

Complaint

IN THE MATTER OF
OFFICE DEPOT, INC.

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

Docket C-3977; File No. 9923313

Complaint, September 5, 2000--Decision, September 5, 2000

This consent order addresses Office Depot's claims regarding the sale of a \$1,049.97 Compaq Presario 5716 computer system based upon a \$400 rebate that required consumers to enter into a three-year contract for Internet service and the sale of a Afree@ emachines computer based upon a similar \$400 rebate. The complaint alleges that Office Depot represented that the total cost of the computer system was \$1,049.97 and that consumers could obtain the Afree@ emachines computer at no cost after rebates. However, Respondent failed to disclose or failed to disclose adequately that: (a) consumers were required to subscribe to CompuServe Internet service for three years at an additional cost; (b) consumers who cancel the Internet service within three years must repay the entire \$400 rebate and pay a \$50 cancellation fee; and (c) CompuServe does not provide local access telephone numbers for its Internet service in all areas, so many consumers must either pay long distance telephone charges or surcharges of \$6.00 per hour to access its Internet service. The consent order prohibits Office Depot from misrepresenting the price or cost to consumers of computer or computer related equipment, or from representing the cost of any of these products if that price is conditioned on the purchase of another product without disclosing the condition clearly and conspicuously along with the price of the additional product or service that must be purchased. Additionally, the Respondent is required to disclose, if consumers have to pay additional fees, charges, rebate repayments, or other costs to cancel the Internet access service; or, if consumers may have to pay long distance telephone charges, hourly surcharges, or other costs in excess of local telephone fees to access the Internet.

Participants

For the Commission: *Michael Dershowitz, Michael Ostheimer, Joel Winston, C. Lee Peeler, and BE.*

For the Respondents: *James H. Sneed and Joselle M. Allbracht, McDermott, Will & Emery.*

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COMPLAINT

The Federal Trade Commission, having reason to believe that Office Depot, 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 Office Depot, Inc. is a Delaware corporation with its principal office or place of business at 2200 Old Germantown Road, Delray Beach, Florida 33445.
2. Respondent has advertised, offered for sale, sold, and distributed office products to the public, including personal computers.
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 a Compaq Presario 5716 computer system, including a computer, a keyboard, a mouse, a 15" monitor, speakers and a color inkjet printer. The advertisements include but are not necessarily limited to the attached Exhibit A. The advertisement contains the following statements:

A.

Office Depot⁷
Low Prices every day.

Save \$750

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1799⁹⁷ Computer, Monitor & Printer
- 400⁰⁰ Internet Mail-In Rebate^{HH}
- 200⁰⁰ Price Reduction
- 150⁰⁰ Package Mail-in Rebates*
1049⁹⁷ After Rebates & \$200 Price Reduction

COMPAQ
5716 COMPUTER WITH INTEL
PENTIUM III PROCESSOR 450 MHz

[A fine print disclosure at the bottom of this newspaper ad states:]

ASave \$400 On Any Computer! (When You Sign Up For An
Internet Usage Subscription^{HH})

^{HH} CompuServe \$400 Internet Mail-In Rebate offer is subject to credit approval and your acceptance of CompuServe Terms of Service. Access to CompuServe may be limited especially during peak times. Premium services carry surcharges, and communication surcharges may apply to Arkansas and outside the U.S. You may incur telephone charges depending on your calling plan and location. Offer also requires (1) the purchase of a qualifying eMachine PC, any qualifying HP Pavilion 4500 or 8500 series PC (excluding Model 4530), any qualifying Compaq PC AND Compaq monitor, any qualifying Compaq notebook computer or any IBM Thinkpad, (2) a contract commitment to a 3-year/36-month subscription for CompuServe 2000 Internet Service at a monthly rate of \$21.95, (3) a completed mail-in rebate form, (4) a purchase receipt, and (5) a major credit card. All of the above must be completed and received by CompuServe within 30 days of purchase. Consumers without a valid credit card may pre-pay for 36 months at \$21.95 per month. Within 45 days of credit approval, the \$400 CompuServe Internet Service rebate will be credited to your designated credit card or fulfilled by check sent to the name and address provided on the credit application. Early termination of the 3-year CompuServe 2000 Internet Service requires repayment of the \$400 rebate plus a \$50 cancellation fee. IBM Thinkpad/ CompuServe \$400 Internet Rebate offer expires 9/30/99. HP/CompuServe \$400 Internet Rebate offer expires

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9/30/99. Compaq/ CompuServe \$400 Internet Rebate offer expires 9/30/99. eMachine CompuServe \$400 Internet Rebate offer expires 10/31/99. Age 18 or older. Limit one per household or business. See store for details. CompuServe provides various pricing plans, some of which may be lower than the \$21.95 monthly rate required for this promotion. CompuServe is a trademark of CompuServe Interactive Services Inc.®

5. Through the means described in Paragraph 4, including but not necessarily limited to Exhibit A, respondent has represented, expressly or by implication, that the total cost of a Compaq Presario 5716 computer system is \$1,049.97.

6. In truth and in fact, the total cost of a Compaq Presario 5716 computer system is not \$1,049.97. In order to obtain the Compaq Presario 5716 computer system for \$1,049.97, consumers are required to subscribe to CompuServe Internet Service for 36 months at an additional cost of \$21.95 per month or a full prepayment of \$790.20. Therefore, the representation set forth in Paragraph 5 was, and is, false or misleading.

7. In its advertisements, including but not necessarily limited to Exhibit A, respondent has represented that the total cost of a Compaq Presario 5716 computer system is \$1,049.97. In these advertisements, respondent has failed to disclose or failed to disclose adequately that (a) in order to obtain the Compaq Presario 5716 computer system for \$1,049.97, consumers are required to subscribe to CompuServe Internet Service for 36 months at an additional cost of \$21.95 per month or a full prepayment of \$790.20; (b) consumers who cancel the Internet service within 3 years must repay the entire \$400 rebate and pay a \$50 cancellation fee; and (c) CompuServe does not provide local access telephone numbers for its Internet service in all areas, and therefore many consumers must either pay long distance telephone charges or surcharges of \$6.00 per hour to access its Internet service. These facts would be material to consumers in their purchase or use of the product. The failure to disclose these

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facts, in light of the representation made, was, and is, a deceptive practice.

8. Respondent has disseminated or has caused to be disseminated advertisements for a Afree@ emachines computer. The advertisements include but are not necessarily limited to the attached Exhibit B. The advertisement contains the following statements:

B.

Office Depot⁷

Low Prices every day.

Free emachines Computer After Rebates

When You Sign Up For 3 Years of Prodigy Internet Service*

emachines Save \$450⁰⁰ 17" Monitor
\$449⁹⁹ Computer Only Upgrade for
eTOWER 366i2 WITH INTEL⁷ -\$400⁰⁰ Prodigy Internet
Rebate* Only \$60 More
CELERON^J PROCESSOR 366MHz- \$50⁰⁰ eTower Mail-in
Rebate

FREE Your Final Price

After Rebates

eView 15" Monitor 812-866.....139.99

[Depiction: An emachines computer tower,

\$ 13.8" Viewable Image Area keyboard,

speaker, and monitor. The words

AFREE Computer After Rebates@ are super-

eView 17" Monitor 953-605.....199.99 imposed

over the picture of the monitor.]

\$ 15.8" Viewable Image Area

[A fine print disclosure in the corner of this ad states:

ASubject to credit approval and 1-, 2-, 3-year membership with Prodigy Internet Service. See store for details. To receive instant savings at check out, customer must make any single or

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multi-product purchase in our store in an amount equal to or exceeding the amount of instant savings between 10/3/99 and 12/31/99, enroll in store in a 1-year, 2-year, or 3-year fixed-term AProdigy Internet/Office Depot Membership@ between 10/3/99 and 12/31/99 with a valid, major credit card, accept terms of Prodigy Internet membership, and comply with terms on Prodigy Internet/Office Depot Membership Program. Terms & Conditions available at store. Instant savings of \$400 for a 3-year contract, \$250 for a 2-year contract and \$100 for a 1-year contract. Available only as a credit against purchases on the visit at which membership is approved. No cash payments will be made to customer. Debit cards and Office Depot charge cards not accepted for membership but may be used for purchases of Office Depot merchandise. Payment of \$19.95 per month is required for the length of your commitment. New Prodigy Internet customers only. 18 years of age and older. Phone charges and premium feature fees not included with Internet service. Cancellation fee equal to instant savings amount plus a penalty fee of \$50 if canceled prior to the end of the contract. See Terms & Conditions in store for additional conditions and restrictions. Your creditworthiness will be established for eligibility. Available in store only. No phone, Internet or special orders. Limit one per household.@]

9. Through the means described in Paragraph 8, including but not necessarily limited to Exhibit B, respondent has represented, expressly or by implication, that the Afree@ emachines computer includes a monitor at no additional cost.

10. In truth and in fact, the Afree@ emachines computer does not include a monitor at no additional cost. Consumers must pay \$139.99 for a 15" monitor or \$199.99 for a 17" monitor. Therefore, the representation set forth in Paragraph 9 was, and is, false or misleading.

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11. Through the means described in Paragraph 8, including but not necessarily limited to Exhibit B, respondent has represented, expressly or by implication, that consumers can obtain the Afree@ emachines computer at no cost, after rebates.

12. In truth and in fact, consumers cannot obtain the Afree@ emachines computer at no cost, after rebates. In order to obtain the Afree@ emachines computer, consumers are required to subscribe to Prodigy Internet Service for 36 months at a cost of \$19.95 per month or a full pre-payment of \$718.20. Therefore, the representation set forth in Paragraph 11 was, and is, false or misleading.

13. In its advertisements, including but not necessarily limited to Exhibit B, respondent has represented that consumers can obtain the Afree@ emachines computer at no cost, after rebates. In these advertisements, respondent has failed to disclose or failed to disclose adequately that (a) in order to obtain the Afree@ emachines computer, consumers are required to subscribe to Prodigy Internet Service for 36 months at a cost of \$19.95 per month or a full pre-payment of \$718.20; (b) consumers who cancel the Internet service within 3 years must repay the entire \$400 rebate and pay a \$50 cancellation fee; and (c) Prodigy does not provide local access telephone numbers for its Internet service in all areas, and therefore many consumers must either pay long distance telephone charges or surcharges of \$6.00 per hour to access its Internet service. These facts would be material to consumers in their purchase or use of the product. The failure to disclose these facts, in light of the representation made, was, and is, a deceptive practice.

14. 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 September, 2000, has issued this complaint against respondent.

Complaint Exhibits

By the Commission.

Complaint Exhibits

EXHIBIT A

Office DEPOT
Low Prices every day.

Save \$750
1799⁹⁷
- 400⁰⁰
- 200⁰⁰
- 150⁰⁰
1049⁹⁷
Business Lease for
57⁹⁹ PER MONTH*

Upgrade to
17" Monitor for
100 More

Computer Only \$1199⁹⁹

COMPACT
5716 COMPUTER WITH INTEL PENTIUM III PROCESSOR 450MHz
• 96MB 1600MHz Synchronous
• 15 GB UltraDMA Hard Drive
• 6x DVD-ROM Drive
• Home Networking 10 Mbps Ethernet Port
• 100MB Jazzer ZIP BUILT-IN Drive
• 1.5MB Max Digital DSL 56K Modem
(Actual download speeds may vary)
980 853

MV520 15" COLOR MONITOR
• 13.8" Viewable Image Area
• 0.28 mm Dot Pitch
• 1024 x 768 - 60MHz (max resolution)
984 760

IJ300 COLOR INKJET PRINTER
• Prints 4 ppm Black 2.5 ppm Color
989 266

intel inside
pentium® III

BUSINESS LEASE 12-60 MONTHS
On combined lease of Computers, Business Machines, and Furniture costing \$900 or more.

Save \$400
799⁹⁹
After Internet Rebate

COMPACT PRESARIO 1245
333MHz AMD-K6-2 WITH 3DNOW! TECHNOLOGY
• 32MB Synchronous, Upgradeable to 160MB
• 3.2GB Hard Drive
• 24x (max speed) CD-ROM
• 56K ITU V.90 Modem
(Actual download speeds may vary)
• 512KB L2 Pipeline Burst Cache
• 12.1" HPA Display
• High-Capacity NiMH Battery
992 877

333 MHz
AMD and AMD-K6 are trademarks of Advanced Micro Devices, Inc.

Clearance
DESKJET 720C COLOR INKJET PRINTER
• Prints 5 ppm Black/4 ppm Color
• 1-Year Express Exchange Warranty
• HP PhotoREt II Color Layering Technology
233-313

brother MFC-1970 ALL-IN-ONE
• Plain paper fax — 14.4 bps
• 1MB memory stores up to 50 pages
• Speaker phone
• Printer — 200 x 400 dpi
• Scanner — 400 dpi
• Copier — Multi-copying up to 99 copies
357-974

Save \$400 On Any Computer! (When You Sign Up For An Internet Usage Subscription!)
*Compuserve \$400 Internet Rebate offer is subject to credit approval and your acceptance of Compuserve Terms of Service. Access to Compuserve may be limited especially during peak times. Premium service, carry charges, and communication surcharges may apply to Arkansas and outside the U.S. You may incur additional charges depending on your calling plan and location. Offer also requires (1) the purchase of a qualifying interactive PC or any qualifying HP Pavilion 4000 or 5000 series PC (excluding Model K300), any qualifying Compaq PC AND Compaq monitor, any qualifying Compaq notebook computer or any IBM Thinkpad (2) a contract commitment to a 3-year/36-month subscription for Compuserve 2000 Internet Service at a monthly rate of \$21.95 (3) a completed mail-in rebate form, (4) a purchase receipt and (5) a major credit card. All of the above must be completed and returned to Compuserve within 90 days of purchase. Consumers without a valid credit card may pre-pay for 36 months at \$21.95 per month. Within 45 days of credit approval, the \$400 Internet Service rebate will be credited to your designated credit card or funded by check sent to the name and address provided on the credit application. Early termination of the 3-year Compuserve 2000 Internet Service requires payment of the \$400 rebate plus a \$20 cancellation fee. IBM Thinkpad/Compaq \$400 Internet Rebate offer expires 9/30/99. HP/Compaq \$400 Internet Rebate offer expires 9/30/99. Compuserve provides various pricing plans, some of which may be lower than the \$21.95 monthly rate required for this promotion. Compuserve is a trademark of Compuserve Interactive Services, Inc.

For FREE Next Business Day Delivery: **

PHONE: 1-888-GO-DEPOT (1-888-463-3768)
FAX: 1-800-685-5010
ONLINE: www.officedepot.com
AOL Keyword: Office Depot

Source Code: 99240

For The Office Depot Nearest You, Call 1-888-GO-DEPOT (1-888-463-3768)
It's this simple: If you find the same item advertised locally for less or any other offer product superior — even up to 7 days after you bought it — we'll not only match that price, we'll give you 55% of the difference. Instant! Just give us the details — and we'll make your word for it! (Maximum \$55 credit). We reserve the right to limit quantities.
*Excludes Internet offers, ad errors, rebates, services, floor mats, and transactions for our specialty in-stock items only. We are not responsible for granting or expiring rebates.
**Prices and offers good 9/1/99 through 9/27/99 (unless otherwise noted). Quantities limited. Offers limited to in-stock items only. No cashback or substitutions. Rebate form available in store only. **Available on orders at \$50 or more within our local trading area. Not all items available for next business day delivery.

[illegible]

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 the 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, and having duly considered the comments received, 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 Office Depot, Inc., is a Delaware corporation with its principal office or place of business at 2200 Old Germantown Road, Delray Beach, Florida 33445.

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, instant savings, instant credit, credit towards future purchases, merchandise, services, or any other consideration offered to consumers who purchase products or services from respondent, which is provided at the time of purchase, or subsequent to the purchase.
2. Unless otherwise specified, "respondent" shall mean Office Depot, Inc., a corporation, its successors and assigns and its officers, agents, representatives, and employees.
3. "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.

4. In the case of advertisements disseminated by means of an interactive electronic medium such as the Internet or online services, "in close proximity" shall mean on the same Web page, online service page, or other electronic page, and proximate to the triggering representation, and shall not include disclosures accessed or displayed through hyperlinks, pop-ups, interstitials or other means.

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, subsidiary, division, or other device, in connection with the labeling, advertising, promotion, offering for sale, sale, or distribution of any computer, computer-related product or Internet access service in or affecting commerce, shall not misrepresent, in any manner, expressly or by implication, or by depiction, the price or cost to consumers of such product or

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service, or what is included in the price or cost of any such product or service.

II.

IT IS FURTHER ORDERED that respondent, 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 computer, computer-related product or Internet access service, in or affecting commerce, shall not make any representation, in any manner, expressly or by implication, about the price or cost to consumers of any such computer, computer-related product or Internet access service when that price, cost, or any rebate is conditioned upon the purchase of any other product or service, unless it discloses clearly and conspicuously, and in close proximity to the representation that consumers must purchase the other product or service in order to obtain the represented price or rebate and the cost of the other product or service, including if a service, the length of time that consumers are required to purchase the service.

Provided, that for purposes of this Part, use of the term Arebate@ or Adiscount,@ without any description or characterization of either term shall not, in and of itself, be deemed a representation about the price or cost to consumers of a product or service.

III.

IT IS FURTHER ORDERED that respondent, 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 Internet access service; or any computer or computer-related product for which the price, cost or any rebate is conditioned upon the purchase of Internet access service; in or affecting commerce, shall not make any representation, in any manner, expressly or by implication, about the price or cost to consumers of such Internet access service, unless it discloses, clearly and conspicuously:

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- A. the dollar amounts of any and all fees, charges, rebate repayments, and other costs consumers are required to pay to cancel the Internet access service; and
- B. (1) that consumers may have to pay long distance telephone charges, hourly surcharges, or other costs in excess of local telephone service charges to access the Internet service, if that is the case; and (2) a means for each consumer to ascertain whether he or she would incur such costs or charges to access the Internet service and the amount of any such costs or charges. Provided that respondent may comply with Part III.B.(2), above, by disclosing a means by which consumers may obtain information from the Internet service provider about available access phone numbers and the amount of any hourly surcharges or other costs to access the Internet service; and by advising consumers to contact their local telephone company to determine whether using the access telephone number closest to them will incur charges in excess of local service charges.

IV.

IT IS FURTHER ORDERED that respondent Office Depot, 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

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- 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 respondent Office Depot, 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.

VI.

IT IS FURTHER ORDERED that respondent Office Depot, 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.

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VII.

IT IS FURTHER ORDERED that respondent Office Depot, 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.

VIII.

This order will terminate on September 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 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 Office Depot, Inc. (Arespondent@).

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 advertises, sells, and distributes office products, including personal computers. This matter concerns allegedly false and deceptive advertising claims regarding the sale of a \$1,049.97 Compaq Presario 5716 computer system based upon a \$400 rebate that required consumers to enter into a three year contract for Internet service and the sale of a Afree@ emachines computer based upon a similar \$400 rebate.

The Commission=s proposed complaint alleges that respondent falsely claimed that the total cost of a Compaq Presario 5716 computer system was \$1,049.97. In fact, in order to obtain the system for \$1,049.97, consumers were required to subscribe to CompuServe Internet Service for three years at an additional cost of \$21.95 per month or a full payment of \$790.20. The complaint also alleges that in representing that the total cost of the computer system was \$1,049.97, respondent failed to disclose or failed to disclose adequately that: (a) consumers were required to subscribe to CompuServe Internet service for three years at an additional cost of \$21.95 per month or a full payment of \$790.20; (b) consumers who cancel the Internet service within three years must repay the entire \$400 rebate and pay a \$50 cancellation fee; and (c) CompuServe does not provide local access telephone numbers for its Internet service in all areas, and therefore, that many consumers must either pay long distance

Analysis to Aid Public Comment

telephone charges or surcharges of \$6.00 per hour to access its Internet service. The complaint alleges that the failure to disclose these material facts is a deceptive practice.

In addition, the complaint alleges that respondent falsely claimed that a Afree@ emachines computer included a monitor at no additional cost. In fact, the monitor cost \$139.99 or \$199.99, depending on its size. The complaint also alleges that respondent falsely claimed that consumers could obtain the Afree@ emachines computer at no cost after rebates. In fact, in order to obtain the computer at no cost, consumers were required to subscribe to Prodigy Internet Service for three years at an additional cost of \$19.95 per month or a full payment of \$718.20. The complaint also alleges that in representing that consumers could obtain the Afree@ emachines computer at no cost after rebates respondent failed to disclose or failed to disclose adequately that: (a) consumers were required to subscribe to Prodigy Internet service for three years at an additional cost of \$19.95 per month or a total cost of \$718.20; (b) consumers who cancel the Internet service within three years must repay the entire \$400 rebate and pay a \$50 cancellation fee; and (c) Prodigy does not provide local access telephone numbers for its Internet service in all areas, and therefore, that many consumers must either pay long distance telephone charges or surcharges of \$6.00 per hour to access its Internet service. The complaint alleges that the failure to disclose these material facts is a deceptive practice.

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 making any misrepresentations as to the price or cost to consumers of any computer, computer-related product, or Internet access service.

Analysis to Aid Public Comment

Part II of the proposed order prohibits respondent from making any representation about the price or cost to consumers of any computer, computer-related product, or Internet access service, when that price or cost, or any rebate, is conditioned upon the purchase of another product or service, unless respondent discloses clearly and conspicuously, and in close proximity to the price, cost or rebate representation that consumers must purchase the additional product or service in order to obtain the advertised price or rebate. In addition, Part II requires respondent to disclose the cost of the other product or service that must be purchased. Furthermore, if the advertised product or service is sold together with a service, respondent is also required to disclose the length of time that consumers are required to purchase that service. Part II also contains a proviso that permits respondent to use the terms Arebate@ or Adiscount@ without making the additional cost disclosures, as long as respondent does not describe or characterize the rebate or discount in any way.

Part III of the proposed order prohibits the respondent from making any representation about the price or cost of any Internet access service it offers for sale, unless it discloses certain material facts. If consumers have to pay additional fees, charges, rebate repayments, or other costs to cancel the Internet access service, the amounts of such costs must be disclosed. If consumers may have to pay long distance telephone charges, hourly surcharges, or other costs in excess of local telephone fees to access the Internet service, this fact must be disclosed, along with a means for consumers to ascertain whether or not they would have to incur such costs and the amounts of any such costs. These disclosures must be clear and conspicuous.

Part IV of the proposed order contains a document retention requirement, the purpose of which is to ensure compliance with the proposed order. It requires that respondent maintain copies of ads and promotional material that contain representations covered by the proposed order, and materials that were relied upon by respondent in disseminating the representations.

Analysis to Aid Public Comment

Part V of the proposed order requires respondent to distribute copies of the order to various officers, agents and employees of respondent.

Part VI of the proposed order requires respondent to notify the Commission of any changes in corporate structure that might affect compliance with the order.

Part VII of the proposed order requires respondent to file with the Commission one or more reports detailing compliance with the order.

Part VIII 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

SMARTSCIENCE LABORATORIES, INC., ET AL.

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

Docket C-3980; File No. 9923274

Complaint, November 2, 2000--Decision, November 2, 2000

This consent order addresses SmartScience's representations for JointFlex. The complaint alleges that Respondent advertised that JointFlex eliminated significant pain due to disabling joint conditions, crushed vertebrae, arthritis, herniated disk, and other conditions and that JointFlex provided more pain relief than other over-the-counter pain creams. The complaint also alleges that Respondents ads represented that the glucosamine sulfate and chondroitin sulfate in JointFlex contribute to pain relief when applied topically, but that respondents do not possess competent and reliable evidence that the glucosamine sulfate and chondroitin sulfate in JointFlex, a topically applied cream, penetrates the skin sufficiently to induce a pharmacological effect. The consent order requires SmartScience to have competent and reliable scientific substantiation for any future claims about the comparative efficacy of JointFlex or any other drug or supplement or any ingredient therein for relieving reducing or eliminating pain, or providing health benefits. In addition, the consent order prohibits the respondent from misrepresenting the existence, contents, validity, results, conclusions, or interpretations of any test or study and that the experience of any testimonialist or endorser is typical unless this conclusion is supported by competent and reliable scientific evidence. The order provides a safe harbor not prohibiting representations that permitted by a standard promulgated by the Food and Drug Administration for labeling or in a drug approval.

Participants

For the Commission: *Janet M. Evans, C. Lee Peeler, and BE.*

For the Respondents: *Steven Weitzman, SmartScience Laboratories, Inc. and Gilbert Weil, Weil, Guttman & Malkin L.L.P.*

Complaint

COMPLAINT

The Federal Trade Commission, having reason to believe that SmartScience Laboratories, Inc., a corporation, and Gene C. Weitz, 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 SmartScience Laboratories, Inc. (ASmartScience@) is a Florida corporation with its principal office or place of business at 2327 Destiny Way, Odessa, Florida 33556. SmartScience was formerly known as Eden Laboratories, Inc.
2. Respondent Gene Weitz 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 SmartScience.
3. Respondents have manufactured, advertised, labeled, offered for sale, sold, and distributed products to the public, including JointFlex Pain Relieving Cream (AJointFlex@). JointFlex is a "drug" within the meaning of Sections 12 and 15 of the Federal Trade Commission Act. According to the JointFlex label, camphor (3.1%) is the product's active ingredient. The product also contains chondroitin sulfate and glucosamine sulfate which the label identifies as inactive ingredients.
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 for JointFlex, including but not necessarily limited to the attached Exhibits A through E. These advertisements contain the following statements and depictions:

- A. **A>After two crushed vertebrae followed by painful arthritis, I never thought I=d get rid of the pain, until I used *JointFlex*. The results were amazing!=** [Picture of smiling consumer].

Men and women of all ages are amazed at the relief they are experiencing from a revolutionary new pain relief cream called *JointFlex*. . . . Not only are they getting rid of nagging pain, they=re enjoying the activities they love so much. According to a recent survey, a staggering **95 %** said, ***JointFlex*** helped reduce their pain, often where other pain relief products failed.@

(Exhibit A--Newspaper ad run in USA Today, Dallas Morning News, Washington Post and others)

- B. **AIIs Pain Spoiling Your Fun in Life?
Do What These People Did!**

. . . .

Men and women of all ages are amazed at the relief they are experiencing from a revolutionary new pain relief cream called *JointFlex*. . . . ***

Nutrient Enriched with Glucosamine & Chondroitin Sulfate

. . . .

Why put up with pain when these people got rid of theirs so easily?

Theresa Carmen, an insurance broker swears by *JointFlex*. I used crutches because of a herniated disk in my back. After using *JointFlex*, I am now able to walk without crutches! I was really, REALLY surprised when I got relief in 5 minutes. It=s *amazing*@.

Complaint

Tried Pain Relief Creams With Little Results?

Don Huffer, a man from Florida, said: None of the other name brand products I tried helped, only *JointFlex* worked. An 80-pound header fell on Don's head and crushed two vertebrae. Soon afterwards, very painful arthritis set in. This is what he did. I got two steroid injections that cost \$1,000 each at the hospital. That helped the pain some but I didn't want more injections because of the possible side effects. Then I tried *JointFlex*. To my utter amazement, the pain stopped! It was like a light went on in my life![@]

. . . .

New technology makes the ingredients more effective in relieving pain!

What makes *JointFlex* different from other pain relief creams? No other pain relieving cream utilizes the fast penetrating, patent pending **FUSOME DELIVERY SYSTEM**, and also contains the much publicized, all natural ingredients, **GLUCOSAMINE & CHONDROITIN SULFATE**.

A Revolutionary New Product to help Stop Pain

JointFlex combines the nutrients, glucosamine and chondroitin sulfate, with its patent pending, Fusome Delivery System and makes the combination into a non-greasy cream that can be applied directly to painful areas. The results are astounding!@

* * * *

Which symptoms do you want to eliminate?

- X Arthritis Pain
- X Simple Backache
- X Muscle Sprains
- X Tendonitis
- X Neck Pain

Complaint

X Shoulder Pain
X Knee and Leg Pain
X Muscle Cramps
X Muscle Strains
X Bruises and more

(Exhibit B--Newspaper ad run in USA Today, New York Post, Los Angeles Times, Chicago Tribune, Washington Post, and others)

C. Effective at Reducing Pain for People of all Ages!

Sixteen year old Melissa Cirello couldn't walk because she injured her back cheer leading. After only a few applications of *JointFlex* she said: AThe pain went away completely. I could start cheer leading again!@

....

Do Your Favorite Activity Without Pain!

Catherine Lambert played 18 holes of golf every week until her knees hurt so badly she had to stop.

AI started using JointFlex and the swelling went down. I felt relief. Soon I was back to playing two rounds of golf a week. My friends said, AWhat happened to you? Did you have surgery?[@] I told them no. I started using JointFlex and now I have no pain on most days![@]

(Exhibit C--Internet ad on www.jointflex.com)

F. ahhh!

...More Pain Relief!

GUARANTEED!

Nutrient Enriched with Glucosamine & Chondroitin Sulfate

....

What makes **JointFlex** different from other pain relief creams? No other pain relieving cream utilizes the fast penetrating, patent pending Fusome Delivery System and also contains the all natural nutrients, **glucosamine and**

Complaint

chondroitin sulfate. This new technology makes the ingredients more effective in relieving pain.
(Exhibit D--Magazine ad newspaper ad carried by Newsweek, Prevention)

G. AWhy Continue to Live with Pain?

JointFlex

Pain Relieving Cream . . .

utilizes breakthrough delivery system technology to provide more pain relief than competitive brands!

Guaranteed!@

(Exhibit E--Brochure distributed with product)

6. Through the statements and depictions described in Paragraph 5, respondents have represented, expressly or by implication, that:

- a. JointFlex eliminates significant pain due to disabling joint conditions, crushed vertebrae, arthritis, herniated disk, and other conditions;
- b. JointFlex provides more pain relief than other over-the-counter pain creams; and
- c. Testimonials from consumers appearing in the advertisements for JointFlex represent the typical or ordinary experiences of members of the public who use the product.

7. Through the statements and depictions 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.

Complaint

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.

9. Through the statements and depictions described in Paragraph 5, respondents have represented, expressly or by implication, that the glucosamine sulfate and chondroitin sulfate in JointFlex contribute to pain relief when applied topically.

10. Through the statements and depictions 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.

11. 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. Among other reasons, respondents do not possess competent and reliable evidence that the glucosamine sulfate and chondroitin sulfate in JointFlex, a topically applied cream, penetrate the skin sufficiently to induce a pharmacological effect. Therefore, the representation set forth in Paragraph 10 was, and is, false or misleading.

12. Through the statements and depictions described in Paragraph 5, respondents have represented, expressly or by implication, that:

- a. A competent and reliable survey of JointFlex users shows that ninety-five percent experienced reduction or elimination of pain due to use of JointFlex;
- b. Ninety-five percent of JointFlex users who responded to a survey said that JointFlex helped reduce their pain; and
- c. As characterized in JointFlex advertising, certain testimonials, including but not limited to those of Melissa

Complaint

Cirello and Catherine Lambert, represent the actual experience of those individuals.

13. In truth and in fact:

- a. No competent and reliable survey of JointFlex users shows that ninety-five percent experienced reduction or elimination of pain due to use of JointFlex. The survey respondents relied on was not competent and reliable, because, among other reasons, responding consumers were not randomly selected. In addition, there was no assurance that any pain reduction the responding consumers reported was due to use of the product.
- b. It is not the case that ninety-five percent of JointFlex users who responded to a survey said that JointFlex helped reduce their pain. The ninety-five percent figure reflects responses to the question, Ado you feel that the product helped your symptoms,@ not a question about pain relief, and the surveys also inquired into relief from stiffness, swelling, redness, and protuberances.
- c. As characterized in JointFlex advertising, certain testimonials, including but not limited to those of Melissa Cirello and Catherine Lambert, do not represent the actual experience of those individuals, because, among other reasons, Ms. Cirello=s injury did not stop her from walking and Ms. Lambert=s arthritis did not stop her from playing golf.

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, and the making of false advertisements, in or affecting commerce in

Complaint Exhibits

violation of Sections 5(a) and 12 of the Federal Trade Commission Act.

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

By the Commission.

Complaint Exhibits

Complaint Exhibit A

"After two crushed vertebrae followed by painful arthritis, I never thought I'd get rid of the pain, until I used *JointFlex*. The results were amazing!"



Men and women of all ages are amazed at the relief they are experiencing from a revolutionary new pain relief cream called *JointFlex*, an FDA compliant and registered nonprescription drug. Not only are they getting rid of nagging pain, they're enjoying the activities they love so much. According to a recent survey, a staggering 95% said, *JointFlex* helped reduce their pain, often where other pain relief products failed. *JointFlex* is different from other pain relief creams, in that it utilizes the fast penetrating, patent pending, *FUSOM DELIVERY SYSTEM*, and also contains the much publicized, all natural nutrients, *GLUCOSAMINE* and *CHONDROITIN SULFATE*. This technology makes the ingredients more effective in relieving pain. Apply *JointFlex* to the painful areas and its fast penetrating formula goes right to work to relieve the pain. There is no greasy feel, or medication smell. Now you can try *JointFlex* at no risk to you. Simply order by phone. As soon as it arrives, try it and see if your pain doesn't reduce or disappear. If you're not amazed with the results, just send the remainder back to us and we will instantly mail you a full product refund... no questions asked. Call **TOLL FREE** to order *JointFlex*.



1-800-340-5603 Extension 9950

One tube is **Only \$19.95**. A small price to pay for more pain relief. You can use Visa, Master Card, Discover or American Express.

Order now, get 2nd tube at 1/2 price for only \$9.95

Remember, you can get your money back with *JointFlex*... **IT'S GUARANTEED**, but you can't get back the precious time you lose to pain. Not Available In Stores

Complaint Exhibits

JointFlex Newspaper Ad

<http://www.jointflex.com/newspaper.htm>

Complaint Exhibit C

www.jointflex.comIs Pain Spoiling Your Fun in Life?
Do What These People Did!

using JointFlex, I am now able to walk without crutches! I was really, REALLY, surprised when I got relief in 5 minutes. It's amazing!"

Gene Wirtz, the head scientist at Eden Laboratories, says his goal when developing JointFlex Pain Relieving Formula was to make the ingredients more effective in relieving pain.

A Revolutionary New Product to Help Stop Pain.

Gene has combined the nutrients, glucosamine and chondroitin sulfate, with his patent pending Fusome Delivery System.

Why put up with pain when these people got rid of theirs so easily?

People are amazed at the relief they are experiencing from a revolutionary new pain relief cream called JointFlex. Not only are they getting rid of nagging pain, they are once again enjoying the activities they love so much.

According to a recent survey, a staggering 95 percent of those surveyed said JointFlex helped reduce or eliminate their pain - often where other pain relief products failed.

Don Huffer, a man from Florida said: "None of the other name-brand products I tried helped. Only JointFlex worked."

An 80-pound leader fell on Don's head and crushed two vertebrae. Soon afterwards very painful arthritis set in. This is what he did:

"I got two steroid injections that cost \$1,000 each at the hospital. That helped the pain some but I didn't want more injections because of the possible side effects. Then I tried JointFlex. To my utter amazement the pain stopped! It was like a light went on in my life!"

Tried Pain Relief Creams With Little Results?

What makes JointFlex different from other pain relief creams?

No other pain-relieving cream utilizes the fast-penetrating, patent-pending Fusome Delivery System, and also contains the much publicized, all natural nutrients, glucosamine and chondroitin sulfate. Just how effective is this new technology in relieving pain?

Theresa Carmen, an insurance broker, swears by JointFlex. "I used crutches because of a herniated disk in my back. After

*Arthritis
*Pain
*Simple
*Backache
*Muscle Sprains
*Tendonitis



*Neck Pain
*Shoulder Pain
*Elbow Pain
*Wrist Pain
*Hand Pain
*Back Pain
*Hip Pain
*Knee Pain
*Foot Pain

and made the combination into a non-greasy cream that can be applied directly to painful areas. The results are astounding!

Effective at Reducing Pain for People of all Ages!

Sixteen year old Melissa Cirello couldn't walk because she injured her back cheer leading. After only a few applications of JointFlex she said: "The Pain went away completely. I could start cheer leading again!"

Just apply JointFlex to the painful areas. Its fast-penetrating formula goes right to work to relieve the pain. There is no greasy feel, or pungent medication smell.

Larry Viens, a Real Estate salesman, said: "When I put on JointFlex I can go into restaurants and other places. People don't know I'm wearing pain cream like they might with some other products. There is no medication smell."

If you tried other pain relieving products without results, then you should try JointFlex. With its money back guarantee, you have nothing to lose but the pain!

Do your Favorite Activity Without Pain!

Catherine Lambert played 18 holes of golf every week until her knees hurt so badly she had to stop.

"I started using JointFlex and the swelling went down. I felt relief. Soon I was back to playing two rounds of golf a week. My friends said, 'What happened to you? Did you have surgery?' I told them no. I started using JointFlex and I now have no pain on most days!"

Your Pain Will Reduce - or Your Money Back!

Now you can try JointFlex in the privacy of your home at no risk to you. Simply order by phone. As soon as it arrives, try it out and see if your pain doesn't reduce or disappear. If you're not amazed with the results, just send the remainder back to Eden Laboratories and we will instantly mail you a full product refund.

Call, 1-888-664-3336 to order JointFlex. One bottle is only \$19.95. A small price to pay for pain relief. You can use Visa or Mastercard, Discover or AmEx.

Remember, you can get your money back with JointFlex but you can't get back the precious time you lost to pain.

Complaint Exhibits

Complaint Exhibit D

ahhh!
...More Pain Relief!
GUARANTEED!

Don't Let Pain Spoil Your Fun In Life.

Nutrient Enriched with Glucosamine & Chondroitin Sulfate

Men and women of all ages, are amazed at the relief they are experiencing from a revolutionary new pain relief cream called **JointFlex**, an FDA compliant and registered nonprescription drug. Now, you too can get rid of nagging pain and enjoy the activities you love so much.

According to a recent survey, a staggering 95% said **JointFlex** helped reduce or eliminate their pain, often where other pain relieving products failed!

What makes **JointFlex** different from other pain relief creams? No other pain relieving cream utilizes the fast penetrating, patent pending **Fusome Delivery System** and also contains the all natural nutrients, **glucosamine and chondroitin sulfate**. This new technology makes the ingredients more effective in relieving pain.

JointFlex
Pain Relieving Cream
Nutrient Enriched with Glucosamine and Chondroitin Sulfate

Your pain will reduce... or your MONEY BACK!
No Questions Asked.
Get Rid Of Your Pain... NOW!
1-800-340-5603
Ext. 1008

NOT SOLD IN STORES
Use VISA, MasterCard, Discover or American Express. You can try **JointFlex** in the privacy of your own home, at no risk to you. **Order by phone NOW.** As soon as it arrives, try it and see if your pain doesn't reduce or disappear. If you're not amazed with the results, just return the remainder back to us for a full refund, no questions asked. One large four ounce tube is **Only \$19.95**, plus shipping and handling. A small price to pay for more pain relief.

FDA Drug Registration No. - NDC 64479-110-04
JointFlex and Fusome are trademarks of Eden Laboratories, Inc.

Which symptoms do you want to eliminate?

- Arthritis Pain
- Simple Backache
- Muscle Sprains
- Tendonitis
- Neck Pain
- Shoulder Pain
- Knee and Leg Pain
- Muscle Cramps
- Muscle Strains
- Bruises and more

Eden
LABORATORIES, INC.

Complaint Exhibits

**Eden
Laboratories,
Inc.**

Eden Laboratories, Inc. was formed as the result of tireless research by dedicated individuals on dermal delivery (to the skin) technology and ways to improve pharmaceutical ingredients' effectiveness.

Eden Laboratories products utilize revolutionary dermal delivery system technology to deliver the FDA regulated ingredients directly to the desired areas in a highly effective form to achieve unparalleled results that exceed the results achieved by competitive products, **GUARANTEED!**

Eden Laboratories, Inc. currently offers JointFlex™ Pain Relieving Cream. By utilizing the FUSOME™ technology, JointFlex™ Pain Relieving Cream provides more pain relief compared to competitive brands. It also contains the natural nutrients Glucosamine and Chondroitin Sulfate.

Look for many new products in the future that also incorporate the revolutionary FUSOME™ Delivery System. These products will contain the safest and most effective FDA regulated active ingredient to achieve superior results for each product's intended pharmaceutical end use.

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Eden Laboratories, Inc. is committed to improving the quality of your life by its unique integration of technology and nature.

JointFlex™ Pain Relieving Cream utilizes patent-pending delivery system technology to give you a product that offers unparalleled performance,

GUARANTEED!**Eden Laboratories'
Guarantee**

After using JointFlex™ Pain Relieving Cream daily as directed for a minimum of two weeks, if you don't find that it is the most effective over-the-counter pain relieving cream you have ever used, simply return the unused product for a full refund, no questions asked.



**Eden
LABORATORIES, INC.**
Integrating Technology & Nature

Eden Laboratories, Inc.
2327 Destiny Way
Odessa, FL 33556
(727) 375-5911 • FAX (727) 375-9062
email: sales@jointflex.com
www.jointflex.com

**Why Continue
to Live with
Pain?**



utilizes
breakthrough delivery
system technology to
provide more pain
relief than
competitive brands!
Guaranteed!

Complaint Exhibit E

Complaint Exhibits

FUSOME™ Deep Release System

JointFlex™ Pain Relieving Cream's advantage lies in the cutting edge dermal (to the skin) delivery system. Eden's unique, patent-pending FUSOME™ delivery system effectively delivers the FDA compliant and registered pain relieving formula directly to your problem areas.

The FUSOME™ Deep Release System is a novel combination of the latest advancements in emulsification and skin penetration technology. Ingredients are quickly and safely delivered to the skin enhancing their inherent benefits.

The FUSOME™ Deep Release System provides fast, deep penetration enabling long lasting relief from minor arthritis pain, simple backache, bursitis, tendonitis, muscle strains and sprains, bruises and cramps.

Only **JointFlex™ Pain Relieving Cream** utilizes this revolutionary **break-through FUSOME™** delivery system technology.

JointFlex™ Pain Relieving Cream

Provides temporary relief from minor arthritis pain, simple backache, bursitis, tendonitis, muscle strains and sprains, bruises and cramps.

- FDA Compliant and Registered Non-Prescription Drug
- Utilizes Patent-Pending FUSOME™ Delivery System Technology
- Fast Absorbing, Non-Greasy
- Contains Natural Essential Nutrients - Glucosamine and Chondroitin Sulfate
- Non-Stinging, Non-Burning
- Mild Camphor Scent Dissipates Quickly
- GUARANTEED Performance or your money back



Directions: Cleanse, rinse and dry skin prior to application. Apply generously to painful muscles and joints and gently massage until the JointFlex™ Pain Relieving Cream disappears. Repeat as necessary. For optimum benefit, use twice daily for a minimum of two weeks. See label for additional information.

000004 Testimonials

"I tried other brand-name products to gain relief. *Nothing worked until I tried JointFlex™.* I went to a hospital and got two steroid injections that cost \$1,000 each. That helped the pain some but I didn't want more injections because of the possible side effects. Then I tried JointFlex™. To my utter amazement, the pain stopped! Before using it, I could hardly turn my head. Now I have almost 100% range of motion. It is like somebody switched a new light on in my life!"

- Don H.

"Before using JointFlex I had a hard time getting in and out of my car. I couldn't lift my foot past my ankle because of the pain. *Nothing I tried worked.* I applied JointFlex™ and couldn't believe it when the pain reduced. Now I can lift my foot to my knee...no pain. I can get in and out of my car...no pain. Now I can walk, ride my bike and finally get a good night's rest because of the reduced pain."

- Jim D.

"After applications of JointFlex™ the pain went away. Not only was I able to walk again, I could participate in my cheer leading competition again without any pain."

- Melissa C.

"When I put on JointFlex™ I can go into restaurants and other places. People don't know I'm wearing pain cream - like they might with some other products - because there's no medication smell."

- Larry V.

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 violations of the Federal Trade Commission Act; and

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

The Commission having thereafter considered the matter and having determined that it had reason to believe that the respondents 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 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:

1. Respondent SmartScience Laboratories, Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the State of Florida. The mailing address and principal place of business of SmartScience Laboratories, Inc. is 2327 Destiny Way, Odessa, Florida 33556.

Decision and Order

2. Respondent Gene Weitz is an officer or director of the corporate respondent. Individually or in concert with others, he formulates, directs, or controls the policies, acts, or practices of the corporate respondent, including the acts or practices alleged in the complaint. His principal office or place of business is the same as that of SmartScience Laboratories, Inc.

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

ORDER

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 SmartScience Laboratories, Inc., a corporation, its successors and assigns and their officers; Gene C. Weitz, 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.

Decision and Order

I.

IT IS ORDERED that respondents, directly or through any corporation, subsidiary, division, or other device, in connection with the manufacturing, labeling, advertising, promotion, offering for sale, sale, or distribution of JointFlex Pain Relieving Cream or any dietary supplement or drug, as "drug" is 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, about:

A. The absolute or comparative efficacy of the product in reducing, relieving, or eliminating pain from any source;

B. The health benefits, performance, safety or efficacy of any such product; or

C. The ability of glucosamine sulfate, chondroitin sulfate, or any other ingredient to relieve pain or provide any other health benefit when applied topically;

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

II.

IT IS FURTHER ORDERED that respondents, directly or through any corporation, subsidiary, division, or other device, in connection with the manufacturing, labeling, advertising, promotion, offering for sale, sale, or distribution of any product 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, survey, or research.

Decision and Order

III.

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

A. Shall not misrepresent, in any manner, expressly or by implication, that any user testimonial or endorsement of the product reflects the actual and current opinions, findings, beliefs, or experiences of the user; and

B. Shall not represent, in any manner, expressly or by implication, that the experience represented by any user testimonial or endorsement of the product represents the typical or ordinary experience of members of the public who use the product, unless:

- i. At the time it is made, respondents possess and rely upon competent and reliable scientific evidence that substantiates the representation; or
- ii. Respondents disclose, clearly and conspicuously, and 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, 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).

Decision and Order

IV.

Nothing in this order shall prohibit respondents 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.

V.

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

VI.

IT IS FURTHER ORDERED that respondents SmartScience Laboratories, Inc., its successors and assigns, and respondent Gene Weitz 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.

Decision and Order

VII.

IT IS FURTHER ORDERED that respondents SmartScience Laboratories, Inc., and its successors and assigns, and respondent Gene Weitz 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.

VIII.

IT IS FURTHER ORDERED that respondent SmartScience Laboratories, Inc. and its successors and assigns shall notify the Commission at least thirty (30) days prior to any change in the corporation(s) that may affect compliance obligations arising under this order, including but not limited to a dissolution, assignment, sale, merger, or other action that would result in the emergence of a successor corporation; the creation or dissolution of a subsidiary, parent, or affiliate that engages in any acts or practices subject to this order; the proposed filing of a bankruptcy petition; or a change in the corporate name or address. *Provided, however,* that, with respect to any proposed change in the corporation about which respondent learns less than thirty (30) days prior to the date such action is to take place, respondent shall notify the Commission as soon as is practicable after obtaining such knowledge. All notices required by this Part shall be sent by certified mail to the Associate Director, Division of Enforcement, Bureau of Consumer Protection, Federal Trade Commission, 600 Pennsylvania Avenue, N.W., Washington, D.C. 20580, Attn: SmartScience Laboratories, Inc.

Decision and Order

IX.

IT IS FURTHER ORDERED that respondent Gene Weitz, 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, Attn: SmartScience Laboratories, Inc.

X.

IT IS FURTHER ORDERED that respondent SmartScience Laboratories, Inc., and its successors and assigns, and respondent Gene Weitz 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 November 2, 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 containing a consent order from SmartScience Laboratories, Inc. and its president, Gene Weitz, (together, ASSL@) settling charges that they engaged in a large-scale deceptive advertising campaign for JointFlex, a skin cream.

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 JointFlex. Respondents sold this cream through advertisements in national newspapers and magazines (including USA Today, the

Analysis to Aid Public Comment

Washington Post, and Newsweek), more than 200 other major and minor local newspapers, and two websites that are not currently operative. According to the FTC complaint, SSL advertisements represented that JointFlex eliminates significant pain due to disabling joint conditions, crushed vertebrae, arthritis, herniated disk, and other conditions; that JointFlex provides more pain relief than other over-the-counter pain creams; and that testimonials from consumers appearing in the advertisements for JointFlex represent the typical or ordinary experiences of members of the public who use the product. According to the complaint, SSL lacked a reasonable basis to substantiate these claims. The complaint also alleges that respondents ads represented that the glucosamine sulfate and chondroitin sulfate in JointFlex contribute to pain relief when applied topically, but that respondents do not possess competent and reliable evidence that the glucosamine sulfate and chondroitin sulfate in JointFlex, a topically applied cream, penetrates the skin sufficiently to induce a pharmacological effect.

The complaint further alleges that SSL made several false advertising claims. It alleges that the ads represented that a competent and reliable survey of JointFlex users shows that ninety-five percent experienced reduction or elimination of pain due to use of JointFlex. This claim is alleged to be false because the survey respondents relied on was not competent and reliable, because there is no assurance that any pain reduction the responding consumers reported was due to use of the product, and because the ninety-five percent figure reflects responses to the question, *Do you feel that the product helped your symptoms,* not a question about pain relief, and the surveys also inquired into relief from stiffness, swelling, redness, and protuberances. The complaint alleges that SSL falsely characterized the results of certain testimonials, by overstating the nature of their injuries at the time they used the JointFlex product.

The proposed consent order contains provisions designed to prevent respondents from engaging in similar acts and practices in the future. Part I of the order would require, with regard to JointFlex or any drug or supplement, competent and reliable

Analysis to Aid Public Comment

scientific substantiation for future claims about the absolute or comparative efficacy of the product in reducing, relieving, or eliminating pain from any source; the health benefits, performance, safety or efficacy of any such product; or the ability of glucosamine sulfate, chondroitin sulfate, or any other ingredient to relieve pain or provide any other health benefit when applied topically.

Part II prohibits respondents, in connection with any product, from misrepresenting the existence, contents, validity, results, conclusions, or interpretations of any test, study, survey, or research.

Part III provides that, in connection with any product, respondents shall not misrepresent the experience of any testimonialist or endorser. It further provides that respondents shall not represent that the experience represented by any user testimonial or endorsement of the product represents the typical or ordinary experience of members of the public who use the product, unless the typicality claim is substantiated by competent and reliable scientific evidence; or respondents disclose, clearly and conspicuously, and 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, that is, that consumers should not expect to experience similar results.

Part IV of the order is a safe harbor, providing that the order does not prohibit respondents 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. Part V is a safe harbor, providing that the order does not prohibit respondents from making any representation for any product that is specifically permitted in labeling for such product by regulations promulgated

Analysis to Aid Public Comment

by the Food and Drug Administration pursuant to the Nutrition Labeling and Education Act of 1990.

Parts VI-XI are standard record keeping, order distribution, reporting, compliance, and sunseting provisions.

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

MANHEIM AUCTIONS, 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-3982; File No. 0010098

Complaint, November 13, 2000--Decision, November 13, 2000

This consent order addresses the \$1,000,000,000.00 acquisition by Manheim Auctions, Inc., owned by Cox Entertainment, Inc., of ADT Automotive Holdings, Inc., owned by Tyco International, Ltd. The complaint alleges that the proposed acquisition would lessen competition, increase concentration, and create a monopoly in the provision of wholesale motor vehicle auction services in Kansas City, Missouri, the Colorado Front Range, which includes Denver and Colorado Springs, Colorado, Atlanta, Georgia, San Francisco, California, Seattle, Washington, and the I-4 corridor of Florida, which includes Tampa, Orlando, and Daytona Beach, Florida. The order requires Respondents to divest eight of the acquire ADT auctions to ADESA and to maintain the auctions as they would in the ordinary course of business until the time of the divestiture.

Participants

For the Commission: *Joe Lipinsky, John B. Kirkwood, K. Shane Woods, Steven Balster, Virginia Davidson, Robert J. Schroeder, Daniel P. Ducore, Ezra Friedman, and Jeffrey Fischer.*

For the Respondents: *Timothy J. O'Rourke and John H. Pomeroy, Dow, Lohnes & Albertson, and Steve Newborn, Clifford Chance Rogers & Wells.*

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 (ACommission@), having reason to believe that Respondents Manheim Auctions,

Complaint

Inc. (AManheim@), Cox Enterprises, Inc. (ACox@), ADT Automotive Holdings, Inc. (AADT@) and Tyco International, Ltd. (ATyco@), have entered into an agreement whereby Manheim would acquire all of the voting securities of ADT 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 (AFTC 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:

Manheim and Cox

1. Manheim 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 1400 Lake Hearn Drive, N.E., Atlanta, Georgia 30319.
2. Manheim is a wholly owned subsidiary of Cox, a corporation with its office and principal place of business located at 1400 Lake Hearn Drive, N.E., Atlanta, Georgia 30319.
3. Manheim is the largest wholesale motor vehicle auction company in the United States. It operates 65 auctions in the United States and auctioned more than 6.5 million motor vehicles in 1998.
4. At all times relevant herein, Respondents Manheim and Cox have been and are now engaged in commerce as Acommerce@ 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 Acommerce@ is defined in Section 4 of the Federal Trade Commission Act, as amended, 15 U.S.C. ' 44.

Complaint

ADT and Tyco

5. ADT 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 435 Metroplex Drive, Nashville, Tennessee 37211.

6. ADT is a wholly owned subsidiary of Tyco, a corporation organized, existing and doing business under and by virtue of the laws of Bermuda with its office and principal place of business located at The Zurich Center, Second Floor, 90 Pitts Bay Road, Pembroke HM08, Bermuda. Tyco=s principal operating subsidiary in the United States is located at One Tyco Park, Exeter, New Hampshire 03833.

7. ADT is the third largest wholesale motor vehicle auction company in the United States with 28 auctions across the country. In 1998, it auctioned 2.1 million vehicles.

8. At all times relevant herein, Respondents ADT and Tyco have been and are now engaged in commerce as Acommerce@ 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 Acommerce@ is defined in Section 4 of the Federal Trade Commission Act, as amended, 15 U.S.C. ' 44.

The Proposed Acquisition

9. Pursuant to an agreement among Manheim and ADT, dated January 13, 2000, Manheim agreed to purchase all voting securities of ADT for a purchase price of approximately \$1 billion (the AADT Acquisition@).

Complaint

Count One B Kansas City

10. One relevant line of commerce is the provision of wholesale motor vehicle auction services by major motor vehicle auctioneers (AWMVA services®). These services include marshaling motor vehicles before auctions (picking up vehicles and transporting them to the auction), preparing condition reports, reconditioning the motor vehicles, promoting and marketing auctions to potential buyers, auctioning motor vehicles, and reporting the results of those auctions. Major motor vehicle auctions use sophisticated technology to serve large institutional sellers that have thousands of vehicles to sell.

11. One relevant section of the country is the greater metropolitan area of Kansas City, Missouri. This section consists of the following Missouri counties: Cass, Clay, Clinton, Jackson, Lafayette, Platte, and Ray. This section consists of the following Kansas counties: Johnson, Leavenworth, Miami, and Wyandotte.

12. Respondent Manheim owns and operates the Kansas City Auto Auction in Kansas City, Missouri.

13. Respondent ADT owns and operates the Metro Auto Auction of Kansas City Inc. in Lees Summit, Missouri.

14. Respondents Manheim and ADT are direct and substantial competitors in the business of providing WMVA services in the relevant section of the country set out in Complaint Paragraph 11.

15. The business of providing WMVA services in the relevant section of the country set out in Complaint Paragraph 11 is highly concentrated. The ADT Acquisition would significantly increase concentration in this relevant section of the country, resulting in a Herfindahl-Hirschman Index (commonly referred to as HHI®) of 10,000. That is, the ADT Acquisition would result in a monopoly in the relevant product market and section of the country set out in Complaint Paragraphs 10 and 11.

Complaint

16. The effect of the proposed ADT Acquisition, if consummated, may be substantially to lessen competition or to tend to create a monopoly in the provision of WMVA services 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 ADT Acquisition would eliminate actual and potential competition between Manheim and ADT to provide WMVA services in this relevant section of the country; and

b. Manheim would be likely to exact anticompetitive price increases from buyers of WMVA services in this relevant section of the country.

17. Entry would not be timely, likely, or sufficient to prevent anticompetitive effects in the relevant section of the country set out in Complaint Paragraph 11.

Count Two B Colorado Front Range

18. One relevant line of commerce is the provision of WMVA services.

19. One relevant section of the country includes the Colorado Front Range, which includes the greater metropolitan areas of Denver, Colorado and Colorado Springs, Colorado. This section consists of the following counties: Adams, Arapahoe, Boulder, Denver, Douglas, El Paso, Jefferson, and Weld.

20. Respondent Manheim owns and operates the Denver Auto Auction in Denver, Colorado and the Colorado Auto Auction in Commerce City, Colorado.

Complaint

21. Respondent ADT owns and operates the Colorado Springs Auto Auction Inc., in Fountain, Colorado.

22. Respondents Manheim and ADT are direct and substantial competitors in the provision of WMVA services in the relevant section of the country set out in Complaint Paragraph 19.

23. The business of providing WMVA services in the relevant section of the country set out in Complaint Paragraph 19 is highly concentrated. The ADT Acquisition would significantly increase concentration in this relevant section of the country, resulting in an HHI of 10,000. That is, the ADT Acquisition would result in a monopoly in the relevant product market and section of the country set out in Complaint Paragraphs 18 and 19.

24. The effect of the proposed ADT Acquisition, if consummated, may be substantially to lessen competition or to tend to create a monopoly in the provision of WMVA services in the relevant section of the country set out in Complaint Paragraph 19, 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 ADT Acquisition would eliminate actual and potential competition between Manheim and ADT to provide WMVA services in this relevant section of the country; and

b. Manheim would be likely to exact anticompetitive price increases from buyers of WMVA services in this relevant section of the country.

25. Entry would not be timely, likely, or sufficient to prevent anticompetitive effects in the relevant section of the country set out in Complaint Paragraph 19.

Count Three B Atlanta, Georgia

26. One relevant line of commerce is the provision of WMVA services.

Complaint

Complaint

27. One relevant section of the country is the greater metropolitan area of Atlanta, Georgia. This section consists of the following counties: Barrow, Bartow, Carroll, Cherokee, Clayton, Cobb, Coweta, DeKalb, Douglas, Fayette, Forsyth, Fulton, Gwinnett, Henry, Newton, Paulding, Pickens, Rockdale, Spalding, and Walton.

28. Respondent Manheim owns and operates the Atlanta Auto Auction in Atlanta, Georgia, the Bishop Brothers= Auto Auction in Atlanta, Georgia and the Georgia Dealers= Auto Auction in Atlanta, Georgia.

29. Respondent ADT owns and operates the Southern States Vehicle Auction in Newnan, Georgia.

30. Respondents Manheim and ADT are direct and substantial competitors in the provision of WMVA services in the relevant section of the country set out in Complaint Paragraph 27.

31. The business of providing WMVA services in the relevant section of the country set out in Complaint Paragraph 27 is highly concentrated. The ADT Acquisition would significantly increase concentration in this relevant section of the country, resulting in an HHI of 10,000. That is, the ADT Acquisition would result in a monopoly in the relevant product market and section of the country set out in Complaint Paragraphs 26 and 27.

32. The effect of the proposed ADT Acquisition, if consummated, may be substantially to lessen competition or to tend to create a monopoly in the provision of WMVA services in the relevant section of the country set out in Complaint Paragraph 27, 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 ADT Acquisition would eliminate actual and potential competition between Manheim and ADT to provide WMVA services in this relevant section of the country; and

Complaint

b. Manheim would be likely to exact anticompetitive price increases from buyers of WMVA services in this relevant section of the country.

33. Entry would not be timely, likely, or sufficient to prevent anticompetitive effects in the relevant section of the country set out in Complaint Paragraph 27.

Count Four B San Francisco, California

34. One relevant line of commerce is the provision of WMVA services.

35. One relevant section of the country is the greater metropolitan area of San Francisco, California. This section consists of the following counties: Alameda, Contra Costa, Marin, Napa, San Francisco, San Mateo, Santa Clara, Santa Cruz, Solano and Sonoma.

36. Respondent Manheim owns and operates the Bay Cities Auto Auction in Hayward, California.

37. Respondent ADT owns and operates the Golden Gate Auto Auction in Fremont, California.

38. Respondents Manheim and ADT are direct and substantial competitors in the provision of WMVA services in the relevant section of the country set out in Complaint Paragraph 35.

39. The business of providing WMVA services in the relevant section of the country set out in Complaint Paragraph 35 is highly concentrated. The ADT Acquisition would significantly increase concentration in this relevant section of the country, resulting in an HHI of 10,000. That is, the ADT Acquisition would result in a monopoly in the relevant product market and section of the country set out in Complaint Paragraphs 34 and 35.

Complaint

40. The effect of the proposed ADT Acquisition, if consummated, may be substantially to lessen competition or to tend to create a monopoly in the provision of WMVA services in the relevant section of the country set out in Complaint Paragraph 35, 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 ADT Acquisition would eliminate actual and potential competition between Manheim and ADT to provide WMVA services in this relevant section of the country; and

b. Manheim would be likely to exact anticompetitive price increases from buyers of WMVA services in this relevant section of the country.

41. Entry would not be timely, likely, or sufficient to prevent anticompetitive effects in the relevant section of the country set out in Complaint Paragraph 35.

Count Five B Seattle, Washington

42. One relevant line of commerce is the provision of WMVA services.

43. One relevant section of the country is the greater metropolitan area of Seattle, Washington. This section consists of the following counties: Island, King, Kitsap, Pierce, and Snohomish.

44. Respondent Manheim owns and operates the South Seattle Auto Auction in Seattle, Washington.

45. Respondent ADT owns and operates the Puget Sound Auto Auction Inc., in Auburn, Washington.

Complaint

46. Respondents Manheim and ADT are direct and substantial competitors in the provision of WMVA services in the relevant section of the country set out in Complaint Paragraph 43.

47. The business of providing WMVA services in the relevant section of the country set out in Complaint Paragraph 43 is highly concentrated. The ADT Acquisition would significantly increase concentration in this relevant section of the country, resulting in an HHI of 10,000. That is, the ADT Acquisition would result in a monopoly in the relevant product market and section of the country set out in Complaint Paragraphs 42 and 43.

48. The effect of the proposed ADT Acquisition, if consummated, may be substantially to lessen competition or to tend to create a monopoly in the provision of WMVA services in the relevant section of the country set out in Complaint Paragraph 43, 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 ADT Acquisition would eliminate actual and potential competition between Manheim and ADT to provide WMVA services in this relevant section of the country; and
- b. Manheim would be likely to exact anticompetitive price increases from buyers of WMVA services in this relevant section of the country.

49. Entry would not be timely, likely, or sufficient to prevent anticompetitive effects in the relevant section of the country set out in Complaint Paragraph 43.

Count Six B I-4 Corridor of Florida

50. One relevant line of commerce is the provision of WMVA services.

Complaint

51. One relevant section of the country is the I-4 corridor of Florida, which is approximated by the route of the Interstate highway between Daytona and Tampa, and includes the greater metropolitan areas of Tampa, Orlando, and Daytona Beach. This section consists of the following counties: Flagler, Hernando, Hillsborough, Lake, Orange, Osceola, Pasco, Pinellas, Seminole, and Volusia.

52. Respondent Manheim owns and operates the Daytona Auto Dealers= Exchange in Daytona Beach, Florida, the Florida Auto Auction of Orlando in Ocoee, Florida, the Greater Tampa Bay Auto Auction in Tampa, Florida, the Imperial Auto Auction in Lakeland, Florida, the Lakeland Auto Auction in Lakeland, Florida, Manheim=s Central Florida Auto Auction in Orlando, Florida, Manheim=s Orlando Orange County Auto Auction in Orlando, Florida and the St. Pete Auto Auction in Clearwater, Florida.

53. Respondent ADT owns and operates the Bayside Auto Auction of Tampa in Tampa, Florida, the Clearwater Auto Auction in Clearwater, Florida, and the Dealers= Auto Auction of Sanford Inc., in Sanford, Florida.

54. Respondents Manheim and ADT are direct and substantial competitors in the provision of WMVA services in the relevant section of the country set out in Complaint Paragraph 51.

55. The business of providing WMVA services in the relevant section of the country set out in Complaint Paragraph 51 is highly concentrated. The ADT Acquisition would significantly increase concentration in this relevant section of the country, resulting in an HHI of 10,000. That is, the ADT Acquisition would result in a monopoly in the relevant product market and section of the country set out in Complaint Paragraphs 50 and 51.

Complaint

56. The effect of the proposed ADT Acquisition, if consummated, may be substantially to lessen competition or to tend to create a monopoly in the provision of WMVA services in the relevant section of the country set out in Complaint Paragraph 51, 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 ADT Acquisition would eliminate actual and potential competition between Manheim and ADT to provide WMVA services in this relevant section of the country; and
- b. Manheim would be likely to exact anticompetitive price increases from buyers of WMVA services in this relevant section of the country.

57. Entry would not be timely, likely, or sufficient to prevent anticompetitive effects in the relevant section of the country set out in Complaint Paragraph 51.

Count Seven B Phoenix, Arizona

58. One relevant line of commerce is the provision of WMVA services.

59. One relevant section of the country is the greater metropolitan area of Phoenix, Arizona. This section consists of the following counties: Maricopa and Pinal.

60. JM Family Enterprises, Inc. (AJMF@), is a Delaware corporation with its office and principal place of business located at 100 NW 12th Avenue, Deerfield Beach, Florida.

61. As a result of a 1996 agreement between Manheim and JMF, Manheim acquired a controlling interest in two major wholesale motor vehicle auctions B Manheim=s Greater Auto Auction and Southwest Auto Auction (the APhoenix

Complaint

Acquisition@). Manheim had previously owned the Southwest Auto Auction.

62. The business of providing WMVA services in the relevant section of the country set out in Complaint Paragraph 59 is highly concentrated. The Phoenix Acquisition has significantly increased concentration in this relevant section of the country, resulting in an HHI of 10,000. That is, a monopoly presently exists in the relevant product market and section of the country set out in Complaint Paragraphs 58 and 59.

63. The effect of the Phoenix Acquisition may have substantially lessened competition in the relevant market in the following ways, among others:

- a. by eliminating direct competition between Manheim and JMF; and
- b. by increasing the likelihood that Manheim has been unilaterally exercising and will continue to unilaterally exercise market power;

each of which increases the likelihood that the prices of WMVA services will increase and that services to customers of WMVA will decrease.

64. Entry has not been timely or sufficient to prevent anticompetitive effects in the relevant section of the country set out in Complaint Paragraph 59.

Violations Charged

65. The acquisition described in Complaint Paragraph 9, if consummated, would violate Section 7 of the Clayton Act, as amended, 15 U.S.C. ' 18, and Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. ' 45.

Decision and Order

66. The acquisition described in Complaint Paragraph 61 constitutes a violation of Section 7 of the Clayton Act, as amended, 15 U.S.C. ' 18, and Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. ' 45.

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

By the Commission.

DECISION AND ORDER

The Federal Trade Commission (ACommission@) having initiated an investigation of the acquisition by Respondent Manheim Auctions, Inc. (AManheim@), a wholly owned subsidiary of Respondent Cox Enterprises, Inc. (ACox@), of Respondent ADT Automotive Holdings, Inc. (AADT@), a wholly owned subsidiary of Respondent Tyco International, Ltd. (ATyco@), and Respondents having been furnished thereafter with draft of Complaint that the Bureau of Competition presented to the Commission for its consideration and which, if issued, 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 Consent Order (AConsent 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

Decision and Order

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 said Acts, 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 issues its complaint, and hereby makes the following jurisdictional findings and issues the following Order:

1. Respondent Manheim 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 1400 Lake Hearn Drive, N.E., Atlanta, Georgia 30319.
2. Respondent Manheim is a wholly owned subsidiary of Respondent Cox Enterprises Inc. (ACox@), a corporation with its office and principal place of business located at 1400 Lake Hearn Drive, N.E., Atlanta, Georgia 30319.
3. Respondent ADT 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 435 Metroplex Drive, Nashville, Tennessee 37211.
4. Respondent ADT is a wholly owned subsidiary of Respondent Tyco International Ltd. (ATyco@), a corporation organized, existing and doing business under and by virtue of the laws of Bermuda, with its office and principal place of business located at The Zurich Center,

Decision and Order

Second Floor, 90 Pitts Bay Road, Pembroke HM08, Bermuda. Tyco=s principal operating subsidiary in the United States is located at One Tyco Park, Exeter, New Hampshire 03833.

5. 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. AManheim@ means Manheim Auctions, Inc., its directors, officers, employees, agents and representatives, successors, and assigns; its joint ventures, subsidiaries, divisions, groups and affiliates controlled by Manheim Auctions, Inc., and the respective directors, officers, employees, agents, representatives, successors, and assigns of each.
- B. ACox@ means Cox Enterprises, Inc., its directors, officers, employees, agents and representatives, successors, and assigns; its joint ventures, subsidiaries, divisions, groups and affiliates controlled by Cox Enterprises, Inc., and the respective directors, officers, employees, agents, representatives, successors, and assigns of each.
- C. AADT@ means ADT Automotive Holdings, Inc., its directors, officers, employees, agents and representatives, successors, and assigns; its joint ventures, subsidiaries, divisions, groups and affiliates controlled by ADT Automotive Holdings, Inc., and the respective directors, officers, employees, agents, representatives, successors, and assigns of each.

Decision and Order

- D. ATyco@ means Tyco International, Ltd., its directors, officers, employees, agents and representatives, successors, and assigns; its joint ventures, subsidiaries, divisions, groups and affiliates controlled by Tyco International, Ltd., and the respective directors, officers, employees, agents, representatives, successors, and assigns of each.
- E. ARespondents@ means Manheim, Cox, ADT and Tyco, individually and collectively.
- F. ACommission@ means Federal Trade Commission.
- G. AADESA@ means ADESA Corporation, a corporation with its principal place of business at Two Parkwood Crossing, 310 East 96th Street, Suite 400, Indianapolis, Indiana 46240.
- H. "Acquirer(s)" means the entity or entities approved by the Commission to acquire the Assets To Be Divested pursuant to this Order, individually and collectively, other than ADESA.
- I. "Assets To Be Divested" means the Auctions listed below:
1. AMetro Auto Auction,@ the ADT Auction located at 101 Southwest Oldham Parkway, Lees Summit, Missouri 64081.
 2. AColorado Springs Auto Auction,@ the ADT Auction located at 500 Willow Springs Road, Fountain, Colorado 80817.
 3. ASouthern States Vehicle Auction,@ the ADT Auction located at 300 Raymond Hill Road, Newman, Georgia 30265.
 4. AGolden Gate Auto Auction,@ the ADT Auction located at 6700 Stevenson Boulevard, Fremont, California 94538.

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5. APuget Sound Auto Auction,@ the ADT Auction located at 621 37th Street, N.W. Auburn, Washington 98002.
 6. ABayside Auto Auction,@ the ADT Auction located 3225 North 50th Street, Tampa, Florida 33619.
 7. AClearwater Auto Auction,@ the ADT Auction located at 5153 126th Avenue, North, Clearwater, Florida 33760.
 8. ADealer=s Auto Auction of Sanford,@ the ADT Auction located at 3895 State Road 46 East, Sanford, Florida 32771.
 9. ASouthwest Auto Auction,@ the Manheim Auction located at 400 North Beck Avenue, Chandler, Arizona 85526.
- J. AAuction@ means a wholesale motor vehicle auction, including all tangible and intangible assets used in the business and operations of auctioning used automobiles, including related reconditioning, transportation and repair services, including, but not limited to:
1. All land and buildings and other improvements and fixtures thereon, leasehold interests, easements, licenses, rights to access, rights-of-way, and other real property interests;
 2. All machinery, equipment, tools, computer hardware and software, vehicles, furniture, leasehold improvements, office equipment, plant inventory, spare parts, supplies (including office and reconditioning supplies) and other tangible personal property;
 3. All contracts, agreements, options, leases, commitments, and undertakings, written and oral, and other similar rights and interests;

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4. All rights, titles and interest in and to all licenses and other governmental permits and authorizations;
 5. All accounts receivable, pre-paid expenses, deposits (other than bank deposits), machinery and equipment warranties, customer lists, files and records; and
 6. Goodwill and going concern value.
- K. AAcquisition@ means the proposed acquisition by Manheim of ADT as described in the January 13, 2000, Stock Purchase Agreement between Manheim and ADT General Holdings, Inc.
- L. AKey Employees@ means those individuals employed by Respondents whose principal work relates to any Asset To Be Divested and who hold one of the following positions or perform the duties generally performed by persons with the following titles: (a) General Manager, (b) Assistant General Manager, (c) Fleet/Lease Manager, (d) General Sales Manager, (e) Operations Manager, (f) Controller, and (g) Factory Manager.
- M. ADivestiture Agreement@ means the Asset Purchase Agreement dated July 28, 2000, by and between Manheim and ADESA.
- N. "Third Party Consents" means all consents, waivers and approvals from any person, private or public, that are necessary to effect the complete transfer to ADESA or to the Acquirer(s), as applicable, of the Assets To Be Divested pursuant to this Order.

II.

IT IS FURTHER ORDERED that:

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- A. Respondents shall divest the Assets To Be Divested to ADESA pursuant to and in accordance with the Divestiture Agreement (which agreement shall not vary from or contradict or be construed to vary from or contradict the terms of this Order). The divestiture shall be made no later than three (3) months after Respondent Manheim consummates the Acquisition. Failure to comply with the Divestiture Agreement shall constitute a failure to comply with this Order. PROVIDED, HOWEVER, that if Respondents have divested the Assets To Be Divested to ADESA 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 ADESA is not an acceptable acquirer or that the Divestiture Agreement is not an acceptable manner of divestiture, then Respondents shall immediately rescind the transaction with ADESA and shall divest the Assets To Be Divested within six (6) months of the date the Order becomes final. Respondents shall divest the Assets To Be Divested only to an Acquirer(s) that receives the prior approval of the Commission and only in a manner that receives the prior approval of the Commission.
- B. Respondents shall obtain all material Third Party Consents prior to the closing of the divestitures required by Paragraph II.A.
- C. The purpose of the divestitures of the Assets To Be Divested is to ensure the continued use of the assets in the same businesses in which they were engaged at the time of the announcement of the proposed Acquisition and to remedy the lessening of competition resulting from the Acquisition as alleged in the Commission's complaint.

III.

IT IS FURTHER ORDERED that:

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- A. From the date Respondents sign the Consent Agreement until the divestiture is completed pursuant to the terms of this Order, Respondents shall take, or cause to be taken, reasonable steps, including implementing appropriate incentive plans (such as vesting or crediting of all current and accrued benefits and pensions to which Key Employees are entitled) and paying bonuses, to cause Key Employees to accept offers of employment from ADESA or the Acquirer(s), as applicable.
- B. For a period of one year following the divestiture of the Assets To Be Divested, Manheim shall not, directly or indirectly, solicit or otherwise attempt to induce any Key Employees of the ADT Auctions to terminate their employment relationship with ADESA or other Acquirer(s); *provided, however*, it shall not be deemed to be a violation of this provision if (i) Manheim advertises for employment opportunities in newspapers, trade publications or other media not targeted specifically at the Key Employees, or (ii) Manheim hires Key Employees who apply for employment with Manheim, as long as such Key Employees were not solicited by Manheim in violation of this Paragraph III. B. During the one-year period following the divestiture of the Assets To Be Divested pursuant to the Divestiture Agreement, Manheim shall not, directly or indirectly, hire or enter into any arrangement for the services of any Key Employees employed by Southwest Auto Auctions on the date hereof; *provided, however*, that Manheim shall not be prohibited from hiring, during that one-year period, any Key Employees of Southwest Auto Auctions who are terminated by ADESA or other Acquirer or who move out of the state of Arizona for reasons unrelated to their employment.

IV.

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

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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 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 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 Asset To Be Divested. Respondents shall continue to maintain the inventory of each Asset To Be Divested at levels and selections consistent with those maintained by Manheim or ADT at such Auction in the ordinary course of business consistent with past practice. Respondents shall keep the organization and properties of each Asset 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 Auction. Included in the above obligations, Respondents shall, without limitation:

- A. Maintain operations and departments and neither reduce hours nor change the schedule of auctions at each Asset To Be Divested;
- B. Not transfer inventory from any Asset 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 Asset 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 Asset To Be Divested;

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- E. Not display any signs or conduct any advertising that indicates that any Respondent is moving its operations from an Asset To Be Divested to another location, or that indicates an Asset To Be Divested will close or will be owned by another entity; and
- F. Not change or modify in any material respect the existing advertising practices, programs and policies for any Asset To Be Divested, other than changes in the ordinary course of business consistent with past practice for Auctions of Manheim and ADT not being closed or relocated.

V.**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.
- B. In the event that the Commission brings an action pursuant to Section 5(l) of the Federal Trade Commission Act, 15 U.S.C. § 45(l), or any other statute enforced by the Commission, Respondents shall consent to the appointment of a trustee in such action. Neither the appointment of a trustee nor a decision not to appoint a trustee under this Paragraph shall preclude the Commission from seeking civil penalties or any other relief available to it, including a court-appointed trustee, pursuant to Section 5(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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- C. If a trustee is appointed by the Commission or a court pursuant to Paragraph V.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 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 V.C.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.

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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 a manner that receives the prior approval of the Commission and to Acquirer(s) that receive the prior approval of 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 such acquiring entity, the trustee shall divest such asset to the acquiring entity or entities selected by Respondents from among those approved by the Commission; provided further, however, that Respondents 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,

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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 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 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, 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 V.A. of this Order.
10. The Commission or, in the case of a court-appointed trustee, the court, may on its own initiative or at the request of the trustee issue such additional orders or directions as may be necessary or appropriate to accomplish 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 assets similar and

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corresponding to the Assets To Be Divested of Respondents as necessary to achieve the remedial purposes 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.

VI.

IT IS FURTHER ORDERED that, for a period commencing on the date this Order becomes final and continuing for ten (10) years, Respondents shall not, without providing advance written notification to the Commission, acquire, directly or indirectly, through subsidiaries or otherwise, any ownership, leasehold, or other interest, in whole or in part, in any facility that has operated as an Auction, within six (6) months of the date of such proposed acquisition, in the relevant sections of the country stated in the Complaint.

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 Respondents and not of any other party to the transaction. Respondents shall provide the Notification to the Commission at least thirty (30) days prior to consummating any such transaction (hereinafter referred to as the

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Afirst 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), Respondents 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.

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 Respondents have fully complied with the provisions of Paragraphs II through V 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 through 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 through V of the Order, including a description of all substantive contacts or negotiations relating to the divestitures and the approvals. Respondents shall include in their compliance reports copies, other than of privileged materials, of all written communications to and from such parties, all internal memoranda, and all reports and recommendations concerning the divestitures and approvals. The final compliance report required by this Paragraph VII.A. shall include a statement that the divestitures have been accomplished in the manner approved by the Commission and shall include the dates the divestitures were accomplished.

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- 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, Respondents shall file a verified written report with the Commission setting forth in detail the manner and form in which they have complied and are complying with this Order.

VIII.

IT IS FURTHER ORDERED that Respondents shall notify the Commission at least thirty (30) days prior to any proposed change in the Respondents that may affect compliance obligations arising out of this 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, and subject to any legally recognized privilege, and upon written request with reasonable 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 all facilities and access to inspect and copy all non-privileged books, ledgers, accounts, correspondence, memoranda and other records and documents in the possession or under the control of Respondents relating to any matter contained in this Order; and
- B. Upon five (5) days= notice to Respondents and without restraint or interference from them, to interview officers,

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directors, or employees of Respondents, who may have counsel present, regarding any such matters.

X.

IT IS FURTHERED ORDERED that this Order shall terminate:

- A. With respect to Respondents Manheim and Cox, on November 13, 2010.
- B. With respect to Respondents ADT and Tyco, when the transfer of the Assets To Be Divested to Respondent Manheim has been completed pursuant to the Acquisition.

By the Commission.

**Analysis of the Complaint and Proposed Consent Order to
Aid Public Comment**

I. Introduction

The Federal Trade Commission (“Commission”) has accepted for public comment an Agreement Containing Consent Order (“proposed order”) with Manheim Auctions, Inc. (“Manheim”), Tyco International, Ltd. (“Tyco”), ADT Automotive Holdings, Inc. (“ADT”), and Cox Enterprises, Inc. (“Cox”) (collectively “Proposed Respondents”). The proposed order seeks to remedy the anticompetitive effects of Manheim’s proposed acquisition of ADT’s wholesale motor vehicle auctions by requiring Manheim to divest eight of the acquired ADT auctions in locations where Manheim already owns auctions and its ownership of these acquired auctions would likely injure competition. Moreover, the proposed order seeks to remedy the anticompetitive effects of Manheim’s 1996 acquisition of an auction in the Phoenix,

Analysis to Aid Public Comment

Arizona area by requiring Manheim to divest one of its Phoenix-area auctions.

II. Description of the Parties and the Proposed Acquisition

Manheim, a Delaware corporation, is a wholly-owned subsidiary of Cox and is the largest auto auction company in the United States. Manheim operates 65 auctions nationwide and reported sales of 4.1 million vehicles in 1999. Manheim has acquired 55 auctions in the last 10 years. ADT, a Delaware corporation, is a wholly owned subsidiary of Tyco and is the third-largest auction company in the United States. ADT operates 28 auctions nationwide and reported sales of 1.3 million automobiles in 1999.

By the terms of a Stock Purchase Agreement dated January 13, 2000, Manheim will acquire all of ADT's outstanding voting stock for approximately \$1 billion.

In a separate transaction that occurred in 1996, Manheim acquired JM Family Enterprises, Inc., its sole competitor in the provision of wholesale motor vehicle auction services in the greater metropolitan area of Phoenix, Arizona.

III. The Proposed Complaint

The proposed complaint alleges that the relevant line of commerce (i.e., the product market) in which to analyze this transaction is the provision of wholesale motor vehicle auction services ("WMVA services") by major vehicle auctioneers. These services include marshaling motor vehicles before auctions, preparing condition reports, reconditioning the motor vehicles, promoting and marketing auctions to potential buyers, auctioning motor vehicles, and reporting the results of those auctions.

Major wholesale auctions serve automakers and large institutional lessors that sell large quantities of used motor

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vehicles. They are equipped with advanced computer systems and technology that allow them to deal with larger customers than the smaller wholesale auto auctions can handle. Moreover, this technological sophistication and the resulting benefits and services simultaneously attract a large number of buyers and sellers to each auction. These attributes distinguish major wholesale auction services from the broader market, which consists of services provided by small, independent wholesale auctions that serve regional customers. Typically, major wholesale auctions serve a trade area consisting of a large city and the surrounding metropolitan area.

The proposed complaint further alleges that Manheim's proposed acquisition of ADT, if consummated, may substantially lessen competition 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 trade areas (i.e., the geographic markets): (a) the greater metropolitan area of Kansas City, Missouri; (b) the Colorado Front Range, which includes the greater metropolitan areas of Denver and Colorado Springs; (c) the greater metropolitan area of Atlanta, Georgia; (d) the greater metropolitan area of San Francisco, California; (e) the greater metropolitan area of Seattle, Washington; and (f) the I-4 Corridor of Florida, which includes the greater metropolitan areas of Tampa, Orlando, and Daytona Beach. The acquisition would substantially increase concentration and create a monopoly in the provision of WMVA services, as evidenced by post-acquisition Herfindahl-Hirschman Indices ("HHIs") of 10,000 in each of these geographic markets. After the proposed acquisition, Manheim would have the ability to unilaterally increase prices charged for WMVA services and to substantially decrease the quality and range of services offered to auction customers in these areas.

The proposed complaint also alleges that in 1996 Manheim acquired JM Family Enterprises, Inc., its sole competitor in the provision of WMVA services in the greater Phoenix, Arizona area. The effect of that acquisition, which also resulted in an HHI of 10,000, may have been to substantially lessen competition and

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create a monopoly in violation of Section 7 of the Clayton Act and Section 5 of the Federal Trade Commission Act. Manheim may have both unilaterally increased prices charged for WMVA services and reduced the quality and range of services offered to auction customers in the greater Phoenix area.

The proposed complaint further alleges that new entry into the relevant geographic markets will not be likely, timely or sufficient to prevent or counteract these anticompetitive effects. Building an auction requires substantial amounts of capital and entails significant assumption of risk. Other companies have recently required more than two years to complete construction of major auctions. Moreover, even if built, a competing auction would not likely provide significant competition to an existing firm. Because of the large capital investment required, major auctions must sell a high volume of motor vehicles to be profitable, while sellers are reluctant to use the services of an auction that does not have an existing base of strong buyers and buyers are reluctant to attend an auction that does not have a significant number of participating sellers. Consequently, existing auctions possess a considerable first-mover advantage over new entrants. Thus, even if a competitor entered the market, it might not attract enough business to restore competition. In the Phoenix area, no new competitors have entered since 1996.

IV. Terms of the Agreement Containing Consent Order

The proposed order is designed to remedy the alleged anticompetitive effects of the proposed acquisition. Under the terms of the proposed order, the Proposed Respondents must divest to ADESA eight of the acquired ADT auctions and one Manheim auction that currently operate in the geographic markets described above.

The Commission's goal in evaluating possible purchasers of divested assets is to maintain the competitive environment that

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existed prior to the acquisition. A proposed buyer of divested assets must not itself present competitive problems.

The Commission is satisfied that ADESA is a well-qualified acquirer of the divested assets. Based in Indianapolis, Indiana, ADESA is a large chain with 30 auction sites throughout the United States. ADESA possesses the necessary industry expertise to replace the competition that existed prior to the proposed acquisition in the divestiture markets. Furthermore, ADESA poses no separate competitive issues as the acquirer of the divested assets.

The proposed order requires that Proposed Respondents divest the nine auctions to ADESA, in accordance with an agreement between Manheim and ADESA, within 3 months after Manheim acquires ADT. If, at the time the Commission decides to make the proposed order final, the Commission notifies the Proposed Respondents that ADESA is not an acceptable acquirer, or that the agreement with ADESA is not an acceptable manner of divestiture, then Proposed Respondents must immediately rescind the transaction and divest the auction, within 6 months after the proposed order becomes final, to an acquirer approved by the Commission.

The proposed order also includes a provision requiring Proposed Respondents to use their best efforts to maintain the auctions as they would in the ordinary course of business until the divestiture occurs. Moreover, the proposed order prohibits Proposed Respondents from soliciting and hiring employees away from the divested auctions for a period of one year after the divestitures occur.

Additionally, for a period of 10 years after the proposed order becomes final, Proposed Respondents must provide written notice to the Commission prior to acquiring any interest in any wholesale auction facility. Furthermore, Proposed Respondents must provide the Commission with a report of compliance with the proposed order within 30 days after the proposed order becomes final and every 30 days thereafter until they have

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complied with their divestiture obligations. Respondents are also required to provide annual reports during the term of the proposed order. For Manheim and Cox, the term of the proposed order is 10 years; for ADT and Tyco, the term ends when the eight ADT auctions are transferred to Manheim.

In the event that Proposed Respondents fail to divest the required auctions within the time allotted, the proposed order enables the Commission to appoint a trustee to divest any assets necessary to satisfy the requirements of the proposed order. Appointment of a trustee is in addition to civil penalties and other relief available from Proposed Respondents for non-compliance with any provision of the proposed order.

V. Opportunity for Public Comment

The proposed 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 thirty 30 days, the Commission will again review the proposed order and the comments received and will decide whether it should withdraw from the proposed order or make it final. By accepting the proposed order subject to final approval, the Commission anticipates that the competitive problems alleged in the proposed complaint will be resolved. The purpose of this analysis is to invite public comment on the proposed order, including the proposed divestitures, to aid the Commission in its determination of whether to make the proposed order final. This analysis is not intended to constitute an official interpretation of the proposed order, nor is it intended to modify the terms of the proposed order in any way.

Complaint

IN THE MATTER OF

AGRIUM, 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-3981; File No. 0010100**Complaint, November 13, 2000--Decision, November 13, 2000*

This consent order addresses the acquisition by Agrium of the nitrogen fertilizer business of Unocal Corporation. The complaint alleges that the proposed acquisition would substantially lessen competition in the markets for urea, ammonia, and UAN 32% in the Northwest United States. The order would require Agrium to divest Unocal's deepwater terminal at Rivergate, part of its upriver terminal at Hedges and the leases on three UAN terminals to J.R. Simplot Company. The order also requires Agrium to provide a long term lease on ammonia storage at Hedges and perpetual access to the Hedges dock, roadway, railspur and weight scales.

Participants

For the Commission: *John B. Kirkwood, K. Shane Woods, Patricia A. Hensley, Joe Lipinsky, Michael Lewkonja, Nathan Rush, Virginia A. Davidson, Robert J. Schroeder, Daniel P. Ducore, James M. Ferguson, and Louis Silvia.*

For the Respondents: *William Blumenthal, King & Spalding and John Collins, Dewy Ballantine.*

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 (ACommission@) having reason to believe that Respondents Agrium Inc. (AAgrium@), and Union Oil Company of California and Unocal Corporation (AUnocal@), have entered into an agreement whereby Agrium would acquire certain assets owned by Unocal 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 (AFTC

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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:

Agrium

1. Agrium is a corporation organized, existing and doing business under and by virtue of the laws of the country of Canada, with its office and principal place of business located at 13131 Lake Fraser Drive SE, Calgary, Alberta, T2J7E8, Canada.

2. Agrium is a leading producer and marketer of fertilizer in North America and a major retail supplier of agricultural products and services in North America. In 1999, Agrium operated six nitrogen fertilizer plants and generated wholesale sales of nitrogen fertilizer of approximately \$500 million.

3. Agrium is acquiring Unocal=s corporate assets through its wholly owned subsidiary RSI Acquisition, Inc., a California corporation with its principal place of business located at 4582 S. Ulster St., Suite 1400, Denver, Colorado 80237.

4. At all times relevant herein, Respondent Agrium has been and is now engaged in commerce as Acommerce@ 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 Acommerce@ is defined in Section 4 of the Federal Trade Commission Act, as amended, 15 U.S.C. ' 44.

Unocal

5. Union Oil Company of California, a wholly owned subsidiary of Unocal Corporation, is a corporation organized,

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existing and doing business under and by virtue of the laws of the State of California, with its office and principal place of business located at 2141 Rosecrans Avenue, Suite 4000, El Segundo, California 90245.

6. Unocal 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 2141 Rosecrans Avenue, Suite 4000, El Segundo, California 90245.

7. Unocal manufactures, distributes, and sells nitrogen-based fertilizers. Unocal operates seven nitrogen fertilizer plants and three deepwater terminals within the states of Alaska, Washington, Oregon, and California.

8. Unocal operates its Agricultural Products Business, which includes its nitrogen fertilizer manufacturing and distribution facilities, through Prodicta, LLC, and Alaska Nitrogen Products, LLC, two wholly owned subsidiaries of Union Oil Company of California.

9. At all times relevant herein, Respondent Unocal has been and is now engaged in commerce as Acommerce@ 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 Acommerce@ 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 Purchase and Sale Agreement between RSI Acquisitions Inc. and Unocal, dated January 19, 2000 (hereinafter referred to as the AAgreement@), Unocal agreed to sell to Agrium its Agricultural Products Business for a purchase price of \$325 million plus an AEarn-Out@ for six years based on the future relationship between certain commodity price indexes and certain

Complaint

forecasted prices for Kenai, Alaska, facilities (hereinafter referred to as the AAgrium Acquisition@).

Count One B UREA

11. One relevant line of commerce is the production, distribution, and wholesale sale of the nitrogen-based fertilizer urea.

12. One relevant section of the country is the Northwest, which consists of the states of Washington, Oregon, and Idaho.

13. Respondent Agrium is one of the largest suppliers of urea in the Northwest.

14. Respondent Unocal is one of the largest suppliers of urea in the Northwest.

15. Respondents Agrium and Unocal are direct and substantial competitors in the business of producing, distributing, and selling urea in the relevant section of the country set out in Complaint Paragraph 12.

16. The business of producing, distributing and selling urea in the relevant section of the country set out in Complaint Paragraph 12 is highly concentrated. The Agrium Acquisition would significantly increase concentration in this relevant section of the country as evidenced by an increase in the Herfindahl-Hirschman Index (commonly referred to as AHHI@) of over 2200 to over 4800.

17. The effect of the proposed Agrium Acquisition, if consummated, may be substantially to lessen competition or to tend to create a monopoly in the production, distribution and sale of urea in the relevant section of the country set out in Complaint Paragraph 12, in violation of Section 7 of the Clayton Act, as

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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 Agrium Acquisition would eliminate actual and potential competition between Agrium and Unocal to supply urea in this relevant section of the country; and

b. Agrium would be likely to exact anticompetitive price increases from buyers of urea in this relevant section of the country.

18. Entry would not be timely, likely, or sufficient to prevent anticompetitive effects in the relevant section of the country set out in Complaint Paragraph 12.

Count Two B UAN 32

19. One relevant line of commerce is the production, distribution, and wholesale sale of the nitrogen-based fertilizer UAN 32% solution (AUAN 32").

20. One relevant section of the country is the Northwest, as defined in Complaint Paragraph 12.

21. Respondent Agrium is one of the largest suppliers of UAN 32 in the Northwest.

22. Respondent Unocal is one of the largest suppliers of UAN 32 in the Northwest.

23. Respondents Agrium and Unocal are direct and substantial competitors in the business of producing, distributing, and selling UAN 32 in the relevant section of the country set out in Complaint Paragraph 20.

24. The business of producing, distributing, and selling UAN 32 in the relevant section of the country set out in Complaint

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Paragraph 20 is highly concentrated. The Agrium Acquisition would significantly increase concentration in this relevant section of the country as evidenced by an increase in the HHI of over 1922 to over 4200.

25. The effect of the Agrium Acquisition, if consummated, may be substantially to lessen competition or to tend to create a monopoly in the production, distribution, and sale of UAN 32 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 Agrium Acquisition would eliminate actual and potential competition between Agrium and Unocal to supply UAN 32 in this relevant section of the country; and

b. Agrium would be likely to exact anticompetitive price increases from buyers of UAN 32 in this relevant section of the country.

26. Entry would not be timely, likely, or sufficient to prevent anticompetitive effects in the relevant section of the country set out in Complaint Paragraph 20.

Count Three B Ammonia

27. One relevant line of commerce is the production, distribution, and wholesale sale of the nitrogen-based fertilizer anhydrous ammonia (Aammonia@).

28. One relevant section of the country is the Northwest, as defined in Complaint Paragraph 12.

29. Respondent Agrium is one of the largest suppliers of ammonia to the Northwest.

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30. Respondent Unocal is one of the largest suppliers of ammonia to the Northwest.

31. Respondents Agrium and Unocal are direct and substantial competitors in the business of producing, distributing, and selling ammonia in the relevant section of the country set out in Complaint Paragraph 28.

32. The business of producing, distributing, and selling ammonia in the relevant section of the country set out in Complaint Paragraph 28 is highly concentrated. The Agrium Acquisition would significantly increase concentration in this relevant section of the country as evidenced by an increase in the HHI of over 1560 to over 3800.

33. The effect of the Agrium Acquisition, if consummated, may be substantially to lessen competition or to tend to create a monopoly in the production, distribution, and sale of ammonia in the relevant section of the country set out in Complaint Paragraph 28, 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 Agrium Acquisition would eliminate actual and potential competition between Agrium and Unocal to supply ammonia in this relevant section of the country; and
- b. Agrium would be likely to exact anticompetitive price increases from buyers of ammonia in this relevant section of the country.

34. Entry would not be timely, likely, or sufficient to prevent anticompetitive effects in the relevant section of the country set out in Complaint Paragraph 28.

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35. The proposed acquisition described in Complaint Paragraph 10 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 thirteenth day of November, 2000, issues its Complaint against said Respondents.

By the Commission, Commissioner Swindle not participating.

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The Federal Trade Commission (ACommission@) having initiated an investigation of the acquisition by Respondent Agrium, Inc. (AAgrium@) of assets held by Respondents Union Oil Company of California (AUnion Oil@) and Unocal Corporation (AUnocal@), 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, 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 Consent Order (AConsent 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

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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

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The Commission having thereafter considered the matter and having determined that it had reason to believe that Respondents have violated said Acts, 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 makes the following jurisdictional findings and issues the following Order:

1. Respondent Agrium, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of Canada, with its office and principal place of business located at 13131 Lake Fraser Drive SE, Calgary, Alberta, T2J7E8, Canada. For the purposes of this matter, Agrium, Inc. acquires all assets through its wholly owned subsidiary RSI Acquisition, Inc., a California company with its principal place of business located at 4582 S. Ulster St., Suite 1400, Denver, Colorado 80237.
2. Respondent Union Oil Company of California, a wholly owned subsidiary of Unocal Corporation, is a corporation organized, existing and doing business under and by virtue of the laws of the State of California, with its principal place of business at 2141 Rosecrans Avenue, Suite 4000, El Segundo, California 90245.
3. Respondent Unocal Corporation is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Delaware, with its office and principal place of business at 2141 Rosecrans Avenue, Suite 4000, El Segundo, California 90245.
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.

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ORDER**I.**

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

- A. **AAgrium@** means Agrium, Inc., its directors, officers, employees, agents, representatives, successors, and assigns; its joint ventures, subsidiaries, divisions, groups and affiliates controlled by Agrium, Inc., and the respective directors, officers, employees, agents, representatives, successors, and assigns of each.
- B. **AUnion Oil@** means Union Oil Company of California, its directors, officers, employees, agents, representatives, successors, and assigns; its joint ventures, subsidiaries, divisions, groups and affiliates controlled by Union Oil Company of California, and the respective directors, officers, employees, agents, representatives, successors, and assigns of each.
- C. **AUnocal@** means Unocal Corporation, its directors, officers, employees, agents, representatives, successors, and assigns; its joint ventures, subsidiaries, divisions, groups, and affiliates controlled by Unocal Corporation, and the respective directors, officers, employees, agents, representatives, successors, and assigns of each.
- D. **ARespondents@** means Agrium, Union Oil, and Unocal, individually and collectively.
- E. **ASimplot@** means J.R. Simplot Company, a Nevada corporation with its principal place of business at 999 Main Street, Suite 1300, Boise, Idaho 83605.

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- F. ACommission@ means the Federal Trade Commission.
- G. AAlternate Acquirer@ means the entity or entities to whom the Divestiture Assets, as defined in Paragraph I.L., may be divested by the Respondents pursuant to Paragraph II. of this Decision and Order or by the trustee pursuant to Paragraph V. of this Decision and Order, as applicable.
- H. ADivestiture Agreement@ means the July 12, 2000, Purchase and Sale Agreement and the August 3, 2000, Amendment to that Agreement (and all Exhibits attached to either) between Simplot and Agrium whereby Simplot acquires the Divestiture Assets from Agrium. All references in this Decision and Order to Exhibits are to the Exhibits of the Divestiture Agreement, unless otherwise specified.
- I. ARivergate@ means the terminal facility that has Atidewater@ access and is located in Portland, Oregon, as defined in Exhibit A.
- J. AHedges@ means the terminal facility located in Kennewick, Washington, as defined in Exhibit C.
- K. AApportioned Hedges@ means the divested terminal facility comprised of a 600 x 700 foot block in the east south east corner of Hedges and a 200 foot wide corridor along the south east property line of Hedges, as illustrated in Exhibit B.
- L. ADivestiture Assets@ means all of Agrium=s right, title, and interest acquired from Union Oil and Unocal pursuant to the Acquisition in all assets described in the Divestiture Agreement, including, without limitation, the following:
 - 1. The real property Rivergate together with all rights, interests, improvements, and appurtenances pertaining thereto, including but not limited to the following assets:
 - a. All fertilizer terminal related assets such as the Atidewater@ piers, ship unloading systems,

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warehousing facilities, machinery, fixtures, equipment, technology, know-how, specifications, designs, drawings, processes, quality control data, vehicles, transportation and storage facilities, furniture, tools, supplies, stores, spare parts, and any tangible personal property defined in Exhibit E;

- b. Any adjacent strips and gores between the property and any abutting properties, and any land lying in or under the bed of any creek, stream, or waterway or any highway, avenue, road, easement, street, alley, or right-of-way, open or proposed, in, on, across, abutting, or adjacent to the property;
- c. All certificates for appropriation of water and other water rights generally that relate to the property;
- d. All right, title, interest in and to the contracts listed in Exhibit D;
- e. All rights under warranties and guarantees, express or implied, wherever located;
- f. All dedicated management information systems and information contained in management information systems, and all separately maintained, as well as relevant portions of not separately maintained books, records, and files, wherever located;
- g. All federal, state, and local regulatory agency registrations, permits, and applications, and all documents related thereto, wherever located;
- h. All items of prepaid expense;
- i. Services of one to four Crane Operators at any given time for a period of (12) twelve months following the

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Closing Date, according to the terms of the Crane Operator Labor Agreement set out in Exhibit J; and

- j. Any additional assets defined in the Divestiture Agreement.
2. The real property Apportioned Hedges together with all rights, interests, improvements, and appurtenances pertaining thereto, including but not limited to the following assets:
- a. A 10,000 short ton dry warehouse, related loading and unloading equipment, machinery, fixtures, equipment, designs, drawings, and transportation and storage facilities;
 - b. Any adjacent strips and gores between the property and any abutting properties, and any land lying in or under the bed of any creek, stream, or waterway or any highway, avenue, road, easement, street, alley, or right-of-way, open or proposed, in, on, across, abutting, or adjacent to the property;
 - c. A lease for transfer, storage, and handling of up to 20,000 short tons of anhydrous ammonia at the ammonia facilities at Hedges for a period of ten years with an option to extend the lease for another ten years, according to the terms of the Transfer, Storage, and Handling Agreement set out in Exhibit I;
 - d. A perpetual, non-exclusive easement granting to Simplot or the Alternate Acquirer, as applicable, the right-of-way to pass and repass, and to install and/or maintain utilities to or from Apportioned Hedges over and along the private roadway and the rail track spur (as identified in Exhibit A of the Easement Agreement), according to the terms of the Easement Agreement set out in Exhibit L;

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- e. An irrevocable, non-exclusive license to access the Pier (as identified in Exhibit A of the Easement Agreement) for the purposes of barge unloading and loading of dry fertilizer products, according to the terms of the Easement Agreement set out in Exhibit L;
- f. Truck and rail car scale services, according to the terms of the Easement Agreement set forth in Exhibit L;
- g. For five (5) years, either a commercially reasonable lease for ammonia barge services or, if an agreement cannot be reached, an unconditional option to purchase one barge at its independently appraised value, according to the terms of the Divestiture Agreement;
- h. Right of First Refusal on the non-divested portion of the Hedges site, according to the terms of the Right of First Refusal Agreement set out in Exhibit G;
- i. All rights under warranties and guarantees, express or implied, wherever located;
- j. All separately maintained, as well as relevant portions of not separately maintained books, records, and files, wherever located;
- k. All federal, state, and local regulatory agency registrations, permits, and applications, and all documents related thereto, wherever located;
- l. All items of prepaid expense; and
- m. Any additional assets defined in the Divestiture Agreement.

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3. Agrium storage and handling lease for the Tidewater Terminal Co., Inc. terminal at East Pasco, Washington (defined as ALease@ in the Divestiture Agreement), and Prodicta leases for the Tidewater Terminal Co., Inc. terminals at Vancouver and Wilma, Washington (as listed in Exhibit D) .

PROVIDED, HOWEVER, Divestiture Assets do not include the following assets:

- (1) Product inventory located at either Rivergate or Apportioned Hedges;
 - (2) The non-divested, western portion (approximately 29 acres) of Hedges including the pier and related ammonia truck and barge handling equipment systems and sites (as illustrated in Exhibit B);
 - (3) The assets and facilities known as the N-Phuric Production Facility, as illustrated by Exhibit B; and
 - (4) Any additional assets excluded in the Divestiture Agreement.
- M. ANitrogen-Based Fertilizers@ means urea, UAN 32% solution, and anhydrous ammonia.
- N. AAquisition@ means the proposed acquisition by Agrium of Unocal=s Agricultural Products Business as described in the January 19, 2000, Purchase and Sale Agreement between RSI Acquisition, Inc., and Union Oil.
- O. AAgricultural Products Business@ means the assets of Prodicta LLC, a Delaware limited liability company, and the assets of Alaska Nitrogen Products LLC, an Alaska limited liability company, both with their principal places of business at 2141 Rosecrans Avenue, Suite 4000, El Segundo, California 90245.

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Prodica LLC and Alaska Nitrogen Products LLC are wholly owned subsidiaries of Respondent Union Oil.

- P. **AAcquisition Agreement@** means the January 19, 2000, Purchase and Sale Agreement between RSI Acquisition, Inc., and Union Oil.
- Q. **AClosing Date@** means the date, as defined in the Divestiture Agreement, when the parties have fully consummated the transfer of assets contemplated in the Divestiture Agreement.
- R. **ANorthwest@** means the State of Washington and any and all land and territorial waters subject to the jurisdiction of the State of Washington; the State of Oregon and any and all land and territorial waters subject to the jurisdiction of the State of Oregon; and the State of Idaho and any and all land subject to the jurisdiction of the State of Idaho.
- S. **AThird Party Approvals@** means all consents or waivers from private entities, and local, state and federal regulatory bodies, or other consents or waivers from partners or otherwise, that are necessary to effect the complete transfer of the Divestiture Assets to Simplot or the Alternate Acquirer, as applicable.
- T. **AUnocal Employees@** means all employees currently employed by Unocal who work primarily at the Rivergate facility, including but not limited to (a) individuals executing the duties generally performed by executive managers, managers, and supervisors, (b) all **AEmployees@** as that term is defined and used in the Divestiture Agreement, and (c) all other personnel necessary and beneficial to maintaining Rivergate as an ongoing facility.
- U. **ACrane Operators@** means qualified, state certified crane operators of the type currently utilized at Rivergate.

II.

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IT IS FURTHER ORDERED that:

- A. Respondents shall divest or cause to be divested to Simplot, or to the Alternate Acquirer if applicable, absolutely and in good faith, at no minimum price, the Divestiture Assets as ongoing facilities in the distribution and wholesale sale of Nitrogen-Based Fertilizers.
- B.
 - 1. The divestiture shall be made immediately after Respondent Agrium consummates the Acquisition, and shall be pursuant to and in accordance with the Divestiture Agreement (which agreement shall not vary or contradict, or be construed to vary or contradict, the terms of this Decision and Order). Failure to comply with the Divestiture Agreement shall constitute a failure to comply with this Decision and Order.
 - 2. PROVIDED, HOWEVER, that if Respondents have divested the Divestiture Assets to Simplot prior to the date the Decision and Order becomes final, and if, at the time the Commission determines to make the Decision and Order final, the Commission notifies Respondents that Simplot is not an acceptable acquirer or that the Divestiture Agreement specifies an unacceptable manner of divestiture, then Respondents shall immediately rescind the transaction with Simplot and shall divest the Divestiture Assets within four (4) months of the date the Decision and Order becomes final. Respondents shall divest the Divestiture Assets only to an Alternate 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 secure all Third-Party Approvals prior to the Closing Date.
- D. The purpose of the divestiture of the Divestiture Assets is to ensure the continued use of the Divestiture Assets in the same

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businesses in which they were engaged at the time of the announcement of the proposed Acquisition, and to remedy the lessening of competition resulting from the Acquisition as alleged in the Commission's complaint.

- E. Respondents shall waive and not exercise any preferential right, right of first refusal, back-in right, or any contractual option that would permit Respondents, as a result of the divestiture to Simplot or Alternate Acquirer, as applicable, to acquire any interest in any Divestiture Asset acquired pursuant to this Decision and Order by Simplot or Alternate Acquirer, as applicable.

III.

IT IS FURTHER ORDERED that:

- A. Respondents shall maintain the viability, marketability, and competitiveness of the Divestiture Assets, and shall not cause the wasting or deterioration of the Divestiture Assets, nor shall they cause the Divestiture Assets 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 Divestiture Assets. Respondents shall comply with the terms of this Paragraph until such time as Respondents have divested the Divestiture Assets pursuant to the terms of this Decision and Order. Respondents shall conduct or cause to be conducted the business of the Divestiture Assets 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 Divestiture Assets in the ordinary course of business and in accordance with past practice. Respondents shall not terminate the operation of any Divestiture Asset and Respondents shall continue to operate the Divestiture Assets

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at a level and manner consistent with those maintained by Respondents in the ordinary course of business consistent with past practices.

- B. Respondents shall use best efforts to keep the organization and properties of each Divestiture Asset intact, including current business operations and physical facilities. Included in the above obligations as set forth in Paragraph III.A. and B., Respondents shall, without limitation:
1. Maintain operations and departments and neither reduce hours nor manner of operation of any Divestiture Asset;
 2. Not transfer inventory or equipment from any Divestiture Asset or make any physical alterations to any Divestiture Asset other than in the ordinary course of business consistent with past practice, or unless otherwise agreed to by Respondents in the Divestiture Agreement; and
 3. Make any payment required to be paid under any contract or lease when due, maintain and renew all permits and licenses associated with any Divestiture Asset, and otherwise pay all liabilities and satisfy all obligations associated with any Divestiture Asset, in each case in a manner consistent with past practice.

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

- A. From the date Respondents sign the Consent Agreement until the divestiture is completed pursuant to the terms of this Decision and Order, Respondents shall take, or cause to be taken, reasonable steps, including implementing appropriate incentive plans (such as vesting or crediting of all current and accrued benefits and pensions, to which Unocal Employees are entitled) and paying bonuses, to cause the Unocal Employees to accept offers of employment from Simplot or the Alternate Acquirer, as applicable.

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- B. For a period of two (2) years following the date Respondents sign the Consent Agreement, Respondents shall not solicit for employment any Unocal Employee employed by Simplot or the Alternate Acquirer, as applicable, unless and until such employee=s employment by Simplot or the Alternate Acquirer, as applicable, has been terminated.

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

- A. If Respondents have not divested or have not caused to be divested, absolutely and in good faith the Divestiture Assets to Simplot or the Alternate Acquirer, as applicable, within the time period required by Paragraph II. of this Decision and Order, the Commission may appoint a trustee to divest or cause to be divested the Divestiture Assets.
- B. 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 enforced by the Commission, for any failure by the Respondents to comply with this Decision and Order.
- C. If a trustee is appointed by the Commission or a court pursuant to Paragraph V.A. of this Decision and Order, Respondents shall consent to the following terms and

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conditions regarding the trustee's powers, duties, authority, and responsibilities:

1. The Commission shall select the trustee, subject to the consent of the 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 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 or cause to be divested, respectively, the 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 and obtain the consents 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 V.C.3. to accomplish the divestiture and obtain the consents, 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 or that consents can be obtained in 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,*

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the Commission may extend this period only two (2) times.

5. The trustee shall have full and complete access, subject to any legally recognized privilege of Respondents, to the personnel, books, records and facilities related to the Divestiture Assets 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, but shall divest expeditiously at no minimum price. The divestiture shall be made only to an acquirer that receives the prior approval of the Commission, and the divestiture and consents shall be accomplished only in a manner that receives the prior approval of 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 or entities selected by Respondents from among those approved by the Commission; provided further, however, that Respondents shall select such entity within five (5) days of receiving written 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

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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 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 duties, including all reasonable fees of counsel and other expenses incurred in connection with the preparation for, or defense of any claim, whether or not resulting in any liability, except to the extent that such liabilities, losses, damages, claims, or expenses result from misfeasance, gross negligence, willful or wanton acts, or bad faith by the trustee.
9. If the trustee ceases to act or fails to act diligently, a substitute trustee shall be appointed in the same manner as provided in Paragraph V.A. of this 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.

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11. In the event that the trustee determines that he or she is unable to divest or cause to be divested the Divestiture Assets in a manner consistent with the Commission's purpose as described in Paragraph II., the trustee may divest assets similar and corresponding to the Divestiture Assets of Respondents as necessary to achieve the remedial purposes of this Decision and Order.
12. The trustee shall have no obligation or authority to operate or maintain the Divestiture Assets.
13. The trustee shall report in writing to Respondents and the Commission every sixty (60) days concerning the trustee's efforts to accomplish the divestiture and to obtain the necessary consents.

VI.

IT IS FURTHER ORDERED that, for a period commencing on the date this Decision and Order becomes final and continuing for ten (10) years, Respondents shall not, without providing advance written notification to the Commission acquire, directly or indirectly, through subsidiaries or otherwise, any ownership, leasehold, or other interest, in whole or in part, in (a) any of the Divestiture Assets required to be divested pursuant to Paragraph II. of this Decision and Order, and (b) any terminal facility that has Atidewater@ access and is used in the transfer and storage of UAN 32% solution in the Northwest.

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 Athe 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

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notification is required only of Respondents and not of any other party to the transaction. Respondents shall provide the Notification to the Commission at least thirty (30) days prior to consummating any such transaction (hereinafter referred to as the Afirst 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), Respondents 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.

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

- A. Within thirty (30) days after the date this Decision and Order becomes final and every thirty (30) days thereafter until Respondents have fully complied with the provisions of Paragraphs II. through IV. 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. through IV. 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. through IV. of the Decision and Order, including a description of all substantive contacts or negotiations relating to the divestitures and the approvals. Respondents shall include in their compliance reports copies, other than of privileged materials, of all written communications to and from such parties, all internal

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memoranda, and all reports and recommendations concerning the divestiture and approvals. The final compliance report required by this Paragraph VII. A. 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.

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- 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, Respondents shall file a verified written report with the Commission setting forth in detail the manner and form in which they have complied and are complying with this Order.

VIII.

IT IS FURTHER ORDERED that Respondents shall notify the Commission at least thirty (30) days prior to any proposed change in the Respondents that may affect compliance obligations arising out of this Decision and 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 Decision and Order, and subject to any legally recognized privilege, and upon written request with reasonable 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 all facilities and access to inspect and copy all non-privileged books, ledgers, accounts, correspondence, memoranda and other records and documents in the possession or under the control of Respondents relating to any matter contained in this Decision and Order; and
- B. Upon five (5) days= notice to Respondents and without restraint or interference from them, to interview officers, directors, or employees of Respondents, who may have counsel present, regarding any such matters.

X.

Analysis to Aid Public Comment

IT IS FURTHER ORDERED that this Decision and Order shall terminate:

- A. With respect to Respondent Agrium, on November 13, 2010.
- B. With respect to Respondents Unocal and Union Oil, when the transfer of the Divestiture Assets to Respondent Agrium has been completed pursuant to the Acquisition Agreement.

By the Commission, Commissioner Swindle not participating.

[Confidential Appendix I Redacted From Public Record Version]

**Analysis of the Proposed Consent Order to Aid Public
Comment**

The Federal Trade Commission ("Commission") has accepted for public comment an Agreement Containing Consent Order with Agrium, Inc. (AAgrium@) and Union Oil Company of California and Unocal Corp. (AUnocal@). The purpose of the agreement is to remedy the anticompetitive effects of Agrium=s proposed acquisition of Unocal=s nitrogen fertilizer business. The proposed order would require that Agrium divest assets that are integral to the sale of nitrogen fertilizers in the Northwest (Washington, Oregon, and Idaho).

Analysis to Aid Public Comment

Nitrogen fertilizers are used by farmers around the world to improve crop yields by supplying the nitrogen essential to plant growth. Agrium, with production facilities in Texas and near its headquarters in Alberta, Canada, is one of the world=s largest producers of nitrogen fertilizers. In 1998, Agrium=s wholesale sales of nitrogen fertilizers were \$501 million. Unocal produces and sells nitrogen fertilizers through its subsidiaries Alaska Nitrogen Products LLC and Prodicta LLC, which have production and distribution facilities in Alaska, Washington, Oregon and California. Unocal=s 1998 wholesale sales of nitrogen fertilizers were approximately \$377 million.

Agrium and Unocal are the leading sellers of anhydrous ammonia, urea, and UAN 32% solution, which are the most popular nitrogen fertilizers in the Northwest. Substitution among these fertilizers, and between them and other nitrogen fertilizers, is limited because of agricultural considerations (they differ in their suitability for particular crops, soils, weather conditions, etc.) and commercial factors (e.g., each of these fertilizers requires different storage and application equipment). In the manufacture of an important resin, there is no substitute for urea.

The complaint alleges that Agrium=s proposed acquisition of Unocal, if consummated, may substantially lessen competition 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. The complaint identifies three relevant lines of commerce (product markets) in which to analyze the effects of this acquisition: urea, ammonia, and UAN 32%. The relevant section of the country (geographic market) alleged in the complaint is the Northwest, which consists of the states of Washington, Oregon, and Idaho. In urea, Agrium=s acquisition of Unocal would result in an increase in the Herfindahl-Hirschman Index (commonly referred to as HHI) from 2200 to over 4800; in ammonia, the HHI rises from 1922 to over 4200; and in UAN 32% it rises from 1560 to over 3800. By eliminating competition between Agrium and Unocal, who are the top two suppliers of each of these products in the Northwest, the

Analysis to Aid Public Comment

acquisition would enable Agrium to unilaterally increase the prices of ammonia, urea, and UAN 32% in that geographic market.

It is unlikely that the competition eliminated by the proposed acquisition would be replaced by new entry into the Northwest. The construction of a new nitrogen fertilizer plant to supply the Northwest appears to be uneconomic. One recent attempt at building a plant in the region was abandoned four years after it was first announced. Design, site selection, permitting and construction of a new plant to supply the Northwest would require considerably more than two years. Producers with plants in the Northwest cannot expand output because these plants are operating at capacity. Importers of offshore fertilizers are unlikely to ship significantly more to the Northwest because the transfer and storage terminals they need are either unavailable or more expensive to use than Unocal's Rivergate terminal. Midwest producers face obstacles to increasing shipments to the Northwest, including high transportation costs, commitments to local customers, the attractiveness of netbacks closer to their plants, and differences in seasonal demand that often make California a better market for their product.

The proposed consent order would require that Agrium divest Unocal's deepwater terminal at Rivergate, part of its upriver terminal at Hedges (containing urea storage and land for expansion and road access), and leases on three UAN terminals (including one with deepwater access) to J.R. Simplot Company. The order would also require Agrium to provide Simplot with a long-term lease on the ammonia storage at Hedges and perpetual access to the Hedges dock, roadway, rail spur and weight scales.

The Commission is preliminarily satisfied that Simplot is well qualified to reproduce Unocal's competitive role in the Northwest. Simplot is a \$2.8 billion agribusiness that, among other things, produces, wholesales and retails nitrogen and other

Analysis to Aid Public Comment

fertilizers around North America. It operates a large nitrogen fertilizer production facility in Manitoba, numerous phosphate plants, and a chain of retail outlets. In the Northwest, Simplot is a substantial source of phosphate fertilizers, but its wholesaling of nitrogen fertilizers is very limited. The proposed divestiture would enable Simplot to become a major wholesaler of nitrogen fertilizers in the Northwest.

The proposed order requires that respondents divest the specified assets to Simplot, in accordance with the agreement between Agrium and Simplot, immediately after Agrium acquires Unocal. If, at the time the Commission decides to make the proposed consent order final, the Commission notifies the respondents that Simplot is not an acceptable acquirer, or that the agreement with Simplot is not an acceptable manner of divestiture, the respondents must immediately rescind the transaction and divest those assets to an acceptable acquirer, and in an acceptable manner, within four months of the date the proposed consent order becomes final.

For a period of ten (10) years from the date the proposed order becomes final, respondents are required to provide written notice to the Commission prior to acquiring any interest in (1) any asset to be divested or (2) any terminal with deepwater access used in the transfer and storage of UAN 32 in the Northwest. These appear to be the only assets in the Northwest whose acquisition might substantially affect competition in the sale of the relevant products but not trigger a reporting obligation under the Hart-Scott-Rodino Act. Respondents are required to provide to the Commission a report of compliance with the proposed order within thirty (30) days of the date the order becomes final and every sixty (60) days thereafter until respondents have complied with the divestiture obligations. Respondents are also required to provide annual reports during the term of the order. For Agrium the term of the order would be ten years; for Unocal it would be until the assets to be divested are transferred to Agrium.

The Agreement Containing Consent Order has been placed on the public record for thirty (30) days for receipt of comments by

Analysis to Aid Public Comment

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 order and the comments received and will decide whether it should withdraw from the order or make it final. By accepting the proposed 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 order, including the specified divestitures, to aid the Commission in its determination of whether it should make the order final. This analysis is not intended to constitute an official interpretation of the proposed order, nor is it intended to modify the terms of the order in any way.