdaq.

FREE!

- Earnings Calendar
- Stock Screener
- Global Market
- Portfolio Tracker

We offer a **2-week Free Trial** on all our services so you can see for yourself how profitable short-term trading can be. As a member you will be alerted to stocks exploding to the upside in real-time allowing you to jump aboard for a profit instead of just reading about it in the newspapers the next day.

Real Time

- Real Time
- Trading Resources
- Trading Tools
- Real Performance
- 1999 History Available

Our daily and intra-day stock recommendations produce substantial profits within very short periods. *Imagine the advantages you will have, trading with professionals that make their entire livelihood from the equity markets.* Sign up now! View our [services](#) for more information and prices.

Support

- FAQ
- Contact Us
- Suggestion Box
- Update Info
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New! Spread the news and win a FREE month's membership!



New! Members can now customize a start page to their preferences.

(888) 790-4800



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Exhibit A

Complaint Exhibits

Services

wysiwyg://21:http://www.daytradingintl.com/SignUp/Services_services.htm

MASTERS INSTITUTE

Sign Up
 2-Week Free Trial
 24/7 Support
 Sample Newsletter
 Services

Services
 Trading Room Access
 Evening News
 Expert News
 Futures Board
 Market Chat Page
 100+ Members
 Stock Alerts
 Updated During the Day

FREE!
 2-Week Free Trial
 24/7 Support
 Sample Newsletter
 Services

Book Here
 Online Registration
 24/7 Support
 100+ Members
 1999 Model Portfolio

Support
 24/7 Support
 Sample Newsletter
 Services

We are committed to helping you be successful while trading securities. Our past performance demonstrates the success we've had. Read about our services to learn what we can offer you.

The Trading Room provides live intra-day plays to our members. These trades produce fractional gains in a very short period of time. If you are looking to make 1/4's, 3/8's, 1/2's, or even points, perhaps on several occasions through out the day, then this is where you should be. These calls are made by our traders that have over 18 years of trading experience and are profitable more than 85% of the time when managed correctly. This forum allows us to alert all of our members instantaneously of breaking news stocks on the verge of exploding upwards.

The Trading Room is an interactive forum where all members are welcome to participate and interact with other members as long as we conduct ourselves in a professional manner. Please keep in mind that the Trading Room is very fast paced, and more suitable for the active trader. In order to take full advantage of this service, you should have sufficient capital to buy between 500 and 1000 shares or more, have access to real time quotes as well as a good broker with fast execution. This style of trading can be the most profitable of all, because 1/4 point on 2000 shares is \$500. Two or three of those each day, adds up pretty nicely.

The Trading Room will provide you with plenty of those 3, 4, and 5 point winners you always dream about. Just one decent trade pays for this service for an entire year. We do all the research daily for our own trading, sharing it with our members in real time helps everyone involved. We offer a full 2-week FREE Trial, click here to register and activate your trial membership. [Order Now!](#)

Our Daily Picks newsletter provides members with a listing of securities that have triggered one or more of our indicators during our nightly scan of the entire equity market. These securities are then analyzed until we narrow them down to our 1 or 2 prime picks. Other services swamp you with as many as 20 recommendations everyday, this makes it hard to the trader with limited capital. We at Day Trading International feel that quality picks are better than quantity and so do our subscribers.

These recommendations are then e-mailed directly to each member prior to the market open. This gives members the opportunity to take action during pre-market hours using selectnet or instinet. Along with the recommendations come entry, exit, average, stop, as well as target prices for each security. Our picks are then added to our model portfolio that tracks each recommendation we make. This is also e-mailed each day which allows everyone to track our performance and how we handle the day to day happenings in the market.

These plays are short-term which are usually held only 1 to 5 days to produce gains of between 2% and 10% per trade. Since inception in January 1996, this service has returned an average of 167% annually. This strategy is sometimes referred to as "swing trading" and is the perfect opportunity for the individual trader. Don't forget to register and receive

Complaint Exhibits

Services

wystwyg: 21 http://www.daytradingintl.com/SignUp/Services/Services.htm

your [2-week FREE Trial](#), and view our [sample newsletter](#). **Order Now!**

This daily newsletter deals strictly with equities in the \$5 - \$15 range, that have explosive upside potential. Every night we scan the securities in this price range. The stocks that trigger two or more of our indicators are then run through our analytical program to determine our buy recommendations. You will receive between 1 and 3 calls per day, you won't be flooded with them.

These will then be compiled into our daily newsletter which is e-mailed to each member prior to the market open. Along with these recommendations come entry, exit, average, stop as well as target prices. Please keep in mind, we do NOT play penny stocks, nor do we have a desire to. None of these small cap recommendations will be below \$5. These stocks are then added to our model portfolio which is also contained in the daily newsletter. This way we can all see what and how well we are doing.

This has become our fastest growing service as well as our best performer. During 1996 and 1997 the small cap recommendations returned an average annual return of 214%. As you can see, small cap stocks, or should I say, the RIGHT small cap stocks can score remarkable gains. We offer you a full [2-week FREE Trial](#), and view our [sample newsletter](#). **Order Now!**

-
- **Premium Service \$189.00- Includes Trading Room and Both Newsletters**
 - **Trading Room *plus* Daily Picks \$169.00**
 - **Daily Picks and Small Caps Newsletters Only \$139.00**
 - **Daily Picks Newsletter \$79.00**
 - **Small Caps Newsletter \$79.00**
 - **Order Now!**

Our guarantee is to provide you with the best service possible. If you are experiencing a problem with your account at anytime, simply contact us and we'll correct it as soon as possible. If you wish to discontinue your membership, simply e-mail us before the end of the month, and your account will be canceled at the end of the current billing cycle. Service is month-to-month, partial refunds are not given unless service is interrupted due to prolonged equipment failure.

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All Rights Reserved. Please view our [Disclaimer](#).

Site design by
Design

Exhibit B

Decision and Order

DECISION AND ORDER

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

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

The Commission having thereafter considered the matter and having determined that it had reason to believe that respondents have violated the said Act, and that complaint should issue stating its charges in that respect, and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of thirty (30) days, now in further conformity with the procedure prescribed in § 2.34 of its Rules, the Commission hereby issues its complaint, makes the following jurisdictional findings and enters the following order:

1. Respondents Michael G. Chrisman and Michelle R. Chrisman are the co-owners of DayTrading International, a Missouri company with its principal office or place of business at 113 West Porter Street, Kirksville, MO 63501. Individually or in concert with others, they formulate, direct, or control the policies,

Decision and Order

acts, or practices of the company. Their address is the same as that of the company.

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. "Clearly and conspicuously" shall mean as follows:
 - A. In an advertisement communicated through an electronic medium (such as television, video, radio, and interactive media such as the Internet and online services), the disclosure shall be presented simultaneously in both the audio and visual portions of the advertisement. *Provided, however,* that in any advertisement presented solely through visual or audio means, the disclosure may be made through the same means in which the ad is presented. The audio disclosure shall be delivered in a volume and cadence sufficient for an ordinary consumer to hear and comprehend it. The visual disclosure shall be of a size and shade, and shall appear on the screen for a duration, sufficient for an ordinary consumer to read and comprehend it. In addition to the foregoing, in interactive media, the disclosure shall also be unavoidable and shall be presented prior to the consumer incurring any financial obligation.

Decision and Order

- B. In a print advertisement, promotional material, or instructional manual, the disclosure shall be in a type size and location sufficiently noticeable for an ordinary consumer to read and comprehend it, in print that contrasts with the background against which it appears.
- C. On a product label, the disclosure shall be in a type size and location on the principal display panel sufficiently noticeable for an ordinary consumer to read and comprehend it, in print that contrasts with the background against which it appears.

The disclosure shall be in understandable language and syntax. Nothing contrary to, inconsistent with, or in mitigation of the disclosure shall be used in any advertisement or on any label.

- 2. "Commerce" shall mean as defined in Section 4 of the Federal Trade Commission Act, 15 U.S.C. § 44.
- 3. "Trading program" shall mean any program, service, course, instruction, system, training, manual or other materials involving the purchase or sale of stocks, currencies, commodity futures, options, or other financial instruments or investments.
- 4. "Day trading program" shall mean any trading program involving the purchase and sale of stocks, currencies, commodity futures, options, or other financial instruments or investments within a short period of time, usually within one day.
- 5. Unless otherwise specified, "respondents" shall mean Michael G. Chrisman and Michelle R. Chrisman, individually and doing business as DayTrading International, and their officers, agents, representatives, and employees.

Decision and Order

I.

IT IS ORDERED that respondents, directly or through any corporation, subsidiary, division, trade name, or other device, in connection with the advertising, promotion, offering for sale, sale, or distribution of any trading program, in or affecting commerce, shall not represent, in any manner, expressly or by implication:

- A. The percentage, ratio, or number of trades that a user of such trading program could reasonably expect to be profitable;
- B. The amount of earnings, income, or profit that a user of such trading program could reasonably expect to attain;
- C. The rate of return that a user of such trading program could reasonably expect to attain or the length of time over which such a rate of return could reasonably be expected;
- D. The past performance of such trading program; or
- E. Any financial benefit or other benefit of any kind from the purchase or use of such trading program;

unless respondents possess and rely upon a reasonable basis substantiating the representation at the time it is made.

II.

IT IS FURTHER ORDERED that respondents, directly or through any corporation, subsidiary, division, trade name, or other device, in connection with the advertising, promotion, offering for sale, sale, or distribution of any trading program, in or affecting commerce, shall not misrepresent, in any manner, expressly or by implication:

Decision and Order

- A. That since January 1996, respondents' "Daily Picks Newsletter" program has returned an average of 167 percent annually;
- B. That during 1996 and 1997, respondents' "Hot Small Caps Newsletter" program returned an average annual return of 214 percent;
- C. That users of such trading program can reasonably expect to trade profitably with little or no risk; or
- D. The extent of risk to which users of such trading program are exposed.

III.

IT IS FURTHER ORDERED that respondents, directly or through any corporation, subsidiary, division, trade name, or other device, in connection with the advertising, promotion, offering for sale, sale, or distribution of any day trading program, in or affecting commerce, shall not make any representation, in any manner, expressly or by implication, about the financial benefits of such program, unless they disclose, clearly and conspicuously, and in close proximity to the representation,

"DAY TRADING involves high risks and YOU can LOSE a lot of money."

Provided, the disclosure required by this Part is in addition to, and not in lieu of, any other disclosure that respondents may be required to make, including but not limited to any disclosure required by state or federal law or by a self-regulatory organization. The requirements of this Part are not intended to, and shall not be interpreted to, exempt respondents from making any other disclosure.

Decision and Order

IV.

IT IS FURTHER ORDERED that respondents Michael G. Chrisman and Michelle R. Chrisman, individually and doing business as DayTrading International, 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 (including packaging) containing the representation;
- B. All materials that were relied upon in disseminating the representation; and
- C. All tests, reports, studies, surveys, demonstrations, or other evidence in their possession or control that contradict, qualify, or call into question the representation, or the basis relied upon for the representation, including complaints and other communications with consumers or with governmental or consumer protection organizations.

V.

IT IS FURTHER ORDERED that respondents Michael G. Chrisman and Michelle R. Chrisman, individually and doing business as DayTrading International, shall deliver a copy of this order to all current and future officers, employees, and agents having responsibilities with respect to the subject matter of this order, and shall secure from each such person a signed and dated statement acknowledging receipt of the order. Respondents shall deliver this order to current personnel within thirty (30) days after the date of service of this order, and to future personnel within thirty (30) days after the person assumes such position or responsibilities. Respondents shall maintain and upon request

Decision and Order

make available to the Commission for inspection and copying each such signed and dated statement for a period of five (5) years after creation.

VI.

IT IS FURTHER ORDERED that respondents Michael G. Chrisman and Michelle R. Chrisman, individually and doing business as DayTrading International, for a period of ten (10) years after the date of issuance of this order, shall notify the Commission of the discontinuance of their current business or employment, or of their affiliation with any new business or employment, or of a change in the name of their business. The notice shall include respondents' new business address and telephone number and a description of the nature of the business or employment and their duties and responsibilities. All notices required by this Part shall be sent by certified mail to the Associate Director, Division of Enforcement, Bureau of Consumer Protection, Federal Trade Commission, 601 Pennsylvania Avenue, N.W., Washington, D.C. 20580.

VII.

IT IS FURTHER ORDERED that respondents Michael G. Chrisman and Michelle R. Chrisman, individually and doing business as DayTrading International shall, within sixty (60) days after the date of service of this order, and at such other times as the Federal Trade Commission may require, file with the Commission a report, in writing, setting forth in detail the manner and form in which they have complied with this order.

VIII.

This order will terminate on June 7, 2020, 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

Analysis to Aid Public Comment

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 respondents 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 respondents 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.

By the Commission.

Analysis of Proposed Consent Order to Aid Public Comment

The Federal Trade Commission has accepted, subject to final approval, an agreement containing a consent order from Michael G. Chrisman and Michelle R. Chrisman, individually and doing business as DayTrading International (“respondents”).

Analysis to Aid Public Comment

The proposed consent order has been placed on the public record for thirty (30) days for receipt of comments by interested persons. Comments received during this period will become part of the public record. After thirty (30) days, the Commission will again review the agreement and the comments received, and will decide whether it should withdraw from the agreement or make final the agreement's proposed order.

Respondents sell and distribute recommendations for trading stock. Their trading products or services include the "Live Interactive Trading Room," the "Daily Picks Newsletter," and the "Hot Small Caps Newsletter." The "Live Interactive Trading Room" is an Internet chat room where respondents provide "live" day trading advice during the day on when to buy and sell stocks. The "Daily Picks Newsletter," and the "Hot Small Caps Newsletter" are in the form of e-mails delivered once per day which contain advice for stock trading. Respondents advertise on their Internet Web site, www.daytradingintl.com. This matter concerns allegedly deceptive representations of the earnings and profit potential, as well as the extent of risk involved in using respondents' stock trading program.

The Commission's proposed complaint alleges that respondents made unsubstantiated claims that users of respondents' "Live Interactive Trading Room" program can reasonably expect to achieve profits on their trades more than 85 percent of the time and achieve substantial profits on a consistent basis (e.g., \$500 per trade, two or three times each day); and that users of respondents' "Daily Picks Newsletter" program can reasonably expect to make short term trades, held one to five days, that achieve a rate of return of between two percent and ten percent per trade.

In addition, the complaint alleges that respondents misrepresented that users of their trading programs can reasonably expect to trade stocks profitably with little or no risk. The complaint also alleges that respondents misrepresented that since January 1996, their "Daily Picks Newsletter" program has

Analysis to Aid Public Comment

returned an average of 167 percent annually and that during 1996 and 1997, their “Hot Small Caps Newsletter” program returned an average annual return of 214 percent. The complaint explains that respondents did not begin to offer the “Daily Picks Newsletter” or “Hot Small Caps Newsletter” until 1998.

The proposed consent order contains provisions designed to prevent respondents from engaging in similar acts and practices in the future.

Part I of the proposed order requires respondents to have a reasonable basis substantiating any representation about the percentage, ratio, or number of trades that a user of any trading program could reasonably expect to be profitable; the amount of earnings, income, or profit that a user of any trading program could reasonably expect to attain; the rate of return that a user of any trading program could reasonably expect to attain or the length of time over which such a rate of return could reasonably be expected; or the past performance of a trading program. Part I also requires respondents to possess a reasonable basis substantiating claims about any financial benefit or other benefit from any trading program.

Part II of the proposed order prohibits respondents from misrepresenting that since January 1996, respondents’ “Daily Picks Newsletter” program has returned an average of 167 percent annually or that during 1996 and 1997, respondents’ “Hot Small Caps Newsletter” program returned an average annual return of 214 percent. It also prohibits respondents from misrepresenting that users of any trading program can reasonably expect to trade with little or no financial risk and from misrepresenting the extent of risk to which users of any such program are exposed.

Analysis to Aid Public Comment

Part III of the proposed order requires respondents to disclose, clearly and conspicuously, "DAY TRADING involves high risks and YOU can LOSE a lot of money," in close proximity to any representation they make about the financial benefits of any day trading program. This disclosure is in addition to, and not instead of, any other disclosure that respondents may be required to make.

Parts IV-VII of the proposed order require respondents to keep copies of relevant advertisements and materials substantiating claims made in the advertisements; to provide copies of the order to certain personnel; to notify the Commission of changes in their employment status and any changes in the name of their business for a period of ten years; and to file compliance reports with the Commission. Part VIII provides that the order will terminate after twenty (20) years under certain circumstances.

The purpose of this analysis is to facilitate public comment on the proposed order. It is not intended to constitute an official interpretation of the agreement and proposed order or to modify in any way their terms.

Complaint

IN THE MATTER OF
COLEGIO DE CIRUJANOS DENTISTAS
DE PUERTO RICO

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

Docket C-3953; File No. 9710038
Complaint, June 12, 2000--Decision, June 12, 2000

This consent order prohibits Respondent Colegio de Cirujanos Dentistas de Puerto Rico from endorsing or approving, refusing to endorse or approve, or prohibiting or declaring unethical a dentist's participation in a health plan based on the amount, manner of calculating, or other terms relating to reimbursement for dental services, or on whether the plan is open to participation by all Colegio members. The Colegio also is prohibited from 1) negotiating on behalf of any dentists with any payer or provider; 2) refusing to deal, boycotting, or threatening to boycott any payer or provider; or 3) determining any terms, conditions, or requirements upon which dentists will deal with any provider, including terms of reimbursement, and whether the plan is open to participation by all Colegio members. The order also prohibits respondent from communicating to any payer or provider any term, condition, or requirement on which Colegio members are willing or unwilling to deal with a payer or provider, and from communicating with any member concerning the desirability or appropriateness of any term or condition of a payer relating to dental services, or whether the plan is open to participation by all Colegio members, or facilitating in any manner, or transfer the exchange of, information concerning dentists' intentions to contract with any payer, or under what terms. Respondent also may not limit truthful advertising of dental services and the solicitation of costumers, though it may generate ethical rules and guidelines for it members to limit representations that would be deemed false or deceptive within the meaning of Section 5 of the Federal Trade Commission Act, or in person solicitations to people who may be vulnerable to undue influence.

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Participants

For the Commission: *Steven J. Osnowitz, Gary H. Schorr, Patricia A. Allen, Meleah A. Geertsma, Christopher S. Thurber, David R. Pender, Richard A. Feinstein, Peter D. Guly, Louis Silvia, and Gregory Vistnes.*

For the Respondents: *Rebeca Rojas and Hector Reichard de Cardona, Richard & Escalera, and Julio Fontanet-Maldonado.*

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, as amended, 15 U.S.C. § 41 *et seq.*, and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that the Colegio de Cirujanos Dentistas de Puerto Rico ("Colegio"), hereinafter sometimes referred to as "respondent," has violated Section 5 of the Federal Trade Commission Act, 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, hereby issues this complaint, stating its charges as follows:

PARAGRAPH ONE: The Colegio is a nonprofit incorporated professional association of dentists in Puerto Rico, and is organized, existing, and doing business under and by virtue of the laws of the Commonwealth of Puerto Rico, with its principal place of business located at Calle Manuel V. Domenech #200, Hato Rey, Puerto Rico 00918.

PARAGRAPH TWO: The Colegio exists and operates, and at all times relevant to this complaint existed and operated, in substantial part for the pecuniary benefit of its members. By virtue of its purposes and activities, the Colegio is a "corporation" within the meaning of Section 4 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 44.

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PARAGRAPH THREE: The acts and practices of the Colegio and its members, including those herein alleged, are in or affect commerce within the meaning of Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45.

PARAGRAPH FOUR: Approximately 1800 dentists are members of the Colegio, constituting almost all of the dentists licensed to practice in Puerto Rico. Membership in the Colegio is required by statute in order to practice dentistry in Puerto Rico, excepting only certain dental faculty and dentists in the United States Armed Forces.

PARAGRAPH FIVE: Colegio members are generally engaged in the business of providing dental services to patients for a fee. Absent agreements among competing dentists on the price and other terms upon which they will provide services to third-party payers and patients, competing dentists decide individually whether to enter into contracts with third-party payers and treat patients, and on the terms and conditions under which they are willing to enter into such contracts and treat patients.

PARAGRAPH SIX: Puerto Rico has created a program to provide medical, pharmaceutical, and dental services to the indigent (“the Reform”), established pursuant to the Puerto Rico Health Insurance Administration Act of 1993, Act No. 72, Article II. The Reform was intended to create a health insurance system to give high quality health care, including dental services, to indigent residents of Puerto Rico. The Reform is financed by the Commonwealth of Puerto Rico, federal Medicaid funds, and income from privatization funds (such as leases and sales of government owned health care facilities). The Administracion de Seguros de Salud (“ASES”), a public corporation, implements and administers the Reform. ASES has divided Puerto Rico into regions, soliciting for each region bids from payers to organize

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and provide services for beneficiaries. ASES selects payers for the regions, and each payer then contracts with providers, including hospitals, physicians, pharmacies, and dentists.

PARAGRAPH SEVEN: The Colegio, acting as a combination of its members, and in conspiracy with at least some of its members, has acted to restrain competition by, among other things, encouraging, facilitating, entering into, and implementing agreements among the Colegio's members, express or implied, to raise the fees paid by payers and patients to dentists, to conduct boycotts or threaten boycotts of payers to obtain higher reimbursement, and to restrain truthful, nondeceptive advertising by dentists.

PARAGRAPH EIGHT: The Colegio has promulgated a Code of Ethics that states that any dentist contracting with a plan not endorsed by the Colegio is in "serious" violation of the Code of Ethics. The Code provides that serious violations may be punished, at the discretion of the Ethics Committee, by penalties that can include suspension or expulsion from the Colegio. The Code also sets forth certain minimum requirements that plans must satisfy for dentists' participation to be acceptable, including requirements that plans be open to all Colegio members, and that the plans pay fees that are at an appropriate level. The Code of Ethics has been widely distributed to Colegio members, and Colegio officials have acted to promote adherence to the Code.

PARAGRAPH NINE: The Colegio established a Committee on Prepaid Dental Services to act as the collective bargaining agent for its members. Through this Committee, and in other ways, the Colegio has engaged in discussions with numerous payers about fees and other terms its members would accept as reimbursement from these payers. The Colegio has refused to give its endorsement or approval of health insurance plans ("plans") unless they meet certain conditions: the plans must reimburse dentists on a fee-for-service basis, and must not pay dentists on the basis of capitation; the plans must be open to the

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participation of all dentists (“free selection”); and the plans must be responsive to raising fees at the Colegio’s request.

PARAGRAPH TEN: Many third-party payers seek endorsement or approval of their plans from the Colegio, in order to secure a sufficient number of participating dentists. When well-established third-party payers have been able to successfully market their plans to dentists without the formal endorsement or approval of the Colegio, it is because these plans have been consistent with the requirements of the Colegio: these plans are open to all dentists, pay relatively high levels of fee-for-service reimbursement, and do not include capitation as a form of payment to dentists.

PARAGRAPH ELEVEN: In furtherance of its anticompetitive agreements, combinations, and conspiracies to set the prices and other terms under which its member dentists would deal with payers, and raise the fees paid by payers and patients to dentists, the Colegio’s conduct included, but was not limited to, the following with regard to contracts with payers not under the Reform:

A. Conducted negotiations with Island Health Care in 1989 over the terms and conditions of dental contracts for Colegio members, including the amount of fees and which procedures would be covered.

B. Conducted negotiations with payer representatives in 1993 and 1994 to achieve higher fees for Colegio members, while urging Colegio members to give the Colegio support and solidarity during these dealings. During 1993, when CIGNA attempted to establish a new PPO, the Colegio’s President urged the membership to not sign the CIGNA contract until the Colegio and CIGNA reached an agreement that would insure periodic rate increases for Colegio members.

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C. Conducted negotiations with Atlantic Southern Insurance Co. ("Atlantic") during 1993 and 1994, including negotiation of price terms, as a condition for giving Atlantic the Colegio's endorsement. Atlantic had difficulty signing up dentists absent the Colegio's endorsement, which the Colegio provided after Atlantic agreed to added reimbursement by expanding coverage for high-priced procedures, and Atlantic committed to meet annually with Colegio representatives to review and adjust fees.

D. Conducted negotiations for many years with the two largest payers for dental coverage in Puerto Rico, Triple S and La Cruz Azul, concerning the fees they would reimburse for dental services. From 1992 through 1994, the President of the Colegio and other Colegio officials successfully negotiated fee increases from both payers for a variety of procedures.

E. During 1994, Triple S attempted to form a managed care plan under which dentists would be paid by capitation. The Colegio helped organize dentists to refuse to deal with this proposed plan, and Triple S was compelled to cancel its capitated plan.

PARAGRAPH TWELVE: In furtherance of its anticompetitive agreements, combinations, and conspiracies to set the prices and other terms under which its member dentists would deal with payers, and raise the fees paid by payers to dentists, the Colegio's conduct included, but was not limited to, the following with regard to contracts with payers under the Reform:

A. During 1995, the Colegio successfully resisted Triple S attempts to implement a system of capitation for the payment of dentists in the North Region of the Reform, resisted Triple S attempts to implement a 10% discount for dental fees, and negotiated a limited discount of 5% off of regular dental fees. During 1996, the Colegio successfully imposed the same terms and conditions of payment on Triple S for the Northwest region of the Reform.

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B. During 1995, the Colegio negotiated with PCA, a payer, the terms under which its member dentists would participate in the Central Region of Reform. In return for obtaining the Colegio's endorsement, the Colegio required PCA to agree that payments to dentists would be based on fee for service, with dental panels open to all Colegio members. During 1996, when PCA attempted to revise its dental contracts for the Central Region to provide for utilization and quality audits, the Colegio withheld its endorsement. When PCA attempted to bypass the Colegio and approached dentists in the Central Region of the Reform individually, only 60 of 450 dentists contracted with it, an insufficient number under ASES regulations. In return for most dentists agreeing to deal with PCA, the Colegio was able to limit utilization review.

C. During 1995 after another payer, United, contacted individual dentists about their willingness to participate in capitation, United was informed by the Colegio that its members would refuse to participate in any capitation plan. As a result, United was forced to implement its Reform plans in the Southwest and East Regions without capitation.

D. During 1998, the Colegio succeeded in forcing Triple S to raise its fees for dentists in the North Region of the Reform. During these efforts to raise fees, the President of the Colegio wrote to Triple S that when members of the Colegio's Board of Directors, Executive Committee, or Committee on Prepaid Dental Services meet with Triple S, these dentists do so as representatives of the membership of the Colegio, and not as individual dentists.

PARAGRAPH THIRTEEN: The Colegio maintains, distributes to its members, and enforces a Code of Ethics that prohibits truthful, nondeceptive advertising and solicitation.

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Among other things, the Colegio's rules ban advertising that is not professionally acceptable, use of most illustrations, advertisements deemed not in good taste, and all personal solicitations. The Ethics Committee and other Colegio officials have acted to ensure that Colegio members adhere to the Code of Ethics.

PARAGRAPH FOURTEEN: During December 1995 and January 1996, dentists from Juana Diaz, Coamo, and Santa Isabel, Puerto Rico, in an effort to secure higher fees and other terms as a condition for participating in the Reform, concertedly refused to treat patients under the Reform. Dentists from Ponce truthfully advertised their willingness to accept Reform patients from Juana Diaz, Coamo, and Santa Isabel. In response to complaints by boycotting dentists about this advertising, the Colegio found three Ponce dentists to be in violation of the Code of Ethics for engaging in newspaper advertising not professionally acceptable. In addition, one of the dentists from Ponce was found to be in violation of the Code of Ethics rules on advertising on the ground that signs and banners containing his advertisements were placed too close to the offices of the dentists conducting a boycott of the Reform. In response to the Colegio's inquiries and actions, the Ponce dentists stopped advertising that was targeted to residents of Juana Diaz, Coamo, and Santa Isabel.

PARAGRAPH FIFTEEN: The Colegio has not integrated the practices of its members in any economically significant way, nor has it created any efficiencies that might justify the acts and practices described in paragraphs seven through fourteen.

PARAGRAPH SIXTEEN: The acts and practices of the respondent as described in this complaint have had the purpose, tendency, effects, and capacity to restrain trade unreasonably and hinder competition in the provision of dental goods and services in Puerto Rico in the following ways, among others:

- A. to restrain competition among dentists;

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B. to deprive consumers of the benefits of competition among dentists;

C. to fix or increase the prices that consumers and third-party payers pay for dental services;

D. to fix the terms and conditions upon which dentists would deal with third-party payers, including terms of compensation for dental services, thereby raising the price to consumers of insurance coverage issued by third-party payers;

E. to raise prices paid by ASES and delay the offering of dental services under the Reform;

F. to deprive consumers of the benefits of new health care delivery systems; and

E. to deprive consumers of the benefits of truthful information contained in advertising.

PARAGRAPH SEVENTEEN: The aforesaid acts and practices of the respondent are to the prejudice and injury of the public and constitute unfair methods of competition in or affecting commerce in violation of Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45. The acts and practices of the respondent, as herein alleged, are continuing and will continue or recur in the absence of the relief requested.

WHEREFORE, THE PREMISES CONSIDERED, the Federal Trade Commission on this twelfth day of June, 2000, issues its complaint against said respondent.

By the Commission.

DECISION AND ORDER

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

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

1. Respondent is a nonprofit incorporated professional association of dentists in Puerto Rico, and is organized, existing, and doing business under and by virtue of the laws of the Commonwealth of Puerto Rico, with its principal place of business located at Calle Manuel V. Domenech #200, Hato Rey, Puerto Rico 00918.

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

ORDER

I.

IT IS ORDERED that, for the purposes of this Order, the following definitions shall apply:

- A. "Respondent" or "Colegio" means Colegio de Cirujanos Dentistas de Puerto Rico, its directors, officers, employees, agents, representatives, predecessors, successors, and assigns; its subsidiaries, divisions, groups, chapters, and affiliates controlled by Colegio de Cirujanos Dentistas de Puerto Rico, and the respective directors, officers, employees, agents, representatives, successors, and assigns of each.
- B. "Dentist" means a provider of dental services as defined by the laws of Puerto Rico, with a degree of D.M.D. or D.D.S.
- C. "Person" means both natural persons and artificial persons, including, but not limited to, corporations, unincorporated entities, and governments.
- D. "Payer" means any person that purchases, reimburses for, or otherwise pays for all or part of any health care services for itself or for any other person. Payer includes, but is not limited to, any health insurance company; preferred provider organization; prepaid hospital, medical, or other health service plan; health maintenance organization;

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government health benefits program; employer or other person providing or administering self-insured health benefits programs; and patients who purchase health care or dental services for themselves.

- E. "Provider" means any person, including but not limited to any dentist, physician, hospital, or clinic, that supplies health care services to any other person.
- F. "Reimbursement" means any payment, whether cash or non-cash, or other benefit received for the provision of dental services.

II.

IT IS FURTHER ORDERED that respondent, directly or indirectly, or through any corporate or other device, in connection with the provision of dental services in or affecting commerce, as "commerce" is defined in Section 4 of the Federal Trade Commission Act, 15 U.S.C. § 44, cease and desist from:

- A. Endorsing or approving, refusing to endorse or approve, or prohibiting or declaring unethical participation in, any health plan based on the amount of, manner of calculating, or other terms relating to reimbursement for dental services, or on whether the plan is open to participation by all Colegio members.
- B. Entering into, adhering to, participating in, maintaining, organizing, implementing, enforcing, or otherwise facilitating any combination, conspiracy, agreement, or understanding:
 - 1. To negotiate on behalf of any dentists with any payer or provider;
 - 2. To deal, refuse to deal, or threaten to refuse to deal with any payer or provider;

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3. Regarding any term, condition, or requirement upon which any dentists deal, or are willing to deal, with any payer or provider, including, but not limited to, terms of reimbursement and whether the health plan is open to participation by all Colegio members.
- C. Communicating to any payer or provider any term, condition, or requirement, on which Colegio members are willing or unwilling to deal with any payer or provider, including, but not limited to, terms of reimbursement and whether the health plan is open to participation by all Colegio members.
 - D. Communicating with any member regarding the desirability or appropriateness of any term or condition of dealing with any payer or provider that relates to the amount of, manner of calculating, or other terms relating to reimbursement for dental services, or to whether the plan is open to participation by all Colegio members.
 - E. Exchanging, transferring, or facilitating in any manner the exchange or transfer among dentists of information (including, but not limited to, any actual or possible views, intentions, or positions) concerning any dentist's intention or decision with respect to:
 1. entering into, refusing to enter into, threatening to refuse to enter into, or withdrawing from any existing or proposed agreement with any payer; or
 2. agreeing to, or refusing to agree to, any term, condition, or requirement upon which any dentist deals, or is likely willing to deal, with any payer or provider.

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- F. Encouraging, urging, suggesting, requesting, advising, pressuring, inducing, or attempting to induce any nongovernmental person or organization to engage in any action that would be prohibited if the person were subject to Part II. of this Order.

PROVIDED, HOWEVER, that nothing contained in this Order shall be construed to prevent respondent from petitioning any federal, state, or Commonwealth government executive agency or legislative body concerning legislation, rules, or procedures, or to participate in any federal, state, or Commonwealth administrative or judicial proceeding, in so far as such activity is protected by the Noerr-Pennington doctrine.

III.

IT IS FURTHER ORDERED that respondent, directly or indirectly, or through any corporate or other device, in connection with the provision of dental services in or affecting commerce, as "commerce" is defined in Section 4 of the Federal Trade Commission Act, 15 U.S.C. § 44, cease and desist from:

- A. Prohibiting, restricting, regulating, impeding, declaring unethical, or interfering with the advertising or publishing by any person of the prices, terms or conditions of sale of dentists' services, or of information about dentists' services, facilities or equipment which are offered for sale or made available by dentists or by any organization with which dentists are affiliated.
- B. Prohibiting, restricting, regulating, impeding, declaring unethical, or interfering with the solicitation of patients, patronage, or contracts to supply dentists' services by any dentist or by any organization with which dentists are affiliated, through advertising or by any other means.

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- C. Encouraging, urging, suggesting, requesting, advising, pressuring, inducing, or attempting to induce any nongovernmental person or organization to engage in any action that would be prohibited if the person were subject to Part III. of this Order.

PROVIDED, HOWEVER, that nothing contained in this Order shall prohibit respondent from formulating, adopting, disseminating, and enforcing, reasonable ethical guidelines governing the conduct of its members with respect to representations that respondent reasonably believes would be false or deceptive within the meaning of Section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45, or with respect to uninvited in-person solicitation of actual or potential patients who, because of their particular circumstances, are vulnerable to undue influence.

IV.

IT IS FURTHER ORDERED that respondent shall:

- A. Within thirty (30) days after the date on which this Order becomes final, distribute by first-class mail a copy of this Order and the accompanying complaint, as well as certified Spanish translations thereof, to:
1. Each person who, at the time this Order becomes final, is an employee or member of the Colegio;
 2. Each payer or provider with whom, at any time since January 1, 1995, the Colegio has had communications regarding a possible or executed contract for the provision of dental services.
- B. For a period of five (5) years after the date this Order becomes final:

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1. Within thirty (30) days of the date the person assumes such position, distribute by first-class mail a copy of this Order and the accompanying complaint, as well as certified Spanish translations thereof, to each new officer, director, manager, agent, representative, employee, committee member, or member of the Colegio;
 2. Annually publish, in an official annual report, newsletter, or memorandum sent to all members of the Colegio, a copy of this Order and the accompanying complaint, as well as certified Spanish translations thereof, with such prominence as is given to official communications or regularly featured articles;
 3. Annually provide a briefing, class, or seminar for members of the Colegio, available and open to all members of the Colegio and in conjunction with a meeting open to the full Colegio membership, on the meaning and requirements of this Order and the antitrust laws, including penalties for the violation of this Order.
- C. For a period of ten (10) years after the date this Order becomes final:
1. Maintain complete files and records of all correspondence and other communications concerning advertising and solicitation by dentists;
 2. Create and maintain records of nonwritten communications, in which the Colegio participates, concerning advertising and solicitation by dentists, including in such records the names and positions of all participants, the dates and locations of the meetings or other communications, a summary or description of

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any advice or information given or stated by the Colegio, and the nature of such information or advice;

3. Maintain complete files and records of all ethical codes, bylaws, rules, and regulations of the Colegio, or amendments or proposed amendments thereto, which concern advertising or solicitation by dentists;
4. Retain and make available to any authorized representative of the Commission on request the complete files and records required by subparagraphs 1, 2, and 3 of IV. C of this Order.

PROVIDED, HOWEVER, that nothing contained in the requirements of IV.C. of this Order shall require respondent to retain any individual document or record responsive to IV.C. that is over five years old.

V.

IT IS FURTHER ORDERED that the Colegio shall file a verified written report with the Commission within sixty (60) days after this Order becomes final, annually thereafter for five (5) years on the anniversary of the date the Order becomes final, and at such other times as the Commission may by written notice require, setting forth in detail the manner and form in which the respondent intends to comply, is complying, and has complied, with this Order. In addition to any other information that may be necessary to demonstrate compliance, the Colegio shall include in such reports information identifying each payer and provider that has communicated with the Colegio concerning a possible contract for dental services, the proposed terms and conditions of any such contract, and the Colegio's response to such payer or provider.

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VI.

IT IS FURTHER ORDERED that the Colegio shall notify the Commission at least thirty (30) days prior to any proposed change in the Colegio, such as dissolution, assignment, sale, or other event resulting in the emergence of a successor corporation or association, the creation or dissolution of subsidiaries or constituent societies or associations, changes in the requirements for membership in the Colegio, or any other change in the Colegio that may affect compliance obligations arising out of this Order.

VII.

IT IS FURTHER ORDERED that, for the purpose of determining or securing compliance with this Order, the Colegio 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, calendars, and other records and documents in the possession or under the control of the Colegio relating to any matter contained in this Order; and
- B. Upon five (5) business days' notice to the respondent, and without restraint or interference from it, to interview the Colegio's officers, directors, employees, agents, and other representatives.

VIII.

IT IS FURTHER ORDERED that this Order shall terminate on June 12, 2020.

By the Commission.

Analysis to Aid Public Comment

Analysis of Proposed Consent Order to Aid Public Comment

The Federal Trade Commission ("Commission") has accepted, subject to final approval, a proposed consent order settling charges that the Colegio de Cirujanos Dentistas de Puerto Rico ("Colegio"), an association of dentists in Puerto Rico: (1) organized boycotts and refusals to deal, and engaged in other anticompetitive conduct, designed to raise prices for dental services; and (2) prohibited its members from engaging in certain types of truthful, nondeceptive advertising. The proposed consent order has been placed on the public record for sixty (60) days to receive comments by interested persons. The proposed consent order has been entered into for settlement purposes only and does not constitute an admission by the Colegio that it violated the law or that the facts alleged in the complaint, other than the jurisdictional facts, are true.

The Complaint

The Colegio is an association of approximately 1800 dentists licensed to practice dentistry in Puerto Rico. Puerto Rico law requires, with certain limited exceptions, that dentists maintain membership in the Colegio to practice in Puerto Rico. Accordingly, the Colegio's members constitute the vast majority of dentists practicing in Puerto Rico.

The complaint charges that the Colegio restrained competition among dentists in Puerto Rico by, among other things, fixing the terms under which individual dentists would deal with health insurers and other payers of health care services, and orchestrating or threatening boycotts of payers by its members to obtain higher reimbursement. According to the proposed complaint, the Colegio promulgated a Code of Ethics that bars dentists from contracting with any health insurance plan ("plan") that is not endorsed by the Colegio. The Colegio refused to approve plans

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unless they: reimbursed dentists on a fee-for-service basis rather than capitation; were open to participation by all dentists; and were “responsive” to raising fees at the Colegio’s request. Plans sought the Colegio’s endorsement or approval in order to secure a sufficient number of participating dentists.

The complaint also alleges that the Colegio acted as the collective bargaining agent for its members. Through its Committee on Prepaid Dental Services, and in other ways, the Colegio engaged in discussions with numerous payers about fees and other terms its members would accept from these payers. For example, from 1992 through 1994, the Colegio successfully negotiated on behalf of its members to obtain fee increases from the two largest payers for dental coverage in Puerto Rico, Triple S and La Cruz Azul. In another instance, the complaint charges, the Colegio organized dentists to refuse to deal with a new plan proposed by Triple S that would have paid dentists a set amount per enrollee rather than the traditional fee for service, and Triple S was compelled to cancel the plan.

The complaint further alleges that the Colegio set the prices and other terms under which its member dentists would deal with plans operating under Puerto Rico’s Health Insurance Act of 1993 (the “Reform”), a program to provide health care services to the indigent. During 1995, for example, the Colegio successfully blocked Triple S attempts to implement a new plan in the North Region of the Reform, and defeated Triple S plans to implement a 10% discount for dental fees. In the Central Region of the Reform, the Colegio succeeded in forcing PCA to agree that payments to dentists would be based on fee for service, and that its dental panels would be open to all Colegio members. When PCA attempted in 1996 to revise its dental contracts for the Central Region, in order to provide for utilization and quality audits, the Colegio withheld its endorsement, and PCA was unable to secure contracts with a sufficient number of dentists to offer the plan.

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The complaint charges that the Colegio has acted to prevent certain forms of truthful, nondeceptive advertising. Its Code of Ethics bans advertising that is not “professionally acceptable,” use of most illustrations, advertisements deemed not in good taste, and all personal solicitations. The complaint further alleges that the Colegio applied its ban on unprofessional advertising against dentists from Ponce, Puerto Rico, who truthfully advertised their willingness to accept Reform patients from neighboring areas where dentists were conducting a boycott of the Reform.

According to the complaint, the Colegio has not integrated the practices of its members in any economically significant way, nor has it created any efficiencies that might justify the acts and practices alleged in the complaint. Rather, the complaint charges that the Colegio's conduct has had the purpose and effect of restraining competition among dentists and injuring consumers by, among other things, fixing or increasing prices for dental services; fixing the terms and conditions upon which dentists would deal with payers, thereby raising the price to consumers of insurance coverage; raising prices paid by the Reform and delaying the offering of dental services under the Reform; and depriving consumers of truthful information about dental services.

The Proposed Consent Order

The proposed consent order prohibits the Colegio from continuing the illegal conduct described in the complaint. Specifically, Part II of the order prohibits the Colegio from endorsing or approving, refusing to endorse or approve, or prohibiting or declaring unethical a dentist's participation in a health plan based on the amount, manner of calculating, or other terms relating to reimbursement for dental services, or on whether the plan is open to participation by all Colegio members. The Colegio also is prohibited from 1) negotiating on behalf of any dentists with any payer or provider; 2) refusing to deal,

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boycotting, or threatening to boycott any payer or provider; or 3) determining any terms, conditions, or requirements upon which dentists will deal with any provider, including terms of reimbursement, and whether the plan is open to participation by all Colegio members.

Further, the Colegio is prohibited from communicating to any payer or provider any term, condition, or requirement on which Colegio members are willing or unwilling to deal with a payer or provider, and from communicating with any member concerning the desirability or appropriateness of any term or condition of a payer relating to dental services, or whether the plan is open to participation by all Colegio members. The Colegio cannot facilitate in any manner, or transfer the exchange of, information concerning dentists' intentions to contract with any payer, or under what terms.

The proposed order does not restrict legitimate communications between the Colegio and payers. Health care practitioners' provision of certain kinds of information to payers is not likely to raise antitrust concerns, but instead may serve to promote competition and benefit consumers. For example, the DOJ/FTC *Statements of Enforcement Policy in Health Care* (1996) define two "antitrust safety zones" dealing with the provision of information to payers, and state that conduct falling within these safety zones will not be challenged by the enforcement agencies absent extraordinary circumstances.¹ The

¹ Statement 5 provides a safety zone for providers' collective provision of "factual information concerning the providers' current or historical fees or other aspects of reimbursement, such as discounts or alternative reimbursement methods accepted . . .," so long as collection of the information meets certain requirements designed to ensure that the exchange of price or cost data is not used by competing providers to discuss or coordinate costs or prices. Statements at 44-45. The safety zone in Statement 4 covers the provision of "underlying medical data that may improve purchasers' resolution of issues relating to the mode, quality, or efficiency of treatment," as well as providers' "development of suggested practice parameters - standards for patient management developed to assist providers in clinical decisionmaking - that

Analysis to Aid Public Comment

proposed order does not prohibit the Colegio from engaging in activities encompassed in these safety zones, or from communicating with payers about other matters, unless the communication is part of an agreement or course of conduct specifically prohibited by the order.

The proposed order likewise does not restrict the right of the Colegio to provide government bodies with information and opinions in an effort to influence legislation or regulatory action. A proviso states explicitly that the order does not prohibit the Colegio from petitioning any federal, state, or Commonwealth government executive agency or legislative body concerning legislation, rules, or procedures, or from participating in any federal, state, or Commonwealth administrative or judicial proceeding, insofar as the activity is protected from antitrust scrutiny by the Noerr-Pennington doctrine.² That doctrine does not, however, protect price-fixing agreements, refusals to deal, or similar conduct designed to obtain higher prices from government purchasers.³

Part III of the proposed order prohibits the Colegio from restricting truthful advertising of dental services or solicitation of patients. The Colegio, however, can formulate, adopt, disseminate, and enforce reasonable ethical guidelines governing the conduct of its members with respect to representations that respondent reasonably believes would be false or deceptive within

also may provide useful information to patients, providers, and purchasers.” Statements at 41.

² See, e.g., *FTC v. Superior Court Trial Lawyers Ass'n*, 493 U.S. 411 (1990); *United Mine Workers v. Pennington*, 381 U.S. 657 (1965); *Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961).

³ *FTC v. Superior Court Trial Lawyers Ass'n*, 493 U.S. at 424-425.

Analysis to Aid Public Comment

the meaning of Section 5 of the Federal Trade Commission Act, or with respect to uninvited in-person solicitation of actual or potential patients who, because of their particular circumstances, are vulnerable to undue influence.

Part IV of the proposed order requires the Colegio to distribute copies of the order and accompanying complaint to its employees and members, and to payers or providers who since January 1, 1995, communicated a desire or interest in contracting for dentists' services. Part IV also requires the Colegio to maintain certain records pertaining to advertising for a period of ten years, while other order provisions will remain in effect for twenty years. Parts V and VI of the proposed order impose certain reporting requirements, while Part VII of the proposed order provides for access to the Colegio's documents and personnel. Parts V, VI, and VII are to assist the Commission in monitoring compliance with the proposed order.

Opportunity for Public Comment

The proposed order has been placed on the public record for sixty (60) days in order to receive public comments from interested persons. Comments received during this period will become part of the public record. After sixty (60) days, the Commission will again review the agreement and the comments received and will decide whether it should withdraw from the agreement or make final the agreement's proposed order.

The purpose of this analysis is to facilitate public comment on the agreement. The analysis is not intended to constitute an official interpretation of the agreement, the proposed complaint, or the proposed consent order, or to modify their terms in any way.

Complaint

IN THE MATTER OF

BUMBLE BEE SEAFOODS, INC.CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATIONS OF
SEC. 5 OF THE FEDERAL TRADE COMMISSION ACT

*Docket C-3954; File No. 9823560
Complaint, June 12, 2000--Decision, June 12, 2000*

This consent order prohibits Respondent Bumble Bee Seafoods, Inc. From making representation of the terms or conditions of any rebate offer and requires the company to display prominently the amount of items required for purchase to receive any rebate. The consent order defines "rebate" as cash, merchandise, credit towards future purchases, or any other consideration offered to consumers who purchase products from the respondent, which is provided subsequent to purchase. The consent order also requires that Respondent commence a coupon program that includes the distribution of seven million, five hundred eighty-six thousand, two hundred and eight tearpad coupons that clearly offer 75¢ off any two or multi-pack Bumble Bee Solid White Albacore Tuna which an expiration date of at least six months after distribution.

Participants

For the Commission: *Don D'Amato, Rhonda Joy McLean, and BE.*

For the Respondents: *John F. Kroeger, International Home Foods, Inc.*

COMPLAINT

The Federal Trade Commission, having reason to believe that Bumble Bee Seafoods, Inc., a corporation, (hereinafter "Bumble Bee" or "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:

Complaint

1. Respondent Bumble Bee is a Delaware corporation with its principal office or place of business at 3990 Ruffin Road, San Diego, CA 92123.

2. Respondent has advertised, offered for sale, sold and distributed food products to the public, including Bumble Bee Solid White Albacore Tuna. Bumble Bee Solid White Albacore Tuna is sold in six ounce cans, among other sizes.

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 distributed or caused to be distributed six ounce cans of Bumble Bee Solid White Albacore Tuna that are affixed with labels that include, but are not limited to, the attached Exhibit A. Copy on the face side of these labels includes the statement: "75¢ OFF Next Purchase Details Inside Label."

5. Through the means described in Paragraph 4, respondent has represented, expressly or by implication, that purchasers of six ounce cans of Bumble Bee Solid White Albacore Tuna affixed with the label described in Paragraph 4 can receive seventy-five cents off their next purchase of a single six ounce can of Bumble Bee Solid White Albacore Tuna.

6. In truth and in fact, purchasers of six ounce cans of Bumble Bee Solid White Albacore Tuna affixed with the label described in Paragraph 4 cannot receive seventy-five cents off their next purchase of a single six ounce can of Bumble Bee Solid White Albacore Tuna. Purchasers are not eligible for the seventy-five cents off unless they purchase five additional six ounce cans of Bumble Bee Solid White Albacore Tuna. That fact is disclosed only on the reverse side of the label, which is affixed to the can and is not accessible until after the purchase. Therefore, the representation set forth in Paragraph 5 was, and is, false or misleading.

Decision and Order

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

THEREFORE, the Federal Trade Commission this twelfth day of June, 2000, has issued this complaint against respondent.

By the Commission.

DECISION AND ORDER

The Federal Trade Commission ("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 Commission's Northeast Region proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge respondent with violation of the Federal Trade Commission Act; and

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

Decision and Order

and waivers and other provisions as required by the Commission's Rules; and

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

1. Respondent Bumble Bee Seafoods, Inc. is a Delaware corporation with its principal office or place of business at 3990 Ruffin Road, San Diego, CA 92123.
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 Bumble Bee Seafoods, Inc., a corporation, its successors and assigns and its officers; and each of the above's agents, representatives, and employees.
2. "Rebate" shall mean cash, merchandise, credit towards future purchases, or any other consideration offered to consumers who

Decision and Order

purchase products or services from respondent, which is provided subsequent to the purchase.

3. "Clearly and prominently" shall mean as follows:

- A. In an advertisement communicated through an electronic medium (such as television, video, radio, and interactive media such as the Internet and online services), the disclosure shall be presented simultaneously in both the audio and video portions of the advertisement. ***Provided, however,*** that in any advertisement presented solely through video or audio means, the disclosure may be made through the same means in which the advertisement is presented. The audio disclosure shall be delivered in a volume and cadence sufficient for an ordinary consumer to hear and comprehend it. The video disclosure shall be of a size and shade, and shall appear on the screen for a duration sufficient for an ordinary consumer to read and comprehend it. In addition to the foregoing, in interactive media the disclosure shall also be unavoidable and shall be presented prior to the consumer incurring any financial obligation.
- B. In a print advertisement, promotional material, or instructional manuals, the disclosure shall be in a type size and location sufficiently noticeable for an ordinary consumer to read and comprehend it, in print that contrasts with the background against which it appears. In multi-page documents, the disclosure shall appear on the cover or, alternatively, on the first page.
- C. On a product label, the disclosure shall be in a type size and location on the principal display panel sufficiently noticeable for an ordinary consumer to read and

Decision and Order

comprehend it, in print that contrasts with the background against which it appears.

The disclosure shall be in understandable language and syntax. Nothing contrary to, inconsistent with, or in mitigation of the disclosure shall be used in any advertisement or on any label.

4. "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 any product or service in or affecting commerce, shall:

- A. Not misrepresent, in any manner, expressly or by implication, the terms or conditions of any rebate offer; and
- B. Disclose the number of products or services that must be purchased in order to qualify for any rebate offer. The disclosure shall be made clearly and prominently and in close proximity to the offer.

II.

IT IS FURTHER ORDERED that:

- A. Respondent shall commence within ninety (90) days after the service of this order a consumer tearpad coupon program that includes a national distribution of at least seven million, five hundred and eighty-six thousand, two hundred and eight (7,586,208) tearpad coupons at least five inches (5") by two and one-half inches (2½") in size that clearly and prominently offer seventy-five cents (75¢)

Decision and Order

off the purchase of “any two (2) cans or multi-packs” of Bumble Bee Solid White Albacore Tuna. These tearpad coupons shall be redeemable at the place of purchase, and have an expiration date of at least six (6) months after distribution. Respondent’s obligations set forth in this Subpart shall hereafter be referred to as the “Program.”

- B. Respondent agrees that if the total costs incurred in this Program (including but not limited to the costs of printing, distributing, and redeeming the tearpad coupons) do not exceed two hundred thousand dollars (\$200,000) (“Minimum Expenditure”) ninety (90) days after the expiration date on the tearpad coupon, respondent shall transfer electronically to the United States Treasury within ten (10) business days a dollar amount equal to the difference between the actual cost of the Program and the Minimum Expenditure.
- C. In the event of respondent’s failure to implement the Program in accordance with the terms of this order, the entire amount of the Minimum Expenditure, together with interest, as computed pursuant to 28 U.S.C. § 1961 from the date of service of this order to the date of payment, shall immediately become due and payable. Notwithstanding any other provision of this order, respondent agrees that if it fails to meet the payment obligations set forth in this Part, respondent shall pay the costs and attorneys fees incurred by the Federal Trade Commission and its agents in any attempts to collect amounts due pursuant to this order.
- D. Respondent further agrees that the facts as alleged in the complaint filed in this action shall be taken as true in any subsequent litigation filed by the Federal Trade Commission to enforce its rights pursuant to this Part.

Decision and Order

III.

IT IS FURTHER ORDERED that respondent shall within ninety (90) days after the date of service of this order, send by certified mail a report, in the form of a sworn affidavit executed on behalf of the respondent to the Associate Director, Division of Enforcement, Bureau of Consumer Protection, Federal Trade Commission, Washington, D.C. 20580 certifying that it has implemented the Program set forth in Part II. Within ninety (90) days of the expiration date on the Program's tearpad coupon, the respondent shall send by certified mail a report, in the form of a sworn affidavit executed on behalf of the respondent to the Associate Director, Division of Enforcement, Bureau of Consumer Protection, Federal Trade Commission, Washington, D.C. 20580 setting forth in detail the manner and form it has complied with Part II of this order, including but not limited to a detailed report that specifies the costs of the Program such as monies expended printing the coupons, distributing the coupons, dispersing coupon processing fees to retailers, and redeeming the coupons.

IV.

IT IS FURTHER ORDERED that respondent 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, product labels, and promotional materials containing the representation; and
- B. 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.

Decision and Order

V.

IT IS FURTHER ORDERED that respondent shall deliver a copy of this order to all current and future principals, officers, directors, and managers, and to all current and future employees, agents, and representatives having responsibilities with respect to the subject matter of this order, and shall secure from each such person a signed and dated statement acknowledging receipt of the order. Respondent shall deliver this order to current personnel within thirty (30) days after the date of service of this order, and to future personnel within thirty (30) days after the person assumes such position or responsibilities.

VI.

IT IS FURTHER ORDERED that respondent shall notify the Federal Trade Commission at least thirty (30) days prior to any change in the corporation that may affect compliance obligations arising under this order, including but not limited to a dissolution, assignment, sale, merger, or other action that would result in the emergence of a successor corporation; the creation or dissolution of a subsidiary, parent, or affiliate that engages in any acts or practices subject to this order; the proposed filing of a bankruptcy petition; or a change in the corporate name or address. **Provided, however,** that, with respect to any proposed change in the corporation about which respondent learns less than thirty (30) days prior to the date such action is to take place, respondent shall notify the Federal Trade 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. 20580.

Decision and Order

VII.

IT IS FURTHER ORDERED that respondent 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 Federal Trade 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 June 12, 2020, 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.

By the Commission.

Analysis to Aid Public Comment

Analysis of Proposed Consent Order to Aid Public Comment

The Federal Trade Commission has accepted, subject to final approval, an agreement to a proposed consent order from Bumble Bee Seafoods, Inc. (“Bumble Bee”).

The proposed consent order has been placed on the public record for sixty (60) days for the receipt of comments by interested persons. Comments received during this period will become part of the public record. After sixty (60) days, the Commission will again review the agreement and comments received and will decide whether it should withdraw from the agreement and take appropriate action or make final the agreement's proposed order.

This matter involves Bumble Bee's making of a representation in the marketing and sale of canned tuna. Specifically, the face of the product label indicates that the purchaser will save seventy-five cents (75¢) on his next purchase of tuna, however, the reverse side of the label, which is affixed to the can and is not accessible until after purchase, indicates that the purchase of five additional cans of tuna is required in order to save the seventy-five cents (75¢). The proposed complaint alleges that Bumble Bee has violated Section 5 of the Federal Trade Commission Act (“FTC Act”) by misrepresenting that purchasers of tuna affixed with the subject label can receive seventy-five cents (75¢) off their next purchase of a single can of tuna.

Part I of the proposed order prohibits Bumble Bee from misrepresenting the terms or conditions of any rebate offer and requires the company to disclose clearly and prominently and in close proximity to the offer the number of products that must be purchased in order to qualify for any rebate offer. The order defines “rebate” to mean cash, merchandise, credit towards future purchases, or any other consideration offered to consumers who

Analysis to Aid Public Comment

purchase products from the respondent, which is provided subsequent to purchase.

Part II A provides that Bumble Bee shall commence within ninety (90) days after the service of the order, a consumer tearpad coupon program that includes a national distribution of at least seven million, five hundred and eighty-six thousand, two hundred and eight (7,586,208) tearpad coupons at least five inches (5") by two and one-half inches (2½") in size that clearly and prominently offer seventy-five cents (75¢) off the purchase of "any two (2) cans or multi-packs" of Bumble Bee Solid White Albacore Tuna. Part II A further provides that these tearpad coupons shall be redeemable at the place of purchase, and have an expiration date of at least six (6) months after distribution. The proposed order refers to Bumble Bee's obligations set forth in Part II A as the "Program."

Part II B provides that if Bumble Bee's total costs incurred by implementing the Program do not exceed two hundred thousand dollars (\$200,000) ("Minimum Expenditure") ninety (90) days after the expiration date on the tearpad coupon, Bumble Bee shall transfer electronically to the United States Treasury within ten (10) business days a dollar amount equal to the difference between the actual cost of the Program and the Minimum Expenditure.

Part III provides that Bumble Bee shall provide to the Commission: a) within ninety (90) days after the date of service of the order, a sworn affidavit certifying that it has implemented the Program set forth in Part II; and b) within ninety (90) days of the expiration date on the Program's tearpad coupon, a sworn affidavit setting forth in detail the manner and form in which it has complied with Part II of the order, including but not limited to, a detailed report that specifies the costs of the Program.

Part IV of the proposed order contains record keeping requirements for materials related to representations covered by the proposed order. Part V of the proposed order requires

Analysis to Aid Public Comment

distribution of a copy of the order to current and future officers and agents having responsibilities with respect to the subject matter of the proposed order. Part VI provides for Commission notification upon a change in the respondent and Part VII requires the respondent to keep and maintain all records demonstrating compliance with the terms and provisions of the order. Part VIII provides for the termination of the order after twenty (20) years under certain circumstances.

The purpose of the analysis is to facilitate public comment on the proposed order, and it is not intended to constitute an official interpretation of the agreement and proposed order or to modify in any way their terms.

Complaint

IN THE MATTER OF

**SANTA FE NATURAL TOBACCO COMPANY,
INC.**

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

*Docket C-3952; File No. 9923026
Complaint, June 12, 2000--Decision, June 12, 2000*

This consent order requires Respondent Santa Fe Natural Tobacco Company, Inc. to include the following disclosure, clearly and prominently, in certain advertising for its tobacco cigarettes: "No additives in our tobacco does NOT mean a safer cigarette." The order exempts Santa Fe from the disclosure requirement: (1) for cigarette advertisements not required to bear the Surgeon General's health warning; and (2) if Santa Fe possesses scientific evidence demonstrating that its "no additives" cigarette poses materially lower health risks than other cigarettes of the same type. Respondent is also required to include the following disclosure, clearly and prominently, in advertising and on packaging for herbal cigarettes: "Herbal cigarettes are dangerous to your health. They produce tar and carbon monoxide." The disclosure must be included in all advertising and on packaging for herbal smoking products that represent that the product has no tobacco, unless respondent possesses scientific evidence demonstrating that such herbal smoking products do not pose any material health risks.

Participants

For the Commission: *Michael Ostheimer, Shira Modell, Matthew D. Gold, Linda K. Badger, Kerry O'Brien, C. Lee Peeler, and BE.*

For the Respondents: *C. Randall Nuckolls and Mark R. Heilbrun, Long Aldridge & Norman.*

COMPLAINT

The Federal Trade Commission, having reason to believe that Santa Fe Natural Tobacco Company, Inc., a corporation ("respondent"), has violated the provisions of the Federal Trade

Complaint

Commission Act, and it appearing to the Commission that this proceeding is in the public interest, alleges:

1. Respondent Santa Fe Natural Tobacco Company, Inc. is a New Mexico corporation with its principal office or place of business at 1368 Cerrillos Road, Santa Fe, NM 87505-3507.
2. Respondent has advertised, promoted, offered for sale, sold and distributed cigarettes, including Natural American Spirit tobacco cigarettes and Natural American Spirit herbal cigarettes.
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 disseminated or caused to be disseminated advertisements for Natural American Spirit tobacco cigarettes, including but not necessarily limited to the attached Exhibits A through C. These advertisements contain the following statements:

(A) "If you use tobacco the way Native Americans intended ...

or if you smoke out of choice rather than habit ...

Here is an alternative you should try.

**100% FREE OF CHEMICAL ADDITIVES
• NATURAL TOBACCO AND CIGARETTES**

[Depiction of Natural American Spirit cigarettes]

Made from 100% Chemical-Additive-Free, Whole Leaf,
Natural Tobacco
and nothing else."

Complaint

(Exhibit A, June - August 1997 magazine advertisement)
(emphasis in original).

(B) "If you smoke *because you enjoy smoking*, Natural American Spirit is the natural tobacco alternative you should try.

Natural American Spirit cigarettes are made from 100% chemical-additive-free, natural tobacco ... and nothing else."

(Exhibit B, Fall 1997 magazine advertisement).

(C) "100% Chemical-Additive-Free
Whole Leaf, Natural Tobacco Products"

(Exhibit C, Winter 1996 - 97 magazine advertisement).

5. Through the means described in Paragraph 4, respondent has represented, expressly or by implication, that smoking Natural American Spirit tobacco cigarettes, because they contain no additives or chemicals, is less hazardous to a smoker's health than smoking otherwise comparable cigarettes that contain additives or chemicals.

6. Through the means described in Paragraph 4, respondent has represented, expressly or by implication, that it possessed and relied upon a reasonable basis that substantiated the representation set forth in Paragraph 5, 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 5, at the time the representation was made. Among other reasons, the smoke from Natural American Spirit tobacco cigarettes, like the smoke from all cigarettes, contains numerous carcinogens and toxins, including tar and carbon monoxide.

Complaint

Therefore, the representation set forth in Paragraph 6 was, and is, false or misleading.

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

THEREFORE, the Federal Trade Commission this twelfth day of June, 2000, has issued this complaint against respondent.

By the Commission.

Complaint Exhibits

Complaint Exhibits

didn't happen a hundred years ago—they are still happening today.

After five hundred years of White exploitation, there is a very real feeling among some Native people that, now that Whites have taken everything else, we want their religion, too. Louis always spoke of such things as the sacred pipe and the drum as his people's "instruments of worship" and the ceremonies as their "ways of worship." The statement is often made that these "ways of worship" do not constitute a religion. This is usually stated in the positive sense—that these ways are not reliant on a written code and that they are a way of life, as opposed to something outside of daily life. Yet, I believe such statements can lead some people to want to borrow bits and pieces of these ways of worship as spiritual "exercises." Within Native communities, the ceremonies are used to help heal broken families, alcoholism, and all the terrible effects of oppression. It should not surprise us if some Natives are reluctant to welcome Whites who want to use Native sacred instruments of worship because it is now the "spiritually cool" thing to do.

The bridge Louis wanted to create was one of mutual respect. If calling his people's spiritual ways a religion afforded them the same respect as the so-called Great Religions, then he would call them a religion. It bothered him to no end that money was being charged for his people's sacred ceremonies. He likened it to money being charged to take part in a Catholic Mass.

Many aspects of the New Age approach to Native American spirituality both amused and troubled Louis. The idea that picking up a drum and performing certain rituals learned in one or two weekend workshops could make one a shaman was an utterly foreign concept to him. Within most Native traditions, a shaman is one who is chosen or deemed worthy by the spirits. The ease with which some people claimed to have obtained animal spirit guides was also amusing to Louis. Almost everyone today has an eagle, bear, or other equally majestic animal as a guide, but few understand those powers. Bear medicine, for example, was very powerful—something obtained through a dangerous encounter with a bear, or through a lifetime of observing and living and breathing Bear. These days, most people's knowledge of bears is limited to images from Disney cartoons or, at best, from Discovery documentaries; few people are willing to make any effort to learn more—much less to make the sacrifices necessary to obtain and maintain Bear medicine.

Something Louis stressed was that the

If you use tobacco the way Native Americans intended ... *Here is an alternative you should try.* ... or if you smoke out of choice rather than habit ...

100% FREE OF CHEMICAL ADDITIVES - NATURAL TOBACCO AND CIGARETTES



Made from 100% Chemical-Additive-Free, Whole Leaf, Natural Tobacco and nothing else.

First time customers receive **free** shipping and handling on pre-paid orders for a full carton or more. Or send **\$1.00 for each sample** of the Natural American Spirit® product checked below. Only **one** sample of **each** product per household.

pack of Mild Cigarettes pack of Regular Filter Cigarettes pack of Menthol Cigarettes pack of Non-Filter Cigarettes

Identify that I am of legal age to purchase tobacco products. pouch of rolling tobacco to make my own cigarettes.

NAME _____ Charge telephone orders for cartons
STREET _____ or for sample orders (\$4) to MC/V:
CITY/STATE _____ ZIP _____ 1-(800)-332-5595

Natural American Spirit, PO Box 25140, Santa Fe, NM 87504

**SURGEON GENERAL'S WARNING: Cigarette
Smoke Contains Carbon Monoxide.**

SD39

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Dan Alford, Matthew Bronson, Lisa Faithorn, Peter Gold, Michael Harner, Joanna Macy, Margaret Mackenzie, Mutombo Mpanya, Richard Shapiro, Jody Timms



Complaint Exhibits



NATURAL
AMERICAN
SPIRIT

100% Chemical-Additive-Free
Whole Leaf, Natural Tobacco Products

Regular filter, Mild filter, Non-filter,
and Menthol filter Cigarettes;
Pouch Tobacco, and Pow-Wow Blend

U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES
SURGEON GENERAL'S WARNING: Quitting Now Greatly Reduces Serious Risks to Your Smoking. Smoking Causes Lung Cancer, Heart Disease, Emphysema, And May Complicate Pregnancy or Cause Complications in Pregnant Women.

Exhibit C

For a List of Stores in Your Area Please
Call 1-800-559-5595 or Send Your Name and Address to:

NATURAL TOBACCO COMPANY
140, SANTA FE, NM 87504

Decision and Order

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 thirty (30) days, now in further conformity with the procedure prescribed in § 2.34 of its Rules, the Commission hereby issues its complaint, makes the following jurisdictional findings and enters the following order:

1. Respondent Santa Fe Natural Tobacco Company, Inc. is a New Mexico corporation with its principal office or place of business at 1368 Cerrillos Road, Santa Fe, NM 87505-3507.

Decision and Order

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. "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 Santa Fe Natural Tobacco Company, Inc., a corporation, its successors and assigns and its officers, agents, representatives, and employees.
3. "Commerce" shall mean as defined in Section 4 of the Federal Trade Commission Act, 15 U.S.C. § 44.
4. "Advertisement" shall mean any written or verbal statement, illustration, or depiction that is designed to effect a sale or create interest in the purchasing of any product, including but not limited to a statement, illustration or depiction in or on a brochure, newspaper, magazine, free standing insert, pamphlet, leaflet, circular, mailer, book insert, letter, coupon, catalog, poster, chart, billboard, transit advertisement, point of purchase display, specialty or utilitarian item, sponsorship material, package insert, film, slide, or the Internet or other computer network or system.

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5. "Tobacco product" shall mean cigarettes, cigars, cigarillos, little cigars, smokeless tobacco, cigarette tobacco, pipe tobacco, and any other product made or derived from tobacco that is intended for human consumption, including any component, part, or accessory of a tobacco product.
6. "Herbal smoking product" shall mean cigarettes, cigars, cigarillos, little cigars and any other product made or derived from plant material other than tobacco, that is intended for human smoking, including any component, part, or accessory of an herbal smoking product.
7. "Clearly and prominently" shall mean:
 - a. With regard to advertisements for tobacco and herbal smoking products, in black type on a solid white background, or in white type on a solid red background, or in any other color combination that would provide an equivalent or greater degree of print contrast as objectively determined by densitometer or comparable measurements of the type and the background color. The color of the ruled rectangle shall be the same color as that of the type; and
 - b. (i) With regard to advertisements for tobacco products, centered, both horizontally and vertically, in a ruled rectangle. The area enclosed by the rectangle shall be no less than 40% of the size of the area enclosed by the ruled rectangle surrounding the health warnings for tobacco cigarettes mandated by 15 U.S.C. § 1333. The width of the rule forming the rectangle shall be no less than 50% of the width of the rule required for the health warnings for tobacco cigarettes mandated by 15 U.S.C. § 1333.

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Provided that, if, at any time after this order becomes final, 15 U.S.C. § 1333 is amended, modified, or superseded by any other law, the area enclosed by the ruled rectangle shall be no less than 40% of the area required for health warnings for tobacco cigarettes by such amended, modified, or superseding law, and the width of the rule forming the rectangle shall be no less than 50% of the width of any surrounding rule required for health warnings for tobacco cigarettes by such amended, modified, or superseding law; and

- (ii) With regard to advertisements for herbal smoking products, centered, both horizontally and vertically, in a ruled rectangle. The area enclosed by the rectangle shall be no less than the size of the area enclosed by the ruled rectangle surrounding the health warnings for tobacco cigarettes mandated by 15 U.S.C. § 1333. The width of the rule forming the rectangle shall be no less than the width of the rule required for the health warnings for tobacco cigarettes mandated by 15 U.S.C. § 1333.

Provided that, if, at any time after this order becomes final, 15 U.S.C. § 1333 is amended, modified, or superseded by any other law, the area enclosed by the ruled rectangle shall be no less than the area required for health warnings for tobacco cigarettes by such amended, modified, or superseding law, and the width of the rule forming the rectangle shall be no less than the width of any surrounding rule required for health warnings for tobacco cigarettes by such amended, modified, or superseding law; and

- c. In the same type style and type size as that required for health warnings for tobacco cigarettes pursuant to 15 U.S.C. § 1333.

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Provided that, if, at any time after this order becomes final, 15 U.S.C. § 1333 is amended, modified, or superseded by any other law, the type style and type size of the disclosure shall be the same as the type style and type size required for health warnings for tobacco cigarettes by such amended, modified, or superseding law; and

- d. In a clear and prominent location but not immediately next to other written or textual matter or any rectangular designs, elements, or similar geometric forms, including but not limited to any warning statement required under the Federal Cigarette Labeling and Advertising Act, 15 U.S.C. § 1331 *et seq.*, or the Comprehensive Smokeless Tobacco Health Education Act, 15 U.S.C. § 4401 *et seq.* In addition, the disclosure shall not be positioned in the margin of a print advertisement. A disclosure shall be deemed "not immediately next to" other geometric or textual matter if the distance between the disclosure and the other matter is as great as the distance between the outside left edge of the rule of the rectangle enclosing the health warning required by 15 U. S. C. § 1333 and the top left point of the letter "S" in the word "SURGEON" in that health warning; and
- e. For audiovisual or audio advertisements, including but not limited to advertisements on videotapes, cassettes, discs, or the Internet; promotional films or filmstrips; and promotional audiotapes or other types of sound recordings, the disclosure shall appear on the screen at the end of the advertisement in the format described above for a length of time and in such a manner that it is easily legible and shall be announced simultaneously at the end of the advertisement in a manner that is clearly audible.

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Provided, however, that in any advertisement that does not contain a visual component, the disclosure need not appear in visual format, and in any advertisement that does not contain an audio component, the disclosure need not be announced in audio format.

I.

IT IS ORDERED that respondent, directly or through any corporation, subsidiary, division, or other device, in connection with the advertising, promotion, offering for sale, sale, or distribution of Natural American Spirit tobacco cigarettes or any other tobacco product in or affecting commerce, shall display in advertisements as specified below, clearly and prominently, the following disclosures (including the line breaks, punctuation, bold font and capitalization illustrated):

In cigarette advertisements:

No additives in our tobacco
does **NOT** mean a safer cigarette.

In advertisements for any other tobacco product:

No additives in our tobacco
does **NOT** mean safer.

These disclosures shall be displayed beginning no later than thirty (30) days after the date of service of this order, in any advertisement that, through the use of such phrases as "no additives," "no chemicals," "additive-free," "chemical-free," "chemical-additive-free," "100% tobacco," "pure tobacco," or substantially similar terms, represents that a tobacco product has no additives or chemicals.

Provided, that the above disclosures shall not be required in any cigarette advertisement that is not required to bear a health warning pursuant to 15 U.S.C. § 1333.

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Provided further, that the above disclosures shall not be required if respondent possesses and relies upon competent and reliable scientific evidence demonstrating that such cigarette or other tobacco product poses materially lower health risks than other cigarettes or other products of the same type.

Nothing contrary to, inconsistent with, or in mitigation of any disclosure provided for in this part shall be used in any advertisement. *Provided, however*, that this provision shall not prohibit respondent from truthfully representing, through the use of such phrases as "no additives," "no chemicals," "additive-free," "chemical-free," "chemical-additive-free," "100% tobacco," "pure tobacco," or substantially similar terms, that a tobacco product has no additives or chemicals, where such representation is accompanied by the disclosure mandated by this provision.

II.

IT IS FURTHER ORDERED that respondent, directly or through any corporation, subsidiary, division, or other device, in connection with the advertising, promotion, offering for sale, sale, or distribution of any herbal smoking product in or affecting commerce, shall display in advertisements and on packaging as specified below, clearly and prominently, the following disclosure (including the line breaks, punctuation and capitalization illustrated):

In advertisements and on packaging for herbal cigarettes:

Herbal cigarettes are dangerous to your health.
They produce tar and carbon monoxide.

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In advertisements and on packaging for other herbal smoking products:

Smoking this product is dangerous to your health.
It produces tar and carbon monoxide.

These disclosures shall be displayed beginning no later than thirty (30) days after the date of service of this order, in any advertisement and on any package that, through the use of such phrases as "no tobacco," "tobacco-free," "herbal," or substantially similar terms, represents that an herbal smoking product has no tobacco.

Provided, that the above disclosures shall not be required if respondent possesses and relies upon competent and reliable scientific evidence demonstrating that such herbal smoking products do not pose any material health risks. Nothing contrary to, inconsistent with, or in mitigation of any disclosure provided for in this part shall be used in any advertisement. *Provided, however*, that this provision shall not prohibit respondent from truthfully representing, through the use of such phrases as "no tobacco," "tobacco-free," "herbal," or substantially similar terms, that an herbal smoking product has no tobacco, where such representation is accompanied by the disclosure mandated by this provision.

III.

IT IS FURTHER ORDERED that respondent shall:

- A. Provide, within forty-five (45) days after the date of service of this order, an exact copy of the notice attached hereto as Attachment A to each retailer, distributor, or other purchaser for resale to whom respondent has supplied Natural American Spirit tobacco cigarettes since January 1, 1998. Respondent shall send the notice by first class mail. The mailing shall not include any other documents.

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- B. Discontinue dealing with any retailer, distributor, or other purchaser for resale once respondent has actual knowledge, or knowledge fairly implied on the basis of objective circumstances, that such retailer, distributor, or other purchaser for resale has continued to use or disseminate any of respondent's advertisements for any of respondent's tobacco products that:
1. represents, through the use of such phrases as "no additives," "no chemicals," "additive-free," "chemical-free," "chemical-additive-free," "100% tobacco," "pure tobacco," or substantially similar terms, that the tobacco products have no additives or chemicals; and
 2. does not include the disclosure specified in Part I of this order

unless, upon notification by respondent, such retailer, distributor, or other purchaser for resale immediately ceases using or disseminating such advertisements. If, after such notification, respondent obtains actual knowledge, or knowledge fairly implied on the basis of objective circumstances, that such retailer, distributor, or other purchaser for resale has not permanently ceased using or disseminating such advertisements, respondent must immediately and indefinitely, discontinue dealing with such retailer, distributor, or other purchaser for resale, until such time as respondent has obtained written assurance and verified that such retailer, distributor, or other purchaser for resale has permanently ceased using or disseminating such advertisements.

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- C. For five (5) years after the date of service of this order, maintain and upon request make available to the Federal Trade Commission for inspection and copying:
1. copies of all notification letters sent to retailers, distributors, or other purchasers for resale pursuant to subparagraph A of this part; and
 2. copies of all communications with retailers, distributors, or other purchasers for resale pursuant to subparagraph B of this part.

IV.

IT IS FURTHER ORDERED that respondent Santa Fe Natural Tobacco Company, Inc., 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 packaging containing the representation;
- B. All materials that were relied upon in disseminating the representation; and
- C. All tests, reports, studies, surveys, demonstrations, or other evidence in their possession or control that contradict, qualify, or call into question the representation, or the basis relied upon for the representation, including complaints and other communications with consumers or with governmental or consumer protection organizations.

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V.

IT IS FURTHER ORDERED that respondent Santa Fe Natural Tobacco Company, Inc., and its successors and assigns, shall deliver a copy of this order, in either paper or electronic form, to all current and future principals, officers, and directors, and to all current and future managers, employees, agents, and representatives having responsibilities with respect to the subject matter of this order. Respondent shall secure from each such person either 1) a signed and dated statement acknowledging receipt of the order; or 2) a dated, electronic acknowledgment indicating that the person has read, downloaded or printed the order. Respondent shall deliver this order to current personnel within thirty (30) days after the date of service of this order, and to future personnel within thirty (30) days after the person assumes such position or responsibilities. Respondent shall maintain and upon request make available to the Federal Trade Commission for inspection and copying a copy of each signed statement acknowledging receipt of the order or a record, in either electronic or paper form, of each electronic acknowledgment of receipt of the order.

VI.

IT IS FURTHER ORDERED that respondent Santa Fe Natural Tobacco Company, Inc., and its successors and assigns shall notify the Commission at least thirty (30) days prior to the sale of any of its tobacco products or herbal smoking products for which the composition or formula has been changed in such a manner as may affect compliance obligations arising under this order, including but not limited to the addition of any additives to any variety of such products. 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

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Commission, 600 Pennsylvania Avenue, N.W., Washington, D.C. 20580.

VII.

IT IS FURTHER ORDERED that respondent Santa Fe Natural Tobacco Company, Inc., and its successors and assigns shall notify the Commission at least thirty (30) days prior to any change in the corporation that may affect compliance obligations arising under this order, including but not limited to a dissolution 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, 600 Pennsylvania Avenue, N.W., Washington, D.C. 20580.

VIII.

IT IS FURTHER ORDERED that respondent Santa Fe Natural Tobacco Company, Inc., 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 they have complied with this order.

IX.

This order will terminate on June 20, 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

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violation of the order, whichever comes later; *provided, however*, that the filing of such a complaint will not effect 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.

By the Commission.

ATTACHMENT A

[To be printed on Santa Fe Natural Tobacco Company, Inc. letterhead]

[date]

Dear [retailer, distributor, or other purchaser for resale]:

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This letter is to inform you that Santa Fe Natural Tobacco Company, Inc. recently reached a settlement agreement with the Federal Trade Commission ("FTC") concerning certain past advertising for Natural American Spirit cigarettes. The FTC has been reviewing "no additive" claims for cigarettes and other tobacco products as a result of concerns that such representations might mislead consumers to believe that tobacco products without additives are safer than tobacco products containing additives. As part of this review, the FTC conducted an investigation of past advertising for Natural American Spirit cigarettes and alleged that certain of our past advertising was misleading. Although we do not admit the FTC's allegations, we have agreed to notify our distributors, retailers and others who sell our cigarettes to consumers that we will be adding a new disclosure statement to certain advertisements making a "no additive" claim and that they should discontinue the use of certain old advertising materials not containing the new disclosure language.

The FTC Agreement

The FTC claimed that because we state that the tobacco used in Natural American Spirit cigarettes contains no additives or chemicals, we made implied, unsubstantiated claims that smoking our cigarettes is less hazardous to a smoker's health than smoking otherwise comparable cigarettes that contain additives or chemicals. Beginning in late 1997, we voluntarily began placing the statement "To our knowledge there is no research indicating cigarettes containing additive-free tobacco are safer than cigarettes with tobacco containing additives" in certain ads for Natural American Spirit tobacco cigarettes. Since early 1998, we have also included the statement "We make no representation expressed or implied that these cigarettes are any less hazardous than any other cigarettes" on the packaging of Natural American Spirit cigarettes. We have now agreed to revise our disclosure in certain advertisements for Natural American Spirit tobacco cigarettes to state the following:

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**No additives in our tobacco
does NOT mean a safer cigarette.**

Our Notification Obligations

In addition to agreeing to revise our disclosure statement, we have also agreed to request that you discontinue using, relying on or distributing certain old Natural American Spirit advertisements or promotional materials in your possession that do not contain the new disclosure statement. Certain existing point of sale items may continue to be used without the new disclosure statement while other items will need to be discontinued or removed unless a sticker is applied containing the new disclosure statement. In the near future, we will provide instructions for dealing with these existing items and we will be sending you new Natural American Spirit promotional materials. If you are a distributor, we also ask that you make this information available to your Natural American Spirit dealers who may have existing materials so that they can take similar action. The FTC agreement requires us to cease doing business with even our most loyal customers in the event they continue using noncompliant materials, so please help us make this transition in an orderly and prompt fashion.

If you have any questions, you may call us at (xxx) xxx-xxxx. We apologize for any inconvenience this may cause you and thank you for your assistance.

Sincerely,
Robin Sommers, President
Santa Fe Natural Tobacco Company, Inc.

Analysis to Aid Public Comment

Analysis of Proposed Consent Order to Aid Public Comment

The Federal Trade Commission has accepted, subject to final approval, an agreement containing a consent order from Santa Fe Natural Tobacco Company, Inc. ("Santa Fe").

The proposed consent order has been placed on the public record for thirty (30) days for receipt of comments by interested persons. Comments received during this period will become part of the public record. After thirty (30) days, the Commission will again review the agreement and the comments received, and will decide whether it should withdraw from the agreement or make final the agreement's proposed order.

This matter involves an alleged misleading representation for Natural American Spirit cigarettes, which Santa Fe has advertised as containing no additives. According to the FTC complaint, through these advertisements, Santa Fe represented that because Natural American Spirit cigarettes contain no additives, smoking them is less hazardous to a smoker's health than smoking otherwise comparable cigarettes that contain additives. The complaint alleges that Santa Fe did not have a reasonable basis for the representation at the time it was made. Among other reasons, according to the complaint, the smoke from Natural American Spirit cigarettes, like the smoke from all cigarettes, contains numerous carcinogens and toxins, including tar and carbon monoxide¹.

The proposed consent order contains provisions designed to prevent Santa Fe from engaging in similar acts and practices in the future.

¹ In late 1997, Santa Fe voluntarily did begin placing the statement, "To our knowledge there is no research indicating cigarettes containing additive-free tobacco are safer than cigarettes with tobacco containing additives" in certain ads for Natural American Spirit tobacco cigarettes. Since early 1998, Santa Fe has also included the statement "We make no representation expressed or implied that these cigarettes are any less hazardous than any other cigarettes" on the packaging of Natural American Spirit cigarettes.

Analysis to Aid Public Comment

Part I of the order requires Santa Fe to include the following disclosure, clearly and prominently, in certain advertising for its tobacco cigarettes: "No additives in our tobacco does NOT mean a safer cigarette." (The order requires a similar disclosure in advertising for other tobacco products Santa Fe advertises as having no additives.) The disclosure must be included in all tobacco advertising that represents (through such phrases as "no additives" or "100% tobacco") that the product has no additives. This Part exempts Santa Fe from the disclosure requirement: (1) for cigarette advertisements not required to bear the Surgeon General's health warning; and (2) if Santa Fe possesses scientific evidence demonstrating that its "no additives" cigarette poses materially lower health risks than other cigarettes of the same type. In general, the disclosure required by Part I must be in the same type size and style as the Surgeon General's warning and must appear within a rectangular box that is no less than 40% of the size of the box containing the Surgeon General's warning.

Part II of the order requires Santa Fe to include the following disclosure, clearly and prominently, in advertising and on packaging for herbal cigarettes: "Herbal cigarettes are dangerous to your health. They produce tar and carbon monoxide." (The order requires a similar disclosure for other herbal smoking products.) The disclosure must be included in all advertising and on packaging for herbal smoking products that represent (through such phrases as "no tobacco," "tobacco-free," or "herbal") that the product has no tobacco. This Part also contains an exemption from the disclosure requirement if Santa Fe possesses scientific evidence demonstrating that such herbal smoking products do not pose any material health risks. In general, the disclosure required by Part II must be in the same type size and style as the Surgeon General's warning and for advertisements must appear within a rectangular box that is the same size as the box containing the Surgeon General's warning.

Analysis to Aid Public Comment

Part III requires Santa Fe to send a letter to its purchasers for resale notifying them that they should discontinue the use of certain existing Natural American Spirit cigarette advertisements and promotional materials and that Santa Fe is required to stop doing business with purchasers for resale that do not comply with this request.

Parts IV VIII of the order require Santa Fe to keep copies of relevant advertisements and materials substantiating claims made in the advertisements; to provide copies of the order to certain of its personnel; to notify the Commission of changes in the composition or formula of Natural American Spirit cigarettes that may affect the order; to notify the Commission of changes in corporate structure; and to file compliance reports with the Commission. Part IX provides that the order will terminate after twenty (20) years under certain circumstances.

The purpose of this analysis is to facilitate public comment on the proposed order, and it is not intended to constitute an official interpretation of the agreement and proposed order or to modify in any way their terms.

Complaint

IN THE MATTER OF**QVC, INC.****CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATIONS OF
SEC. 5 AND 12 OF THE FEDERAL TRADE COMMISSION ACT**

*Docket C-3955; File No. 9823152
Complaint, June 14, 2000--Decision, June 14, 2000*

This consent order addresses representations by respondent Quigley Corporation concerning the effectiveness of its Cold-Eeze Zinc Lozenges, Cold-Eezer Plus Zinc Gluconate Lozenges, and Kids-Eeze Bubble Gum ("Kids-Eeze") products. The consent order prohibits the respondent from making representations that its products prevent users from contracting colds and pneumonia; will treat allergies; will reduce the severity of colds in children; and that Kids-Eeze will reduce the severity of cold symptoms in children unless it possesses and relies upon competent and reliable scientific evidence that substantiates such representations. The consent order also prohibits the respondent from making any representation that any food, drug, or dietary supplement can or will cure, treat, or prevent any disease, or have any effect on the structure or function of the human body, unless it possesses and relies upon competent and reliable scientific evidence that substantiates the representation.

Participants

For the Commission: *Daniel Kaufman, Lisa B. Kopchik, C. Lee Peeler and Michelle K. Rusk.*

For the Respondent: *Lewis Rose, Arent Fox Plotkin & Kahn, PLLC; Alan K. Palmer, Cooper, Carvin & Rosenthal; Glenn A. Mitchell, Stein, Mitchell & Mezines; and Ed Glynn, Venable, Baetjer, Howard & Civiletti, LLP.*

COMPLAINT

The Federal Trade Commission, having reason to believe that QVC, Inc., a corporation ("respondent"), has violated the provisions of the Federal Trade Commission Act, and it appearing

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to the Commission that this proceeding is in the public interest, alleges:

1. Respondent QVC, Inc. ("QVC") is a Delaware corporation with its principal office or place of business at 1200 Wilson Drive, West Chester, PA 19380. QVC operates two cable shopping services and is principally engaged in the marketing of a variety of consumer products by means of live, customer-interactive, televised sales programs and through its Internet Web site (www.qvc.com). QVC produces and disseminates advertising in the form of television programming that is disseminated through cable channels, broadcast stations and satellite dish receivers. This programming markets consumer products directly to viewers.

2. Respondent has advertised, offered for sale, sold and distributed dietary supplement products to the public, including Cold-Eezer Plus Zinc Gluconate Lozenges and Cold-Eeze Zinc Lozenges (hereinafter, collectively, "Cold-Eeze"). 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 Cold-Eeze, including but not limited to the attached Exhibits A through E, transcripts of television advertisements that appeared on QVC or Q2, home shopping cable channels run by QVC. These advertisements contain the following statements:

- (a) Show Host: Chuck is back to tell us why Cold-Eezers are so fabulous. Perfect time of year to bring them back because we've got hay fever and allergies combined with an

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upcoming cold season. Already I'm starting to see lots of sniffles around QVC.

(Exhibit A, p. 1).

(b) C. Phillips: To have a strategy to help fight the common cold. The kids are in school. They are there right now.

...

C. Phillips: It's a breeding ground. Everything they touch -- if the child before had a cold and they touch that spot and they touch their noses, its off to the races.

...

C. Phillips: So, there's a couple of strategies. One is we can take one a day and try to see if you can beat the cold to what they call prophylactic or a preventive medicine.

Show Host: Excellent

C. Phillips: Try taking one a day. Or if the child comes home and you see that it's here . . . that they have symptoms, start treating the child. Take one every three hours. But everyone in the family should take a couple to prevent picking up that cold.

(Exhibit A, p. 2).

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(c) Caller: I just wanted you to know I have a granddaughter that's 12 years old, and ever since birth when she gets a cold, it turns into bronchitis.

. . .

Caller: And so I tried these . . . and it eliminated the cold almost immediately.

C. Phillips: Well, that's really important because we have several customers we know through QVC and other places where they really can't afford to have their children even get a cold because what happens is this exacerbated condition appears.

Show Host: Sure.

C. Phillips: You get bronchitis, pneumonias. And here's an opportunity right in front of us to stop it right now.

Show Host: Right. Exactly.

(Exhibit A, p. 3).

(d) C. Phillips: The other thing is allergies.

Show Host: Yes.

C. Phillips: We have many, many people who have reported to us that their usual choice is to have antihistamines, which make them dopey --

Show Host: Sure.

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C. Phillips: -- which make them incapable of functioning, some of them.

Show Host: Right.

C. Phillips: And we suggested they try it. So, we -- they tried it and they take one and they see how long it lasts. It does diminish the symptoms of allergies.

(Exhibit A, p. 4).

(e) Show Host: Children can absolutely take this. In fact, I've heard . . . people will wrap one of these in cheesecloth and let their toddler suck on it so they can get the benefits from it without actually risking choking or anything.

C. Phillips: Um-hum. Yes.

(Exhibit A, p. 6).

(f) Caller: And I was glad to hear you say something about taking one a day as a preventative. We've never tried that before.

C. Phillips: Yes. Well, now's the time to try it.

Show Host: Yep.

C. Phillips: This is -- this is a strategy that may pay off big-time because it does help block as you saw in the animation. If we can stop the

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viruses we pick up over the day, they will not have a chance to even start.

Show Host: Perfect.

C. Phillips: Therefore, it will preclude you getting the cold.

Caller: Yes.

C. Phillips: And it's a good strategy. We highly recommend people try that.

(Exhibit A, pp. 6-7)

(g) Show Host: \$18.25. Now, you get 60 lozenges. If you want to do it as a preventative measure, that's going to be a two month supply for you. If you want to stash some in your desk at work, stash some in the glove compartment in your car. Give a couple to your kids at school, because halfway through the day if they start to get that tickle in their throat, by taking one of these, they're already taking steps ahead to prevent getting sicker and to prevent spreading it to the rest of the family. So, these do last you a good long time.

But this is the time of year to stock up. Even if you're not suffering from hay fever and allergies, you know that cold season has pretty much started –

(Exhibit A, p. 8).

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(h) C. Phillips: Well not only that, but zinc is a critical, very important mineral that we all need. A lot of us are deficient in it. . . . So, not only are you preventing a cold, but you're getting that zinc which has been proven many times to have a positive effect on many conditions of the body.

Show Host: So you're getting even healthier.

C. Phillips: Absolutely.

(Exhibit A, p. 9).

(i) Show Host: And actually, if you take these on a preventative basis, you might not ever get a cold at all.

R. Pollack: Right.

(Exhibit B, p. 3)

(j) Show Host: You know, my own grandma just got over pneumonia.

R. Pollack: Hmm.

Show Host: And I'm sending her these so that she can continue to take them, and as some of the people do, take them on a preventative basis.

R. Pollack: Right. Yes.

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Show Host: I know that you have women in nursing homes --

R. Pollack: Right.

Show Host: -- and gentlemen in retirement communities who are taking these.

R. Pollack: Yes. And they find them very effective.

(Exhibit B, p. 4).

(k) Show Host: If you're thinking, oh, well, cold season is over, we're already into April 1st, let me tell you, many, many, many of our viewers and studies will prove that the Cold-Eezers Plus are also effective on airborne allergies. If you are just about to get into ragweed season in your part of the country, if you are constantly dealing with allergic reactions to all of the pollen, if you have to deal with sinus infections because you're just breathing in the junk, this is the alternative. . . . What does Cold-Eezers Plus do? Well, it's the zinc. The zinc that's included within this product literally prohibits the virus or the airborne allergies from adhering to the tissue inside your nose.

(Exhibit C. p. 1)

(l) Show Host: Well, and this is also going to help -- from what the information has told us and what from viewers tell us, this is going to help during your allergy season, because you guys have a lot of beautiful flowering plants out that way. So, this is going to

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help if you are ever subject to allergy attacks.

(Exhibit C, p. 2)

(m) Show Host: But I'm telling you something, I'm always sick. November of every year, I get strep throat, tonsillitis, I always get some sort of horrible throat ailment. And, you know, this year, I didn't get it and I really am a firm believer in these. I think that they're preventing me from getting sick.

(Exhibit D, p. 4).

(n) C. Phillips: We're suggesting to moms, get Cold-Eezer Plus in the house.

Show Host: Um-hum.

C. Phillips: Have it ready, and at the very first hint of a cold, start applying it. But even before then, try to use it as a preventative measure, so that if you know that the child has had an exposure, which is school, they can take one a day --

Show Host: Um-hum.

C. Phillips: -- to try to prevent getting a cold.

Show Host: And you're talking about schools, I mean, everywhere you go, I mean, other children have it, other adults have it, you're just always exposed.

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C. Phillips: Always exposed, exactly. You touch things.

Show Host: Um-hum.

C. Phillips: You touch a doorknob and you go up and you touch your nose, you've got the chance to have it.

Show Host: Right.

C. Phillips: So, what we're saying is, point one, if you don't have it in the house, get some in the house so that you have it to use at the very first sign of a cold.

Show Host: Um-hum.

C. Phillips: That's the important thing. This year we're saying, have it around and take one a day. Give your child one before he goes to school, that way, it can possibly prevent that child from getting a cold.

(Exhibit E, p. 2).

(o) C. Phillips: It's also excellent for allergies.

Show Host: Oh, really?

C. Phillips: Absolutely.

(Exhibit E, p. 5)

Complaint

5. Through the means described in Paragraph 4, respondent has represented, expressly or by implication, that:

- (a) Daily use of Cold Eeze will prevent users from contracting colds.
- (b) Use of Cold-Eeze will prevent users from contracting colds.
- (c) Use of Cold Eeze will reduce the risk of contracting pneumonia.
- (d) Use of Cold Eeze will relieve or reduce the symptoms of hay fever or allergies.
- (e) Use of Cold Eeze will reduce the severity of cold symptoms in children.
- (f) Daily use of Cold Eeze will prevent children from contracting colds.

6. Through the means described in Paragraph 4, respondent has represented, expressly or by implication, that, it possessed and relied upon a reasonable basis that substantiated the representations set forth in Paragraph 5, at the time the representations were made.

7. In truth and in fact, respondent did not possess and rely upon a reasonable basis that substantiated the representations set forth in Paragraph 5, at the time the representations were made. Therefore, the representation set forth in Paragraph 6 was, and is, false or misleading.

8. The acts and practices of respondent as alleged in this complaint constitute unfair or deceptive acts or practices, and the

Complaint

making of false advertisements, in or affecting commerce in violation of Sections 5(a) and 12 of the Federal Trade Commission Act.

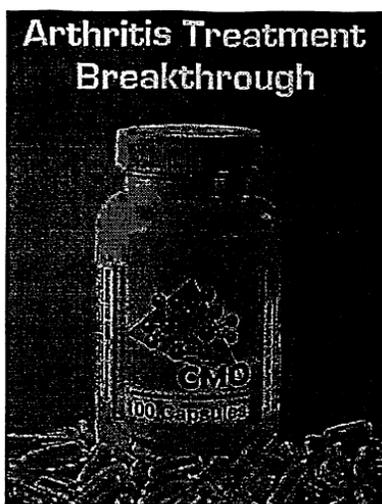
IN WITNESS WHEREOF, the Federal Trade Commission has caused its complaint to be signed by its Secretary and its official seal to be hereto affixed at Washington, D.C. this fourteenth day of June, 2000.

By the Commission, Commissioner Leary not participating.

Complaint Exhibits

Complaint Exhibits

ARTHRITIS TREATMENT BREAKTHROUGH

<http://home.earthlink.net/~cmocure/cmocure>

Welcome to our online information center. The purpose of this web site is to give you the opportunity to learn about the arthritis treatment breakthrough called CMO™. It is being hailed by doctors, the media and its users as the cure for arthritis. It has taken 26 years to develop CMO™ and make it available to the public. We urge you to explore this site and learn about this revolutionary new substance.

- [CMO... THE DISCOVERY](#)
- [HOW IT WORKS](#)
- [WHY IT'S DIFFERENT](#)
- [WHAT'S BEING SAID](#)
- [ABOUT CMO](#)
- [FREQUENTLY ASKED QUESTIONS](#)
- [ORDERING !\[\]\(591688423ccb43e9b083e2a713525f4a_img.jpg\)](#)



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Exhibit A
CMO Distribution Center

Complaint Exhibits

CMO... THE DISCOVERY

<http://home.earthlink.net/~cmocure/cmocure/cm00001.html>**CMO... THE DISCOVERY**

In 1971, the predecessor of CMO™ capsules, was first discovered by a researcher at the National Institutes of Health. That predecessor was cetyl myristoleate. The researcher was unable to get his project funded and slowly carried on at his own expense. Eventually he discovered that when this substance was injected near the joints of lab animals it protected them from arthritis. Many years later he contracted arthritis himself. After his doctor could provide no further relief through conventional medicine, he successfully injected himself to permanently reverse his arthritic condition. His doctor was so amazed at the beneficial results, he urged him to publish a report.



In March of 1994, that report about injectable cetyl myristoleate was published in The Journal of Pharmaceutical Sciences. In that report, the researcher expressed his hope that other studies would be conducted, "particularly, more extensive tests of cetyl myristoleate analogues."

In late 1994, the San Diego Clinic's research staff did exactly what that researcher had hoped for in his report. They developed an orally administered nutritional supplement. This natural dietary supplement is an analogue called CMO™, which is the trade name for cerasomal-cis-9-cetylmyristoleate. The San Diego Clinic did the first clinical study on CMO™. That study proved CMO™ to be of great benefit to osteo, rheumatoid and reactive arthritis. Subsequent data proves its value for nearly all other forms of arthritis except gouty arthritis.

In December 1995, CMO™ was introduced to the medical community at the National Medical Conference on Aging in Nevada. Five doctors afflicted with a variety of arthritis conditions tried CMO™ at the conference. All five doctors responded successfully within three days and CMO™ became the "star" of the conference resulting in hundreds of doctors using CMO™ on their patients.

In February 1996, after successful reports from the medical community, CMO™ became available to the public. The beneficial effects of CMO™ have been so dramatic, it has inspired two books about the subject. Finally CMO™ has finished its 26 year long journey from the point of discovery to benefit the general public.

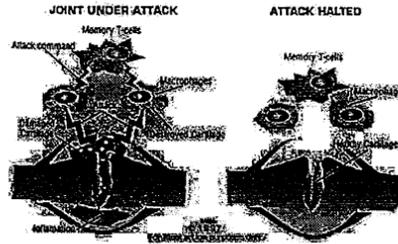


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Complaint Exhibits

HOW IT WORKS

<http://home.earthlink.net/~cmocure/cmocure/cm00002.htm>**HOW IT WORKS**

In their October 28, 1996 issue, Time magazine reported on the three most promising developments in arthritis research. The scientists participating in all three projects are intensely focused on intervening in the immune system's involvement in the arthritic process. According to doctors, that is exactly what CMO™ does. It corrects the disease at the source in the immune system. Dr. Len Sands the director of the San Diego Clinic says: "Unlike everything else made for arthritis, you don't have to take it over and over again. CMO™ is not a pain reliever, anti-inflammatory, cortisone or other steroid. CMO™ is an immunomodulator, it regulates your immune system. There's never been anything like it before for arthritis. Instead of treating the symptoms of pain and inflammation, CMO™ capsules act directly against the cause of arthritis, the memory T-cells in your immune system that create the attacks against your joints. Once the error in your immune system is corrected by CMO™, the attacks on your joints stop and the pain and inflammation should be relieved forever. Once the problems are corrected, they stay corrected and you no longer need CMO™ or other arthritis remedies."



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Complaint Exhibits

WHY IT'S DIFFERENT

<http://home.earthlink.net/~cmocure/cmocure/cm00003.html>**WHY IT'S DIFFERENT**

CMO™ is not a conventional product. There's never been anything like it before. It's not a pain reliever, herb or anti-inflammatory. CMO™ is a natural immunomodulator. It has the unique ability to normalize the immune system. CMO™ acts directly to regulate and normalize the malfunctioning immune system and stop the arthritic process itself. Once that occurs, the destruction stops, and the pain and inflammation are automatically relieved. Your body then has a chance to heal itself and return to normal.

We must emphasize that cetylmyristoleate is not CMO™, nor is CMO™ any sort of generic chemical designation. The trademarked designation "CMO™" applies exclusively to cerasomal-cis-9-cetylmyristoleate and to no other product.

Cetylmyristoleate oil is the injectable precursor of CMO™. Cetylmyristoleate was not developed for oral administration. Therefore, its effectiveness as an injectable does not apply to oral applications.

CMO™ powder was developed for oral administration. As a result, it is 40 - 200 times more easily absorbed. This makes it very effective. CMO is:

FAST**LASTING RELIEF IS JUST A FEW DAYS AWAY**

Most users report significant relief in two weeks or less. Even in severe cases it rarely takes longer than 21 days.

EASY**ONLY ONE SET OF ORAL CAPSULES**

Take three capsules in the morning and then again at night for 16 days, then say goodbye to the problems of arthritis. Only one bottle is all that is needed in most cases.

SAFE**NO SIDE EFFECTS**

CMO™ is not like the many medicines for arthritis that are toxic. CMO™ is not even like the several types of vitamins that are toxic at high levels. CMO™ has been tested and shown to have no ill effects whatsoever. To date thousands upon thousands of people have used CMO™ to relieve the symptoms of arthritis and there are no reported ill effects from anyone.

EFFECTIVE**IT WORKS FOR ALMOST EVERYONE**

It works for both osteoarthritis and rheumatoid arthritis. It works for all other types of arthritis except gouty arthritis. CMO™ has been effective on nearly everyone that does not have severe liver damage. CMO™ almost always provides relief of pain, swelling and return of mobility. In the clinical studies they found a few cases that only received 70% to 100% relief. Relief provided by CMO™ was invaluable and the subjects were able to return to a normal life.

NATURAL**DRUG FREE PAIN RELIEF**

CMO™ is the commercial name for cerasomal-cis-9-cetylmyristoleate. It is naturally derived from beef. Similar substances have long been used in common foods including

Complaint Exhibits

WHY IT'S DIFFERENT

<http://home.earthlink.net/~cmocure/cmocure/cm00003.htm>

cheese and chocolate. This treatment is accepted by the modern medical community. It is natural, drug free and non-toxic.

PERMANENT**TAKE CMO™ ONLY ONCE**

One bottle of capsules is all you should ever need for relief from the symptoms of arthritis for the rest of your life. Most affected persons need to take CMO™ for only a couple of weeks. No further treatment or medicines are needed, not even CMO™. Once CMO™ has done it's work stopping arthritis the benefits continue for long periods of time as your body repairs and reverses the damage done by arthritis.



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Complaint Exhibits

WHAT'S BEING SAID ABOUT CMO

<http://home.earthlink.net/~cmocure/cmocure/cm01000.html>**WHAT'S BEING SAID ABOUT CMO**

The medical community, users, books, television news, radio health talk shows, medical newsletters and scientific journals all report CMO™ to be a revolutionary breakthrough!

- [What do doctors say about CMO?](#)
- [What is the media saying about CMO?](#)
- [What are people saying about CMO?](#)



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Complaint Exhibits

What do doctors say about CMO?

<http://home.earthlink.net/~cmocure/cmocure/cm01001.htm>

What do doctors say about CMO?

Dr. Douglass wrote in his newsletter: "A New Miracle Cure for Arthritis ...now we have a new star on the horizon that promises as much (or more) than the old sure-cures."



Dr. Muller of Ferndale, Mich. says there's a cure. He knows, he's taken it. Dr. Muller had osteoarthritis for 30 years. Bravely he forged ahead into the naturopathic remedy and tried CMO™. Dr. Muller is no longer troubled by arthritis.

Dr. Hunt was so impressed by CMO™ he wrote a book called "Boom, You're Well". In that book he says: "...rheumatoid arthritis damages tissues, causes extreme suffering, and premature death. ...If you have rheumatoid arthritis, or you know someone who has it, then you know I am reporting a miracle ... A MIRACLE."



Dr. Sands the director of the San Diego Clinic knows there's a cure. He's taken it and now he says, "I was rescued from arthritis". In fact that is the name of his forthcoming book about CMO™. In that book he says, "The arthritic process can be halted. Arthritis can be reversed. The pain and inflammation can be relieved. And it's all been done without any harmful side effects."



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Complaint Exhibits

What is the media saying about CMO?

<http://home.earthlink.net/~cmocure/cmocure/cm01002.html>

What is the media saying about CMO?



Books, Television News, Radio Health Talk Shows, Medical Newsletters and Scientific Journals all report CMO™ to be a revolutionary breakthrough!

Quotes extracted from: The Mark Scot Show, WXYT Radio Detroit, December 1996: "Hang on folks because if you haven't heard this before, it certainly is going to be an eye opener for you. ...Amazing is not the word for it. ...CMO™ gets to the source of the problem, it actually stops the arthritic process."

Quotes extracted from: The Don Bodenbach Show, KCEO Radio San Diego, August 1996 "...It may be what we consider almost a miracle cure for arthritis, and the form of arthritis doesn't matter. ...What is more impressive is once you undergo the appropriate treatment ...you are in most cases free from arthritis symptoms forever."

Quotes extracted from: The Nature of Health Magazine, Stop Arthritis Now! The Amazing Story of CMO™, September 1996 "CMO™ is a natural substance and is considered an immunomodulator. The reason for the enormous interest is the effect of CMO™ on both rheumatoid and osteoarthritis... The results of CMO™ are so impressive that nothing that mainstream or natural medicine has to offer can come close to the dramatic reversals in arthritis that have been observed. The link between CMO™ and arthritis was discovered at the National Institutes of Health... Standard medical treatment is aimed at symptomatic relief of pain and inflammation and has shown to actually accelerate the disease process... In contrast, the CMO™ protocol works rapidly and does not need to be continued in the vast majority of cases."



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Complaint Exhibits

What are people saying about CMO?

<http://home.earthlink.net/~cmocure/cmocure/cm01003.htm>**What are people saying about CMO?**

"It's a miracle! Ten years with arthritis ... three in a wheelchair ... and now I've got a completely normal life again. Just watch me make up for lost time."

"As crippled as I was, I hadn't worn out a pair of shoes in seven years. Now I'm out shopping for them again all by myself. My whole life has made a complete about face."

"Even as a doctor, I find CMO™ miraculous. It cured my knee problems, and it's performing every bit as well for my patients, too. I've seen several 'miracle cures' already."

"After nine years of crippling pain, I can't believe I'm actually skiing again. CMO™ is truly incredible."



"After two years in a wheelchair, I just can't believe that I'm taking care of myself and my family again."

"I am a trophy winning martial arts competitor and I had to quit three years ago because of my arthritis. I'm 100% now that I tried CMO™. I look forward to going to Australia next year to compete again."

"I couldn't even put on my own socks. My wife had to do it. Now after seven years of excruciating pain, I'm out golfing again."

"Before, I needed two hands just to lift a cup of coffee. Now I find myself rearranging furniture all by myself. Last week I even changed a flat tire on the car."



"I didn't even realize CMO™ had worked for me till I found myself moving a bunch of heavy junk out of the garage. The change was so smooth and natural I just took it for granted."

"Imagine my agony. I was a professional athlete all my life. CMO™ gave me back my life. Even knee surgery didn't do that for me. It's amazing how CMO™ ended up fixing all my joints."



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Complaint Exhibits

FREQUENTLY ASKED QUESTIONS

<http://home.earthlink.net/~cmocure/cmocure/cm02000.html>**FREQUENTLY ASKED QUESTIONS**

The following questions were answered by the doctors, staff and research associates of the San Diego Clinic. You can scroll down the page to view them all, or click on specific question to view the answer. Use "back to top" button to return to questions after viewing an answer.

- o [What makes CMO different from all the other remedies?](#)
- o [Does that mean a person takes CMO only once and that's it?](#)
- o [Does it work for both rheumatoid and osteoarthritis?](#)
- o [Does CMO improve joint mobility?](#)
- o [Does it stop arthritis pain?](#)
- o [Does CMO reduce inflammation?](#)
- o [How long before it takes effect?](#)
- o [Will it correct deformities?](#)
- o [What about really severe cases?](#)
- o [What about joints where the cartilage is completely worn away?](#)
- o [Does it work for everyone?](#)
- o [Can I continue with my usual medications while taking CMO?](#)
- o [Do I have to go on a special diet?](#)
- o [What about exercise?](#)
- o [Is it okay to exercise?](#)
- o [Is it expensive?](#)
- o [Is age a factor?](#)
- o [What causes arthritis?](#)
- o [How does CMO work?](#)
- o [Is it harmful in any way?](#)
- o [What is CMO? Where does it come from?](#)
- o [Is CMO used for any other ailments?](#)

What makes CMO different to other remedies?

CMO is not a pain reliever, nor is it a steroid or anti-inflammatory. It is an immunomodulator. There's never been anything like it before for arthritis. Instead of treating the symptoms of pain and inflammation, CMO act against the cause of arthritis – the erroneously programmed Memory T Cells of your own immune system that cause the attacks against your joints. Once the attacks on your joints are halted the symptom of pain and inflammation is promptly remedied.

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Does that mean a person takes CMO only once and that's it?

Yes. Most afflicted persons need to take the capsules for only a couple of weeks to be free of arthritis symptoms forever. No further medication is ever necessary, not even CMO.

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Does it work for both rheumatoid and osteoarthritis?

Both types respond equally well. It also works for most other types of arthritis such as those associated with Ankylosing Spondylitis, Reiter's syndrome, Behcet's syndrome, Sjogren's syndrome and Psoriasis.

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FREQUENTLY ASKED QUESTIONS

<http://home.earthlink.net/~cmocure/cmocure/cm02000.htm>

It has also been found to relieve various types of back pain of undetermined origin (probably arthritis related)

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Does CMO improve joint mobility?

Yes, it can! If the joint can be moved, joint mobility may be improved. But if the bones have fused and grown together, only surgery can help those particular joints.

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Does it stop arthritis pain?

Arthritis pain will disappear completely in almost every instance. In a few extreme cases pain was reduced by only 70% to 90%, which was still of such major benefit that it allowed the persons to function normally again.

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Does CMO reduce inflammation?

Yes, and it does so very effectively. The pressure in the joints caused by the inflammation is the major cause of stiffness and pain.

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How long before it takes effect?

Most people can begin to feel relief within a couple of weeks. Others may need several months.

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Will it correct deformities?

Yes. Deformed fingers and toes are often caused by inflammation which swells joints and pushes the bones out of place. Reduction of the swelling alone improves appearance dramatically and often allows the dislocated bones to return to their normal positions. Extreme cases may require some physical therapy.

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What about really severe cases?

Even most persons previously confined to bed or to wheelchairs have responded dramatically and are

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FREQUENTLY ASKED QUESTIONS

<http://home.earthlink.net/~cmocure/cmocure/cm02000.html>

now no longer dependent on others for care. A number of these cases received additional benefit from repeating the treatment one more time. A few others found that physical therapy or exercise programs also helped.

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What about joints where the cartilage is completely worn away?

Unless the bones have fused together, the usual problem is not lack of mobility, but pain. The majority of such drastic cases have responded favorably resulting in painless movement, even in the knees.

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Does it work for every one?

No. CMO has been able to help many individuals, but not everyone will see an improvement in their arthritic symptoms. We all have different bodies, lifestyles, eating habits, etc., therefore the results will vary. Digestive problems or liver function impairment, can sometimes interfere with success.

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Can I continue with my usual medications while taking CMO?

Yes, but after a few days you probably won't need them. However, it's best to avoid steroids if possible.

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Do I have to go on a special diet?

Alcohol, chocolate, and tea should be avoided. Some users find that avoiding or limiting other foods helps improve effectiveness. A recommended diet accompanies this product, but it only need be followed for a few weeks. Many people take digestive enzymes with CMO to help them absorb it. Afterwards, there are no restrictions.

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Will I have to exercise?

The absence of pain and return of joint mobility is so profound that normal activities will follow quite naturally. No special exercises are necessary. Actually, the usual tendency is to overindulge in the new found freedom, sometimes temporarily resulting in soreness of muscles previously unused.

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Is it okay to exercise?

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FREQUENTLY ASKED QUESTIONS

<http://home.earthlink.net/~cmocure/cmocure/cm02000.htm>

Yes. Many people want to lose weight and or rebuild strength once they are free to do so again painlessly. But, as with all sound fitness programs, it's best to do so gradually. Your body will need time to adjust.

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Is it expensive?

The cost of treatment is very modest. Most arthritis victims are already spending more on pain and anti-inflammation medications in just a few months. Since you usually need to take only one set of CMO capsules, it actually saves thousands of dollars in the long run.

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Is age a factor?

Not really. All ages respond well. Although arthritis becomes far more common with advancing age, even very young children are sometimes afflicted.

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What causes arthritis?

The numerous theories about what causes arthritis have filled hundreds of volumes. But one thing we do know is that the arthritic process is regulated by Memory T Cells which have been erroneously programmed, causing attacks on your own joints and cartilage.

In osteoarthritis, this faulty programming usually results from physical damage (like a fall, sports injury, vehicle accident, repeated operation of vibrating machinery, long-term strenuous physical work or sports activities, and continuous repetitive motions of certain joints) etc. The damage results in an immune response involving the memory T cells producing attacks against the affected joints. Unfortunately, there's no stop or end command given and the attack continues against healthy cartilage and joints as well. That's why arthritis is called an autoimmune disease, our own body is attacked by our own immune cells.

Although the various forms of rheumatoid arthritis are usually caused by some ineffective microorganism. Memory T cells is again involved in the same arthritic process. Without CMO it continues to worsen.

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How does CMO work?

CMO corrects the root cause of arthritis by erasing the memory of the badly programmed memory T cells. Once the destruction of your joints is halted, your body can begin its repair process without interference, and joints begin to normalize. Although the major benefits come promptly, minor improvements continue even for several months after finishing CMO. With the pain and inflammation relieved, the joints can function again quite normally. Despite minor physical damage to bones as a

Complaint Exhibits

FREQUENTLY ASKED QUESTIONS

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result of long affliction, perfectly normal joint function usually returns regardless.

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Is it harmful in any way?

CMO studies began at the US National Institutes of Health more than 20 years ago. Recently, clinical applications studies were conducted in San Diego. No harmful short or long-term effects were ever observed in humans, or in laboratory animals even at extremely high doses. Similar substances have long been used in common foods including cheese and chocolate, and even in medicines and cosmetics. It is a perfectly safe and naturally derived substance.

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What is CMO? Where does it come from?

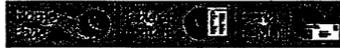
Cerasomal-cis-9-cetylmyristoleate is the biomedical name. CMO is the trade name. It is a completely natural substance found in certain animals such as cows, beavers, mice, and whales. As supplied in capsules, it is a naturally derived, highly purified and refined waxy ester prepared for oral administration.

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Is CMO used for any other ailments?

Current studies include CMO as a part of therapeutic protocol for other disorders with autoimmune components including multiple sclerosis, leukemia, lupus, emphysema, certain cancers, benign prostatic hyperplasia, silicon breast disease, and especially asthma. It also works for dogs, cats, horses and other animals.

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ORDERING

http://home.earthlink.net/~cmocure/cmocure/cm03000.htm

ORDERING

CMO™ now comes in 60 capsule bottles: Starting January 10th, we will offer the 60 capsule bottles of CMO™ for the introductory price of \$95.00 plus shipping and handling. This price is for a limited time only. Regular suggested retail is \$119.00.

100 capsule bottles: The new prices for 100 capsule bottles will be \$195.00 plus shipping and handling.



CMO™; Beware of imitations! Look for the accompanying trademark and graphic logo to be sure you are ordering from an authorized distributor. The testimonials and clinical studies quoted in this web site only apply to the real CMO™. A recommended diet accompanies this product to improve it's effectiveness, consult your physician before making any dietary changes. CMO™ is inexpensive compared to the thousands of dollars it costs for any ongoing arthritis treatment.



Book, Boom You're Well: By Dr. Douglas Hunt \$ 19.95.
Book, Rescued From Arthritis: By Dr. Len Sands, call for availability.

Feel free to call us if you have any questions about CMO™ or would like to place an order.

Toll free in the US: 1-800-909-CURE
Dial direct from overseas: 941-954-2100



Email Ordering

Free Pamphlets: We invite you to order any of our free pamphlets for you or your friends. There are email versions of the Clinical Studies, Case Histories and Questions & Answers. This web site is an electronic version of the "Arthritis Treatment Breakthrough" pamphlet which is only available through standard mail.

Free Tape: We invite you to order our free CMO™ Information Tape for you or your friends. This tape features interviews with Dr. Sands.

Form with fields for To, Subject, Name, E-mail Addr, Company, Address, City, State, Postal, Country, Home Phone, Home Fax, Work Phone.

Complaint Exhibits

ORDERING

<http://home.earthlink.net/~cmocure/cmocure/cm03000.htm>

Work Fax:
 (submit this order)
 (clear this order)

Our Mailing Address

CMO Distribution Centers of America
5726 Cortez Road West Suite # 202
Bradenton, FL 34210 USA

Manufacturers Statement

Modestly speaking, CMO™ is a revolutionary new product. CMO™ is naturally derived, it is sold only as a dietary supplement not intended to treat, cure, or diagnose any disease. Therefore it is available without prescription. CMO™ is produced and bottled in the USA. The production facilities are state of the art and inspected by the California State Food and Drug Branch of Health Services.



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Decision and Order

DECISION & 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 the 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 respondent of all the jurisdictional facts set forth in the draft 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 or that the facts, as alleged in the complaint, other than jurisdictional facts, are true; and

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

1. Respondent QVC, Inc. is a Delaware corporation with its principal office or place of business at 1200 Wilson Drive, West Chester, PA 19380.

Decision and Order

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 QVC, Inc., its successors and assigns and its officers, agents, representatives, and employees.
3. "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 Cold-Eeze Zinc Lozenges, or any other food, drug or dietary supplement, as "food" and "drug" are defined in Section 15 of the Federal Trade Commission Act, in or affecting commerce, shall not make any representation, in any manner, expressly or by implication, that such product:

- A. will prevent users from contracting colds;
- B. will reduce the risk of contracting pneumonia;

Decision and Order

- C. will relieve or reduce the symptoms of hay fever or allergies;
- D. will reduce the severity of cold symptoms in children; or
- E. will prevent children from contracting colds;

unless, at the time the representation is made, respondent possesses and relies upon 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 dietary supplement, in or affecting commerce, shall not make any representation, in any manner, expressly or by implication, that such product can or will cure, treat, or prevent any disease, or have any effect on the structure or function of the human body unless, at the time the representation is made, respondent possesses and relies upon competent and reliable scientific evidence that substantiates the representation.

III.

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

Decision and Order

IV.

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.

V.

IT IS FURTHER ORDERED that respondent QVC, Inc., 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, including videotapes of all such broadcast advertisements;
- B. All materials that were relied upon in disseminating the representation; and
- C. All tests, reports, studies, surveys, demonstrations, or other evidence in their possession or control that contradict, qualify, or call into question the representation, or the basis relied upon for the representation, including complaints and other communications with consumers or with governmental or consumer protection organizations.

VI.

IT IS FURTHER ORDERED that respondent QVC, Inc., and its successors and assigns, shall deliver a copy of this order to all current and future principals, officers, directors, and managers, and to all current and future employees, agents, and representatives having responsibilities with respect to the subject matter of this order, and shall secure from each such person a

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signed and dated statement acknowledging receipt of the order. Respondent shall deliver this order to current personnel within thirty (30) days after the date of service of this order, and to future personnel within thirty (30) days after the person assumes such position or responsibilities. Respondent shall maintain and upon request, make available to the Federal Trade Commission for inspection and copying, a copy of each signed statement acknowledging receipt of the order.

VII.

IT IS FURTHER ORDERED that respondent QVC, Inc., and its successors and assigns, shall notify the Commission at least thirty (30) days prior to any change in the corporation that may affect compliance obligations arising under this order, including but not limited to a dissolution, assignment, sale, merger, or other action that would result in the emergence of a successor corporation; the creation or dissolution of a subsidiary, parent, or affiliate that engages in any acts or practices subject to this order; the proposed filing of a bankruptcy petition; or a change in the corporate name or address. Provided, however, that, with respect to any proposed change in the corporation about which 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, 600 Pennsylvania Avenue, N.W., Washington, D.C. 20580.

VIII.

IT IS FURTHER ORDERED that respondent QVC, Inc., 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

Decision and Order

Trade Commission may require, file with the Commission a report, in writing, setting forth in detail the manner and form in which they have complied with this order.

IX.

This order will terminate on June 14, 2020, 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.

By the Commission, Commissioner Leary not participating.

Complaint

IN THE MATTER OF

ALTERNATIVE CIGARETTES, INC., ET AL.CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATIONS OF
SEC. 5 OF THE FEDERAL TRADE COMMISSION ACT

*Docket C-3956; File No. 9823022
Complaint, June 14, 2000--Decision, June 14, 2000*

This consent order requires Respondent Alternative Cigarettes, Inc. to include the following disclosure, clearly and prominently, in certain advertising for its tobacco cigarettes: "No additives in our tobacco does NOT mean a safer cigarette." The order exempts Alternative Cigarettes from the disclosure requirement: (1) for cigarette advertisements not required to bear the Surgeon General's health warning; and (2) if Alternative Cigarettes possesses scientific evidence demonstrating that its "no additives" cigarette poses materially lower health risks than other cigarettes of the same type. Respondent is also required to include the following disclosure, clearly and prominently, in advertising and on packaging for herbal cigarettes: "Herbal cigarettes are dangerous to your health. They produce tar and carbon monoxide." The disclosure must be included in all advertising and on packaging for herbal smoking products that represent that the product has no tobacco, unless respondent possesses scientific evidence demonstrating that such herbal smoking products do not pose any material health risks. Respondent is required to possess competent and reliable scientific evidence prior to: (1) claiming that any herbal smoking product does not present the health risks associated with smoking tobacco cigarettes; or (2) making any claim about the health risks associated with the use of any herbal smoking product.

Participants

For the Commission: *Michael Ostheimer, Shira Modell, Matthew D. Gold, Linda K. Badger, Kerry O'Brien, C. Lee Peeler, and BE.*

For the Respondents: *Joseph Pandolfino, Alternative Cigarettes.*

Complaint

COMPLAINT

The Federal Trade Commission, having reason to believe that Alternative Cigarettes, Inc., a corporation, and Joseph Pandolfino, individually and as an officer of the corporation ("respondents"), have violated the provisions of the Federal Trade Commission Act, and it appearing to the Commission that this proceeding is in the public interest, alleges:

1. Respondent Alternative Cigarettes, Inc., is a New York corporation with its principal office or place of business at 125 Virgil Avenue, Buffalo, New York 14216.
2. Respondent Joseph Pandolfino is an officer of the corporate respondent. Individually or in concert with others, he formulates, directs, or controls the policies, acts, or practices of the corporation, including the acts or practices alleged in this complaint. His principal office or place of business is the same as that of Alternative Cigarettes, Inc.
3. Respondents have advertised, promoted, offered for sale, sold and distributed tobacco cigarettes, including Pure cigarettes and Glory cigarettes, and non-tobacco herbal cigarettes, including Herbal Gold cigarettes and Magic cigarettes.
4. The acts and practices of respondents alleged in this complaint have been in or affecting commerce, as "commerce" is defined in Section 4 of the Federal Trade Commission Act.
5. Respondents have disseminated or have caused to be disseminated advertisements for cigarettes, including but not necessarily limited to the attached Exhibits A through I. These advertisements contain the following statements:
 - A. "The major tobacco companies literally put hundreds of chemicals and additives in their cigarette brands. After years of pressure by American consumers and by Congress, this list was recently disclosed by the giant

Complaint

tobacco companies themselves. This exact list is enclosed for your review.

A number of these additives should give smokers cause for concern. Some of these are known carcinogens. Notice that ammonia is on this list. A recent finding shows that when ammonia is added to cigarettes it actually increases the amount of nicotine that the body absorbs. Other studies show that the most popular brands have up to 12 percent sugar. They also use a high percentage of reconstituted (recycled) tobacco.

Native Americans smoked all natural tobacco without the ills that are associated with smoking today. Could it be that the chemicals and additives cause more health problems than the natural tobacco itself? Much research needs to be done on this subject."

(Exhibit A: Alternative Cigarettes, Inc.'s World Wide Web site)

B. "PURE

100% Natural Tobacco Cigarettes...ADDITIVE FREE!

PREMIUM BRAND

Most popular cigarette brands contain many added chemicals, flavorings, and preservatives. They also contain recycled (reconstituted) tobacco. PURE is made from 100% natural tobacco. No additives are in our cigarettes. Smokers enjoy the natural taste of our premium tobacco without all the additives. PURE is filtered and comes in full flavor, lights, and menthol. PURE is how smoking was originally meant to be."

Complaint

(Exhibit B: Alternative Cigarettes, Inc.'s World Wide Web site)

C. "GLORY

100% Natural Tobacco Cigarettes...ADDITIVE FREE!

GLORY cigarettes are price competitive with any generic cigarette anywhere. However, unlike generic and premium brands manufactured by the major tobacco companies, GLORY tobacco is natural and additive free. It has no added chemicals, flavorings, preservatives, or recycled tobacco. GLORY is filtered and comes in regular and menthol."

(Exhibit C: Alternative Cigarettes, Inc.'s World Wide Web site)

D. "HERBAL GOLD

100% Nicotine Free Herbal Cigarettes!

NO NICOTINE

HERBAL GOLD does not contain any nicotine or tobacco. It is made from a special blend of smoking herbs: Marshmallow, Yerba Santa, Damiana, Passion Flower, Jasmine and Ginseng. HERBAL GOLD looks and smokes just like tobacco cigarettes. HERBAL GOLD is taking the country by storm since smokers can now enjoy a great tasting cigarette without any nicotine. Each carton has 10 king size packs of 20. Regular, menthol, vanilla and cherry are available.

What are HERBAL GOLD cigarettes?

Complaint

Herbal Gold is a revolutionary product that is nicotine and tobacco free. Herbal Gold offers a special blend of smoking herbs: Marshmallow, Yerba Santa, Damiana, Passion Flower, Jasmine and Ginseng. These herbs have very good reputations with the health food industry and herbalists. Their histories and other information can be found in numerous herbal and health books.

Our cigarettes are the highest quality non-tobacco smokes in the world. They are filtered and look and smoke just like tobacco cigarettes. Herbal Gold comes in regular, menthol, vanilla and cherry.

Most brands of tobacco cigarettes manufactured by the major tobacco companies have numerous unnatural components, including reconstituted tobacco. Reconstituted tobacco is recycled tobacco that the tobacco companies refuse to waste. The major tobacco companies also put hundreds of chemicals, additives, and preservatives in their brands.

What About HERBAL GOLD'S Taste and Aroma?

Herbal Gold offers a pleasant light taste. Its aroma is sweeter than that of tobacco. One can't expect Herbal Gold's aroma to be identical to tobacco cigarettes since Herbal Gold is tobacco free. The herbs in our cigarettes are natural and are not cured or processed like tobacco.

The vast majority of smokers and non-smokers alike say that the smoke from Herbal Gold is a lot less irritating to the eyes, nose, and throat than tobacco smoke.

Complaint

Everybody, except the folks from the major tobacco companies, agrees that the arrival of Herbal Gold has been long over due. Our cigarettes are considered by many to be a great alternative to tobacco. In fact, many Herbal Gold smokers believe our product is superior to tobacco."

(Exhibit D: Alternative Cigarettes, Inc.'s World Wide Web site)

E. "MAGIC

100% Nicotine Free Herbal Cigarettes!

NO NICOTINE

MAGIC does not contain any nicotine or tobacco. It is made from a special blend of smoking herbs: Marshmallow, Yerba Santa, Damiana, Passion Flower, Jasmine and Ginseng. MAGIC looks and smokes just like tobacco cigarettes. MAGIC is taking the country by storm since smokers can now enjoy a great tasting cigarette without any nicotine. Each carton has 10 king size packs of 20. Regular and menthol are available.

What are MAGIC cigarettes?

Magic is a revolutionary product that is nicotine and tobacco free. Magic contains the herbs Marshmallow, Yerba Santa, Damiana, Passion Flower, Jasmine and Ginseng. These herbs have very good reputations with the health food industry and herbalists. Their histories and other information can be found in numerous herbal and health books.

Our cigarettes are the highest quality non-tobacco smokes in the world. They are filtered and look and smoke just like tobacco cigarettes. Magic comes in regular and menthol.

Complaint

Most brands of tobacco cigarettes manufactured by the major tobacco companies have numerous unnatural components, including reconstituted tobacco. Reconstituted tobacco is recycled tobacco that the tobacco companies refuse to waste. The major tobacco companies also put hundreds of chemicals, additives, and preservatives in their brands.

What About MAGIC'S Taste and Aroma?

Magic offers a pleasant light taste. Its aroma is sweeter than that of tobacco. One can't expect Magic's aroma to be identical to tobacco cigarettes since Magic is tobacco free. The herbs in our cigarettes are natural and are not cured or processed like tobacco.

The vast majority of smokers and non-smokers alike say that the smoke from Magic is a lot less irritating to the eyes, nose, and throat than tobacco smoke.

Everybody, except the folks from the major tobacco companies, agrees that the arrival of Magic has been long over due. Our cigarettes are considered by many to be a great alternative to tobacco. In fact, many Magic smokers believe our product is superior to tobacco."

(Exhibit E: Alternative Cigarettes, Inc.'s World Wide Web site)

- F. "Water is the Only Ingredient Added to Tobacco in the Manufacturing of PURE and GLORY.

Do You Want to Smoke This?

Complaint

The 599 Ingredients Added to Tobacco in the Manufacture of Cigarettes by the Five Major American Cigarette Companies:

[List of Ingredients]"

(Exhibit F: Alternative Cigarettes, Inc.'s World Wide Web site)

- G. "The secret is finally out...on all the chemicals, flavorings, preservatives, and fillers that are added to the tobacco in most of the major cigarette brands.

Therefore, a countless number of smokers across the country are requesting our brands.

For Questions Call:
Alternative Cigarettes, Inc.

...

See us on the world wide web at: <http://www.altcigs.com>"

(Exhibit G: brochure)

- H. "PURE
100% NATURAL TOBACCO
ADDITIVE-FREE CIGARETTES

GLORY
100% NATURAL TOBACCO
ADDITIVE-FREE CIGARETTES"

(Exhibit H: Point-of-sale display)

- I. "NICOTINE FREE HERBAL CIGARETTES"

(Exhibit I: Point-of-sale display)

Complaint

CLAIMS REGARDING TOBACCO PRODUCTS

6. Through the means described in Paragraph 5, respondents have represented, expressly or by implication, that smoking Pure and Glory cigarettes, because they contain no additives, chemicals, flavorings or preservatives, is less hazardous to a smoker's health than smoking otherwise comparable cigarettes that contain additives, chemicals, flavorings or preservatives.

7. Through the means described in Paragraph 5, respondents have represented, expressly or by implication, that they possessed and relied upon a reasonable basis that substantiated the representation set forth in Paragraph 6, at the time the representation was made.

8. In truth and in fact, respondents did not possess and rely upon a reasonable basis that substantiated the representation set forth in Paragraph 6, at the time the representation was made. Among other reasons, the smoke from Pure and Glory cigarettes, like the smoke from all cigarettes, contains numerous carcinogens and toxins, including tar and carbon monoxide. Therefore, the representation set forth in Paragraph 7 was, and is, false or misleading.

CLAIMS REGARDING NON-TOBACCO PRODUCTS

9. Through the means described in Paragraph 5, respondents have represented, expressly or by implication, that smoking Herbal Gold and Magic herbal cigarettes does not pose the health risks associated with smoking tobacco cigarettes.

10. In truth and in fact, smoking Herbal Gold and Magic herbal cigarettes does pose many of the health risks associated with smoking tobacco cigarettes. Although Herbal Gold and Magic

Complaint

herbal cigarettes do not contain nicotine, their smoke, like the smoke from tobacco cigarettes, contains numerous carcinogens and toxins, including tar and carbon monoxide. Therefore, the representation set forth in Paragraph 9 was, and is, false or misleading.

11. Through the means described in Paragraph 5, respondents have represented, expressly or by implication, that they possessed and relied upon a reasonable basis that substantiated the representation set forth in Paragraph 9, at the time the representation was made.

12. In truth and in fact, respondents did not possess and rely upon a reasonable basis that substantiated the representation set forth in Paragraph 9, at the time the representation was made. Therefore, the representation set forth in Paragraph 11 was, and is, false or misleading.

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

THEREFORE, the Federal Trade Commission this fourteenth day of June, 2000, has issued this complaint against respondents.

By the Commission.

Complaint Exhibits

Complaint Exhibits



About Us

Home Page

About Us

Herbal Gold

Magic

Pure

Glory

Lewiston

Order Online

See What Other Manufacturers Put In Their Cigarettes

Get Your Local Store To Carry Alternative Cigarettes

News

Alternative Cigarettes, Inc. is proud to offer our alternative cigarette brands to smokers across the country. These brands give consumers a choice over commercialized brands. The five major American tobacco companies could have offered such products to smokers years ago. However, they have refused to do so.

The major tobacco companies literally put hundreds of chemicals and additives in their cigarette brands. After years of pressure by American consumers and by Congress, this list was recently disclosed by the giant tobacco companies themselves. This exact list is enclosed for your review.

A number of these additives should give smokers cause for concern. Some of these are known carcinogens. Notice that ammonia is on this list. A recent finding shows that when ammonia is added to cigarettes it actually increases the amount of nicotine that the body absorbs. Other studies show that the most popular brands have up to 12 percent sugar. They also use a high percentage of reconstituted (recycled) tobacco.

Native Americans smoked all natural tobacco without the ills that are associated with smoking today. Could it be that the chemicals and additives cause more health problems than the natural tobacco itself? Much research needs to be done on this subject.

For Questions
Call TOLL FREE 1-800-225-1838

Alternative Cigarettes, Inc.

PO Box 678

Buffalo, NY 14207

1-800-225-1838 (716) 877-2983

Fax (716) 877-3064

SURGEON GENERAL'S WARNING:
Quitting Smoking Now Greatly
Reduces Serious Risks to Your Health.

Complaint Exhibits


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Manufacturers
Put in Their
Cigarettes](#)
[Get Your Local
Store To Carry
Alternative
Cigarettes](#)
[News](#)


100% Natural Tobacco
Cigarettes...ADDITIVE
FREE!



PREMIUM BRAND

Most popular cigarette brands contain many added chemicals, flavorings, and preservatives. They also contain recycled (reconstituted) tobacco. PURE is made from 100% natural tobacco. No additives are in our cigarettes. Smokers enjoy the natural taste of our premium tobacco without all the additives. PURE is filtered and comes in full flavor, lights, and menthol. PURE is how smoking was originally meant to be.

SURGEON GENERAL'S WARNING:
Quitting Smoking Now Greatly
Reduces Serious Risks to Your Health.

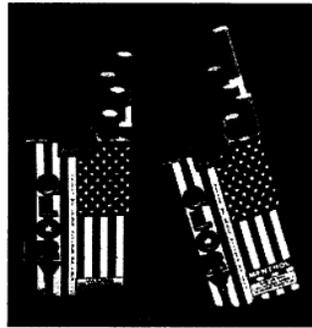
EXHIBIT B

Complaint Exhibits

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GLORY

100% Natural Tobacco
Cigarettes...ADDITIVE
FREE!



GLORY cigarettes are price competitive with any generic cigarette anywhere. However, unlike generic and premium brands manufactured by the major tobacco companies, GLORY tobacco is natural and additive free. It has no added chemicals, flavorings, preservatives, or recycled tobacco. GLORY is filtered and comes in regular and menthol.

SURGEON GENERAL'S WARNING:
Quitting Smoking Now Greatly
Reduces Serious Risks to Your Health.

EXHIBIT C

Complaint Exhibits


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HERBAL GOLD

100% Nicotine Free Herbal
Cigarettes!



NO NICOTINE

HERBAL GOLD does not contain any nicotine or tobacco. It is made from a special blend of smoking herbs: Marshmallow, Yerba Santa, Damiana, Passion Flower, Jasmine and Ginseng. HERBAL GOLD looks and smokes just like tobacco cigarettes. HERBAL GOLD is taking the country by storm since smokers can now enjoy a great tasting cigarette without any nicotine. Each carton has 10 king size packs of 20. Regular, menthol, vanilla and cherry are available.

What are HERBAL GOLD cigarettes?

Herbal Gold is a revolutionary product that is nicotine and tobacco free. Herbal Gold offers a special blend of smoking herbs: Marshmallow, Yerba Santa, Damiana, Passion Flower, Jasmine and Ginseng. These herbs have very good reputations with the health food industry and herbalists. Their histories and other information can be found in numerous herbal and health books.

EXHIBIT D

Complaint Exhibits

Our cigarettes are the highest quality non-tobacco smokes in the world. They are filtered and look and smoke just like tobacco cigarettes. Herbal Gold comes in regular, menthol, vanilla and cherry.

Most brands of tobacco cigarettes manufactured by the major tobacco companies have numerous unnatural components, including reconstituted tobacco. Reconstituted tobacco is recycled tobacco that the tobacco companies refuse to waste. The major tobacco companies also put hundreds of chemicals, additives, and preservatives in their brands.

What About HERBAL GOLD'S Taste and Aroma?

Herbal Gold offers a pleasant light taste. Its aroma is sweeter than that of tobacco. One can't expect Herbal Gold's aroma to be identical to tobacco cigarettes since Herbal Gold is tobacco free. The herbs in our cigarettes are natural and are not cured or processed like tobacco.

The vast majority of smokers and non-smokers alike say that the smoke from Herbal Gold is a lot less irritating to the eyes, nose, and throat than tobacco smoke.

Everybody, except the folks from the major tobacco companies, agrees that the arrival of Herbal Gold has been long over due. Our cigarettes are considered by many to be a great alternative to tobacco. In fact, many Herbal Gold smokers believe our product is superior to tobacco.

For more information and to find out if any stores near you carry our brands call: 1-800-225-1838
If there are no stores in your area that carry Herbal Gold, click the Order Online Button in the left panel.

SURGEON GENERAL'S WARNING:
Quitting Smoking Now Greatly
Reduces Serious Risks to Your Health.

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MAGIC

100% Nicotine Free Herbal Cigarettes!



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Our cigarettes are the highest quality non-tobacco smokes in

EXHIBIT E

Complaint Exhibits

the world. They are filtered and look and smoke just like tobacco cigarettes. Magic comes in regular and menthol.

Most brands of tobacco cigarettes manufactured by the major tobacco companies have numerous unnatural components, including reconstituted tobacco. Reconstituted tobacco is recycled tobacco that the tobacco companies refuse to waste. The major tobacco companies also put hundreds of chemicals, additives, and preservatives in their brands.

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For more information and to find out if any stores near you carry our brands call: 1-800-225-1838
If there are no stores in your area that carry Magic, click on the Order Online button on the left panel.

SURGEON GENERAL'S WARNING:
Quitting Smoking Now Greatly
Reduces Serious Risks to Your Health.

Complaint Exhibits



Water is the Only Ingredient Added to Tobacco
in the Manufacturing of PURE and GLORY.

Do You Want to Smoke This?

*The 599 Ingredients Added to Tobacco in the
Manufacture of Cigarettes by the Five Major
American Cigarette Companies:*

Acetanisole, Acetic Acid, Acetoin, Acetophenone, 6-Acetoxydihydrotheaspirane, 2-Acetyl-3-Ethylpyrazine, 2-Acetyl-5-Methylfuran, Acetylpyrazine, 2-Acetylpyridine, 3-Acetylpyridine, 2-Acetylthiazole, Aconitic Acid, dl-Alanine, Alfalfa Extract, Allspice Extract, Oleoresin, And Oil, Allyl Hexanoate, Allyl Ionone, Almond Bitter Oil, Ambergriis Tincture, Ammonia, Ammonium Bicarbonate, Ammonium Hydroxide, Ammonium Phosphate Dibasic, Ammonium Sulfide, Amyl Alcohol, Amyl Butyrate, Amyl Formate, Amyl Octanoate, alpha-Amylcinnamaldehyde, Amyris Oil, trans-Anethole, Angelica Root Extract, Oil and Seed Oil, Anise, Anise Star, Extract and Oils, Anisyl Acetate, Anisyl Alcohol, Anisyl Formate, Anisyl Phenylacetate, Apple Juice Concentrate, Extract, and Skins, Apricot Extract and Juice Concentrate, 1-Arginine, Asafetida Fluid Extract And Oil, Ascorbic Acid, 1-Asparagine Monohydrate, 1-Aspartic Acid, Balsam Peru and Oil, Basil Oil, Bay Leaf, Oil and Sweet Oil, Beeswax White, Beet Juice Concentrate, Benzaldehyde, Benzaldehyde Glyceryl Acetal, Benzoic Acid, Benzoin, Benzoin Resin, Benzophenone, Benzyl Alcohol, Benzyl Benzoate, Benzyl Butyrate, Benzyl Cinnamate, Benzyl Propionate, Benzyl Salicylate, Bergamot Oil, Bisabolene, Black Currant Buds Absolute, Borneol, Bornyl Acetate, Buchu Leaf Oil, 1,3-Butanediol, 2,3-Butanedione, 1-Butanol, 2-Butanone, 4(2-Butenylidene)-3,5,5-Trimethyl-2-Cyclohexen-1-One, Butter, Butter Esters, and Butter Oil, Butyl Acetate, Butyl Butyrate, Butyl Butyryl Lactate, Butyl Isovalerate, Butyl Phenylacetate, Butyl Undecylenate, 3-Butylidene-phthalide, Butyric Acid, Cadinene, Caffeine, Calcium Carbonate, Camphene, Cananga Oil, Capsicum Oleoresin, Caramel Color, Caraway Oil, Carbon Dioxide, Cardamom Oleoresin, Extract, Seed Oil, and Powder, Carob Bean and Extract, beta-Carotene, Carrot Oil, Carvacrol, 4-Carvomenthenol, 1-Carvone, beta-Caryophyllene, beta-Caryophyllene Oxide, Cascarilla Oil and Bark Extract, Cassia Bark Oil, Cassie Absolute and Oil, Castoreum Extract, Tincture and Absolute, Cedar Leaf Oil, Cedarwood Oil Terpenes and Virginiana, Cedrol, Celery Seed Extract, Solid, Oil, And Oleoresin, Cellulose Fiber, Chamomile Flower Oil And Extract, Chicory Extract, Chocolate, Cinnamaldehyde, Cinnamic Acid, Cinnamon Leaf Oil, Bark Oil, and Extract, Cinnamyl Acetate, Cinnamyl Alcohol, Cinnamyl Cinnamate, Cinnamyl

EXHIBIT F

Complaint Exhibits

Isovalerate, Cinnamyl Propionate, Citral, Citric Acid, Citronella Oil, dl-Citronellol, Citronellyl Butyrate, Citronellyl Isobutyrate, Civet Absolute, Clary Oil, Clover Tops, Red Solid Extract, Cocoa, Cocoa Shells, Extract, Distillate And Powder, Coconut Oil, Coffee, Cognac White and Green Oil, Copaiba Oil, Coriander Extract and Oil, Corn Oil, Corn Silk, Costus Root Oil, Cubeb Oil, Cuminaldehyde, para-Cymene, 1-Cysteine, Dandelion Root Solid Extract, Davana Oil, 2-trans, 4-trans-Decadienal, delta-Decalactone, gamma-Decalactone, Decanal, Decanoic Acid, 1-Decanol, 2-Decenal, Dehydromenthofuroolactone, Diethyl Malonate, Diethyl Sebacate, 2,3-Diethylpyrazine, Dihydro Anethole, 5,7-Dihydro-2-Methylthieno(3,4-D) Pyrimidine, Dill Seed Oil and Extract, meta-Dimethoxybenzene, para-Dimethoxybenzene, 2,6-Dimethoxyphenol, Dimethyl Succinate, 3,4-Dimethyl-1,2-Cyclopentanedione, 3,5-Dimethyl-1,2-Cyclopentanedione, 3,7-Dimethyl-1,3,6-Octatriene, 4,5-Dimethyl-3-Hydroxy-2,5-Dihydrofuran-2-One, 6,10-Dimethyl-5,9-Undecadien-2-One, 3,7-Dimethyl-6-Octenoic Acid, 2,4-Dimethylacetophenone, alpha,para-Dimethylbenzyl Alcohol, alpha,alpha-Dimethylphenethyl Acetate, alpha,alpha-Dimethylphenethyl Butyrate, 2,3-Dimethylpyrazine,2,5-Dimethylpyrazine, 2,6-Dimethylpyrazine, Dimethyltetrahydrobenzofuranone, delta-Dodecalactone, gamma-Dodecalactone, para-Ethoxybenzaldehyde, Ethyl 10-Undecenoate, Ethyl 2-Methylbutyrate, Ethyl Acetate, Ethyl Acetoacetate, Ethyl Alcohol, Ethyl Benzoate, Ethyl Butyrate, Ethyl Cinnamate, Ethyl Decanoate, Ethyl Fenchol, Ethyl Furoate, Ethyl Heptanoate, Ethyl Hexanoate, Ethyl Isovalerate, Ethyl Lactate, Ethyl Laurate, Ethyl Levulinate, Ethyl Maltol, Ethyl Methyl Phenylglycidate, Ethyl Myristate, Ethyl Nonanoate, Ethyl Octadecanoate, Ethyl Octanoate, Ethyl Oleate, Ethyl Palmitate, Ethyl Phenylacetate, Ethyl Propionate, Ethyl Salicylate, Ethyl trans-2-Butenoate, Ethyl Valerate, Ethyl Vanillin, 2-Ethyl (or Methyl)-(3,5 and 6)-Methoxypyrazine, 2-Ethyl-1-Hexanol, 3-Ethyl -2-Hydroxy-2-Cyclopenten-1-One, 2-Ethyl-3, (5 or 6)-Dimethylpyrazine, 5-Ethyl-3-Hydroxy-4-Methyl-2(5H)-Furanone, 2-Ethyl-3-Methylpyrazine, 4-Ethylbenzaldehyde, 4-Ethylguaiaicol, para-Ethylphenol, 3-Ethylpyridine, Eucalyptol, Farnesol, D-Fenchone, Fennel Sweet Oil, Fenugreek, Extract, Resin, and Absolute, Fig Juice Concentrate, Food Starch Modified, Furfuryl Mercaptan, 4-(2-Furyl)-3-Buten-2-One, Galbanum Oil, Genet Absolute, Gentian Root Extract, Geraniol, Geranium Rose Oil, Geranyl Acetate, Geranyl Butyrate, Geranyl Formate, Geranyl Isovalerate, Geranyl Phenylacetate, Ginger Oil and Oleoresin, 1-Glutamic Acid, 1-Glutamine, Glycerol, Glycyrrhizin Ammoniated, Grape Juice Concentrate, Guaiac Wood Oil, Guaiacol, Guar Gum, 2,4-Heptadienal, gamma-Heptalactone, Heptanoic Acid, 2-Heptanone, 3-Hepten-2-One, 2-Hepten-4-One, 4-Heptenal, trans -2-Heptenal, Heptyl Acetate, omega-6-Hexadecenlactone, gamma-Hexalactone, Hexanal, Hexanoic Acid, 2-Hexen-1-Ol, 3-Hexen-1-Ol,

Complaint Exhibits

cis-3-Hexen-1-yl Acetate, 2-Hexenal, 3-Hexenoic Acid, trans-2-Hexenoic Acid, cis-3-Hexenyl Formate, Hexyl 2-Methylbutyrate, Hexyl Acetate, Hexyl Alcohol, Hexyl Phenylacetate, 1-Histidine, Honey, Hops Oil, Hydrolyzed Milk Solids, Hydrolyzed Plant Proteins, 5-Hydroxy-2,4-Decadienoic Acid delta-Lactone, 4-Hydroxy-2,5-Dimethyl-3(2H)-Furanone, 2-Hydroxy-3,5,5-Trimethyl-2-Cyclohexen-1-One, 4-Hydroxy-3-Pentenoic Acid Lactone, 2-Hydroxy-4-Methylbenzaldehyde, 4-Hydroxybutanoic Acid Lactone, Hydroxycitronellal, 6-Hydroxydihydrotheaspirane, 4-(para-Hydroxyphenyl)-2-Butanone, Hyssop Oil, Immortelle Absolute and Extract, alpha-Ionone, beta-Ionone, alpha-Irone, Isoamyl Acetate, Isoamyl Benzoate, Isoamyl Butyrate, Isoamyl Cinnamate, Isoamyl Formate, Isoamyl Hexanoate, Isoamyl Isovalerate, Isoamyl Octanoate, Isoamyl Phenylacetate, Isobornyl Acetate, Isobutyl Acetate, Isobutyl Alcohol, Isobutyl Cinnamate, Isobutyl Phenylacetate, Isobutyl Salicylate, 2-Isobutyl-3-Methoxypyrazine, alpha-Isobutylphenethyl Alcohol, Isobutyraldehyde, Isobutyric Acid, d,l-Isoleucine, alpha-Isomethylionone, 2-Isopropylphenol, Isovaleric Acid, Jasmine Absolute, Concrete and Oil, Kola Nut Extract, Labdanum Absolute and Oleoresin, Lactic Acid, Lauric Acid, Lauric Aldehyde, Lavandin Oil, Lavender Oil, Lemon Oil and Extract, Lemongrass Oil, 1-Leucine, Levulinic Acid, Licorice Root, Fluid, Extract and Powder, Lime Oil, Linalool, Linalool Oxide, Linalyl Acetate, Linden Flowers, Lovage Oil and Extract, 1-Lysine, Mace Powder, Extract and Oil, Magnesium Carbonate, Malic Acid, Malt and Malt Extract, Maltodextrin, Maltol, Maltyl Isobutyrate, Mandarin Oil, Maple Syrup and Concentrate, Mate Leaf, Absolute and Oil, para-Mentha-8-Thiol-3-One, Menthol, Menthone, Menthyl Acetate, dl-Methionine, Methoprene, 2-Methoxy-4-Methylphenol, 2-Methoxy-4-Vinylphenol, para-Methoxybenzaldehyde, 1-(para-Methoxyphenyl)-1-Penten-3-One, 4-(para-Methoxyphenyl)-2-Butanone, 1-(para-Methoxyphenyl)-2-Propanone, Methoxypyrazine, Methyl 2-Furoate, Methyl 2-Octynoate, Methyl 2-Pyrrolyl Ketone, Methyl Anisate, Methyl Anthranilate, Methyl Benzoate, Methyl Cinnamate, Methyl Dihydrojasmonate, Methyl Ester of Rosin, Partially Hydrogenated, Methyl Isovalerate, Methyl Linoleate (48%), Methyl Linolenate (52%) Mixture, Methyl Naphthyl Ketone, Methyl Nicotinate, Methyl Phenylacetate, Methyl Salicylate, Methyl Sulfide, 3-Methyl-1-Cyclopentadecanone, 4-Methyl-1-Phenyl-2-Pentanone, 5-Methyl-2-Phenyl-2-Hexenal, 5-Methyl-2-Thiophenecarboxaldehyde, 6-Methyl-3,-5-Heptadien-2-One, 2-Methyl-3-(para-Isopropylphenyl) Propionaldehyde, 5-Methyl-3-Hexen-2-One, 1-Methyl-3Methoxy-4-Isopropylbenzene, 4-Methyl-3-Pentene-2-One, 2-Methyl-4-Phenylbutyraldehyde, 6-Methyl-5-Hepten-2-One, 4-Methyl-5-Thiazolethanol, 4-Methyl-5-Vinylthiazole, Methyl-alpha-Ionone, Methyl-trans-2-Butenoic Acid, 4-Methylacetophenone,

Complaint Exhibits

para-Methylanisole, alpha-Methylbenzyl Acetate, alpha-Methylbenzyl Alcohol, 2-Methylbutyraldehyde, 3-Methylbutyraldehyde, 2-Methylbutyric Acid, alpha-Methylcinnamaldehyde, Methylcyclopentenolone, 2-Methylheptanoic Acid, 2-Methylhexanoic Acid, 3-Methylpentanoic Acid, 4-Methylpentanoic Acid, 2-Methylpyrazine, 5-Methylquinoxaline, 2-Methyltetrahydrofuran-3-One, (Methylthio)Methylpyrazine (Mixture Of Isomers), 3-Methylthiopropionaldehyde, Methyl 3-Methylthiopropionate, 2-Methylvaleric Acid, Mimosa Absolute and Extract, Molasses Extract and Tincture, Mountain Maple Solid Extract, Mullein Flowers, Myristaldehyde, Myristic Acid, Myrrh Oil, beta-Naphthyl Ethyl Ether, Nerol, Neroli Bigarde Oil, Nerolidol, Nona-2-trans,6-cis-Dienal, 2,6-Nonadien-1-Ol, gamma-Nonalactone, Nonanal, Nonanoic Acid, Nonanone, trans-2-Nonen-1-Ol, 2-Nonenal, Nonyl Acetate, Nutmeg Powder and Oil, Oak Chips Extract and Oil, Oak Moss Absolute, 9,12-Octadecadienoic Acid (48%) And 9,12,15-Octadecatrienoic Acid (52%), delta-Octalactone, gamma-Octalactone, Octanal, Octanoic Acid, 1-Octanol, 2-Octanone, 3-Octen-2-One, 1-Octen-3-Ol, 1-Octen-3-Yl Acetate, 2-Octenal, Octyl Isobutyrate, Oleic Acid, Olibanum Oil, Opoponax Oil And Gum, Orange Blossoms Water, Absolute, and Leaf Absolute, Orange Oil and Extract, Origanum Oil, Orris Concrete Oil and Root Extract, Palmarosa Oil, Palmitic Acid, Parsley Seed Oil, Patchouli Oil, omega-Pentadecalactone, 2,3-Pentanedione, 2-Pentanone, 4-Pentenoic Acid, 2-Pentylpyridine, Pepper Oil, Black And White, Peppermint Oil, Peruvian (Bois De Rose) Oil, Petitgrain Absolute, Mandarin Oil and Terpeneless Oil, alpha-Phellandrene, 2-Phenethyl Acetate, Phenethyl Alcohol, Phenethyl Butyrate, Phenethyl Cinnamate, Phenethyl Isobutyrate, Phenethyl Isovalerate, Phenethyl Phenylacetate, Phenethyl Salicylate, 1-Phenyl-1-Propanol, 3-Phenyl-1-Propanol, 2-Phenyl-2-Butenal, 4-Phenyl-3-Buten-2-Ol, 4-Phenyl-3-Buten-2-One, Phenylacetaldehyde, Phenylacetic Acid, 1-Phenylalanine, 3-Phenylpropionaldehyde, 3-Phenylpropionic Acid, 3-Phenylpropyl Acetate, 3-Phenylpropyl Cinnamate, 2-(3-Phenylpropyl)Tetrahydrofuran, Phosphoric Acid, Pimenta Leaf Oil, Pine Needle Oil, Pine Oil, Scotch, Pineapple Juice Concentrate, alpha-Pinene, beta-Pinene, D-Piperitone, Piperonal, Pipsissewa Leaf Extract, Plum Juice, Potassium Sorbate, 1-Proline, Propenylguaethol, Propionic Acid, Propyl Acetate, Propyl para-Hydroxybenzoate, Propylene Glycol, 3-Propylideneophthalide, Prune Juice and Concentrate, Pyridine, Pyroligneous Acid And Extract, Pyrrole, Pyruvic Acid, Raisin Juice Concentrate, Rhodinol, Rose Absolute and Oil, Rosemary Oil, Rum, Rum Ether, Rye Extract, Sage, Sage Oil, and Sage Oleoresin, Salicylaldehyde, Sandalwood Oil, Yellow, Sclareolide, Skatole, Smoke Flavor, Snakeroot Oil, Sodium Acetate, Sodium Benzoate, Sodium Bicarbonate, Sodium Carbonate, Sodium Chloride, Sodium Citrate, Sodium Hydroxide, Solanone, Spearmint Oil, Styrax Extract, Gum and Oil, Sucrose Octaacetate, Sugar Alcohols, Sugars, Tagetes Oil, Tannic Acid, Tartaric Acid, Tea Leaf and Absolute, alpha-Terpeneol, Terpinolene, Terpinyl Acetate,

Complaint Exhibits

5,6,7,8-Tetrahydroquinoxaline,
1,5,5,9-Tetramethyl-13-Oxatricyclo(8.3.0.0(4,9))Tridecane,
2,3,4,5, and 3,4,5,6-Tetramethylethyl-Cyclohexanone,
2,3,5,6-Tetramethylpyrazine, Thiamine Hydrochloride,
Thiazole, 1-Threonine, Thyme Oil, White and Red, Thymol,
Tobacco Extracts, Tocopherols (mixed), Tolu Balsam Gum
and Extract, Tolualdehydes, para-Tolyl 3-Methylbutyrate,
para-Tolyl Acetaldehyde, para-Tolyl Acetate, para-Tolyl
Isobutyrate, para-Tolyl Phenylacetate, Triacetin,
2-Tridecanone, 2-Tridecenal, Triethyl Citrate, 3,5,5-Trimethyl
-1-Hexanol, para,alpha,alpha-Trimethylbenzyl Alcohol,
4-(2,6,6-Trimethylcyclohex-1-Enyl)But-2-En-4-One,
2,6,6-Trimethylcyclohex-2-Ene-1,4-Dione,
2,6,6-Trimethylcyclohexa-1,3-Dienyl Methan,
4-(2,6,6-Trimethylcyclohexa-1,3-Dienyl)But-2-En-4-One,
2,2,6-Trimethylcyclohexanone, 2,3,5-Trimethylpyrazine,
1-Tyrosine, delta-Undercalactone, gamma-Undecalactone,
Undecanal, 2-Undecanone, 10-Undecenal, Urea, Valencene,
Valeraldehyde, Valerian Root Extract, Oil and Powder,
Valeric Acid, gamma-Valerolactone, Valine, Vanilla Extract
And Oleoresin, Vanillin, Veratraldehyde, Vetiver Oil,
Vinegar, Violet Leaf Absolute, Walnut Hull Extract, Water,
Wheat Extract And Flour, Wild Cherry Bark Extract, Wine
and Wine Sherry, Xanthan Gum, 3,4-Xylenol, Yeast

SURGEON GENERAL'S WARNING:

Quitting Smoking Now Greatly
Reduces Serious Risks to Your Health.

Complaint Exhibits

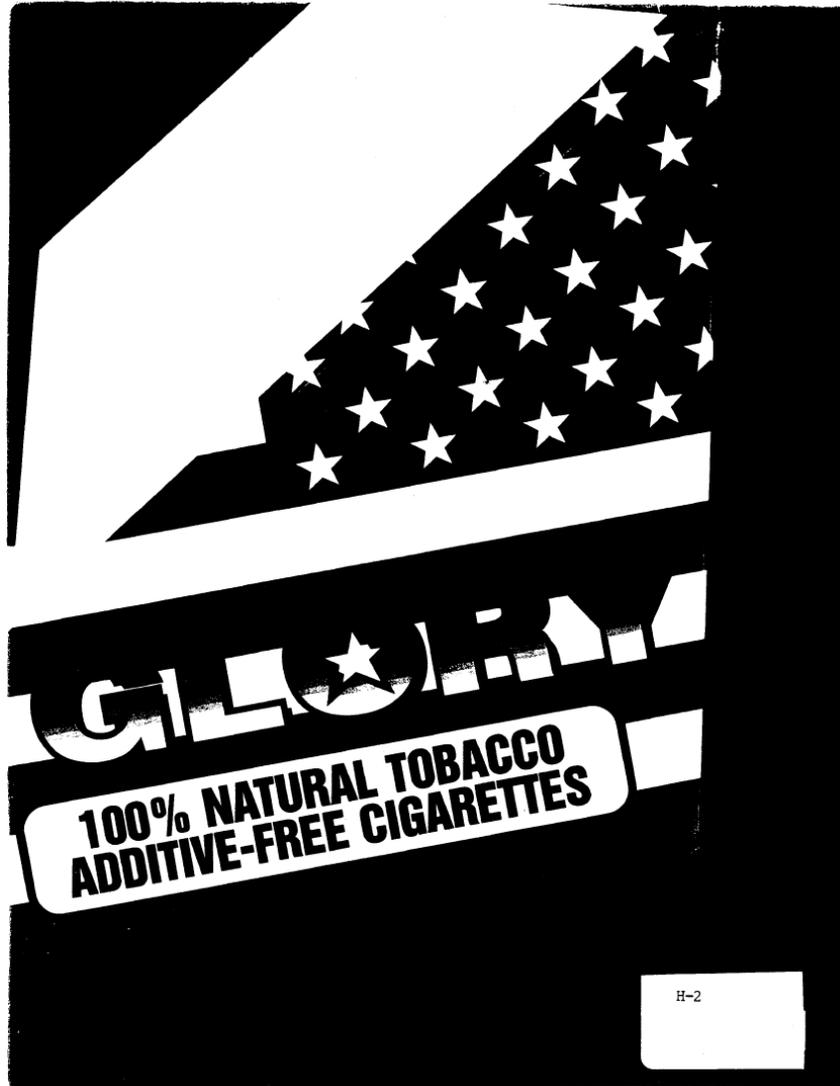


EXHIBIT G

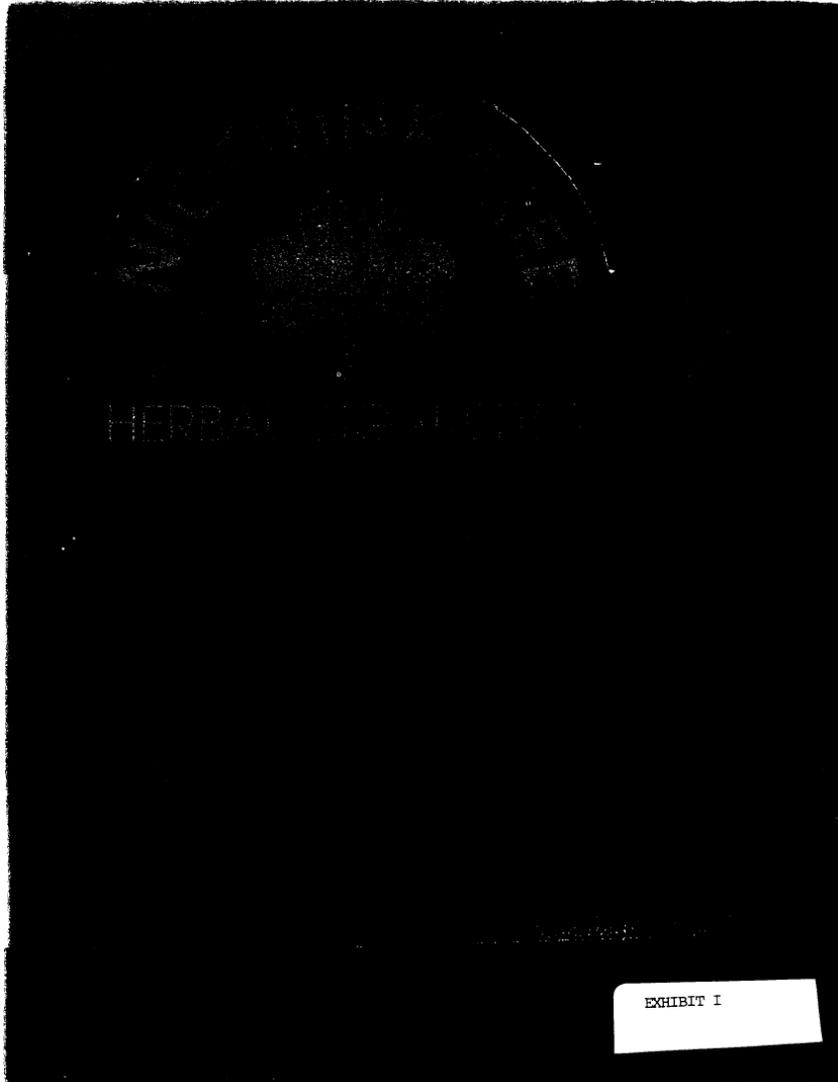
Complaint Exhibits



Complaint Exhibits



Complaint Exhibits



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DECISION AND ORDER

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

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

The Commission having thereafter considered the matter and having determined that it had reason to believe that the respondents have violated the said Act, and that complaint should issue stating its charges in that respect, and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of thirty (30) days, now in further conformity with the procedure prescribed in § 2.34 of its Rules, the Commission hereby issues its complaint, makes the following jurisdictional findings and enters the following order:

Decision and Order

1.a. Respondent Alternative Cigarettes, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of New York, with its office and principal place of business at 125 Virgil Avenue, Buffalo, New York 14216.

1.b. Respondent Joseph Pandolfino is an officer of the corporate respondent. Individually or in concert with others, he formulates, directs, or controls the policies, acts, or practices of the corporation. His principal office or place of business is the same as that of Alternative Cigarettes, Inc.

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. "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, "respondents" shall mean Alternative Cigarettes, Inc., a corporation, its successors and assigns and its officers; Joseph Pandolfino, individually and as an officer of the corporation; and each of the above's agents, representatives, and employees.

3. "Commerce" shall mean as defined in Section 4 of the Federal Trade Commission Act, 15 U.S.C. § 44.

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4. "Advertisement" shall mean any written or verbal statement, illustration, or depiction that is designed to effect a sale or create interest in the purchasing of any product, including but not limited to a statement, illustration or depiction in or on a brochure, newspaper, magazine, free standing insert, pamphlet, leaflet, circular, mailer, book insert, letter, coupon, catalog, poster, chart, billboard, transit advertisement, point of purchase display, specialty or utilitarian item, sponsorship material, package insert, film, slide, or the Internet or other computer network or system.
5. "Tobacco product" shall mean cigarettes, cigars, cigarillos, little cigars, smokeless tobacco, cigarette tobacco, pipe tobacco, and any other product made or derived from tobacco that is intended for human consumption, including any component, part, or accessory of a tobacco product.
6. "Herbal smoking product" shall mean cigarettes, cigars, cigarillos, little cigars and any other product made or derived from plant material other than tobacco, that is intended for human smoking, including any component, part, or accessory of an herbal smoking product.
7. "Clearly and prominently" shall mean:
 - a. With regard to advertisements for tobacco and herbal smoking products, in black type on a solid white background, or in white type on a solid red background, or in any other color combination that would provide an equivalent or greater degree of print contrast as objectively determined by densitometer or comparable measurements of the type and the background color. In advertisements, the color of the ruled rectangle shall be the same color as that of the type; and

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- b. i. With regard to advertisements for tobacco products, centered, both horizontally and vertically, in a ruled rectangle. The area enclosed by the rectangle shall be no less than 40% of the size of the area enclosed by the ruled rectangle surrounding the health warnings for tobacco cigarettes mandated by 15 U.S.C. § 1333. The width of the rule forming the rectangle shall be no less than 50% of the width of the rule required for the health warnings for tobacco cigarettes mandated by 15 U.S.C. § 1333.

Provided that, if, at any time after this order becomes final, 15 U.S.C. § 1333 is amended, modified, or superseded by any other law, the area enclosed by the ruled rectangle shall be no less than 40% of the area required for health warnings for tobacco cigarettes by such amended, modified, or superseding law, and the width of the rule forming the rectangle shall be no less than 50% of the width of any surrounding rule required for health warnings for tobacco cigarettes by such amended, modified, or superseding law; and

- ii. With regard to advertisements for herbal smoking products, centered, both horizontally and vertically, in a ruled rectangle. The area enclosed by the rectangle shall be no less than the size of the area enclosed by the ruled rectangle surrounding the health warnings for tobacco cigarettes mandated by 15 U.S.C. § 1333. The width of the rule forming the rectangle shall be no less than the width of the rule required for the health warnings for tobacco cigarettes mandated by 15 U.S.C. § 1333.

Provided that, if, at any time after this order becomes final, 15 U.S.C. § 1333 is amended, modified, or superseded by any other law, the area enclosed by the ruled rectangle shall be no less than the area required for health warnings for tobacco cigarettes by such

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amended, modified, or superseding law, and the width of the rule forming the rectangle shall be no less than the width of any surrounding rule required for health warnings for tobacco cigarettes by such amended, modified, or superseding law; and

- c. In the same type style and type size as that required for health warnings for tobacco cigarettes pursuant to 15 U.S.C. § 1333.

Provided that, if, at any time after this order becomes final, 15 U.S.C. § 1333 is amended, modified, or superseded by any other law, the type style and type size of the disclosure shall be the same as the type style and type size required for health warnings for tobacco cigarettes by such amended, modified, or superseding law; and

- d. In a clear and prominent location but not immediately next to other written or textual matter or any rectangular designs, elements, or similar geometric forms, including but not limited to any warning statement required under the Federal Cigarette Labeling and Advertising Act, 15 U.S.C. § 1331 *et seq.*, or the Comprehensive Smokeless Tobacco Health Education Act, 15 U.S.C. § 4401 *et seq.* In addition, the disclosure shall not be positioned in the margin of a print advertisement. A disclosure shall be deemed “not immediately next to” other geometric or textual matter if the distance between the disclosure and the other matter is as great as the distance between the outside left edge of the rule of the rectangle enclosing the health warning required by 15 U. S. C. § 1333 and the top left point of the letter “S” in the word “SURGEON” in that health warning; and

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- e. For audiovisual or audio advertisements, including but not limited to advertisements on videotapes, cassettes, discs, or the Internet; promotional films or filmstrips; and promotional audiotapes or other types of sound recordings, the disclosure shall appear on the screen at the end of the advertisement in the format described above for a length of time and in such a manner that it is easily legible and shall be announced simultaneously at the end of the advertisement in a manner that is clearly audible.

Provided, however, that in any advertisement that does not contain a visual component, the disclosure need not appear in visual format, and in any advertisement that does not contain an audio component, the disclosure need not be announced in audio format.

I.

IT IS ORDERED that respondents, directly or through any corporation, subsidiary, division, or other device, in connection with the advertising, promotion, offering for sale, sale, or distribution of Pure Cigarettes, Glory Cigarettes, or any other tobacco product in or affecting commerce, shall display in advertisements as specified below, clearly and prominently, the following disclosures (including the line breaks, punctuation, bold font and capitalization illustrated):

In cigarette advertisements:

No additives in our tobacco
does **NOT** mean a safer cigarette.

In advertisements for any other tobacco product:

No additives in our tobacco
does **NOT** mean safer.

Decision and Order

These disclosures shall be displayed beginning no later than thirty (30) days after the date of service of this order in any advertisement that, through the use of such phrases as “no additives,” “100% tobacco,” “additive-free,” “pure tobacco,” “does not contain additives,” “no chemicals,” “no flavorings,” “no preservatives,” or substantially similar terms, represents that a tobacco product has no additives, chemicals, flavorings or preservatives.

Provided, that the above disclosures shall not be required in any cigarette advertisement that is not required to bear a health warning pursuant to 15 U.S.C. § 1333.

Provided further, that the above disclosures shall not be required if respondents possess and rely upon competent and reliable scientific evidence demonstrating that such cigarette or other tobacco product poses materially lower health risks than other cigarettes or other products of the same type.

Nothing contrary to, inconsistent with, or in mitigation of any disclosure provided for in this part shall be used in any advertisement. *Provided, however*, that this provision shall not prohibit respondents from truthfully representing, through the use of such phrases “no additives,” “100% tobacco,” “additive-free,” “pure tobacco,” “does not contain additives,” “no chemicals,” “no flavorings,” “no preservatives,” or substantially similar terms, that a tobacco product has no additives, chemicals, flavorings or preservatives, where such representation is accompanied by the disclosure mandated by this provision.

II.

IT IS FURTHER ORDERED that respondents, directly or through any corporation, subsidiary, division, or other device, in connection with the advertising, promotion, offering for sale, sale,

Decision and Order

or distribution of Herbal Gold cigarettes, Magic cigarettes, or any other herbal smoking product in or affecting commerce, shall display in advertisements and on packaging as specified below, clearly and prominently, the following disclosure (including the line breaks, punctuation and capitalization illustrated):

In advertisements and on packaging for herbal cigarettes:

Herbal cigarettes are dangerous to your health.
They produce tar and carbon monoxide.

In advertisements and on packaging for other herbal smoking products:

Smoking this product is dangerous to your health.
It produces tar and carbon monoxide.

These disclosures shall be displayed beginning no later than thirty (30) days after the date of service of this order in any advertisement and on any package that, through the use of such phrases as “no nicotine,” “nicotine-free,” “no tobacco,” “tobacco-free,” “herbal,” or substantially similar terms, represents that an herbal smoking product has no tobacco or nicotine.

Provided, that the above disclosures shall not be required if respondents possess and rely upon competent and reliable scientific evidence demonstrating that such herbal smoking products do not pose any material health risks.

Nothing contrary to, inconsistent with, or in mitigation of any disclosure provided for in this part shall be used in any advertisement. *Provided, however*, that this provision shall not prohibit respondents from truthfully representing, through the use of such phrases as “no nicotine,” “nicotine-free,” “no tobacco,” “tobacco-free,” “herbal,” or substantially similar terms, that an herbal smoking product has no nicotine or tobacco, where such representation is accompanied by the disclosure mandated by this provision.

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III.

IT IS FURTHER ORDERED that respondents, directly or through any corporation, subsidiary, division or other device, in connection with the labeling, advertising, promotion, offering for sale, sale, or distribution of any herbal smoking product, in or affecting commerce, shall not make any representation, in any manner, expressly or by implication:

- A. That such product does not present the health risks associated with smoking tobacco cigarettes; or
- B. About the health risks associated with the use of such product,

unless the representation is true and, at the time it is made, respondents possess and rely upon competent and reliable scientific evidence that substantiates the representation.

IV.

IT IS FURTHER ORDERED that respondents shall:

- A. Provide, within forty-five (45) days after the date of service of this order, an exact copy of the notice attached hereto as Attachment A to each retailer, distributor, or other purchaser for resale to whom respondents have supplied Pure or Glory tobacco cigarettes, or Herbal Gold or Magic herbal cigarettes, since January 1, 1998. Respondents shall send the notice by first class mail. The mailing shall not include any other documents.
- B. Discontinue dealing with any retailer, distributor, or other purchaser for resale once respondents have actual

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knowledge, or knowledge fairly implied on the basis of objective circumstances, that such retailer, distributor, or other purchaser for resale has continued to use or disseminate:

(1) any of respondents' advertisements for any of respondents' tobacco products that:

- a) represents, through the use of such phrases as "no additives," "100% tobacco," "additive-free," "pure tobacco," "does not contain additives," "no chemicals," "no flavorings," "no preservatives," or substantially similar terms, that the tobacco products have no additives, chemicals or preservatives; and
- b) does not include the disclosure specified in Part I of this order; or

(2) any of respondents' advertisements for any of respondents' herbal smoking products that:

- a) represents, through the use of such phrases as "no nicotine," "nicotine-free," "no tobacco," "tobacco-free," "herbal," or substantially similar terms, that the herbal smoking products have no tobacco; and
- b) does not include the disclosure specified in Part II of this order;

unless, upon notification by respondents, such retailer, distributor, or other purchaser for resale immediately ceases using or disseminating such advertisements. If, after such notification, respondents obtain actual knowledge, or knowledge fairly implied on the basis of objective circumstances, that such retailer, distributor, or other purchaser for resale has not permanently ceased using or disseminating such advertisements, respondents

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must immediately and permanently discontinue dealing with such retailer, distributor, or other purchaser for resale.

- C. For five (5) years after the date of service of this order, maintain and upon request make available to the Federal Trade Commission for inspection and copying:
- (1) copies of all notification letters sent to retailers, distributors, or other purchasers for resale pursuant to subparagraph A of this part; and
 - (2) copies of all communications with retailers, distributors, or other purchasers for resale pursuant to subparagraph B of this part.

V.

IT IS FURTHER ORDERED that respondent Alternative Cigarettes, Inc., and its successors and assigns, and respondent Joseph Pandolfino 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 packaging containing the representation;
- B. All materials that were relied upon in disseminating the representation; and
- C. All tests, reports, studies, surveys, demonstrations, or other evidence in their possession or control that contradict, qualify, or call into question the representation, or the basis relied upon for the representation, including

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complaints and other communications with consumers or with governmental or consumer protection organizations.

VI.

IT IS FURTHER ORDERED that respondent Alternative Cigarettes, Inc., and its successors and assigns, and respondent Joseph Pandolfino shall deliver a copy of this order to all current and future principals, officers, directors, and managers, and to all current and future employees, agents, and representatives having responsibilities with respect to the subject matter of this order, and shall secure from each such person a signed and dated statement acknowledging receipt of the order. Respondents shall deliver this order to current personnel within thirty (30) days after the date of service of this order, and to future personnel within thirty (30) days after the person assumes such position or responsibilities. Respondents shall maintain and upon request make available to the Federal Trade Commission for inspection and copying a copy of each signed statement acknowledging receipt of the order.

VII.

IT IS FURTHER ORDERED that respondent Alternative Cigarettes, Inc., and its successors and assigns shall notify the Commission at least thirty (30) days prior to the sale of any of its tobacco products or herbal smoking products for which the composition or formula has been changed in such a manner as may affect compliance obligations arising under this order, including but not limited to the addition of any additives to any variety of such products. 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, 600 Pennsylvania Avenue, N.W., Washington, D.C. 20580.

Decision and Order

VIII.

IT IS FURTHER ORDERED that respondent Alternative Cigarettes, Inc., and its successors and assigns shall notify the Commission at least thirty (30) days prior to any change in the corporation that may affect compliance obligations arising under this order, including but not limited to a dissolution 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, 600 Pennsylvania Avenue, N.W., Washington, D.C. 20580.

IX.

IT IS FURTHER ORDERED that respondent Joseph Pandolfino, for a period of ten (10) years after the date of issuance of this order, shall notify the Commission of the discontinuance of his current business or employment, or of his affiliation with any new business or employment. The notice shall include respondent's new business address and telephone number and a description of the nature of the business or employment and his duties and responsibilities. All notices required by this Part shall be sent by certified mail to the Associate Director, Division of Enforcement, Bureau of Consumer Protection, Federal Trade Commission, 600 Pennsylvania Avenue, N.W., Washington, D.C. 20580.

Decision and Order

X.

IT IS FURTHER ORDERED that respondent Alternative Cigarettes, Inc., 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 they have complied with this order.

XI.

This order will terminate on June 14, 2020, 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 effect 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.

By the Commission.

Analysis to Aid Public Comment

Analysis of Proposed Consent Order to Aid Public Comment

The Federal Trade Commission has accepted, subject to final approval, an agreement containing a consent order from Alternative Cigarettes, Inc., and its President, Joseph Pandolfino (hereinafter AAAlternative Cigarettes@). The proposed consent order has been placed on the public record for thirty (30) days for receipt of comments by interested persons. Comments received during this period will become part of the public record. After thirty (30) days, the Commission will again review the agreement and the comments received, and will decide whether it should withdraw from the agreement or make final the agreement's proposed order.

This matter involves alleged misleading representations for Alternative Cigarettes= Pure and Glory tobacco cigarettes, and the company=s Herbal Gold and Magic herbal cigarettes. Alternative Cigarettes advertised that Pure and Glory cigarettes contain no additives. According to the FTC complaint, through these advertisements respondents represented that because Pure and Glory cigarettes contain no additives, smoking them is less hazardous to a smoker's health than smoking otherwise comparable cigarettes that contain additives. The complaint alleges that respondents did not have a reasonable basis for the representation at the time it was made. Among other reasons, according to the complaint, the smoke from Pure and Glory cigarettes, like the smoke from all cigarettes, contains numerous carcinogens and toxins, including tar and carbon monoxide.

The FTC complaint further alleges that Alternative Cigarettes represented that smoking Herbal Gold and Magic herbal cigarettes does not pose the health risks associated with smoking tobacco cigarettes. According to the complaint, this claim is false, as Herbal Gold and Magic cigarette smoke, like the smoke from

Analysis to Aid Public Comment

tobacco cigarettes, contains numerous carcinogens and toxins, including tar and carbon monoxide.

The proposed consent order contains provisions designed to prevent Alternative Cigarettes from engaging in similar acts and practices in the future. Part I of the order requires Alternative Cigarettes to include the following disclosure, clearly and prominently, in certain advertising for its tobacco cigarettes: "No additives in our tobacco does NOT mean a safer cigarette." (The order requires a similar disclosure in advertising for other tobacco products Alternative Cigarettes advertises as having no additives.) The disclosure must be included in all tobacco advertising that represents (through such phrases as "no additives" or "100% tobacco") that the product has no additives. Part I exempts Alternative Cigarettes from the disclosure requirement: (1) for cigarette advertisements not required to bear the Surgeon General's health warning; and (2) if Alternative Cigarettes possesses scientific evidence demonstrating that its "no additives" cigarette poses materially lower health risks than other cigarettes of the same type. In general, the disclosure required by Part I must be in the same type size and style as the Surgeon General's warning and must appear within a rectangular box that is no less than 40% of the size of the box containing the Surgeon General's warning.

Part II of the order requires Alternative Cigarettes to include the following disclosure, clearly and prominently, in advertising and on packaging for herbal cigarettes: "Herbal cigarettes are dangerous to your health. They produce tar and carbon monoxide." (The order requires a similar disclosure for other herbal smoking products.) The disclosure must be included in all advertising and on packaging for herbal smoking products that represent (through such phrases as "no tobacco," "tobacco-free," or "herbal") that the product has no tobacco. Part II also contains an exemption from the disclosure requirement if Alternative Cigarettes possesses scientific evidence demonstrating that such herbal smoking products do not pose any material health risks. In general, the disclosure required by Part II must be in the same

Analysis to Aid Public Comment

type size and style as the Surgeon General's warning and for advertisements must appear within a rectangular box that is the same size as the box containing the Surgeon General's warning.

Part III of the order requires Alternative Cigarettes to possess competent and reliable scientific evidence prior to: (1) claiming that any herbal smoking product does not present the health risks associated with smoking tobacco cigarettes; or (2) making any claim about the health risks associated with the use of any herbal smoking product.

Part IV requires Alternative Cigarettes to send a letter to its purchasers for resale notifying them that they should discontinue the use of certain existing Alternative Cigarettes advertisements and promotional materials and that Alternative Cigarettes is required to stop doing business with purchasers for resale that do not comply with this request.

Parts V VIII of the order contain requirements that Alternative Cigarettes keep copies of relevant advertisements and materials substantiating claims made in the advertisements; provide copies of the order to certain of its current and future personnel; notify the Commission of changes in the composition or formula of its tobacco products or herbal smoking products that may affect compliance with the order; and notify the Commission of any changes in the corporate structure that might affect compliance with the order. Part IX requires that the individual respondent notify the Commission of changes in his employment status for a period of ten years. Part X requires Alternative Cigarettes to file one or more reports detailing compliance with the order. Part XI provides that the order will terminate after twenty (20) years under certain circumstances.

Analysis to Aid Public Comment

The purpose of this analysis is to facilitate public comment on the proposed order, and it is not intended to constitute an official interpretation of the agreement and proposed order or to modify in any way their terms.

Complaint

IN THE MATTER OF

EFAMOL NUTRACEUTICALS, INC.

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

*Docket C-3958; File No. 9923027
Complaint, June 22, 2000--Decision, June 22, 2000*

This consent order requires Respondent Efamol Nutraceuticals, Inc. to possess competent and reliable scientific evidence for any claim about the health benefits, efficacy or safety of any food, drug or dietary supplement that contains essential fatty acids. The order permits respondent to make drug claims that have been approved by the FDA pursuant to either a new drug application or a tentative final or final standard and to make claims that the FDA has approved pursuant to the Nutrition Labeling and Education Act of 1990.

Participants

For the Commission: *Matthew D. Gold, Linda K. Badger,
Kerry O'Brien.*

For the Respondents: *Stephen H. McNamara and A. Wes
Siegener, Jr., Hyman, Phelps & McNamara, P.C.*

COMPLAINT

The Federal Trade Commission, having reason to believe that Efamol Nutraceuticals, Inc. ("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:

Complaint

Respondent Efamol Nutraceuticals, Inc., is a Delaware corporation with its principal office or place of business at 23 Dry Dock Avenue, 2nd Floor, Boston, Massachusetts 02210.

Respondent has manufactured, advertised, labeled, offered for sale, sold, and distributed numerous dietary supplements to the public, all of which contain essential fatty acids. Included among respondent's products are "Efalex" and "Efalex Focus." Respondent has marketed Efalex and Efalex Focus to parents of children with Attention Deficit Disorder and Attention Deficit Hyperactivity Disorder ("ADD/ADHD"). Efalex and Efalex Focus are "foods" and/or "drugs," within the meaning of Sections 12 and 15 of the Federal Trade Commission Act.

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.

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

A. "LONG-TERM SIDE EFFECTS MAY INCLUDE:
HUGGING YOUR MOM.

When your child is bouncing off the walls, hyper and aggressive, do you go crazy wishing he'd just let you love him? Efalex™ is a dietary supplement that manages fatty acid deficiency in ADD/ADHD. It's safe and gentle, and it's available today without a prescription. In capsules or liquid. Because hugging your mom is the best medicine of all. To find out more, call 1 888 EFAMOL 1 or visit www.efamol.com."

(Exhibit A, Print Advertisement).

Complaint

B. "FREAK

Why would anyone say such a thing? He's a beautiful kid. But sometimes beautiful kids suffer from really ugly attention and behavior problems. Luckily, Efalex™ is here. This safe, gentle, dietary supplement, now available in capsules or liquid, manages fatty acid deficiency in ADD/ADHD. Because he's not a monster, a demon, a weirdo. He's your child. Call 1 888 EFAMOL 1 or visit www.efamol.com."

(Exhibit B, Print Advertisement).

C. "You'd Try Anything to Help Your Child with ADHD. Try This.

Studies show that some children with Attention Deficit Hyperactivity Disorder (ADHD) have a fatty acid deficiency. This is because they have problems converting essential fatty acids into the long chain forms the body needs to maintain optimum eye and brain function.

Only Efalex provides the precise combination of these important fatty acids -- G.A., DHA, and AA -- to properly manage this deficiency.

Efalex has been used by thousands of children in the United Kingdom, other parts of Europe and Australia. Manufactured by Efamol, the world leader in fatty acid research, Efalex is a safe, gentle way to manage fatty acid deficiency.

Now Efalex is available at your local pharmacy in the vitamin/natural products section. For more

Complaint

information on fatty acid deficiency and ADHD, call 1-888-EFAMOL-1 or visit www.efamol.com.

Efamol. Better Science for Better Nutrition.”

(Exhibit C, Print Advertisement).

D. “Can you help him stay focused?”

Today’s children are intelligent, creative and more talented than ever, yet some find it difficult to focus on even the most everyday tasks. What causes this problem remains a mystery.

Nutritional research conducted at a major American university may offer hope. Studies have shown that essential fatty acids may play a role in maintaining eye and brain function. New research has shown that these nutrients may be low in some of today’s overly active children.

More and more parents are finding out about Efalex™ Focus -- a new dietary supplement from Efamol Ltd., the world leader in essential fatty acid research.

Efalex™ Focus is a patented formula that provides an important balance of these fatty acids. It has been widely used in Europe and is now available in the U.S.

To learn more about Efalex™ Focus and essential fatty acids, or to locate a store near you, call 1-888-EFAMOL-1 or visit us at www.efamol.com.”

(Exhibit D, Print Advertisement).

Through the means described in Paragraph 4, respondent has represented, expressly or by implication, that:

Complaint

- A. Efalex and Efalex Focus can cure, prevent, treat or mitigate ADD/ADHD or its symptoms.
- B. Efalex and Efalex Focus are effective in reducing attention and behavioral problems.

Through the means described in Paragraph 4, respondent has represented, expressly or by implication, that it possessed and relied upon a reasonable basis that substantiated the representations set forth in Paragraph 5, at the time the representations were made.

In truth and in fact, respondent did not possess and rely upon a reasonable basis that substantiated the representations set forth in Paragraph 5, at the time the representations were made. There are no studies showing that children suffering from ADD/ADHD can be effectively treated by supplementation with essential fatty acids. Respondent relied on studies that do not purport to establish a link between essential fatty acid supplementation and an effect on ADD/ADHD or its symptoms. Therefore, the representation set forth in Paragraph 6 was, and is, false or misleading.

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.

THEREFORE, the Federal Trade Commission this twenty-second day of June, 2000, has issued this complaint against respondent.

By the Commission.

Complaint Exhibits

Complaint Exhibits

**LONG-TERM SIDE EFFECTS MAY INCLUDE:
HUGGING YOUR MOM.**

When your child is bouncing off the walls, hyper and aggressive, do you go crazy wishing he'd just let you love him? Efalex™ is a dietary supplement that manages fatty acid deficiency in ADD/ADHD. It's safe and gentle, and it's available



today without a prescription, in capsules or liquid. Because hugging your mom is the best medicine of all. To find out more, call 1888 EFAMOL 1 or visit www.efamol.com



NOW AVAILABLE AT FOOD, DRUG, DISCOUNT AND HEALTH FOOD STORES EVERYWHERE

EXHIBIT A

Complaint Exhibits



Why would anyone say such a thing? He's a beautiful kid. But sometimes beautiful kids suffer from really ugly attention and behavior problems. Luckily, Efalex™ is here. This safe, gentle dietary supplement,



now available in capsules or liquid, manages fatty acid deficiency in ADD/ADHD. Because he's not a monster, a demon, a weirdo. He's your child. Call 1888 EFAMOL I or visit www.efamol.com



NOW AVAILABLE AT CVS PHARMACY, RITE AID, ECKERD AND OTHER FINE STORES

EXHIBIT B

Complaint Exhibits

Now available at Brooks, Walgreens and Wal-Mart.

You'd Try Anything to Help Your Child with ADHD. Try This.

Studies show that some children with Attention Deficit Hyperactivity Disorder (ADHD) have a fatty acid deficiency. This is because they have problems converting essential fatty acids into the long chain forms the body needs to maintain optimum eye and brain function.

Only Efalex provides the precise combination of these important fatty acids - GLA, DHA, and AA - to properly manage the deficiency. Efalex has been used by thousands of children in the United Kingdom, other parts of Europe and Australia. Manufactured by Elamal, Efalex is a safe, gentle way to manage fatty acid deficiency.

Now Efalex is available at your local pharmacy in the vitamin/mineral products section. For more information on fatty acid deficiency and ADHD, call 1-888-ELAMAL. For visit www.elamal.com

Efalex
For the Dietary Management of Fatty Acid Deficiency in ADHD/ADD

With DHA 60 capsules

Efalex
Better Science for Better Nutrition.

EXHIBIT C

Complaint Exhibits





Can you help him stay focused?

Today's children are intelligent, creative, and more talented than ever, yet some find it difficult to focus on even the most everyday tasks. What causes this problem remains a mystery. Nutritional research conducted at a major American university may offer hope. Studies have shown that essential fatty acids may play a role in maintaining eye and brain function. New research has shown that these nutrients may be low in some of today's overly active children.



More and more parents are finding out about Efalex[®] Focus—a new dietary supplement from Efamol Ltd., the world leader in essential fatty acid research.

Efalex[®] Focus is a patented formula that provides an important balance of these fatty acids. It has been widely used in Europe and is now available in the US.

To learn more about Efalex[®] Focus and essential fatty acids, or to locate a store near you, call 1-888-EFALEX-1 or visit us at www.efamol.com



Available at GNC and Fine Health Food Stores Everywhere

These statements have not yet been evaluated by the Food and Drug Administration. This product is not intended to treat, prevent or cure any disease.

EXHIBIT D

Decision and Order

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

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

The Commission having thereafter considered the matter and having determined that it had reason to believe that the respondent has violated the said Act, and that complaint should issue stating its charges in that respect, and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of thirty (30) days, now in further conformity with the procedure prescribed in § 2.34 of its Rules, the Commission hereby issues its complaint, makes the following jurisdictional findings and enters the following order:

1. Respondent Efamol Nutraceuticals, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware, with its office and principal place of business at 23 Dry Dock Avenue, 2nd Floor, Boston, Massachusetts 02210.

Decision and Order

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

ORDER

DEFINITIONS

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

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 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.
2. Unless otherwise specified, "Respondent" shall mean Efamol Nutraceuticals, Inc., its successors and assigns and its officers, agents, representatives and employees.
3. "Drug" shall mean as defined in Section 15 of the Federal Trade Commission Act, 15 U.S.C. § 55.
4. "Food" shall mean as defined in Section 15 of the Federal Trade Commission Act, 15 U.S.C. § 55.
5. "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, partnership, subsidiary, division, or other device, in

Decision and Order

connection with the manufacturing, labeling, advertising, promotion, offering for sale, sale, or distribution of “Efalex,” “Efalex Focus,” or any food, drug or dietary supplement, in or affecting commerce, shall not make any representation, in any manner, expressly or by implication, that:

- A. Such product can cure, prevent, treat or mitigate Attention Deficit Disorder, Attention Deficit Hyperactivity Disorder, or their symptoms;
- B. Such product is effective in reducing attention and behavioral problems;

unless, at the time the representation is made, respondent possesses and relies upon competent and reliable scientific evidence that substantiates the representation.

II.

IT IS FURTHER ORDERED that respondent, directly or through any corporation, partnership, subsidiary, division, or other device, in connection with the manufacturing, labeling, advertising, promotion, offering for sale, sale, or distribution of any food, drug or dietary supplement that contains essential fatty acids, in or affecting commerce, shall not make any representation, in any manner, expressly or by implication, about the health benefits, efficacy or safety of such product, unless, at the time the representation is made, respondent possesses and relies upon competent and reliable scientific evidence that substantiates the representation.

III.

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

Decision and Order

IV.

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.

V.

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.

VI.

IT IS FURTHER ORDERED that respondent, and its successors and assigns, shall, for a period of five (5) years from the date of service of this order, deliver a copy of this order to all

Decision and Order

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

VII.

IT IS FURTHER ORDERED that respondent, and its successors and assigns, shall notify the Commission at least thirty (30) days prior to any change in the corporation that may affect compliance obligations arising under this order, including but not limited to a dissolution, assignment, sale, merger, or other action that would result in the emergence of a successor corporation; the creation or dissolution of a subsidiary, parent or affiliate that engages in any acts or practices subject to this order; the proposed filing of a bankruptcy petition; or a change in the corporate name or address. Provided, however, that, with respect to any proposed change in the corporation about which 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. 20580.

VIII.

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.

Decision and Order

IX.

This order will terminate twenty on June 22, 2020, 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.

By the Commission.

Analysis to Aid Public Comment

Analysis of Proposed Consent Order to Aid Public Comment

The Federal Trade Commission has accepted, subject to final approval, an agreement containing a consent order from Efamol Nutraceuticals, Inc., (“Efamol”). Efamol is a marketer of dietary supplement products, all of which contain essential fatty acids.

The proposed consent order has been placed on the public record for thirty (30) days for receipt of comments by interested persons. Comments received during this period will become part of the public record. After thirty (30) days, the Commission will again review the agreement and the comments received, and will decide whether it should withdraw from the agreement or make final the agreement's proposed order.

This matter involves alleged misleading representations for Efalex and Efalex Focus, two of Efamol's dietary supplement products. The advertisements claimed that these products can mitigate or cure the effects of Attention Deficit Disorder or Attention Deficit Hyperactivity Disorder (“ADD/ADHD”).

The proposed complaint alleges that Efamol could not substantiate the following claims: (1) that Efalex and Efalex Focus can cure, prevent, treat or mitigate ADD/ADHD or its symptoms; and (2) that Efalex and Efalex Focus are effective in reducing attention and behavioral problems. Part I of the proposed order would address these misrepresentations by prohibiting Efamol from making the claims in the future unless it possesses and relies upon competent and reliable scientific evidence that substantiates the claim.

Part II of the proposed order requires Efamol to possess competent and reliable scientific evidence for any claim about the health benefits, efficacy or safety of any food, drug or dietary supplement that contains essential fatty acids. Because all of Efamol's products contain essential fatty acids, this provision would apply to the company's entire current product line.

Analysis to Aid Public Comment

Part III of the proposed order contains language permitting Efamol to make drug claims that have been approved by the FDA pursuant to either a new drug application or a tentative final or final standard. Part IV states that Efamol would be permitted to make claims that the FDA has approved pursuant to the Nutrition Labeling and Education Act of 1990.

Parts V-VII of the proposed order contain requirements that Efamol keep copies of relevant advertisements and materials substantiating claims made in the advertisements; provide copies of the order to certain of its current and future personnel; and notify the Commission of changes in the corporate structure that might affect compliance with the order. Part VIII requires Efamol to file one or more reports detailing compliance with the order. Part IX provides that the order will terminate after twenty (20) years under certain circumstances.

The purpose of this analysis is to facilitate public comment on the proposed order, and it is not intended to constitute an official interpretation of the agreement and proposed order or to modify in any way their terms.

Complaint

IN THE MATTER OF

ZIM TEXTILE CORPORATIONCONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATIONS OF
SEC. 5 OF THE FEDERAL TRADE COMMISSION ACT*Docket C-3960; File No. 0023082
Complaint, June 29, 2000--Decision, June 29, 2000*

This consent order prohibits Respondent Zim Textile Corporation from future violations of the Textile Fiber Products Identification Act and Commission rules and regulations, found at 16 C.F.R. Part 303, implementing the requirements of the statute.

Participants

For the Commission: *Carol Jennings, Stephen Ecklund, Elaine D. Kolish, and BE.*

For the Respondents: *Jerry P. Wiskin, Simons & Wiskin.*

COMPLAINT

The Federal Trade Commission, having reason to believe that Zim Textile Corporation (respondent) has violated the provisions of the Federal Trade Commission Act, 15 U.S.C. § 41 *et seq.* (FTC Act) and the Textile Fiber Products Identification Act, 15 U.S.C. § 70 *et seq.* (Textile Act), and it appearing to the Commission that this proceeding is in the public interest, alleges:

1. Respondent is a New York corporation with its principal office or place of business at 300 Campus Drive, Suite E, Morganville, New Jersey 07751.
2. Respondent is a manufacturer and distributor of household textile products, including sheets and pillowcases. Respondent has manufactured, offered for sale, sold, and distributed textile products subject to the requirements of the Textile Act.

Decision and Order

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 offered for sale and sold household textile products, subject to the requirements of the Textile Act, without disclosing on a tag or label affixed to the product the fiber content, the manufacturer or dealer identity, and the country of origin, thus violating 15 U.S.C. § 70b(b), and implementing regulations in 16 C.F.R. § 303.2.
5. The acts and practices of respondent as alleged in this complaint constitute unfair or deceptive acts or practices in or affecting commerce in violation of Section 5(a) of the Federal Trade Commission Act, 15 U.S.C. § 45(a).

THEREFORE, the Federal Trade Commission this twenty-ninth day of June, 2000, has issued this complaint against respondent.

By the Commission.

DECISION AND ORDER

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

Decision and Order

Commission Act and the Textile Fiber Products Identification Act.

The respondent and counsel for the Commission having thereafter executed an agreement containing a consent order, and admission by the respondent of all the jurisdictional facts set forth in the draft 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 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 thirty (30) 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 is a New York corporation with its principal office or place of business at 300 Campus Drive, Suite E, Morganville, New Jersey 07751.
2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondent, and the proceeding is in the public interest.

ORDER**I.**

IT IS ORDERED that respondent Zim Textile Corporation, its successors and assigns, and its officers, agents, representatives, and employees, directly or through any corporation, subsidiary,

Decision and Order

division, or other device, shall not violate any provision of the Textile Fiber Products Identification Act, 15 U.S.C. § 70 *et seq.*, and any of the Rules promulgated pursuant to the Act, 16 C.F.R. Part 303, or as they may hereafter be amended.

II.

IT IS FURTHER ORDERED that respondent Zim Textile Corporation, and its successors and assigns, for three (3) years after the date of issuance of this Order, shall maintain, and upon request make available to the Federal Trade Commission, business records demonstrating compliance with the terms and provisions of this Order.

III.

IT IS FURTHER ORDERED that respondent Zim Textile Corporation, and its successors and assigns, shall deliver a copy of this Order to all current and future principals, officers, and directors, and to all current and future employees, agents, and representatives having responsibilities with respect to the subject matter of this Order, and shall secure from each such person a signed and dated statement acknowledging receipt of the Order. Respondent shall deliver this Order to current personnel within thirty (30) days after the date of service of this Order, and to future personnel within thirty (30) days after the person assumes such position or responsibilities.

IV.

IT IS FURTHER ORDERED that respondent Zim Textile Corporation, and its successors and assigns, shall notify the Commission at least thirty (30) days prior to any change in the corporation that may affect compliance obligations arising under this Order, including but not limited to a dissolution, assignment,

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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. 20580.

V.

IT IS FURTHER ORDERED that respondent Zim Textile Corporation, 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.

VI.

This Order will terminate on June 29, 2020, 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

Analysis to Aid Public Comment

- 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.

By the Commission.

Analysis of Proposed Consent Order to Aid Public Comment

The Federal Trade Commission has accepted, subject to final approval, an agreement to a proposed consent order from respondent Zim Textile Corporation.

The proposed consent order has been placed on the public record for thirty (30) days for reception of comments by interested persons. Comments received during this period will become part of the public record. After thirty (30) days, the Commission will again review the agreement and the comments received and will decide whether it should withdraw from the agreement and take other appropriate action or make final the agreement's proposed order.

Analysis to Aid Public Comment

This matter concerns practices related to the manufacture, sale, and distribution of household textile products. The Commission's complaint charges that respondent violated the Federal Trade Commission Act, 15 U.S.C. § 41 *et seq.*, and the Textile Fiber Products Identification Act, 15 U.S.C. § 70 *et seq.*, by offering for sale and selling household textile products without disclosing on a tag or label affixed to each such product the fiber content, the manufacturer or dealer identity, and the country of origin.

Part I of the proposed consent order prohibits future violations of the Textile Fiber Products Identification Act and Commission rules and regulations, found at 16 C.F.R. Part 303, implementing the requirements of the statute.

Part II of the proposed order requires the respondent, for three years after the date of issuance of the order, to maintain records demonstrating compliance with the order.

Part III of the proposed order requires the respondent to distribute copies of the order to certain company officials and employees. Part IV of the proposed order requires the respondent to notify the Commission of any change in the corporation that may affect compliance obligations under the order. Part V of the proposed order requires the respondent to file one or more compliance reports. Part VI of the proposed order is a provision whereby the order, absent certain circumstances, terminates twenty years from the date of issuance.

The purpose of this analysis is to facilitate public comment on the proposed consent order. It is not intended to constitute an official interpretation of the agreement and proposed order or to modify in any way their terms.

Complaint

IN THE MATTER OF

SERVICE CORPORATION INTERNATIONAL

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

*Docket C-3959; File No. 9810108
Complaint, June 29, 2000--Decision, June 29, 2000*

This consent order addresses the anticompetitive effects of the 1994 acquisition by Respondent Service Corporation International, the nations largest chain of funeral homes, of LaGrone Funeral Home giving them a monopoly on funeral services in Roswell, New Mexico. Prompted by the Commission's investigation, Respondent sold Ballard Funeral Home, in Roswell, to Sentry Group Services, Inc. The order requires that, if Respondent acquires the Ballard Funeral Home pursuant to a default on Sentry's loan with Provident, a subsidiary of Respondent, Respondent must divest Ballard to a Commission-approved buyer within 90 days. Provident is also prohibited, by the order, from sharing information regarding Sentry with Respondent.

Participants

For the Commission: *Harold E. Kirtz, Randi M. Boorstein, and Gregory S. Vistnes.*

For the Respondents: *James M. Shelger, Service Corporation International, and David Clanton and David Laing, Baker & McKenzie.*

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act ("FTC 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 Service Corporation International ("SCI") has acquired LaGrone Funeral

Complaint

Home in violation of Section 7 of the Clayton Act, 15 U.S.C. §18, and Section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45, 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 Service Corporation International

1. Respondent SCI (hereinafter "Respondent") is a corporation organized, existing and doing business under and by virtue of the laws of the State of Texas, with its office and principal place of business located at 1929 Allen Parkway, Houston, Texas 77019. Respondent had sales in 1998 of approximately \$2.8 billion.
2. Respondent is, and at all times relevant herein has been, engaged in commerce, or in activities affecting commerce, within the meaning of Section 1 of the Clayton Act, 15 U.S.C. § 12, and Section 4 of the Federal Trade Commission Act, 15 U.S.C. § 44.
3. Respondent is, and at all times relevant herein has been, engaged in the provision of funeral services in Roswell, New Mexico.

II. The Acquisition

4. On or about May 17, 1994, Respondent acquired the LaGrone Funeral Home in Roswell, New Mexico. Respondent had entered the Roswell area with its purchase of the Ballard Funeral Home on or about February 1, 1979.

III. Trade and Commerce

5. The relevant line of commerce in which to analyze the acquisition is funeral services.

Complaint

6. The relevant section of the country in which to analyze the acquisition in connection with the provision of funeral services is Roswell, New Mexico.

IV. Entry Conditions

7. Entry into the relevant market is difficult, and would not be timely, likely or sufficient to prevent anticompetitive effects.

V. Concentration

8. The relevant market is highly concentrated, whether measured by the Herfindahl-Hirschman Index ("HHI") or by two-firm concentration ratios. The HHI increased from 5050 to 10,000 because of the acquisition.

VI. Effects of the Acquisition

9. The acquisition may have substantially lessened competition in the relevant market in the following ways, among others:
 - (a) by eliminating direct competition between Respondent and LaGrone; and
 - (b) by increasing the likelihood that Respondent has been unilaterally exercising and will continue to unilaterally exercise market power;

each of which increases the likelihood that the prices of funeral services will increase and that services to customers of funeral services will decrease. In fact, prices charged for funeral services in the relevant market have already increased substantially.

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10. In 1998, the Commission began a formal investigation of the Roswell, New Mexico, funeral services market. On September 28, 1999, Respondent divested the assets of Ballard Funeral Home.

VII. Violations Charged

11. The acquisition described in Paragraph 4 constitutes a violation of Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18, and Section 5 of the FTC Act, as amended, 15 U.S.C. § 45.

WHEREFORE, THE PREMISES CONSIDERED, the Federal Trade Commission has caused this Complaint to be signed by the Secretary and its official seal to be affixed in Washington, D.C., this twenty-ninth day of June, 2000.

By the Commission.

DECISION AND ORDER

The Federal Trade Commission having initiated an investigation of the acquisition by Respondent Service Corporation International of the assets of LaGrone Funeral Home, and Respondent having been furnished thereafter with a copy of a draft of Complaint that the Bureau of Competition and the Southeast Region 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

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Respondent, its attorneys, and counsel for the Commission having thereafter executed an Agreement Containing Consent Order ("Consent Agreement"), containing an admission by Respondent of all the jurisdictional facts set forth in the aforesaid draft of Complaint, a statement that the signing of said Consent 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 Respondent has violated the said Acts, and that a Complaint should issue stating its charges in that respect, and having thereupon issued its Complaint, and having accepted the executed Consent Agreement and placed the Agreement on the public record for a period of thirty (30) days for the receipt and consideration of public comments, now in further conformity with the procedure described in Commission Rule 2.34, 16 C.F.R. § 2.34, the Commission hereby makes the following jurisdictional findings and issues the following Order:

1. Respondent Service Corporation International is a corporation organized, existing and doing business under and by virtue of the laws of the State of Texas, with its office and principal place of business located at 1929 Allen Parkway, Houston, Texas 77019.

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

Decision and Order

ORDER**I.**

IT IS ORDERED that, as used in this Decision and Order, the following definitions shall apply:

A. "Respondent" or "SCI" means Service Corporation International, its directors, officers, employees, agents, representatives, successors and assigns; its subsidiaries, divisions, groups and affiliates controlled by SCI, and the respective directors, officers, employees, agents, representatives, successors and assigns of each.

B. "Commission" means the Federal Trade Commission.

C. "Acquisition" means the acquisition by SCI of LaGrone Funeral Home.

D. "Funeral Services" means a group of services provided at the death of an individual, the focus of which is some form of commemorative ceremony of the life of the deceased at which ceremony the body is present; this group of services ordinarily includes, but is not limited to: removal of the body from the place of death; embalming or other preparation; making available a place for visitation and viewing, for the conduct of a Funeral Service, and for the display of caskets and outer burial containers; and arrangements for and conveyance of the body to a cemetery or crematory for final disposition.

E. "Divested Assets" consists of Ballard Funeral Home, located in Roswell, New Mexico, and all assets, leases, properties, permits (to the extent transferable), customer lists, businesses and goodwill, tangible and intangible, related to or utilized as part of Ballard Funeral Home.

F. "Provident" means Provident Services, Inc., a subsidiary of SCI.

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G. "Sentry" means Sentry Group Services, Inc., which acquired the Divested Assets on September 28, 1999.

II.**IT IS FURTHER ORDERED** that:

A. For a period of ten (10) years from the date this Decision and Order becomes final, Respondent shall not, without providing advance written notification to the Commission, directly or indirectly, through subsidiaries, partnerships, or otherwise, acquire any stock, share capital, equity or other interest, except for an interest obtained by Provident to secure financing as provided in Paragraph III. D. of this Decision and Order, in any concern, corporate or non-corporate, or any assets used or previously used (and still suitable for use), engaged at the time of such acquisition, or within the two (2) years preceding such acquisition, in the provision of funeral services in Chaves County, New Mexico.

B. The aforesaid 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 shall be filed with the Secretary of the Commission, notification need not be made to the United States Department of Justice, and notification is required only of Respondent and not of any other party to the transaction. Respondent shall provide the Notification to the Commission at least thirty (30) 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

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material (within the meaning of 16 C.F.R. §803.20), Respondent shall not consummate the transaction until twenty (20) days after submitting such additional information or 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 shall not be required by this Paragraph for a transaction for which notification is required to be made, and has been made, pursuant to Section 7A of the Clayton Act, 15 U.S.C. §18a.

C. Provident shall keep information received from or made available to Sentry confidential from any person other than persons employed or retained by Provident who are or are expected to be engaged in reviewing, evaluating, approving, structuring, or administering the financing for Sentry. Provident shall not disclose any information received from or made available to Sentry to any officer, employee, or director of SCI or of any subsidiary or division of SCI other than Provident. Provident shall be permitted to disclose information received from or made available to Sentry (a) upon the order of any court or administrative agency, (b) upon the request or demand of a regulatory or other authority having jurisdiction over Provident, (c) to the extent reasonably required in connection with the exercise of any remedy under a loan agreement pertaining to any financing provided to Sentry, (d) to Provident's auditors or legal counsel, (e) in connection with the filing of any loan statement or similar document in connection with any public record filed in connection with financing provided to Sentry, and (f) in connection with any sale, participation, or syndication of any loan by Provident.

III.**IT IS FURTHER ORDERED** that:

A. If Respondent re-obtains the Divested Assets by means of the interest held by Provident, Respondent shall divest absolutely and in good faith the Divested Assets no later than ninety (90)

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days from the date on which Respondent obtains such interest to an acquirer (“the New Acquirer”) that receives the prior approval of the Commission and only in a manner that receives the prior approval of the Commission.

B. For purposes of Paragraph III. A., Respondent shall take such actions as are necessary to maintain the viability, marketability, and competitiveness of the Divested Assets, pending the divestiture of the Divested Assets to the New Acquirer, and preserve the ability of these assets to compete at the same levels of sales, profitability, and market share as prior to the Acquisition, and shall not permit the destruction, removal, wasting, deterioration, or impairment of any of these assets, except for ordinary wear and tear that does not affect their viability, marketability, or competitiveness, and shall transfer each asset required to be divested pursuant to Paragraph III. A. of this Decision and Order to the New Acquirer in a manner that preserves the assets’ marketability, viability, and competitiveness.

C. The purposes of this Paragraph III are to remedy the lessening of competition resulting from the Acquisition, as alleged in the Commission’s complaint, and to ensure the continuation of the Divested Assets as an ongoing, viable enterprise engaged in the same business in which it was engaged at the time of the Acquisition.

D. For purposes of this Paragraph III., Provident shall be permitted to provide financing for, and to take and hold a security interest in, the Divested Assets to the New Acquirer, subject to the conditions set forth in Paragraph II. C. of this Decision and Order. In the event that Provident exercises the right under a loan agreement relating to financing provided to the New Acquirer to foreclose on a property, Provident shall divest all title and other interests in the property obtained through foreclosure in the manner set forth in Paragraph III of this Decision and Order. In

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the event that SCI sells, divests, or otherwise disposes of Provident, and that SCI has no officers, directors, or employees in common with Provident, then the provisions of this Paragraph III. D., and of Paragraphs II. C. and V. A., shall no longer be operative.

IV.**IT IS FURTHER ORDERED** that:

A. If Respondent obtains the Divested Assets by means of the security interest that SCI retains in the Divested Assets through its financing of the divestiture of the Divested Assets by Provident and has not divested, absolutely and in good faith, the Divested Assets within ninety (90) days, the Commission may appoint a trustee to accomplish the required divestiture, at no minimum price, to an acquirer that receives the prior approval of the Commission, and in a manner that receives the prior approval of the Commission.

B. In the event that the Commission or the Attorney General brings an action pursuant to Section 5(l) of the Federal Trade Commission Act, 15 U.S.C. §45(l), or any other statute enforced by the Commission, the Respondent shall consent to the appointment of a trustee in such action.

C. Neither the appointment of a trustee nor a decision not to appoint a trustee shall preclude the Commission or the Attorney General from seeking civil penalties or any other relief (including, but not limited to, a court-appointed trustee) pursuant to the Federal Trade Commission Act, or any other statute enforced by the Commission, for any failure by the Respondent to comply with this Decision and Order.

D. If a trustee is appointed by the Commission or a court pursuant to Paragraph IV. A. or IV. B. of this Decision and Order, Respondent shall consent to the following terms and conditions

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regarding the trustee's powers, duties, authority, and responsibilities:

1. The Commission shall select the trustee, subject to the consent of Respondent, which consent shall not be unreasonably withheld. The trustee shall be a person with experience and expertise in acquisitions and divestitures. If Respondent has not opposed, in writing, including the reasons for opposing, the selection of any proposed trustee within ten (10) days after notice by the staff of the Commission to Respondent of the identity of any proposed trustee, Respondent shall be deemed to have consented to the selection of the proposed trustee.
2. Subject to the prior approval of the Commission, the trustee shall have the exclusive power and authority to divest the Divested Assets.
3. Within ten (10) days after appointment of the trustee, Respondent shall execute a trust agreement that, subject to the prior approval of the Commission and, in the case of a court-appointed trustee, of the court, transfers to the trustee all rights and powers necessary to permit the trustee to effect the divestiture required by this Decision and Order.
4. The trustee shall have twelve (12) months from the date the Commission approves the trust agreement described in Paragraph IV. D. 3. to accomplish the divestiture, which shall be subject to the prior approval of the Commission. If, however, at the end of the twelve-month period, the trustee has submitted a plan of divestiture or believes that divestiture can be achieved within a reasonable time, the divestiture period may be extended by the Commission, or, in the case of a court-appointed trustee, by the court;

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provided, however, the Commission may extend this period only two (2) times.

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

6. The trustee shall use his or her best efforts to negotiate the most favorable price and terms available in each contract that is submitted to the Commission, subject to Respondent's absolute and unconditional obligation to divest expeditiously at no minimum price. The divestiture shall be made in the manner and to the acquirer as set out in Paragraph III of this Decision and Order; provided, however, if the trustee receives bona fide offers from more than one acquiring entity, and if the Commission determines to approve more than one such acquiring entity, the trustee shall divest to the acquiring entity selected by Respondent from among those approved by the Commission; provided further, however, that Respondent shall select such entity within five (5) days of receiving notification of the Commission's approval.

7. The trustee shall serve, without bond or other security, at the cost and expense of Respondent, on such reasonable and customary terms and conditions as the Commission or a court may set. The trustee shall have the authority to employ, at the cost and expense of Respondent, such consultants, accountants, attorneys, investment bankers,

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business brokers, appraisers, and other representatives and assistants as are necessary to carry out the trustee's duties and responsibilities. The trustee shall account for all monies derived from the divestiture and all expenses incurred. After approval by the Commission and, in the case of a court-appointed trustee, by the court, of the account of the trustee, including fees for his or her services, all remaining monies shall be paid at the direction of the Respondent, and the trustee's power shall be terminated. The trustee's compensation shall be based at least in significant part on a commission arrangement contingent on the trustee's divesting the Divested Assets.

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

9. If the trustee ceases to act or fails to act diligently, a substitute trustee shall be appointed in the same manner as provided in Paragraph IV. A. of this Decision and Order.

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

Decision and Order

11. In the event that the trustee determines that he or she is unable to divest the Divested Assets as described in Paragraph I. E. of this Decision and Order, the trustee may divest such additional assets of Respondent in that geographic area as necessary to satisfy the requirements of this Decision and Order.

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

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

V.**IT IS FURTHER ORDERED** that:

A. In the event that Respondent obtains the Divested Assets because of the interest held by Provident, Respondent shall submit to the Commission a verified written report setting forth in detail the manner and form in which it intends to comply, is complying, and has complied with Paragraphs III and IV of this Decision and Order within thirty (30) days of the date on which it obtains the Divested Assets and every thirty (30) days thereafter until it has fully complied with Paragraphs III and IV of this Decision and Order. Respondent shall include in its compliance reports, among other things that are required from time to time, a full description of the efforts being made to comply with Paragraphs III and IV of the Decision and Order, including a description of all substantive contacts or negotiations for the divestiture and the identity of all parties contacted. Respondent shall include in its compliance reports copies of all written communications to and from such parties, all internal memoranda, and all reports and recommendations concerning divestiture.

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B. On the first November fifteenth after the date on which this Decision and Order is issued, annually for the next nine (9) years on November fifteenth, and at other times as the Commission may require, Respondent shall file a verified written report with the Commission setting forth in detail the manner and form in which it has complied and is complying with this Decision and Order.

VI.

IT IS FURTHER ORDERED that Respondent shall notify the Commission at least thirty (30) days prior to any proposed change in the Respondent such as dissolution, assignment, sale resulting in the emergence of a successor entity, or the creation or dissolution of subsidiaries or any other change that may affect compliance obligations arising out of this Decision and Order.

VII.

IT IS FURTHER ORDERED that, for the purpose of determining or securing compliance with this Decision and Order, upon written request to counsel, Respondent shall permit any duly authorized representative of the Commission:

A. Access, during office hours and in the presence of counsel, to inspect any facility and 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 Decision and Order; and

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

Analysis to Aid Public Comment

VIII.

IT IS FURTHER ORDERED that this Decision and Order shall terminate on June 29, 2010.

By the Commission.

Analysis of Proposed Consent Order to Aid Public Comment

The Federal Trade Commission has accepted an agreement for public comment from Service Corporation International (“SCI”) designed to remedy the anticompetitive effects arising from SCI’s 1994 acquisition of the LaGrone Funeral Home (“LaGrone”) in Roswell, New Mexico. SCI, headquartered in Houston, Texas, is the nation’s largest chain of funeral homes and cemeteries. LaGrone, at the time of the acquisition, operated two funeral homes in New Mexico.

At the time of the acquisition, there were only two funeral homes operating in Roswell, New Mexico. SCI owned the Ballard Funeral Home. LaGrone owned the remaining funeral home. The acquisition gave SCI a monopoly in the provision of funeral services in Roswell. Funeral services include transporting the deceased from the place of death to the funeral home, embalming and otherwise preparing the body for burial, providing a casket, holding a viewing or other ceremony, and transporting the body to the cemetery or crematorium. Since the acquisition, no new entry into the provision of funeral services in Roswell has occurred. After the acquisition, prices for funeral services increased in Roswell.

On September 28, 1999, prompted by the Commission’s investigation of the LaGrone acquisition, SCI sold the Ballard Funeral Home to Sentry Group Services, Inc. (“Sentry”). Sentry,

Analysis to Aid Public Comment

a privately-held company, owns and operates 37 funeral homes in Oklahoma, Texas, New Mexico, Kansas, and Colorado. Provident Services, Inc. ("Provident"), SCI's financing subsidiary, provided financing for Sentry's acquisition.¹

To ensure that competition is fully restored in Roswell, the Commission's proposed Consent Order requires that, if SCI acquires the Ballard Funeral Home pursuant to a default on Sentry's loan with Provident, SCI must divest Ballard to a Commission-approved buyer within 90 days. In the event SCI does not accomplish the divestiture within 90 days, the proposed Consent Order provides that the Commission may appoint a trustee to divest Ballard. Moreover, the proposed Consent Order prohibits Provident from sharing information obtained from Sentry with SCI.

The proposed Consent Order also provides that, for a period of ten years, SCI must give prior notice to the Commission of any proposed acquisition of a funeral home serving Chaves County, New Mexico, where Roswell is located.

The proposed Consent Order has been placed on the public record for thirty days for receipt of comments by interested persons. Comments received during this period will become part of the public record. The purpose of this analysis is to invite and facilitate public comment concerning the proposed Consent Order in order to aid the Commission in its determination of whether to

¹ Provident is kept separate and distinct from the operating divisions of SCI. Because there are unique financing needs in the funeral industry, Provident provides loan services for many transactions, including the construction or acquisition of funeral homes by a number of SCI's competitors. Consequently, Provident's loan agreement includes a provision guaranteeing the confidentiality of information provided to Provident by a borrowing funeral home operator.

Analysis to Aid Public Comment

make the proposed Consent Order final. It is not intended to constitute an official interpretation of the proposed Consent Order, nor is it intended to modify the terms in any way. After thirty days, the Commission will again review the agreement and the comments received and will decide whether it should withdraw from the agreement or make the proposed Consent Order final.

**INTERLOCUTORY, MODIFYING, VACATING,
AND MISCELLANEOUS ORDERS**

IN THE MATTER OF

DURA LUBE CORPORATION, ET AL.

Docket No. 9292. Order, January 19, 2000

Order withdrawing this matter from adjudication..

**ORDER WITHDRAWING MATTER FROM
ADJUDICATION**

This matter is before the Commission upon the joint motion filed by Complaint Counsel and Counsel for Respondents that this matter be withdrawn from adjudication -- pursuant to Section 3.25(b) and (c) of the Commission Rules of Practice, 16 C.F.R. §§ 3.25(b), (c) (1999) -- for the purpose of considering a proposed consent agreement executed by Complaint Counsel, Respondents, and Counsel for Respondents.

IT IS ORDERED that the aforesaid motion to withdraw this matter from adjudication be, and it hereby is, granted.

By the Commission.

Interlocutory Orders, etc.

IN THE MATTER OF

**GENERAL NUTRITION CORPORATION, ALSO
TRADING AS NATURAL SALES COMPANY AND
DAVID B. SHAKARIAN***Docket No. C-1517. Order, January 31, 2000*

Order withdrawing this matter from adjudication..

IN THE MATTER OF

GENERAL NUTRITION, INC.*Docket No. 9175. Order, January 31, 2000*

Order withdrawing this matter from adjudication..

**ORDER GRANTING IN PART AND DENYING IN PART
REQUEST TO REOPEN THE PROCEEDING AND
MODIFY CEASE AND DESIST ORDER IN
DOCKET NO. C-1517
AND DENYING REQUEST TO REOPEN AND MODIFY
CEASE AND DESIST ORDER IN
DOCKET NO. 9175**

On May 7, 1999, General Nutrition, Inc. (“GNC”) filed a request to reopen the proceedings in Docket No. C-15171 and 91752, and to modify the orders issued by the Commission, pursuant to Section 5(b) of the Federal Trade Commission Act (“FTC Act”), 15 U.S.C. 9 45(b), and Section 2.51 of the

¹ 75 F.T.C. 529 (1969), *modified*, 77 F.T.C. 1458 (1970) (“1969 order”).

² 111 F.T.C. 387 (1989) (“1989 order”).

Interlocutory Orders, etc.

Commission's Rules of Practice, 16 C.F.R. 4 2.51.3 The request was placed on the public record for 30 days for comment. No comments were filed. GNC also requests that the Commission seek the Department of Justice's assistance in asking a federal court to modify a 1994 consent decree⁴ enjoining GNC from violating these two orders and h m making deceptive claims for any hair loss product.

I. THE ORDERS AND THE DECREE

The 1969 order applies to all food or drug preparations containing vitamins and/or minerals marketed by GNC and its "officers . . . agents, representatives and employees, directly or through any corporate or other device." Paragraph 1 (a) prohibits GNC from claiming the use of any such preparation will be of benefit in the prevention, relief or treatment of any symptom unless: (1) the claim is expressly limited to a symptom caused by a deficiency of one or more of the vitamins or iron provided by the preparation; and (2) GNC discloses that the preparation will not prevent, treat, or relieve the symptom for the vast majority of persons suffering from such symptom; and that the presence of an iron or vitamin deficiency cannot be self-diagnosed and can be determined only by tests conducted under a physician's supervision. Paragraphs 1 (b)-(h) prohibit GNC from making specific false claims involving the body's ability to store vitamins B and C, the treatment of iron deficiency, and the diagnosis of iron or vitamin deficiencies.

Paragraph 2 prohibits GNC from disseminating any advertisement of a product advertised for sale by reason of its vitamin and/or mineral content which lists or refers to an

³ Pursuant to Section 3.72(b)(3)(ii) of the Rules of Practice, 16 C.F.R. § 3.729b(3)(ii), these two administrative orders will terminate no sooner than April 28, 2014.

⁴ Civil No. 94-686 (W.D. Pa. May 20, 1994).

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ingredient, except in the name of such product, the need for which in human nutrition has not been established, or an ingredient whose presence is without nutritional significance, unless the advertisement discloses that the presence of such ingredient is without nutritional significance. Paragraph 2 also prohibits GNC from misrepresenting that the need for an ingredient for human nutrition has been established. In addition, Paragraph 2 contains a safe harbor providing that any regulation by the FDA affirmatively permitting a claim of nutritional significance for a vitamin or mineral in a specified amount will be accepted as evidence that the presence of that amount of the specified nutrient has nutritional significance.

On August 19, 1993, Commission staff from the Bureau of Consumer Protection's Division of Enforcement issued an advisory opinion addressing the scope of Paragraph 1 (a) of the 1969 order.⁵ The staff's advisory opinion states that Paragraph 1(a) applies only to food and drug preparations containing vitamins and/or minerals for which claims are made, directly or by implication, that the vitamin[s] or mineral[s] present in such preparations will be of benefit in the prevention of tiredness, etc. Thus, as interpreted by Commission staff, Paragraph 1(a) does not apply to a product marketed as effective in preventing tiredness provided the benefit is attributed to an ingredient other than any vitamins or minerals also present in the product.

The 1989 order is considerably broader than the 1969 order. Part I of the 1989 order prohibits GNC from making certain false cancer-related claims for "Healthy Greens" (a food supplement made from vegetables and containing various nutrients) or any substantially similar product. Part II prohibits GNC from making false claims relating to scientific evidence with respect to any product's ability to cure, treat, prevent or reduce the risk of

⁵ See Letter from Justin Dingfelder, Asst. Dir., Div. of Enforcement, Bureau of Consumer Protection, FTC, to Christopher Smith, Arent Fox Kintner Plotkin & Kahn.

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developing any disease. Part III prohibits GNC from making certain muscle building, fat or weight loss, and other health-related claims for any free form amino acid containing arginine, ornithine, tryptophane or a combination thereof. Part IV prohibits GNC from using the expression “Growth Hormone Releaser” or any similar expression as a brand name or product description, unless such product stimulates the production or release of greater amounts of human growth hormone in users than in non-users and GNC has substantiation for the claim. Part V prohibits GNC from making any unsubstantiated representation: (1) concerning any product’s ability to cure, treat, prevent or reduce the risk of developing any disease; (2) that any product assists a user to lose or control weight or fat or suppress appetite; (3) that any product expands, extends, or prolongs life or retards aging; or (4) that any product aids a user in achieving greater or faster muscular development, greater endurance, strength, power or stamina, or shorter exercise recovery time.⁶

Like the 1969 order, Parts I through V of the 1989 order apply to GNC and its “officers, agents, representatives, and employees, directly or through any corporation, subsidiary, division, or other device.” Part VI required GNC to pay \$600,000 to the American Diabetes Association, the American Cancer Society, and the American Heart Association. Parts VII to X require recordkeeping, notice of corporate status changes, the filing of a compliance report, and distribution of the order to GNC’s divisions and distributors.

⁶ Part V contains a “safe harbor” providing that GNC shall not be liable under this paragraph for any representation contained on a package label or package insert for a product that meets all of the following conditions: (1) the product is manufactured and distributed by a third party and is not manufactured or distributed exclusively for GNC; (2) the product is generally available at competing retail outlets; (3) the product is not identified with GNC and does not contain GNC’s name or logo; (4) the product was not developed or manufactured at the instigation or with the assistance of GNC; and (5) the product representation is not otherwise advertised or promoted by GNC.

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In 1994, the Commission brought an enforcement action against GNC alleging numerous violations of the 1969 and 1989 orders, as well as Sections 5(a) and 12 of the FTC Act. GNC settled the action by agreeing to pay a \$2.4 million civil penalty and to the entry of an injunction prohibiting GNC and its “officers, agents, representatives and employees . . . directly or through any corporation, subsidiary, division, or other device” from violating the 1969 and 1989 orders. The injunction also prohibits false and unsubstantiated claims regarding the ability of any product or service to prevent, cure, relieve, reverse or reduce hair loss, or promote the growth of hair, where hair has already been lost. Paragraph 6 of the consent decree provides that: “In the event that either the 1989 or the 1970 Order [the 1969 order] is hereafter modified, defendant’s compliance with such Order as so modified shall not be deemed a violation of this injunction.”

II. STANDARD FOR REOPENING A FINAL ORDER

Section 5(b) of the FTC Act provides that the Commission shall reopen an order to consider whether it should be altered, modified, or set aside if the respondent makes “a satisfactory showing that changed conditions of law or fact” so require.⁷ A satisfactory showing sufficient to require reopening is made when

⁷ Section 5(b), as amended in 1980, provides, in part:

[T]he Commission may at any time . . . reopen and alter, modify, or set aside, in whole or in part any report or order made or issued by it under this section, whenever in the opinion of the Commission conditions of fact or of law have so changed as to require such action or if the public interest shall so require.

The 1980 amendment to Section 5(b) did not change the standard for order reopening and modification, but “codifie[d] existing Commission procedure by requiring the Commission to reopen an order if the specified showing is made,” S. Rep. 96-500, 96th Cong., 2d Sess. 9-10 (1979), and the amendment added the requirement that the Commission act on petitions to reopen within 120 days of filing.

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a request identifies significant changes in circumstances and shows that the changes eliminate the need for the order or make continued application of the order inequitable or harmful to competition. *Louisiana Pacific Corp.*, Docket No. C-2956, Letter to John C. Hart (June 5, 1986) at 4.

Generally in determining whether to modify an order based on a *change in fact*, the Commission requires that the change be one that was unforeseeable.⁸ In a dynamic economy, change is predictable and inevitable. But, the nature and type of change are not necessarily foreseeable. The Commission has recognized marketplace realities in evaluating whether petitions have demonstrated that a change was not reasonably foreseeable.

For example, in *Beneficial Corp.*, 108 F.T.C. 168, 171 (1986), the petitioners asked the Commission to reopen and modify a 1979 order addressing their marketing of tax return preparation services based on change in fact and law, and on public interest grounds. The petitioners argued, among other things, that their tax return preparing personnel were now required to undergo more extensive training compared to the training required at the time of the order's issuance. *Id.* at 171. The petitioners further argued that this constituted a change in fact warranting modification of Paragraph Six, which was an absolute prohibition against representations regarding the competence of the petitioners' tax return preparing personnel. The petitioners asked the Commission to modify Paragraph Six to prohibit them from "misrepresenting,

⁸ See *Phillips Petroleum Co.*, 78 F.T.C. 1573, 1575 (1971) (modification not required for changes reasonably foreseeable at time of consent negotiations); *Pay Less Drugstores Northwest, Inc.*, Docket No. C-3039, Letter to H.B. Hummelt (Jan. 22, 1982) (changed conditions must be unforeseeable, create severe competitive hardship and eliminate dangers that the order sought to remedy) (unpublished); see also *United States v. Swift & Co.*, 286 U.S. 106, 119 (1932) ("clear showing" of changes that eliminate reasons for order or such that order causes unanticipated hardship).

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in any manner, the competence or the ability of respondents' tax preparing personnel." *Id.* The Commission held that the petitioners had demonstrated a change in fact warranting modification of Paragraph Six of the order so that it would only prohibit misrepresentations of competence or ability.⁹

In determining whether to modify an order based on a *change in law*, the Commission decides whether the change brings the order into conflict with existing law. *Union Carbide Corp.*, 108 F.T.C. 184, 186 (1986). In *Kroger Co.*, 113 F.T.C. 772, 775-76 (1990), the Commission modified the order to make it consistent with the amended Unavailability Rule, 16 C.F.R. § 424, in part based on changed conditions of law. In its petition, Kroger argued that it was in the position of violating the order by complying with the amended Rule or violating the amended Rule by complying with the order. *Id.* at 774. The Commission concluded that the amendments to the Rule brought the terms of the order into conflict with the Rule. *Id.* at 776. In *Bulova Watch Co.*, 102 F.T.C. 1834 (1983), the Commission found that the Supreme Court's ruling in *Continental T.V., Inc. v. GTE Sylvania, Inc.*, 433 US. 36, 57-59 (1977), that non-price vertical restraints such as transshipment restrictions are not *per se* illegal, but instead should be evaluated pursuant to the rule of reason, constituted a change in law warranting deletion of the order's transshipment provisions. Thus, a change in law may warrant modification of an order if, because of a change in law, the order prohibits conduct that would or could be permissible absent the order (even if it is possible to

⁹ See also *Union Carbide Corp.*, 108 F.T.C. 184, 188 (1986)(petitioner's sale of welding products and gas welding apparatus operations warranted deletion of references to these product lines from the order on change in fact and public interest grounds); *General Mills Fun Group, Inc.*, 106 F.T.C. 607 (1985)(sale of the subsidiary that had engaged in violative conduct deemed a change in fact warranting modification); *Genstar Ltd.*, 104 F.T.C. 264 (1984)(increased capacity in the relevant market required reopening and modification of the order); *AHC Pharmcal*, 101 F.T.C. 40 (1983)(corrective advertising requirement deleted in part because of respondent's changed financial condition).

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comply with the order and the changed law simultaneously). A change in law need not result in a direct conflict to warrant reopening. In *ITT Continental Baking Co.*, 102 F.T.C. 1298 (1983), the Commission held that the passage of the Hart-Scott-Rodino Act constituted a change in law requiring an order modification because it overlapped with the order's disclosure requirements.

Section 5(b) also provides that the Commission may reopen and modify an order when, although changed circumstances would not require reopening, the Commission determines that the public interest so requires. The Commission recently reopened and modified an order on public interest grounds, because the reasons to modify the order outweighed the reasons to retain it as written. *Schnuck Markets, Inc.*, Docket No. C-3585 (June 2, 1998) (modifying prohibition on removal of equipment from supermarkets owned by respondent to allow respondent to make a specified charitable donation to a college of used equipment from a store closed for nearly three years). There, the Commission concluded that there was only a slight possibility that the original purpose of the prohibition -- to make it more likely that any supermarket closed by respondent would be reopened as a supermarket by someone else -- would be affected by the modification, and this possibility was outweighed by the possible detrimental impact on the respondent's public image and the public benefits to the college of retaining the prohibition. *Id.* at 3.

The language of Section 5(b) indicates that the requester has the burden of making "a satisfactory showing" of changed conditions to obtain reopening of the order. *See Gautreaux v. Pierce*, 535 F. Supp. 423,426 (N.D. Ill. 1982) (requester must show "exceptional circumstances, new, changed or unforeseen at the time the decree was entered"). The legislative history also makes clear that the requester has the burden of showing, by

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means other than conclusory statements, why an order should be modified.¹⁰

If the Commission determines that the requester has made the necessary showing, the Commission must reopen the order to determine whether the modification is required and, if so, the nature and extent of the modification. The Commission is not required to reopen the order, however, if the requester fails to meet its burden of making the satisfactory showing of changed conditions required by the statute. The requester's burden is not a light one in view of the public interest in repose and finality of Commission orders.¹¹

III. PETITIONER'S REQUEST AND ANALYSIS

GNC alleges that changes in law and fact, as well as public interest considerations, warrant reopening and modifying the orders and decree. GNC requests that the Commission modify the 1969 order by:

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

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

¹¹ See *Federated Department Stores, Inc. v. Moitie*, 452 U.S. 394 (1981) (strong public interest considerations support repose and finality); *Bowman Transportation, Inc. v. Arkansas-Best Freight System, Inc.*, 419 U.S. 281,296 (1974) ("sound basis for. . . [not reopening] except in the most extraordinary circumstances"); *RSR Corp. v. FTC*, 656 F.2d 718,721-22 (D.C. Cir. 1981) (applying *Bowman Transportation* standard to FTC order).

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(1) replacing Paragraph 1, which prohibits a number of specific claims and requires certain triggered disclosures, with a provision prohibiting GNC from making any unsubstantiated claim that the presence of any vitamin or mineral will prevent, relieve, or treat any symptom or that the presence of any vitamin or mineral deficiency can be self-diagnosed;

(2) deleting Paragraph 2, a disclosure requirement regarding the nutritional significance of certain food ingredients, and Paragraphs 3 and 4, two provisions that are no longer necessary in light of the proposed changes to Paragraph 1 and the deletion of Paragraph 2;

(3) adding “safe harbors” providing that nothing in the order shall prohibit GNC from making any representation: (a) that is specifically permitted in labeling by regulations promulgated by the Food and Drug Administration (“FDA”) pursuant to the Nutritional Labeling and Education Act of 1990 or sections 303-304 of the Food and Drug Administration Modernization Act of 1997; or (b) that is permitted in labeling under any tentative final or final standard or monograph promulgated by the FDA, or under any new drug application approved by the FDA;

(4) adding three definitions and deleting two administrative provisions imposing one-time requirements that GNC distribute the order and file a compliance report; and

(5) dropping the individual respondent who is now deceased.

In addition, GNC requests that the Commission modify the 1969 and 1989 orders and seek modification of the 1994 consent decree to add a new provision limiting GNC’s liability for the actions of its franchisees and licensees. This provision would require GNC to bind its franchisees and licensees contractually to

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comply with the respective order or decree, notify non-complying franchisees and licensees that they are violating the respective order or decree, and report noncomplying franchisees and licensees to the FTC if they continue to violate the respective order or decree after receiving such notice. It would also provide that GNC's compliance with the new provision shall constitute an affirmative defense to any civil penalty action arising from the conduct of a franchisee or licensee provided GNC has not authorized, approved or ratified the conduct and has reported that conduct promptly to the FTC.

On August 30, 1999, GNC submitted a new proposed provision limiting its liability for the conduct of its franchisees and licensees. Unlike GNC's first proposed modification, this new provision would require GNC to monitor advertising of its franchisees and licensees. It would also provide that the affirmative defense is not available to GNC unless the company has "diligently pursued reasonable and appropriate remedies available under the franchise or license agreement and applicable state law to bring about the cessation of that conduct by the franchisee or licensee" in cases where the franchisee or licensee conduct constitutes a material or repeated violation of the order.

A. GNC's Proposed Modifications of the 1969 Order**1. GNC's Request and Rationale**

GNC requests that the Commission modify the 1969 order by replacing it with the following language:

ORDER

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

- A. "Competent and reliable scientific evidence" shall mean tests, analyses, research, studies, or other evidence based on the expertise of professionals in the relevant area, that

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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.

- B. Unless otherwise specified, “respondent” shall mean General Nutrition, Inc., a corporation, its successors and assigns, and its officers, agents, representatives, and employees.
- C. “Commerce” shall mean as defined in Section 4 of the Federal Trade Commission Act, 15 U.S.C. 0 44.

I.

IT IS ORDERED that respondent, directly or through any corporation, subsidiary, division, or other device, in connection with the advertising of any food, dietary supplement, or drug containing any vitamin or mineral, as “food” and “drug” are defined in Section 15 of the Federal Trade Commission Act, 15 U.S.C. § 55, and as “dietary supplement” is defined in Section 201(ff) of the Federal Food, Drug and Cosmetic Act, 21 U.S.C. 9 321(ff), in or affecting commerce, shall not make any representation, in any manner, expressly or by implication:

- A. That the presence of any vitamin or mineral in any such food, dietary supplement, or drug will be of benefit in the prevention, relief or treatment of tiredness, listlessness, lack of normal appetite, “depleted” feeling, “run-down” feeling, easy fatigability or any other symptom; or
- B. That the presence of any vitamin or mineral deficiency can be self-diagnosed;

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unless, at the time the representation is made, respondent possesses and relies upon competent and reliable scientific evidence that substantiates the representation.

II.

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 or to Sections 303-304 of the Food and Drug Administration Modernization Act of 1997.

III.

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

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GNC asserts that the proposed modification would simplify the order and reconcile the scope of Paragraph 1 with staff's 1993 advisory opinion, and that the modification is warranted on public interest grounds. GNC maintains that Paragraph 1 as currently worded is ambiguous in that it does not precisely define the advertising claims that trigger the disclosure requirement. GNC relies on *Encyclopedia Britannica, Inc.*, 111 F.T.C. 1 (1988), a case where the Commission reopened and modified the order on public interest grounds to effectively eliminate any conceivable ambiguity in a provision requiring verbal disclosures during telephone sales presentations by establishing a bright line standard to measure future compliance. GNC contends that it is impractical for it to make the lengthy disclosures required by Part l(a), and

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that as a result, this provision operates in effect as a ban on the claims triggering the disclosure requirement.¹² GNC further maintains that it cannot rely on the 1993 staff advisory opinion described earlier because the staff's interpretation of the order may change in the future. GNC thus argues that there is an affirmative need to modify this provision to provide legal certainty regarding the scope of the provision.

GNC asserts that deletion of Paragraph 2 is warranted on public interest and change in law grounds. GNC relies on *Firestone Tire & Rubber Co.*, 114 F.T.C. 450 (1991), a case where the Commission reopened and set aside an order as to respondent Shell Oil Co. on change in law grounds. The Commission set aside the order as to Shell because the legal standard for liability relating to tying and nonprice vertical restraints had changed. GNC argues that the Paragraph 2 affirmative disclosure requirement no longer comports with the current state of Food and Drug Administration ("FDA") regulations pertaining to dietary supplements, and that it is contrary to the regulatory scheme for supplements created by the Dietary Supplement Health and Education Act of 1994 ("DSHEA"). GNC maintains that the parties intended Paragraph 2 to track the then-current FDA regulations concerning the labeling of products containing vitamins and minerals. At that time, the FDA required labeling disclaimers for certain vitamin and mineral ingredients for which no need in human nutrition has been established. Because the FDA no longer requires such disclaimers, GNC contends the Commission should delete Paragraph 2. If the Commission does not delete Paragraph 2 as

¹² As noted earlier, Paragraph 1(a) requires GNC to disclose that the preparation will not prevent, treat, or relieve the symptom for the vast majority of persons suffering from such symptom; and that the presence of an iron or vitamin deficiency cannot be self-diagnosed and can be determined only by tests conducted under a physician's supervision.

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requested, GNC will be subject to disclosure requirements to which the rest of the supplement industry is no longer subject to as a result of DSHEA and the changes in FDA regulations.

GNC also argues that the disclosures required by Paragraph 2 conflict with disclosures required by DSHEA and could generate confusion. DSHEA requires the following disclaimer to appear in conjunction with claims of nutritional support: “This statement has not been evaluated by the Food and Drug Administration. This product is not intended to diagnose, treat, cure, or prevent any disease.” GNC contends that the disclaimer required by Paragraph 2 (i.e. this ingredient is without nutritional significance) conflicts with the DSHEA disclaimer. To illustrate this point, GNC offers a hypothetical example involving the FDA’s proposal to permit the statement “to meet nutritional needs during pregnancy” on labeling for a supplement provided the statement can be properly substantiated. GNC asserts that it could have substantiation for this statement as to a particular vitamin or mineral, yet be unable to establish a need in human nutrition for the vitamin or mineral. If so, GNC contends, its advertising would confuse consumers by stating “Product X contains ingredient Y which helps meet nutritional needs during pregnancy” along with the DSHEA disclaimer and the Paragraph 2 disclaimer “this ingredient is without nutritional significance.”¹³

GNC also argues that modifying Paragraph 2 would serve the public interest by enabling GNC to market products in accordance with DSHEA without risking a regulatory challenge from the FTC based on the Paragraph 2 disclosure requirement, and that GNC

¹³ As explained in more detail below, GNC’s argument lacks merit. If GNC can substantiate a claim that a particular vitamin or mineral helps meet nutritional needs during pregnancy and the FDA permits such a claim to be made, it arguably follows that a need for the vitamin or mineral in human nutrition has been established. If the need for a particular vitamin or mineral has been established, Paragraph 2 does not require GNC to make any disclosures in advertising for such vitamin or mineral. GNC would not have to disclose which symptoms, if any, are prevented, relieved or treated by the vitamin or mineral.

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has therefore demonstrated an affirmative need to modify Paragraph 2. GNC maintains that the modification would also serve the public interest by preventing any potential confusion about the value of certain vitamins and minerals stemming from the Paragraph 2 disclosure requirement.

2. Analysis

GNC has demonstrated that changes in law and the public interest warrant reopening the 1969 order. Without modification, the 1969 order potentially could prohibit truthful advertising claims and require disclosure of inaccurate or irrelevant information to consumers.

a. Paragraph 1

The public interest warrants modification of Paragraph 1. Paragraph 1 (a) of the 1969 order prohibits GNC from disseminating an advertisement claiming that the use of any food or drug preparation will be of benefit in the prevention, relief or treatment of any symptom unless: (1) the claim is expressly limited to a symptom caused by a deficiency of one or more of the vitamins or iron provided by the preparation; and (2) GNC makes certain disclosures. Theoretically, this provision as interpreted by Commission staff in 1993 could prohibit a truthful claim that a vitamin or iron prevents, relieves or treats a symptom (e.g., a situation where there is evidence that taking more than the recommended daily allowance of a vitamin would help prevent, relieve, or treat a symptom). The modification sought by GNC would enable it to make any substantiated symptom prevention, relief or treatment claim for a vitamin or mineral, regardless of whether such symptom is related to a vitamin or mineral deficiency.

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In addition, the substitute language would not require GNC to make the three lengthy disclosures required by Paragraph 1 (a) of the order. GNC must make these disclosures if the triggering claim is for any vitamin or for iron. As a result, the order could require GNC to make irrelevant or even inaccurate disclosures. For example, if GNC advertised truthfully that a vitamin helps prevent a symptom other than fatigue, Paragraph 1 (a)(1) of the order would require GNC to disclose that for the great majority of consumers the product will be of no benefit in the prevention of such symptom. This disclosure could be inaccurate. Such a claim would also trigger the requirement in Paragraph 1 (a)(2) that GNC disclose that the presence of iron deficiency anemia or iron deficiency of any degree cannot be self-diagnosed and can be determined only by means of medical or laboratory tests conducted by or under the supervision of a physician. This disclosure could be irrelevant to the claim that triggers it. This claim would also trigger the requirement in Paragraph 1(a)(3) that GNC disclose that the presence of a deficiency of the B vitamins, or of any vitamin, cannot be self-diagnosed and can be determined only by means of medical or laboratory tests conducted by or under the supervision of a physician. This disclosure could be of dubious value to consumers considering supplementation.

Paragraph 1 (a) of the order is even more problematic if one interprets it literally instead of interpreting it as the Commission staff did in its 1993 advisory opinion. Interpreted literally, Paragraph 1 (a) would require GNC to make the disclosures described above in advertising for a product containing an ingredient that is effective in treating a symptom and one or more vitamins or iron for which no claim regarding the treatment of any symptom is made. It would make no sense to require GNC to make the Paragraph 1 (a) disclosures in this context. For example, if GNC marketed a product containing an ingredient proven effective in treating nasal congestion plus vitamins or iron, there would be no reason to require a disclosure that the great majority of persons suffering from nasal congestion will not benefit from the product. This disclosure would contradict the truthful claim

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being made for the product and could confuse consumers. Similarly, there would be no reason to require a disclosure that the presence of an iron or vitamin deficiency cannot be self-diagnosed and can be determined only through medical tests. This disclosure would be irrelevant to the efficacy claims being made for the product.

Paragraphs 1(b)-(h) of the order prohibit a number of specific claims relating to the body's ability to store any B Complex Vitamin or Vitamin C; the effectiveness of ingredients other than iron in treating iron deficiency anemia; vitamin or mineral deficiencies accompanying iron deficiency; and the ability of consumers to self-diagnose vitamin or iron deficiencies. These provisions could at some point prohibit truthful claims if, for example, scientific advances make it possible for consumers to self-diagnose deficiencies without the aid of a physician. The proposed modification of the order simplifies these provisions by replacing them with a substantiation requirement for symptom prevention, relief and treatment claims as well as claims that the presence of a vitamin or mineral deficiency can be self-diagnosed.

For these reasons, we conclude that the public interest warrants modification of Paragraph 1. The order as modified will require GNC to substantiate the relevant claims, but will no longer prohibit truthful claims nor require disclosure of inaccurate or irrelevant information.

b. Paragraph 2

GNC correctly asserts that FDA regulation of dietary supplements has changed substantially since 1970, the last time the Commission modified Paragraph 2. As a result of these changes in FDA regulation, Paragraph 2 requires GNC to make disclosures that other supplement companies need not make. Although it is not uncommon for companies under FTC order to

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be in this position, in this case Paragraph 2 was initially drafted to ensure that GNC's advertising contained the same disclosures required in labeling by the FDA.¹⁴

In 1970 FDA regulations required the labeling disclosure: "The need for X in human nutrition has not been established" for vitamin and mineral ingredients for which no minimum daily requirement had been established.¹⁵ This appears to have been consistent with the prevailing scientific view that the benefits of supplements were limited to prevention of deficiencies. The enactment of DSHEA in 1994 reflected a broader view of the benefits of supplements. DSHEA explicitly permits statements of nutritional support¹⁶ on supplement labeling regardless of whether the FDA has recognized the ingredient in question to be of significant nutritional value. FDA has revised its regulations to be consistent with DSHEA and no longer requires the nutritional significance disclaimer on food supplement labels.

In passing DSHEA in 1994, Congress stated that the "Federal Government should not take any actions to impose unreasonable regulatory barriers limiting or slowing the flow of safe products

¹⁴ GNC's April 1970 Motion for Amendment to Order to Cease and Desist asserts that the "sole purpose. . . of Paragraph 2 of the Order was to bring any listing of ingredients in any advertisement predicated upon alleged vitamin or mineral efficacy into conformity with any listing of ingredients shown on the labels for the advertised products." The FTC staff's Answer to Respondents' Motion for Amendment to Order to Cease and Desist did not dispute this assertion. In 1970 the Commission modified the order by, among other things, adding a safe harbor providing that any FDA regulation permitting claims of nutritional significance of a vitamin or mineral in a specified amount will be accepted as evidence that the presence of that amount of the specified nutrient has nutritional significance.

¹⁵ 21 C.F.R. §§ 125.3(a)(2), 125.4(a)(2) (1970).

¹⁶ A claim of "nutritional support" is a term used in DSHEA to describe a claim regarding an effect on the structure or function of the human body, as opposed to a claim about the prevention or cure of disease.

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and accurate information to consumers.” Section 6 of DSHEA allows a statement for a dietary supplement to be made if:

- (A) the statement claims a benefit related to a classical nutrient deficiency disease and discloses the prevalence of such disease in the United States, describes the role of a nutrient or dietary ingredient intended to affect the structure or function in humans, characterizes the documented mechanism by which a nutrient or dietary ingredient acts to maintain such structure or function, or describes general well-being from consumption of a nutrient or dietary ingredient,
- (B) the manufacturer of the dietary supplement has substantiation that such statement is truthful and not misleading, and
- (C) the statement contains, prominently displayed and in boldface type, the following: “This statement has not been evaluated by the Food and Drug Administration. This product is not intended to diagnose, treat, cure, or prevent any disease.”

Section 7 of DSHEA provides that ingredients for which a recommendation for daily consumption has been established are listed first. Other ingredients are listed next. DSHEA requires listing such ingredients but does not require or prohibit disclosures regarding the absence of nutritional significance.

Subsequent to the enactment of DSHEA, the FDA modified its regulations in several respects. For example, FDA deleted 21 C.F.R. § 101.9(k)(5), a provision stating that a food is misbranded if its label or labeling represents, suggests, or implies that “the food has dietary properties when such properties are of no significant value or need in human nutrition,” to eliminate any inconsistency between FDA regulations and Section 6 of DSHEA.

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Paragraph 2 of the 1969 order is not directly inconsistent with DSHEA, given the latter's application to the FDA and not the FTC. However, Paragraph 2 is inconsistent with Congress' intent that the federal government not impose unreasonable limits on the provision of accurate information to consumers, because it could chill advertising permitted under the DSHEA. If GNC lists an ingredient, it must, unlike its competitors operating under amended FDA regulations, disclose that the presence of the ingredient is without nutritional significance unless the need for the ingredient has been established.

Accordingly, we conclude the passage of DSHEA and the evolution of FDA regulations constitute a change in law warranting modification of Paragraph 2. This provision was designed to track the FDA regulations in effect in 1970 so as to ensure that GNC's advertising set forth the same disclosures required on labels by FDA. The FDA disclosure requirements effective in 1970 no longer exist. Therefore, the law has changed in that companies marketing food supplements are no longer required to make these disclosures on their product labels.

In addition, public interest considerations support the modification sought by GNC. Paragraph 2 requires GNC to make advertising disclosures that its competitors need not make and that may in some instances confuse consumers regarding the value of certain nutrients. Deletion of Paragraph 2 would promote a level playing field in the supplement industry by eliminating disclosure requirements based on defunct FDA regulations and applicable only to GNC.

c. Other Issues

GNC proposes two FDA safe harbors commonly included in orders addressing claims for food and drug products. The NLEA safe harbor is standard, except that it also covers any representation for any product that is specifically permitted in labeling for such product by FDA regulations promulgated

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pursuant to Sections 303-304 of the Food and Drug Administration Modernization Act of 1997 (“FDAMA”). Sections 303-304 of FDAMA permit advertisers to make health claims for their food products if such claims are based on current, published, authoritative statements from certain federal scientific bodies, as well as from the National Academy of Sciences. This safe harbor applies only to any claim that FDA has “specifically permitted” by promulgating a regulation permitting the claim pursuant to the NLEA or FDAMA. This safe harbor would not apply to a claim that FDA has permitted by taking no action with respect to the claim.

GNC also proposes to add three standard definitions of “competent and reliable scientific evidence,” “the respondent,” and “commerce”; and to delete two administrative provisions that imposed one-time obligations on GNC to distribute the order and file a compliance report. In addition, GNC proposes to drop the individual respondent who is now deceased.

Finally, GNC proposes to delete Paragraphs 3 and 4 of the order. Paragraph 3 prohibits the dissemination of advertisements containing statements which are inconsistent with any of the affirmative disclosures required by Paragraphs 1 or 2 of the order. This paragraph would serve no purpose after elimination of the disclosure requirements in Paragraphs 1 and 2. Paragraph 4 prohibits the dissemination of any advertisement which contains any of the representations prohibited by Paragraphs 1 and 2 or that fails to comply with the disclosure requirements in Paragraphs 1 and 2. This paragraph merely restates the prohibition on making claims prohibited by Paragraph 1 and requires compliance with disclosure requirements that will no longer exist.

The changes discussed above serve the public interest by simplifying the order, deleting requirements already fulfilled by

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GNC or made obsolete by the death of the individual respondent, and conforming the order to modern practice.

B. GNC's Proposed Limitation of its Liability for the Conduct of Franchisees and Licensees

1. GNC's Request and Rationale

GNC also requests that the Commission reopen the 1969 and 1989 orders and add a new provision limiting its liability for the conduct of GNC franchisees and licensees. In addition, GNC requests that the Commission seek modification of the 1994 consent decree by adding an identical provision. GNC's petition proposes to add the following provision to each order and the decree:

Respondent shall distribute a copy of this Order to each of its franchisees and licensees and shall contractually bind them to comply with the prohibitions and affirmative requirements of this Order,

Respondent may satisfy this contractual requirement by incorporating such Order requirements into its Franchisee Operations Manual or license agreements with its licensees; and

Respondent shall further make reasonable efforts to monitor its franchisees' and licensees' compliance with the Order provisions; respondent may satisfy this requirement by (1) taking reasonable steps to notify promptly any franchisee or licensee that respondent determines is failing materially or repeatedly to comply with any Order provision that such franchisee or licensee is not in compliance with the Order provisions and that disciplinary action may result from such noncompliance; and (2) providing the Federal Trade Commission with the name and address of the franchisee or licensee and the nature of the noncompliance if the franchisee

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or licensee fails to comply promptly with the relevant Order provision after being so notified;

provided, however, that respondent's compliance with this Part shall constitute an affirmative defense to any civil penalty action arising from an act or practice of one of respondent's franchisees or licensees that violates this Order where respondent: (a) has not authorized, approved or ratified that conduct; and (b) has reported that conduct promptly to the Federal Trade Commission under this Part.

On August 30, 1999, GNC submitted a new proposed provision limiting its liability for the conduct of its franchisees and licensees and advised that this new provision replaces the provision set forth in the petition:

Respondent shall distribute a copy of this Order to each of its franchisees and licensees;

Respondent shall contractually bind its franchisees to comply with the requirements of this Order; Respondent shall contractually bind its licensees to comply with the Order as it pertains to licensed products;

Respondent may satisfy this contractual requirement by incorporating such Order requirements into its Franchisee Operations Manual or license agreement with its licensees; and

Respondent shall further use its best efforts to obtain its franchisees' and licensees' compliance with this Order by doing the following:

(1) Respondent shall distribute a copy of this Order to each of its franchisees or licensees;

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(2) Respondent shall review advertising and promotional materials submitted to it from its franchisees or licensees prior to dissemination and publication to determine compliance with the requirements of this Order;

(3) Respondent shall notify any franchisee or licensee in writing if any advertising or promotional material does not comply with the requirements of this Order and that it should not be disseminated or published;

(4) Respondent shall monitor franchisee and licensee advertising and where it finds advertising that has not been submitted to it and which it believes is not in compliance with the requirements of this Order, it will notify such franchisee or licensee in writing of its findings and that such advertising should be withdrawn;

(5) Respondent shall maintain separate files for each franchisee or licensee containing copies of any correspondence relating to any advertising and promotional materials with respect to the issues raised by this Order for a period of three (3) years; and

(6) Upon request, Respondent shall make these files available to the Commission staff for inspection and copying.

Provided, however, that Respondent's compliance with this Part shall constitute an affirmative defense to any civil penalty action arising from an act or practice of one of Respondent's franchisees or licensees that violates this Order where Respondent: (a) has not authorized, approved or ratified that conduct; (b) has reported that conduct promptly to the Federal Trade Commission under this Part; and (c) in cases where that franchisee's or licensee's conduct constitutes a material or repeated violation of the Order, has diligently pursued reasonable and appropriate remedies available under the franchise or license agreement and applicable state law to

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bring about a cessation of that conduct by the franchisee or licensee.

#

GNC asserts that this modification is warranted on public interest and change in fact grounds. To support its contention that the public interest warrants this modification, GNC relies on *Tarra Hall Clothes, Inc.*, 115 F.T.C. 920 (1992), a case where the Commission reopened and modified the order on public interest grounds. The Commission modified a requirement that prohibited the importation of wool products unless the respondents filed a bond with the Secretary of the Treasury by limiting the scope of the bonding requirement to recycled wool products. The Commission held that the public interest may warrant a modification if intrinsic fairness dictates the modification.

GNC argues that the relief it seeks is consistent with the relief obtained by the respondents in *Tarra Hall*. GNC explains that, just as the *Tarra Hall* respondents did not seek the elimination of the bonding requirement, GNC does not seek to abdicate all responsibility for its franchisees' and licensees' conduct. Instead, GNC maintains, it only seeks to avoid liability for the unlawful conduct of franchisees and licensees if it has not authorized, approved or ratified the conduct and takes other actions as explained above.

GNC contends that it has demonstrated an affirmative need to modify the orders and decree in this way so as to prevent the imposition of strict liability for the acts of its franchisees and licensees. GNC asserts that it has over 1,200 domestic franchises, and plans to add an additional 240 franchises during the current fiscal year. GNC also asserts that it has established a strategic alliance with Rite Aid Corporation in which Rite Aid as a licensee is expected to open GNC stores inside 1,500 Rite Aid locations

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during the next three years. GNC claims that it cannot exercise sufficient control over these franchises and licensees to ensure compliance with the orders and decree. Thus, GNC maintains, fairness dictates that it should not be strictly liable for the acts of its franchisees and licensees.

GNC also contends that it is unreasonable to hold it liable for the acts of its franchisees and licensees because they are not its agents. GNC argues that it does not exert sufficient control over the day-today operations of the franchisees and licensees to establish an agency relationship. GNC submitted a copy of its standard franchise agreement and cites several court cases addressing whether an agency relationship exists.

GNC also argues that the Commission has reopened and modified orders on public interest grounds to bring them into conformity with Commission policy. In *Schnuck Markets*, GNC notes, the Commission modified the order to convert the prior approval requirement into a prior notice requirement, to make the order consistent with the Commission's *Statement of Federal Trade Commission Policy Concerning Prior Approval and Prior Notice Provisions*. GNC contends that the Commission has also set aside or modified several orders prohibiting price restrictions in cooperative advertising programs to bring the orders into conformity with the Commission's change in policy regarding the legal standard applied to such restrictions.

In this respect, GNC asserts that the modification it seeks is consistent with current Commission policy as expressed by a number of existing Commission orders against respondents that market products or services through a franchise system. GNC cites a number of recent orders containing provisions purportedly similar to the one it seeks. GNC also maintains that the modification would serve the public interest by clarifying the orders and the decree, none of which mention franchises. As a result, GNC argues, it must conduct its business in regulatory uncertainty. The addition of the requested provision would clarify

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GNC's exposure under the order and be consistent with Commission policy as expressed in other Commission orders.

Finally, GNC maintains that the initiation and enormous expansion of its franchise operations constitute a change in fact warranting the requested modifications. GNC asserts that it could not have foreseen the initiation and expansion of its franchise operations at the time it agreed to the issuance of the 1969 and 1989 orders. GNC states that it did not initiate its franchise operations until mid-1988, over a year after GNC executed the consent agreement leading to the 1989 order. Although GNC's franchise operations existed when it agreed to the 1994 consent decree, GNC claims that it raised but did not press the franchise issue because both it and Commission staff agreed that the franchise issue would be more appropriately addressed for the two orders and the decree collectively at some future time.¹⁷

2. Analysis

GNC has not demonstrated that the public interest or changes in fact warrant reopening and modification of the two orders or the decree by adding a provision limiting GNC's liability for the conduct of its franchisees and licensees.

a. There Are No Public Interest Grounds for Modifying the Orders or Decree

GNC maintains that public interest considerations warrant modification of the orders by addition of an affirmative-defense

¹⁷ In 1994 Commission staff reviewed a draft order modification petition similar to the one currently pending before the Commission. At that time Commission staff advised GNC in writing that it could not support GNC's petition, concluding among other things that GNC would be liable for the acts of its franchisees.

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provision that protects GNC from liability for order violations, based on the actions of its franchisees and licensees, as long as GNC engages in specified types of monitoring of those entities. In support of this contention, GNC advances four arguments: (1) it would be unfair for the Commission to hold GNC strictly liable for the transgressions of its franchisees and licensees, because of the reduced control GNC exercises over those entities in comparison with its company-owned stores; (2) it would be unreasonable for GNC to be liable for the actions of its franchisees and licensees since no agency relationship exists between GNC and those entities; (3) provisions similar to the ones that GNC seeks appear in other Commission orders against companies that operate through franchisees or licensees, establishing a Commission policy favoring such provisions; (4) the requested modifications would clarify the terms of the orders. We find these arguments unpersuasive.¹⁸

**(1) No Inequity Would Result from Any
Determination that GNC Is Liable for Order
Violations Based on Actions of Its
Franchisees or Licensees**

GNC's first argument misconceives the import of the absence from the orders of any provision relating to GNC's potential liability for the actions of its franchisees or licensees. The premise of GNC's argument is that, by their silence on this subject, the orders make it "strictly liable for its franchisees' and licensees' Order violations." That is a misreading of the orders. The orders, with minor variations in wording, impose compliance obligations

¹⁸ GNC also seeks to derive support for its position from *Tarra Hall Clothes, Inc.*, 115 F.T.C. 920 (1992), a case where the Commission reopened and modified the order on public interest grounds. The only point of similarity between *Tarra Hall* and the present matter is that in the former the respondent sought, and in the latter GNC seeks, what GNC describes as "a limitation, not an elimination" of an existing order requirement. The unexceptional proposition that the Commission may sometimes agree to a limited modification of an order does nothing to advance GNC's argument.

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upon GNC and its “officers, . . . agents, representatives and employees, directly or through any corporate or other device.” Insofar as such language renders GNC liable for the acts of its franchisees and licensees, it simply reflects the well-established principle that a respondent may, where the public interest requires, be held liable under the FTC Act for violations committed by its agents or other similarly related entities or individuals, even where the respondent alleges that it cannot control or prevent those violations. The issue of GNC’s liability for the actions of its franchisees and licensees is one that cannot be resolved in the abstract, but would depend on the particular facts and circumstances giving rise to a civil penalty action.¹⁹ Therefore, contrary to the premise of GNC’s argument, the orders in their present form do not make GNC “strictly liable” for any order violations committed by its franchisees or licensees.

To the extent that GNC views its potential liability for the actions of its franchisees and licensees as “unfair,” its disagreement is not with anything contained in the orders, which

¹⁹ We note that Commission staff have previously advised GNC of their view that GNC is in fact liable for the acts of its franchisees. See *supra* note 17. The question whether GNC may be held to have violated the orders by virtue of the actions of its franchisees and licensees is, of course, ultimately one for the courts to decide. In deciding such an issue, the courts may consider, for example, the extent to which the violative actions appear to be authorized by the respondent and the nature of the benefit, if any, the respondent may derive from those actions. See, e.g., *Goodman v. FTC*, 244 F.2d 584,593 (9th Cir. 1957) (salesmen who worked for the respondent as independent contractors appeared to be the respondent’s authorized agents, “so far as the public was concerned”); *Standard Distributors, Inc. v. FTC*, 211 F.2d 7, 12-13 (2d Cir. 1954) (despite respondent’s “honest” efforts to detect and prevent its salesmen from making certain misrepresentations, “they made were at least within the apparent scope of their authority and part of the inducement by which were made sales that inured to the benefit of the corporate petitioner. Unsuccessful efforts by the principal to prevent such misrepresentations by agents will not put the principal beyond the reach of the [FTC] Act.”).

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are silent on this point, but rather with the law of vicarious liability. GNC's argument therefore presents no grounds for modifying the orders.

(2) GNC's Contention that It Is Not in an Agency Relationship with Its Franchisees and Licensees Is of No Relevance

GNC's argument that the degree of its control over its franchisees and licensees is insufficient to establish an agency relationship under common law, whether correct or not, does not supply any basis for modifying the orders. As noted above, the orders are silent on this point. GNC's disagreement with the law of vicarious liability cannot justify any modification of the orders.

(3) There Is No Commission Policy Favoring Inclusion in Orders of the Provisions that GNC Seeks

GNC cites several Commission orders that contain provisions similar to the modification it proposes for its own orders, and argues that its orders should be modified to bring them into conformity with what it characterizes as "Commission policy." There is no such policy. While pointing to four²⁰ Commission orders that contain an affirmative defense provision of the sort

²⁰ GNC cites six Commission orders that it claims "contain language substantially similar to that requested by GNC." But only four of those orders include an affirmative-defense provision. See *Diet Workshop, Inc.*, 121 F.T.C. 726 (1996); *Formu-3 Int'l, Inc.*, 119 F.T.C. 449 (1995); *Diet Center, Inc.*, 116 F.T.C. 1453 (1993); and *Physicians Weight Loss Centers, Inc.*, 116 F.T.C. 1484 (1993). The other two orders require the respondents to monitor their franchisees' and licensees' compliance with the orders, but do not offer any affirmative defense to civil penalty liability based on actions of those franchisees and licensees. See *Jenny Craig, Inc.*, Docket No. 9260 (Feb. 27, 1998); *Beverly Hills Weight Loss Clinics Int'l, Inc.*, 118 F.T.C. 213 (1994). *Weight Watchers Int'l, Inc.*, Docket No. 9261 (Dec. 24, 1997), upon which GNC further relies, likewise contains no affirmative defense provision.

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GNC seeks, GNC ignores the vastly greater number of orders that, like its own, are silent as to the respondent's responsibility for the actions of its franchisees and licensees.²¹ The orders that GNC cites are unusual, in that they limit the application of the law of vicarious liability that the Commission would otherwise apply if it sought to hold GNC liable for the actions of its franchisees and licensees.²² While a divergence from the ordinary rules of liability may be appropriate in limited circumstances, it is not Commission policy to insulate respondents from liability in this way,²³ nor has GNC demonstrated why such a divergence would be warranted here.

(4) No Clarification of the Orders Is Required

As noted above, the orders' silence concerning GNC's liability for actions of its franchisees and licensees that violate the orders means that the existing law of vicarious liability under the FTC Act will determine whether GNC is liable for such actions. The orders therefore do not give rise to any lack of clarity beyond

²¹ See, e.g., *Sun Co.*, 115 F.T.C. 560 (1992); *Unocal Corp.*, 117 F.T.C. 500 (1994). Although respondents in both of these cases market gasoline through franchise operations, the cited orders do not include the kind of "affirmative defense" provision that GNC seeks here.

²² Furthermore, the affirmative defense that GNC seeks could also have the peculiar result of insulating GNC from liability based on actions by its franchisees or licensees that violate the orders, while GNC would remain liable for those entities' violations of Section 5 of the FTC Act that happen to fall outside the terms of the order.

²³ In approving a relatively recent consent order, the members of the Commission expressed their views that self-imposed limitations on the Commission's exercise of its prosecutorial discretion are highly disfavored. See *Civic Development Group, Inc.*, C-3810, Concurring Statement of Chairman Robert Pitofsky and Commissioner Sheila F. Anthony and Concurring Statement of Commissioner Mozelle W. Thompson (March 18, 1998).

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that which necessarily exists with respect to application of a legal standard that depends upon the factual circumstances presented.

**b. There Is No Change in Fact Warranting
Modification of the Orders or Decree**

GNC reports that its sales network now consists of about 3,700 stores, of which over 1,200 are operated by franchisees. GNC's petition asserts that it plans to add an additional 240 franchisees during the current fiscal year. In addition, during the next three years, GNC plans to add 1,500 stores operated by Rite Aid as a licensee.

Neither the creation and expansion of its franchise operation nor the Rite Aid licensing arrangement constitutes a change in fact warranting modification of the orders or the decree. The likelihood that GNC would operate through franchisees and licensees was reasonably foreseeable at the time GNC agreed to the 1989 order, and its operation through franchisees was actually known at the time GNC agreed to the entry of the 1994 decree. GNC argues that it did not open its first franchise store until mid-1988, nearly a year and a half after it executed the consent agreement that gave rise to the 1989 order. The consent agreement was executed on February 2, 1987, and was provisionally approved and placed on the public record on June 13, 1988. If GNC opened its first franchise store in mid-1988, it seems unlikely that GNC could not have reasonably foreseen the creation of the franchise operation in early 1987, especially when competitors such as Great Earth International²⁴ were marketing their products through franchises. In addition, GNC had the opportunity to seek revisions to the proposed order while the consent agreement was subject to public comment from June to August 1988. GNC did not take this opportunity to ask the Commission to include a provision limiting its liability for the

²⁴ See *Great Earth Int'l, Inc.*, 110 F.T.C. 188 (1988).

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conduct of franchisees and licensees, even though GNC opened its first franchise store in mid- 1988, and must have contemplated and planned this development for some period of time in advance.

IV. CONCLUSION

The Commission concludes that the 1969 order should be reopened and modified as described above. The Commission further finds that GNC has not established any grounds, predicated on the public interest or change in fact, for modifying the 1969 or 1989 orders by adding a provision limiting GNC's liability for order violations on the part of its franchisees and licensees. The Commission accordingly concludes that the 1969 and 1989 orders should not be reopened and modified with respect to the requested limitation on liability, and that there are no grounds for assisting GNC to seek court modification of the 1994 consent decree.

It is therefore ordered, That the proceeding is hereby reopened and the order issued on April 4, 1969, and previously modified on November 4, 1970, is hereby modified to read as follows:

ORDER

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

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

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- B. Unless otherwise specified, “respondent” shall mean General Nutrition, Inc., a corporation, its successors and assigns, and its officers, agents, representatives, and employees.
- C. “Commerce” shall mean as defined in Section 4 of the Federal Trade Commission Act, 15 U.S.C. 0 44.

I.

IT IS ORDERED that respondent, directly or through any corporation, subsidiary, division, or other device, in connection with the advertising of any food, dietary supplement, or drug containing any vitamin or mineral, as “food” and “drug” are defined in Section 15 of the Federal Trade Commission Act, 15 U.S.C. § 55, and as “dietary supplement” is defined in Section 201(ff) of the Federal Food, Drug and Cosmetic Act, 21 U.S.C. § 321(ff), in or affecting commerce, shall not make any representation, in any manner, expressly or by implication:

- A. That the presence of any vitamin or mineral in any such food, dietary supplement, or drug will be of benefit in the prevention, relief or treatment of tiredness, listlessness, lack of normal appetite, “depleted” feeling, “run-down” feeling, easy fatigability or any other symptom; or
- B. That the presence of my vitamin or mineral deficiency can be self-diagnosed;

unless, at the time the representation is made, respondent possesses and relies upon competent and reliable scientific evidence that substantiates the representation.

II.

Nothing in this order shall prohibit respondent from making any representation for any product that is specifically permitted in

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labeling for such product by regulations promulgated by the Food and Drug Administration pursuant to the Nutrition Labeling and Education Act of 1990 or to Sections 303-304 of the Food and Drug Administration Modernization Act of 1997.

III.

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

By the Commission.

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IN THE MATTER OF

**DEBT COLLECTION COORDINATION
PROJECT**

FTC File No. P964811. Decision, March 31, 2000

RESPONSE TO THE REQUEST BY THE AMERICAN COLLECTORS
ASSOCIATION FOR AN ADVISORY OPINION

This is in response to the American Collectors Association's ("ACA's") request for two Commission advisory opinions ("Request") regarding the Fair Debt Collection Practices Act ("FDCPA"), which the association submitted pursuant to Sections 1.1 - 1.4 of the Commission's Rules of Practice, 16 C.F.R. §§ 1.1 - 1.4. The two issues will be addressed in the order in which they were presented.

FIRST ISSUE:

Does Section 809(b) of the FDCPA permit a collection agency to either demand payment or take legal action during the pendency of the thirty (30) day period for disputing a debt in situations where a debtor has not notified the collection agency that the debt is disputed?

[The] starting point in every case involving construction of a statute is the language itself." *Southeastern Community College v. Davis*, 442 U.S. 397,405 (1979) (quoting *Blue Chip Stamp v. Manor Drug Stores*, 421 U.S. 723,756 (1975) (Powell, J., concurring)). The language of Section 809(b) provides that, "[i]f the consumer notifies the debt collector in writing within the thirty-day period" that the debt is disputed, the debt collector must cease collection of the debt until verification of the debt is obtained and mailed to the consumer¹. Where Congress intended

¹ Section 809(b), 15 U.S.C. § 1692g(b), provides:

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that debt collectors cease their collection efforts during the thirty-day dispute period, it so specified: if, and only if, a consumer sends the debt collector a notice in writing. Congress did not specify that collectors must cease collection efforts during the dispute period even if consumers send nothing in writing.

The Commission has voiced this opinion in recent annual reports to Congress mandated by the FDCPA. As the Commission stated in the 1999 report, for example, “Nothing within the language of the statute indicates that Congress intended an absolute bar to any appropriate collection activity or legal action within the thirty-day period where the consumer has not disputed the debt.” Letter from Chairman Robert Pitofsky to the Honorable Albert Gore, Jr. regarding Twenty-First Annual Report to Congress Pursuant to Section 815(a) of the Fair Debt Collection Practices Act, at 10 (Mar. 19, 1999) (“1999 Annual Report”). Because there appears to be some confusion regarding whether the thirty-day period is a dispute period or a grace period, the Commission has recommended in recent annual reports that Congress clarify the FDCPA by adding a provision expressly permitting appropriate collection activity within the thirty-day period if the debt collector has not received a letter from the consumer disputing the debt. The Commission emphasized that the clarification should include a caveat that the collection activity should not overshadow or be inconsistent with the disclosure of

If the consumer notifies the debt collector in writing within the thirty-day period described in subsection (a) that the debt, or any portion thereof, is disputed, or that the consumer requests the name and address of the original creditor, the debt collector shall cease collection of the *debt*, or any disputed portion thereof, until the debt collector obtains verification of the debt or any copy of a judgment, or the name and address of the original creditor, and a copy of such verification or judgment, or name and address of the original creditor, is mailed to the consumer by the debt collector.

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the consumer's right to dispute the debt specified. 1999 Annual Report at 10- 11.²

Federal circuit courts that have addressed this issue recently have arrived at the same conclusion. In a 1997 opinion, the Seventh Circuit stated that “[t]he debt collector is perfectly free to sue within the thirty days, he just must cease his efforts at collection during the interval between being asked for verification of the debt and mailing the verification to the debtor.” *Bartlett v. Heibl*, 128 F.3d 497,501 (7th Cir. 1997) (Posner, J.). In the most recent federal appellate court pronouncement on the subject, the Sixth Circuit stated, “A debt collector does not have to stop its collection efforts [during the thirty-day period] to comply with the Act. Instead, it must ensure that its efforts do not threaten a consumer's right to dispute the validity of his debt.” *Smith v. Computer Credit, Inc.*, 167 F.3d 1052, 1054 (6th Cir. 1999).

The Commission continues to believe that the thirty-day time frame set forth in Section 809 is a dispute period within which the consumer may insist that the collector verify the debt, and not a grace period within which collection efforts are prohibited. In

² In the Staff *Commentary on the Fair Debt Collection Practices Act*, 53 Fed. Reg. 50097(1988) (“Staff Commentary”), and staff opinion letters, Commission staff have consistently read Section 809(b) to permit a debt collector to continue to make demands for payment or take legal action within the thirty-day period. See 53 Fed. Reg. at 50,109, comment 809(b)-1 (“A debt collector need not cease normal collection activities within the consumer's 30-day period to give notice of a dispute until he receives a notice from the consumer.”); letter from John F. LeFevre, FDCPA Program Advisor, to S. Joshua Berger (May 29,1997):

We interpret the “thirty-day period” as a period within which consumers must dispute their debts in writing in order to avail themselves of their Section 809(b) rights, but not as a “grace” period. Thus, we believe that there is nothing in the Act that prevents you from filing suit during this period, so long as you do not make any representations that contradict Section 809(b).

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response to the ACA's question, therefore, the Commission opines that Section 809(b) does permit a collection agency to either demand payment or take legal action during the thirty-day period for disputing a debt when a consumer from whom the collection agency is attempting to collect a debt has not notified the collection agency that the debt is disputed. The collection agency must ensure, however, that its collection activity does not overshadow and is not inconsistent with the disclosure of the consumer's right to dispute the debt specified by Section 809(a).

SECOND ISSUE:

Where an attorney debt collector institutes legal proceedings against a debtor but has no prior communications with the debtor, are the requirements for the validation of debts set forth in Section 809 of the FDCFA supreme to state law or state court rules that otherwise prohibit the inclusion of the validation notice on court documents?

In responding to this issue, the Commission notes first that Section 809(a) of the FDCPA, 15 U.S.C. § 1692g(a), provides:

(a) Within five days after the initial communication with a consumer in connection with the collection of any debt, a debt collector shall, unless the following information is contained in the initial communication or the consumer has paid the debt, send the consumer a written notice containing –

- (1) the amount of the debt;
- (2) the name of the creditor to whom the debt is owed;
- (3) a statement that unless the consumer, within thirty days after receipt of the notice, disputes the validity of the debt,

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or any portion thereof, the debt will be assumed to be valid by the debt collector,

(4) a statement that if the consumer notifies the debt collector in writing within the thirty-day period that the debt, or any portion thereof, is disputed, the debt collector will obtain verification of the debt or a copy of a judgment against the consumer and a copy of such verification or judgment will be mailed to the consumer by the debt collector; and

(5) a statement that, upon the consumer's written request within the thirty-day period, the debt collector will provide the consumer with the name and address of the original creditor, if different from the current creditor.

Section 803(2) of the FDCPA, 15 U.S.C. § 1692a(2), defines the term "communication" as "the conveying of information regarding a debt directly or indirectly to any person through any medium." In its Staff Commentary, Commission staff stated that the term "communication" "does not include formal legal action (e.g., filing of a lawsuit or other petition/pleadings with a court; service of a complaint or other legal papers in connection with a lawsuit, or activities directly related to such Service)." 53 Fed. Reg. at 50101, comment 803(2)-2. Similarly, in the introductory portion of the Staff Commentary, Commission staff opined that "[a]ttorneys or law firms that engage in traditional debt collection activities (sending dunning letters, making collection calls to consumers) are covered by the FDCPA, but those whose practice is limited to legal activities are not covered."³ Id. at 50,100.

Seven years after the Staff Commentary was issued, the United States Supreme Court held that the FDCPA's definition of

³ The introductory comments were not part of the Commentary itself. The statement in the Commentary that the introductory remark referred to provided that the term "debt collector" does not include "[a]n attorney whose practice is limited to legal activities (e.g., the filing and prosecution of lawsuits to reduce debt to judgment." 53 Fed. Reg. at 50,102, comment 803(6)-2.

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“debt collector,” Section 803(6), 15 U.S.C. § 1692a(6), “applies to attorneys who ‘regularly’ engage in consumer-debt-collection activity, even when that activity consists of litigation.” *Heintz v. Jenkins*, 514 U.S. 291,299 (1995). In arriving at this conclusion, the Court explicitly considered and rejected Commission staffs introductory remark regarding the coverage of litigation attorneys. *Id.* at 298. In light of *Heintz*, the Commission concludes that, if an attorney debt collector serves on a consumer a court document “conveying [] information regarding a debt,” that court document is a “communication” for purposes of the FDCPA.⁴

If an attorney debt collector has had no prior communications with a consumer before serving a summons or other court document on the consumer, that document would constitute the “initial communication” with the consumer if it conveys information regarding a debt. The attorney would therefore have to include the written notice mandated by Section 809(a) (often referred to as the “validation notice”) in the court document itself or send it to the consumer “within five days after the initial communication.”

According to the ACA’s Request, some “state laws or state court rules [] prohibit the inclusion of additional language such as the validation notice on documents filed with courts.” Request at 9. The association asks whether the requirements of Section 809(a) are “supreme to,” and thus preempt, these state laws or state court rules. *Id.* Preemption cases generally proceed

⁴ In an Opinion letter issued after the *Heintz* decision, Commission staff opined that “all pleadings must be considered ‘communications’ if they convey ‘information regarding a debt directly or indirectly to any person through any medium.’” Letter from John F. LeFevre, FDCPA Program Advisor, to S. Joshua Berger (May 29,1997). See also *Mendus v. Morgan & Associates*, 1999 Okla. Civ. App. LEXIS 140, at *19 (Okla. Civ. App. 1999) (“[A] pleading or a summons is a ‘communicatiOn’ under the [FDCPA].”).

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from “the starting presumption that Congress does not intend to supplant state laws.” *New York State Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.*, 514 U.S. 645, 654 (1995).⁵ According to the Court in *English v. General Electric Co.*, 496 U.S. 72 (1990):

[S]tate law is pre-empted under the Supremacy Clause, U.S. Const. Art. VI, cl. 2, in three circumstances. First, Congress can define explicitly the extent to which its enactments pre-empt state law. Pre-emption fundamentally is a question of congressional intent, and when Congress has made its intent known through explicit statutory language, the courts’ task is an easy one.

Second, in the absence of explicit statutory language, state law is pre-empted where it regulates conduct in a field that Congress intended the Federal Government to occupy exclusively. Such an intent may be inferred from a “scheme of federal regulation. . . so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it,” or where an Act of Congress “touch[es] a field in which the federal interest is so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject.” .

. . .

Finally, state law is pre-empted to the extent that it actually conflicts with federal law. Thus, the Court has found pre-emption where it is impossible for a private party to comply with both state and federal requirements,

⁵ This presumption does not apply to all cases. In particular, the Supreme Court recently held that it does not apply to state laws bearing upon national and international maritime commerce. *United States v. Locke*, 120 S. Ct. 1135, 1148 (2000). *Locke* was apparently based on the relatively large traditional federal role in this area and the relatively small traditional state role, *see id.* at 1147-48, and does not affect the current analysis.

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or where state law “stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.”

Id. at 7849 (omission in internal quotation in original) (citations omitted).

The preemption provision of the FDCPA, Section 816,15 U.S.C. § 1692n, provides:

This title does not annul, alter, or affect, or exempt any person subject to the provisions of this title from complying with the laws of any State with respect to debt collection practices, except to the extent that those laws are inconsistent with any provision of this title, and then only to the extent of the inconsistency. For purposes of this section, a State law is not inconsistent with this title if the protection such law affords any consumer is greater than the protection provided by this title.

The Commission does not believe that this section expressly preempts state laws and court rules that prohibit attorney debt collectors from including validation notices in court documents. The quoted provision makes express that Congress did not intend to preempt the field, but allowed only for conflict preemption. However, there is no conflict preemption here.

First, there is no conflict preemption based on impossibility of compliance because it is possible for attorney debt collectors to comply with both the federal provision and the state provisions.⁶

⁶ See *Codar, Inc. v. Arizona*, No. 94-16902, 1996 U.S. App. LEXIS 21536, at *14-15 (9th Cir. Aug. 19, 1996) (memorandum) (Arizona laws requiring debt collectors to be licensed in the state before they may contact consumers preempted by Section 816 to the extent they prevent unlicensed out-of-state collector from providing Section 809(a) validation notices to Arizona

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Instead of including such notices in court documents, attorney debt collectors in jurisdictions that prohibit validation notices in court documents may deliver the notices to consumers via some other medium - either before serving the court document on the consumer or, if the court document is truly the first communication with the consumer, within five days of serving the court document.⁷

Second, there is no conflict preemption based on state law standing as an obstacle to the full accomplishment and execution of Congressional purposes and objectives. As Congress declared in Section 802(e) of the FDCPA, 15 U.S.C. § 1692(e), the purpose of the panoply of protections under the federal debt collection statute is:

to eliminate abusive debt collection practices by debt collectors, to insure that those debt collectors who refrain from using abusive debt collection practices are not competitively disadvantaged, and to promote consistent State action to protect consumers against debt collection abuses.

residents who contact such debt collectors to discuss alleged debts; preemption because unlicensed out-of-state collectors that send validation notice would violate state law).

⁷ The Request refers to a Commission staff opinion letter which advised that, “[u]nder the principles that the Supreme Court set out in *Heintz v. Jenkins*, law firms that are ‘debt collectors’ presumably must include Section 809 notices in connection with every summons, if the summons is the first communication with the consumer in connection with the collection of a debt.” Letter from Thomas E. Kane to Gordon N.J. Kroft (Mar. 8, 1996). While the letter was not binding on the Commission it does accurately interpret the statute. An attorney debt collector must provide the validation notice “in connection with every summons,” if the summons is the first communication with the consumer in connection with the debt. As the Commission notes here, however, the validation notice need not be included in the summons itself. It may be delivered either before or within five days after the summons is served on the consumer.

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The state provisions about which you inquire do not prevent consumers from receiving the full panoply of protections from abusive debt collection practices afforded by the FDCPA. The only FDCPA provision that could be affected by these state laws and court rules is Section 809(a). As noted above, an attorney debt collector who is prohibited from including the validation notice in court documents may deliver the notice to consumers before serving the consumer with the court document or, if the court document is the first communication with the consumer, within five days after serving the court document. Thus, even in a jurisdiction that prohibits validation notices in court documents, a consumer will receive the validation notice and learn, for example, that the debt collector must provide the consumer with written verification of the debt if the consumer disputes the debt within thirty days. State legislation that prohibits validation notices in court documents also does not stand as an obstacle to the promotion of “consistent State action to protect consumers against debt collection abuses.” Consumers will receive their validation notices in jurisdictions that prohibit validation notices in court documents as well as in jurisdictions that permit the practice.

After reviewing state laws and court rules that prohibit validation notices in court documents under a preemption analysis, the Commission concludes that such state legislation is not preempted by the FDCPA.

By direction of the Commission.

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IN THE MATTER OF

J SAINSBURY PLC, ET AL.*FTC File No. 991 0075. Decision, April 5, 2000*

LETTER GRANTING COMMISSION APPROVAL FOR DIVESTITURE.

Dear Mr. Koonce,

This letter responds to the Application for Approval of Divestiture Pursuant to Agreement Containing Consent Order (*‘Application’*) that you filed on December 3, 1999, on behalf of J Sainsbury plc and Shaw’s Supermarkets, Inc. (“Respondents”) seeking prior approval by the Federal Trade Commission of the divestiture of Shaw’s Supermarket located at 10 Technology Drive, Route 85, Hudson, Massachusetts 01749 (as identified in Schedule D of the above referenced Agreement Containing Consent Order (“Order”)) to the Stop & Shop Supermarket Company¹. The Order requires prior Commission approval of the divestiture by Respondents.

After consideration of the proposed transaction as set forth in the Application and supplemental documents, as well as other available information, the Commission has determined to approve Respondents’ Application. In according its approval to this transaction, the Commission has relied upon the information submitted and representations made in connection with Respondents’ Application, and has assumed them to be accurate and complete.

By direction of the Commission.

¹ On March 1, 2000, Respondents filed the necessary agreement with the landlord consenting to the assignment of the relevant lease from the Respondents to Stop & Shop.

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IN THE MATTER OF

HARBOUR GROUP INVESTMENTS, L.P.

Docket No. 9244. Order, May 22, 2000

Order reopening and modifying order.

ORDER REOPENING AND MODIFYING ORDER

On February 16, 2000, Meade Instruments Corporation ("Meade"), the successor to the respondent named in the consent order issued by the Commission on August 19, 1991, in Docket No. 9244 ("Order"), filed its Petition To Reopen and Modify Consent Order ("Petition") in this matter. Meade asks that the Commission reopen and modify the Order pursuant to Section 5(b) of the Federal Trade Commission Act, 15 U.S.C. § 45(b), and Section 2.51 of the Commission's Rules of Practice and Procedure, 16 C.F.R. § 2.51, and consistent with the Statement of Federal Trade Commission Policy Concerning Prior Approval And Prior Notice Provisions, 60 Fed. Reg. 39,745 (Aug. 3, 1995) ("Prior Approval Policy Statement"). Meade's Petition requests that the Commission reopen and modify the Order so as to remove the prior approval requirement contained in Paragraph II of the Order, which currently requires Meade to seek the prior approval of the Commission before directly or indirectly, through subsidiaries or otherwise, acquiring the whole or any part of the stock, share capital, equity interest, or assets, other than purchases of manufactured product in the ordinary course of business, of any company engaged in the United States in the manufacture or sale of mid-sized Schmidt-Cassegrain telescopes with apertures of eight (8) to eleven (11) inches used for astronomical viewing ("SCTs"). The thirty-day public comment period on Meade's Petition ended on March 24, 2000. No comments were received. For the reasons discussed below, the Commission has determined to reopen and modify the order.

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The Commission, in its Prior Approval Policy Statement, "concluded that a general policy of requiring prior approval is no longer needed," citing the availability of the premerger notification and waiting period requirements of Section 7A of the Clayton Act, commonly referred to as the Hart-Scott-Rodino ("HSR") Act, 15 U.S.C. § 18a, to protect the public interest in effective merger law enforcement. 60 Fed. Reg. at 39,746. The Commission announced that it will "henceforth rely on the HSR process as its principal means of learning about and reviewing mergers by companies as to which the Commission had previously found a reason to believe that the companies had engaged or attempted to engage in an illegal merger." *Id.* As a general matter, "Commission orders in such cases will not include prior approval or prior notification requirements." *Id.*

The Commission stated that it will continue to fashion remedies as needed in the public interest, including ordering narrow prior approval or prior notification requirements in certain limited circumstances. The Commission said in its Prior Approval Policy Statement that "a narrow prior approval provision may be used where there is a credible risk that a company that engaged or attempted to engage in an anticompetitive merger would, but for the provision, attempt the same or approximately the same merger." 60 Fed. Reg. at 39,746. The Commission also said that "a narrow prior notification provision may be used where there is a credible risk that a company that engaged or attempted to engage in an anticompetitive merger would, but for an order, engage in an otherwise unreportable anticompetitive merger." *Id.* As explained in the Prior Approval Policy Statement, the need for a prior notification requirement will depend on circumstances such as the structural characteristics of the relevant markets, the size and other characteristics of the market participants, and other relevant factors. *Id.*

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The Commission also announced, in its Prior Approval Policy Statement, its intention "to initiate a process for reviewing the retention or modification of these existing requirements" and invited respondents subject to such requirements "to submit a request to reopen the order." 60 Fed. Reg. at 39,746. The Commission determined that, "when a petition is filed to reopen and modify an order pursuant to . . . [the Prior Approval Policy Statement], the Commission will apply a rebuttable presumption that the public interest requires reopening of the order and modification of the prior approval requirement consistent with the policy announced" in the Prior Approval Policy Statement. *Id.*

The complaint in this matter alleged that the entry of Harbour Group Investments, L.P. ("Harbour Group"), the predecessor to Meade, into a joint venture with Diethelm Holding (U.S.A.) Ltd ("Diethelm") would have violated 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 lessening competition and tending to create a monopoly in the market for SCTs in the United States.

The presumption is that setting aside the general prior approval requirement in this Order is in the public interest. Prior notification is appropriate for acquisitions in the relevant markets because the record evidences a credible risk that Meade could engage in future anticompetitive acquisitions that would not be subject to the premerger notification and waiting period requirements of the HSR Act. The complaint in this matter alleged that, in 1990, Harbour Group and Diethelm collectively had sales of only \$4.1 million in the relevant market, but had sufficient market share to create a "virtual monopoly" in that market if the transaction had been consummated. This is an indication that acquisitions in the relevant market could fall below the sheaf-transaction threshold in the HSR Act. By letter dated March 22, 2000, Meade agreed to accept a prior notification requirement as a

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substitute for the prior approval requirement. Accordingly, the Commission has determined to reopen the proceedings and modify the Order to replace the original prior approval requirement with a prior notification requirement.

Accordingly, IT IS ORDERED that this matter be, and it hereby is, reopened; and

IT IS FURTHER ORDERED that Paragraph II of the Order be, and it hereby is, modified, as of the effective date of this order, to read as follows:

IT IS FURTHER ORDERED that, for a period commencing on the date this order becomes final and continuing for ten (10) years, Harbour Group shall not, without prior notification to the Commission, directly or indirectly, through subsidiaries or otherwise, acquire the whole or any part of the stock, share capital, equity interest, or assets, other than purchases of manufactured product in the ordinary course of business, of any company engaged in the manufacture or sale of SCTs in the United States. Provided, however, that these prohibitions shall not relate to the construction of new facilities.

The prior notification required by this Paragraph II 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 shall be filed with the Secretary of the Commission, notification need not be made to the United States Department of Justice, and notification is required only of Respondent and not of any other party to the transaction. Respondent shall provide the Notification to the Commission at least thirty (30) days prior to consummating any such transaction (hereinafter referred to as the "first waiting period"). If, within the first waiting period, representatives of the Commission make a

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written request for additional information, Respondent shall not consummate the transaction until twenty (20) days after substantially complying with such request for additional information. Early termination of the waiting periods in this paragraph may be requested and, where appropriate, granted by letter from the Bureau of Competition. Notwithstanding, prior notification shall not be required by this paragraph for a transaction for which notification is required to be made, and has been made, pursuant to Section 7A of the Clayton Act, 15 U.S.C. § 18a.

By the Commission.

RESPONSES TO PETITIONS TO QUASH OR LIMIT COMPULSORY PROCESS

ANDRX CORP. AND HOECHST MARION ROUSSEL, INC

FTC File No. 981 0368 Decision, January 19, 2000

RESPONSE TO HOECHST MARION ROUSSEL, INC.'S REQUEST FOR FULL COMMISSION REVIEW OF DENIAL OF PETITION TO QUASH

Dear Mr. Koon:

This letter advises you of the Federal Trade Commission's ruling on Hoechst Marion Roussel, Inc.'s ("Hoechst" or "Petitioner") *Request for Full Commission Review of Denial of Petition to Quash* ("Appeal"). The Appeal seeks review of the November 1, 1999 letter ruling by Commissioner Anthony ("Initial Ruling") denying the September 15, 1999 *Petition of Hoechst Marion Roussel, Inc. to Quash* ("Petition") the subpoena *ad testificandum* issued to James M. Spears, Esquire ("Subpoena"), outside counsel to Hoechst. For the reasons set forth below, the Commission affirms the Initial Ruling and sets January 27, 2000 at 9:00 a.m. as the new date and time for Spears to appear and give testimony. Petitioner's request for oral argument is denied.

I. Background

The focus of this investigation is a September, 1997 agreement between Hoechst and Andrx Corporation (the "Agreement"). As the Initial Ruling states: "The Commission is concerned that the Agreement may have unlawfully prevented or delayed Andrx and others from marketing generic alternatives, or at least may have been intended to achieve these ends." Initial Ruling at 2. In its Appeal, Hoechst does not dispute that Spears

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took the lead in negotiating and drafting the Agreement on behalf of Hoechst or that Spears is the most knowledgeable Hoechst representative with respect to many of the negotiations and drafts. *See id.* at 2, 5.

Rather, Hoechst argues that the Commission must apply the heightened standards used by *some* federal courts in considering whether to permit depositions of opposing counsel in the context of civil litigation. Appeal at 3-6, 11-12. Hoechst further maintains that these standards are not met here. *Id.* at 6-8. Hoechst also argues: (1) that, even if the Commission is unwilling to quash the Subpoena, it should limit the scope of the questioning; and (2) that forcing Spears to assert any applicable privileges in response to specific questions is inappropriate. The Commission rejects each of these arguments.

II. Analysis

A. An Administrative Investigation Is Not Equivalent to Civil Discovery.

Hoechst argues that certain federal court precedent regarding subpoenas directed to opposing counsel “apply to agency investigatory subpoenas” Appeal at 6 (citing *Shelton v. American Motors Corp.*, 805 F.2d 1323 (8th Cir. 1986)). First, to the extent Hoechst is arguing that the Commission is bound to follow this precedent, it is wrong. The Commission is an independent federal agency with its own procedural Rules, not a part of the federal judiciary obliged to apply the Federal Rules of Civil Procedure. Moreover, the precedent upon which Hoechst relies is merely one of two conflicting lines of authority in the federal courts on a question the Supreme Court has not addressed. *See generally Sparton Corp. v. United States*, 44 Fed. Cl. 557, 560 (Ct. Cl. 1999) (collecting cases on both sides of the conflict).

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Second, as Commissioner Anthony noted in the Initial Ruling, the aims and limits of administrative investigations often diverge from those of civil litigation. *See* Initial Ruling at 7-8. Civil discovery is intended to narrow the issues for trial. An administrative investigation is aimed at determining whether violations of law likely exist that should be pursued through litigation.¹ The Commission must take these differences into account in determining the persuasive significance of precedent established under the Federal Rules of Civil Procedure to an administrative investigation governed by the Commission's Rules.

B. The *Shelton* Case Is Inapplicable Here.

The normal standards governing subpoenas both in administrative investigations and in civil litigation place on the party opposing the subpoena "the difficult burden of showing that the demands are unduly burdensome or unreasonably broad." *FTC v. Shaffner*, 626 F.2d 32, 38 (7th Cir. 1980). Hoechst, however, advocates the special standards proposed by the Eighth Circuit in *Shelton* for limiting depositions of opposing counsel and urges the Commission to apply those standards to investigational hearings of counsel representing parties under investigation. We decline to do so.

Shelton was a tort suit arising from a Jeep roll-over accident. The district court granted default judgment against the manufacturer after the manufacturer's in-house counsel, during her deposition, refused to state whether she was aware of the existence of any documents relating to roll-over tests or accidents in her client's files. The only issue on appeal was whether the

¹ As the Supreme Court explained fifty years ago, an investigation by the Commission is "analogous to the Grand Jury, which does not depend on a case or controversy for power to get evidence but can investigate merely on suspicion that the law is being violated, or even just because it wants assurance that it is not. When investigative and accusatory duties are delegated by statute to an administrative body, it, too, may take steps to inform itself as to whether there is probably violation of the law." *United States v. Morton Salt Co.*, 338 U.S. 632, 642-43 (1950).

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attorney's mere acknowledgment of the existence of the documents would constitute work product. The court concluded that because such acknowledgment would reveal the counsel's mental impressions ("mental selective process" in culling certain documents from the voluminous files reviewed during litigation), it was privileged. 805 F.2d at 1326, 1329. In dicta, the court disapproved of depositions of opposing counsel "as a negative development in the area of litigation" and proposed that such depositions should be permitted only where "the party seeking to take the deposition has shown that (1) no other means exist to obtain the information . . . ; (2) the information sought is relevant and nonprivileged; and (3) the information is crucial to the preparation of the case." *Id.* at 1327.²

This formulation has been criticized by several other federal courts. *See, e.g., qad.inc v. ALN Associates, Inc.*, 132 F.R.D. 492, 495 (N.D. Ill. 1990) ("This Court's disagreement with a principle stated in such broadbrush terms is respectful but profound. What *Shelton* says may fairly (and properly) reflect an attitude of protecting our brethren at the bar, all other things being equal. But stated as a rule of law it must be viewed as wrong"); *Rainbow Investors v. Fuji Trucolor*, 168 F.R.D. 34 (W.D. La. 1996); *Kaiser v. Mutual Life Ins. Co. of New York*, 161 F.R.D. 378 (S.D. Ind. 1994); *see also First Security Sav. v. Kansas Bankers Surety Co.*, 115 F.R.D. 181, 182-83 (D. Neb. 1987) (interpreting *Shelton* as not intended to effect a change in the general burden of persuasion for attorney depositions).³

² The *Shelton* court also stated: "To be sure, the Federal Rules of Civil Procedure do not specifically prohibit the taking of opposing counsel's deposition" and "We do not hold that opposing trial counsel is absolutely immune from being deposed." 805 F.2d at 1327.

³ Other courts of appeals have declined to take sides in this conflict. *See Nguyen v. Excel Corp.*, 1999 U.S. App. Lexis 32457, *23 (5th Cir. 1999) (assuming, without deciding, "the applicability of the *Shelton* inquiry");

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At least in the context of administrative investigative subpoenas, the Commission believes that the approach of these latter courts is preferable. The *Shelton* dicta appear to reverse the normal burden of persuasion on subpoenas and add a novel requirement that the party seeking information prove before obtaining it that it is “crucial” to the case. In doing so, the Eighth Circuit was reacting to concerns that private litigants were abusing the discovery process by frequently noticing depositions of opposing counsel as a means of harassment. See 805 F.2d at 1327, 1330. The Commission does not frequently issue subpoenas to counsel, nor does it do so in bad faith. Moreover, since Commission investigations are aimed at determining whether to bring a case, it would be premature to require at the investigatory stage a showing that the information sought “is crucial to the preparation of the case.”

1. Unlike the Attorney in *Shelton*,
Spears Was a Direct Participant.

A key distinction between *Shelton* and the instant matter is that the attorney in *Shelton* was not a material witness or actor in conduct prior to the proceeding in which her testimony was sought. The *Shelton* attorney was merely being deposed about her client’s honesty in responding to discovery. See 805 F.2d at 1330. Here, Commission counsel seeks to question Spears about his first-hand participation in the formation of the agreement at the heart of this investigation, which was negotiated, drafted, and executed before the investigation began. As one court aptly noted, “[e]ven cases in the *Shelton* line recognize that, if an attorney is a witness or actor in prelitigation conduct, he may be deposed the same as any other witness.” *Kaiser*, 161 F.R.D. at 382 (citations omitted); see also *Bogan v. Northwestern Mut. Life Ins. Co.*, 152 F.R.D. 9, 14 (S.D.N.Y. 1993) (*Shelton* standards do not bar depositions of opposing counsel “where attorneys take part

Boughton v. Cotter Corp., 65 F.3d 823, 829 n.7 (10th Cir. 1995) (declining to take sides between the *Shelton* dicta and *qad.inc*).

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in significant, relevant pre-events and the attorney-client privilege does not apply to the testimony sought”); *Johnston Dev. Group v. Carpenters Local 1578*, 130 F.R.D. 348, 352 (D.N.J. 1990) (“The deposition of the attorney may be ‘both necessary and appropriate’ where the attorney may be a fact witness, such as an ‘actor or viewer,’ rather than one who was not a party to any of the underlying transactions giving rise to the action, or whose role in a transaction was speculative and not central to the dispute”); *In re Tutu Water Wells Contamination*, 184 F.R.D. 266, 267 (D.V.I. 1999) (“protective order will not issue where the attorney’s conduct is the basis for the claim or defense or where the attorney observed or participated in the underlying transaction or occurrence giving rise to the cause of action”).

In its Appeal, Hoechst argues that Spears cannot be considered an actor or participant “merely because he may have negotiated and or drafted any of the subject documents in the course of his representational duties.” Appeal at 7, n.9. On the contrary, a negotiator and drafter of an agreement *is* an actor and participant in the formation of that agreement. That participant’s status as counsel does not exempt him from questioning in discovery or, for that matter, administrative investigations. *See, e.g., United Phosphorus, Ltd. v. Midland Fumigant, Inc.*, 164 F.R.D. 245, 248 (D. Kan. 1995) (“Attorneys with discoverable facts, not protected by attorney-client privilege or work product, are not exempt from being a source for discovery by virtue of their license to practice law or their employment by a party to represent them in litigation.”).

The case of *Rainbow Investors v. Fuji Trucolor*, 168 F.R.D. 34 (W.D. La. 1996), is instructive. There, defendants noticed the opposing counsel’s deposition and the plaintiffs moved for a protective order. Finding, among other things, that the attorney played a “key role” “in negotiating the transaction which lies at the

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heart of this dispute,” the court denied the motion and ordered the deposition to proceed. *Id.* at 38; *accord, Tutu*, 184 F.R.D. at 267-68 (deposition of attorney ordered where attorneys “were actors or witnesses to the agreement giving rise to the cause of action”). In reaching its ruling, the *Rainbow Investors* court declined to follow the *Shelton* court in its apparent reversal of the burden of persuasion. Instead, it explained:

Federal Rule of Civil Procedure 26(b)(1) allows for discovery “regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action” Moreover, the Federal Rules of Civil Procedure do not specifically prohibit taking the deposition of counsel. Thus, the party seeking the protective order to preclude their attorney’s deposition bears the burden under Rule 26(c) of demonstrating good cause to preclude or limit the testimony.

168 F.R.D. at 36 (citations omitted); *see also Johnston*, 130 F.R.D. at 352-53 (“The preclusion of attorney depositions is to be analyzed with the same standards as any other protective order motion, with the movant bearing the burden of persuasion under Rule 26(c)”); *Kaiser*, 161 F.R.D. at 380 (“The burden is on the Rule 26(c) movant to establish adequate grounds (‘good cause’) for an order protecting against discovery.”).

The *Rainbow Investors* court then found that the “plaintiff ha[d] failed to make the required showing of good cause” 168 F.R.D. at 37. Spears is situated similarly to the attorney in *Rainbow Investors*,⁴ and the same approach is appropriate here.

⁴ Some of the similarities are striking. For example, the defendants in *Rainbow Investors* took the deposition of the plaintiff corporation’s president, and during that deposition “defendants learned that [the attorney] may possess vital information unknown even to [the president] regarding the negotiation of the [asset sale agreement].” *Id.* at 37; *see also Nguyen*, 1999 U.S. App. Lexis 32457, *23-*24 (approving a deposition of defense counsel “even assuming the applicability of the *Shelton* inquiry” where the defendant had not established

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Addressing privilege concerns, the *Rainbow Investors* court held that bona fide attorney-client communications regarding the negotiations were privileged. But “[i]nsofar as [the attorney] was acting more as a negotiator in a business activity on [his client’s] behalf than as their attorney, any knowledge possessed by [the attorney] in this regard is discoverable. Moreover, any non-privileged communications between [the attorney] and [the other party to the agreement] are also discoverable.” *Id.* at 37. The same is true here: while communications between Spears and Hoechst during the negotiation of the Agreement, to the extent not otherwise subject to waiver, are likely to be privileged, Spears’ actions as a negotiator and his communications with Andrx’s representatives are proper subjects for inquiry by Commission counsel.

2. The *Shelton* Dicta Are Inconsistent with the Commission’s Rules.

Hoechst argues that investigative subpoenas to counsel for a party under investigation should not be enforced unless the FTC attorneys conducting the investigation on behalf of the Commission satisfy the Commission that the *Shelton* factors are met. Appeal at 6 & n.6.⁵ Whatever the merits of the *Shelton* dicta

that “its executives could . . . respond meaningfully to the questions to be posed”). Here, [investigational hearings] [redacted] revealed that Spears was the only source of vital information regarding the Agreement at issue here. *See* Initial Ruling at 2, 5.

⁵ Lest there be any confusion, we note that investigative subpoenas are not issued by FTC staff, but by the Commission. All FTC investigative subpoenas are reviewed and executed by a Commissioner, acting as the Commission’s delegate, based upon information provided by Commission staff as to the need to direct compulsory process to the recipient and upon a compulsory process resolution approved by the full Commission.

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and their apparent burden-shifting under the Federal Rules of Civil Procedure, their approach cannot be reconciled with the Commission's Rules.

Section 2.7(d) of the Commission's Rules, 16 C.F.R. § 2.7(d) (1999), places the burden on the petitioner to show with particularity why a subpoena should be limited or quashed.⁶ In the Commission's view, this provision precludes a burden-shifting approach. Instead, the Commission interprets Rule 2.7(d) as requiring *the party seeking to avoid appearance or production obligations* to show good cause according to traditional criteria, as elaborated in *Johnston*:

The party seeking to block its attorney's deposition concerning relevant information will succeed if it establishes undue burden or oppression measured by (1) the relative quality of information in the attorney's knowledge, that is, whether the deposition would be disproportional to the discovering party's needs; (2) the availability of the information from other sources that are less intrusive into the adversarial process; and (3) the harm to the party's representational rights of its attorney if called upon to give a deposition testimony.

130 F.R.D. at 353.

All three of these concerns were addressed at length in the Initial Ruling, and we affirm and hereby adopt those findings.

⁶ Section 2.7(d)(1) provides, in relevant part:

Any petition to limit or quash any investigational subpoena . . . shall set forth all assertions of privilege or other factual and legal objections to the subpoena . . . , including all appropriate arguments, affidavits and other supporting documentation.

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Specifically, (1) the information possessed by Spears is central to the subject of the investigation, namely the Agreement, Initial Ruling at 4-5, 8; (2) the information is not available from another source, *id.* at 5, 8; and (3) representational harm is speculative,⁷ *id.* at 5-6. On appeal, Hoechst does not even argue that Spears lacks relevant information⁸ or that the Spears information could

⁷ See *Rainbow Investors*, 168 F.R.D. at 37-38 (“although the prospect of oppression is present in the examination of opposing counsel, I find that the risk is justified here due to the key role [the attorney] played in negotiating the transaction which lies at the heart of this dispute”); see also *Frazier v. S.E. Pa. Transp. Auth.*, 161 F.R.D. 309, 314 (E.D. Pa. 1995) (rejecting the potential disqualification argument “because of the flimsy nature of its premise: whether [the attorney] is compelled to testify at trial depends not on whether his deposition is taken, but on the nature of the information he possesses”); *Bogan*, 152 F.R.D. at 14 (“The fact that an attorney is deposed, or that an adversary claims the testimony is or may be material, does not establish that the attorney should be a witness at trial or must be disqualified. This remedy is not to be lightly imposed.”).

⁸ Instead, Hoechst argues that the staff has failed to show that the information Spears possesses is “critical to the staff’s investigation.” Appeal at 6. As noted above, we hold that the staff bears no such burden. Rather, it is Hoechst that is obliged to show that the harm it will suffer as a result of the hearing outweighs the importance of the information that Spears has to offer. Of course, as with all subpoenas, staff must satisfy the executing Commissioner that the subpoena is appropriate and necessary. The status of the recipient as counsel to the target would certainly be a significant factor weighing in the Commissioner’s review.

Hoechst further argues that the Commission does not need the Spears testimony because, Hoechst alleges, the staff has already decided to recommend suit. *Id.* First, whether or not staff has made, or decided to make, a recommendation is a confidential internal matter, and the Commission declines to respond to rumors or allegations regarding such matters. Second, even when a recommendation is made, the investigatory phase is not over until the Commission votes on the recommendation. The Commission, and not the staff, determines whether the evidence amassed by staff provides reason to believe that a violation has occurred. Indeed, the staff is obligated to continue to gather all relevant information to inform the Commission’s ultimate decision

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be obtained from other sources. Nor does it offer any further evidence demonstrating how the hearing would oppress Hoechst. In short, Hoechst has failed to carry its burden of showing good cause for the Commission to quash or limit the Subpoena.

C. Scope and Duration Restrictions.

As an alternative to its argument that the *Shelton* standards apply and preclude the hearing altogether, Hoechst argues that the scope and duration of the hearing should be limited. Appeal at 8-9. We decline to do so because Hoechst has not met its burden to demonstrate the need for such limitations and because we find that no such limitations are necessary or appropriate.

First, Hoechst has failed to propose any specific substantive limitations other than to suggest that inquiries be limited to non-privileged matters in light of general “dangers inherent in attorney depositions.” *Id.* at 9. A petitioner seeking to limit a subpoena must present specific proposals for limitation and support those proposals with facts and reasoned argument. *See* 16 C.F.R. 2.7(d)(1). Hoechst has failed to discharge that burden.

right up until the final vote is cast regarding the issuance or non-issuance of a complaint.

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Second, limiting the lines of inquiry in advance is unnecessary to protect applicable privileges and inappropriate.⁹ It is unnecessary, because Hoechst or Spears is free to assert an appropriate claim of privilege during the investigational hearing in lieu of a response to a specific question. *See* Section D, *infra*; *see also* Letter from B. Albert to M. Koon, September 3, 1999, at 2. In addition, such a limitation is inappropriate because the Commission as the investigator is not in the position to know what areas are likely to be privileged or if a privilege will be waived. A general limitation specifying no more than “only non-privileged matters” is, therefore, essentially meaningless. Moreover, the Commission will not impose a prior restraint that would hobble staff in carrying out its duty to pursue all relevant lines of inquiry. *See United Phosphorus*, 164 F.R.D. at 250 (“The court is unwilling to preclude plaintiff from discovery of facts which may be relevant in this case simply because defendant has chosen Mr. Tillotson to represent it as counsel in this matter notwithstanding his personal knowledge of the underlying facts which are related to the action.”). We concur with the *qad.inc* court, which “reject[ed] any prior restraint in favor of permitting the deposition to go forward, with any individualized objections to be dealt with during its regular course.” 132 F.R.D. at 495.

D. Spears Must Assert Privileges in Response to Specific Questions at the Hearing.

⁹ In its Appeal, Hoechst contends that the Commission’s desire for testimony regarding discussions between the representatives of the two parties to the Agreement and the drafts exchanged between those representatives “underscores that the focus of the subpoena is on attorney work product and attorney-client communications.” Appeal at 7. Discussions with third parties and documents shared with them are not, however, generally privileged. If any specific communications are privileged, specific objections can be asserted at the appropriate time, as discussed below.

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Hoechst argues that because “seemingly innocent questions may trench upon privileged matters” and present a “trap for the unwary,” requiring the invocation of privileges in response to specific questions is inappropriate.¹⁰ Appeal at 9-11. We disagree.

The general rule in the federal courts is equally applicable here: “Protective orders suppressing depositions are rarely granted; deponents are expected instead to assert their objections during the deposition and allow the questioning parties to develop circumstantial facts in order to explore the propriety of the assertion of the privilege, immunity or other objection.” *Kaiser*, 161 F.R.D. at 380, *citing* 8 Fed’l Prac. & Proc. § 2037 at 272. This principle applies with full force when the person giving testimony is an attorney. *See Bogan*, 152 F.R.D. at 14 (“Counsel whose deposition is sought concededly participated in disputed pre-litigation events which at least may relate to issues raised in this litigation. If questions put at the deposition relate to privileged matters, a proper objection can be interposed at that time.”). As one district court explained:

[C]hallenges to the taking of an attorney’s deposition, based upon claims that any of the attorney’s testimony will involve disclosure of privileged information or “work product,” have been held to be premature. . . . [C]ompletely preventing the taking of a deposition on either of the above grounds would tend to limit or fix the

¹⁰ Hoechst argues that the Commission’s Rules require privilege objections to be asserted in petitions to quash, and, therefore, requiring privilege claims to be asserted in response to specific questions during a hearing is at odds with the Rules. Appeal at 10. While some privilege claims – most notably those asserted in response to subpoenas *duces tecum* – might well be made in a petition to quash, the specific rule dealing with testimony, Section 2.9, states with regard to claims of privilege: “Where it is claimed . . . that the witness is privileged to refuse to answer a question . . . the witness or counsel for the witness may object on the record to the question . . . and may state briefly and precisely the ground therefor.” 16 C.F.R. § 2.9(b)(2) (1999).

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scope of the examination before it began and would usurp the court's role in deciding whether certain questions seek privileged information. *The more appropriate method is to allow the deposition to be taken and permit the attorney to claim privilege in the face of certain questions if necessary.*

Hunt Intern. Resources Corp. v. Binstein, 98 F.R.D. 689, 690 (N.D. Ill. 1983) (emphasis added, citations omitted).

In addition, staff has worked cooperatively with other witnesses in this matter to deal with potential privilege issues, and the Commission is confident that the same consideration will be extended to Spears.

III. Conclusion

The Commission does not routinely issue investigative subpoenas to counsel for targets in its investigations. Nor does it take lightly the privilege and burden issues potentially raised by such subpoenas. However, where, as here, counsel for a party has acted as the target's agent in conduct that is the subject of the investigation, the attorney is a proper witness and may be a necessary one. This is even more true where, as here, the attorney is the *only* source for certain key information. The Commission will not reverse the burden with respect to investigatory hearings of attorneys; as with all other witnesses, the burden is on the witness, or other objecting party, to show that the hearing should not take place or should be limited. The Commission rejects the notion that a prior restraint is necessary to deal with any privilege or burden issues that an investigatory hearing of counsel might raise. Instead, burden issues should be addressed by a petition to quash in advance of the hearing, and privilege claims should be made in response to individual questions posed at the hearing. A

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more restrictive approach would unduly interfere with the Commission's ability to carry out its mandate to investigate potential anticompetitive practices that may seriously harm consumers.

The Commission concludes that Commissioner Anthony's November 1, 1999 Initial Ruling fairly and properly considered and addressed all of Petitioner's arguments. Accordingly, the full Commission hereby affirms the Initial Ruling. The Commission amends that ruling only insofar as it set November 17, 1999 as the new return date. The new return date is January 27, 2000.

By direction of the Commission.

The Ken Roberts Company, et al.

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**THE KEN ROBERTS COMPANY, THE UNITED
STATES CHART COMPANY, THE KEN
ROBERTS INSTITUTE, INC., AND THE TED
WARREN CORPORATION**

FTC File No. 992 3259 Decision, February 25, 2000

RESPONSE TO THE KEN ROBERTS COMPANY, THE UNITED STATES
CHART COMPANY, THE KEN ROBERTS INSTITUTE, INC. AND THE
TED WARREN CORPORATION PETITION TO QUASH CIVIL
INVESTIGATIVE DEMANDS

Dear Messrs. Goteiner and Fong:

This letter advises you of the Federal Trade Commission's ruling on the petition of The Ken Roberts Company, The United States Chart Company, The Ken Roberts Institute, Inc. and The Ted Warren Corporation (collectively "petitioners") to quash civil investigative demands ("CIDs") in the above-referenced matter (the "petition"). The petition is **denied** for the reasons stated below.¹ The new deadline for petitioners to respond to, and otherwise comply with, the CIDs is **March 17, 2000**.

Because the petition raised questions regarding the jurisdiction of the Commission, Commissioner Sheila F. Anthony, the

¹ Petitioners' request for oral argument is also denied. Petitioners set forth their arguments in substantial detail in their thirty-seven page petition. Moreover, petitioners state that "the fundamental and dispositive jurisdictional issues are unalloyed questions of law, and . . . that no additional facts are necessary to decide whether this investigation is preempted by the CFTC and the SEC." Petition at 2. Additional argument is therefore unnecessary and would only further delay this investigation.

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Commission's delegate for ruling on petitions to quash, referred this petition to the full Commission for a determination. *See* 16 C.F.R. § 2.7(d)(4). Accordingly, this decision was reached by the full Commission, and petitioner does not have the right to request further review of this matter by the full Commission. *See* 16 C.F.R. § 2.7(f).

I. BACKGROUND

Petitioners are companies that sell various sets of instructional materials, including written materials, videos, cassettes, and online and facsimile updates, that purport to teach customers how to make significant sums of money by trading commodities or stocks. Petitioners advertise and market those materials on several web sites that allow customers to order their products online or by telephone, facsimile, or mail. The web sites also include numerous earnings claims and customer testimonials.

On September 30, 1999, the Commission issued CIDs for written interrogatories and documentary material to petitioners seeking substantiation for, *inter alia*, eighteen earnings claims and dozens of customer testimonials. Petitioners submitted responses to some of the interrogatories (subject to their jurisdictional concerns) on October 15, 1999, and October 22, 1999, and filed their petition to quash all the CIDs on October 28, 1999.² Although petitioners present their arguments in several different ways, their basic contention in the petition is that the Commission is barred from investigating their advertising and marketing practices because the Commodity Exchange Act ("CEA") provides the Commodity Futures Trading Commission ("CFTC") with exclusive jurisdiction with respect to the advertising and marketing practices of commodities trading advisers ("CTAs").³

² The Commission provided petitioners with two extensions for producing the documents requested in the CIDs for documentary materials as well as two additional extensions for filing their petition to quash.

³ This is not the first time that the Commission has investigated or sought to prevent deceptive practices by a CTA. Indeed, the Commission has brought

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Petition at 7-33. Petitioners also make a brief argument to the effect that the FTC is barred from investigating investment advisers because the Securities and Exchange Commission (“SEC”) has exclusive jurisdiction to regulate the advertising and marketing practices of investment advisers. *Id.* at 33-36.

After careful review of the CIDs, the petition, the declarations and various correspondence filed with the petition, and the relevant statutes and case law, the Commission finds that none of petitioners’ arguments provides a basis for quashing the CIDs.

II. ANALYSIS

Section 5 of the Federal Trade Commission Act (“FTC Act”) gives the Commission broad authority to “prevent persons, partnerships, or corporations” from “using unfair methods of competition in or affecting commerce and unfair or deceptive acts or practices in or affecting commerce.” 15 U.S.C. § 45(a)(2) (1999). Section 5 also sets forth a few limited exceptions to this grant of authority: the Commission is not empowered to prevent deceptive or unfair practices by banks, savings and loan institutions, federal credit unions, common carriers and air carriers, insofar as those entities are subject to specified regulations, or by anyone subject to the Packers and Stockyards Act. *Id.*

The Commission’s investigative authority is even broader. Section 6 of the FTC Act, 15 U.S.C. § 46 (1999), gives the Commission the power to:

several actions against defendants in the commodity futures industry. *See, e.g., FTC v. Osborne*, No. 94-55615, 1995 U.S. App. LEXIS 31570 (9th Cir. Oct. 27, 1995) (upholding injunction against defendant corporations for deceptive trade practices in the sale of options for precious metals to consumer investors).

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gather and compile information concerning, and to investigate from time to time the organization, business, conduct, practices, and management of any person, partnership, or corporation engaged in or whose business affects commerce, excepting banks, savings and loan institutions described in section 18(f)(3), Federal credit unions described in section 18(f)(4), and common carriers subject to the Act to regulate commerce, and its relation to other persons, partnerships, and corporations.

Absent a specific statutory exemption, the Commission thus has authority to investigate or prohibit deceptive practices by any person or commercial enterprise.⁴ See *Blue Ribbon Quality Meats, Inc. v. FTC*, 560 F.2d 874, 876 (8th Cir. 1977) (noting that “the investigatory power granted the FTC under 15 U.S.C. § 46 reaches further than the regulatory power granted it under 15 U.S.C. § 4” in holding that FTC had authority to investigate meat packer).⁵

⁴ A few other industries, such as the insurance industry, are also partially or wholly excluded from the Commission’s investigative and enforcement authority by virtue of other explicit statutory provisions. See, e.g., 15 U.S.C. § 1012 (1999) (FTC Act applies to insurance business only insofar as business is not regulated by state law).

⁵ Importantly, the fact that another agency also has regulatory power over a specific industry does not bar the FTC from investigating a company in that field as well. See *FTC v. Texaco, Inc.*, 555 F.2d 862, 881 (D.C. Cir. 1977) (“this is an area of overlapping agency jurisdiction under different statutory mandates”). For example, the FTC and the Securities and Exchange Commission (“SEC”) have, on occasion, both taken action against the same defendant. See, e.g., *Securities and Exchange Commission v. Glenn W. Turner Enters.*, 474 F.2d 476 (9th Cir. 1973) (upholding preliminary injunction against fraudulent sales scheme); *In the Matter of Koscot Interplanetary, Inc.*, 86 F.T.C. 1106 (1975) (order requiring party to cease engaging in unfair and misleading commercial practices); see also *Thompson Medical Co. v. FTC*, 791 F.2d 189, 192 (D.C. Cir. 1986) (FTC can regulate drug-related advertising regardless of Food and Drug Administration’s regulation of advertisers; “[n]owhere in the case law or in the FTC’s grant of authority is there even a hint that the FTC’s jurisdiction is so constricted”).

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Among the Commission's investigatory powers is the ability to use CIDs to gather information and to enforce those demands in federal district court. *See* 15 U.S.C. § 20. In deciding whether to enforce compulsory process issued by the Commission, the federal courts apply a deferential standard, asking only whether (a) the investigation at issue is within the Commission's authority, (b) the information sought is reasonably relevant to the investigation, and (c) the request is not unduly burdensome. *See, e.g., FTC v. Invention Submission Corp.*, 965 F.2d 1086, 1089 (D.C. Cir. 1992). In this matter, petitioners argue that the investigation does not fall within the Commission's authority.⁶ According to petitioners, the CFTC's exclusive jurisdiction over the commodity futures market under Section 2(i) of the CEA bars an FTC investigation of their advertising practices. However, because the FTC Act gives the FTC broad authority to investigate and prohibit unfair trade practices in all areas of commerce except those specifically excluded, this argument can only succeed if petitioners can demonstrate that the CEA expressly or impliedly repealed the FTC Act as it applies to CTAs. As detailed below, petitioners are unable to do so.⁷

⁶ Petitioners also state in the petition that the Commission's investigation is "duplicative" of the efforts of the CFTC, which has also sought documents from petitioners on numerous occasions. Petition at 3-7. Because the Commission's investigation is not directed at the same practices as the CFTC's, only some of the document requests overlap. However, to the extent that petitioners are concerned that re-production of certain documents would be unduly burdensome, Commission staff has agreed to retrieve any overlapping documents sought by the Commission directly from the CFTC, and petitioners need not produce them again.

⁷ Petitioners set forth their basic argument -- that the CEA's exclusive jurisdiction clause prohibits the Commission from investigating CTAs -- under several different argument headings. For the sake of clarity, our decision separates their arguments into three sections: express repeal (which addresses arguments made in Sections I.A, I.B and I.E of the petition), implied repeal

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A. Express Repeal

Prior to 1974, commodities were generally regulated by the Commodity Exchange Authority (the Authority), which was statutorily authorized to regulate futures trading on certain agricultural products. Because the Authority's jurisdiction was quite narrow, however, a great deal of trading in the futures market was unregulated and thus subject to dangerous speculation and manipulation. In 1974, Congress responded to this danger by overhauling the CEA and creating the CFTC. In doing so, Congress' stated intent was to institute a more comprehensive regulatory structure to oversee the volatile and esoteric futures trading complex. *Commodity Futures Trading Commission v. Schor*, 478 U.S. 833, 836 (1986) (citing H.R. Rep. No. 93-975, at 1 (1974)). Accordingly, a key provision in the new law was a limited grant of exclusive jurisdiction to the Commodity Futures Trading Commission to create uniform rules for the operation of the futures market. 120 Cong. Rec. 34,736 (1974) (statement of Rep. Poage). Under the new provision, the CFTC was given exclusive jurisdiction . . . with respect to accounts, agreements . . . and transactions involving contracts of sale of a commodity for future delivery, traded or executed on a contract market. 7 U.S.C. § 2(i) (1999).

In order to ensure that the limited exclusive jurisdiction provision in the CEA was not misinterpreted as broadly preempting other federal laws and regulations, Congress went out of its way to make clear that its grant of exclusive jurisdiction did not abrogate other laws of general application. Accordingly, the statute provides that

Except as hereinabove provided, nothing
contained in this section shall (I) supersede or limit

(which addresses arguments made in Section I.D.1 of the petition), and finally, preemption and the specific remedy rule (which addresses arguments made in Sections I.A, I.C and I.D.2 of the petition).

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the jurisdiction at any time conferred on the Securities and Exchange Commission or other regulatory authorities under the laws of the United States or of any State, or (II) restrict the Securities and Exchange Commission and such other authorities from carrying out their duties and responsibilities in accordance with such laws. Nothing in this section shall supersede or limit the jurisdiction conferred on courts of the United States or any State.

7 U.S.C. § 2(i) (1999). Congress thus provided that the CFTC's exclusive jurisdiction only applies to the regulation of the futures market itself (*i.e.*, promulgating rules and regulations) and does not, outside that narrow area, supersede any other federal regulatory authority. *See American Agric. Movement, Inc. v. Board of Trade of Chicago*, 977 F.2d 1147, 1157 (7th Cir. 1992) ("Laws of general application of course operate in a variety of arenas, and are preempted only when plaintiffs attempt to use them in a manner that would, in effect, regulate the futures markets.").

In analyzing the CFTC's jurisdiction, several courts have recognized that the CEA does not prevent a law enforcement agency (such as the Commission) from enforcing generally applicable laws against CTAs. According to the *Abrahams* decision,

where the [CFTC's] jurisdiction is exclusive, the jurisdiction of other regulatory agencies, state and federal, is preempted. This frees the exchanges from having to conform their practices to conflicting agency standards. However, these decisions do not establish that law

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enforcement agencies are precluded from prosecuting alleged frauds under criminal provisions other than those contained in the Act.

Abrahams, 493 F. Supp. at 301.⁸

In sum, preserving the ability of other agencies such as the FTC to enforce general laws is consistent with the letter and the spirit of the CEA.⁹ Accordingly, petitioners have failed to show that the CEA expressly repealed Sections 5 and 6 of the FTC Act.

B. Implied Repeal

Petitioners have also failed to show that the FTC's authority was impliedly repealed. "The law is well settled . . . that repeal by implication is not favored and that it follows only where the later act is clearly intended to be in substitution for the earlier act." *U.S. v. Abrahams*, 493 F. Supp. 296, 300 (S.D.N.Y. 1980). The Supreme Court has thus developed -- and lower federal courts have applied -- a very strict standard for finding implied repeal. Under this standard, we consider first whether "Congress expressed an intent partially to repeal" the prior statute, and second, "whether there is a repugnancy in the subject matter of the two statutes which would justify an implication of repeal." *Id.*;

⁸ As part of their efforts to demonstrate that the Commission is barred from investigating their advertising and marketing practices, petitioners discuss, at considerable length, the anti-fraud provisions in the CEA. Among their arguments, petitioners state that the breadth of these provisions "is another strong indicator that the CFTC has occupied the field" of CTA advertising and solicitation. Petition at 14. As discussed in Part I.C, *infra*, however, the concept of field preemption does not apply to the relationship between two federal agencies. Moreover, as discussed in Part I.B, *infra*, the CEA and the FTC Act can both operate to regulate similar behavior as long as they are not repugnant to each other.

⁹ Petitioners themselves inadvertently make this point by citing several cases recognizing that the CEA explicitly preserves the jurisdiction of federal courts to decide private rights of action involving the commodity futures trading industry that arise under other federal laws. Petition at 21 n. 11.

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see also *Matsushita Electric Indus. Co. v. Epstein*, 516 U.S. 367, 381 (1996) (citation omitted) (implied repeal occurs only where there is “an irreconcilable conflict between the two federal statutes at issue”); *Strobl v. New York Mercantile Exchange*, 768 F.2d 22, 27 (2d Cir. 1985) (repeal of a law is only to be implied when “there is a plain repugnancy” between two statutes) (citation omitted). In arguing that the CEA impliedly repealed Sections 5 and 6 of the FTC Act (insofar as they are applied to CTAs), petitioners have failed to provide any evidence that Congress intended to abrogate the Commission’s authority under Sections 5 and 6 to prohibit unfair practices by CTAs. Moreover, the two statutes at issue in this matter (the FTC Act and the CEA) are in no way repugnant to each other.

First, in passing the CEA, Congress did not demonstrate any intent to repeal prior anti-fraud laws such as Section 5 of the FTC Act. To the contrary, as noted above, Section 2(i) of the CEA contains two savings clauses. The first preserves the jurisdiction of other federal agencies except as they are superseded by the limited grant of exclusive jurisdiction. The second unqualifiedly preserves the jurisdiction of the federal and state courts. The latter clause provides particularly strong textual support for the proposition that Congress did not intend to abrogate generally available federal causes of action -- such as, for example, FTC actions under Section 13(b), 15 U.S.C. § 53(b). Furthermore, in introducing the bill, Senator Talmadge, chairman of the Senate Committee on Agriculture and Forestry, emphasized that “it is not the intent of the committee to exempt persons in the futures trading industry from existing laws and regulations such as the antitrust laws.” 120 Cong. Rec. 30,459 (1974) (statement of Sen. Talmadge). Thus, rather than suggest that it intended to repeal prior laws, Congress made clear its intent that CTAs continue to

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comply with “existing laws and regulations,” such as the FTC Act.¹⁰

Second, petitioners are unable to demonstrate the type of “repugnancy” between the CEA and FTC Act that is necessary for a finding of implied repeal. The Commission’s investigation of petitioners is intended to enforce a general anti-fraud law; the Commission is not purporting to *regulate* advertising practices by CTAs.¹¹ Moreover, there is no “irreconcilable conflict” between the two statutes. To the contrary, insofar as the purpose of the FTC Act is to prohibit fraudulent trade practices, it actually supports (rather than conflicts with) the CEA, which also contains anti-fraud provisions. *See* 7 U.S.C. § 6b (1999) (making it

¹⁰ Petitioners’ argument that the creation of the CFTC in 1974 somehow abrogated the FTC’s jurisdiction over CTAs is also rebutted by the fact that the FTC Act has been amended twice since 1974 to exclude savings and loan associations and federal credit unions from the FTC’s jurisdiction. *See* 15 U.S.C. § 46(a) (1999). Had Congress also intended to exclude CTAs, it could have done so. *See Andrus v. Glover Constr. Co.*, 446 U.S. 608, 616-17 (1980) (“Where Congress explicitly enumerates certain exceptions to a general prohibition, additional exceptions are not to be implied, in the absence of evidence of a contrary legislative intent.”).

¹¹ Petitioners consistently fail to distinguish between regulatory activity and law enforcement actions. For example, petitioners cite numerous cases for the proposition that only the CFTC can “exercise regulatory authority over the commodity futures trading industry and its activities.” Petition at 20-22 (emphasis in original). These cases include *Mullis v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 492 F. Supp. 1345, 1349-50 (D. Nev. 1980), cited for the proposition that the “CFTC preempts all other agency regulation in the commodities field.” Petition at 21. However, the *Mullis* case draws a distinction between the application of non-CEA statutes and the application of non-CFTC rules to the commodities industry, holding that federal courts have jurisdiction to hear cases brought under federal securities statutes (but not under SEC rules or regulations) where the dominant purpose of the security is for trading in commodity futures. *Mullis*, 492 F. Supp. at 1350-51. Because the Commission is investigating petitioners pursuant to the FTC Act and not a Commission rule or regulation, the reasoning of the *Mullis* court clearly allows this investigation to continue. We need not reach the question of whether the Commission could apply its own rules or regulations to petitioners’ business practices.

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unlawful to “cheat or defraud” another person in connection with the sale of a commodity).

Two federal courts faced with similar issues have held that the CEA did not impliedly repeal federal antitrust law or the federal mail fraud statute. *See Strobl*, 768 F.2d at 26-28; *U.S. v. Abrahams*, 493 F. Supp. at 296. In *Strobl*, the U.S. Court of Appeals for the Second Circuit held that an individual could bring claims under the Sherman Act and the Clayton Act in connection with alleged price manipulation that led to a 1976 default of potato futures. The court held that Congress did not intend to limit the application of the antitrust laws simply by establishing an overlapping regulatory scheme. *See Strobl*, 768 F.2d at 27. Rather, the correct test was whether the two statutes were in conflict, and the court held they were not. *Id.* The court’s conclusion regarding price manipulation holds true for the advertising fraud at issue here as well.

As price manipulation also violates antitrust laws, none of [the anti-manipulation] provisions [in the CEA] conflicts with the purposes and standards of the antitrust laws. There is no built-in balance in the regulatory scheme of the Act that permits a little price manipulation in order to further some other statutory goal. Quite the opposite, price manipulation is an evil that is always forbidden under every circumstance by both the Commodity Exchange Act and the antitrust laws. Therefore, application of the latter cannot be said to be repugnant to the purposes of the former.

Strobl, 768 F.2d at 28.

The *Abrahams* court used similar logic in holding that the CEA does not bar the prosecution of CTAs under the mail fraud

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statute. Like petitioners here, the defendant in *Abrahams* attempted to argue that the CEA's own fraud provisions were "intended by Congress to be the sole means by which fraudulent conduct in the commodities field . . . should be prosecuted." *Abrahams*, 493 F. Supp. at 299. The court disagreed. While recognizing that "where the Commission's jurisdiction is exclusive, the jurisdiction of other regulatory agencies, state and federal is preempted," the court found that such exclusive jurisdiction does not preclude law enforcement agencies "from prosecuting alleged frauds under criminal provisions other than those contained in the Act." *Id.* at 301 n.10. *See also Mullis*, 492 F. Supp. at 1349-50 (plaintiff could bring private right of action under securities statutes but not under SEC rules and regulations regarding a securities/commodities matter within the CFTC's exclusive jurisdiction).

The conclusion reached by the *Abrahams* court regarding the CEA and the mail fraud statute applies equally to the CEA and the FTC Act. "The mail fraud statute and the criminal provisions of the Act are not in conflict," the court held. "[I]nstead, they complement each other. The Court concludes that there is no conflict between the two statutory provisions which would justify an implication of repeal." *Id.* at 303. The CEA's fraud provisions and Sections 5 and 6 of the FTC Act similarly complement each other, and thus, here too, there is no conflict that would justify a finding of repeal.

C. Field Preemption and the Exclusive Remedy Rule

Petitioners also attempt to argue that the FTC is barred from investigating their advertising practices under a "field preemption" theory and under the "specific remedy rule." These arguments similarly fail.

First, the concept of field preemption, which is based on the Supremacy Clause of the Constitution, applies to the relationship between federal and state laws and not the relationship between

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two different federal laws. *See American Mfg. Mut. Ins. Co. v. Tison Hog Market, Inc.*, 182 F.3d 1284, 1287-88 (11th Cir. 1999) (“Field preemption occurs when Congress regulates a field so pervasively . . . that an intent to preempt state law can be inferred.”). Thus, petitioners’ discussion regarding preemption is inapplicable to analyzing the relationship between federal agencies.¹²

Second, petitioners’ argument regarding the “specific remedy rule” is just another twist on their “implied repeal” argument (*see* Section II.B, *supra*) and therefore fails for the same reasons. “[A]lthough the ‘specific over general’ principle is an accepted rule of statutory interpretation, it is not to be followed blindly.” *Strobl*, 768 F.2d at 30 (holding that specific remedy rule does not bar application of antitrust laws to commodities futures trading). Rather, “[s]tatutes are to be construed together to effectuate, to the greatest extent possible, the legislative policies of both.” *Id.* Because the CEA and the FTC Act can be construed together to

¹² In any event, the cases that petitioners cite in support of their field preemption argument do not buttress their conclusions. For example, petitioners cite to *Board of Trade of Chicago v. Securities and Exchange Comm’n*, 677 F.2d 1137 (7th Cir.), *vacated as moot*, 459 U.S. 1026 (1982), to support their argument that the savings clause in the CEA does not preserve this Commission’s jurisdiction over their advertising practices. Petition at 13-14, 19-20. However, the *Chicago Board of Trade* decision merely considers whether the sale of Government National Mortgage Association mortgage-backed pass-through certificates (“GNMAs”) are “transactions involving contracts of sale of a commodity for future delivery,” and therefore fall within the CFTC’s exclusive jurisdiction. *Id.* The court ruled that, because GNMA options should be included within the statutory definition of commodities for future delivery, the CFTC had exclusive jurisdiction, the savings clause did not apply and the SEC could not regulate their sale. *Id.* at 1161. Thus, the analysis of the CFTC’s exclusive jurisdiction focused on what constitutes a commodity future -- not on what constitutes pervasive regulation -- and is therefore inapplicable to the issue at hand.

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effectuate the legislative policies of both, the specific remedy rule is inapplicable.

D. Investment Advisers

Petitioners' final argument is that the Commission also lacks jurisdiction to investigate The Ken Roberts Institute, Inc. ("KRI") and the Ted Warren Corporation ("Warren"), the two petitioners that are involved in providing securities advice, because KRI and Warren "fall under the SEC's definition of 'investment advisers' and, as such, are subject to the exclusive regulation of the SEC." Petition at 33. Petitioners do not provide any statutes or case law in support of their statement that the SEC has exclusive jurisdiction over investment advisers, and we have found no legal authority in support of their views. Thus, even if KRI and Warren can be regulated by the SEC as investment advisers, that does not bar the FTC from investigating their advertising practices.

The one case petitioners rely upon in arguing for exclusive SEC jurisdiction, *Spinner Corp. v. Princeville Dev. Corp.*, 849 F.2d 388 (9th Cir. 1988), is not controlling. *Spinner* involved whether the Hawaii "baby FTC Act" applied to a private cause of action against an investment adviser -- and did not in any way rule on the jurisdiction of the Commission itself. *Id.* at 393. Rather, the court only considered this Commission's practices in light of a state statute that commands courts to be guided by judicial interpretations of the FTC Act. *Id.* at 389-90. Because the court found that the FTC Act has not been regularly applied to securities transactions, it did not allow the private cause of action to go forward under the "baby FTC Act." Importantly, the court did not rule on the jurisdiction of the Commission itself. Indeed, the *Spinner* decision itself recognizes that the FTC Act "read literally, would include security transactions." *Id.* at 392 n. 4. As noted above, the FTC and the SEC have brought cases against the

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same entities, alleging violations of their respective statutes for the same conduct.¹³ *See* note 5, *supra*.

III. CONCLUSION

The Commission's investigation of petitioners is a proper and statutorily authorized investigation. Neither the CFTC nor the SEC has exclusive authority to enforce laws of general applicability as they apply to CTAs or investment advisers.

For the foregoing reasons, the petition is **denied**, and pursuant to Rule 2.7(e), 16 C.F.R. § 2.7(e), **petitioner is directed to comply with the CIDs on or before Friday, March 17, 2000.**

By direction of the Commission.

¹³ In addition, the FTC and the SEC have participated in joint law enforcement efforts. In 1998 both agencies brought cases against sellers of investments in general partnerships or "private placement" stock offerings. *See, e.g., FTC v. Affordable Media, LLC*, 1999-1 Trade Cas. (CCH) ¶ 72,547 (11th Cir. 1999)(in upholding entry of preliminary injunction, court described defendants' sale of partnership units as a Ponzi Scheme); *Securities and Exchange Commission v. Rynell & Associates, Inc., et al.*, Civil Action No. 98-6508 WMB (Cwx)(C.D. Cal., Aug. 11, 1998)(sale of general partnership units for movie "Desert Gold").

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WILLIAM E. SHELL, M.D

FTC Docket No. C-3749 Decision, March 31, 2000

RESPONSE TO WILLIAM E. SHELL, M.D.'S PETITION TO LIMIT
SUBPOENA *DUCES TECUM*

Dear Mr. Shaw:

This letter advises you of the Federal Trade Commission's ruling on the above-referenced Petition to Limit ("Petition") you submitted on behalf of your client, William E. Shell, M.D. ("Petitioner"). The decision was made by Commissioner Sheila F. Anthony, acting as the Commission's delegate. See 16 C.F.R. § 2.7(d)(4). The Petition is denied for the reasons stated below.

Petitioner may request review of this matter by the full Commission. Such a request must be filed with the Secretary of the Commission within three days after service of this letter.¹ The filing of a request for review by the full Commission does not stay or otherwise affect the new return date, April 14, 2000, unless the Commission rules otherwise. See 16 C.F.R. § 2.7(f).

I. BACKGROUND

Petitioner advertises, markets, and sells various products over the Internet through a web site called Targeted Medical Foods (targetedmedicalfoods.com). Petitioner represents that these products, such as Sentra-AM, Viralex, Vascular, and Lister B, aid the body's production of neurotransmitters and thereby prevent or mitigate specific diseases, including Chronic Fatigue Syndrome, fibromyalgia, erectile dysfunction, arteriosclerosis, high blood

¹ This letter is being delivered by facsimile and by express mail. The facsimile is being provided only as a courtesy. Computation of the time for appeal, therefore, should be calculated from the date you receive the express mail copy of this letter.

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pressure, cold sores, colds, and sore throats. The Commission is investigating whether any of Petitioner's claims and practices are deceptive and, therefore, constitute violations of Sections 5 and 12 of the Federal Trade Commission Act, 15 U.S.C. §§ 45 and 52, as amended.

On December 20, 1999, pursuant to the Commission's September 7, 1999, omnibus resolution authorizing investigations of Internet Advertisers, Sellers, and Promoters, the Commission issued a subpoena *duces tecum* to the Petitioner. The Subpoena requests various documents, including sales figures, product labels, and advertising materials. The two specifications at the heart of this Petition call for (1) documents constituting the basis of evidence relied upon to substantiate Petitioner's claims regarding the products advertised on the Targeted Medical Foods web site, and (2) documentary materials that may limit or call into question those product claims.

Petitioner asks that these two specifications, numbered 1 and 2 in the Subpoena, be stricken or modified on the grounds that they are unduly burdensome. Specifically, Petitioner argues that the two specifications would require the downloading and printing of 45,000 pages of materials.

II. ANALYSIS

The issue at the heart of this investigation is whether Petitioner's claims about the products at issue are adequately substantiated. The two specifications Petitioner seeks to have stricken or modified are those seeking to elicit evidence on this central issue.

After reciting some general legal authorities and summarizing the two Subpoena specifications at issue, Petitioner's brief offers only *one sentence* in support of his burden argument: "the production of documents responsive to the First and Second

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Requests of the Subpoena Duces Tecum requires downloading and printing of approximately 45,000 pages of materials and is therefore unduly burdensome as it hinders and disrupts the normal operations of Targeted Medical Foods.” Memorandum of Points and Authorities in Support of Petition to Limit Subpoena Duces Tecum Issued to William E. Shell, M.D. at 3. This bald conclusory statement is simply insufficient to show that the specifications should be stricken or limited.

Rule 2.7(d)(1) provides, in relevant part, that petitions “shall set forth all assertions of privilege or other factual and legal objections to the subpoena ... , *including all appropriate arguments, affidavits and other supporting documentation.*” 16 C.F.R. § 2.7(d)(1) (emphasis added). The instant Petition fails to meet this basic requirement.

The burden of showing that a particular request for production within an administrative subpoena *duces tecum* is unreasonably burdensome, or requires an unreasonably burdensome amount of effort and expense, rests with the subpoenaed party. See FTC v. Texaco, 555 F.2d 862, 882 (D.C. Cir. 1977) (citing U.S. v. Powell, 379 U.S. 48, 58 (1964)). The petitioner has not met this burden. For example, Petitioner provides no file lists, examples of files, file summaries, man-hour cost projections or business analysis affidavits of any sort to support his claim that downloading the files relating to specifications one and two in the Subpoena will “unduly disrupt or seriously hinder normal operations” of his business. Instead, Petitioner merely offers a single conclusory statement with no supporting evidence. Reviewing courts have found such unsupported or vague assertions of excessive burden unconvincing and inadequate to support challenges to FTC compulsory process requests.²

² See, e.g., FTC v. Standard American, Inc., 306 F.2d 231, 235 (3rd Cir. 1962)(asserting that a corporation subpoenaed for documents by the FTC should have “met their burden of a showing of the unreasonableness of the Commission’s demand,” by making “a record that would convince (the District Court) of the measure of their grievance rather than ask (it)” to be assumed from the corporation’s mere statement that it would be deprived of “thousands of current records in daily business use” without a “single shred of evidence.”)

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All compulsory process specifications require recipients to expend some effort and incur some expense. Compulsory process would be rendered useless if it could be avoided based upon nothing more than bald assertions that compliance would require the expenditure of time and resources.

III. CONCLUSION

For the foregoing reasons, the Petition is denied, and, pursuant to Rule 2.7(e), 16 C.F.R. § 2.7(e), Petitioner is directed to comply with the Subpoena on or before Friday, April 14, 2000.

By direction of the Commission.