FEDERAL TRADE COMMISSION DECISIONS

FINDING, OPINIONS, AND ORDERS

PUBLISHED BY THE COMMISSION

VOLUME 130

Compiled by
The Office of the Secretary
April J. Tabor and Robert F. Swenson, Editors

MEMBERS OF THE FEDERAL TRADE COMMISSION
DURING THE PERIOD
JULY 1, 2000 TO DECEMBER 31, 2000

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

SHEILA F. ANTHONY, *Commissioner*
Took oath of office September 30, 1997.

MOZELLE W. THOMPSON, *Commissioner*
Took oath of office December 17, 1997.

ORSON SWINDLE, *Commissioner*
Took oath of office December 18, 1997.

THOMAS B. LEARY, *Commissioner*
Took oath of office November 17, 1999.

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

TABLE OF CONTENTS

TABLE OF CASES

FEDERAL TRADE COMMISSION DECISIONS

FINDINGS, OPINIONS, AND ORDERS

JANUARY 1, 2000, TO JUNE 30, 2000

IN THE MATTER OF

J & R RESEARCH CORPORATION, ET AL.

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

Docket C-3961; File No. 972 3234
Complaint, July 19, 2000--Decision, July 19, 2000

This consent order addresses J & R Research, Inc.'s, and its principal, Gerald G. McCarthy's claims that pycnogenol, a substance derived from the bark of the maritime pine tree, could mitigate or cure the effects of numerous diseases or disorders. The complaint alleges that the advertising claims made about pycnogenol could not be substantiated. There was no scientific research demonstrating that pycnogenol products can alleviate or cure any of the diseases or disorders mentioned in advertisements and testimonials from consumers appearing in the advertisements for pycnogenol products did not reflect the typical or ordinary experience of members of the public who use pycnogenol products. The consent order requires respondents to possess competent and reliable scientific evidence before making any claim regarding the benefits, performance, or efficacy of any food, drug, or dietary supplement and prevents respondents from misrepresent the existence, contents, validity, results, conclusions, or interpretations of any test, study, or research in an advertisement for any product. Furthermore, when using endorsements or testimonials, respondents must disclose either, what the generally expected results would be for users of the advertised products, or the limited applicability of the endorser's experience to what consumers may generally expect to achieve.

Participants

For the Commission: *Matthew D. Gold* and *Kerry O=Brien.*

For the Respondents: *Gerald McCarthy, J&R Research, Inc., Joseph H. Thibodeau, P.C.* and *Claude C. Wild III, Patton Boggs, L.L.P.*

COMPLAINT

The Federal Trade Commission, having reason to believe that J & R Research Corporation, a corporation, and Gerald G. McCarthy, 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 J & R Research Corporation is an Iowa corporation with its principal office or place of business at 109 Main Street, Massena, Iowa 50853.

2. Respondent Gerald G. McCarthy is an officer of J & R Research Corporation. Individually or in concert with others, he formulates, directs, or controls the policies, acts, or practices of J & R Research Corporation, including the acts or practices alleged in this complaint. His principal office or place of business is the same as that of J & R Research Corporation.

3. Respondents have been general partners in a distributorship that has promoted the products of Kaire International, Inc., a multilevel marketing company. Kaire International's marketing plan allows distributors to earn commissions by recruiting other consumers both to purchase Kaire's products and to become distributors. The amount of commission earned by a distributor is based on the total dollar amount of the products purchased by those consumers and others whom they, in turn, recruit to be distributors.

4. Respondents have profited from the sale of various Kaire International nutritional supplement products containing pycnogenol, a substance derived from the bark of the maritime pine tree. These products have been sold under the names UltraPrime, Maritime Prime, Super Maritime Prime and Maritime Plus (Apycnogenol products@). Respondents= pycnogenol products are Afoods@ and/or Adrugs,@ within the meaning of sections 12 and 15 of the Federal Trade Commission Act.

5. Respondents have sold and disseminated or caused to be disseminated promotional materials to distributors of Kaire International. These promotional materials are intended to be, and are, used by distributors in their efforts to sell Kaire International's pycnogenol products and to recruit other distributors.

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

7. The promotional materials sold and disseminated by respondents, including but not necessarily limited to the attached Exhibits A through F, contain the following statements and depictions:

A. **" THE FACTS ABOUT AN AMAZING, NEW HEALTH-BUILDING NUTRIENT FROM FRANCE"**

DR. McCARTHY: Hello, I'm Dr. Gerald McCarthy and, in a few minutes I'll also introduce to you Dr. W. Lamar Rosquist. This tape contains a candid report on a natural occurring nutritional and health promoting new plant compound from France, one that has remarkable healing qualities. Now used by millions in Europe, its relatively new to consumers in the U.S. and Canada. However, there are already tens of thousands of health conscious North Americans who have read the research data or the books that have been published about this compound, who have begun using it, and with excellent health results.

Moreover, many doctors here who practice with holistic or nutritional therapy are finding this to be the single most powerful nutritional healing compound that they've ever used. This patented plant compound . . . has extremely potent health promoting qualities that's been shown to dramatically help

relieve the inflammation, pain and symptoms in many cases of rheumatoid arthritis, osteoarthritis and rheumatism, that fights the effects of diabetes, that helps prevent strokes and the recurrences of strokes. The compound powerfully helps prostate problems and menstrual problems, that dramatically promotes prevention of heart problems, circulatory problems and even tumor formation.

. . . .

I know, those are some pretty bold statements. But please bear with me because what you're about to hear on this tape may have far reaching benefits to your health and well being and that of those you love. . . .

. . . [W]hat you're about to hear are health benefits that are scientifically documented within published articles by researchers from around the world and especially within two recently published books authored by Dr. Richard A. Passwater, who is a Ph.D. in biochemistry. Dr. Passwater is one of the nation's most respected biochemists and is often cited as the most recognized scientific researcher and authority on the health-restoring effectiveness of anti-oxidant vitamins and the benefits that other natural anti-oxidant nutritional compounds have on one's health, well being and life span.

. . . .

This report is about one you've probably not heard of yet because its a newly patented compound and is only available from a few sources, but has been hailed as the most powerful anti-oxidant nutrient ever discovered, called pycnogenol. First, it is an anti-oxidant compound just like vitamin C and E are anti-oxidants. But there the similarity ends, because pycnogenol is actually 20 times more powerful an anti-oxidant per milligram than vitamin C, and 50 times more powerful than vitamin E.

Next I'll introduce you to a respected colleague and friend, Dr. W. Lamar Rosquist, N.D., D.C. . . . .

DR. ROSQUIST: This is Dr. Lamar Rosquist speaking. I'm making this tape in an effort to acquaint you with an experience that I've had in using an extraordinary compound called pycnogenol. I'm not going to mention any trade name, I'm just going to talk strictly about a product that has been, I think, one of the greatest discoveries or re-discoveries of the century. . . . Pycnogenol is a flavonoid that is proven to be 20 times more powerful as a flavonoid per milligram than one milligram of vitamin C, and 50 times per milligram more potent than a milligram of vitamin E. So you can see it's quite a powerful flavonoid. This compound, pycnogenol . . . has produced a myriad of results which I've never seen with any other nutritional approaches that I've used in the past.

. . . . In reading the literature that my friend brought me, I saw that this was a compound was tremendous in helping to resolve phlebitis or inflammation of the vein, thrombophlebitis and to help eliminate blood clots in the vein. To help reduce faracoscies (phonetic), to increase circulation, to strengthen the vascular walls. . . . . [I] started taking this because of all the things I found that it had possible healthful effects for me. I read that it would help people who had previously suffered CVAs, Cerebral Vascular Accidents, or we commonly call strokes, and it would help strengthen their vascular systems so that it wouldn't be so easy for them to experience a second stroke.

It would also help people who had previous heart attacks. The reason it would help them is because it would strengthen the vascular walls. The vessels would not be so permeable and weak, which allows fluids to flow in and out of the blood vessel walls into the tissue spaces. The linings of the vessels would be stronger, so when a person had too much stress or

too much pressure, their risk of a heart attack or a stroke would be greatly reduced.

Just the mere fact that I could take something that would help protect me so that I would not have to have other problems or episodes with my veins such as I had had, I was willing to take the pycnogenol. I was also willing to take pycnogenol because of my family history. Some of my previous members had weak blood vessels and had strokes and heart attacks. For these reasons I was willing to take pycnogenol as a preventative measure. For sometime I had a prostate problem, and usually men in their 60's get prostate problems. I would have to get up, as many men do, in the middle of the night to eliminate and void the bladder. I read in the literature that this product helps inflammation and inflammatory conditions and I realized that when a person has to void the bladder, there's usually an inflammation of the prostate gland or prostatitis. So, if it will help eliminate inflammatory conditions, it would help the prostate as well as any other type of inflammatory illness that might exist in the body such as phlebitis, which is inflammation of the vein, thrombophlebitis, which is inflammation of the vein with a blood clot, and arthritis which is inflammation of the various articular joints of the body.

So, I started taking 11 of these a day. It was only a matter of a week when I noticed that I didn't have to get up in the middle of the night to void my bladder. I also noticed that the pain in both my thumbs, my fingers and the weakness in my knees while going upstairs have all disappeared.

I had a man from Grand Forks, North Dakota sent to me by his daughter. He had been diagnosed as having terminal lung cancer with tumors in both lungs and they were in areas that were inoperable. Obviously they couldn't operate on the lung and remove the tumors because then he wouldn't have enough lung left to receive oxygen to sustain life. So they told him that he was too far gone for surgery. They thought

chemotherapy and radiation would be too rough on him. They just literally sent him home to die.

He came out to my office, I examined him. Here was a man who was in a very bad condition. His nose was purple, his hands were purple, his face was purple, his lips were purple. He was breathing in short pants, really struggling for oxygen and I didn't know what I could do. But I knew I had been having success with pycnogenol. So I put him on pycnogenol and gave him some other anti-oxidants, vitamin A, vitamin E, vitamin C and zinc and sent him back to his home in Grand Forks, North Dakota.

I didn't know what was going to happen to him. I put him on the saturation dosage like I take. . . . . In another 30 days he called me and said I've good news and I've got bad news. And I said, well, give me the bad news first. He said they've discovered that I have a heart problem besides my lung problems and so my doctors here in Grand Forks took all my records, my x-rays, put them in a packet and sent me to Rochester, Minnesota to the Mayo Clinic because my case was too complicated.

When I arrived there, they put me in the hospital, did all kinds of tests and x-rays for a period of seven days. And at the end of seven days they called me into the consultation room and told me that the tumors in my left lung had totally disappeared and they wanted to know what I had done. So, I told them that I had been going to a doctor in Salt Lake and he put me on this special compound that came from France. So they told me whatever you do continue to take it. So I continued to take the product and they told me to come back in 30 days, that now because one lung was better that they could possibly do surgery and if my heart was okay, they were going to do an angiogram on the next visit.

And so I went back there in 30 days, they were going to do the angiogram and they put me in the hospital again. Did the same procedures but this time it was only for three days. And at the end of this time they took me aside and said, now tell us again, what have you been doing? And he said, well, I told you I've been taking these vitamins from this doctor and this compound from France. And, he said, why do you ask? And they said, your tumors are gone in the right lung as well. Because the tumors are gone in the right and the left lung and your breathing is so much better, we don't have to do the angiogram. And he said, well, what do I do now? And they said, go home continue what you're doing and don't stop. Come and see us in three months. I just received a call from him about two weeks ago and he said that he plays golf now very regularly and so this is quite an accomplishment for him to come back from where he was. So when people think according to their condition, how long am I going to take it, well, you figure how long do you want to have the relief from your symptoms? Because many of these symptoms just didn't start building up and coming on all of a sudden. They've been building up and coming on gradually for a long time.

. . . .

Any compound that will make this type of change is remarkable because it means that it=s possible to reverse severe medical conditions. It means that you are not just going to take it to stop a situation but you are going to make the condition reversible. We are talking here about the strengthening of the blood vessel walls and the linings of these blood vessels to give us protection against heart attacks and strokes as well as many vascular conditions.

. . . .

It also helps people with Parkinson's disease, and they have mentioned it with Alzheimer's, as well as general senile dementia. A compound that has this many properties is one that nearly everyone needs to take.

. . . .

I thought I might tell you about some case histories. All of these are on a first person basis. These case histories refer to my patients in my practice. Patients that I've put on this product. A doctor called me from Billings, Montana and he asked me if I had anything which would help him with his prostate condition. I asked him to elaborate. He told me that for nine months he had an inflammation of his prostate and he had gone to two urologists, had taken antibiotics and other formulas that they had given him. None had worked. Then I told him that there was a compound that had been helping some of my patients and I was treating other prostate problems with it. He asked me to send him some literature and so I sent him some literature about pycnogenol. The next thing I knew I received a call from him about ten days later and he said, well, I read the literature and decided I'd give this product a try. He said that he had started taking the product the day before and that the pain in his prostate had left and it had not come back. I've followed through with three phone calls since that happened and that was four months ago. When I ask him how his prostate condition is he answers, AI don't have a prostate problem.@

I have a brother-in-law that came to me and also had a prostate problem but he is 83 and you could expect that he would have a prostate problem and he started taking pycnogenol. He used to have to get up three to four times a night. He never gets up at night anymore. He has noticed that his stream is full and he can evacuate his bladder immediately and there is no pain. So, he started thinking well, if this will help my prostate, it will help other things. So he started to put his wife on it and it has helped her arthritis, and now her knees do not give out on her. She has been able to go places this winter more than ever before.

But he has a younger daughter, I guess she is about 35, who has asthma very bad and has had it all her life, and she has it so bad that they have a lung machine that helps her when she gets in severe states of asthmatic attacks. Many times even when the lung machine does not help, they have to take her to an emergency room to get adrenalin to help her over the asthmatic attack. He had read the book written by Dr. Passwater who is a Ph.D. in biochemistry about some of his experience and scientific results that had been accomplished with pycnogenol. Dr. Passwater mentioned that you can take care of asthma and so this brother-in-law had his daughter start taking pycnogenol. This has been six weeks ago and after the first week, she never had to use the lung machine anymore. She is now, as he says, totally free of asthma. And she is now able to walk, take afternoon and evening walks with her friends around the block up to one to two miles with no effects at all, whereas before she had trouble just walking out to her mailbox and back.

. . . .

In our church area, we had a young man, 35 years of age, that was a juvenile diabetic and was losing his eyesight. He was suffering from a diabetic complication called peripheral retinopathy. This means the blood vessels in the back of the iris are so fragile as a result of years of taking insulin that his vessels had become very weak and they could not withstand pressure. The slightest little pressure would cause these blood vessels to break. Blood started filling into the vitreous humor of the eye. The blood in front of the optic disk made it impossible to see through it, therefore he was going blind. The young man came to my office and we started him on pycnogenol for seven months. Three months ago his eyesight started coming back. The blood vessels in the back of the eye were becoming stronger and because of this the bleeding slowed down to the point that now the blood that was in the eye was being resolved and absorbed by the body. The ophthalmologist was now able to go into his eye and by using lasers, zap some of these vessels that were weak and which

allowed blood to build up in the vitreous humor. He has noticed that his level of blood insulin has dropped and that's also an interesting thing.

The other day a woman called at my office and told me about her young child who had juvenile diabetes and that he was up to seven units a day. They were so depressed about it and I told her about the story of this young gentleman who was losing his eyesight. She started giving her son some pycnogenol and in less than two weeks his number of units of insulin had dropped from seven down to three. Many people who have diabetes have other problems especially circulatory problems, heart problems and have responded tremendously to taking pycnogenol.

. . . .

I have MS patients taking pycnogenol now. I have one MS patient in Phoenix, Arizona that is excited because she has been taking pycnogenol now for about four months. Her daughter is getting married in a couple of months. She has been in a wheelchair for about five years and she's excited because she's getting to the point where she's starting to stand and to walk a little. She's very excited about walking down the aisle and standing next to her daughter when she gets married. This didn't happen all at once. Many people take their product and figure well, I'll take it for 30 days and in 30 days its either going to work or I'll stop taking it. How long do you think free radicals have been working on your body to tear it down and destroy it and limit its use? It has been happening all your life. So don't think that in 30 days you're going to change something that's been taking so long to develop. Fortunately, the exciting result about this product is that so many people get overnight, instantaneous results. But given time, it will also work on some of those slower developing conditions such as arthritis.

. . . . We were on a cruise ship and had 1500 people on it. . . . . We were sitting at our dining room table on the first night out. The pharmacist and I were talking shop. Naturally he's talking about the new kinds of drugs and other things that are on the market and I'm talking about my office patients. I told him the story about this gentleman from North Dakota and the results I had with him taking this pycnogenol and he had never heard of this compound before. After we finished talking, the woman who was sitting to my left with her husband, tugged on my coat and she said, we've been listening to your conversation and I wanted to tell you that the very thing you've been talking about, the lung cancer the man in North Dakota has, has been a problem with me. My husband and I are on this cruise because I have lung cancer with an inoperable tumor that's wrapped itself around my esophagus. I've gone through radiation and I've gone through chemotherapy and this hair that I have is a wig. Then she introduced me to her husband, and her husband was one of the top medical surgeons in the United States. So, her husband immediately asked where they could get some pycnogenol. Well on this cruise I=d brought extra bottles with me. Now I've stayed in touch with his woman and her husband and she's gone back for three subsequent tests, back to the Western Division of the Mayo Clinic in Scottsdale, Arizona. She's gone back there three times and the tumor has not grown. It started to get smaller. This morning she called me from Arizona to tell me that she had just come out of Mayo Clinic and they could not find any trace of the tumors in her lungs or around her esophagus. She's feeling better and her husband, who is as I told you a surgeon, is eternally grateful.

. . . .

I have another case that I want to talk about and this is a woman that called me one day and said, Adoctor, is there anything you can do to help me with my leg.@ I said, Awhat's wrong?@ She said, Ayou know I have diabetes and I have developed a condition called osteomyelitis. With this

osteomyelitis I developed an infection in my right leg and it went into the bone marrow,@ and in osteomyelitis the infection is usually from a staphylococcus organism, which is one of the most resistant organisms to antibiotics there is. She said the antibiotics didn't kill the organisms and she started getting decay of her bone and her legs started swelling up and she had horrible pains. So they amputated her leg below the knee. She said it was now starting to happen in the left leg and that they now wanted to amputate her left leg. She said that she had become used to the prosthesis on her right leg and that she could get around but that she didn't want to live if she had to wear two prosthesis. She asked me if I knew of anything that might help her. I told her AI'll send you some literature on the pine bark extract called pycnogenol. I think this might help you.@ She started taking pycnogenol. . . . . In two weeks she called me, and all the pain was gone from her good leg, and all the swelling was gone. The infection and the inflammation in the bone marrow, which the antibiotics hadn't touched, was gone. The doctor did not have to amputate her leg.

. . . .

I'm finding that people have results with pycnogenol. I have a patient who lives in Malad, Idaho who had a severe cerebral vascular accident, a stroke, which left his whole left side of his body paralyzed. He could hardly walk. He came to me for other treatments and I told him about pycnogenol and he started taking it. Now he's walking almost normally, his balance and equilibrium are perfect. His biggest fear and the biggest fear of anyone that has had a stroke, is a second stroke. And he doesn't want that to happen.

I've heard of all types of cases and this is interesting because here in the United States, every other week in the newspaper, there is always something new about products like

the u-tree which is a type of pine tree that also has a bark similar to the maritime pine which pycnogenol comes from. Medical science is now using the extract from the bark of the u-tree to treat ovary, breast and uterine cancers. The same type of compound that's found in the u-tree is found in the bark of the maritime pine. I have three cases that I'm monitoring right now that have the same condition that killed the actor, Michael Landon. Cancer of the pancreas. They're desperate. That everyone of these cases have now lived three times longer than they were supposed to. They were given months to live, now they have lived much longer. They had jaundice, they are free of the jaundice. Their eyes aren't yellow, their skin is not yellow. They have no idea how long they're going to live. I have no idea how long they are going to live, but they're taking pycnogenol and they're taking the other anti-oxidants A, C, E and zinc faithfully.

. . . .

What are the other conditions that they're using pycnogenol for? I'm using it for arthritis, for bursitis, for diabetics, for people that have had strokes and heart attacks or people who have had predispositions to strokes or heart attacks. I'm using it for skin problems, for Parkinson's cases. . . .

I've found that this is a great product for people that have liver conditions from let's say alcoholism. Let me make one statement here and you can take this for what it's worth. Is it better, let's say if you're an alcoholic and you drink, or you're a smoker and you smoke, and say that because you have this problem you're not going to take pycnogenol and let your body deteriorate and wear down or is it better to add pycnogenol and try to fight some of those free radicals that you're bringing into your body? It's my estimation that everyone ought to be taking pycnogenol if they have one of these problems. They should be taking pycnogenol just to stop the further deterioration of their condition. Remember

what I have talked about. Quality of life and quantity of life can be expanded by the use of pycnogenol. . . .

Because I do not have case histories right now in front of me, I can not tell you all the other results that I have had happen. And we're talking about gastrointestinal problems straightening up, diarrhea straightening up, livers becoming decongested.

. . . .

I had someone take pycnogenol and all of a sudden they were able to sleep. And are able to get better rest at night then they have achieved for many years. So, you're going to find that this has a tranquilizing affect on the nervous system because it can cross the blood brain barriers as I mentioned earlier.

It also works really well with people who have edema. They're able to reduce the swelling that takes place in their legs. We have found that it will help the asthmatics, the edemas, the vascular conditions and, another thing I've found that it helps, is jet lag. So this would be an ideal product for people that are in the aircraft industry. Pilots, stewardess and people that do a lot of traveling will find that they do not have jet lag.

You will also find that pycnogenol helps nearly any kind of problem. . . . There are going to be many doctors in this company that will have results similar to or even greater than mine.

DR. McCARTHY: This is Dr. McCarthy again, and I hope that you were inspired by hearing Dr. Rosquist's in practice results that confirm the information that I shared with you at the beginning of this tape. So let me summarize some of the main points about pycnogenol as scientifically

documented within Dr. Passwater's two books on pycnogenol, that will help confirm why Dr. Rosquist, who you've just heard was able to report the various results that he has been seeing in his patients.

Pycnogenol literally helps to slow down the body's aging process. . . . . Dr. Passwater and other researchers have found pycnogenol to be protective against hardening of the arteries. It helps to prevent the biochemical mechanisms that cause the plaque build up that often occurs within arteries, no matter what a person=s age may be. Because of that, it greatly helps to reduce the risk of heart problems, and very important, it's used to help prevent recurrences of sudden acute heart problems. In fact, many people use pycnogenol to protect and improve the health and elasticity of the heart=s coronary arteries and other blood vessels within the body. One famous British medical scholar has referred to pycnogenol as the arterial sclerosis antidote. Because pycnogenol greatly strengthens your body's blood vessels, the capillaries, arteries and veins, edema, -- or swelling of the legs is greatly reduced. And because of the increased vessel walls strength, it dramatically helps to prevent strokes and other circulatory problems within the body are also helped, as are the symptoms of PMS, menstrual problems such as excessive menstrual bleeding, water retention and so forth.

Pycnogenol is now used to greatly help prevent or actually reverse the circulatory and nervous system complications of diabetes, such as easy bruising, fragile capillaries and poor circulation. Pycnogenol is widely known to actually help repair and rebuild capillary function when it's deficient. Scientific studies and gratifying healing results reported by doctors show that pycnogenol can greatly help arthritis and rheumatism and severe prostate problems. It's used to heal and reduce varicose veins, phlebitis and hemorrhoids. It's dramatically effective against psoriasis and many other skin problems. It has a calming affect on the nervous system and helps provide better and deeper sleep, plus more pep and

energy upon awakening. Pycnogenol is remarkably effective against asthma, hay fever and other allergies. . . . .

As regards arthritis, the types where inflammation is involved, pycnogenol thus helps to reduce the swelling, irritation and pain in the body's joints. In osteoarthritis where wear and tear on joint cartilages is primary, understand that your joint cartilages are mostly composed of collagen, and pycnogenol literally binds with, protects and helps rebuild collagen wherever it occurs within the body. So, this anti-inflammatory and joint rebuilding quality of pycnogenol can help all of the joints of the body including those in the low back and neck, shoulders, elbows, hands, hips, knees and so forth. The same anti-inflammatory affect and tissue collagen rebuilding affect of pycnogenol greatly helps tendinitis, bursitis, muscle soreness and injuries. In fact, it greatly speeds up the healing time of injured, damaged body tissues after accidents or surgery such as skin damage, or trauma, bed sores, muscles that have been strained, joints that have been sprained and so forth. Because of that, athletes of all types around the world are now using pycnogenol on a daily basis to give them a definite competitive edge and to rapidly heal athletic injuries to get back into competition in a fraction of the time that would be required without using pycnogenol.

. . . . In fact, Dr. Passwater shows that it has such a powerful, but natural, anti-viral affect, that it's been shown to inhibit herpes and even polio viruses. Pycnogenol helps to boost a person's muscular stamina and agility of body movement at any age, it sharpens memory and other mental processes. As I mentioned earlier, ponder again on the magnitude of this fact, the compound reduces the risks of, and has been shown to help, fully 60 of our most troublesome, chronic, degenerate of health conditions, naturally.

To mention just a few more of those, it's used to help people who have Alzheimer's, Parkinson's and senility.

Because pycnogenol protects brain cells and nerve cells from chemical damage by free radicals, it's used to heal chronic gum problems. It's used in cases of cataracts, chronic fatigue and to repair liver damage. It helps to repair degeneration of the eye's retina and in fact has been noted to improve the sharpness of vision within normal eyes. It greatly helps chronically dry skin. Pycnogenol is used to improve blood circulation over the entire body. When poor blood circulation in the pelvis is part of the cause, it even helps reverse male sexual inadequacy. Also, because pycnogenol helps to normalize capillary strength and resistance, it can be a powerful natural aid in reducing high blood pressure and the health risks that can cause.

Note that you can and should refer to Dr. Passwater's two books to back up everything on this tape about pycnogenol. One of the most intriguing things that Dr. Passwater documents is that pycnogenol has a strong, anti-cariogenic and anti-neoplastic affect - that is the ability to help prevent and inhibit tumor cell production of the body. . . . .

Now, before closing this tape, just one last word. Don't be surprised if your doctor hasn't yet gotten the facts on pycnogenol. And the point is this, if what you've heard on this tape makes sense to you and it should, do not accept the opinion of any doctor regarding pycnogenol who you can not verify as to having studied the latest research papers or books on the compound that contains the facts. So, do your doctor a favor and loan him or her Dr. Passwater's two books on pycnogenol. Believe me, that doctor will eventually thank you with sincere gratitude for having done so because of the stunning healing affects that they'll quickly see in scores of their patients who they will have recommended pycnogenol to.

And very important, the information that we just shared with you about pycnogenol is meant to be strictly educational. And though pycnogenol has helped countless people with various conditions, that help is the result of the powerful

nutritional effect that pycnogenol can render. But where it comes to identifying what your physical problems may be, that is the job of your physician. So, Dr. Rosquist and I suggest that in all cases where you have various signs and symptoms of a physical problem, be sure to first consult with your doctor, weigh his or her advice, then consider adding the magic of super nutrition to your daily schedule. Do not attempt on your own to try to treat unidentified signs and symptoms that have not yet been identified by your doctor with pycnogenol or anything for that matter. That is the job of your doctor. . . . .@
(Exhibit A, J & R Research Corporation cassette tape).

B. **"13 DOCTORS CONFIRM A HEALTH-BUILDING BREAKTHROUGH"**

Dr. McCarthy: Hello. I=m Dr. Gerald McCarthy. I=m a D.C. and am president and CEO of J & R Research Corporation, and I urge you to listen very carefully to this brief tape because it=s message may very well give you or someone you love a new lease on life from improved health and vitality, more energy and feeling of well-being. Plus a new way to relieve the cause of many types of acute and chronic pain.

In a moment, I=ll introduce you to thirteen medical professionals -- doctors who will reveal their exciting in-practice results from a new and patented breakthrough in nutritional science. Already used by countless doctors in Europe, it=s relatively new to the U.S. and Canada, but these thirteen doctors and thousands of others are now proving it to be the single most powerful nutritional health promoting compound they=ve ever used.

. . . .

Dr. McCarthy: [T]he name of the compound is pycnogenol. . . . . And, it=s a totally safe to use extract from the bark of the french maritime pine tree. Now, before these doctors share their experiences with you, there are several things I need to point out. First, their enthusiasm about pycnogenol is unique. Never before has a nutritional compound so captured the attention of mainstream medical doctors. . . . . Next, their excitement is about a very specific and exclusive formulation of pycnogenol. One that=s specially produced by a company in **Longmont, Colorado**. [Emphasis added].

. . . .

Dr. Shields: I am Dr. Russell B. Shields. I am a medical doctor and since 1963 I=ve been practicing medicine as a board certified family physician. . . . . That is before my immune system started to malfunction. When that happened, I became more and more disabled with rheumatoid arthritis, and during the next nine years, my condition continued to deteriorate. I became extremely handicapped. The periarticular swelling and pain in my joints was severe. I rarely slept more than two hours at a time. Also, it looked like a hip replacement was needed. [M]y brother, who is also a medical doctor, had suggested many times that I try something new. . . . It was a compound from pine tree bark called pycnogenol. . . . And now here=s what happened. As a scientist, I=ve got to admit, the results that followed were far beyond any ever witnessed in my practice. In fact, I was virtually overwhelmed by the relief that occurred over a period of time. Today I=ve regained 100% normal function of all joints, and am free of pain. The range of motion of my joints is back to normal. My gratitude for this compound and what its done, is beyond anything that words can convey. But I=ll try to express it by saying this, anyone with degenerative health conditions who fails to give this compound a try is passing up the single greatest opportunity to help correct their immune system malfunction.

Also, realize that there are many anti-oxidant products on the market, and many of them are good basic products but there=s only one that I endorse 100%, and those are the pycnogenol formulations produced in Colorado. No other anti-oxidant compound provides even remotely the same degree of result. . . . . [I] could reveal many case histories wherein I=ve successfully used pycnogenol and the Colorado company=s other compounds. . . . . Their use, especially for patients with hard to treat degenerative conditions, will I=m sure soon reach the attention of the mass media.

. . . .

Dr. Buerger: My name is Clark L. Buerger, Jr., B.S., M.D. I . . . practiced for over 40 years in the specialty of OB/GYN. I am 77 years old but still keep my license active. I am one of the founding fellows of the American College of OB/GYN. . . . While shopping . . . , the salesman noticed how crippled I was and brought me a chair to sit in while he demonstrated his products. He asked me if I would like to try a nutrient that is the strongest anti-oxidant currently available. I was very skeptical and doubted that this man could offer me anything that could improve my condition. However, I told him that I would be glad to give it a try. I later became extremely excited over this which I call the wonder pill of the century! I was loaded with degenerative disease such as diabetic neuropathy, degenerative arthritis, high blood pressure, prostate problem, hemorrhoids, arterial sclerosis with cardio vascular changes, and Crohnes Disease. I had a total right knee performed, the removal of all the bone in the joint and replaced with stainless steel. My left knee was equally as bad and the doctor suggested that I have both done at the same time, but I refused and only had the right knee operated on. I was happy over this decision because my left knee is now back to normal without surgery. After starting on pycnogenol

from Colorado, I was in for a great surprise. In time, I had a complete turnaround of all my symptoms. My prostate cleared, my neuropathy cleared, my blood pressure came down, my hemorrhoids improved, my left knee, as I told you, was completely back to normal and my Crohnes Disease had markedly improved. Then I ran out of pynogenol. All of my symptoms returned. I immediately went out and searched for pycnogenol and found a look alike in a local health food store. To my dismay, my conditions remained unchanged. Finally, my pycnogenol arrived from Colorado and in time I again improved. . . . . I have patients with lupus, Parkinson=s Disease, arthritis, prostate problems, and fibromyalgia. All of these conditions are showing marked improvement. . . . .

. . . .

Dr. Phillips: . . . . I=m a doctor of podiatric medicine and surgery. . . . .

[C]onditions that I have seen personally in my office practice improve were conditions such as arthritis, diabetic ulcers, decubatus ulcers, neurotrophic ulcers, and edema, along with cases of diabetic neuropathy. Personally, I=ve experienced resolvement of a chronic skin condition I=ve had for 25 years. Through family and associates, I=ve seen improvement in rotator cuff problem and associated pain, and also lupus, Crohnes Disease, hypertension, irritable bowel syndrome, bronchitis, asthma and the list goes on. In regards to ADD with a five year old male, this little boy had been on Ritalin at 20 milligrams per day. He did terrible. He didn=t eat. He didn=t sleep. He argued all the time with the parents and he was crabby. They put this child on pycnogenol and also within a certain period of time, he slept better, he ate better, he had a better personality. He had an increased focus and was more attentive. One statement that really got my attention was that the mother called my up one evening and she said: AThank you very much for giving my son back to me.@ And, this really hit home.

. . . .

Dr. Cunningham: . . . . I=ve been an optometrist for the past eight years. I specialize in behavioral and functional vision with great emphasis on visual perception. . . . . I had heard much about pycnogenol so I began purchasing just basic pycnogenol at the local store for a period of time and nothing happened. So my first impression was that pycnogenol was a hoax. Then a friend contacted me and encouraged my to try pycnogenol from a company in Colorado. . . . [W]hat struck me the most was that my vision was noticeably improved. The depth, contrast, color and also my peripheral awareness had all improved. . . . . It just stands to reason that pycnogenol, an anti-oxidant 50 times more powerful than Vitamin E and 20 times more powerful than Vitamin C, will have an amazing effect on the retinal tissue. I can foresee the widespread use of Pycnogenol with other anti-oxidants to treat the various conditions of the retina.

Dr. Shore: . . . . I am an osteopathic physician and surgeon. . . . . I have some patients that I would like to tell you about and some of the results of these patients have gotten them from using the Pycnogenol that we get from this company in Colorado. FR is a patient who has rheumatoid arthritis. Prior to starting pycnogenol, she was taking cortisone, as well as tetracycline and also needed to use a walker, and it took her approximately five to eight minutes to get from the living room to answer the door bell. She was able to get off the Prednisone; she was able to get off the tetracycline and she no longer needed the walker. I have had several patients with ADD and ADHD, attention deficit disorder and attention deficit hyperactive disorder, who have gotten excellent results with pycnogenol. Some of the patients have been able to get off their prescribed medications entirely and other of the patients have been able to decrease their dosage by as much as 50%.

. . . .

Now, all of us may not get results quickly, but everybody will get results with Pycnogenol if they stay on the product long enough and at a high enough dose.

. . . .

Dr. Fischbach: . . . . I=m a medical doctor specializing in family practice and ophthalmology. I was introduced to pycnogenol by a friend approximately three years ago. . . . Now I=ve had some experience with multiple disorders and illnesses, among which are multiple sclerosis, rheumatoid arthritis, fibromyalgia, attention deficit disorder and attention hyperactive disorder, diabetes, osteoarthritis, lupus and the list goes on and on. My experience is quite extensive. I=d like to give you a few examples of some very dramatic cases that I=ve had over the years. One that comes to mind immediately is of a woman in her 60's with multiple sclerosis who came to me after having been tried on virtually all conventional medications without any success whatsoever. She came hobbling in with a cane and looked very distraught and very much in pain. . . . . [I] placed her both on the pycnogenol and aloe vera and the next time I saw her she came in and said that she thought this was starting to help her. . . . . And the next visit I had with her, she definitely noticed a tremendous difference. . . . And the following visit we had, she came in, she did not even have her cane with her -- she left it in the waiting room. She didn=t even realize she did this. She says she feels wonderful. She hasn=t felt his good in many, many years. . . . . I had never been able to achieve these types of results with any other conventional medication. . . .

I saw a boy . . . who had attention deficit disorder and his mother told me that try as hard as he could in school, he just could not concentrate. This caused tremendous problems with his grades; as a result, his self esteem was very low. She was

familiar with the drug Ritalin used in Attention Deficit Disorder but was very concerned about all she had read and the side effect profile. . . . . [W]e placed him on pycnogenol and she notified me a while later that the results were amazing. He now was able to concentrate. He could perform his studies and his grades improved dramatically; his self confidence was now back, and she was just amazed and so was he at how dramatic a turn around this compound did for him. It was just incredible!

Another friend of mine has severe osteoarthritis of both knees, to the extent where there is no longer any cartilage between the two main bones and he basically is in a situation of bone rubbing against bone whenever he=s walking. This naturally has led to a tremendous amount of pain on a regular basis. I placed him on pycnogenol and again, a short while later, he told me that he started to notice an improvement and we spoke again a while later and he said his symptoms were almost gone. He could now wake up without any pain. His mobility was much improved and he just could not believe the difference. . . . .

Now these are some examples, just a few, of what I have seen pycnogenol do over the last three years and it=s interesting because prior to the introduction of Pycnogenol in this country, conventional anti-oxidants that have been available, which are Vitamin C and Vitamin E, just couldn=t even come close to doing things like what I=ve just related to you. Vitamin C, we found to be 20 times less potent than pycnogenol; Vitamin E, 50 times less potent. . . . .

[I] have researched this quite thoroughly and found that the only pycnogenol that is of superior quality comes from a company in Colorado. And, all the other pycnogenols I=ve seen are far, far less potent.

. . . .

While in fact these products have been extensively studied in Europe and their safety and effectiveness proven without question, the relatively recent introduction to this country has not yet generated a body of evidence to support what we who have used them already know. . . . .

(Exhibit B, J & R Research Corporation, cassette tape).

C.

NATURE=S MIRACLES
AN M.D.=s EXPERIENCE

By
Dr. Gary Fischbach M.D.

INTRODUCTION

. . . .

The air we breathe, the water we drink, the foods we eat, and the way we choose to live our lives will be our epitaph. The culprit - trillions of tiny molecules called Afree radicals.@ These unstable oxygen molecules unleashed by pollutants, chemicals, stress, and even physical exertion and sunlight are felt to be largely responsible for the degenerative process known as aging, and even more important, the largest contributor to disease. From the common cold to widespread cancer, we have become victims of this deadly chain of events, initiated by Afree radicals,@ that ultimately wears down our immune system and its ability to defend the body.

. . . .

The conventional weapons in this fight, Aanti-oxidants@ as they are known, have been Vitamin C, E and Beta Carotene. This is the classic David versus Goliath - like trying to put out a forest fire with a water pistol - hopeless.

. . . .

God help us if we do not wake up soon. Our legacies left to our children might make it difficult to survive.

While needless to say, all the preceding declarations of doom are quite depressing, all is not lost. The picture is no longer as hopeless as it once was. In the pages that follow, you will learn of a compound unlike any other previously discovered. A substance that has been widely used in Europe by doctors and other health care providers for over forty years. A compound that is able for the first time to be winning the battle against free radical destruction.

. . . .

So why, you might ask, aren=t these substances well known and readily available to everyone? Why don=t doctors know about them? Why haven=t they been popularized in the media? Why hasn=t the FDA, the Government=s Food and Drug Administration, examined the studies abroad, seen the potential benefits, and pushed these compounds through? Well sadly, the fact is that it costs over 200 million dollars and 10 years of research to gain the FDA=s ringing endorsement these days - a practice that has deprived us Americans of the many benefits afforded people in other countries whose laws are not nearly as stringent. As a matter of fact, these very substances we have been discussing are not only in widespread use in Europe and Scandinavia, but for many conditions, they are the number one recommended treatment by doctors. . . . .

But make no mistake - the information that follows is not intended as a promise or cure; we make no medical claims. Rather, it is based on the experiences of people with a large variety of medical problems and conditions. We refer to this as anecdotal evidence, as opposed to that which is derived

from scientific studies. While, in fact, these substances have been extensively studied in Europe for over 40 years, and their safety and effectiveness proven without question, their relatively recent introduction to this country has not yet generated a body of evidence to support what we, who have used them, already know. Without question these studies will follow, and create such significant and overwhelming proof, that the medical establishment will be unable to deny the facts.

. . . .

. . . . Studies have shown it to be 20 times more potent than Vit. C and 50 times more powerful than Vit. E as an antioxidant. The compound=s name - MARITIME PINE.

. . . .

As previously stated, this compound has been carefully studied for decades, and has been in widespread use throughout Europe and Scandinavia against a multitude of medical conditions. Over the years, professors, physicians, researchers, and even a 1986 Nobel Prize nominee have sung the praises of this ASuper Antioxidant.@ Finally, it is now available in the United States.

. . . .

REFERENCE TABLES

. . . .

I am not stating that these compounds will cure, improve, or even alter these conditions whatsoever. I am merely offering up a significant body of Aanecdotal@ evidence derived from personal experience with these substances in my practice. These encounters happen to support the massive amount of foreign literature accumulated over the last few decades illustrating the health benefits of these substances. . . . .

(copy of reference tables attached as Exhibit C).

D. A. . . .

Dear Friend,

You had asked for this information on Attention Deficit Disorder. Remember . . . We had visited on the phone?

Dr. McCarthy=s enclosed brief tape reveals a new, safe to use, non-drug, nutritional breakthrough method for relief of ADD. . .

If you had thought that powerful stimulant drugs were the only means of relief for ADD, the good news is this:

Every week from coast to coast, many thousands of grateful parents, adult ADD sufferers and ADD support group members. . . are discovering dramatic relief with this new, nutritional method.

. . . .

As you listen to Dr. McCarthy=s brief tape you will hear the experiences of three doctors who reveal typical case histories of patients they had taken off of Ritalin-- and other drugs-- then, placing them on Pycnogenol, how those patients experienced wonderful relief.

Also, you will hear the experiences of a typical, grateful parent, and an adult ADD sufferer who gained relief with Pycnogenol.. . . . @
(Exhibit D, J & R Research Corporation promotional letter).

E. ADR. McCARTHY: Hello, this is Dr. McCarthy again, and this report is a vital update on the astonishing new nutritional compound previously reported to you on my audio Tapes 1-A and 2-A. On Tape 1-A, you heard Dr. W. Lamar Rosquist refer to it as the "nutritional miracle" of the <90s. Well, in line with that statement, this tape will reveal the remarkable effectiveness of that safe to use compound for another very pressing national health problem, Attention Deficit Disorder, also Attention Deficit Hyperactivity Disorder. You'll get the facts on this new approach to ADD or ADHD and in detail. Not only from me, but from several physicians, two medical practitioners, a pharmacist, a doctor of chiropractic and grateful parents of ADD suffering children, plus an adult with ADD. . . .

ADD, or ADHD, is a baffling and frustrating disorder, not only for those who suffer from it, but also for their loved ones and our nation's physicians who have done their best to treat it. The frustration among physicians is because science has not yet found the cause or causes of ADD. . . . One thing that is a fact, millions have been prescribed powerful stimulant drugs in the attempt to help ADD. But there are two problems with drug treatment. One, in many cases drugs such as Ritalin, Dexedrine and Cylert, often do not work very well. And second, they cause very dangerous side effects. But the good news is this: Every week from coast to coast, many thousands of parents, adult ADD sufferers plus countless ADD support group members are discovering wonderful natural relief with pycnogenol . . . .

First, I'll introduced you to Dr. Gary T. Fischbach, M.D. Dr. Fischbach practices internal medical as a family medical practitioner and also practices ophthalmology. . . . [H]e is one of the few medical doctors in the U.S. who has over three years in-depth clinical experience with the virtually astounding health results pycnogenol provides. Listen especially to his experiences with ADD patients.

DR. FISCHBACH: I was introduced to pycnogenol by some associates here in the town that I live in and became very intrigued by some of the claims that were being made, experiences that were had by physicians in Europe, specifically, with quite a number of disorders, and became intrigued enough to investigate the literature and did some of my own testing as well. And, to my amazement, I found that pycnogenol was very effective against quite a number of disease processes, and I could finally achieve results with this natural compound that before I could not achieve with conventional pharmaceuticals.

Let me give you some examples. I've been able to effectively improve conditions such as multiple sclerosis, rheumatoid arthritis, osteoarthritis, fibromyalgia, lupus, as well as attention deficit disorder and attention deficit hyperactive disorder. The latter two I have found over the years to be an extremely difficult disorder to treat, both for the patient and for the family . . . . And it's just been amazing the response that I've gotten from parents of children who I've placed on the compound pycnogenol. They see results usually very rapidly and they comment that the child's behavior is able to be maintained over the course of a whole day, something which we often not see with Ritalin.

Let me tell you that I've seen a couple cases that I must say are remarkable and extremely dramatic. I had one mother, after her son began pycnogenol tell me that the child was able to sit quietly, carry on a conversation, play with his cousin uninterrupted and what even happened is that the child noticed this, and we're talking about a six year old child. He could feel the difference and he would actually run to take pycnogenol, whereas before the mother had to actually force him to take the Ritalin. She understandably was beside herself with joy at these results and just praised the coming of pycnogenol, so to speak.

And I've had numerous other cases equally dramatic. The feedback from parents has been astounding. They notice rapid results and they all comment that the behavior pattern has been smoothed out completely without any peaks and valleys and their school work has improved dramatically. I must also say that I've had some experience where they would run out of the brand that I was exposing them to and would be forced to seek other means of obtaining the compound. They would find some at their local health food store. They would come to me showing me a bottle of pycnogenol and would ask me "Doctor, isn't this actually the same compound?" I would tell them politely, "No, this really isn't anywhere near the quality of the pycnogenol that I have gotten for you. And you can experiment yourself and try what you find at the health food store and compare it to the compound that you had gotten from me." And, lo and behold, each time this occurred they would then come back to me and tell me that they could not feel any benefit whatsoever from the compound they had purchased themselves and ask me what was the difference. Well, then I would proceed to tell them that this company located in Colorado manufactures the highest quality pycnogenol available anywhere and this company has an exclusive patent for their process. . . .

I must say that I have never seen such a change in individuals with so many varied problems as I have with the use of Pycnogenol and that includes all my experiences with all types of pharmaceutical drugs. . . .

. . . .

DR. McCARTHY: . . . . [I]n a minute you'll hear the experiences of two typical consumers who are benefitting from pycnogenol. One whose son is taking it . . . .

RAY: . . . . [It] can be very frustrating and very stressful when your child has ADHD because they don't follow instructions, they don't make eye contact, they don't listen to you, it seems like they're ignoring you. They're always in trouble, they're

impulsively hitting. It's just you really feel out of control and discipline just doesn't work. . . . David was on Ritalin. He went through the child study team and psychological evaluation, he went to a neurologist and they said it's ADHD. He did focus a little better in school. Not right away. We changed the dose of the Ritalin, the doctor told us to, he got a little better. But the immediate side effect, he would come home with the Ritalin rebound it was called. He would literally bounce off the wall when this Ritalin would wear off. It was horrible. You'd come home from school, your kid's all glassy-eyed, running from one wall to the next, bouncing off, and you're calling his name and he doesn't even know you're there. He wasn't sleeping, he's up until one o'clock in the morning because he couldn't sleep. His lips were real dry, he had tummy aches. He was on it for I guess about two months or so. Thanksgiving we decided to give Pycnogenol. . . . Well, he started following multiple instructions, making eye contact, tracking what you're saying. You could see him looking at you, tracking what you're saying. . . . He focuses for an hour and a half in the morning and an hour and a half in the afternoon. I got to tell you, it's a different kid. It really, really is . . . . @

(Exhibit E, J & R Research Corporation cassette tape).

F. **AFAIRBORNE PYCNOGENOL MONOGRAPH #2**
Relative to Attention Deficit Disorder & ADHD

The data within this monograph was created for our Fairborne Association=s member -- physicians who practice in the field. This information is to further disclose facts obtained regarding the compound Pycnogenol, and particularly its efficacy for alleviation of the signs and symptoms of Attention Deficit Disorder (ADD) and Attention Deficit Hyperactivity Disorder or ADHD.

. . . .

The commercial source for the compound we continue to utilize, is the same formulator in Colorado referred to in our first monograph. The only reason we continue to use that source is because their proprietary, blended *formulations* of Pycnogenol have significantly greater bioavailability than *basic* Pycnogenol sold over the counter in pharmacies and other sources. . . . .

. . . .

Interesting to note is the fact that even though, over the years, many so called Anutritional@ approaches to ADD have been attempted, no nutritional methods had heretofore produced *significant* alleviation of symptoms.

However, not only is Pycnogenol proving to be exceedingly efficacious for ADD, from the anecdotal results reported from the field it is becoming a very attractive *first-line* method of choice by many physicians, in preference to conventional drug administration. Also, in most cases, traditional *drug* therapy can usually be discontinued - or significantly reduced - provided the patient continues to consume Pycnogenol.

. . . .

TYPICAL RESULTS WITH ADD/ADHD PATIENTS:

(a) A generalized calming effect.
(b) Significantly increased mental alertness and increased ability to remain focused upon a given task or problem.
(c) Activities and plans much more organized.
(d) Far less impulsiveness of behavior.
(e) Decreased aggressiveness.
(f) A subjective feeling of being Aat ease.@
(g) More in control of one=s thoughts.
(h) Particularly exhibited in young children and teenage ADD patients,

as well as the above:

1. Improved grades in school.
2. Improved recognition of and cooperation with requests from teachers and parents.
3. Less noisiness and disruptive behavior in class, at home, among siblings and peers.
4. Marked improvement in the ability to remain still. (Decreased Restlessness).

. . . .

PHASE 3: DRUG REDUCTION AND/OR ELIMINATION

For ADD patients currently being treated with drugs such as Ritalin, Cylert and Dexedrine, as you know, those drugs are often withdrawn gradually, to avoid drug-dependent withdrawal symptoms. (Refer to your PDR). It is entirely up to the physician as to *when* to begin gradually decreasing daily dosages of Ritalin, etc. during Pycnogenol administration. However, keep this in mind:

. . . .

Reports from physicians in the field indicate that as Ritalin, etc., is gradually decreased over a number of days, for most patients it can be *entirely* eliminated. However, a smaller percentage of patients may still require some drug intervention as well. And, then, in most cases, only at peak stress periods such as afternoon school sessions and so forth. Moreover, the drug *dosage* required at those peak stress periods is significantly lower than formerly required before initiating Pycnogenol dosage.. . . .@
(Exhibit F, Respondent J & R Research Corporation promotional material).

8. Through the means described in Paragraph 7, respondents

have represented, expressly or by implication, that Kaire International=s pycnogenol products:

A. dramatically treat or improve rheumatoid arthritis, osteoarthritis and rheumatism, including the elimination or reduction of inflammation and pain associated with these disorders;

B. reduce the amount of insulin needed to treat diabetes;

C. treat and/or improve health disorders associated with diabetes, including neuropathy, retinopathy, osteomyelitis, circulatory problems and heart problems;

D. help treat lupus, Parkinson=s Disease, multiple sclerosis and fibromyalgia;

E. treat or improve digestive disorders, including Crohnes Disease and irritable bowel syndrome;

F. help prevent strokes and the reoccurrence of strokes;

G. dramatically improve physical disabilities caused by stroke;

H. dramatically help prevent heart disease, including arterial sclerosis;

I. reduce blood pressure;

J. dramatically improve and help prevent circulatory problems, including phlebitis, thrombophlebitis, blood clots, and varicose veins;

K. dramatically promote the shrinkage of tumors and help prevent tumor formation;

L. treat cancer and/or prolong the life of cancer victims;

M. reduce or eliminate inflammation of the prostate;

N. eliminate or reduce the incidence of asthma attacks and symptoms caused by allergies;

O. improve eyesight and treat disorders of the retina;

P. help rebuild joints and soft tissue;

Q. greatly accelerate the healing time of injuries;

R. improve or cure skin conditions such as psoriasis and acne;

S. treat Attention Deficit Disorder and Attention Deficit Hyperactive Disorder;

T. reduce or eliminate the need for medication in individuals with Attention Deficit Disorder and Attention Deficit Hyperactive Disorder; and

U. are twenty times more protective as an antioxidant than Vitamin C, and fifty times more protective than Vitamin E.

9. Through the means described in Paragraph 7, respondents have represented, expressly or by implication, that testimonials from consumers appearing in the advertisements for Kaire International=s pycnogenol products reflect the typical or ordinary experience of members of the public who use pycnogenol products.

10. Through the means described in Paragraph 7, respondents have represented, expressly or by implication, that they possessed and relied upon a reasonable basis that substantiated the

representations set forth in Paragraphs 8 and 9, at the time the representations were made.

11. In truth and in fact, respondents did not possess and rely upon a reasonable basis that substantiated the representations set forth in Paragraphs 8 and 9, at the time the representations were made. Therefore, the representation set forth in Paragraph 10 was, and is, false or misleading.

12. Through the means described in Paragraph 7, respondents have represented, expressly or by implication, that scientific research demonstrates that Kaire International=s pycnogenol products:

A. dramatically treat or improve rheumatoid arthritis, osteoarthritis and rheumatism, including the elimination or reduction of inflammation and pain associated with these disorders;

B. reduce the amount of insulin needed to treat diabetes;

C. dramatically treat and/or improve health disorders associated with diabetes, including retinopathy, osteomyelitis, circulatory problems and heart problems;

D. help treat Parkinson=s Disease and multiple sclerosis;

E. help prevent strokes and the reoccurrence of strokes;

F. dramatically improve physical disabilities caused by stroke;

G. dramatically help prevent heart disease, including arterial sclerosis;

H. dramatically improve and help prevent circulatory problems, including phlebitis, thrombophlebitis, blood clots and varicose veins;

I. dramatically promote the shrinkage of tumors and help prevent tumor formation;

J. treat cancer and/or prolong the life of cancer victims;

K. reduce or eliminate inflammation of the prostate;

L. eliminate or reduce the incidence of asthma attacks and symptoms caused by allergies;

M. improve eyesight and treat disorders of the retina;

N. help rebuild joints and soft tissue;

O. greatly accelerate the healing time of injuries;

P. improve or cure skin conditions such as psoriasis; and

Q. are twenty times more protective as an antioxidant than Vitamin C, and fifty times more protective than Vitamin E.

13. In truth and in fact, scientific research does not demonstrate that Kaire International=s pycnogenol products:

A. dramatically treat or improve rheumatoid arthritis, osteoarthritis and rheumatism, including the elimination or reduction of inflammation and pain associated with these disorders;

B. reduce the amount of insulin needed to treat diabetes;

C. dramatically treat and/or improve health disorders associated with diabetes, including retinopathy, osteomyelitis, circulatory problems and heart problems;

D. help treat Parkinson=s Disease and multiple sclerosis;

E. help prevent strokes and the reoccurrence of strokes;

F. dramatically improve physical disabilities caused by stroke;

G. dramatically help prevent heart disease, including arterial sclerosis;

H. dramatically improve and help prevent circulatory problems, including phlebitis, thrombophlebitis, blood clots and varicose veins;

I. dramatically promote the shrinkage of tumors and help prevent tumor formation;

J. treat cancer and/or prolong the life of cancer victims;

K. reduce or eliminate inflammation of the prostate;

L. eliminate or reduce the incidence of asthma attacks and symptoms caused by allergies;

M. improve eyesight and treat disorders of the retina;

N. help rebuild joints and soft tissue;

O. greatly accelerate the healing time of injuries;

P. improve or cure skin conditions such as psoriasis; and

Q. are twenty times more protective as an antioxidant than Vitamin C, and fifty times more protective than Vitamin E.

Therefore, the representations set forth in Paragraph 12, were, and are false or misleading.

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

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

By the Commission.

Complaint Exhibits

EXHIBIT **A**

AUDIO CASSETTE TAPE

EXHIBIT B

'AUDIOCASSETTE TAPE

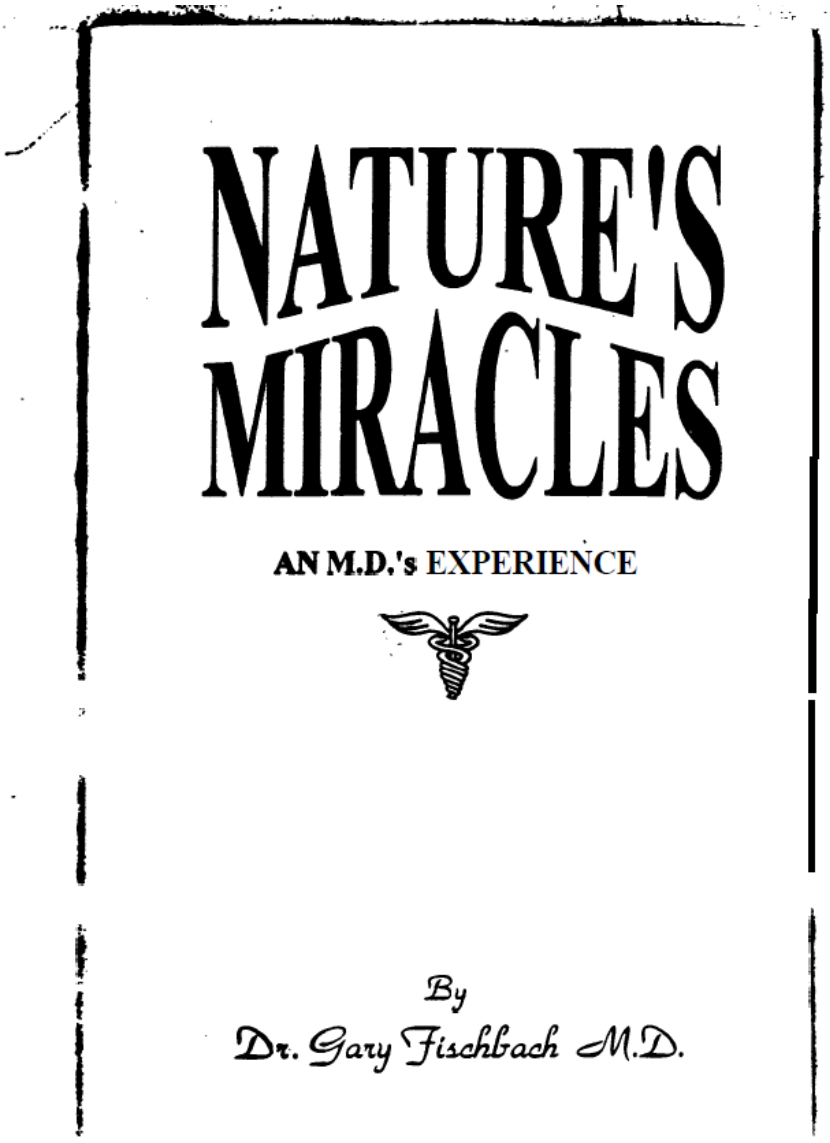


EXHIBIT C

TABLES REFERENCE CHART	See Table(s)	Maritime Pine @ 20 mg/tab	Maritime Pine Plus Other Nutrients	Aloe Vera Juice Concentrate	Aloe Vera Gel	Emu Oil Pain Cream	Colloidal Silver
Abrasions	a				✓		
Aches, Minor	1+ 9	✓				✓	
Acne	7			✓			✓
Acquired Immune AIDS Deficiency Syndrome	5	✓	✓	✓			✓
Aging	1	✓					
Allergies	2	✓		✓			
Alzheimer's	4	✓	✓				
Arthritis	2 3	✓		✓		✓	
Asthma	2	✓		✓			
Atherosclerosis	1	✓					
Athlete's Foot	8				✓		
Attention Deficit Disorder	4	✓	✓				
Attention Deficit Hyperactive Disorder	4	✓	✓				
Autism	4	✓	✓				
Backache	1+ 9	✓				✓	
Blood Clots	1	✓					
Blood Pressure, High	1	✓					
Boils	8				✓		

27 CONTINUED

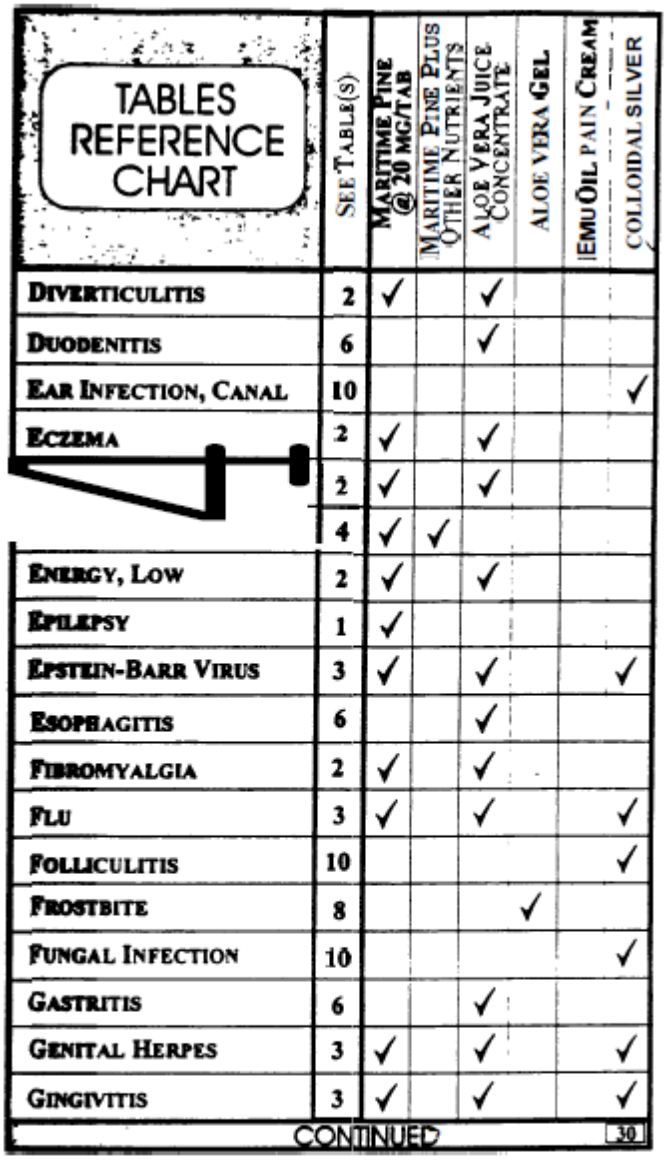
TABLES REFERENCE CHART	See Table(s)	Maritime Pine @ 20 mg/tab	Maritime Pine Plus Other Nutrients	Aloe Vera Juice Concentrate	Aloe Vera Gel	Emu Oil Pain Cream	Colloidal Silver
Conjunctivitis (Pink Eye)	10						✓
Constipation	6						
Contusion	2+ 9	✓		✓		✓	
Cough	3	✓		✓			✓
Cradle Cap	8				✓		✓
Cramps	2	✓		✓			
Crest Syndrome	3	✓		✓			✓
Crohn's Disease	2	✓		✓			
Cuts	8				✓		✓
Dandruff	2	✓		✓			
Dementia	4	✓	✓				
Denture Sores	7			✓			✓
Depression	4	✓	✓				
Dermatitis	1	✓					
Diabetes	2	✓		✓			
Diabetic Retinopathy	2	✓		✓			
Diaper Rash	8				✓		✓
Diarrhea	2	✓		✓			

CONTINUED

TABLES REFERENCE CHART	SEE TABLE(S)	MARITIME PINE @ 20 MG/TAB	MARITIME PINE PLUS OTHER NUTRIENTS	ALOE VERA JUICE CONCENTRATE	ALOE VERA GEL	EMU OIL PAIN CREAM	COLLOIDAL SILVER
BRONCHITIS	3	✓		✓			✓
BRUISES	9					✓	
BURNS	8				✓		✓
BURSITIS	2	✓		✓			
CANCER, INTERNAL	5	✓	✓	✓			✓
CANCER, SKIN	5+8	✓	✓	✓	✓		✓
CANDIDA	7			✓			✓
CANKER SORE	8				✓		✓
CARBUNCLES	8				✓		✓
CARPAL TUNNEL SYNDROME	2+9	✓		✓		✓	
CATARACTS	1	✓					
CELLULITIS	10						✓
CHICKEN POX	10						✓
CHOLESTEROL, HIGH	2	✓		✓			
CHRONIC FATIGUE SYNDROME	3	✓		✓			✓
CIRCULATION, POOR	1	✓					
COLDS	3	✓		✓			✓
COLIC	6			✓			

CONTINUED 28

Complaint



TABLES REFERENCE CHART	See Table(s)	Maritime Pine @ 20 mg/tab	Maritime Pine Plus Other Nutrients	Aloe Vera Juice Concentrate	Aloe Vera Gel	Emu Oil Pain Cream	Colloidal Silver
Diverticulitis	2	✓		✓			
Duodenitis	6			✓			
Ear Infection, Canal	10						✓
Eczema	2	✓		✓			
	2	✓		✓			
	4	✓	✓				
Energy, Low	2	✓		✓			
Epilepsy	1	✓					
Epstein-Barr Virus	3	✓		✓			✓
Esophagitis	6			✓			
Fibromyalgia	2	✓		✓			
Flu	3	✓		✓			✓
Folliculitis	10						✓
Frostbite	8				✓		
Fungal Infection	10						✓
Gastritis	6			✓			
Genital Herpes	3	✓		✓			✓
Gingivitis	3	✓		✓			✓

CONTINUED 30

TABLES REFERENCE CHART	See Table(s)	Maritime Pine @ 20 mg/tab	Maritime Pine Plus Other Nutrients	Aloe Vera Juice Concentrate	Aloe Vera Gel	Emu Oil Pain Cream	Colloidal Silver
Gout	2	✓		✓			
Hay Fever	1	✓					
Headache	1+9	✓				✓	
Heart Attack	2	✓		✓			
Heart Disease	2	✓		✓			
Hemorrhoids	2+8	✓		✓	✓		
Hepatitis	3	✓		✓			✓
Herpes Zoster (Shingles)	1+8	✓			✓		✓
Hidradenitis	10						✓
Hodgkin's Disease	3	✓		✓			✓
Hypertension	1	✓					
Hypertensive Retinopathy	1	✓					
Hypoglycemia	2	✓		✓			
Impotence	1	✓					
Indigestion	6			✓			
Infections	6+8			✓	✓		✓
Inflammation	2+9	✓		✓		✓	
Influenza	3	✓		✓			✓

CONTINUED

Complaint

TABLES REFERENCE CHART	SEE TABLE(S)	MARITIME PINE @ 20 MG/TAB	MARITIME PINE PLUS OTHER NUTRIENTS	ALOE VERA JUICE CONCENTRATE	ALOE VERA GEL	EMU OIL PAIN CREAM	COLLOIDAL SILVER
INSECT BITES & STINGS	8				✓		✓
INSOMNIA	2	✓		✓			
JET LAG	1	✓					
JOINT PAIN	2+9	✓		✓		✓	
LEG CRAMPS	1+9	✓				✓	
LEUKEMIA	5	✓	✓	✓			✓
LUPUS	3	✓		✓			✓
LYME DISEASE	3	✓		✓			✓
MACULAR DEGENERATION	2	✓		✓			
MANIC DEPRESSIVE	4	✓	✓				
MEASLES	6+8			✓	✓		✓
MEMORY, SLUGGISH	4	✓	✓				
MENSTRAL CRAMPS	2	✓		✓			
MIGRAINE	1	✓					
MULTIPLE SCLEROSIS (MS)	2	✓		✓			
MUSCLE PAIN	1+9	✓				✓	
NAUSEA	2	✓		✓			
NERVOUS DISORDERS	1	✓					

CONTINUED 32

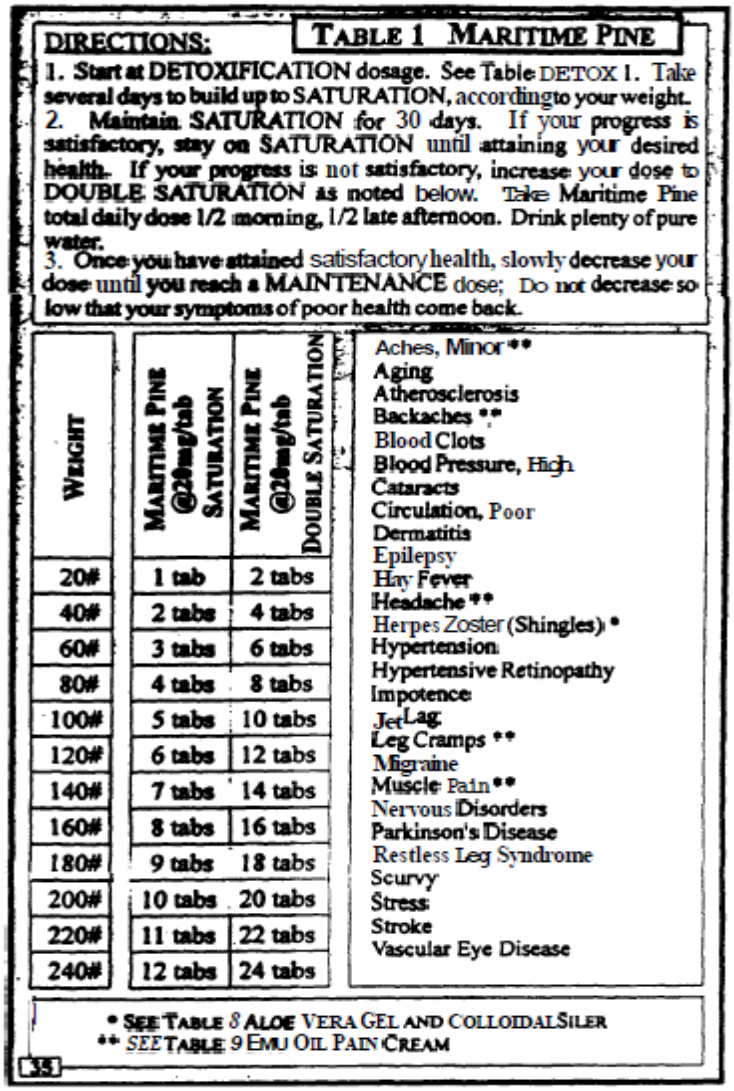
TABLES REFERENCE CHART	See Table(s)	Maritime Pine @ 20 mg/tab	Maritime Pine Plus Other Nutrients	Aloe Vera Juice Concentrate	Aloe Vera Gel	Emu Oil Pain Cream	Colloidal Silver
Osteoarthritis	2+ 9	✓		✓		✓	
Pain	2+ 9	✓		✓		✓	
Parkinson's Disease	1	✓					
Phlebitis	2	✓		✓			
Premenstrual Syndrome (PMS)	2	✓		✓			
Prostatitis	3	✓		✓			✓
Psoriasis	2	✓		✓			
Rashes	2+ 8	✓		✓			✓
Restless Leg Syndrome	1	✓					
Rheumatoid Arthritis	3	✓		✓			✓
Scleroderma	3	✓		✓			✓
Scurvy	1	✓					
Seborrhea	2	✓		✓			
Senility	4	✓	✓				
Sinus Congestion	10						✓
Sinusitis (Infection)	10						✓
Sjogren's Syndrome	2	✓		✓			
Stress	1	✓					

33 CONTINUED

Complaint

TABLES REFERENCE CHART	See Table(s)	Maritime Pine @ 20 mg/tab	Maritime Pine Plus Other Nutrients	Aloe Vera Juice Concentrate	Aloe Vera Gel	Emu Oil Pain Cream	Colloidal Silver
Stroke	1	✓					
Sunburn	8				✓		✓
Systemic Candidiasis	3	✓		✓			✓
Ulcerative Colitis	2	✓		✓			
Ulcers	6			✓			
Vaginitis	7			✓			✓
Varicose Veins	2	✓		✓			
Vascular Eye Disease	1	✓					
Vasculitis	3	✓		✓			✓
Viral Infection	7			✓			✓
Vitality & Vigor	2	✓		✓			
Warts	8				✓		✓
Yeast Infections	7			✓			✓

34



DIRECTIONS:

TABLE 1 MARITIME PINE

1. **Start at DETOXIFICATION dosage. See Table DETOX 1. Take several days to build up to SATURATION, according to your weight.**
2. **Maintain SATURATION for 30 days. If your progress is satisfactory, stay on SATURATION until attaining your desired health. If your progress is not satisfactory, increase your dose to DOUBLE SATURATION as noted below. Take Maritime Pine total daily dose 1/2 morning, 1/2 late afternoon. Drink plenty of pure water.**
3. **Once you have attained satisfactory health, slowly decrease your dose until you reach a MAINTENANCE dose; Do not decrease so low that your symptoms of poor health come back.**

WEIGHT	MARITIME PINE @250mg/tab SATURATION	MARITIME PINE @250mg/tab DOUBLE SATURATION
20#	1 tab	2 tabs
40#	2 tabs	4 tabs
60#	3 tabs	6 tabs
80#	4 tabs	8 tabs
100#	5 tabs	10 tabs
120#	6 tabs	12 tabs
140#	7 tabs	14 tabs
160#	8 tabs	16 tabs
180#	9 tabs	18 tabs
200#	10 tabs	20 tabs
220#	11 tabs	22 tabs
240#	12 tabs	24 tabs

Aches, Minor **
Aging
Atherosclerosis
Backaches **
Blood Clots
Blood Pressure, High
Cataracts
Circulation, Poor
Dermatitis
Epilepsy
Hay Fever
Headache **
Herpes Zoster (Shingles) *
Hypertension
Hypertensive Retinopathy
Impotence
Jet Lag
Leg Cramps **
Migraine
Muscle Pain **
Nervous Disorders
Parkinson's Disease
Restless Leg Syndrome
Scurvy
Stress
Stroke
Vascular Eye Disease

* SEE TABLE 8 ALOE VERA GEL AND COLLOIDAL SILER
** SEE TABLE 9 EMU OIL PAIN CREAM

35

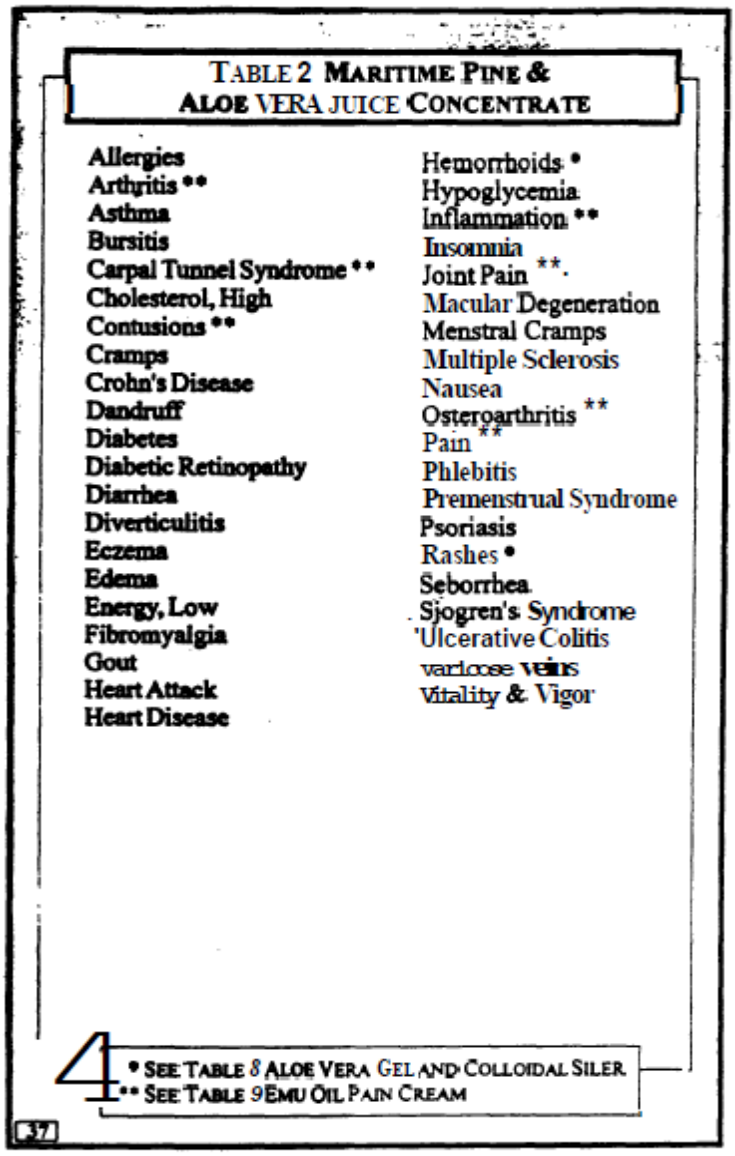


TABLE 2 MARITIME PINE & ALOE VERA JUICE CONCENTRATE

Allergies
Arthritis **
Asthma
Bursitis
Carpal Tunnel Syndrome **
Cholesterol, High
Contusions **
Cramps
Crohn's Disease
Dandruff
Diabetes
Diabetic Retinopathy
Diarrhea
Diverticulitis
Eczema
Edema
Energy, Low
Fibromyalgia
Gout
Heart Attack
Heart Disease
Hemorrhoids *
Hypoglycemia
Inflammation **
Insomnia
Joint Pain **
Macular Degeneration
Menstral Cramps
Multiple Sclerosis
Nausea
Osteroarthritis **
Pain **
Phlebitis
Premenstrual Syndrome
Psoriasis
Rashes *
Seborrhea
Sjogren's Syndrome
Ulcerative Colitis
varicose veins
Vitality & Vigor

4

* SEE TABLE 8 ALOE VERA GEL AND COLLOIDAL SILER
** SEE TABLE 9 EMU OIL PAIN CREAM

37

TABLE 2 MARITIME PINE & ALOE VERA JUICE CONCENTRATE

DIRECTIONS;

1. **Start at** DETOXIFICATION **dosages.** *Take* **several** days **to build up to SATURATION,** according **to your** weight
Pycnogenol® see Table DETOX 1.
Aloe Vera Juice see Table DETOX 2.

2. **Maintain** SATURATION **for** *30* days. If **your progress is satisfactory, stay** on SATURATION until **attaining** your **desired health. If your** progress **is** not satisfactory, **increase** your dose to **DOUBLE SATURATION** as noted below. **Take** Maritime **Pine total daily dose** 1/2 morning, 1/2 late afternoon. Portion *out* the **Aloe Vera juice concentrate** throughout the day, maximum 2 ounces **at a time. Drink plenty** of pure water.

3. **Once you have** attained satisfactory **health,** slowly decrease **your dose** until **you** reach a MAINTENANCE dose. Do not **decrease so low that your symptoms** of poor **health come back**

WEIGHT	MARITIME PINE @20mg/tab SATURATION	ALOE VERA JUICE CONCENTRATE SATURATION	MARITIME PINE @20mg/tab DOUBLE SATURATION	ALOE VERA JUICE CONCENTRATE DOUBLE SATURATION
20#	1 tab	.5 oz	2 tabs	1 oz
40#	2 tabs	1 oz	4 tabs	2 oz
60#	3 tabs	1.5 oz	6 tabs	3 oz
80#	4 tabs	2 oz	8 tabs	4 oz
100#	5 tabs	3 oz	10 tabs	8 oz
120#	6 tabs	4 oz		
140#	7 tabs	4 oz		
160#	8 tabs	4 oz	16 tabs	
180#	9 tabs	4 oz	18 tabs	8 oz
200#	10 tabs	4 oz	20 tabs	8 oz
220#	11 tabs	4 oz	22 tabs	8 oz
240#	12 tabs	4 oz	24 tabs	8 oz

CONTINUED

36

Complaint

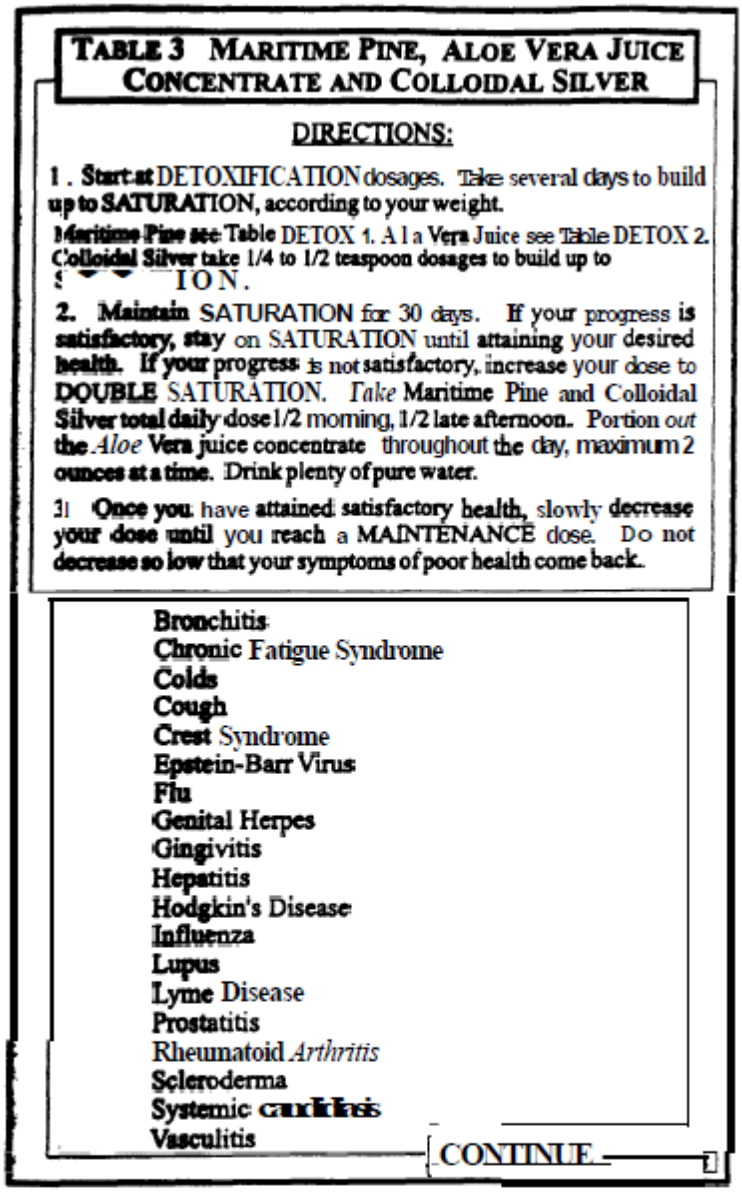


TABLE 3 MARITIME PINE, ALOE VERA JUICE CONCENTRATE AND COLLOIDAL SILVER

DIRECTIONS:

1. **Start at** DETOXIFICATION dosages. Take several days to build **up to SATURATION,** according to your weight.

Maritime Pine see Table DETOX 1. A l a **Vera** Juice see Table DETOX 2. **Colloidal Silver take** 1/4 to 1/2 teaspoon dosages to build up to [illegible] ION.

2. **Maintain** SATURATION for 30 days. **If** your progress **is satisfactory, stay** on SATURATION until **attaining** your desired **health. If your** progress is not satisfactory, increase your dose to **DOUBLE** SATURATION. *Take* Maritime Pine and Colloidal **Silver total daily** dose 1/2 morning, 1/2 late afternoon. Portion *out* **the** *Aloe* **Vera** juice concentrate throughout the day, maximum 2 **ounces at a time.** Drink plenty of pure water.

3. **Once you** have **attained satisfactory health,** slowly **decrease your dose until** you reach a MAINTENANCE dose. Do not **decrease so low** that your symptoms of poor health come back.

Bronchitis
Chronic Fatigue Syndrome
Colds
Cough
Crest Syndrome
Epstein-Barr Virus
Flu
Genital Herpes
Gingivitis
Hepatitis
Hodgkin's Disease
Influenza
Lupus
Lyme Disease
Prostatitis
Rheumatoid *Arthritis*
Scleroderma
Systemic candidiasis
Vasculitis

CONTINUE

TABLE 3 MARITIME PINE, ALOE VERA JUICE CONCENTRATE AND COLLOIDAL SILVER

WEIGHT	MARITIME PINE @20mg/tab SATURATION	ALOE VERA JUICE CONCENTRATE SATURATION	COLLOIDAL SILVER SATURATION	MARITIME PINE @20mg/tab DOUBLE SATURATION	ALOE VERA JUICE CONCENTRATE DOUBLE SATURATION	COLLOIDAL SILVER DOUBLE SATURATION
20#	1 tab	.5 oz	1/4 tsp	2 tabs	1 oz	1/2 tsp
40#	2 tabs	1 oz	1/2 tsp	4 tabs	2 oz	1 tsp
60#	3 tabs	1.5 oz	1/2 tsp	6 tabs	3 oz	1 tsp
80#	4 tabs	2 oz	1 tsp	8 tabs	4 oz	2 tsp
100#	5 tabs	3 oz	1 tsp	10 tabs	6oz	2 tsp
120#	6 tabs	4 oz	1 tsp	12 tabs	8 oz	2 tsp
140#	7 tabs	4 oz	1 tsp	14 tabs	8 oz	2 tsp
160#	8 tabs	4 oz	1 tsp	16 tabs	8 oz	2 tsp
180#	9 tabs	4 oz	1 tsp	18 tabs	8 oz	2 tsp
200#	10 tabs	4 oz	1 tsp	20 tabs	8 oz	2 tsp
220#	11 tabs	4 oz	1 tsp	22 tabs	8 oz	2 tsp
240#	12 tabs	4 oz	1 tsp	24 tabs	8 oz	2 tsp

39

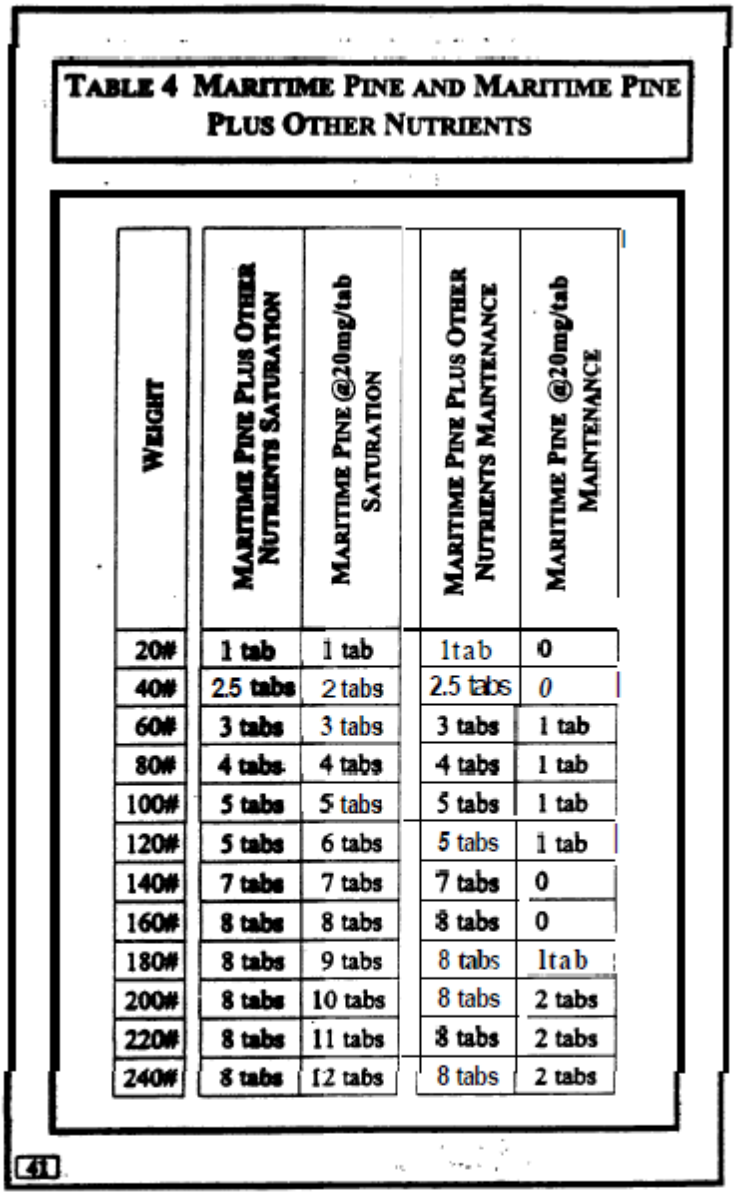


TABLE 4 MARITIME PINE AND MARITIME PINE PLUS OTHER NUTRIENTS

WEIGHT	MARITIME PINE PLUS OTHER NUTRIENTS SATURATION	MARITIME PINE @20mg/tab SATURATION	MARITIME PINE PLUS OTHER NUTRIENTS MAINTENANCE	MARITIME PINE @20mg/tab MAINTENANCE
20#	1 tab	1 tab	1tab	0
40#	2.5 tabs	2 tabs	2.5 tabs	0
60#	3 tabs	3 tabs	3 tabs	1 tab
80#	4 tabs	4 tabs	4 tabs	1 tab
100#	5 tabs	5 tabs	5 tabs	1 tab
120#	5 tabs	6 tabs	5 tabs	1 tab
140#	7 tabs	7 tabs	7 tabs	0
160#	8 tabs	8 tabs	8 tabs	0
180#	8 tabs	9 tabs	8 tabs	1tab
200#	8 tabs	10 tabs	8 tabs	2 tabs
220#	8 tabs	11 tabs	8 tabs	2 tabs
240#	8 tabs	12 tabs	8 tabs	2 tabs

41

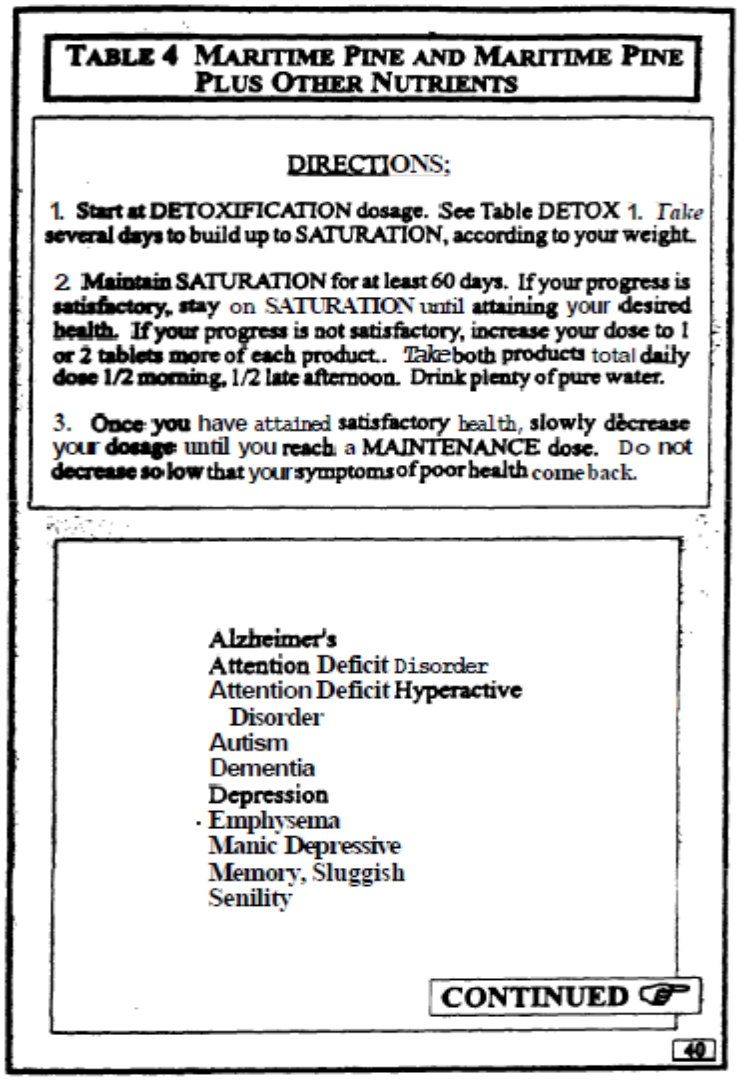


TABLE 4 MARITIME PINE AND MARITIME PINE PLUS OTHER NUTRIENTS

DIRECTIONS:

1. **Start at DETOXIFICATION dosage. See Table DETOX 1.** *Take* **several days to build up to SATURATION, according to your weight.**

2. **Maintain SATURATION for at least 60 days. If your progress is satisfactory, stay** on SATURATION until **attaining** your **desired health. If your progress is not satisfactory, increase your dose to 1 or 2 tablets more of each product.. Take both products** total **daily dose 1/2 morning, 1/2 late afternoon. Drink plenty of pure water.**

3. **Once you** have attained **satisfactory** health, **slowly decrease your dosage** until you **reach** a **MAINTENANCE dose.** Do not **decrease so low** that your **symptoms of poor health** come back.

Alzheimer's
Attention Deficit Disorder
Attention Deficit Hyperactive
Disorder
Autism
Dementia
Depression
Emphysema
Manic Depressive
Memory, Sluggish
Senility

CONTINUED

40

TABLE 4 MARITIME PINE AND MARITIME PINE PLUS OTHER NUTRIENTS

WEIGHT	MARITIME PINE PLUS OTHER NUTRIENTS SATURATION	MARITIME PINE @20mg/tab SATURATION	MARITIME PINE PLUS OTHER NUTRIENTS MAINTENANCE	MARITIME PINE @20mg/tab MAINTENANCE
20#	1 tab	1tab	1 tab	0
40#	25 tabs	2 tabs	25 tabs	0
60#	3 tabs	3 tabs	3 tabs	1 tab
80#	4 tabs	4 tabs	4 tabs	1 tab
100#	5 tabs	5 tabs	5 tabs	1 tab
120#	5 tabs	6 tabs	5 tabs	1 tab
140#	7 tabs	7 tabs	7 tabs	0
160#	8 tabs	8 tabs	8 tabs	0
180#	8 tabs	9 tabs	8 tabs	1tab
200#	8 tabs	10 tabs	8 tabs	2 tabs
220#	8 tabs	11 tabs	8 tabs	2 tabs
240#	8 tabs	12 tabs	8 tabs	2 tabs

41

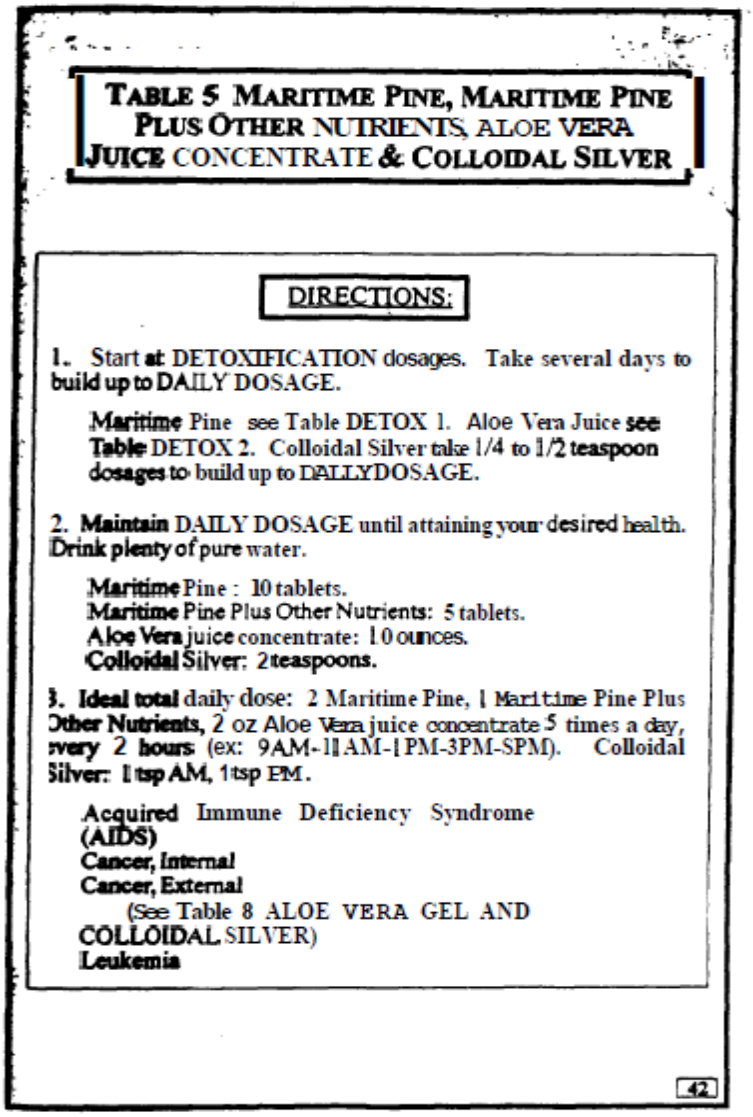


TABLE 5 MARITIME PINE, MARITIME PINE PLUS OTHER NUTRIENTS, ALOE VERA JUICE CONCENTRATE & COLLOIDAL SILVER

DIRECTIONS:

1. Start at DETOXIFICATION dosages. Take several days to build up to DAILY DOSAGE.

Maritime Pine see Table DETOX 1. Aloe Vera Juice see Table DETOX 2. Colloidal Silver take 1/4 to 1/2 teaspoon dosages to build up to DAILY DOSAGE.

2. Maintain DAILY DOSAGE until attaining your desired health. Drink plenty of pure water.

Maritime Pine : 10 tablets.
Maritime Pine Plus Other Nutrients: 5 tablets.
Aloe Vera juice concentrate: 10 ounces.
Colloidal Silver: 2 teaspoons.

3. Ideal total daily dose: 2 Maritime Pine, 1 Maritime Pine Plus Other Nutrients, 2 oz Aloe Vera juice concentrate 5 times a day, every 2 hours (ex: 9AM-11AM-1PM-3PM-5PM). Colloidal Silver: 1 tsp AM, 1 tsp PM.

Acquired Immune Deficiency Syndrome (AIDS)
Cancer, Internal
Cancer, External
(See Table 8 ALOE VERA GEL AND COLLOIDAL SILVER)
Leukemia

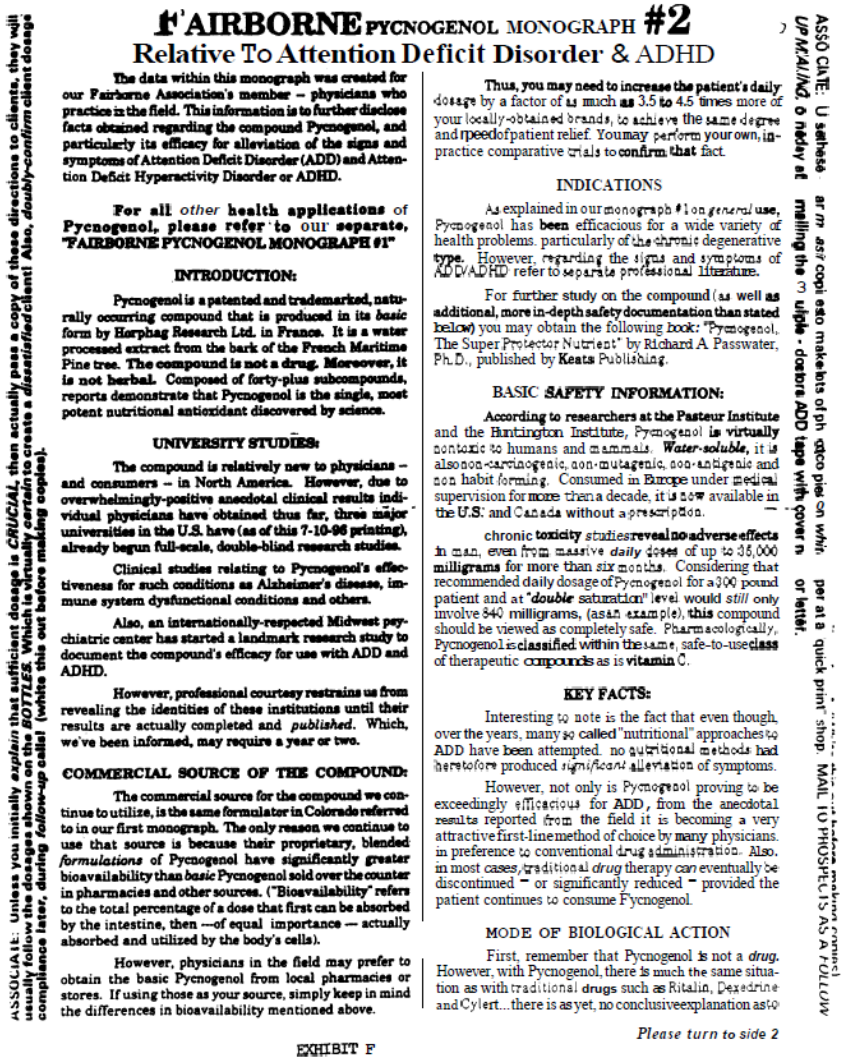
42

EXHIBIT D

REDACTED

EXHIBIT E

AUDIO CASSETTE TAPE



ASSOCIATE: Unless you initially *explain* that sufficient dosage is *CRUCIAL*, then actually pass a copy of these directions to clients, they will usually follow the dosages shown on the *BOTTLES*. Which is virtually *certain* to create a *dissatisfied* client! Also, *double-confirm* client dosage compliance later, during *follow-up* calls! (while this out before making copies).

FAIRBORNE PYCNOGENOL MONOGRAPH #2

Relative To Attention Deficit Disorder & ADHD

The data within this monograph was created for our Fairborne Association's member -- physicians who practice in the field. This information is to further disclose facts obtained regarding the compound Pycnogenol, and particularly its efficacy for alleviation of the signs and symptoms of Attention Deficit Disorder (ADD) and Attention Deficit Hyperactivity Disorder or ADHD.

For all *other* health applications of Pycnogenol, please refer to our separate, "FAIRBORNE PYCNOGENOL MONOGRAPH #1"

INTRODUCTION:

Pycnogenol is a patented and trademarked, naturally occurring compound that is produced in its *basic* form by Horphag Research Ltd. in France. It is a water processed extract from the bark of the French Maritime Pine tree. The compound is not a drug. Moreover, it is not herbal. Composed of forty-plus subcompounds, reports demonstrate that Pycnogenol is the single, most potent nutritional antioxidant discovered by science.

UNIVERSITY STUDIES:

The compound is relatively new to physicians -- and consumers -- in North America. However, due to overwhelmingly-positive anecdotal clinical results individual physicians have obtained thus far, three major universities in the U.S. have (as of this 7-10-96 printing), already begun full-scale, double-blind research studies.

Clinical studies relating to Pycnogenol's effectiveness for such conditions as Alzheimer's disease, immune system dysfunctional conditions and others.

Also, an internationally-respected Midwest psychiatric center has started a landmark research study to document the compound's efficacy for use with ADD and ADHD.

However, professional courtesy restrains us from revealing the identities of these institutions until their results are actually completed and *published*. Which, we've been informed, may require a year or two.

COMMERCIAL SOURCE OF THE COMPOUND:

The commercial source for the compound we continue to utilize, is the same formulator in Colorado referred to in our first monograph. The only reason we continue to use that source is because their proprietary, blended *formulations* of Pycnogenol have significantly greater bioavailability than *basic* Pycnogenol sold over the counter in pharmacies and other sources. ("Bioavailability" refers to the total percentage of a dose that first can be absorbed by the intestine, then ---of equal importance --- actually absorbed and utilized by the body's cells).

However, physicians in the field may prefer to obtain the basic Pycnogenol from local pharmacies or stores. If using those as your source, simply keep in mind the differences in bioavailability mentioned above.

Thus, you may need to increase the patient's daily dosage by a factor of as much **as** 3.5 **to** 4.5 times more of your locally-obtained brands, to achieve the same degree and speed of patient relief. You may perform your own, in-practice comparative trials to **confirm that** fact.

INDICATIONS

As explained in our monograph #1 on *general* use, Pycnogenol has **been** efficacious for a wide variety of health problems, particularly of the chronic degenerative **type.** However, regarding the signs and symptoms of ADD/ADHD refer to separate professional literature.

For further study on the compound (as well **as additional, more in-depth safety documentation than stated below)** you may obtain the following *book:* "Pycnogenol, The Super Protector Nutrient" by Richard A. Passwater, Ph.D., published by **Keats** Publishing.

BASIC SAFETY INFORMATION:

According to researchers at the Pasteur Institute and the Huntington Institute, Pycnogenol **is virtually** nontoxic to humans and mammals. ***Water-soluble,*** it is also non-carcinogenic, non-mutagenic, non-antigenic and non habit forming. Consumed in Europe under medical supervision for more than a decade, it is now available in the **U.S.** and Canada without a prescription.

chronic **toxicity** *studies* **reveal no adverse effects** in man, even from massive ***daily*** doses of up to 35,000 **milligrams** for more than *six* months. Considering that recommended daily dosage of Pycnogenol for a 300 pound patient and at ***"double*** saturation" level would *still* only involve 840 milligrams, (as an example), **this** compound should be viewed as completely safe. Pharmacologically, Pycnogenol is **classified within the same,** safe-to-use **class** of therapeutic **compounds** as is **vitamin** C.

KEY FACTS:

Interesting to note is the fact that even though, over the years, many so **called** "nutritional" approaches to ADD have been attempted, no nutritional methods had heretofore produced *significant* alleviation of symptoms.

However, not only is Pycnogenol proving to be exceedingly efficacious for ADD, from the anecdotal results reported from the field it is becoming a very attractive first-line method of choice by many physicians, in preference to conventional drug administration. Also, in most *cases,* traditional *drug* therapy *can* eventually be discontinued -- or significantly reduced -- provided the patient continues to consume Pycnogenol.

MODE OF BIOLOGICAL ACTION

First, remember that Pycnogenol is not a *drug.* However, with Pycnogenol, there is much the same situation as with traditional **drugs** such as Ritalin, Dexedrine and Cylert...there is as yet, no conclusive explanation as to

Please turn to side 2

EXHIBIT F

Complaint

ASSOCIATE: You should make a follow up service call to each customer about three days after they have *received* their first order...to be sure they understand PROPER DOSAGE *TO THE LETTER!* (White this out before making copies).

required to maintain maximum relief of symptoms. That may - in fact - prove to *be* "saturation" dosage (as shown in the chart) in many cases. In others, that may be the average "maintenance" dosage indicated on the chart, or somewhat more.

Finding the ideal, minimum daily Pycnogenol dosage for ADD, is solely to render the lowest possible *cost* to the patient. Realize Pycnogenol is so *safe* to use, some of our Association's physicians suggest *ongoing* "saturation" dosage for disease preventative purposes. Moreover, some even recommend ongoing *double* "saturation" dosage for serious health challenges. Knowing that complete safety to the patient is assured.

BODY TOXINS ELIMINATION

As explained on page 2, the *gradual* 10-day buildup to daily "saturation" Pycnogenol dosage *prevents* body toxins -- elimination healing reactions in practically all cases. However, *a very rare few* may *still* experience that. Such as mild diarrhea, skin rash, light-headedness, slight headache, gas or stomach upset. Or even feeling as though their health problem is getting *worse*...

Actually a *positive* sign, it indicates large volumes of health-retarding, stored toxins being cleansed from the body. If such complaints are TOLERABLE, *maintain* "saturation" dosage level but include *at least* 8 to 10 eight-ounce glasses of water per day to *accelerate* toxins elimination. Discomfort then usually ceases within 2 or 3 days and the patient will then feel *energized and renewed.*

If *NOT* TOLERABLE to the patient, simply cut back Pycnogenol dosage to very low "day 1" level. Then, *very* gradually build up to daily "saturation" dosage over a 30-day period or even longer. Also maintain high water intake as explained above.

A WORD OF CAUTION:

Several years ago, the nutritional products supplier-company in Colorado -- that our Fairborne Association's doctors currently recommend -- introduced Pycnogenol to North America.. Since then, doctors have proven it to be a historically effective health-restoring compound. Due to its success, many other companies have attempted to capitalise on the health *trend* that the Colorado supplier's *blends* of Pycnogenol are setting. Other companies now promote compounds such as grape *seed* extracts (not from grape *skins* and grape seeds)...extracts from soybeans... and *inferior* grades of pine bark extract....And claim they are equal to, or even more effective than, Pycnogenol.

Our Fairborne Association's doctors (and many others) have **proven** that those **claims** are simply not true. **However, you should not merely *accept* that statement...You may** do the **same**, simple comparative **test** our physicians in the **field** have performed as follows ...

You will then **have** factual experience. In addition, you **will understand** why **we** currently recommend the Colorado supplier.

Realize that *basic* Pycnogenol from France is now in **many** pharmacies and other stores. However, the **Colorado-based** supplier developed a proprietary, plant-baaed *enzyme **delivery** system* that is blended with their Pycnogenol formulations.

The clinical importance of that is this: Their Pycnogenol formulations **are** demonstrating 3.5 to 4.5 times more biological **effectiveness** than **store-obtained *basic* Pycnogenol. Which is to say, a patient would need to consume from** 3.5 to **4.5** times **more store-obtained *basic*** Pycnogenol to produce the same health results.

SIMPLE TEST FOR **COMPARATIVE, CLINICAL EFFECTIVENESS:**

First obtain maximum relief and health results using the recommended Colorado-supplied Pycnogenol. Then substitute any store-purchased Pycnogenol brand. Or—for **that** matter—you may substitute any other company's highly-publicised antioxidant compounds. What's more, have **the** patient **consume** at least a two **times *higher* daily dosage** of the **substituted** compound. **The patient's symptoms will gradually start to *return*** after having done so. **You would then, of course,** switch the **patients** back to the **Colorado-obtained** tablets.

PATIENT ***COST* CONSIDERATIONS:**

After obtaining those **test** results, realize that the currently-recommended *Colorado* Pycnogenol will represent a considerable savings in *cost* to the patient.

Another reason why our Fairborne physicians suggest the Colorado-supplied **Pycnogenol:** There **is** no **financial risk** to the patient. **As** a professional *courtesy,* when a patient – or, for that matter, any consumer – orders Pycnogenol it is shipped with a **90-day**, cost returned **certification** of assured **satisfaction.**

Which means that the supplier ships their **Pycnogenol** on an ***on-trial* basis.** Thus, if one is not satisfied with the health results obtained – during the 90-day, experimental trial of the compound – they simply return the empty bottles within 90 days and the Colorado supplier directly returns their **cost.** In addition, that supplier charges no fee for the privilege of being able to place relatively small orders with them, at wholesale cost.

AS SOCIATE: Y • **uld make** **ollow up call about three *weeks* after your ADD customers have been using the products...to det ermine satisfac** **hand t get referrals of *others* to send the multiple-doctors ADD tape tol** (White this out before making copies).

THE FAIRBORNE INST. & ASSOCIATION was founded in March 1995. It is an independent, national professional association composed primarily of Medical Doctors plus other physicians and health care professionals whose practices include the use of alternative or complimentary health-promoting compounds; inclusive of but not limited to Pycnogenol and other valid health-restoring, natural compounds. Due to tens-of-thousands of copies of these professional directions now in circulation, member-physicians generally prefer that their names and phone numbers remain confidential, as they maintain very busy health-care practices. However, the Association has registered its credentials plus the names, professional degrees and backgrounds of its thirteen founding member-physicians with the currently-recommended, Colorado Pycnogenol supplier. Professional inquiries ***from physicians only***, may be mailed to: Fairborne Inst. & Association, Box 125, Massena, Iowa 50853.

F-2

DECISION AND ORDER

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

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

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

1.a Respondent J & R Research Corporation is a corporation organized, existing and doing business under and by virtue of the laws of the State of Iowa , with its office and principal place of business at 109 Main Street, Massena, Iowa 50853.

1.b.Respondent Gerald G. McCarthy is an officer of said corporation. He formulates, directs and controls the policies, acts

and practices of said corporation, and his principal office and place of business is located at the above stated address.

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

ORDER

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 J & R Research Corporation, a corporation, its successors and assigns and its officers; Gerald McCarthy, 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.

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 pycnogenol or any other food,

drug, or dietary supplement, as Afood@ and Adrug@ are defined in Section 15 of the Federal Trade Commission Act, in or affecting commerce, shall not make any representation, in any manner, expressly or by implication, that such product:

A. will treat or improve rheumatoid arthritis, osteoarthritis or rheumatism, including the elimination or reduction of inflammation or pain associated with these disorders;

B. will reduce the amount of insulin needed to treat diabetes;

C. will treat or improve health disorders associated with diabetes, including neuropathy, retinopathy, osteomyelitis, circulatory problems or heart problems;

D. will help treat lupus, Parkinson=s Disease, multiple sclerosis or fibromyalgia;

E. will treat or improve digestive disorders, including Crohnes Disease or irritable bowel syndrome;

F. will help prevent strokes or the recurrence of strokes;

G. will improve physical disabilities caused by stroke;

H. will help prevent heart disease, including arterial sclerosis;

I. will reduce blood pressure;

J. will improve or help prevent circulatory problems, including phlebitis, thrombophelbitis, blood clots, or varicose veins;

K. will promote the shrinkage of tumors or help prevent tumor formation;

L. will treat cancer or prolong the life of cancer victims;
M. will reduce or eliminate inflammation of the prostate;

N. will eliminate or reduce the incidence of asthma attacks and symptoms caused by allergies;

O. will improve eyesight or treat disorders of the retina;

P. will help rebuild joints and soft tissue;

Q. will accelerate the healing time of injuries;

R. will improve or cure skin conditions such as psoriasis and acne;

S. will treat Attention Deficit Disorder or Attention Deficit Hyperactive Disorder;

T. will reduce or eliminate the need for medication in individuals with Attention Deficit Disorder or Attention Deficit Hyperactive Disorder; or

U. is more protective as an antioxidant than Vitamin C or Vitamin E;

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

II.

IT IS FURTHER ORDERED that respondents, directly or through any corporation, subsidiary, division, or other device, in connection with the manufacturing, labeling, advertising, promotion, offering for sale, sale, or distribution of any food, drug, or dietary supplement, as Afood@ and Adrug@ are defined in Section 15 of the Federal Trade Commission Act, in or affecting commerce, shall not make any representation, in any manner,

expressly or by implication, about the benefits, performance, or efficacy of such product, unless, at the time the representation is made, respondents possess and rely upon competent and reliable scientific evidence that substantiates the representation.

III.

IT IS FURTHER ORDERED that respondents, directly or through any 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, or research.

IV.

IT IS FURTHER ORDERED that respondents, directly or through any corporation, subsidiary, division, or other device, in connection with the manufacturing, labeling, advertising, promotion, offering for sale, sale, or distribution of any food, drug, or dietary supplement, as Afood@ and Adrug@ are defined in Section 15 of the Federal Trade Commission Act, in or affecting commerce, shall not represent, in any manner, expressly or by implication, that the experience represented by any user testimonial or endorsement of the product represents the typical or ordinary experience of members of the public who use the product, unless;

A. At the time it is made, respondents possess and rely upon competent and reliable scientific evidence that substantiates the representation; or

B. Respondents disclose, clearly and prominently, and in close proximity to the endorsement or testimonial, either:

   1. what the generally expected results would be for users of the product, or

2. the limited applicability of the endorser=s experience to what consumers may generally expect to achieve, that is, that consumers should not expect to experience similar results.

For purposes of this Part, Aendorsement@ shall mean as defined in 16 C.F.R. ' 255.0(b).

V.

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.

VI.

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.

VII.

IT IS FURTHER ORDERED that respondent J & R Research Corporation, and its successors and assigns, and respondent Gerald McCarthy 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 came into their possession from a distributor or any other source that were relied upon in disseminating the representation; and

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

VIII.

IT IS FURTHER ORDERED that respondent J & R Research Corporation, and its successors and assigns, and respondent Gerald McCarthy shall deliver a copy of this order to all current and future principals, officers, directors, and managers, and to all current and future employees, agents, and representatives having responsibilities with respect to the subject matter of this order, and shall secure from each such person a signed and dated statement acknowledging receipt of the order. Respondents shall deliver this order to current personnel within thirty (30) days after the date of service of this order, and to future personnel within thirty (30) days after the person assumes such position or responsibilities. Respondents shall maintain and upon request make available to the Federal Trade Commission for inspection and copying a copy of each signed statement acknowledging receipt of the order.

IX.

IT IS FURTHER ORDERED that respondent J & R Research Corporation and its successors and assigns shall notify the Commission at least thirty (30) days prior to any change in the corporation that may affect compliance obligations arising under this order, including but not limited to a dissolution, assignment, sale, merger, or other action that would result in the emergence of a successor corporation; the creation or dissolution of a subsidiary, parent, or affiliate that engages in any acts or practices

subject to this order; the proposed filing of a bankruptcy petition; or a change in the corporate name or address. *Provided, however*, that, with respect to any proposed change in the corporation about which respondent learns less than thirty (30) days prior to the date such action is to take place, respondent shall notify the Commission as soon as is practicable after obtaining such knowledge. All notices required by this Part shall be sent by certified mail to the Associate Director, Division of Enforcement, Bureau of Consumer Protection, Federal Trade Commission, Washington, D.C. 20580.

X.

IT IS FURTHER ORDERED that respondent Gerald McCarthy, for a period of ten (10) years after the date of issuance of this order, shall notify the Commission of the discontinuance of his current business or employment, or of his affiliation with any new business or employment. The notice shall include respondent's new business address and telephone number and a description of the nature of the business or employment and his duties and responsibilities. All notices required by this Part shall be sent by certified mail to the Associate Director, Division of Enforcement, Bureau of Consumer Protection, Federal Trade Commission, Washington, D.C. 20580.

XI.

IT IS FURTHER ORDERED that respondent J & R Research Corporation, and its successors and assigns, and respondent Gerald McCarthy 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.

XII.

This order will terminate on July 19, 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 an agreement, subject to final approval, to a proposed consent order from J & R Research, Inc., and its principal, Gerald G. McCarthy ("respondents"). Respondents were general partners in a distributorship of Kaire International, Inc., a multi-level marketing company. Respondents also created and marketed to Kaire distributors audio tapes and other promotional materials touting a Kaire product containing pycnogenol, a substance derived from the bark of the maritime pine tree.

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

Respondents' advertisements claimed that pycnogenol could mitigate or cure the effects of numerous diseases or disorders. The proposed complaint alleges that respondents could not substantiate claims that pycnogenol: (1) alleviates rheumatoid arthritis, osteoarthritis and rheumatism; (2) reduces the amount of insulin needed to treat diabetes; (3) treats and/or improves health disorders associated with diabetes, including neuropathy, retinopathy, osteomyelitis, circulatory problems and heart problems; (4) helps treat lupus, Parkinson=s Disease, multiple sclerosis and fibromyalgia; (5) treats or improves digestive disorders, including Crohnes Disease and irritable bowel syndrome; (6) helps prevent strokes and the reoccurrence of strokes; (7) dramatically improve physical disabilities caused by stroke; (8) dramatically helps prevent heart disease, including arterial sclerosis; (9) reduces blood pressure; (10) dramatically improves and helps prevent circulatory problems, including

phlebitis, thrombophlebitis, blood clots, and varicose veins; (11) dramatically promotes the shrinkage of tumors and helps prevent tumor formation; (12) treats cancer and/or prolongs the life of cancer victims; (13) reduces or eliminates inflammation of the prostate; (14) eliminates or reduces the incidence of asthma attacks and symptoms caused by allergies; (15) improves eyesight and treats disorders of the retina; (16) helps rebuild joints and soft tissue; (17) greatly accelerates the healing time of injuries; (18) improves or cures skin conditions such as psoriasis and acne; (19) treats Attention Deficit Disorder and Attention Deficit Hyperactive Disorder; (20) reduces or eliminates the need for medication in individuals with Attention Deficit Disorder and Attention Deficit Hyperactive Disorder; and (21) is twenty times more protective as an antioxidant than Vitamin C, and fifty times more protective than Vitamin E.

The complaint further alleges that respondents falsely claimed that scientific research demonstrates that pycnogenol products can alleviate or cure many of these diseases or disorders. Finally, the complaint alleges that respondents could not substantiate its claim that testimonials from consumers appearing in the advertisements for pycnogenol products reflect the typical or ordinary experience of members of the public who use pycnogenol products.

Part I of the proposed consent order would require respondents, when advertising pycnogenol or any other food, drug, or dietary supplement, to possess competent and reliable scientific evidence before making any of the claims that were alleged as unsubstantiated in the complaint. Part II of the proposed order would require respondents to possess competent and reliable scientific evidence before making any claim regarding the benefits, performance, or efficacy of any food, drug, or dietary supplement. Part III of the proposed order would prevent respondents from misrepresent the existence, contents, validity, results, conclusions, or interpretations of any test, study, or research in an advertisement for any product.

Analysis to Aid Public Comment

Part IV of the proposed order addresses claims made through endorsements or testimonials. Under Part IV, respondents may make such representations if they possess and rely upon competent and reliable evidence that substantiates the representations; or the respondents must disclose either what the generally expected results would be for users of the advertised products, or the limited applicability of the endorser's experience to what consumers may generally expect to achieve. The proposed order's treatment of testimonial claims is in accordance with the Commission's "Guides Concerning Use of Endorsements and Testimonials in Advertising," 16 C.F.R. 255.2 (a).

Part V of the proposed order contains language permitting respondents to make drug claims that have been approved by the FDA pursuant to either a new drug application or a tentative final or final standard. Part VI states that respondents would be permitted to make claims that the FDA has approved pursuant to the Nutrition Labeling and Education Act of 1990.

Part VII of the proposed order requires respondents to retain, and make available to the Commission upon request, all advertisements and promotional materials containing any representation covered by the order, as well as any materials that it relied upon in disseminating the representation and any materials that contradict, qualify, or call into question the representation.

The remainder of the proposed order contains standard requirements that respondents distribute the order to relevant personnel, that the corporate respondent notify the Commission of any changes in corporate structure that might affect compliance with the order; that the individual respondent notify the Commission of changes in his employments status, and that respondents file one or more reports detailing their compliance with the order.

Analysis to Aid Public Comment

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

Complaint

IN THE MATTER OF

RILEY MANUFACTURED HOMES, INC., ET AL.

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATIONS OF THE TRUTH IN LENDING ACT

Docket C-3963; File No. 992 3202
Complaint, July 24, 2000 -- Decision, July 24, 2000

This consent order addresses Riley Manufactured Homes, Inc.'s, and its president, Dennis Ohnstad's failure to fully disclose financing terms when selling manufactured homes. The complaint alleges that respondents= advertisements stated a rate of finance charge for financing the purchase of manufactured homes but did not properly disclose the rate as an annual percentage rate, as required by Regulation Z. Additionally, respondents= credit advertisements stated a monthly payment amount or other Atriggering@ terms, but failed to disclose the amount or percentage of the down payment; the terms of repayment; and the annual percentage rate. The consent order prohibits respondents from: (A) stating a rate of finance charge without disclosing the APR; (B) using triggering terms without providing the additional disclosures required by Regulation Z; and (C) failing to comply with TILA and Regulation Z.

Participants

For the Commission: *John C. Hallerud,* and *BE.*

For the Respondents: *Evan D. Coobs; Meyer, Capel, Hirschfeld, Muncy, Jahn & Aldeen.*

COMPLAINT

The Federal Trade Commission, having reason to believe that Riley Manufactured Homes, Inc., a corporation, and Dennis Ohnstad, individually and as an officer of the corporation ("respondents"), have violated the provisions of the Truth in Lending Act, 15 U.S.C. '' 1601-1667e, as amended, and its implementing Regulation Z, 12 C.F.R. ' 226, as amended, and it

appearing to the Commission that this proceeding is in the public interest, alleges:

1. Respondent Riley Manufactured Homes, Inc., is an Illinois corporation with its principal office or place of business at 2610 N. Cunningham Avenue, Urbana, Illinois 61801.

2. Respondent Dennis Ohnstad 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 Riley Manufactured Homes, Inc.

3. Respondents have disseminated advertisements to the public that promote extensions of closed-end credit in consumer credit transactions, as the terms Aadvertisement,@ and Aconsumer credit@ are defined in Section 226.2 of Regulation Z, 12 C.F.R. ' 226.2, as amended.

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, 15 U.S.C. ' 44.

CREDIT ADVERTISING

5. Respondents have disseminated or have caused to be disseminated advertisements for homes in the print media, including but not necessarily limited to the attached Exhibit A. These advertisements contain statements such as the following:

Interest rates from 5.78%

6. Respondents have disseminated or have caused to be disseminated advertisements for homes in the print media, including but not necessarily limited to the attached Exhibit B. These advertisements contain statements such as the following:

$279 PER Month*
* * *

*based on $29,900 SP plus ST, less $1589 DP for 300 months at 10.25% VAR interest.

TRUTH IN LENDING ACT AND REGULATION Z VIOLATIONS:
Failure to Disclose Required Information

7. In advertisements, including, but not necessarily limited to, Exhibits A and B, respondents have stated a rate of finance charge for financing the purchase of the advertised homes.

8. These advertisements, described in Paragraph 7, have failed to state the rate of finance charge as an annual percentage rate as required by Regulation Z, 12 C.F.R. ' 226.24(b).

9. Respondents' failure to state the rate of finance charge as an annual percentage rate as set forth in Paragraph 8 violates Section 144 of the Truth in Lending Act, 15 U.S.C. ' 1664, as amended, and Section 226.24(b) of Regulation Z, 12 C.F.R. ' 226.24(b).

10. In advertisements, including, but not necessarily limited to, Exhibit B, respondents have stated the amount or percentage of any downpayment; the number of payments or the period of repayment; the amount of any payment; or the amount of any finance charge.

11. These advertisements have failed to state the amount or percentage of the downpayment; the terms of repayment; and the "annual percentage rate," using that term or the abbreviation "APR," as required by Regulation Z, 12 C.F.R. ' 226.24(c).

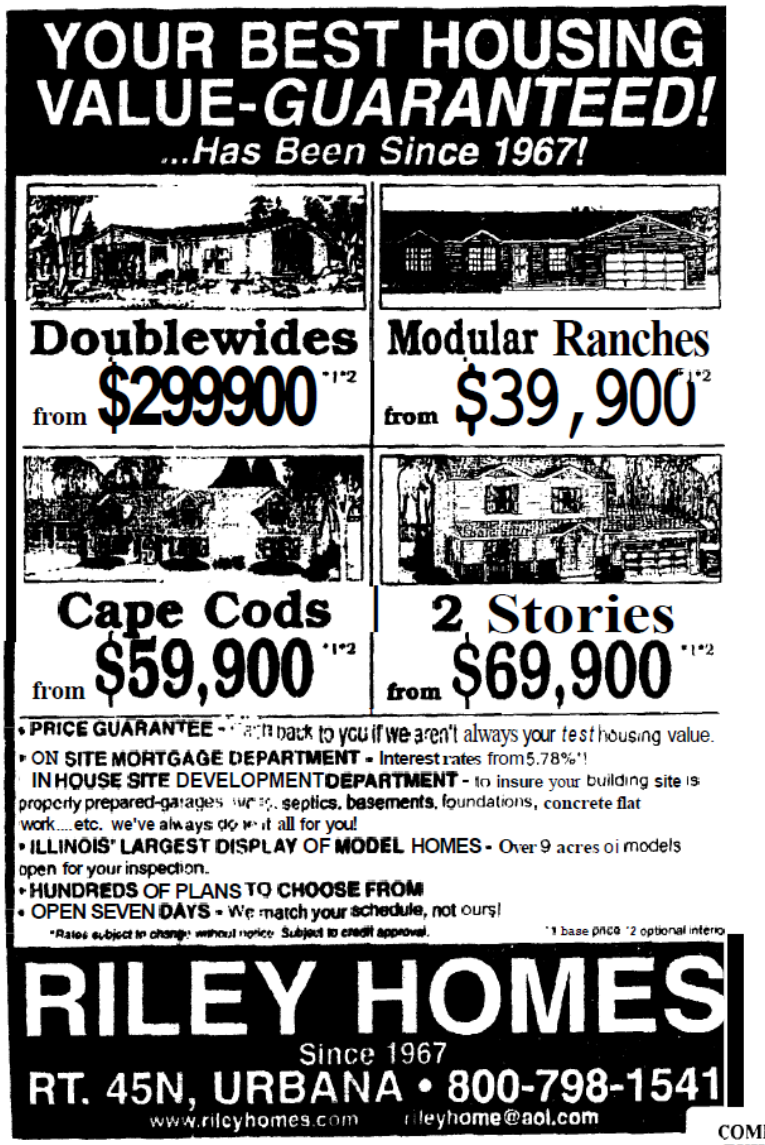
12. Respondents' failure to state the amount or percentage of the downpayment; the terms of repayment; and the "annual percentage rate," using that term or the abbreviation "APR," as set forth in Paragraph 11 violates Section 144 of the Truth in Lending Act, 15 U.S.C. ' 1664, as amended, and Section 226.24(c) of Regulation Z, 12 C.F.R. ' 226.24(c).

THEREFORE, the Federal Trade Commission this twenty-fourth day of July, 2000, has issued this complaint against respondents.

By the Commission.

Complaint

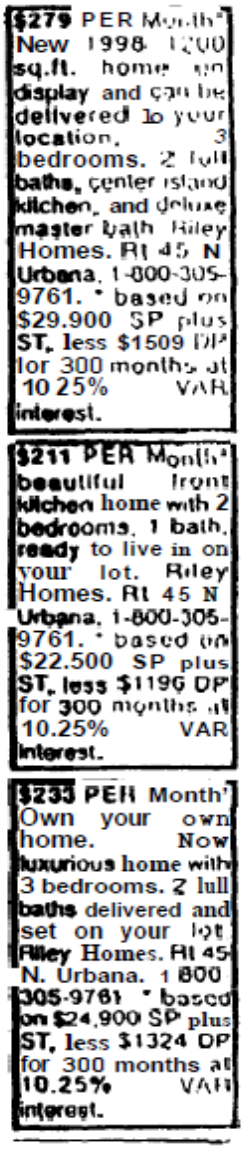
EXHIBIT A



COMPLAINT
EXHIBIT A

Complaint

EXHIBIT B



$279 PER Month* New 1998 1200 sq.ft. home on display and can be delivered to your location. 3 bedrooms, 2 full baths, center island kitchen, and deluxe master bath. Riley Homes. Rt 45 N Urbana, 1-800-305-9761. * based on $29,900 SP plus ST, less $1509 DP for 300 months at 10.25% VAR interest.

$211 PER Month* beautiful front kitchen home with 2 bedrooms, 1 bath, ready to live in on your lot. Riley Homes. Rt 45 N Urbana, 1-800-305-9761. * based on $22,500 SP plus ST, less $1196 DP for 300 months at 10.25% VAR interest.

$233 PER Month* Own your own home. Now luxurious home with 3 bedrooms, 2 full baths delivered and set on your lot. Riley Homes. Rt 45 N. Urbana. 1-800-305-9761 * based on $24,900 SP plus ST, less $1324 DP for 300 months at 10.25% VAR interest.

COMPLAINT
EXHIBIT B

DECISION AND ORDER

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

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

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

1.a. Respondent Riley Manufactured Homes, Inc., is an Illinois corporation with its principal office or place of business at 2610 North Cunningham Avenue, Urbana, Illinois 61801.

1.b.Respondent Dennis Ohnstad is an officer of the corporate Respondent. Individually or in concert with others, he formulates, directs, or controls the policies, acts, or practices of the corporation. His principal office or place of business is the same as that of Riley Manufactured Homes, Inc.

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

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

ORDER

DEFINITIONS

1. ACommerce@ shall mean as defined in Section 4 of the Federal Trade Commission Act, 15 U.S.C. ' 44.

2. Unless otherwise specified, ARespondents@ shall mean Riley Manufactured Homes, Inc., a corporation, its successors and assigns and its officers; Dennis Ohnstad, individually and as an officer of the corporation; and each of the above's agents, representatives, and employees.

I.

IT IS ORDERED that Respondents, directly or through any corporation, subsidiary, division, or any other device, in connection with any advertisement to promote, directly or indirectly, any extension of consumer credit in or affecting commerce, as Aadvertisement@ and Aconsumer credit@ are defined in Section 226.2 of Regulation Z, 12 C.F.R. ' 226.2, as amended, shall not, in any manner, expressly or by implication:

A. State a rate of finance charge without stating the rate as an annual percentage rate as required by Section 144 of the Truth in Lending Act (ATILA@), 15 U.S.C. ' 1664, as amended, and Section 226.24(b) of Regulation Z, 12 C.F.R. ' 226.24(b), as amended.

B. State the amount or percentage of any downpayment, the number of payments or period of repayment, the amount of any payment, or the amount of any finance charge, without disclosing clearly and conspicuously all of the terms required by Section 144 of the Truth in Lending Act, 15 U.S.C. ' 1664, as amended, and Section 226.24(c) of Regulation Z, 12 C.F.R. ' 226.24(c), as amended, as more fully set out in Section 226.24(c) of the Federal Reserve Board's Official Staff Commentary to Regulation Z, 12 C.F.R. ' 226.24(c), as amended, as follows:

1. the amount or percentage of the downpayment;

2. the terms of repayment; and

3. the annual percentage rate, using that term or the abbreviation "APR." If the annual percentage rate may be increased after consummation of the credit transaction, that fact must also be disclosed.

C. Fail to comply in any other respect with Regulation Z, 12 C.F.R. ' 226, as amended, and the TILA, 15 U.S.C. ' ' 1601-1667, as amended.

II.

IT IS FURTHER ORDERED that Respondents shall, for five (5) years after the last date of dissemination of any advertisement covered by this order, maintain and upon request make available to the Federal Trade Commission for inspection

and copying all records that will demonstrate compliance with the requirements of this order.

III.

IT IS FURTHER ORDERED that Respondents shall deliver a copy of this order to all current and future principals, officers, directors, and managers, and to all current and future employees, agents, and representatives having responsibilities with respect to the subject matter of this order, and shall secure from each such person a signed and dated statement acknowledging receipt of the order. Respondents shall deliver this order to such current personnel within thirty (30) days after the date of service of this order, and to such future personnel within thirty (30) days after the person assumes such position or responsibilities.

IV.

IT IS FURTHER ORDERED that Respondent Riley Manufactured Homes, Inc., and its successors and assigns, shall notify the Commission at least thirty (30) days prior to any change in the corporation that may affect compliance obligations arising under this order, including but not necessarily limited to a dissolution, assignment, sale, merger, or other action that would result in the emergence of a successor corporation; the creation or dissolution of a subsidiary, parent, or affiliate that engages in any acts or practices subject to this order; the proposed filing of a bankruptcy petition; or a change in the corporate name or address. *Provided*, *however*, that, with respect to any proposed change in the corporation about which Respondent learns less than thirty (30) days prior to the date such action is to take place, Respondent shall notify the Commission as soon as is practicable after obtaining such knowledge. All notices required by this Part shall be sent by certified mail to Director, Midwest Region, Federal Trade Commission, 55 East Monroe, Suite 1860, Chicago, Illinois 60603.

V.

IT IS FURTHER ORDERED that Respondent Dennis Ohnstad, for a period of three (3) years after the date of issuance of this order, shall notify the Commission of the discontinuance of his current business or employment, or of his affiliation with any new business or employment involving the advertising and/or extension of "consumer credit," as that term is defined in the TILA and its implementing Regulation Z. The notice shall include Respondent's new business address and telephone number and a description of the nature of the business or employment and his duties and responsibilities. All notices required by this Part shall be sent by certified mail to Director, Midwest Region, 55 East Monroe, Suite 1860, Chicago, Illinois 60603.

VI.

IT IS FURTHER ORDERED that Respondents shall, within sixty (60) days after the date of service of this order, and at such other times as the Federal Trade Commission may require, file with the Commission a report, in writing, setting forth in detail the manner and form in which they have complied with this order.

VII.

IT IS FURTHER ORDERED that this order will terminate on July 24, 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 of Proposed Consent Order to Aid Public Comment

The Federal Trade Commission has accepted an agreement to a proposed consent order from Riley Manufactured Homes, Inc., and its president, Dennis Ohnstad (Arespondents@).

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

The Commission=s complaint alleges that respondents= credit advertisements violated Section 144 of the Truth in Lending Act, (ATILA@), 15 U.S.C. ' 1664, and Section 226.24 of Regulation

Z, 12 C.F.R. '' 226.24. Congress established statutory disclosure requirements for credit advertising under the TILA and directed the Federal Reserve Board (ABoard@) to promulgate a regulation implementing such statute - - Regulation Z. See 15 U.S.C. '' 1601-1667e; 12 C.F.R. Part 226.

According to the complaint, respondents= advertisements stated a rate of finance charge for financing the purchase of manufactured homes but did not properly disclose the rate as an annual percentage rate, as required by Regulation Z. The complaint also alleges that respondents= credit advertisements stated a monthly payment amount or other Atriggering@ terms (the amount or percentage of any downpayment; the number of payments or the period of repayment; the amount of any payment; or the amount of any finance charge), but failed to disclose the following information required by Regulation Z: the amount or percentage of the downpayment; the terms of repayment; and the annual percentage rate.

The proposed consent order contains provisions designed to remedy the violations charged and to prevent the proposed respondents from engaging in similar acts in the future. In particular, Part I of the proposed order prohibits respondents from: (A) stating a rate of finance charge without disclosing the APR; (B) using triggering terms without providing the additional disclosures required by Regulation Z; and (C) failing to comply with TILA and Regulation Z. Part II of the proposed order requires respondents to maintain and make available records of compliance for five years. Part III requires respondents to distribute copies of the order to company personnel. Part IV requires respondents to notify the Commission of changes in corporate structure that may affect compliance obligations under the proposed order. Part V requires the individual respondent to notify the Commission of changes in his employment status for three years. Part VI requires respondents to file compliance reports. Finally, Part VII sunsets the proposed order after twenty years.

Analysis to Aid Public Comment

Analysis to Aid Public Comment

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

Complaint

IN THE MATTER OF

PFIZER INC. AND WARNER-LAMBERT COMPANY

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-3957; File No. 0010059
Complaint, June 19, 2000--Decision, July 27, 2000

This consent order addresses the $90 billion acquisition by Pfizer Inc. of Warner-Lambert Company. The complaint alleges that the proposed merger, if consummated, would constitute a violation of Section 7 of the Clayton Act and Section 5 of the FTC Act in the markets for: (1) SSRI/SNRI antidepressants; (2) pediculicides; (3) drugs for the treatment of Alzheimer=s disease; and (4) EGFr-tk inhibitors for the treatment of cancer. The consent order requires the companies to terminate Warner=s agreement with Forest Laboratories, Inc. to co-promote the antidepressant Celexa; divest Pfizer=s RID pediculicide (used to treat head lice) business to Bayer Corporation; divest all of Warner=s assets relating to the Alzheimer=s drug, Cognex, to First Horizon Pharmaceutical Corporation; and transfer and surrender, to OSI Pharmaceuticals, Inc., all of Pfizer=s assets relating to the Epidermal Growth Factor receptor tyrosine kinase inhibitor, CP-358,774, for the treatment of cancer.

Participants

For the Commission: *Elizabeth A. Jex, Randall A. Long, Laura I. Bren, Ann Malester, David Von Nirschl, Elizabeth A. Piotrowski, Debra J. Holt, Daniel O=Brien,* and *Gregory S. Vistnes.*

For the Respondents: *Mark D. Godler, David Klingsberg,* and *Michael Malina, Kaye Scholer, Fierman, Hays & Handler, Alec Y. Chang* and *Clifford N. Aronson, Skadden, Arps, Slate, Meagher & Flom LLP. Christopher R. Manning, Burke, Warren, Mackay & Serritella, Robert E. Bell, Wilmer, Cutler & Pickering, Howard Adler, Baker & McKenzie,* and *Herschel S. Weinstein, Dornbush, Mensch, Mandelstham & Schaeffer, LLP.*

COMPLAINT

The Federal Trade Commission (ACommission@), having reason to believe that Respondent Pfizer Inc. (APfizer@), a corporation subject to the jurisdiction of the Commission, has agreed to merge with Respondent Warner-Lambert Company (AWarner@), a corporation subject to the jurisdiction of the Commission, in violation of Section 7 of the Clayton Act, as amended, 15 U.S.C. ' 18, and Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. ' 45, and it appearing to the Commission that a proceeding in respect thereof would be in the public interest, hereby issues its Complaint, stating its charges as follows:

I. DEFINITIONS

1. "Forest" means Forest Laboratories, Inc., a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware, with its offices and principal place of business located at 909 Third Avenue, New York, New York 10022.

2. AMerger Agreement@ means the Agreement and Plan of Merger among Pfizer, through its wholly-owned subsidiary, Seminole Acquisition Sub Corp., and Warner, dated February 6, 2000.

3. "Commission" means the Federal Trade Commission.

4. AFDA@ means the United States Food and Drug Administration.

5. AOTC pediculicides@ means all over-the-counter products manufactured, developed, or sold for the treatment of lice infestation.

6. ASSRI@ means selective serotonin reuptake inhibitor.

7. ASNRI@ means serotonin norepinephrine reuptake inhibitor.

8. ASSRI/SNRI drugs for the treatment of depression@ means the SSRI/SNRI pharmaceutical preparations approved by the FDA for the treatment of depression.

9. ADrugs for the treatment of Alzheimer=s disease@ means any acetylcholinesterase inhibitor pharmaceutical preparation approved by the FDA for the treatment of Alzheimer=s disease.

10. AEGFr-tk inhibitors for the treatment of cancer@ means any small molecule pharmaceutical preparation which inhibits the tyrosine kinase activity of the epidermal growth factor receptor in development or approved by the FDA for the treatment of cancer.

11. ACelexa@ means any pharmaceutical preparation containing the drug substance citalopram HBr.

12. AZoloft@ means any pharmaceutical preparation containing the drug substance sertraline hydrochloride.

13. ACognex@ means any pharmaceutical preparation containing the drug substance tacrine hydrochloride.

14. AAricept@ means any pharmaceutical preparation containing the drug substance donepezil hydrochloride.

II. RESPONDENTS

15. Respondent Pfizer 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 235 East 42nd Street, New York, New York 10017. Pfizer, among other things, is engaged in the research, development,

manufacturing and sale of human pharmaceutical products, including OTC pediculicides, SSRI/SNRI drugs for the treatment of depression, drugs for the treatment of Alzheimer=s disease, and EGFr-tk inhibitors for the treatment of cancer.

16. Respondent Warner 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 201 Tabor Road, Morris Plains, New Jersey 07950. Warner, among other things, is engaged in the research, development, manufacturing and sale of human pharmaceutical products, including OTC pediculicides, SSRI/SNRI drugs for the treatment of depression, drugs for the treatment of Alzheimer=s disease, and EGFr-tk inhibitors for the treatment of cancer.

17. Respondents are, and at all times relevant herein have been, 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 business is in, or affects commerce, as Acommerce@ is defined in Section 4 of the Federal Trade Commission Act, as amended, 15 U.S.C. ' 44.

III. THE PROPOSED MERGER

18. On February 6, 2000, Pfizer and Warner entered into a Merger Agreement whereby Pfizer agreed to acquire, through its wholly-owned subsidiary, Seminole Acquisition Sub Corp., 100 percent of all issued shares of Warner for approximately $90 billion (AMerger@). Upon completion of the transaction the merged entity will be known as Pfizer.

IV. THE RELEVANT MARKETS

19. For the purposes of this Complaint, the relevant lines of commerce in which to analyze the effects of the Merger are:

a. the research, development, manufacture and sale of OTC pediculicides;

b. the research, development, manufacture and sale of SSRI/SNRI drugs for the treatment of depression;

c. the research, development, manufacture and sale of drugs for the treatment of Alzheimer=s disease; and

d. the research, development, manufacture and sale of EGFr-tk inhibitors for the treatment of cancer.

20. For the purposes of this Complaint, the United States is the relevant geographic area in which to analyze the effects of the Merger in the relevant lines of commerce.

V. THE STRUCTURE OF THE MARKETS

21. The market for OTC pediculicides is highly concentrated as measured by the Herfindahl-Hirschman Index (AHHI@). Pfizer and Warner are the two leading suppliers of OTC pediculicides in the United States. Pfizer and Warner each have approximately 30 percent of the market, and the pre-merger HHI is 2223. As a result of the Merger, Pfizer would have a 60 percent share of the market, and the post-merger HHI would be 4024.

22. The market for SSRI/SNRI drugs for the treatment of depression is concentrated as measured by the HHI. Pfizer=s Zoloft has 23 percent of the market, while Celexa, which Warner co-promotes with Forest, has a 10 percent market share, and the pre-merger HHI is 1834. As a result of the Merger, Pfizer/Forest would have a 33 percent share of the market, and the post-merger HHI would be 2294.

23. The market for drugs for the treatment of Alzheimer=s disease is highly concentrated as measured by the HHI. Pfizer=s Aricept has over 98 percent of the market, while Warner=s Cognex has about one percent market share, and the pre-merger

HHI is 9801. As a result of the Merger, Pfizer would obtain a monopoly position and post-merger HHI would be 10,000.

24. In the market for EGFr-tk inhibitors for the treatment of cancer, the FDA has yet to approve any product. If approved by the FDA, these products would offer a significant improvement in the treatment of solid tumor cancers. The market for the research, development, manufacture and sale of EGFr-tk inhibitors for the treatment of cancer is highly concentrated; currently only four companies, including Pfizer and Warner, have EGFr-tk inhibitors in human clinical testing. The proposed Merger would reduce the number of companies to three.

VI. ENTRY CONDITIONS

25. Entry into the market for OTC pediculicides is unlikely and would not occur in a timely manner to deter or counteract the adverse competitive effects described in Paragraph 29, because, among other things, the time and expense necessary to develop a product capable of successful entry are disproportionate to the likely available sales opportunity.

26. Entry into the market for SSRI/SNRI drugs for the treatment of depression will not occur in a timely manner to deter or counteract the adverse competitive effects described in Paragraph 29, because of, among other things, the time and expense necessary to develop an FDA-approved antidepressant.

27. Entry into the market for drugs for the treatment of Alzheimer=s disease will not occur in a timely manner to deter or counteract the adverse competitive effects described in Paragraph 29, because of, among other things, the time and expense necessary to develop an FDA-approved Alzheimer=s disease treatment.

28. Entry into the market for the research, development, manufacture and sale of EGFr-tk inhibitors for the treatment of cancer will not occur in a timely manner to deter or counteract the

adverse competitive effects described in Paragraph 29, because of, among other things, the time and expense necessary to develop an FDA-approved cancer treatment.

VII. EFFECTS OF THE MERGER

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

a. by increasing the ability of the merged entity to unilaterally increase prices, and reduce innovation and promotional activities, in the market for OTC pediculicides;

b. by increasing the likelihood of coordinated interaction in the market for SSRI/SNRI drugs for the treatment of depression;

c. by increasing the likelihood that the merged entity would unilaterally increase prices and reduce innovation in the market for drugs for the treatment of Alzheimer=s disease; and

d. by increasing the likelihood that the merged entity would unilaterally delay, deter or eliminate competing programs to research and develop EGFr-tk inhibitors for the treatment of cancer, potentially reducing the number of drugs reaching the market and thus resulting in higher prices for consumers.

VIII. VIOLATIONS CHARGED

30. The Merger Agreement described in Paragraph 18 constitutes a violation of Section 5 of the FTC Act, as amended, 15 U.S.C. ' 45.

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

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

By the Commission.

ORDER TO MAINTAIN ASSETS

The Federal Trade Commission (ACommission@) having initiated an investigation of the proposed merger between Pfizer Inc. (APfizer@) and Warner-Lambert Company (AWarner@), hereinafter referred to as ARespondents,@ and the Respondents having been furnished thereafter with a copy of a draft of Complaint which the Bureau of Competition presented to the Commission for its consideration and which, if issued by the Commission, would charge the Respondents with violations of Section 7 of the Clayton Act, as amended, 15 U.S.C. ' 18, and Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. ' 45; and

Respondents, their attorneys, and counsel for the Commission having thereafter executed an Agreement Containing Consent Orders (AConsent Agreement@), containing the proposed Decision and Order, an admission by the Respondents of all of the jurisdictional facts set forth in the aforesaid draft of Complaint, a statement that the signing of said Consent Agreement is for settlement purposes only and does not constitute an admission by

the Respondents that the law has been violated as alleged in such Complaint, or that the facts as alleged in such Complaint, other than the jurisdictional facts, are true, and waivers and other provisions as required by the Commission=s Rules; and

The Commission having thereafter considered the matter and having determined that it has reason to believe that Respondents have violated the said Acts, and that a Complaint should issue stating its charges in that respect, and having determined to accept the executed Consent Agreement and to place the Consent Agreement on the public record for a period of thirty (30) days, the Commission hereby issues its Complaint, makes the following jurisdictional findings and issues this Order to Maintain Assets:

1. Respondent Pfizer 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 235 East 42nd Street, New York, New York 10017.

2. Respondent Warner is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware, with its principal place of business located at 201 Tabor Road, Morris Plains, New Jersey 07950.

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

ORDER

I.

IT IS ORDERED that, as used in this Order to Maintain Assets, the definitions used in the Consent Agreement and the attached Decision and Order shall apply.

II.

Order to Maintain Assets

IT IS FURTHER ORDERED that from the date this Order to Maintain Assets becomes final:

A. Respondents shall take such actions as are reasonably necessary to maintain the viability, marketability, and competitiveness of the Celexa Assets, the Cognex Divestiture Assets, the RID Divestiture Assets, and the EGFr-tk Assets, hereinafter collectively referred to as AAssets,@ and to prevent the destruction, removal, wasting, or deterioration, of the Assets, except for ordinary wear and tear and as would otherwise occur in the ordinary course of business.

B. Pending the divestiture or transfer of each of the respective Assets, Respondents shall adhere to and abide by the Celexa Termination Agreement, the Cognex Divestiture Agreement, the RID Divestiture Agreement, and the EGFr-tk Divestiture Agreement, which agreements are incorporated by reference into this Order to Maintain Assets and made a part hereof, and are also appended to the attached Decision and Order.

III.

IT IS FURTHER ORDERED that at any time after the Commission issues this Order to Maintain Assets, the Commission may appoint an Interim Trustee as provided in the attached Decision and Order.

IV.

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

V.

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

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

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

VI.

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

A. Three (3) business days after the Commission withdraws its acceptance of the Consent Agreement pursuant to the provisions of Commission Rule 2.34, 16 C.F.R. ' 2.34; or

B. The day after all of the divestitures or transfers of the Assets, as described in and required by the Decision and Order, are completed.

By the Commission.

DECISION AND ORDER

The Federal Trade Commission (ACommission@) having initiated an investigation of the proposed merger of Respondent Warner-Lambert Company (AWarner@) and Respondent Pfizer Inc. (APfizer@), hereinafter referred to as ARespondents,@ and Respondents having been furnished thereafter with a copy of a draft of Complaint that the Bureau of Competition presented to the Commission for its consideration and which, if issued by the Commission, would charge Respondents with violations of Section 7 of the Clayton Act, as amended, 15 U.S.C. ' 18, and Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. ' 45; and

Respondents, their attorneys, and counsel for the Commission having thereafter executed an Agreement Containing Consent Orders (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 alleged in such Complaint, or that the facts as alleged in such Complaint, other than jurisdictional facts, are true, and waivers and other provisions as required by the Commission=s Rules; and

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

1. Respondent Pfizer 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 235 East 42nd Street, New York, New York 10017.

2. Respondent Warner 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 201 Tabor Road, Morris Plains, New Jersey 07950.

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

ORDER

I.

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

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

B. "Warner" means Warner-Lambert Company, its directors, officers, employees, agents, representatives, predecessors, successors, and assigns; its joint ventures, subsidiaries, divisions, groups and affiliates controlled by Warner-Lambert Company (including, but not limited to, the Parke-Davis Division), and the respective directors, officers, employees, agents, representatives, successors, and assigns of each.

C. "Respondents" means Pfizer and Warner, individually and collectively.

D. AMerger@ means the proposed merger of Pfizer and Warner by means of an Agreement and Plan of Merger dated as of February 6, 2000 among Pfizer, Seminole Acquisition Sub. Corp., and Warner.

E. "Commission" means the Federal Trade Commission.

F. "Forest" means Forest Laboratories, Inc., a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware, with its offices and principal place of business located at 909 Third Avenue, New York, New York 10022.

G. AFirst Horizon@ means First Horizon Pharmaceutical Corporation, a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware, with its offices and principal place of business located at 660 Hembree Parkway, Suite 106, Roswell, Georgia 30076.

H. ABayer@ means Bayer Corporation, a corporation organized, existing and doing business under and by virtue of the laws of the State of Indiana, with its offices and principal place of business located at 36 Columbia Road, Morristown, New Jersey 07962-1910.

I. AOSI@ means OSI Pharmaceuticals, Inc., a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware, with its offices and principal place of business located at 106 Charles Lindbergh Boulevard, Uniondale, New York, 11553-3649.

J. ACelexa@ means any pharmaceutical preparation containing the drug substance citalopram HBr that is the subject of the Celexa Co-Promotion Agreement and the Celexa Amendment. Celexa includes any and all of its constituent

elements, active ingredients or intermediaries, and all rights relating to the research, development, manufacture and sale of Celexa.

K. ACelexa Co-Promotion Agreement@ means the Agreement dated March 27, 1998 by and between Forest and the Parke-Davis Division of Warner attached hereto as non-public Appendix I.

L. ACelexa Amendment@ means the Amendment to the Celexa Co-Promotion Agreement between Forest and the Parke-Davis Division of Warner, dated September 1, 1999, attached hereto as non-public Appendix II.

M. ACelexa Assets@ mean all rights granted to Warner pursuant to the Celexa Co-Promotion Agreement and Celexa Amendment.

N. ACelexa Termination Agreement@ means the Amendment No. 2 and Termination Agreement terminating the Celexa Co-Promotion Agreement and Celexa Amendment by and between Forest and Warner, dated May 11, 2000, attached hereto as non-public Appendix III.

O. AKnow-how@ means all technological, technical, scientific, chemical, biological, pharmacological, toxicological, regulatory and marketing materials and information used to develop, make, use, sell, offer for sale, import or seek regulatory approval in any country to market a Product, including without limitation all: formulae; trade secrets; inventions; techniques; intellectual property (including patents and patent applications) whether or not patentable; discoveries; compounds; compositions of matter, assays, reagents, and biological materials; trademarks; research data; technical data and information; testing data; preclinical and clinical data; toxicological and pharmacological data; regulatory files; statistical analyses; analytical data; clinical protocols; specifications; designs; drawings; processes; testing and quality assurance/quality control data; manufacturing data and information; regulatory submissions; and any other information and experience, whether recorded on paper or electronically.

Decision and Order

P. ACelexa Know-how@ means all Confidential Business Information and Know-how in the possession or control of Warner as of the date Warner signed the Celexa Termination Agreement that relates in whole or in part to Celexa, including without limitation information and documents stored on all computer files and management information systems; written, recorded and graphic materials of every kind; proprietary software used in connection with Celexa; all data, contractual rights, materials, documents and information relating to obtaining FDA approvals and other government or regulatory approvals for Celexa; and any other information, documents and experience relating to Celexa. Celexa Know-how shall be deemed to include all information comprised by Celexa Assets. Celexa Know-how includes, but is not limited to:

1. notes, minutes and other documents relating to speaker programs, Alunch and learn@ programs, and meetings with medical advisers to Forest or Warner in connection with the Celexa Co-Promotion Agreement (and Celexa Amendment), including plans for future programs and meetings, market research data and proposals relating to Celexa;

2. all marketing plans including written fiscal year and contract year marketing plans, media placement plans, public relations plans, convention plans, symposia plans, publication plans, pricing plans, and line extension plans related to Celexa;

3. minutes of all Celexa meetings, and intracompany and intercompany correspondence related to such meetings;

4. all advisory board and consultants= correspondence related to Celexa;

5. all correspondence with advertising, public relations and medical education agencies related to Celexa;

6. speaker training materials and all other medical education materials related to Celexa;

7. all market research, including both primary and secondary, whether conducted by Forest or Warner=s Parke-Davis Division related to Celexa;

8. all forecasts and assumptions, including sample production forecasts related to Celexa;

9. all presentation materials used at national sales meetings or manager meetings related to Celexa;

10. all physician targeting data and call plans including reach and frequency
plans related to Celexa;

11. all communications with the FDA and DDMAC related to Celexa;

12. all Phase IV clinical study plans and protocols provided to Warner related to Celexa;

13. all regulatory and development information including information on Celexa line extensions, tablet strengths and SKUs related to Celexa;

14. any and all information provided from the Celexa NDA, investigators= brochures or study reports;

15. all professional affairs letters related to Celexa utilized to respond to physician inquiries; and

16. all information related to Celexa pertaining to managed care, government accounts, hospitals, long-term care

and other channels. This includes all contracts and contracting templates and strategies.

Provided, however, that Celexa Know-how does not include information which becomes or became available to Respondents on a non-confidential basis from a source other than Forest, if such source is not under obligation (whether contractual, legal or fiduciary) to Forest to keep such information confidential.

Q. AConfidential Business Information@ means all information that is not in the public domain concerning the research, development, marketing, distribution, cost, pricing, sale and commercialization of a Product or of a Product in development.

R. "Celexa Material Confidential Information@ means any information not in the public domain obtained by Respondents directly or indirectly from Forest pursuant to the Celexa Co-Promotion Agreement and Celexa Amendment prior to the date this Order becomes final, and includes, but is not limited to, Celexa Know-how and Confidential Business Information relating to Celexa.

S. AFDA@ means the United States Food and Drug Administration.

T. ADDMAC@ means the Division of Drug Marketing, Advertising and Communication of the FDA.

U. ANDA@ means a New Drug Application filed or to be filed with the FDA, any preparatory work, drafts and data necessary for the preparation thereof, and Know-how, and includes without limitation both supplemental and abbreviated NDAs.

V. AZoloft@ means any pharmaceutical preparation containing the drug substance sertraline hydrochloride, any of its constituent elements, active ingredients or intermediaries, and all

rights relating to the research, development, manufacture and sale of Zoloft, which is manufactured, marketed and distributed by Pfizer.

W. ASSRI/SNRI@ means any selective serotonin reuptake inhibitor/serotonin norepinephrine reuptake inhibitor, including, but not limited to, branded, generic or isomer forms of the following drugs: Paxil, Prozac, Zoloft, Luvox, Effexor, and Celexa.

X. ACognex@ means any pharmaceutical preparation containing the drug substance tacrine hydrochloride. Cognex includes any of its constituent elements, active ingredients, intermediaries, and all rights relating to the research, development, manufacture and sale of Cognex and the once daily controlled release formulation containing Tacrine as the HCl salt and using the gastrointestinal therapeutic system technology from ALZA Corporation.

Y. ATacrine@ means the active pharmaceutical ingredient produced at Warner=s chemical manufacturing facility in Holland, Michigan.

Z. ACognex Divestiture Assets@ mean all assets relating to Cognex and Tacrine as defined in the Cognex Divestiture Agreement.

AA. ACognex Divestiture Agreement@ means the asset purchase agreement between Warner and First Horizon relating to the sale of the Cognex Divestiture Assets, dated April 14, 2000, attached hereto as non-public Appendix IV.

BB. AEGFr-tk@ means any pharmaceutical preparation containing the drug substance Epidermal Growth Factor receptor tyrosine kinase inhibitor, CP 358,774. EGFr-tk shall also include all salts and prodrug forms of CP 358,774.

CC. AEGFr-tk Assets@ means all assets relating to EGFr-tk to be licensed or transferred to OSI pursuant to the EGFr-tk Divestiture Agreement. *Provided, however,* that if OSI requests such assets, the EGFr-tk Assets shall also include intellectual property and technology (including Joint Technology) arising under the OSI/Pfizer Collaboration Research Agreements and OSI/Pfizer License Agreements which relate to CP 358,774 and to salts and prodrug forms of CP 358,774, and which are reasonably necessary to research, develop, manufacture, or sell EGFr-tk.

DD. AOSI/Pfizer Collaboration Research Agreements@ means the Agreement dated April 1, 1986, the Agreement dated April 1, 1991 and the Agreement dated April 1, 1996, by and between OSI and Pfizer, attached hereto as non-public Appendix V.

EE. AOSI/Pfizer License Agreements@ means the Agreements dated December 14, 1990 and April 1, 1996, by and between OSI and Pfizer, attached hereto as non-public Appendix VI.

FF. AEGFr-tk Divestiture Agreement@ means the Agreement between Pfizer and OSI dated May 23, 2000, attached hereto as non-public Appendix VII.

GG. AJoint Technology@ means all technology and technical information relating to EGFr-tk pursuant to the OSI/Pfizer Collaboration Research Agreements.

HH. AOwnership Interest@ means any right(s), present or contingent, to hold voting or nonvoting interest(s), equity interest(s), and/or beneficial ownership(s) in the capital stock of OSI.

II. ARID@ means Pfizer=s rights and assets relating to any Product containing the active ingredient pyrethrum that is a lice treatment or related Product, including all rights relating to the research, development, manufacture and sale of lice treatments or related Products, including but not limited to individual, kit,

advance systems and bulk SKUs containing RID spray, shampoo, egg loosener gel, mousse or comb.

JJ. ARID Assets@ means all assets relating to RID as defined in the RID Divestiture Agreement.

KK. ARID Divestiture Assets@ means:

1. all intellectual property, including pending patent applications, licenses, inventions, technology, Know-how, patents, trademarks, brand names, trade names, trade dress, trade secrets, and copyrights;

2. all research materials, formulations, new product formulations, line extensions, patent rights, trade secrets, specifications, protocols, technical information, regulatory information and approvals, manufacturing information, management information systems, software, specifications, designs, drawings, processes and quality control data;

3. all customer lists, vendor lists, medical marketing lists, catalogs, sales promotion literature, promotional materials, displays, tokens, advertising materials, marketing plans and strategies, price and discount strategies, price lists, sales forecasts, distribution information, trade booths, medical marketing convention floor space and related items, telephone and facsimile numbers, as well as other customer support materials (including, without limitation, web sites);

4. inventory and storage capacity;

5. all third party agreements and contracts that are related to the research, development, manufacture, marketing, sale or use of RID, including but not limited to contract manufacturing arrangements;

6. inventories, including finished goods inventory of RID, works in progress, raw material and packaging materials for RID, including but not limited to the active ingredient pyrethrum;

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

8. all rights under warranties and guarantees, express or implied;

9. all books, records and files; and

10. all items of prepaid expense.

Provided, however, that the RID Divestiture Assets shall also include all research, development and manufacturing assets necessary to produce RID in a government-approved facility if the person acquiring the RID Divestiture Assets requests such assets.

LL. ARID Divestiture Agreement@ means the asset purchase agreement between Bayer and Pfizer dated April 11, 2000, attached hereto as non-public Appendix VIII.

MM. AProduct@ means any finished pharmaceutical composition containing any formulation or dosage of a compound as its pharmaceutically active ingredient.

NN. ARID Closing@ means the date that Bayer acquires the RID Assets from Pfizer.

OO. APublic Record Date@ means the date that the Commission places the Consent Agreement on the public record pursuant to Commission Rule 2.34, 16 C.F.R. ' 2.34.

PP. AEPA@ means the United States Environmental Protection Agency.

QQ. ASKU@ means stock keeping unit.

RR. AKey Employees@ means the individuals identified in public Appendix IX attached hereto.

II.

IT IS FURTHER ORDERED that:

A. Not later than (10) days after the Public Record Date, Respondents shall terminate, absolutely and in good faith, the Celexa Co-Promotion Agreement and Celexa Amendment, pursuant to and in accordance with the terms of the Celexa Termination Agreement. The Celexa Termination Agreement is incorporated by reference into this Order and made a part hereof as non-public Appendix III. Failure to comply with all of the terms of the Celexa Termination Agreement shall constitute a failure to comply with this Order.

B. Respondents shall return and submit to Forest at its New York corporate office, at Respondents= expense, all Celexa Know-how pursuant to the terms of the Celexa Termination Agreement. Respondents shall not retain any copies of Celexa Know-how except as required by law.

C. Respondents shall provide Forest with the opportunity to enter into employment contracts with the Key Employees listed in Appendix IX attached to this Order through March 31, 2001. Respondents shall provide Forest an opportunity to inspect the personnel files and other documentation relating to these employees, to the extent permissible under applicable laws, at the request of Forest any time after execution of the Celexa Termination Agreement. Respondents shall not interfere with the

employment by Forest of these employees and shall remove any impediments that may deter such employees from accepting employment with Forest, including, but not limited to, any non-compete provisions of employment or other contracts with Respondents that would affect the ability or incentive of those individuals to be employed by Forest.

D. Respondents shall not use, disclose or convey, directly or indirectly, any Celexa Know-how or any Confidential Business Information relating to the research, development, manufacturing or marketing of Celexa to any other person.

E. Respondents shall require each Key Employee to sign a confidentiality agreement pursuant to which such employee shall be required to maintain all Celexa Know-how (including, without limitation, all field experience) strictly confidential, including from all other employees, executives or other personnel of Respondents. (A copy of this confidentiality agreement is appended hereto as public Appendix X). Respondents shall ensure that Key Employees (listed in Appendix IX) shall not be involved in the marketing, sale or promotion of Zoloft or any SSRI/SNRI Product other than Celexa through March 31, 2001.

F. Respondents shall also provide written notification of the restrictions on the use of Celexa Know-how by former Warner personnel and of the restrictions on the Warner personnel from selling Zoloft, or accompanying Pfizer personnel involved with the sale or marketing of Zoloft, for the time periods set forth in the Celexa Termination Agreement, to all Warner employees involved in the sale or marketing of Celexa (other than the Key Employees) and all Pfizer employees involved with the sale or marketing of Zoloft. Respondents shall provide such notification by email with return receipt requested or similar transmission. (A copy of this confidentiality notification is appended hereto as Appendix XI). Respondents shall also obtain from each employee covered by the requirements of this subparagraph an agreement to abide by these restrictions. Respondents shall maintain complete records of all such statements at Respondents= corporate headquarters and shall provide an officer=s certificate to the Commission, stating that such acknowledgment program has been implemented and is being complied with. Respondents shall monitor the implementation by their sales forces of these restrictions, including the provision of written reminders to all

sales personnel at three (3) month intervals until the expiration of the time periods set forth in the Celexa Termination Agreement, and take corrective actions for the failure of sales personnel to comply with such restrictions or to furnish the written acknowledgments required by this Order.

G. Pending the termination of the Celexa Co-Promotion Agreement and the Celexa Amendment, Respondents shall take such actions as are necessary to maintain the viability and marketability of Celexa and to prevent the destruction, removal, wasting, deterioration, or impairment of any Celexa Assets, except for ordinary wear and tear.

H. Except as required by law, Respondents shall not receive or have access to, or use or continue to use, any Celexa Material Confidential Information.

I. The purpose of Paragraph II of this Order is to ensure the continued use of the Celexa Assets in the same business in which the Celexa Assets are engaged at the time of the Merger, and to remedy the lessening of competition resulting from the Merger as alleged in the Commission's complaint.

III.

IT IS FURTHER ORDERED that:

A. Not later than ten (10) days after the Public Record Date, Warner shall divest the Cognex Divestiture Assets to First Horizon pursuant to and in accordance with the Cognex Divestiture Agreement, and such agreement is incorporated by reference into this Order and made part hereof as non-public Appendix IV.

B. Failure to comply with all terms of the Cognex Divestiture Agreement shall constitute a failure to comply with this Order.

C. Pending divestiture of the Cognex Divestiture Assets, Respondents shall take such actions as are necessary to maintain

the viability and marketability of the Cognex Divestiture Assets and to prevent the destruction, removal, wasting, deterioration, or impairment of any of the Cognex Divestiture Assets except for ordinary wear and tear.

D. The purpose of Paragraph III of this Order is to ensure the continued use of the Cognex Divestiture Assets in the same business in which the Cognex Divestiture Assets are engaged at the time of the Merger, and to remedy the lessening of competition resulting from the Merger as alleged in the Commission's complaint.

IV.

IT IS FURTHER ORDERED that:

A. Not later than ten (10) days after the Public Record Date, Pfizer shall divest the RID Assets to Bayer pursuant to and in accordance with the RID Divestiture Agreement, and such agreement is incorporated by reference into this Order and made part hereof as non-public Appendix VIII. *Provided*, *however*, that if Respondents have divested the RID Assets to Bayer prior to the date this Order becomes final, and if, at the time the Commission determines to make this Order final, the Commission notifies Respondents that Bayer is not an acceptable purchaser of the RID Assets or that the manner in which the divestiture was accomplished is not acceptable, then Respondents shall immediately rescind the transaction with Bayer and shall divest the RID Divestiture Assets within six (6) months from the date the Order becomes final, absolutely and in good faith, at no minimum price, to an acquirer that receives the prior approval of the Commission and only in a manner that receives the prior approval of the Commission.

B. Failure to comply with all terms of the RID Divestiture Agreement shall constitute a failure to comply with this Order.

C. Pending divestiture of the RID Divestiture Assets, Respondents shall take such actions as are necessary to maintain the viability and marketability of the RID Divestiture Assets and to prevent the destruction, removal, wasting, deterioration, or impairment of any of the RID Divestiture Assets except for ordinary wear and tear.

D. The purpose of Paragraph IV of this Order is to ensure the continued use of the RID Assets or RID Divestiture Assets in the same business in which the RID Assets or RID Divestiture Assets are engaged at the time of the Merger, and to remedy the lessening of competition resulting from the Merger as alleged in the Commission's complaint.

V.

IT IS FURTHER ORDERED that:

A. Not later than ten (10) days after the Public Record Date, Respondents shall transfer and surrender, absolutely and in good faith, all of Pfizer=s EGFr-tk Assets, pursuant to and in accordance with the EGFr-tk Divestiture Agreement to OSI, and such agreement is incorporated by reference into this Order and made a part hereof as non-public Appendix VII. Failure by Respondents to comply with the requirements of the EGFr-tk Divestiture Agreement shall constitute a failure to comply with this Order.

B. Upon reasonable notice and request from OSI to Respondents, Respondents shall provide to OSI, in a timely manner and at no cost to OSI, any assistance, advice or EGFr-tk Assets as may be reasonably necessary for OSI to obtain FDA approvals to manufacture and sell EGFr-tk.

C. Respondents shall not, directly or indirectly: (i) exercise dominion or control over, or otherwise seek to influence, the management, direction or supervision of the business of OSI; (ii) seek or obtain representation on the Board of Directors of OSI; (iii) exercise any voting rights attached to any ownership of OSI

shares of stock; (iv) seek or obtain access to any Confidential Business Information of OSI relating to EGFr-tk and not otherwise necessary to comply with this Order; or (v) take any action or omit to take any action in a manner that would be incompatible with the status of Respondents as passive investors in OSI. The requirements of Paragraph V.C. shall continue and remain in effect so long as the Respondents retain any Ownership Interest in OSI.

D. Pending the completion of the transfer of the EGFr-tk Assets, Respondents shall take such actions as are necessary to maintain the viability and marketability of the EGFr-tk Assets, and to prevent the destruction, deterioration, or impairment of any of the EGFr-tk Assets. Respondents shall also take such actions as are necessary to maintain the viability and marketability of the EGFr-tk Assets, and to prevent the destruction, deterioration, or impairment of any of the EGFr-tk Assets.

E. The purpose of Paragraph V of this Order is to ensure the continued use of the EGFr-tk Assets in the same business in which the EGFr-tk Assets are engaged at the time of the Merger, and to remedy the lessening of competition resulting from the Merger as alleged in the Commission's complaint.

VI.

IT IS FURTHER ORDERED that:

A. At any time after Respondents sign the Consent Agreement in this matter, the Commission may appoint an Interim Trustee to assure that Respondents expeditiously perform their responsibilities as required by this Order and the EGFr-tk Divestiture Agreement.

B. If an Interim Trustee is appointed pursuant to Paragraph VI of this Order, Respondents shall consent to the following terms

and conditions regarding the powers, duties, authorities, and responsibilities of the Interim Trustee:

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

2. The Interim Trustee shall have the power and authority to monitor Respondents= compliance with the terms of this Order and with the terms of the EGFr-tk Divestiture Agreement, and shall exercise such power and authority and carry out the duties and responsibilities of the Interim Trustee in a manner consistent with the purposes of this Order and in consultation with the Commission.

3. Within ten (10) days after appointment of the Interim Trustee, Respondents shall execute a trust agreement that, subject to the prior approval of the Commission, confers on the Interim Trustee all the rights and powers necessary to permit the Interim Trustee to monitor Respondents= compliance with the terms of this Order and with the terms of the EGFr-tk Divestiture Agreement in a manner consistent with the purposes of this Order.

4. The Interim Trustee shall serve until the last obligation under the EGFr-tk Divestiture Agreement has been fully performed; *provided, however*, the Commission may extend this period as may be necessary or appropriate to accomplish the purposes of this Order.

5. The Interim Trustee shall have full and complete access to Respondents= personnel, books, records, documents, facilities and technical information relating to the research,

development and manufacture of EGFr-tk, or to any other relevant information, as the Interim Trustee may reasonably request, including, but not limited to, all documents and records kept in the normal course of business that relate to the manufacture of EGFr-tk and all materials and information relating to FDA and other government or regulatory approvals. Respondents shall cooperate with any reasonable request of the Interim Trustee. Respondents shall take no action to interfere with or impede the Interim Trustee's ability to monitor Respondents= compliance with this Order and the EGFr-tk Divestiture Agreement.

6. The Interim Trustee shall serve, without bond or other security, at the expense of Respondents, on such reasonable and customary terms and conditions as the Commission may set. The Commission may, among other things, require the Interim Trustee to sign an appropriate confidentiality agreement relating to Commission materials and information received in connection with performance of the Interim Trustee's duties. The Interim Trustee shall have authority to employ, at the expense of Respondents, such consultants, accountants, attorneys and other representatives and assistants as are reasonably necessary to carry out the Interim Trustee's duties and responsibilities. The Interim Trustee shall account for all expenses incurred, including fees for his or her services, subject to the approval of the Commission.

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

negligence, willful or wanton acts, or bad faith by the Interim Trustee.

8. If the Commission determines that the Interim Trustee has ceased to act or failed to act diligently, the Commission may appoint a substitute Interim Trustee in the same manner as provided in Paragraph VI.A. of this Order.

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

10. The Interim Trustee shall obtain and evaluate reports submitted to it by OSI with respect to the performance of Respondents= obligations under the EGFr-tk Divestiture Agreement. The Interim Trustee shall report in writing to the Commission every two (2) months from the date the Interim Trustee is appointed concerning compliance by Respondents and OSI with the provisions of this Order and the EGFr-tk Divestiture Agreement until the last obligation under the EGFr-tk Divestiture Agreement has been fully performed.

VII.

IT IS FURTHER ORDERED that:

A. If Respondents have not fully complied with the obligations specified in Paragraph IV of this Order, the Commission may appoint an individual to serve as a trustee to divest the RID Divestiture Assets. In the event that the Commission or the Attorney General brings an action pursuant to ' 5(*l*) of the Federal Trade Commission Act, 15 U.S.C. ' 45(*l*), or any other statute enforced by the Commission, Respondents shall consent to the appointment of a trustee in such action to divest the RID Divestiture Assets. Neither the appointment of a trustee nor a decision not to appoint a trustee under this Paragraph shall preclude the Commission or the Attorney General from seeking

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

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

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

2. Subject to the prior approval of the Commission, the trustee shall have the exclusive power and authority to divest the RID Divestiture Assets.

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

4. The trustee shall have twelve (12) months from the date the Commission approves the trust agreement described in Paragraph VII.B.3. to accomplish the divestiture, which shall be subject to the prior approval of the Commission. If, however, at the end of the twelve-month period, the trustee

has submitted a plan of divestiture or believes that the 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 divestiture period only two (2) times.

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

6. The trustee shall use his or her best efforts to negotiate the most favorable price and terms available in each contract that is submitted to the Commission, subject to Respondents' absolute and unconditional obligation to divest at no minimum price. The divestiture shall be made in the manner and to an acquirer as set out in Paragraph IV of this Order; *provided, however*, if the trustee receives bona fide offers from more than one acquiring entity, and if the Commission determines to approve more than one such acquiring entity, the trustee shall divest to the acquiring entity selected by Respondents from among those approved by the Commission; provided further, however, that Respondents shall select such entity within five (5) business days of receiving notification of the Commission's approval.

7. The trustee shall serve, without bond or other security, at the cost and expense of Respondents, on such reasonable and customary terms and conditions as the Commission or a

court may set. The trustee shall have the authority to employ, at the cost and expense of Respondents, such consultants, accountants, attorneys, investment bankers, business brokers, appraisers, and other representatives and assistants as are necessary to carry out the trustee=s duties and responsibilities. The trustee shall account for all monies derived from the divestiture and all expenses incurred. After approval by the Commission and, in the case of a court-appointed trustee, by the court, of the account of the trustee, including fees for his or her services, all remaining monies shall be paid at the direction of the Respondents, and the trustee=s power shall be terminated. The compensation of the trustee shall be based at least in significant part on a commission arrangement contingent on the divestiture all of Respondents= RID 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 losses, claims, damages, liabilities, or expenses result from misfeasance, gross negligence, willful or wanton acts, or bad faith by the trustee.

9. If the trustee ceases to act or fails to act diligently, a substitute trustee shall be appointed in the same manner as provided in Paragraph VII.B. of this Order.

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

11. The trustee shall have no obligation or authority to operate or maintain the RID Divestiture Assets.

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

VIII.

IT IS FURTHER ORDERED that:

A. Within thirty (30) days after the date this Order becomes final and every sixty (60) days thereafter until Respondents have fully complied with the provisions of Paragraphs II, III, IV, and V.A. of this Order, Respondents shall submit to the Commission a verified written report setting forth in detail the manner and form in which they intend to comply, are complying, and have complied with this Order. Respondents shall submit at the same time a copy of their report concerning compliance with this Order to the Interim Trustee if any Interim Trustee has been appointed. Respondents shall include in their reports, among other things that are required from time to time, a full description of the efforts being made to comply with Paragraphs II through V of the Order, including a description of all substantive contacts or negotiations for the divestitures and the identity of all parties contacted. Respondents shall include in their reports copies of all written communications to and from such parties, all internal memoranda, and all reports and recommendations concerning completing the obligations.

B. One (1) year from the date this Order becomes final, annually for the next five (5) years on the anniversary of the date this Order becomes final, and at other times as the Commission may require, 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.

IX.

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

X.

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

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

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

XI.

IT IS FURTHER ORDERED that this Order shall terminate on July 27, 2020.

By the Commission.

Appendices

APPENDIX I (non-public)
Celexa Co-Promotion Agreement

APPENDIX II. [non-public]
Amendment to Celexa Co-Promotion Agreement

APPENDIX III. [non-public]
Celexa Termination Agreement

APPENDIX IV. [non-public]
Cognex Divestiture Agreement

APPENDIX V. [non-public]
OSI/Pfizer Collaboration Agreements (1986, 1991 and 1996)

Appendix VI [non-public]
OSI/Pfizer License Agreements (1990 and 1996)

Appendices

Appendices

Appendix VII (non-public)
EGFr-tk Divestiture Agreement

Appendix VIII (non-public)
RID Divestiture Agreement

Appendix IX (public)
Key Employees

PARKE-DAVIS CELEXAJ TEAM MEMBERS

John Woychick	VP NE CBU
Doug Saltel	VP CNS Marketing
Tim George	Dir. Strategic Alliances
Katie MacFarlane	Dir. Marketing
Garry Callendar	Dir., Strategic Planning & Information Management
Jim LaMartina	Dir., Sales Training
Scott Van Acker*	Dir., Health Care Management (Field)
Rich Weiss *	Dir., Health Care Management (Marketing)
Ken Massey	Sr. Dir., Medical & Scientific Affairs
Victor Delimata	Sr. Product Manager-CNS Disease Team
Patrick Runde*	Sr. Marketing Manager
George Cavic*	VP Health Care Management
John Richter*	Dir., CNS & Anti-Infective Marketing, Health Care Mgmt.
Ginny Ludwig	Sr. Mgr., Health Care Mgmt.
Ron Preblick, Pharm.D.	Mgr., Health Care Economics

Debra Schramm *	Dir., Contracts and Pricing, Health Care Management
Lynne Fredericks	Market Research
Rick Wantees	Market Research
Lene Ulrich*	VP, SC CBU
John Howard*	VP, NC CBU
Daniel Green*	VP, West CBU
Les Slater*	VP, SE CBU
Laura Johnson*	Marketing Mgr., NE CBU
Andrew Purcell	VP, West CBU
Janice Hall	Senior Product Manager
Allison Fannon	Product Manager
Tim Amato	Product Manager

* These individuals are signing as to confidentiality only

Appendix X (public)
Key Employee Confidentiality Agreement

I, _____, hereby acknowledge that I will maintain all Celexa Know-how (as defined in the Consent Order, including, without limitation, all field experience) regarding Celexa strictly confidential, including from all other employees, executives, or other personnel of Warner-Lambert, its Affiliates and successors.

I also hereby agree that I will not be involved in the marketing, sale, or promotion of Zoloft or any SSRI/SNRI Product (as defined in the Consent Order) other than Celexa through March 31, 2001.

Appendix XI (public)
Warner/Pfizer Notice

I.

Pursuant to a Consent Order entered into between Warner-Lambert Company, Pfizer Inc. and the Federal Trade Commission on May 24, 2000, members of the Warner-Lambert PC-2 salesforce, CNS, Hospital, Managed Care, and Governmental salesforces, who directly participated in the marketing of Celexa within the twelve month period immediately prior to the termination date of April 30, 2000, are prohibited from performing services for Pfizer, or any affiliate of Pfizer, in connection with the marketing or promotion of Zoloft through November 30, 2000. In addition, such employees are prohibited from accompanying Pfizer personnel on Zoloft detailing calls.

In addition, these employees shall maintain all Celexa Know-how (as defined in the Consent Order) in their possession strictly confidential from any person or entity, including from all other employees, executives, or other personnel of Warner-Lambert, its Affiliates and successors.

II.

Pursuant to a Consent Order entered into between Warner-Lambert Company, Pfizer Inc. and the Federal Trade Commission on May 24, 2000, Morris Plains New Jersey and Warner-Lambert Central Business Unit-based Warner-Lambert marketing executives and personnel and administrative and sales personnel, who directly participated in the marketing of Celexa within the twelve month period immediately prior to the termination date of April 30, 2000, are prohibited from performing services for Pfizer, or any affiliate of Pfizer, in connection with the marketing or promotion of Zoloft through March 31, 2001. In addition, such employees are prohibited from accompanying Pfizer personnel on Zoloft detailing calls.

In addition, such employees shall maintain all Celexa Know-how (as defined in the Consent Order) strictly confidential from any person or entity, including from all other employees, executives, or other personnel of Warner-Lambert, its Affiliates and successors.

Analysis of Proposed Consent Order to Aid Public Comment

The Federal Trade Commission (ACommission@) has accepted, subject to final approval, an agreement containing a proposed Consent Order from Pfizer Inc. (APfizer@) and Warner-Lambert Company (AWarner@) which is designed to remedy the anticompetitive effects of the merger of Pfizer and Warner. Under the terms of the agreement, the companies would be required to: (1) terminate Warner=s agreement with Forest Laboratories, Inc. (AForest@) to co-promote the antidepressant Celexa; (2) divest Pfizer=s RID pediculicide (used to treat head lice) business to Bayer Corporation (ABayer@); (3) divest all of Warner=s assets relating to the Alzheimer=s drug, Cognex, to First Horizon Pharmaceutical Corporation; and (4) transfer and surrender to OSI Pharmaceuticals, Inc. (AOSI@) all of Pfizer=s assets relating to the Epidermal Growth Factor receptor tyrosine kinase inhibitor, CP-358,774, for the treatment of cancer.

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

In their merger agreement of February 6, 2000, Pfizer and Warner propose to combine their two companies in a transaction

valued at approximately $90 billion. Thereafter, the merged entity will be renamed Pfizer Inc. The proposed Complaint alleges that the proposed merger, if consummated, would constitute a violation of Section 7 of the Clayton Act, as amended, 15 U.S.C. ' 18, and Section 5 of the FTC Act, as amended, 15 U.S.C. ' 45, in the markets for: (1) SSRI/SNRI antidepressants; (2) pediculicides; (3) drugs for the treatment of Alzheimer=s disease; and (4) EGFr-tk inhibitors for the treatment of cancer. The proposed Consent Order would remedy the alleged violations by replacing the lost competition that would result from the merger in each of these markets.

SSRI/SNRI Antidepressants

Selective serotonin reuptake inhibitors (ASSRIs@) and selective norepinephrine reuptake inhibitors (ASNRIs@) are used to treat depression. Both SSRIs and SNRIs have the same effect on the neurotransmitter serotonin, which is believed to be an important mood regulator. SSRIs and SNRIs are favored by physicians because they offer once-a-day dosing and a lower side effect profile compared to earlier generation antidepressants. Annual U.S. sales of SSRI/SNRI antidepressants total approximately $7 billion.

The market for SSRI/SNRIs is highly concentrated. Pfizer and Warner compete directly against each other in the market for SSRI/SNRI antidepressants. Pfizer markets Zoloft, while Warner co-promotes Celexa with Forest. In 1999, Pfizer=s Zoloft was the second-leading SSRI, with sales in the United States of over $2 billion, while Warner and Forest=s Celexa was the fastest-growing SSRI with sales of $210 million.

There are significant barriers to entry into the SSRI/SNRI market. New entry into the manufacture and sale of drugs for the treatment of depression is difficult, expensive and time-consuming. It requires identifying a preclinical compound,

performing animal safety tests, clinically developing the product in humans, and submitting a New Drug Application for approval by the Food and Drug Administration (AFDA@). In order to enter the market, a firm must incur substantial sunk costs to research, develop, manufacture and sell a SSRI/SNRI. De novo entry has been estimated to take between 8-12 years and cost upwards of $250 million. New entry sufficient to deter or counteract the anticompetitive effects of the merger would not occur in a timely manner. Nor would such entry be likely to occur in the face of a 5 to 10 percent increase in the prices of these drugs.

The proposed merger of Pfizer and Warner is likely to cause significant anticompetitive effects in the U.S. SSRI/SNRI market by increasing the likelihood of coordinated interaction among the remaining firms in the market and by eliminating Celexa, an aggressive new market entrant, as an independent competitor. As a result, American consumers of these drugs would likely pay higher prices and have fewer alternatives for SSRI/SNRI drugs for the treatment of depression.

The proposed Consent Order maintains competition in the SSRI/SNRI market by requiring that: (1) Warner terminate, absolutely and in good faith, the Celexa Co-Promotion Agreement and Celexa Amendment in accordance with the terms of the Celexa Termination Agreement with Forest; (2) Warner return all confidential information regarding Celexa to Forest; (3) the former Warner sales personnel who participated in the marketing of Celexa maintain the confidentiality of this information; and (4) the former Warner sales personnel involved in marketing Celexa be prohibited from selling Zoloft for a period of time.

Pediculicides

Over-the-counter (AOTC@) pediculicides are used to treat head-lice infestation. While prescription products and home remedies may also be used for the treatment of head lice, OTC pediculicides are more effective, cheaper and safer than any

available alternatives. Annual U.S. sales of OTC pediculicides total over $150 million.

The market for OTC pediculicides is highly concentrated. Pfizer and Warner are the two leading suppliers of OTC pediculicides in the United States, with approximately 30 percent of the market each. Thus, as a result of the merger, Pfizer would have a 60 percent share of the market. There are significant barriers to entry and expansion into this market. In order to enter the market, a firm must incur substantial sunk costs to research, develop, manufacture and sell OTC pediculicides. Existing private label and small branded suppliers of pediculicides are not likely to effectively reposition themselves in order to counteract a post-merger price increase because of their minimal market presence, lack of scale economies and lack of consumer brand loyalty. The proposed merger is likely to lead to unilateral anticompetitive effects in the OTC pediculicide market by eliminating the actual, direct, and substantial competition between Pfizer and Warner and allowing the combined firm to raise prices.

The proposed Consent Order remedies the merger=s anticompetitive effects by requiring that Pfizer divest its entire RID brand of pediculicide and all assets associated with this product line to Bayer.

Drugs for the Treatment of Alzheimer=s Disease

Pfizer and Warner market the only two products sold in the United States for the treatment of Alzheimer=s disease, Aricept and Cognex, respectively. Aricept dominates the market with more than 98 percent market share, while Cognex accounts for the remainder of the market. While the FDA has recently approved one new product, Novartis AG=s Exelon, for the treatment of Alzheimer=s disease, Novartis has yet to market its product. Even taking into account Novartis=s entry into the market, the market will still be highly concentrated. There are significant

barriers to entry into this market. New entry into the manufacture and sale of drugs for the treatment of Alzheimer=s disease is difficult, expensive and time-consuming because of the lengthy development periods, the need for FDA approval, and the substantial sunk costs required to research, develop, manufacture and sell these drugs. As a result, entry likely to deter or counteract the likely anticompetitive effects of the proposed merger is unlikely.

The merger would result in Pfizer=s having a monopoly in the market for drugs for the treatment of Alzheimer=s disease, with that monopoly position lessening only slightly when Exelon is launched in the United States. Accordingly, the merger would increase Pfizer=s dominant position in the market, allowing it to increase prices and potentially eliminate Cognex, the smaller competitor, from the market. The proposed Consent Order remedies the merger=s anticompetitive effects by requiring Warner to divest Cognex to First Horizon Pharmaceutical Corporation.

EGFr-tk Inhibitors for the Treatment of Cancer

Pfizer and Warner are developing Epidermal Growth Factor receptor tyrosine kinase (AEGFr-tk@) inhibitors for the treatment of solid cancerous tumors. Solid tumor cancer targets include head and neck, non-small-cell lung, breast, ovarian, pancreatic and colorectal cancers. Currently, over 1.2 million Americans are diagnosed with solid tumor cancers each year. It is anticipated that EGFr-tk inhibitors will be used in conjunction with surgery, radiation and chemotherapy to treat cancer patients.

EGFr-tk inhibitors target the EGFr oncogene that regulates cancer cell growth. The EGFr has been identified as being over-expressed (too prevalent) in as many as 700,000 of the 1.2 million Americans diagnosed with a solid tumor cancer each year. Patients with an over-expression of EGFr are believed to have a worse prognosis than other cancer patients. Accordingly, scientists have developed drugs that attempt to inhibit the EGFr

activity of cell division signal transduction that results in cancer cell proliferation.

The most advanced EGFr-tk inhibitors include those being developed by Pfizer and Warner. Pfizer and Warner are two of only a few companies in clinical development of EGFr-tk inhibitors for solid tumor cancers. There are significant barriers to entry into the market. In order to enter the market, a firm must incur substantial sunk costs to research, develop, manufacture and sell EGFr-tk inhibitors.

The proposed merger is likely to create anticompetitive effects in the EGFr-tk inhibitor market by potentially eliminating one of the few research and development efforts in this area. As a result of the merger, the combined entity could unilaterally delay, terminate or otherwise fail to develop one of the two competing EGFr-tk drugs, resulting in less product innovation, fewer choices, and higher prices for consumers.

To resolve these concerns, the proposed Consent Order requires Pfizer to return its EGFr-tk inhibitor, CP-358,774, to its development partner, OSI. OSI holds a contractual right to obtain CP-358,774 should Pfizer terminate development efforts. Thus, while other companies have expressed interest in acquiring the rights to CP-358,774, none may do so without the prior approval of OSI.

The proposed Consent Order maintains competition in the research and development of EGFR-tk inhibitors for the treatment of cancer by requiring that Pfizer fulfill its obligations under the May 23, 2000 agreement between Pfizer and OSI to (1) transfer and surrender its rights to CP-358,774 to OSI; (2) grant OSI a royalty-free, irrevocable worldwide license, including the right to sublicense, to all of its rights in, and to, the patents currently owned jointly by OSI and Pfizer relating to EGFr-tk inhibitors; (3) complete, at Pfizer=s cost, ongoing clinical trials of CP-358,774; (4) provide OSI with a manufacturing and supply

agreement for the continued supply of CP-358,774, pending transfer of manufacturing technology to a new manufacturer; (5) assume liability for all completed clinical trials; and (6) transfer all know-how and technology relating to CP-358-774 to OSI. The Consent Order also provides for an Interim Trustee to be appointed to oversee Pfizer=s obligations under the Order and to ensure the continued development and viability of CP-358,774.

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

Complaint

IN THE MATTER OF

SWISHER INTERNATIONAL, INC.

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

Docket C-3964; File No. 0023199
Complaint, August 18, 2000--Decision, August 18, 2000

This consent order addresses Swisher's cigar advertising. The complaint alleges that the failure to disclose that regular cigar smoking can cause serious adverse health effects is both unfair and deceptive in violation of Section 5 of the FTC Act. The consent order requires the respondents to make a clear and conspicuous disclosure using specified warning statements on cigar labels and in advertising.

Participants

For the Commission: *Mamie Kresses, Rosemary Rosso, Michael Ostheimer, Anne V. Maher, C. Lee Peeler, Marc Winerman, Christian S. White*, and *BE.*

For the Respondents: *Andrew L. Zausner* and *Peter J. Kadzik, Dickstein Shapiro Morin & Oshinsky.*

COMPLAINT

The Federal Trade Commission, having reason to believe that Swisher International, 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 Swisher International, Inc., is a Delaware corporation with its principal office or place of business at 459 East 16th Street, Jacksonville, FL 32206-3063.

2. Respondent has manufactured, advertised, labeled, offered for sale, sold, and distributed products to the public, including cigars.

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. In its advertising, labeling, and sale of cigars, respondent has failed to disclose that regular cigar smoking can cause several serious adverse health conditions including, but not limited to, cancers of the mouth (oral cavity), throat (esophagus and larynx), and lungs. These facts would be material to consumers in their purchase and use of the product. Respondent=s failure to disclose these facts has caused or is likely to cause substantial injury to consumers that is not outweighed by countervailing benefits to consumers or competition and is not reasonably avoidable by consumers. Therefore, the failure to disclose these facts was, and is, an unfair or deceptive practice.

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

THEREFORE, the Federal Trade Commission this eighteenth day of August, 2000, has issued this complaint against respondent.

By the Commission.

DECISION AND ORDER

IT IS HEREBY AGREED by and between, by its duly authorized officers, and counsel for the Federal Trade Commission that:

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

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

1. Respondent, Swisher International, Inc., is a Delaware corporation with its office or principal place of business located at 459 East 16th Street, Jacksonville, Florida 32206-3063.

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

ORDER

DEFINITIONS

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

1. Unless otherwise specified, "respondent" shall mean Swisher International, Inc., a corporation, its successors and assigns, and its officers, agents, representatives, and employees.

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

3. "Cigar" shall mean any roll of tobacco wrapped in leaf tobacco or wrapped in any other substance containing tobacco, other than a cigarette within the meaning of the Federal Cigarette Labeling and Advertising Act, 15 U.S.C.1331, et seq.

4. "Little cigar" shall mean any roll of tobacco wrapped in leaf tobacco or any substance containing tobacco (other than any roll of tobacco which is a cigarette within the meaning of the Federal Cigarette Labeling and Advertising Act, 15 U.S.C.1331, et seq.) and as to which one thousand units weigh not more than three pounds.

5. APremium cigar@ shall mean a hand-rolled cigar that is wrapped in a natural tobacco leaf wrapper.

6. "Commission" shall mean the Federal Trade Commission.

7. "Brand" shall mean cigars that bear a common identifying name or mark, regardless of whether the cigars are differentiated by type of product, size, shape, packaging, or other characteristic, and, in the case of generic or private label cigars, means all cigars produced or imported by respondent or its affiliates.

8. "Package" shall mean any pack, box, carton, tube, can, jar, container or wrapping in which any cigar is offered for sale, sold or otherwise distributed to consumers, but for purposes of this order, package does not include: (a) any shipping container or wrapping used solely for transporting cigars in bulk or quantity to respondent or packagers, processors, wholesalers or retailers unless the container or wrapping is intended for use as a retail display or (b) any wrapping or container that bears no written, printed or graphic matter. Any package that is also used as a point-of-sale display item shall also constitute "advertising" for purposes of this order.

9. "Label" shall mean any written, printed or graphic matter affixed to or appearing on any package containing a cigar, with the exception of any revenue stamp affixed to a cigar or any cigar band with a total surface area less than three (3) square inches.

10. "Utilitarian item" shall mean any item, other than cigars, that is sold or given or caused to be sold or given by respondent to consumers for their personal use, and that display cigar advertising such as a brand name, logo or selling message. Such items include, but are not limited to, matchbooks, lighters, clothing or sporting goods. The term "logo" includes any brand specific characteristics of a cigar, including but not limited to any recognizable pattern of colors or symbols associated with a particular brand.

11. Unless otherwise exempted by specific provision of this order, "advertisement" (including the terms "advertise" and

"advertising") shall include any oral, written, printed, pictorial or graphic representation made by or on behalf of respondent, the purpose or effect of which is to promote the sale or use of any cigar manufactured or distributed by respondent, including but not limited to a statement, illustration or depiction in or on a brochure, newspaper, magazine, free standing insert, pamphlet, leaflet, circular, mailer, book insert, letter, coupon, catalog, poster, chart, billboard, transit advertisement, utilitarian item, sponsorship material, package insert, film, slide, or point of purchase display (including any cigar package that can be used as an open package display or any functional item such as a clock or change mat that includes advertising), any advertising on television, radio, or the Internet, and any other electronic advertisement.

I.

IT IS ORDERED that respondent, directly or through any corporation, subsidiary, division, or other device, shall not fail to disclose clearly and conspicuously and in the manner set forth in this order one of the following statements on all cigar labels and, unless otherwise exempt from disclosure by this order, in all cigar advertisements:

SURGEON GENERAL WARNING: Cigar Smoking Can Cause Cancers Of The Mouth And Throat, Even If You Do Not Inhale.

SURGEON GENERAL WARNING: Cigar Smoking Can Cause Lung Cancer And Heart Disease.

SURGEON GENERAL WARNING: Tobacco Use Increases The Risk Of Infertility, Stillbirth And Low Birth Weight.

SURGEON GENERAL WARNING: Cigars Are Not A Safe Alternative To Cigarettes.

SURGEON GENERAL WARNING: Tobacco Smoke Increases The Risk Of Lung Cancer And Heart Disease, Even In Nonsmokers.

Provided, however, that the warning statement requirements shall not apply to company and divisional names, when used as such; to signs on factories, plants, warehouses or other facilities related to the manufacture or storage of cigars; to corporate or financial reports; to communications to security holders and others who customarily receive copies of these communications; or to promotional materials that are distributed to wholesalers, dealers or merchants but not to consumers, and are not for public display or consumer exposure. In addition, these warning statement requirements do not apply to shelf-talkers and similar product locators with a display area of twelve (12) square inches or less.

II.

IT IS FURTHER ORDERED that for purposes of this order, "clear and conspicuous" disclosure of any warning statement required by this order means that the warning statement shall be set out as follows:

A. The warning statement shall be capitalized and punctuated as indicated in Part I of this order, with the words "**SURGEON GENERAL WARNING**" printed in uppercase letters in bold print and the remaining words printed with the initial letter of each word in uppercase print and the remaining letters in lowercase print;

B. The warning statement shall be printed in black against a solid white background. In addition, the warning statement shall appear in two to four lines that are parallel to each other as well to the base of the cigar package or advertisement; and

C. The language of the warning statement shall appear:

(1) For any cigar label, the warning statement shall be set out in the English language. If the label of a cigar contains a required warning in a language other than English, the required warning shall also appear in English.
(2) For any cigar advertisement, the warning statement shall be set out in the English language, except as follows:

(a) In the case of any cigar advertising in a newspaper, magazine, periodical, or other publication that is not in English, the warning statement shall appear in the predominant language of the publication in which the advertisement appears; and

(b) In the case of any other cigar advertising, the warning statement shall appear in the language of the target audience (ordinarily the language principally used in the advertisement).

III.

IT IS FURTHER ORDERED that in the case of any cigar label required by the order to bear a warning statement, the following requirements shall apply:

A. The warning statement shall be in a clear and conspicuous place on the principal display panel of the label. The principal display panel is the part of a label that is likely to be displayed, presented, shown, or examined under normal viewing conditions. In the case of a rectangular or square cigar package, the principal display panel shall mean the front or top panel of the package, whichever is larger. *Provided, however*, that in the case of a rectangular or square package containing ten or more premium cigars, the warning shall appear on the front or top panel of the package, whichever is the principal display panel. In the case of a cylindrical cigar package, a clear and conspicuous place shall mean along the length of the cylinder and perpendicular to the top and bottom of the cylinder.

Provided, however, that in the case of any cigar package, the warning statement shall not be deemed to be in a clear and conspicuous place if it:

(1) appears or is affixed on the bottom of the package;

(2) is printed or affixed on the tear line;

(3) is printed or affixed on cellophane or any plastic film overwrap (with the exception of any package whose label appears only on cellophane or plastic film overwrap); or

(4) is printed or affixed in any other location that will be obliterated when the package is opened.

B. The warning statement shall appear in a clear and conspicuous and legible type and be separated in every direction from other written or graphic matter on the label by the equivalent of at least twice the height of the "W" in the word "WARNING" in that warning statement.

C. On a rectangular or square cigar package, the warning statement shall appear in the type style Univers 57 Condensed in the following type size in relation to total surface area of the largest panel of the package:

(1) Surface area of less than 5 square inches
Type size: 9 point

(2) Surface area of 5 to less than 10 square inches
Type size: 10 point

(3) Surface area of 10 to less than 15 square inches
Type size: 11 point

(4) Surface area of 15 to less than 25 square inches
Type size: 12 point

(5) Surface area of 25 to less than 40 square inches
Type size: 14 point

(6) Surface area of 40 or more square inches
Type size: 16 point

D. On a cylindrical cigar package, the warning statement shall appear in Univers 57 Condensed type style in the following type size in relation to the lengthwise surface area of the cylinder:

(1) Surface area of less than 5 square inches
Type size: 8 point

(2) Surface area of 5 to less than 15 square inches
Type size: 9 point

(3) Surface area of 15 to less than 25 square inches
Type size: 10 point

(4) Surface area of 25 to less than 30 square inches
Type size: 12 point

(5) Surface area of 30 to less than 40 square inches
Type size: 14 point

(6) Surface area of 40 or more square inches
Type size: 16 point

E. The warning statements required by this order may be affixed to the cigar label by sticker, provided that: the sticker is placed directly on the surface of the package, and not on any cellophane or other plastic film overwrap (with the exception of any package whose label appears only on cellophane or plastic film overwrap); the sticker is permanent (non-removable) and durable; and the warning statement complies with all other requirements of Parts I, II, III and VIII herein.

F. Each cigar label shall meet the requirements of this order upon being prepared for distribution in commerce for retail sale, but before it is distributed to be offered for retail sale. In the case of any cigar that is imported, the warning statements may be affixed in the country of origin or after importation into the United States, but shall be affixed before the cigar is removed from bond for sale or distribution. This section does not apply to any cigar that is manufactured, packaged or imported in the United States for export from the United States, if the cigar is not in fact distributed in commerce for use in the United States.

IV.

IT IS FURTHER ORDERED that in the case of any advertisement required by this order to bear a warning statement, except advertisements covered by Part V of this order, the following requirements shall apply:

A. The warning statement shall appear in a ruled rectangular box with the enclosing rule printed in black, and shall be centered both horizontally and vertically within the rectangular box and separated from any edge of the rule by at least one-half the height of the "W" in the word "WARNING" in the warning statement;

B. The warning statement shall be in a clear and conspicuous place. For purposes of this part, a "clear and conspicuous place"shall mean a location within the advertisement that is separated from any other written or textual matter or any graphic designs, elements or geometric forms by a distance from the outside rule at least twice the height of the "W" in the word "WARNING" in that warning statement. In addition, the disclosure shall not be positioned in the margin of a print advertisement. *Provided further*, the warning statement shall not be included as an integral part of a specific design or illustration in the advertisement, such as a picture of the

package, unless at least 80 percent of the area of the advertisement is taken up by a picture of the package.

C. The size of the warning statement shall be clear and conspicuous and shall be in Univers 57 Condensed type style, with the following outside dimensions and type size in relation to the advertising display area of the advertisement:

(1) Total area of less than 15 square inches
Border: 2c" by :"
Rule width: 1 point
Type size: 9 point

(2) Total area of 15 to less than 65 square inches
Border: 3c" by :"
Rule width: 2 point
Type size: 11 point

(3) Total area of 65 to less than 110 square inches
Border: 32" by f"
Rule width: 2 point
Type size: 13 point

(4) Total area of 110 to less than 180 square inches
Border: 4c" by 1"
Rule width: 2 point
Type size: 15 point

(5) Total area of 180 to less than 360 square inches
Border: 4d" inches by 1c"
Rule width: 2 point
Type size: 16 point

(6) Total area of 360 to less than 470 square inches
Border: 5" by 13"
Rule width: 22 point
Type size: 18 point

(7) Total area of 470 to less than 720 square inches
Border: 83" by 1:"
Rule width: 3 point
Type size: 30 point

(8) Total area of 5 to less than 10 square feet
Border: 11" by 32"
Rule width: 6 point
Type size: 43 point

(9) Total area of 10 to less than 20 square feet
Border: 1' 4" by 32"
Rule width: 8 point
Type size: 58 point

(10) Total area of 20 to less than 40 square feet
Border: 2' 8" by 1'
Rule width: 3"
Type size: 12" (Cap Height)

(11) Total area of 40 to less than 80 square feet
Border: 3' 4" by 1' 2"
Rule width: d"
Type size: 23" (Cap Height)

(12) Total area of 80 to less than 160 square feet
Border: 5' 8" by 2' 4"
Rule width: :"
Letter height: 32" (Cap Height)

(13) Total area of 160 to less than 350 square feet
Border: 19' 4" by 7' 4"
Rule width: 1:"
Letter height:11" (Cap Height)

(14) Total area of 350 to 1200 square feet
Border: 20' by 7' 8"

Rule width: 23"
Letter height:12" (Cap Height)

(15) Total area of 1200 square feet or more
Border: 27' 4" by 9' 4"
Rule width: 3"
Letter height: 1' 4" (Cap Height)

D. In determining the outside dimensions, type size and placement of the warning statement in any advertisement in a newspaper, magazine or other periodical that appears on more than one page:

(1) A double full page or multiple full page advertisement shall not be required to have more than one warning, but the outside dimensions and type size of the warning statement shall be determined by the aggregate advertising display area of the entire advertisement;

(2) An advertisement that occupies one full page and part of another page shall not be required to have more than one warning, but the outside dimensions and type size of the warning statement shall be determined by the aggregate advertising display area of the entire advertisement and the warning shall appear on the full page on which the advertisement appears; and

(3) An advertisement that occupies parts of two or more pages shall not be required to contain more than one warning, but the outside dimensions and type size of the warning statement shall be determined by the aggregate advertising display area of the entire advertisement and the warning shall appear on the page that contains the greater (or greatest) part of the advertisement.

E. In determining the outside dimensions, type size and placement of the warning statement on any point-of sale advertisement with curved, irregular or multiple surfaces:

(1) In the case of point-of-sale items that are designed to contain products ("merchandisers") such as counter and floor displays, package dispensers, racks and gondolas:

(a) Where the merchandiser itself contains no cigar advertising, the merchandiser shall not require a warning statement;

(b) Where the merchandiser contains cigar advertising, the outside dimensions and type size of the warning statement shall be determined by the aggregate advertising display area of all of the surfaces containing such advertising;

(c) On merchandisers displaying advertising on more than one side, the warning statement shall be placed on the largest side of the item that is visible to the public from its normal viewing position.

(d) For merchandiser formats designed and in use as of May 1, 2000 where the height or width of the display panel on which the warning statement must appear is less than the height or width of the border of the warning statement required by Part IV.C of this order, respondent may submit for approval, and the Commission shall approve upon a showing of practical necessity, a warning statement that has an alternative outside border provided that the warning statement has the same rule width, type size and total area as required by Part IV.C.

(2) In the case of functional items such as clocks, change mats, change trays and welcome signs, the outside dimensions and type size of the warning statement shall be determined by the surface area of that side of the item which contains advertising, unless the advertising is clearly separated from the remainder of the area of that side by clear border lines of a contrasting color and one-quarter inch in width, in which event the size of the

warning statement shall be determined by the surface area within the border area containing the advertising.

F. In the case of a cigar package that also can function as a point-of-sale display, such item shall also comply with the advertising provisions of this order. In determining the outside dimensions, type size and placement of the advertising warning statement on such item:

(1) in the case of a package that itself contains two or more packages of cigars, the item shall comply with the requirements of Part IV.E.1 of this order; and

(2) in the case of a package that contains two or more individual cigars, and can function as an open package display:

(a) the warning statement shall be placed on the principal display panel of the interior of the package and shall be positioned so that it is visible to the public from any normal viewing position; and

(b) the outside dimensions, type size and style of the warning statement shall be determined by the area of the panel on which the statement is placed.

G. For any catalogue, leaflet, brochure or other non-point-of-sale promotional advertisement that has more than one page:

(1) An advertisement that occupies up to four pages shall not be required to contain more than one warning, but the outside dimensions and type size of the warning statement shall be determined by the aggregate advertising display area of the entire advertisement and the warning shall appear on the page that contains the greater (or greatest) part of the advertisement; and

(2) An advertisement that occupies more than four pages shall be required to contain multiple warnings on alternating pages, with the outside dimensions and type size of the warning statement determined by the twice the advertising display area of the page containing the warning.

V.

IT IS FURTHER ORDERED that in a television, radio, Internet or other electronic advertisement, or any other audio or video advertisement, including but not limited to videotapes, cassettes, discs, films, filmstrips, audiotapes or other types of sound recordings, "clear and conspicuous" disclosure shall mean as follows:

A. If the advertisement has a visual component, the warning statement shall be superimposed on the screen in black print on a white background enclosed in a black rectangular box format, as specified in Parts IV.A and IV.B above, and its size, duration on the screen and location shall be sufficient for an ordinary consumer to read and comprehend it;

B. If the advertisement has an audio component, the warning statement shall be announced orally and shall be delivered in a volume, cadence, and location sufficient for an ordinary consumer to hear and comprehend it;

Provided, however, in the case of an audio advertisement in a retail store or other place where cigars are offered for sale, no warning shall be required, even if respondent provides an incentive for disseminating the advertisement, so long as the announcement includes only the brand name or product identifier, the price, and the product's location in the store.

C. If the advertisement has both a visual and an audio component, the warning statement shall be superimposed on the screen in a rectangular box format and announced orally in compliance with the requirements set out in Sub-parts A and B of this Part V of the order. In addition to the foregoing, in advertising in an interactive electronic medium such as the

Internet or online services, the disclosure shall be presented in an unavoidable manner on every Web page, online service page, or other electronic page, and shall not be accessed or displayed through hyperlinks, pop-ups, interstitials or other similar means.

D. Pursuant to the Federal Cigarette Labeling and Advertising Act, 15 U.S.C. 1331, et seq, it shall be unlawful for respondent to disseminate any advertisement for little cigars on any medium of electronic communication subject to the jurisdiction of the Federal Communications Commission.

VI.

IT IS FURTHER ORDERED that in the case of advertisements for cigars on utilitarian items:

A. The warning statements required by this order shall be in a clear and conspicuous and legible type and shall appear within the rectangular box format specified in Part IV;

B. The warning statement required by this order must be in a clear and conspicuous location on the object. A clear and conspicuous location on the object is one that is proximate to and on the same surface as the cigar advertising, and is visible when the brand name, logo or selling message is visible.

C. The outside dimensions and type style and size of the warning statement shall conform to the requirements set forth in Part IV.C of this order. For purposes of determining the outside dimensions and type size of the warning statement, the advertising display area for an advertisement on a utilitarian item shall be the visible area on which the advertising appears. For example, the advertising display area for a shirt bearing a brand name, logo or selling message on the front or back is the entire front or back of the shirt, excluding any sleeves.

For a shirt bearing a brand name, logo or selling message on the sleeve, the advertising display area is the sleeve.

D. If the cigar advertising appears in more than one location on the utilitarian item, the warning either:

(1) Shall appear proximate to each area with the advertising; or

(2) Shall appear only once on the item, however, in such case, the advertising display area shall be the aggregate of all the surface areas on which any advertising appears.

E. The warning statement required by this order must be printed, embossed, embroidered or otherwise affixed to the utilitarian item with a permanence and durability that is comparable to the permanence and durability of the brand name, logo, or selling message. *Provided, however*, that if a product brand name or logo is embroidered on a hat, and a legible warning cannot be embroidered in the proper size due to technological limitations, the warning may be affixed to the hat by another method, so long as its permanence and durability is comparable to that of the brand name, logo or selling message.

F. For fabric baseball style hats, the warning statement shall appear in the Number 3 size as set forth in Part IV.C of this order.

G. For those utilitarian items under eight (8) square inches that are viewed predominantly by the user, the warning statement shall be:

(1) Printed on the package of the item, if the item is disseminated in a package to the consumer. The total surface area of the package shall comprise the advertising display area for purposes of determining the outside dimensions and type size of the warning statement; or

(2) Placed in the form of a sticker or decal directly onto the item in the Number 1 warning size as set forth in Part IV.C of this order. The item shall be packaged in such a way to ensure that the sticker cannot be removed before it is received by the consumer.

VII.

IT IS FURTHER ORDERED that all cooperative advertisements paid for, directly or indirectly, in whole or in part, by respondent must bear the required warning. *Provided, however*, in the case of a print advertisement with a display area of four (4) square inches or less, disseminated by a retailer, no warning is required so long as the advertisement contains only the brand name or other product identifier and a price. In addition, no warning is required in the case of certain in-store audio announcements as described in Part V.B of this order.

VIII.

IT IS FURTHER ORDERED that with regard to the rotation, display, and distribution of warning statements on cigar packages, respondent shall:

A. Display each of the five warning statements required by this order randomly in each twelve (12) month period in as equal a number of times as possible on the labels of each brand of the product and distribute the packages randomly in all parts of the United States in which the cigars are marketed.

Provided, however, that for purposes of this order, the phrase "as equal a number of times as possible" shall permit deviations of four (4) percent or less in a 12-month period.

Provided further, that the term "random distribution" shall mean that nothing in the production or distribution process of a cigar would prevent the five warning statements on the

package from being distributed evenly in all parts of the United States where the product is marketed.

B. No later than ninety (90) days after the effective date of this order, respondent shall submit to the Commission or its designated representative for approval a plan that provides for the display of the five warning statements on packages of cigars as required by this order, and comply with the plan as approved. This plan shall be sufficiently detailed to enable the Commission to determine whether the warning statements appear on the package in a manner consistent with the requirements of this order. The equal display requirements may be satisfied by one of the following three methods:

(1) A plan may satisfy the requirements by providing for the engraving or preparation of cylinders, plates, or equivalent production materials in a manner that results in the simultaneous printing of the five required warnings in as near an equal number of times as possible under the circumstances;

(2) A plan may satisfy the requirements by providing for the preparation of separate cylinders, plates, and equivalent production materials and requiring that they be changed at fixed intervals in a manner that results in the display of the five required warnings in as near an equal number of times as possible under the circumstances during a one-year period; or

(3) A plan may satisfy the requirements by providing that stickers bearing the five required warnings be printed in equal numbers and affixed randomly to packages of the product.

Provided, however, nothing in this part of the order requires the use of more than one warning statement on the label of any brand during any given part of the 12-month period except for a cigar package that also functions as a cigar display (which

must also comply with the advertising requirements of this order).

C. A plan for the rotation, display, and distribution of warning statements on cigar packages shall include representative samples of labels with each of the five warning statements required by this order. This provision does not require submission of a label with each of the required warning statements for every brand marketed by respondent, and shall be deemed to be satisfied by submission of labels for different types of cigars, and a range of cigar package sizes for each type of product.

IX.

IT IS FURTHER ORDERED that with regard to the rotation, display, and dissemination of warning statements in cigar advertising:

A. Except as specified in sub-part B. herein, respondent shall rotate each of the five warning statements required by this order every three (3) months in an alternating sequence in the advertisement for each brand of cigar. *Provided, however*, that any rotational system may take into account practical constraints on the production and distribution of advertising.

B. On merchandisers, utilitarian items, and cigar packages that can function as open package displays, respondent shall display each of the five warning statements required by this order randomly in each twelve (12) month period in as equal a number of times as possible, and distribute such merchandisers, utilitarian items, and cigar packages randomly in all parts of the United States in which they are disseminated.

Provided, however, that for purposes of this sub-part, the phrase "as equal a number of times as possible" shall permit deviations of four (4) percent or less in a 12-month period.
Provided further, that the term "random distribution" shall mean that nothing in the production or distribution process of a merchandiser or cigar package than can be used as an open package display would prevent the five warning statements on such display items from being distributed evenly in all parts of the United States where they are disseminated.

C. No later than ninety (90) days after the effective date of this order, respondent shall submit a plan to the Commission or its designated representative for approval that ensures that:

(1) On all types of cigar advertising, except those specified in sub-part B herein, the five warning statements are rotated every three months in alternating sequence, and that respondents comply with the plan as approved. This rotational warning requirement may be satisfied by requiring either that all brands display the same warning during each three-month period or that each brand display a different warning during a given three-month period. A plan shall describe the method of rotation and shall include a list of the designated warnings for each three-month period during the first fifteen (15) month period for each brand. The plan also shall describe the method that will be used to ensure proper rotation in different advertising media in sufficient detail to ensure compliance with the order. For advertising in newspapers, magazines, or other periodicals, the method of rotation shall be set either according to the cover date or the closing date of the publication. For posters and placards, the method of rotation shall be set according to either the scheduled or actual appearance of the advertising. The method of rotation for point-of-sale and non-point-of-sale promotional materials such as leaflets, pamphlets, coupons, direct mail circulars, paperback book inserts, or non-print items shall be set according to either the date the materials or objects are ordered or the date on which the

objects or materials are scheduled to be disseminated, provided that the production of such materials or objects is carried out in a manner consistent with customary business practices.

(2) On merchandisers, utilitarian items, and cigar packages that can function as open package displays, each of the five warning statements required by this order is displayed randomly in each twelve (12) month period in as equal a number of times as possible.

D. A plan for the rotation, display, and dissemination of warning statements in cigar advertising shall include a representative sample of each of the five warning statements required by this order. This provision does not require the submission of all advertising for each brand marketed by respondent and shall be deemed to be satisfied by submission of actual examples of different types of advertising materials or acetates or other facsimiles indicating the warning statements as they would appear in advertisements of varying sizes.

X.

IT IS FURTHER ORDERED that the Commission intends that this order provide for a uniform, federally mandated system of health warnings on cigar packages and advertisements nationwide. Entry of the order will uniformly provide consumers in all states and territories of the United States with clear, conspicuous and understandable disclosures of the health risks of cigar smoking. The Commission shall consider a state or local requirement for the display of different warnings concerning cigar smoking and health to be in conflict with the requirements of this order, but only to the extent that any such provision requires that the state or local warning appear on any package or advertisement required to display the Federal warnings set forth herein.

XI.

IT IS FURTHER ORDERED that respondent shall be deemed to be in compliance with this order if it has taken reasonable steps to:

A. Provide, by written contract or other clear and prominent instructions, for the rotation of the label statements required by this order;

B. Give clear and prominent instruction and, to the extent possible, furnish materials (such as film negatives, acetates or other facsimiles) for the production of cigar packages and advertising that contain the required warning statements; and

C. Prevent and correct mistakes, errors or omissions that have come to its attention.

Provided, however, that in the event of the distribution of labels or the publication of advertisements that do not conform to this order, the burden of establishing that reasonable steps have been taken to comply with this order (including fulfilling the conditions described in this Part of the order) shall rest solely with respondent.

XII.

IT IS FURTHER ORDERED that the cigar labeling and advertising requirements of Parts III through VI of this order shall become effective one hundred eighty (180) days after issuance of the order. *Provided, however*, that:

A. The cigar labeling requirements of Part III of this order shall not apply to cigars distributed in commerce for retail sale prior to one hundred eighty (180) days from the date of issuance of the order.

B. The cigar advertising requirements of Parts IV through VII of this order shall take into account practical constraints on respondent with respect to the production and distribution of

advertising submitted for publication prior to one hundred eighty (180) days from the date of issuance of the order.

XIII.

IT IS FURTHER ORDERED that in the event the Federal Cigarette Labeling and Advertising Act, 15 U.S.C. 1331, et seq., or the Comprehensive Smokeless Tobacco Health Education Act, 15 U.S.C. 4401, et seq., or the regulations implemented thereunder, 16 C.F.R. 307, et seq., are amended or modified to change the size or format of the warning requirements for the labeling or advertising of cigarettes or smokeless tobacco, respectively, such action shall constitute sufficient changed conditions to reopen this order to determine whether the size or the format of the warning statements contained herein should be altered or modified to conform to the same or similar size or format.

XIV.

IT IS FURTHER ORDERED that respondent and its successors and assigns, for five (5) years after the last date of dissemination of any cigar label or advertisement covered by this order, shall maintain and upon request make available to the Federal Trade Commission business records demonstrating their compliance with the terms and provisions of this order, including, but not limited, to a sample copy of each advertisement and label disseminated during such time.

XV.

IT IS FURTHER ORDERED that respondent and its successors and assigns shall deliver a copy of this order to all current and future principals, officers, directors, and managers, and to all current and future employees, agents, and representatives having responsibilities with respect to the subject matter of this order, and shall secure from each such person a signed and dated statement acknowledging receipt of the order. Respondent 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.

XVI.

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

XVII.

IT IS FURTHER ORDERED that respondent and its successors and assigns shall, at such times as the Commission may require, file with the Commission a report, in writing, setting forth in detail the manner and form in which they have complied with this order.

By the Commission.

Analysis of Proposed Consent Orders to Aid Public Comment

The Federal Trade Commission has accepted, subject to final approval, agreements containing consent orders from the following cigar manufacturers, importers or marketers:

Swisher International, Inc. (Matter No. 002-3199);
Consolidated Cigar Corporation (Matter No. 002-3200);
Havatampa, Inc. (Matter No. 002-3204);
General Cigar Holdings, Inc. (Matter No. 002-3202);
John Middleton, Inc. (Matter No. 002-3205);
Lane Limited (Matter No. 002-3203); and
Swedish Match North America, Inc.(Matter No. 002-3201).

The proposed consent orders have been placed on the public record for thirty (30) days for the receipt of comments by interested persons. Comments received during this period will become part of the public record. After thirty (30) days, the Commission will again review the agreements and comments received and will decide whether it should withdraw from the agreements and take appropriate action or make final the agreements' proposed orders.

Background

In July 1999, the Federal Trade Commission provided a Report to Congress, entitled Cigar Sales and Advertising and Promotional Expenditures for Calendar Years 1996 and 1997 ("Commission Report"). The Commission Report recommended that, given the significant increase in cigar smoking prevalence in recent years and the serious health risks posed by cigar smoking,[1] cigars should be regulated in a manner consistent with the current regulation of cigarettes and smokeless tobacco. *See* Federal

1 *See* U.S. Department of Health and Human Services, National Cancer Institute, Smoking and Tobacco Control Monograph No. 9 Cigars: Health Effects and Trends (1998), NIH publication no. 98-4302 (ACigar Monograph@).

Cigarette Labeling and Advertising Act, 15 U.S.C. § 1331 et seq.; Comprehensive Smokeless Tobacco Health Education Act of 1986, 15 U.S.C. § 4401 et seq. The Commission Report recommended that Congress either enact legislation to require federal health warnings on cigar labeling and advertising or direct the Commission to use its existing authority, under Section 5 of the Federal Trade Commission Act, to require cigar health warnings.

In November 1999, in the Joint Explanatory Note of the Conferees to H.R. 3421 Appropriations Bill, the Congressional Appropriations Committees responded to the Commission Report by directing the FTC to report back to the Committees on Commission plans to establish "uniform Federal health warning label[s]."[2]

After consideration of the National Cancer Institute's findings in its Cigar Monograph on the serious health risks of regular cigar use, and the failure of cigar advertising and labeling to disclose these health risks, the Commission negotiated consent agreements with the seven largest cigar companies to implement health warnings on cigar labeling and advertising nationwide.[3]

The Proposed Complaints and Orders

The proposed complaints each allege that the failure to disclose that regular cigar smoking can cause serious adverse health effects is both unfair and deceptive in violation of Section 5 of the FTC Act. Part I of the proposed orders requires the respondents to make a clear and conspicuous disclosure of the following warning statements on cigar labels and in advertising:

---

2 145 Cong. Rec. H12230-02 (daily ed. Nov. 17, 1999).

3 Like all FTC consent orders, these orders are for settlement purposes only and do not constitute an admission by the cigar manufacturers of any law violation.

SURGEON GENERAL WARNING: Cigar Smoking Can Cause Cancers Of The Mouth And Throat, Even If You Do Not Inhale.

SURGEON GENERAL WARNING: Cigar Smoking Can Cause Lung Cancer And Heart Disease.

SURGEON GENERAL WARNING: Cigars Are Not A Safe Alternative To Cigarettes.

SURGEON GENERAL WARNING: Tobacco Use Increases The Risk Of Infertility, Stillbirth, And Low Birth Weight.

SURGEON GENERAL WARNING: Tobacco Smoke Increases The Risk Of Lung Cancer And Heart Disease, Even In Nonsmokers.

Part II of the proposed orders sets out specific format requirements for the warnings, which are designed to ensure that the warnings are visible and readable. Part II also requires that the warning statements on labeling and advertising be printed in black print on a solid white background, and be capitalized and punctuated as set forth in Part I.

Part III specifies the location and size requirements for the disclosure of the health warnings on cigar *labels*. The orders require that the warning be displayed on the principal display panel of the package. For the majority of cigar boxes, the orders define the principal display panel to be the larger of the top or front panel of the package, thus ensuring that the warning is in the most noticeable location. The orders make an exception for boxes of premium (hand-rolled) cigars, providing that the warning can appear on the top or front of the box, depending upon which panel is more likely to be seen by consumers.

Part IV sets forth the specific format and size requirements for the disclosure of the health warnings on cigar *advertising*. The orders provide that the warning shall be in black print on a white

background and be centered in a black ruled rectangular box. Part IV specifies how to calculate the size of the warning and where to place the warning in various types of advertising, including periodicals, merchandisers, functional items, catalogues and cigar packages that also function as point-of-sale displays.

Part V specifies how to make the required disclosures in audio and video advertisements, including radio, television, the Internet, tapes and films. The orders require that in interactive media, such as the Internet, the warnings must be displayed in an unavoidable manner on every Web page.

Part VI of the proposed orders addresses requirements for the disclosure of the warnings on utilitarian items. Utilitarian items are treated like other advertising, and the warning statements must appear in a rectangular box format, in a size based upon the item's total advertising display area.

Part VII provides that cooperative advertisements paid for in whole or in part by a respondent must include the warnings, with the exception of very small print advertisements containing only brand name and price information.

Part VIII sets forth the specific requirements for the rotation, display and distribution of the warning statements on cigar packages. For each cigar brand, respondents must display each of the five required warning statements randomly in as equal a number of times as possible, and must distribute the packages randomly in all parts of the U.S.A. in which they are marketed.

Part IX provides that, on most types of advertising, the five warning statements shall be rotated in an alternating sequence every three months. Part IX provides for equal simultaneous display of the warning statements on merchandisers, cigar boxes that can function as open package displays and utilitarian items. Parts VIII and IX of the proposed orders also require the companies to submit to the Commission for approval plans for the

display of the warnings on cigar packages and advertisements, and to comply with the plans as approved.

Part X of the proposed orders states that the Commission will consider state or local requirements for different health warnings on any cigar labeling or advertising that is required to display the FTC warning to be in conflict with the orders.

Part XI provides a safe harbor in the event the companies have taken reasonable steps to assure compliance; in the event of labels or advertisements that do not comply with the order, the proposed respondents will bear the burden of establishing that reasonable steps were taken to comply with the order. This same safe harbor provision is included in the Commission's smokeless tobacco regulations.

Part XII of the proposed orders states that the warning requirements shall become effective one hundred and eighty (180) days after issuance of the order.

Part XIII provides that in the event the Federal Cigarette Labeling and Advertising Act or the Comprehensive Smokeless Tobacco Health Education Act or the Commission's Smokeless Tobacco Regulations are amended or modified to change the size or format of the warnings for cigarettes or smokeless tobacco, the cigar orders may be reopened to determine whether the size or format of the warnings for cigars should be modified to conform to such changes.

Parts XIV through XVI of the proposed orders contain standard recordkeeping, reporting and compliance requirements.

The proposed orders do not contain a sunset provision due to the importance of the health warnings required therein.

Analysis to Aid Public Comment

Objectives of the Proposed Orders

The Commission's intent in obtaining the proposed consent orders is to provide a uniform national system of health warnings on cigar labeling and advertising. National health warnings that are clear and conspicuous benefit consumers. Here, the cigar warnings will prevent future deception and unfairness by providing important information with which consumers nationwide can make more informed choices.[4]

Each of the five warnings conveys a simple and specific message about health risks associated with cigar use. The orders' requirements for display of the warnings on packaging and advertising will provide sufficient repetition of each warning statement to contribute to long-term recall of each message, while decreasing the likelihood that any one message will become so familiar and overexposed that its effectiveness will "wear out." Together, the five warnings provide a comprehensive warning scheme that provides necessary and important information to consumers nationwide.

Because the proposed respondents' cigar packaging and advertising is disseminated in the national marketplace, a comprehensive national system of simple and direct warnings will provide the greatest benefits to consumers. Moreover, multiple, and potentially inconsistent, warnings on individual packages or advertisements could neutralize or negate those benefits. Such multiple warnings may be confusing to consumers and undercut the saliency of the warnings required by these consent orders. Further, they are likely to have the unintended effect of making it more difficult for consumers to process the warning messages required here. And, while diminished effectiveness could result when *one* state mandates additional warnings on packages or

4 Uniform national health warnings likewise benefit national competition. Multiple different warnings can raise costs and regulatory burdens for national marketers such as the proposed respondents.

advertisements bearing the Commission warnings, the problem will be exacerbated if more than one state imposes requirements applicable to a single package or advertisement.

In light of the important benefits from a national warning system, Part X of the Commission's orders preempts state or local requirements for different health warnings on any cigar labeling or advertising that is required to display the FTC warnings. At the same time, the Commission recognizes the critically important role that states play in consumer protection and tobacco control. The provision does not affect other state or local requirements. For example, required warnings for types of advertising that are not covered by the proposed orders (such as shelf talkers under a certain size), or state or local restrictions on advertising placement or youth access to tobacco products are not affected. It is the Commission's intent that this provision apply only to state requirements for different health warnings by companies who have entered into the FTC consent orders, and only to packages and advertising required to contain the federally-mandated warnings.

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

Complaint

IN THE MATTER OF

CONSOLIDATED CIGAR CORPORATION

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

Docket C-3966; File No. 0023200
Complaint, August 18, 2000--Decision, August 18, 2000

This consent order addresses Consolidated Cigar's advertising. The complaint alleges that the failure to disclose that regular cigar smoking can cause serious adverse health effects is both unfair and deceptive in violation of Section 5 of the FTC Act. The consent order requires the respondents to make a clear and conspicuous disclosure using specified warning statements on cigar labels and in advertising.

Participants

For the Commission: *Mamie Kresses, Rosemary Rosso, Michael Ostheimer, Anne V. Maher, C. Lee Peeler, Marc Winerman, Christian S. White*, and *BE.*

For the Respondents: *Andrew L. Zausner* and *Peter J. Kadzik, Dickstein Shapiro Morin & Oshinsky.*

COMPLAINT

The Federal Trade Commission, having reason to believe that Consolidated Cigar Corporation, a corporation ("respondent@), has violated the provisions of the Federal Trade Commission Act, and it appearing to the Commission that this proceeding is in the public interest, alleges:

1. Respondent Consolidated Cigar Corporation is a Delaware corporation with its principal office or place of business at 5900 North Andrews Avenue, Ft. Lauderdale, Florida 33309.

2. Respondent has manufactured, advertised, labeled, offered for sale, sold, and distributed products to the public, including cigars.

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. In its advertising, labeling, and sale of cigars, respondent has failed to disclose that regular cigar smoking can cause several serious adverse health conditions including, but not limited to, cancers of the mouth (oral cavity), throat (esophagus and larynx), and lungs. These facts would be material to consumers in their purchase and use of the product. Respondent=s failure to disclose these facts has caused or is likely to cause substantial injury to consumers that is not outweighed by countervailing benefits to consumers or competition and is not reasonably avoidable by consumers. Therefore, the failure to disclose these facts was, and is, an unfair or deceptive practice.

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

THEREFORE, the Federal Trade Commission this eighteenth day of August, 2000, has issued this complaint against respondent.

By the Commission.

DECISION AND ORDER

IT IS HEREBY AGREED by and between, by its duly authorized officers, and counsel for the Federal Trade Commission that:

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

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

1. Respondent, Consolidated Cigar Corporation, is a Delaware corporation with its office or principal place of business located at 5900 North Andrews Avenue, Ft. Lauderdale, Florida 33309.

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

ORDER

DEFINITIONS

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

1. Unless otherwise specified, "respondent" shall mean Consolidated Cigar Corporation, a corporation, its successors and assigns, and its officers, agents, representatives, and employees.

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

3. "Cigar" shall mean any roll of tobacco wrapped in leaf tobacco or wrapped in any other substance containing tobacco, other than a cigarette within the meaning of the Federal Cigarette Labeling and Advertising Act, 15 U.S.C.1331, et seq.

4. "Little cigar" shall mean any roll of tobacco wrapped in leaf tobacco or any substance containing tobacco (other than any roll of tobacco which is a cigarette within the meaning of the Federal Cigarette Labeling and Advertising Act, 15 U.S.C.1331, et seq.) and as to which one thousand units weigh not more than three pounds.

5. APremium cigar@ shall mean a hand-rolled cigar that is wrapped in a natural tobacco leaf wrapper.

6. "Commission" shall mean the Federal Trade Commission.
7. "Brand" shall mean cigars that bear a common identifying name or mark, regardless of whether the cigars are differentiated by type of product, size, shape, packaging, or other characteristic, and, in the case of generic or private label cigars, means all cigars produced or imported by respondent or its affiliates.

8. "Package" shall mean any pack, box, carton, tube, can, jar, container or wrapping in which any cigar is offered for sale, sold or otherwise distributed to consumers, but for purposes of this order, package does not include: (a) any shipping container or wrapping used solely for transporting cigars in bulk or quantity to respondent or packagers, processors, wholesalers or retailers unless the container or wrapping is intended for use as a retail display or (b) any wrapping or container that bears no written, printed or graphic matter. Any package that is also used as a point-of-sale display item shall also constitute "advertising" for purposes of this order.

9. "Label" shall mean any written, printed or graphic matter affixed to or appearing on any package containing a cigar, with the exception of any revenue stamp affixed to a cigar or any cigar band with a total surface area less than three (3) square inches.

10. "Utilitarian item" shall mean any item, other than cigars, that is sold or given or caused to be sold or given by respondent to consumers for their personal use, and that display cigar advertising such as a brand name, logo or selling message. Such items include, but are not limited to, matchbooks, lighters, clothing or sporting goods. The term "logo" includes any brand specific characteristics of a cigar, including but not limited to any recognizable pattern of colors or symbols associated with a particular brand.

11. Unless otherwise exempted by specific provision of this order, "advertisement" (including the terms "advertise" and "advertising") shall include any oral, written, printed, pictorial or

graphic representation made by or on behalf of respondent, the purpose or effect of which is to promote the sale or use of any cigar manufactured or distributed by respondent, including but not limited to a statement, illustration or depiction in or on a brochure, newspaper, magazine, free standing insert, pamphlet, leaflet, circular, mailer, book insert, letter, coupon, catalog, poster, chart, billboard, transit advertisement, utilitarian item, sponsorship material, package insert, film, slide, or point of purchase display (including any cigar package that can be used as an open package display or any functional item such as a clock or change mat that includes advertising), any advertising on television, radio, or the Internet, and any other electronic advertisement.

I.

IT IS ORDERED that respondent, directly or through any corporation, subsidiary, division, or other device, shall not fail to disclose clearly and conspicuously and in the manner set forth in this order one of the following statements on all cigar labels and, unless otherwise exempt from disclosure by this order, in all cigar advertisements:

SURGEON GENERAL WARNING: Cigar Smoking Can Cause Cancers Of The Mouth And Throat, Even If You Do Not Inhale.

SURGEON GENERAL WARNING: Cigar Smoking Can Cause Lung Cancer And Heart Disease.

SURGEON GENERAL WARNING: Tobacco Use Increases The Risk Of Infertility, Stillbirth And Low Birth Weight.

SURGEON GENERAL WARNING: Cigars Are Not A Safe Alternative To Cigarettes.

SURGEON GENERAL WARNING: Tobacco Smoke Increases The Risk Of Lung Cancer And Heart Disease, Even In Nonsmokers.

Provided, however, that the warning statement requirements shall not apply to company and divisional names, when used as such; to signs on factories, plants, warehouses or other facilities related to the manufacture or storage of cigars; to corporate or financial reports; to communications to security holders and others who customarily receive copies of these communications; or to promotional materials that are distributed to wholesalers, dealers or merchants but not to consumers, and are not for public display or consumer exposure. In addition, these warning statement requirements do not apply to shelf-talkers and similar product locators with a display area of twelve (12) square inches or less.

II.

IT IS FURTHER ORDERED THAT for purposes of this order, "clear and conspicuous" disclosure of any warning statement required by this order means that the warning statement shall be set out as follows:

A. The warning statement shall be capitalized and punctuated as indicated in Part I of this order, with the words "**SURGEON GENERAL WARNING**" printed in uppercase letters in bold print and the remaining words printed with the initial letter of each word in uppercase print and the remaining letters in lowercase print;

B. The warning statement shall be printed in black against a solid white background. In addition, the warning statement shall appear in two to four lines that are parallel to each other as well to the base of the cigar package or advertisement; and

C. The language of the warning statement shall appear:

(1) For any cigar label, the warning statement shall be set out in the English language. If the label of a cigar contains a

required warning in a language other than English, the required warning shall also appear in English.

(2) For any cigar advertisement, the warning statement shall be set out in the English language, except as follows:

(a) In the case of any cigar advertising in a newspaper, magazine, periodical, or other publication that is not in English, the warning statement shall appear in the predominant language of the publication in which the advertisement appears; and

(b) In the case of any other cigar advertising, the warning statement shall appear in the language of the target audience (ordinarily the language principally used in the advertisement).

III.

IT IS FURTHER ORDERED that in the case of any cigar label required by the order to bear a warning statement, the following requirements shall apply:

A. The warning statement shall be in a clear and conspicuous place on the principal display panel of the label. The principal display panel is the part of a label that is likely to be displayed, presented, shown, or examined under normal viewing conditions. In the case of a rectangular or square cigar package, the principal display panel shall mean the front or top panel of the package, whichever is larger. *Provided, however*, that in the case of a rectangular or square package containing ten or more premium cigars, the warning shall appear on the front or top panel of the package, whichever is the principal display panel. In the case of a cylindrical cigar package, a clear and conspicuous place shall mean along the length of the cylinder and perpendicular to the top and bottom of the cylinder.

Provided, however, that in the case of any cigar package, the warning statement shall not be deemed to be in a clear and conspicuous place if it:

(1) appears or is affixed on the bottom of the package;

(2) is printed or affixed on the tear line;

(3) is printed or affixed on cellophane or any plastic film overwrap (with the exception of any package whose label appears only on cellophane or plastic film overwrap); or

(4) is printed or affixed in any other location that will be obliterated when the package is opened.

B. The warning statement shall appear in a clear and conspicuous and legible type and be separated in every direction from other written or graphic matter on the label by the equivalent of at least twice the height of the "W" in the word "WARNING" in that warning statement.

C. On a rectangular or square cigar package, the warning statement shall appear in the type style Univers 57 Condensed in the following type size in relation to total surface area of the largest panel of the package:

(1) Surface area of less than 5 square inches
Type size: 9 point

(2) Surface area of 5 to less than 10 square inches
Type size: 10 point

(3) Surface area of 10 to less than 15 square inches
Type size: 11 point

(4) Surface area of 15 to less than 25 square inches
Type size: 12 point

(5) Surface area of 25 to less than 40 square inches
Type size: 14 point

(6) Surface area of 40 or more square inches
Type size: 16 point

D. On a cylindrical cigar package, the warning statement shall appear in Univers 57 Condensed type style in the following type size in relation to the lengthwise surface area of the cylinder:

(1) Surface area of less than 5 square inches
Type size: 8 point

(2) Surface area of 5 to less than 15 square inches
Type size: 9 point

(3) Surface area of 15 to less than 25 square inches
Type size: 10 point

(4) Surface area of 25 to less than 30 square inches
Type size: 12 point

(5) Surface area of 30 to less than 40 square inches
Type size: 14 point

(6) Surface area of 40 or more square inches
Type size: 16 point

E. The warning statements required by this order may be affixed to the cigar label by sticker, provided that: the sticker is placed directly on the surface of the package, and not on any cellophane or other plastic film overwrap (with the exception of any package whose label appears only on cellophane or plastic film overwrap); the sticker is permanent (non-removable) and durable; and the warning statement complies with all other requirements of Parts I, II, III and VIII herein.

F. Each cigar label shall meet the requirements of this order upon being prepared for distribution in commerce for retail sale, but before it is distributed to be offered for retail sale. In the case of any cigar that is imported, the warning statements may be affixed in the country of origin or after importation into the United States, but shall be affixed before the cigar is removed from bond for sale or distribution. This section does not apply to any cigar that is manufactured, packaged or imported in the United States for export from the United States, if the cigar is not in fact distributed in commerce for use in the United States.

IV.

IT IS FURTHER ORDERED that in the case of any advertisement required by this order to bear a warning statement, except advertisements covered by Part V of this order, the following requirements shall apply:

A. The warning statement shall appear in a ruled rectangular box with the enclosing rule printed in black, and shall be centered both horizontally and vertically within the rectangular box and separated from any edge of the rule by at least one-half the height of the "W" in the word "WARNING" in the warning statement;

B. The warning statement shall be in a clear and conspicuous place. For purposes of this part, a "clear and conspicuous place"shall mean a location within the advertisement that is separated from any other written or textual matter or any graphic designs, elements or geometric forms by a distance from the outside rule at least twice the height of the "W" in the word "WARNING" in that warning statement. In addition, the disclosure shall not be positioned in the margin of a print advertisement. *Provided further*, the warning statement shall not be included as an integral part of a specific design or illustration in the advertisement, such as a picture of the

package, unless at least 80 percent of the area of the advertisement is taken up by a picture of the package.

C. The size of the warning statement shall be clear and conspicuous and shall be in Univers 57 Condensed type style, with the following outside dimensions and type size in relation to the advertising display area of the advertisement:

(1) Total area of less than 15 square inches
Border: 2c" by :"
Rule width: 1 point
Type size: 9 point

(2) Total area of 15 to less than 65 square inches
Border: 3c" by :"
Rule width: 2 point
Type size: 11 point

(3) Total area of 65 to less than 110 square inches
Border: 32" by f"
Rule width: 2 point
Type size: 13 point

(4) Total area of 110 to less than 180 square inches
Border: 4c" by 1"
Rule width: 2 point
Type size: 15 point

(5) Total area of 180 to less than 360 square inches
Border: 4d" inches by 1c"
Rule width: 2 point
Type size: 16 point

(6) Total area of 360 to less than 470 square inches
Border: 5" by 13"
Rule width: 22 point
Type size: 18 point

Decision and Order

(7) Total area of 470 to less than 720 square inches
Border: 83" by 1:"
Rule width: 3 point
Type size: 30 point

(8) Total area of 5 to less than 10 square feet
Border: 11" by 32"
Rule width: 6 point
Type size: 43 point

(9) Total area of 10 to less than 20 square feet
Border: 1' 4" by 32"
Rule width: 8 point
Type size: 58 point

(10)Total area of 20 to less than 40 square feet
Border: 2' 8" by 1'
Rule width: 3"
Type size: 12" (Cap Height)

(11)Total area of 40 to less than 80 square feet
Border: 3' 4" by 1' 2"
Rule width: d"
Type size: 23" (Cap Height)

(12)Total area of 80 to less than 160 square feet
Border: 5' 8" by 2' 4"
Rule width: :"
Letter height: 32" (Cap Height)

(13)Total area of 160 to less than 350 square feet
Border: 19' 4" by 7' 4"
Rule width: 1:"
Letter height:11" (Cap Height)

(14)Total area of 350 to 1200 square feet
Border: 20' by 7' 8"
Rule width: 23"
Letter height:12" (Cap Height)

(15)Total area of 1200 square feet or more
Border: 27' 4" by 9' 4"
Rule width: 3"
Letter height: 1' 4" (Cap Height)

D. In determining the outside dimensions, type size and placement of the warning statement in any advertisement in a newspaper, magazine or other periodical that appears on more than one page:

(1) A double full page or multiple full page advertisement shall not be required to have more than one warning, but the outside dimensions and type size of the warning statement shall be determined by the aggregate advertising display area of the entire advertisement;

(2) An advertisement that occupies one full page and part of another page shall not be required to have more than one warning, but the outside dimensions and type size of the warning statement shall be determined by the aggregate advertising display area of the entire advertisement and the warning shall appear on the full page on which the advertisement appears; and

(3) An advertisement that occupies parts of two or more pages shall not be required to contain more than one warning, but the outside dimensions and type size of the warning statement shall be determined by the aggregate advertising display area of the entire advertisement and the warning shall appear on the page that contains the greater (or greatest) part of the advertisement.

E. In determining the outside dimensions, type size and placement of the warning statement on any point-of sale advertisement with curved, irregular or multiple surfaces:

(1) In the case of point-of-sale items that are designed to contain products ("merchandisers") such as counter and floor displays, package dispensers, racks and gondolas:

(a) Where the merchandiser itself contains no cigar advertising, the merchandiser shall not require a warning statement;

(b) Where the merchandiser contains cigar advertising, the outside dimensions and type size of the warning statement shall be determined by the aggregate advertising display area of all of the surfaces containing such advertising;

(c) On merchandisers displaying advertising on more than one side, the warning statement shall be placed on the largest side of the item that is visible to the public from its normal viewing position.

(d) For merchandiser formats designed and in use as of May 1, 2000 where the height or width of the display panel on which the warning statement must appear is less than the height or width of the border of the warning statement required by Part IV.C of this order, respondent may submit for approval, and the Commission shall approve upon a showing of practical necessity, a warning statement that has an alternative outside border provided that the warning statement has the same rule width, type size and total area as required by Part IV.C.

(2) In the case of functional items such as clocks, change mats, change trays and welcome signs, the outside dimensions and type size of the warning statement shall be determined by the surface area of that side of the item which contains advertising, unless the advertising is clearly separated from the remainder of the area of that side by clear border lines of a contrasting color and one-quarter inch in width, in which event the size of the warning statement shall be determined by the surface area within the border area containing the advertising.

F. In the case of a cigar package that also can function as a point-of-sale display, such item shall also comply with the advertising provisions of this order. In determining the outside dimensions, type size and placement of the advertising warning statement on such item:

(1) in the case of a package that itself contains two or more packages of cigars, the item shall comply with the requirements of Part IV.E.1 of this order; and

(2) in the case of a package that contains two or more individual cigars, and can function as an open package display:

(a) the warning statement shall be placed on the principal display panel of the interior of the package and shall be positioned so that it is visible to the public from any normal viewing position; and

(b) the outside dimensions, type size and style of the warning statement shall be determined by the area of the panel on which the statement is placed.

G. For any catalogue, leaflet, brochure or other non-point-of-sale promotional advertisement that has more than one page:

Decision and Order

(1) An advertisement that occupies up to four pages shall not be required to contain more than one warning, but the outside dimensions and type size of the warning statement shall be determined by the aggregate advertising display area of the entire advertisement and the warning shall appear on the page that contains the greater (or greatest) part of the advertisement; and

(2) An advertisement that occupies more than four pages shall be required to contain multiple warnings on alternating pages, with the outside dimensions and type size of the warning statement determined by the twice the advertising display area of the page containing the warning.

V.

IT IS FURTHER ORDERED that in a television, radio, Internet or other electronic advertisement, or any other audio or video advertisement, including but not limited to videotapes, cassettes, discs, films, filmstrips, audiotapes or other types of sound recordings, "clear and conspicuous" disclosure shall mean as follows:

A. If the advertisement has a visual component, the warning statement shall be superimposed on the screen in black print on a white background enclosed in a black rectangular box format, as specified in Parts IV.A and IV.B above, and its size, duration on the screen and location shall be sufficient for an ordinary consumer to read and comprehend it;

B. If the advertisement has an audio component, the warning statement shall be announced orally and shall be delivered in a volume, cadence, and location sufficient for an ordinary consumer to hear and comprehend it;

Provided, however, in the case of an audio advertisement in a retail store or other place where cigars are offered for sale, no warning shall be required, even if respondent provides an incentive for disseminating the advertisement, so long as the announcement includes only the brand name or product identifier, the price, and the product's location in the store.

C. If the advertisement has both a visual and an audio component, the warning statement shall be superimposed on the screen in a rectangular box format and announced orally in compliance with the requirements set out in Sub-parts A and B of this Part V of the order. In addition to the foregoing, in advertising in an interactive electronic medium such as the Internet or online services, the disclosure shall be presented in an unavoidable manner on every Web page, online service page, or other electronic page, and shall not be accessed or displayed through hyperlinks, pop-ups, interstitials or other similar means.

D. Pursuant to the Federal Cigarette Labeling and Advertising Act, 15 U.S.C. 1331, et seq, it shall be unlawful for respondent to disseminate any advertisement for little cigars on any medium of electronic communication subject to the jurisdiction of the Federal Communications Commission.

VI.

IT IS FURTHER ORDERED that in the case of advertisements for cigars on utilitarian items:

A. The warning statements required by this order shall be in a clear and conspicuous and legible type and shall appear within the rectangular box format specified in Part IV;

B. The warning statement required by this order must be in a clear and conspicuous location on the object. A clear and conspicuous location on the object is one that is proximate to and on the same surface as the cigar advertising, and is visible when the brand name, logo or selling message is visible.

C. The outside dimensions and type style and size of the warning statement shall conform to the requirements set forth in Part IV.C of this order. For purposes of determining the outside dimensions and type size of the warning statement, the advertising display area for an advertisement on a utilitarian item shall be the visible area on which the advertising appears. For example, the advertising display area for a shirt bearing a brand name, logo or selling message on the front or back is the entire front or back of the shirt, excluding any sleeves. For a shirt bearing a brand name, logo or selling message on the sleeve, the advertising display area is the sleeve.

D. If the cigar advertising appears in more than one location on the utilitarian item, the warning either:

(1) Shall appear proximate to each area with the advertising; or

(2) Shall appear only once on the item, however, in such case, the advertising display area shall be the aggregate of all the surface areas on which any advertising appears.

E. The warning statement required by this order must be printed, embossed, embroidered or otherwise affixed to the utilitarian item with a permanence and durability that is comparable to the permanence and durability of the brand name, logo, or selling message. *Provided, however*, that if a product brand name or logo is embroidered on a hat, and a legible warning cannot be embroidered in the proper size due to technological limitations, the warning may be affixed to the hat by another method, so long as its permanence and durability is comparable to that of the brand name, logo or selling message.

F. For fabric baseball style hats, the warning statement shall appear in the Number 3 size as set forth in Part IV.C of this order.

G. For those utilitarian items under eight (8) square inches that are viewed predominantly by the user, the warning statement shall be:

(1) Printed on the package of the item, if the item is disseminated in a package to the consumer. The total surface area of the package shall comprise the advertising display area for purposes of determining the outside dimensions and type size of the warning statement; or

(2) Placed in the form of a sticker or decal directly onto the item in the Number 1 warning size as set forth in Part IV.C of this order. The item shall be packaged in such a way to ensure that the sticker cannot be removed before it is received by the consumer.

VII.

IT IS FURTHER ORDERED that all cooperative advertisements paid for, directly or indirectly, in whole or in part, by respondent must bear the required warning. *Provided, however*, in the case of a print advertisement with a display area of four (4) square inches or less, disseminated by a retailer, no warning is required so long as the advertisement contains only the brand name or other product identifier and a price. In addition, no warning is required in the case of certain in-store audio announcements as described in Part V.B of this order.

VIII.

IT IS FURTHER ORDERED that with regard to the rotation, display, and distribution of warning statements on cigar packages, respondent shall:

A. Display each of the five warning statements required by this order randomly in each twelve (12) month period in as equal a number of times as possible on the labels of each brand of the product and distribute the packages randomly in all parts of the United States in which the cigars are marketed.

Provided, however, that for purposes of this order, the phrase "as equal a number of times as possible" shall permit deviations of four (4) percent or less in a 12-month period.

Provided further, that the term "random distribution" shall mean that nothing in the production or distribution process of a cigar would prevent the five warning statements on the package from being distributed evenly in all parts of the United States where the product is marketed.

B. No later than ninety (90) days after the effective date of this order, respondent shall submit to the Commission or its designated representative for approval a plan that provides for the display of the five warning statements on packages of cigars as required by this order, and comply with the plan as approved. This plan shall be sufficiently detailed to enable the Commission to determine whether the warning statements appear on the package in a manner consistent with the requirements of this order. The equal display requirements may be satisfied by one of the following three methods:

(1) A plan may satisfy the requirements by providing for the engraving or preparation of cylinders, plates, or equivalent production materials in a manner that results in the simultaneous printing of the five required warnings in as near an equal number of times as possible under the circumstances;

(2) A plan may satisfy the requirements by providing for the preparation of separate cylinders, plates, and equivalent production materials and requiring that they be changed at fixed intervals in a manner that results in the display of the five required warnings in as near an equal number of times as possible under the circumstances during a one-year period; or

(3) A plan may satisfy the requirements by providing that stickers bearing the five required warnings be printed in equal numbers and affixed randomly to packages of the product.

Provided, however, nothing in this part of the order requires the use of more than one warning statement on the label of any brand during any given part of the 12-month period except for a cigar package that also functions as a cigar display (which must also comply with the advertising requirements of this order).

C. A plan for the rotation, display, and distribution of warning statements on cigar packages shall include representative samples of labels with each of the five warning statements required by this order. This provision does not require submission of a label with each of the required warning statements for every brand marketed by respondent, and shall be deemed to be satisfied by submission of labels for different types of cigars, and a range of cigar package sizes for each type of product.

IX.

IT IS FURTHER ORDERED that with regard to the rotation, display, and dissemination of warning statements in cigar advertising:

A. Except as specified in sub-part B. herein, respondent shall rotate each of the five warning statements required by this order every three (3) months in an alternating sequence in the advertisement for each brand of cigar. *Provided, however*, that any rotational system may take into account practical constraints on the production and distribution of advertising.

B. On merchandisers, utilitarian items, and cigar packages that can function as open package displays, respondent shall display each of the five warning statements required by this order randomly in each twelve (12) month period in as equal a

number of times as possible, and distribute such merchandisers, utilitarian items, and cigar packages randomly in all parts of the United States in which they are disseminated.

Provided, however, that for purposes of this sub-part, the phrase "as equal a number of times as possible" shall permit deviations of four (4) percent or less in a 12-month period.
Provided further, that the term "random distribution" shall mean that nothing in the production or distribution process of a merchandiser or cigar package than can be used as an open package display would prevent the five warning statements on such display items from being distributed evenly in all parts of the United States where they are disseminated.

C. No later than ninety (90) days after the effective date of this order, respondent shall submit a plan to the Commission or its designated representative for approval that ensures that:

(1) On all types of cigar advertising, except those specified in sub-part B herein, the five warning statements are rotated every three months in alternating sequence, and that respondents comply with the plan as approved. This rotational warning requirement may be satisfied by requiring either that all brands display the same warning during each three-month period or that each brand display a different warning during a given three-month period. A plan shall describe the method of rotation and shall include a list of the designated warnings for each three-month period during the first fifteen (15) month period for each brand. The plan also shall describe the method that will be used to ensure proper rotation in different advertising media in sufficient detail to ensure compliance with the order. For advertising in newspapers, magazines, or other periodicals, the method of rotation shall be set either according to the cover date or the closing date of the publication. For posters and placards, the method of

rotation shall be set according to either the scheduled or actual appearance of the advertising. The method of rotation for point-of-sale and non-point-of-sale promotional materials such as leaflets, pamphlets, coupons, direct mail circulars, paperback book inserts, or non-print items shall be set according to either the date the materials or objects are ordered or the date on which the objects or materials are scheduled to be disseminated, provided that the production of such materials or objects is carried out in a manner consistent with customary business practices.

(2) On merchandisers, utilitarian items, and cigar packages that can function as open package displays, each of the five warning statements required by this order is displayed randomly in each twelve (12) month period in as equal a number of times as possible.

D. A plan for the rotation, display, and dissemination of warning statements in cigar advertising shall include a representative sample of each of the five warning statements required by this order. This provision does not require the submission of all advertising for each brand marketed by respondent and shall be deemed to be satisfied by submission of actual examples of different types of advertising materials or acetates or other facsimiles indicating the warning statements as they would appear in advertisements of varying sizes.

X.

IT IS FURTHER ORDERED that the Commission intends that this order provide for a uniform, federally mandated system of health warnings on cigar packages and advertisements nationwide. Entry of the order will uniformly provide consumers in all states and territories of the United States with clear, conspicuous and understandable disclosures of the health risks of cigar smoking. The Commission shall consider a state or local requirement for the display of different warnings concerning cigar smoking and health to be in conflict with the requirements of this

order, but only to the extent that any such provision requires that the state or local warning appear on any package or advertisement required to display the Federal warnings set forth herein.

XI.

IT IS FURTHER ORDERED that respondent shall be deemed to be in compliance with this order if it has taken reasonable steps to:

A. Provide, by written contract or other clear and prominent instructions, for the rotation of the label statements required by this order;

B. Give clear and prominent instruction and, to the extent possible, furnish materials (such as film negatives, acetates or other facsimiles) for the production of cigar packages and advertising that contain the required warning statements; and

C. Prevent and correct mistakes, errors or omissions that have come to its attention.

Provided, however, that in the event of the distribution of labels or the publication of advertisements that do not conform to this order, the burden of establishing that reasonable steps have been taken to comply with this order (including fulfilling the conditions described in this Part of the order) shall rest solely with respondent.

XII.

IT IS FURTHER ORDERED that the cigar labeling and advertising requirements of Parts III through VI of this order shall become effective one hundred eighty (180) days after issuance of the order. *Provided, however*, that:

A. The cigar labeling requirements of Part III of this order shall not apply to cigars distributed in commerce for retail sale prior to one hundred eighty (180) days from the date of issuance of the order.

B. The cigar advertising requirements of Parts IV through VII of this order shall take into account practical constraints on respondent with respect to the production and distribution of advertising submitted for publication prior to one hundred eighty (180) days from the date of issuance of the order.

XIII.

IT IS FURTHER ORDERED that in the event the Federal Cigarette Labeling and Advertising Act, 15 U.S.C. 1331, et seq., or the Comprehensive Smokeless Tobacco Health Education Act, 15 U.S.C. 4401, et seq., or the regulations implemented thereunder, 16 C.F.R. 307, et seq., are amended or modified to change the size or format of the warning requirements for the labeling or advertising of cigarettes or smokeless tobacco, respectively, such action shall constitute sufficient changed conditions to reopen this order to determine whether the size or the format of the warning statements contained herein should be altered or modified to conform to the same or similar size or format.

XIV.

IT IS FURTHER ORDERED that respondent and its successors and assigns, for five (5) years after the last date of dissemination of any cigar label or advertisement covered by this order, shall maintain and upon request make available to the Federal Trade Commission business records demonstrating their compliance with the terms and provisions of this order, including, but not limited, to a sample copy of each advertisement and label disseminated during such time.

XV.

IT IS FURTHER ORDERED that respondent and its successors and assigns shall deliver a copy of this order to all current and future principals, officers, directors, and managers, and to all current and future employees, agents, and representatives having responsibilities with respect to the subject matter of this order, and shall secure from each such person a signed and dated statement acknowledging receipt of the order. Respondent 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.

XVI.

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

XVII.

IT IS FURTHER ORDERED that respondent and its successors and assigns shall, at such times as the Commission may require, file with the Commission a report, in writing, setting forth in detail the manner and form in which they have complied with this order.

By the Commission.

Analysis of Proposed Consent Orders to Aid Public Comment

The Federal Trade Commission has accepted, subject to final approval, agreements containing consent orders from the following cigar manufacturers, importers or marketers:

Swisher International, Inc. (Matter No. 002-3199);
Consolidated Cigar Corporation (Matter No. 002-3200);
Havatampa, Inc. (Matter No. 002-3204);
General Cigar Holdings, Inc. (Matter No. 002-3202);
John Middleton, Inc. (Matter No. 002-3205);
Lane Limited (Matter No. 002-3203); and
Swedish Match North America, Inc.(Matter No. 002-3201).

The proposed consent orders have been placed on the public record for thirty (30) days for the receipt of comments by interested persons. Comments received during this period will become part of the public record. After thirty (30) days, the Commission will again review the agreements and comments received and will decide whether it should withdraw from the agreements and take appropriate action or make final the agreements' proposed orders.

Analysis to Aid public Comment

Background

In July 1999, the Federal Trade Commission provided a Report to Congress, entitled Cigar Sales and Advertising and Promotional Expenditures for Calendar Years 1996 and 1997 ("Commission Report"). The Commission Report recommended that, given the significant increase in cigar smoking prevalence in recent years and the serious health risks posed by cigar smoking,[1] cigars should be regulated in a manner consistent with the current regulation of cigarettes and smokeless tobacco. *See* Federal Cigarette Labeling and Advertising Act, 15 U.S.C. § 1331 et seq.; Comprehensive Smokeless Tobacco Health Education Act of 1986, 15 U.S.C. § 4401 et seq. The Commission Report recommended that Congress either enact legislation to require federal health warnings on cigar labeling and advertising or direct the Commission to use its existing authority, under Section 5 of the Federal Trade Commission Act, to require cigar health warnings.

In November 1999, in the Joint Explanatory Note of the Conferees to H.R. 3421 Appropriations Bill, the Congressional Appropriations Committees responded to the Commission Report by directing the FTC to report back to the Committees on Commission plans to establish "uniform Federal health warning label[s]."[2]

After consideration of the National Cancer Institute's findings in its Cigar Monograph on the serious health risks of regular cigar use, and the failure of cigar advertising and labeling to disclose these health risks, the Commission negotiated consent agreements

---

1 *See* U.S. Department of Health and Human Services, National Cancer Institute, Smoking and Tobacco Control Monograph No. 9 Cigars: Health Effects and Trends (1998), NIH publication no. 98-4302 (ACigar Monograph@).

2 145 Cong. Rec. H12230-02 (daily ed. Nov. 17, 1999).

with the seven largest cigar companies to implement health warnings on cigar labeling and advertising nationwide.[3]

The Proposed Complaints and Orders

The proposed complaints each allege that the failure to disclose that regular cigar smoking can cause serious adverse health effects is both unfair and deceptive in violation of Section 5 of the FTC Act. Part I of the proposed orders requires the respondents to make a clear and conspicuous disclosure of the following warning statements on cigar labels and in advertising:

> **SURGEON GENERAL WARNING:** Cigar Smoking Can Cause Cancers Of The Mouth And Throat, Even If You Do Not Inhale.
>
> **SURGEON GENERAL WARNING:** Cigar Smoking Can Cause Lung Cancer And Heart Disease.
>
> **SURGEON GENERAL WARNING:** Cigars Are Not A Safe Alternative To Cigarettes.
>
> **SURGEON GENERAL WARNING:** Tobacco Use Increases The Risk Of Infertility, Stillbirth, And Low Birth Weight.
>
> **SURGEON GENERAL WARNING:** Tobacco Smoke Increases The Risk Of Lung Cancer And Heart Disease, Even In Nonsmokers.

Part II of the proposed orders sets out specific format requirements for the warnings, which are designed to ensure that the warnings are visible and readable. Part II also requires that the warning statements on labeling and advertising be printed in

---

3 Like all FTC consent orders, these orders are for settlement purposes only and do not constitute an admission by the cigar manufacturers of any law violation.

black print on a solid white background, and be capitalized and punctuated as set forth in Part I.

Part III specifies the location and size requirements for the disclosure of the health warnings on cigar *labels*. The orders require that the warning be displayed on the principal display panel of the package. For the majority of cigar boxes, the orders define the principal display panel to be the larger of the top or front panel of the package, thus ensuring that the warning is in the most noticeable location. The orders make an exception for boxes of premium (hand-rolled) cigars, providing that the warning can appear on the top or front of the box, depending upon which panel is more likely to be seen by consumers.

Part IV sets forth the specific format and size requirements for the disclosure of the health warnings on cigar *advertising*. The orders provide that the warning shall be in black print on a white background and be centered in a black ruled rectangular box. Part IV specifies how to calculate the size of the warning and where to place the warning in various types of advertising, including periodicals, merchandisers, functional items, catalogues and cigar packages that also function as point-of-sale displays.

Part V specifies how to make the required disclosures in audio and video advertisements, including radio, television, the Internet, tapes and films. The orders require that in interactive media, such as the Internet, the warnings must be displayed in an unavoidable manner on every Web page.

Part VI of the proposed orders addresses requirements for the disclosure of the warnings on utilitarian items. Utilitarian items are treated like other advertising, and the warning statements must appear in a rectangular box format, in a size based upon the item's total advertising display area.

Part VII provides that cooperative advertisements paid for in whole or in part by a respondent must include the warnings, with the exception of very small print advertisements containing only brand name and price information.

Part VIII sets forth the specific requirements for the rotation, display and distribution of the warning statements on cigar packages. For each cigar brand, respondents must display each of the five required warning statements randomly in as equal a number of times as possible, and must distribute the packages randomly in all parts of the U.S.A. in which they are marketed.

Part IX provides that, on most types of advertising, the five warning statements shall be rotated in an alternating sequence every three months. Part IX provides for equal simultaneous display of the warning statements on merchandisers, cigar boxes that can function as open package displays and utilitarian items. Parts VIII and IX of the proposed orders also require the companies to submit to the Commission for approval plans for the display of the warnings on cigar packages and advertisements, and to comply with the plans as approved.

Part X of the proposed orders states that the Commission will consider state or local requirements for different health warnings on any cigar labeling or advertising that is required to display the FTC warning to be in conflict with the orders.

Part XI provides a safe harbor in the event the companies have taken reasonable steps to assure compliance; in the event of labels or advertisements that do not comply with the order, the proposed respondents will bear the burden of establishing that reasonable steps were taken to comply with the order. This same safe harbor provision is included in the Commission's smokeless tobacco regulations.

Part XII of the proposed orders states that the warning requirements shall become effective one hundred and eighty (180) days after issuance of the order.

Analysis to Aid public Comment

Part XIII provides that in the event the Federal Cigarette Labeling and Advertising Act or the Comprehensive Smokeless Tobacco Health Education Act or the Commission's Smokeless Tobacco Regulations are amended or modified to change the size or format of the warnings for cigarettes or smokeless tobacco, the cigar orders may be reopened to determine whether the size or format of the warnings for cigars should be modified to conform to such changes.

Parts XIV through XVI of the proposed orders contain standard recordkeeping, reporting and compliance requirements.

The proposed orders do not contain a sunset provision due to the importance of the health warnings required therein.

Objectives of the Proposed Orders

The Commission's intent in obtaining the proposed consent orders is to provide a uniform national system of health warnings on cigar labeling and advertising. National health warnings that are clear and conspicuous benefit consumers. Here, the cigar warnings will prevent future deception and unfairness by providing important information with which consumers nationwide can make more informed choices.[4]

Each of the five warnings conveys a simple and specific message about health risks associated with cigar use. The orders' requirements for display of the warnings on packaging and advertising will provide sufficient repetition of each warning statement to contribute to long-term recall of each message, while decreasing the likelihood that any one message will become so familiar and overexposed that its effectiveness will "wear out." Together, the five warnings provide a comprehensive warning

4 Uniform national health warnings likewise benefit national competition. Multiple different warnings can raise costs and regulatory burdens for national marketers such as the proposed respondents.

scheme that provides necessary and important information to consumers nationwide.

Because the proposed respondents' cigar packaging and advertising is disseminated in the national marketplace, a comprehensive national system of simple and direct warnings will provide the greatest benefits to consumers. Moreover, multiple, and potentially inconsistent, warnings on individual packages or advertisements could neutralize or negate those benefits. Such multiple warnings may be confusing to consumers and undercut the saliency of the warnings required by these consent orders. Further, they are likely to have the unintended effect of making it more difficult for consumers to process the warning messages required here. And, while diminished effectiveness could result when *one* state mandates additional warnings on packages or advertisements bearing the Commission warnings, the problem will be exacerbated if more than one state imposes requirements applicable to a single package or advertisement.

In light of the important benefits from a national warning system, Part X of the Commission's orders preempts state or local requirements for different health warnings on any cigar labeling or advertising that is required to display the FTC warnings. At the same time, the Commission recognizes the critically important role that states play in consumer protection and tobacco control. The provision does not affect other state or local requirements. For example, required warnings for types of advertising that are not covered by the proposed orders (such as shelf talkers under a certain size), or state or local restrictions on advertising placement or youth access to tobacco products are not affected. It is the Commission's intent that this provision apply only to state requirements for different health warnings by companies who have entered into the FTC consent orders, and only to packages and advertising required to contain the federally-mandated warnings.

Analysis to Aid public Comment

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

Complaint

IN THE MATTER OF

SWEDISH MATCH NORTH AMERICA, INC.

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

Docket C-3970; File No. 0023201
Complaint, August 18, 2000--Decision, August 18, 2000

This consent order addresses Swedish Match's cigar advertising. The complaint alleges that the failure to disclose that regular cigar smoking can cause serious adverse health effects is both unfair and deceptive in violation of Section 5 of the FTC Act. The consent order requires the respondents to make a clear and conspicuous disclosure using specified warning statements on cigar labels and in advertising.

Participants

For the Commission: *Mamie Kresses, Rosemary Rosso, Michael Ostheimer, Anne V. Maher, C. Lee Peeler, Marc Winerman, Christian S. White,* and *BE.*

For the Respondents: *Andrew L. Zausner* and *Peter J. Kadzik, Dickstein Shapiro Morin & Oshinsky.*

COMPLAINT

The Federal Trade Commission, having reason to believe that Swedish Match North America, 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 Swedish Match North America, Inc., is a Delaware corporation with its principal office or place of business at 6600 West Broad Street, Richmond, VA 23228.

2. Respondent has manufactured, advertised, labeled, offered for sale, sold, and distributed products to the public, including cigars.

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. In its advertising, labeling, and sale of cigars, respondent has failed to disclose that regular cigar smoking can cause several serious adverse health conditions including, but not limited to, cancers of the mouth (oral cavity), throat (esophagus and larynx), and lungs. These facts would be material to consumers in their purchase and use of the product. Respondent=s failure to disclose these facts has caused or is likely to cause substantial injury to consumers that is not outweighed by countervailing benefits to consumers or competition and is not reasonably avoidable by consumers. Therefore, the failure to disclose these facts was, and is, an unfair or deceptive practice.

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

THEREFORE, the Federal Trade Commission this eighteenth day of August, 2000, has issued this complaint against respondent.

By the Commission.

DECISION AND ORDER

IT IS HEREBY AGREED by and between, by its duly authorized officers, and counsel for the Federal Trade Commission that:

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

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

1. Respondent, Swedish Match North America, Inc., is a Delaware corporation with its office or principal place of business located at 6600 West Broad Street, Richmond, Virginia 23228.

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

ORDER

DEFINITIONS

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

1. Unless otherwise specified, "respondent" shall mean Swedish Match North America, Inc., a corporation, its successors and assigns, and its officers, agents, representatives, and employees.

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

3. "Cigar" shall mean any roll of tobacco wrapped in leaf tobacco or wrapped in any other substance containing tobacco, other than a cigarette within the meaning of the Federal Cigarette Labeling and Advertising Act, 15 U.S.C. 1331, et seq.

4. "Little cigar" shall mean any roll of tobacco wrapped in leaf tobacco or any substance containing tobacco (other than any roll of tobacco which is a cigarette within the meaning of the Federal Cigarette Labeling and Advertising Act, 15 U.S.C. 1331, et seq.) and as to which one thousand units weigh not more than three pounds.

5. APremium cigar@ shall mean a hand-rolled cigar that is wrapped in a natural tobacco leaf wrapper.

6. "Commission" shall mean the Federal Trade Commission.

7. "Brand" shall mean cigars that bear a common identifying name or mark, regardless of whether the cigars are differentiated by type of product, size, shape, packaging, or other characteristic, and, in the case of generic or private label cigars, means all cigars produced or imported by respondent or its affiliates.

8. "Package" shall mean any pack, box, carton, tube, can, jar, container or wrapping in which any cigar is offered for sale, sold or otherwise distributed to consumers, but for purposes of this order, package does not include: (a) any shipping container or wrapping used solely for transporting cigars in bulk or quantity to respondent or packagers, processors, wholesalers or retailers unless the container or wrapping is intended for use as a retail display or (b) any wrapping or container that bears no written, printed or graphic matter. Any package that is also used as a point-of-sale display item shall also constitute "advertising" for purposes of this order.

9. "Label" shall mean any written, printed or graphic matter affixed to or appearing on any package containing a cigar, with the exception of any revenue stamp affixed to a cigar or any cigar band with a total surface area less than three (3) square inches.

10. "Utilitarian item" shall mean any item, other than cigars, that is sold or given or caused to be sold or given by respondent to consumers for their personal use, and that display cigar advertising such as a brand name, logo or selling message. Such items include, but are not limited to, matchbooks, lighters, clothing or sporting goods. The term "logo" includes any brand specific characteristics of a cigar, including but not limited to any recognizable pattern of colors or symbols associated with a particular brand.

11. Unless otherwise exempted by specific provision of this order, "advertisement" (including the terms "advertise" and "advertising") shall include any oral, written, printed, pictorial or

graphic representation made by or on behalf of respondent, the purpose or effect of which is to promote the sale or use of any cigar manufactured or distributed by respondent, including but not limited to a statement, illustration or depiction in or on a brochure, newspaper, magazine, free standing insert, pamphlet, leaflet, circular, mailer, book insert, letter, coupon, catalog, poster, chart, billboard, transit advertisement, utilitarian item, sponsorship material, package insert, film, slide, or point of purchase display (including any cigar package that can be used as an open package display or any functional item such as a clock or change mat that includes advertising), any advertising on television, radio, or the Internet, and any other electronic advertisement.

I.

IT IS ORDERED that respondent, directly or through any corporation, subsidiary, division, or other device, shall not fail to disclose clearly and conspicuously and in the manner set forth in this order one of the following statements on all cigar labels and, unless otherwise exempt from disclosure by this order, in all cigar advertisements:

SURGEON GENERAL WARNING: Cigar Smoking Can Cause Cancers Of The Mouth And Throat, Even If You Do Not Inhale.

SURGEON GENERAL WARNING: Cigar Smoking Can Cause Lung Cancer And Heart Disease.

SURGEON GENERAL WARNING: Tobacco Use Increases The Risk Of Infertility, Stillbirth And Low Birth Weight.

SURGEON GENERAL WARNING: Cigars Are Not A Safe Alternative To Cigarettes.

SURGEON GENERAL WARNING: Tobacco Smoke Increases The Risk Of Lung Cancer And Heart Disease, Even In Nonsmokers.

Provided, however, that the warning statement requirements shall not apply to company and divisional names, when used as such; to signs on factories, plants, warehouses or other facilities related to the manufacture or storage of cigars; to corporate or financial reports; to communications to security holders and others who customarily receive copies of these communications; or to promotional materials that are distributed to wholesalers, dealers or merchants but not to consumers, and are not for public display or consumer exposure. In addition, these warning statement requirements do not apply to shelf-talkers and similar product locators with a display area of twelve (12) square inches or less.

II.

IT IS FURTHER ORDERED THAT for purposes of this order, "clear and conspicuous" disclosure of any warning statement required by this order means that the warning statement shall be set out as follows:

A. The warning statement shall be capitalized and punctuated as indicated in Part I of this order, with the words "**SURGEON GENERAL WARNING**" printed in uppercase letters in bold print and the remaining words printed with the initial letter of each word in uppercase print and the remaining letters in lowercase print;

B. The warning statement shall be printed in black against a solid white background. In addition, the warning statement shall appear in two to four lines that are parallel to each other as well to the base of the cigar package or advertisement; and

C. The language of the warning statement shall appear:

(1) For any cigar label, the warning statement shall be set out in the English language. If the label of a cigar contains a required warning in a language other than English, the required warning shall also appear in English.

(2) For any cigar advertisement, the warning statement shall be set out in the English language, except as follows:

(a) In the case of any cigar advertising in a newspaper, magazine, periodical, or other publication that is not in English, the warning statement shall appear in the predominant language of the publication in which the advertisement appears; and

(b) In the case of any other cigar advertising, the warning statement shall appear in the language of the target audience (ordinarily the language principally used in the advertisement).

III.

IT IS FURTHER ORDERED that in the case of any cigar label required by the order to bear a warning statement, the following requirements shall apply:

A. The warning statement shall be in a clear and conspicuous place on the principal display panel of the label. The principal display panel is the part of a label that is likely to be displayed, presented, shown, or examined under normal viewing conditions. In the case of a rectangular or square cigar package, the principal display panel shall mean the front or top panel of the package, whichever is larger. *Provided, however*, that in the case of a rectangular or square package containing ten or more premium cigars, the warning shall appear on the front or top panel of the package, whichever is the principal display panel. In the case of a cylindrical cigar package, a clear and conspicuous place shall mean along the

length of the cylinder and perpendicular to the top and bottom of the cylinder.

Provided, however, that in the case of any cigar package, the warning statement shall not be deemed to be in a clear and conspicuous place if it:

(1) appears or is affixed on the bottom of the package;

(2) is printed or affixed on the tear line;

(3) is printed or affixed on cellophane or any plastic film overwrap (with the exception of any package whose label appears only on cellophane or plastic film overwrap); or

(4) is printed or affixed in any other location that will be obliterated when the package is opened.

B. The warning statement shall appear in a clear and conspicuous and legible type and be separated in every direction from other written or graphic matter on the label by the equivalent of at least twice the height of the "W" in the word "WARNING" in that warning statement.

C. On a rectangular or square cigar package, the warning statement shall appear in the type style Univers 57 Condensed in the following type size in relation to total surface area of the largest panel of the package:

(1) Surface area of less than 5 square inches
Type size: 9 point

(2) Surface area of 5 to less than 10 square inches
Type size: 10 point

(3) Surface area of 10 to less than 15 square inches
Type size: 11 point

(4) Surface area of 15 to less than 25 square inches
Type size: 12 point

(5) Surface area of 25 to less than 40 square inches
Type size: 14 point

(6) Surface area of 40 or more square inches
Type size: 16 point

D. On a cylindrical cigar package, the warning statement shall appear in Univers 57 Condensed type style in the following type size in relation to the lengthwise surface area of the cylinder:

(1) Surface area of less than 5 square inches
Type size: 8 point

(2) Surface area of 5 to less than 15 square inches
Type size: 9 point

(3) Surface area of 15 to less than 25 square inches
Type size: 10 point

(4) Surface area of 25 to less than 30 square inches
Type size: 12 point

(5) Surface area of 30 to less than 40 square inches
Type size: 14 point

(6) Surface area of 40 or more square inches
Type size: 16 point

E. The warning statements required by this order may be affixed to the cigar label by sticker, provided that: the sticker is placed directly on the surface of the package, and not on any cellophane or other plastic film overwrap (with the exception of any package whose label appears only on cellophane or

plastic film overwrap); the sticker is permanent (non-removable) and durable; and the warning statement complies with all other requirements of Parts I, II, III and VIII herein.

F. Each cigar label shall meet the requirements of this order upon being prepared for distribution in commerce for retail sale, but before it is distributed to be offered for retail sale. In the case of any cigar that is imported, the warning statements may be affixed in the country of origin or after importation into the United States, but shall be affixed before the cigar is removed from bond for sale or distribution. This section does not apply to any cigar that is manufactured, packaged or imported in the United States for export from the United States, if the cigar is not in fact distributed in commerce for use in the United States.

IV.

IT IS FURTHER ORDERED that in the case of any advertisement required by this order to bear a warning statement, except advertisements covered by Part V of this order, the following requirements shall apply:

A. The warning statement shall appear in a ruled rectangular box with the enclosing rule printed in black, and shall be centered both horizontally and vertically within the rectangular box and separated from any edge of the rule by at least one-half the height of the "W" in the word "WARNING" in the warning statement;

B. The warning statement shall be in a clear and conspicuous place. For purposes of this part, a "clear and conspicuous place"shall mean a location within the advertisement that is separated from any other written or textual matter or any graphic designs, elements or geometric forms by a distance from the outside rule at least twice the height of the "W" in the word "WARNING" in that warning statement. In addition, the disclosure shall not be positioned in the margin of a print advertisement. *Provided further,* the warning statement shall

not be included as an integral part of a specific design or illustration in the advertisement, such as a picture of the package, unless at least 80 percent of the area of the advertisement is taken up by a picture of the package.

C. The size of the warning statement shall be clear and conspicuous and shall be in Univers 57 Condensed type style, with the following outside dimensions and type size in relation to the advertising display area of the advertisement:

(1) Total area of less than 15 square inches
Border: 2c" by :"
Rule width: 1 point
Type size: 9 point

(2) Total area of 15 to less than 65 square inches
Border: 3c" by :"
Rule width: 2 point
Type size: 11 point

(3) Total area of 65 to less than 110 square inches
Border: 32" by f"
Rule width: 2 point
Type size: 13 point

(4) Total area of 110 to less than 180 square inches
Border: 4c" by 1"
Rule width: 2 point
Type size: 15 point

(5) Total area of 180 to less than 360 square inches
Border: 4d" inches by 1c"
Rule width: 2 point
Type size: 16 point

(6) Total area of 360 to less than 470 square inches
Border: 5" by 13"
Rule width: 22 point
Type size: 18 point

(7) Total area of 470 to less than 720 square inches
Border: 83" by 1:"
Rule width: 3 point
Type size: 30 point

(8) Total area of 5 to less than 10 square feet
Border: 11" by 32"
Rule width: 6 point
Type size: 43 point

(9) Total area of 10 to less than 20 square feet
Border: 1' 4" by 32"
Rule width: 8 point
Type size: 58 point

(10) Total area of 20 to less than 40 square feet
Border: 2' 8" by 1'
Rule width: 3"
Type size: 12" (Cap Height)

(11) Total area of 40 to less than 80 square feet
Border: 3' 4" by 1' 2"
Rule width: d"
Type size: 23" (Cap Height)

(12) Total area of 80 to less than 160 square feet
Border: 5' 8" by 2' 4"
Rule width: :"
Letter height: 32" (Cap Height)

(13) Total area of 160 to less than 350 square feet
Border: 19' 4" by 7' 4"
Rule width: 1:"

Letter height:11" (Cap Height)

(14) Total area of 350 to 1200 square feet
Border: 20' by 7' 8"
Rule width: 23"
Letter height:12" (Cap Height)

(15) Total area of 1200 square feet or more
Border: 27' 4" by 9' 4"
Rule width: 3"
Letter height: 1' 4" (Cap Height)

D. In determining the outside dimensions, type size and placement of the warning statement in any advertisement in a newspaper, magazine or other periodical that appears on more than one page:

(1) A double full page or multiple full page advertisement shall not be required to have more than one warning, but the outside dimensions and type size of the warning statement shall be determined by the aggregate advertising display area of the entire advertisement;

(2) An advertisement that occupies one full page and part of another page shall not be required to have more than one warning, but the outside dimensions and type size of the warning statement shall be determined by the aggregate advertising display area of the entire advertisement and the warning shall appear on the full page on which the advertisement appears; and

(3) An advertisement that occupies parts of two or more pages shall not be required to contain more than one warning, but the outside dimensions and type size of the warning statement shall be determined by the aggregate advertising display area of the entire advertisement and the warning shall appear on the page that contains the greater (or greatest) part of the advertisement.

E. In determining the outside dimensions, type size and placement of the warning statement on any point-of sale advertisement with curved, irregular or multiple surfaces:

(1) In the case of point-of-sale items that are designed to contain products ("merchandisers") such as counter and floor displays, package dispensers, racks and gondolas:

(a) Where the merchandiser itself contains no cigar advertising, the merchandiser shall not require a warning statement;

(b) Where the merchandiser contains cigar advertising, the outside dimensions and type size of the warning statement shall be determined by the aggregate advertising display area of all of the surfaces containing such advertising;

(c) On merchandisers displaying advertising on more than one side, the warning statement shall be placed on the largest side of the item that is visible to the public from its normal viewing position.

(d) For merchandiser formats designed and in use as of May 1, 2000 where the height or width of the display panel on which the warning statement must appear is less than the height or width of the border of the warning statement required by Part IV.C of this order, respondent may submit for approval, and the Commission shall approve upon a showing of practical necessity, a warning statement that has an alternative outside border provided that the warning statement has the same rule width, type size and total area as required by Part IV.C.

(2) In the case of functional items such as clocks, change mats, change trays and welcome signs, the outside dimensions and type size of the warning statement shall be

determined by the surface area of that side of the item which contains advertising, unless the advertising is clearly separated from the remainder of the area of that side by clear border lines of a contrasting color and one-quarter inch in width, in which event the size of the warning statement shall be determined by the surface area within the border area containing the advertising.

F. In the case of a cigar package that also can function as a point-of-sale display, such item shall also comply with the advertising provisions of this order. In determining the outside dimensions, type size and placement of the advertising warning statement on such item:

(1) in the case of a package that itself contains two or more packages of cigars, the item shall comply with the requirements of Part IV.E.1 of this order; and

(2) in the case of a package that contains two or more individual cigars, and can function as an open package display:

(a) the warning statement shall be placed on the principal display panel of the interior of the package and shall be positioned so that it is visible to the public from any normal viewing position; and

(b) the outside dimensions, type size and style of the warning statement shall be determined by the area of the panel on which the statement is placed.

G. For any catalogue, leaflet, brochure or other non-point-of-sale promotional advertisement that has more than one page:

(1) An advertisement that occupies up to four pages shall not be required to contain more than one warning, but the outside dimensions and type size of the warning statement

shall be determined by the aggregate advertising display area of the entire advertisement and the warning shall appear on the page that contains the greater (or greatest) part of the advertisement; and

(2) An advertisement that occupies more than four pages shall be required to contain multiple warnings on alternating pages, with the outside dimensions and type size of the warning statement determined by the twice the advertising display area of the page containing the warning.

V.

IT IS FURTHER ORDERED that in a television, radio, Internet or other electronic advertisement, or any other audio or video advertisement, including but not limited to videotapes, cassettes, discs, films, filmstrips, audiotapes or other types of sound recordings, "clear and conspicuous" disclosure shall mean as follows:

A. If the advertisement has a visual component, the warning statement shall be superimposed on the screen in black print on a white background enclosed in a black rectangular box format, as specified in Parts IV.A and IV.B above, and its size, duration on the screen and location shall be sufficient for an ordinary consumer to read and comprehend it;

B. If the advertisement has an audio component, the warning statement shall be announced orally and shall be delivered in a volume, cadence, and location sufficient for an ordinary consumer to hear and comprehend it;

Provided, however, in the case of an audio advertisement in a retail store or other place where cigars are offered for sale, no warning shall be required, even if respondent provides an incentive for disseminating the advertisement, so long as the announcement includes only the brand name or product identifier, the price, and the product's location in the store.

C. If the advertisement has both a visual and an audio component, the warning statement shall be superimposed on the screen in a rectangular box format and announced orally in compliance with the requirements set out in Sub-parts A and B of this Part V of the order. In addition to the foregoing, in advertising in an interactive electronic medium such as the Internet or online services, the disclosure shall be presented in an unavoidable manner on every Web page, online service page, or other electronic page, and shall not be accessed or displayed through hyperlinks, pop-ups, interstitials or other similar means.

D. Pursuant to the Federal Cigarette Labeling and Advertising Act, 15 U.S.C. 1331, et seq, it shall be unlawful for respondent to disseminate any advertisement for little cigars on any medium of electronic communication subject to the jurisdiction of the Federal Communications Commission.

VI.

IT IS FURTHER ORDERED that in the case of advertisements for cigars on utilitarian items:

A. The warning statements required by this order shall be in a clear and conspicuous and legible type and shall appear within the rectangular box format specified in Part IV;

B. The warning statement required by this order must be in a clear and conspicuous location on the object. A clear and conspicuous location on the object is one that is proximate to and on the same surface as the cigar advertising, and is visible when the brand name, logo or selling message is visible.

C. The outside dimensions and type style and size of the warning statement shall conform to the requirements set forth in Part IV.C of this order. For purposes of determining the outside dimensions and type size of the warning statement, the

advertising display area for an advertisement on a utilitarian item shall be the visible area on which the advertising appears. For example, the advertising display area for a shirt bearing a brand name, logo or selling message on the front or back is the entire front or back of the shirt, excluding any sleeves. For a shirt bearing a brand name, logo or selling message on the sleeve, the advertising display area is the sleeve.

D. If the cigar advertising appears in more than one location on the utilitarian item, the warning either:

(1) Shall appear proximate to each area with the advertising; or

(2) Shall appear only once on the item, however, in such case, the advertising display area shall be the aggregate of all the surface areas on which any advertising appears.

E. The warning statement required by this order must be printed, embossed, embroidered or otherwise affixed to the utilitarian item with a permanence and durability that is comparable to the permanence and durability of the brand name, logo, or selling message. *Provided, however*, that if a product brand name or logo is embroidered on a hat, and a legible warning cannot be embroidered in the proper size due to technological limitations, the warning may be affixed to the hat by another method, so long as its permanence and durability is comparable to that of the brand name, logo or selling message.

F. For fabric baseball style hats, the warning statement shall appear in the Number 3 size as set forth in Part IV.C of this order.

G. For those utilitarian items under eight (8) square inches that are viewed predominantly by the user, the warning statement shall be:

(1) Printed on the package of the item, if the item is disseminated in a package to the consumer. The total surface area of the package shall comprise the advertising display area for purposes of determining the outside dimensions and type size of the warning statement; or

(2) Placed in the form of a sticker or decal directly onto the item in the Number 1 warning size as set forth in Part IV.C of this order. The item shall be packaged in such a way to ensure that the sticker cannot be removed before it is received by the consumer.

VII.

IT IS FURTHER ORDERED that all cooperative advertisements paid for, directly or indirectly, in whole or in part, by respondent must bear the required warning. *Provided, however*, in the case of a print advertisement with a display area of four (4) square inches or less, disseminated by a retailer, no warning is required so long as the advertisement contains only the brand name or other product identifier and a price. In addition, no warning is required in the case of certain in-store audio announcements as described in Part V.B of this order.

VIII.

IT IS FURTHER ORDERED that with regard to the rotation, display, and distribution of warning statements on cigar packages, respondent shall:

A. Display each of the five warning statements required by this order randomly in each twelve (12) month period in as equal a number of times as possible on the labels of each brand of the product and distribute the packages randomly in all parts of the United States in which the cigars are marketed.

Provided, however, that for purposes of this order, the phrase "as equal a number of times as possible" shall permit deviations of four (4) percent or less in a 12-month period.

Provided further, that the term "random distribution" shall mean that nothing in the production or distribution process of a cigar would prevent the five warning statements on the package from being distributed evenly in all parts of the United States where the product is marketed.

B. No later than ninety (90) days after the effective date of this order, respondent shall submit to the Commission or its designated representative for approval a plan that provides for the display of the five warning statements on packages of cigars as required by this order, and comply with the plan as approved. This plan shall be sufficiently detailed to enable the Commission to determine whether the warning statements appear on the package in a manner consistent with the requirements of this order. The equal display requirements may be satisfied by one of the following three methods:

(1) A plan may satisfy the requirements by providing for the engraving or preparation of cylinders, plates, or equivalent production materials in a manner that results in the simultaneous printing of the five required warnings in as near an equal number of times as possible under the circumstances;

(2) A plan may satisfy the requirements by providing for the preparation of separate cylinders, plates, and equivalent production materials and requiring that they be changed at fixed intervals in a manner that results in the display of the five required warnings in as near an equal number of times as possible under the circumstances during a one-year period; or

(3) A plan may satisfy the requirements by providing that stickers bearing the five required warnings be printed in equal numbers and affixed randomly to packages of the product.

Provided, however, nothing in this part of the order requires the use of more than one warning statement on the label of any brand during any given part of the 12-month period except for a cigar package that also functions as a cigar display (which must also comply with the advertising requirements of this order).

C. A plan for the rotation, display, and distribution of warning statements on cigar packages shall include representative samples of labels with each of the five warning statements required by this order. This provision does not require submission of a label with each of the required warning statements for every brand marketed by respondent, and shall be deemed to be satisfied by submission of labels for different types of cigars, and a range of cigar package sizes for each type of product.

IX.

IT IS FURTHER ORDERED that with regard to the rotation, display, and dissemination of warning statements in cigar advertising:

A. Except as specified in sub-part B. herein, respondent shall rotate each of the five warning statements required by this order every three (3) months in an alternating sequence in the advertisement for each brand of cigar. *Provided, however*, that any rotational system may take into account practical constraints on the production and distribution of advertising.

B. On merchandisers, utilitarian items, and cigar packages that can function as open package displays, respondent shall display each of the five warning statements required by this order randomly in each twelve (12) month period in as equal a number of times as possible, and distribute such merchandisers, utilitarian items, and cigar packages randomly in all parts of the United States in which they are disseminated.

Provided, however, that for purposes of this sub-part, the phrase "as equal a number of times as possible" shall permit deviations of four (4) percent or less in a 12-month period.

Provided further, that the term "random distribution" shall mean that nothing in the production or distribution process of a merchandiser or cigar package than can be used as an open package display would prevent the five warning statements on such display items from being distributed evenly in all parts of the United States where they are disseminated.

C. No later than ninety (90) days after the effective date of this order, respondent shall submit a plan to the Commission or its designated representative for approval that ensures that:

(1) On all types of cigar advertising, except those specified in sub-part B herein, the five warning statements are rotated every three months in alternating sequence, and that respondents comply with the plan as approved. This rotational warning requirement may be satisfied by requiring either that all brands display the same warning during each three-month period or that each brand display a different warning during a given three-month period. A plan shall describe the method of rotation and shall include a list of the designated warnings for each three-month period during the first fifteen (15) month period for each brand. The plan also shall describe the method that will be used to ensure proper rotation in different advertising media in sufficient detail to ensure compliance with the order. For advertising in newspapers, magazines, or other

periodicals, the method of rotation shall be set either according to the cover date or the closing date of the publication. For posters and placards, the method of rotation shall be set according to either the scheduled or actual appearance of the advertising. The method of rotation for point-of-sale and non-point-of-sale promotional materials such as leaflets, pamphlets, coupons, direct mail circulars, paperback book inserts, or non-print items shall be set according to either the date the materials or objects are ordered or the date on which the objects or materials are scheduled to be disseminated, provided that the production of such materials or objects is carried out in a manner consistent with customary business practices.

(2) On merchandisers, utilitarian items, and cigar packages that can function as open package displays, each of the five warning statements required by this order is displayed randomly in each twelve (12) month period in as equal a number of times as possible.

D. A plan for the rotation, display, and dissemination of warning statements in cigar advertising shall include a representative sample of each of the five warning statements required by this order. This provision does not require the submission of all advertising for each brand marketed by respondent and shall be deemed to be satisfied by submission of actual examples of different types of advertising materials or acetates or other facsimiles indicating the warning statements as they would appear in advertisements of varying sizes.

X.

IT IS FURTHER ORDERED that the Commission intends that this order provide for a uniform, federally mandated system of health warnings on cigar packages and advertisements nationwide. Entry of the order will uniformly provide consumers

in all states and territories of the United States with clear, conspicuous and understandable disclosures of the health risks of cigar smoking. The Commission shall consider a state or local requirement for the display of different warnings concerning cigar smoking and health to be in conflict with the requirements of this order, but only to the extent that any such provision requires that the state or local warning appear on any package or advertisement required to display the Federal warnings set forth herein.

XI.

IT IS FURTHER ORDERED that respondent shall be deemed to be in compliance with this order if it has taken reasonable steps to:

A. Provide, by written contract or other clear and prominent instructions, for the rotation of the label statements required by this order;

B. Give clear and prominent instruction and, to the extent possible, furnish materials (such as film negatives, acetates or other facsimiles) for the production of cigar packages and advertising that contain the required warning statements; and

C. Prevent and correct mistakes, errors or omissions that have come to its attention.

Provided, however, that in the event of the distribution of labels or the publication of advertisements that do not conform to this order, the burden of establishing that reasonable steps have been taken to comply with this order (including fulfilling the conditions described in this Part of the order) shall rest solely with respondent.

XII.

IT IS FURTHER ORDERED that the cigar labeling and advertising requirements of Parts III through VI of this order shall become effective one hundred eighty (180) days after issuance of the order. *Provided, however*, that:

A. The cigar labeling requirements of Part III of this order shall not apply to cigars distributed in commerce for retail sale prior to one hundred eighty (180) days from the date of issuance of the order.

B. The cigar advertising requirements of Parts IV through VII of this order shall take into account practical constraints on respondent with respect to the production and distribution of advertising submitted for publication prior to one hundred eighty (180) days from the date of issuance of the order.

XIII.

IT IS FURTHER ORDERED that in the event the Federal Cigarette Labeling and Advertising Act, 15 U.S.C. 1331, et seq., or the Comprehensive Smokeless Tobacco Health Education Act, 15 U.S.C. 4401, et seq., or the regulations implemented thereunder, 16 C.F.R. 307, et seq., are amended or modified to change the size or format of the warning requirements for the labeling or advertising of cigarettes or smokeless tobacco, respectively, such action shall constitute sufficient changed conditions to reopen this order to determine whether the size or the format of the warning statements contained herein should be altered or modified to conform to the same or similar size or format.

XIV.

IT IS FURTHER ORDERED that respondent and its successors and assigns, for five (5) years after the last date of dissemination of any cigar label or advertisement covered by this order, shall maintain and upon request make available to the Federal Trade Commission business records demonstrating their compliance with the terms and provisions of this order, including, but not limited, to a sample copy of each advertisement and label disseminated during such time.

XV.

IT IS FURTHER ORDERED that respondent and its successors and assigns shall deliver a copy of this order to all current and future principals, officers, directors, and managers, and to all current and future employees, agents, and representatives having responsibilities with respect to the subject matter of this order, and shall secure from each such person a signed and dated statement acknowledging receipt of the order. Respondent 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.

XVI.

IT IS FURTHER ORDERED that respondent and its successors and assigns shall notify the Commission at least thirty (30) days prior to any change in the corporation that may affect compliance obligations arising under this order, including but not limited to a dissolution, assignment, sale, merger, or other action that would result in the emergence of a successor corporation; the creation or dissolution of a subsidiary, parent, or affiliate that engages in any acts or practices subject to this order; the proposed filing of a bankruptcy petition; or a change in the corporate name or address. *Provided, however*, that, with respect to any proposed change in the corporation about which respondent learns less than thirty (30) days prior to the date such action is to take place,

respondent shall notify the Commission as soon as is practicable after obtaining such knowledge. All notices required by the Part shall be sent by certified mail to the Associate Director, Division of Enforcement, Bureau of Consumer Protection, Federal Trade Commission, Washington, D.C. 20580.

XVII.

IT IS FURTHER ORDERED that respondent and its successors and assigns shall, at such times as the Commission may require, file with the Commission a report, in writing, setting forth in detail the manner and form in which they have complied with this order.

By the Commission.

Analysis of Proposed Consent Orders to Aid Public Comment

The Federal Trade Commission has accepted, subject to final approval, agreements containing consent orders from the following cigar manufacturers, importers or marketers:

Swisher International, Inc. (Matter No. 002-3199);
Consolidated Cigar Corporation (Matter No. 002-3200);
Havatampa, Inc. (Matter No. 002-3204);
General Cigar Holdings, Inc. (Matter No. 002-3202);
John Middleton, Inc. (Matter No. 002-3205);
Lane Limited (Matter No. 002-3203); and
Swedish Match North America, Inc.(Matter No. 002-3201).

The proposed consent orders have been placed on the public record for thirty (30) days for the receipt of comments by interested persons. Comments received during this period will

become part of the public record. After thirty (30) days, the Commission will again review the agreements and comments received and will decide whether it should withdraw from the agreements and take appropriate action or make final the agreements' proposed orders.

Background

In July 1999, the Federal Trade Commission provided a Report to Congress, entitled Cigar Sales and Advertising and Promotional Expenditures for Calendar Years 1996 and 1997 ("Commission Report"). The Commission Report recommended that, given the significant increase in cigar smoking prevalence in recent years and the serious health risks posed by cigar smoking [1], cigars should be regulated in a manner consistent with the current regulation of cigarettes and smokeless tobacco. *See* Federal Cigarette Labeling and Advertising Act, 15 U.S.C. § 1331 et seq.; Comprehensive Smokeless Tobacco Health Education Act of 1986, 15 U.S.C. § 4401 et seq. The Commission Report recommended that Congress either enact legislation to require federal health warnings on cigar labeling and advertising or direct the Commission to use its existing authority, under Section 5 of the Federal Trade Commission Act, to require cigar health warnings.

In November 1999, in the Joint Explanatory Note of the Conferees to H.R. 3421 Appropriations Bill, the Congressional Appropriations Committees responded to the Commission Report by directing the FTC to report back to the Committees on Commission plans to establish "uniform Federal health warning label[s]."[2]

---

1 *See* U.S. Department of Health and Human Services, National Cancer Institute, Smoking and Tobacco Control Monograph No. 9 Cigars: Health Effects and Trends (1998), NIH publication no. 98-4302 (ACigar Monograph@).

2 145 Cong. Rec. H12230-02 (daily ed. Nov. 17, 1999).

After consideration of the National Cancer Institute=s findings in its Cigar Monograph on the serious health risks of regular cigar use, and the failure of cigar advertising and labeling to disclose these health risks, the Commission negotiated consent agreements with the seven largest cigar companies to implement health warnings on cigar labeling and advertising nationwide.[3]

The Proposed Complaints and Orders

The proposed complaints each allege that the failure to disclose that regular cigar smoking can cause serious adverse health effects is both unfair and deceptive in violation of Section 5 of the FTC Act. Part I of the proposed orders requires the respondents to make a clear and conspicuous disclosure of the following warning statements on cigar labels and in advertising:

SURGEON GENERAL WARNING: Cigar Smoking Can Cause Cancers Of The Mouth And Throat, Even If You Do Not Inhale.

SURGEON GENERAL WARNING: Cigar Smoking Can Cause Lung Cancer And Heart Disease.

SURGEON GENERAL WARNING: Cigars Are Not A Safe Alternative To Cigarettes.

SURGEON GENERAL WARNING: Tobacco Use Increases The Risk Of Infertility, Stillbirth, And Low Birth Weight.

SURGEON GENERAL WARNING: Tobacco Smoke Increases The Risk Of Lung Cancer And Heart Disease, Even In Nonsmokers.

---

3 Like all FTC consent orders, these orders are for settlement purposes only and do not constitute an admission by the cigar manufacturers of any law violation.

Part II of the proposed orders sets out specific format requirements for the warnings, which are designed to ensure that the warnings are visible and readable. Part II also requires that the warning statements on labeling and advertising be printed in black print on a solid white background, and be capitalized and punctuated as set forth in Part I.

Part III specifies the location and size requirements for the disclosure of the health warnings on cigar *labels*. The orders require that the warning be displayed on the principal display panel of the package. For the majority of cigar boxes, the orders define the principal display panel to be the larger of the top or front panel of the package, thus ensuring that the warning is in the most noticeable location. The orders make an exception for boxes of premium (hand-rolled) cigars, providing that the warning can appear on the top or front of the box, depending upon which panel is more likely to be seen by consumers.

Part IV sets forth the specific format and size requirements for the disclosure of the health warnings on cigar *advertising*. The orders provide that the warning shall be in black print on a white background and be centered in a black ruled rectangular box. Part IV specifies how to calculate the size of the warning and where to place the warning in various types of advertising, including periodicals, merchandisers, functional items, catalogues and cigar packages that also function as point-of-sale displays.

Part V specifies how to make the required disclosures in audio and video advertisements, including radio, television, the Internet, tapes and films. The orders require that in interactive media, such as the Internet, the warnings must be displayed in an unavoidable manner on every Web page.

Part VI of the proposed orders addresses requirements for the disclosure of the warnings on utilitarian items. Utilitarian items are treated like other advertising, and the warning statements must appear in a rectangular box format, in a size based upon the item's total advertising display area.

Analysis to Aid Public Comment

Part VII provides that cooperative advertisements paid for in whole or in part by a respondent must include the warnings, with the exception of very small print advertisements containing only brand name and price information.

Part VIII sets forth the specific requirements for the rotation, display and distribution of the warning statements on cigar packages. For each cigar brand, respondents must display each of the five required warning statements randomly in as equal a number of times as possible, and must distribute the packages randomly in all parts of the U.S.A. in which they are marketed.

Part IX provides that, on most types of advertising, the five warning statements shall be rotated in an alternating sequence every three months. Part IX provides for equal simultaneous display of the warning statements on merchandisers, cigar boxes that can function as open package displays and utilitarian items. Parts VIII and IX of the proposed orders also require the companies to submit to the Commission for approval plans for the display of the warnings on cigar packages and advertisements, and to comply with the plans as approved.

Part X of the proposed orders states that the Commission will consider state or local requirements for different health warnings on any cigar labeling or advertising that is required to display the FTC warning to be in conflict with the orders.

Part XI provides a safe harbor in the event the companies have taken reasonable steps to assure compliance; in the event of labels or advertisements that do not comply with the order, the proposed respondents will bear the burden of establishing that reasonable steps were taken to comply with the order. This same safe harbor provision is included in the Commission's smokeless tobacco regulations.

Part XII of the proposed orders states that the warning requirements shall become effective one hundred and eighty (180) days after issuance of the order.

Part XIII provides that in the event the Federal Cigarette Labeling and Advertising Act or the Comprehensive Smokeless Tobacco Health Education Act or the Commission's Smokeless Tobacco Regulations are amended or modified to change the size or format of the warnings for cigarettes or smokeless tobacco, the cigar orders may be reopened to determine whether the size or format of the warnings for cigars should be modified to conform to such changes.

Parts XIV through XVI of the proposed orders contain standard recordkeeping, reporting and compliance requirements.

The proposed orders do not contain a sunset provision due to the importance of the health warnings required therein.

Objectives of the Proposed Orders

The Commission's intent in obtaining the proposed consent orders is to provide a uniform national system of health warnings on cigar labeling and advertising. National health warnings that are clear and conspicuous benefit consumers. Here, the cigar warnings will prevent future deception and unfairness by providing important information with which consumers nationwide can make more informed choices.[4]

Each of the five warnings conveys a simple and specific message about health risks associated with cigar use. The orders' requirements for display of the warnings on packaging and advertising will provide sufficient repetition of each warning statement to contribute to long-term recall of each message, while decreasing the likelihood that any one message will become so

4 Uniform national health warnings likewise benefit national competition. Multiple different warnings can raise costs and regulatory burdens for national marketers such as the proposed respondents.

familiar and overexposed that its effectiveness will "wear out." Together, the five warnings provide a comprehensive warning scheme that provides necessary and important information to consumers nationwide.

Because the proposed respondents' cigar packaging and advertising is disseminated in the national marketplace, a comprehensive national system of simple and direct warnings will provide the greatest benefits to consumers. Moreover, multiple, and potentially inconsistent, warnings on individual packages or advertisements could neutralize or negate those benefits. Such multiple warnings may be confusing to consumers and undercut the saliency of the warnings required by these consent orders. Further, they are likely to have the unintended effect of making it more difficult for consumers to process the warning messages required here. And, while diminished effectiveness could result when *one* state mandates additional warnings on packages or advertisements bearing the Commission warnings, the problem will be exacerbated if more than one state imposes requirements applicable to a single package or advertisement.

In light of the important benefits from a national warning system, Part X of the Commission's orders preempts state or local requirements for different health warnings on any cigar labeling or advertising that is required to display the FTC warnings. At the same time, the Commission recognizes the critically important role that states play in consumer protection and tobacco control. The provision does not affect other state or local requirements. For example, required warnings for types of advertising that are not covered by the proposed orders (such as shelf talkers under a certain size), or state or local restrictions on advertising placement or youth access to tobacco products are not affected. It is the Commission's intent that this provision apply only to state requirements for different health warnings by companies who have entered into the FTC consent orders, and only to packages and advertising required to contain the federally-mandated warnings.

Analysis to Aid Public Comment

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

Complaint

IN THE MATTER OF

GENERAL CIGAR HOLDINGS, INC.

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

Docket C-3967; File No. 0023202
Complaint, August 18, 2000--Decision, August 18, 2000

This consent order addresses General Cigar's advertising. The complaint alleges that the failure to disclose that regular cigar smoking can cause serious adverse health effects is both unfair and deceptive in violation of Section 5 of the FTC Act. The consent order requires the respondents to make a clear and conspicuous disclosure using specified warning statements on cigar labels and in advertising.

Participants

For the Commission: *Mamie Kresses, Rosemary Rosso, Michael Ostheimer, Anne V. Maher, C. Lee Peeler, Marc Winerman, Christian S. White,* and *BE.*

For the Respondents: *Andrew L. Zausner* and *Peter J. Kadzik, Dickstein Shapiro Morin & Oshinsky,* and *John Kirby, Nicholas Allard* and *Latham & Watkins.*

COMPLAINT

The Federal Trade Commission, having reason to believe that General Cigar Holdings, 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 General Cigar Holdings, Inc., is a Delaware corporation with its principal office or place of business at 387 Park Avenue South, New York, NY 10016-8899.

2. Respondent has manufactured, advertised, labeled, offered for sale, sold, and distributed products to the public, including cigars.

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. In its advertising, labeling, and sale of cigars, respondent has failed to disclose that regular cigar smoking can cause several serious adverse health conditions including, but not limited to, cancers of the mouth (oral cavity), throat (esophagus and larynx), and lungs. These facts would be material to consumers in their purchase and use of the product. Respondent=s failure to disclose these facts has caused or is likely to cause substantial injury to consumers that is not outweighed by countervailing benefits to consumers or competition and is not reasonably avoidable by consumers. Therefore, the failure to disclose these facts was, and is, an unfair or deceptive practice.

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

THEREFORE, the Federal Trade Commission this eighteenth day of August, 2000, has issued this complaint against respondent.

By the Commission.

DECISION AND ORDER

IT IS HEREBY AGREED by and between, by its duly authorized officers, and counsel for the Federal Trade Commission that:

Decision and Order

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

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

1. Respondent, General Cigar Holdings, Inc., is a Delaware corporation with its office or principal place of business located at 387 Park Avenue South, New York, New York 10016-8899.

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

ORDER

DEFINITIONS

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

1. Unless otherwise specified, "respondent" shall mean General Cigar Holdings, Inc., a corporation, its successors and assigns, and its officers, agents, representatives, and employees.

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

3. "Cigar" shall mean any roll of tobacco wrapped in leaf tobacco or wrapped in any other substance containing tobacco, other than a cigarette within the meaning of the Federal Cigarette Labeling and Advertising Act, 15 U.S.C.1331, et seq.

4. "Little cigar" shall mean any roll of tobacco wrapped in leaf tobacco or any substance containing tobacco (other than any roll of tobacco which is a cigarette within the meaning of the Federal Cigarette Labeling and Advertising Act, 15 U.S.C.1331, et seq.) and as to which one thousand units weigh not more than three pounds.

5. APremium cigar@ shall mean a hand-rolled cigar that is wrapped in a natural tobacco leaf wrapper.

6. "Commission" shall mean the Federal Trade Commission.

7. "Brand" shall mean cigars that bear a common identifying name or mark, regardless of whether the cigars are differentiated by type of product, size, shape, packaging, or other characteristic,

and, in the case of generic or private label cigars, means all cigars produced or imported by respondent or its affiliates.

8. "Package" shall mean any pack, box, carton, tube, can, jar, container or wrapping in which any cigar is offered for sale, sold or otherwise distributed to consumers, but for purposes of this order, package does not include: (a) any shipping container or wrapping used solely for transporting cigars in bulk or quantity to respondent or packagers, processors, wholesalers or retailers unless the container or wrapping is intended for use as a retail display or (b) any wrapping or container that bears no written, printed or graphic matter. Any package that is also used as a point-of-sale display item shall also constitute "advertising" for purposes of this order.

9. "Label" shall mean any written, printed or graphic matter affixed to or appearing on any package containing a cigar, with the exception of any revenue stamp affixed to a cigar or any cigar band with a total surface area less than three (3) square inches.

10. "Utilitarian item" shall mean any item, other than cigars, that is sold or given or caused to be sold or given by respondent to consumers for their personal use, and that display cigar advertising such as a brand name, logo or selling message. Such items include, but are not limited to, matchbooks, lighters, clothing or sporting goods. The term "logo" includes any brand specific characteristics of a cigar, including but not limited to any recognizable pattern of colors or symbols associated with a particular brand.

11. Unless otherwise exempted by specific provision of this order, "advertisement" (including the terms "advertise" and "advertising") shall include any oral, written, printed, pictorial or graphic representation made by or on behalf of respondent, the purpose or effect of which is to promote the sale or use of any cigar manufactured or distributed by respondent, including but not limited to a statement, illustration or depiction in or on a brochure,

newspaper, magazine, free standing insert, pamphlet, leaflet, circular, mailer, book insert, letter, coupon, catalog, poster, chart, billboard, transit advertisement, utilitarian item, sponsorship material, package insert, film, slide, or point of purchase display (including any cigar package that can be used as an open package display or any functional item such as a clock or change mat that includes advertising), any advertising on television, radio, or the Internet, and any other electronic advertisement.

I.

IT IS ORDERED that respondent, directly or through any corporation, subsidiary, division, or other device, shall not fail to disclose clearly and conspicuously and in the manner set forth in this order one of the following statements on all cigar labels and, unless otherwise exempt from disclosure by this order, in all cigar advertisements:

SURGEON GENERAL WARNING: Cigar Smoking Can Cause Cancers Of The Mouth And Throat, Even If You Do Not Inhale.

SURGEON GENERAL WARNING: Cigar Smoking Can Cause Lung Cancer And Heart Disease.

SURGEON GENERAL WARNING: Tobacco Use Increases The Risk Of Infertility, Stillbirth And Low Birth Weight.

SURGEON GENERAL WARNING: Cigars Are Not A Safe Alternative To Cigarettes.

SURGEON GENERAL WARNING: Tobacco Smoke Increases The Risk Of Lung Cancer And Heart Disease, Even In Nonsmokers.

Provided, however, that the warning statement requirements shall not apply to company and divisional names, when used as such; to signs on factories, plants, warehouses or other facilities

related to the manufacture or storage of cigars; to corporate or financial reports; to communications to security holders and others who customarily receive copies of these communications; or to promotional materials that are distributed to wholesalers, dealers or merchants but not to consumers, and are not for public display or consumer exposure. In addition, these warning statement requirements do not apply to shelf-talkers and similar product locators with a display area of twelve (12) square inches or less.

II.

IT IS FURTHER ORDERED THAT for purposes of this order, "clear and conspicuous" disclosure of any warning statement required by this order means that the warning statement shall be set out as follows:

A. The warning statement shall be capitalized and punctuated as indicated in Part I of this order, with the words "**SURGEON GENERAL WARNING**" printed in uppercase letters in bold print and the remaining words printed with the initial letter of each word in uppercase print and the remaining letters in lowercase print;

B. The warning statement shall be printed in black against a solid white background. In addition, the warning statement shall appear in two to four lines that are parallel to each other as well to the base of the cigar package or advertisement; and

C. The language of the warning statement shall appear:

(1) For any cigar label, the warning statement shall be set out in the English language. If the label of a cigar contains a required warning in a language other than English, the required warning shall also appear in English.

(2) For any cigar advertisement, the warning statement shall be set out in the English language, except as follows:

(a) In the case of any cigar advertising in a newspaper, magazine, periodical, or other publication that is not in English, the warning statement shall appear in the predominant language of the publication in which the advertisement appears; and

(b) In the case of any other cigar advertising, the warning statement shall appear in the language of the target audience (ordinarily the language principally used in the advertisement).

III.

IT IS FURTHER ORDERED that in the case of any cigar label required by the order to bear a warning statement, the following requirements shall apply:

A. The warning statement shall be in a clear and conspicuous place on the principal display panel of the label. The principal display panel is the part of a label that is likely to be displayed, presented, shown, or examined under normal viewing conditions. In the case of a rectangular or square cigar package, the principal display panel shall mean the front or top panel of the package, whichever is larger. *Provided, however*, that in the case of a rectangular or square package containing ten or more premium cigars, the warning shall appear on the front or top panel of the package, whichever is the principal display panel. In the case of a cylindrical cigar package, a clear and conspicuous place shall mean along the length of the cylinder and perpendicular to the top and bottom of the cylinder.

Provided, however, that in the case of any cigar package, the warning statement shall not be deemed to be in a clear and conspicuous place if it:

(1) appears or is affixed on the bottom of the package;

(2) is printed or affixed on the tear line;

(3) is printed or affixed on cellophane or any plastic film overwrap (with the exception of any package whose label appears only on cellophane or plastic film overwrap); or

(4) is printed or affixed in any other location that will be obliterated when the package is opened.

B. The warning statement shall appear in a clear and conspicuous and legible type and be separated in every direction from other written or graphic matter on the label by the equivalent of at least twice the height of the "W" in the word "WARNING" in that warning statement.

C. On a rectangular or square cigar package, the warning statement shall appear in the type style Univers 57 Condensed in the following type size in relation to total surface area of the largest panel of the package:

(1) Surface area of less than 5 square inches
Type size: 9 point

(2) Surface area of 5 to less than 10 square inches
Type size: 10 point

(3) Surface area of 10 to less than 15 square inches
Type size: 11 point

(4) Surface area of 15 to less than 25 square inches
Type size: 12 point

(5) Surface area of 25 to less than 40 square inches
Type size: 14 point

(6) Surface area of 40 or more square inches
Type size: 16 point

D. On a cylindrical cigar package, the warning statement shall appear in Univers 57 Condensed type style in the following type size in relation to the lengthwise surface area of the cylinder:

(1) Surface area of less than 5 square inches
Type size: 8 point

(2) Surface area of 5 to less than 15 square inches
Type size: 9 point

(3) Surface area of 15 to less than 25 square inches
Type size: 10 point

(4) Surface area of 25 to less than 30 square inches
Type size: 12 point

(5) Surface area of 30 to less than 40 square inches
Type size: 14 point

(6) Surface area of 40 or more square inches
Type size: 16 point

E. The warning statements required by this order may be affixed to the cigar label by sticker, provided that: the sticker is placed directly on the surface of the package, and not on any cellophane or other plastic film overwrap (with the exception of any package whose label appears only on cellophane or plastic film overwrap); the sticker is permanent (non-removable) and durable; and the warning statement complies with all other requirements of Parts I, II, III and VIII herein.

F. Each cigar label shall meet the requirements of this order upon being prepared for distribution in commerce for retail sale, but before it is distributed to be offered for retail sale. In the case of any cigar that is imported, the warning statements may be

affixed in the country of origin or after importation into the United States, but shall be affixed before the cigar is removed from bond for sale or distribution. This section does not apply to any cigar that is manufactured, packaged or imported in the United States for export from the United States, if the cigar is not in fact distributed in commerce for use in the United States.

IV.

IT IS FURTHER ORDERED that in the case of any advertisement required by this order to bear a warning statement, except advertisements covered by Part V of this order, the following requirements shall apply:

A. The warning statement shall appear in a ruled rectangular box with the enclosing rule printed in black, and shall be centered both horizontally and vertically within the rectangular box and separated from any edge of the rule by at least one-half the height of the "W" in the word "WARNING" in the warning statement;

B. The warning statement shall be in a clear and conspicuous place. For purposes of this part, a "clear and conspicuous place"shall mean a location within the advertisement that is separated from any other written or textual matter or any graphic designs, elements or geometric forms by a distance from the outside rule at least twice the height of the "W" in the word "WARNING" in that warning statement. In addition, the disclosure shall not be positioned in the margin of a print advertisement. *Provided further*, the warning statement shall not be included as an integral part of a specific design or illustration in the advertisement, such as a picture of the package, unless at least 80 percent of the area of the advertisement is taken up by a picture of the package.

C. The size of the warning statement shall be clear and conspicuous and shall be in Univers 57 Condensed type style, with the following outside dimensions and type size in relation to the advertising display area of the advertisement:

(1) Total area of less than 15 square inches
Border: 2c" by :"
Rule width: 1 point
Type size: 9 point

(2) Total area of 15 to less than 65 square inches
Border: 3c" by :"
Rule width: 2 point
Type size: 11 point

(3) Total area of 65 to less than 110 square inches
Border: 32" by f"
Rule width: 2 point
Type size: 13 point

(4) Total area of 110 to less than 180 square inches
Border: 4c" by 1"
Rule width: 2 point
Type size: 15 point

(5) Total area of 180 to less than 360 square inches
Border: 4d" inches by 1c"
Rule width: 2 point
Type size: 16 point

(6) Total area of 360 to less than 470 square inches
Border: 5" by 13"
Rule width: 22 point
Type size: 18 point

(7) Total area of 470 to less than 720 square inches
Border: 83" by 1:"
Rule width: 3 point

Type size: 30 point

(8) Total area of 5 to less than 10 square feet
Border: 11" by 32"
Rule width: 6 point
Type size: 43 point

(9) Total area of 10 to less than 20 square feet
Border: 1' 4" by 32"
Rule width: 8 point
Type size: 58 point

(10) Total area of 20 to less than 40 square feet
Border: 2' 8" by 1'
Rule width: 3"
Type size: 12" (Cap Height)

(11) Total area of 40 to less than 80 square feet
Border: 3' 4" by 1' 2"
Rule width: d"
Type size: 23" (Cap Height)

(12) Total area of 80 to less than 160 square feet
Border: 5' 8" by 2' 4"
Rule width: :"
Letter height: 32" (Cap Height)

(13) Total area of 160 to less than 350 square feet
Border: 19' 4" by 7' 4"
Rule width: 1:"
Letter height:11" (Cap Height)

(14) Total area of 350 to 1200 square feet
Border: 20' by 7' 8"
Rule width: 23"
Letter height:12" (Cap Height)

Decision and Order

(15) Total area of 1200 square feet or more
Border: 27' 4" by 9' 4"
Rule width: 3"
Letter height: 1' 4" (Cap Height)

D. In determining the outside dimensions, type size and placement of the warning statement in any advertisement in a newspaper, magazine or other periodical that appears on more than one page:

(1) A double full page or multiple full page advertisement shall not be required to have more than one warning, but the outside dimensions and type size of the warning statement shall be determined by the aggregate advertising display area of the entire advertisement;

(2) An advertisement that occupies one full page and part of another page shall not be required to have more than one warning, but the outside dimensions and type size of the warning statement shall be determined by the aggregate advertising display area of the entire advertisement and the warning shall appear on the full page on which the advertisement appears; and

(3) An advertisement that occupies parts of two or more pages shall not be required to contain more than one warning, but the outside dimensions and type size of the warning statement shall be determined by the aggregate advertising display area of the entire advertisement and the warning shall appear on the page that contains the greater (or greatest) part of the advertisement.

E. In determining the outside dimensions, type size and placement of the warning statement on any point-of sale advertisement with curved, irregular or multiple surfaces:

(1) In the case of point-of-sale items that are designed to contain products ("merchandisers") such as counter and floor displays, package dispensers, racks and gondolas:

(a) Where the merchandiser itself contains no cigar advertising, the merchandiser shall not require a warning statement;

(b) Where the merchandiser contains cigar advertising, the outside dimensions and type size of the warning statement shall be determined by the aggregate advertising display area of all of the surfaces containing such advertising;

(c) On merchandisers displaying advertising on more than one side, the warning statement shall be placed on the largest side of the item that is visible to the public from its normal viewing position.

(d) For merchandiser formats designed and in use as of May 1, 2000 where the height or width of the display panel on which the warning statement must appear is less than the height or width of the border of the warning statement required by Part IV.C of this order, respondent may submit for approval, and the Commission shall approve upon a showing of practical necessity, a warning statement that has an alternative outside border provided that the warning statement has the same rule width, type size and total area as required by Part IV.C.

(2) In the case of functional items such as clocks, change mats, change trays and welcome signs, the outside dimensions and type size of the warning statement shall be determined by the surface area of that side of the item which contains advertising, unless the advertising is clearly separated from the remainder of the area of that side by clear border lines of a contrasting color and one-quarter inch in width, in which event the size of the

warning statement shall be determined by the surface area within the border area containing the advertising.

F. In the case of a cigar package that also can function as a point-of-sale display, such item shall also comply with the advertising provisions of this order. In determining the outside dimensions, type size and placement of the advertising warning statement on such item:

(1) in the case of a package that itself contains two or more packages of cigars, the item shall comply with the requirements of Part IV.E.1 of this order; and

(2) in the case of a package that contains two or more individual cigars, and can function as an open package display:

(a) the warning statement shall be placed on the principal display panel of the interior of the package and shall be positioned so that it is visible to the public from any normal viewing position; and

(b) the outside dimensions, type size and style of the warning statement shall be determined by the area of the panel on which the statement is placed.

G. For any catalogue, leaflet, brochure or other non-point-of-sale promotional advertisement that has more than one page:

(1) An advertisement that occupies up to four pages shall not be required to contain more than one warning, but the outside dimensions and type size of the warning statement shall be determined by the aggregate advertising display area of the entire advertisement and the warning shall appear on the page that contains the greater (or greatest) part of the advertisement; and

(2) An advertisement that occupies more than four pages shall be required to contain multiple warnings on alternating pages, with the outside dimensions and type size of the warning statement determined by the twice the advertising display area of the page containing the warning.

V.

IT IS FURTHER ORDERED that in a television, radio, Internet or other electronic advertisement, or any other audio or video advertisement, including but not limited to videotapes, cassettes, discs, films, filmstrips, audiotapes or other types of sound recordings, "clear and conspicuous" disclosure shall mean as follows:

A. If the advertisement has a visual component, the warning statement shall be superimposed on the screen in black print on a white background enclosed in a black rectangular box format, as specified in Parts IV.A and IV.B above, and its size, duration on the screen and location shall be sufficient for an ordinary consumer to read and comprehend it;

B. If the advertisement has an audio component, the warning statement shall be announced orally and shall be delivered in a volume, cadence, and location sufficient for an ordinary consumer to hear and comprehend it;

Provided, however, in the case of an audio advertisement in a retail store or other place where cigars are offered for sale, no warning shall be required, even if respondent provides an incentive for disseminating the advertisement, so long as the announcement includes only the brand name or product identifier, the price, and the product's location in the store.

C. If the advertisement has both a visual and an audio component, the warning statement shall be superimposed on the screen in a rectangular box format and announced orally in compliance with the requirements set out in Sub-parts A and B of this Part V of the order. In addition to the foregoing, in

advertising in an interactive electronic medium such as the Internet or online services, the disclosure shall be presented in an unavoidable manner on every Web page, online service page, or other electronic page, and shall not be accessed or displayed through hyperlinks, pop-ups, interstitials or other similar means.

D. Pursuant to the Federal Cigarette Labeling and Advertising Act, 15 U.S.C. 1331, et seq, it shall be unlawful for respondent to disseminate any advertisement for little cigars on any medium of electronic communication subject to the jurisdiction of the Federal Communications Commission.

VI.

IT IS FURTHER ORDERED that in the case of advertisements for cigars on utilitarian items:

A. The warning statements required by this order shall be in a clear and conspicuous and legible type and shall appear within the rectangular box format specified in Part IV;

B. The warning statement required by this order must be in a clear and conspicuous location on the object. A clear and conspicuous location on the object is one that is proximate to and on the same surface as the cigar advertising, and is visible when the brand name, logo or selling message is visible.

C. The outside dimensions and type style and size of the warning statement shall conform to the requirements set forth in Part IV.C of this order. For purposes of determining the outside dimensions and type size of the warning statement, the advertising display area for an advertisement on a utilitarian item shall be the visible area on which the advertising appears. For example, the advertising display area for a shirt bearing a brand name, logo or selling message on the front or back is the entire front or back of the shirt, excluding any sleeves. For a

shirt bearing a brand name, logo or selling message on the sleeve, the advertising display area is the sleeve.

D. If the cigar advertising appears in more than one location on the utilitarian item, the warning either:

(1) Shall appear proximate to each area with the advertising; or

(2) Shall appear only once on the item, however, in such case, the advertising display area shall be the aggregate of all the surface areas on which any advertising appears.

E. The warning statement required by this order must be printed, embossed, embroidered or otherwise affixed to the utilitarian item with a permanence and durability that is comparable to the permanence and durability of the brand name, logo, or selling message. *Provided, however*, that if a product brand name or logo is embroidered on a hat, and a legible warning cannot be embroidered in the proper size due to technological limitations, the warning may be affixed to the hat by another method, so long as its permanence and durability is comparable to that of the brand name, logo or selling message.

F. For fabric baseball style hats, the warning statement shall appear in the Number 3 size as set forth in Part IV.C of this order.

G. For those utilitarian items under eight (8) square inches that are viewed predominantly by the user, the warning statement shall be:

(1) Printed on the package of the item, if the item is disseminated in a package to the consumer. The total surface area of the package shall comprise the advertising display area for purposes of determining the outside dimensions and type size of the warning statement; or
(2) Placed in the form of a sticker or decal directly onto the item in the Number 1 warning size as set forth in Part IV.C

of this order. The item shall be packaged in such a way to ensure that the sticker cannot be removed before it is received by the consumer.

VII.

IT IS FURTHER ORDERED that all cooperative advertisements paid for, directly or indirectly, in whole or in part, by respondent must bear the required warning. *Provided, however*, in the case of a print advertisement with a display area of four (4) square inches or less, disseminated by a retailer, no warning is required so long as the advertisement contains only the brand name or other product identifier and a price. In addition, no warning is required in the case of certain in-store audio announcements as described in Part V.B of this order.

VIII.

IT IS FURTHER ORDERED that with regard to the rotation, display, and distribution of warning statements on cigar packages, respondent shall:

A. Display each of the five warning statements required by this order randomly in each twelve (12) month period in as equal a number of times as possible on the labels of each brand of the product and distribute the packages randomly in all parts of the United States in which the cigars are marketed.

Provided, however, that for purposes of this order, the phrase "as equal a number of times as possible" shall permit deviations of four (4) percent or less in a 12-month period.

Provided further, that the term "random distribution" shall mean that nothing in the production or distribution process of a cigar would prevent the five warning statements on the package from being distributed evenly in all parts of the United States where the product is marketed.

B. No later than ninety (90) days after the effective date of this order, respondent shall submit to the Commission or its designated representative for approval a plan that provides for the display of the five warning statements on packages of cigars as required by this order, and comply with the plan as approved. This plan shall be sufficiently detailed to enable the Commission to determine whether the warning statements appear on the package in a manner consistent with the requirements of this order. The equal display requirements may be satisfied by one of the following three methods:

(1) A plan may satisfy the requirements by providing for the engraving or preparation of cylinders, plates, or equivalent production materials in a manner that results in the simultaneous printing of the five required warnings in as near an equal number of times as possible under the circumstances;

(2) A plan may satisfy the requirements by providing for the preparation of separate cylinders, plates, and equivalent production materials and requiring that they be changed at fixed intervals in a manner that results in the display of the five required warnings in as near an equal number of times as possible under the circumstances during a one-year period; or

(3) A plan may satisfy the requirements by providing that stickers bearing the five required warnings be printed in equal numbers and affixed randomly to packages of the product.

Provided, however, nothing in this part of the order requires the use of more than one warning statement on the label of any brand during any given part of the 12-month period except for a cigar package that also functions as a cigar display (which must also comply with the advertising requirements of this order).

C. A plan for the rotation, display, and distribution of warning statements on cigar packages shall include representative

samples of labels with each of the five warning statements required by this order. This provision does not require submission of a label with each of the required warning statements for every brand marketed by respondent, and shall be deemed to be satisfied by submission of labels for different types of cigars, and a range of cigar package sizes for each type of product.

IX.

IT IS FURTHER ORDERED that with regard to the rotation, display, and dissemination of warning statements in cigar advertising:

A. Except as specified in sub-part B. herein, respondent shall rotate each of the five warning statements required by this order every three (3) months in an alternating sequence in the advertisement for each brand of cigar. *Provided, however*, that any rotational system may take into account practical constraints on the production and distribution of advertising.

B. On merchandisers, utilitarian items, and cigar packages that can function as open package displays, respondent shall display each of the five warning statements required by this order randomly in each twelve (12) month period in as equal a number of times as possible, and distribute such merchandisers, utilitarian items, and cigar packages randomly in all parts of the United States in which they are disseminated.

Provided, however, that for purposes of this sub-part, the phrase "as equal a number of times as possible" shall permit deviations of four (4) percent or less in a 12-month period.

Provided further, that the term "random distribution" shall mean that nothing in the production or distribution process of a merchandiser or cigar package than can be used as an open

package display would prevent the five warning statements on such display items from being distributed evenly in all parts of the United States where they are disseminated.

C. No later than ninety (90) days after the effective date of this order, respondent shall submit a plan to the Commission or its designated representative for approval that ensures that:

(1) On all types of cigar advertising, except those specified in sub-part B herein, the five warning statements are rotated every three months in alternating sequence, and that respondents comply with the plan as approved. This rotational warning requirement may be satisfied by requiring either that all brands display the same warning during each three-month period or that each brand display a different warning during a given three-month period. A plan shall describe the method of rotation and shall include a list of the designated warnings for each three-month period during the first fifteen (15) month period for each brand. The plan also shall describe the method that will be used to ensure proper rotation in different advertising media in sufficient detail to ensure compliance with the order. For advertising in newspapers, magazines, or other periodicals, the method of rotation shall be set either according to the cover date or the closing date of the publication. For posters and placards, the method of rotation shall be set according to either the scheduled or actual appearance of the advertising. The method of rotation for point-of-sale and non-point-of-sale promotional materials such as leaflets, pamphlets, coupons, direct mail circulars, paperback book inserts, or non-print items shall be set according to either the date the materials or objects are ordered or the date on which the objects or materials are scheduled to be disseminated, provided that the production of such materials or objects is carried out in a manner consistent with customary business practices.

(2) On merchandisers, utilitarian items, and cigar packages that can function as open package displays, each of the

five warning statements required by this order is displayed randomly in each twelve (12) month period in as equal a number of times as possible.

D. A plan for the rotation, display, and dissemination of warning statements in cigar advertising shall include a representative sample of each of the five warning statements required by this order. This provision does not require the submission of all advertising for each brand marketed by respondent and shall be deemed to be satisfied by submission of actual examples of different types of advertising materials or acetates or other facsimiles indicating the warning statements as they would appear in advertisements of varying sizes.

X.

IT IS FURTHER ORDERED that the Commission intends that this order provide for a uniform, federally mandated system of health warnings on cigar packages and advertisements nationwide. Entry of the order will uniformly provide consumers in all states and territories of the United States with clear, conspicuous and understandable disclosures of the health risks of cigar smoking. The Commission shall consider a state or local requirement for the display of different warnings concerning cigar smoking and health to be in conflict with the requirements of this order, but only to the extent that any such provision requires that the state or local warning appear on any package or advertisement required to display the Federal warnings set forth herein.

XI.

IT IS FURTHER ORDERED that respondent shall be deemed to be in compliance with this order if it has taken reasonable steps to:

A. Provide, by written contract or other clear and prominent instructions, for the rotation of the label statements required by this order;

B. Give clear and prominent instruction and, to the extent possible, furnish materials (such as film negatives, acetates or other facsimiles) for the production of cigar packages and advertising that contain the required warning statements; and

C. Prevent and correct mistakes, errors or omissions that have come to its attention.

Provided, however, that in the event of the distribution of labels or the publication of advertisements that do not conform to this order, the burden of establishing that reasonable steps have been taken to comply with this order (including fulfilling the conditions described in this Part of the order) shall rest solely with respondent.

XII.

IT IS FURTHER ORDERED that the cigar labeling and advertising requirements of Parts III through VI of this order shall become effective one hundred eighty (180) days after issuance of the order. *Provided, however*, that:

A. The cigar labeling requirements of Part III of this order shall not apply to cigars distributed in commerce for retail sale prior to one hundred eighty (180) days from the date of issuance of the order.

B. The cigar advertising requirements of Parts IV through VII of this order shall take into account practical constraints on respondent with respect to the production and distribution of advertising submitted for publication prior to one hundred eighty (180) days from the date of issuance of the order.

XIII.

IT IS FURTHER ORDERED that in the event the Federal Cigarette Labeling and Advertising Act, 15 U.S.C. 1331, et seq., or the Comprehensive Smokeless Tobacco Health Education Act, 15 U.S.C. 4401, et seq., or the regulations implemented thereunder, 16 C.F.R. 307, et seq., are amended or modified to change the size or format of the warning requirements for the labeling or advertising of cigarettes or smokeless tobacco, respectively, such action shall constitute sufficient changed conditions to reopen this order to determine whether the size or the format of the warning statements contained herein should be altered or modified to conform to the same or similar size or format.

XIV.

IT IS FURTHER ORDERED that respondent and its successors and assigns, for five (5) years after the last date of dissemination of any cigar label or advertisement covered by this order, shall maintain and upon request make available to the Federal Trade Commission business records demonstrating their compliance with the terms and provisions of this order, including, but not limited, to a sample copy of each advertisement and label disseminated during such time.

XV.

IT IS FURTHER ORDERED that respondent and its successors and assigns shall deliver a copy of this order to all current and future principals, officers, directors, and managers, and to all current and future employees, agents, and representatives having responsibilities with respect to the subject matter of this order, and shall secure from each such person a signed and dated statement acknowledging receipt of the order. Respondent 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.

XVI.

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

XVII.

IT IS FURTHER ORDERED that respondent and its successors and assigns shall, at such times as the Commission may require, file with the Commission a report, in writing, setting forth in detail the manner and form in which they have complied with this order.

By the Commission.

Analysis of Proposed Consent Orders to Aid Public Comment

The Federal Trade Commission has accepted, subject to final approval, agreements containing consent orders from the following cigar manufacturers, importers or marketers:

Swisher International, Inc. (Matter No. 002-3199);
Consolidated Cigar Corporation (Matter No. 002-3200);
Havatampa, Inc. (Matter No. 002-3204);
General Cigar Holdings, Inc. (Matter No. 002-3202);
John Middleton, Inc. (Matter No. 002-3205);
Lane Limited (Matter No. 002-3203); and
Swedish Match North America, Inc.(Matter No. 002-3201).

The proposed consent orders have been placed on the public record for thirty (30) days for the receipt of comments by interested persons. Comments received during this period will become part of the public record. After thirty (30) days, the Commission will again review the agreements and comments received and will decide whether it should withdraw from the agreements and take appropriate action or make final the agreements' proposed orders.

Background

In July 1999, the Federal Trade Commission provided a Report to Congress, entitled Cigar Sales and Advertising and Promotional Expenditures for Calendar Years 1996 and 1997 ("Commission Report"). The Commission Report recommended that, given the significant increase in cigar smoking prevalence in recent years and the serious health risks posed by cigar smoking,[1]

1 *See* U.S. Department of Health and Human Services, National Cancer Institute, Smoking and Tobacco Control Monograph No. 9 Cigars: Health Effects and Trends (1998), NIH publication no. 98-4302 (ACigar Monograph@).

cigars should be regulated in a manner consistent with the current regulation of cigarettes and smokeless tobacco. *See* Federal Cigarette Labeling and Advertising Act, 15 U.S.C. § 1331 et seq.; Comprehensive Smokeless Tobacco Health Education Act of 1986, 15 U.S.C. § 4401 et seq. The Commission Report recommended that Congress either enact legislation to require federal health warnings on cigar labeling and advertising or direct the Commission to use its existing authority, under Section 5 of the Federal Trade Commission Act, to require cigar health warnings.

In November 1999, in the Joint Explanatory Note of the Conferees to H.R. 3421 Appropriations Bill, the Congressional Appropriations Committees responded to the Commission Report by directing the FTC to report back to the Committees on Commission plans to establish "uniform Federal health warning label[s]."[2]

After consideration of the National Cancer Institute=s findings in its Cigar Monograph on the serious health risks of regular cigar use, and the failure of cigar advertising and labeling to disclose these health risks, the Commission negotiated consent agreements with the seven largest cigar companies to implement health warnings on cigar labeling and advertising nationwide.[3]

The Proposed Complaints and Orders

The proposed complaints each allege that the failure to disclose that regular cigar smoking can cause serious adverse health effects is both unfair and deceptive in violation of Section 5 of the FTC Act. Part I of the proposed orders requires the respondents to make a clear and conspicuous disclosure of the following warning statements on cigar labels and in advertising:

---

2 145 Cong. Rec. H12230-02 (daily ed. Nov. 17, 1999).

3 Like all FTC consent orders, these orders are for settlement purposes only and do not constitute an admission by the cigar manufacturers of any law violation.

SURGEON GENERAL WARNING: Cigar Smoking Can Cause Cancers Of The Mouth And Throat, Even If You Do Not Inhale.

SURGEON GENERAL WARNING: Cigar Smoking Can Cause Lung Cancer And Heart Disease.

SURGEON GENERAL WARNING: Cigars Are Not A Safe Alternative To Cigarettes.

SURGEON GENERAL WARNING: Tobacco Use Increases The Risk Of Infertility, Stillbirth, And Low Birth Weight.

SURGEON GENERAL WARNING: Tobacco Smoke Increases The Risk Of Lung Cancer And Heart Disease, Even In Nonsmokers.

Part II of the proposed orders sets out specific format requirements for the warnings, which are designed to ensure that the warnings are visible and readable. Part II also requires that the warning statements on labeling and advertising be printed in black print on a solid white background, and be capitalized and punctuated as set forth in Part I.

Part III specifies the location and size requirements for the disclosure of the health warnings on cigar *labels*. The orders require that the warning be displayed on the principal display panel of the package. For the majority of cigar boxes, the orders define the principal display panel to be the larger of the top or front panel of the package, thus ensuring that the warning is in the most noticeable location. The orders make an exception for boxes of premium (hand-rolled) cigars, providing that the warning can appear on the top or front of the box, depending upon which panel is more likely to be seen by consumers.

Part IV sets forth the specific format and size requirements for the disclosure of the health warnings on cigar *advertising*. The orders provide that the warning shall be in black print on a white background and be centered in a black ruled rectangular box. Part IV specifies how to calculate the size of the warning and where to place the warning in various types of advertising, including periodicals, merchandisers, functional items, catalogues and cigar packages that also function as point-of-sale displays.

Part V specifies how to make the required disclosures in audio and video advertisements, including radio, television, the Internet, tapes and films. The orders require that in interactive media, such as the Internet, the warnings must be displayed in an unavoidable manner on every Web page.

Part VI of the proposed orders addresses requirements for the disclosure of the warnings on utilitarian items. Utilitarian items are treated like other advertising, and the warning statements must appear in a rectangular box format, in a size based upon the item's total advertising display area.

Part VII provides that cooperative advertisements paid for in whole or in part by a respondent must include the warnings, with the exception of very small print advertisements containing only brand name and price information.

Part VIII sets forth the specific requirements for the rotation, display and distribution of the warning statements on cigar packages. For each cigar brand, respondents must display each of the five required warning statements randomly in as equal a number of times as possible, and must distribute the packages randomly in all parts of the U.S.A. in which they are marketed.

Part IX provides that, on most types of advertising, the five warning statements shall be rotated in an alternating sequence every three months. Part IX provides for equal simultaneous display of the warning statements on merchandisers, cigar boxes that can function as open package displays and utilitarian items. Parts VIII and IX of the proposed orders also require the

companies to submit to the Commission for approval plans for the display of the warnings on cigar packages and advertisements, and to comply with the plans as approved.

Part X of the proposed orders states that the Commission will consider state or local requirements for different health warnings on any cigar labeling or advertising that is required to display the FTC warning to be in conflict with the orders.

Part XI provides a safe harbor in the event the companies have taken reasonable steps to assure compliance; in the event of labels or advertisements that do not comply with the order, the proposed respondents will bear the burden of establishing that reasonable steps were taken to comply with the order. This same safe harbor provision is included in the Commission's smokeless tobacco regulations.

Part XII of the proposed orders states that the warning requirements shall become effective one hundred and eighty (180) days after issuance of the order.

Part XIII provides that in the event the Federal Cigarette Labeling and Advertising Act or the Comprehensive Smokeless Tobacco Health Education Act or the Commission's Smokeless Tobacco Regulations are amended or modified to change the size or format of the warnings for cigarettes or smokeless tobacco, the cigar orders may be reopened to determine whether the size or format of the warnings for cigars should be modified to conform to such changes.

Parts XIV through XVI of the proposed orders contain standard recordkeeping, reporting and compliance requirements.

The proposed orders do not contain a sunset provision due to the importance of the health warnings required therein.

Objectives of the Proposed Orders

The Commission's intent in obtaining the proposed consent orders is to provide a uniform national system of health warnings on cigar labeling and advertising. National health warnings that are clear and conspicuous benefit consumers. Here, the cigar warnings will prevent future deception and unfairness by providing important information with which consumers nationwide can make more informed choices.[4]

Each of the five warnings conveys a simple and specific message about health risks associated with cigar use. The orders' requirements for display of the warnings on packaging and advertising will provide sufficient repetition of each warning statement to contribute to long-term recall of each message, while decreasing the likelihood that any one message will become so familiar and overexposed that its effectiveness will "wear out." Together, the five warnings provide a comprehensive warning scheme that provides necessary and important information to consumers nationwide.

Because the proposed respondents' cigar packaging and advertising is disseminated in the national marketplace, a comprehensive national system of simple and direct warnings will provide the greatest benefits to consumers. Moreover, multiple, and potentially inconsistent, warnings on individual packages or advertisements could neutralize or negate those benefits. Such multiple warnings may be confusing to consumers and undercut the saliency of the warnings required by these consent orders. Further, they are likely to have the unintended effect of making it more difficult for consumers to process the warning messages required here. And, while diminished effectiveness could result when *one* state mandates additional warnings on packages or advertisements bearing the Commission warnings, the problem

4 Uniform national health warnings likewise benefit national competition. Multiple different warnings can raise costs and regulatory burdens for national marketers such as the proposed respondents.

will be exacerbated if more than one state imposes requirements applicable to a single package or advertisement.

In light of the important benefits from a national warning system, Part X of the Commission's orders preempts state or local requirements for different health warnings on any cigar labeling or advertising that is required to display the FTC warnings. At the same time, the Commission recognizes the critically important role that states play in consumer protection and tobacco control. The provision does not affect other state or local requirements. For example, required warnings for types of advertising that are not covered by the proposed orders (such as shelf talkers under a certain size), or state or local restrictions on advertising placement or youth access to tobacco products are not affected. It is the Commission's intent that this provision apply only to state requirements for different health warnings by companies who have entered into the FTC consent orders, and only to packages and advertising required to contain the federally-mandated warnings.

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

Complaint

IN THE MATTER OF

LANE LIMITED

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

Docket C-3969; File No. 0023203
Complaint, August 18, 2000--Decision, August 18, 2000

This consent order addresses Lane's cigar advertising. The complaint alleges that the failure to disclose that regular cigar smoking can cause serious adverse health effects is both unfair and deceptive in violation of Section 5 of the FTC Act. The consent order requires the respondents to make a clear and conspicuous disclosure using specified warning statements on cigar labels and in advertising.

Participants

For the Commission: *Mamie Kresses, Rosemary Rosso, Michael Ostheimer, Anne V. Maher, C. Lee Peeler, Marc Winerman, Christian S. White*, and *BE.*

For the Respondents: *Andrew L. Zausner* and *Peter J. Kadzik, Dickstein Shapiro Morin & Oshinsky.*

COMPLAINT

The Federal Trade Commission, having reason to believe that Lane Limited, 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 Lane Limited is a New York corporation with its principal office or place of business at 2280 Mountain Industrial Blvd., Tucker, GA 30084.

2. Respondent has manufactured, advertised, labeled, offered for sale, sold, and distributed products to the public, including cigars.

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. In its advertising, labeling, and sale of cigars, respondent has failed to disclose that regular cigar smoking can cause several serious adverse health conditions including, but not limited to, cancers of the mouth (oral cavity), throat (esophagus and larynx), and lungs. These facts would be material to consumers in their purchase and use of the product. Respondent=s failure to disclose these facts has caused or is likely to cause substantial injury to consumers that is not outweighed by countervailing benefits to consumers or competition and is not reasonably avoidable by consumers. Therefore, the failure to disclose these facts was, and is, an unfair or deceptive practice.

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

THEREFORE, the Federal Trade Commission this eighteenth day of August, 2000, has issued this complaint against respondent.

By the Commission.

DECISION AND ORDER

IT IS HEREBY AGREED by and between, by its duly authorized officers, and counsel for the Federal Trade Commission that:

Decision and Order

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

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

1. Respondent, Lane Limited., is a New York corporation with its office or principal place of business located at 2280 Mountain Industrial Blvd., Tucker, Georgia 30084.

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

ORDER

DEFINITIONS

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

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

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

3. "Cigar" shall mean any roll of tobacco wrapped in leaf tobacco or wrapped in any other substance containing tobacco, other than a cigarette within the meaning of the Federal Cigarette Labeling and Advertising Act, 15 U.S.C. 1331, et seq.

4. "Little cigar" shall mean any roll of tobacco wrapped in leaf tobacco or any substance containing tobacco (other than any roll of tobacco which is a cigarette within the meaning of the Federal Cigarette Labeling and Advertising Act, 15 U.S.C. 1331, et seq.) and as to which one thousand units weigh not more than three pounds.

5. APremium cigar@ shall mean a hand-rolled cigar that is wrapped in a natural tobacco leaf wrapper.

6. "Commission" shall mean the Federal Trade Commission.

7. "Brand" shall mean cigars that bear a common identifying name or mark, regardless of whether the cigars are differentiated by type of product, size, shape, packaging, or other characteristic,

and, in the case of generic or private label cigars, means all cigars produced or imported by respondent or its affiliates.

8. "Package" shall mean any pack, box, carton, tube, can, jar, container or wrapping in which any cigar is offered for sale, sold or otherwise distributed to consumers, but for purposes of this order, package does not include: (a) any shipping container or wrapping used solely for transporting cigars in bulk or quantity to respondent or packagers, processors, wholesalers or retailers unless the container or wrapping is intended for use as a retail display or (b) any wrapping or container that bears no written, printed or graphic matter. Any package that is also used as a point-of-sale display item shall also constitute "advertising" for purposes of this order.

9. "Label" shall mean any written, printed or graphic matter affixed to or appearing on any package containing a cigar, with the exception of any revenue stamp affixed to a cigar or any cigar band with a total surface area less than three (3) square inches.

10. "Utilitarian item" shall mean any item, other than cigars, that is sold or given or caused to be sold or given by respondent to consumers for their personal use, and that display cigar advertising such as a brand name, logo or selling message. Such items include, but are not limited to, matchbooks, lighters, clothing or sporting goods. The term "logo" includes any brand specific characteristics of a cigar, including but not limited to any recognizable pattern of colors or symbols associated with a particular brand.

11. Unless otherwise exempted by specific provision of this order, "advertisement" (including the terms "advertise" and "advertising") shall include any oral, written, printed, pictorial or graphic representation made by or on behalf of respondent, the purpose or effect of which is to promote the sale or use of any cigar manufactured or distributed by respondent, including but not limited to a statement, illustration or depiction in or on a brochure, newspaper, magazine, free standing insert, pamphlet, leaflet, circular, mailer, book insert, letter, coupon, catalog, poster, chart,

billboard, transit advertisement, utilitarian item, sponsorship material, package insert, film, slide, or point of purchase display (including any cigar package that can be used as an open package display or any functional item such as a clock or change mat that includes advertising), any advertising on television, radio, or the Internet, and any other electronic advertisement.

I.

IT IS ORDERED that respondent, directly or through any corporation, subsidiary, division, or other device, shall not fail to disclose clearly and conspicuously and in the manner set forth in this order one of the following statements on all cigar labels and, unless otherwise exempt from disclosure by this order, in all cigar advertisements:

SURGEON GENERAL WARNING: Cigar Smoking Can Cause Cancers Of The Mouth And Throat, Even If You Do Not Inhale.

SURGEON GENERAL WARNING: Cigar Smoking Can Cause Lung Cancer And Heart Disease.

SURGEON GENERAL WARNING: Tobacco Use Increases The Risk Of Infertility, Stillbirth And Low Birth Weight.

SURGEON GENERAL WARNING: Cigars Are Not A Safe Alternative To Cigarettes.

SURGEON GENERAL WARNING: Tobacco Smoke Increases The Risk Of Lung Cancer And Heart Disease, Even In Nonsmokers.

Provided, however, that the warning statement requirements shall not apply to company and divisional names, when used as such; to signs on factories, plants, warehouses or other facilities

related to the manufacture or storage of cigars; to corporate or financial reports; to communications to security holders and others who customarily receive copies of these communications; or to promotional materials that are distributed to wholesalers, dealers or merchants but not to consumers, and are not for public display or consumer exposure. In addition, these warning statement requirements do not apply to shelf-talkers and similar product locators with a display area of twelve (12) square inches or less.

II.

IT IS FURTHER ORDERED THAT for purposes of this order, "clear and conspicuous" disclosure of any warning statement required by this order means that the warning statement shall be set out as follows:

A. The warning statement shall be capitalized and punctuated as indicated in Part I of this order, with the words "**SURGEON GENERAL WARNING**" printed in uppercase letters in bold print and the remaining words printed with the initial letter of each word in uppercase print and the remaining letters in lowercase print;

B. The warning statement shall be printed in black against a solid white background. In addition, the warning statement shall appear in two to four lines that are parallel to each other as well to the base of the cigar package or advertisement; and

C. The language of the warning statement shall appear:

(1) For any cigar label, the warning statement shall be set out in the English language. If the label of a cigar contains a required warning in a language other than English, the required warning shall also appear in English.

(2) For any cigar advertisement, the warning statement shall be set out in the English language, except as follows:

(a) In the case of any cigar advertising in a newspaper, magazine, periodical, or other publication that is not in English, the warning statement shall appear in the predominant language of the publication in which the advertisement appears; and

(b) In the case of any other cigar advertising, the warning statement shall appear in the language of the target audience (ordinarily the language principally used in the advertisement).

III.

IT IS FURTHER ORDERED that in the case of any cigar label required by the order to bear a warning statement, the following requirements shall apply:

A. The warning statement shall be in a clear and conspicuous place on the principal display panel of the label. The principal display panel is the part of a label that is likely to be displayed, presented, shown, or examined under normal viewing conditions. In the case of a rectangular or square cigar package, the principal display panel shall mean the front or top panel of the package, whichever is larger. *Provided, however*, that in the case of a rectangular or square package containing ten or more premium cigars, the warning shall appear on the front or top panel of the package, whichever is the principal display panel. In the case of a cylindrical cigar package, a clear and conspicuous place shall mean along the length of the cylinder and perpendicular to the top and bottom of the cylinder.

Provided, however, that in the case of any cigar package, the warning statement shall not be deemed to be in a clear and conspicuous place if it:

(1) appears or is affixed on the bottom of the package;

(2) is printed or affixed on the tear line;

(3) is printed or affixed on cellophane or any plastic film overwrap (with the exception of any package whose label appears only on cellophane or plastic film overwrap); or

(4) is printed or affixed in any other location that will be obliterated when the package is opened.

B. The warning statement shall appear in a clear and conspicuous and legible type and be separated in every direction from other written or graphic matter on the label by the equivalent of at least twice the height of the "W" in the word "WARNING" in that warning statement.

C. On a rectangular or square cigar package, the warning statement shall appear in the type style Univers 57 Condensed in the following type size in relation to total surface area of the largest panel of the package:

(1) Surface area of less than 5 square inches
Type size: 9 point

(2) Surface area of 5 to less than 10 square inches
Type size: 10 point

(3) Surface area of 10 to less than 15 square inches
Type size: 11 point

(4) Surface area of 15 to less than 25 square inches
Type size: 12 point

(5) Surface area of 25 to less than 40 square inches
Type size: 14 point

(6) Surface area of 40 or more square inches
Type size: 16 point

D. On a cylindrical cigar package, the warning statement shall appear in Univers 57 Condensed type style in the following type size in relation to the lengthwise surface area of the cylinder:

(1) Surface area of less than 5 square inches
Type size: 8 point

(2) Surface area of 5 to less than 15 square inches
Type size: 9 point

(3) Surface area of 15 to less than 25 square inches
Type size: 10 point

(4) Surface area of 25 to less than 30 square inches
Type size: 12 point

(5) Surface area of 30 to less than 40 square inches
Type size: 14 point

(6) Surface area of 40 or more square inches
Type size: 16 point

E. The warning statements required by this order may be affixed to the cigar label by sticker, provided that: the sticker is placed directly on the surface of the package, and not on any cellophane or other plastic film overwrap (with the exception of any package whose label appears only on cellophane or plastic film overwrap); the sticker is permanent (non-removable) and durable; and the warning statement complies with all other requirements of Parts I, II, III and VIII herein.

F. Each cigar label shall meet the requirements of this order upon being prepared for distribution in commerce for retail sale, but before it is distributed to be offered for retail sale. In the case of any cigar that is imported, the warning statements may be affixed in the country of origin or after importation into the United States, but shall be affixed before the cigar is removed

from bond for sale or distribution. This section does not apply to any cigar that is manufactured, packaged or imported in the United States for export from the United States, if the cigar is not in fact distributed in commerce for use in the United States.

IV.

IT IS FURTHER ORDERED that in the case of any advertisement required by this order to bear a warning statement, except advertisements covered by Part V of this order, the following requirements shall apply:

A. The warning statement shall appear in a ruled rectangular box with the enclosing rule printed in black, and shall be centered both horizontally and vertically within the rectangular box and separated from any edge of the rule by at least one-half the height of the "W" in the word "WARNING" in the warning statement;

B. The warning statement shall be in a clear and conspicuous place. For purposes of this part, a "clear and conspicuous place"shall mean a location within the advertisement that is separated from any other written or textual matter or any graphic designs, elements or geometric forms by a distance from the outside rule at least twice the height of the "W" in the word "WARNING" in that warning statement. In addition, the disclosure shall not be positioned in the margin of a print advertisement. *Provided further*, the warning statement shall not be included as an integral part of a specific design or illustration in the advertisement, such as a picture of the package, unless at least 80 percent of the area of the advertisement is taken up by a picture of the package.

C. The size of the warning statement shall be clear and conspicuous and shall be in Univers 57 Condensed type style, with the following outside dimensions and type size in relation to the advertising display area of the advertisement:

(1) Total area of less than 15 square inches
Border: 2c" by :"
Rule width: 1 point
Type size: 9 point

(2) Total area of 15 to less than 65 square inches
Border: 3c" by :"
Rule width: 2 point
Type size: 11 point

(3) Total area of 65 to less than 110 square inches
Border: 32" by f"
Rule width: 2 point
Type size: 13 point

(4) Total area of 110 to less than 180 square inches
Border: 4c" by 1"
Rule width: 2 point
Type size: 15 point

(5) Total area of 180 to less than 360 square inches
Border: 4d" inches by 1c"
Rule width: 2 point
Type size: 16 point

(6) Total area of 360 to less than 470 square inches
Border: 5" by 13"
Rule width: 22 point
Type size: 18 point

(7) Total area of 470 to less than 720 square inches

Border: 83" by 1:"
Rule width: 3 point
Type size: 30 point

(8) Total area of 5 to less than 10 square feet
Border: 11" by 32"
Rule width: 6 point
Type size: 43 point

(9) Total area of 10 to less than 20 square feet
Border: 1' 4" by 32"
Rule width: 8 point
Type size: 58 point

(10) Total area of 20 to less than 40 square feet
Border: 2' 8" by 1'
Rule width: 3"
Type size: 12" (Cap Height)

(11) Total area of 40 to less than 80 square feet
Border: 3' 4" by 1' 2"
Rule width: d"
Type size: 23" (Cap Height)

(12)Total area of 80 to less than 160 square feet
Border: 5' 8" by 2' 4"
Rule width: :"
Letter height: 32" (Cap Height)

(13) Total area of 160 to less than 350 square feet
Border: 19' 4" by 7' 4"
Rule width: 1:"
Letter height:11" (Cap Height)

(14) Total area of 350 to 1200 square feet
Border: 20' by 7' 8"
Rule width: 23"
Letter height:12" (Cap Height)

Decision and Order

(15) Total area of 1200 square feet or more
Border: 27' 4" by 9' 4"
Rule width: 3"
Letter height: 1' 4" (Cap Height)

D. In determining the outside dimensions, type size and placement of the warning statement in any advertisement in a newspaper, magazine or other periodical that appears on more than one page:

(1) A double full page or multiple full page advertisement shall not be required to have more than one warning, but the outside dimensions and type size of the warning statement shall be determined by the aggregate advertising display area of the entire advertisement;

(2) An advertisement that occupies one full page and part of another page shall not be required to have more than one warning, but the outside dimensions and type size of the warning statement shall be determined by the aggregate advertising display area of the entire advertisement and the warning shall appear on the full page on which the advertisement appears; and

(3) An advertisement that occupies parts of two or more pages shall not be required to contain more than one warning, but the outside dimensions and type size of the warning statement shall be determined by the aggregate advertising display area of the entire advertisement and the warning shall appear on the page that contains the greater (or greatest) part of the advertisement.

E. In determining the outside dimensions, type size and placement of the warning statement on any point-of sale advertisement with curved, irregular or multiple surfaces:

(1) In the case of point-of-sale items that are designed to contain products ("merchandisers") such as counter and floor displays, package dispensers, racks and gondolas:

(a) Where the merchandiser itself contains no cigar advertising, the merchandiser shall not require a warning statement;

(b) Where the merchandiser contains cigar advertising, the outside dimensions and type size of the warning statement shall be determined by the aggregate advertising display area of all of the surfaces containing such advertising;

(c) On merchandisers displaying advertising on more than one side, the warning statement shall be placed on the largest side of the item that is visible to the public from its normal viewing position.

(d) For merchandiser formats designed and in use as of May 1, 2000 where the height or width of the display panel on which the warning statement must appear is less than the height or width of the border of the warning statement required by Part IV.C of this order, respondent may submit for approval, and the Commission shall approve upon a showing of practical necessity, a warning statement that has an alternative outside border provided that the warning statement has the same rule width, type size and total area as required by Part IV.C.

(2) In the case of functional items such as clocks, change mats, change trays and welcome signs, the outside dimensions and type size of the warning statement shall be determined by the surface area of that side of the item which contains advertising, unless the advertising is clearly separated from the remainder of the area of that side by clear border lines of a contrasting color and one-quarter inch in width, in which event the size of the warning statement shall be determined by the surface area within the border area containing the advertising.

F. In the case of a cigar package that also can function as a point-of-sale display, such item shall also comply with the advertising provisions of this order. In determining the outside dimensions, type size and placement of the advertising warning statement on such item:

(1) in the case of a package that itself contains two or more packages of cigars, the item shall comply with the requirements of Part IV.E.1 of this order; and

(2) in the case of a package that contains two or more individual cigars, and can function as an open package display:

(a) the warning statement shall be placed on the principal display panel of the interior of the package and shall be positioned so that it is visible to the public from any normal viewing position; and

(b) the outside dimensions, type size and style of the warning statement shall be determined by the area of the panel on which the statement is placed.

G. For any catalogue, leaflet, brochure or other non-point-of-sale promotional advertisement that has more than one page:

(1) An advertisement that occupies up to four pages shall not be required to contain more than one warning, but the outside dimensions and type size of the warning statement shall be determined by the aggregate advertising display area of the entire advertisement and the warning shall appear on the page that contains the greater (or greatest) part of the advertisement; and

(2) An advertisement that occupies more than four pages shall be required to contain multiple warnings on alternating pages, with the outside dimensions and type size of the warning statement determined by the twice the advertising display area of the page containing the warning.

V.

IT IS FURTHER ORDERED that in a television, radio, Internet or other electronic advertisement, or any other audio or video advertisement, including but not limited to videotapes, cassettes, discs, films, filmstrips, audiotapes or other types of sound recordings, "clear and conspicuous" disclosure shall mean as follows:

A. If the advertisement has a visual component, the warning statement shall be superimposed on the screen in black print on a white background enclosed in a black rectangular box format, as specified in Parts IV.A and IV.B above, and its size, duration on the screen and location shall be sufficient for an ordinary consumer to read and comprehend it;

B. If the advertisement has an audio component, the warning statement shall be announced orally and shall be delivered in a volume, cadence, and location sufficient for an ordinary consumer to hear and comprehend it;

Provided, however, in the case of an audio advertisement in a retail store or other place where cigars are offered for sale, no warning shall be required, even if respondent provides an incentive for disseminating the advertisement, so long as the announcement includes only the brand name or product identifier, the price, and the product's location in the store.

C. If the advertisement has both a visual and an audio component, the warning statement shall be superimposed on the screen in a rectangular box format and announced orally in

compliance with the requirements set out in Sub-parts A and B of this Part V of the order. In addition to the foregoing, in advertising in an interactive electronic medium such as the Internet or online services, the disclosure shall be presented in an unavoidable manner on every Web page, online service page, or other electronic page, and shall not be accessed or displayed through hyperlinks, pop-ups, interstitials or other similar means.

D. Pursuant to the Federal Cigarette Labeling and Advertising Act, 15 U.S.C. 1331, et seq, it shall be unlawful for respondent to disseminate any advertisement for little cigars on any medium of electronic communication subject to the jurisdiction of the Federal Communications Commission.

VI.

IT IS FURTHER ORDERED that in the case of advertisements for cigars on utilitarian items:

A. The warning statements required by this order shall be in a clear and conspicuous and legible type and shall appear within the rectangular box format specified in Part IV;

B. The warning statement required by this order must be in a clear and conspicuous location on the object. A clear and conspicuous location on the object is one that is proximate to and on the same surface as the cigar advertising, and is visible when the brand name, logo or selling message is visible.

C. The outside dimensions and type style and size of the warning statement shall conform to the requirements set forth in Part IV.C of this order. For purposes of determining the outside dimensions and type size of the warning statement, the advertising display area for an advertisement on a utilitarian item shall be the visible area on which the advertising appears. For example, the advertising display area for a shirt bearing a brand name, logo or selling message on the front or back is the entire front or back of the shirt, excluding any sleeves.

For a shirt bearing a brand name, logo or selling message on the sleeve, the advertising display area is the sleeve.

D. If the cigar advertising appears in more than one location on the utilitarian item, the warning either:

(1) Shall appear proximate to each area with the advertising; or

(2) Shall appear only once on the item, however, in such case, the advertising display area shall be the aggregate of all the surface areas on which any advertising appears.

E. The warning statement required by this order must be printed, embossed, embroidered or otherwise affixed to the utilitarian item with a permanence and durability that is comparable to the permanence and durability of the brand name, logo, or selling message. *Provided, however*, that if a product brand name or logo is embroidered on a hat, and a legible warning cannot be embroidered in the proper size due to technological limitations, the warning may be affixed to the hat by another method, so long as its permanence and durability is comparable to that of the brand name, logo or selling message.

F. For fabric baseball style hats, the warning statement shall appear in the Number 3 size as set forth in Part IV.C of this order.

G. For those utilitarian items under eight (8) square inches that are viewed predominantly by the user, the warning statement shall be:

(1) Printed on the package of the item, if the item is disseminated in a package to the consumer. The total surface area of the package shall comprise the advertising display area for purposes of determining the outside dimensions and type size of the warning statement; or

(2) Placed in the form of a sticker or decal directly onto the item in the Number 1 warning size as set forth in Part IV.C of this order. The item shall be packaged in such a way to ensure that the sticker cannot be removed before it is received by the consumer.

VII.

IT IS FURTHER ORDERED that all cooperative advertisements paid for, directly or indirectly, in whole or in part, by respondent must bear the required warning. *Provided, however,* in the case of a print advertisement with a display area of four (4) square inches or less, disseminated by a retailer, no warning is required so long as the advertisement contains only the brand name or other product identifier and a price. In addition, no warning is required in the case of certain in-store audio announcements as described in Part V.B of this order.

VIII.

IT IS FURTHER ORDERED that with regard to the rotation, display, and distribution of warning statements on cigar packages, respondent shall:

A. Display each of the five warning statements required by this order randomly in each twelve (12) month period in as equal a number of times as possible on the labels of each brand of the product and distribute the packages randomly in all parts of the United States in which the cigars are marketed.

Provided, however, that for purposes of this order, the phrase "as equal a number of times as possible" shall permit deviations of four (4) percent or less in a 12-month period.

Provided further, that the term "random distribution" shall mean that nothing in the production or distribution process of a cigar would prevent the five warning statements on the package from being distributed evenly in all parts of the United States where the product is marketed.

B. No later than ninety (90) days after the effective date of this order, respondent shall submit to the Commission or its designated representative for approval a plan that provides for the display of the five warning statements on packages of cigars as required by this order, and comply with the plan as approved. This plan shall be sufficiently detailed to enable the Commission to determine whether the warning statements appear on the package in a manner consistent with the requirements of this order. The equal display requirements may be satisfied by one of the following three methods:

(1) A plan may satisfy the requirements by providing for the engraving or preparation of cylinders, plates, or equivalent production materials in a manner that results in the simultaneous printing of the five required warnings in as near an equal number of times as possible under the circumstances;

(2) A plan may satisfy the requirements by providing for the preparation of separate cylinders, plates, and equivalent production materials and requiring that they be changed at fixed intervals in a manner that results in the display of the five required warnings in as near an equal number of times as possible under the circumstances during a one-year period; or

(3) A plan may satisfy the requirements by providing that stickers bearing the five required warnings be printed in equal numbers and affixed randomly to packages of the product.

Provided, however, nothing in this part of the order requires the use of more than one warning statement on the label of any brand during any given part of the 12-month period except for a cigar package that also functions as a cigar display (which must also comply with the advertising requirements of this order).

C. A plan for the rotation, display, and distribution of warning statements on cigar packages shall include representative samples of labels with each of the five warning statements required by this order. This provision does not require submission of a label with each of the required warning statements for every brand marketed by respondent, and shall be deemed to be satisfied by submission of labels for different types of cigars, and a range of cigar package sizes for each type of product.

IX.

IT IS FURTHER ORDERED that with regard to the rotation, display, and dissemination of warning statements in cigar advertising:

A. Except as specified in sub-part B. herein, respondent shall rotate each of the five warning statements required by this order every three (3) months in an alternating sequence in the advertisement for each brand of cigar. *Provided, however*, that any rotational system may take into account practical constraints on the production and distribution of advertising.

B. On merchandisers, utilitarian items, and cigar packages that can function as open package displays, respondent shall display each of the five warning statements required by this order randomly in each twelve (12) month period in as equal a number of times as possible, and distribute such merchandisers, utilitarian items, and cigar packages randomly in all parts of the United States in which they are disseminated.

Provided, however, that for purposes of this sub-part, the phrase "as equal a number of times as possible" shall permit deviations of four (4) percent or less in a 12-month period.

Provided further, that the term "random distribution" shall mean that nothing in the production or distribution process of a merchandiser or cigar package than can be used as an open

package display would prevent the five warning statements on such display items from being distributed evenly in all parts of the United States where they are disseminated.

C. No later than ninety (90) days after the effective date of this order, respondent shall submit a plan to the Commission or its designated representative for approval that ensures that:

(1) On all types of cigar advertising, except those specified in sub-part B herein, the five warning statements are rotated every three months in alternating sequence, and that respondents comply with the plan as approved. This rotational warning requirement may be satisfied by requiring either that all brands display the same warning during each three-month period or that each brand display a different warning during a given three-month period. A plan shall describe the method of rotation and shall include a list of the designated warnings for each three-month period during the first fifteen (15) month period for each brand. The plan also shall describe the method that will be used to ensure proper rotation in different advertising media in sufficient detail to ensure compliance with the order. For advertising in newspapers, magazines, or other periodicals, the method of rotation shall be set either according to the cover date or the closing date of the publication. For posters and placards, the method of rotation shall be set according to either the scheduled or actual appearance of the advertising. The method of rotation for point-of-sale and non-point-of-sale promotional materials such as leaflets, pamphlets, coupons, direct mail circulars, paperback book inserts, or non-print items shall be set according to either the date the materials or objects are ordered or the date on which the objects or materials are scheduled to be disseminated, provided that the production of such materials or objects is carried out in a manner consistent with customary business practices.

(2) On merchandisers, utilitarian items, and cigar packages that can function as open package displays, each of the five warning statements required by this order is displayed randomly in each twelve (12) month period in as equal a number of times as possible.

D. A plan for the rotation, display, and dissemination of warning statements in cigar advertising shall include a representative sample of each of the five warning statements required by this order. This provision does not require the submission of all advertising for each brand marketed by respondent and shall be deemed to be satisfied by submission of actual examples of different types of advertising materials or acetates or other facsimiles indicating the warning statements as they would appear in advertisements of varying sizes.

X.

IT IS FURTHER ORDERED that the Commission intends that this order provide for a uniform, federally mandated system of health warnings on cigar packages and advertisements nationwide. Entry of the order will uniformly provide consumers in all states and territories of the United States with clear, conspicuous and understandable disclosures of the health risks of cigar smoking. The Commission shall consider a state or local requirement for the display of different warnings concerning cigar smoking and health to be in conflict with the requirements of this order, but only to the extent that any such provision requires that the state or local warning appear on any package or advertisement required to display the Federal warnings set forth herein.

XI.

IT IS FURTHER ORDERED that respondent shall be deemed to be in compliance with this order if it has taken reasonable steps to:

A. Provide, by written contract or other clear and prominent instructions, for the rotation of the label statements required by this order;

B. Give clear and prominent instruction and, to the extent possible, furnish materials (such as film negatives, acetates or other facsimiles) for the production of cigar packages and advertising that contain the required warning statements; and

C. Prevent and correct mistakes, errors or omissions that have come to its attention.

Provided, however, that in the event of the distribution of labels or the publication of advertisements that do not conform to this order, the burden of establishing that reasonable steps have been taken to comply with this order (including fulfilling the conditions described in this Part of the order) shall rest solely with respondent.

XII.

IT IS FURTHER ORDERED that the cigar labeling and advertising requirements of Parts III through VI of this order shall become effective one hundred eighty (180) days after issuance of the order. *Provided, however*, that:

A. The cigar labeling requirements of Part III of this order shall not apply to cigars distributed in commerce for retail sale prior to one hundred eighty (180) days from the date of issuance of the order.

B. The cigar advertising requirements of Parts IV through VII of this order shall take into account practical constraints on respondent with respect to the production and distribution of advertising submitted for publication prior to one hundred eighty (180) days from the date of issuance of the order.

XIII.

IT IS FURTHER ORDERED that in the event the Federal Cigarette Labeling and Advertising Act, 15 U.S.C. 1331, et seq., or the Comprehensive Smokeless Tobacco Health Education Act, 15 U.S.C. 4401, et seq., or the regulations implemented thereunder, 16 C.F.R. 307, et seq., are amended or modified to change the size or format of the warning requirements for the labeling or advertising of cigarettes or smokeless tobacco, respectively, such action shall constitute sufficient changed conditions to reopen this order to determine whether the size or the format of the warning statements contained herein should be altered or modified to conform to the same or similar size or format.

XIV.

IT IS FURTHER ORDERED that respondent and its successors and assigns, for five (5) years after the last date of dissemination of any cigar label or advertisement covered by this order, shall maintain and upon request make available to the Federal Trade Commission business records demonstrating their compliance with the terms and provisions of this order, including, but not limited, to a sample copy of each advertisement and label disseminated during such time.

XV.

IT IS FURTHER ORDERED that respondent and its successors and assigns shall deliver a copy of this order to all current and future principals, officers, directors, and managers, and to all current and future employees, agents, and representatives having responsibilities with respect to the subject matter of this order, and shall secure from each such person a signed and dated statement acknowledging receipt of the order. Respondent 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.

XVI.

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

XVII.

IT IS FURTHER ORDERED that respondent and its successors and assigns shall, at such times as the Commission may require, file with the Commission a report, in writing, setting forth in detail the manner and form in which they have complied with this order.

By the Commission.

Analysis of Proposed Consent Orders to Aid Public Comment

The Federal Trade Commission has accepted, subject to final approval, agreements containing consent orders from the following cigar manufacturers, importers or marketers:

Swisher International, Inc. (Matter No. 002-3199);
Consolidated Cigar Corporation (Matter No. 002-3200);
Havatampa, Inc. (Matter No. 002-3204);
General Cigar Holdings, Inc. (Matter No. 002-3202);
John Middleton, Inc. (Matter No. 002-3205);
Lane Limited (Matter No. 002-3203); and
Swedish Match North America, Inc.(Matter No. 002-3201).

The proposed consent orders have been placed on the public record for thirty (30) days for the receipt of comments by interested persons. Comments received during this period will become part of the public record. After thirty (30) days, the Commission will again review the agreements and comments received and will decide whether it should withdraw from the agreements and take appropriate action or make final the agreements' proposed orders.

Background

In July 1999, the Federal Trade Commission provided a Report to Congress, entitled Cigar Sales and Advertising and Promotional Expenditures for Calendar Years 1996 and 1997 ("Commission Report"). The Commission Report recommended that, given the significant increase in cigar smoking prevalence in recent years and the serious health risks posed by cigar smoking,[1] cigars should be regulated in a manner consistent with the current regulation of cigarettes and smokeless tobacco. *See* Federal

1 *See* U.S. Department of Health and Human Services, National Cancer Institute, Smoking and Tobacco Control Monograph No. 9 Cigars: Health Effects and Trends (1998), NIH publication no. 98-4302 (ACigar Monograph@).

Cigarette Labeling and Advertising Act, 15 U.S.C. § 1331 et seq.; Comprehensive Smokeless Tobacco Health Education Act of 1986, 15 U.S.C. § 4401 et seq. The Commission Report recommended that Congress either enact legislation to require federal health warnings on cigar labeling and advertising or direct the Commission to use its existing authority, under Section 5 of the Federal Trade Commission Act, to require cigar health warnings.

In November 1999, in the Joint Explanatory Note of the Conferees to H.R. 3421 Appropriations Bill, the Congressional Appropriations Committees responded to the Commission Report by directing the FTC to report back to the Committees on Commission plans to establish "uniform Federal health warning label[s]."[2]

After consideration of the National Cancer Institute=s findings in its Cigar Monograph on the serious health risks of regular cigar use, and the failure of cigar advertising and labeling to disclose these health risks, the Commission negotiated consent agreements with the seven largest cigar companies to implement health warnings on cigar labeling and advertising nationwide.[3]

The Proposed Complaints and Orders

The proposed complaints each allege that the failure to disclose that regular cigar smoking can cause serious adverse health effects is both unfair and deceptive in violation of Section 5 of the FTC Act. Part I of the proposed orders requires the respondents to make a clear and conspicuous disclosure of the following warning statements on cigar labels and in advertising:

---

2 145 Cong. Rec. H12230-02 (daily ed. Nov. 17, 1999).

3 Like all FTC consent orders, these orders are for settlement purposes only and do not constitute an admission by the cigar manufacturers of any law violation.

SURGEON GENERAL WARNING: Cigar Smoking Can Cause Cancers Of The Mouth And Throat, Even If You Do Not Inhale.

SURGEON GENERAL WARNING: Cigar Smoking Can Cause Lung Cancer And Heart Disease.

SURGEON GENERAL WARNING: Cigars Are Not A Safe Alternative To Cigarettes.

SURGEON GENERAL WARNING: Tobacco Use Increases The Risk Of Infertility, Stillbirth, And Low Birth Weight.

SURGEON GENERAL WARNING: Tobacco Smoke Increases The Risk Of Lung Cancer And Heart Disease, Even In Nonsmokers.

Part II of the proposed orders sets out specific format requirements for the warnings, which are designed to ensure that the warnings are visible and readable. Part II also requires that the warning statements on labeling and advertising be printed in black print on a solid white background, and be capitalized and punctuated as set forth in Part I.

Part III specifies the location and size requirements for the disclosure of the health warnings on cigar *labels*. The orders require that the warning be displayed on the principal display panel of the package. For the majority of cigar boxes, the orders define the principal display panel to be the larger of the top or front panel of the package, thus ensuring that the warning is in the most noticeable location. The orders make an exception for boxes of premium (hand-rolled) cigars, providing that the warning can appear on the top or front of the box, depending upon which panel is more likely to be seen by consumers.

Part IV sets forth the specific format and size requirements for the disclosure of the health warnings on cigar *advertising*. The orders provide that the warning shall be in black print on a white

background and be centered in a black ruled rectangular box. Part IV specifies how to calculate the size of the warning and where to place the warning in various types of advertising, including periodicals, merchandisers, functional items, catalogues and cigar packages that also function as point-of-sale displays.

Part V specifies how to make the required disclosures in audio and video advertisements, including radio, television, the Internet, tapes and films. The orders require that in interactive media, such as the Internet, the warnings must be displayed in an unavoidable manner on every Web page.

Part VI of the proposed orders addresses requirements for the disclosure of the warnings on utilitarian items. Utilitarian items are treated like other advertising, and the warning statements must appear in a rectangular box format, in a size based upon the item's total advertising display area.

Part VII provides that cooperative advertisements paid for in whole or in part by a respondent must include the warnings, with the exception of very small print advertisements containing only brand name and price information.

Part VIII sets forth the specific requirements for the rotation, display and distribution of the warning statements on cigar packages. For each cigar brand, respondents must display each of the five required warning statements randomly in as equal a number of times as possible, and must distribute the packages randomly in all parts of the U.S.A. in which they are marketed.

Part IX provides that, on most types of advertising, the five warning statements shall be rotated in an alternating sequence every three months. Part IX provides for equal simultaneous display of the warning statements on merchandisers, cigar boxes that can function as open package displays and utilitarian items. Parts VIII and IX of the proposed orders also require the companies to submit to the Commission for approval plans for the

display of the warnings on cigar packages and advertisements, and to comply with the plans as approved.

Part X of the proposed orders states that the Commission will consider state or local requirements for different health warnings on any cigar labeling or advertising that is required to display the FTC warning to be in conflict with the orders.

Part XI provides a safe harbor in the event the companies have taken reasonable steps to assure compliance; in the event of labels or advertisements that do not comply with the order, the proposed respondents will bear the burden of establishing that reasonable steps were taken to comply with the order. This same safe harbor provision is included in the Commission's smokeless tobacco regulations.

Part XII of the proposed orders states that the warning requirements shall become effective one hundred and eighty (180) days after issuance of the order.

Part XIII provides that in the event the Federal Cigarette Labeling and Advertising Act or the Comprehensive Smokeless Tobacco Health Education Act or the Commission's Smokeless Tobacco Regulations are amended or modified to change the size or format of the warnings for cigarettes or smokeless tobacco, the cigar orders may be reopened to determine whether the size or format of the warnings for cigars should be modified to conform to such changes.

Parts XIV through XVI of the proposed orders contain standard recordkeeping, reporting and compliance requirements.

The proposed orders do not contain a sunset provision due to the importance of the health warnings required therein.

Analysis to Aid Public Comment

Objectives of the Proposed Orders

The Commission's intent in obtaining the proposed consent orders is to provide a uniform national system of health warnings on cigar labeling and advertising. National health warnings that are clear and conspicuous benefit consumers. Here, the cigar warnings will prevent future deception and unfairness by providing important information with which consumers nationwide can make more informed choices.[4]

Each of the five warnings conveys a simple and specific message about health risks associated with cigar use. The orders' requirements for display of the warnings on packaging and advertising will provide sufficient repetition of each warning statement to contribute to long-term recall of each message, while decreasing the likelihood that any one message will become so familiar and overexposed that its effectiveness will "wear out." Together, the five warnings provide a comprehensive warning scheme that provides necessary and important information to consumers nationwide.

Because the proposed respondents' cigar packaging and advertising is disseminated in the national marketplace, a comprehensive national system of simple and direct warnings will provide the greatest benefits to consumers. Moreover, multiple, and potentially inconsistent, warnings on individual packages or advertisements could neutralize or negate those benefits. Such multiple warnings may be confusing to consumers and undercut the saliency of the warnings required by these consent orders. Further, they are likely to have the unintended effect of making it more difficult for consumers to process the warning messages required here. And, while diminished effectiveness could result when *one* state mandates additional warnings on packages or

4 Uniform national health warnings likewise benefit national competition. Multiple different warnings can raise costs and regulatory burdens for national marketers such as the proposed respondents.

advertisements bearing the Commission warnings, the problem will be exacerbated if more than one state imposes requirements applicable to a single package or advertisement.

In light of the important benefits from a national warning system, Part X of the Commission's orders preempts state or local requirements for different health warnings on any cigar labeling or advertising that is required to display the FTC warnings. At the same time, the Commission recognizes the critically important role that states play in consumer protection and tobacco control. The provision does not affect other state or local requirements. For example, required warnings for types of advertising that are not covered by the proposed orders (such as shelf talkers under a certain size), or state or local restrictions on advertising placement or youth access to tobacco products are not affected. It is the Commission's intent that this provision apply only to state requirements for different health warnings by companies who have entered into the FTC consent orders, and only to packages and advertising required to contain the federally-mandated warnings.

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

Complaint

IN THE MATTER OF

HAVATAMPA, INC.

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

Docket C-3965; File No. 0023204
Complaint, August 18, 2000--Decision, August 18, 2000

This consent order addresses Havatampa's cigar advertising. The complaint alleges that the failure to disclose that regular cigar smoking can cause serious adverse health effects is both unfair and deceptive in violation of Section 5 of the FTC Act. The consent order requires the respondents to make a clear and conspicuous disclosure using specified warning statements on cigar labels and in advertising.

Participants

For the Commission: *Mamie Kresses, Rosemary Rosso, Michael Ostheimer, Anne V. Maher, C. Lee Peeler, Marc Winerman, Christian S. White*, and *BE.*

For the Respondents: *Andrew L. Zausner* and *Peter J. Kadzik, Dickstein Shapiro Morin & Oshinsky.*

COMPLAINT

The Federal Trade Commission, having reason to believe that Havatampa, 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 Havatampa, Inc., is a Delaware corporation with its principal office or place of business at 3901 Riga Boulevard, Tampa, FL 33601.

2. Respondent has manufactured, advertised, labeled, offered for sale, sold, and distributed products to the public, including cigars.

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. In its advertising, labeling, and sale of cigars, respondent has failed to disclose that regular cigar smoking can cause several serious adverse health conditions including, but not limited to, cancers of the mouth (oral cavity), throat (esophagus and larynx), and lungs. These facts would be material to consumers in their purchase and use of the product. Respondent=s failure to disclose these facts has caused or is likely to cause substantial injury to consumers that is not outweighed by countervailing benefits to consumers or competition and is not reasonably avoidable by consumers. Therefore, the failure to disclose these facts was, and is, an unfair or deceptive practice.

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

THEREFORE, the Federal Trade Commission this eighteenth day of August, 2000, has issued this complaint against respondent.

By the Commission.

DECISION AND ORDER

IT IS HEREBY AGREED by and between, by its duly authorized officers, and counsel for the Federal Trade Commission that:

Decision and Order

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

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

1. Respondent, Havatampa, Inc., is a Delaware corporation with its office or principal place of business located at 3901 Riga Boulevard, Tampa, Florida 33601.

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

ORDER

DEFINITIONS

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

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

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

3. "Cigar" shall mean any roll of tobacco wrapped in leaf tobacco or wrapped in any other substance containing tobacco, other than a cigarette within the meaning of the Federal Cigarette Labeling and Advertising Act, 15 U.S.C.1331, et seq.

4. "Little cigar" shall mean any roll of tobacco wrapped in leaf tobacco or any substance containing tobacco (other than any roll of tobacco which is a cigarette within the meaning of the Federal Cigarette Labeling and Advertising Act, 15 U.S.C.1331, et seq.) and as to which one thousand units weigh not more than three pounds.

5. APremium cigar@ shall mean a hand-rolled cigar that is wrapped in a natural tobacco leaf wrapper.

6. "Commission" shall mean the Federal Trade Commission.

7. "Brand" shall mean cigars that bear a common identifying name or mark, regardless of whether the cigars are differentiated by type of product, size, shape, packaging, or other characteristic,

and, in the case of generic or private label cigars, means all cigars produced or imported by respondent or its affiliates.

8. "Package" shall mean any pack, box, carton, tube, can, jar, container or wrapping in which any cigar is offered for sale, sold or otherwise distributed to consumers, but for purposes of this order, package does not include: (a) any shipping container or wrapping used solely for transporting cigars in bulk or quantity to respondent or packagers, processors, wholesalers or retailers unless the container or wrapping is intended for use as a retail display or (b) any wrapping or container that bears no written, printed or graphic matter. Any package that is also used as a point-of-sale display item shall also constitute "advertising" for purposes of this order.

9. "Label" shall mean any written, printed or graphic matter affixed to or appearing on any package containing a cigar, with the exception of any revenue stamp affixed to a cigar or any cigar band with a total surface area less than three (3) square inches.

10. "Utilitarian item" shall mean any item, other than cigars, that is sold or given or caused to be sold or given by respondent to consumers for their personal use, and that display cigar advertising such as a brand name, logo or selling message. Such items include, but are not limited to, matchbooks, lighters, clothing or sporting goods. The term "logo" includes any brand specific characteristics of a cigar, including but not limited to any recognizable pattern of colors or symbols associated with a particular brand.

11. Unless otherwise exempted by specific provision of this order, "advertisement" (including the terms "advertise" and "advertising") shall include any oral, written, printed, pictorial or graphic representation made by or on behalf of respondent, the purpose or effect of which is to promote the sale or use of any cigar manufactured or distributed by respondent, including but not limited to a statement, illustration or depiction in or on a brochure,

newspaper, magazine, free standing insert, pamphlet, leaflet, circular, mailer, book insert, letter, coupon, catalog, poster, chart, billboard, transit advertisement, utilitarian item, sponsorship material, package insert, film, slide, or point of purchase display (including any cigar package that can be used as an open package display or any functional item such as a clock or change mat that includes advertising), any advertising on television, radio, or the Internet, and any other electronic advertisement.

I.

IT IS ORDERED that respondent, directly or through any corporation, subsidiary, division, or other device, shall not fail to disclose clearly and conspicuously and in the manner set forth in this order one of the following statements on all cigar labels and, unless otherwise exempt from disclosure by this order, in all cigar advertisements:

SURGEON GENERAL WARNING: Cigar Smoking Can Cause Cancers Of The Mouth And Throat, Even If You Do Not Inhale.

SURGEON GENERAL WARNING: Cigar Smoking Can Cause Lung Cancer And Heart Disease.

SURGEON GENERAL WARNING: Tobacco Use Increases The Risk Of Infertility, Stillbirth And Low Birth Weight.

SURGEON GENERAL WARNING: Cigars Are Not A Safe Alternative To Cigarettes.

SURGEON GENERAL WARNING: Tobacco Smoke Increases The Risk Of Lung Cancer And Heart Disease, Even In Nonsmokers.

Provided, however, that the warning statement requirements shall not apply to company and divisional names, when used as such; to signs on factories, plants, warehouses or other facilities

related to the manufacture or storage of cigars; to corporate or financial reports; to communications to security holders and others who customarily receive copies of these communications; or to promotional materials that are distributed to wholesalers, dealers or merchants but not to consumers, and are not for public display or consumer exposure. In addition, these warning statement requirements do not apply to shelf-talkers and similar product locators with a display area of twelve (12) square inches or less.

II.

IT IS FURTHER ORDERED THAT for purposes of this order, "clear and conspicuous" disclosure of any warning statement required by this order means that the warning statement shall be set out as follows:

A. The warning statement shall be capitalized and punctuated as indicated in Part I of this order, with the words "**SURGEON GENERAL WARNING**" printed in uppercase letters in bold print and the remaining words printed with the initial letter of each word in uppercase print and the remaining letters in lowercase print;

B. The warning statement shall be printed in black against a solid white background. In addition, the warning statement shall appear in two to four lines that are parallel to each other as well to the base of the cigar package or advertisement; and

C. The language of the warning statement shall appear:

(1) For any cigar label, the warning statement shall be set out in the English language. If the label of a cigar contains a required warning in a language other than English, the required warning shall also appear in English.

(2) For any cigar advertisement, the warning statement shall be set out in the English language, except as follows:

(a) In the case of any cigar advertising in a newspaper, magazine, periodical, or other publication that is not in English, the warning statement shall appear in the predominant language of the publication in which the advertisement appears; and

(b) In the case of any other cigar advertising, the warning statement shall appear in the language of the target audience (ordinarily the language principally used in the advertisement).

III.

IT IS FURTHER ORDERED that in the case of any cigar label required by the order to bear a warning statement, the following requirements shall apply:

A. The warning statement shall be in a clear and conspicuous place on the principal display panel of the label. The principal display panel is the part of a label that is likely to be displayed, presented, shown, or examined under normal viewing conditions. In the case of a rectangular or square cigar package, the principal display panel shall mean the front or top panel of the package, whichever is larger. *Provided, however*, that in the case of a rectangular or square package containing ten or more premium cigars, the warning shall appear on the front or top panel of the package, whichever is the principal display panel. In the case of a cylindrical cigar package, a clear and conspicuous place shall mean along the length of the cylinder and perpendicular to the top and bottom of the cylinder.

Provided, however, that in the case of any cigar package, the warning statement shall not be deemed to be in a clear and conspicuous place if it:

(1) appears or is affixed on the bottom of the package;

(2) is printed or affixed on the tear line;

(3) is printed or affixed on cellophane or any plastic film overwrap (with the exception of any package whose label appears only on cellophane or plastic film overwrap); or

(4) is printed or affixed in any other location that will be obliterated when the package is opened.

B. The warning statement shall appear in a clear and conspicuous and legible type and be separated in every direction from other written or graphic matter on the label by the equivalent of at least twice the height of the "W" in the word "WARNING" in that warning statement.

C. On a rectangular or square cigar package, the warning statement shall appear in the type style Univers 57 Condensed in the following type size in relation to total surface area of the largest panel of the package:

(1) Surface area of less than 5 square inches
Type size: 9 point

(2) Surface area of 5 to less than 10 square inches
Type size: 10 point

(3) Surface area of 10 to less than 15 square inches
Type size: 11 point

(4) Surface area of 15 to less than 25 square inches
Type size: 12 point

(5) Surface area of 25 to less than 40 square inches
Type size: 14 point

(6) Surface area of 40 or more square inches
Type size: 16 point

D. On a cylindrical cigar package, the warning statement shall appear in Univers 57 Condensed type style in the following type size in relation to the lengthwise surface area of the cylinder:

(1) Surface area of less than 5 square inches
Type size: 8 point

(2) Surface area of 5 to less than 15 square inches
Type size: 9 point

(3) Surface area of 15 to less than 25 square inches
Type size: 10 point

(4) Surface area of 25 to less than 30 square inches
Type size: 12 point

(5) Surface area of 30 to less than 40 square inches
Type size: 14 point

(6) Surface area of 40 or more square inches
Type size: 16 point

E. The warning statements required by this order may be affixed to the cigar label by sticker, provided that: the sticker is placed directly on the surface of the package, and not on any cellophane or other plastic film overwrap (with the exception of any package whose label appears only on cellophane or plastic film overwrap); the sticker is permanent (non-removable) and durable; and the warning statement complies with all other requirements of Parts I, II, III and VIII herein.

F. Each cigar label shall meet the requirements of this order upon being prepared for distribution in commerce for retail sale, but before it is distributed to be offered for retail sale. In the case of any cigar that is imported, the warning statements may be

affixed in the country of origin or after importation into the United States, but shall be affixed before the cigar is removed from bond for sale or distribution. This section does not apply to any cigar that is manufactured, packaged or imported in the United States for export from the United States, if the cigar is not in fact distributed in commerce for use in the United States.

IV.

IT IS FURTHER ORDERED that in the case of any advertisement required by this order to bear a warning statement, except advertisements covered by Part V of this order, the following requirements shall apply:

A. The warning statement shall appear in a ruled rectangular box with the enclosing rule printed in black, and shall be centered both horizontally and vertically within the rectangular box and separated from any edge of the rule by at least one-half the height of the "W" in the word "WARNING" in the warning statement;

B. The warning statement shall be in a clear and conspicuous place. For purposes of this part, a "clear and conspicuous place"shall mean a location within the advertisement that is separated from any other written or textual matter or any graphic designs, elements or geometric forms by a distance from the outside rule at least twice the height of the "W" in the word "WARNING" in that warning statement. In addition, the disclosure shall not be positioned in the margin of a print advertisement. *Provided further*, the warning statement shall not be included as an integral part of a specific design or illustration in the advertisement, such as a picture of the package, unless at least 80 percent of the area of the advertisement is taken up by a picture of the package.

C. The size of the warning statement shall be clear and conspicuous and shall be in Univers 57 Condensed type style, with the following outside dimensions and type size in relation to the advertising display area of the advertisement:

(1) Total area of less than 15 square inches
Border: 2c" by :"
Rule width: 1 point
Type size: 9 point

(2) Total area of 15 to less than 65 square inches
Border: 3c" by :"
Rule width: 2 point
Type size: 11 point

(3) Total area of 65 to less than 110 square inches
Border: 32" by f"
Rule width: 2 point
Type size: 13 point

(4) Total area of 110 to less than 180 square inches
Border: 4c" by 1"
Rule width: 2 point
Type size: 15 point

(5) Total area of 180 to less than 360 square inches
Border: 4d" inches by 1c"
Rule width: 2 point
Type size: 16 point

(6) Total area of 360 to less than 470 square inches
Border: 5" by 13"
Rule width: 22 point
Type size: 18 point

(7) Total area of 470 to less than 720 square inches
Border: 83" by 1:"
Rule width: 3 point

Type size: 30 point

(8) Total area of 5 to less than 10 square feet
Border: 11" by 32"
Rule width: 6 point
Type size: 43 point

(9) Total area of 10 to less than 20 square feet
Border: 1' 4" by 32"
Rule width: 8 point
Type size: 58 point

(10) Total area of 20 to less than 40 square feet
Border: 2' 8" by 1'
Rule width: 3"
Type size: 12" (Cap Height)

(11) Total area of 40 to less than 80 square feet
Border: 3' 4" by 1' 2"
Rule width: d"
Type size: 23" (Cap Height)

(12) Total area of 80 to less than 160 square feet
Border: 5' 8" by 2' 4"
Rule width: :"
Letter height: 32" (Cap Height)

(13) Total area of 160 to less than 350 square feet
Border: 19' 4" by 7' 4"
Rule width: 1:"
Letter height:11" (Cap Height)

(14) Total area of 350 to 1200 square feet
Border: 20' by 7' 8"
Rule width: 23"
Letter height:12" (Cap Height)

Decision and Order

(15) Total area of 1200 square feet or more
Border: 27' 4" by 9' 4"
Rule width: 3"
Letter height: 1' 4" (Cap Height)

D. In determining the outside dimensions, type size and placement of the warning statement in any advertisement in a newspaper, magazine or other periodical that appears on more than one page:

(1) A double full page or multiple full page advertisement shall not be required to have more than one warning, but the outside dimensions and type size of the warning statement shall be determined by the aggregate advertising display area of the entire advertisement;

(2) An advertisement that occupies one full page and part of another page shall not be required to have more than one warning, but the outside dimensions and type size of the warning statement shall be determined by the aggregate advertising display area of the entire advertisement and the warning shall appear on the full page on which the advertisement appears; and

(3) An advertisement that occupies parts of two or more pages shall not be required to contain more than one warning, but the outside dimensions and type size of the warning statement shall be determined by the aggregate advertising display area of the entire advertisement and the warning shall appear on the page that contains the greater (or greatest) part of the advertisement.

E. In determining the outside dimensions, type size and placement of the warning statement on any point-of sale advertisement with curved, irregular or multiple surfaces:

(1) In the case of point-of-sale items that are designed to contain products ("merchandisers") such as counter and floor displays, package dispensers, racks and gondolas:

(a) Where the merchandiser itself contains no cigar advertising, the merchandiser shall not require a warning statement;

(b) Where the merchandiser contains cigar advertising, the outside dimensions and type size of the warning statement shall be determined by the aggregate advertising display area of all of the surfaces containing such advertising;

(c) On merchandisers displaying advertising on more than one side, the warning statement shall be placed on the largest side of the item that is visible to the public from its normal viewing position.

(d) For merchandiser formats designed and in use as of May 1, 2000 where the height or width of the display panel on which the warning statement must appear is less than the height or width of the border of the warning statement required by Part IV.C of this order, respondent may submit for approval, and the Commission shall approve upon a showing of practical necessity, a warning statement that has an alternative outside border provided that the warning statement has the same rule width, type size and total area as required by Part IV.C.

(2) In the case of functional items such as clocks, change mats, change trays and welcome signs, the outside dimensions and type size of the warning statement shall be determined by the surface area of that side of the item which contains advertising, unless the advertising is clearly separated from the remainder of the area of that side by clear border lines of a contrasting color and one-quarter inch in width, in which event the size of the

warning statement shall be determined by the surface area within the border area containing the advertising.

F. In the case of a cigar package that also can function as a point-of-sale display, such item shall also comply with the advertising provisions of this order. In determining the outside dimensions, type size and placement of the advertising warning statement on such item:

(1) in the case of a package that itself contains two or more packages of cigars, the item shall comply with the requirements of Part IV.E.1 of this order; and

(2) in the case of a package that contains two or more individual cigars, and can function as an open package display:

(a) the warning statement shall be placed on the principal display panel of the interior of the package and shall be positioned so that it is visible to the public from any normal viewing position; and

(b) the outside dimensions, type size and style of the warning statement shall be determined by the area of the panel on which the statement is placed.

G. For any catalogue, leaflet, brochure or other non-point-of-sale promotional advertisement that has more than one page:

(1) An advertisement that occupies up to four pages shall not be required to contain more than one warning, but the outside dimensions and type size of the warning statement shall be determined by the aggregate advertising display area of the entire advertisement and the warning shall appear on the page that contains the greater (or greatest) part of the advertisement; and

(2) An advertisement that occupies more than four pages shall be required to contain multiple warnings on alternating pages, with the outside dimensions and type size of the warning statement determined by the twice the advertising display area of the page containing the warning.

V.

IT IS FURTHER ORDERED that in a television, radio, Internet or other electronic advertisement, or any other audio or video advertisement, including but not limited to videotapes, cassettes, discs, films, filmstrips, audiotapes or other types of sound recordings, "clear and conspicuous" disclosure shall mean as follows:

A. If the advertisement has a visual component, the warning statement shall be superimposed on the screen in black print on a white background enclosed in a black rectangular box format, as specified in Parts IV.A and IV.B above, and its size, duration on the screen and location shall be sufficient for an ordinary consumer to read and comprehend it;

B. If the advertisement has an audio component, the warning statement shall be announced orally and shall be delivered in a volume, cadence, and location sufficient for an ordinary consumer to hear and comprehend it;

Provided, however, in the case of an audio advertisement in a retail store or other place where cigars are offered for sale, no warning shall be required, even if respondent provides an incentive for disseminating the advertisement, so long as the announcement includes only the brand name or product identifier, the price, and the product's location in the store.

C. If the advertisement has both a visual and an audio component, the warning statement shall be superimposed on the screen in a rectangular box format and announced orally in compliance with the requirements set out in Sub-parts A and B of this Part V of the order. In addition to the foregoing, in

advertising in an interactive electronic medium such as the Internet or online services, the disclosure shall be presented in an unavoidable manner on every Web page, online service page, or other electronic page, and shall not be accessed or displayed through hyperlinks, pop-ups, interstitials or other similar means.

D. Pursuant to the Federal Cigarette Labeling and Advertising Act, 15 U.S.C. 1331, et seq, it shall be unlawful for respondent to disseminate any advertisement for little cigars on any medium of electronic communication subject to the jurisdiction of the Federal Communications Commission.

VI.

IT IS FURTHER ORDERED that in the case of advertisements for cigars on utilitarian items:

A. The warning statements required by this order shall be in a clear and conspicuous and legible type and shall appear within the rectangular box format specified in Part IV;

B. The warning statement required by this order must be in a clear and conspicuous location on the object. A clear and conspicuous location on the object is one that is proximate to and on the same surface as the cigar advertising, and is visible when the brand name, logo or selling message is visible.

C. The outside dimensions and type style and size of the warning statement shall conform to the requirements set forth in Part IV.C of this order. For purposes of determining the outside dimensions and type size of the warning statement, the advertising display area for an advertisement on a utilitarian item shall be the visible area on which the advertising appears. For example, the advertising display area for a shirt bearing a brand name, logo or selling message on the front or back is the entire front or back of the shirt, excluding any sleeves.

For a shirt bearing a brand name, logo or selling message on the sleeve, the advertising display area is the sleeve.

D. If the cigar advertising appears in more than one location on the utilitarian item, the warning either:

(1) Shall appear proximate to each area with the advertising; or

(2) Shall appear only once on the item, however, in such case, the advertising display area shall be the aggregate of all the surface areas on which any advertising appears.

E. The warning statement required by this order must be printed, embossed, embroidered or otherwise affixed to the utilitarian item with a permanence and durability that is comparable to the permanence and durability of the brand name, logo, or selling message. *Provided, however*, that if a product brand name or logo is embroidered on a hat, and a legible warning cannot be embroidered in the proper size due to technological limitations, the warning may be affixed to the hat by another method, so long as its permanence and durability is comparable to that of the brand name, logo or selling message.

F. For fabric baseball style hats, the warning statement shall appear in the Number 3 size as set forth in Part IV.C of this order.

G. For those utilitarian items under eight (8) square inches that are viewed predominantly by the user, the warning statement shall be:

(1) Printed on the package of the item, if the item is disseminated in a package to the consumer. The total surface area of the package shall comprise the advertising display area for purposes of determining the outside dimensions and type size of the warning statement; or
(2) Placed in the form of a sticker or decal directly onto the item in the Number 1 warning size as set forth in Part IV.C

of this order. The item shall be packaged in such a way to ensure that the sticker cannot be removed before it is received by the consumer.

VII.

IT IS FURTHER ORDERED that all cooperative advertisements paid for, directly or indirectly, in whole or in part, by respondent must bear the required warning. *Provided, however*, in the case of a print advertisement with a display area of four (4) square inches or less, disseminated by a retailer, no warning is required so long as the advertisement contains only the brand name or other product identifier and a price. In addition, no warning is required in the case of certain in-store audio announcements as described in Part V.B of this order.

VIII.

IT IS FURTHER ORDERED that with regard to the rotation, display, and distribution of warning statements on cigar packages, respondent shall:

A. Display each of the five warning statements required by this order randomly in each twelve (12) month period in as equal a number of times as possible on the labels of each brand of the product and distribute the packages randomly in all parts of the United States in which the cigars are marketed.

Provided, however, that for purposes of this order, the phrase "as equal a number of times as possible" shall permit deviations of four (4) percent or less in a 12-month period.

Provided further, that the term "random distribution" shall mean that nothing in the production or distribution process of a cigar would prevent the five warning statements on the package from being distributed evenly in all parts of the United States where the product is marketed.

B. No later than ninety (90) days after the effective date of this order, respondent shall submit to the Commission or its designated representative for approval a plan that provides for the display of the five warning statements on packages of cigars as required by this order, and comply with the plan as approved. This plan shall be sufficiently detailed to enable the Commission to determine whether the warning statements appear on the package in a manner consistent with the requirements of this order. The equal display requirements may be satisfied by one of the following three methods:

(1) A plan may satisfy the requirements by providing for the engraving or preparation of cylinders, plates, or equivalent production materials in a manner that results in the simultaneous printing of the five required warnings in as near an equal number of times as possible under the circumstances;

(2) A plan may satisfy the requirements by providing for the preparation of separate cylinders, plates, and equivalent production materials and requiring that they be changed at fixed intervals in a manner that results in the display of the five required warnings in as near an equal number of times as possible under the circumstances during a one-year period; or

(3) A plan may satisfy the requirements by providing that stickers bearing the five required warnings be printed in equal numbers and affixed randomly to packages of the product.

Provided, however, nothing in this part of the order requires the use of more than one warning statement on the label of any brand during any given part of the 12-month period except for a cigar package that also functions as a cigar display (which must also comply with the advertising requirements of this order).

C. A plan for the rotation, display, and distribution of warning statements on cigar packages shall include representative

samples of labels with each of the five warning statements required by this order. This provision does not require submission of a label with each of the required warning statements for every brand marketed by respondent, and shall be deemed to be satisfied by submission of labels for different types of cigars, and a range of cigar package sizes for each type of product.

IX.

IT IS FURTHER ORDERED that with regard to the rotation, display, and dissemination of warning statements in cigar advertising:

A. Except as specified in sub-part B. herein, respondent shall rotate each of the five warning statements required by this order every three (3) months in an alternating sequence in the advertisement for each brand of cigar. *Provided, however*, that any rotational system may take into account practical constraints on the production and distribution of advertising.

B. On merchandisers, utilitarian items, and cigar packages that can function as open package displays, respondent shall display each of the five warning statements required by this order randomly in each twelve (12) month period in as equal a number of times as possible, and distribute such merchandisers, utilitarian items, and cigar packages randomly in all parts of the United States in which they are disseminated.

Provided, however, that for purposes of this sub-part, the phrase "as equal a number of times as possible" shall permit deviations of four (4) percent or less in a 12-month period.

Provided further, that the term "random distribution" shall mean that nothing in the production or distribution process of a merchandiser or cigar package than can be used as an open

package display would prevent the five warning statements on such display items from being distributed evenly in all parts of the United States where they are disseminated.

C. No later than ninety (90) days after the effective date of this order, respondent shall submit a plan to the Commission or its designated representative for approval that ensures that:

(1) On all types of cigar advertising, except those specified in sub-part B herein, the five warning statements are rotated every three months in alternating sequence, and that respondents comply with the plan as approved. This rotational warning requirement may be satisfied by requiring either that all brands display the same warning during each three-month period or that each brand display a different warning during a given three-month period. A plan shall describe the method of rotation and shall include a list of the designated warnings for each three-month period during the first fifteen (15) month period for each brand. The plan also shall describe the method that will be used to ensure proper rotation in different advertising media in sufficient detail to ensure compliance with the order. For advertising in newspapers, magazines, or other periodicals, the method of rotation shall be set either according to the cover date or the closing date of the publication. For posters and placards, the method of rotation shall be set according to either the scheduled or actual appearance of the advertising. The method of rotation for point-of-sale and non-point-of-sale promotional materials such as leaflets, pamphlets, coupons, direct mail circulars, paperback book inserts, or non-print items shall be set according to either the date the materials or objects are ordered or the date on which the objects or materials are scheduled to be disseminated, provided that the production of such materials or objects is carried out in a manner consistent with customary business practices.

(2) On merchandisers, utilitarian items, and cigar packages that can function as open package displays, each of the

five warning statements required by this order is displayed randomly in each twelve (12) month period in as equal a number of times as possible.

D. A plan for the rotation, display, and dissemination of warning statements in cigar advertising shall include a representative sample of each of the five warning statements required by this order. This provision does not require the submission of all advertising for each brand marketed by respondent and shall be deemed to be satisfied by submission of actual examples of different types of advertising materials or acetates or other facsimiles indicating the warning statements as they would appear in advertisements of varying sizes.

X.

IT IS FURTHER ORDERED that the Commission intends that this order provide for a uniform, federally mandated system of health warnings on cigar packages and advertisements nationwide. Entry of the order will uniformly provide consumers in all states and territories of the United States with clear, conspicuous and understandable disclosures of the health risks of cigar smoking. The Commission shall consider a state or local requirement for the display of different warnings concerning cigar smoking and health to be in conflict with the requirements of this order, but only to the extent that any such provision requires that the state or local warning appear on any package or advertisement required to display the Federal warnings set forth herein.

XI.

IT IS FURTHER ORDERED that respondent shall be deemed to be in compliance with this order if it has taken reasonable steps to:

A. Provide, by written contract or other clear and prominent instructions, for the rotation of the label statements required by this order;

B. Give clear and prominent instruction and, to the extent possible, furnish materials (such as film negatives, acetates or other facsimiles) for the production of cigar packages and advertising that contain the required warning statements; and

C. Prevent and correct mistakes, errors or omissions that have come to its attention.

Provided, however, that in the event of the distribution of labels or the publication of advertisements that do not conform to this order, the burden of establishing that reasonable steps have been taken to comply with this order (including fulfilling the conditions described in this Part of the order) shall rest solely with respondent.

XII.

IT IS FURTHER ORDERED that the cigar labeling and advertising requirements of Parts III through VI of this order shall become effective one hundred eighty (180) days after issuance of the order. *Provided, however*, that:

A. The cigar labeling requirements of Part III of this order shall not apply to cigars distributed in commerce for retail sale prior to one hundred eighty (180) days from the date of issuance of the order.

B. The cigar advertising requirements of Parts IV through VII of this order shall take into account practical constraints on respondent with respect to the production and distribution of advertising submitted for publication prior to one hundred eighty (180) days from the date of issuance of the order.

XIII.

IT IS FURTHER ORDERED that in the event the Federal Cigarette Labeling and Advertising Act, 15 U.S.C. 1331, et seq., or the Comprehensive Smokeless Tobacco Health Education Act, 15 U.S.C. 4401, et seq., or the regulations implemented thereunder, 16 C.F.R. 307, et seq., are amended or modified to change the size or format of the warning requirements for the labeling or advertising of cigarettes or smokeless tobacco, respectively, such action shall constitute sufficient changed conditions to reopen this order to determine whether the size or the format of the warning statements contained herein should be altered or modified to conform to the same or similar size or format.

XIV.

IT IS FURTHER ORDERED that respondent and its successors and assigns, for five (5) years after the last date of dissemination of any cigar label or advertisement covered by this order, shall maintain and upon request make available to the Federal Trade Commission business records demonstrating their compliance with the terms and provisions of this order, including, but not limited, to a sample copy of each advertisement and label disseminated during such time.

XV.

IT IS FURTHER ORDERED that respondent and its successors and assigns shall deliver a copy of this order to all current and future principals, officers, directors, and managers, and to all current and future employees, agents, and representatives having responsibilities with respect to the subject matter of this order, and shall secure from each such person a signed and dated statement acknowledging receipt of the order. Respondent 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.

XVI.

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

XVII.

IT IS FURTHER ORDERED that respondent and its successors and assigns shall, at such times as the Commission may require, file with the Commission a report, in writing, setting forth in detail the manner and form in which they have complied with this order.

By the Commission.

Analysis of Proposed Consent Orders to Aid Public Comment

The Federal Trade Commission has accepted, subject to final approval, agreements containing consent orders from the following cigar manufacturers, importers or marketers:

Swisher International, Inc. (Matter No. 002-3199);
Consolidated Cigar Corporation (Matter No. 002-3200);
Havatampa, Inc. (Matter No. 002-3204);
General Cigar Holdings, Inc. (Matter No. 002-3202);
John Middleton, Inc. (Matter No. 002-3205);
Lane Limited (Matter No. 002-3203); and
Swedish Match North America, Inc.(Matter No. 002-3201).

The proposed consent orders have been placed on the public record for thirty (30) days for the receipt of comments by interested persons. Comments received during this period will become part of the public record. After thirty (30) days, the Commission will again review the agreements and comments received and will decide whether it should withdraw from the agreements and take appropriate action or make final the agreements' proposed orders.

Background

In July 1999, the Federal Trade Commission provided a Report to Congress, entitled Cigar Sales and Advertising and Promotional Expenditures for Calendar Years 1996 and 1997 ("Commission Report"). The Commission Report recommended that, given the significant increase in cigar smoking prevalence in recent years and the serious health risks posed by cigar smoking,[1]

1 *See* U.S. Department of Health and Human Services, National Cancer Institute, Smoking and Tobacco Control Monograph No. 9 Cigars: Health Effects and Trends (1998), NIH publication no. 98-4302 (ACigar Monograph@).

cigars should be regulated in a manner consistent with the current regulation of cigarettes and smokeless tobacco. *See* Federal Cigarette Labeling and Advertising Act, 15 U.S.C. § 1331 et seq.; Comprehensive Smokeless Tobacco Health Education Act of 1986, 15 U.S.C. § 4401 et seq. The Commission Report recommended that Congress either enact legislation to require federal health warnings on cigar labeling and advertising or direct the Commission to use its existing authority, under Section 5 of the Federal Trade Commission Act, to require cigar health warnings.

In November 1999, in the Joint Explanatory Note of the Conferees to H.R. 3421 Appropriations Bill, the Congressional Appropriations Committees responded to the Commission Report by directing the FTC to report back to the Committees on Commission plans to establish "uniform Federal health warning label[s]."[2]

After consideration of the National Cancer Institute=s findings in its Cigar Monograph on the serious health risks of regular cigar use, and the failure of cigar advertising and labeling to disclose these health risks, the Commission negotiated consent agreements with the seven largest cigar companies to implement health warnings on cigar labeling and advertising nationwide.[3]

The Proposed Complaints and Orders

The proposed complaints each allege that the failure to disclose that regular cigar smoking can cause serious adverse health effects is both unfair and deceptive in violation of Section 5 of the FTC Act. Part I of the proposed orders requires the respondents to make a clear and conspicuous disclosure of the following warning statements on cigar labels and in advertising:

---

2 145 Cong. Rec. H12230-02 (daily ed. Nov. 17, 1999).

3 Like all FTC consent orders, these orders are for settlement purposes only and do not constitute an admission by the cigar manufacturers of any law violation.

SURGEON GENERAL WARNING: Cigar Smoking Can Cause Cancers Of The Mouth And Throat, Even If You Do Not Inhale.

SURGEON GENERAL WARNING: Cigar Smoking Can Cause Lung Cancer And Heart Disease.

SURGEON GENERAL WARNING: Cigars Are Not A Safe Alternative To Cigarettes.

SURGEON GENERAL WARNING: Tobacco Use Increases The Risk Of Infertility, Stillbirth, And Low Birth Weight.

SURGEON GENERAL WARNING: Tobacco Smoke Increases The Risk Of Lung Cancer And Heart Disease, Even In Nonsmokers.

Part II of the proposed orders sets out specific format requirements for the warnings, which are designed to ensure that the warnings are visible and readable. Part II also requires that the warning statements on labeling and advertising be printed in black print on a solid white background, and be capitalized and punctuated as set forth in Part I.

Part III specifies the location and size requirements for the disclosure of the health warnings on cigar *labels*. The orders require that the warning be displayed on the principal display panel of the package. For the majority of cigar boxes, the orders define the principal display panel to be the larger of the top or front panel of the package, thus ensuring that the warning is in the most noticeable location. The orders make an exception for boxes of premium (hand-rolled) cigars, providing that the warning can appear on the top or front of the box, depending upon which panel is more likely to be seen by consumers.

Part IV sets forth the specific format and size requirements for the disclosure of the health warnings on cigar *advertising*. The orders provide that the warning shall be in black print on a white background and be centered in a black ruled rectangular box. Part IV specifies how to calculate the size of the warning and where to place the warning in various types of advertising, including periodicals, merchandisers, functional items, catalogues and cigar packages that also function as point-of-sale displays.

Part V specifies how to make the required disclosures in audio and video advertisements, including radio, television, the Internet, tapes and films. The orders require that in interactive media, such as the Internet, the warnings must be displayed in an unavoidable manner on every Web page.

Part VI of the proposed orders addresses requirements for the disclosure of the warnings on utilitarian items. Utilitarian items are treated like other advertising, and the warning statements must appear in a rectangular box format, in a size based upon the item's total advertising display area.

Part VII provides that cooperative advertisements paid for in whole or in part by a respondent must include the warnings, with the exception of very small print advertisements containing only brand name and price information.

Part VIII sets forth the specific requirements for the rotation, display and distribution of the warning statements on cigar packages. For each cigar brand, respondents must display each of the five required warning statements randomly in as equal a number of times as possible, and must distribute the packages randomly in all parts of the U.S.A. in which they are marketed.

Part IX provides that, on most types of advertising, the five warning statements shall be rotated in an alternating sequence every three months. Part IX provides for equal simultaneous display of the warning statements on merchandisers, cigar boxes that can function as open package displays and utilitarian items. Parts VIII and IX of the proposed orders also require the

companies to submit to the Commission for approval plans for the display of the warnings on cigar packages and advertisements, and to comply with the plans as approved.

Part X of the proposed orders states that the Commission will consider state or local requirements for different health warnings on any cigar labeling or advertising that is required to display the FTC warning to be in conflict with the orders.

Part XI provides a safe harbor in the event the companies have taken reasonable steps to assure compliance; in the event of labels or advertisements that do not comply with the order, the proposed respondents will bear the burden of establishing that reasonable steps were taken to comply with the order. This same safe harbor provision is included in the Commission's smokeless tobacco regulations.

Part XII of the proposed orders states that the warning requirements shall become effective one hundred and eighty (180) days after issuance of the order.

Part XIII provides that in the event the Federal Cigarette Labeling and Advertising Act or the Comprehensive Smokeless Tobacco Health Education Act or the Commission's Smokeless Tobacco Regulations are amended or modified to change the size or format of the warnings for cigarettes or smokeless tobacco, the cigar orders may be reopened to determine whether the size or format of the warnings for cigars should be modified to conform to such changes.

Parts XIV through XVI of the proposed orders contain standard recordkeeping, reporting and compliance requirements.

The proposed orders do not contain a sunset provision due to the importance of the health warnings required therein.

Objectives of the Proposed Orders

The Commission's intent in obtaining the proposed consent orders is to provide a uniform national system of health warnings on cigar labeling and advertising. National health warnings that are clear and conspicuous benefit consumers. Here, the cigar warnings will prevent future deception and unfairness by providing important information with which consumers nationwide can make more informed choices.[4]

Each of the five warnings conveys a simple and specific message about health risks associated with cigar use. The orders' requirements for display of the warnings on packaging and advertising will provide sufficient repetition of each warning statement to contribute to long-term recall of each message, while decreasing the likelihood that any one message will become so familiar and overexposed that its effectiveness will "wear out." Together, the five warnings provide a comprehensive warning scheme that provides necessary and important information to consumers nationwide.

Because the proposed respondents' cigar packaging and advertising is disseminated in the national marketplace, a comprehensive national system of simple and direct warnings will provide the greatest benefits to consumers. Moreover, multiple, and potentially inconsistent, warnings on individual packages or advertisements could neutralize or negate those benefits. Such multiple warnings may be confusing to consumers and undercut the saliency of the warnings required by these consent orders. Further, they are likely to have the unintended effect of making it more difficult for consumers to process the warning messages required here. And, while diminished effectiveness could result when *one* state mandates additional warnings on packages or advertisements bearing the Commission warnings, the problem

4 Uniform national health warnings likewise benefit national competition. Multiple different warnings can raise costs and regulatory burdens for national marketers such as the proposed respondents.

will be exacerbated if more than one state imposes requirements applicable to a single package or advertisement.

In light of the important benefits from a national warning system, Part X of the Commission's orders preempts state or local requirements for different health warnings on any cigar labeling or advertising that is required to display the FTC warnings. At the same time, the Commission recognizes the critically important role that states play in consumer protection and tobacco control. The provision does not affect other state or local requirements. For example, required warnings for types of advertising that are not covered by the proposed orders (such as shelf talkers under a certain size), or state or local restrictions on advertising placement or youth access to tobacco products are not affected. It is the Commission's intent that this provision apply only to state requirements for different health warnings by companies who have entered into the FTC consent orders, and only to packages and advertising required to contain the federally-mandated warnings.

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

Complaint

IN THE MATTER OF

JOHN MIDDLETON, INC.

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

Docket C-3968; File No. 0023205
Complaint, August 18, 2000--Decision, August 18, 2000

This consent order addresses John Middleton, Inc.'s cigar advertising. The complaint alleges that the failure to disclose that regular cigar smoking can cause serious adverse health effects is both unfair and deceptive in violation of Section 5 of the FTC Act. The consent order requires the respondents to make a clear and conspicuous disclosure using specified warning statements on cigar labels and in advertising.

Participants

For the Commission: *Mamie Kresses, Rosemary Rosso, Michael Ostheimer, Anne V. Maher, C. Lee Peeler, Marc Winerman, Christian S. White*, and *BE.*

For the Respondents: *Andrew L. Zausner* and *Peter J. Kadzik, Dickstein Shapiro Morin & Oshinsky.*

COMPLAINT

The Federal Trade Commission, having reason to believe that John Middleton, 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 John Middleton, Inc., is a Pennsylvania corporation with its principal office or place of business at 418 West Church Road, King of Prussia, PA 19406.

2. Respondent has manufactured, advertised, labeled, offered for sale, sold, and distributed products to the public, including cigars.

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. In its advertising, labeling, and sale of cigars, respondent has failed to disclose that regular cigar smoking can cause several serious adverse health conditions including, but not limited to, cancers of the mouth (oral cavity), throat (esophagus and larynx), and lungs. These facts would be material to consumers in their purchase and use of the product. Respondent=s failure to disclose these facts has caused or is likely to cause substantial injury to consumers that is not outweighed by countervailing benefits to consumers or competition and is not reasonably avoidable by consumers. Therefore, the failure to disclose these facts was, and is, an unfair or deceptive practice.

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

THEREFORE, the Federal Trade Commission this eighteenth day of August, 2000, has issued this complaint against respondent.

By the Commission.

DECISION AND ORDER

IT IS HEREBY AGREED by and between, by its duly authorized officers, and counsel for the Federal Trade Commission that:

Decision and Order

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

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

1. Respondent, John Middleton, Inc., is a Pennsylvania corporation with its office or principal place of business located at 418 West Church Road, King of Prussia, Pennsylvania 19406.

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

ORDER

DEFINITIONS

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

1. Unless otherwise specified, "respondent" shall mean John Middleton, Inc., a corporation, its successors and assigns, and its officers, agents, representatives, and employees.

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

3. "Cigar" shall mean any roll of tobacco wrapped in leaf tobacco or wrapped in any other substance containing tobacco, other than a cigarette within the meaning of the Federal Cigarette Labeling and Advertising Act, 15 U.S.C.1331, et seq.

4. "Little cigar" shall mean any roll of tobacco wrapped in leaf tobacco or any substance containing tobacco (other than any roll of tobacco which is a cigarette within the meaning of the Federal Cigarette Labeling and Advertising Act, 15 U.S.C.1331, et seq.) and as to which one thousand units weigh not more than three pounds.

5. APremium cigar@ shall mean a hand-rolled cigar that is wrapped in a natural tobacco leaf wrapper.

6. "Commission" shall mean the Federal Trade Commission.

7. "Brand" shall mean cigars that bear a common identifying name or mark, regardless of whether the cigars are differentiated by type of product, size, shape, packaging, or other characteristic,

and, in the case of generic or private label cigars, means all cigars produced or imported by respondent or its affiliates.

8. "Package" shall mean any pack, box, carton, tube, can, jar, container or wrapping in which any cigar is offered for sale, sold or otherwise distributed to consumers, but for purposes of this order, package does not include: (a) any shipping container or wrapping used solely for transporting cigars in bulk or quantity to respondent or packagers, processors, wholesalers or retailers unless the container or wrapping is intended for use as a retail display or (b) any wrapping or container that bears no written, printed or graphic matter. Any package that is also used as a point-of-sale display item shall also constitute "advertising" for purposes of this order.

9. "Label" shall mean any written, printed or graphic matter affixed to or appearing on any package containing a cigar, with the exception of any revenue stamp affixed to a cigar or any cigar band with a total surface area less than three (3) square inches.

10. "Utilitarian item" shall mean any item, other than cigars, that is sold or given or caused to be sold or given by respondent to consumers for their personal use, and that display cigar advertising such as a brand name, logo or selling message. Such items include, but are not limited to, matchbooks, lighters, clothing or sporting goods. The term "logo" includes any brand specific characteristics of a cigar, including but not limited to any recognizable pattern of colors or symbols associated with a particular brand.

11. Unless otherwise exempted by specific provision of this order, "advertisement" (including the terms "advertise" and "advertising") shall include any oral, written, printed, pictorial or graphic representation made by or on behalf of respondent, the purpose or effect of which is to promote the sale or use of any cigar manufactured or distributed by respondent, including but not limited to a statement, illustration or depiction in or on a brochure, newspaper, magazine, free standing insert, pamphlet, leaflet,

circular, mailer, book insert, letter, coupon, catalog, poster, chart, billboard, transit advertisement, utilitarian item, sponsorship material, package insert, film, slide, or point of purchase display (including any cigar package that can be used as an open package display or any functional item such as a clock or change mat that includes advertising), any advertising on television, radio, or the Internet, and any other electronic advertisement.

I.

IT IS ORDERED that respondent, directly or through any corporation, subsidiary, division, or other device, shall not fail to disclose clearly and conspicuously and in the manner set forth in this order one of the following statements on all cigar labels and, unless otherwise exempt from disclosure by this order, in all cigar advertisements:

SURGEON GENERAL WARNING: Cigar Smoking Can Cause Cancers Of The Mouth And Throat, Even If You Do Not Inhale.

SURGEON GENERAL WARNING: Cigar Smoking Can Cause Lung Cancer And Heart Disease.

SURGEON GENERAL WARNING: Tobacco Use Increases The Risk Of Infertility, Stillbirth And Low Birth Weight.

SURGEON GENERAL WARNING: Cigars Are Not A Safe Alternative To Cigarettes.

SURGEON GENERAL WARNING: Tobacco Smoke Increases The Risk Of Lung Cancer And Heart Disease, Even In Nonsmokers.

Provided, however, that the warning statement requirements shall not apply to company and divisional names, when used as such; to signs on factories, plants, warehouses or other facilities related to the manufacture or storage of cigars; to corporate or financial reports; to communications to security holders and others who customarily receive copies of these communications; or to promotional materials that are distributed to wholesalers, dealers or merchants but not to consumers, and are not for public display or consumer exposure. In addition, these warning statement requirements do not apply to shelf-talkers and similar product locators with a display area of twelve (12) square inches or less.

II.

IT IS FURTHER ORDERED THAT for purposes of this order, "clear and conspicuous" disclosure of any warning statement required by this order means that the warning statement shall be set out as follows:

A. The warning statement shall be capitalized and punctuated as indicated in Part I of this order, with the words "**SURGEON GENERAL WARNING**" printed in uppercase letters in bold print and the remaining words printed with the initial letter of each word in uppercase print and the remaining letters in lowercase print;

B. The warning statement shall be printed in black against a solid white background. In addition, the warning statement shall appear in two to four lines that are parallel to each other as well to the base of the cigar package or advertisement; and

C. The language of the warning statement shall appear:

(1) For any cigar label, the warning statement shall be set out in the English language. If the label of a cigar contains a required warning in a language other than English, the required warning shall also appear in English.

(2) For any cigar advertisement, the warning statement shall be set out in the English language, except as follows:

(a) In the case of any cigar advertising in a newspaper, magazine, periodical, or other publication that is not in English, the warning statement shall appear in the predominant language of the publication in which the advertisement appears; and

(b) In the case of any other cigar advertising, the warning statement shall appear in the language of the target audience (ordinarily the language principally used in the advertisement).

III.

IT IS FURTHER ORDERED that in the case of any cigar label required by the order to bear a warning statement, the following requirements shall apply:

A. The warning statement shall be in a clear and conspicuous place on the principal display panel of the label. The principal display panel is the part of a label that is likely to be displayed, presented, shown, or examined under normal viewing conditions. In the case of a rectangular or square cigar package, the principal display panel shall mean the front or top panel of the package, whichever is larger. *Provided, however*, that in the case of a rectangular or square package containing ten or more premium cigars, the warning shall appear on the front or top panel of the package, whichever is the principal display panel. In the case of a cylindrical cigar package, a clear and conspicuous place shall mean along the

length of the cylinder and perpendicular to the top and bottom of the cylinder.
Provided, however, that in the case of any cigar package, the warning statement shall not be deemed to be in a clear and conspicuous place if it:

(1) appears or is affixed on the bottom of the package;

(2) is printed or affixed on the tear line;

(3) is printed or affixed on cellophane or any plastic film overwrap (with the exception of any package whose label appears only on cellophane or plastic film overwrap); or

(4) is printed or affixed in any other location that will be obliterated when the package is opened.

B. The warning statement shall appear in a clear and conspicuous and legible type and be separated in every direction from other written or graphic matter on the label by the equivalent of at least twice the height of the "W" in the word "WARNING" in that warning statement.

C. On a rectangular or square cigar package, the warning statement shall appear in the type style Univers 57 Condensed in the following type size in relation to total surface area of the largest panel of the package:

(1) Surface area of less than 5 square inches
Type size: 9 point

(2) Surface area of 5 to less than 10 square inches
Type size: 10 point

(3) Surface area of 10 to less than 15 square inches
Type size: 11 point

(4) Surface area of 15 to less than 25 square inches
Type size: 12 point

(5) Surface area of 25 to less than 40 square inches
Type size: 14 point

(6) Surface area of 40 or more square inches
Type size: 16 point

D. On a cylindrical cigar package, the warning statement shall appear in Univers 57 Condensed type style in the following type size in relation to the lengthwise surface area of the cylinder:

(1) Surface area of less than 5 square inches
Type size: 8 point

(2) Surface area of 5 to less than 15 square inches
Type size: 9 point

(3) Surface area of 15 to less than 25 square inches
Type size: 10 point

(4) Surface area of 25 to less than 30 square inches
Type size: 12 point

(5) Surface area of 30 to less than 40 square inches
Type size: 14 point

(6) Surface area of 40 or more square inches
Type size: 16 point

E. The warning statements required by this order may be affixed to the cigar label by sticker, provided that: the sticker is placed directly on the surface of the package, and not on any cellophane or other plastic film overwrap (with the exception of any package whose label appears only on cellophane or plastic film overwrap); the sticker is permanent (non-removable) and durable; and the warning statement complies with all other requirements of Parts I, II, III and VIII herein.

F. Each cigar label shall meet the requirements of this order upon being prepared for distribution in commerce for retail sale, but before it is distributed to be offered for retail sale. In the case of any cigar that is imported, the warning statements may be affixed in the country of origin or after importation into the United States, but shall be affixed before the cigar is removed from bond for sale or distribution. This section does not apply to any cigar that is manufactured, packaged or imported in the United States for export from the United States, if the cigar is not in fact distributed in commerce for use in the United States.

IV.

IT IS FURTHER ORDERED that in the case of any advertisement required by this order to bear a warning statement, except advertisements covered by Part V of this order, the following requirements shall apply:

A. The warning statement shall appear in a ruled rectangular box with the enclosing rule printed in black, and shall be centered both horizontally and vertically within the rectangular box and separated from any edge of the rule by at least one-half the height of the "W" in the word "WARNING" in the warning statement;

B. The warning statement shall be in a clear and conspicuous place. For purposes of this part, a "clear and conspicuous place"shall mean a location within the advertisement that is separated from any other written or textual matter or any graphic designs, elements or geometric forms by a distance from the outside rule at least twice the height of the "W" in the word "WARNING" in that warning statement. In addition, the disclosure shall not be positioned in the margin of a print advertisement. *Provided further*, the warning statement shall not be included as an integral part of a specific design or illustration in the advertisement, such as a picture of the

package, unless at least 80 percent of the area of the advertisement is taken up by a picture of the package.

C. The size of the warning statement shall be clear and conspicuous and shall be in Univers 57 Condensed type style, with the following outside dimensions and type size in relation to the advertising display area of the advertisement:

(1) Total area of less than 15 square inches
Border: 2c" by :"
Rule width: 1 point
Type size: 9 point

(2) Total area of 15 to less than 65 square inches
Border: 3c" by :"
Rule width: 2 point
Type size: 11 point

(3) Total area of 65 to less than 110 square inches
Border: 32" by f"
Rule width: 2 point
Type size: 13 point

(4) Total area of 110 to less than 180 square inches
Border: 4c" by 1"
Rule width: 2 point
Type size: 15 point

(5) Total area of 180 to less than 360 square inches
Border: 4d" inches by 1c"
Rule width: 2 point
Type size: 16 point

(6) Total area of 360 to less than 470 square inches
Border: 5" by 13"
Rule width: 22 point

Type size: 18 point

(7) Total area of 470 to less than 720 square inches
Border: 83" by 1:"
Rule width: 3 point
Type size: 30 point

(8) Total area of 5 to less than 10 square feet
Border: 11" by 32"
Rule width: 6 point
Type size: 43 point

(9) Total area of 10 to less than 20 square feet
Border: 1' 4" by 32"
Rule width: 8 point
Type size: 58 point

(10) Total area of 20 to less than 40 square feet
Border: 2' 8" by 1'
Rule width: 3"
Type size: 12" (Cap Height)

(11) Total area of 40 to less than 80 square feet
Border: 3' 4" by 1' 2"
Rule width: d"
Type size: 23" (Cap Height)

(12) Total area of 80 to less than 160 square feet
Border: 5' 8" by 2' 4"
Rule width: :"
Letter height: 32" (Cap Height)

(13) Total area of 160 to less than 350 square feet
Border: 19' 4" by 7' 4"
Rule width: 1:"
Letter height:11" (Cap Height)

(14) Total area of 350 to 1200 square feet
Border: 20' by 7' 8"
Rule width: 23"
Letter height:12" (Cap Height)

(15) Total area of 1200 square feet or more
Border: 27' 4" by 9' 4"
Rule width: 3"
Letter height: 1' 4" (Cap Height)

D. In determining the outside dimensions, type size and placement of the warning statement in any advertisement in a newspaper, magazine or other periodical that appears on more than one page:

(1) A double full page or multiple full page advertisement shall not be required to have more than one warning, but the outside dimensions and type size of the warning statement shall be determined by the aggregate advertising display area of the entire advertisement;

(2) An advertisement that occupies one full page and part of another page shall not be required to have more than one warning, but the outside dimensions and type size of the warning statement shall be determined by the aggregate advertising display area of the entire advertisement and the warning shall appear on the full page on which the advertisement appears; and

(3) An advertisement that occupies parts of two or more pages shall not be required to contain more than one warning, but the outside dimensions and type size of the warning statement shall be determined by the aggregate advertising display area of the entire advertisement and the warning shall appear on the page that contains the greater (or greatest) part of the advertisement.

E. In determining the outside dimensions, type size and placement of the warning statement on any point-of sale advertisement with curved, irregular or multiple surfaces:

(1) In the case of point-of-sale items that are designed to contain products ("merchandisers") such as counter and floor displays, package dispensers, racks and gondolas:

(a) Where the merchandiser itself contains no cigar advertising, the merchandiser shall not require a warning statement;

(b) Where the merchandiser contains cigar advertising, the outside dimensions and type size of the warning statement shall be determined by the aggregate advertising display area of all of the surfaces containing such advertising;

(c) On merchandisers displaying advertising on more than one side, the warning statement shall be placed on the largest side of the item that is visible to the public from its normal viewing position.

(d) For merchandiser formats designed and in use as of May 1, 2000 where the height or width of the display panel on which the warning statement must appear is less than the height or width of the border of the warning statement required by Part IV.C of this order, respondent may submit for approval, and the Commission shall approve upon a showing of practical necessity, a warning statement that has an alternative outside border provided that the warning statement has the same rule width, type size and total area as required by Part IV.C.

(2) In the case of functional items such as clocks, change mats, change trays and welcome signs, the outside dimensions and type size of the warning statement shall be determined by the surface area of that side of the item which contains advertising, unless the advertising is clearly separated from the remainder of the area of that side by clear border lines of a contrasting color and one-quarter inch in width, in which event the size of the warning statement shall be determined by the surface area within the border area containing the advertising.

F. In the case of a cigar package that also can function as a point-of-sale display, such item shall also comply with the advertising provisions of this order. In determining the outside dimensions, type size and placement of the advertising warning statement on such item:

(1) in the case of a package that itself contains two or more packages of cigars, the item shall comply with the requirements of Part IV.E.1 of this order; and

(2) in the case of a package that contains two or more individual cigars, and can function as an open package display:

(a) the warning statement shall be placed on the principal display panel of the interior of the package and shall be positioned so that it is visible to the public from any normal viewing position; and

(b) the outside dimensions, type size and style of the warning statement shall be determined by the area of the panel on which the statement is placed.

G. For any catalogue, leaflet, brochure or other non-point-of-sale promotional advertisement that has more than one page:

(1) An advertisement that occupies up to four pages shall not be required to contain more than one warning, but the outside dimensions and type size of the warning statement shall be determined by the aggregate advertising display area of the entire advertisement and the warning shall appear on the page that contains the greater (or greatest) part of the advertisement; and

(2) An advertisement that occupies more than four pages shall be required to contain multiple warnings on alternating pages, with the outside dimensions and type size of the warning statement determined by the twice the advertising display area of the page containing the warning.

V.

IT IS FURTHER ORDERED that in a television, radio, Internet or other electronic advertisement, or any other audio or video advertisement, including but not limited to videotapes, cassettes, discs, films, filmstrips, audiotapes or other types of sound recordings, "clear and conspicuous" disclosure shall mean as follows:

A. If the advertisement has a visual component, the warning statement shall be superimposed on the screen in black print on a white background enclosed in a black rectangular box format, as specified in Parts IV.A and IV.B above, and its size, duration on the screen and location shall be sufficient for an ordinary consumer to read and comprehend it;

B. If the advertisement has an audio component, the warning statement shall be announced orally and shall be delivered in a volume, cadence, and location sufficient for an ordinary consumer to hear and comprehend it;

Provided, however, in the case of an audio advertisement in a retail store or other place where cigars are offered for sale, no warning shall be required, even if respondent provides an incentive for disseminating the advertisement, so long as the announcement includes only the brand name or product identifier, the price, and the product's location in the store.

C. If the advertisement has both a visual and an audio component, the warning statement shall be superimposed on the screen in a rectangular box format and announced orally in compliance with the requirements set out in Sub-parts A and B of this Part V of the order. In addition to the foregoing, in advertising in an interactive electronic medium such as the Internet or online services, the disclosure shall be presented in an unavoidable manner on every Web page, online service page, or other electronic page, and shall not be accessed or displayed through hyperlinks, pop-ups, interstitials or other similar means.

D. Pursuant to the Federal Cigarette Labeling and Advertising Act, 15 U.S.C. 1331, et seq, it shall be unlawful for respondent to disseminate any advertisement for little cigars on any medium of electronic communication subject to the jurisdiction of the Federal Communications Commission.

VI.

IT IS FURTHER ORDERED that in the case of advertisements for cigars on utilitarian items:

A. The warning statements required by this order shall be in a clear and conspicuous and legible type and shall appear within the rectangular box format specified in Part IV;

B. The warning statement required by this order must be in a clear and conspicuous location on the object. A clear and conspicuous location on the object is one that is proximate to and on the same surface as the cigar advertising, and is visible when the brand name, logo or selling message is visible.

C. The outside dimensions and type style and size of the warning statement shall conform to the requirements set forth in Part IV.C of this order. For purposes of determining the outside dimensions and type size of the warning statement, the advertising display area for an advertisement on a utilitarian item shall be the visible area on which the advertising appears. For example, the advertising display area for a shirt bearing a brand name, logo or selling message on the front or back is the entire front or back of the shirt, excluding any sleeves. For a shirt bearing a brand name, logo or selling message on the sleeve, the advertising display area is the sleeve.

D. If the cigar advertising appears in more than one location on the utilitarian item, the warning either:

(1) Shall appear proximate to each area with the advertising; or

(2) Shall appear only once on the item, however, in such case, the advertising display area shall be the aggregate of all the surface areas on which any advertising appears.

E. The warning statement required by this order must be printed, embossed, embroidered or otherwise affixed to the utilitarian item with a permanence and durability that is comparable to the permanence and durability of the brand name, logo, or selling message. *Provided, however*, that if a product brand name or logo is embroidered on a hat, and a legible warning cannot be embroidered in the proper size due to technological limitations, the warning may be affixed to the hat by another method, so long as its permanence and durability is comparable to that of the brand name, logo or selling message.

F. For fabric baseball style hats, the warning statement shall appear in the Number 3 size as set forth in Part IV.C of this order.

G. For those utilitarian items under eight (8) square inches that are viewed predominantly by the user, the warning statement shall be:

(1) Printed on the package of the item, if the item is disseminated in a package to the consumer. The total surface area of the package shall comprise the advertising display area for purposes of determining the outside dimensions and type size of the warning statement; or

(2) Placed in the form of a sticker or decal directly onto the item in the Number 1 warning size as set forth in Part IV.C of this order. The item shall be packaged in such a way to ensure that the sticker cannot be removed before it is received by the consumer.

VII.

IT IS FURTHER ORDERED that all cooperative advertisements paid for, directly or indirectly, in whole or in part, by respondent must bear the required warning. *Provided, however*, in the case of a print advertisement with a display area of four (4) square inches or less, disseminated by a retailer, no warning is required so long as the advertisement contains only the brand name or other product identifier and a price. In addition, no warning is required in the case of certain in-store audio announcements as described in Part V.B of this order.

VIII.

IT IS FURTHER ORDERED that with regard to the rotation, display, and distribution of warning statements on cigar packages, respondent shall:

A. Display each of the five warning statements required by this order randomly in each twelve (12) month period in as equal a number of times as possible on the labels of each brand of the product and distribute the packages randomly in all parts of the United States in which the cigars are marketed.

Provided, however, that for purposes of this order, the phrase "as equal a number of times as possible" shall permit deviations of four (4) percent or less in a 12-month period.

Provided further, that the term "random distribution" shall mean that nothing in the production or distribution process of a cigar would prevent the five warning statements on the package from being distributed evenly in all parts of the United States where the product is marketed.

B. No later than ninety (90) days after the effective date of this order, respondent shall submit to the Commission or its designated representative for approval a plan that provides for the display of the five warning statements on packages of cigars as required by this order, and comply with the plan as approved. This plan shall be sufficiently detailed to enable the Commission to determine whether the warning statements appear on the package in a manner consistent with the requirements of this order. The equal display requirements may be satisfied by one of the following three methods:

(1) A plan may satisfy the requirements by providing for the engraving or preparation of cylinders, plates, or equivalent production materials in a manner that results in the simultaneous printing of the five required warnings in as near an equal number of times as possible under the circumstances;

(2) A plan may satisfy the requirements by providing for the preparation of separate cylinders, plates, and equivalent production materials and requiring that they be changed at fixed intervals in a manner that results in the display of the five required warnings in as near an equal number of times as possible under the circumstances during a one-year period; or

(3) A plan may satisfy the requirements by providing that stickers bearing the five required warnings be printed in equal numbers and affixed randomly to packages of the product.

Provided, however, nothing in this part of the order requires the use of more than one warning statement on the label of any brand during any given part of the 12-month period except for a cigar package that also functions as a cigar display (which must also comply with the advertising requirements of this order).

C. A plan for the rotation, display, and distribution of warning statements on cigar packages shall include representative samples of labels with each of the five warning statements required by this order. This provision does not require submission of a label with each of the required warning statements for every brand marketed by respondent, and shall be deemed to be satisfied by submission of labels for different types of cigars, and a range of cigar package sizes for each type of product.

IX.

IT IS FURTHER ORDERED that with regard to the rotation, display, and dissemination of warning statements in cigar advertising:

A. Except as specified in sub-part B. herein, respondent shall rotate each of the five warning statements required by this order every three (3) months in an alternating sequence in the advertisement for each brand of cigar. *Provided, however*, that any rotational system may take into account practical constraints on the production and distribution of advertising.

B. On merchandisers, utilitarian items, and cigar packages that can function as open package displays, respondent shall display each of the five warning statements required by this order randomly in each twelve (12) month period in as equal a

number of times as possible, and distribute such merchandisers, utilitarian items, and cigar packages randomly in all parts of the United States in which they are disseminated.

Provided, however, that for purposes of this sub-part, the phrase "as equal a number of times as possible" shall permit deviations of four (4) percent or less in a 12-month period.

Provided further, that the term "random distribution" shall mean that nothing in the production or distribution process of a merchandiser or cigar package than can be used as an open package display would prevent the five warning statements on such display items from being distributed evenly in all parts of the United States where they are disseminated.

C. No later than ninety (90) days after the effective date of this order, respondent shall submit a plan to the Commission or its designated representative for approval that ensures that:

(1) On all types of cigar advertising, except those specified in sub-part B herein, the five warning statements are rotated every three months in alternating sequence, and that respondents comply with the plan as approved. This rotational warning requirement may be satisfied by requiring either that all brands display the same warning during each three-month period or that each brand display a different warning during a given three-month period. A plan shall describe the method of rotation and shall include a list of the designated warnings for each three-month period during the first fifteen (15) month period for each brand. The plan also shall describe the method that will be used to ensure proper rotation in different advertising media in sufficient detail to ensure compliance with the order. For advertising in newspapers, magazines, or other periodicals, the method of rotation shall be set either according to the cover date or the closing date of the

publication. For posters and placards, the method of rotation shall be set according to either the scheduled or actual appearance of the advertising. The method of rotation for point-of-sale and non-point-of-sale promotional materials such as leaflets, pamphlets, coupons, direct mail circulars, paperback book inserts, or non-print items shall be set according to either the date the materials or objects are ordered or the date on which the objects or materials are scheduled to be disseminated, provided that the production of such materials or objects is carried out in a manner consistent with customary business practices.

(2) On merchandisers, utilitarian items, and cigar packages that can function as open package displays, each of the five warning statements required by this order is displayed randomly in each twelve (12) month period in as equal a number of times as possible.

D. A plan for the rotation, display, and dissemination of warning statements in cigar advertising shall include a representative sample of each of the five warning statements required by this order. This provision does not require the submission of all advertising for each brand marketed by respondent and shall be deemed to be satisfied by submission of actual examples of different types of advertising materials or acetates or other facsimiles indicating the warning statements as they would appear in advertisements of varying sizes.

X.

IT IS FURTHER ORDERED that the Commission intends that this order provide for a uniform, federally mandated system of health warnings on cigar packages and advertisements nationwide. Entry of the order will uniformly provide consumers in all states and territories of the United States with clear, conspicuous and understandable disclosures of the health risks of cigar smoking. The Commission shall consider a state or local requirement for the display of different warnings concerning cigar

smoking and health to be in conflict with the requirements of this order, but only to the extent that any such provision requires that the state or local warning appear on any package or advertisement required to display the Federal warnings set forth herein.

XI.

IT IS FURTHER ORDERED that respondent shall be deemed to be in compliance with this order if it has taken reasonable steps to:

A. Provide, by written contract or other clear and prominent instructions, for the rotation of the label statements required by this order;

B. Give clear and prominent instruction and, to the extent possible, furnish materials (such as film negatives, acetates or other facsimiles) for the production of cigar packages and advertising that contain the required warning statements; and

C. Prevent and correct mistakes, errors or omissions that have come to its attention.

Provided, however, that in the event of the distribution of labels or the publication of advertisements that do not conform to this order, the burden of establishing that reasonable steps have been taken to comply with this order (including fulfilling the conditions described in this Part of the order) shall rest solely with respondent.

XII.

IT IS FURTHER ORDERED that the cigar labeling and advertising requirements of Parts III through VI of this order shall become effective one hundred eighty (180) days after issuance of the order. *Provided, however*, that:

A. The cigar labeling requirements of Part III of this order shall not apply to cigars distributed in commerce for retail sale prior to one hundred eighty (180) days from the date of issuance of the order.

B. The cigar advertising requirements of Parts IV through VII of this order shall take into account practical constraints on respondent with respect to the production and distribution of advertising submitted for publication prior to one hundred eighty (180) days from the date of issuance of the order.

XIII.

IT IS FURTHER ORDERED that in the event the Federal Cigarette Labeling and Advertising Act, 15 U.S.C. 1331, et seq., or the Comprehensive Smokeless Tobacco Health Education Act, 15 U.S.C. 4401, et seq., or the regulations implemented thereunder, 16 C.F.R. 307, et seq., are amended or modified to change the size or format of the warning requirements for the labeling or advertising of cigarettes or smokeless tobacco, respectively, such action shall constitute sufficient changed conditions to reopen this order to determine whether the size or the format of the warning statements contained herein should be altered or modified to conform to the same or similar size or format.

XIV.

IT IS FURTHER ORDERED that respondent and its successors and assigns, for five (5) years after the last date of dissemination of any cigar label or advertisement covered by this order, shall maintain and upon request make available to the Federal Trade Commission business records demonstrating their compliance with the terms and provisions of this order, including, but not limited, to a sample copy of each advertisement and label disseminated during such time.

XV.

IT IS FURTHER ORDERED that respondent and its successors and assigns shall deliver a copy of this order to all current and future principals, officers, directors, and managers, and to all current and future employees, agents, and representatives having responsibilities with respect to the subject matter of this order, and shall secure from each such person a signed and dated statement acknowledging receipt of the order. Respondent 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.

XVI.

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

XVII.

IT IS FURTHER ORDERED that respondent and its successors and assigns shall, at such times as the Commission may require, file with the Commission a report, in writing, setting forth in detail the manner and form in which they have complied with this order.

By the Commission.

Analysis of Proposed Consent Orders to Aid Public Comment

The Federal Trade Commission has accepted, subject to final approval, agreements containing consent orders from the following cigar manufacturers, importers or marketers:

Swisher International, Inc. (Matter No. 002-3199);
Consolidated Cigar Corporation (Matter No. 002-3200);
Havatampa, Inc. (Matter No. 002-3204);
General Cigar Holdings, Inc. (Matter No. 002-3202);
John Middleton, Inc. (Matter No. 002-3205);
Lane Limited (Matter No. 002-3203); and
Swedish Match North America, Inc.(Matter No. 002-3201).

The proposed consent orders have been placed on the public record for thirty (30) days for the receipt of comments by interested persons. Comments received during this period will become part of the public record. After thirty (30) days, the Commission will again review the agreements and comments received and will decide whether it should withdraw from the agreements and take appropriate action or make final the agreements' proposed orders.

Analysis to Aid Public Comment

Background

In July 1999, the Federal Trade Commission provided a Report to Congress, entitled Cigar Sales and Advertising and Promotional Expenditures for Calendar Years 1996 and 1997 ("Commission Report"). The Commission Report recommended that, given the significant increase in cigar smoking prevalence in recent years and the serious health risks posed by cigar smoking,[1] cigars should be regulated in a manner consistent with the current regulation of cigarettes and smokeless tobacco. *See* Federal Cigarette Labeling and Advertising Act, 15 U.S.C. § 1331 et seq.; Comprehensive Smokeless Tobacco Health Education Act of 1986, 15 U.S.C. § 4401 et seq. The Commission Report recommended that Congress either enact legislation to require federal health warnings on cigar labeling and advertising or direct the Commission to use its existing authority, under Section 5 of the Federal Trade Commission Act, to require cigar health warnings.

In November 1999, in the Joint Explanatory Note of the Conferees to H.R. 3421 Appropriations Bill, the Congressional Appropriations Committees responded to the Commission Report by directing the FTC to report back to the Committees on Commission plans to establish "uniform Federal health warning label[s]."[2]

After consideration of the National Cancer Institute's findings in its Cigar Monograph on the serious health risks of regular cigar use, and the failure of cigar advertising and labeling to disclose these health risks, the Commission negotiated consent agreements

---

1 *See* U.S. Department of Health and Human Services, National Cancer Institute, Smoking and Tobacco Control Monograph No. 9 Cigars: Health Effects and Trends (1998), NIH publication no. 98-4302 (ACigar Monograph@).

2 145 Cong. Rec. H12230-02 (daily ed. Nov. 17, 1999).

with the seven largest cigar companies to implement health warnings on cigar labeling and advertising nationwide.[3]

The Proposed Complaints and Orders

The proposed complaints each allege that the failure to disclose that regular cigar smoking can cause serious adverse health effects is both unfair and deceptive in violation of Section 5 of the FTC Act. Part I of the proposed orders requires the respondents to make a clear and conspicuous disclosure of the following warning statements on cigar labels and in advertising:

> **SURGEON GENERAL WARNING:** Cigar Smoking Can Cause Cancers Of The Mouth And Throat, Even If You Do Not Inhale.
>
> **SURGEON GENERAL WARNING:** Cigar Smoking Can Cause Lung Cancer And Heart Disease.
>
> **SURGEON GENERAL WARNING:** Cigars Are Not A Safe Alternative To Cigarettes.
>
> **SURGEON GENERAL WARNING:** Tobacco Use Increases The Risk Of Infertility, Stillbirth, And Low Birth Weight.
>
> **SURGEON GENERAL WARNING:** Tobacco Smoke Increases The Risk Of Lung Cancer And Heart Disease, Even In Nonsmokers.

Part II of the proposed orders sets out specific format requirements for the warnings, which are designed to ensure that the warnings are visible and readable. Part II also requires that the warning statements on labeling and advertising be printed in

---

3 Like all FTC consent orders, these orders are for settlement purposes only and do not constitute an admission by the cigar manufacturers of any law violation.

black print on a solid white background, and be capitalized and punctuated as set forth in Part I.

Part III specifies the location and size requirements for the disclosure of the health warnings on cigar *labels*. The orders require that the warning be displayed on the principal display panel of the package. For the majority of cigar boxes, the orders define the principal display panel to be the larger of the top or front panel of the package, thus ensuring that the warning is in the most noticeable location. The orders make an exception for boxes of premium (hand-rolled) cigars, providing that the warning can appear on the top or front of the box, depending upon which panel is more likely to be seen by consumers.

Part IV sets forth the specific format and size requirements for the disclosure of the health warnings on cigar *advertising*. The orders provide that the warning shall be in black print on a white background and be centered in a black ruled rectangular box. Part IV specifies how to calculate the size of the warning and where to place the warning in various types of advertising, including periodicals, merchandisers, functional items, catalogues and cigar packages that also function as point-of-sale displays.

Part V specifies how to make the required disclosures in audio and video advertisements, including radio, television, the Internet, tapes and films. The orders require that in interactive media, such as the Internet, the warnings must be displayed in an unavoidable manner on every Web page.

Part VI of the proposed orders addresses requirements for the disclosure of the warnings on utilitarian items. Utilitarian items are treated like other advertising, and the warning statements must appear in a rectangular box format, in a size based upon the item's total advertising display area.

Part VII provides that cooperative advertisements paid for in whole or in part by a respondent must include the warnings, with the exception of very small print advertisements containing only brand name and price information.

Part VIII sets forth the specific requirements for the rotation, display and distribution of the warning statements on cigar packages. For each cigar brand, respondents must display each of the five required warning statements randomly in as equal a number of times as possible, and must distribute the packages randomly in all parts of the U.S.A. in which they are marketed.

Part IX provides that, on most types of advertising, the five warning statements shall be rotated in an alternating sequence every three months. Part IX provides for equal simultaneous display of the warning statements on merchandisers, cigar boxes that can function as open package displays and utilitarian items. Parts VIII and IX of the proposed orders also require the companies to submit to the Commission for approval plans for the display of the warnings on cigar packages and advertisements, and to comply with the plans as approved.

Part X of the proposed orders states that the Commission will consider state or local requirements for different health warnings on any cigar labeling or advertising that is required to display the FTC warning to be in conflict with the orders.

Part XI provides a safe harbor in the event the companies have taken reasonable steps to assure compliance; in the event of labels or advertisements that do not comply with the order, the proposed respondents will bear the burden of establishing that reasonable steps were taken to comply with the order. This same safe harbor provision is included in the Commission's smokeless tobacco regulations.

Part XII of the proposed orders states that the warning requirements shall become effective one hundred and eighty (180) days after issuance of the order.

Part XIII provides that in the event the Federal Cigarette Labeling and Advertising Act or the Comprehensive Smokeless Tobacco Health Education Act or the Commission's Smokeless Tobacco Regulations are amended or modified to change the size or format of the warnings for cigarettes or smokeless tobacco, the cigar orders may be reopened to determine whether the size or format of the warnings for cigars should be modified to conform to such changes.

Parts XIV through XVI of the proposed orders contain standard recordkeeping, reporting and compliance requirements.

The proposed orders do not contain a sunset provision due to the importance of the health warnings required therein.

Objectives of the Proposed Orders

The Commission's intent in obtaining the proposed consent orders is to provide a uniform national system of health warnings on cigar labeling and advertising. National health warnings that are clear and conspicuous benefit consumers. Here, the cigar warnings will prevent future deception and unfairness by providing important information with which consumers nationwide can make more informed choices.[4]

Each of the five warnings conveys a simple and specific message about health risks associated with cigar use. The orders' requirements for display of the warnings on packaging and advertising will provide sufficient repetition of each warning statement to contribute to long-term recall of each message, while decreasing the likelihood that any one message will become so familiar and overexposed that its effectiveness will "wear out." Together, the five warnings provide a comprehensive warning

4 Uniform national health warnings likewise benefit national competition. Multiple different warnings can raise costs and regulatory burdens for national marketers such as the proposed respondents.

scheme that provides necessary and important information to consumers nationwide.

Because the proposed respondents' cigar packaging and advertising is disseminated in the national marketplace, a comprehensive national system of simple and direct warnings will provide the greatest benefits to consumers. Moreover, multiple, and potentially inconsistent, warnings on individual packages or advertisements could neutralize or negate those benefits. Such multiple warnings may be confusing to consumers and undercut the saliency of the warnings required by these consent orders. Further, they are likely to have the unintended effect of making it more difficult for consumers to process the warning messages required here. And, while diminished effectiveness could result when *one* state mandates additional warnings on packages or advertisements bearing the Commission warnings, the problem will be exacerbated if more than one state imposes requirements applicable to a single package or advertisement.

In light of the important benefits from a national warning system, Part X of the Commission's orders preempts state or local requirements for different health warnings on any cigar labeling or advertising that is required to display the FTC warnings. At the same time, the Commission recognizes the critically important role that states play in consumer protection and tobacco control. The provision does not affect other state or local requirements. For example, required warnings for types of advertising that are not covered by the proposed orders (such as shelf talkers under a certain size), or state or local restrictions on advertising placement or youth access to tobacco products are not affected. It is the Commission's intent that this provision apply only to state requirements for different health warnings by companies who have entered into the FTC consent orders, and only to packages and advertising required to contain the federally-mandated warnings.

Analysis to Aid Public Comment

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

Complaint

IN THE MATTER OF

BP AMOCO P.L.C. AND ATLANTIC RICHFIELD COMPANY

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-3938; File No. 9910192
Complaint, April 13, 2000 -- Decision, August 25, 2000

This consent order addresses the $26 billion acquisition by BP Amoco p.l.c. of Atlantic Richfield Company. The complaint alleges that the merger will lessen competition in each of the markets for (1) the production, sale, and delivery of ANS crude oil; (2) the production, sale, and delivery of crude oil used by targeted West Coast refiners; (3) the production, sale, and delivery of all crude oil used on the West Coast; (4) the purchase of exploration rights on the Alaskan North Slope; (5) the sale of crude oil transportation on TAPS; (6) the development for commercial sale of natural gas on the Alaskan North Slope; and (7) the supply of crude oil pipeline transportation to, and crude oil storage in, Cushing, Oklahoma. The consent order requires the divestiture of Atlantic Richfield Company's assets and interests related to and primarily used with or in connection with their Alaska businesses and the assets related to its Cushing, Oklahoma crude oil business to Phillips Petroleum Company.

Participants

For the Commission: *Joseph Brownman, Arthur J. Nolan, William R. Vigdor, Barbara K. Shapiro, Steven W. Sockwell, Jr., Jeff Dahnke, Frank Lipson, Patricia Galvan, Mark Menna, Jonathan S. Kanter, Stephen W. Riddell, Renee Henning, Marc Jarsulic, Paul Frangie, Nathan Muyskens, Eric Rohlck, Dana Stall, Carrie Atiyeh, Scott Hansen, Angela Thaler, Jocelyn Yeh, Lorenzo Cellini, Steven Collier, Karen Harris, Valicia Spriggs, Richard Liebeskind, Phillip L. Broyles, Daniel P. Ducore,* and *BE.*

For the Respondents: *Bob Osgood, Sullivan & Cromwell, Frank Cicero Jr., Kirkland & Ellis, Mike Sohn, Arnold & Porter,* and *Illene Knable Gotts, Wachtel, Lipton, Rosen & Katz.*

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, having reason to believe that BP Amoco p.l.c. ("BP Amoco@) and Atlantic Richfield Company (AARCO@) have entered into an agreement in violation of Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. ' 45, and that the terms of such agreement, were they to be implemented, would result in a violation of Section 5 of the Federal Trade Commission Act and Section 7 of the Clayton Act, 15 U.S.C. ' 18, and it appearing to the Commission that a proceeding in respect thereof would be in the public interest, hereby issues its complaint, stating its charges as follows:

I. Respondent BP Amoco p.l.c.

1. Respondent BP Amoco is a corporation organized, existing and doing business under and by virtue of the laws of the United Kingdom with its office and principal place of business located at Brittanic House, 1 Finsbury Circus, London EC2M 7BA, England. BP Amoco=s principal offices in the United States are located at 200 East Randolph Drive, Chicago, Illinois 60601

2. Respondent BP Amoco is, and at all times relevant herein has been, engaged in the exploration, development, and production of crude oil on the Alaska North Slope, and the sale of that crude oil to refinery customers located in the states of Alaska, Hawaii, California, and Washington, and elsewhere.

3. Respondent BP Amoco had total sales, of all products, of over $91 billion in 1999. Respondent BP Amoco=s United States sales of all products totaled over $38 billion in 1999.

4. Respondent BP Amoco is, and at all times relevant herein has been, engaged in commerce, or in activities affecting commerce, within the meaning of Section 1 of the Clayton Act, 15 U.S.C. ' 12, and Section 4 of the Federal Trade Commission Act, 15 U.S.C. ' 44.

II. Respondent ARCO

5. Respondent ARCO is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware, with its office and principal place of business located at 333 S. Hope Street, Los Angeles, California 90071.

6. Respondent ARCO is, and at all times relevant herein has been, engaged in the exploration, development, and production of crude oil on the Alaska North Slope, and the sale or delivery of that crude oil to refinery customers, or its own refineries, located in the states of Alaska, Hawaii, California, and Washington.

7. Respondent ARCO had total sales, of all products, of more than $12 billion in 1999.

8. Respondent ARCO is, and at all times relevant herein has been, engaged in commerce, or in activities affecting commerce, within the meaning of Section 1 of the Clayton Act, 15 U.S.C. ' 12, and Section 4 of the Federal Trade Commission Act, 15 U.S.C. ' 44.

III. The Merger

9. On or about March 31, 1999, Respondents BP Amoco and ARCO executed an agreement to merge their two companies. The value of the merger, when it was announced, was approximately $26 billion.

IV. Trade and Commerce

A. *Alaska North Slope Crude Oil:*

10. The Alaska North Slope is a major oil-producing region of the United States. Alaska North Slope crude oil (AANS crude oil@) is used to supply refineries in Alaska, Hawaii, the West Coast of the United States, and Asia. Approximately 90% of all ANS crude oil is refined on the United States West Coast, and approximately 45% of all crude oil refined on the United States West Coast is ANS crude oil.

11. Oil companies that produce ANS crude oil engage in bidding competition for oil and gas leases on lands principally owned by the State of Alaska or the United States government. Successful bidders acquire rights to engage in exploration and development activities on those lands. Exploration and development, if successful, are followed by production.

12. BP Amoco and ARCO are the two most significant competitors in bidding for exploration leases for oil and gas on the Alaska North Slope. The State of Alaska and the United States government have no alternatives for the development of the oil and gas resources under the lands that they own.

13. BP Amoco and ARCO are the two most significant explorers, developers, and producers of ANS crude oil. They are also the only two companies that actually operate the Alaska North Slope oil fields.

B. *TAPS Pipeline*:

14. Except for the small amount of ANS crude oil that is used by refineries in Alaska, ANS crude oil is transported from the North Slope via the Trans-Alaska Pipeline System (ATAPS@),

an 800-mile long pipeline, to the warm water port of Valdez on Alaska=s Prince William Sound. The only way that ANS crude oil can be transported from the Alaska North Slope to Valdez is through TAPS.

15. Seven companies jointly own the TAPS pipeline. BP Amoco and ARCO are the two largest owners. BP has about a 50% interest and ARCO has about a 22% interest. Each owner of TAPS has an exclusive right to sell space on its ownership-share of TAPS capacity and to set its own tariff, to which it can apply discounts, for carriage on that capacity. After the merger, BP Amoco would control a 72% interest in TAPS.

16. All ANS crude oil is commingled in TAPS, and all ANS crude oil produced from any field, by any producer, is undifferentiated at Valdez.

C. *Sale and Delivery of ANS Crude Oil*:

17. The major oil companies that produce ANS crude oil own or have long term charters over specialized marine tankers. These specialized tankers are the only form of marine transportation permitted by law to transport ANS crude oil from Valdez to the United States West Coast.

18. The ANS crude oil sold or delivered by ARCO is identical to the ANS sold or delivered by BP Amoco.

19. Unlike the sale of most crude oil elsewhere in the world, ANS crude oil is sold and shipped by the larger oil producing companies on the Alaska North Slope to refineries on a delivered price basis. West Coast refineries do not have the option of hiring a tanker to carry ANS crude oil purchased in Valdez. Nor do these refineries have the option to deliver it to another refinery.

20. The small North Slope producers -- with no tanker fleets of their own -- sell their oil either to a producer with a tanker fleet or to the small refineries located in Alaska.

21. Refineries use crude oil as the principal input in making gasoline, diesel fuel, kerosene jet fuel, asphalt, coke, and other refined petroleum products. There are no substitutes for crude oil as an input into petroleum refineries for the manufacture of petroleum-based fuels.

22. Crude oils that come from different places have different gravity, sulfur, aromatics, metals and other characteristics.

23. Each refinery is uniquely designed to handle a particular crude oil slate. For a refinery, changing the crude oil slate changes both the overall product yield and the output of particular products. For this reason, there are often no substitutes at competitive prices for individual types of crude oil, including ANS crude oil, for individual refineries.

24. Refineries cannot substitute from among different crude oils readily, and do not do so without evaluating, assisted by complex computer linear programs, the economics of crude oil substitution. BP Amoco knows this, and with the aid of computer models designed to replicate those of its refinery customers, attempts to price its ANS crude oil up to -- but not above -- the point at which a refinery customer is likely to switch to an alternative crude oil. Each refinery customer has a different substitution point, or Atrigger point@ at which it will switch from ANS crude oil to an alternative crude oil.

25. BP Amoco limits supplies of ANS crude oil delivered to the United States West Coast. BP Amoco accomplishes this by exporting ANS crude oil to Asia, often at lower prices, net of its transportation costs, than it could obtain by selling the ANS crude oil on the West Coast. BP Amoco makes these sales in order artificially to short the United States West Coast market. The ANS crude oil supply deficit created by BP Amoco causes the price of ANS crude oil to rise on the West Coast.

26. ARCO exercises some constraint on BP Amoco=s ability to exercise market power. In the recent past, ARCO has been a more significant constraint on BP Amoco, and, with new production about to commence, as well as a new, increased, ability to substitute other crude oils for ANS crude oil at its Los Angeles refinery, ARCO will be able to constrain BP Amoco=s pricing more substantially in the future.

27. Through future exploration and production activities, ARCO is the firm most likely to constrain BP Amoco=s ability to exercise market power.

D.*Alaska North Slope Natural Gas:*

28. The Alaska North Slope contains an estimated 35 trillion cubic feet of natural gas reserves. Together, BP Amoco and ARCO own more than half of these reserves. Although small quantities of ANS natural gas are now sold to North Slope contractors and gas utilities, most of the gas remains stranded on the North Slope.

29. Large scale sales of North Slope natural gas have not been feasible due to high costs in transporting the gas from the Alaska North Slope to markets in the rest of Alaska, the lower 48 states, or Asia. BP Amoco and ARCO have expended huge sums of money over the years in efforts to find ways to bring the North Slope natural gas to market. These efforts include using liquefied natural gas (ALNG@) and gas-to-liquids (AGTL@) technologies, and the transportation requirements associated with them. These efforts and expenditures have continued at least through the time of the announcement of the proposed merger.

30. BP Amoco and ARCO are the two most important potential future developers, producers, and sellers of North Slope natural gas.

Complaint

E. *West Texas Intermediate Crude Oil:*

31. BP Amoco and ARCO provide pipeline transportation and oil storage services into, and in, a crude oil marketing hub located in Cushing, Oklahoma. The Cushing area serves as a major crude oil marketing hub in the United States. The crude oils coming out of Cushing are transported by a network of pipelines to refineries located in the central parts of the United States.

32. There are no substitutes for pipelines for the transport of crude oil to Cushing, and no substitutes for storage facilities in Cushing for the storage of crude oil pending delivery. Pipeline and storage facilities located in other regions cannot serve the crude oil trading activities in Cushing.

33. A substantial portion of the crude oil traded in Cushing consists of West Texas Intermediate (AWTI@) crude oil, which arrives from pipelines originating in Texas, and imported crude oil, which is offloaded from tankers on the Gulf Coast and transported to Cushing by pipeline. Prices for WTI crude oil traded in Cushing serve as a benchmark for the worldwide pricing of many crude oils.

34. Cushing also serves as a delivery point, for light sweet crude oil futures trading on the New York Mercantile Exchange (ANYMEX@). When NYMEX contracts expire, traders typically meet their obligations to deliver light sweet crude oil by tendering WTI crude oil. NYMEX contracts for crude oil futures typically designate Cushing as the delivery point.

35. Efficient functioning of the pipeline and oil storage facilities into and in Cushing is critical to the fluid operation of both the trading activities in Cushing and the trading of crude oil futures contracts on the NYMEX. The restriction of pipeline or storage capacity can affect the deliverable supply of crude

oil in Cushing, and consequently affect both WTI crude oil cash prices and NYMEX futures prices.

36. A firm that controlled substantial storage in Cushing, and pipeline capacity into Cushing, would be able to manipulate NYMEX futures trading markets and thereby enhance its own futures positions at the expense of producers, refiners, and traders. Because the price of WTI crude oil is used as a benchmark for the price of other crude oil, the ability to manipulate the delivered price of WTI crude oil will have ripple effects throughout the oil industry.

COUNT ONE: LOSS OF COMPETITION IN PRODUCTION AND SALE OF ANS CRUDE OIL

37. Paragraphs 1 - 36 are incorporated by reference as if fully set forth herein.

A. Relevant Product Markets

38. The relevant product markets in which it is appropriate to assess the effects of the proposed merger include:

(a) the production, sale, and delivery of ANS crude oil;

(b) the production, sale, and delivery of crude oil used by targeted West Coast refiners; and

(b) the production, sale, and delivery of all crude oil used by refiners on the West Coast.

B. Relevant Geographic Markets

39. The relevant geographic market in which it is appropriate to assess the effects of the proposed merger are:

(a) the United States West Coast;

(b) smaller areas within the United States West Coast, including Los Angeles, San Francisco, and Seattle; and
(c) targeted refineries on the United States West Coast.

C. Concentration

40. The relevant markets are highly concentrated and the proposed merger, if consummated, will substantially increase that concentration.

D. Conditions of Entry

41. Entry into the relevant markets would not be timely, likely, or sufficient to prevent anticompetitive effects.

E. Effects

42. The merger will eliminate existing and potential competition between BP Amoco and ARCO, and will enhance, increase, and facilitate the continued exercise by BP Amoco of its market power, in the sale of ANS crude oil, among other ways, by:

(a) reducing the amount of ANS crude oil reserves found and developed;

(b) reducing the amount of ANS crude oil produced;

(c) reducing the amount of crude oil shipped to the United States West Coast; and

(d) raising barriers to entry;

each of which will increase the likelihood that the price of ANS crude oil will increase, or will not decrease as much as it otherwise would have, but for the merger.

COUNT TWO: LOSS OF COMPETITION IN BIDDING FOR RIGHTS TO EXPLORE ON THE ALASKA NORTH SLOPE

43. Paragraphs 1 - 42 are incorporated by reference as if fully set forth herein.

A. The Relevant Product Market

44. The purchase of exploration rights is a relevant product market and line of commerce within which to assess the likely effects of the proposed merger.

B. The Relevant Geographic Market

45. The Alaska North Slope is the geographic market within which to assess the likely effects of the proposed merger.

C. Concentration

46. After the merger, BP Amoco would become the leading bidder and, alone, would control a dominant share of exploration and development assets. The proposed merger would substantially increase market concentration in an already highly concentrated market for bidding on exploration rights for new North Slope fields.

D. Conditions of Entry

47. Entry into the relevant markets would not be timely, likely, or sufficient to prevent the anticompetitive effects.

E. Effects

48. The effect of the proposed merger, if consummated, will be substantially to lessen competition in bidding for leases on state and federal properties on the Alaska North Slope. The proposed merger will also raise already formidable barriers to

entry.

COUNT THREE: LOSS OF COMPETITION IN PIPELINE TRANSPORTATION OF ANS CRUDE OIL

49. Paragraphs 1 - 48 are incorporated by reference as if fully set forth herein.

A. The Relevant Product Market

50. The pipeline transportation of ANS crude oil is a relevant product market and line of commerce within which to assess the likely effects of the proposed merger.

B. The Relevant Geographic Market

51. The Alaska North Slope is the geographic market within which to assess the likely effects of the proposed merger.

C. Concentration

52. The relevant market is highly concentrated and the proposed merger would substantially increase market concentration. After the merger, BP Amoco would become the largest owner of TAPS pipeline capacity and would control a dominant share of that market.

D. Conditions of Entry

53. Entry into the relevant markets would not be timely, likely, or sufficient to prevent the anticompetitive effects.

E. Effects

54. The effect of the proposed merger, if consummated, will be substantially to lessen actual and potential competition, either unilaterally or through coordinated interaction, with the likelihood that the price of transporting ANS crude oil through TAPS will increase.

COUNT FOUR: LOSS OF POTENTIAL COMPETITION IN SALE OF ANS NATURAL GAS

55. Paragraphs 1 - 54 are incorporated by reference as if fully set forth herein.

A. The Relevant Product Market

56. The development for commercial sale of natural gas is a relevant product market in which it is appropriate to assess the likely effects of the proposed merger.

B. The Relevant Geographic Market

57. The Alaska North Slope is the appropriate geographic market within which to assess the likely effects of the proposed merger.

C. Concentration

58. Three companies have an interest in the resources that are capable of producing natural gas from the Alaska North Slope in commercial quantities. The proposed merger will reduce that number to two.

D. Conditions of Entry

59. Entry into the relevant markets would not be timely, likely, or sufficient to prevent the anticompetitive effects.

E. Effects

60. The effect of the proposed merger, if consummated, will eliminate substantial potential competition between BP Amoco and ARCO. The elimination of that competition will substantially increase the probability that commercial development of natural gas on the North Slope will be

delayed, and that the sale of natural gas, when and if the fields are commercially developed, will be at noncompetitive prices.

COUNT FIVE: LOSS OF COMPETITION IN PIPELINE AND OIL STORAGE SERVICES IN CUSHING, OKLAHOMA

61. Paragraphs 1 - 60 are incorporated by reference as if fully set forth herein.

A. The Relevant Product Market

62. Oil pipeline and storage services into and in Cushing are an appropriate relevant product market within which to assess the likely effects of the proposed merger.

B. The Relevant Geographic Market

63. Cushing is an appropriate section of the country and geographic market within which to assess the likely effects of the proposed merger on pipeline and storage services for crude oil trading based in Cushing.

C. Concentration

64. The proposed merger would substantially increase market concentration in an already highly concentrated market. After the proposed merger, BP would control over 40% of the pipeline and storage capacity serving Cushing.

D. Conditions of Entry

65. Entry into the relevant markets would not be timely, likely, or sufficient to prevent the anticompetitive effects.

E. Effects

66. The proposed merger, if consummated, would substantially lessen competition in pipeline and storage services into and in Cushing by, among other ways:

(a) eliminating substantial actual competition between BP Amoco and ARCO;

(b) creating or enhancing or facilitating the ability of BP Amoco to exercise market power; and

(c) enabling BP Amoco to manipulate NYMEX trading in light sweet crude oil futures by restricting or otherwise manipulating the deliverable supply of crude oil in Cushing.

V. Violations Charged

67. The agreement entered into between Respondents BP Amoco and ARCO for their merger constitutes a violation of Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. ' 45. Further, the agreement, if consummated, would be a violation of Section 5 of the Federal Trade Commission Act and Section 7 of the Clayton Act, 15 U.S.C. ' 18.

WHEREFORE, THE PREMISES CONSIDERED, the Federal Trade Commission on this thirteenth day of April, 2000, issues its Complaint against Respondents BP Amoco and ARCO.

By the Commission.

ORDER TO HOLD SEPARATE AND MAINTAIN ASSETS

The Federal Trade Commission (ACommission@) having initiated an investigation of the proposed acquisition by Respondent BP Amoco p.l.c. (ABP Amoco@), of all of the outstanding shares of Respondent Atlantic Richfield Company (AARCO@) and Respondents having been furnished thereafter with a copy of a draft of Complaint which the Bureau of Competition presented to the Commission for its consideration and which, if issued by the Commission, would charge Respondents with violations of Section 7 of the Clayton Act, as amended, 15 U.S.C. ' 18, and Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. ' 45; and

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

The Commission having thereafter considered the matter and having determined that it had reason to believe that Respondents have violated the said Acts, and that a Complaint should issue stating its charges in that respect, and having determined to accept the executed Consent Agreement and to place such Consent Agreement containing the Decision and Order on the public record for a period of thirty (30) days, the Commission hereby issues its Complaint, makes the following jurisdictional findings and issues this Order to Hold Separate and Maintain Assets:

1. Respondent BP Amoco is a corporation organized, existing, and doing business under and by virtue of the laws of England and Wales, with its office and principal place of business located at Britannic House, 1 Finsbury Circus, London EC2M 7BA, England. BP Amoco=s operating subsidiary in the United States is located at BP Amoco Corporation, 200 East Randolph Drive, Chicago, Illinois 60601-7125.

2. Respondent ARCO is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Delaware with its office and principal place of business located at 333 S. Hope Street, Los Angeles, California 90071.

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

ORDER

I.

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

A. ABP Amoco@ means BP Amoco p.l.c., its directors, officers, employees, agents and representatives, predecessors, successors, and assigns; its subsidiaries, divisions, groups and affiliates controlled by BP Amoco, and the respective directors, officers, employees, agents and representatives, successors, and assigns of each.

B. AARCO@ means The Atlantic Richfield Company its directors, officers, employees, agents and representatives, predecessors, successors, and assigns; its subsidiaries,

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

C. ARespondents@ means BP Amoco and ARCO, individually and collectively.

D. ACommission@ means the Federal Trade Commission.

E. APhillips@ means Phillips Petroleum Company, a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware with its principal place of business at Phillips Building, 422 South Keeler Street, Bartlesville, Oklahoma 74004, and any of its subsidiaries, successors and assigns.

F. AAcquisition@ means the proposed acquisition by BP Amoco of ARCO as described in the March 31, 1999, Agreement and Plan of Merger between BP Amoco and ARCO.

G. AAlaska Acquirer@ means the single entity and any of its subsidiaries, successors and assigns to whom the ARCO Alaska Assets and ARCO Beluga, Inc. are divested by the trustee as required by the terms of the Consent Agreement and Decision and Order.

H. AAlaska Asset Maintenance Trustee@ means the trustee appointed pursuant to Paragraph III of this Order.

I. AAlaska Held Separate Businesses@ means the ARCO Alaska Assets, which includes the Alaska Approval Assets, and all of ARCO=s interest in ARCO Beluga, Inc.

J. AAlaska Hold Separate Trustee@ means the trustee appointed pursuant to Paragraph IV of this Order.

K. AARCO Cushing Assets@ means:

Order to Hold Separate and Maintain Assets

1. all of ARCO=s assets, properties, businesses and goodwill, tangible and intangible, of and interest in, direct or indirect, the Seaway Crude Oil Pipeline Assets, and

2. all of ARCO=s assets, properties, businesses and goodwill, tangible and intangible, of and interest in, direct or indirect, the Mid-Continent Crude Oil Logistics and Services Businesses.

L. AARCO Pipe Line Company@ means ARCO Pipe Line Company, a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware with its principal place of business at 15600 JFK Boulevard, Houston, Texas 77032, as it is constituted at the beginning of the Hold Separate Period for the Cushing Held Separate Businesses, and which shall, at a minimum, include the ARCO Cushing Assets.

M. ACushing Acquirer@ means the entity or entities and any of their subsidiaries, successors and assigns to whom the ARCO Cushing Assets are divested pursuant to Paragraph III of the Consent Agreement and Decision and Order or by the trustee pursuant to Paragraph V of the Consent Agreement and Decision and Order.

N. ACushing Asset Maintenance Trustee@ means the trustee appointed pursuant to Paragraph V of this Order.

O. ACushing Held Separate Businesses@ means ARCO Pipe Line Company.

P. ACushing Hold Separate Trustee@ means the trustee appointed pursuant to Paragraph VI of this Order.

Q. ADivestiture Trustee@ means the trustee appointed by the Commission pursuant to Paragraph V of the Consent Agreement and the Decision and Order.

R. AHold Separate Period@ means the period of time which shall begin: (1) for the Alaska Held Separate Businesses, ten (10) days after Respondents fail to complete the divestiture to Phillips within the time required by Paragraph II.B.1 of the Consent Agreement and the Decision and Order, and (2) for the Cushing Held Separate Businesses, ten (10) days after the consummation of the Acquisition, and shall terminate as provided in Paragraph IX of this Order to Hold Separate and Maintain Assets.

S. AMaterial Confidential Information@ means competitively sensitive or proprietary information not independently known to an entity from sources other than the entity to which the information pertains, and includes, but is not limited to, all customer lists, price lists, marketing methods, patents, technologies, processes, know-how, or other trade secrets.

PROVIDED, HOWEVER, any term used in this Order to Hold Separate and Maintain Assets that is not otherwise defined in this Paragraph I has the same meaning as defined in the Consent Agreement and the Decision and Order.

II.

IT IS FURTHER ORDERED that, from the date this Order to Hold Separate and Maintain Assets becomes final:

A. Respondents shall take such actions as are reasonably necessary to maintain the viability and marketability of the ARCO Alaska Assets, the Alaska Approval Assets and ARCO Beluga, Inc., and to prevent the destruction, removal, wasting, deterioration, sale, disposition, transfer or impairment of any of the ARCO Alaska Assets, the Alaska Approval Assets and ARCO Beluga, Inc., except for ordinary wear and tear and as

would otherwise occur in the ordinary course of business;

B. Respondents shall use reasonable best efforts to secure the approvals, consents or waivers for the Alaska Approval Assets pursuant to the terms and provisions of the Consent Agreement and the Decision and Order;

C. Respondents shall complete expeditiously the Transition Services Agreement, as that term is defined in Paragraph II.C. of the Consent Agreement and Decision and Order, pursuant to which ARCO will provide Phillips with transition services related to Phillips= acquisition of the ARCO Alaska Assets, the Alaska Approval Assets, and ARCO Beluga, Inc.;

D. Respondents shall comply with Paragraph IV of the Consent Agreement and Decision and Order relating to ARCO Alaska Employees and Key ARCO Alaska Employees.

E. Respondents shall take such actions as are reasonably necessary to maintain the viability and marketability of the ARCO Cushing Assets and to prevent the destruction, removal, wasting, deterioration, sale, disposition, transfer or impairment of any of the ARCO Cushing Assets, except for ordinary wear and tear and as would otherwise occur in the ordinary course of business;

III.

IT IS FURTHER ORDERED that:

A. At any time after the Commission issues this Order to Hold Separate and Maintain Assets the Commission may appoint an Alaska Asset Maintenance Trustee to ensure that Respondents comply with their obligations relating to the ARCO Alaska Assets, Alaska Approval Assets, ARCO Beluga, Inc., and Alaska Asset Approval Consents under the terms of Paragraph II of this Order to Hold Separate and Maintain Assets and of any corresponding terms in the Consent Agreement and the Decision and Order.

Order to Hold Separate and Maintain Assets

B. Respondents shall consent to the following terms and conditions regarding the powers, duties, authorities and responsibilities of the Alaska Asset Maintenance Trustee appointed pursuant to Paragraph III.A.:

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

2. The Alaska Asset Maintenance Trustee shall have the power and authority to monitor Respondents= compliance with the terms of Paragraphs II and III of this Order to Hold Separate and Maintain Assets and of any corresponding terms in the Consent Agreement and the Decision and Order.

3. Within ten (10) days after appointment of the Alaska Asset Maintenance Trustee, Respondents shall execute a trust agreement that, subject to the prior approval of the Commission, confers on the Alaska Asset Maintenance Trustee all the rights and powers necessary to permit the Alaska Asset Maintenance Trustee to monitor Respondents= compliance with the terms of this Order to Hold Separate and Maintain Assets and the Consent Agreement and the Decision and Order.

4. The Alaska Asset Maintenance Trustee shall serve for such time as is necessary to monitor Respondents= compliance with the provisions of Paragraph II of this Order.
5. The Alaska Asset Maintenance Trustee shall have full and

complete access, subject to any legally recognized privilege of Respondents, to Respondents= personnel, books, records, documents, facilities and technical information relating to the ARCO Alaska Assets, ARCO Beluga, Inc., ARCO and the Alaska Approval Assets, or to any other relevant information, as the Alaska Asset Maintenance Trustee may reasonably request, including, but not limited to, all documents and records kept in the normal course of business that relate to the ARCO Alaska Assets, ARCO Beluga, Inc., and the Alaska Approval Assets. Respondents shall cooperate with any reasonable request of the Alaska Asset Maintenance Trustee. Respondents shall take no action to interfere with or impede the Alaska Asset Maintenance Trustee=s ability to monitor Respondents=s compliance with this Order to Hold Separate and Maintain Assets and the Consent Agreement and the Decision and Order.

6. The Alaska Asset Maintenance Trustee shall serve, without bond or other security, at the expense of the Respondents, on such reasonable and customary terms and conditions as the Commission may set. The Alaska Asset Maintenance Trustee shall have the authority to employ, at the expense of Respondents, such consultants, accountants, attorneys and other representatives and assistants as are reasonably necessary to carry out the Alaska Asset Maintenance Trustee=s duties and responsibilities.

7. Respondents shall indemnify the Alaska Asset Maintenance Trustee and hold the Alaska Asset Maintenance Trustee harmless against any losses, claims, damages, liabilities or expenses arising out of, or in connection with, the performance of the Alaska Asset Maintenance Trustee=s duties, including all reasonable fees of counsel and other expenses incurred in connection

with the preparations for, or defense of, any claim whether or not resulting in any liability, except to the extent that such liabilities, losses damages, claims, or expenses result from misfeasance, gross negligence, wilful or wanton acts, or bad faith by the Alaska Asset Maintenance Trustee.

8. If the Commission determines that the Alaska Asset Maintenance Trustee has ceased to act or failed to act diligently, the Commission may appoint a substitute trustee in the same manner as provided in Paragraph III.A. of this Order.

9. The Commission may on its own initiative or at the request of the Alaska Asset Maintenance Trustee issue such additional orders or directions as may be necessary or appropriate to assure compliance with the requirements of this Order to Hold Separate and Maintain Assets, the Consent Agreement and the Decision and Order.

10. The Alaska Asset Maintenance Trustee shall evaluate information submitted to it by Respondents and Phillips with respect to the efforts of Phillips and Respondents to obtain the Alaska Approval Asset Consents. The Alaska Asset Maintenance Trustee shall have the authority to take reasonable measures to expedite the Alaska Approval Asset Consents. The Alaska Asset Maintenance Trustee shall have the authority to take reasonable measures to expedite the divestiture to Phillips of individual assets or groups of assets within the ARCO Alaska Approval Assets consistent with the purposes of this Order, the Consent Agreement and the Decision and Order. Such measures shall be made with the consent of Respondents, which consent shall not be unreasonably withheld, and with written notice to Respondents, the Commission and Phillips. The Alaska Asset Maintenance Trustee shall report in writing to the Commission, concerning compliance by Respondents with the provisions of Paragraph II of this Order to Hold Separate and Maintain Assets, the Consent Agreement and the Decision and

Order, within twenty (20) days from the date of appointment and every thirty (30) days until the Respondents have complied with the provisions of Paragraph II of this Order. Such report shall include at least the following:

a. whether Respondents have given the Alaska Asset Maintenance Trustee reports and access to all information and records pursuant to Paragraph III.B.5 of this Order;

b. what steps Respondents and Phillips have taken to secure the Alaska Approval Asset Consents including, but not limited to, timetables, status reports, what documents have been filed, what documents are required to be filed, plans by Respondents to comply with this Order to Hold Separate and Maintain Assets, the Consent Agreement and the Decision and Order, and information about problems or concerns of the regulatory bodies, Respondents, Phillips and third parties;

c. whether, in the Alaska Asset Maintenance Trustee=s opinion, Respondents are making a good faith effort to comply expeditiously with this Order to Hold Separate and Maintain Assets, the Consent Agreement and the Decision and Order and whether and when the Alaska Approval Assets Consents are likely to be obtained;

d. whether Respondents have maintained the ARCO Alaska Assets and the Alaska Approval Assets as required by Paragraph II of this Order; and

e. any other information that may assist the Commission in determining whether Respondents are

complying with the terms of this Order, the Consent Agreement and the Decision and Order.

C. The Alaska Asset Maintenance Trustee may be the same person appointed as the Alaska Hold Separate Trustee pursuant to Paragraph IV of this Order to Hold Separate and Maintain Assets, as the Divestiture Trustee pursuant to Paragraph V.A. of the Decision and Order in this matter, and as any similar trustee for the ARCO Cushing Assets.

IV.

IT IS FURTHER ORDERED that:

A. During the Hold Separate Period, Respondents shall hold the Alaska Held Separate Businesses as a separate and independent business except to the extent that Respondents must exercise direction and control over the Alaska Held Separate Businesses to assure compliance with this Order to Hold Separate and Maintain Assets, or with the Consent Agreement, and except as otherwise provided in this Order to Hold Separate and Maintain Assets, and shall vest the Alaska Held Separate Businesses with all powers and authorities necessary to conduct business. The purpose of this Paragraph is: (i) to preserve the Alaska Held Separate Businesses as viable, competitive, and ongoing businesses, independent of Respondents, until their complete divestiture is achieved; (ii) to assure that no Material Confidential Information is exchanged between Respondents and the Alaska Held Separate Businesses; and (iii) to prevent interim harm to competition pending divestiture and other relief.

B. The Commission shall select an Alaska Hold Separate Trustee, subject to the consent of Respondents, which consent shall not be unreasonably withheld, to satisfy the requirements of Paragraph IV of this Order to Hold Separate and Maintain Assets, and the Consent Agreement and the Decision and Order. If Respondents have not opposed, in writing, including the reasons for opposing, the selection of any proposed trustee within ten (10) days after receipt of written notice by the staff

of the Commission to Respondents of the identity of any proposed trustee, Respondents shall be deemed to have consented to the selection of the proposed trustee.

C. Respondents shall consent to the following procedures with regard to the Alaska Hold Separate Trustee:

1. The Alaska Hold Separate Trustee shall have the power and authority to monitor Respondents=s compliance with the terms of this Order to Hold Separate and Maintain Assets and the Consent Agreement and the Decision and Order.

2. Within ten (10) days after appointment of the Alaska Hold Separate Trustee, Respondent shall execute a trust agreement that, subject to the prior approval of the Commission, confers on the Alaska Hold Separate Trustee all the rights and powers necessary to permit the Alaska Hold Separate Trustee to monitor Respondent=s compliance with the terms of this Order to Hold Separate and Maintain Assets and of any corresponding terms in the Consent Agreement and the Decision and Order.

3. The Alaska Hold Separate Trustee shall serve until the termination of the Hold Separate Period.

4. The Alaska Hold Separate Trustee shall have full and complete access, subject to any legally recognizable privilege of Respondents, to Respondents=s personnel, books, records, documents, facilities and technical information relating to the Alaska Held Separate Businesses or to any other relevant information, as the Alaska Hold Separate Trustee may reasonably request, including, but not limited to, all documents and records kept in the normal course of business that relate to the Alaska Held Separate Businesses. Respondents shall

cooperate with any reasonable request of the Alaska Hold Separate Trustee. Respondents shall take no action to interfere with or impede the Alaska Hold Separate Trustee=s ability to monitor Respondents=s compliance with this Order to Hold Separate and Maintain Assets and the Consent Agreement and the Decision and Order.

5. The Alaska Hold Separate Trustee shall serve, without bond or other security, at the expense of the Respondents, on such reasonable and customary terms and conditions as the Commission may set. The Alaska Hold Separate Trustee shall have the authority to employ, at the expense of Respondents, such consultants, accountants, attorneys and other representatives and assistants as are reasonably necessary to carry out the Alaska Hold Separate Trustee=s duties and responsibilities.

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

7. If the Commission determines that the Alaska Hold Separate Trustee has ceased to act or failed to act diligently, the Commission may appoint a substitute trustee in the same manner as provided in Paragraph IV of this Order.

8. The Commission may on its own initiative or at the request of the Alaska Hold Separate Trustee issue such

additional orders or directions as may be necessary or appropriate to assure compliance with the requirements of Paragraph IV of this Order to Hold Separate and Maintain Assets, and of any corresponding terms in the Consent Agreement and the Decision and Order.

9. The Alaska Hold Separate Trustee shall report in writing to the Commission concerning compliance by Respondents with the applicable provisions of this Order to Hold Separate and Maintain Assets, the Consent Agreement and the Decision and Order, within twenty (20) days from the date of appointment and every thirty (30) days until the Respondents have complied with the applicable provisions of this Order, the Consent Agreement and the Decision and Order. Such report shall include at least the following:

   a. whether Respondents have given the Alaska Hold Separate Trustee reports and access to all information and records pursuant to Paragraph IV.C.4 of this order;

   b. whether Respondents have complied with the requirements of Paragraph IV of this Order, and of any corresponding terms in the Consent Agreement and the Decision and Order; and

   c. any other information that may assist the Commission in determining whether Respondents are complying with the applicable terms of this Order, the Consent Agreement and the Decision and Order.

D. The Alaska Hold Separate Trustee may be the same person appointed as the Alaska Asset Maintenance Trustee pursuant to Paragraph III of this Order to Hold Separate and Maintain Assets, as the Divestiture Trustee pursuant to Paragraph V.A. of the Decision and Order in this matter, and as any similar trustee for the ARCO Cushing assets.

E. Respondents shall, subject to any applicable obligations of ARCO Alaska, Inc. under the Alaska MPSA, establish the following with regard to the Alaska Held Separate Businesses:

1. The Alaska Held Separate Businesses shall be staffed with sufficient employees to maintain the viability and competitiveness of the Alaska Held Separate Businesses. Respondents shall, within ten (10) days of the start of the Hold Separate Period, appoint, subject to the approval of the Alaska Hold Separate Trustee, three (3) individuals from among the current employees of Alaska Held Separate Businesses working in the management, exploration and production, transportation, regulatory, marketing, and financial operations of the Alaska Held Separate Businesses to manage and maintain the Alaska Held Separate Businesses (AAlaska Management Team@). The Alaska Management Team, in its capacity as such, shall report directly and exclusively to the Alaska Hold Separate Trustee, and shall manage the Alaska Held Separate Businesses independently of the management of Respondents. The Alaska Management Team shall not be involved in any way in the other operations of the businesses of Respondents, other than being kept informed on all issues dealing with the Alaska Held Separate Businesses during the Hold Separate Period.

2. Respondents shall not change the composition of the management of the Alaska Held Separate Businesses except that the Alaska Management Team shall be permitted to remove management employees for cause subject to approval of the Alaska Hold Separate Trustee. Respondents shall not change the composition of the Alaska Management Team except that the Alaska Hold Separate Trustee shall have the power to remove members of the Alaska Management Team for cause and to require Respondents to appoint replacement members to the Alaska Management Team in the same manner as provided in Paragraph IV.E.1 of this Order to Hold Separate and Maintain Assets.

Order to Hold Separate and Maintain Assets

3. The Alaska Hold Separate Trustee shall have responsibility, through the Alaska Management Team, for managing the Alaska Held Separate Businesses consistent with the terms of this Order to Hold Separate and Maintain Assets; for maintaining the independence of the Alaska Held Separate Businesses consistent with the terms of this Order to Hold Separate and Maintain Assets and the Consent Agreement; and for assuring Respondents= compliance with their obligations pursuant to this Order to Hold Separate and Maintain Assets.

4. Employees of the Alaska Held Separate Businesses shall include: (i) all personnel employed by the Alaska Held Separate Businesses as of the date the Commission accepts the Consent Agreement for public comment; and (ii) those persons hired from other sources. The Alaska Management Team, with the approval of the Alaska Hold Separate Trustee, shall have the authority to replace employees who have otherwise left their positions with the Alaska Held Separate Businesses since March 1, 2000. To the extent that employees of any of the Alaska Held Separate Businesses leave the Alaska Held Separate Businesses prior to the divestiture of the Alaska Held Separate Businesses, the Alaska Management Team, with the approval of the Alaska Hold Separate Trustee, may replace the departing employees of the Alaska Held Separate Businesses with persons who have similar experience and expertise.

5. Respondents shall, within ten (10) days of the start of the Hold Separate Period, cause the Alaska Hold Separate Trustee, each member of the Management Team, and each supervisory employee of the Alaska Held Separate Businesses to submit to the Commission a signed statement that the individual will maintain the confidentiality required by the terms and conditions of this Order to Hold Separate and Maintain Assets. These individuals must retain and maintain all Material Confidential Information relating to the Alaska Held

separate business on a confidential basis and, except as is permitted by this Order to Hold Separate and Maintain Assets, such persons shall be prohibited from providing, discussing, exchanging, circulating, or otherwise furnishing any such information to or with any other person whose employment involves any of Respondents= businesses other than the Alaska Held Separate Businesses. These persons shall not be involved in any way in the management, sales, marketing, and financial operations of the competing products of Respondents.

6. Respondents shall, within ten (10) days of the start of the Hold Separate Period, establish written procedures, to be approved by the Alaska Hold Separate Trustee, covering the management, maintenance, and independence of the Alaska Held Separate Businesses consistent with the provisions of this Order to Hold Separate and Maintain Assets.

7. Respondents shall, within ten (10) days of the start of the Hold Separate Period, circulate to employees of the Alaska Held Separate Businesses a notice of this Order to Hold Separate and Maintain Assets and Consent Agreement, in the form attached as Attachment A.

8. The Alaska Hold Separate Trustee, if one is appointed, and the Alaska Management Team shall serve, without bond or other security, at the cost and expense of Respondents, on reasonable and customary terms commensurate with the person's experience and responsibilities. Respondents shall indemnify the Alaska Hold Separate Trustee and the Alaska Management Team, and hold the Alaska Hold Separate Trustee and the Alaska Management Team harmless against any losses, claims, damages, liabilities, or expenses arising out of, or in connection with, the performance of the Alaska Hold Separate Trustee's or the

Alaska Management Team=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 Alaska Hold Separate Trustee or the Alaska Management Team.

9. Respondents shall provide the Alaska Held Separate Businesses with sufficient working capital to operate the Alaska Held Separate Businesses at least at current rates of operation, to meet all capital calls with respect to the Alaska Held Separate Businesses and to carry on, at least at their scheduled pace, all capital projects for the Alaska Held Separate Businesses that are ongoing or approved as of March 1, 2000. In addition, Respondents shall continue, at least at their scheduled pace, any additional expenditures for the Alaska Held Separate Businesses authorized prior to the date the Consent Agreement was signed by Respondents. During the Hold Separate Period, Respondents shall make available for use by the Alaska Held Separate Businesses funds sufficient to perform all necessary routine maintenance to, and replacements of, assets of the Alaska Held Separate Businesses. Respondents shall provide the Alaska Held Separate Businesses with such funds as are necessary to maintain the viability, competitiveness, and marketability of the Alaska Held Separate Businesses until the date the divestiture is completed, provided the Alaska Held Separate Businesses may not assume any new long-term debt except as necessary to meet a competitive threat and as approved by the Alaska Hold Separate Trustee.

10. Respondents shall continue to provide the same support services, if any, to the Alaska Held Separate Businesses as are being provided to such assets by Respondents as of the date the Consent Agreement was signed by Respondents. Respondents may charge the Alaska Held Separate

Businesses the same fees, if any, charged by Respondents for such support services as of the date the Consent Agreement was signed by Respondents. Respondents= personnel providing such support services shall retain and maintain all Material Confidential Information of the Alaska Held Separate Businesses on a confidential basis, and, except as is permitted by this Order to Hold Separate and Maintain Assets, such persons shall be prohibited from providing, discussing, exchanging, circulating, or otherwise furnishing any such information to or with any person whose employment involves any of Respondents= other businesses. Such personnel shall also execute confidentiality agreements prohibiting the disclosure of any Material Confidential Information of the Alaska Held Separate Businesses.

11. Except as provided in this Order to Hold Separate and Maintain Assets, Respondents shall not employ or make offers of employment to employees of the Alaska Held Separate Businesses during the Hold Separate Period. The Alaska Acquirer of the Alaska Held Separate Businesses shall have the option of offering employment to the Alaska Held Separate Businesses employees. After the Hold Separate Period, Respondents may offer employment to the Alaska Held Separate Businesses employees who have not been employed or whose employment has been terminated by the acquirer of the Alaska Held Separate Businesses. Respondents shall not interfere with the employment of employees of the Alaska Held Separate Businesses by the Alaska Acquirer of the Alaska Held Separate Businesses; shall not offer any incentive to said employees to decline employment with the Alaska Acquirer of the Alaska Held Separate Businesses or accept other employment with Respondents; and shall remove any impediments that may deter employees of the Alaska Held Separate Businesses from accepting employment

with the acquirer of the Alaska Held Separate Businesses including, but not limited to, any non-compete or confidentiality provisions of employment or other contracts with the Alaska Held Separate Businesses that would affect the ability of employees of the Alaska Held Separate Businesses to be employed by the acquirer of the Alaska Held Separate Businesses.

12. Notwithstanding the above, Respondents may offer a bonus or severance to those ARCO Alaska Employees that continue their employment with the Alaska Held Separate Businesses until the date that the Alaska Held Separate Businesses are divested.

13. Respondents shall not exercise direction or control over, or influence directly or indirectly, the Alaska Held Separate Businesses, the Alaska Hold Separate Trustee, the Alaska Management Team, or any of its operations; *provided, however*, that Respondents may exercise only such direction and control over the Alaska Held Separate Businesses as are necessary to assure compliance with this Order to Hold Separate and Maintain Assets, the Consent Agreement, the Decision and Order, or with all applicable laws.

14. Except to the extent provided in subparagraphs IV.E.10, IV.E.13, IV.E.16, IV.E.17, Respondents shall not permit any non-Alaska Held Separate Businesses employees, officers, or directors to be involved in the operations of the Alaska Held Separate Businesses.

15. If the Alaska Hold Separate Trustee ceases to act or fails to act diligently and consistent with the purposes of this Order to Hold Separate and Maintain Assets, the Commission may appoint a substitute Alaska Hold Separate Trustee in the same manner as provided in Paragraph IV of this Order to Hold Separate and Maintain Assets.

Order to Hold Separate and Maintain Assets

16. Until the divestiture of the Alaska Held Separate Businesses is accomplished, Respondents shall ensure that Alaska Held Separate Businesses employees continue to be paid their salaries, all accrued bonuses, pensions and other accrued benefits to which such employees would otherwise have been entitled had they remained in the employment of ARCO during the Hold Separate Period.

17. Except as required by law or applicable regulatory authorities, and except to the extent that necessary information is exchanged in the course of consummating the Acquisition, carrying out their obligations under the Transition Services Agreement, defending investigations, defending or prosecuting litigation, obtaining legal advice, negotiating agreements to divest assets pursuant to the Consent Agreement, or complying with this Order to Hold Separate and Maintain Assets, the Consent Agreement or the Decision and Order, Respondents shall not receive or have access to, or use or continue to use, any Material Confidential Information, not in the public domain, about the Alaska Held Separate Businesses. Respondents may receive, on a regular basis, aggregate financial information relating to the Alaska Held Separate Businesses, but only insofar as is necessary to allow Respondents to prepare United States or foreign consolidated financial reports and tax returns. Any such information that is obtained pursuant to this subparagraph shall be used only for the purposes set forth in this subparagraph.

18. the Alaska Hold Separate Trustee shall report in writing to the Commission concerning the Alaska Hold Separate Trustee=s efforts to accomplish the provisions and purposes of this Order, the Consent Agreement and the Decision and Order. Included within that report shall be the Alaska Hold Separate Trustee's or the Alaska Management Team=s assessment of the extent to which the Alaska Held Separate Businesses are meeting (or exceeding) their projected goals as are reflected in

operating plans, budgets, projections or any other regularly prepared financial statements.

V.

IT IS FURTHER ORDERED that:

A. At any time after the Commission issues this Order to Hold Separate and Maintain Assets, the Commission may appoint a Cushing Asset Maintenance Trustee to ensure that Respondents comply with their obligations relating to the ARCO Cushing Assets under the terms of Paragraph II.E of this Order to Hold Separate and Maintain Assets and of any corresponding terms in the Consent Agreement and the Decision and Order.

B. Respondents shall consent to the following terms and conditions regarding the powers, duties, authorities and responsibilities of the Cushing Asset Maintenance Trustee appointed pursuant to Paragraph V.A.:

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

2. The Cushing Asset Maintenance Trustee shall have the power and authority to monitor Respondents= compliance with the terms of Paragraphs II and V of this Order to Hold Separate and Maintain Assets and of any corresponding terms in the Consent Agreement and the

Decision and Order.

3. Within ten (10) days after appointment of the Cushing Asset Maintenance Trustee, Respondent shall execute a trust agreement that, subject to the prior approval of the Commission, confers on the Cushing Asset Maintenance Trustee all the rights and powers necessary to permit the Cushing Asset Maintenance Trustee to monitor Respondents= compliance with the terms of this Order to Hold Separate and Maintain Assets and the Consent Agreement and the Decision and Order.

4. The Cushing Asset Maintenance Trustee shall serve for such time as is necessary to monitor Respondents= compliance with the provisions of Paragraph II.E of this Order.

5. The Cushing Asset Maintenance Trustee shall have full and complete access, subject to any legally recognized privilege of Respondents, to Respondents= personnel, books, records, documents, facilities and technical information relating to the ARCO Cushing Assets or to any other relevant information, as the Cushing Asset Maintenance Trustee may reasonably request, including, but not limited to, all documents and records kept in the normal course of business that relate to the ARCO Cushing Assets. Respondents shall cooperate with any reasonable request of the Cushing Asset Maintenance Trustee. Respondents shall take no action to interfere with or impede the Cushing Asset Maintenance Trustee=s ability to monitor Respondents=s compliance with this Order to Hold Separate and Maintain Assets and the Consent Agreement and the Decision and Order.

6. The Cushing Asset Maintenance Trustee shall serve, without bond or other security, at the expense of the Respondents, on such reasonable and customary terms and conditions as the Commission may set. The Cushing Asset Maintenance Trustee shall have the authority to

employ, at the expense of Respondents, such consultants, accountants, attorneys and other representatives and assistants as are reasonably necessary to carry out the Cushing Asset Maintenance Trustee=s duties and responsibilities.

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

8. If the Commission determines that the Cushing Asset Maintenance Trustee has ceased to act or failed to act diligently, the Commission may appoint a substitute trustee in the same manner as provided in Paragraph V.A. of this Order.

9. The Commission may on its own initiative or at the request of the Cushing Asset Maintenance Trustee issue such additional orders or directions as may be necessary or appropriate to assure compliance with the requirements of this Order to Hold Separate and Maintain Assets, the Consent Agreement and the Decision and Order.

10. The Cushing Asset Maintenance Trustee shall evaluate information submitted to it by Respondents with respect to the efforts of Respondents to complete the divestiture. The Cushing Asset Maintenance Trustee shall report in

writing to the Commission, concerning compliance by Respondents with the provisions of Paragraph V of this Order to Hold Separate and Maintain Assets, the Consent Agreement and Decision and Order, within twenty (20) days from the date of appointment and every thirty (30) days until the Respondents have complied with the provisions of Paragraph II.E of this Order. Such report shall include at least the following:

a. whether Respondents have given the Cushing Asset Maintenance Trustee reports and access to all information and records pursuant to Paragraph V.B.5 of this order;

b. whether, in the Cushing Asset Maintenance Trustee=s opinion, Respondents are making a good faith effort to comply expeditiously with this Order to Hold Separate and Maintain Assets, the Consent Agreement and the Decision and Order;

c. whether Respondents have maintained the ARCO Cushing Assets as required by Paragraph II.E of this Order; and

d. any other information that may assist the Commission in determining whether Respondents are complying with the terms of this Order, the Consent Agreement and the Decision and Order.

C. The Cushing Asset Maintenance Trustee may be the same person appointed as the Cushing Hold Separate Trustee pursuant to Paragraph VI of this Order to Hold Separate and Maintain Assets, as the Divestiture Trustee pursuant to Paragraph V.A. of the Decision and Order in this matter, and as any similar trustee for the Alaska Held Separate Businesses.

VI.

IT IS FURTHER ORDERED that:

A. During the Hold Separate Period, Respondents shall hold the Cushing Held Separate Businesses as a separate and independent business except to the extent that Respondents must exercise direction and control over the Cushing Held Separate Businesses to assure compliance with this Order to Hold Separate and Maintain Assets, or with the Consent Agreement, and except as otherwise provided in this Order to Hold Separate and Maintain Assets, and shall vest the Cushing Held Separate Businesses with all powers and authorities necessary to conduct business. The purpose of this Paragraph is: (i) to preserve the Cushing Held Separate Businesses as viable, competitive, and ongoing businesses, independent of Respondents, until their complete divestiture is achieved; (ii) to assure that no Material Confidential Information is exchanged between Respondents and the Cushing Held Separate Businesses; and (iii) to prevent interim harm to competition pending divestiture and other relief.

B. The Commission shall select a Cushing Hold Separate Trustee, subject to the consent of Respondents, which consent shall not be unreasonably withheld, to satisfy the requirements of Paragraph VI of this Order and the Consent Agreement and the Decision and Order. If Respondents have not opposed, in writing, including the reasons for opposing, the selection of any proposed trustee within ten (10) days after receipt of written notice by the staff of the Commission to Respondents of the identity of any proposed trustee, Respondents shall be deemed to have consented to the selection of the proposed trustee.

C. Respondents shall consent to the following procedures with regard to the Cushing Hold Separate Trustee:

    1. The Cushing Hold Separate Trustee shall have the power and authority to monitor Respondents=s compliance with the terms of this Order to Hold Separate and Maintain

Assets and the Consent Agreement and the Decision and Order.

2. Within ten (10) days after appointment of the Cushing Hold Separate Trustee, Respondent shall execute a trust agreement that, subject to the prior approval of the Commission, confers on the Cushing Hold Separate Trustee all the rights and powers necessary to permit the Cushing Hold Separate Trustee to monitor Respondent=s compliance with the terms of this Order to Hold Separate and Maintain Assets and of any corresponding terms in the Consent Agreement and the Decision and Order.

3. The Cushing Hold Separate Trustee shall serve until the termination of the Hold Separate Period.

4. The Cushing Hold Separate Trustee shall have full and complete access, subject to any legally recognizable privilege of Respondents, to Respondents=s personnel, books, records, documents, facilities and technical information relating to the Cushing Held Separate Businesses or to any other relevant information, as the Cushing Hold Separate Trustee may reasonably request, including, but not limited to, all documents and records kept in the normal course of business that relate to the Cushing Held Separate Businesses. Respondents shall cooperate with any reasonable request of the Cushing Hold Separate Trustee. Respondents shall take no action to interfere with or impede the Cushing Hold Separate Trustee=s ability to monitor Respondents=s compliance with this Order to Hold Separate and Maintain Assets and the Consent Agreement and the Decision and Order.

5. The Cushing Hold Separate Trustee shall serve, without bond or other security, at the expense of the Respondents, on such reasonable and customary terms and conditions as the Commission may set. The Cushing Hold Separate Trustee shall have the authority to employ, at the expense

of Respondents, such consultants, accountants, attorneys and other representatives and assistants as are reasonably necessary to carry out the Cushing Hold Separate Trustee=s duties and responsibilities.

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

7. If the Commission determines that the Cushing Hold Separate Trustee has ceased to act or failed to act diligently, the Commission may appoint a substitute trustee in the same manner as provided in Paragraph VI of this Order.

8. The Commission may on its own initiative or at the request of the Cushing Hold Separate Trustee issue such additional orders or directions as may be necessary or appropriate to assure compliance with the requirements of Paragraph VI of this Order to Hold Separate and Maintain Assets, and of any corresponding terms of the Consent Agreement and the Decision and Order.

9. The Cushing Hold Separate Trustee shall report in writing to the Commission concerning compliance by Respondents with the applicable provisions of this Order to Hold Separate and Maintain Assets, the Consent

Agreement and the Decision and Order, within twenty (20) days from the date of appointment and every thirty (30) days until the Respondents have complied with the applicable provisions of this Order, the Consent Agreement and the Decision and Order. Such report shall include at least the following:

a. whether Respondents have given the Cushing Hold Separate Trustee reports and access to all information and records pursuant to Paragraph VI.C.4 of this order;

b. whether Respondents have complied with the requirements of Paragraph VI of this Order; and

c. any other information that may assist the Commission in determining whether Respondents are complying with the applicable terms of this Order, the Consent Agreement and the Decision and Order.

D. The Cushing Hold Separate Trustee may be the same person appointed as the Cushing Asset Maintenance Trustee pursuant to Paragraph V of this Order to Hold Separate and Maintain Assets, as the Divestiture Trustee pursuant to Paragraph V.A. of the Decision and Order in this matter, and as any similar trustee for the Alaska Held Separate Businesses.

E. Respondents shall establish the following with regard to the Cushing Hold Separate Businesses:

1. The Cushing Held Separate Businesses shall be staffed with sufficient employees to maintain the viability and competitiveness of the Cushing Held Separate Businesses. Respondents shall, within ten (10) days of the start of the Hold Separate Period, appoint, subject to the approval of the Hold Separate Trustee, three (3) individuals from among the current employees of Cushing Held Separate Businesses working in the management, transportation, regulatory, marketing, and financial operations of the Cushing Held Separate Businesses to manage and

maintain the Cushing Held Separate Businesses (ACushing Management Team@). The Cushing Management Team, in its capacity as such, shall report directly and exclusively to the Cushing Hold Separate Trustee, and shall manage the Cushing Held Separate Businesses independently of the management of Respondents. The Cushing Management Team shall not be involved in any way in the other operations of the businesses of Respondents, other than being kept informed on all issues dealing with the Cushing Held Separate Businesses during the Hold Separate Period.

2. Respondents shall not change the composition of the management of the Cushing Held Separate Businesses except that the Cushing Management Team shall be permitted to remove management employees for cause subject to approval of the Cushing Hold Separate Trustee. Respondents shall not change the composition of the Cushing Management Team except the Cushing Hold Separate Trustee shall have the power to remove members of the Cushing Management Team for cause and to require Respondents to appoint replacement members to the Cushing Management Team in the same manner as provided in subparagraph VI.E.1 of this Order to Hold Separate and Maintain Assets.

3. The Cushing Hold Separate Trustee shall have responsibility, through the Cushing Management Team, for managing the Cushing Held Separate Businesses consistent with the terms of this Order to Hold Separate and Maintain Assets; for maintaining the independence of the Cushing Held Separate Businesses consistent with the terms of this Order to Hold Separate and Maintain Assets and the Consent Agreement; and for assuring Respondents= compliance with their obligations pursuant to this Order to Hold Separate and Maintain Assets.

4. Employees of the Cushing Held Separate Businesses shall include: (i) all personnel employed by the Cushing Held Separate Businesses as of the date the Commission accepts the Consent Agreement for public comment; and (ii) those persons hired from other sources. The Cushing Management Team, with the approval of the Cushing Hold Separate Trustee, shall have the authority to replace employees who have otherwise left their positions with the Cushing Held Separate Businesses since March 1, 2000. To the extent that employees of any of the Cushing Held Separate Businesses leave the Cushing Held Separate Businesses prior to the divestiture of the Cushing Held Separate Businesses, the Cushing Management Team, with the approval of the Cushing Hold Separate Trustee, may replace the departing employees of the Cushing Held Separate Businesses with persons who have similar experience and expertise.

5. Respondents shall, within ten (10) days of the start of the Hold Separate Period, cause the Cushing Hold Separate Trustee, each member of the Management Team, and each supervisory employee of the Cushing Held Separate Businesses to submit to the Commission a signed statement that the individual will maintain the confidentiality required by the terms and conditions of this Order to Hold Separate and Maintain Assets. These individuals must retain and maintain all Material Confidential Information relating to the Cushing Held separate business on a confidential basis and, except as is permitted by this Order to Hold Separate and Maintain Assets, such persons shall be prohibited from providing, discussing, exchanging, circulating, or otherwise furnishing any such information to or with any other person whose employment involves any of Respondents= businesses other than the Cushing Held Separate Businesses. These persons shall not be involved in any way in the management, sales, marketing, and financial operations of the competing products of Respondents.

6. Respondents shall, within ten (10) days of the start of the Hold Separate Period, establish written procedures to be approved by the Cushing Hold Separate Trustee covering the management, maintenance, and independence of the Cushing Held Separate Businesses consistent with the provisions of this Order to Hold Separate and Maintain Assets.

7. Respondents shall, within ten (10) days of the start of the Hold Separate Period, circulate to employees of the Cushing Held Separate Businesses a notice of this Order to Hold Separate and Maintain Assets and Consent Agreement, in the form attached as Attachment B.

8. The Cushing Hold Separate Trustee, if one is appointed, and the Cushing Management Team shall serve, without bond or other security, at the cost and expense of Respondents, on reasonable and customary terms commensurate with the person's experience and responsibilities. Respondents shall indemnify the Cushing Hold Separate Trustee and the Cushing Management Team, and hold the Cushing Hold Separate Trustee and the Cushing Management Team harmless against any losses, claims, damages, liabilities, or expenses arising out of, or in connection with, the performance of the Cushing Hold Separate Trustee's or the Cushing Management Team=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 Cushing Hold Separate Trustee or the Cushing Management Team.

9. Respondents shall provide the Cushing Held Separate

Businesses with sufficient working capital to operate the Cushing Held Separate Businesses at least at current rates of operation, to meet all capital calls with respect to the Cushing Held Separate Businesses and to carry on, at least at their scheduled pace, all capital projects for the Cushing Held Separate Businesses that are ongoing or approved as of March 1, 2000. In addition, Respondents shall continue, at least at their scheduled pace, any additional expenditures for the Cushing Held Separate Businesses authorized prior to the date the Consent Agreement was signed by Respondents. During the period this Order to Hold Separate and Maintain Assets is effective, Respondents shall make available for use by the Cushing Held Separate Businesses funds sufficient to perform all necessary routine maintenance to, and replacements of, assets of the Cushing Held Separate Businesses. Respondents shall provide the Cushing Held Separate Businesses with such funds as are necessary to maintain the viability, competitiveness, and marketability of the Cushing Held Separate Businesses until the date the divestiture is completed, provided the Cushing Held Separate Businesses may not assume any new long-term debt except as necessary to meet a competitive threat and as approved by the Cushing Hold Separate Trustee.

10. Respondents shall continue to provide the same support services to the Cushing Held Separate Businesses as are being provided to such assets by Respondents as of the date the Consent Agreement was signed by Respondents. Respondents may charge the Cushing Held Separate Businesses the same fees, if any, charged by Respondents for such support services as of the date the Consent Agreement was signed by Respondents. Respondents= personnel providing such support services shall retain and maintain all Material Confidential Information of the Cushing Held Separate Businesses on a confidential basis, and, except as is permitted by this Order to Hold Separate and Maintain Assets, such persons shall be prohibited from providing, discussing, exchanging, circulating, or

otherwise furnishing any such information to or with any person whose employment involves any of Respondents= other businesses. Such personnel shall also execute confidentiality agreements prohibiting the disclosure of any Material Confidential Information of the Cushing Held Separate Businesses.

11. Except as provided in this Order to Hold Separate and Maintain Assets, Respondents shall not employ or make offers of employment to employees of the Cushing Held Separate Businesses during the Hold Separate Period. The acquirer of the Cushing Held Separate Businesses shall have the option of offering employment to the Cushing Held Separate Businesses employees. After the Hold Separate Period, Respondents may offer employment to the Cushing Held Separate Businesses employees who have not been employed or whose employment has been terminated by the acquirer of the Cushing Held Separate Businesses. Respondents shall not interfere with the employment of employees of the Cushing Held Separate Businesses by the acquirer of the ARCO Cushing Assets; shall not offer any incentive to said employees to decline employment with the acquirer of the Cushing Held Separate Businesses or accept other employment with Respondents; and shall remove any impediments that may deter employees of the Cushing Held Separate Businesses from accepting employment with the acquirer of the ARCO Cushing Assets including, but not limited to, any non-compete or confidentiality provisions of employment or other contracts with the Cushing Held Separate Businesses that would affect the ability of employees of the Cushing Held Separate Businesses to be employed by the acquirer of the ARCO Cushing Assets.

12. Notwithstanding the above, Respondents may offer a bonus or severance to those Cushing Held Separate Businesses employees who continue their employment

with the Cushing Held Separate Businesses until the date that the ARCO Cushing Assets are divested.

13. Respondents shall not exercise direction or control over, or influence directly or indirectly, the Cushing Held Separate Businesses, the Cushing Hold Separate Trustee, the Cushing Management Team, or any of its operations; *provided, however*, that Respondents may exercise only such direction and control over the Cushing Held Separate Businesses as are necessary to assure compliance with this Order to Hold Separate and Maintain Assets, the Consent Agreement, the Decision and Order, or with all applicable laws.

14. Except to the extent provided in subparagraphs VI.E.10, VI.E.13, VI.E.16, VI.E.17, Respondents shall not permit any non-Cushing Held Separate Businesses employees, officers, or directors to be involved in the operations of the Cushing Held Separate Businesses.

15. If the Cushing Hold Separate Trustee ceases to act or fails to act diligently and consistent with the purposes of this Order to Hold Separate and Maintain Assets, the Commission may appoint a substitute Cushing Hold Separate Trustee in the same manner as provided in Paragraph VI of this Order to Hold Separate and Maintain Assets.

16. Until the divestiture of the ARCO Cushing Assets is accomplished, Respondents shall ensure that Cushing Held Separate Businesses employees continue to be paid their salaries, all accrued bonuses, pensions and other accrued benefits to which such employees would otherwise have been entitled had they remained in the employment of ARCO during the Hold Separate Period.

17. Except as required by law and applicable regulatory authorities, and except to the extent that necessary information is exchanged in the course of consummating

the Acquisition, defending investigations, defending or prosecuting litigation, obtaining legal advice, negotiating agreements to divest assets pursuant to the Consent Agreement, or complying with this Order to Hold Separate and Maintain Assets, the Consent Agreement or the Decision and Order, Respondents shall not receive or have access to, or use or continue to use, any Material Confidential Information, not in the public domain, about the Cushing Held Separate Businesses. Respondents may receive, on a regular basis, aggregate financial information relating to the Cushing Held Separate Businesses, but only insofar as is necessary to allow Respondents to prepare United States or foreign consolidated financial reports and tax returns. Any such information that is obtained pursuant to this subparagraph shall be used only for the purposes set forth in this subparagraph.

18. The Cushing Hold Separate Trustee shall report in writing to the Commission concerning the Cushing Hold Separate Trustee=s efforts to accomplish the provisions and purposes of this Order, the Consent Agreement and the Decision and Order. Included within that report shall be the Cushing Hold Separate Trustee's or the Cushing Management Team=s assessment of the extent to which the Cushing Held Separate Businesses are meeting (or exceeding) their projected goals as are reflected in operating plans, budgets, projections or any other regularly prepared financial statements.

VII.

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.

VIII.

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

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

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

IX.

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

A. Three (3) business days after the Commission withdraws its acceptance of the Consent Agreement pursuant to the provisions of Commission Rule 2.34, 16 C.F.R. ' 2.34; or

B. (1) For the Alaska Held Separate Businesses, three (3) business days after the divestiture of the ARCO Alaska Assets pursuant to Paragraph II or V of the Consent Agreement and the Decision and Order, and (2) for the ARCO Cushing Assets, three (3) business days after the

divestiture of the ARCO Cushing Assets pursuant to Paragraph III or Paragraph V of the Consent Agreement and the Decision and Order.

By the Commission.

ATTACHMENT A

NOTICE OF DIVESTITURE AND REQUIREMENT FOR CONFIDENTIALITY

On April 13, 2000, BP-Amoco p.l.c. (ABP-Amoco@) and the Atlantic Richfield Company (AARCO@), hereinafter referred to collectively as ABP/ARCO,@ entered into an Agreement Containing Consent Orders (AConsent Agreement@) with the Federal Trade Commission (AFTC@) relating to the divestiture of certain assets. That Consent Agreement includes two orders. The Decision and Order requires divestiture of two packages of assets: one in Alaska and the other in Oklahoma and Texas. The Order to Hold Separate and Maintain Assets (Athe Hold Separate Order@) requires those assets to be maintained and/or held separate pending their divestiture under the Decision and Order. In addition, on _____, 2000, BP-Amoco and ARCO entered into a Consent Decree (AConsent Decree@) with the States of California, Oregon and Washington (Athe States@), which also requires the divestiture of the Alaska package of assets. This Consent Decree was approved by the U.S. District Court for the Northern District of California and was entered on _____, 2000. The States= Consent Decree includes provisions that are comparable to the FTC=s Hold Separate Order.

Under the Decision and Order and the States Consent Decree, BP/ARCO are required to divest certain Alaska Assets to Phillips Petroleum Company within thirty days of the date BP-Amoco

acquired ARCO. That divestiture, however, has not occurred, and certain requirements of the second order B the Hold Separate Order B and the comparable provisions of the States= Consent Decree are now in place to hold certain ARCO Alaska assets separate pending divestiture to a buyer who must be approved by the FTC and the States. You are receiving this notice because you are an employee for an entity that is part of the Alaska assets and businesses that are now being held separate. These assets are called the AAlaska Held Separate Businesses@ and are defined in the Hold Separate Order, Decision and Order, and the States= Consent Decree and mean, among other things, ARCO Alaska, Inc, ARCO Transportation Alaska, Inc. (including any interests in Alyeska Pipeline Service Company and Prince William Sound Oil Spill Response Corp.), ARCO Marine, Inc., ARCO Marine Spill Response Company, Union Texas Petroleum Holdings, Inc., (AUTPH@) (excluding all assets of UTPH other than Union Texas Alaska, LLC), Union Texas Alaska, LLC, Kuparuk Pipeline Company (including any interests in Kuparuk Transportation Company and Kuparuk Transportation Capital Corporation), Cook Inlet Pipeline Company, Alpine Pipeline Company and Oliktok Pipeline Company.

The Alaska Held Separate Businesses must be managed and maintained as a separate, ongoing business, independent of all other businesses of BP/ARCO until such assets are divested. All competitive information relating to the Alaska Held Separate Businesses must be retained and maintained by the persons involved in the operation of those assets on a confidential basis, and such persons must not provide, discuss, exchange, circulate, or otherwise furnish any such information to or with any other person whose employment involves any other business of BP/ARCO. Similarly, persons involved in similar activities for BP/ARCO must not provide, discuss, exchange, circulate, or otherwise furnish any similar information to or with any other person whose employment involves the Alaska Held Separate Businesses.

Any violation of the Decision and Order, Hold Separate Order, or the States= Consent Decree may subject BP/ARCO to civil penalties and other relief as provided by law. If you have questions regarding the confidentiality of information, the Decision and Order, the Hold Separate Order or the States= Consent Decree, you should contact _____ at ____-___-_____.

ATTACHMENT B

NOTICE OF DIVESTITURE AND REQUIREMENT FOR CONFIDENTIALITY

On April 13, 2000, BP-Amoco p.l.c. (ABP-Amoco@) and the Atlantic Richfield Company (AARCO@), hereinafter referred to collectively as ARespondents,@ entered into an Agreement Containing Consent Orders (AConsent Agreement@) with the Federal Trade Commission (AFTC@) relating to the divestiture of certain assets. That Consent Agreement included two orders. The Decision and Order requires divestiture of two packages of assets: one in Alaska and the other in Oklahoma and Texas. The Order to Hold Separate and Maintain Assets (Athe Hold Separate Order@) requires those assets to be maintained and/or held separate pending their divestiture under the Decision and Order.

Under the Decision and Order, Respondents are required to divest certain Oklahoma and Texas assets relating to the crude oil business to an acquirer within 120 days after they sign the Consent Agreement. While that divestiture is pending, the Hold Separate Order is now in place to hold separate the ARCO Pipe Line Company, which encompasses more assets than are required to be divested under the Decision and Order. Any buyer of the Oklahoma and Texas crude oil assets must be approved by the

FTC. You are receiving this notice because you are an employee of the ARCO Pipe Line Company that is being held separate.

The ARCO Pipe Line Company must be managed and maintained as a separate, ongoing business, independent of all other businesses of the Respondents until the required assets are divested. All competitive information relating to the ARCO Pipe Line Company must be retained and maintained by the persons involved in the operation of those assets on a confidential basis, and such persons must not provide, discuss, exchange, circulate, or otherwise furnish any such information to or with any other person whose employment involves any other business of the Respondents. Similarly, persons involved in similar activities for the Respondents must not provide, discuss, exchange, circulate, or otherwise furnish any similar information to or with any other person whose employment involves the ARCO Pipe Line Company.

Any violation of the Decision and Order or Hold Separate Order may subject Respondents to civil penalties and other relief as provided by law. If you have questions regarding the confidentiality of information, the Decision and Order, or the Hold Separate Order, you should contact _____ at ____-___-_____.

DECISION AND ORDER

The Federal Trade Commission (ACommission@) having initiated an investigation of the acquisition by Respondent BP Amoco p.l.c. of Respondent Atlantic Richfield Company, 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 Orders (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 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 thereupon issued its Complaint and an Order to Hold Separate and Maintain Assets, and having accepted the executed Consent Agreement and placed such Consent Agreement on the public record for a period of thirty (30) days for the receipt and consideration of public comments, and having modified this Decision and Order in certain respects, 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 finding and issues the following Order:

1. Respondent BP Amoco p.l.c. is a corporation organized, existing and doing business under and by virtue of the laws of England and Wales with its office and principal place of business located at Britannic House, 1 Finsbury Circus, London EC2M 7BA, England. BP Amoco p.l.c.=s principal operating subsidiary in the United States is located at BP Amoco Corporation, 200 East Randolph Drive, Chicago, Illinois 60601-7125.

2. Respondent Atlantic Richfield Company is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware with its principal place of business at 333 S. Hope Street, Los Angeles, California 90071.

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

ORDER

I.

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

A. ABP Amoco@ means BP Amoco p.l.c., its directors, officers, employees, agents and representatives, predecessors, successors, and assigns; its joint ventures, subsidiaries, divisions, groups and affiliates controlled by BP Amoco p.l.c., and the respective directors, officers, employees, agents, representatives, successors, and assigns of each.

B. @ARCO@ means Atlantic Richfield Company, its directors, officers, employees, agents and representatives, predecessors, successors, and assigns; its joint ventures, subsidiaries,

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

C. @Respondents@ means BP Amoco and ARCO, individually and collectively.

D. ACommission@ means Federal Trade Commission.

E. @Phillips@ means Phillips Petroleum Company, a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware with its principal place of business at Phillips Building, 422 South Keeler Street, Bartlesville, Oklahoma 74004.

F. @Alaska Acquirer@ means the single entity and its subsidiaries, successors and assigns, to whom the ARCO Alaska Assets and ARCO Beluga, Inc., are divested by the trustee as required by the terms of this Order.

G. ACushing Acquirer@ means the entity or entities and their subsidiaries, successors and assigns, to whom the ARCO Cushing Assets are divested pursuant to Paragraph III of this Order or by the trustee pursuant to Paragraph V of this Order, as applicable.

H. AAcquisition@ means the proposed acquisition by BP Amoco of ARCO as described in the March 31, 1999, Agreement and Plan of Merger between BP Amoco and ARCO.

I. @Alaska@ means the State of Alaska and offshore land and outer continental shelf subject to the jurisdiction of the State of Alaska or the United States.

J. @Alaska Approval Assets@ means the following ARCO Alaska Assets requiring Alaska Approval Asset Consents:

1. All of the outstanding shares of common stock of ARCO Transportation Alaska, Inc. and any associated local, state and federal rights of way;

2. All of the outstanding shares of common stock of ARCO Marine, Inc. and any associated local, state and federal rights of way;

3. All of the outstanding shares of common stock of Kuparuk Pipeline Company and any associated local, state and federal rights of way;

4. All of the outstanding shares of common stock of Oliktok Pipeline Company and any associated local, state and federal rights of way;

5. All of the outstanding shares of common stock of Alpine Pipeline Company and any associated local, state and federal rights of way;

6. All of ARCO=s shares of Cook Inlet Pipeline Company and any associated local, state and federal rights of way;

7. The Certificate of Convenience and Necessity for the Alpine Pipeline Company crude oil pipeline (the AAlpine Certificate@) from ARCO Alaska, Inc. to Alpine Pipeline Company;

8. All Alaska State oil and gas leases held or controlled by ARCO or any subsidiary of ARCO, as identified in Schedule A, attached;

9. Existing Supply Agreements for the long-term supply of crude oil between BP Amoco and certain refineries, as identified in Schedule B, attached;

10. all rights, titles and interests of AMI Leasing, Inc. in and to the Construction Contract;

11. Any other local, state and federal permits not otherwise included in this definition of the Alaska Approval Assets;

12. The Alpine Rights of Way; and

13. Any or all of the AMI Conveyed Properties, if necessary, as that term is defined in the Alaska MPSA, and the ARCO Trader bareboat charter assignments.

K. AAlaska Approval Asset Consents@ means all consents or waivers from private entities, and local, state and federal regulatory bodies, including FERC and the State of Alaska, or other consents or waivers from partners or otherwise, that are necessary to effect the complete transfer of the Alaska Approval Assets or of any other assets that were not listed in the definition of Alaska Approval Assets, but are a part of the ARCO Alaska Assets, to Phillips or the Alaska Acquirer, as applicable.

L. @Alaska MPSA@ means the March 15, 2000, Master Purchase and Sale Agreement, and amendments thereto, by and among ARCO, CH-Twenty, Inc., BP Amoco and Phillips, as amended, April 6, 2000.

M. AAlpine Rights of Way@ means the two right-of-way leases by and between the State of Alaska and ARCO for the Alpine crude oil pipeline (ADL-415701) and the Alpine diesel line (ADL-415932) and the right-of-way granted by and between the State of Alaska and ARCO Alaska, Inc. under the Alpine utility pipeline (ADL-415857).

N. AANS crude oil@ means crude oil produced from the Alaska North Slope.

O. AARCO Alaska Assets@ means all assets, properties, businesses and goodwill, tangible and intangible, of ARCO, that are, as of March 15, 2000, related to and primarily used with or in connection with the ARCO Alaska Businesses, including without limitation, the following:

1. ARCO=s interest, direct or indirect, in ARCO Alaska, Inc., ARCO Transportation Alaska, Inc. (including any interests in Alyeska Pipeline Service Company and Prince William Sound Oil Spill Response Corp.), ARCO Marine, Inc., ARCO Marine Spill Response Company, Union Texas Petroleum Holdings, Inc., (AUTPH@) (excluding all assets of UTPH other than Union Texas Alaska, LLC), Union Texas Alaska, LLC, Kuparuk Pipeline Company (including any interests in Kuparuk Transportation Company and Kuparuk Transportation Capital Corporation), Cook Inlet Pipeline Company, Alpine Pipeline Company and Oliktok Pipeline Company;

2. all interests of ARCO in the office complex of ARCO Alaska, Inc., located at Lot 1A, Block 81, ORIGINAL TOWNSITE, according to the official plat thereof, filed under Plat Number 82-337, Records of the Anchorage Recording District, Third Judicial District, State of Alaska;

3. all interests of ARCO in the aircraft lease (Amended and Restated Lease Agreement between First Security Bank, National Association, Lessor and ARCO, Lessee, dated as of December 31, 1999) covering one Boeing 737-205 Aircraft and its related Engines, U.S. Registration No. N733AR;

4. ARCO Alaska Intellectual Property;

5. ARCO Patents;

6. ARCO Seismic Data;
7. all rights, titles and interests of AMI Leasing, Inc. (a wholly owned subsidiary of ARCO) in and to five vessels (named, at the time the Consent Agreement was signed by Respondents, the ARCO Alaska, the ARCO California, the ARCO Texas, the ARCO Spirit and the ARCO Independence), being all of the tankers used by ARCO in the ARCO Alaska Businesses and the bareboat charter of the ARCO Trader;

8. all rights, titles and interests of AMI Leasing, Inc. in and to the Construction Contract, being the only existing agreement of ARCO for new ship construction relating to the ARCO Alaska Businesses;

9. all rights, titles and interests of ARCO and ARCO Alaska, Inc. in and to the Alpine Rights of Way;

10. all rights, titles and interests in and to the Alaska State oil and gas leases held by ARCO relating to the ARCO Alaska Businesses, which are identified on Schedule A, attached;

11. to the extent not included in any of the foregoing sections of this Paragraph, any rights, commitments, contracts or other options held by ARCO to acquire, lease or rent any asset primarily used in or connected with exploring for and developing or producing hydrocarbons in Alaska or transporting hydrocarbons to or from Alaska;

12. to the extent not included in any of the foregoing sections of this Paragraph, all rights, titles and interests in and to contracts, licenses, permits and agreements primarily used in or connected with the ARCO Alaska Businesses, including all rights, titles and interests in and to the contracts entered into in the ordinary course of business in connection with the ARCO Alaska Businesses with customers (together with associated bid and performance bonds), suppliers, service providers, vendors, sales

representatives, distributors, partners, agents, personal property lessors, personal property lessees, licensors, licensees, consignors and consignees;

13. all customer lists, vendor lists, catalogs, sales promotion literature and advertising materials that are used in or connected with the ARCO Alaska Businesses;

14. all of the books, ledgers, files, reports, plans and operating records of, or maintained by, or pertaining to, any ARCO Alaska Company in whatever form stored or retained; and

15. all Product Inventory as that term is defined in the Alaska MPSA.

PROVIDED, HOWEVER, that ARCO Beluga, Inc. and ARCO=s proprietary trade names and trademarks are excluded from the definition of ARCO Alaska Assets.

P. AARCO Alaska Businesses@ means the business of:

1. acquiring any right or option (whether or not contingent) to bid for or to explore for, to develop or to produce hydrocarbons in Alaska;

2. exploring for, developing or producing hydrocarbons in Alaska or transporting or shipping hydrocarbons within or from Alaska;

3. providing any product or service, directly or indirectly, with or without compensation, to any person engaged in any of the activities in Paragraphs P.1. and P.2. where such product or service is primarily used in or related to such person=s activities in Alaska; or

4. supporting ARCO in any of the activities in Paragraphs P.1., P.2., and P.3. as those activities were conducted by ARCO on March 15, 2000.

Q. AARCO Alaska Company@ means each of ARCO Alaska, Inc., ARCO Transportation Alaska, Inc., ARCO Marine, Inc., ARCO Marine Spill Response Company, Union Texas Petroleum Holdings, Inc., Union Texas Alaska, LLC, Kuparuk Pipeline Company, Alpine Pipeline Company and Oliktok Pipeline Company.

R. @ARCO Alaska Employees@ means employees employed by or working for the ARCO Alaska Businesses on or since March 15, 2000, including all employees of any ARCO Alaska Company, or ARCO Beluga, Inc. and those employees covered by Schedule 5.6 of the Alaska MPSA.

S. @ARCO Alaska Intellectual Property@ means intellectual property, inventions, technology, trademarks, trade names, trade secrets, copyrights, know-how, research material, technical information, seismic data, geological data, geophysical data, management information systems, software and software specifications, designs, drawings, plans (whether proposed or tentative, whether adopted, pending or implemented), specifications, processes and quality control data that, as of the date that the Consent Agreement is signed by Respondents, are owned, in whole or in part (but only to the extent of such part), by or have been assigned to any ARCO Alaska Company, including any special analyses, interpretations and other derivatives from proprietary seismic, geological and geophysical data owned by ARCO Alaska, Inc. relating to any hydrocarbons in Alaska or the geology of Alaska.

PROVIDED, HOWEVER, that ARCO Alaska Intellectual Property shall not include the ARCO Patents or any proprietary trade names or trademarks of ARCO.

T. AARCO Beluga, Inc.@ means ARCO Beluga, Inc., a wholly-owned subsidiary of CH-Twenty, Inc., in which ARCO Alaska, Inc. owns approximately 43% of its common stock with the remainder owned by ARCO and seven non-affiliated investors.

U. AARCO Cushing Assets@ means:

1. all of ARCO=s assets, properties, businesses and goodwill, tangible and intangible, of and interest in, direct or indirect, the Seaway Crude Oil Pipeline Assets, and

2. all of ARCO=s assets, properties, businesses and goodwill, tangible and intangible, of and interest in, direct or indirect, the Mid-Continent Crude Oil Logistics and Services Businesses.

V. AARCO Geoscience and Reservoir Intellectual Property@ means all technical information, patents, computer programs and code, including all supporting manuals and documentation that, as of the date the Consent Agreement is signed by Respondents, are owned, in whole or in part (but only to the extent of such part), by ARCO, excluding any ARCO Alaska Company, and used in or connected with the ARCO Alaska Businesses and related to (1) modeling and simulation of subsurface hydrocarbon reservoirs, (2) interpreting seismic, geological and geophysical data and reservoir data, (3) optimizing facilities, and (4) drilling and producing hydrocarbons. Such ARCO Geoscience and Reservoir Intellectual Property includes, but is not limited to: (a) geophysical techniques employing elastic impedance seismic inversion technology; (b) reservoir simulation computer models (known as AACRES@); (c) enhanced oil recovery and fluid characterization technology; (d) geomechanical modeling; (e) fluid flow (AARCO90A) relative permeability technology; and (e) analytical reservoir measurement techniques.

W. AARCO Intellectual Property@ means intellectual property, inventions, technology, trademarks, trade names, trade secrets, patents, copyrights, know-how, research material, technical information, management information systems, software and software specifications, designs, drawings, plans (whether proposed or tentative, whether adopted, pending or implemented), specifications, processes and quality control data that, as of the date the Consent Agreement is signed by Respondents, are owned, in whole or in part (but only to the extent of such part), by ARCO, excluding any ARCO Alaska Company, and either are licensed by ARCO to an ARCO Alaska Company or are otherwise primarily used in, for or connected with the ARCO Alaska Businesses as of the date the Consent Agreement is signed by Respondents, including, without limitation, all information, technology, know-how, research and other intangible assets and expertise used in connection with the ARCO Alaska Businesses related to miscible injection for enhanced oil recovery and technology related to unconsolidated sands.

PROVIDED, HOWEVER, that ARCO Intellectual Property shall not include ARCO Patents, ARCO Seismic Data, ARCO Geoscience and Reservoir Intellectual Property or any proprietary trade names or trademarks of ARCO.

X. AARCO Patents@ means all patents, patent applications and inventions that, as of the date the Consent Agreement is signed by Respondents, are owned, in whole or in part (but only to the extent of such part), by ARCO and primarily related to ARCO Alaska Businesses or otherwise primarily used by, for or in connection with an ARCO Alaska Company, in each case subject to any licenses to or other agreements with third parties in effect as of the date the Consent Agreement is signed by Respondents.

Y. AARCO Seismic Data@ means all proprietary seismic, geological and geophysical data that, as of the date that the

Consent Agreement is signed by Respondents, are owned, in whole or in part (but only to the extent of such part), by ARCO relating to any hydrocarbons in Alaska or the geology of Alaska.

Z. AConstruction Contract@ means the new-build, construction contract for the ARCO Endeavour, the ARCO Resolution and the ARCO Discovery to which AMI Leasing, Inc. is a party.

AA. AExisting Supply Agreements@ means those ANS crude oil supply agreements identified in Schedule B, attached.

BB. AFERC@ means Federal Energy Regulatory Commission.

CC. AHydrocarbons@ means crude oil, natural gas, natural gas liquids and condensates.

DD. AKey ARCO Alaska Employees@ means:

1. the following individuals if the Alaska Acquirer acquires pursuant to Paragraph V of this Order:

   a. all persons employed by or working for ARCO Alaska, Inc.=s Exploration and Land organization (ARCO organization code Z4000000) whose responsibilities include analyzing or interpreting geological data and information relating to Alaska, whether or not those persons are located in Alaska;

   b. all persons employed by or working for ARCO knowledgeable about and presently working with miscible injectant technology and research used for enhanced oil recovery and unconsolidated sands technology and research, whether or not those persons are located in Alaska; and

Decision and Order

c. individuals who are (a) either (i) independent contractors, or (ii) employees of the oil and gas contractors that perform services for more than one of the companies on the Alaska North Slope, and (b) whose jobs are functionally equivalent to those individuals defined in this Paragraph I.DD.1.a and b.

2. The individuals listed in Confidential Schedule C, attached, if Phillips acquires pursuant to Paragraph II of this Order.

EE. AMid-Continent Crude Oil Logistics and Services@ means:

1. all of ARCO=s assets, properties, businesses and goodwill, tangible and intangible, of and interest in, direct or indirect, the Basin Pipeline including, but not limited to, ARCO=s interests in the portion of the undivided joint interest crude oil pipeline owned by Equilon and ARCO Pipeline Company that runs from Jal, New Mexico, to Wichita Falls, Texas and the portion that runs from Wichita Falls, Texas, to Cushing, Oklahoma;

2. all of ARCO=s assets, properties, businesses and goodwill, tangible and intangible, of and interest in, direct or indirect, the line transfer business including, but not limited to, the trade documentation service for ARCO=s ARCO Pipeline Company customers at Cushing, Oklahoma, and Midland, Texas, in which ARCO documents the transfer of title/ownership of crude oil between contracting buyers and sellers that take place in the ARCO Pipeline Company facilities, and includes, but is not limited to, the tracking of line transfer activities and the timely communication of >position= during the trading month to ensure balance for customers at the terminals;

3. all of ARCO=s assets, properties, businesses and goodwill, tangible and intangible, of and interest in, direct or indirect, the pumpover business at Cushing, Oklahoma, and Midland, Texas, including, but not limited to, all services related to the crude oil title transfer and physical barrel delivery, and ARCO=s interest in the Cushing terminal and Midland terminal;

4. all of ARCO=s assets, properties, businesses and goodwill, tangible and intangible, of and interest in, direct or indirect, the West Texas Trunk System, including but not limited to, receipt and delivery pipeline systems centered around the Midland Terminal;

5. all of ARCO=s assets, properties, businesses and goodwill, tangible and intangible, of and interest in, direct or indirect, the Rancho Pipeline, a 400-mile, 24-inch crude oil, undivided interest pipeline including, but not limited to, ARCO=s approximately 25% interest in the pipeline segment from McCamey, Texas to El Dorado, Texas, ARCO=s approximately 20% interest in the pipeline segment from El Dorado, Texas to Houston, Texas, and ARCO=s approximately 24% interest in the Genoa, Texas Junction and the Texas Terminal Lines; and

6. the following that are related to Paragraphs EE.1. through EE.5.:

    a. any rights, titles and interests in and to contracts, licenses, permits and agreements, including all rights, titles and interests in and to the contracts entered into in the ordinary course of business with customers (together with associated bid and performance bonds), suppliers, sales representatives, distributors, agents, personal property lessors, personal property lessees, licensors, licensees, consignors, consignees;

b. all research material, technical information, management information systems, software and software specifications, designs, drawings, plans (whether proposed or tentative, whether adopted, pending or implemented), specifications, processes and quality control data related thereto;

c. any rights, commitments, contracts or other options to acquire, lease or rent any asset;

d. all owned or leased real property and improvements, buildings, plants, machinery, fixtures, equipment, furniture, tools, assets and other tangible personal property;

e. all customer lists, vendor lists, catalogs, sales promotion literature and advertising materials;

f. all rights under warranties and guarantees, express or implied; and

g. all books, records and files, and all items of prepaid expense.

PROVIDED HOWEVER, Mid-Continent Crude Oil Logistics and Services does not include the Cushing, Oklahoma to East Chicago, Illinois, 700-mile, 24-inch crude oil pipeline.

FF. ASeaway Crude Oil Pipeline Assets@ means all of ARCO=s assets, properties, businesses and goodwill, tangible and intangible, of and interest in, direct or indirect, the 30-inch crude oil pipeline from Freeport, Texas, to Cushing, Oklahoma, and associated crude distribution system, marine terminals and storage facilities (including, but not limited to, the Texas City Terminal, the Freeport Terminal, approximately 45 miles from Texas City, Texas, and the Jones

Creek Storage facilities); including, but not limited to, the following that are related to this Paragraph FF:

1. any rights, titles and interests in and to contracts, licenses, permits and agreements, including all rights, titles and interests in and to the contracts entered into in the ordinary course of business with customers (together with associated bid and performance bonds), suppliers, sales representatives, distributors, agents, personal property lessors, personal property lessees, licensors, licensees, consignors, consignees;

2. all research material, technical information, management information systems, software and software specifications, designs, drawings, plans (whether proposed or tentative, whether adopted, pending or implemented), specifications, processes and quality control data related thereto;

3. any rights, commitments, contracts or other options to acquire, lease or rent any asset;

4. all owned or leased real property and improvements, buildings, plants, machinery, fixtures, equipment, furniture, tools, assets and other tangible personal property;

5. all customer lists, vendor lists, catalogs, sales promotion literature and advertising materials;

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

7. all books, records and files, and all items of prepaid expense.

GG. AThird Party Intellectual Property@ means intellectual property, inventions, technology, trademarks, trade names, trade secrets, patents, copyrights, know-how, research material, technical information, management information

systems, software and software specifications, designs, drawings, plans (whether proposed or tentative, whether adopted, pending or implemented), specifications, processes and quality control data that, as of the date the Consent Agreement is signed by Respondents, are owned by a party other than ARCO but are licensed to ARCO, excluding any ARCO Alaska Company, and are primarily used in, for or connected with the ARCO Alaska Businesses (excluding subparagraph 4 of the definition thereof in Paragraph I.P.4.).

II.

IT IS FURTHER ORDERED that:

A. Respondents shall divest or cause to be divested, absolutely and in good faith, at no minimum price, the ARCO Alaska Assets and ARCO Beluga, Inc., as ongoing businesses.

B. 1. The divestiture shall be made no later than thirty (30) days after Respondent BP Amoco consummates the Acquisition, and shall be pursuant to and in accordance with the Alaska MPSA (which agreement shall not vary or contradict, or be construed to vary or contradict, the terms of this Order or the Order to Hold Separate and Maintain Assets), the Transition Services Agreement, referred to in Paragraph II.C.1, and the license agreements referred to in Paragraphs II.C.2, II.C.3, and II.C.4 (collectively, the ALicense Agreements@), below. Failure to comply with the Alaska MPSA, Transition Services Agreement, or the License Agreements shall constitute a failure to comply with this Order.

2. PROVIDED, HOWEVER, that notwithstanding the foregoing, Respondents shall divest ARCO=s rights, titles and interests in ARCO Transportation Alaska, Inc.,

Kuparuk Pipeline Company, Cook Inlet Pipeline Company, Alpine Pipeline Company and Oliktok Pipeline Company and their respective subsidiaries, and all of AMI Leasing, Inc.=s rights, titles and interests in and to the Construction Contract to Phillips no later than fifteen (15) business days following the Respondents=s receipt of the Alaska Approval Asset Consents with respect to all such rights, titles and interests. PROVIDED FURTHER, HOWEVER, that Respondents shall divest all such rights, titles, and interests within six (6) months of the date on which Respondents signed the Consent Agreement in this matter.

C. On or before the time of the First Closing of the Alaska MPSA, as that term is defined in the Alaska MPSA, and subject to the prior approval of the Commission, Respondents shall:

1. Enter into a transition services agreement, which is a part of the Alaska MPSA, pursuant to which Respondents will provide Phillips with transition services that Phillips requires in order to conduct the ARCO Alaska Assets and the ARCO Alaska Businesses as currently conducted (the ATransition Services Agreement@). PROVIDED, HOWEVER, Respondents shall use reasonable best efforts to bring to a conclusion expeditiously the Transition Services Agreement.

2. Enter into a license agreement for the ARCO Intellectual Property pursuant to which Respondents will grant to Phillips a fully paid-up, irrevocable non-exclusive license, for use of the ARCO Intellectual Property in connection with the operation in any manner by Phillips of the ARCO Alaska Businesses (excluding subparagraph 4 of the definition thereof in Paragraph I.P.4.) as existing as of the date the Consent Agreement is signed by Respondents, subject to any restrictions on the transfer or license of any such ARCO Intellectual Property arising under any

agreement with a third party. Respondents shall cooperate with Phillips and use reasonable best efforts to assist Phillips in obtaining a waiver, consent or license, as applicable, for any such restricted ARCO Intellectual Property (or the benefits equivalent thereto), the expense of any such license or equivalent benefits to be borne by Phillips.

3. Enter into a license agreement for the ARCO Geoscience and Reservoir Intellectual Property pursuant to which Respondents will grant to Phillips a fully paid-up, irrevocable non-exclusive license, for use of the ARCO Geoscience and Reservoir Intellectual Property in connection with the operation in any manner by Phillips of the ARCO Alaska Businesses (excluding subparagraph 4 of the definition thereof in Paragraph I.P.4.) as existing as of the date the Consent Agreement is signed by Respondents, subject to any restrictions on the transfer or license of any such ARCO Geoscience and Reservoir Intellectual Property arising under any agreement with a third party and subject to the rights of any third parties under licenses previously granted by ARCO. Respondents shall cooperate with Phillips and use reasonable best efforts to assist Phillips in obtaining a waiver, consent or license, as applicable, for any such restricted ARCO Geoscience and Reservoir Intellectual Property (or the benefits equivalent thereto), the expense of any such license or equivalent benefits to be borne by Phillips.

4. Enter into a license agreement pursuant to which Phillips will grant to Respondents a fully paid-up, irrevocable, non-exclusive license for use of the ARCO Patents worldwide. Such license will permit sublicenses to third parties.

D. Respondents shall cooperate with Phillips and use reasonable best efforts to assist Phillips in obtaining a license for any Third Party Intellectual Property (or the benefits equivalent

thereto), the expense of any such license or equivalent benefits to be borne by Phillips.

E. Respondents shall use reasonable best efforts expeditiously to secure the consents or waivers of private entities required for divestiture of the Alaska Approval Assets prior to their divestiture and to secure prompt Alaska Approval Asset Consents.

F. Respondents shall comply with all of their obligations under the long-term crude oil supply contract between BP Amoco and Paramount Petroleum Corporation (Paramount Contract Number 103505).

G. Pending divestiture of the ARCO Alaska Assets and ARCO Beluga, Inc. to Phillips or the Alaska Acquirer, Respondents shall take such actions as are reasonably necessary to maintain the viability and marketability of the ARCO Alaska Assets and ARCO Beluga, Inc., and to prevent the destruction, removal, wasting, deterioration, sale, disposition, transfer, or impairment of any of the ARCO Alaska Assets and ARCO Beluga, Inc., except for ordinary wear and tear and as would otherwise occur in the ordinary course of business.

H. The purpose of the divestitures of the ARCO Alaska Assets and ARCO Beluga, Inc. is to ensure the continued use of the ARCO Alaska Assets and ARCO Beluga, Inc. 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.

I. 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 Phillips or the Alaska Acquirer, as applicable, to acquire any interest in any ARCO Alaska Asset acquired pursuant to this Order by Phillips or the Alaska Acquirer, as applicable.

III.

IT IS FURTHER ORDERED that:

A. Respondents shall divest the ARCO Cushing Assets to the Cushing Acquirer, absolutely and in good faith and at no minimum price, within 120 days from the date Respondents sign the Consent Agreement. Respondents shall divest the ARCO Cushing Assets only to a Cushing Acquirer that receives the prior approval of the Commission, and only in a manner that receives the prior approval of the Commission.

B. Pending divestiture of the ARCO Cushing Assets to the Cushing Acquirer, Respondents shall take such actions as are reasonably necessary to maintain the viability and marketability of the ARCO Cushing Assets and to prevent the destruction, removal, wasting, deterioration, sale, disposition, transfer or impairment of any of the ARCO Cushing Assets except for ordinary wear and tear.

C. The purpose of the divestiture of the ARCO Cushing Assets is to ensure the continued use of the ARCO Cushing 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.

IV.

IT IS FURTHER ORDERED that:

A. From the date Respondents sign the Consent Agreement until the divestitures are 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 the employees are entitled) and paying bonuses, to cause the ARCO Alaska Employees to accept offers of employment from Phillips or the Alaska Acquirer, as applicable.

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

C. For a period of three (3) years following the date Respondents sign the Consent Agreement, Respondents shall not solicit for employment any Key ARCO Alaska Employees employed by Phillips or the Alaska Acquirer, as applicable, unless and until such employee=s employment by Phillips or the Alaska Acquirer, as applicable, has been terminated.

D. Respondents shall provide, cause to be provided, or reimburse Phillips or the Alaska Acquirer, as applicable, for providing to Key ARCO Alaska Employees the following financial incentives to continue in their employment positions or to accept employment with Phillips or the Alaska Acquirer, as applicable:

1. Vesting of all pension benefits current and accrued as of the date of transition to employment with Phillips or the Alaska Acquirer after the relevant divestiture pursuant to Paragraph II.A or Paragraph V, as applicable; and

2. Payment of a bonus equal to no less than 35 percent of the base salary (together with the amount of any social security, unemployment and similar taxes imposed upon the employer by applicable law with respect to such bonus) for each Key ARCO Alaska Employee (in addition to any other bonus or incentive payment made to Key ARCO Alaska Employees during the normal course of business). This bonus payment shall be conditional upon the acceptance of a position with Phillips or the Alaska Acquirer and remaining employed with Phillips or the

Alaska Acquirer for a period of at least twelve (12) months. One-half of the bonus will be paid upon hire by Phillips or the Alaska Acquirer and the remainder will be paid after twelve (12) months of employment with Phillips or the Alaska Acquirer.

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 ARCO Alaska Assets and ARCO Beluga, Inc. to Phillips within the time period required by Paragraph II of this Order or the ARCO Cushing Assets within the time period required by Paragraph III of this Order, respectively, the Commission may appoint a trustee to divest or cause to be divested, respectively, the ARCO Alaska Assets, ARCO Beluga, Inc., or obtain the Alaska Approval Asset Consents and divest the Alaska Approval Assets, or to divest the ARCO Cushing 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 Order.

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 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 written notice by the staff of the Commission to Respondents of the identity of any proposed trustee, Respondents shall be deemed to have consented to the selection of the proposed trustee. The trustee may be the same person or entity as any trustee appointed pursuant to the Order to Hold Separate and Maintain Assets.

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 ARCO Alaska Assets, ARCO Beluga, Inc. and to obtain the Alaska Approval Asset Consents and divest the Alaska Approval Assets, or to divest the ARCO Cushing 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 divestitures and obtain the consents required by this Order.

4. The trustee shall have twelve (12) months from the date the Commission approves the trust agreement described in Paragraph V. C. 3. to accomplish the divestitures 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*, 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 ARCO Alaska Assets, ARCO Beluga, Inc., the Alaska Approval Assets, or ARCO Cushing 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 divestitures shall be made only to an acquirer that receives the prior approval of the Commission, and the divestitures 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 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 respondent, and the trustee's power shall be terminated. The trustee's compensation shall be based at least in significant part on a commission arrangement contingent on the trustee's divesting the ARCO Alaska Assets, ARCO Beluga, Inc. and obtaining the Alaska Approval Asset Consents and divesting the Alaska Approval Assets or divesting the ARCO Cushing Assets, depending on the circumstances.

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

11. In the event that the trustee determines that he or she is unable to divest or cause to be divested the ARCO Alaska Assets, ARCO Beluga, Inc. or to obtain the Alaska Approval Asset Consents and divest the Alaska Approval Assets in a manner consistent with the Commission's purpose as described in Paragraph II or to divest the ARCO Cushing Assets in a manner consistent with the Commission=s purpose as described in Paragraph III, the trustee may divest assets similar and corresponding to the ARCO Alaska Assets, ARCO Beluga, Inc. or the ARCO Cushing Assets, of Respondents, respectively, as necessary to achieve the remedial purposes of this Order.

12. The trustee shall have no obligation or authority to operate or maintain the ARCO Alaska Assets, ARCO Beluga, Inc., the Alaska Approval Assets, or the ARCO Cushing 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 divestitures and to obtain the necessary consents.

VI.

IT IS FURTHER ORDERED that:

A. For a period commencing on the date this Order becomes final and continuing for ten (10) years, Respondents shall not acquire, under the circumstances described below, any asset

required to be divested pursuant to Paragraph II of this Order without providing advance written notification to the Commission and observing the waiting periods specified in Paragraph VI.B. An acquisition requiring advance written notification shall be one that satisfies any one or more of the following:

1. For oil reserves, when such acquisition, alone or in combination with such prior acquisitions, will result in a net increase in Respondents=

   (a). oil production by an amount greater than 10,000 barrels per day, or

   (b). proved reserves in an amount greater than 20 million barrels of oil.

2. For oil or gas exploration, development, or production leases, when such acquisition, alone or in combination with such prior acquisitions,

   (a). will result in Respondents= acquiring acreage in an amount greater than 15,000 net acres; or

   (b). will transfer, by exercise of voting right, the power of any person to initiate, promote, or prevent any activity involving such leases.

3. For ARCO Seismic Data,

   (a). in any amount, when Phillips does not retain ownership; or

   (b). when such acquisition, alone or in combination with such prior acquisitions, will result in a value greater than $3 million.

4. For any combination of ARCO Alaska Intellectual Property and ARCO Patents,

   (a). in any amount, when Phillips does not retain ownership; or

   (b). when such acquisition, alone or in combination with such prior acquisitions, will result in a value greater than $2 million.

B. Any notification required by Paragraphs VI.A.1., VI.A.2., VI.A.3., or VI.A.4. shall be provided by Respondents in the form of a letter to the Commission (hereinafter referred to as Athe Notification@) containing a description of the acquisition, including the value of the acquisition and the type of consideration paid for the acquisition, and also including attachments as necessary (e.g., maps) to fully explain the acquisition. Respondents shall provide the Notification at least thirty (30) days prior to consummating any such acquisition (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 VI may be requested and, where appropriate, granted by letter from the Bureau of Competition.

C. Notwithstanding anything in Paragraphs VI.A. and VI.B., notification pursuant to Paragraph VI.A. need not be made for:

   1. Any acquisition, during a one-year period beginning on the date this Order becomes final, if such acquisition is necessary to implement the Prudhoe Bay Unit Alignment Agreement, Exchange Agreement, Alaska North Slope

Alignment Agreement, or Point Thompson Area Alignment and Exchange Agreement, or

2. Any transaction for which notification is required to be made, and has been made, pursuant to Section 7A of the Clayton Act, 15 U.S.C. ' 18a.

D. All valuations made pursuant to Paragraph VI.A.(*i.e.*, for quantities of oil production and proved reserves, or dollar value of seismic data, intellectual property, or patents) shall be determined as follows:

1. In the case of transactions as to which no prior notification is required, at the time of acquisition; and

2. In the case of transactions as to which prior notification is required, at the time of filing.

VII.

IT IS FURTHER ORDERED that, within thirty (30) days after the date this Order becomes final and every sixty (60) days thereafter until Respondents have fully complied with the provisions of Paragraphs II 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 and with the Order to Hold Separate and Maintain Assets. 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 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.

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

X.

IT IS FURTHER ORDERED that this Order shall terminate on August 25, 2010.

By the Commission.

SCHEDULE A
ALASKA STATE OIL AND GAS LEASES

ADL-380049

ADL-380050

ADL-380051

ADL-380052

ADL-380053

ADL-380054

ADL-380055

ADL-380058

ADL-380059

ADL-380060

ADL-380062

ADL-380087

ADL-380088

ADL-380089

ADL-380090

ADL-380106

ADL-380107

SCHEDULE B
EXISTING SUPPLY AGREEMENTS

1. Alaskan North Slope Crude Oil Sales Agreement by and between U.S. Oil and Refining Co. and BP Oil Supply Company.

2. Alaskan North Slope Crude Oil Sales Agreement by and between Tosco Refining Company and BP Oil Supply Company.

3. Alaskan North Slope Crude Oil Sales Agreement by and between Petro Star Inc. and BP Oil Supply Company. (Petro Star Contract Number 2000-1)

4. Alaskan North Slope Crude Oil Sales Agreement by and between Petro Star Inc. and BP Oil Supply Company. (Petro Star Contract Number 2000-2)

5. Alaskan North Slope Crude Oil Sales Agreement by and between Petro Star Inc. and BP Oil Supply Company. (Petro Star Contract Number 2000-3)

6. Alaskan North Slope Crude Oil Sales Agreement by and between Petro Star Inc. and BP Oil Supply Company. (Petro Star Contract Number 2000-4)

7. Alaskan North Slope Crude Oil Sales Agreement by and between Williams Energy Marketing & Trading Co. and BP Oil Supply Company. (Williams Contract Number ABS-129-0001)

8. Alaskan North Slope Crude Oil Sales Agreement by and between Williams Energy Marketing & Trading Co. and BP Oil Supply Company. (Williams Contract Number ABS-129-0002)

9. Alaskan North Slope Crude Oil Sales Agreement by and between Williams Energy Marketing & Trading Co. and BP Oil Supply Company. (Williams Contract Number ABS-129-0003)

10. Alaskan North Slope Crude Oil Sales Agreement by and between Williams Energy Marketing & Trading Co. and BP Oil Supply Company. (Williams Contract Number ABS-129-0004)

11. Alaskan North Slope Crude Oil Sales Agreement by and between Williams Energy Marketing & Trading Co. and BP Oil Supply Company. (Williams Contract Number ABS-129-0005)

12. Alaskan North Slope Crude Oil Sales Agreement by and between Equilon Enterprises LLC and BP Oil Supply Company.

SCHEDULE C
CONFIDENTIAL LIST: KEY ARCO ALASKA EMPLOYEES
[REDACTED]

Commissioners' Statement

STATEMENT OF CHAIRMAN ROBERT PITOFSKY AND COMMISSIONER MOZELLE W. THOMPSON, CONCURRING IN PART AND DISSENTING IN PART

The Commission makes final today a consent order that requires BP Amoco plc (ABP@), as a condition of its acquisition of Atlantic Richfield Company (AARCO@), to divest all of ARCO=s crude oil exploration and production assets in Alaska and related pipeline rights, maritime assets, seismic data and technical information. In effect, BP agrees to divest Aall of ARCO@ in Alaska. In addition, the consent order requires BP to divest all ARCO pipeline and storage facilities in and around the crude oil marketing and trading hub at Cushing, Oklahoma (Athe Cushing assets@) to a buyer to be approved by the Commission within 120 days of the date on which BP and ARCO sign the consent order.

The consent order provides that the divested Alaska assets will be acquired by Phillips Petroleum Co. (APhillips@). Phillips is an integrated petroleum company with oil and gas exploration and production interests in several countries and (as of 1999) assets of about $15 billion and annual revenues of about $13.9 billion. Prior to the divestitures, Phillips had some Alaska oil and gas exploration and production interests of its own, but these were tiny relative to those of BP and ARCO. Phillips is engaged in refining and gasoline marketing in several of the United States, but not on the West Coast. BP selected Phillips as the buyer of ARCO=s Alaska assets, and the Commission has unanimously approved Phillips as the buyer.

Since BP and ARCO signed the consent order and the Commission accepted it for public comment, ARCO=s Alaska assets have been divested to Phillips and the Cushing assets have been divested, with the Commission=s approval, to Texas Eastern Products Pipeline Company, LLC. (ATEPPCO@). Three transitional agreements between BP and Phillips and between BP

and TEPPCO, required by the consent order, remain in place, and, pursuant to the consent order, a trustee has been appointed to monitor compliance with those agreements.

In most respects, this consent order achieves all the Commission sought, and all the relief that would likely have been achieved if the Commission prevailed in litigation. But we voted against the Commission=s acceptance of the consent order for placement on the public record for comment, and we write separately to express our continuing concern with the majority=s decision not to include in the consent order a provision prohibiting BP and Phillips from exporting ANS crude oil at a loss for the purpose of maintaining oil prices on the West Coast of the United States.[1]

Before the merger and the divestitures, BP had the largest share -- about 40% -- of all crude oil produced on the Alaska North Slope (AANS@); had the largest interest -- about 50% -- in the Trans-Alaska Pipeline System (ATAPS@) that is used to transport crude oil to port at Valdez, Alaska; and had the largest fleet available for transporting ANS crude oil from Alaska to refineries in the rest of the United States. ARCO was its largest rival in each of these respects, with a share of over 30% of ANS crude production; a 22% stake in TAPS; and the second largest available fleet. BP and ARCO=s dominance of the market was even greater when measured in terms of exploration assets and operatorships in Alaska. BP, which did not own any West Coast refineries, sold all of its ANS crude in the merchant market. ARCO, which owned two of the largest refineries on the West Coast, consumed the bulk of its ANS production internally. However, ARCO also sold on the merchant market, thereby, according to the Commission=s complaint, serving as Athe firm most likely to constrain BP=s exercise of monopoly power,@ a

[1] The provision that we would favor is explained, and its terms defined, further below.

constraint that Alikely would increase@ over time but for the merger.[2]

Because it provided for Phillips to acquire all of ARCO=s assets in Alaska, the consent order is likely to restore competition on the Alaska North Slope. In the market for the supply of ANS crude oil to targeted refineries on the West Coast, Phillips will be in a different position from ARCO because, unlike ARCO, Phillips is neither a refiner nor a gasoline marketer on the West Coast. This difference should leave Phillips with more crude oil to sell on the open market than ARCO previously had after supplying its own refineries, and, if not undermined by private conduct, may actually improve upon the level of competition in that market. In Cushing, a clean sweep of ARCO=s pipeline and storage assets to TEPPCO should also suffice to restore competition.

Negotiations leading to this settlement were extensive and complicated. Nevertheless, once the outline of a settlement was agreed upon - that is, divestiture of Aall of ARCO@ in Alaska and in and around Cushing - BP, ARCO and Commission staff worked out the details with dispatch.

In one respect, however, the Commission=s action in this matter is disappointing. In its original complaint and in its memorandum supporting the complaint, the Commission alleged that BP systematically and over an extended period of time exported ANS crude at a loss in Asia and to other regions in the United States in order to curtail or tighten supply to refiners on the U.S. West Coast and to maintain crude oil prices in that market.[3] The Commission was prepared to substantiate its charge

---

[2] *See FTC v. BP Amoco plc*, Civ. No. 00-0416-SI (N.D.Cal. filed Feb. 4, 2000), Compl. & 18.

[3] *See FTC v. BP Amoco plc*, Compl. && 18, 23; Points and Authorities in Support of FTC Motion for a Preliminary Injunction at 7, 9-11.

with a series of documents, cited in its memorandum supporting the complaint but currently under seal in the United States District Court.[4] The Commission alleged that the pattern of exports reflected BP=s market power, and that such market power would increase as a result of the proposed merger.

When litigation was suspended for settlement negotiations, the issue of exports designed to raise price was addressed. BP and Phillips reportedly stated publicly that they would not export U.S. crude resources out of PADD V (the technical term for the U.S. West Coast market, specifically, the States of Alaska, Arizona, California, Hawaii, Nevada, Oregon and Washington).[5]

We believe that the Commission should follow the logic of its own complaint and require BP and Phillips to affirm their public statements in our consent agreement in this matter. That would require the following provision in the order:

> ABP and Phillips shall not knowingly and intentionally Sell for Export[6] ANS crude oil for the purpose of increasing the

---

[4] *See id.* at 7, n.13, 9-10 & nn. 16-18. (The public version of the FTC=s Points and Authorities, with the parties= confidential information redacted, is available at <http://www.ftc.gov/os/bpamoco/index.htm>. All references in this statement to the memorandum supporting the complaint are to that version.)

[5] *See, e.g.*, H. Josef Hebert, ACompany ties offer to halt exporting Alaska crude to merger@ (Associated Press, March 24, 2000) (citing a letter from BP to U.S. Representative Don Young of Alaska); Associated Press, ABP Amoco Would End Alaska Exports@ (March 24, 2000); Reuters, ABP Amoco, Phillips to halt Alaskan oil exports@ (March 24, 2000) (citing a letter from BP to U.S. Representative George Miller of California).

[6] ASell for Export@ and ASale for Export@ would be defined terms, referring to the sale, exchange, delivery or transfer of ANS crude oil for refining at a refinery located outside of PADD V, PROVIDED, however, that they would not include any sale, exchange, delivery or transfer of ANS crude oil in return for which ANS crude oil from another person is tendered or delivered to Respondents at a location in PADD V.

> Spot Price[7] of ANS crude oil in PADD V, PROVIDED, however, that a Sale for Export at a price reasonably anticipated to produce a higher profit than a contemporaneous sale in PADD V shall be presumed not to violate this Order.@

This provision is narrower than the parties= public statements, thereby assuring that it would in no way affect normal, competitive business conduct, such as exporting oil abroad when the price offered abroad (net of transportation and other costs) is higher than on the West Coast. Instead, it would target the systematic export of United States= crude oil to Asia or elsewhere at a loss (relative to the profit that could have been obtained on the same crude oil within PADD V) for the purpose of raising U.S. West Coast prices B a practice that we consider an extraordinary exercise of market power. If engaged in through coordinated action B and the Commission=s memorandum alleges that BP Amop[ped] up >excess= supplies of ANS@ crude from others[8] -- such conduct would be illegal *per se*. *See United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 190-91, 216, 218-28 (1940) (holding illegal *per se* agreements to purchase Adistress gasoline@ in order to raise prices or prevent price decreases). Regardless of its legality, exporting at a loss in order to raise West Coast prices plainly threatens competition in a market where this agency has a duty to ensure that competition is fully restored. *See, e.g., Ford Motor Co. v. United States*, 405 U.S. 562, 573 (1972); *United States v. E.I. du Pont de Nemours & Co.*, 366 U.S. 316, 326 (1961).

Because the Commission was prepared to prove that intentional manipulation of supply on the West Coast occurred in

---

[7] ASpot Price@ would be a defined term, referring to the amount paid for a single delivery of crude oil as part of an arms-length transaction as reported by Reuters, Telerate or Platts.

[8] *FTC v. BP Amoco plc*, Points and Authorities in Support of FTC Motion for a Preliminary Injunction at 10.

the past, and could occur again in the future, the provision would be appropriate relief for the Commission to require. *See, e.g., FTC v. National Lead Co.,* 352 U.S. 419, 429, 430 (1957) (a remedy is proper if it bears a A>reasonable relation to the unlawful practices found to exist=@ and Adecrees often suppress a lawful device when it is used to carry out an unlawful purpose@) (citations omitted); *cf. FTC v. Ruberoid Co.,* 343 U.S. 470, 473 (1952) (A[I]f the Commission is to obtain the objectives Congress envisioned, it cannot be required to confine its road block to the narrow lane the transgressor has traveled; it must be allowed effectively to close all roads to the prohibited goal, so that its order may not be by-passed with impunity.@).

Notwithstanding the substantial evidence of manipulation supporting the allegations in the complaint and memorandum, a majority of the Commission declines to require this provision. In omitting any provision concerning exports, we do not understand our fellow Commissioners to condone the practices that we identified in our complaint. But we see no good reason for the omission.

First, the majority suggests that the divestitures ordered today eliminate the competitive overlap that was the central competitive concern raised by the proposed merger. While we believe that the divestiture to Phillips is effective and appropriate relief, and may even improve competition, we would also address directly the competitive concerns raised by past and potentially future exporting practices aimed at exploiting precisely the market power that the BP-ARCO merger places at issue. The consent made final today permits both a realignment of operatorship interests on the Alaska North Slope and a vertical realignment, whereby BP=s crude supply will now be aligned with what were ARCO=s downstream assets, and ARCO=s successor, Phillips, will likely replace BP as the principal supplier to the merchant (*i.e.,* non-vertically-integrated) market on the West Coast. How those realignments will affect the incentives and opportunities of BP and Phillips to continue BP=s past practice of exporting to maintain West Coast prices is uncertain, as are future fluctuations

in their production and reserves on the Alaska North Slope and their likely effects on those incentives and opportunities.

The majority believes that it is unnecessary to impose any restriction on exports[9] because ABP likely will need to use most of its ANS crude oil production@ in the ARCO refineries it is acquiring on the West Coast, and because APhillips will have a much smaller share of ANS crude oil production than did BP.@ (We understand Phillips= initial share of ANS crude oil production to be between 30 and 35%.) Even if true today, there is no assurance that in the future either company, in an uncertain and evolving marketplace, will not find itself in a position to engage in the same conduct BP engaged in previously. Any such risk should not be borne by the consumer.

Second, as noted above, precedent establishes that conduct relief ancillary to structural relief may be appropriate in a merger case to address related competitive concerns, even when the conduct restriction may, in doing so, restrain some lawful conduct.[10] Such relief is especially appropriate where, as in this

---

[9] The provision that we advocate is not, of course, an export ban. It is, rather, a narrow restriction, targeted at exports that entail an extraordinary exercise of market power.

[10] It is well established that the Commission has a broad remedial discretion that would, where appropriate, permit substantial further relief against conduct that does not independently violate the antitrust laws. *See, e.g., Ford Motor Co.*, 405 U.S. at 575; *E.I. du Pont de Nemours*, 366 U.S. at 344. Courts have approved a variety of remedies against potentially lawful conduct as ancillary to structural relief, including future lawful participation in a market previously entered by means of unlawful merger, *Ford Motor Co*, 405 U.S. at 575-76, an injunction against further acquisitions, *United States v. Grinnell Corp.*, 384 U.S. 563, 580 (1966), requirements of prior Commission approval for future joint ventures, mergers or acquisitions, *Yamaha Motor Co. v. FTC*, 657 F.2d 971, 984-85 (8th Cir. 1981); *Luria Bros. & Co. v. FTC*, 389 F.2d 847, 865-66 (3d Cir. 1968), and prohibitions of sales between joint venture partners, *United States v. Alcan Aluminum Ltd.*, 605 F. Supp. 619 (W.D. Ky. 1985).

case, the merger creates uncertainties in a market already characterized by exercises of market power that may harm consumers and where the relief imposed will increase the likelihood that competition will be fully restored. *See, e.g., Ford Motor Co.*, 405 U.S. at 578 (approving district court relief aimed at Anurtur[ing]@ lost competition over an objection that the forces in the marketplace might suffice to restore it).[11]

Third, we believe that a narrow export-at-a-loss restriction like the one set forth above would effectively protect, and would in no way inhibit, free and vigorous competition.[12] We recognize that in 1995, Congress repealed an export ban on ANS crude oil, and we have no intention of undermining that repeal. However, as we have noted above, a consent agreement provision that narrowly prohibits exports (1) reasonably anticipated to be at a loss and (2) made Aknowingly and intentionally . . . for the purpose of increasing the Spot Price of ANS crude oil in PADD V@ is far removed from a general export ban, and would leave firms entirely free to engage in normal, competitive export activities both within PADD V and elsewhere. Further, although the

---

[11] The majority emphasizes that Ait is not the Commission=s mandate to use merger enforcement as a vehicle for imposing its own notions of how competition may be >improved.=@ We of course agree that merger enforcement is not an appropriate vehicle for Aimproving@ markets in ways unrelated to the merger. But as the precedents cited in footnote 10, above, exemplify, it is equally fundamental that mergers must be viewed, and the competitive concerns that they raise addressed, in the practical and dynamic context of the markets in which they occur. *See, e.g., Brown Shoe Co. v. United States*, 370 U.S. 294, 321-23 (1962).

[12] The majority expresses concern that our provision would not Aapply equally to all producers@ of ANS crude oil. It is true that our provision would place restrictions on the two parties before us, who will also be the two largest producers of ANS crude oil, that would not apply to smaller competitors. But our narrow restriction would not prevent them from competing vigorously -- only from engaging in a practice that the Commission=s complaint identified as an exercise of market power that distorted competition. Because the mandate of this agency is to protect competition, not the individual interests of particular competitors, we are not concerned about inhibiting BP and Phillips= ability to exercise market power by manipulating West Coast prices.

provision that we propose would be narrow, we believe that it would be effective. The proviso requiring that sales be reasonably anticipated to be at a loss to be suspect would give both the parties and FTC enforcement staff an objective benchmark, while the intent and purpose requirements B requirements familiar to antitrust law, *see, e.g., Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585, 602 (1985) B would ensure that normal competitive conduct would be unaffected.

Under normal circumstances we favor structural rather than behavioral remedies. That approach underlies the substantial structural relief that the Commission unanimously requires in this case. However, we believe that in addition, the above-described export restriction is appropriate and warranted by the facts and circumstances of this case. Accordingly, we dissent from the majority decision not to include in the consent order a provision restraining in the future the manipulation of ANS crude supply to the West Coast that we believe occurred in the past.

STATEMENT OF COMMISSIONERS ANTHONY, SWINDLE, AND LEARY

Alaska's North Slope is one of the largest sources of crude oil in the world. Crude oil extracted from Alaska's North Slope ("ANS crude oil") is transported through the Trans-Alaska Pipeline System ("TAPS") to the warm water port of Valdez, Alaska. From Valdez, large oil tankers transport ANS crude oil to refineries, most of which are located on the West Coast of the United States. The West Coast refineries process ANS crude oil and other crude oils to produce gasoline that ultimately is sold to consumers located on the West Coast.

The three main producers of ANS crude oil are British Petroleum/Amoco Oil Co., Inc. ("BP"), Atlantic Richfield Corporation ("ARCO"), and ExxonMobil Corporation ("Exxon"). BP produces about 45% of ANS crude oil, ARCO about 30%, and Exxon about 22%. Each of these producers own interests in TAPS and the oil tanker fleet that are roughly proportionate to its share of ANS crude oil production. Because BP does not own any refineries on the West Coast, it sells most of its ANS crude oil to other West Coast refiners. In contrast, ARCO and Exxon use most of their ANS crude oil in their own West Coast refineries.

BP's proposed merger with ARCO would give the merged firm about a 75% share of exploration, production, and transportation of ANS crude oil. The complaint alleges that the merger is likely substantially to lessen competition in the market for the sale of ANS crude oil to West Coast refineries. The basic theory is that prior to the merger BP was able to exercise market power in sales of ANS crude oil to West Coast refineries, i.e., BP was able to profitably maintain prices above competitive levels for a significant period of time. BP's acquisition of ARCO would increase BP's ability to exercise market power, which could cause West Coast refineries to pay more for ANS crude oil. While the case raises complex market definition and other issues, we have reason to believe that the proposed merger, absent the contemplated relief, is likely substantially to lessen competition as alleged in the complaint.

Traditionally, if a merger raises competitive concerns, the Commission requires the merging parties to divest assets to eliminate the competitive overlap before allowing the merger to be consummated. Consistent with this approach, in this case the Commission has issued an order requiring BP and ARCO to divest all of ARCO's assets in Alaska to Phillips Petroleum Company ("Phillips"). We believe that this divestiture will remedy the antitrust concerns raised by the merger. In fact, as the concurring statement of Chairman Pitofsky and Commissioner Thompson points out, the relief in the order has the potential to "actually improve upon the level of competition" in the West Coast market. As a result of the divestiture, Phillips will have

about a 30% share of ANS crude oil exploration, production, and transportation, and Phillips will have even more crude oil to sell on the open market than ARCO did. Phillips appears to have the financial resources and experience to be a vigorous competitor in the exploration, production, and transportation of ANS crude oil.

In addition to this structural relief, Chairman Pitofsky and Commissioner Thompson would favor "behavioral" relief that would require the Commission to engage in extensive monitoring of ANS crude oil exports and prices for the next decade. Specifically, they support a provision that would prohibit BP and Phillips, for 10 years, from "knowingly and intentionally" exporting ANS crude oil outside the West Coast of the United States "for the purpose of increasing the Spot Price of ANS crude oil" on the West Coast. The proposed export restriction also would include a presumptive safe harbor if an export sale were made at a "price reasonably anticipated to produce a higher profit than a contemporaneous sale" on the West Coast. We believe that this over-regulatory export restriction would be unnecessary, unenforceable, and otherwise inappropriate.[1]

It is unnecessary to impose the proposed export restriction on BP because BP is highly unlikely to engage in exports following the merger. There is some evidence that, prior to the merger, BP occasionally exported ANS crude oil to the Far East in order to increase spot prices for ANS crude oil on the West Coast. It is

---

[1] It bears noting that in 1995, Congress explicitly repealed the then-existing ban on ANS exports. If Congress were to determine that the ban should be reinstated, it could so act. In addition, the 1995 legislation lifting the export ban granted the President, in consultation with the Secretary of Energy, the power to reimpose the export ban upon a determination by the Secretary of Commerce that "exporting oil . . . has caused sustained oil prices significantly above world market levels . . . ." (30 U.S.C. 185(s)(5)). Such a ban would apply equally to all producers, and would not leave some producers under the restrictions of the Commission=s order while permitting other producers to export without inhibition.

important to emphasize that BP's unilateral actions were not illegal under the antitrust laws - and, indeed, the complaint makes no allegation that the exports were illegal.[2] In any event, however, BP's incentives to export will change as a result of the divestitures that the order requires. Before the merger, BP sold most of its ANS crude oil to other West Coast refiners because it did not own refineries on the West Coast. BP benefitted from higher spot prices because of its status as a merchant marketer, and also because Alaska's royalty scheme for ANS production was tied to ANS spot prices on the West Coast. With the merger, BP will acquire two West Coast oil refineries that were part of ARCO, and BP likely will need to use most of its ANS crude oil production to operate these two refineries. Since BP will be consuming most of its ANS production internally, BP will now benefit from lower royalty payments to the extent that the ANS spot price drops. Therefore, as a result of the new market structure created by the divestitures required by the order, BP is extremely unlikely to resume exporting ANS crude oil to the Far East (or elsewhere) to increase spot prices for ANS crude oil on the West Coast.

Nor is it necessary to impose the export restriction on Phillips. Phillips is purchasing ARCO's assets in Alaska lock-stock-and-barrel, i.e., Phillips is assuming ARCO's position as an explorer, producer, and transporter of ANS crude oil. There is no evidence that ARCO ever engaged in strategic ANS exports for the purpose of increasing West Coast spot prices. Granted, it might appear that Phillips will have a greater incentive than ARCO did to increase spot prices for ANS crude oil, because Phillips, like the pre-merger BP, will sell its ANS crude oil to

---

[2] Rather, the exports are cited as evidence that pre-merger BP had existing market power with respect to ANS sales on the West Coast. (Complaint && 24-26). Therefore, the Commission alleges, it would be unlawful for BP to acquire its closest competitor in this market, and thereby enhance its market power. Of course, if two or more producers appeared to engage in such exports through coordinated or other illegal action, the Commission could initiate an investigation of such unlawful conduct and take appropriate enforcement measures.

West Coast refineries on the merchant market (whereas ARCO consumed most of its production in its own West Coast refineries). However, Phillips will have a smaller share of ANS crude oil production than did BP - approximately 30% for Phillips versus 45% for BP - which makes it quite unlikely that Phillips could successfully engage in exports to increase spot prices for ANS crude oil on the West Coast.

Not only is the export restriction unnecessary, it also would be extremely difficult to enforce because it would require proof of BP's or Phillips's knowledge and intent. We cannot rely on the companies to create an unambiguously inculpating "paper trail," and in the face of ambiguous evidence, the Commission's burden of proof would be very high indeed. We do not think that the public interest would be well served by including an order provision that is so obviously difficult to enforce that it would have little or no practical effect. Moreover, the proposed safe harbor would complicate enforcement proceedings even further by introducing additional factual issues that would be difficult to resolve.

We do not believe the export restriction is an appropriate measure for the Commission to impose in the context of a merger settlement, especially when structural relief fully restores, and may even improve upon, the status quo ante. The export restriction would address a pre-existing market condition, under which BP allegedly, unilaterally, and sporadically exported ANS crude oil with some slight effect on West Coast prices.[3] We acknowledge the public concern over the relatively high price of gasoline on the West Coast, but people will be cruelly disappointed if they are led to believe that the export restriction would have a detectable effect on the situation. Moreover, it is not the Commission's mandate to use merger enforcement as a vehicle

[3] We have reason to believe that the upward price effects of these sporadic sales amounted to no more than one-half cent per gallon at the pump.

for imposing its own notions of how competition may be "improved." Instead, Congress has directed the Commission only to prevent any harm to competition that is likely to flow from a merger. We believe that the divestitures already accomplish that goal.

We acknowledge that the parties were willing to sign an order with an export restriction. We need not speculate about whether they were induced to do so because of a compelling need to strike a deal promptly, or because they believe the restriction is unnecessary or unenforceable.Whatever the reason, in light of the structural relief the order achieves, we see no need to bind the parties to an unnecessary behavioral provision.

For the reasons set forth above, we do not believe that the export restriction should be included in the order.

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

I. Introduction

The Federal Trade Commission (ACommission@) has accepted for public comment from BP Amoco p.l.c. (ABP Amoco@) and Atlantic Richfield Company (AARCO@) (collectively, AProposed Respondents@) an *Agreement Containing Consent Orders* ("Proposed Consent Order"). The Proposed Respondents have also reviewed a draft complaint that the Commission contemplates issuing. The Commission and BP Amoco and ARCO have also agreed to an Order to Hold Separate and Maintain Assets (AHold Separate Order@) that requires the Proposed Respondents to hold separate and maintain certain divested assets. The Proposed Consent Order is designed to remedy the likely anticompetitive effects arising from BP Amoco=s proposed acquisition of ARCO.

II. The Parties and the Transaction

BP Amoco is a United Kingdom corporation with headquarters in London, England. It is the world=s third largest oil company, with total worldwide revenues of more than $91 billion in 1999. BP Amoco is engaged in exploration, development, and production of crude oil on the Alaskan North Slope (AANS crude oil@), which it sells to refineries on the West Coast of the United States, Hawaii, and Alaska, and in markets abroad. It also owns capacity on the Trans-Alaska Pipeline

System (ATAPS@) and leasehold interests in Jones Act tankers. These specialized tankers are used by BP Amoco to transport ANS crude oil from the North Slope production fields to its refinery customers.

ARCO is a Delaware corporation with headquarters in Los Angeles, California. In 1999, ARCO had total revenues of more than $12 billion. ARCO is also engaged in the exploration, development, and production of ANS crude. ARCO also owns capacity on TAPS, and it owns its own Jones Act tankers, which it uses to transport ANS crude oil to the West Coast. ARCO also owns and operates two refineries on the West Coast that refine ANS crude oil.

BP Amoco and ARCO were the pioneers in developing the Alaska North Slope, and today are the two most important oil companies doing business there. They account for more than half of all ANS crude oil discovered over the last decade, and currently produce about 74% of all ANS crude oil. BP Amoco and ARCO are the only two operators of ANS crude oil fields, they each own more proven ANS crude oil reserves than any other oil company, they have the largest leaseholds of exploration and production acres, and they have drilled the largest number of exploration wells on the North Slope. Individually, each has won more exploration tracts than any other company in the last decade.

The Alaska North Slope is a major oil-producing region of the United States. ANS crude oil is used to supply refineries in Alaska, Hawaii, the West Coast of the United States, and Asia. Approximately 90% of all ANS crude oil is refined on the United States West Coast, and approximately 45% of all crude oil refined on the United States West Coast is ANS crude oil.

BP Amoco and ARCO entered into an agreement on March 31, 1999, to merge their companies. The size of the transaction, based upon the value of the deal when it was announced, was about $26 billion.

III. The Proposed Complaint and Consent Order

The proposed complaint alleges that merger of BP Amoco and ARCO 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. The proposed complaint alleges that the merger will lessen competition in each of the following markets: (1) the production, sale, and delivery of ANS crude oil; (2) the production, sale, and delivery of crude oil used by targeted West Coast refiners; (3) the production, sale, and delivery of all crude oil used on the West Coast; (4) the purchase of exploration rights on the Alaskan North Slope; (5) the sale of crude oil transportation on TAPS; (6) the development for commercial sale of natural gas on the Alaskan North Slope; and (7) the supply of crude oil pipeline transportation to, and crude oil storage in, Cushing, Oklahoma. The competitive concerns underlying the allegations in the draft complaint are discussed in Part V of this analysis.

IV. The Proposed Consent Order

To remedy the alleged anticompetitive effects of the merger, the Proposed Consent Order requires Proposed Respondents to divest: (1) all of ARCO=s assets and interests related to and primarily used with or in connection with ARCO=s Alaska businesses; and (2) all of ARCO=s assets related to its Cushing, Oklahoma crude oil business. Proposed Respondents will divest all of ARCO=s Alaska assets to Phillips Petroleum Company (APhillips@), an approved up-front buyer. The vast majority of these assets must be divested to Phillips within 30-days of the signing of the Proposed Consent Order. Some of the ARCO Alaska assets require third-party or governmental approvals and Proposed Respondents have up to six (6) months to divest those particular assets. Proposed Respondents will divest the Cushing assets to an acquirer or acquirers that receive the prior approval of the Commission and in a manner approved by the Commission.

They must divest the Cushing assets within four (4) months of signing the Proposed Consent Order.

For a period of ten (10) years from the date the Proposed Consent Order becomes final, the Proposed Consent Order prohibits the Proposed Respondents from acquiring, directly or indirectly, any ownership, leasehold or other interests in any of the assets they are required to divest without giving prior notice to the Commission.

The Proposed Consent Order also requires the Proposed Respondents to provide the Commission with a report of compliance with the terms of the Proposed Consent Order within thirty (30) days after the Order becomes final, and every sixty (60) days thereafter, until the Proposed Respondents have fully complied with the divestiture requirements under the Proposed Consent Order. The Proposed Respondents must also file annual compliance reports detailing their compliance with the notice provisions under the Proposed Consent Order.

Proposed Respondents have also agreed to a Hold Separate Order. The purpose of the Hold Separate Order is (a) to preserve the competitive viability of the assets required to be divested under the Proposed Consent Order, pending their actual divestiture, (b) to assure that no material confidential information is exchanged between BP Amoco and the held-separate businesses, and (c) to prevent interim harm to competition pending the divestitures. The Commission may immediately appoint an asset maintenance trustee to monitor both the ARCO Alaska businesses and the ARCO Cushing Assets which are to be divested, and, in the case of the Alaska assets, to monitor whether the necessary waivers and regulatory approvals are being expeditiously pursued.

Under the terms of the Hold Separate Order, if the Proposed Respondents have not completed the divestiture of the ARCO Alaska assets that do not require third party or regulatory approvals within thirty (30) days of consummating the merger of BP Amoco and ARCO, they must maintain the relevant ARCO

Alaska businesses as a separate, competitively viable businesses, and not combine them with BP Amoco=s operations. A trustee may be appointed to oversee the held separate businesses.

Under the terms of Hold Separate Order, until the divestiture of the ARCO Cushing Assets has been completed, Proposed Respondents must maintain the ARCO Pipeline Company as a separate, competitively viable business, and not combine it with BP Amoco=s operations. The Proposed Consent Order also requires the Proposed Respondents to maintain the assets to be divested in a manner that will preserve their viability, competitiveness and marketability, to avoid causing their wasting or deterioration. Pending divestiture, Proposed Respondents are prohibited from selling, transferring, or otherwise impairing the marketability or viability of the assets to be divested.

Under the terms of the Proposed Consent Order, in the event that BP Amoco and ARCO do not divest the assets required to be divested under the terms and time constraints of the Proposed Consent Order, the Commission may appoint a trustee to divest those assets, expeditiously, and at no minimum price. Also, in the event the assets requiring third-party or governmental regulatory approvals are not divested within the allowed time, a trustee may be appointed to oversee the divestiture of those assets to Phillips.

V. The Competitive Concerns

The merger of BP Amoco and ARCO gives rise to competitive concerns in seven relevant markets, each of which is discussed below.

A. Production and Sale of ANS Crude Oil

BP Amoco currently has about a 44% share of all ANS crude oil production and ARCO has about 30% share. BP Amoco owns no refineries that it supplies with ANS crude oil. As a

consequence, all of its ANS crude oil sales are to third party customers. ARCO, on the other hand, owns two refiners that use ANS crude oil. One is located in the Los Angeles area (at Carson) and the second is in the Seattle area (at Cherry Point). Because ARCO supplies its West Coast refineries with ANS crude oil, ARCO now sells only relatively small amount of ANS crude oil to third parties.

According to the complaint the Commission intends to issue, BP Amoco already exercises market power in the sale of ANS crude oil to refineries on the West Coast. The evidence of this market power is the fact that BP Amoco engages in price discrimination on two fronts: First, BP Amoco sells ANS crude to West Coast refinery customers at different prices, net of transportation (Anetbacks@). Second, BP sells ANS crude to the West Coast refineries at higher netbacks than to refineries in the Far East. The Commission=s draft complaint alleges the existence of three relevant markets implicated by BP Amoco=s ANS crude oil pricing: (1) the production, sale, and delivery of ANS crude oil; (2) the production, sale, and delivery of crude oil used by targeted West Coast refiners; and (3) the production, sale, and delivery of all crude oil used by refiners on the West Coast.

According to the Commission=s draft complaint, for several reasons, ARCO is the firm most likely to be able to constrain BP Amoco=s future exercise of market power. First, with the opening of the Alpine oil field, ARCO has new production that is about to commence. Second, with a new and increased ability to substitute away from ANS crude oil to other types of crude oil at its Los Angeles refinery, ARCO will have incentives to substitute cheaper imports for ANS crude oil if the price of ANS crude oil becomes non-competitive. Third, ARCO is the firm best positioned and most likely to find new sources of ANS crude oil, and bring that oil to market.

Entry into the crude oil markets implicated by this merger is unlikely to occur in a timely or sufficient manner to prevent the merger from reducing competition in the relevant markets. Entry

has not constrained BP Amoco=s exercise of market power to date. Nor is it likely that producers of other types of crude oils will supply West Coast refineries in a manner that would constrain BP Amoco=s ability to exercise market power. The most compelling evidence is that they have not already done so, even as BP Amoco has been exercising market power directed at West Coast refineries for many years.

B. Bidding for ANS Crude Oil Exploration Rights

BP Amoco and ARCO are the two most important competitors in bidding for exploration leases for oil and gas on the Alaska North Slope. They own or control all exploration, development, and production assets and won over 60% of all State of Alaska lease auctions over the last decade. During that same period the top four firms won 75%. In the most recent North Slope lease sale, BP Amoco and ARCO collectively won more than 70% of the tracts bid.

After the merger, no single firm, or combination of firms, will be both large enough and sufficiently well informed with respect to the value of individual tracts, to replace the loss of revenues to the State of Alaska and the Federal Government, from bidding revenues. Moreover, the reduced competition in the bidding for oil and gas leaseholds will eventually result in less exploration and development, and less production of ANS crude oil.

New entry will not be timely, likely or sufficient to undermine the anticompetitive effects of the merger. Firms that lack the information, infrastructure, and interest in North Slope bidding will simply be unable to fill the void created by the loss of ARCO as an independent bidder for exploration and development acreage.

C. TAPS Pipeline Competition

Seven companies jointly own the TAPS pipeline, with BP Amoco and ARCO the two largest owners. BP has about a 50% interest and ARCO has about a 22% interest. Each owner of TAPS has an exclusive right to sell space on its ownership-share of TAPS capacity and to set its own tariff, and to discount those tariffs, for carriage on that capacity. After the merger, BP Amoco would control a 72% interest in TAPS. Alyeska Pipeline Service Company operates TAPS.

The owners of TAPS ere entitled to capacity on the pipeline in proportion to their ownership interests. Because not all oil producers have an interest in TAPS, or an interest in TAPS in proportion to their oil production, TAPS owners can and do discount their tariffs in an effort to attract additional shippers. According to the Commission=s draft complaint, the increase in concentration in TAPS ownership may cause the TAPS tariffs to increase.

D. Natural Gas Commercialization

BP Amoco and ARCO are the two largest holders of natural gas reserves on the Alaska North Slope. ExxonMobil is the only other company that holds sufficiently large volumes of natural gas reserves to have the potential to develop those reserves for significant commercial use. The merger of BP Amoco and ARCO would reduce the potential for future competition in the sale of North Slope natural gas from three firms to two firms.

Although it is unclear at this time when the North Slope gas fields will be commercialized, it is likely that this will eventually occur. To date, over $1 billion has been spent by various firms in an effort to commercialize the North Slope=s natural gas reserves. When gas commercialization does become a reality, the benefit of three firms competing for this business, rather than a market characterized by a duopoly, will result in increased competition and lower prices.

E. Crude Transportation and Storage Services in Cushing, Oklahoma

Efficient functioning of the pipeline and oil storage facilities leading into, and in, Cushing, Oklahoma, is critical to the fluid operation of both the trading activities in Cushing and the trading of crude oil futures contracts on the NYMEX. The restriction of pipeline or storage capacity can affect the deliverable supply of crude oil in Cushing, and consequently affect both WTI crude oil cash prices and NYMEX futures prices.

The proposed merger would concentrate control of over 43% of Cushing storage capacity, 49% of Cushing pipeline delivery capacity, and 95% of the trading services provided at Cushing. A firm that controls substantial crude oil storage capacity in Cushing, and crude oil pipeline capacity leading into Cushing, would be able to manipulate NYMEX futures trading markets. This threat of manipulation will cause prices to rise and, because WTI crude oil is a benchmark crude oil, have ripple effects throughout the oil industry.

VI. Resolution of the Competitive Concerns

The Proposed Consent Order alleviates the competitive concerns arising from the merger as discussed below.

A. The Proposed Order Resolves Competitive Concerns in Alaska by Requiring that All of ARCO=s Alaska Assets be Divested to Phillips

The Proposed Consent Order, if finally issued by the Commission, would settle all of the charges alleged in the Commission's complaint. Under the terms of the Proposed Consent Order, BP Amoco has agreed to divest to Phillips all of the assets, properties, businesses, and goodwill, tangible and intangible, that as of March 15, 2000, were related to and

primarily used with or in connection with ARCO=s Alaska businesses.

The ARCO assets and properties that BP Amoco and ARCO are required to divest to Phillips include the following: (a) ARCO Alaska, Inc,; (b) ARCO Transportation Alaska, Inc., (including any interest in Alyeska Pipeline Service Company and Prince William Sound Oil Spill Response Company; (c) ARCO Marine, Inc.; (d) ARCO Marine Spill Response Company; (e) Union Texas Alaska assets of Union Texas Petroleum Holdings, Inc.; (f) Union Texas Alaska, LLC; (g) Kuparuk Pipeline Company, (including any interests in Kuparuk Transportation Company and Kuparuk Transportation Capital Corporation); (h) Oliktok Pipeline Company; (i) Alpine Pipeline Company; (j) Cook Inlet Pipeline Company; (k) All Alaska oil and gas leases; (l) AMI Leasing Inc.; (m) ARCO Beluga, Inc. (a wholly-owned subsidiary of CH-Twenty, Inc.); (n) ARCO=s office complex in Anchorage; (o) intellectual property; (p) Patents; (q) seismic data; (r) ship construction contracts; (s) customer and vendor lists; (t) ARCO records; and (u) long-term supply agreements entered between BP Amoco and several West Coast refiners.

To ensure that key ARCO employees remain with the company, and become available to work for Phillips, the Proposed Consent order also provides that (a) BP Amoco not solicit for employment any ARCO employee unless that employee was terminated by Phillips; (b) vest all current and future pension benefits; and (c) pay a bonus of not less than 35% of the base salary for certain key ARCO employees.

Phillips is headquartered in Bartlesville, Oklahoma and is the sixth largest United States oil company. In 1999 it had total revenues of about $14 billion. Phillips currently has about a one percent interest in ANS crude oil production and about a 1.4% interest in TAPS. Phillips also owns oil and gas leases in the National Petroleum Reserve area of the North Slope.

Analysis to Aid Public Comment

The divestiture of ARCO=s Alaska Businesses is intended to preserve the level of competition that existed before the merger in the production, sale and delivery of crude oil to the West Coast, bidding for exploration rights on the Alaskan North Slope, and in pipeline transportation services for ANS crude oil.

1. The Proposed Respondents Have Thirty (30) Days To Divest Most of the ARCO Alaska Assets to Phillips

Except for those ARCO Alaska assets that require consents, waivers, or approvals by regulatory authorities or other third parties before they may be transferred to Phillips (e.g., pipelines, oil and gas leases, rights of way), the Proposed Respondents must complete the required divestitures of the Alaska assets within thirty (30) days of the acquisition. The Proposed Respondents must cooperate with Phillips and use reasonable best efforts to assist Phillips in securing the consent and waivers that may be required from private entities. The Proposed Respondents must complete all other divestitures within six (6) months of consummating their merger.

2. Transition Services

The Proposed Consent Order requires that the Proposed Respondents enter into a transition services agreement with Phillips. Under this agreement, the Proposed Respondents must provide Phillips with the transition services it may need in order to conduct the ARCO businesses as they are currently being conducted.

3. Licensing Agreements

The Proposed Consent Order requires that the Proposed Respondents enter into various licensing agreements with Phillips for intellectual property necessary or related to the ARCO Alaska Assets. These agreements are in addition to the absolute transfer of other intellectual property.

B. The Proposed Order Resolves Competitive Concerns in Cushing by Requiring that All of ARCO=s Cushing Assets be Sold Within 120 Days to an Acquirer Approved by the Commission

Under the terms of the Proposed Consent Order, BP Amoco agreed to divest ARCO=s assets related to its Cushing, Oklahoma crude oil business to an acquirer to be approved by the Commission and in a manner approved by the Commission. Those assets include all of ARCO's assets, properties, businesses and goodwill, tangible and intangible, in the Seaway Crude Oil Pipeline and the Mid-Continent Crude Oil Logistics Services Businesses.

The ARCO assets and properties that BP Amoco and ARCO are required to divest include the following: (a) ARCO=s crude oil interest in Seaway Pipeline Company, a partnership with subsidiaries of Phillips; (b) ARCO=s crude oil terminal facilities in Cushing, Oklahoma and Midland, Texas, including the line transfer and pumpover business at each location; (c) ARCO=s undivided ownership interest in the Rancho Pipeline, a 400-mile, 24-inch diameter crude oil pipeline from West Texas to Houston; (d) ARCO=s undivided ownership interest in the Basin Pipeline, a 416-mile crude oil pipeline running from Jal, N.M., to Wichita Falls, Texas and then on to Cushing, Oklahoma; and (e) the ARCO West Texas Trunk System of receipt and delivery pipelines, which is centered around Midland.

BP Amoco and ARCO must complete the required divestitures of the Cushing assets, within 120 days of their signing the Proposed Consent Order, to an acquirer or acquirers that receive the prior approval of the Commission.

VII. Opportunity for Public Comment

The Proposed Consent Order has been placed on the public record for thirty (30) days for receipt of comments by interested persons. Comments received during this period will become part

of the public record. After thirty (30) days, the Commission will again review the Proposed Consent Order and the comments received and will decide whether it should withdraw from the Proposed Consent Order or make it final.

By accepting the Proposed Consent Order subject to final approval, the Commission anticipates that the competitive problems alleged in the complaint will be resolved. The purpose of this analysis is to invite public comment on the Proposed Consent Order, including the proposed divestitures, to aid the Commission in its determination of whether it should make final the Proposed Consent Order. This analysis is not intended to constitute an official interpretation of the Proposed Consent Order, nor is it intended to modify the terms of the Proposed Consent Order in any way.

Complaint

IN THE MATTER OF

SONY MUSIC ENTERTAINMENT, INC.

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

Docket C-3971; File No. 9710070
Complaint, August 30, 2000--Decision, August 30, 2000

This consent order addresses Sony Music's practices that restricted competition in the domestic market for prerecorded music. The complaint alleges that Sony Music adopted, implemented, and enforced Minimum Advertised Price ("MAP") provisions in their Cooperative Advertising Programs. By defining advertising broadly enough to include all in-store displays and signs, the MAP policies effectively precluded many retailers from communicating prices below MAP to their customers. The order requires Respondent to discontinue its MAP program for a period of seven years and contains several prohibitions to ensure that Respondent is unable to maintain the anticompetitive status quo in some other way.

Participants

For the Commission: *William L. Lanning, Karin F. Richards, James W. Frost, Geoffrey M. Green, Karen Mills, Jeffrey Goodman, June Casalmir, Kent Cox, Kristin Malmberg, Beverly Dodson, Brynna Connolly, Lorenzo Cellini, Veronica G. Kayne, Michael E. Antalics, John Howell, Daniel P. O=Brien,* and *Gregory Vistnes.*

For the Respondents: *William T. Lifland* and *Dean Ringel, Cahill Gordon & Reidel, George S. Cary, Cleary, Gottlieb, Steen & Hamilton,* and *James J. Calder, Rosenmann & Colin LLP.*

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, as amended,15 U.S.C. '' 41 et seq., by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that Sony Music Entertainment Inc. has violated the provisions of Section 5 of the Federal Trade Commission Act, 15 U.S.C. ' 45, and it appearing to the

Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues this complaint, stating its charges as follows:

PARAGRAPH ONE: Respondent Sony Music Entertainment Inc. (ASony@) is a corporation organized and existing under the laws of the State of Delaware with its principal place of business at 550 Madison Avenue, New York, New York. Sony produces, manufactures, distributes, and markets prerecorded music, among other things.

PARAGRAPH TWO: Five major distributors sell and distribute over 85% of all prerecorded music in the United States. Sony is one of the five Amajor distributors@ of prerecorded music. Warner-Elektra-Atlantic Corp., Universal Music and Video Distribution Inc., EMI Music Distribution, and Bertelsmann Music Group, Inc. are the other Amajor distributors.@

PARAGRAPH THREE: The major distributors sell prerecorded music to numerous retailers including independent retailers, large national chains, mass merchandisers, regional chains and consumer electronics stores. They also sell prerecorded music to sub-distributors who in turn supply retailers not serviced directly by the prerecorded music distributors.

PARAGRAPH FOUR: There are two relevant markets in this matter. First, the commercial development, distribution and wholesale sale, by any means, of prerecorded music (hereinafter Awholesale market@). Second, the retail sale, by any means, of prerecorded music (hereinafter Aretail market@). The geographic scope of the wholesale market is the United States of America. The wholesale market is characterized by high entry barriers that seriously limit the likelihood of effective new entry.

PARAGRAPH FIVE: In the early 1990=s, several large consumer electronics chains began selling compact discs and

other prerecorded music products. These new entrants competed aggressively on price and offered consumers substantial savings on some prerecorded music products. A retail price war ensued and music retailers lowered their prices.

PARAGRAPH SIX: Some retailers, faced with newly invigorated price competition in the retail market, requested margin protection from Sony. In 1993, Sony was also concerned that declining retail prices could have wholesale price effects**.** Thereafter, Sony decided to introduce a Minimum Advertised Pricing (AMAP@) policy. In 1992 and 1993, the other major distributors adopted MAP policies. These policies set forth minimum advertised prices for most prerecorded music products. As discussed below, these MAP policies were modified between 1995 and 1996. In 1995 and 1996, retail prices increased. Since 1997, wholesale prices have also increased.

PARAGRAPH SEVEN: The MAP policy changes which occurred in 1995 and 1996 significantly tightened the programs. By February 1, 1997, each of the major distributors had implemented similar policies. The new MAP policies provided that any retailer who advertised the distributors= product below the established MAP would be subject to a suspension of all cooperative advertising and promotional funds for either 60 or 90 days. BMG=s policy varied slightly and provided that any retailer who violated the policy three times within a twelve month period would be subject to a suspension of all cooperative advertising and promotional funds for up to twelve months. For each company, the suspension would be imposed whether or not the retailer paid for the offending advertisement or promotion. In addition, the suspension would be imposed for in-store Aadvertising and promotion@ that included virtually every method of communicating the price of the product to the consumer other than the pre-printed price sticker on the product.

PARAGRAPH EIGHT: With the exception of the BMG policy described herein, a single violation of the new MAP policies resulted in a total loss of all cooperative advertising and

promotional funds for the specified suspension period The severity of the new MAP penalties ensured that even the most aggressive retail competitors would stop advertising prices below MAP. By defining advertising broadly enough to include all in-store displays and signs, the MAP policies effectively precluded many retailers from communicating prices below MAP to their customers.

PARAGRAPH NINE: Shortly after adopting the new MAP policies, the distributors began aggressively enforcing the policies. Several high profile enforcement actions that resulted in long periods of suspension were widely publicized by the trade press.

PARAGRAPH TEN: Sony=s stricter MAP policy, in effect since August of 1996 and continuing to date, was implemented to eliminate aggressive retail pricing and to stabilize overall prices in the retail marketplace. This policy was successful.

PARAGRAPH ELEVEN: The purpose, effects, tendency or capacity of the acts and practices described in PARAGRAPHS SIX, SEVEN, EIGHT, NINE, and TEN relating to the implementation and enforcement of MAP policies are and have been to restrain trade unreasonably and hinder competition in the retail and wholesale markets for prerecorded music in the United States, and constitute a violation of Section 5 of the Federal Trade Commission Act, as amended,15 U.S.C. ' 45.

CONCLUSION

PARAGRAPH TWELVE: The aforesaid acts and practices of the respondent were and are to the prejudice and injury of the public. These acts and practices constitute unfair methods of competition in or affecting commerce in violation of Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. ' 45.

These acts and practices may recur in the absence of the relief requested.

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

By the Commission.

DECISION AND ORDER

The Federal Trade Commission having initiated an investigation of certain acts and practices of Respondent, Sony Music Entertainment Inc., and Respondent having been furnished thereafter with a copy of the draft of Complaint that the Bureau of Competition presented to the Commission for its consideration and which, if issued, would charge Respondent with violations of Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. ' 45; and

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

The Commission having thereafter considered the matter and having determined that it had reason to believe that Respondent has violated said Act, and that a Complaint should issue stating its

charges in that respect, and having accepted the executed Consent Agreement and placed such Consent Agreement on the public record for a period of thirty (30) days for the receipt and consideration of public comments, and having duly considered the comments filed thereafter by interested persons pursuant to ' 2.34 of its Rules, the Commission hereby issues its complaint, makes the following jurisdictional findings and issues the following Order:

1. Respondent Sony Music Entertainment Inc. is a corporation organized and existing under the laws of the State of Delaware with its principal place of business at 550 Madison Avenue, New York, New York.

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

ORDER

I.

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

A. ASony@ or ARespondent@ means Sony Music Entertainment Inc., its directors, officers, employees, agents, representatives, predecessors, successors, and assigns; its subsidiaries, divisions, groups, and affiliates controlled by Sony, and the respective directors, officers, employees, agents, representatives, successors, and assigns of each.

B. ACommission@ means the Federal Trade Commission.

C. ARecord Clubs@ means the divisions of The Columbia House Company and BMG Music Service that operate as club-based

direct marketers of prerecorded music, and manufacture or have manufactured for them product pursuant to a club license.

D. AProduct@ means prerecorded music in physical or electronic format that is offered for sale or sold in the United States, including, but not limited to, compact discs (ACDs@), audio DVDs, audio cassettes, albums and digital audio files (i.e., digital files which are delivered to the consumer electronically, to be stored on the consumer=s hard drive or other storage device). AProduct@ does not include prerecorded music in physical or other electronic format manufactured or distributed by or for Record Clubs pursuant to Record Club licenses.

E. ADealer@ means any person, corporation, or entity that in the course of its business offers for sale or sells any Product in or into the United States, including, but not limited to, wholesale distributors, retail establishments, and Internet retail sites, but excluding Record Producers.

F. ARecord Producer@ means any person, corporation or entity that in the course of its business produces sound recordings for recording artists and manufactures Product from such sound recordings.

G. ACooperative Advertising or Other Promotional Funds@ means any payment, rebate, charge-back or other consideration provided to a Dealer by Sony in exchange for any type of advertising, promotion or marketing efforts by that Dealer on behalf of Sony. This term also includes advertising, promotion, or marketing efforts by Sony on behalf of one or more identified Dealers. Examples of cooperative advertising include, but are not limited to, free goods provided to a Dealer by Sony, and payments for newspaper advertisements, radio and television advertisements, internet banner advertisements, posters and signs within a Dealer=s retail stores, pricing or positioning of Products within a Dealer=s retail stores, and point-of-purchase merchandising.

Decision and Order

H. AMedia Advertising@ means any promotional effort by a Dealer outside of the Dealer=s physical location or Dealer-controlled internet site, including but not limited to, print, radio, billboards, or television.

I. AIn-Store Promotion@ means any promotional effort conducted in or on the physical premises of a Dealer or a Dealer-controlled internet site, including but not limited to, signs, bin cards, end caps, hit walls, listening posts, internet banner advertisements, and promotional stickers.

J. AAdvertised or Promoted@ means:

(1) any form of advertising, promotion, or marketing efforts by Sony on behalf of one or more of its Dealers;

(2) any form of Media Advertising efforts including, but not limited to, print, radio, billboard, or television; and

(3) any form of In-Store Promotion efforts including, but not limited to, signs, bin cards, end caps, hit walls, listening posts, internet banner advertisements and promotional stickers.

II.

It is further ordered that for a period of seven (7) years, Sony, directly, indirectly, or through any corporation, subsidiary, division or other device, in connection with the offering for sale, sale or distribution of any Sony Product in or into the United States of America in or affecting Acommerce,@ as defined by the Federal Trade Commission Act, shall cease and desist from directly or indirectly adopting, maintaining, enforcing or threatening to enforce any policy, practice or plan which makes the receipt of any Cooperative Advertising or Other Promotional Funds contingent upon the price or price level at which any Sony Product is Advertised or Promoted.

III.

It is further ordered that Sony, directly, indirectly, or through any corporation, subsidiary, division or other device, in connection with the offering for sale, sale or distribution of any Sony Product in or into the United States of America in or affecting Acommerce,@ as defined by the Federal Trade Commission Act, shall not directly or indirectly:

A. Adopt, maintain, enforce or threaten to enforce any policy, practice or plan which makes the receipt of any Cooperative Advertising or Other Promotional Funds contingent upon the price at which any Sony Product is offered for sale or sold;

B. Adopt, maintain, enforce or threaten to enforce any policy, practice or plan which makes the receipt of any Cooperative Advertising or Other Promotional Funds contingent upon the price or price level of the Sony Product in any In-Store Promotion or Media Advertising where the Dealer does not seek any contribution from Sony for the cost of said Media Advertising or In-Store Promotion;

C. Adopt, maintain, enforce or threaten to enforce any policy, practice or plan which makes the receipt of any Cooperative Advertising or Other Promotional Funds contingent upon the price or price level of the Sony Product in any In-Store

Promotion or Media Advertising if Sony=s contribution exceeds 100% of the Dealer=s actual costs of said Media Advertising or In-Store Promotion;

D. Agree with any Dealer to control or maintain the resale price at which the Dealer may offer for sale or sell any Sony Product;

E. For a period of five (5) years, announce resale or minimum advertised prices of Sony Product and unilaterally terminate those who fail to comply because of such failure. Notwithstanding the foregoing, nothing herein shall prohibit Sony from announcing suggested list prices for Sony Product.

IV.

Nothing herein shall prohibit Sony from providing Cooperative Advertising or Other Promotional Funds on the condition that such funds are passed through in whole or in part to the consumer (hereinafter APass-Through Funds@). Sony shall maintain records that specifically identify by title or collection of titles the amount of Pass-Through Funds provided to each Dealer and the date said amount was provided. Whenever Sony provides Pass-Through Funds to a Dealer, Sony shall specifically notify the Dealer in writing either that these funds are intended to be passed through to the ultimate consumer in whole, or that the Dealer may determine what portion of the funds are to be passed through, provided that some portion of the funds must be passed through to the ultimate consumer. The documents described in this Paragraph VI shall be provided to the Commission upon request.

V.

It is further ordered that for a period of seven (7) years:

A. Sony shall amend all policy manuals applicable to the distribution of Sony Product to state affirmatively that Sony

does not maintain or enforce any plan, practice or policy of the type prohibited in Paragraph II of this Order, and not otherwise permitted by Paragraph IV of this Order.

B. In each published full catalogue or published full price list in which Sony states suggested list prices or codes indicative of such prices, Sony shall state affirmatively that it does not maintain or enforce any plan, practice or policy of the type prohibited in Paragraph II of this Order, and not otherwise permitted by Paragraph IV of this Order.

The documents described in this Paragraph V shall be provided to the Commission upon request.

VI.

It is further ordered that, within 10 days after this Order becomes final, Sony shall mail by first class mail a letter containing the language attached as Exhibit A to:

A. All of its directors, officers, distributors, agents and sales representatives in the United States, and

B. All Dealers to which Sony sells directly and that are engaged in the sale of any Sony Product in or into the United States of America.

VII.

It is further ordered that for a period of seven (7) years Sony shall mail by first class mail a letter containing the language attached as Exhibit A to:

A. Each new director, officer, distributor, agent, and sales representative of Sony in the United States, and

B. Each new Dealer to which Sony sells directly which is engaged in the sale of any Sony Product in or into the United States of America,

within thirty (30) days of the commencement of such person=s employment or affiliation with Sony.

VIII.

It is further ordered, that annually for five (5) years on the anniversary of the date this Order becomes final, and at such other times as the Commission may by written notice to Sony require, Sony shall file with the Commission a verified written report setting forth in detail the manner and form in which Sony has complied and is complying with this Order.

IX.

It is further ordered, that this Order shall terminate on August 30, 2020.

By the Commission.

EXHIBIT A

[COMPANY LETTERHEAD]

Dear [Recipient]:

Sony announces several important changes in policy. All of these changes will be reflected in the new Policy Manual.

Sony has dropped its Minimum Advertised Price (AMAP@) policy effective _____. Cooperative advertising and other promotional funds will not be conditioned upon the price at which

Sony product is advertised or promoted. As many of you know, the Federal Trade Commission has conducted an investigation into Sony=s MAP policies. To end the investigation expeditiously and to avoid disruption to the conduct of its business, Sony has voluntarily agreed, without admitting any violation of the law, to the entry of a Consent Agreement relating to MAP and other related matters.

Sony=s customers can advertise and promote our products at any price they choose. Sony will not withhold cooperative advertising or other promotional funds on the basis of the price at which Sony product is advertised in the media or promoted in your stores. Sony may announce suggested retail prices, but retailers remain free to sell and advertise Sony product at any price they choose.

Concurrence:

_____

William L. Lanning, Esq.
Federal Trade Commission
Bureau of Competition

STATEMENT OF CHAIRMAN ROBERT PITOFSKY AND COMMISSIONERS SHEILA F. ANTHONY, MOZELLE W. THOMPSON, ORSON SWINDLE, AND THOMAS B. LEARY

The Commission has unanimously found reason to believe that the arrangements entered into by the five largest distributors of prerecorded music violate the antitrust laws in two respects. First, when considered together, the arrangements constitute practices that facilitate horizontal collusion among the distributors, in violation of Section 5 of the Federal Trade Commission Act. Second, when viewed individually, each distributor=s arrangement constitutes an unreasonable vertical

restraint of trade under the rule of reason. A discussion of these violations is spelled out in our Analysis to Aid Public Comment. *See* Attached.

The Commission considered carefully whether the anticompetitive vertical restraints should be evaluated under a *per se* rule or a rule of reason. In the past, the Commission has employed the rule of reason to examine cooperative advertising programs that restrict reimbursement for the advertising of discounts, because such programs may be precompetitive or competitively neutral. *Statement of Policy Regarding Price Restrictions in Cooperative Advertising Programs B Rescission*, 6 Trade Reg. Rep. (CCH) & 39,057. The cooperative advertising programs that were the subject of previous Commission actions involved only advertising paid for in whole or in part by the manufacturer, but did not restrain the dealer from selling at a discount or from advertising discounts when the dealer itself paid for the advertisement. *See, e.g., The Advertising Checking Bureau, Inc.*, 109 F.T.C. 146, 147 (1987) (Athe restraints . . . do not prohibit retailers from selling at discount prices or advertising discounts or sale prices with their own funds@).

The Minimum Advertised Pricing (AMAP@) policies of the five distributors in this matter go well beyond the cooperative advertising programs with which the Commission has previously dealt: the distributors= MAP policies prohibited retailers from advertising discounts in all advertising, including advertising paid for entirely by the retailer; the MAP policies applied to in-store advertising, excepting only the smallest price labels affixed to the product; and a single violation of a distributor=s MAP policy carried severe financial penalties, resulting in the loss of all MAP funds for all of the retailer=s stores for 60 to 90 days (*see* Paragraph 7 of each Complaint).

Retailers were free to sell at any price, so long as they did not advertise a discounted price. In fact, there was evidence that

some retailers on rare occasions did sell product at a discount without advertising the discounted price, instead advertising simply that the product was available at a Aguaranteed low price.@ We are therefore reluctant to declare that compliance with the MAP policies by retailers constituted *per se* unlawful minimum resale price maintenance, because we cannot say that there is sufficient evidence of an agreement by retailers to charge a minimum price. As stated by a majority in *In the Matter of American Cyanamid Co.*, Aboth the courts and the Commission have judged cooperative advertising cases under the rule of reason, as long as the arrangements do not limit the dealer=s right: (1) to discount below the advertised price, and (2) to advertise at any price when the dealer itself pays for the advertisement.@ 123 F.T.C. 1257, 1265 (1997) (Statement of Chairman Robert Pitofsky and Commissioners Janet D. Steiger and Christine A. Varney).[1]

In *Business Electronics Corp. v. Sharp Electronics Corp.*, 485 U.S. 717, 735-36 (1988), the Supreme Court held that Aa vertical restraint is not illegal *per se* unless it includes some agreement on price or price levels.@ In our view, *Sharp* requires something more than a showing that an agreement has some influence on price. Restrictions on advertisements that include discounted prices in advertisements funded in whole or in part by the manufacturer are not *per se* illegal, notwithstanding the fact that they are likely to have an influence on resale prices. Indeed, the pervasive practice of publishing suggested retail prices is also likely to have some influence on actual prices, but it is well established that this practice is not *per se* illegal. *See, e.g., Monsanto Co. v. Spray-Rite Serv. Corp.*, 465 U.S. 752, 761 (1984).

---

[1] In *American Cyanamid*, the manufacturer conditioned financial payments on its dealers= charging a specified minimum price, which the Commission found to be *per se* unlawful minimum resale price maintenance. By contrast, financial payments under the distributors= MAP policies here were conditioned on the price advertised, not on the price charged.

Nonetheless, we conclude that the distributors= MAP policies are unlawful under a rule of reason analysis. The five distributors together account for over 85 percent of the market (*see* Paragraph 2 of each Complaint), and each has market power in that no music retailer can realistically choose not to carry the music of any of the five major distributors. The MAP policies were adopted by each of the distributors for the purpose of stabilizing retail prices (*see* Paragraph 10 of each Complaint). The MAP policies achieved their purpose and effectively stabilized retail prices with consequential effects on wholesale prices, ending the price competition that previously existed in the retail marketplace and the resulting pressure on the distributors= margins (i*d.*). Compliance with the MAP policies B which was secured through significant financial incentives B effectively eliminated the retailers= ability to communicate discounts to consumers (*see* Paragraph 8 of each Complaint). Even absent an actual agreement to refrain from discounting, this inability to effectively communicate discounts to consumers meant that retailers had little incentive to actually sell product at a discount.

In the future, the Commission will view with great skepticism cooperative advertising programs that effectively eliminate the ability of dealers to sell product at a discount. The Commission will, of course, consider *per se* unlawful[2] any arrangement between a manufacturer and its dealers that includes an explicit or implied agreement on minimum price or price levels,[3] and it will

---

[2] Commissioners Swindle and Leary have previously stated that the Supreme Court should reassess the applicability of the *per se* rule to the practice when the appropriate case arises. *Nine West Group Inc.*, Dkt. No. C-3937 (Statement of Commissioners Orson Swindle and Thomas B. Leary). However, they agree that, so long as this *per se* rule is the law, summary treatment is appropriate for resale price agreements and other agreements with the same practical effect.

[3] In addition, the Commission will continue to consider *per se* unlawful any cooperative advertising program that is part of a resale price maintenance scheme. *Cf. The Magnavox Co.*, 113 F.T.C. 255, 262 (1990) (AOf course, any

henceforth consider unlawful arrangements that have the same practical effect of such an agreement without a detailed market analysis, even if adopted by a manufacturer that lacks substantial market power.

---

cooperative advertising program implemented by Magnavox as part of a resale price maintenance scheme would be *per se* unlawful . . . .@).

Analysis to Aid Public Comment on the Proposed Consent Order

The Federal Trade Commission ("Commission") has accepted agreements containing proposed consent orders from the corporate parents of the five largest distributors of prerecorded music in the United States. The five distributors, Sony Music Distribution ("Sony"), Universal Music & Video Distribution ("UNI"), BMG Distribution ("BMG"), Warner-Elektra-Atlantic Corporation ("WEA") and EMI Music Distribution ("EMI"), account for approximately 85% of the industry's $13.7 billion in domestic sales. The agreements would settle charges by the Commission that these five companies violated Section 5 of the Federal Trade Commission Act by engaging in practices that restricted competition in the domestic market for prerecorded music.

The proposed consent orders have been placed on the public record for thirty (30) days for receipt of comments by interested persons. Comments received during this period will become part of the public record. After thirty (30) days, the Commission will review the agreements and the comments received and will decide whether it should withdraw from the agreements or make final the agreements' proposed orders.

The purpose of this analysis is to invite public comment concerning the consent order. This analysis is not intended to constitute an official interpretation of the agreement and order or to modify its terms in any way.

There are five separate complaints and proposed consent orders in this matter, one for each of the distributors, which are virtually identical with the exception of minor variations related to the corporate structure of each respondent.

Analysis

The complaints allege that all five distributors have engaged in acts and practices that have unreasonably restrained competition in the market for prerecorded music in the United States through their adoption, implementation and enforcement of Minimum Advertised Price ("MAP") provisions of their Cooperative Advertising Programs.

These five companies, which collectively dominate this market, adopted significantly stricter MAP programs between late 1995 and 1996. Under the new MAP provisions, retailers seeking any cooperative advertising funds were required to observe the distributors' minimum advertised prices in all media advertisements, even in advertisements funded solely by the retailers. Retailers seeking any cooperative funds were also required to adhere to the distributors' minimum advertised prices on all in-store signs and displays, regardless of whether the distributor contributed to their cost.

Failure to adhere to the respondents' MAP provisions for any particular music title would subject the retailer to a suspension of all cooperative advertising funding offered by the distributor for an extended period, typically 60 to 90 days.[1] The severity of these penalties ensured that even the most aggressive retail competitors would stop advertising prices below MAP. The complaints further allege that by defining advertising broadly enough to include all in-store displays and signs, the MAP policies effectively precluded many retailers from communicating prices below MAP to their customers.

The MAP provisions were implemented with the anticompetitive intent to limit retail price competition and to

---

[1] BMG's policy differed slightly. Under the BMG MAP provisions, the suspension of all cooperative advertising funding required a finding of two MAP violations. However, BMG MAP provisions also established a suspension of up to a year for repeated violations.

stabilize the retail prices in this industry. Prior to the adoption of these policies, new retail entrants, especially consumer electronic chains, had sparked a retail "price war" that had resulted in significantly lower compact discs prices to consumers and lower margins for retailers. Some retailers, who could not compete with the newcomers, asked the distributors for discounts or for more stringent MAP provisions to take pressure off their margins.

The complaints allege that the distributors were concerned that declining retail prices could cause a reduction in wholesale prices. Through these stricter MAP programs, the distributors hoped to stop retail price competition, take pressure off their own margins, and eventually increase their own prices. The distributors' actions were effective. Retail prices were stabilized by these MAP programs. Thereafter, each distributor raised its wholesale prices.

While some vertical restraints can benefit consumers (known as "efficiencies") by enhancing interbrand competition and expanding market output, plausible efficiency justifications are absent in this case. Beneficial vertical restraints encourage retailers to provide better services to consumers than would have been provided in the absence of the restraint. However, in this case, the distributors' MAP policies provided no benefits to consumers. In particular, the new retailers that charged lower prices to consumers provided services that were as good as, and in some cases, superior to the services provided by the higher priced retailers they were moving to replace. These policies were plainly not motivated by "free-riding" concerns.

The substantial anticompetitive effects of these programs, balanced against the absence of plausible efficiency rationales for them, give us reason to believe that these programs constitute unreasonable vertical restraints in violation of Section 5 of the FTC Act under a rule of reason analysis. Although the Commission has concluded that compliance by retailers with these programs did not constitute per se unlawful minimum resale

price maintenance agreements, it should be noted that the MAP provisions implemented here go well beyond typical cooperative advertising programs, where a manufacturer places restraints on the prices its dealers may advertise in advertisements funded in whole or in part by the manufacturer. Such traditional cooperative advertising programs are judged under the rule of reason. *American Cyanamid*, 123 F.T.C. 1257, 1265 (1997); *U.S. Pioneer Electronics Corp.*, 115 F.T.C. 446, 453 (1992); *The Advertising Checking Bureau, Inc.*,109 F.T.C. 146 (1987).

The market structure in which the distributors' MAP provisions have operated also gives us reason to believe that these programs violate Section 5 of the FTC Act as practices which materially facilitate interdependent conduct. The MAP programs were implemented with an anticompetitive intent and they had significant anticompetitive effects. In addition, there was no plausible business justification for these programs. *E.I. du Pont de Nemours & Co. v. FTC*, 729 F.2d 128 (2d Cir. 1984).

The wholesale market for prerecorded music is characterized by high entry barriers which limit the likelihood of effective new entry. In this industry, the respondents can easily monitor the pricing and policies of their competition.

The history of MAP policies in this industry also indicates a propensity for interdependent behavior among the distributors. All five distributors adopted MAP policies in 1992 and 1993 that generally required adherence to minimum advertised prices in advertisements paid for by the distributors. In 1995 and 1996, all five distributors expanded the restrictions in their MAP programs to require adherence to minimum advertised prices in advertisements regardless of the funding source. In one case, the new MAP provisions were announced four months prior to their effective date. During this four month hiatus, two other distributors adopted similar provisions. By the end of 1996, all five distributors had adopted MAP provisions that were virtually identical. Shortly thereafter, several distributors embarked on high profile enforcement actions against major discounters who

were discounting prices; these enforcement actions were widely publicized by the trade press.

The Proposed Consent Order

There are five separate consent orders, one for each company.

Part I of the proposed orders establishes definitions. These definitions make clear that the provisions of the order apply to the directors, officers, employees, agents and representatives of the five distributors. This section also makes clear that its provisions apply to cooperative funding efforts regardless of whether the retailer sells prerecorded music in traditional retail stores or over the Internet.

Part II of the orders requires all of the distributors to discontinue their MAP programs in their entirety for a period of seven years. The Commission believes this relief is necessary because some of the challenged MAP programs have been in place for more than four years. Quite simply, it will take several years without the MAP restrictions to restore retail price competition.

Part III of the orders contains several prohibitions to ensure that the distributors are unable to maintain the anticompetitive status quo in some other way. Subsection A prohibits the companies from conditioning the availability of any advertising funds on a retailer's actual selling price. Subsection B prohibits the distributors from restricting the availability of any advertising funds on the basis of an advertisement funded solely by its customers that do not adhere to the minimum advertised price. Subsection C prohibits the distributors from making payments that exceed the retailers' promotional costs to ensure compliance with any MAP program. Subsection D prohibits the distributors from controlling their customers' resale prices. Subsection E prohibits, for five years, the distributors from exercising their

Colgate rights to unilaterally terminate dealers for failure to comply with any minimum advertised or resale price.

For EMI, BMG, and UNI, Parts IV, V, and VI are various notice provisions requiring the companies to notify their customers and senior management concerning the terms of this order. Part VII establishes that the distributors shall make annual compliance reports concerning their compliance with the terms of this order. Such reports may also be required by the Commission at any time. Part VIII establishes that the order shall terminate in twenty (20) years.

Part IV of the WMG and Sony orders specifically incorporates an exception to the prohibition against RPM that permits distributors to require their dealers to pass-through discounts. The notice and compliance requirements, and term of the order, are the same as for the other three respondents and are found at Parts V, VI, VII and VII of the orders for WMG and Sony.

Complaint

IN THE MATTER OF

TIME WARNER, INC.

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

Docket C-3972; File No. 9710070
Complaint, August 30, 2000--Decision, August 30, 2000

This consent order addresses Time Warner's practices that restricted competition in the domestic market for prerecorded music. The complaint alleges that Time Warner adopted, implemented, and enforced Minimum Advertised Price ("MAP") provisions in their Cooperative Advertising Programs. By defining advertising broadly enough to include all in-store displays and signs, the MAP policies effectively precluded many retailers from communicating prices below MAP to their customers. The order requires Respondent to discontinue its MAP program for a period of seven years and contains several prohibitions to ensure that Respondent is unable to maintain the anticompetitive status quo in some other way.

Participants

For the Commission: *William L. Lanning, Karin F. Richards, James W. Frost, Geoffrey M. Green, Karen Mills, Jeffrey Goodman, June Casalmir, Kent Cox, Kristin Malmberg, Beverly Dodson, Brynna Connolly, Lorenzo Cellini, Veronica G. Kayne, Michael E. Antalics, John Howell, Daniel P. O=Brien,* and *Gregory Vistnes.*

For the Respondents: *Robert Joffee, Cravath, Swaine & Moore.*

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, as amended,15 U.S.C. '' 41 et seq., by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that Time Warner Inc. has violated the provisions of Section 5 of the Federal Trade Commission Act, 15

U.S.C. ' 45, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues this complaint, stating its charges as follows:

PARAGRAPH ONE: Respondent Time Warner Inc. (ATime Warner@) is a corporation organized and existing under the laws of the State of Delaware with its principal place of business at 75 Rockefeller Plaza, New York, New York. Time Warner has interests in businesses that produce, manufacture, distribute, and market prerecorded music, among other things. Warner Music Group Inc. (AWMG@) is a wholly owned subsidiary of Time Warner, and is a corporation organized and existing under the laws of the State of Delaware with its principal place of business at 75 Rockefeller Plaza, New York, New York. Warner-Elektra-Atlantic Corporation (AWEA@) is a wholly owned subsidiary of Time Warner, and is a corporation organized and existing under the laws of the State of New York with its principal place of business at 111 N. Hollywood Way, Burbank, California.

PARAGRAPH TWO: Five major distributors sell and distribute over 85% of all prerecorded music in the United States. WEA is one of the five Amajor distributors@ of prerecorded music. Sony Music Entertainment Inc., Universal Music and Video Distribution Inc., EMI Music Distribution, and Bertelsmann Music Group, Inc. are the other Amajor distributors.@

PARAGRAPH THREE: The major distributors sell prerecorded music to numerous retailers including independent retailers, large national chains, mass merchandisers, regional chains and consumer electronics stores. They also sell prerecorded music to sub-distributors who in turn supply retailers not serviced directly by the prerecorded music distributors.

PARAGRAPH FOUR: There are two relevant markets in this matter. First, the commercial development, distribution and wholesale sale, by any means, of prerecorded music (hereinafter Awholesale market@). Second, the retail sale, by any means, of prerecorded music (hereinafter Aretail market@). The geographic

scope of the wholesale market is the United States of America. The wholesale market is characterized by high entry barriers that seriously limit the likelihood of effective new entry.

PARAGRAPH FIVE: In the early 1990=s, several large consumer electronics chains began selling compact discs and other prerecorded music products. These new entrants competed aggressively on price and offered consumers substantial savings on some prerecorded music products. A retail price war ensued and music retailers lowered their prices.

PARAGRAPH SIX: Some retailers, faced with newly invigorated price competition in the retail market, requested margin protection from WEA. In 1992, WEA was also concerned that declining retail prices could have wholesale price effects**.** Thereafter, WEA decided to introduce a Minimum Advertised Pricing (AMAP@) policy. In 1992 and 1993, the other major distributors adopted MAP policies. These policies set forth minimum advertised prices for most prerecorded music products. As discussed below, these MAP policies were modified between 1995 and 1996. In 1995 and 1996, retail prices increased. Since 1997, wholesale prices have also increased.

PARAGRAPH SEVEN: The MAP policy changes which occurred in 1995 and 1996 significantly tightened the programs. By February 1, 1997, each of the major distributors had implemented similar policies. The new MAP policies provided that any retailer who advertised the distributors= product below the established MAP would be subject to a suspension of all cooperative advertising and promotional funds for either 60 or 90 days. BMG=s policy varied slightly and provided that any retailer who violated the policy three times within a twelve month period would be subject to a suspension of all cooperative advertising and promotional funds for up to twelve months. For each company, the suspension would be imposed whether or not the retailer paid for the offending advertisement or promotion. In

addition, the suspension would be imposed for in-store Aadvertising and promotion@ that included virtually every method of communicating the price of the product to the consumer other than the pre-printed price sticker on the product.

PARAGRAPH EIGHT: With the exception of the BMG policy described herein, a single violation of the new MAP policies resulted in a total loss of all cooperative advertising and promotional funds for the specified suspension period. The severity of the new MAP penalties ensured that even the most aggressive retail competitors would stop advertising prices below MAP. By defining advertising broadly enough to include all in-store displays and signs, the MAP policies effectively precluded many retailers from communicating prices below MAP to their customers.

PARAGRAPH NINE: Shortly after adopting the new MAP policies, the distributors began aggressively enforcing the policies. Several high profile enforcement actions that resulted in long periods of suspension were widely publicized by the trade press.

PARAGRAPH TEN: WEA=s stricter MAP policy, in effect since December of 1995 and continuing to date, was implemented to eliminate aggressive retail pricing and to stabilize overall prices in the retail marketplace. This policy was successful.

PARAGRAPH ELEVEN: The purpose, effects, tendency or capacity of the acts and practices described in PARAGRAPHS SIX, SEVEN, EIGHT, NINE, and TEN relating to the implementation and enforcement of MAP policies are and have been to restrain trade unreasonably and hinder competition in the retail and wholesale markets for prerecorded music in the United States, and constitute a violation of Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. ' 45.

CONCLUSION

PARAGRAPH TWELVE: The aforesaid acts and practices of the respondent were and are to the prejudice and injury of the public. These acts and practices constitute unfair methods of competition in or affecting commerce in violation of Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. ' 45. These acts and practices may recur in the absence of the relief requested.

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

By the Commission.

DECISION AND ORDER

The Federal Trade Commission having initiated an investigation of certain acts and practices of Respondent, Time Warner Inc., and Respondent having been furnished thereafter with a copy of the draft of Complaint that the Bureau of Competition presented to the Commission for its consideration and which, if issued, would charge Respondent with violations of Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. ' 45, and

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

Agreement is for settlement purposes only and does not constitute an admission by Respondent that the law has been violated as alleged in such Complaint, or that the facts as alleged in such Complaint, other than jurisdictional facts, are true, and waivers and other provisions as required by the Commission=s Rules; and

The Commission having thereafter considered the matter and having determined that it had reason to believe that Respondent has violated said Act, and that a Complaint should issue stating its charges in that respect, and having accepted the executed Consent Agreement and placed such Consent Agreement on the public record for a period of thirty (30) days for the receipt and consideration of public comments, and having duly considered the comments filed thereafter by interested persons pursuant to ' 2.34 of its Rules, the Commission hereby issues its complaint, makes the following jurisdictional findings and issues the following Order:

1. Respondent Time Warner Inc. is a corporation organized and existing under the laws of the State of Delaware with its principal place of business at 75 Rockefeller Plaza, New York, New York. Warner Music Group Inc. is a wholly owned subsidiary of Time Warner Inc., and is a corporation organized and existing under the laws of the State of Delaware with its principal place of business at 75 Rockefeller Plaza, New York, New York. Warner-Elektra-Atlantic Corporation is a wholly owned subsidiary of Time Warner, and is a corporation organized and existing under the laws of the State of New York with its principal place of business at 111 N. Hollywood Way, Burbank, California.

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

ORDER

I.

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

A. ATime Warner@ or ARespondent@ means Time Warner Inc., its directors, officers, employees, agents, representatives, predecessors, successors, and assigns; its subsidiaries, divisions, groups, and affiliates controlled by Time Warner, and the respective directors, officers, employees, agents, representatives, successors, and assigns of each.

B. AWMG@ means Warner Music Group Inc., its directors, officers, employees, agents, representatives, predecessors, successors, and assigns; its subsidiaries, divisions, groups, and affiliates controlled by WMG, and the respective directors, officers, employees, agents, representatives, successors, and assigns of each.

C. AWEA@ means Warner-Elektra-Atlantic Corporation, its directors, officers, employees, agents, representatives, predecessors, successors, and assigns; its subsidiaries, divisions, groups, and affiliates controlled by WEA, and the respective directors, officers, employees, agents, representatives, successors, and assigns of each.

D. ACommission@ means the Federal Trade Commission.

E. ARecord Clubs@ means the divisions of The Columbia House Company and BMG Music Service that operate as club-based direct marketers of prerecorded music, and manufacture or have manufactured for them product pursuant to a club license.

F. AProduct@ means prerecorded music in physical or electronic format that is offered for sale or sold in the United States, including, but not limited to, compact discs (ACDs@), audio DVDs, audio cassettes, albums and digital audio files (i.e., digital files which are delivered to the consumer

electronically, to be stored on the consumer=s hard drive or other storage device). AProduct@ does not include prerecorded music in physical or other electronic format manufactured or distributed by or for Record Clubs pursuant to Record Club licenses.

G. ADealer@ means any person, corporation, or entity that in the course of its business offers for sale or sells any Product in or into the United States, including, but not limited to, wholesale distributors, retail establishments, and Internet retail sites, but excluding Record Producers.

H. ARecord Producer@ means any person, corporation or entity that in the course of its business produces sound recordings for recording artists and manufactures Product from such sound recordings.

I. ACooperative Advertising or Other Promotional Funds@ means any payment, rebate, charge-back or other consideration provided to a Dealer by WMG in exchange for any type of advertising, promotion or marketing efforts by that Dealer on behalf of WMG. This term also includes advertising, promotion, or marketing efforts by WMG on behalf of one or more identified Dealers. Examples of cooperative advertising include, but are not limited to, free goods provided to a Dealer by WMG, and payments for newspaper advertisements, radio and television advertisements, internet banner advertisements, posters and signs within a Dealer=s retail stores, pricing or positioning of Products within a Dealer=s retail stores, and point-of-purchase merchandising.

J. AMedia Advertising@ means any promotional effort by a Dealer outside of the Dealer=s physical location or Dealer-controlled internet site, including but not limited to, print, radio, billboards, or television.

K. AIn-Store Promotion@ means any promotional effort conducted in or on the physical premises of a Dealer or a

Dealer-controlled internet site, including but not limited to, signs, bin cards, end caps, hit walls, listening posts, internet banner advertisements, and promotional stickers.

L. AAdvertised or Promoted@ means:

(1) any form of advertising, promotion, or marketing efforts by WMG on behalf of one or more of its Dealers;

(2) any form of Media Advertising efforts including, but not limited to, print, radio, billboard, or television; and

(3) any form of In-Store Promotion efforts including, but not limited to, signs, bin cards, end caps, hit walls, listening posts, internet banner advertisements and promotional stickers.

II.

It is further ordered that for a period of seven (7) years, WMG, directly, indirectly, or through any corporation, subsidiary, division or other device, in connection with the offering for sale, sale or distribution of any WMG Product in or into the United States of America in or affecting Acommerce,@ as defined by the Federal Trade Commission Act, shall cease and desist from directly or indirectly adopting, maintaining, enforcing or threatening to enforce any policy, practice or plan which makes the receipt of any Cooperative Advertising or Other Promotional Funds contingent upon the price or price level at which any WMG Product is Advertised or Promoted.

III.

It is further ordered that WMG, directly, indirectly, or through any corporation, subsidiary, division or other device, in connection with the offering for sale, sale or distribution of any WMG Product in or into the United States of America in or affecting "commerce," as defined by the Federal Trade Commission Act, shall not directly or indirectly:

A. Adopt, maintain, enforce or threaten to enforce any policy, practice or plan which makes the receipt of any Cooperative Advertising or Other Promotional Funds contingent upon the price at which any WMG Product is offered for sale or sold;

B. Adopt, maintain, enforce or threaten to enforce any policy, practice or plan which makes the receipt of any Cooperative Advertising or Other Promotional Funds contingent upon the price or price level of the WMG Product in any In-Store Promotion or Media Advertising where the Dealer does not seek any contribution from WMG for the cost of said Media Advertising or In-Store Promotion;

C. Adopt, maintain, enforce or threaten to enforce any policy, practice or plan which makes the receipt of any Cooperative Advertising or Other Promotional Funds contingent upon the price or price level of the WMG Product in any In-Store Promotion or Media Advertising if WMG=s contribution exceeds 100% of the Dealer=s actual costs of said Media Advertising or In-Store Promotion;

D. Agree with any Dealer to control or maintain the resale price at which the Dealer may offer for sale or sell any WMG Product;

E. For a period of five (5) years, announce resale or minimum advertised prices of WMG Product and unilaterally terminate those who fail to comply because of such failure. Notwithstanding the foregoing, nothing herein shall prohibit WMG from announcing suggested list prices for WMG Product.

IV.

Nothing herein shall prohibit WMG from providing Cooperative Advertising or Other Promotional Funds on the

condition that such funds are passed through in whole or in part to the consumer (hereinafter APass-Through Funds@). WMG shall maintain records that specifically identify by title or collection of titles the amount of Pass-Through Funds provided to each Dealer and the date said amount was provided. Whenever WMG provides Pass-Through Funds to a Dealer, WMG shall specifically notify the Dealer in writing either that these funds are intended to be passed through to the ultimate consumer in whole, or that the Dealer may determine what portion of the funds are to be passed through, provided that some portion of the funds must be passed through to the ultimate consumer. The documents described in this Paragraph IV shall be provided to the Commission upon request.

V.

It is further ordered that for a period of seven (7) years:

A. WMG shall amend all policy manuals applicable to the distribution of WMG Product to state affirmatively that WMG does not maintain or enforce any plan, practice or policy of the type prohibited in Paragraph II of this Order, and not otherwise permitted by Paragraph IV of this Order.

B. In each published full catalogue or published full price list in which WMG states suggested list prices or codes indicative of such prices, WMG shall state affirmatively that it does not maintain or enforce any plan, practice or policy of the type prohibited in Paragraph II of this Order, and not otherwise permitted by Paragraph IV of this Order.

The documents described in this Paragraph V shall be provided to the Commission upon request.

VI.

It is further ordered that within 10 days after this Order becomes final, WMG shall mail by first class mail a letter containing the language attached as Exhibit A to:

A. All of its directors, officers, distributors, agents and sales representatives in the United States, and

B. All Dealers to which WEA sells directly and that are engaged in the sale of any WMG Product in or into the United States of America.

VII.

It is further ordered that for a period of seven (7) years WMG shall mail by first class mail a letter containing the language attached as Exhibit A to:

A. Each new director, officer, distributor, agent, and sales representative of WMG in the United States, and

B. Each new Dealer to which WEA sells directly which is engaged in the sale of any WMG Product in or into the United States of America, within thirty (30) days of the commencement of such person=s employment or affiliation with WMG or WEA.

VIII.

It is further ordered that annually for five (5) years on the anniversary of the date this Order becomes final, and at such other times as the Commission may by written notice to Time Warner require, Time Warner shall file with the Commission a verified written report setting forth in detail the manner and form in which Time Warner has complied and is complying with this Order.

IX.

It is further ordered that this Order shall terminate on August 30, 2020.

By the Commission.

EXHIBIT A

[COMPANY LETTERHEAD]

Dear [Recipient]:

WEA announces several important changes in policy. All of these changes will be reflected in the new Policy Manual.

WEA has dropped its Minimum Advertised Price (AMAP@) policy effective _____. Cooperative advertising and other promotional funds will not be conditioned upon the price at which WMG product is advertised or promoted. As many of you know, the Federal Trade Commission has conducted an investigation into WEA=s MAP policies. To end the investigation expeditiously and to avoid disruption to the conduct of its business, WEA has voluntarily agreed, without admitting any violation of the law, to the entry of a Consent Agreement relating to MAP and other related matters.

WEA=s customers can advertise and promote our products at any price they choose. WEA will not withhold cooperative advertising or other promotional funds on the basis of the price at which WMG product is advertised in the media or promoted in your stores. WEA may announce suggested retail prices, but retailers remain free to sell and advertise WMG product at any price they choose.

Concurrence:

_____

William L. Lanning, Esq.
Federal Trade Commission
Bureau of Com

STATEMENT OF CHAIRMAN ROBERT PITOFSKY AND COMMISSIONERS SHEILA F. ANTHONY, MOZELLE W. THOMPSON, ORSON SWINDLE, AND THOMAS B. LEARY

The Commission has unanimously found reason to believe that the arrangements entered into by the five largest distributors of prerecorded music violate the antitrust laws in two respects. First, when considered together, the arrangements constitute practices that facilitate horizontal collusion among the distributors, in violation of Section 5 of the Federal Trade Commission Act. Second, when viewed individually, each distributor=s arrangement constitutes an unreasonable vertical restraint of trade under the rule of reason. A discussion of these violations is spelled out in our Analysis to Aid Public Comment. *See* Attached.

The Commission considered carefully whether the anticompetitive vertical restraints should be evaluated under a *per se* rule or a rule of reason. In the past, the Commission has employed the rule of reason to examine cooperative advertising programs that restrict reimbursement for the advertising of discounts, because such programs may be precompetitive or competitively neutral. *Statement of Policy Regarding Price Restrictions in Cooperative Advertising Programs B Rescission*, 6 Trade Reg. Rep. (CCH) & 39,057. The cooperative advertising programs that were the subject of previous Commission actions involved only advertising paid for in whole or in part by the manufacturer, but did not restrain the dealer from selling at a discount or from advertising discounts when the dealer itself paid for the advertisement. *See, e.g., The Advertising Checking Bureau, Inc.*, 109 F.T.C. 146, 147 (1987) (Athe restraints . . . do not prohibit retailers from selling at discount prices or advertising discounts or sale prices with their own funds@).

The Minimum Advertised Pricing (AMAP@) policies of the five distributors in this matter go well beyond the cooperative

advertising programs with which the Commission has previously dealt: the distributors= MAP policies prohibited retailers from advertising discounts in all advertising, including advertising paid for entirely by the retailer; the MAP policies applied to in-store advertising, excepting only the smallest price labels affixed to the product; and a single violation of a distributor=s MAP policy carried severe financial penalties, resulting in the loss of all MAP funds for all of the retailer=s stores for 60 to 90 days (*see* Paragraph 7 of each Complaint).

Retailers were free to sell at any price, so long as they did not advertise a discounted price. In fact, there was evidence that some retailers on rare occasions did sell product at a discount without advertising the discounted price, instead advertising simply that the product was available at a Aguaranteed low price.@ We are therefore reluctant to declare that compliance with the MAP policies by retailers constituted *per se* unlawful minimum resale price maintenance, because we cannot say that there is sufficient evidence of an agreement by retailers to charge a minimum price. As stated by a majority in *In the Matter of American Cyanamid Co.*, Aboth the courts and the Commission have judged cooperative advertising cases under the rule of reason, as long as the arrangements do not limit the dealer=s right: (1) to discount below the advertised price, and (2) to advertise at any price when the dealer itself pays for the advertisement.@ 123 F.T.C. 1257, 1265 (1997) (Statement of Chairman Robert Pitofsky and Commissioners Janet D. Steiger and Christine A. Varney).[1]

In *Business Electronics Corp. v. Sharp Electronics Corp.*, 485 U.S. 717, 735-36 (1988), the Supreme Court held that Aa vertical restraint is not illegal *per se* unless it includes some agreement on

[1] In *American Cyanamid*, the manufacturer conditioned financial payments on its dealers= charging a specified minimum price, which the Commission found to be *per se* unlawful minimum resale price maintenance. By contrast, financial payments under the distributors= MAP policies here were conditioned on the price advertised, not on the price charged.

price or price levels.@ In our view, *Sharp* requires something more than a showing that an agreement has some influence on price. Restrictions on advertisements that include discounted prices in advertisements funded in whole or in part by the manufacturer are not *per se* illegal, notwithstanding the fact that they are likely to have an influence on resale prices. Indeed, the pervasive practice of publishing suggested retail prices is also likely to have some influence on actual prices, but it is well established that this practice is not *per se* illegal. *See, e.g., Monsanto Co. v. Spray-Rite Serv. Corp.*, 465 U.S. 752, 761 (1984).

Nonetheless, we conclude that the distributors= MAP policies are unlawful under a rule of reason analysis. The five distributors together account for over 85 percent of the market (*see* Paragraph 2 of each Complaint), and each has market power in that no music retailer can realistically choose not to carry the music of any of the five major distributors. The MAP policies were adopted by each of the distributors for the purpose of stabilizing retail prices (*see* Paragraph 10 of each Complaint). The MAP policies achieved their purpose and effectively stabilized retail prices with consequential effects on wholesale prices, ending the price competition that previously existed in the retail marketplace and the resulting pressure on the distributors= margins (i*d.*). Compliance with the MAP policies B which was secured through significant financial incentives B effectively eliminated the retailers= ability to communicate discounts to consumers (*see* Paragraph 8 of each Complaint). Even absent an actual agreement to refrain from discounting, this inability to effectively communicate discounts to consumers meant that retailers had little incentive to actually sell product at a discount.

In the future, the Commission will view with great skepticism cooperative advertising programs that effectively eliminate the ability of dealers to sell product at a discount. The Commission

will, of course, consider *per se* unlawful[2] any arrangement between a manufacturer and its dealers that includes an explicit or implied agreement on minimum price or price levels,[3] and it will henceforth consider unlawful arrangements that have the same practical effect of such an agreement without a detailed market analysis, even if adopted by a manufacturer that lacks substantial market power.

---

[2] Commissioners Swindle and Leary have previously stated that the Supreme Court should reassess the applicability of the *per se* rule to the practice when the appropriate case arises. *Nine West Group Inc.*, Dkt. No. C-3937 (Statement of Commissioners Orson Swindle and Thomas B. Leary). However, they agree that, so long as this *per se* rule is the law, summary treatment is appropriate for resale price agreements and other agreements with the same practical effect.

[3] In addition, the Commission will continue to consider *per se* unlawful any cooperative advertising program that is part of a resale price maintenance scheme. *Cf. The Magnavox Co.*, 113 F.T.C. 255, 262 (1990) (AOf course, any cooperative advertising program implemented by Magnavox as part of a resale price maintenance scheme would be *per se* unlawful . . . .@).

Analysis to Aid Public Comment on the Proposed Consent Order

The Federal Trade Commission ("Commission") has accepted agreements containing proposed consent orders from the corporate parents of the five largest distributors of prerecorded music in the United States. The five distributors, Sony Music Distribution ("Sony"), Universal Music & Video Distribution ("UNI"), BMG Distribution ("BMG"), Warner-Elektra-Atlantic Corporation ("WEA") and EMI Music Distribution ("EMI"), account for approximately 85% of the industry's $13.7 billion in domestic sales. The agreements would settle charges by the Commission that these five companies violated Section 5 of the Federal Trade Commission Act by engaging in practices that restricted competition in the domestic market for prerecorded music.

The proposed consent orders have been placed on the public record for thirty (30) days for receipt of comments by interested persons. Comments received during this period will become part of the public record. After thirty (30) days, the Commission will review the agreements and the comments received and will decide whether it should withdraw from the agreements or make final the agreements' proposed orders.

The purpose of this analysis is to invite public comment concerning the consent order. This analysis is not intended to constitute an official interpretation of the agreement and order or to modify its terms in any way.

There are five separate complaints and proposed consent orders in this matter, one for each of the distributors, which are virtually identical with the exception of minor variations related to the corporate structure of each respondent.

Analysis

The complaints allege that all five distributors have engaged in acts and practices that have unreasonably restrained competition in the market for prerecorded music in the United States through their adoption, implementation and enforcement of Minimum Advertised Price ("MAP") provisions of their Cooperative Advertising Programs.

These five companies, which collectively dominate this market, adopted significantly stricter MAP programs between late 1995 and 1996. Under the new MAP provisions, retailers seeking any cooperative advertising funds were required to observe the distributors' minimum advertised prices in all media advertisements, even in advertisements funded solely by the retailers. Retailers seeking any cooperative funds were also required to adhere to the distributors' minimum advertised prices on all in-store signs and displays, regardless of whether the distributor contributed to their cost.

Failure to adhere to the respondents' MAP provisions for any particular music title would subject the retailer to a suspension of all cooperative advertising funding offered by the distributor for an extended period, typically 60 to 90 days.[1] The severity of these penalties ensured that even the most aggressive retail competitors would stop advertising prices below MAP. The complaints further allege that by defining advertising broadly enough to include all in-store displays and signs, the MAP policies effectively precluded many retailers from communicating prices below MAP to their customers.

The MAP provisions were implemented with the anticompetitive intent to limit retail price competition and to

---

[1] BMG's policy differed slightly. Under the BMG MAP provisions, the suspension of all cooperative advertising funding required a finding of two MAP violations. However, BMG MAP provisions also established a suspension of up to a year for repeated violations.

stabilize the retail prices in this industry. Prior to the adoption of these policies, new retail entrants, especially consumer electronic chains, had sparked a retail "price war" that had resulted in significantly lower compact discs prices to consumers and lower margins for retailers. Some retailers, who could not compete with the newcomers, asked the distributors for discounts or for more stringent MAP provisions to take pressure off their margins.

The complaints allege that the distributors were concerned that declining retail prices could cause a reduction in wholesale prices. Through these stricter MAP programs, the distributors hoped to stop retail price competition, take pressure off their own margins, and eventually increase their own prices. The distributors' actions were effective. Retail prices were stabilized by these MAP programs. Thereafter, each distributor raised its wholesale prices.

While some vertical restraints can benefit consumers (known as "efficiencies") by enhancing interbrand competition and expanding market output, plausible efficiency justifications are absent in this case. Beneficial vertical restraints encourage retailers to provide better services to consumers than would have been provided in the absence of the restraint. However, in this case, the distributors' MAP policies provided no benefits to consumers. In particular, the new retailers that charged lower prices to consumers provided services that were as good as, and in some cases, superior to the services provided by the higher priced retailers they were moving to replace. These policies were plainly not motivated by "free-riding" concerns.

The substantial anticompetitive effects of these programs, balanced against the absence of plausible efficiency rationales for them, give us reason to believe that these programs constitute unreasonable vertical restraints in violation of Section 5 of the FTC Act under a rule of reason analysis. Although the Commission has concluded that compliance by retailers with these programs did not constitute per se unlawful minimum resale

price maintenance agreements, it should be noted that the MAP provisions implemented here go well beyond typical cooperative advertising programs, where a manufacturer places restraints on the prices its dealers may advertise in advertisements funded in whole or in part by the manufacturer. Such traditional cooperative advertising programs are judged under the rule of reason. *American Cyanamid*, 123 F.T.C. 1257, 1265 (1997); *U.S. Pioneer Electronics Corp.*, 115 F.T.C. 446, 453 (1992); *The Advertising Checking Bureau, Inc.*,109 F.T.C. 146 (1987).

The market structure in which the distributors' MAP provisions have operated also gives us reason to believe that these programs violate Section 5 of the FTC Act as practices which materially facilitate interdependent conduct. The MAP programs were implemented with an anticompetitive intent and they had significant anticompetitive effects. In addition, there was no plausible business justification for these programs. *E.I. du Pont de Nemours & Co. v. FTC*, 729 F.2d 128 (2d Cir. 1984).

The wholesale market for prerecorded music is characterized by high entry barriers which limit the likelihood of effective new entry. In this industry, the respondents can easily monitor the pricing and policies of their competition.

The history of MAP policies in this industry also indicates a propensity for interdependent behavior among the distributors. All five distributors adopted MAP policies in 1992 and 1993 that generally required adherence to minimum advertised prices in advertisements paid for by the distributors. In 1995 and 1996, all five distributors expanded the restrictions in their MAP programs to require adherence to minimum advertised prices in advertisements regardless of the funding source. In one case, the new MAP provisions were announced four months prior to their effective date. During this four month hiatus, two other distributors adopted similar provisions. By the end of 1996, all five distributors had adopted MAP provisions that were virtually identical. Shortly thereafter, several distributors embarked on high profile enforcement actions against major discounters who

were discounting prices; these enforcement actions were widely publicized by the trade press.

The Proposed Consent Order

There are five separate consent orders, one for each company.

Part I of the proposed orders establishes definitions. These definitions make clear that the provisions of the order apply to the directors, officers, employees, agents and representatives of the five distributors. This section also makes clear that its provisions apply to cooperative funding efforts regardless of whether the retailer sells prerecorded music in traditional retail stores or over the Internet.

Part II of the orders requires all of the distributors to discontinue their MAP programs in their entirety for a period of seven years. The Commission believes this relief is necessary because some of the challenged MAP programs have been in place for more than four years. Quite simply, it will take several years without the MAP restrictions to restore retail price competition.

Part III of the orders contains several prohibitions to ensure that the distributors are unable to maintain the anticompetitive status quo in some other way. Subsection A prohibits the companies from conditioning the availability of any advertising funds on a retailer's actual selling price. Subsection B prohibits the distributors from restricting the availability of any advertising funds on the basis of an advertisement funded solely by its customers that do not adhere to the minimum advertised price. Subsection C prohibits the distributors from making payments that exceed the retailers' promotional costs to ensure compliance with any MAP program. Subsection D prohibits the distributors from controlling their customers' resale prices. Subsection E prohibits, for five years, the distributors from exercising their

Colgate rights to unilaterally terminate dealers for failure to comply with any minimum advertised or resale price.

For EMI, BMG, and UNI, Parts IV, V, and VI are various notice provisions requiring the companies to notify their customers and senior management concerning the terms of this order. Part VII establishes that the distributors shall make annual compliance reports concerning their compliance with the terms of this order. Such reports may also be required by the Commission at any time. Part VIII establishes that the order shall terminate in twenty (20) years.

Part IV of the WMG and Sony orders specifically incorporates an exception to the prohibition against RPM that permits distributors to require their dealers to pass-through discounts. The notice and compliance requirements, and term of the order, are the same as for the other three respondents and are found at Parts V, VI, VII and VII of the orders for WMG and Sony.

Complaint

IN THE MATTER OF

BMG MUSIC

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

Docket C-3973; File No. 9710070
Complaint, August 30, 2000--Decision, August 30, 2000

This consent order addresses BMG Music's practices that restricted competition in the domestic market for prerecorded music. The complaint alleges that BMG Music adopted, implemented, and enforced Minimum Advertised Price ("MAP") provisions in their Cooperative Advertising Programs. By defining advertising broadly enough to include all in-store displays and signs, the MAP policies effectively precluded many retailers from communicating prices below MAP to their customers. The order requires Respondent to discontinue its MAP program for a period of seven years and contains several prohibitions to ensure that Respondent is unable to maintain the anticompetitive status quo in some other way.

Participants

For the Commission: *William L. Lanning, Karin F. Richards, James W. Frost, Geoffrey M. Green, Karen Mills, Jeffrey Goodman, June Casalmir, Kent Cox, Kristin Malmberg, Beverly Dodson, Brynna Connolly, Lorenzo Cellini, Veronica G. Kayne, Michael E. Antalics, John Howell, Daniel P. O=Brien,* and *Gregory Vistnes.*.

For the Respondents: *Robert Bloch, Mayer, Brown & Platt.*

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, as amended,15 U.S.C. '' 41 et seq., by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that BMG Music has violated the provisions of Section 5 of the Federal Trade Commission Act, 15

U.S.C. ' 45, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues this complaint, stating its charges as follows:

PARAGRAPH ONE: Respondent, BMG Music, (hereinafter ABMG@), is a partnership organized and existing under the laws of the State of New York with its principal place of business at 1540 Broadway, New York, New York. The partnership is comprised of Bertlesmann Music Group, Inc. and Ariola Eurodisc, Inc., both of which are Delaware corporations. BMG Distribution is a unit of BMG Music. BMG Music produces, manufactures, distributes, and markets prerecorded music, among other things.

PARAGRAPH TWO: Five major distributors sell and distribute over 85% of all prerecorded music in the United States. BMG Music is one of the five major distributors of prerecorded music. Universal Music and Video Distribution, Sony Music Distribution, Inc., WEA Inc. and EMD Music Distribution, are the other major distributors.

PARAGRAPH THREE: The major distributors sell prerecorded music to numerous retailers including independent retailers, large national chains, mass merchandisers, regional chains and consumer electronics stores. They also sell prerecorded music to sub-distributors who in turn supply retailers not serviced directly by the prerecorded music distributors.

PARAGRAPH FOUR: There are two relevant markets in this matter. First, the commercial development, distribution and wholesale sale, by any means, of prerecorded music (hereinafter Awholesale market@). Second, the retail sale, by any means, of prerecorded music (hereinafter, Aretail market@). The geographic scope of the wholesale market is the United States of America. The wholesale market is characterized by high entry barriers that seriously limit the likelihood of effective new entry.

PARAGRAPH FIVE: In the early 1990=s, several large consumer electronics chains began selling compact discs and other prerecorded music products. These new entrants competed aggressively on price and offered consumers substantial savings on some prerecorded music products. A retail price war ensued and music retailers lowered their prices.

PARAGRAPH SIX: Some retailers, faced with newly invigorated price competition in the retail market, requested margin protection from BMG. In 1993, BMG, was also concerned that declining retail prices could have wholesale price effects**.** Thereafter, BMG decided to introduce a Minimum Advertised Pricing (AMAP@) policy. In 1992 and 1993, the other major distributors adopted MAP policies. These policies set forth minimum advertised prices for most prerecorded music products. As discussed below, these MAP policies were modified between 1995 and 1996. In 1995 and 1996, retail prices increased. Since 1997, wholesale prices have also increased.

PARAGRAPH SEVEN: The MAP policy changes which occurred in 1995 and 1996 significantly tightened the programs. By February 1, 1997, each of the major distributors had implemented similar policies. The new MAP policies provided that any retailer who advertised the distributors= product below the established MAP would be subject to a suspension of all cooperative advertising and promotional funds for either 60 or 90 days. BMG=s policy varied slightly and provided that any retailer who violated the policy three times within a twelve month period would be subject to a suspension of all cooperative advertising and promotional funds for up to twelve months. For each company, the suspension would be imposed whether or not the retailer paid for the offending advertisement or promotion. In addition, the suspension would be imposed for in-store Aadvertising and promotion@ that included virtually every method of communicating the price of the product to the consumer other than the pre-printed price sticker on the product.

PARAGRAPH EIGHT: A single violation of the new MAP policies resulted in a total loss of all cooperative advertising and promotional funds for the specified suspension period with the exception of the BMG policy described herein. The severity of the new MAP penalties ensured that even the most aggressive retail competitors would stop advertising prices below MAP. By defining advertising broadly enough to include all in-store displays and signs, the MAP policies effectively precluded many retailers from communicating prices below MAP to their customers.

PARAGRAPH NINE: Shortly after adopting the new MAP policies, the distributors began aggressively enforcing the policies. Several high profile enforcement actions that resulted in long periods of suspension were widely publicized by the trade press.

PARAGRAPH TEN: BMG=s stricter MAP policy, in effect since January 1, 1997 and continuing to date, was implemented to eliminate aggressive retail pricing and to stabilize overall prices in the retail marketplace. This policy was successful.

PARAGRAPH ELEVEN: The purpose, effects, tendency or capacity of the acts and practices described in PARAGRAPHS SIX, SEVEN, EIGHT, NINE and TEN relating to the implementation and enforcement of MAP policies are and have been to restrain trade unreasonably and hinder competition in the retail and wholesale markets for prerecorded music in the United States, and constitute a violation of Section 5 of the Federal Trade Commission Act, as amended,15 U.S.C. ' 45.

CONCLUSION

PARAGRAPH TWELVE: The aforesaid acts and practices of the respondent were and are to the prejudice and injury of the public. These acts and practices constitute unfair methods of competition in or affecting commerce in violation of Section 5 of

the Federal Trade Commission Act, as amended, 15 U.S.C. ' 45. These acts and practices may recur in the absence of the relief requested.

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

By the Commission.

DECISION AND ORDER

The Federal Trade Commission having initiated an investigation of certain acts and practices of Respondent BMG Music and Respondent having been furnished thereafter with a copy of the draft of Complaint that the Bureau of Competition presented to the Commission for its consideration and which, if issued, would charge Respondent with violations of Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. ' 45; and

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

Decision and Order

The Commission having thereafter considered the matter and having determined that it had reason to believe that Respondent has violated said Act, and that a Complaint should issue stating its charges in that respect, and having accepted the executed Consent Agreement and placed such Consent Agreement on the public record for a period of thirty (30) days for the receipt and consideration of public comments, and having duly considered the comments filed thereafter by interested persons pursuant to ' 2.34 of its Rules, the Commission hereby issues its complaint, makes the following jurisdictional findings and issues the following Order:

1. Respondent BMG Music is a partnership organized and existing under the laws of the State of New York with its principal place of business at 1540 Broadway, New York, New York. The partnership is comprised of Bertlesmann Music Group, Inc. and Ariola Eurodisc, Inc., both of which are Delaware corporations. BMG Music does business under the trade name BMG Entertainment among others. BMG Distribution is a unit of BMG Music.

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

ORDER

I.

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

A. ABMG Music@ or ARespondent@ means BMG Music, its directors, officers, employees, agents, representatives, predecessors, successors, and assigns; its subsidiaries, divisions, groups, and affiliates controlled by BMG Music,

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

B. ACommission@ means the Federal Trade Commission.

C. AProduct@ means prerecorded music in physical or electronic format that is offered for sale or sold in the United States, including, but not limited to, compact discs (ACDs@), audio DVDs, audio cassettes, albums and digital audio files (i.e., digital files which are delivered to the consumer electronically, to be stored on the consumer=s hard drive or other storage device).

D. ADealer@ means any person, corporation, or entity that in the course of its business offers for sale or sells any Product in or into the United States, including, but not limited to, wholesale distributors, retail establishments, and Internet retail sites.

E. ACooperative Advertising or Other Promotional Funds@ means any payment, rebate, charge-back or other consideration provided to a Dealer by BMG Music in exchange for any type of advertising, promotion or marketing efforts by that Dealer on behalf of BMG Music. This term also includes advertising, promotion, or marketing efforts by BMG Music on behalf of one or more identified Dealers. Examples of cooperative advertising include, but are not limited to, free goods provided to a Dealer by BMG Music, and payments for newspaper advertisements, radio and television advertisements, internet banner advertisements, posters and signs within a Dealer=s retail stores, pricing or positioning of Products within a Dealer=s retail stores, and point-of-purchase merchandising.

F. AMedia Advertising@ means any promotional effort by a Dealer outside of the Dealer=s physical location or Dealer-controlled internet site, including but not limited to, print, radio, billboards, or television.

G. AIn-Store Promotion@ means any promotional effort conducted in or on the physical premises of a Dealer or a Dealer-controlled internet site, including but not limited to, signs, bin cards, end caps, hit walls, listening posts, internet banner advertisements, and promotional stickers.

H. AAdvertised or Promoted@ means:

(1) any form of advertising, promotion, or marketing efforts by BMG Music on behalf of one or more of its Dealers;

(2) any form of Media Advertising efforts including, but not limited to, print, radio, billboard, or television; and

(3) any form of In-Store Promotion efforts including, but not limited to, signs, bin cards, end caps, hit walls, listening posts, internet banner advertisements and promotional stickers.

II.

It is further ordered that for a period of seven (7) years, BMG Music, directly, indirectly, or through any corporation, subsidiary, division or other device, in connection with the offering for sale, sale or distribution of any BMG Music Product in or into the United States of America in or affecting Acommerce,@ as defined by the Federal Trade Commission Act, shall cease and desist from directly or indirectly adopting, maintaining, enforcing or threatening to enforce any policy, practice or plan which makes the receipt of any Cooperative Advertising or Other Promotional Funds contingent upon the price or price level at which any BMG Music Product is Advertised or Promoted.

III.

It is further ordered that BMG Music, directly, indirectly, or through any corporation, subsidiary, division or other device, in connection with the offering for sale, sale or distribution of any BMG Music Product in or into the United States of America in or affecting Acommerce,@ as defined by the Federal Trade Commission Act, shall not directly or indirectly:

A. Adopt, maintain, enforce or threaten to enforce any policy, practice or plan which makes the receipt of any Cooperative Advertising or Other Promotional Funds contingent upon the price at which any BMG Music Product is offered for sale or sold;

B. Adopt, maintain, enforce or threaten to enforce any policy, practice or plan which makes the receipt of any Cooperative Advertising or Other Promotional Funds contingent upon the price or price level of the BMG Music Product in any In-Store Promotion or Media Advertising where the Dealer does not seek any contribution from BMG Music for the cost of said Media Advertising or In-Store Promotion;

C. Adopt, maintain, enforce or threaten to enforce any policy, practice or plan which makes the receipt of any Cooperative Advertising or Other Promotional Funds contingent upon the price or price level of the BMG Music Product in any In-Store Promotion or Media Advertising if BMG Music=s contribution exceeds 100% of the Dealer=s actual costs of said Media Advertising or In-Store Promotion;

D. Agree with any Dealer to control or maintain the resale price at which the Dealer may offer for sale or sell any BMG Music Product;

E. For a period of five (5) years, announce resale or minimum advertised prices of BMG Music Product and unilaterally terminate those who fail to comply because of such failure. Notwithstanding the foregoing, nothing herein shall prohibit

BMG Music from announcing suggested list prices for BMG Music Product.

IV.

It is further ordered that for a period of seven (7) years:

A. BMG Music shall amend all Advertising Policy statements applicable to the distribution of BMG Music Product to state affirmatively that BMG Music does not maintain or enforce any plan, practice or policy of the type prohibited in Paragraph II of this Order.

B. In each published full catalogue or published full price list in which BMG Music states suggested list prices or codes indicative of such prices, BMG Music shall state affirmatively that it does not maintain or enforce any plan, practice or policy of the type prohibited in Paragraph II of this Order.

The documents described in this Paragraph IV shall be provided to the Commission upon request.

V.

It is further ordered that within 10 days after this Order becomes final, BMG Music shall mail by first class mail a letter containing the language attached as Exhibit A to:

A. All officers, employees and sales representatives of BMG Distribution, a unit of BMG Music, and sales representatives of the labels for which BMG Distribution distributes Product in the United States, and

B. All Dealers to which BMG Music sells directly and that are engaged in the sale of any BMG Music Product in the United States of America.

VI.

It is further ordered that for a period of seven (7) years, BMG Music shall mail by first class mail a letter containing the language attached as Exhibit A to:

A. Each new officer, employee and sales representative of BMG Distribution, a unit of BMG Music, and each new sales representative of the labels for which BMG Distribution distributes Product in the United States, and

B. Each new Dealer to which BMG Music sells directly which is engaged in the sale of any BMG Music Product in the United States of America, within thirty (30) days of the commencement of such person=s employment or affiliation with BMG Music.

VII.

It is further ordered that annually for five (5) years on the anniversary of the date this Order becomes final, and at such other times as the Commission may by written notice to BMG Music require, BMG Music shall file with the Commission a verified written report setting forth in detail the manner and form in which BMG Music has complied and is complying with this Order.

VIII.

It is further ordered that this Order shall terminate on August 30, 2020.

By the Commission.

EXHIBIT A
[COMPANY LETTERHEAD]

Dear [Recipient]:

BMG announces several important changes in policy. All of these changes will be reflected in new Advertising Policy statements.

BMG has dropped its Minimum Advertised Price (AMAP@) policy effective _____, 2000. Cooperative advertising and other promotional funds will not be conditioned upon the price at which BMG product is advertised or promoted. As many of you know, the Federal Trade Commission has conducted an investigation into BMG=s MAP policies. To end the investigation expeditiously and to avoid disruption to the conduct of its business, BMG has voluntarily agreed, without admitting any violation of the law, to the entry of a Consent Agreement relating to MAP and other related matters.

BMG=s customers can advertise and promote our products at any price they choose. BMG will not withhold cooperative advertising or other promotional funds on the basis of the price at which product is advertised in the media or promoted in your stores. BMG may announce suggested retail prices, but retailers remain free to sell and advertise BMG product at any price they choose.

STATEMENT OF CHAIRMAN ROBERT PITOFSKY AND COMMISSIONERS SHEILA F. ANTHONY, MOZELLE W. THOMPSON, ORSON SWINDLE, AND THOMAS B. LEARY

The Commission has unanimously found reason to believe that the arrangements entered into by the five largest distributors of prerecorded music violate the antitrust laws in two respects. First, when considered together, the arrangements constitute practices that facilitate horizontal collusion among the distributors, in violation of Section 5 of the Federal Trade Commission Act. Second, when viewed individually, each distributor=s arrangement constitutes an unreasonable vertical restraint of trade under the rule of reason. A discussion of these violations is spelled out in our Analysis to Aid Public Comment. *See* Attached.

The Commission considered carefully whether the anticompetitive vertical restraints should be evaluated under a *per se* rule or a rule of reason. In the past, the Commission has employed the rule of reason to examine cooperative advertising programs that restrict reimbursement for the advertising of discounts, because such programs may be precompetitive or competitively neutral. *Statement of Policy Regarding Price Restrictions in Cooperative Advertising Programs B Rescission*, 6 Trade Reg. Rep. (CCH) & 39,057. The cooperative advertising programs that were the subject of previous Commission actions involved only advertising paid for in whole or in part by the manufacturer, but did not restrain the dealer from selling at a discount or from advertising discounts when the dealer itself paid for the advertisement. *See, e.g., The Advertising Checking Bureau, Inc.*, 109 F.T.C. 146, 147 (1987) (Athe restraints . . . do not prohibit retailers from selling at discount prices or advertising discounts or sale prices with their own funds@).

The Minimum Advertised Pricing (AMAP@) policies of the five distributors in this matter go well beyond the cooperative

advertising programs with which the Commission has previously dealt: the distributors= MAP policies prohibited retailers from advertising discounts in all advertising, including advertising paid for entirely by the retailer; the MAP policies applied to in-store advertising, excepting only the smallest price labels affixed to the product; and a single violation of a distributor=s MAP policy carried severe financial penalties, resulting in the loss of all MAP funds for all of the retailer=s stores for 60 to 90 days (*see* Paragraph 7 of each Complaint).

Retailers were free to sell at any price, so long as they did not advertise a discounted price. In fact, there was evidence that some retailers on rare occasions did sell product at a discount without advertising the discounted price, instead advertising simply that the product was available at a Aguaranteed low price.@ We are therefore reluctant to declare that compliance with the MAP policies by retailers constituted *per se* unlawful minimum resale price maintenance, because we cannot say that there is sufficient evidence of an agreement by retailers to charge a minimum price. As stated by a majority in *In the Matter of American Cyanamid Co.*, Aboth the courts and the Commission have judged cooperative advertising cases under the rule of reason, as long as the arrangements do not limit the dealer=s right: (1) to discount below the advertised price, and (2) to advertise at any price when the dealer itself pays for the advertisement.@ 123 F.T.C. 1257, 1265 (1997) (Statement of Chairman Robert Pitofsky and Commissioners Janet D. Steiger and Christine A. Varney).[1]

In *Business Electronics Corp. v. Sharp Electronics Corp.*, 485 U.S. 717, 735-36 (1988), the Supreme Court held that Aa vertical restraint is not illegal *per se* unless it includes some agreement on

[1] In *American Cyanamid*, the manufacturer conditioned financial payments on its dealers= charging a specified minimum price, which the Commission found to be *per se* unlawful minimum resale price maintenance. By contrast, financial payments under the distributors= MAP policies here were conditioned on the price advertised, not on the price charged.

price or price levels.@ In our view, *Sharp* requires something more than a showing that an agreement has some influence on price. Restrictions on advertisements that include discounted prices in advertisements funded in whole or in part by the manufacturer are not *per se* illegal, notwithstanding the fact that they are likely to have an influence on resale prices. Indeed, the pervasive practice of publishing suggested retail prices is also likely to have some influence on actual prices, but it is well established that this practice is not *per se* illegal. *See, e.g., Monsanto Co. v. Spray-Rite Serv. Corp.*, 465 U.S. 752, 761 (1984).

Nonetheless, we conclude that the distributors= MAP policies are unlawful under a rule of reason analysis. The five distributors together account for over 85 percent of the market (*see* Paragraph 2 of each Complaint), and each has market power in that no music retailer can realistically choose not to carry the music of any of the five major distributors. The MAP policies were adopted by each of the distributors for the purpose of stabilizing retail prices (*see* Paragraph 10 of each Complaint). The MAP policies achieved their purpose and effectively stabilized retail prices with consequential effects on wholesale prices, ending the price competition that previously existed in the retail marketplace and the resulting pressure on the distributors= margins (i*d.*). Compliance with the MAP policies B which was secured through significant financial incentives B effectively eliminated the retailers= ability to communicate discounts to consumers (*see* Paragraph 8 of each Complaint). Even absent an actual agreement to refrain from discounting, this inability to effectively communicate discounts to consumers meant that retailers had little incentive to actually sell product at a discount.

In the future, the Commission will view with great skepticism cooperative advertising programs that effectively eliminate the ability of dealers to sell product at a discount. The Commission

will, of course, consider *per se* unlawful[2] any arrangement between a manufacturer and its dealers that includes an explicit or implied agreement on minimum price or price levels,[3] and it will henceforth consider unlawful arrangements that have the same practical effect of such an agreement without a detailed market analysis, even if adopted by a manufacturer that lacks substantial market power.

---

[2] Commissioners Swindle and Leary have previously stated that the Supreme Court should reassess the applicability of the *per se* rule to the practice when the appropriate case arises. *Nine West Group Inc.*, Dkt. No. C-3937 (Statement of Commissioners Orson Swindle and Thomas B. Leary). However, they agree that, so long as this *per se* rule is the law, summary treatment is appropriate for resale price agreements and other agreements with the same practical effect.

[3] In addition, the Commission will continue to consider *per se* unlawful any cooperative advertising program that is part of a resale price maintenance scheme. *Cf. The Magnavox Co.*, 113 F.T.C. 255, 262 (1990) (AOf course, any cooperative advertising program implemented by Magnavox as part of a resale price maintenance scheme would be *per se* unlawful . . . .@).

Analysis to Aid Public Comment on the Proposed Consent Order

The Federal Trade Commission ("Commission") has accepted agreements containing proposed consent orders from the corporate parents of the five largest distributors of prerecorded music in the United States. The five distributors, Sony Music Distribution ("Sony"), Universal Music & Video Distribution ("UNI"), BMG Distribution ("BMG"), Warner-Elektra-Atlantic Corporation ("WEA") and EMI Music Distribution ("EMI"), account for approximately 85% of the industry's $13.7 billion in domestic sales. The agreements would settle charges by the Commission that these five companies violated Section 5 of the Federal Trade Commission Act by engaging in practices that restricted competition in the domestic market for prerecorded music.

The proposed consent orders have been placed on the public record for thirty (30) days for receipt of comments by interested persons. Comments received during this period will become part of the public record. After thirty (30) days, the Commission will review the agreements and the comments received and will decide whether it should withdraw from the agreements or make final the agreements' proposed orders.

The purpose of this analysis is to invite public comment concerning the consent order. This analysis is not intended to constitute an official interpretation of the agreement and order or to modify its terms in any way.

There are five separate complaints and proposed consent orders in this matter, one for each of the distributors, which are virtually identical with the exception of minor variations related to the corporate structure of each respondent.

Analysis

The complaints allege that all five distributors have engaged in acts and practices that have unreasonably restrained competition in the market for prerecorded music in the United States through their adoption, implementation and enforcement of Minimum Advertised Price ("MAP") provisions of their Cooperative Advertising Programs.

These five companies, which collectively dominate this market, adopted significantly stricter MAP programs between late 1995 and 1996. Under the new MAP provisions, retailers seeking any cooperative advertising funds were required to observe the distributors' minimum advertised prices in all media advertisements, even in advertisements funded solely by the retailers. Retailers seeking any cooperative funds were also required to adhere to the distributors' minimum advertised prices on all in-store signs and displays, regardless of whether the distributor contributed to their cost.

Failure to adhere to the respondents' MAP provisions for any particular music title would subject the retailer to a suspension of all cooperative advertising funding offered by the distributor for an extended period, typically 60 to 90 days.[1] The severity of these penalties ensured that even the most aggressive retail competitors would stop advertising prices below MAP. The complaints further allege that by defining advertising broadly enough to include all in-store displays and signs, the MAP policies effectively precluded many retailers from communicating prices below MAP to their customers.

---

[1] BMG's policy differed slightly. Under the BMG MAP provisions, the suspension of all cooperative advertising funding required a finding of two MAP violations. However, BMG MAP provisions also established a suspension of up to a year for repeated violations.

Analysis to Aid Public Comment

The MAP provisions were implemented with the anticompetitive intent to limit retail price competition and to stabilize the retail prices in this industry. Prior to the adoption of these policies, new retail entrants, especially consumer electronic chains, had sparked a retail "price war" that had resulted in significantly lower compact discs prices to consumers and lower margins for retailers. Some retailers, who could not compete with the newcomers, asked the distributors for discounts or for more stringent MAP provisions to take pressure off their margins.

The complaints allege that the distributors were concerned that declining retail prices could cause a reduction in wholesale prices. Through these stricter MAP programs, the distributors hoped to stop retail price competition, take pressure off their own margins, and eventually increase their own prices. The distributors' actions were effective. Retail prices were stabilized by these MAP programs. Thereafter, each distributor raised its wholesale prices.

While some vertical restraints can benefit consumers (known as "efficiencies") by enhancing interbrand competition and expanding market output, plausible efficiency justifications are absent in this case. Beneficial vertical restraints encourage retailers to provide better services to consumers than would have been provided in the absence of the restraint. However, in this case, the distributors' MAP policies provided no benefits to consumers. In particular, the new retailers that charged lower prices to consumers provided services that were as good as, and in some cases, superior to the services provided by the higher priced retailers they were moving to replace. These policies were plainly not motivated by "free-riding" concerns.

The substantial anticompetitive effects of these programs, balanced against the absence of plausible efficiency rationales for them, give us reason to believe that these programs constitute unreasonable vertical restraints in violation of Section 5 of the FTC Act under a rule of reason analysis. Although the

Commission has concluded that compliance by retailers with these programs did not constitute per se unlawful minimum resale price maintenance agreements, it should be noted that the MAP provisions implemented here go well beyond typical cooperative advertising programs, where a manufacturer places restraints on the prices its dealers may advertise in advertisements funded in whole or in part by the manufacturer. Such traditional cooperative advertising programs are judged under the rule of reason. *American Cyanamid*, 123 F.T.C. 1257, 1265 (1997); *U.S. Pioneer Electronics Corp.*, 115 F.T.C. 446, 453 (1992); *The Advertising Checking Bureau, Inc.*,109 F.T.C. 146 (1987).

The market structure in which the distributors' MAP provisions have operated also gives us reason to believe that these programs violate Section 5 of the FTC Act as practices which materially facilitate interdependent conduct. The MAP programs were implemented with an anticompetitive intent and they had significant anticompetitive effects. In addition, there was no plausible business justification for these programs. *E.I. du Pont de Nemours & Co. v. FTC*, 729 F.2d 128 (2d Cir. 1984).

The wholesale market for prerecorded music is characterized by high entry barriers which limit the likelihood of effective new entry. In this industry, the respondents can easily monitor the pricing and policies of their competition.

The history of MAP policies in this industry also indicates a propensity for interdependent behavior among the distributors. All five distributors adopted MAP policies in 1992 and 1993 that generally required adherence to minimum advertised prices in advertisements paid for by the distributors. In 1995 and 1996, all five distributors expanded the restrictions in their MAP programs to require adherence to minimum advertised prices in advertisements regardless of the funding source. In one case, the new MAP provisions were announced four months prior to their effective date. During this four month hiatus, two other distributors adopted similar provisions. By the end of 1996, all five distributors had adopted MAP provisions that were virtually identical. Shortly thereafter, several distributors embarked on

high profile enforcement actions against major discounters who were discounting prices; these enforcement actions were widely publicized by the trade press.

The Proposed Consent Order

There are five separate consent orders, one for each company.

Part I of the proposed orders establishes definitions. These definitions make clear that the provisions of the order apply to the directors, officers, employees, agents and representatives of the five distributors. This section also makes clear that its provisions apply to cooperative funding efforts regardless of whether the retailer sells prerecorded music in traditional retail stores or over the Internet.

Part II of the orders requires all of the distributors to discontinue their MAP programs in their entirety for a period of seven years. The Commission believes this relief is necessary because some of the challenged MAP programs have been in place for more than four years. Quite simply, it will take several years without the MAP restrictions to restore retail price competition.

Part III of the orders contains several prohibitions to ensure that the distributors are unable to maintain the anticompetitive status quo in some other way. Subsection A prohibits the companies from conditioning the availability of any advertising funds on a retailer's actual selling price. Subsection B prohibits the distributors from restricting the availability of any advertising funds on the basis of an advertisement funded solely by its customers that do not adhere to the minimum advertised price. Subsection C prohibits the distributors from making payments that exceed the retailers' promotional costs to ensure compliance with any MAP program. Subsection D prohibits the distributors from controlling their customers' resale prices. Subsection E prohibits, for five years, the distributors from exercising their

Colgate rights to unilaterally terminate dealers for failure to comply with any minimum advertised or resale price.

For EMI, BMG, and UNI, Parts IV, V, and VI are various notice provisions requiring the companies to notify their customers and senior management concerning the terms of this order. Part VII establishes that the distributors shall make annual compliance reports concerning their compliance with the terms of this order. Such reports may also be required by the Commission at any time. Part VIII establishes that the order shall terminate in twenty (20) years.

Part IV of the WMG and Sony orders specifically incorporates an exception to the prohibition against RPM that permits distributors to require their dealers to pass-through discounts. The notice and compliance requirements, and term of the order, are the same as for the other three respondents and are found at Parts V, VI, VII and VII of the orders for WMG and Sony.

Complaint

IN THE MATTER OF

UNIVERSAL MUSIC & VIDEO DISTRIBUTION CORP., ET AL.

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

Docket C-3974; File No. 9710070
Complaint, August 30, 2000--Decision, August 30, 2000

This consent order addresses Universal Music's practices that restricted competition in the domestic market for prerecorded music. The complaint alleges that Universal Music adopted, implemented, and enforced Minimum Advertised Price ("MAP") provisions in their Cooperative Advertising Programs. By defining advertising broadly enough to include all in-store displays and signs, the MAP policies effectively precluded many retailers from communicating prices below MAP to their customers. The order requires Respondent to discontinue its MAP program for a period of seven years and contains several prohibitions to ensure that Respondent is unable to maintain the anticompetitive status quo in some other way.

Participants

For the Commission: *William L. Lanning, Karin F. Richards, James W. Frost, Geoffrey M. Green, Karen Mills, Jeffrey Goodman, June Casalmir, Kent Cox, Kristin Malmberg, Beverly Dodson, Brynna Connolly, Lorenzo Cellini, Veronica G. Kayne, Michael E. Antalics, John Howell, Daniel P. O=Brien,* and *Gregory Vistnes.*

For the Respondents: *Glenn D. Pomerantz, Munger, Tolles & Olson* and *Steven A. Marenberg, Irell & Manella.*

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, as amended, 15 U.S.C. '' 41 et seq., by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that Universal Music & Video

Distribution Corp. and UMG Recordings, Inc. have violated the provisions of Section 5 of the Federal Trade Commission Act, 15 U.S.C. ' 45, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues this complaint, stating its charges as follows:

PARAGRAPH ONE: Respondents, Universal Music & Video Distribution Corp. and UMG Recordings, Inc., (hereinafter AUMVD@), are corporations organized and existing under the laws of the State of Delaware with their principal place of business at 70 Universal City Plaza, Universal City, California 91608. UMVD produces, manufactures, distributes, and markets prerecorded music, among other things.

PARAGRAPH TWO: Five major distributors sell and distribute over 85% of all prerecorded music in the United States. UMVD is one of the five major distributors of prerecorded music. Sony Music Distribution, Inc., WEA Inc., BMG Music and EMD Music Distribution, are the other major distributors.

PARAGRAPH THREE: The major distributors sell prerecorded music to numerous retailers including independent retailers, large national chains, mass merchandisers, regional chains and consumer electronics stores. They also sell prerecorded music to sub-distributors who in turn supply retailers not serviced directly by the prerecorded music distributors.

PARAGRAPH FOUR: There are two relevant markets in this matter. First, the commercial development, distribution and wholesale sale, by any means, of prerecorded music (hereinafter Awholesale market@). Second, the retail sale, by any means, of prerecorded music (hereinafter, Aretail market@). The geographic scope of the wholesale market is the United States of America. The wholesale market is characterized by high entry barriers that seriously limit the likelihood of effective new entry.

PARAGRAPH FIVE: In the early 1990=s, several large consumer electronics chains began selling compact discs and

other prerecorded music products. These new entrants competed aggressively on price and offered consumers substantial savings on some prerecorded music products. A retail price war ensued and music retailers lowered their prices.

PARAGRAPH SIX: Some retailers, faced with newly invigorated price competition in the retail market, requested margin protection from UMVD. In 1993, UMVD, was also concerned that declining retail prices could have wholesale price effects**.** Thereafter, UMVD decided to introduce a Minimum Advertised Pricing (AMAP@) policy. In 1992 and 1993, the other major distributors adopted MAP policies. These policies set forth minimum advertised prices for most prerecorded music products. As discussed below, these MAP policies were modified between 1995 and 1996. In 1995 and 1996, retail prices increased. Since 1997, wholesale prices have also increased.

PARAGRAPH SEVEN: The MAP policy changes which occurred in 1995 and 1996 significantly tightened the programs. By February 1, 1997, each of the major distributors had implemented similar policies. The new MAP policies provided that any retailer who advertised the distributors= product below the established MAP would be subject to a suspension of all cooperative advertising and promotional funds for either 60 or 90 days. BMG=s policy varied slightly and provided that any retailer who violated the policy three times within a twelve month period would be subject to a suspension of all cooperative advertising and promotional funds for up to twelve months. For each company, the suspension would be imposed whether or not the retailer paid for the offending advertisement or promotion. In addition, the suspension would be imposed for in-store Aadvertising and promotion@ that included virtually every method of communicating the price of the product to the consumer other than the pre-printed price sticker on the product.

PARAGRAPH EIGHT: A single violation of the new MAP policies resulted in a total loss of all cooperative advertising and promotional funds for the specified suspension period with the exception of the BMG policy described herein. The severity of the new MAP penalties ensured that even the most aggressive retail competitors would stop advertising prices below MAP. By defining advertising broadly enough to include all in-store displays and signs, the MAP policies effectively precluded many retailers from communicating prices below MAP to their customers.

PARAGRAPH NINE: Shortly after adopting the new MAP policies, the distributors began aggressively enforcing the policies. Several high profile enforcement actions that resulted in long periods of suspension were widely publicized by the trade press.

PARAGRAPH TEN: UMVD=s stricter MAP policy, in effect since July 1,1996 and continuing to date, was implemented to eliminate aggressive retail pricing and to stabilize overall prices in the retail marketplace. This policy was successful.

PARAGRAPH ELEVEN: The purpose, effects, tendency or capacity of the acts and practices described in PARAGRAPHS SIX, SEVEN, EIGHT, NINE and TEN relating to the implementation and enforcement of MAP policies are and have been to restrain trade unreasonably and hinder competition in the retail and wholesale markets for prerecorded music in the United States, and constitute a violation of Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. ' 45.

CONCLUSION

PARAGRAPH TWELVE: The aforesaid acts and practices of the respondents were and are to the prejudice and injury of the public. These acts and practices constitute unfair methods of competition in or affecting commerce in violation of Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. ' 45.

These acts and practices may recur in the absence of the relief requested.

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

By the Commission.

DECISION AND ORDER

The Federal Trade Commission having initiated an investigation of certain acts and practices of Respondents Universal Music & Video Distribution Corp. and UMG Recordings, Inc., and Respondents having been furnished thereafter with a copy of the 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

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 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 Act, and that a Complaint should issue stating its charges in that respect, and having accepted the executed Consent Agreement and placed such Consent Agreement on the public record for a period of thirty (30) days for the receipt and consideration of public comments, and having duly considered the comments filed thereafter by interested persons pursuant to ' 2.34 of its Rules, the Commission hereby issues its complaint, makes the following jurisdictional findings and issues the following Order:

1. Respondent Universal Music & Video Distribution Corp. is a corporation organized and existing under the laws of the State of Delaware with its principal place of business at 70 Universal Plaza, Universal City, California 91608.

2. Respondent UMG Recordings, Inc. is a corporation organized and existing under the laws of the State of Delaware with its principal place of business at 70 Universal City Plaza, Universal City, California 91608.

3. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and over both 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. AUniversal Music & Video Distribution Corp.@ means Universal Music & Video Distribution Corp. its directors, officers, employees, agents, representatives, predecessors, successors, and assigns; its subsidiaries, divisions, groups, and affiliates controlled by Universal Music & Video Distribution

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

B. AUMG Recordings, Inc.@ means UMG Recordings, Inc., its directors, officers, employees, agents, representatives, predecessors, successors, and assigns; its subsidiaries, divisions, groups, and affiliates controlled by UMG Recordings, Inc., and the respective directors, officers, employees, agents, representatives, successors, and assigns of each.

C. ARespondents@ means both Universal Music & Video Distribution Corp. and UMG Recordings, Inc.

D. ACommission@ means the Federal Trade Commission.

E. AProduct@ means prerecorded music in physical or electronic format that is offered for sale or sold in the United States, including, but not limited to, compact discs (ACDs@), audio DVDs, audio cassettes, albums and digital audio files (i.e., digital files which are delivered to the consumer electronically, to be stored on the consumer=s hard drive or other storage device).

F. ADealer@ means any person, corporation, or entity that in the course of its business offers for sale or sells any Product in or into the United States, including, but not limited to, wholesale distributors, retail establishments, and Internet retail sites.

G. ACooperative Advertising or Other Promotional Funds@ means any payment, rebate, charge-back or other consideration provided to a Dealer by Universal Music & Video Distribution Corp. or UMG Recordings, Inc. in exchange for any type of advertising, promotion or marketing efforts by that Dealer on behalf of Universal Music & Video Distribution Corp. or UMG Recordings, Inc. This term also includes advertising, promotion, or marketing efforts by Universal Music & Video Distribution Corp. or UMG Recordings, Inc. on behalf of one or more identified Dealers. Examples of cooperative advertising include, but are not limited to, free goods provided to a Dealer by Universal Music

& Video Distribution Corp. or UMG Recordings, Inc., and payments for newspaper advertisements, radio and television advertisements, internet banner advertisements, posters and signs within a Dealer=s retail stores, pricing or positioning of Products within a Dealer=s retail stores, and point-of-purchase merchandising.

H. AMedia Advertising@ means any promotional effort by a Dealer outside of the Dealer=s physical location or Dealer-controlled internet site, including but not limited to, print, radio, billboards, or television.

I. AIn-Store Promotion@ means any promotional effort conducted in or on the physical premises of a Dealer or a Dealer-controlled internet site, including but not limited to, signs, bin cards, end caps, hit walls, listening posts, internet banner advertisements, and promotional stickers.

J. AAdvertised or Promoted@ means:

(1) any form of advertising, promotion, or marketing efforts by Universal Music & Video Distribution Corp. or UMG Recordings, Inc. on behalf of one or more of their Dealers;

(2) any form of Media Advertising efforts including, but not limited to, print, radio, billboard, or television; and

(3) any form of In-Store Promotion efforts including, but not limited to, signs, bin cards, end caps, hit walls, listening posts, internet banner advertisements and promotional stickers.

II.

It is further ordered that for a period of seven (7) years, Universal Music & Video Distribution Corp. and UMG

Recordings, Inc., directly, indirectly, or through any corporation, subsidiary, division or other device, in connection with the offering for sale, sale or distribution of any Universal Music & Video Distribution Corp. or UMG Recordings, Inc. Product in or into the United States of America in or affecting Acommerce,@ as defined by the Federal Trade Commission Act, shall cease and desist from directly or indirectly adopting, maintaining, enforcing or threatening to enforce any policy, practice or plan which makes the receipt of any Cooperative Advertising or Other Promotional Funds contingent upon the price or price level at which any Universal Music & Video Distribution Corp. or UMG Recordings, Inc. Product is Advertised or Promoted.

III.

It is further ordered that Universal Music & Video Distribution Corp. and UMG Recordings, Inc., directly, indirectly, or through any corporation, subsidiary, division or other device, in connection with the offering for sale, sale or distribution of any Universal Music & Video Distribution Corp. or UMG Recordings, Inc. Product in or into the United States of America in or affecting Acommerce,@ as defined by the Federal Trade Commission Act, shall not directly or indirectly:

A. Adopt, maintain, enforce or threaten to enforce any policy, practice or plan which makes the receipt of any Cooperative Advertising or Other Promotional Funds contingent upon the price at which any Universal Music & Video Distribution Corp. or UMG Recordings, Inc. Product is offered for sale or sold;

B. Adopt, maintain, enforce or threaten to enforce any policy, practice or plan which makes the receipt of any Cooperative Advertising or Other Promotional Funds contingent upon the price or price level of the Universal Music & Video Distribution Corp. or UMG Recordings, Inc. Product in any In-Store Promotion or Media Advertising where the Dealer does not seek any contribution from Universal Music & Video

Distribution Corp. or UMG Recordings, Inc. for the cost of said Media Advertising or In-Store Promotion;

C. Adopt, maintain, enforce or threaten to enforce any policy, practice or plan which makes the receipt of any Cooperative Advertising or Other Promotional Funds contingent upon the price or price level of the Universal Music & Video Distribution Corp. or UMG Recordings, Inc. Product in any In-Store Promotion or Media Advertising if Universal Music & Video Distribution Corp.=s or UMG Recordings, Inc.=s contribution exceeds 100% of the Dealer=s actual costs of said Media Advertising or In-Store Promotion;

D. Agree with any Dealer to control or maintain the resale price at which the Dealer may offer for sale or sell any Universal Music & Video Distribution Corp. or UMG Recordings, Inc. Product;

E. For a period of five (5) years, announce resale or minimum advertised prices of Universal Music & Video Distribution Corp. or UMG Recordings, Inc. Product and unilaterally terminate those who fail to comply because of such failure. Notwithstanding the foregoing, nothing herein shall prohibit Universal Music & Video Distribution Corp. or UMG Recordings, Inc. from announcing suggested list prices for Universal Music & Video Distribution Corp. or UMG Recordings, Inc. Product.

IV.

It is further ordered that for a period of seven (7) years:

A. Universal Music & Video Distribution Corp. and UMG Recordings, Inc. shall amend all Advertising Policy statements applicable to the distribution of Universal Music & Video Distribution Corp. or UMG Recordings, Inc. Product to state affirmatively that Universal Music & Video Distribution

Corp. and UMG Recordings, Inc. do not maintain or enforce any plan, practice or policy of the type prohibited in Paragraph II of this Order.

B. In each published full catalogue or published full price list in which Universal Music & Video Distribution Corp. or UMG Recordings, Inc. states suggested list prices or codes indicative of such prices, Universal Music & Video Distribution Corp. and UMG Recordings, Inc. shall state affirmatively that they do not maintain or enforce any plan, practice or policy of the type prohibited in Paragraph II of this Order.

The documents described in this Paragraph IV shall be provided to the Commission upon request.

V.

It is further ordered that within 10 days after this Order becomes final, Universal Music & Video Distribution Corp. and UMG Recordings, Inc. shall mail by first class mail a letter containing the language attached as Exhibit A to:

C. All officers, employees and sales representatives of Universal Music & Video Distribution Corp. and UMG Recordings, Inc., and sales representatives of all the wholly-owned labels for which Universal Music & Video Distribution Corp. distributes Product in the United States, and

D. All Dealers to which Universal Music & Video Distribution Corp.or UMG Recordings, Inc. sells directly and that are engaged in the sale of any Universal Music & Video Distribution Corp. or UMG Recordings, Inc. Product in the United States of America.

VI.

It is further ordered that for a period of seven (7) years, Universal Music & Video Distribution Corp. and UMG Recordings, Inc. shall mail by first class mail a letter containing the language attached as Exhibit A to:

A. Each new officer, employee and sales representative of Universal Music & Video Distribution Corp. or UMG Recordings, Inc. and each new sales representative of all the wholly-owned labels for which Universal Music & Video Distribution Corp. distributes Product in the United States, and

B. Each new Dealer to which Universal Music & Video Distribution Corp. or UMG Recordings, Inc. sells directly which is engaged in the sale of any Universal Music & Video Distribution Corp. or UMG Recordings, Inc. Product in the United States of America, within thirty (30) days of the commencement of such person=s employment or affiliation with Universal Music & Video Distribution Corp. or UMG Recordings, Inc.

VII.

It is further ordered that annually for five (5) years on the anniversary of the date this Order becomes final, and at such other times as the Commission may by written notice to Universal Music & Video Distribution Corp. or UMG Recordings, Inc. require, Universal Music & Video Distribution Corp. and UMG Recordings, Inc. shall file with the Commission a verified written report setting forth in detail the manner and form in which Universal Music & Video Distribution Corp. or UMG Recordings, Inc. has complied and is complying with this Order.

VIII.

It is further ordered that this Order shall terminate on August 30, 2020.

By the Commission.

EXHIBIT A

[COMPANY LETTERHEAD]

Dear [Recipient]:

Universal Music & Video Distribution Corp. announces several important changes in policy. All of these changes will be reflected in new Advertising Policy statements.

Universal has dropped its Minimum Advertised Price (AMAP@) policy effective _____, 2000. Cooperative advertising and other promotional funds will not be conditioned upon the price at which Universal product is advertised or promoted. As many of you know, the Federal Trade Commission has conducted an investigation into Universal=s MAP policies. To end the investigation expeditiously and to avoid disruption to the conduct of its business, Universal has voluntarily agreed, without admitting any violation of the law, to the entry of a Consent Agreement relating to MAP and other related matters.

Universal=s customers can advertise and promote our products at any price they choose. Universal will not withhold cooperative advertising or other promotional funds on the basis of the price at which product is advertised in the media or promoted in your stores. Universal may announce suggested retail prices, but retailers remain free to sell and advertise Universal product at any price they choose.

STATEMENT OF CHAIRMAN ROBERT PITOFSKY AND COMMISSIONERS SHEILA F. ANTHONY, MOZELLE W. THOMPSON, ORSON SWINDLE, AND THOMAS B. LEARY

The Commission has unanimously found reason to believe that the arrangements entered into by the five largest distributors of prerecorded music violate the antitrust laws in two respects. First, when considered together, the arrangements constitute practices that facilitate horizontal collusion among the distributors, in violation of Section 5 of the Federal Trade Commission Act. Second, when viewed individually, each distributor=s arrangement constitutes an unreasonable vertical restraint of trade under the rule of reason. A discussion of these violations is spelled out in our Analysis to Aid Public Comment. *See* Attached.

The Commission considered carefully whether the anticompetitive vertical restraints should be evaluated under a *per se* rule or a rule of reason. In the past, the Commission has employed the rule of reason to examine cooperative advertising programs that restrict reimbursement for the advertising of discounts, because such programs may be precompetitive or competitively neutral. *Statement of Policy Regarding Price Restrictions in Cooperative Advertising Programs B Rescission,* 6 Trade Reg. Rep. (CCH) & 39,057. The cooperative advertising programs that were the subject of previous Commission actions involved only advertising paid for in whole or in part by the manufacturer, but did not restrain the dealer from selling at a discount or from advertising discounts when the dealer itself paid for the advertisement. *See, e.g., The Advertising Checking Bureau, Inc.,* 109 F.T.C. 146, 147 (1987) (Athe restraints . . . do not prohibit retailers from selling at discount prices or advertising discounts or sale prices with their own funds@).

The Minimum Advertised Pricing (AMAP@) policies of the five distributors in this matter go well beyond the cooperative advertising programs with which the Commission has previously dealt: the distributors= MAP policies prohibited retailers from

advertising discounts in all advertising, including advertising paid for entirely by the retailer; the MAP policies applied to in-store advertising, excepting only the smallest price labels affixed to the product; and a single violation of a distributor=s MAP policy carried severe financial penalties, resulting in the loss of all MAP funds for all of the retailer=s stores for 60 to 90 days (*see* Paragraph 7 of each Complaint).

Retailers were free to sell at any price, so long as they did not advertise a discounted price. In fact, there was evidence that some retailers on rare occasions did sell product at a discount without advertising the discounted price, instead advertising simply that the product was available at a Aguaranteed low price.@ We are therefore reluctant to declare that compliance with the MAP policies by retailers constituted *per se* unlawful minimum resale price maintenance, because we cannot say that there is sufficient evidence of an agreement by retailers to charge a minimum price. As stated by a majority in *In the Matter of American Cyanamid Co.*, Aboth the courts and the Commission have judged cooperative advertising cases under the rule of reason, as long as the arrangements do not limit the dealer=s right: (1) to discount below the advertised price, and (2) to advertise at any price when the dealer itself pays for the advertisement.@ 123 F.T.C. 1257, 1265 (1997) (Statement of Chairman Robert Pitofsky and Commissioners Janet D. Steiger and Christine A. Varney).[1]

In *Business Electronics Corp. v. Sharp Electronics Corp.*, 485 U.S. 717, 735-36 (1988), the Supreme Court held that Aa vertical restraint is not illegal *per se* unless it includes some agreement on

[1] In *American Cyanamid*, the manufacturer conditioned financial payments on its dealers= charging a specified minimum price, which the Commission found to be *per se* unlawful minimum resale price maintenance. By contrast, financial payments under the distributors= MAP policies here were conditioned on the price advertised, not on the price charged.

price or price levels.@ In our view, *Sharp* requires something more than a showing that an agreement has some influence on price. Restrictions on advertisements that include discounted prices in advertisements funded in whole or in part by the manufacturer are not *per se* illegal, notwithstanding the fact that they are likely to have an influence on resale prices. Indeed, the pervasive practice of publishing suggested retail prices is also likely to have some influence on actual prices, but it is well established that this practice is not *per se* illegal. *See, e.g., Monsanto Co. v. Spray-Rite Serv. Corp.*, 465 U.S. 752, 761 (1984).

Nonetheless, we conclude that the distributors= MAP policies are unlawful under a rule of reason analysis. The five distributors together account for over 85 percent of the market (*see* Paragraph 2 of each Complaint), and each has market power in that no music retailer can realistically choose not to carry the music of any of the five major distributors. The MAP policies were adopted by each of the distributors for the purpose of stabilizing retail prices (*see* Paragraph 10 of each Complaint). The MAP policies achieved their purpose and effectively stabilized retail prices with consequential effects on wholesale prices, ending the price competition that previously existed in the retail marketplace and the resulting pressure on the distributors= margins (i*d.*). Compliance with the MAP policies B which was secured through significant financial incentives B effectively eliminated the retailers= ability to communicate discounts to consumers (*see* Paragraph 8 of each Complaint). Even absent an actual agreement to refrain from discounting, this inability to effectively communicate discounts to consumers meant that retailers had little incentive to actually sell product at a discount.

In the future, the Commission will view with great skepticism cooperative advertising programs that effectively eliminate the ability of dealers to sell product at a discount. The Commission will, of course, consider *per se* unlawful[2] any arrangement

[2] Commissioners Swindle and Leary have previously stated that the Supreme Court should reassess the applicability of the *per se* rule to the

between a manufacturer and its dealers that includes an explicit or implied agreement on minimum price or price levels,[3] and it will henceforth consider unlawful arrangements that have the same practical effect of such an agreement without a detailed market analysis, even if adopted by a manufacturer that lacks substantial market power.

---

practice when the appropriate case arises. *Nine West Group Inc.*, Dkt. No. C-3937 (Statement of Commissioners Orson Swindle and Thomas B. Leary). However, they agree that, so long as this *per se* rule is the law, summary treatment is appropriate for resale price agreements and other agreements with the same practical effect.

[3] In addition, the Commission will continue to consider *per se* unlawful any cooperative advertising program that is part of a resale price maintenance scheme. *Cf. The Magnavox Co.*, 113 F.T.C. 255, 262 (1990) (AOf course, any cooperative advertising program implemented by Magnavox as part of a resale price maintenance scheme would be *per se* unlawful . . . .@).

Analysis to Aid Public Comment on the Proposed Consent Order

The Federal Trade Commission ("Commission") has accepted agreements containing proposed consent orders from the corporate parents of the five largest distributors of prerecorded music in the United States. The five distributors, Sony Music Distribution ("Sony"), Universal Music & Video Distribution ("UNI"), BMG Distribution ("BMG"), Warner-Elektra-Atlantic Corporation ("WEA") and EMI Music Distribution ("EMI"), account for approximately 85% of the industry's $13.7 billion in domestic sales. The agreements would settle charges by the Commission that these five companies violated Section 5 of the Federal Trade Commission Act by engaging in practices that restricted competition in the domestic market for prerecorded music.

The proposed consent orders have been placed on the public record for thirty (30) days for receipt of comments by interested persons. Comments received during this period will become part of the public record. After thirty (30) days, the Commission will review the agreements and the comments received and will decide whether it should withdraw from the agreements or make final the agreements' proposed orders.

The purpose of this analysis is to invite public comment concerning the consent order. This analysis is not intended to constitute an official interpretation of the agreement and order or to modify its terms in any way.

There are five separate complaints and proposed consent orders in this matter, one for each of the distributors, which are virtually identical with the exception of minor variations related to the corporate structure of each respondent.

Analysis

The complaints allege that all five distributors have engaged in acts and practices that have unreasonably restrained competition in the market for prerecorded music in the United States through their adoption, implementation and enforcement of Minimum Advertised Price ("MAP") provisions of their Cooperative Advertising Programs.

These five companies, which collectively dominate this market, adopted significantly stricter MAP programs between late 1995 and 1996. Under the new MAP provisions, retailers seeking any cooperative advertising funds were required to observe the distributors' minimum advertised prices in all media advertisements, even in advertisements funded solely by the retailers. Retailers seeking any cooperative funds were also required to adhere to the distributors' minimum advertised prices on all in-store signs and displays, regardless of whether the distributor contributed to their cost.

Failure to adhere to the respondents' MAP provisions for any particular music title would subject the retailer to a suspension of all cooperative advertising funding offered by the distributor for an extended period, typically 60 to 90 days.[1] The severity of these penalties ensured that even the most aggressive retail competitors would stop advertising prices below MAP. The complaints further allege that by defining advertising broadly enough to include all in-store displays and signs, the MAP policies effectively precluded many retailers from communicating prices below MAP to their customers.

---

[1] BMG's policy differed slightly. Under the BMG MAP provisions, the suspension of all cooperative advertising funding required a finding of two MAP violations. However, BMG MAP provisions also established a suspension of up to a year for repeated violations.

The MAP provisions were implemented with the anticompetitive intent to limit retail price competition and to stabilize the retail prices in this industry. Prior to the adoption of these policies, new retail entrants, especially consumer electronic chains, had sparked a retail "price war" that had resulted in significantly lower compact discs prices to consumers and lower margins for retailers. Some retailers, who could not compete with the newcomers, asked the distributors for discounts or for more stringent MAP provisions to take pressure off their margins.

The complaints allege that the distributors were concerned that declining retail prices could cause a reduction in wholesale prices. Through these stricter MAP programs, the distributors hoped to stop retail price competition, take pressure off their own margins, and eventually increase their own prices. The distributors' actions were effective. Retail prices were stabilized by these MAP programs. Thereafter, each distributor raised its wholesale prices.

While some vertical restraints can benefit consumers (known as "efficiencies") by enhancing interbrand competition and expanding market output, plausible efficiency justifications are absent in this case. Beneficial vertical restraints encourage retailers to provide better services to consumers than would have been provided in the absence of the restraint. However, in this case, the distributors' MAP policies provided no benefits to consumers. In particular, the new retailers that charged lower prices to consumers provided services that were as good as, and in some cases, superior to the services provided by the higher priced retailers they were moving to replace. These policies were plainly not motivated by "free-riding" concerns.

The substantial anticompetitive effects of these programs, balanced against the absence of plausible efficiency rationales for them, give us reason to believe that these programs constitute unreasonable vertical restraints in violation of Section 5 of the FTC Act under a rule of reason analysis. Although the Commission has concluded that compliance by retailers with these programs did not constitute per se unlawful minimum resale

price maintenance agreements, it should be noted that the MAP provisions implemented here go well beyond typical cooperative advertising programs, where a manufacturer places restraints on the prices its dealers may advertise in advertisements funded in whole or in part by the manufacturer. Such traditional cooperative advertising programs are judged under the rule of reason. *American Cyanamid*, 123 F.T.C. 1257, 1265 (1997); *U.S. Pioneer Electronics Corp.*, 115 F.T.C. 446, 453 (1992); *The Advertising Checking Bureau, Inc.*,109 F.T.C. 146 (1987).

The market structure in which the distributors' MAP provisions have operated also gives us reason to believe that these programs violate Section 5 of the FTC Act as practices which materially facilitate interdependent conduct. The MAP programs were implemented with an anticompetitive intent and they had significant anticompetitive effects. In addition, there was no plausible business justification for these programs. *E.I. du Pont de Nemours & Co. v. FTC*, 729 F.2d 128 (2d Cir. 1984).

The wholesale market for prerecorded music is characterized by high entry barriers which limit the likelihood of effective new entry. In this industry, the respondents can easily monitor the pricing and policies of their competition.

The history of MAP policies in this industry also indicates a propensity for interdependent behavior among the distributors. All five distributors adopted MAP policies in 1992 and 1993 that generally required adherence to minimum advertised prices in advertisements paid for by the distributors. In 1995 and 1996, all five distributors expanded the restrictions in their MAP programs to require adherence to minimum advertised prices in advertisements regardless of the funding source. In one case, the new MAP provisions were announced four months prior to their effective date. During this four month hiatus, two other distributors adopted similar provisions. By the end of 1996, all five distributors had adopted MAP provisions that were virtually identical. Shortly thereafter, several distributors embarked on

high profile enforcement actions against major discounters who were discounting prices; these enforcement actions were widely publicized by the trade press.

The Proposed Consent Order

There are five separate consent orders, one for each company.

Part I of the proposed orders establishes definitions. These definitions make clear that the provisions of the order apply to the directors, officers, employees, agents and representatives of the five distributors. This section also makes clear that its provisions apply to cooperative funding efforts regardless of whether the retailer sells prerecorded music in traditional retail stores or over the Internet.

Part II of the orders requires all of the distributors to discontinue their MAP programs in their entirety for a period of seven years. The Commission believes this relief is necessary because some of the challenged MAP programs have been in place for more than four years. Quite simply, it will take several years without the MAP restrictions to restore retail price competition.

Part III of the orders contains several prohibitions to ensure that the distributors are unable to maintain the anticompetitive status quo in some other way. Subsection A prohibits the companies from conditioning the availability of any advertising funds on a retailer's actual selling price. Subsection B prohibits the distributors from restricting the availability of any advertising funds on the basis of an advertisement funded solely by its customers that do not adhere to the minimum advertised price. Subsection C prohibits the distributors from making payments that exceed the retailers' promotional costs to ensure compliance with any MAP program. Subsection D prohibits the distributors from controlling their customers' resale prices. Subsection E prohibits, for five years, the distributors from exercising their *Colgate* rights to unilaterally terminate dealers for failure to comply with any minimum advertised or resale price.

For EMI, BMG, and UNI, Parts IV, V, and VI are various notice provisions requiring the companies to notify their customers and senior management concerning the terms of this order. Part VII establishes that the distributors shall make annual compliance reports concerning their compliance with the terms of this order. Such reports may also be required by the Commission at any time. Part VIII establishes that the order shall terminate in twenty (20) years.

Part IV of the WMG and Sony orders specifically incorporates an exception to the prohibition against RPM that permits distributors to require their dealers to pass-through discounts. The notice and compliance requirements, and term of the order, are the same as for the other three respondents and are found at Parts V, VI, VII and VII of the orders for WMG and Sony.

Complaint

IN THE MATTER OF

CAPITOL RECORDS, INC., ET AL.

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

Docket C-3975; File No. 9710070
Complaint, August 30, 2000--Decision, August 30, 2000

This consent order addresses Capitol Records' practices that restricted competition in the domestic market for prerecorded music. The complaint alleges that Capitol Records adopted, implemented, and enforced Minimum Advertised Price ("MAP") provisions in their Cooperative Advertising Programs. By defining advertising broadly enough to include all in-store displays and signs, the MAP policies effectively precluded many retailers from communicating prices below MAP to their customers. The order requires Respondent to discontinue its MAP program for a period of seven years and contains several prohibitions to ensure that Respondent is unable to maintain the anticompetitive status quo in some other way.

Participants

For the Commission: *William L. Lanning, Karin F. Richards, James W. Frost, Geoffrey M. Green, Karen Mills, Jeffrey Goodman, June Casalmir, Kent Cox, Kristin Malmberg, Beverly Dodson, Brynna Connolly, Lorenzo Cellini, Veronica G. Kayne, Michael E. Antalics, John Howell, Daniel P. O=Brien,* and *Gregory Vistnes.*.

For the Respondents: *Irving Scher, Weil, Gotshal & Manges*

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, as amended,15 U.S.C. '' 41 et seq., by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that Capitol Records, Inc. has violated the provisions of Section 5 of the Federal Trade Commission Act, 15 U.S.C. ' 45, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues this complaint, stating its charges as follows:

PARAGRAPH ONE: Respondent Capitol Records, Inc. (hereinafter AEMI@) is a corporation organized and existing under the laws of the State of Delaware with its principal place of business at 1750 North Vine Street, Hollywood California. Capitol Records, Inc. is the principal, indirect U.S. subsidiary of the EMI Group PLC, a United Kingdom corporation. EMI produces, manufactures, distributes, and markets prerecorded music, among other things. EMI Music Distribution (hereinafter AEMD@) is a division of Capitol Records, Inc. which manufactures, markets and distributes prerecorded music, among other things.

PARAGRAPH TWO: Five major distributors sell and distribute over 85% of all prerecorded music in the United States. EMD is one of the five major distributors of prerecorded music. Universal Music and Video Distribution Inc., Sony Music Distribution, WEA Inc. and Bertelsmann Music Group, Inc. (hereinafter ABMG@) are the other major distributors.

PARAGRAPH THREE: The major distributors sell prerecorded music to numerous retailers including independent retailers, large national chains, mass merchandisers, regional chains and consumer electronics stores. They also sell prerecorded music to sub-distributors who in turn supply retailers not serviced directly by the prerecorded music distributors.

PARAGRAPH FOUR: There are two relevant markets in this matter. First, the commercial development, distribution and wholesale sale, by any means, of prerecorded music (hereinafter Awholesale market@). Second the retail sale, by any means, of prerecorded music (hereinafter, Aretail market@). The geographic scope of the wholesale market is the United States of America. The wholesale market is characterized by high entry barriers that seriously limit the likelihood of effective new entry.

PARAGRAPH FIVE: In the early 1990=s, several large consumer electronics chains began selling compact discs and other prerecorded music products. These new entrants competed aggressively on price and offered consumers substantial savings on some prerecorded music products. A retail price war ensued and music retailers lowered their prices.

PARAGRAPH SIX: Some retailers, faced with newly invigorated price competition in the retail market, requested margin protection from EMD. In 1992, EMD was also concerned that declining retail prices could have wholesale price effects. Thereafter, EMD decided to introduce a Minimum Advertised Pricing (AMAP@) policy. In 1992 and 1993, the other major distributors adopted MAP policies. These policies set forth minimum advertised prices for most prerecorded music products. As discussed below, these MAP policies were modified between 1995 and 1996. In 1995 and 1996, retail prices increased. Since 1997, wholesale prices have also increased.

PARAGRAPH SEVEN: The MAP policy changes which occurred in 1995 and 1996 significantly tightened the programs. By February 1, 1997, all the major distributors had implemented similar policies. The new MAP policies provided that any retailer who advertised the distributors= product below the established MAP would be subject to a suspension of all cooperative advertising and promotional funds for either 60 or 90 days. BMG=s policy varied slightly and provided that any retailer who violated the policy three times within a twelve month period would be subject to a suspension of all cooperative advertising and promotional funds for up to twelve months. For each company, the suspension would be imposed whether or not the distributor paid for the offending advertisement or promotion. In addition, the suspension would be imposed for in-store Aadvertising and promotion@ that included virtually every method of communicating the price of the product to the consumer other than the pre-printed price sticker on the product.

PARAGRAPH EIGHT: With the exception of the BMG policy described herein, a single violation of the new MAP policies resulted in a total loss of all cooperative advertising and promotional funds for the specified suspension period. The severity of the new MAP penalties ensured that even the most aggressive retail competitors would stop advertising prices below MAP. By defining advertising broadly enough to include all in-store displays and signs, the MAP policies effectively precluded many retailers from communicating prices below MAP to their customers.

PARAGRAPH NINE: Shortly after adopting the new MAP policies, the distributors began aggressively enforcing the policies. Several high profile enforcement actions that resulted in long periods of suspension were widely publicized by the trade press.

PARAGRAPH TEN: EMD=s stricter MAP policy, in effect since July of 1996, and continuing to date, was implemented to eliminate aggressive retail pricing and to stabilize overall prices in the retail marketplace. This policy was successful.

PARAGRAPH ELEVEN: The purpose, effects, tendency or capacity of the acts and practices described in PARAGRAPHS SIX, SEVEN, EIGHT, NINE and TEN relating to the implementation and enforcement of MAP policies are and have been to restrain trade unreasonably and hinder competition in the retail and wholesale markets for prerecorded music in the United States, and constitute a violation of Section 5 of the Federal Trade Commission Act, as amended,15 U.S.C. ' 45.

CONCLUSION

PARAGRAPH TWELVE: The aforesaid acts and practices of the Respondent were and are to the prejudice and injury of the public. These acts and practices constitute unfair methods of

competition in or affecting commerce in violation of Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. ' 45. These acts and practices may recur in the absence of the relief requested.

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

By the Commission.

DECISION AND ORDER

The Federal Trade Commission having initiated an investigation of certain acts and practices of Respondent Capitol Records, Inc. and Respondent having been furnished thereafter with a copy of the draft of Complaint that the Bureau of Competition presented to the Commission for its consideration and which, if issued, would charge Respondent with violations of Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. ' 45; and

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

The Commission having thereafter considered the matter and having determined that it had reason to believe that Respondent has violated said Act, and that a Complaint should issue stating its charges in that respect, and having accepted the executed Consent Agreement and placed such Consent Agreement on the public record for a period of thirty (30) days for the receipt and consideration of public comments, and having duly considered the comments filed thereafter by interested persons pursuant to ' 2.34 of its Rules, the Commission hereby issues its complaint, makes the following jurisdictional findings and issues the following Order:

1. Respondent Capitol Records, Inc. (hereinafter AEMI@) is a corporation organized and existing under the laws of the State of Delaware with its principal place of business at 1750 North Vine Street, Hollywood California. Capitol Records, Inc. is the principal, indirect U.S. subsidiary of the EMI Group PLC, a United Kingdom corporation. EMI produces, manufactures, distributes, and markets prerecorded music, among other things. EMI Music Distribution (hereinafter AEMD@) is a division of Capitol Records, Inc. which manufactures, markets and distributes prerecorded music, among other things.

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

ORDER

I.

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

A. The terms ACapitol@ and AEMI@ both mean Capitol Records, Inc., its directors, officers, employees, agents, representatives,

predecessors, successors, and assigns; its subsidiaries, divisions, groups, and affiliates controlled by Capitol Records, Inc., and the respective directors, officers, employees, agents, representatives, successors and assigns of each.

B. ARespondent@ means Capitol Records, Inc.

C. ACommission@ means the Federal Trade Commission.

D. AProduct@ means prerecorded music in physical or electronic format that is offered for sale or sold in the United States, including, but not limited to, compact discs (ACDs@), audio DVDs, audio cassettes, albums and digital audio files (i.e., digital files which are delivered to the consumer electronically, to be stored on the consumer=s hard drive or other storage device).

E. ADealer@ means any person, corporation, or entity that in the course of its business offers for sale or sells any Product in the United States, including, but not limited to, wholesale distributors, retail establishments, and Internet retail sites.

F. ACooperative Advertising or Other Promotional Funds@ means any payment, rebate, charge-back or other consideration provided to a Dealer by EMI in exchange for any type of advertising, promotion or marketing efforts by that Dealer on behalf of EMI. This term also includes advertising, promotion, or marketing efforts by EMI on behalf of one or more identified Dealers. Examples of cooperative advertising include, but are not limited to, free goods provided to a Dealer by EMI, and payments for newspaper advertisements, radio and television advertisements, internet banner advertisements, posters and signs within a Dealer=s retail stores, pricing or positioning of Products within a Dealer=s retail stores, and point-of-purchase merchandising.

G. AMedia Advertising@ means any promotional effort by a Dealer outside of the Dealer=s physical location or Dealer-

controlled internet site, including but not limited to, print, radio, billboards, or television.

H. AIn-Store Promotion@ means any promotional effort conducted in or on the physical premises of a Dealer or a Dealer-controlled internet site, including but not limited to, signs, bin cards, end caps, hit walls, listening posts, internet banner advertisements, and promotional stickers.

I. AAdvertised or Promoted@ means:

(1) any form of advertising, promotion, or marketing efforts by EMI on behalf of one or more of its identified Dealers;

(2) any form of Media Advertising efforts including, but not limited to, print, radio, billboard, or television; and

(3) any form of In-Store Promotion efforts including, but not limited to, signs, bin cards, end caps, hit walls, listening posts, internet banner advertisements and promotional stickers.

II.

It is further ordered that for a period of seven (7) years, EMI directly, indirectly, or through any corporation, subsidiary, division or other device, in connection with the offering for sale, sale or distribution of any EMI Product in the United States of America in or affecting Acommerce,@ as defined by the Federal Trade Commission Act, shall cease and desist from directly or indirectly adopting, maintaining, enforcing or threatening to enforce any policy, practice or plan which makes the receipt of any Cooperative Advertising or Other Promotional Funds contingent upon the price or price level at which any EMI Product is Advertised or Promoted.

III.

It is further ordered that EMI, directly, indirectly, or through any corporation, subsidiary, division or other device, in connection with the offering for sale, sale or distribution of any EMI Product in the United States of America in or affecting "commerce," as defined by the Federal Trade Commission Act, shall not directly or indirectly:

A. Adopt, maintain, enforce or threaten to enforce any policy, practice or plan which makes the receipt of any Cooperative Advertising or Other Promotional Funds contingent upon the price at which any EMI Product is offered for sale or sold;

B. Adopt, maintain, enforce or threaten to enforce any policy, practice or plan which makes the receipt of any Cooperative Advertising or Other Promotional Funds contingent upon the price or price level of the EMI Product in any In-Store Promotion or Media Advertising where the Dealer does not seek any contribution from EMI for the cost of said Media Advertising or In-Store Promotion;

C. Adopt, maintain, enforce or threaten to enforce any policy, practice or plan which makes the receipt of any Cooperative Advertising or Other Promotional Funds contingent upon the price or price level of the EMI Product in any In-Store Promotion or Media Advertising if EMI=s contribution exceeds 100% of the Dealer=s actual costs of said Media Advertising or In-Store Promotion;

D. Agree with any Dealer to control or maintain the resale price at which the Dealer may offer for sale or sell any EMI Product;

E. For a period of five (5) years, announce resale or minimum advertised prices of EMI Product and unilaterally terminate

those who fail to comply because of such failure. Notwithstanding the foregoing, nothing herein shall prohibit EMI from announcing suggested list prices for EMI Product.

IV.

It is further ordered that for a period of seven (7) years:

A. EMI shall amend all policy manuals applicable to the distribution of EMI Product to state affirmatively that EMI and Capitol does not maintain or enforce any plan, practice or policy of the type prohibited in Paragraph II of this Order.

B. In each published full catalogue or published full price list in which EMI states suggested list prices or codes indicative of such prices, EMI shall state affirmatively that it does not maintain or enforce any plan, practice or policy of the type prohibited in Paragraph II of this Order.

The documents described in this Paragraph IV shall be provided to the Commission upon request.

V.

It is further ordered that within 10 days after this Order becomes final, EMI shall mail by first class mail, electronic mail or facsimile a letter containing the language attached as Exhibit A to:

E. All of the directors, officers, agents and sales representatives of EMD, and all of the sales representatives of the labels for which EMD distributes Products in the United States of America.

F. All Dealers to which EMI sells directly and that are engaged in the sale of any EMI Product in the United States of America.

VI.

It is further ordered that for a period of seven (7) years, EMI shall mail by first class mail, electronic mail, or facsimile a letter containing the language attached as Exhibit A to:

C. Each new director, officer, agent and sales representative of EMD and each new sales representative of the labels for which EMD distributes Products in the United States of America.

D. Each new Dealer to which EMI sells directly which is engaged in the sale of any EMI Product in the United States of America, within thirty (30) days of the commencement of such person=s employment or affiliation with EMI.

VII.

It is further ordered that annually for five (5) years on the anniversary of the date this Order becomes final, and at such other times as the Commission may by written notice to EMI require, EMI shall file with the Commission a verified written report setting forth in detail the manner and form in which EMI has complied and is complying with this Order.

VIII.

It is further ordered that this Order shall terminate on August 30, 2020.

By the Commission.

EXHIBIT A

[COMPANY LETTERHEAD]

Dear [Recipient]:

EMI announces several important changes in policy. All of these changes will be reflected in the new Policy Manual.

EMI has dropped its Minimum Advertised Price (AMAP@) policy effective ____, 2000. Cooperative advertising and other promotional funds will not be conditioned upon the price at which EMI product is advertised or promoted. As many of you know, the Federal Trade Commission has conducted an investigation into EMI=s MAP policy. To end the investigation expeditiously and to avoid disruption to the conduct of its business, EMI has voluntarily agreed, without admitting any violation of the law, to the entry of a Consent Agreement relating to MAP and other related matters.

EMI=s customers can advertise and promote our products at any price they choose. EMI will not withhold cooperative advertising or other promotional funds on the basis of the price at which EMI product is advertised in the media or promoted in your stores. EMI may announce suggested retail prices, but retailers remain free to sell and advertise EMI product at any price they choose.

STATEMENT OF CHAIRMAN ROBERT PITOFSKY AND COMMISSIONERS SHEILA F. ANTHONY, MOZELLE W. THOMPSON, ORSON SWINDLE, AND THOMAS B. LEARY

The Commission has unanimously found reason to believe that the arrangements entered into by the five largest distributors of prerecorded music violate the antitrust laws in two respects. First, when considered together, the arrangements constitute practices that facilitate horizontal collusion among the distributors, in violation of Section 5 of the Federal Trade Commission Act. Second, when viewed individually, each distributor=s arrangement constitutes an unreasonable vertical restraint of trade under the rule of reason. A discussion of these violations is spelled out in our Analysis to Aid Public Comment. *See* Attached.

The Commission considered carefully whether the anticompetitive vertical restraints should be evaluated under a *per se* rule or a rule of reason. In the past, the Commission has employed the rule of reason to examine cooperative advertising programs that restrict reimbursement for the advertising of discounts, because such programs may be precompetitive or competitively neutral. *Statement of Policy Regarding Price Restrictions in Cooperative Advertising Programs B Rescission*, 6 Trade Reg. Rep. (CCH) & 39,057. The cooperative advertising programs that were the subject of previous Commission actions involved only advertising paid for in whole or in part by the manufacturer, but did not restrain the dealer from selling at a discount or from advertising discounts when the dealer itself paid for the advertisement. *See, e.g., The Advertising Checking Bureau, Inc.*, 109 F.T.C. 146, 147 (1987) (Athe restraints . . . do not prohibit retailers from selling at discount prices or advertising discounts or sale prices with their own funds@).

The Minimum Advertised Pricing (AMAP@) policies of the five distributors in this matter go well beyond the cooperative

advertising programs with which the Commission has previously dealt: the distributors= MAP policies prohibited retailers from advertising discounts in all advertising, including advertising paid for entirely by the retailer; the MAP policies applied to in-store advertising, excepting only the smallest price labels affixed to the product; and a single violation of a distributor=s MAP policy carried severe financial penalties, resulting in the loss of all MAP funds for all of the retailer=s stores for 60 to 90 days (*see* Paragraph 7 of each Complaint).

Retailers were free to sell at any price, so long as they did not advertise a discounted price. In fact, there was evidence that some retailers on rare occasions did sell product at a discount without advertising the discounted price, instead advertising simply that the product was available at a Aguaranteed low price.@ We are therefore reluctant to declare that compliance with the MAP policies by retailers constituted *per se* unlawful minimum resale price maintenance, because we cannot say that there is sufficient evidence of an agreement by retailers to charge a minimum price. As stated by a majority in *In the Matter of American Cyanamid Co.*, Aboth the courts and the Commission have judged cooperative advertising cases under the rule of reason, as long as the arrangements do not limit the dealer=s right: (1) to discount below the advertised price, and (2) to advertise at any price when the dealer itself pays for the advertisement.@ 123 F.T.C. 1257, 1265 (1997) (Statement of Chairman Robert Pitofsky and Commissioners Janet D. Steiger and Christine A. Varney).[1]

In *Business Electronics Corp. v. Sharp Electronics Corp.*, 485 U.S. 717, 735-36 (1988), the Supreme Court held that Aa vertical restraint is not illegal *per se* unless it includes some agreement on

[1] In *American Cyanamid*, the manufacturer conditioned financial payments on its dealers= charging a specified minimum price, which the Commission found to be *per se* unlawful minimum resale price maintenance. By contrast, financial payments under the distributors= MAP policies here were conditioned on the price advertised, not on the price charged.

price or price levels.@ In our view, *Sharp* requires something more than a showing that an agreement has some influence on price. Restrictions on advertisements that include discounted prices in advertisements funded in whole or in part by the manufacturer are not *per se* illegal, notwithstanding the fact that they are likely to have an influence on resale prices. Indeed, the pervasive practice of publishing suggested retail prices is also likely to have some influence on actual prices, but it is well established that this practice is not *per se* illegal. *See, e.g., Monsanto Co. v. Spray-Rite Serv. Corp.*, 465 U.S. 752, 761 (1984).

Nonetheless, we conclude that the distributors= MAP policies are unlawful under a rule of reason analysis. The five distributors together account for over 85 percent of the market (*see* Paragraph 2 of each Complaint), and each has market power in that no music retailer can realistically choose not to carry the music of any of the five major distributors. The MAP policies were adopted by each of the distributors for the purpose of stabilizing retail prices (*see* Paragraph 10 of each Complaint). The MAP policies achieved their purpose and effectively stabilized retail prices with consequential effects on wholesale prices, ending the price competition that previously existed in the retail marketplace and the resulting pressure on the distributors= margins (i*d.*). Compliance with the MAP policies B which was secured through significant financial incentives B effectively eliminated the retailers= ability to communicate discounts to consumers (*see* Paragraph 8 of each Complaint). Even absent an actual agreement to refrain from discounting, this inability to effectively communicate discounts to consumers meant that retailers had little incentive to actually sell product at a discount.

In the future, the Commission will view with great skepticism cooperative advertising programs that effectively eliminate the ability of dealers to sell product at a discount. The Commission

will, of course, consider *per se* unlawful[2] any arrangement between a manufacturer and its dealers that includes an explicit or implied agreement on minimum price or price levels,[3] and it will henceforth consider unlawful arrangements that have the same practical effect of such an agreement without a detailed market analysis, even if adopted by a manufacturer that lacks substantial market power.

---

[2] Commissioners Swindle and Leary have previously stated that the Supreme Court should reassess the applicability of the *per se* rule to the practice when the appropriate case arises. *Nine West Group Inc.*, Dkt. No. C-3937 (Statement of Commissioners Orson Swindle and Thomas B. Leary). However, they agree that, so long as this *per se* rule is the law, summary treatment is appropriate for resale price agreements and other agreements with the same practical effect.

[3] In addition, the Commission will continue to consider *per se* unlawful any cooperative advertising program that is part of a resale price maintenance scheme. *Cf. The Magnavox Co.*, 113 F.T.C. 255, 262 (1990) (AOf course, any cooperative advertising program implemented by Magnavox as part of a resale price maintenance scheme would be *per se* unlawful . . . .@).

Analysis to Aid Public Comment on the Proposed Consent Order

The Federal Trade Commission ("Commission") has accepted agreements containing proposed consent orders from the corporate parents of the five largest distributors of prerecorded music in the United States. The five distributors, Sony Music Distribution ("Sony"), Universal Music & Video Distribution ("UNI"), BMG Distribution ("BMG"), Warner-Elektra-Atlantic Corporation ("WEA") and EMI Music Distribution ("EMI"), account for approximately 85% of the industry's $13.7 billion in domestic sales. The agreements would settle charges by the Commission that these five companies violated Section 5 of the Federal Trade Commission Act by engaging in practices that restricted competition in the domestic market for prerecorded music.

The proposed consent orders have been placed on the public record for thirty (30) days for receipt of comments by interested persons. Comments received during this period will become part of the public record. After thirty (30) days, the Commission will review the agreements and the comments received and will decide whether it should withdraw from the agreements or make final the agreements' proposed orders.

The purpose of this analysis is to invite public comment concerning the consent order. This analysis is not intended to constitute an official interpretation of the agreement and order or to modify its terms in any way.

There are five separate complaints and proposed consent orders in this matter, one for each of the distributors, which are virtually identical with the exception of minor variations related to the corporate structure of each respondent.

Analysis

The complaints allege that all five distributors have engaged in acts and practices that have unreasonably restrained competition in the market for prerecorded music in the United States through their adoption, implementation and enforcement of Minimum Advertised Price ("MAP") provisions of their Cooperative Advertising Programs.

These five companies, which collectively dominate this market, adopted significantly stricter MAP programs between late 1995 and 1996. Under the new MAP provisions, retailers seeking any cooperative advertising funds were required to observe the distributors' minimum advertised prices in all media advertisements, even in advertisements funded solely by the retailers. Retailers seeking any cooperative funds were also required to adhere to the distributors' minimum advertised prices on all in-store signs and displays, regardless of whether the distributor contributed to their cost.

Failure to adhere to the respondents' MAP provisions for any particular music title would subject the retailer to a suspension of all cooperative advertising funding offered by the distributor for an extended period, typically 60 to 90 days.[1] The severity of these penalties ensured that even the most aggressive retail competitors would stop advertising prices below MAP. The complaints further allege that by defining advertising broadly enough to include all in-store displays and signs, the MAP policies effectively precluded many retailers from communicating prices below MAP to their customers.

The MAP provisions were implemented with the anticompetitive intent to limit retail price competition and to

---

[1] BMG's policy differed slightly. Under the BMG MAP provisions, the suspension of all cooperative advertising funding required a finding of two MAP violations. However, BMG MAP provisions also established a suspension of up to a year for repeated violations.

stabilize the retail prices in this industry. Prior to the adoption of these policies, new retail entrants, especially consumer electronic chains, had sparked a retail "price war" that had resulted in significantly lower compact discs prices to consumers and lower margins for retailers. Some retailers, who could not compete with the newcomers, asked the distributors for discounts or for more stringent MAP provisions to take pressure off their margins.

The complaints allege that the distributors were concerned that declining retail prices could cause a reduction in wholesale prices. Through these stricter MAP programs, the distributors hoped to stop retail price competition, take pressure off their own margins, and eventually increase their own prices. The distributors' actions were effective. Retail prices were stabilized by these MAP programs. Thereafter, each distributor raised its wholesale prices.

While some vertical restraints can benefit consumers (known as "efficiencies") by enhancing interbrand competition and expanding market output, plausible efficiency justifications are absent in this case. Beneficial vertical restraints encourage retailers to provide better services to consumers than would have been provided in the absence of the restraint. However, in this case, the distributors' MAP policies provided no benefits to consumers. In particular, the new retailers that charged lower prices to consumers provided services that were as good as, and in some cases, superior to the services provided by the higher priced retailers they were moving to replace. These policies were plainly not motivated by "free-riding" concerns.

The substantial anticompetitive effects of these programs, balanced against the absence of plausible efficiency rationales for them, give us reason to believe that these programs constitute unreasonable vertical restraints in violation of Section 5 of the FTC Act under a rule of reason analysis. Although the Commission has concluded that compliance by retailers with these programs did not constitute per se unlawful minimum resale

price maintenance agreements, it should be noted that the MAP provisions implemented here go well beyond typical cooperative advertising programs, where a manufacturer places restraints on the prices its dealers may advertise in advertisements funded in whole or in part by the manufacturer. Such traditional cooperative advertising programs are judged under the rule of reason. *American Cyanamid*, 123 F.T.C. 1257, 1265 (1997); *U.S. Pioneer Electronics Corp.*, 115 F.T.C. 446, 453 (1992); *The Advertising Checking Bureau, Inc.*,109 F.T.C. 146 (1987).

The market structure in which the distributors' MAP provisions have operated also gives us reason to believe that these programs violate Section 5 of the FTC Act as practices which materially facilitate interdependent conduct. The MAP programs were implemented with an anticompetitive intent and they had significant anticompetitive effects. In addition, there was no plausible business justification for these programs. *E.I. du Pont de Nemours & Co. v. FTC*, 729 F.2d 128 (2d Cir. 1984).

The wholesale market for prerecorded music is characterized by high entry barriers which limit the likelihood of effective new entry. In this industry, the respondents can easily monitor the pricing and policies of their competition.

The history of MAP policies in this industry also indicates a propensity for interdependent behavior among the distributors. All five distributors adopted MAP policies in 1992 and 1993 that generally required adherence to minimum advertised prices in advertisements paid for by the distributors. In 1995 and 1996, all five distributors expanded the restrictions in their MAP programs to require adherence to minimum advertised prices in advertisements regardless of the funding source. In one case, the new MAP provisions were announced four months prior to their effective date. During this four month hiatus, two other distributors adopted similar provisions. By the end of 1996, all five distributors had adopted MAP provisions that were virtually identical. Shortly thereafter, several distributors embarked on high profile enforcement actions against major discounters who

were discounting prices; these enforcement actions were widely publicized by the trade press.

The Proposed Consent Order

There are five separate consent orders, one for each company.

Part I of the proposed orders establishes definitions. These definitions make clear that the provisions of the order apply to the directors, officers, employees, agents and representatives of the five distributors. This section also makes clear that its provisions apply to cooperative funding efforts regardless of whether the retailer sells prerecorded music in traditional retail stores or over the Internet.

Part II of the orders requires all of the distributors to discontinue their MAP programs in their entirety for a period of seven years. The Commission believes this relief is necessary because some of the challenged MAP programs have been in place for more than four years. Quite simply, it will take several years without the MAP restrictions to restore retail price competition.

Part III of the orders contains several prohibitions to ensure that the distributors are unable to maintain the anticompetitive status quo in some other way. Subsection A prohibits the companies from conditioning the availability of any advertising funds on a retailer's actual selling price. Subsection B prohibits the distributors from restricting the availability of any advertising funds on the basis of an advertisement funded solely by its customers that do not adhere to the minimum advertised price. Subsection C prohibits the distributors from making payments that exceed the retailers' promotional costs to ensure compliance with any MAP program. Subsection D prohibits the distributors from controlling their customers' resale prices. Subsection E prohibits, for five years, the distributors from exercising their

Colgate rights to unilaterally terminate dealers for failure to comply with any minimum advertised or resale price.

For EMI, BMG, and UNI, Parts IV, V, and VI are various notice provisions requiring the companies to notify their customers and senior management concerning the terms of this order. Part VII establishes that the distributors shall make annual compliance reports concerning their compliance with the terms of this order. Such reports may also be required by the Commission at any time. Part VIII establishes that the order shall terminate in twenty (20) years.

Part IV of the WMG and Sony orders specifically incorporates an exception to the prohibition against RPM that permits distributors to require their dealers to pass-through discounts. The notice and compliance requirements, and term of the order, are the same as for the other three respondents and are found at Parts V, VI, VII and VII of the orders for WMG and Sony.

Complaint

IN THE MATTER OF

VALUE AMERICA, INC.

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

Docket C-3976; File No. 9923206
Complaint, September 5, 2000--Decision, September 5, 2000

This consent order addresses Value America's advertising claims regarding the sale of various computer systems based upon a $400 rebate that required consumers to enter into a three-year contract for Internet service. The complaint alleges that Value America advertised computer systems citing a total cost amount that included undisclosed requirements. The complaint further alleges that the Respondent falsely claimed that a monitor would be included in some systems at no additional cost. Respondent also failed to ship some or all of the merchandise ordered in a timely manner and failed to offer buyers the option to consent to the delay in shipping or to cancel the order and receive a prompt refund. The order prohibits Value America from misrepresenting the price or cost to consumers of computers or computer related equipment without disclosing any condition clearly and conspicuously along with the price of the additional product or service that must be purchased. The order also requires the Respondent to disclose, clearly and conspicuously, and in close proximity to the after-rebate price or cost representation, the amounts of any rebates offered, and the total cost of the computer product or service, excluding any rebate amounts. Additionally, the order prohibits Respondent from making any representation about the cost of Internet access services without disclosing the following material facts: (1) if consumers have to pay additional fees, charges, rebate repayments, or other costs to cancel the Internet access service; (2) the amounts of such costs must be disclosed; (3) 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; (4) the amount of time required for purchasers to receive any rebate. These disclosures can be made through hyperlinks if the hyperlink clearly indicated the nature and importance of the information included.

Participants

For the Commission: *Beverly J. Thomas, Michael Dershowitz, Sydney Knight, Joel Winston, C. Lee Peeler,* and *BE.*

For the Respondents: *Alfred J.T. Byrne, LeClair Ryan, PC.*

COMPLAINT

The Federal Trade Commission, having reason to believe that Value America, 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 Value America, Inc. is a Virginia corporation with its principal office or place of business at 2300 Commonwealth Drive, Charlottesville, Virginia 22901.

2. Respondent has advertised, offered for sale, sold, and distributed products to the public, including books, sporting goods, housewares, appliances, personal electronic devices, and personal computers. Value America sells these products through its Internet Web sites, <www.va.com> and <www.valueamerica.com> , and through toll-free telephone numbers.

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. The term AMail Order Rule@ means the Federal Trade Commission=s Trade Regulation Rule entitled AMail or Telephone Order Merchandise,@ 16 C.F.R. Part 435, and as it may hereafter be amended. Pursuant to Section 18(d)(3) of the FTC Act, 15 U.S.C. S 57a(d)(3), a violation of the Mail Order Rule constitutes an unfair or deceptive act or practice in violation of Section 5(a)(1) of the Federal Trade Commission Act.

5. Respondent has disseminated or has caused to be disseminated advertisements for numerous computer systems, including but not limited to, a Toshiba Satellite 2100 CDS laptop, an HP Pavilion 4535 Multimedia PC, a Proteva computer, an IBM Aptiva E572

Micro Tower, and an *e*machines etower 366C. Advertisements for these computers appear in various media and include but are not necessarily limited to the attached Exhibits A through E.

The advertisements contain the following statements:

Exhibit A: Magazine ad

Get Out of Here
Hit the Road with Our Notebooks and Palm PCs

[Depiction:Toshiba laptop] **Let >Em Think You Paid Top Dollar**

The Toshiba Satellite 2100CDS looks and performs like a high-priced notebook, but actually costs a lot less. Built for speed, this Satellite boasts a 400 MHz AMD K67-2 processor with [component specifications for laptop].

Toshiba Satellite
$1299, less optional Prodigy
$400 Internet rebate!*

Pay as little as $899

[A fine print disclosure, in approximately 5-point type, at the bottom of this magazine ad states:]

*Prodigy Offer Terms & Conditions Offer limited to new Prodigy Internet members only and valid only in the United States. Mail-in rebate valid only on qualifying Toshiba notebook computers purchased from authorized Toshiba retailers or direct mail resellers between August 8, 1999, and December 31, 1999, and accompanied by enrollment in a fixed-term ARebate:Toshiba/ Prodigy Internet@ membership on Prodigy Internet between

August 8, 1999, and January 31, 2000, using only the CD sent to you per this request. Enrollment in the Prodigy Internet service must be completed with an automatic payment plan on a valid major credit card. Payment of $19.95 per month is required for the length of your commitment. Mail-in rebate offer is subject to all Terms & Conditions on the reverse side of the mail-in rebate form which you will receive with your CD. Rebate checks will be processed within 8 weeks after Prodigy has received payment for your second monthly Prodigy membership fee, received your properly completed rebate form with a legible copy of your store receipt, and established your creditworthiness. If you cancel your membership prior to the end of your fixed term enrollment commitment, your credit card will be charged a cancellation fee equal to the amount of your Prodigy Internet mail-in rebate plus a $50 service fee as described in the Terms and Conditions on the mail-in rebate form. Rebate offered by Prodigy and not Toshiba.

Exhibit B: Radio ad

Announcer:
ValueAmerica.com - changing the way America buys. This week at ValueAmerica.com, we have the NEW Hewlett-Packard Pavilion 4535 Multi-media PC - with the Intel CELERON Processor - 400 megahertz . . . . It comes with a CD-ROM, Windows 98, and a 56K Modem. Imagine the quality of H-P at a price of less than $500 - in a package that also includes stereo speakers, a color monitor and a color printer. At Value America, this H-P Pavilion 4535 Multi-media PC, with the Intel CELERON processor, is ONLY 449! - after internet rebate. You heard right! 449 and if you call right now, we=ll throw in FREE DELIVERY! To take advantage of this week=s special, the H-P Pavilion 4535 for only 499 (sic), with FREE Shipping, call now at 888-XXX-XXXX. 888-XXX-XXXX or go online at ValueAmerica.com.

Exhibit C: Infomercial

Audio Portion:	***Simultaneously Displayed on TV Screen:***
The following is a paid program brought to you by Value America, the Internet and now television=s leading source for brand name products at unbeatable prices. Stay tuned for the following products: * * * * <u>Stay tuned for Value America Showcase.</u> * * * * So how much do you think you should pay for a system like this? ... What would you do if I told you $1299 after rebates? . . . [A]nd when you get hooked up with the Microsoft Internet plan they=re going to give you a $400 rebate. We=re also going to give you a printer factory rebate of $50 and a scanner rebate of $50 for a total of $500 in rebates. . . . [T]hat brings the total to	[Lists computer system and bundled components] * * * * A$3000 [crossed out], $2000 [crossed out] -- **$1299** after rebates@ AValue America Discount Price: $1799 minus -Microsoft Rebate: $400 (with MSN Activation) -Printer Rebate: $50 -Scanner Rebate: $50 Total Rebates: $500"

$1299 for everything we=ve
talked about.

And, if you call right now, we=re going to throw in free shipping and handling. . . . . * * * * We're talking about Proteva, let's hear a little bit about Proteva. They're a huge company based in Wisconsin . . . * * * *	A. . . . one-year Proteva warranty . . .@ **A$1299** after rebates@ [in lower left corner of the screen; remains in lower left corner of the screen for much of the remaining minutes of the program.] * * * * Proteva, 10 year old computer manufacturer . . . . * * * *

[No audio]	[The following is the full text of the terms and conditions associated with the $400 rebate offer. This text is scrolled vertically down the television screen, over a 4 to 5 second time period. There is no audio or visual indication that this text applies to the rebate offer and, because it scrolls so quickly, it cannot be read or understood by viewers.] **Terms and Conditions.** We know that you will like our service, and as an inducement to give MSN Plus Internet Access a full and fair trial, we are prepared to lend you the amount of the rebate selected above (up to $400) to help you get online. If you continue as a paying member of the MSN Plus service for the full period selected by you above, then you do not have to repay any part of the

	rebate amount. But if your MSN account is cancelled or terminated at any time before the end of the required period, you agree to pay back the full amount of the rebate. In either case you pay no interest.

(No audio) Within six to eight weeks of our acceptance of your application, which is subject to credit approval, the Microsoft Network, LLS, ("MSN") will advance to you the amount of (*sic*) designated above provided you have signed up for the MSN Plus Internet Access service. The rebate amount will either be credited to your credit card account as designated above or will be remitted by check to the address designated above. Accordingly to qualify for this program (1) you must pay for the MSN Plus Internet Access service each month in advance ($21.95); (2) you must purchase a Proteva PC no later than December 31, 1999; (3) this
form must be completed fully mailed and postmarked within 30

(No audio) days of purchase date; (4) you must sign below to show that you agree to the items and conditions described in this application and the MSN member agreement which was presented to you online upon signup (and checked "I accepted") for line service; (5) you must attach this application, the original receipt, evidencing your purchase, with the purchase price circled, and (6) you must be at least 18 years old. You may receive only one rebate for each purchase. Accordingly you may receive only one rebate

for each new MSN Internet access account.

You are not obligated to continue as a MSN Plus Internet Access member for any particular length of time. HOWEVER, IF FOR ANY REASON WHATSOEVER YOU DO NOT CONTINUE FOR THE PERIOD OF TIME SPECIFIED ABOVE FOR THE REBATE YOU HAVE ELECTED TO RECEIVE, YOU AGREE THAT YOU WILL REPAY MSN THE AMOUNT [OF THE] REBATE ("Reimbursement amount") IMMEDIATELY UPON CANCELLATION OR TERMINATION OF YOUR MSN PLUS INTERNET ACCESS ACCOUNT. If you do not render payment in cash for the full reimbursement amount at the time that your MSN Plus Internet Access account is cancelled or terminated, and if your membership ends before the time designated for your rebate amount, you agree that MSN is authorized to change the reimbursement amount to your credit or debit card account. You acknowledge and agree that MSN may terminate your MSN Plus Internet Access account if you violate the MSN membership agreement. In such event you will be required to repay the reimbursement amount as described herein. You may designate your preferred credit card account above, but you understand and agree that MSN may charge any of your debit or credit card accounts and you authorize the issuer of any card account to which MSN charges the amount of the rebate to charge that amount to your account balance.

[End of advertisement]

You agree that this agreement will be governed by the laws of the state of Washington and you consent to the exclusive

jurisdiction and venue of the courts in King County Washington in all disputes arising out of or relating to this agreement.

You acknowledge and agree that your purchase is from the applicable retailer and not from MSN LLC, MSN or Microsoft Corporation.

This MSN rebate program is available only to residents of the 50 United States and the District of Columbia that purchase a Proteva PC.

Exhibit D: Web page advertisements

Exhibit D.1

Hyperlink to D.2 [Depiction is a hyperlink which, after two more hyperlinks, leads to Exhibit D.2.]

"Hyperlink to shopping cart list

(Exhibit D.1 is the initial Web page for the Home Computer section of Value America=s online store. Consumers can click on the shopping cart hyperlink to initiate the online purchase process, without viewing Exhibits D.2 or D.3.)

Exhibit D.2

Your Price: $1,019.00
Price After Rebate: $619.00

[Hyperlink to shopping cart list]

Product Overview
Specifications
Manufacturer Info

Product Rebates

ASpecifications@

[List of twenty technical specifications about the advertised model, followed by:]
$ Note: Monitor sold separately.

[AProduct Rebates@ tab is a hyperlink to Exhibit D.3]

(Exhibit D.2: ASpecifications@ Web page accessed through a minimum of two hyperlinks, whose labels do not refer or relate to the monitor. The quoted statement ANote: Monitor sold separately.@ appears at the bottom of the Web page after a lengthy list of technical product specifications. Consumers could purchase the advertised computer model from respondent online without viewing this page.)

Exhibit D.3

AProduct Rebates@

A**$400 Mail-In Offer from Compuserve**
3 year Internet Service contract and major

"[Undisclosed hyperlink behind the phrase A$400 Mail-In Offer from

credit card required. Valid with a purchase of an IBM Aptiva PC and monitor from July 18, 1999 to January 31, 2000. See rebate form for complete details.@	Compuserve,@ which leads to the home page of a third party Web site.]

(Exhibit D.3: AProduct Rebates@ Web page accessed from Exhibit D.1 through a minimum of two hyperlinks, the first of which is not labeled as referring or relating to information about the advertised rebate offer. This Web page discloses that the advertised rebate offer is from CompuServe and requires a three year Internet service contract. Consumers could purchase the Aptiva E572 Micro Tower, with its associated rebate offer, from respondent online without viewing Exhibit D.3. No Arebate form@ or additional details about the CompuServe rebate offer are available at or from Value America=s Web site. An undisclosed hyperlink behind the phrase A$400 Mail-In Offer from Compuserve@ links to the home page of a third party Web site, which home page does not contain any information about the advertised rebate or any hyperlinks that refer or relate to the advertised rebate offer. Although information about other material terms and conditions of the CompuServe rebate offer is available on interior pages of the third party Web site, Value America=s Web pages do not hyperlink to these pages or otherwise provide access to this information.)

Exhibit E: Web banner ad

FREE PC!		***e*machines** etower 366C	Cyrix MII 366PR Monitor not included

6. Through the means described in Paragraph 5, including but not necessarily limited to Exhibits A through E, respondent has represented, expressly or by implication, that the total cost of the advertised computer systems is $899 for the Toshiba Satellite 2100CDS laptop, $449 for the Hewlett-Packard Pavilion 4535 Multi-media PC, $1299 for the Proteva PC and bundled video camera, printer, scanner and software, $619 for the Aptiva E572 Micro Tower computer and FREE for the *e*machines etower 366C computer.

7. In truth and in fact, the total cost of the computers and bundled components described in Paragraph 6 was not as advertised. In order to obtain the advertised computer systems and bundled components at the prices advertised, consumers were required to subscribe to CompuServe 2000 Premier Internet Service, Prodigy Internet, or Microsoft MSN Plus Internet Access for 36 months at an additional cost of $19.95 to $21.95 per month or, in the case of CompuServe Internet Service, optional full pre-payment of $790.20. Therefore, the representations set forth in Paragraph 6 were, and are, false or misleading.

8. In its advertisements, including but not limited to Exhibits A through E, for the computers and bundled components described in Paragraph 6, respondent has represented that the total cost of the advertised computer systems, respectively, is $899, $449, $1299, $619, and FREE. In these advertisements, respondent has failed to disclose or failed to disclose adequately:

(a) that in order to obtain the advertised computers and bundled components for the advertised prices, consumers are required to subscribe to CompuServe 2000 Internet Service, Prodigy Internet, or Microsoft MSN Plus Internet Access for 36 months at an additional cost of $19.95 to $21.95 per month or in the case of CompuServe Internet Service, optional full pre-payment of $790.20;

(b) with respect to Exhibits B and E, the amounts of the rebates - $400 for the Internet service rebate - and the total price of the computer system, with bundled components where applicable, before rebates;

(c) that consumers who terminate their Internet service contracts within three years must repay all or a prorated portion of the $400 rebate and, in the case of the CompuServe and Prodigy rebate offers, also pay a cancellation fee of up to $50;

(d) that it can take up to eight weeks after payment has been received for the consumer=s second monthly Internet service membership fee, or a total of 12 to 17 weeks, to receive the $400 Prodigy Internet rebate; and

(e) that CompuServe 2000 Premier Internet, Prodigy Internet, and Microsoft MSN Plus Internet Access do not provide local access telephone numbers for their respective Internet services in all areas, and therefore that many consumers must either pay long distance telephone charges or surcharges of up to $6.00 per hour to access their Internet services.

These facts would be material to consumers in their purchase or use of the products. The failure to disclose these facts, in light of the representations made, was, and is, a deceptive practice.

9. Through the means described in Paragraph 5, including but not necessarily limited to Exhibit D, respondent has represented, expressly or by implication that the IBM Aptiva E572 Micro Tower computer includes a monitor at the advertised after-rebate price of $619 or the total price of $1,019. The IBM Aptiva E572 Micro Tower is depicted in Exhibit D with a monitor, with the IBM Aptiva logo written across the monitor, on both the initial product offering Web page and on subsequent Web pages advertising and offering this model for sale.

10. In truth and in fact, the depicted IBM Aptiva E572 Micro Tower does not include a monitor at the advertised after-rebate price of $619 or the total price of $1,019. Consumers must purchase a monitor separately. Although there is a statement on one page of the Internet ad indicating that a monitor is not included, the hyperlinks leading to the disclosure page are not labeled as referring or relating to the monitor, and the statement can be viewed only by scrolling to the bottom of the page, past a list of more than twenty technical product specifications. Furthermore, this disclosure is avoidable entirely before purchase by those consumers who view the depiction and proceed directly to the online ordering and payment process. Therefore, the representation set forth in Paragraph 9 was, and is, false or misleading.

11. In numerous instances, after having solicited telephone orders for merchandise, including but not limited to orders submitted over the Internet at its Web site, and having received Aproperly completed orders,@ as that term is defined in Section 435.2(d) of the Mail Order Rule, 16 C.F.R. ' 435.2(d), respondent has been unable to ship some or all of the ordered merchandise to the buyer within the time stated in the solicitation, or if no time was stated, within 30 days, as required by Section 435.1(a)(1) of the Mail Order Rule, 16 C.F.R. ' 435.1(a)(1).

12. In numerous instances in which respondent was not able to ship ordered merchandise as set forth in Paragraph 11, respondent solicited such orders when it had no reasonable basis to expect that it would be able to ship some or all of such merchandise within the time stated in the solicitation, or if no time was stated clearly and conspicuously in the solicitation, within thirty (30) days after receipt of a properly completed order, thereby violating 16 C.F.R. ' 435.1(a)(1).

13. In numerous instances in which respondent was not able to ship ordered merchandise as set forth in Paragraph 11, respondent

failed to offer to the buyer, clearly and conspicuously and without prior demand, an option either to consent to a delay in shipping or to cancel the order and receive a prompt refund, thereby violating 16 C.F.R. ' 435.1(b)(1).

14. In numerous instances in which respondent was not able to ship ordered merchandise as set forth in Paragraph 11, having failed to offer the affected buyers an option either to consent to a delay in shipping or to cancel the order and receive a prompt refund, as required by 16 C.F.R. ' 435,1(b)(1), respondent failed to deem the order cancelled and to make a prompt refund to the buyer involved, thereby violating 16 C.F.R. ' 435.1(c)(5).

15. The acts and practices of respondent as alleged in this complaint constitute unfair or deceptive acts or practices in or affecting commerce in violation of Section 5(a) of the Federal Trade Commission Act, 15 U.S.C. ' 45(a).

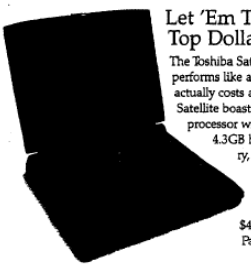
THEREFORE, the Federal Trade Commission this fifth day of September, 2000, has issued this complaint against respondent.

By the Commission.

Complaint Exhibits

Get Out of Here

Hit the Road with Our Notebooks and Palm PCs.



Let 'Em Think You Paid Top Dollar

The Toshiba Satellite 2100CDS looks and performs like a high-priced notebook, but actually costs a lot less. Built for speed, this Satellite boasts a 400MHz AMD K6®-2 processor with 3D Now! technology, 4.3GB hard drive, 32MB of memory, a built-in 56K V.90 modem, and a CD-ROM drive.

Toshiba Satellite
$1299, less optional Prodigy $400 Internet rebate!*
Pay as little as $899

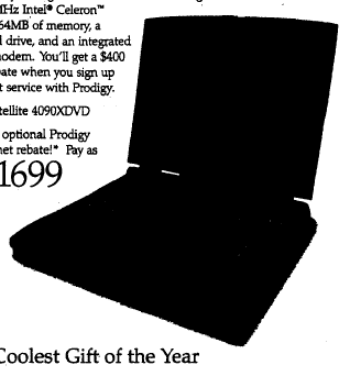
Symantec Norton AntiVirus 2000 v6.0
$34.95, less $20.00 mfr's mail-in upgrade rebate: $14.95

Big, Fast, and Versatile

Toshiba's Satellite notebook computer features a huge 14.1" TFT active-matrix display for a great look. View movies using the DVD-ROM drive. It has a 400MHz Intel® Celeron™ processor, 64MB of memory, a 6.4GB hard drive, and an integrated 56K V.90 modem. You'll get a $400 mail-in rebate when you sign up for Internet service with Prodigy.

Toshiba Satellite 4090XDVD

$2099, less optional Prodigy $400 Internet rebate!* Pay as little as $1699



The Most Popular Palm PC

The Palm V handheld organizer offers a slick, anodized aluminum frame and peerless data control. But it's got more than just good looks. The Palm V also has scads of memory—there's room to store about 6,000 addresses, five years of appointments, to-do lists, and other great applications. Style and substance come together in this organizer, a member of the famous 'Palm' family from 3Com. It comes with HotSync cradle, stylus pen, and rechargeable battery.

3COM Palm V $349

The Coolest Gift of the Year

Apple packs power and personality into what's sure to be this holiday season's bestseller. The iBook is a yummy, translucent dream of a notebook with a pull-out handle, a PowerPC G3 processor, a CD-ROM drive, a modem *and* built-in ethernet, and the option to go totally wireless, even when connected to the Net. It's tough, too—designed to survive transport in a student's backpack! Order your iBook now, and we'll give you a Umax Astra 2000U USB Color Flatbed Scanner.

Apple iBook with Umax Scanner
$1639 , less $40 mail-in rebate.
Your price: $1599
Blueberry or Tangerine

The Value America Credit Card

*No Interest, No Payments for 90 Days!**

Offer Details: *$199 minimum purchase required. With credit approval for purchases made on the Value America Credit Card. As of September 31, 1999, APR: Best Rate 22.26%; Std. Rate 24.26% (rates may vary). Min. Fin. Chg. $.50. See Revolving Credit Agreement for details. Offer is for individuals, not businesses. Offer expires December 31, 1999.

Finance Charges: Finance Charges accrue from the date of purchase and all accrued Finance Charges will be added to your Account for the entire deferred period if qualifying purchases are not paid in full by the end of the deferred payment period or if you fail to make any required payment on your Account when due.

Symantec
PC Anywhere 9.0
$89.95

*Prodigy Offer Terms & Conditions Offer limited to new Prodigy Internet members only and valid only in the United States. Mail-in rebate valid only on qualifying Toshiba notebook computers purchased from authorized Toshiba retailers or direct mail resellers between August 8, 1999, and December 31, 1999, and accompanied by enrollment in a fixed-term "Rebate: Toshiba/Prodigy Internet" membership on Prodigy Internet between August 8, 1999, and January 31, 2000, using only the CD sent to you per this request. Enrollment in the Prodigy Internet service must be completed with an automatic payment plan on a valid major credit card. Payment of $19.95 per month is required for the length of your commitment. Mail-in rebate offer is subject to all Terms & Conditions on the the reverse side of the mail-in rebate form which you will receive with your CD. Rebate checks will be processed within 8 weeks after Prodigy has received payment for your second monthly Prodigy membership fee, received your properly completed rebate form with a legible copy of your store receipt, and established your creditworthiness. If you cancel your membership prior to the end of your fixed term enrollment commitment, your credit card will be charged a cancellation fee equal to the amount of your Prodigy Internet mail-in rebate plus a $50 service fee as described in the Terms and Conditions on the mail-in rebate form. Rebate offered by Prodigy and not Toshiba.

Buy Everything You Need for Your Home & Office Online @ ValueAMERICA.com *or Call Toll-Free:* (888) 222-7527 *Shop Online: VA.com*

Exhibit A

Complaint Exhibits

Value America HP Pavilion 4535 - Intel Celeron Radio :60 1.3	
ANNCR:	ValueAmerica.com...changing the way America buys. This week at ValueAmerica.com... we have the NEW Hewlett-Packard Pavilion 4535 Multi-media PC... with the Intel CELERON Processor... 400 megahertz... (Intel bong) ...it comes with a CD-ROM, Windows 98, and a 56K Modem. Imagine the quality of H-P at a price of less than $500... In a package that also includes stereo speakers, a color monitor and a color printer... At ValueAmerica. this H-P Pavilion 4535 Multi-media PC, with the Intel CELERON Processor... is ONLY 449!...after internet rebate. You heard right! 449 and if you call right now, we'll throw in FREE DELIVERY! To take advantage of this week's special, the H-P Pavilion 4535 for only 499, with FREE Shipping... Call now at 888-400-VALU... 888-400-8258 or go online at ValueAmerica.com.

last revised: 10/22/994:08 PM

Exhibit B

Complaint Exhibits

OFFICIAL TRANSCRIPT PROCEEDING

FEDERAL TRADE COMMISSION

MATTER NO. 9923206

TITLE VALUE AMERICA, INC.

DATE RECORDED: OCTOBER 12, 1999
TRANSCRIBED: JANUARY 12, 2000

PAGES 1 THROUGH 47

VIDEOTAPE - PROTEVA COMPUTER SYSTEM

FOR THE RECORD, INC.
603 POST OFFICE ROAD, SUITE 309
WALDORF, MARYLAND 20602
(301)870-8025

Exhibit C

(Transcript not reproduced here; relevant portions are quoted in complaint)

Complaint Exhibits

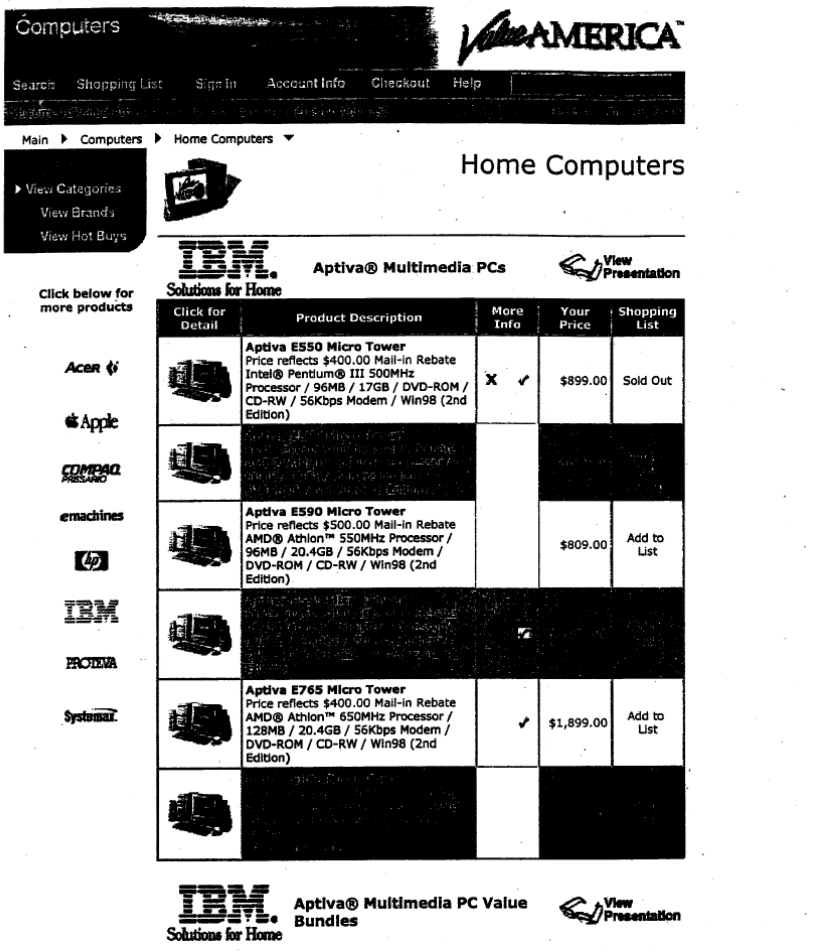


Exhibit D.1

Complaint Exhibits

Click for Detail	Product Description	More Info	Your Price	Shopping List
	**Aptiva E572 Micro Tower Computer w/ 17" Monitor, Canon Printer, UMAX Flatbed Scanner** Price reflects $580.00 Mail-in Rebate AMD® Athlon™ 500MHz Processor / 96MB / 17GB / 56Kbps Modem / DVD-ROM / Win98 (2nd Edition)	✔	$919.00	Add to List
	[redacted]		[redacted]	
	**Aptiva E595 Micro Tower w/ 17" Aptiva Monitor, Canon Printer, and UMAX Scanner** Price reflects $580.00 Mail-in Rebate AMD® Athlon™ 600MHz Processor / 128MB / 20.4GB / 56K Modem / DVD-ROM / CD-RW / Win98 (2nd Edition)	✔	$1,479.00	Add to List
	[redacted]	[redacted]		
	**Aptiva E805 Micro Tower w/15" Monitor, Canon Printer & UMAX Scanner** Price reflects $480.00 Mail-in Rebate AMD®-K6-2 500MHz Processor / 64MB / 10GB / CD-ROM / 56K Modem / Win 98	✔	$569.00	Add to List
	[redacted]	[redacted]		

Product Status Legend
(For more info, hold your cursor over any icon.)

✖ Sold Out

✔ Shipping Included

Back To Top

Search | Shopping List | Sign In | Account Info | Checkout | Help
You Have Our Word | Security & Privacy | Contact Us
Order Status

Complaint Exhibits

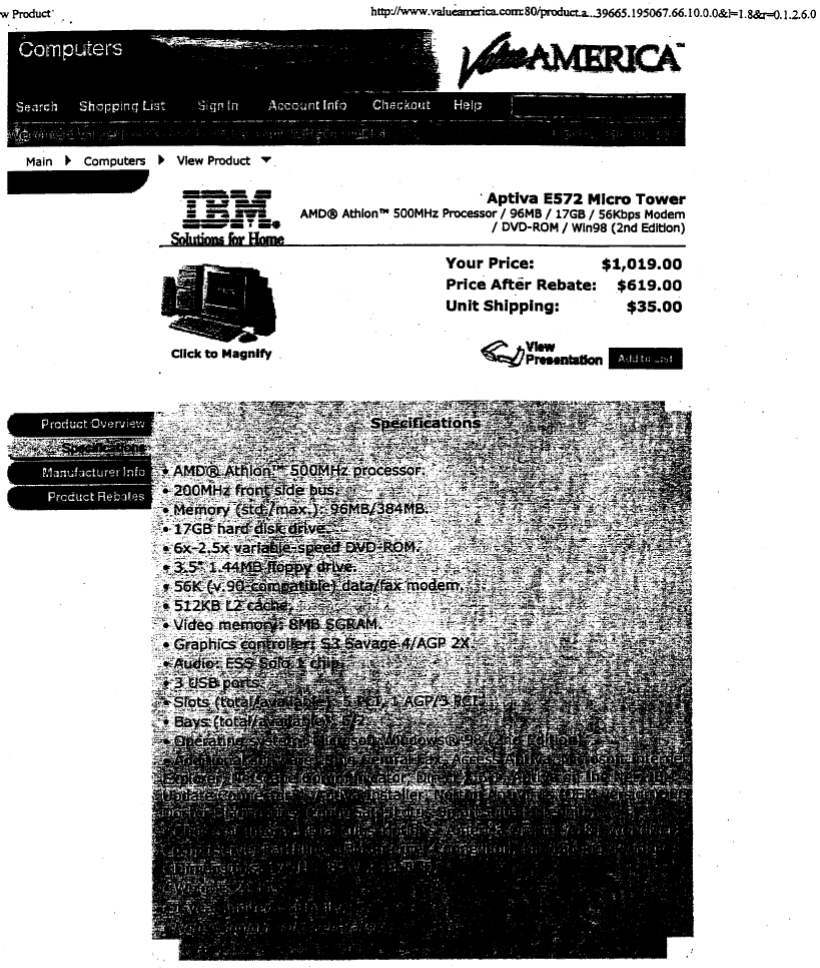


Exhibit D.2

Complaint Exhibits

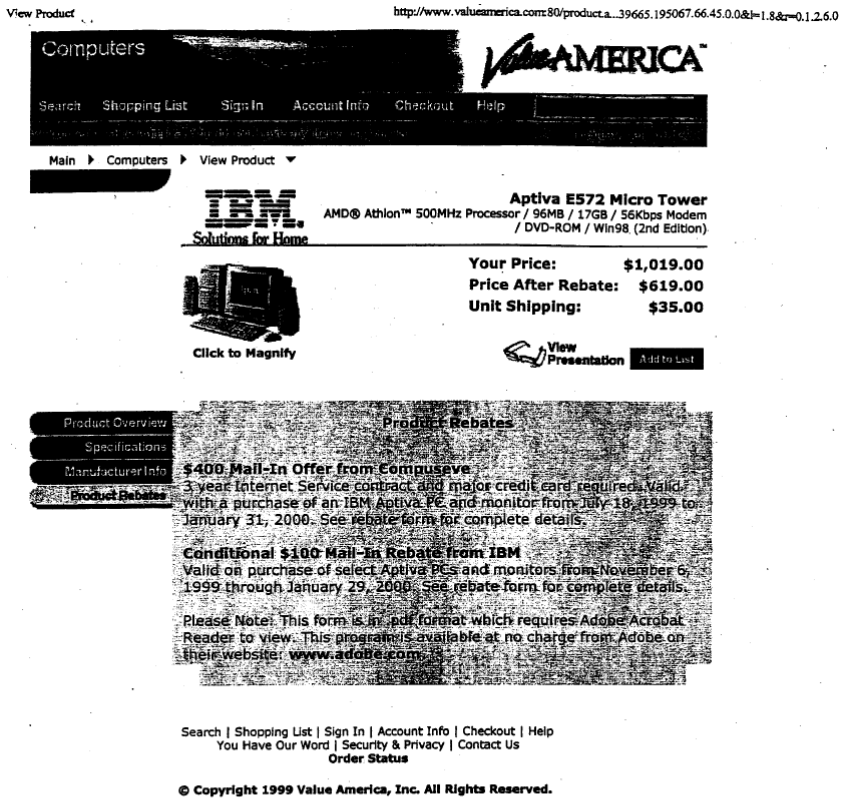


Exhibit D.3

1 of 1 01/10/2000 1:22 PM

Complaint Exhibits

Exhibit E

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 Value America, Inc., is a Virginia corporation with its principal office or place of business at 2300 Commonwealth Drive, Charlottesville, Virginia 22901.

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 Value America, 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, online services, and software), the disclosure shall be presented simultaneously in both the audio and visual portions of the advertisement. *Provided, however*, that in any advertisement presented predominantly through audio or visual means, the disclosure may be made through the same means in which the ad is predominantly presented. The audio disclosure shall be delivered in a volume and cadence sufficient for an ordinary consumer to hear and comprehend it. The visual disclosure shall be of a size and shade, and shall appear on the screen for a duration, sufficient for an ordinary consumer to read and comprehend it.

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

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 software, the Internet, or online services:

(i) Ain 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;

(ii) a disclosure made Athrough the use of a hyperlink@ shall mean a hyperlink that is itself clear and conspicuous, is clearly identified as a hyperlink, is labeled to convey the nature and relevance of the information it leads to, is on the same Web page, online service page, or other electronic page and proximate to the triggering representation, and takes the consumer directly to the disclosure on the click-through electronic page or other display window or panel.

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

6. The term AMail or Telephone Order Merchandise Rule@ means the Federal Trade Commission=s Trade Regulation Rule

entitled AMail or Telephone Order Merchandise,@ 16 C.F.R. Part 435, and as it may hereafter be amended.

7. AEligible purchaser@ shall mean any person, firm or other entity that ordered and paid for any product from respondent prior to the date of service of this order, whose product has not been shipped by respondent, and who has not previously received a refund and who has not previously consented to a delay in shipping; and more than ten (10) days have passed after the date stated by respondent in the solicitation for shipment or the delay notice (or if no time was stated, thirty (30) days after receipt of the properly competed order or issuance of the delay notice).

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, the price or cost to consumers of such product or service or what is included in the price 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 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 after-rebate cost of such product or service, unless it discloses, clearly and conspicuously, and in close proximity to the representation, the amounts of any and all rebates offered and the total price or cost to consumers of the product or service, excluding any and all rebate amounts (*i.e.*, the before-rebate price).

Provided, however, if (1) the offer involves only one rebate and no other reductions in the total price of such product or service, and (2) respondent discloses the amount of that rebate as prescribed above, then respondent need not disclose the before-rebate price or cost of such product or service.

IV.

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:

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;

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 IV.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; and

C. the amount of time required for purchasers to receive any rebate.

Provided that in the case of advertisements disseminated through an interactive electronic medium, such as software, the Internet or other online services, respondent may make the disclosures required by this Part through the use of a hyperlink. In addition,

1. for Part IV.A, above, any such hyperlink must be labeled: AEarly Cancellation of the Internet Service May Result in Substantial Penalties. Click Here.@;

2. for Part IV.B, above, any such hyperlink must be labeled: AYou May Have to Pay Significant Telephone Charges to Use the Internet Service. Click Here.@;

3. for Part IV.C , above, any such hyperlink must be labeled: ATime to Receive Rebate. Click Here.@

V.

IT IS FURTHER ORDERED that respondent Value America, Inc., directly or through any corporation, subsidiary, division or other device shall not violate any provision of the Mail or Telephone Order Merchandise Rule, including but not limited to:

A. Soliciting orders for the sale of telephone order merchandise unless it has a reasonable basis to expect that it will be able to ship some or all of such merchandise within the time stated in the solicitation or, if no time is stated clearly and conspicuously in the solicitation, within thirty (30) days after receipt of a properly completed order, as required by 16 C.F.R. ' 435.1(a)(1);

B. Where respondent is unable to ship within the applicable time set forth in 16 C.F.R. ' 435.1(a)(1), failing to offer to the buyer, clearly and conspicuously and without prior demand, an option either to consent to a delay in shipping or to cancel the order and receive a prompt refund, as required by 16 C.F.R. ' 435.1(b)(1); and

C. Having failed to offer the option to consent to a delay or to cancel the order and receive a prompt refund, as required by 16 C.F.R. ' 435.1(b)(1), and also having failed to ship the merchandise within the applicable time, failing to

deem the order canceled and to make a prompt refund, as required by 16 C.F.R. ' 435.1(c)(5).

Provided that, in the event the Mail or Telephone Order Merchandise Rule is hereafter amended or modified, respondent=s compliance with the Mail or Telephone Order Merchandise Rule as so amended or modified shall not be deemed a violation of this order.

VI.

IT IS FURTHER ORDERED that respondent Value America, Inc., and its successors and assigns, shall, for a period of five (5) years from the date of issue of this Order, maintain and make available to the Federal Trade Commission, within thirty days (30) days of the date of receipt of a written request, business records demonstrating compliance with the terms and provisions of Part V.

VII.

IT IS FURTHER ORDERED that respondent shall provide refunds to eligible purchasers in accordance with the provisions of this Part.

A. Within twenty (20) days from the date of service of this order, respondent shall compile a list containing: (1) the name, last known mailing address, phone number and electronic mail address of each eligible purchaser; and (2) the total price paid by each such eligible purchaser for all products ordered but not received, including all charges for applicable taxes and for shipping and handling, if any. Respondent shall retain a National Change of Address System (ANCOA@) licensee to update the mailing addresses on this list by processing the name and mailing address portion of this list through the NCOA database, provided that respondent=s obligation to retain such an

NCOA licensee shall expire at such time as respondent completes its compilation of the above-referenced list.

B. Within thirty (30) days after the date of service of this order, respondent shall cancel the order of each eligible purchaser contained on the list required by Part VII.A, and shall send to each such person, via first-class mail, a Refund Notice in the form set forth in Appendix A, accompanied by a check for the amount stated on the list. The phrase: ANOTICE: REFUND CHECK ENCLOSED@ shall appear on the front of the envelope transmitting the Refund Notice in typeface equal or larger in size to 14 point. The words AForward and Address Correction Requested@ shall appear in the upper, left-hand corner one-quarter of an inch beneath the return address.

Provided that, in lieu of mailing a refund check to any eligible purchaser, respondent may credit each such eligible purchaser=s credit card or debit card account for the amount stated on the list required by Part VII.A, and shall send the Refund Notice via electronic mail. The subject line of the electronic mail shall state ARefund Credit.@ The Refund Notice shall include the amount of the refund credit and the date such action was taken.

The Refund Notice shall not include any information other than that contained in Appendix A, nor shall any other material be transmitted with the notice, except for a refund check, if applicable.

C. Within sixty (60) days after the date of service of this order, respondent shall furnish to Federal Trade Commission staff:

1. a copy of the list required by Part VII.A,

2. for each eligible purchaser, (a) the amount, check number and mailing date of the refund check mailed to such purchaser, or (b) the amount credited to such person=s credit card or debit card account, and the date on which it was credited.

VIII.

IT IS FURTHER ORDERED that respondent Value America, 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;

Provided however, that in the case of advertisements and promotional materials disseminated by means of an interactive electronic medium, respondent and its successors and assigns may comply with this provision by maintaining and making available all advertisements and promotional materials for computer or computer-related products or services for which the price, cost or any rebate is conditioned upon the purchase of Internet access service; but, multiple versions of advertisements and promotional materials need not be maintained or submitted, if they differ only in terms of the prices of the products or services being offered;

B. All materials that were relied upon in complying with this order; 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.

IX.

IT IS FURTHER ORDERED that respondent Value America, Inc., and its successors and assigns, shall deliver a copy of this order and the Mail or Telephone Order Merchandise Rule 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.

X.

IT IS FURTHER ORDERED that respondent Value America, 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.

XI.

IT IS FURTHER ORDERED that respondent Value America, 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.

XII.

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.

APPENDIX A

REFUND NOTICE

[To be printed on Value America, Inc. letterhead]

[Date]

[Name and address of recipient]

Dear [recipient=s name]:

Our records show that you have an outstanding order of merchandise from Value America. Pursuant to the terms of an agreement with the Federal Trade Commission concerning our merchandise delivery practices, we have agreed to provide full refunds to any customer whose shipment has not been made within ten days of the date we promised. Because your merchandise has not been shipped, you are entitled to a refund.

We have [enclosed a refund check] [credited your charge or debit card on [date]] for [amount of redress]. This amount includes the purchase price(s) for the merchandise you ordered, plus any taxes and shipping and handling charges. If you still wish to purchase the merchandise, you may reorder it from Value America.

Please call toll-free 1-800-XXX-XXXX or see our website at www.va.com if you have any questions.

Sincerely,

[Name and title of Value America, Inc. official]

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 Value America, 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 personal electronic devices, computer software, personal computers, and other products through its Internet Web site (reached by <www.va.com> or <www.valueamerica.com>), and through toll-free telephone numbers. This matter concerns allegedly false and deceptive advertising claims regarding the sale of various computer systems based upon a $400 rebate that required consumers to enter into a three year contract for Internet service. This matter also concerns alleged violations of the Mail or Telephone Order Merchandise Rule.

The Commission=s proposed complaint alleges that respondent falsely claimed that the total cost of a Toshiba Satellite 2100CDS laptop was $899; that the total cost of a Hewlett-Packard Pavilion 4535 Multimedia PC was $449; that the total cost of a Proteva computer system was $1299; that the total cost of an IBM Aptiva E572 Micro Tower computer was $619; and that an *e*machines etower 366C computer was Afree.@ In fact, in order to obtain these computers at the advertised prices, consumers were required to subscribe to CompuServe 2000 Premier Internet Service, Prodigy Internet, or Microsoft MSN Plus Internet Access for three years at an additional cost of $19.95

to $21.95 per month or, in the case of CompuServe Internet Service, an optional full pre-payment of $790.20.

The complaint also alleges that when respondent represented that the total cost of the computers was, respectively, $899, $449, $1299, $619, or Afree,@ respondent failed to disclose or failed to disclose adequately: (a) that consumers were required to subscribe to CompuServe 2000 Premier Internet Service, Prodigy Internet, or Microsoft MSN Plus Internet Access for three years at an additional cost of $19.95 to $21.95 per month or, in the case of CompuServe Internet Service, an optional full pre-payment of $790.20; (b) the amounts of the rebates, and the total price of the computer systems before rebates with respect to the Hewlett-Packard Pavilion 4535 Multimedia PC, and the *e*machines etower 366C computer; (c) that consumers who cancel the Internet service within three years must repay all or portion of the $400 rebate and, in the case of the CompuServe and Prodigy rebate offers, also pay a cancellation fee of up to $50; (d) that, in the case of the Prodigy rebate, it can take a total of 12 to 17 weeks to receive the $400 rebate; and (e) that CompuServe, Prodigy, and Microsoft do not provide local access telephone numbers for their respective Internet services in all areas, and therefore, that many consumers must either pay long distance telephone charges or, in the case of CompuServe 2000 or Prodigy Internet, $6.00 per hour to access their 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 the IBM Aptiva E572 Micro Tower computer included a monitor at no additional cost. In fact, consumers must purchase a monitor separately. The complaint also alleges that in numerous instances, respondent failed to ship some or all of the ordered merchandise to the buyer within the time stated in the solicitation, or if no time was stated, within 30 days after receipt of a properly completed order, as required by the Mail Order Rule. The complaint also alleges that when respondent was not able to ship some or all of the ordered merchandise to the buyer, respondent failed to offer to the buyer an option either to consent to a delay in shipping or to cancel the order and receive a prompt

refund, as required by the Mail Order Rule. The complaint also alleges that when respondent was not able to ship ordered merchandise to the buyer, and having failed to offer the affected buyer an option either to consent to a delay in shipping or to cancel the order and receive a prompt refund, as required by the rule, respondent failed to deem the order canceled and to make a prompt refund to the buyer, as required by the Mail Order Rule.

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

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, along with the length of time consumers are required to purchase such other 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 a claim about the after-rebate price or cost of any computer, computer-related product, or Internet access service, unless it discloses, clearly and conspicuously, and in close

proximity to the after-rebate price or cost representation, the amounts of any rebates offered, and the total cost of the computer product or service, excluding any rebate amounts (i.e., the before-rebate price). Part III also contains a proviso that states that if there is only one rebate involved in the offer, and no other reductions in the total price of the product or service, respondent need only disclose the amount of that one rebate, and need not also disclose the before-rebate price.

In connection with the promotion or sale of any Internet access service, or any computer or computer-related product whose price is conditioned upon the purchase of Internet access service, Part IV of the proposed order prohibits respondent from making any representation about the price or cost to consumers of any Internet access service, 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. In addition, respondent must disclose the amount of time required for purchasers to receive any rebate. These disclosures must be clear and conspicuous.

Part IV of the proposed order also contains a proviso, that together with the definition of Athrough the use of a hyperlink,@ provides a way in which the disclosures required by Part IV can be made on the Internet with hyperlinks. These disclosures may be made through the use of hyperlinks, as long as each hyperlink label contains sufficient information about the nature and importance of the required disclosure, is itself clear and conspicuous, is on the same Web page and proximate to the Internet service price or cost representation, and leads directly to the full disclosure. According to the proviso, if a hyperlink is used to disclose information about Internet cancellation terms, it

must be labeled as follows: AEarly Cancellation of the Internet Service May Result in Substantial Penalties. Click Here.@ Similarly, if a hyperlink is used to disclose information about Internet access costs, it must be labeled: AYou May Have to Pay Significant Telephone Charges to Use the Internet Service. Click Here.@ Finally, if a hyperlink is used to disclose information about the time it takes to receive a rebate, it must be labeled: ATime to Receive Rebate. Click Here.@

Part V of the proposed order prohibits respondent from violating any provision of the Mail or Telephone Order Merchandise Rule, including the soliciting of orders for merchandise, either by mail or phone, without a reasonable basis to expect to be able to ship some or all of the merchandise within the time stated in the solicitation, or if no time is stated, within 30 days of receiving a properly completed order. Respondent must offer the buyer the option of either consenting to a delay in shipping or canceling the order and receiving a prompt refund when respondent is unable to ship within the applicable time period. Respondent must also deem the order canceled and make a prompt refund in instances where respondent failed to ship on time and failed to offer the buyer the option of either consenting to the delay or canceling the order and receiving a prompt refund.

Part VI of the proposed order requires respondent to maintain and make available to the Commission for five years, business records demonstrating compliance with the terms and conditions of Part V. Part VII of the proposed order requires respondent to compile a list of purchasers who ordered products from respondent and paid for them prior to the service date of the order, and who had not previously received a refund or consented to a delay, but did not receive ordered products more than ten days after the date respondent stated they would be shipped, or the date of the delay notice. Respondent must then cancel each such order and send a refund to each purchaser on the list for the total amount paid, including all taxes and shipping and handling

charges, if any. Respondent must furnish the list of purchasers to the Commission, indicating for each the amount and date the refund was paid.

Part VIII 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 complying with the proposed order.

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

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

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

Part XII of the proposed order is a Asunset@ provision, dictating that the order will terminate twenty years after 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

BUY.COM INC.

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

Docket C-3978; File No. 9923282
Complaint, September 5, 2000--Decision, September 5, 2000

This consent order addresses BUY.COM's advertising claims regarding the sale of a $269 Compaq Presario 5304 computer system based upon a $400 rebate that required consumers to enter into a three year contract for Internet service. The complaint alleges that BUY.COM represented that the total cost of the computer system was $269, but failed to disclose pertinent requirements and rebates necessary to purchase at the advertised price. The consent order prohibits BUY.COM 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. The order also prohibits the respondent from making a claim about the after-rebate price or cost of any computer, computer-related product, or Internet access service, unless it discloses, clearly and conspicuously, and in close proximity to the after-rebate price or cost representation, the amounts of any rebates offered, and the total cost of the computer product or service, excluding any rebate amounts. Additionally, the order prohibits Respondent from making any representation about the cost of Internet access services unless it discloses the following material facts: (1) if consumers have to pay additional fees, charges, rebate repayments, or other costs to cancel the Internet access service; (2) the amounts of such costs must be disclosed; (3) 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; (4) the amount of time required for purchasers to receive any rebate. These disclosures can be made through hyperlinks if the hyperlink clearly indicated the nature and importance of the information included.

Participants

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

For the Respondents: *Michael B. Green, Brobeck, Phleger, & Harrison.*

COMPLAINT

The Federal Trade Commission, having reason to believe that BUY.COM 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 BUY.COM Inc. is a Delaware corporation with its principal office or place of business at 85 Enterprise, Aliso Viejo, California 92656.

2. Respondent has advertised, offered for sale, sold, and distributed products to the public, including books, music and video recordings, personal electronic devices, computer software, and personal computers. BUY.COM sells these products through its Internet Web site, <www.buy.com>.

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

4. Respondent has disseminated or has caused to be disseminated advertisements for a Compaq Presario 5304 computer system, including but not necessarily limited to the attached Exhibits A through C. Exhibit A is a newspaper advertisement. Exhibit B is a subsequent newspaper and magazine advertisement. Exhibit C is a Web site advertisement. The advertisements contain the following statements:

A.

[Depiction: A Compaq Presario 5304 computer system.]

"COMPAQ PRESARIO 5304 SYSTEM

WITH REBATES, INCLUDES 15" MONITOR, SPEAKERS,
COLOR INKJET PRINTER, KEYBOARD,
MOUSE, AND FREE SHIPPING. VISIT WWW.BUY.COM
TODAY FOR REBATE DETAILS.

$269

CAN YOU FIND
THE TYPPO
IN THIS AD?"

[*An extremely fine print disclosure, in approximately 4 point type, at the very top of the ad states:*
"BUY.COM,J BUYCOMP.COM,J BUYSOFT.COM,J BUYBOOKS.COM,J BUYVIDEOS.COM,J BUYGAMES.COM,J BUYMUSIC.COM,J and BUYSURPLUS.COMJ are trademarks or servicemarks of BUY.COM Inc. Prices subject to change. Quantities limited. Requires Compuserve activation. See site for details. Buy.com reserves the right to cancel this offer at any time. 81999"]

(Exhibit A, Full page newspaper advertisement that appeared in USA Today, The Washington Post, The New York Times, The Sacramento Bee, The San Jose Mercury News, and The Wall Street Journal.)

B.

[Depiction: A Compaq Presario 5304 computer system.]

"COMPAQ PRESARIO 5304 SYSTEM

WITH REBATES, INCLUDES 15" MONITOR, SPEAKERS,
COLOR INKJET PRINTER, KEYBOARD,

MOUSE, AND FREE SHIPPING. REQUIRES 36-MONTH COMPUSERVE 2000 PREMIER INTERNET SERVICE CONTRACT AT $21.95 PER MONTH. VISIT WWW.BUY.COM TODAY FOR ALL THE REBATE DETAILS.

$269*

CAN YOU FIND
THE TYPPO
IN THIS AD?"

[*A very fine print disclosure, in approximately 5 point type, at the very top of the ad states:*
"*BUY.COM,J BUYCOMP.COM,J BUYSOFT.COM,J BUYBOOKS.COM,J BUYVIDEOS.COM,J BUYGAMES.COM,J BUYMUSIC.COM,J and BUYSURPLUS.COMJ are trademarks or servicemarks of BUY.COM Inc. Prices subject to change. Quantities limited. Complete System $869.00 - $400 CompuServe 2000 Premier Internet Mail-in Rebate - $200 Compaq Bundle Mail-in Rebate. Requires 36 months of Compuserve 2000 Internet service at $21.95 a month. Early cancellation may result in additional charges. See site for details. BUY.COM reserves the right to cancel this offer at any time. 1999"]

(Exhibit B, Full page newspaper and magazine advertisement that appeared in The Wall Street Journal and PC Week Magazine).

C.1.

"BUYCOMP.COM
The Internet Computer Superstore

COMPAQ
$269* *[Depiction: A Compaq Presario 5304*
FREE Ground Shipping! *computer system]*

* After rebates

A Complete System $269.00" *[Hyperlink to: Exhibit C.3.]*

(Exhibit C.1., The home page of respondent=s Web site, <www.buy.com>).

C.2.

"COMPAQ $269*

[Depiction: A Compaq Presario 5304 computer system]

includes: computer, monitor with speakers, and printer.

Click Here Now!
[Hyperlink to: Exhibit C.3.]

FREE Ground Shipping!
***With rebates. Requires three year subscription to CompuServe internet service.**"

(Exhibit C.2., The main page of BUYCOMP.COM, the computer section of respondent=s Web site, <www.buy.com/comp/default.asp>).

C.3.

"**COMPAQ** Savings from **BUY.COM**

[Depiction: A Compaq Presario 5304 computer system.]

System Price	$869.00
iSave Rebate	-$400.00
5304 Rebate	-$200.00
Ground Shipping	$0.00
Your Price	$269.00!

Click Here To Buy

[Hyperlink to: Purchase application]
Save a bundle...
when you combine the Compaq iSave $400 Internet rebate *[Hyperlink to: Exhibit C.4.]* with an additional $200 cash back *[Hyperlink to: Rebate form]* from Compaq.
Here's How It Works
1. Order your new Compaq system.
2. Sign up for three years of CompuServe2000 Internet service within 30 days of your purchase).
3. Fill out both the iSave $400 Internet rebate form *[Hyperlink to: Exhibit C.4.]* and the $200 cash back form *[Hyperlink to: Rebate form]* and mail to Compaq. See full details on rebate forms.

Here's What You Get. . ."

(Exhibit C.3., Page of respondent=s Web site devoted to Compaq Presario 5304 computer system package offer, <www.buy.com/comp/stores/compaq/600_promo.asp>)

C.4.

"**$400 Rebate** (Mail-in Rebate) on the purchase of any Compaq Presario desktop PC and Compaq Monitor or Compaq Presario notebook PC, 7/25-10/9/99. Sign up for 3 years of Compuserve 2000 Premier Internet Service for $21.95 a month. Mail-in-rebate must be postmarked by 11/30/99.

To redeem this rebate offer, simply:

1. **Purchase** an eligible Compaq product
2. **Sign** up for CompuServe 2000 service using your Compaq/CompuServe CD rebate kit
(CD kits are available from your local authorized reseller)
3. **Fill** in the form, then print it out; or **print** out the blank form, and fill it in by hand
4. **Mail** it to the address below with proof of purchase"

[*A fine print disclosure at the very bottom of this web page states:*
"**Terms and Conditions**
$400 Mail-In Rebate requires (1) purchase of any eligible Compaq Presario desktop & monitor or notebook computer, (2) contract commitment to a 3 year (36 months) subscription for CompuServe 2000 Internet Service at the monthly rate of $21.95 or full prepayment of $790.20 at the time of registration, (3) a completed mail-in rebate form, and (4) a dated purchase receipt with a copy of your receipt and UPC Code. All of the above must be completed and received by CompuServe within 30 days of purchase. Offer subject to your acceptance of CompuServe Terms of Service. If prepayment is not chosen, membership termination prior to 36 months requires pro-rated repayment of the rebate plus a $50 cancellation fee, based on the following repayment schedule: Months 1-12/$400, Months 13-24/$300.00, and Months 25-36/$200.00. Within 60 days of rebate approval, the rebate will be credited to your designated credit card or fulfilled by check sent to the name and address provided on the mail-in rebate form. Offer valid in the U.S. only for purchases through 10/9/99. You must be 18 years or older. Limit one per household. A major credit card is required. Premium CompuServe services carry surcharges, and communications surcharges may apply to AK and outside of the U.S. You may incur telephone charges, depending on your calling plan and location. Availability Access to CompuServe may be limited, especially during peak times."]

(Exhibit C.4., Page of respondent=s Web site containing the application form for the iSave $400 Internet rebate, <www.buy.com/comp/stores/compaq/400_rebate_form.asp>. Consumers could purchase the Compaq Presario 5304 computer system without viewing this page.).

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 5304 computer system is $269.

6. In truth and in fact, the total cost of a Compaq Presario 5304 computer system is not $269. In order to obtain the Compaq Presario 5304 computer system for $269, consumers are required to subscribe to CompuServe 2000 Internet service for 36 months at an additional cost of $21.95 per month or a full pre-payment of $790.20. Therefore, the representation set forth in Paragraph 5 was, and is, false or misleading.

7. In its advertisements, including but not limited to Exhibits A through C, for the Compaq Presario 5304 computer system respondent has represented that the total cost of the Compaq Presario 5304 computer system is $269 after rebates. In these advertisements, respondent has failed to disclose or failed to disclose adequately:

(a) with respect to Exhibits A and C, that in order to obtain the Compaq Presario 5304 computer system for $269, consumers are required to subscribe to CompuServe 2000 Internet service for 36 months at an additional cost of $21.95 per month or a full pre-payment of $790.20;

(b) with respect to Exhibits A and B, the amounts of the rebates, $200 and $400, and the total price of the computer system before rebates, $869;

(c) that consumers who cancel the Internet service within 3 years must repay all or a portion of the $400 rebate and pay a $50 cancellation fee; and

(d) that 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 telephone charges or surcharges of $6.00 per hour to access its Internet service.

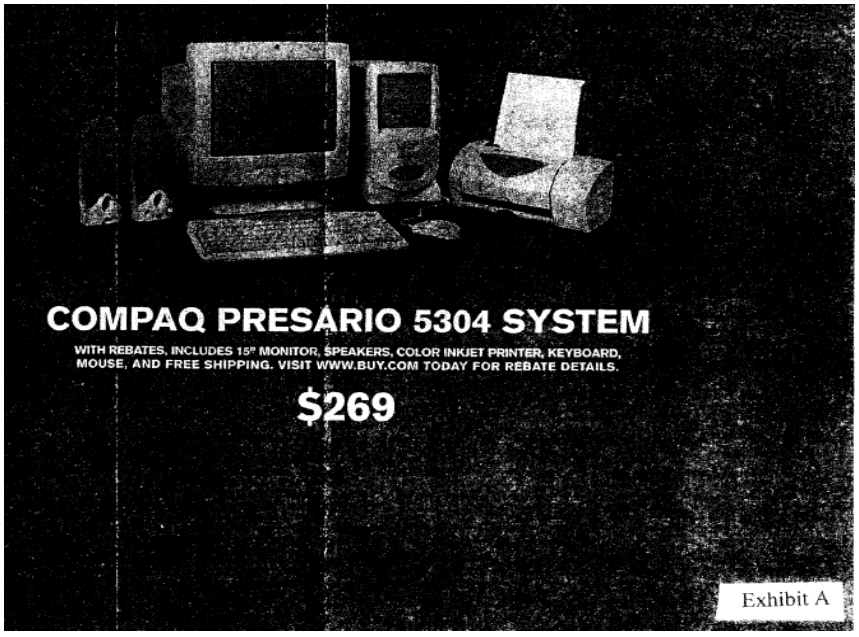
These facts would be material to consumers in their purchase or use of the product. The failure to disclose these facts, in light of the representation made, was, and is, a deceptive practice.

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

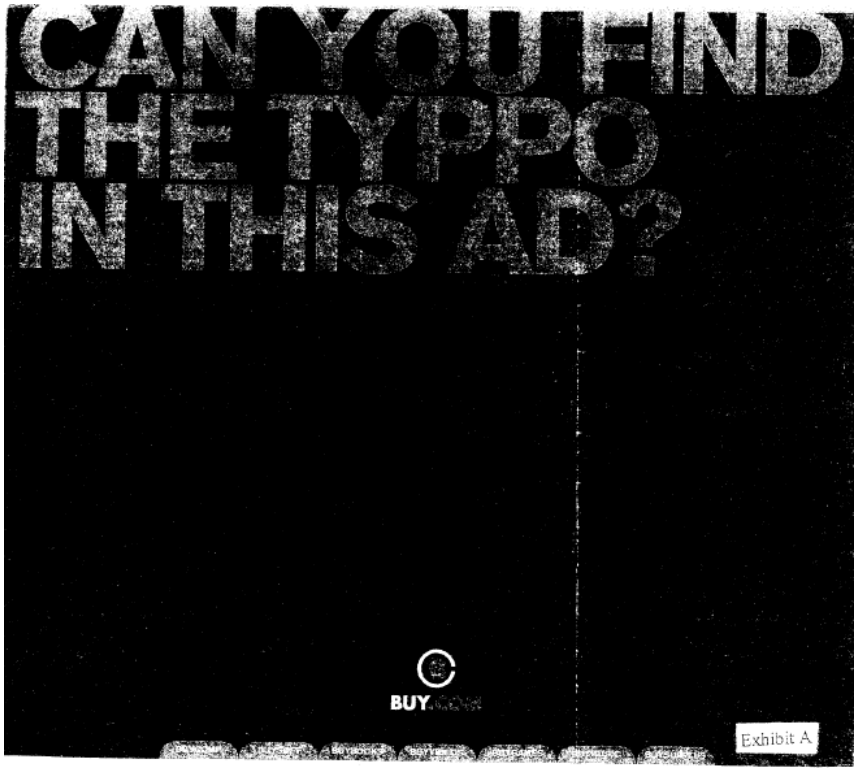
THEREFORE, the Federal Trade Commission this fifth day of September, 2000, has issued this complaint against respondent.

By the Commission.

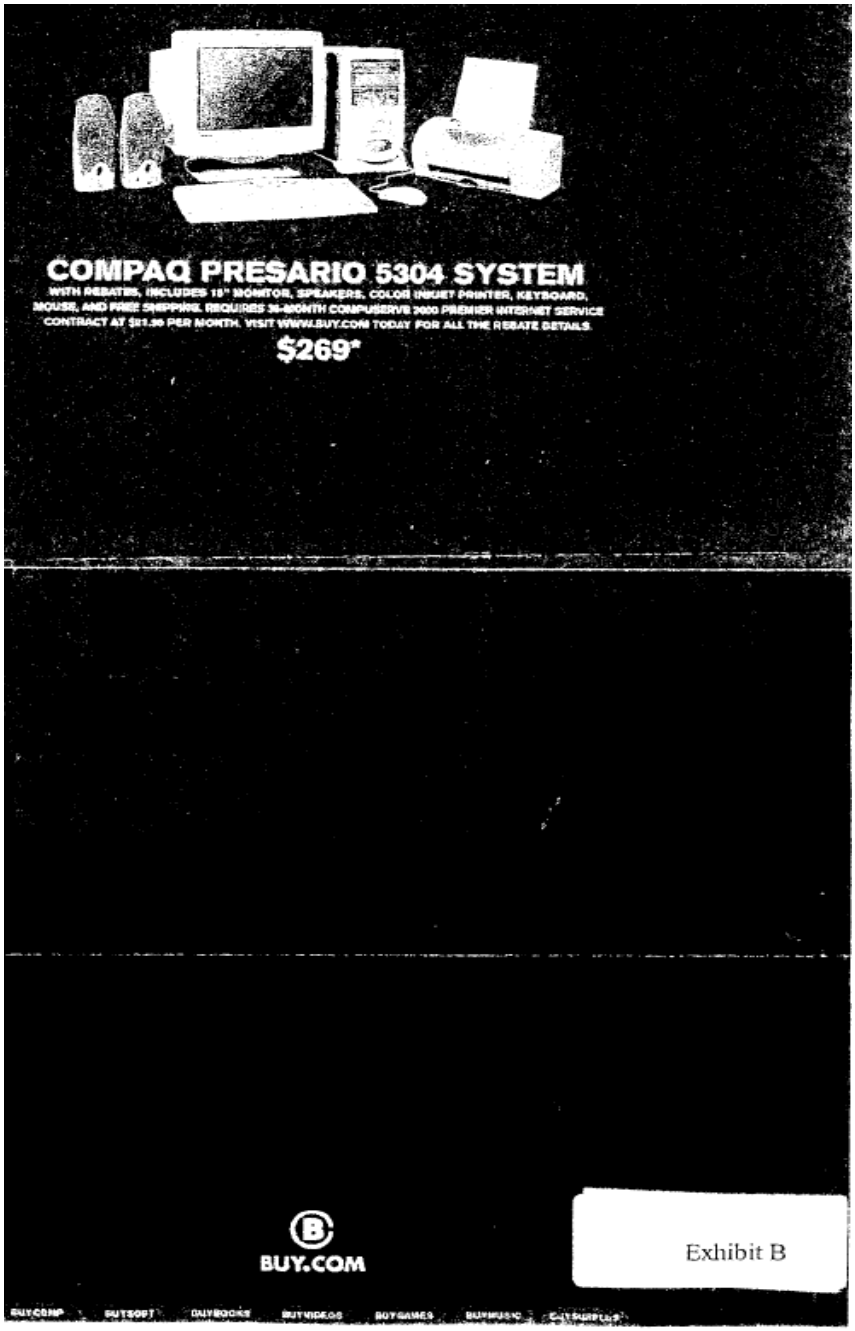
Complaint Exhibits



Complaint Exhibits



Complaint Exhibits



Complaint Exhibits

Exhibit C.1

Complaint Exhibits

Exhibit C.2

Complaint Exhibits

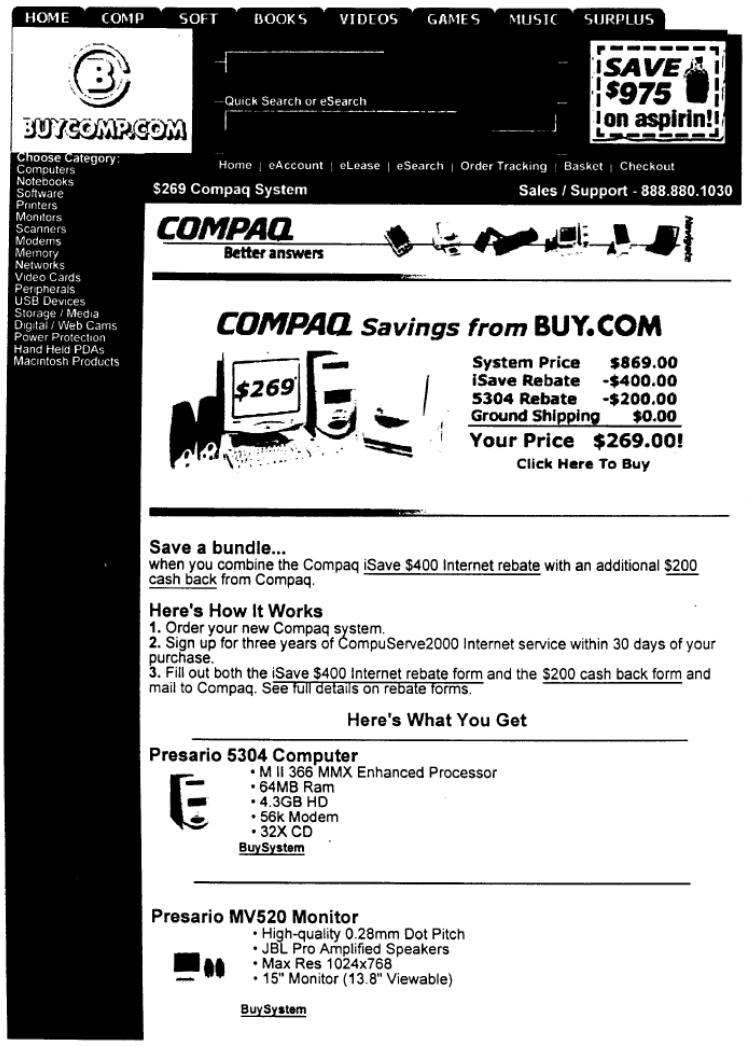


Exhibit C.3

Complaint Exhibits

BUYCOMP.COM - The Internet Computer Superstore http://www.buy.com/comp/stores/compaq/600_promo.asp

[redacted]

Compaq IJ300 Inkjet Printer

- Up to 1200 x 1200 dots per inch
- Up to 4 pages per minute black
- Up to 2.5 pages per minute color
- Input tray holds up to 100 sheets
- Output tray holds up to 25 sheets

BuySystem

Customer Service | FAQs | Site Guide | Company Info | Advertising | Terms | Help

Exhibit C.3

$400 Rebate (Mail-in Rebate) on the purchase of any Compaq Presario desktop PC and Compaq Monitor or Compaq Presario notebook PC, 7/25 - 10/9/99. Sign up for 3 years of Compuserve 2000 Premier Internet service for $21.95 a month. Mail-in rebate must be postmarked by 11/30/99.

To redeem this rebate offer, simply:

1. **Purchase** an eligible Compaq product
2. **Sign up** for CompuServe 2000 service using your Compaq/CompuServe CD rebate kit **(CD kits are available from your local authorized reseller)**
3. **Fill in the form, then print it out; or print out the blank form, and fill it in by hand**
4. **Mail** it to the address below with proof of purchase

Compaq / CompuServe "iSAVE" Rebate Offer
PO Box 430800
El Paso, TX 88543-0800

$400 Mail-in Rebate Form

1. Credit Information:

Credit Card # ☐☐☐☐☐☐☐☐☐☐☐☐☐☐☐☐

Expiration Date: ☐☐ / ☐☐ / ☐☐

(Check One)

☐ MasterCard ☐ American Express ☐ Visa ☐ Discover

Bank name (MasterCard/Visa only): ☐☐☐☐☐☐☐☐☐☐☐☐☐☐☐☐

2. Compaq Presario PC Information:

Retailer where you purchased your computer: ☐☐☐☐☐☐☐☐☐☐☐☐☐☐☐☐

PC Serial Number: ☐☐☐☐☐☐☐☐☐☐☐☐

PC Model # ☐☐☐☐☐☐☐☐☐☐☐☐☐☐☐☐

Monitor Serial Number (if applicable): ☐☐☐☐☐☐☐☐☐☐☐☐

Monitor Model # ☐☐☐☐☐☐☐☐☐☐☐☐☐☐☐☐

3. UPC Barcode Information:

Provide the UPC barcode number from the outside of your computer: ☐☐☐☐☐☐☐☐☐☐☐☐☐☐☐☐

4. CompuServe 2000 Enrollment:

Subscription program you wish to commit to (please check one) :

☐ $400.00 mail-in- rebate. 3-year Commitment to CS2000 at $21.95 per month.

OR

☐ $400.00 Mail-In-Rebate. Prepayment of $790.20 for 3 Year Membership of CompuServe 2000 (36 months @21.95 per month)

Exhibit C.4

Complaint Exhibits

5. CompuServe 2000 Screen Name:

Please complete the following section AFTER setting up your new Compaq Presario computer and establishing your CompuServe 2000 account:

CompuServe 2000 Screen Name: ☐

(your Screen Name will also be your e-mail address, for example: if your screen name is "bjones", then your e-mail address is "bjones@cs.com".)

6. Other:

(optional) Do you plan to cancel your existing Internet service to replace with CompuServe?

☐ Yes ☐ No

If yes to above, which Internet service will you replace? ☐

☐ I don't have an existing Internet service subscription.

I agree to allow CompuServe to charge my credit card based on the rebate plan chosen above. I also agree to abide by the terms and conditions of the CompuServe subscription agreement.

PC and monitor do not have to be purchased at the same time. The rebate must be postmarked by 11/30/99 and received by 12/8/99.

Name ☐

Address ☐

City ☐ ST (US ONLY) AL

ZIP ☐

Phone ☐

E-mail Address ☐

Terms and Conditions

$400 Mail-In Rebate requires (1) purchase of any eligible Compaq Presario desktop & monitor or notebook computer (2) contract commitment to a 3 year (36 months) subscription for CompuServe 2000 Internet Service at the monthly rate of $21.95 or full prepayment of $790.20 at the time of registration, (3) a completed mail-in rebate form, and (4) a dated purchase receipt with a copy of your receipt and UPC code. All of the above must be completed and received by CompuServe within 30 days of purchase. Offer subject to your acceptance of CompuServe Terms of Service. If prepayment is not chosen, membership termination prior to 36 months requires pro-rated repayment of the rebate plus a $50 cancellation fee, based on the following repayment schedule: Months 1-12/$400, Months 13-24/$300.00, and Months 25-36/$200.00. Within 60 days of rebate approval, the rebate will be credited to your designated credit card or fulfilled by check sent to the name and address provided on the mail-in rebate form. Offer valid in the U.S. only for purchases through 10/9/99. You must be 18 years or older. Limit one per household. A major credit card is required. Premium CompuServe services carry surcharges, and communications surcharges may apply to AK and outside of the U.S. You may incur telephone charges, depending on your calling plan and location. Availability Access to CompuServe may be limited, especially during peak times.

Exhibit C.4

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 BUY.COM Inc. is a Delaware corporation with its principal office or place of business at 85 Enterprise, Aliso Viejo, California 92656.

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. ARebate@ 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, Arespondent@ shall mean BUY.COM Inc., a corporation, its successors and assigns and its officers, agents, representatives, and employees.

3. AClearly and conspicuously@ shall mean as follows:

A. In an advertisement communicated through an electronic medium (such as television, video, radio, and interactive media such as the Internet and online services), the disclosure shall be presented simultaneously in both the audio and visual portions of the advertisement. *Provided, however*, that in any advertisement presented solely through visual or audio means, the disclosure may be made through the same means in which the ad is presented. The audio disclosure shall be delivered in a volume and cadence sufficient for an ordinary consumer to hear and comprehend it. The visual disclosure shall be of a size and shade, and shall appear on the screen for a duration, sufficient for an ordinary consumer to read and comprehend it.

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

C. On a product label, the disclosure shall be in a type size and location on the principal display panel sufficiently 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 software, the Internet or online services:

(i) Ain 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;

(ii) a disclosure made Athrough the use of a hyperlink@ shall mean a hyperlink that is itself clear and conspicuous, is clearly identified as a hyperlink, is labeled to convey the nature and relevance of the information it leads to, is on the same Web page, online service page, or other electronic page and proximate to the triggering representation, and takes the consumer directly to the disclosure on the click-through electronic page or other display window or panel.

5. ACommerce@ 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, the price or cost to consumers of 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 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 after-rebate cost of such product or service, unless it discloses, clearly and conspicuously, and in close proximity to the representation, the amounts of any and all rebates offered and the total price or cost to consumers of the product or service, excluding any and all rebate amounts (i.e., the before-rebate price).

Provided, however, if (1) the offer involves only one rebate and no other reductions in the total price of such product or service, and (2) respondent discloses the amount of that rebate as prescribed above, then respondent need not disclose the before-rebate price or cost of such product or service.

IV.

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:

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 IV.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.

Provided that in the case of advertisements disseminated through an interactive electronic medium, such as software, the Internet or other online services, respondent may make the disclosures required by this Part through the use of a hyperlink. In addition,

1. for Part IV.A, above, any such hyperlink must be labeled: AEarly Cancellation of the Internet Service Will Result in Substantial Penalties. Click Here.@;

2. for Part IV.B, above, any such hyperlink must be labeled: AYou May Have to Pay Significant Telephone Charges to Use the Internet Service. Click Here.@

V.

IT IS FURTHER ORDERED that respondent BUY.COM 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;

Provided however, that in the case of advertisements and promotional materials disseminated by means of an interactive electronic medium, respondent and its successors and assigns may comply with this provision by maintaining and making available all advertisements and promotional materials for computer or computer-related products or services for which the price, cost or any rebate is conditioned upon the purchase of Internet access service; but, multiple versions of advertisements and promotional materials need not be maintained or submitted, if they differ only in terms of the prices of the products or services being offered;

B. All materials that were relied upon in complying with this Order; and

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

VI.

IT IS FURTHER ORDERED that respondent BUY.COM 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.

VII.

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

VIII.

IT IS FURTHER ORDERED that respondent BUY.COM 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.

IX.

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 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 BUY.COM 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.

Analysis to Aid Public Comment

Respondent advertises, sells, and distributes books, music and video recordings, personal electronic devices, computer software, personal computers and other products though its Internet Website, www.buy.com. This matter concerns allegedly false and deceptive advertising claims regarding the sale of a $269 Compaq Presario 5304 computer system based upon a $400 rebate that required consumers to enter into a three year contract for Internet service.

The Commission=s proposed complaint alleges that respondent falsely claimed that the total cost of a Compaq Presario 5304 computer system was $269. In fact, in order to obtain the computer system for $269, consumers were required to subscribe to CompuServe 2000 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 $269, respondent failed to disclose or failed to disclose adequately: (a) that consumers were required to subscribe to CompuServe 2000 Internet service for three years at an additional cost of $21.95 per month or a total cost of $790.20; (b) the amounts of the rebates, $200 and $400, and the total price of the computer system before rebates, $869; (c) that consumers who cancel the Internet service within three years must repay all or a portion of the $400 rebate and pay a $50 cancellation fee; and (d) that 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 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.

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 a claim about the after-rebate price or cost of any computer, computer-related product, or Internet access service, unless it discloses, clearly and conspicuously, and in close proximity to the after-rebate price or cost representation, the amounts of any rebates offered, and the total cost of the computer product or service, excluding any rebate amounts (i.e., the before-rebate price). Part III also contains a proviso that states that if there is only one rebate involved in the offer, and no other reductions in the total price of the product or service, respondent need only disclose the amount of that one rebate, and need not also disclose the before-rebate price.

Part IV 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 also contains a proviso, that together with the definition of Athrough the use of a hyperlink,@ provides a way in which the disclosures required by Part IV can be made on the Internet with hyperlinks. These disclosures may be made through the use of hyperlinks, as long as each hyperlink label contains sufficient information about the nature and importance of the required disclosure, is, itself, clear and conspicuous, is on the same Web page and proximate to the Internet service price or cost representation, and leads directly to the full disclosure. According to the proviso, if a hyperlink is used to disclose information about Internet cancellation terms, it must be labeled as follows: AEarly Cancellation of the Internet Service Will Result in Substantial Penalties. Click Here.@ Similarly, if a hyperlink is used to disclose information about Internet access costs, it must be labeled: AYou May Have to Pay Significant Telephone Charges to Use the Internet Service. Click Here.@

Part V 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 complying with the proposed order.

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

Analysis to Aid Public Comment

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

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

Part IX of the proposed order is a Asunset@ 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

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@ *e*machines 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@ *e*machines 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.*

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

1799^{97} Computer, Monitor & Printer
- 400^{00} Internet Mail-In RebateHH
- 200^{00} Price Reduction
- 150^{00} Package Mail-in Rebates*
1049^{97} 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 SubscriptionHH)

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

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 pre-payment 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 pre-payment 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

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@ *e*machines 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 *e*machines Computer After Rebates
When You Sign Up For 3 Years of Prodigy Internet Service*

*e*machines Save $450^00 17" Monitor
$449^99 Computer Only Upgrade for
*e*TOWER 366i2 WITH INTEL7 -$400^00 Prodigy Internet
Rebate* Only $60 More
CELERONJ PROCESSOR 366MHz- $50^00 eTower Mail-in
Rebate
FREE Your Final Price
After Rebates
eView 15" Monitor 812-866.....139.99
[Depiction: An *e*machines 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

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@ *e*machines computer includes a monitor at no additional cost.

10. In truth and in fact, the Afree@ *e*machines 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.

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@ *e*machines computer at no cost, after rebates.

12. In truth and in fact, consumers cannot obtain the Afree@ *e*machines computer at no cost, after rebates. In order to obtain the Afree@ *e*machines 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@ *e*machines 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@ *e*machines 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.

By the Commission.

Complaint Exhibits

EXHIBIT A

Complaint Exhibits

EXHIBIT B

DECISION AND ORDER

The Federal Trade Commission having initiated an investigation of certain acts and practices of the respondent named in the caption hereof, and the respondent having been furnished thereafter with a copy of a draft 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.

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.

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, Ain 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

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:

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

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.

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 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@ *e*machines 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

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@ *e*machines 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@ *e*machines 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@ *e*machines 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.

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.

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 Asunset@ 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

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.

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. **AIs 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*@.

Tried Pain Relief Creams With Little Results?

Don Huffer, a man from Florida, said: ANone 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. AI 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 it=s 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

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**

chondroitin sulfate. This new technology makes the ingredients more effective in relieving pain.

(Exhibit D--Magazine ad newspaper ad carried by Newsweek, Prevention)

G. A**Why 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.

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

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

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***.

JointFlex
MORE PAIN RELIEF

000019

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 Exhibit B

Is Pain Spoiling Your Fun in Life? Do What These People Did!

0000

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 are once again enjoying the activities they love so much.

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

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*".

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 nutrients, ***GLUCOSAMINE & CHONDROITIN SULFATE.***

A Revolutionary New Product to help Stop Pain

JointFlex combines the nutrients, glucosamine and chondroitin sulfate, with it's 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!

Effective at Relieving Pain for People of any Age!

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

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

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.

Do Your Favorite Activity Without Pain!

Cathrine Lambert played two rounds (18 holes) of golf every week until the osteo arthritis in her knees hurt so badly, she had to stop. "I started using JointFlex and the swelling went down and 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!"

Try JointFlex today and you'll have your own success story!

Save $2.00

On One 4oz. size tube

MANUFACTURER COUPON | EXPIRES 2/29/00

NEW JointFlex Pain Relieving Cream

Use *JointFlex*. Lose The Pain

GUARANTEED!

LIMIT ONE COUPON PER PURCHASE

Consumer pays any sales tax. Void if taxed, prohibited or restricted by law. Any other use constitutes fraud. Cash value .001¢. Customer is responsible for any taxes on the face value of this coupon plus its handling provided it is redeemed by a consumer at the time of purchase on the specified brand. Mail to CMS5800808, 1 Fawcett Dr. Del Rio Texas, 33333 Cash value .001¢

5 48668 11004 6 48668 11004 5

12345678901

Complaint Exhibits

Eden Laboratories | Purchase Center

Complaint Exhibit C

www.jointflex.com

Is Pain Spoiling Your Fun in Life? Do What These People Did!

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 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!"

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 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 Weitz, 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 -

*Arthritis Pain
*Simple Backache
*Muscle Sprains
*Tendonitis

*Neck Pain
*Shoulder Pain
*Knee Pain
*Cramps
*Muscle Strains
*Bruises

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 tired 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 Labor-atories and we will instantly mail you a full product refund.

Call, 1-888-464-3336 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 AmX.

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

Complaint Exhibits

Complaint Exhibit D

ahhh!

...More Pain Relief! GUARANTEED!

000015

Nutrient Enriched with Glucosamine & Chondroitin Sulfate

Don't Let Pain Spoil Your Fun In Life.

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.

If you have tried other pain relieving creams without results, you should try **JointFlex.** After all, with its' money back guarantee, you have nothing to lose but the pain. **JointFlex**, with its revolutionary **Fusome Delivery System**, has a pleasant, nonmedical odor, is non-greasy, non-burning and can be applied directly to painful areas for astounding results ...fast!

Your pain will reduce... or your MONEY BACK! No Questions Asked.

Get Rid Of Your Pain... NOW!

1-800-340-5603 Ext. 1008

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.

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.

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.

000033

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

[illegible] 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.

0004 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

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.

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. ACompetent 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.

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.

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).

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., it 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.

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.

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

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

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, 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. 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

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

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 sunsetting 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,

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.

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@).

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 Lee=s 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 AHHI@) 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.

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.

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

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

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.

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.

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.

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.

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

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.

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

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,

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.

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, Lee=s 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.

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;

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:

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:

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

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;

D. Maintain the books and records of each Asset To Be Divested;

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.

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.

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,

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

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 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 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 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.

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,

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,

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

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

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

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

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 it's 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 Lewkonia, 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

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,

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 Prodica, 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

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

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

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.

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.

Violations Charged

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.

DECISION AND ORDER

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

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 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.

Decision and Order

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.

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,

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

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;

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.

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 Prodica 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. AAcquisition@ 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 Prodica 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.

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.

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

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

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.

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

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*,

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

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.

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

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

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.

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.

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 Prodica 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 AHHI@) 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

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

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

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.

Complaint

IN THE MATTER OF

WEIDER NUTRITION INTERNATIONAL, INC.

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

Docket C-3983; File No. 9823035
Complaint, November 15, 2000--Decision, November 15, 2000

This consent order addresses Weider Nutrition's advertisements claiming that PhenCal and PhenCal 106 have been proven to cause weight loss and to prevent the regaining of lost weight. The complaint alleges that the Respondent could not substantiate its claims regarding PhenCal and PhenCal 106. The consent order requires Weider Nutrition to pay $400,000.00 in consumer redress and to have competent and reliable scientific substantiation for any future claims that PhenCal and PhenCal 106: (1) cause significant weight loss; (2) significantly increase a person=s ability to maintain a reduced caloric diet and exercise program; (3) significantly reduce food cravings and eating binges; (4) prevent the regaining of lost weight; (5) are as effective as the prescription weight loss treatment commonly known as "Phen-Fen"; (6) are safe when used to promote or maintain weight loss; (7) the safety of such product or program; (8) the effect of such a product on a condition or disease; (9) the comparative affect or their product to any other product. In addition, the consent order prohibits the respondent from misrepresenting the existence, contents, validity, results, conclusions, or interpretations of any test or study. 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: *Lemuel W. Dowdy, Laura D. Koss, Joni Lupovitz, Richard Cleland, Elaine D. Kolish,* and *BE.*

For the Respondents: *Claude C. Wild III, Patton Boggs.*

COMPLAINT

The Federal Trade Commission, having reason to believe that Weider Nutrition International, Inc. ("respondent"), has violated the provisions of the Federal Trade Commission Act, and it appearing to the Commission that this proceeding is in the public interest, alleges:

1. Respondent Weider Nutrition International, Inc. is a Delaware corporation with its principal office or place of business at 2002 South 5070 West, Salt Lake City, Utah 84104.

2. Respondent has manufactured, advertised, labeled, offered for sale, sold, and distributed products to the public, including PhenCal and PhenCal 106, both of which contain DL-Phenylalanine, L-Tyrosine, L-Glutamine, L-5-Hydroxytryptophan, L-Carnitine, Chromium Picolinate, and Vitamin B6. PhenCal and PhenCal 106 are "foods" and/or "drugs," within the meaning of Sections 12 and 15 of the Federal Trade Commission Act. Advertisements for PhenCal 106 and PhenCal have appeared in numerous publications, including but not limited to, USA Today, the Washington Post, and the New York Times newspapers.

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

4. Respondent has disseminated or has caused to be disseminated advertisements and promotional materials for PhenCal and PhenCal 106, including but not necessarily limited to the attached Exhibits A through C. These advertisements and promotional materials contain the following statements:

A. A newspaper advertisement (Exhibit A):

> **Proven: Effective As Prescription Treatments** In a 90 day clinical trial, overweight subjects using PhenCal 106 and on a controlled diet and exercise regimen lost an average of 27 pounds. These results are comparable to results of similar studies performed on prescription weight loss treatments.

Proven: To Decrease Food Cravings In a separate study, PhenCal 106 patients on a low calorie diet and exercise regimen reduced the average number of binges by 73%. . . .

Proven: Safe Without a Prescription PhenCal 106 was shown to work effectively and without any significant side effects during a two-year open controlled study.

B. A brochure mailed to consumers who request information about PhenCal 106 (Exhibit B):

In a 90-day trial, participants using PhenCal 106 reduced carbohydrate binging and craving and lost an average of 27 pounds. When compared to similar studies of prescription treatments (Phen-Fen) PhenCal 106 was shown to be as effective.

In addition, a two-year clinical study showed that the PhenCal 106 user was 292% less likely to regain the lost weight than someone who had not used PhenCal 106. In fact, PhenCal 106 has been proven to help prevent weight regain after 2 years of use.

C. A newspaper advertisement (Exhibit C):

Proven Safe Without a Prescription Unlike diet pills or prescription drug treatments, PHENCAL does not contain any stimulants or diuretics. It is not designed for you to skip meals or >burn fat=. Instead, it allows you to maintain a healthy diet and exercise regimen by warding off cravings and impulses to binge.*

Proven to Decrease Food Cravings Feelings of hunger are controlled by regulating the neurotransmitters in the brain. If there is an imbalance of these brain chemicals, cravings and feelings of distress can occur. PHENCAL actually helps normalize the amount of these chemicals

and helps you resist the urge to splurge and regain, or yo-yo back and forth.*

Proven Safe & Effective in Clinical Trials In a human trial, PHENCAL promoted weight loss at levels comparable to those shown in other clinical trials for prescription drug treatments for weight loss. PHENCAL subjects had reduced carbohydrate binging and craving and lost an average of 27 pounds in 90 days.*

Fine print disclosure at bottom of page: "*These statements have not been evaluated by the Food and Drug Administration. This product is not intended to diagnose, treat or prevent any disease."

5. Through the means described in Paragraph 4, respondents have represented, expressly or by implication, that PhenCal 106 and PhenCal:

A. Cause significant weight loss.

B. Significantly increase a person=s ability to maintain a reduced calorie diet and exercise regimen.

C. Significantly reduce food cravings and eating binges.

D. Prevent the regaining of lost weight.

E. Are as effective as the prescription weight loss treatment commonly known as "Phen-Fen."

F. Are safe when used to promote or maintain weight loss.

6. Through the means described in Paragraph 4, respondent has represented, expressly or by implication, that it possessed and relied upon a reasonable basis that substantiated the

representations set forth in Paragraph 5, at the time the representations were made.

7. In truth and in fact, respondent did not possess and rely upon a reasonable basis that substantiated the representations set forth in Paragraph 5, at the time the representations were made. Therefore, the representation set forth in Paragraph 6 was, and is, false or misleading.

8. Through the means described in Paragraph 4, respondent has represented, expressly or by implication, that clinical studies prove that PhenCal 106 and PhenCal:

A. Cause significant weight loss.

B. Prevent the regaining of lost weight.

C. Reduce food cravings and eating binges.

D. Are as effective as the prescription weight loss treatment commonly known as "Phen-Fen."

E. Are safe.

9. In truth and in fact, the clinical studies referred to in respondent=s advertisements do not prove that PhenCal 106 and PhenCal:

A. Cause significant weight loss.

B. Prevent the regaining of lost weight.

C. Reduce food cravings and eating binges.

D. Are as effective as the prescription weight loss treatment commonly known as "Phen-Fen."

E. Are safe.

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

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

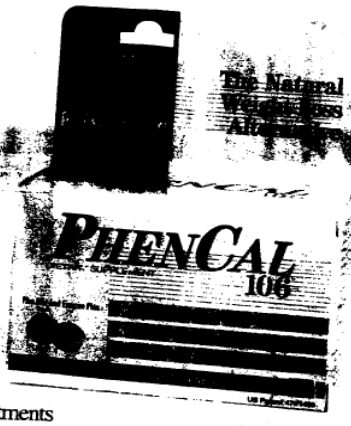
THEREFORE, the Federal Trade Commission this fifteenth day of November, 2000, has issued this complaint against respondent.

By the Commission.

Complaint Exhibits

EXHIBIT A

YOU NO LONGER NEED TO CHOOSE BETWEEN THE DANGERS OF BEING OVERWEIGHT AND THE DANGERS OF DIET DRUGS



The Natural Weight Loss Alternative

Regulation of neurotransmitters in the brain helps control feelings of hunger. PhenCal 106™ naturally helps normalize the levels of neurotransmitters in your brain and helps you resist the urge to overeat.

Proven: Effective As Prescription Treatments

In a 90 day clinical trial, overweight subjects using PhenCal 106™ and on a controlled diet and exercise regimen lost an average of 27 pounds. These results are comparable to results of similar studies performed on prescription weight loss treatments.

Proven: To Decrease Food Cravings

In a separate study PhenCal 106™ patients on a low calorie diet and exercise regimen reduced the average number of binges by 73%.

The amino acids in PhenCal 106™ are precursors to the brain chemicals responsible for your appetite. In other words, PhenCal 106™ naturally helps normalize your desire for food, instead of synthetically suppressing it.

Proven: Safe Without A Prescription

PhenCal 106™ was shown to work effectively and without any significant side effects during a two-year open controlled study.

Unlike prescription treatments, PhenCal 106™ contains all-natural ingredients and does not contain any stimulants. This patented formula of amino acids, minerals and other nutrients promotes balanced levels of neurochemicals so that healthy eating patterns can be established.

PhenCal 106™ is not designed for you to skip meals or "burn" fat. Instead, it helps you to maintain a healthy diet and exercise regimen by warding off cravings and impulses to binge.

Why risk the potential side effects associated with prescription treatments when PhenCal 106™ can produce comparable weight loss results? Depend on the all-natural alternative to prescription treatments - PhenCal 106™.

As any weight loss product, it will only work when used in conjunction with an overall diet modification and exercise program. Offered with every bottle of PhenCal 106™ is a free diet and exercise plan.

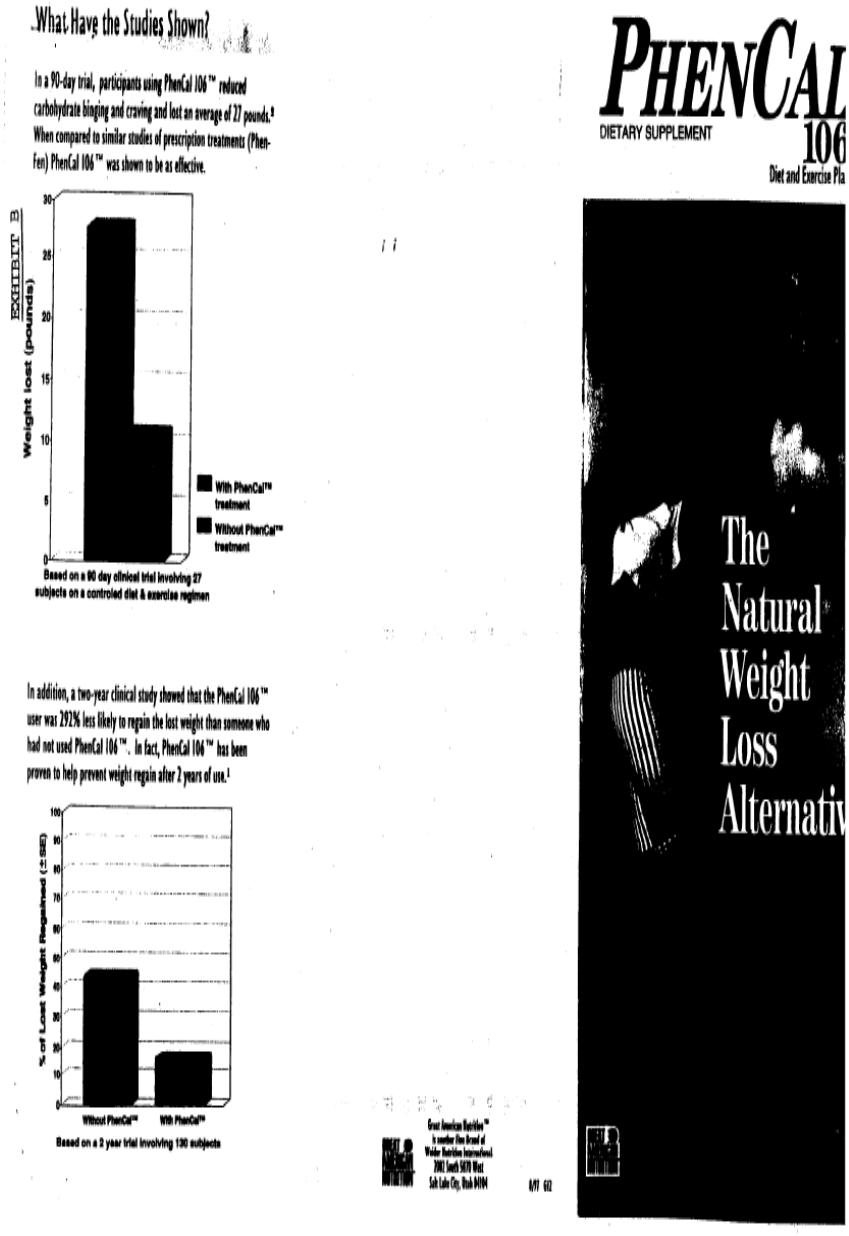
These statements have not been evaluated by the Food and Drug Administration. This product is not intended to diagnose, treat, cure, or prevent any disease.

Need more proof? For free information or questions, call 1-888-PHENCAL

Exclusively from Weider Nutrition. U.S. Patent #4,761,429 & 5,189,064 & Patents Pending.

PHARMOR · Duane Reade · GENOVESE · Drug Emporium · Fred Meyer · Osco Drug · Sav-On · Payless · GREAT

Complaint Exhibits



Complaint Exhibits

PHENCAL 106

DIETARY SUPPLEMENT

Diet and Exercise Plan

What Is PhenCal 106™?

PhenCal 106™ is a patented weight-loss dietary supplement containing amino acids and other nutrients that help regulate chemicals in the brain. These chemicals, called neurotransmitters, play a critical roll in appetite. When neurotransmitters are out of balance, cravings and feelings of distress can occur.

PhenCal 106™ helps balance levels of neurotransmitters, which are then utilized by the brain when needed. They normalize the body's "reward system," promoting feelings of satisfaction.

How Does PhenCal 106™ Work?

PhenCal 106™ contains the amino acids DL-Phenylalanine, L-5 Hydroxytryptophan, and others which are precursors to the neurotransmitters responsible for appetite.

Not enough of one chemical or too much of another has a profound effect on feelings of hunger and how much we eat. PhenCal 106™ actually helps normalize the levels of neurotransmitters and helps you resist the urge to overeat.

PhenCal 106™ enhances weight loss from diet and exercise by warding off cravings and impulses to binge, particularly carbohydrates. Studies show that it works as effectively as prescription weight-loss treatments without the side effects.

What Are The Risks Of PhenCal 106™?

The studies have not shown any significant side effects! A two-year, controlled study showed PhenCal 106™ to be effective and free of any significant side effects.[1]

Even after two years of human clinical studies, PhenCal 106™ has never produced a single major side effect, no heart disease, no hypertension, not even fatigue. Additionally, because it contains no stimulants or diuretics, it doesn't produce the dry mouth, diarrhea, frequent urination, or feelings of anxiety often associated with "diet pills".

In contrast, Phen-Fen consists of Phentermine (a weak amphetamine) and Fenfluramine. The combination of these drugs, some doctors and scientists believe, is responsible for primary pulmonary hypertension, valvular heart disease, and long term changes in brain cells.

Who Can Benefit From PhenCal 106™?

PhenCal 106™ can benefit anyone on a weight loss program consisting of proper diet and exercise. PhenCal 106™ is designed to help normalize, rather than suppress, the appetite so that healthy eating habits may be established. PhenCal 106™ is not designed to help skip meals or "burn" fat. Like any weight-loss product, it will only work with an overall diet modification and exercise plan, as is included with PhenCal 106™.

Who Should Not Use PhenCal 106™?

Do not use PhenCal 106™ if you are phenylketonuric or taking Monoamine Oxidase Inhibitor (MAOI) drugs. PhenCal 106™ is not intended for pregnant or lactating women. People with diabetes or hypoglycemia should use PhenCal 106™ only under the direction of a physician.

How Does PhenCal 106™ Compare to Prescription Treatments?

	PHENCAL 106™	PHEN-FEN
• Contains Stimulants	NO	YES
• Life-threatening side effects	NO	YES
• Reduces craving & binging	YES	UNKNOWN
• Normalizes "reward system"	YES	UNKNOWN
• Prevents weight regain after 2 years	YES	UNKNOWN
• Enhances weight loss*	YES	YES
• Supported by human clinical trials	YES	YES

* when used with a diet & exercise program

Where Can I Get PhenCal 106™?

PhenCal 106™ is a patented formula exclusively distributed by Great American Nutrition.

It is sold in fine drug, grocery, and health food stores throughout the U.S.

Where Can I Get More Information?

For more information or questions call 1-888-PHENCAL

These statements have not been evaluated by the Food and Drug Administration. This product is not intended to diagnose, treat, cure, or prevent any disease.

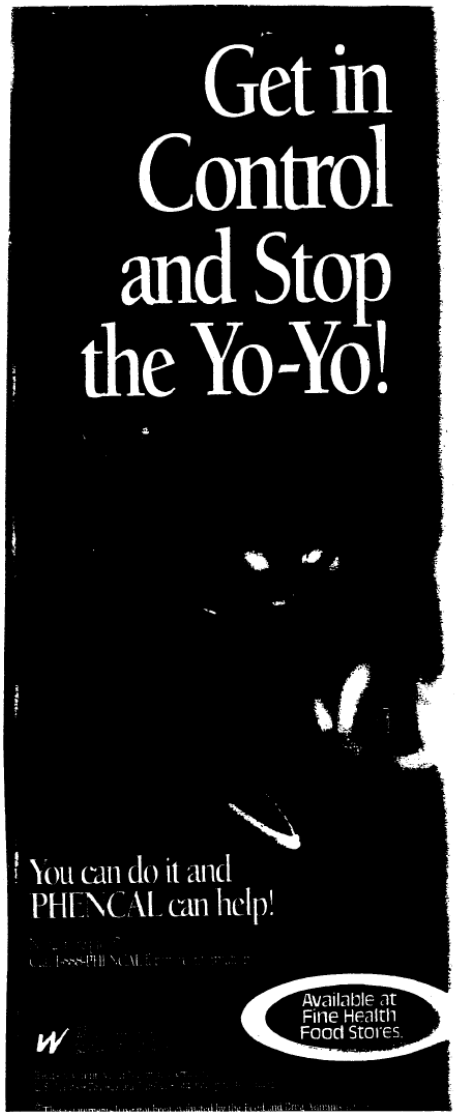
1. Blum, Curr Ther Res 1998; 48: 217-233

2. Blum, Curr Ther Res 1997; in press 1997

GREAT AMERICAN NUTRITION

Complaint Exhibits

EXHIBIT C



PHENCAL™

AS EFFECTIVE AS PRESCRIPTION TREATMENTS* DIETARY SUPPLEMENT

Proven Safe Without a Prescription

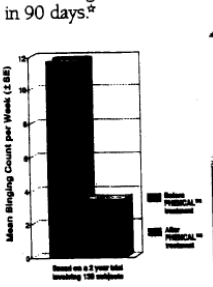
Unlike diet pills or prescription drug treatments, PHENCAL™ does not contain any stimulants or diuretics. It is not designed for you to skip meals or "burn fat". Instead, it allows you to maintain a healthy diet and exercise regimen by warding off cravings and impulses to binge.*

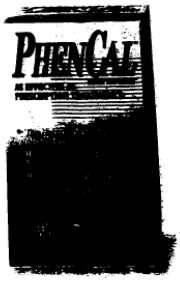
Proven to Decrease Food Cravings

Feelings of hunger are controlled by regulation of neurotransmitters in the brain. If there is an imbalance of these brain chemicals, cravings and feelings of distress can occur. PHENCAL™ actually helps normalize the amount of these chemicals and helps you resist the urge to splurge and regain, or yo-yo back and forth.*

Proven Safe & Effective in Clinical Trials

In a human trial, PHENCAL™ promoted weight loss at levels comparable to those shown in other clinical trials for prescription drug treatments for weight loss. PHENCAL™ subjects had reduced carbohydrate binging and craving and lost an average of 27 pounds in 90 days.*





Schiff

...ring the Way for Over 60 Years!*

DECISION AND ORDER

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

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

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

1. Respondent Weider Nutrition International, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the state of Delaware, with its office and principal place of business located at 2002 South 5070 West, Salt Lake City, Utah 84104.

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

ORDER

DEFINITIONS

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

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

2. Unless otherwise specified, "respondent" shall mean Weider Nutrition International, Inc., a corporation, its successors and assigns, and its officers, agents, representatives, and employees.

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

4. AFood@ shall mean as defined in Section 15 of the Federal Trade Commission Act, 15 U.S.C. ' 55.

5. ADrug@ shall mean as defined in Section 15 of the Federal Trade Commission Act, 15 U.S.C. ' 55.

6. ADisease@ shall mean damage to an organ, part, structure, or system of the body such that it does not function properly (*e.g.*, cancer, cardiovascular disease) or a state of health leading to such dysfunctions (*e.g.*, hypertension); except that diseases resulting from essential nutrient deficiencies (*e.g.*, scurvy, pellagra) are not included in this definition.

I.

IT IS ORDERED that respondent, directly or through any corporation, subsidiary, division, or other device, in connection with the manufacturing, labeling, advertising, promotion, offering for sale, sale, or distribution of PhenCal 106 or PhenCal or any other product or program, in or affecting commerce, shall not make any representation, in any manner, expressly or by implication:

A. That such product or program causes, promotes, or assists in causing significant weight loss or fat loss;

B. That such product or program significantly increases a person=s ability to maintain a reduced calorie diet and exercise regimen;

C. That such product or program reduces food cravings, eating binges, or the urge to overeat;

D. That such product or program prevents the significant regaining of lost weight;

E. That such product or program is as effective as the prescription weight loss treatment commonly known as "Phen-Fen" or any other prescription weight loss treatment; or

F. That such product or program is safe when used to promote or maintain weight loss,

unless, at the time the representation is made, respondent possesses and relies upon competent and reliable scientific evidence that substantiates the representation.

II.

IT IS FURTHER ORDERED that respondent, directly or through any corporation, subsidiary, division, or other device, in connection with the manufacturing, labeling, advertising, promotion, offering for sale, sale, or distribution of any food, drug, dietary supplement, or program, in or affecting commerce, shall not make any representation, in any manner, expressly or by implication, about:

A. The safety of such product or program;

B. The effect of such product or program on any disease; or

C. The comparative or superior health benefit of such product or program with respect to any other product or program,

unless, at the time the representation is made, respondent possesses and relies upon competent and reliable scientific evidence that substantiates the representation.

III.

IT IS FURTHER ORDERED that respondent, directly or through any corporation, subsidiary, division, or other device, in connection with the manufacturing, labeling, advertising, promotion, offering for sale, sale, or distribution of any food, drug, dietary supplement, or program, in or affecting commerce, shall not misrepresent, in any manner, expressly or by implication, the existence, contents, validity, results, conclusions, or interpretations of any test, study or research.

IV.

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

V.

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

VI.

IT IS FURTHER ORDERED that, no later than the date this order becomes final, respondent shall pay to the Federal Trade Commission the sum of four hundred thousand dollars ($400,000), under the following terms and conditions:

A. The payment shall be made by wire transfer or certified or cashier's check made payable to the Federal Trade Commission. In the event of any default in payment, which default continues for ten (10) days beyond the due date of payment, the amount due, together with interest, as computed pursuant to 28 U.S.C. 1961 from the date of default to the date of payment, shall immediately become due and payable.

B. The funds paid by respondent, together with any accrued interest, shall, in the discretion of the Commission, be used by the Commission to provide direct redress to purchasers of PhenCal in connection with the acts or practices alleged in the complaint, and to pay any attendant costs of administration. If the Commission determines, in its sole discretion, that redress to purchasers of this product is wholly or partially impracticable or is otherwise unwarranted, any funds not so used shall be paid to the United States Treasury. Respondent shall be notified as to how the funds are distributed, but shall have no right to contest the manner of distribution chosen by the Commission. No portion of the payment as herein

provided shall be deemed a payment of any fine, penalty or punitive assessment.

C. Respondent relinquishes all dominion, control and title to the funds paid, and all legal and equitable title to the funds vests in the Treasurer of the United States and in the designated consumers. Respondent shall make no claim to or demand for return of the funds, directly or indirectly, through counsel or otherwise; and in the event of bankruptcy of respondent, respondent acknowledges that the funds are not part of the debtor's estate, nor does the estate have any claim or interest therein.

VII.

IT IS FURTHER ORDERED that respondent Weider Nutrition International, Inc., and its successors and assigns, shall, for five (5) years after the last date of dissemination of any representation covered by this order, maintain and upon request make available to the Federal Trade Commission for inspection and copying:

A. All advertisements and promotional materials containing the representation;

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

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

VIII.

IT IS FURTHER ORDERED that respondent Weider Nutrition International, Inc., and its successors and assigns shall deliver a copy of this order to all current and future principals, officers, directors, and managers, and to all current and future employees, agents, and representatives having responsibilities with respect to the subject matter of this order, and shall secure from each such person a signed and dated statement acknowledging receipt of the order. Respondent shall deliver this order to current personnel within thirty (30) days after the date of service of this order, and to future personnel within thirty (30) days after the person assumes such position or responsibilities.

IX.

IT IS FURTHER ORDERED that respondent Weider Nutrition International, 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.

X.

IT IS FURTHER ORDERED that respondent Weider Nutrition International, Inc., and its successors and assigns, shall, within sixty (60) days after the date of service of this order, and at such other times as the Federal Trade Commission may require, file with the Commission a report, in writing, setting forth in detail the manner and form in which they have complied with this order.

XI.

This order will terminate on November 15, 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 an agreement to a proposed consent order from Weider Nutrition International, Inc. (hereinafter "Weider").

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

This matter involves advertisements for a dietary supplement called PhenCal or PhenCal 106. Advertisements claimed that PhenCal and PhenCal 106 have been proven to cause weight loss and to prevent the regaining of lost weight. These advertisements appeared in major newspapers such as the New York Times, the Washington Post, and USA Today.

The proposed complaint alleges that Weider could not substantiate claims that PhenCal and PhenCal 106: (1) cause significant weight loss; (2) significantly increase a person=s ability to maintain a reduced caloric diet and exercise program; (3) significantly reduce food cravings and eating binges; (4) prevent the regaining of lost weight; (5) are as effective as the prescription weight loss treatment commonly known as "Phen-Fen"; and (6) are safe when used to promote or maintain weight loss. The complaint also alleges that Weider made false representations that claims (1), (3), (4), (5), and (6) above, had been scientifically proven.

The proposed consent order contains provisions designed to prevent the respondent from engaging in similar acts and practices in the future.

Part I of the proposed order requires respondent, when advertising any food, drug, dietary supplement or program, to possess competent and reliable scientific evidence before making claims (1) through (6) above.

Part II of the proposed order requires respondent, when advertising any food, drug, dietary supplement, or program, to possess competent and reliable scientific evidence before making claims relating to:

A. The safety of such product or program;

B. The effect of such product or program on any disease; or

C. The comparative or superior health benefit of such product or program with respect to any other product or program.

Part III prohibits respondent from misrepresenting the existence, contents, validity, results, conclusions, or interpretations of any test, study or research in an advertisement for any food, drug, dietary supplement or program.

Part IV allows the respondent to make representations for any drug that are permitted in labeling for that drug under any tentative final or final Food and Drug Administration ("FDA") standard or under any new drug application approved by the FDA.

Part V allows the respondent to make representations for any product that are specifically permitted in labeling for that product by regulations issued by the FDA under the Nutrition Labeling and Education Act of 1990.

Part VI requires respondent to pay $400,000 to the Commission. These funds will be used for consumer redress or, if that is impracticable, the funds will be paid to the United States Treasury.

Analysis to Aid Public Comment

Part VII requires respondent to retain, and make available to the Commission, upon request, all advertisements and promotional materials containing any representation covered by the order, as well as any materials that it relied upon in disseminating the representation and any materials that contradict, qualify, or call into question the representation.

The remainder of the proposed order contains standard requirements that the respondent distribute the order to relevant personnel, that respondent notify the Commission of any changes in corporate structure that might affect compliance with the order and that the respondent file one or more reports detailing its compliance with the order.

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

Complaint

IN THE MATTER OF

FIRSTPLUS FINANCIAL GROUP, INC.

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATIONS OF THE TRUTH IN LENDING ACT

Docket C-3984; File No. 9923121
Complaint, November 28, 2000--Decision, November 28, 2000

This consent order addresses FirstPlus Financial's advertisements promoting high loan-to-value loans, home equity loans, and other types of consumer credit transactions. The complaint alleges that the advertisements are deceptive and misleading. The consent order prohibits FirstPlus from misrepresenting the comparative savings or benefits of consolidating debt, including the circumstances the circumstances under which consumers can save money when consolidating, the monthly saving from consolidation, the eligibility of a consumer to receive a loan, the amount of loan proceeds to be distributed to consumers or to third parties on behalf of consumers. The order also prohibits Respondent from stating the comparative benefit of their consolidation program in comparison to another without accurately, clearly, and conspicuously all of the information consumers need to evaluate the comparison and from giving examples of cost saving or benefits without basing the example on reasonable assumptions regarding average annual percentage rates and repayment terms for comparable transactions. In addition, the order requires Respondent to comply with disclosures requirements of the TILA and Regulation Z when stating the amount or percentage down required, the number or payments or period of repayment, the amount of any payment, or the amount of any finance charge.

Participants

For the Commission: *William Haynes, Ellen Finn, Rolando Berrelez, Hannah Stires, Jessica Rich, David Medine,* and *BE.*

For the Respondents: *Paul H. Schieber, Blank, Rome, Comisky & McCauley* and *Trey Monsour, Verner, Lipfert, Bernhard, McPherson & Hand.*

COMPLAINT

The Federal Trade Commission, having reason to believe that FirstPlus Financial Group, Inc.,a corporation (referred to as "respondent" or AFirstPlus@), has violated the provisions of the Federal Trade Commission Act, 15 U.S.C. '' 45-58, as amended, and the Truth in Lending Act, 15 U.S.C. '' 1601-1667, as amended, and its implementing Regulation Z, 12 C.F.R. ' 226, as amended, and it appearing to the Commission that this proceeding is in the public interest, alleges:

1. Respondent FirstPlus Financial Group, Inc., is a Nevada corporation with its principal office or place of business at 1600 Viceroy Drive, Dallas, Texas 75235.

2. Respondent originates, purchases, services, and sells consumer finance transactions. FirstPlus=s loan products include debt consolidation or home improvement loans secured by second liens on residential real property where the total outstanding debt on the dwelling exceeds the fair market value of the dwelling(known as Ahigh loan-to-value@ or AHLTV@ loans), non-conforming home equity loans (Ahome equity loans@), and personal consumer loans.

3. Respondent has disseminated advertisements to the public that promote consumer credit transactions, as the terms Aadvertisement,@ and Aconsumer credit,@ are defined in Section 226.2 of Regulation Z, 12 C.F.R. ' 226.2, as amended.

4. 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, 15 U.S.C. ' 44.

5. Respondent has disseminated, or has caused to be disseminated, advertisements in various media promoting HLTV loans, home equity loans, and other types of consumer credit transactions (Acredit advertisements@) including but not necessarily limited to the attached FirstPlus Exhibits A and B.

FirstPlus Exhibits A and B are direct-mail advertisements. These credit advertisements contain the following statements:

A. [Exhibit A contains a non-negotiable coupon, which is similar in appearance to a check, in the amount of $34,980.]

Cash in on the savings with a FIRSTPLUS HOME EQUITY LOAN.

Pay off high-interest credit cards, eliminate personal loan payments or consolidate credit cards and other loans into one **lower** monthly payment. And SAVE money!

Here=s an example of the savings you could realize.

Credit Card #1	$245	Paid Off
Credit Card #2	$210	Paid Off
Department Store Cards	$125	Paid Off
Auto Loan	$293	Paid Off
College Loan	$110	Paid Off
TOTAL PAYMENTS	$983	$375

Your <u>One</u> Monthly Payment is now $608 Less!

B. [Exhibit B contains a non-negotiable coupon, which is similar in appearance to a check, in the amount of $42,800.00.]

AWe are pleased to inform you that your home at [address] has recently been verified as eligible for a low interest 2nd trust

deed in the amount shown above. If you would like this amount increased or decreased please contact your agent below.@

AThis program is offered to a very select group of individuals in your community of [city] on a limited basis. Your eligibility allows you to receive these funds in cash within 7-14 working days.@

FEDERAL TRADE COMMISSION ACT VIOLATIONS

COUNT I: Misrepresentation of Cost Savings

6. In advertisements, including but not necessarily limited to FirstPlus Exhibit A, respondent has represented, expressly or by implication that:

A. Consumers, in general, will save money when consolidating existing debts into a FirstPlus home equity loan;

B. The examples shown in respondent=s advertisements accurately illustrate the potential monthly savings of consolidating existing credit card balances and other loans into a FirstPlus home equity loan.

7. In truth and in fact,

A. Consumers, in many instances, will not save money when consolidating existing debts into a FirstPlus home equity loan. For many types of existing debts, depending on the interest rate and/or repayment terms of the existing debt, consumers will pay more per month and/or pay more over time when consolidating existing debts into a FirstPlus loan.

B. The examples shown in respondent=s advertisements do not accurately illustrate the potential monthly savings of consolidating existing debts into a FirstPlus loan. Based on generally available interest rates and repayment terms on credit card balances and other loans, consumers would save far less than the illustrated savings, or pay more per month following the original expiration date of the existing debt.

Therefore, respondent=s representations, as alleged in Paragraph 6, were, and are, false or misleading.

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

COUNT II: Misrepresentation of Credit Approval

9. In advertisements, including but not necessarily limited to FirstPlus Exhibit B, respondent has represented, expressly or by implication, that each recipient of respondent=s solicitations who applies for the loan advertised will receive such a loan.

10. In truth and in fact, not each recipient of respondent=s solicitations who applies for the loan advertised will receive such a loan. Therefore, respondent=s representation as alleged in Paragraph 9, was, and is, false or misleading.

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

Count III: Misrepresentation of Loan Disbursement

12. In advertisements, including but not necessarily limited to FirstPlus Exhibits A and B, respondent has represented, expressly

or by implication, that consumers will receive funds for the full loan amount stated in their advertisements (e.g., $34,980).

13. In truth and in fact, in many instances, consumers do not receive funds for the full loan amount stated in respondent=s advertisements. In many instances, respondent deducts substantial origination fees and closing costs (e.g. 10.43%) from the advertised loan amount and disburses only the remaining amount to consumers. Therefore, respondent=s representation as alleged in Paragraph 12, was, and is, false or misleading.

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

COUNT IV: Failure to Disclose and Failure to Disclose Adequately Credit Terms

15. In advertisements, including but not necessarily limited to FirstPlus Exhibit A, respondent has represented, expressly or by implication, that consumers can obtain a loan at the terms stated in the advertisements, including but not necessarily limited to the monthly payment amount.

16. These advertisements fail to disclose, or fail to disclose adequately, additional terms pertaining to the credit offer, such as annual percentage rate and terms of repayment. This additional information, if provided, appears in fine print in the advertisements and would be material to consumers in deciding whether to apply for a loan from respondent. The failure to disclose, or failure to disclose adequately, this information, in light of the representation made, was, and is, a deceptive practice.

17. Respondent=s practices constitute deceptive acts or practices in or affecting commerce in violation of Section 5(a) of the Federal Trade Commission Act.

TRUTH IN LENDING ACT AND REGULATION Z VIOLATIONS

Count V: Failure to Disclose Clearly and Conspicuously,Required Information

18. In advertisements, including but not necessarily limited to FirstPlus Exhibit A, respondent has stated a monthly payment amount required to repay a loan but has failed to disclose clearly and conspicuously, one or more of the following items of information required by Regulation Z: the annual percentage rate and/or the terms of repayment.

19. The credit disclosures required by Regulation Z, if provided, are not clear and conspicuous because they appear in fine print and/or in an inconspicuous location.

20. Respondent=s practices violate Section 144 of the Truth in Lending Act, 15 U.S.C. ' 1664, and Section 226.24(c) of Regulation Z, 12 C.F.R. ' 226.24(c).

THEREFORE, the Federal Trade Commission this twenty-eighth day of November, 2000, has issued this complaint against respondent.

By the Commission.

DECISION AND ORDER

The Federal Trade Commission having initiated an investigation of certain acts and practices of the respondent named in the caption hereof, and the respondent having been furnished thereafter with a copy of a draft 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 violations of the Federal Trade Commission Act and the Truth in Lending Act; and

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

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

1. Respondent FirstPlus Financial Group, Inc. is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Nevada, with its office and principal place of business located in the City of Dallas, State of Texas.

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

ORDER DEFINITIONS

1. "Clearly and conspicuously" shall mean as follows:

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

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

The disclosure shall be in understandable language and syntax. Nothing contrary to, inconsistent with, or in mitigation of the disclosure shall be used in any advertisement.

2. "Respondent" as used herein shall mean FirstPlus Financial Group, Inc., its successors and assigns, and its officers, agents, representatives, and employees.

3. "Commerce" as used herein shall mean as defined in Section 4 of the Federal Trade Commission Act ("FTC Act"), 15 U.S.C. ' 44.

I.

IT IS ORDERED that respondent, directly or through any corporation, subsidiary, division, or any other device, in connection with any advertisement to aid, promote, or assist, directly or indirectly, any extension of consumer credit in or affecting commerce, as "advertisement" and "consumer credit" are defined in Section 226.2 of Regulation Z, 12 C.F.R. ' 226.2, as amended, shall not, in any manner, expressly or by implication:

A. Misrepresent the comparative or absolute savings or benefits of consolidating existing credit card balances and other loans into a FirstPlus loan, including but not limited to misrepresenting:

1. The circumstances under which consumers can save money when consolidating existing credit card balances and other loans into a FirstPlus loan.

2. The monthly savings consumers will realize over the extended life of the FirstPlus loan.

3. Other terms, conditions, or costs of a FirstPlus loan.

B. Misrepresent an individual=s eligibility, creditworthiness, or prior approval to receive a loan.

C. Misrepresent the amount of loan proceeds to be disbursed to consumers, or misrepresent the amount of loan proceeds to be disbursed on consumers= behalf to third parties.

D. State the dollar value of the cost savings or benefits of a FirstPlus loan, as compared to other consumer credit transactions, whether actual or hypothetical, without disclosing accurately, clearly and conspicuously, all material information needed to evaluate the comparison, such as loan amount(s), terms of repayment, and annual percentage rate(s) on the balances of the credit

transactions purportedly to be paid off with the FirstPlus loan.

E. Use any example of the cost savings or benefits of a FirstPlus loan, compared to other consumer credit transactions, whether actual or hypothetical, unless such example is based on reasonable assumptions regarding average annual percentage rates and repayment terms for comparable credit transactions, such as, but not limited to, those published in the Federal Reserve Board=s Statistical Release G.19 (AConsumer Credit@).

F. State the amount or percentage of any downpayment, the number of payments or period of repayment, the amount of any payment, or the amount of any finance charge, without complying with the Truth-in-Lending Act and Regulation Z, including the disclosure, accurately, clearly, and conspicuously, of all the terms required by the Truth-in-Lending Act and Regulation Z. (TILA, 15 U.S.C. ' ' 1601-1667, as amended, and Regulation Z, 12 C.F.R. ' 226, as amended).

II.

IT IS FURTHER ORDERED that respondent, and its successors and assigns, shall, for five (5) years after the date of service of this order, maintain and upon request make available to the Commission for inspection and copying all records that will demonstrate compliance with the requirements of this order.

III.

IT IS FURTHER ORDERED that respondent, and its successors and assigns, shall, within thirty (30) days after the date of service of this order, distribute a copy of this order to all current principals, officers, directors, managers, employees,

agents, and representatives having responsibilities with respect to the subject matter of this order, and shall secure from each such person a signed and dated statement acknowledging receipt of the order. Respondent shall deliver this order to such current personnel within thirty (30) days after the date of service of this order, and, for five (5) years after the date of service of this order, to such future personnel within thirty (30) days after the person assumes such position or responsibilities.

IV.

IT IS FURTHER ORDERED that respondent, and its successors and assigns, shall notify the Commission at least thirty (30) days prior to any change in the corporation that may affect compliance obligations arising under this order, including but not necessarily limited to dissolution, assignment, sale, merger, or other action that would result in the emergence of a successor corporation; the creation or dissolution of a subsidiary, parent, or affiliate that engages in any acts or practices subject to this order; the proposed filing of a bankruptcy petition; or a change in the corporate name or address. *Provided, however*, that, with respect to any proposed change in the corporation about which respondent learn less than thirty (30) days prior to the date such action is to take place, respondent shall notify the Commission as soon as is practicable after obtaining such knowledge. All notices required by this Part shall be sent by certified mail to the Associate Director, Division of Enforcement, Bureau of Consumer Protection, Federal Trade Commission, Washington, D.C. 20580. Materials submitted pursuant to this Consent Decree and designated confidential shall be accorded the protections accorded to materials designated confidential under Federal Trade Commission Rule 4.10(e), 16 C.F.R. ' 4.10(e).

V.

IT IS FURTHER ORDERED that respondent, and its successors and assigns, shall within one hundred and twenty (120) days after the date of service of this order, and at such other times as the Federal Trade Commission may require, file with the

Commission a report, in writing, setting forth in detail the manner and form in which it has complied with this order.

VI.

This order will terminate on November 28, 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 deadline for appealing such dismissal or ruling and the date such dismissal or ruling is upheld on appeal.

By the Commission.

STATEMENT OF CHAIRMAN ROBERT PITOFSKY AND COMMISSIONERS MOZELLE W. THOMPSON AND THOMAS B. LEARY

This matter is the Commission=s first action brought against a consumer finance company for misrepresenting the savings that consumers would gain by consolidating their debts into a high loan-to-value (HLTV) loan. Accordingly, this case sends an important law enforcement message to companies engaged in this multi-billion dollar financial market that the Commission will look closely at HLTV transactions and take appropriate action when consumers are victimized by those who omit or misrepresent material facts relating to such loans.

Because this principle is so important, we also note that this case does not necessarily establish the full scope of relief that the Commission may seek in future cases. While the Commission=s order B by providing for strong injunctive relief B supplies the full dose of all relief feasible in light of this particular respondent=s weak financial situation, we believe that the Commission may consider pursuing additional relief in future cases involving deceptive HLTV loan advertising. Specifically, we expect that the Commission, in appropriate circumstances, would seek consumer redress or other monetary relief.

Analysis of Proposed Consent Order to Aid Public Comment

The Federal Trade Commission has accepted an agreement to a proposed consent order from FirstPlus Financial Group, Inc. (AFirstPlus@).

Analysis to Aid Public Comment

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

Through direct mail, television, and online advertisements, FirstPlus has disseminated information promoting high loan-to-value (AHLTV@) loans, home equity loans, and other types of consumer credit transactions. The complaint alleges that many of these advertisements are deceptive and misleading, and violate various provisions of the Federal Trade Commission Act (AFTC Act@), the Truth in Lending Act (ATILA@), and Regulation Z. Specifically, the complaint alleges that FirstPlus: (1) falsely represented in its advertising that consumers would save money when consolidating existing debts in a FirstPlus loan and that the examples shown in FirstPlus=s advertising accurately illustrate potential monthly savings; (2) falsely represented that each consumer receiving a solicitation from the company would actually receive a loan; (3) misrepresented that consumers would receive loans for the full amount stated in the company=s advertisement; (4) failed to adequately disclose credit terms for its loan products; and (5) failed to disclose clearly and conspicuously key information about the terms of its credit offers as required by the TILA and Regulation Z.

The proposed consent order (1) prohibits FirstPlus from misrepresenting the comparative or absolute savings or benefits of consolidating debt, including misrepresenting the circumstances under which consumers can save money when consolidating, and misrepresenting the monthly savings consumers will realize over the extended life of the FirstPlus loan; (2) prohibits FirstPlus from misrepresenting an individual=s eligibility to receive a loan; (3) prohibits FirstPlus from misrepresenting the amount of loan

proceeds to be disbursed to consumers, or misrepresenting the amount of proceeds to be disbursed on consumers= behalf to third parties; (4) prohibits FirstPlus from stating the savings or benefits of a FirstPlus loan, as compared to other consumer credit transactions, without disclosing accurately, clearly, and conspicuously all material information needed by consumers to evaluate the comparison; (5) prohibits FirstPlus from using an example of the cost savings or benefits of a FirstPlus loan, as compared to other consumer credit transactions, without basing the example on reasonable assumptions regarding average annual percentage rates and repayment terms for comparable credit transactions; and (6) requires FirstPlus to comply with the disclosure requirements of the TILA and Regulation Z when stating the amount or percentage of any down payment, the number of payments or period of repayment, the amount of any payment, or the amount of any finance charge.

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

TYCO INTERNATIONAL LTD.

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-3985; File No. 0010208
Complaint, December 1, 2000--Decision, December 1, 2000

This consent order addresses the $4.2 billion acquisition by Tyco International Ltd. of Mallinckrodt Inc., the two largest producers of endotracheal tubes. The complaint alleges that the proposed acquisition, if consummated, would substantially lessen competition and to tend to create a monopoly in the Endotracheal Tube market in the United States. The order requires Respondent to divest its Sheridan line of endotracheal tube products to Hudson RCI, and to provide employee incentives for employees from the Sheridan line to accept employment and remain employed by Hudson.

Participants

For the Commission: *Michael Moiseyev, Ann Malester, Elizabeth Callison, Daniel P. O=Brien, Daniel P. Ducore,* and *BE.*

For the Respondents: *Chuck Koob* and *Brandi Katz, Simpson, Thatcher & Bartlett* and *Steve Newborn* and *John Scribner, Clifford, Chance, Rogers & Wells.*

COMPLAINT

The Federal Trade Commission (ACommission@), having reason to believe that Respondent, Tyco International Ltd. (ATyco@), a corporation subject to the jurisdiction of the Commission, has agreed to acquire Mallinckrodt Inc. (AMallinckrodt@), a corporation subject to the jurisdiction of the Commission, in violation of Section 7 of the Clayton Act, as amended, 15 U.S.C. ' 18, and Section 5 of the Federal Trade

Commission Act, as amended, 15.U.S.C. ' 45, and it appearing to the Commission that a proceeding in respect thereof would be in the public interest, hereby issues its Complaint, stating its charges as follows:

I. DEFINITIONS

1. AAcquisition Agreement@ means the Agreement and Plan of Merger By and Among Tyco Acquisition Corp. VI (NV), EVM Merger Corp. and Mallinckrodt Inc. Including Guarantee of Tyco International Ltd., dated June 28, 2000.

2. AEndotracheal Tube@ means a device inserted into the trachea via the nose or mouth and used to maintain an open airway and to administer anesthesia or oxygen, and any related accessories attached to the device used to accomplish those ends.

3. ARespondent@ means Tyco.

II. THE PARTIES

4. Respondent Tyco International Ltd. is 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. Respondent Tyco, among other things, is engaged in the manufacture and sale of Endotracheal Tubes.

5. Mallinckrodt is a corporation organized, existing, and doing business under and by virtue of the laws of the state of New York, with its principal executive offices located at 675 McDonnell Boulevard, St. Louis, Missouri, 63134. Mallinckrodt, among other things, is engaged in the manufacture and sale of Endotracheal Tubes.

6. Pursuant to the Acquisition Agreement, Tyco will acquire 100 percent of the outstanding voting securities of Mallinckrodt.

7. Respondent and Mallinckrodt are, and at all times relevant herein have been, 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 affect commerce, as Acommerce@ is defined in Section 4 of the Federal Trade Commission Act, as amended, 15 U.S.C. ' 44.

III. THE ACQUISITION

8. On June 28, 2000, Respondent and Mallinckrodt entered into an Agreement and Plan of Merger, under which Tyco is to acquire 100 percent of the voting securities of Mallinckrodt in a stock-for-stock transaction valued at approximately $4.2 billion (AAcquisition@).

IV. THE RELEVANT MARKETS

9. For the purposes of this Complaint, the relevant line of commerce in which to analyze the effects of the Acquisition is the manufacture and sale of Endotracheal Tubes.

10. For the purposes of this Complaint, the United States is the relevant geographic area in which to analyze the effects of the Acquisition in the relevant line of commerce.

V. THE STRUCTURE OF THE MARKET

11. The market for the manufacture and sale of Endotracheal Tubes in the United States is highly concentrated. Tyco accounts for approximately 14% of the Endotracheal Tube market in the United States. Mallinckrodt is the leading supplier of Endotracheal Tubes in the United States with a

market share of 72%. The proposed acquisition would provide Tyco with a combined market share in the Endotracheal Tube market of over 86%.

VI. BARRIERS TO ENTRY

12. The United States market for Endotracheal Tubes is characterized by significant barriers to entry. Entry into the endotracheal tube market in the relevant geographic area requires the development of a full line of products in a range of sizes and configurations, procurement of manufacturing equipment and establishment of production practices in conformity with FDA regulations, and development of a track record and customer acceptance. Entry into the Endotracheal Tube market in the United States would be relatively costly and is not likely to occur because sales opportunities would likely be too small to justify the costs and risks associated with new entry.

VII. EFFECTS OF THE ACQUISITION

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

    a. by eliminating actual, direct and substantial competition between Respondent and Mallinckrodt in the relevant market;

    b. by increasing the likelihood that the combined Tyco/Mallinckrodt would increase prices of Endotracheal Tubes unilaterally; and

    c. by reducing innovation in the relevant market.

VIII. VIOLATIONS CHARGED

14. The Acquisition agreement described in Paragraph 8 constitutes a violation of Section 5 of the FTC Act, as amended, 15 U.S.C. ' 45.

15. The Acquisition described in Paragraph 8, if consummated, would constitute a violation of Section 7 of the Clayton Act, as amended, 15 U.S.C. ' 18, and Section 5 of the FTC Act, as amended, 15 U.S.C. ' 45.

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

By the Commission.

DECISION AND ORDER

The Federal Trade Commission ("Commission") having initiated an investigation of the acquisition by Tyco International Ltd. (ATyco@) of Mallinckrodt Inc. (AMallinckrodt@), and Respondent having been furnished thereafter with a copy of a draft of Complaint which the Bureau of Competition presented to the Commission for its consideration and which, if issued by the Commission, would charge Respondent with violations of Section 7 of the Clayton Act, as amended, 15 U.S.C. ' 18, and Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. ' 45; and

Respondent, its attorneys and counsel for the Commission having thereafter executed an Agreement Containing Consent Order (AConsent Agreement@), containing an admission by Respondent of all the jurisdictional facts set forth in the aforesaid

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

The Commission having thereafter considered the matter and having determined that it has reason to believe that Respondent has violated the 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 issues its Complaint, makes the following jurisdictional findings and issues the following Decision and Order (AOrder@):

1. Respondent Tyco International Ltd. is 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.

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

ORDER

I.

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

A 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.

B AMallinckrodt@ means Mallinckrodt Inc., its directors, officers, employees, agents and representatives, successors, and assigns; its joint ventures, subsidiaries, divisions, groups and affiliates controlled by Mallinckrodt Inc, and the respective directors, officers, employees, agents, representatives, successors, and assigns of each.

C ARespondent@ means Tyco.

D AHudson/RCI@ means Hudson Respiratory Care, Inc, a corporation organized, existing and doing business under and by virtue of the laws of the State of California, with its office and principal place of business located at 27711 Diaz Road, P.O. Box 9020, Temecula, California, 92589.

E ACommission@ means the Federal Trade Commission.

F AAcquirer@ means Hudson/RCI or the entity approved by the Commission to acquire the Assets To Be Divested pursuant to this order.

G AAcquisition@ means the proposed acquisition by Tyco of Mallinckrodt pursuant to the Agreement and Plan of Merger By and Among Tyco Acquisition Corp. VI (NV), EVM Merger Corp. and Mallinckrodt Inc. Including Guarantee of Tyco International Ltd., dated June 28, 2000.

H AArgyle Facility@ means the facility located at Route 40, Argyle, New York in which Respondent manufactures the Sheridan Product Line.

I AAssets to Be Divested@ means all of Tyco's assets (excluding receivables) as of the date the Consent Agreement is signed by Respondent, relating to the research, development, manufacture, marketing or sale of the Sheridan Product Line, including, but not limited to, the following assets:

1 all assets included in the Divestiture Agreement;

2 all machinery, fixtures, equipment, vehicles, transportation facilities, furniture, tools and other tangible personal property;

3 a lease for the Argyle Facility together with appurtenances, licenses and permits;

4 trade names, trademarks, brand names, formulations, contractual rights, Patents, trade secrets, technology, know-how, inventions, specifications, designs, drawings, processes, production information, manufacturing information, testing and quality control data, research materials, technical information, marketing and distribution information, customer lists, vendor lists, catalogs, sales promotion literature, advertising materials, software, information stored on management information systems, (and specifications sufficient for the Acquirer to use such information) and all data, contractual rights, materials and information regarding Regulatory Approvals relating to the Sheridan Product Line;

5 inventory and storage capacity;

6 all rights under warranties and guarantees, express or implied;

7 all books, records, and files; and

8 all items of prepaid expense.

J ACost@ means direct cash cost of labor.

K ACurity Endotracheal Tubes@ means Tyco=s Endotracheal Tube products marketed under the Curity7 brand, manufactured in Thailand, and sold exclusively outside the United States.

L ADivestiture Agreement@ means the Asset Purchase Agreement dated September 18, 2000, by and between Tyco Healthcare Group LP and Hudson RCI and all exhibits thereof, incorporated by reference into this order and made a part hereof as Confidential Appendix I, regardless of whether the purchase and sale of assets contemplated by such agreement is consummated.

M ADivestiture Trustee@ means the trustee appointed pursuant to Paragraph IV. of this Order.

N AEndotracheal Tube@ means a device inserted into the trachea via the nose or mouth and used to maintain an open airway and to administer anesthesia or oxygen, and any related accessories attached to the device to accomplish those ends.

O AFDA@ means the United States Food and Drug Administration.

P AGPO Customer@ means a group purchasing organization that negotiates contracts with suppliers of goods or services on behalf of members or customers of the organization.

Q AGPO Customer Contract@ means any contract between any GPO Customer and Respondent relating to Endotracheal

Tubes existing as of the date this Order is placed on the public record, excluding any contract between any GPO Customer and Mallinckrodt existing as of the date this Order is placed on the public record.

R AKey Employees@ means the key employees listed in Confidential Appendix II.

S ANon-Public Acquirer Information@ means any information obtained by Respondent relating to the Sheridan Product Line and any information obtained by Respondent while providing assistance to the Acquirer as required by Paragraph III. of this Order. Non-Public Acquirer Information shall not include information already in the public domain and information that subsequently falls within the public domain through no violation of this Order by Respondent.

T APatents@ means: (1) all patents and patent rights, patent applications, patents of addition, re-examinations, reissues, extensions, granted supplementary protection certificates, substitutions, confirmations, registrations, revalidations, revisions, additions and the like, of or to said patent and patent rights and any and all continuations and continuations-in part and divisionals relating exclusively to the Sheridan Product Line; and (2)(a) exclusive licenses to use all other patents and patent rights, patent applications, patents of addition, re-examinations, reissues, extensions, granted supplementary protection certificates, substitutions, confirmations, registrations, revalidations, revisions, additions and the like, of or to said patent and patent rights and any and all continuations and continuations-in part and divisionals relating in any way to the Sheridan Product Line used for the manufacture, sale, research, development, or distribution of Endotracheal Tubes; and (b) non-exclusive licenses to such other patents and patent rights, patent applications, patents of addition, re-examinations, reissues, extensions, granted

supplementary protection certificates, substitutions, confirmations, registrations, revalidations, revisions, additions and the like, of or to said patent and patent rights and any and all continuations and continuations-in part and divisionals relating in any way to the Sheridan Product Line.

U ARegulatory Approvals@ means approval by the FDA and any other governmental or regulatory approvals held by Tyco for the Sheridan Product Line as of the date of the Acquisition.

V ASheridan Earnout Review@ means the receipt, review or auditing of any Non-Public Acquirer Information for the purposes of making payments pursuant to the asset purchase agreement between Tyco (as the successor-in-interest to The Kendall Company), Sheridan Catheter Corp. and David Sheridan, dated September 23, 1994.

W ASheridan Product Line@ means all of Tyco's Endotracheal Tubes as of the date this Order is placed on the public record, excluding Tyco=s Curity Endotracheal Tubes.

X ASheridan Sales Employees@ means any individuals who have participated in the marketing, sales or promotion of the Sheridan Product Line within twelve (12) months of the date the Consent Agreement is signed by Respondent.

Y AThird-Party Consents@ means all consents, waivers and approvals from any person, private or public, that are necessary to effect the complete transfer to the Acquirer of the Assets To Be Divested pursuant to this Order and enable the Acquirer to manufacture and sell the Sheridan Product Line.

Z ATransitional Services@ means any services or assistance provided by Respondent to enable or facilitate the transfer of the Assets To Be Divested to the Acquirer, including, but not limited to, all services identified in the Transition Services Agreement.

AA ATransition Services Agreement@ means the Transition Services Agreement entered into by and between Tyco and Hudson RCI, attached as Exhibit E to the Divestiture Agreement.

II.

IT IS FURTHER ORDERED that:

A Respondent shall divest the Assets To Be Divested to Hudson/RCI 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 ten days after Respondent consummates the Acquisition. Failure to comply with the Divestiture Agreement shall constitute a failure to comply with this Order; *provided, however*, that if Respondent has divested the Assets To Be Divested to Hudson/RCI prior to the date the Order becomes final, and if, at the time the Commission determines to make the Order final, the Commission notifies Respondent that Hudson/RCI is not an acceptable acquirer or that the Divestiture Agreement is not an acceptable manner of divestiture, then Respondent shall immediately rescind the transaction with Hudson/RCI and shall divest the Assets To Be Divested within six (6) months of the date the Order becomes final. Respondent 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 Respondent shall obtain all Third-Party Consents prior to the closing of the divestiture required by Paragraph II.A; *provided, however*, that Respondent need not obtain novations of supply contracts with the Veterans Administration and the Department of Defense prior to the closing of the divestiture; provided further, however, that Respondent shall provide the Acquirer any assistance necessary to obtain such novations.

C If the Assets To Be Divested are divested to an Acquirer other than Hudson/RCI, Respondent shall comply with all the terms of the resulting agreement with the Acquirer and such agreement shall be deemed incorporated by reference into this Order. Any failure by Respondent to comply with the terms

of such agreement(s) shall constitute a failure to comply with this Order.

D The purpose of the divestiture of the Assets To Be Divested is to ensure the continued use of the assets in the same business 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:

A No later than ten (10) days prior to the divestiture, Respondent shall provide the Acquirer with a complete list of all non-clerical, salaried employees of Tyco who are engaged, or have been engaged, in the research, development, or manufacture of the Sheridan Product Line at any time during the period from June 28, 2000 until the date of the divestiture. The list shall state each individuals' name, position or positions held from June 28, 2000 until the date of the divestiture, address, telephone number, and a description of the duties and work performed by the individual in connection with the Sheridan Product Line. Respondent shall provide the Acquirer the opportunity to enter into employment contracts with such individuals, provided that such contracts are contingent upon the Commission's approval of the divestiture.

B Respondent shall provide the Acquirer with an opportunity to inspect, at any time, the personnel files and other documentation relating to the individuals identified pursuant to Paragraph III.A. of this order to the extent permissible under applicable laws, at the request of the Acquirer any time after the execution of the agreement between Acquirer and Respondent.

C Respondent shall not enforce any confidentiality or non-compete restrictions relating to the Assets To Be Divested that apply to any employee identified pursuant to Paragraph III.A. who accepts employment with the Acquirer that would interfere with the Acquirer=s ability to interview or hire any employee identified pursuant to Paragraph III.A.

D Respondent shall provide all employees identified pursuant to Paragraph III.A. with financial incentives to continue in their positions until the date the divestiture is accomplished. Such incentives shall include a continuation of all employee benefits offered by Tyco until the date the divestiture of the Assets to Be Divested is accomplished, including regularly scheduled raises and bonuses, and a vesting of all pension benefits (as permitted by law). In addition, Respondent shall provide Key Employees incentives to accept employment with the Acquirer at the time of the divestiture. Such incentives shall include a bonus for each Key Employee, equal to 10% of the employee=s current annual salary and commissions (including any annual bonuses) as of the date this Order is accepted by the Commission for public comment (AStay On Bonus@), who accepts an offer of employment on or prior to the date the divestiture is accomplished from the Acquirer and remains employed by the Acquirer for a period of one (1) year, payable by Respondent one (1) year after the commencement of the employee=s employment by the Acquirer.

E For a period of one year following the date the divestiture is accomplished, Tyco shall not, directly or indirectly, solicit or otherwise attempt to induce any employees to terminate their employment relationship with the Acquirer; *provided, however*, it shall not be deemed to be a violation of this provision if: (i) Tyco advertises for employment opportunities in newspapers, trade publications or other media not targeted specifically at the employees, or (ii) Tyco hires employees who apply for employment with Tyco, as long as such employees were not solicited by Tyco in violation of this

Paragraph III E. During the one-year period following the divestiture, Tyco shall not, directly or indirectly, hire or enter into any arrangement for the services of any employees employed by the Acquirer, unless the individual's employment has been terminated by the Acquirer.

F Respondent shall not transfer, without the consent of the Acquirer, any of the individuals identified in Paragraph III.A. of this Order to any other position until the divestiture is accomplished.

G For the period beginning on the date the Divestiture Agreement is signed by Respondent and ending two years following the divestiture required by Paragraph II. of this Order (AExtended Restricted Period@), Respondent shall not:

1 solicit, induce or attempt to induce any GPO Customer to terminate or modify any GPO Customer Contract or, in the case of any GPO Customer Contract which by its terms expires or terminates within two (2) years of the date this Consent Agreement is signed by Respondent, solicit, induce or attempt to induce the GPO Customer which is a party to such GPO Customer Contract to not renew such GPO Customer Contract; or

2 solicit, induce, or attempt to induce any GPO Customer to transfer to Respondent any business that is subject to any GPO Customer Contract during the term of such GPO Customer Contract.

Nothing in this paragraph shall prevent Respondent from responding to an unsolicited invitation to bid on a contract from any GPO Customer during the Extended Restricted Period.

H Respondent shall, at the request of the Acquirer, at Cost to the Acquirer, provide: (a) for a period not to exceed six months

after the divestiture is accomplished, such Transitional Services as are necessary to enable the Acquirer to manufacture and distribute the Sheridan Product Line in substantially the same manner and quality employed or achieved by Respondent; and (b) until all necessary government approvals have been obtained, such assistance, personnel and training as are reasonably necessary to enable the Acquirer to obtain any necessary governmental approvals to manufacture the Sheridan Product Line and sell the Sheridan Product Line in each of the locations in which Respondent currently sells the Sheridan Product Line.

I Respondent shall not provide, disclose or otherwise make available to any of its employees not involved in providing Transitional Services or Sheridan Earnout Review any Non-Public Acquirer Information, nor shall Respondent use any Non-Public Acquirer Information obtained or derived by Respondent in its capacity as provider of assistance pursuant to Paragraph III.H. or through Sheridan Earnout Review, except for the sole purpose of providing assistance pursuant to Paragraph III.H. or engaging in Sheridan Earnout Review. Respondent shall cause each individual involved in providing assistance pursuant to Paragraph III.H. and Sheridan Earnout Review and having access to Non-Public Acquirer Information to sign a statement that the individual will maintain the confidentiality of any Non-Public Acquirer Information as required by the terms and conditions of this Paragraph. No such individuals shall be involved in any way in the management, sales, marketing, or financial operations of the competing products of Respondent.

J Respondent shall not utilize any Sheridan Sales Employees to market, sell or promote Endotracheal Tube products to any customer in North America, European Union countries, or Japan for a period of one year beginning on the date the divestiture is accomplished.

K Pending divestiture of the Assets To Be Divested, Respondent shall take such actions as are necessary to maintain the

viability, marketability and competitiveness of the Assets To Be Divested, and to prevent the destruction, removal, wasting, deterioration or impairment of the Assets To Be Divested except for ordinary wear and tear.

L During the period in which the Acquirer operates the Assets To Be Divested in the Argyle Facility, Respondent shall maintain the Argyle Facility in accordance with past practice (including regular repair and maintenance efforts) and shall use its best efforts to preserve existing relationships with suppliers, employees and others related to maintaining the entire Argyle Facility.

IV.

IT IS FURTHER ORDERED that:

A If Respondent has not divested, absolutely and in good faith and with the Commission's prior approval, the Assets To Be Divested within 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, Respondent shall consent to the appointment of a trustee in such action. Neither the appointment of a trustee nor a decision not to appoint a trustee under this Paragraph shall preclude the Commission from seeking civil penalties or any other relief available to it, including a court-appointed trustee, pursuant to Section 5(*l*) of the Federal Trade Commission Act, or any other statute enforced by the Commission, for any failure by the Respondent to comply with this order.

C If a trustee is appointed by the Commission or a court pursuant to Paragraph IV.A. of this order, Respondent shall consent to the following terms and conditions regarding the trustee's powers, duties, authority, and responsibilities:

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

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

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

4 The trustee shall have twelve (12) months from the date the Commission or court approves the trust agreement described in Paragraph IV.C.3. to accomplish the divestiture, which shall be subject to the prior approval of the Commission. If, however, at the end of the twelve-month period, the trustee has submitted a plan of divestiture or believes that divestiture can be achieved within a reasonable time, the divestiture period may be extended by the Commission, or, in the case of a court-appointed trustee, by the court; *provided, however*, the Commission may extend the period for no more than two (2) additional periods.

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

6 The trustee shall use his or her best efforts to negotiate the most favorable price and terms available in each contract that is submitted to the Commission, subject to Respondent's absolute and unconditional obligation to divest expeditiously at no minimum price. The divestiture shall be made in a manner that receives the prior approval of the Commission and to an Acquirer that receives the prior approval of the Commission; *provided, however*, if the trustee receives bona fide offers for the Assets To Be Divested from more than one acquiring entity, and if the Commission determines to approve more than one such acquiring entity, the trustee shall divest such assets to the acquiring entity or entities selected by Respondent from among those approved by the Commission; provided further, however, that Respondent shall select such entity within five (5) days of receiving notification of the Commission's approval.

7 The trustee shall serve, without bond or other security, at the cost and expense of Respondent, on such reasonable and customary terms and conditions as the Commission or a court may set. The trustee shall have the authority to employ, at the cost and expense of Respondent, such

consultants, accountants, attorneys, investment bankers, business brokers, appraisers, and other representatives and assistants as are necessary to carry out the trustee's duties and responsibilities. The trustee shall account for all monies derived from the divestiture and all expenses incurred. After approval by the Commission and, in the case of a court-appointed trustee, by the court, of the account of the trustee, including fees for his or her services, all remaining monies shall be paid at the direction of Respondent, and the trustee's power shall be terminated. The trustee's compensation shall be based at least in significant part on a commission arrangement contingent on the trustee's divesting the Assets To Be Divested.

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

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

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

11 In the event that the trustee determines that he or she is unable to divest the 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 corresponding to the Assets To Be Divested of Respondent 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 Respondent and the Commission every sixty (60) days concerning the trustee's efforts to accomplish the divestiture required by this order.

V.

IT IS FURTHER ORDERED that:

A. After the date this Order becomes final, the Commission may appoint a monitor trustee to assure that Respondent fully performs its responsibilities in a timely manner as required by this Order.

B. If a monitor trustee is appointed by the Commission, Respondent shall consent to the following terms and conditions regarding the monitor trustee's powers, duties, authority and responsibilities:

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

be deemed to have consented to the selection of the proposed monitor trustee.

2. Within ten (10) days after appointment of the monitor trustee, Respondent shall execute a trust agreement, subject to the prior approval of the Commission, that authorizes and permits the monitor trustee to perform the duties set forth in this Order.

3. The monitor trustee shall have the power and authority to monitor Respondent's compliance with the terms of this Order and shall exercise such power and authority and carry out the duties and responsibilities of the monitor trustee in a manner consistent with the purposes of this Order and in consultation with the Commission.

4. The monitor trustee shall prepare a written report and recommendation, if appropriate, with respect to Respondent's compliance with this Order.

5. The monitor trustee shall maintain the confidentiality of all confidential or proprietary information of Respondent and Acquirer, except that the monitor trustee may disclose to the Commission any confidential and proprietary information when reporting to the Commission on any matter bearing on compliance with the trust agreement and Order or bearing on the monitor trustee's performance of his or her duties.

6. The monitor trustee shall serve pursuant to the trust agreement from the time it is approved by the Commission for the term of the trust agreement.

7. Respondent shall give the monitor trustee full and complete access to the personnel, facilities, computers, books, and records related to the performance of his or her duties under this Order. The monitor trustee shall attempt to schedule any access or requests for information in such a manner as will not unreasonably interfere with Respondent's operations.

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

9. Respondent shall indemnify the monitor trustee and hold the monitor trustee harmless against any losses, claims, damages, liabilities or expenses arising out of, or in connection with, the performance of the monitor 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 monitor trustee.

10. The Commission may on its own initiative or at the request of the monitor trustee issue such additional orders or directions as may be necessary or appropriate to assure compliance with the requirements of this Order.

11. The monitor trustee may recover his or her costs of collection, including reasonable attorneys fees, if Respondent fails to pay compensation pursuant to Paragraph V.B.8. herein.

12. If at any time the Commission determines that the monitor trustee ceases to act or fails to act diligently, or is unwilling to serve, a substitute monitor trustee may be

appointed by the Commission in the same manner as provided in this Paragraph.

VI.

IT IS FURTHER ORDERED that within thirty (30) days after the date this Order becomes final and every sixty (60) days thereafter until Respondent has fully complied with the provisions of Paragraphs II. through IV., excluding Paragraph III.L. of this Order, Respondent shall submit to the Commission a verified written report setting forth in detail the manner and form in which it intends to comply, is complying, and has complied with Paragraphs II. through IV. of this Order. Respondent shall include in its compliance reports, among other things that are required from time to time, a full description of the efforts being made to comply with Paragraphs II. through IV. of the Order, including a description of all substantive contacts or negotiations relating to the divestiture and the approval. Respondent shall include in its 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 divestiture and approval. The final compliance report required by this Paragraph VI. 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.

VII.

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

VIII.

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

A. Access, during office hours and in the presence of counsel to all facilities and access to inspect and copy all non privileged books, ledgers, accounts, correspondence, memoranda and other records and documents in the possession or under the control of Respondent relating to any matter contained in this Order; and

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

By the Commission.

CONFIDENTIAL APPENDIX ICONFIDENTIAL APPENDIX II

Analysis of Agreement Containing Consent Order to Aid Public Comment

The Federal Trade Commission ("Commission") has accepted, subject to final approval, an Agreement Containing Consent Order ("Consent Agreement") from Tyco International, Ltd. ("Tyco"), which is designed to remedy the anticompetitive effects resulting from Tyco=s acquisition of Mallinckrodt, Inc. Under the terms of the agreement, Tyco will be required to divest its endotracheal tube business within ten days of the date the Consent Agreement is placed on the public record to Hudson RCI, or to another Commission-approved buyer no later than six (6) months from the date Tyco signed the Consent Agreement. If the sale of Tyco=s endotracheal tube business is not made within six (6) months, the Commission may appoint a trustee to divest it.

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

Pursuant to a July 28, 2000 Agreement and Plan of Merger, Tyco agreed to acquire Mallinckrodt in a stock-for-stock transaction valued at approximately $4.2 billion. The Commission's Complaint alleges that the acquisition, if consummated, would violate Section 7 of the Clayton Act, as amended, 15 U.S.C ' 18, and Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. ' 45, in the market for endotracheal tubes.

Analysis to Aid Public Comment

Tyco, through its Kendall Division, and Mallinckrodt are the largest providers of endotracheal tubes in the United States. Endotracheal tubes are devices that are inserted through the nose or mouth into the trachea to provide oxygen or anesthesia. Hospitals and emergency personnel use endotracheal tubes to maintain a secure airway during surgical procedures and emergency situations.

The United States endotracheal tube market is highly concentrated, and the proposed acquisition would produce a firm controlling approximately 86% of the market. Mallinckrodt is the largest supplier of endotracheal tubes, claiming that its products are used in over 70% of the surgical procedures performed in the United States each year. Tyco is the next largest supplier. Both companies have product lines consisting of over one hundred different types of endotracheal tubes and related accessories, and have long track records of customer acceptance. As the two largest suppliers in the market, Tyco and Mallinckrodt frequently bid against each other for important hospital group purchasing organization contracts. Tyco and Mallinckrodt are the only two firms that have won contracts to supply members of the largest and most important group purchasing organizations. By eliminating competition between the two most significant competitors in this highly concentrated market, the proposed acquisition would allow the combined Tyco/Mallinckrodt to exercise market power unilaterally, thereby increasing the likelihood that purchasers of endotracheal tubes would be forced to pay higher prices and that innovation and service levels in the market would decrease.

Substantial barriers to new entry exist in the endotracheal tube market. Effective new entry would require the development of a full line of endotracheal tube products, obtaining approvals from the Food and Drug Administration, procurement of several million dollars= worth of specialized manufacturing equipment, and the establishment of a sales and marketing force. Entry is further hampered by the fact that endotracheal tubes are critically

important to customers, though relatively inexpensive, so customers would be reluctant to consider new, unproven products even in the face of higher prices. In light of the fact that the endotracheal tube market is relatively small compared to the costs that a new entrant would have to incur, new entry is not likely to occur. Additionally, new entry into the endotracheal tube market is made more unlikely because of long-term hospital group purchasing organization contracts that may reduce the amount of sales opportunities available to new entrants. Because of the difficulty of accomplishing these tasks, new entry into the United States endotracheal tube market is unlikely to deter or counteract the anticompetitive effects resulting from the transaction

The Consent Agreement effectively remedies the acquisition's anticompetitive effects in the United States endotracheal tube market by requiring Tyco to divest its Sheridan line of endotracheal tube products. Pursuant to the Consent Agreement, Tyco is required to divest the Sheridan Line to Hudson RCI within ten days of the date the Commission places the Order on the public record. If the divestiture to Hudson RCI is not accomplished, Tyco must divest the Sheridan Line to a Commission-approved acquirer within six months. Should Tyco fail to do so, the Commission may appoint a trustee to divest the business.

The Consent Agreement includes a number of provisions that are designed to ensure that the transition of Tyco=s endotracheal tube business to the acquirer is successful. The Consent Agreement requires Tyco to provide incentives to certain key employees to accept employment, and remain employed, by the acquirer. Tyco employees who had been involved with selling the Sheridan endotracheal tube line are prohibited from selling the Mallinckrodt endotracheal tube products for a period of one year. Tyco is also prohibited from inducing key hospital group purchasing organizations from terminating their contracts with the acquirer for a period of two years. Finally, Tyco employees involved with the endotracheal tube business are prohibited from disclosing any confidential information to employees involved with the Mallinckrodt line.

Analysis to Aid Public Comment

In order to ensure that the Commission remains informed about the status of the Tyco endotracheal tube business pending divestiture, and about efforts being made to accomplish the divestiture, the Consent Agreement requires Tyco to report to the Commission within 30 days, and every thirty days thereafter until the divestiture is accomplished. In addition, Tyco is required to report to the Commission every 60 days regarding its obligations to provide transitional services and facilities management.

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

Complaint

IN THE MATTER OF

ALBERTSON=S, 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-3986; File No. 9810339
Complaint, December 6, 2000--Decision, December 6, 2000

This consent order addresses the $13 billion acquisition by Albertson=s, through its wholly owned subsidiary Abacus Holding, Inc., of American Stores Company. The complaint alleges that the proposed acquisition of all of the outstanding securities of American Stores, if consummated, would substantially lessen competition in the market for retail food and grocery items in supermarkets across the United States. The order requires Respondent to divest 144 individually identified stores and 5 identified supermarket sites to five different identified buyers. In 37 of the 57 proposed markets Respondent will divest all of either the Albertson or American stores, and in the remaining markets they will divest some combination. The order specifically requires Respondent to (1) maintain the viability, competitiveness and marketability of the assets to be divested; (2) not cause the wasting or deterioration of the assets to be divested; (3) not sell, transfer, encumber, or otherwise impair their marketability or viability; (4) maintain the supermarkets consistent with past practices; (5) use best efforts to preserve existing relationships with suppliers, customers and employees; and (6) keep the supermarkets open for business and maintain the inventory of products in each store consistent with past practice.

Participants

For the Commission: *Kenneth A. Libby, Phillip L. Broyles, Daniel P. Ducore, Geary A. Gessler,* and *Daniel P. O=Brien.*

For the Respondents: *Andrew G. Berg* and *Daniel F. McInnis, Akin, Gump, Strauss, Hauer & Feld L.L.P.* and *Robert Ling, Unified Western Grocers, Inc.*

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act and the Clayton Act, and by virtue of the authority vested in it by said Acts, the Federal Trade Commission ("Commission"), having reason to believe that respondent Albertson=s, Inc. ("Albertson=s"), through Abacus Holdings, Inc. (AAbacus@), a wholly owned subsidiary, has entered into an agreement to acquire all of the outstanding securities of respondent American Stores Company (AAmerican Stores@), all subject to the jurisdiction of the Commission, in violation of Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. ' 45, that such acquisition, if consummated, would violate Section 7 of the Clayton Act, as amended, 15 U.S.C. ' 18, and Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. ' 45, and that a proceeding in respect thereof would be in the public interest, hereby issues its complaint, stating its charges as follows:

Definition

1. For the purposes of this complaint:

"Supermarket" means a full-line retail grocery store that carries a wide variety of food and grocery items in particular product categories, including bread and dairy products; refrigerated and frozen food and beverage products; fresh and prepared meats and poultry; produce, including fresh fruits and vegetables; shelf-stable food and beverage products, including canned and other types of packaged products; staple foodstuffs, which may include salt, sugar, flour, sauces, spices, coffee, and tea; and other grocery products, including nonfood items such as soaps, detergents, paper goods, other household products, and health and beauty aids.

Albertson=s, Inc.

2. Respondent Albertson=s 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 250 East Parkcenter Boulevard, Boise, Idaho 83726.

3. Respondent Albertson=s is, and at all times relevant herein has been, engaged in the operation of supermarkets in 25 Western, Midwestern, and Southern states. Albertson=s operates 994 supermarkets and combination supermarkets and pharmacies under the Albertson=s, Max Grocery Warehouse, Monte Mart, Seessel=s, and Smitty=s trade names. Albertson=s had approximately $16 billion in total sales for the fiscal year that ended on January 28, 1999.

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

American Stores Company

5. Respondent American Stores 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 299 South Main Street, Salt Lake City, Utah 84111.

6. Respondent American Stores is, and at all times relevant herein has been, engaged in the operation of supermarkets in 12 Western, Midwestern and Eastern states. American Stores operates approximately 802 supermarkets and combination supermarket and pharmacies under the Lucky, SuperSaver, Sav-On, Acme Markets, and Jewel Food Stores trade names. American Stores also operates 773 stand-alone drug stores.

American Stores had $19.9 billion in total sales for the fiscal year that ended on January 30, 1999.

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

Acquisition

8. On or about August 2, 1998, Albertson=s, Abacus, and American Stores entered into an Agreement and Plan of Merger pursuant to which Abacus will acquire and convert all of the outstanding securities of American Stores into Albertson=s stock. Pursuant to the Agreement and Plan of Merger, each share of American Stores common stock would be converted into .63 shares of Albertson=s common stock. Abacus will then merge with and into American Stores, and American Stores will become a wholly owned subsidiary of Albertson=s. The total value of the proposed acquisition is approximately $13 billion.

Trade and Commerce

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

10. Supermarkets provide a distinct set of products and services for consumers who desire to one-stop shop for food and grocery products. Supermarkets carry a full line and wide selection of both food and nonfood products (typically more than 10,000 different stock-keeping units ("SKUs")) as well as a deep inventory of those SKUs in a variety of brand names and sizes. In order to accommodate the large number of food and nonfood products necessary for one-stop shopping, supermarkets are large

stores that typically have at least 10,000 square feet of selling space.

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

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

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

a. Antioch/Pittsburg, California;

b. Apple Valley/Hesperia/Victorville, California;

c. Atascadero, California;

d. Auburn, California;

e. Greater Bakersfield, California;

f. Claremont/Pomona/Rancho Cucamonga, California;

g. Danville/San Ramon/Dublin/Pleasanton, California;

h. Davis, California;

i. Encinitas, California;

j. Escondido, California;

k. Fallbrook, California;

l. Grass Valley, California;

m. Grover City/Arroyo Grande, California;

n. Jackson, California;

o. La Mesa/El Cajon, California;

p. Laguna Beach, California;

q. Lancaster/Palmdale, California;

r. Livermore, California;

s. Monterey/Seaside/Del Rey Oaks/Pacific Grove, California;

t. Moorpark, California;

u. Morro Bay/Los Osos, California;

v. Murrieta/Temecula, California;

w. Napa, California;

x. Northern Covina, California, an area that includes Azusa, Baldwin Park, Charter Oak, Citrus, Covina, Glendora, La Puente, Valinda, Vincent, West Covina, and West Puente;

y. Oceanside/Vista/Carlsbad, California;

z. Oxnard, California;

aa. Palm Springs/Indio, California;

bb. Paso Robles, California;

cc. Petaluma, California;

dd. Poway/North San Diego, California;

ee. Ramona, California;

ff. Redlands, California;

gg. Rialto/Fontana, California;

hh. Riverside/Corona, California;

ii. Greater Sacramento, California, and narrower markets contained therein;

jj. Salinas, California;

kk. San Luis Obispo, California;

ll. Santa Barbara/Goleta, California;

mm. Santa Clarita, California;

nn. Santa Cruz/Capitola, California;

oo. Santa Maria/Orcutt, California;

pp. Santa Rosa, California;

qq. Simi Valley, California;

rr. Sonoma/Hot Springs, California;

ss. South Los Angeles County/North Orange County, California, an area approximately bordered on the north by the Santa Monica and San Jose Hills/Puente Hills/Chino Hills, on the west by Interstate 710 and the Pacific Ocean, on the east by the Santa Ana Mountains, and on the south by the Laguna Hills and El Toro Marine Corps Air Base, and narrower markets contained therein;

tt. South Orange County, California, and narrower markets contained therein;

uu. Southern Covina, California, an area that includes the communities of Diamond Bar, Hacienta Heights, South San Jose Hills, and Walnut;

vv. Thousand Oaks/Newbury Park/Casa Conejo, California;

ww. Torrance, California;

xx. Vacaville, California;

yy. Watsonville/Freedom, California;

zz. Eastern Albuquerque, New Mexico;

aaa. Las Cruces, New Mexico;

bbb. Rio Rancho/Northwest Albuquerque, New Mexico;

ccc. Santa Fe, New Mexico; and

ddd. Greater Las Vegas/Henderson, Nevada, and narrower markets contained therein.

Market Structure

14. The post-merger relevant markets are all highly concentrated, whether measured by the Herfindahl-Hirschman Index (commonly referred to as "HHI") or by the four-firm concentration ratio. The acquisition would substantially increase concentration in each market. The post-acquisition HHIs in the geographic markets range from 2,000 to 8,090.

Entry Conditions

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

Actual Competition

16. Albertson=s and American Stores are actual and direct competitors in and near Apple Valley/Hesperia/Victorville, Auburn, Greater Bakersfield, Claremont/Pomona/Rancho Cucamonga, Danville/San Ramon/Dublin/Pleasanton, Davis, Encinitas, Escondido, Grass Valley, Grover City/Arroyo Grande, Jackson, La Mesa/El Cajon, Laguna Beach, Lancaster/Palmdale, Livermore, Monterey/Seaside/Del Rey Oaks/Pacific Grove, Moorpark, Murrieta/Temecula, Napa, Northern Covina, Oceanside/Vista/Carlsbad, Oxnard, Palm Springs/Indio, Paso Robles, Petaluma, Poway/North San Diego, Ramona, Redlands, Rialto/Fontana, Riverside/Corona, Greater Sacramento, Salinas, San Luis Obispo, Santa Barbara/Goleta, Santa Clarita, Santa Cruz/Capitola, Santa Rosa, Simi Valley, Sonoma/Hot Springs, South Los Angeles County/North Orange County, South Orange County, Southern Covina, Thousand Oaks/Newbury Park/Casa Conejo, Torrance, Vacaville, Watsonville/Freedom, California; Eastern Albuquerque, Las Cruces, Rio Rancho/Northwest Albuquerque, Santa Fe, New Mexico; and Greater Las Vegas/Henderson, Nevada.

Actual Potential Competition

17. Albertson=s is an actual potential competitor against American Stores in and near Antioch/Pittsburg, Atascadero, Fallbrook, and Santa Maria/Orcutt, California. American Stores is an actual potential competitor against Albertson=s in Morro Bay/Los Osos, California. But for the acquisition, Albertson=s and American Stores would have become direct competitors in and near Antioch/Pittsburg, Atascadero, Fallbrook, Morro Bay/Los Osos, and Santa Maria/Orcutt, California. The acquisition will eliminate that competition.

Effects

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

a. by eliminating direct competition between supermarkets owned or controlled by Albertson=s and supermarkets owned or controlled by American Stores;

b. by eliminating actual potential competition between supermarkets owned or controlled by Albertson=s and supermarkets owned or controlled by American Stores;

c. by increasing the likelihood that Albertson=s will unilaterally exercise market power; and

d. by increasing the likelihood of, or facilitating, collusion or coordinated interaction,

each of which increases the likelihood that the prices of food, groceries or services will increase, and the quality and selection of

food, groceries or services will decrease, in the relevant sections of the country.

Violations Charged

19. The Agreement and Plan of Merger between Albertson=s, Abacus and American Stores, pursuant to which Albertson=s and Abacus will acquire all of the outstanding securities of American Stores, violates Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. ' 45, and the proposed acquisition, if consummated, would violate Section 7 of the Clayton Act, as amended, 15 U.S.C. ' 18, and Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. ' 45.

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

By the Commission, Commissioner Leary not participating.

DECISION AND ORDER

The Federal Trade Commission ("Commission") having initiated an investigation of the proposed acquisition by Albertson=s, Inc. ("Albertson=s") of all of the outstanding securities of American Stores Company ("American Stores") (collectively, "Respondents"), and Respondents having been furnished with a copy of a draft complaint that the Bureau of Competition proposed to present to the Commission for its consideration, and which, if issued by the Commission, would charge Respondents with violations of 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

Decision and Order

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

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

1. Respondent Albertson=s, Inc. is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Delaware, with its office and principal place of business located at 250 East Parkcenter Boulevard, Boise, Idaho 83726.

2. Respondent American Stores Company is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Delaware, with its office and principal place of business located at 299 South Main Street, Salt Lake City, Utah 84111.

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

ORDER

I.

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

A. "Albertson=s" means Albertson=s, Inc., its directors, officers, employees, agents, representatives, predecessors, successors, and assigns; its subsidiaries, divisions, groups, and affiliates controlled by Albertson=s, and the respective directors, officers, employees, agents, representatives, successors, and assigns of each. Albertson=s, after consummation of the Acquisition, includes American Stores.

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

C. "Acquirer(s)" means Certified Grocers, Raley=s, Ralphs, Stater, Vons, and/or any other entity or entities approved by the Commission to acquire the Assets To Be Divested pursuant to this Order, individually and collectively.

D. "Acquisition" means the August 2, 1998, Agreement and Plan of Merger between Albertson=s, Abacus Holdings, Inc., a wholly owned subsidiary of Albertson=s, and American Stores pursuant to which Abacus Holdings, Inc. will acquire all of the outstanding securities of American Stores; Abacus Holdings, Inc. will merge with and into American Stores; and American Stores will become a wholly owned subsidiary of Albertson=s.

E. AApplicable Consent Decree@ means (i) a consent decree in an action commenced by the State of California, under which decree Respondents will divest all or part of the Schedule A Assets, Schedule C Assets, Schedule D Assets, and Schedule E Assets; (ii) a consent decree in an action commenced by the State of Nevada, under which decree Respondents will divest all or part of the Schedule B Assets; or (iii) a consent decree in an action commenced by the State of New Mexico, under which decree Respondents will divest all or part of the Schedule B Assets and Schedule C Assets.

F. "Assets To Be Divested" means the Schedule A Assets, the Schedule B Assets, the Schedule C Assets, the Schedule D Assets, and the Schedule E Assets of this Order, or any portion thereof.

G. "Certified Grocers" means Certified Grocers of California, Ltd., now known as Unified Western Grocers, Inc., its directors, officers, employees, agents, representatives, predecessors, successors, and assigns; its subsidiaries, divisions, groups, and affiliates controlled by Certified Grocers, and the respective directors, officers, employees, agents, representatives, successors, and assigns of each.

H. "Certified Grocers Agreement" means the Purchase Agreement between Certified Grocers and Albertson=s executed as of May 8, 1999, and amended as of May 25, 1999, and further amended as of May 28, 1999, for the divestiture by Respondents to Certified Grocers of the Schedule A Assets.

I. "Commission" means the Federal Trade Commission.

J. ALand Sites@ means those Assets To Be Divested identified in Schedule B, Schedule C, Schedule D, and Schedule E at which Respondents were building, causing to be built, or intended to build or cause to be built a Supermarket.

Decision and Order

K. "Raley=s" means Raley=s, 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 located at 500 W. Capital Avenue, West Sacramento, California 95605.

L. "Raley=s Agreement" means the Purchase Agreement between Raley=s and Albertson=s executed as of May 17, 1999, and amended as of May 25, 1999, for the divestiture by Respondents to Raley=s of the Schedule B Assets.

M. "Ralphs" means Ralphs Grocery Company, a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware, with its principal place of business located at 1100 W. Artesia Boulevard, Compton, California 90220.

N. "Ralphs Agreement" means the Purchase Agreement between Ralphs and Albertson=s executed as of May 14, 1999, for the divestiture by Respondents to Ralphs of the Schedule C Assets.

O. ARemaining Assets To Be Divested@ means all portions of the Assets To Be Divested that are not divested within the time provided in Paragraph II.

P. "Respondents" means Albertson=s and American Stores individually and collectively.

Q. ASchedule A Assets@ means the Supermarkets identified in Schedule A of this Order and all assets, leases, properties, governmental permits (to the extent transferable), customer lists, businesses and goodwill, tangible and intangible, related to or utilized in the Supermarket business operated at those locations, but shall not include those assets consisting of or pertaining to any of the Respondents' trade marks, trade dress, service marks, or trade names.

R. ASchedule B Assets@ means the Supermarkets and Land Sites identified in Schedule B of this Order and all assets, leases, properties, governmental permits (to the extent transferable), customer lists, businesses and goodwill, tangible and intangible, related to or utilized in the Supermarket business operated at those locations, but shall not include those assets consisting of or pertaining to any of the Respondents' trade marks, trade dress, service marks, or trade names.

S. ASchedule C Assets@ means the Supermarkets and Land Sites identified in Schedule C of this Order and all assets, leases, properties, governmental permits (to the extent transferable), customer lists, businesses and goodwill, tangible and intangible, related to or utilized in the Supermarket business operated at those locations, but shall not include those assets consisting of or pertaining to any of the Respondents' trade marks, trade dress, service marks, or trade names.

T. ASchedule D Assets@ means the Supermarkets and Land Sites identified in Schedule D of this Order and all assets, leases, properties, governmental permits (to the extent transferable), customer lists, businesses and goodwill, tangible and intangible, related to or utilized in the Supermarket business operated at those locations, but shall not include those assets consisting of or pertaining to any of the Respondents' trade marks, trade dress, service marks, or trade names.

U. ASchedule E Assets@ means the Supermarkets and Land Sites identified in Schedule E of this Order and all assets, leases, properties, governmental permits (to the extent transferable), customer lists, businesses and goodwill, tangible and intangible, related to or utilized in the Supermarket business operated at those locations, but shall not include those assets consisting of or pertaining to any of the Respondents' trade marks, trade dress, service marks, or trade names.

V. "Stater" means Stater Bros. Markets, a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware, with its principal place of business located at 21700 Barton Road, Colton, California 92324.

W. "Stater Agreement" means the Purchase Agreement between Stater and Albertson=s executed as of May 7, 1999, for the divestiture by Respondents to Stater of the Schedule D Assets.

X. "Supermarket" means a full-line retail grocery store that carries a wide variety of food and grocery items in particular product categories, including bread and dairy products; refrigerated and frozen food and beverage products; fresh and prepared meats and poultry; produce, including fresh fruits and vegetables; shelf-stable food and beverage products, including canned and other types of packaged products; staple foodstuffs, which may include salt, sugar, flour, sauces, spices, coffee, and tea; and other grocery products, including nonfood items such as soaps, detergents, paper goods, other household products, and health and beauty aids.

Y. ASupermarkets To Be Divested@ means the Supermarkets and Land Sites identified in Schedule A, Schedule B, Schedule C, Schedule D, and Schedule E.

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

AA. "Vons" means The Vons Companies, Inc., a corporation organized, existing and doing business under and by virtue of the laws of the State of Michigan, with its principal place of business located at 618 Michillinda Avenue, Arcadia, California 91007.

BB. "Vons Agreement" means the Purchase Agreement between Vons and Safeway Inc, the parent of Vons, and Albertson=s executed as of April 30, 1999, for the divestiture by Respondents to Vons of the Schedule E Assets.

II.

IT IS FURTHER ORDERED that:

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

1. ninety days (90) days after the date on which the Acquisition is consummated, or

2. four (4) months after the date on which the Commission accepts the Agreement Containing Consent Order for public comment.

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

Provided, further, that Respondents shall not be required to divest any fixtures, equipment or inventory at any Supermarket

To Be Divested of the Schedule A Assets that the Acquirer of the Schedule A Assets indicates that it does not want to acquire, if the Commission approves the divestiture to such Acquirer and approves the manner of the divestiture excluding such assets.

B. Respondents shall divest, absolutely and in good faith, the Schedule B Assets to Raley=s, in accordance with the Raley=s Agreement (which agreement shall not be construed to vary or contradict the terms of this Order), no later than the earlier of

1. one hundred and two (102) days after the date on which the Acquisition is consummated, or September 13, 1999, whichever is later, or

2. four (4) months after the date on which the Commission accepts the Agreement Containing Consent Order for public comment.

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

Provided, further, that Respondents shall not be required to divest any fixtures, equipment or inventory at any Supermarket To Be Divested of the Schedule B Assets that the Acquirer of the Schedule B Assets indicates that it does not want to acquire, if the

Commission approves the divestiture to such Acquirer and approves the manner of the divestiture excluding such assets.

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

1. one hundred and twenty (120) days after the date on which the Acquisition is consummated, or

2. four (4) months after the date on which the Commission accepts the Agreement Containing Consent Order for public comment.

Provided, however, that Respondents shall divest

1. Lucky store no. 262 in Orcutt, California no later than the earlier of (a) February 28, 2000, or (b) twenty-four (24) hours prior to the opening of any new Supermarket in Orcutt, California, by Respondents; and

2. Lucky store no. 273 in Atascadero, California no later than the earlier of (a) January 31, 2000, or (b) twenty-four (24) hours prior to the opening of any new Supermarket in Atascadero, California, by Respondents.

Provided, further, that if Respondents have divested the Schedule C Assets to Ralphs pursuant to the Ralphs Agreement prior to the date the Order becomes final, and if, at the time the Commission determines to make the Order final, the Commission notifies Respondents that Ralphs is not an acceptable Acquirer or that the Ralphs Agreement is not an acceptable manner of divestiture for any or all of the Schedule C Assets, then Respondents shall immediately rescind the transaction with Ralphs as to such assets and shall divest such assets within three (3) months of the date the Order becomes final, absolutely and in good faith, at no minimum

price, to an Acquirer that receives the prior approval of the Commission and only in a manner that receives the prior approval of the Commission.

Provided, further, that Respondents shall not be required to divest any fixtures, equipment or inventory at any Supermarket To Be Divested of the Schedule C Assets that the Acquirer of the Schedule C Assets indicates that it does not want to acquire, if the Commission approves the divestiture to such Acquirer and approves the manner of the divestiture excluding such assets.

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

1. eighty-five (85) days after the date on which the Acquisition is consummated, or

2. four (4) months after the date on which the Commission accepts the Agreement Containing Consent Order for public comment.

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

Provided, further, that Respondents shall not be required to divest any fixtures, equipment or inventory at any Supermarket To Be Divested of the Schedule D Assets that the Acquirer of the Schedule D Assets indicates that it does not want to acquire, if the Commission approves the divestiture to such Acquirer and approves the manner of the divestiture excluding such assets.

E. Respondents shall divest, absolutely and in good faith, the Schedule E Assets to Vons consisting of Albertson=s store nos. 1605 and 1622 and American Stores store no. 558, in accordance with the Vons Agreement (which agreement shall not be construed to vary or contradict the terms of this Order), no later than the earlier of

1. thirty (30) days after the date on which the Acquisition is consummated, or

2. four (4) months after the date on which the Commission accepts the Agreement Containing Consent Order for public comment,

and the Schedule E Assets consisting of the Land Site for Albertson=s store no. 628, in accordance with the Vons Agreement (which agreement shall not be construed to vary or contradict the terms of this Order), no later than the earlier of

1. sixty (60) days after the date on which the Acquisition is consummated, or

2. four (4) months after the date on which the Commission accepts the Agreement Containing Consent Order for public comment.

Provided, however, that if Respondents have divested the Schedule E Assets to Vons pursuant to the Vons Agreement prior to the date the Order becomes final, and if, at the time the Commission determines to make the Order final, the Commission notifies Respondents that Vons is not an acceptable Acquirer or

that the Vons Agreement is not an acceptable manner of divestiture for any or all of the Schedule E Assets, then Respondents shall immediately rescind the transaction with Vons as to such assets and shall divest such assets within three (3) months of the date the Order becomes final, absolutely and in good faith, at no minimum price, to an Acquirer that receives the prior approval of the Commission and only in a manner that receives the prior approval of the Commission.

Provided, further, that Respondents shall not be required to divest any fixtures, equipment or inventory at any Supermarket To Be Divested of the Schedule E Assets that the Acquirer of the Schedule E Assets indicates that it does not want to acquire, if the Commission approves the divestiture to such Acquirer and approves the manner of the divestiture excluding such assets.

F. Respondents shall obtain all required Third Party Consents prior to the closing of the Certified Grocers Agreement, the Ralphs Agreement, the Raley=s Agreement, the Stater Agreement, the Vons Agreement or any other agreement pursuant to which the Assets To Be Divested are divested to an Acquirer.

G. The purpose of the divestitures is to ensure the continuation of the Assets To Be Divested as ongoing viable enterprises engaged in the Supermarket business and to remedy the lessening of competition resulting from the Acquisition alleged in the Commission's complaint.

III.

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

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

1) maintain operations and departments and not reduce hours at each Supermarket To Be Divested;

2) not transfer inventory from any Supermarket To Be Divested other than in the ordinary course of business consistent with past practice;

3) make any payment required to be paid under any contract or lease when due, and otherwise pay all liabilities and satisfy all obligations, in each case in a manner consistent with past practice;

4) maintain the books and records of each Supermarket To Be Divested;

5) not display any signs or conduct any advertising (*e.g.*, direct mailing, point-of-purchase coupons) that indicates that any Respondent is moving its operations to another location, or that indicates a Supermarket To Be Divested will close;

6) not conduct any "going out of business," "close-out," "liquidation" or similar sales or promotions at or relating to any Supermarket To Be Divested; and

7) not change or modify in any material respect the existing advertising practices, programs and policies for any Supermarket To Be Divested, other than changes in the ordinary course of business consistent with past practice for Supermarkets of the Respondents not being closed or relocated.

IV.

IT IS FURTHER ORDERED that at any time after Respondents sign the Agreement Containing Consent Order in this matter, the Commission may appoint an Interim Trustee to ensure that Respondents expeditiously perform their respective responsibilities as required by this Order. Albertson=s shall consent to the following terms and conditions regarding the powers, duties, authorities, and responsibilities of the Interim Trustee appointed pursuant to this Paragraph IV:

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

B. The Interim Trustee shall have the power and authority to monitor Respondents= compliance with the terms of this Order.

C. Within ten (10) days after appointment of the Interim Trustee, Respondents shall execute a trust agreement that, subject to the prior approval of the Commission, confers on the Interim Trustee all the rights and powers necessary to permit the Interim Trustee to monitor Respondents= compliance with the terms of this Order.

D. The Interim Trustee shall serve until such time as all the divestitures required by the Order have been accomplished.

E. The Interim Trustee shall have full and complete access to Respondents= personnel, books, records, documents, facilities and technical information relating to the Assets To Be Divested, or to any other relevant information, as the Interim Trustee may reasonably request, including, but not limited to, all documents and records kept in the normal course of business that relate to the Assets To Be Divested. Respondents shall cooperate with any reasonable request of the Interim Trustee. Respondents shall take no action to interfere with or impede the Interim Trustee=s ability to monitor Respondents= compliance with this Order.

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

G. Respondents shall indemnify the Interim Trustee and hold the Interim Trustee harmless against any losses, claims, damages, liabilities or expenses arising out of, or in connection with, the performance of the Interim Trustee=s duties, including all reasonable fees of counsel and other expenses incurred in

connection with the preparation for or defense of any claim, whether or not resulting in any liability, except to the extent that such losses, claims, damages, liabilities or expenses result from misfeasance, gross negligence, willful or wanton acts, or bad faith by the Interim Trustee.

H. If the Commission determines that the Interim Trustee has ceased to act or failed to act diligently, the Commission may appoint a substitute trustee in the same manner as provided in Paragraph IV.A. of this Order.

I. The Commission may on its own initiative or at the request of the Interim Trustee issue such additional orders or directions as may be necessary or appropriate to assure compliance with the requirements of this Order and the divestiture agreement with the Acquirer(s).

J. The Interim Trustee shall evaluate reports submitted to it by the Respondents with respect to the Assets To Be Divested. The Interim Trustee shall report to the Commission in writing concerning compliance by Respondents to the Commission every thirty (30) days from the date the Order is accepted for public comment until all the divestitures are accomplished.

V.

IT IS FURTHER ORDERED that:

A. If Respondents have not divested, absolutely and in good faith and with the Commission=s prior approval, all of the Assets To Be Divested within the time required by Paragraph II of this Order, the Commission may appoint a trustee to divest the Remaining Assets To Be Divested. In the event that the Commission or the Attorney General brings an action pursuant to Section 5(*l*) of the Federal Trade Commission Act, 15 U.S.C. ' 45(*l*), or any other statute enforced by the Commission,

Respondents shall consent to the appointment of a trustee in such action. Neither the appointment of a trustee nor a decision not to appoint a trustee under this Paragraph shall preclude the Commission or the Attorney General from seeking civil penalties or any other relief available to it, including a court-appointed trustee, pursuant to Section 5(*l*) of the Federal Trade Commission Act, or any other statute enforced by the Commission, for any failure by the Respondents to comply with this Order.

B. If a trustee is appointed by the Commission or a court pursuant to Paragraph 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 written notice by the staff of the Commission to Respondents of the identity of any proposed trustee, Respondents shall be deemed to have consented to the selection of the proposed trustee.

2. Subject to the prior approval of the Commission, the trustee shall have the exclusive power and authority to divest the Remaining 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.B.3. to accomplish the divestitures, which shall be subject to the prior approval of the Commission. If, however, at the end of the twelve-month period, the trustee has submitted a plan of divestiture or believes that divestiture can be achieved within a reasonable time, the divestiture period may be extended by the Commission, or, in the case of a court-appointed trustee, by the court; *provided, however*, the Commission may extend the period for no more than two (2) additional periods.

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

6. The trustee shall use his or her best efforts to negotiate the most favorable price and terms available in each contract that is submitted to the Commission, subject to Respondents= absolute and unconditional obligation to divest expeditiously at no minimum price. The divestitures shall be made in the manner and to the Acquirer or Acquirers as set out in Paragraph II of this Order; *provided, however*, if the trustee receives bona fide offers for an asset to be divested from more than

one acquiring entity, and if the Commission determines to approve more than one such acquiring entity, the trustee shall divest such asset to the acquiring entity or entities selected by Albertson=s from among those approved by the Commission.

7. The trustee shall serve, without bond or other security, at the cost and expense of Respondents, on such reasonable and customary terms and conditions as the Commission or a court may set. The trustee shall have the authority to employ, at the cost and expense of Respondents, such consultants, accountants, attorneys, investment bankers, business brokers, appraisers, and other representatives and assistants as are necessary to carry out the trustee's duties and responsibilities. The trustee shall account for all monies derived from the divestitures and all expenses incurred. After approval by the Commission and, in the case of a court-appointed trustee, by the court, of the account of the trustee, including fees for his or her services, all remaining monies shall be paid at the direction of Albertson=s, 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 Remaining 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 Remaining Assets To Be Divested in a manner consistent with the Commission's purpose as described in Paragraph II, the trustee may divest additional ancillary assets of Respondents and effect such arrangements as are necessary to satisfy the requirements of this Order.

12. The trustee shall have no obligation or authority to operate or maintain the Remaining 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 if Certified Grocers purchases the Schedule A Assets pursuant to Paragraph II.A.:

A. Certified Grocers shall divest, within three (3) months of the date on which Certified Grocers acquires the Schedule A Assets (or three (3) months after the date the Order becomes final, whichever is later), at least twenty (20) Supermarkets of the

Schedule A Assets to buyers who receive the prior approval of the Commission, and only in a manner approved by the Commission. *Provided, however*, that prior approval of the Commission is not required for the following buyers to acquire the following Supermarkets, so long as the manner of the acquisition is approved by the Commission:

1. A.J. Markets, Inc. (d/b/a Amar Ranch) may acquire American Stores store no. 670;

2. Arden Group (d/b/a Gelsons and Mayfair) may acquire Albertson=s store no. 622;

3. Berberian Enterprises (d/b/a Jons Market) may acquire Albertson=s store no. 1906 and American Stores store no. 650;

4. Bianchini=s Apple Market (d/b/a Apple Market) may acquire Albertson=s store no. 720;

5. Ceiland Coast, Inc. may acquire American Stores store no. 674;

6. Colonial Shopping Center, a general partnership (d/b/a Young=s Market) may acquire American Stores store no. 281;

7. El Tigre Inc. (d/b/a El Tigre Market) may acquire American Stores store no. 211;

8. Goodwin & Sons, Inc. (d/b/a Village Market) may acquire Albertson=s store no. 1611;

9. Hope Mart, Inc. (d/b/a Best Value Grocery Warehouse) may acquire Albertson=s store nos. 1978 and 1983;

10. K.V. Mart Co. (d/b/a Top Valu and Valu Plus Food Warehouse) may acquire Albertson=s store nos. 682, 1666, 1675, 1905, 1909, 1930, and 1953 and American Stores store nos. 431, 630, 679, and 884;

11. Rodd Mart, Inc. (d/b/a Payless Foods) may acquire Albertson=s store no. 1650;

12. Stump=s Apple Markets (d/b/a Apple Market) may acquire Albertson=s store no. 609;

13. UKA=s Big Saver Food, Inc. (d/b/a Big Saver Foods) may acquire American Stores store no. 873;

14. Vallarta Foods Enterprises, Inc. (d/b/a Vallarta Super Markets) may acquire Albertson=s store no. 1963; and

15. Ronald Ziff may acquire American Stores store no. 286.

Respondents shall use their best efforts to assist Certified Grocers in the sale of the Schedule A Assets pursuant to this Paragraph in accordance with the terms of this Order.

B. Certified Grocers shall not sell or otherwise convey, directly or indirectly, any remaining Schedule A Assets, except to an Acquirer approved by the Commission and only in a manner that receives the prior approval of the Commission. Certified Grocers shall comply with this Paragraph until three (3) years after the date this Order becomes final.

VII.

IT IS FURTHER ORDERED that, for a period of ten (10) years from the date this Order becomes final, Respondents shall not, directly or indirectly, through subsidiaries, partnerships, or

otherwise, without providing advance written notification to the Commission:

A. Acquire any ownership or leasehold interest in any facility that has operated as a Supermarket within six (6) months prior to the date of such proposed acquisition in Alameda, Amador, Contra Costa, Kern, Los Angeles, Monterey, Napa, Nevada, Orange, Placer, Riverside, Sacramento, San Bernardino, San Diego, San Luis Obispo, Santa Barbara, Santa Cruz, Solano, Sonoma, Ventura, or Yolo counties in California; Clark County in Nevada; or Bernalillo, Dona Ana, Sandoval, or Santa Fe counties in New Mexico.

B. Acquire any stock, share capital, equity, or other interest in any entity that owns any interest in or operates any Supermarket or owned any interest in or operated any Supermarket within six (6) months prior to such proposed acquisition in Alameda, Amador, Contra Costa, Kern, Los Angeles, Monterey, Napa, Nevada, Orange, Placer, Riverside, Sacramento, San Bernardino, San Diego, San Luis Obispo, Santa Barbara, Santa Cruz, Solano, Sonoma, Ventura, or Yolo counties in California; Clark County in Nevada; or Bernalillo, Dona Ana, Sandoval, or Santa Fe counties in New Mexico.

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

Said notification shall be given on the Notification and Report Form set forth in the Appendix to Part 803 of Title 16 of the Code of Federal Regulations as amended (hereinafter referred to as "the Notification"), and shall be prepared and transmitted in accordance with the requirements of that part, except that no filing fee will be required for 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 "first waiting period"). If, within the first waiting period, representatives of the Commission make a written request for additional information or documentary material (within the meaning of 16 C.F.R. ' 803.20), Respondents shall not consummate the transaction until twenty (20) days after substantially complying with such request. Early termination of the waiting periods in this Paragraph may be requested and, where appropriate, granted by letter from the Bureau of Competition. *Provided, however*, that prior notification shall not be required by this Paragraph for a transaction for which notification is required to be made, and has been made, pursuant to Section 7A of the Clayton Act, 15 U.S.C. ' 18a.

VIII.

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

A. Respondents shall neither enter into nor enforce any agreement that restricts the ability of any person (as defined in Section 1(a) of the Clayton Act, 15 U.S.C. ' 12(a)) that acquires any Supermarket, any leasehold interest in any Supermarket, or any interest in any retail location used as a Supermarket on or after January 1, 1998, in Alameda, Amador, Contra Costa, Kern, Los Angeles, Monterey, Napa, Nevada, Orange, Placer, Riverside, Sacramento, San Bernardino, San Diego, San Luis Obispo, Santa Barbara, Santa Cruz, Solano, Sonoma, Ventura, or Yolo counties in California; Clark County in Nevada; or Bernalillo, Dona Ana, Sandoval, or Santa Fe counties in New Mexico to operate a Supermarket at that site if such Supermarket was formerly owned or operated by Respondents.

B. Respondents shall not remove any fixtures or equipment from a property owned or leased by Respondents in Alameda, Amador, Contra Costa, Kern, Los Angeles, Monterey, Napa, Nevada, Orange, Placer, Riverside, Sacramento, San Bernardino, San Diego, San Luis Obispo, Santa Barbara, Santa Cruz, Solano, Sonoma, Ventura, or Yolo counties in California; Clark County in Nevada; or Bernalillo, Dona Ana, Sandoval, or Santa Fe counties in New Mexico, that is no longer in operation as a Supermarket, except (1) prior to and as part of a sale, sublease, assignment, or change in occupancy of such Supermarket; or (2) to relocate such fixtures or equipment in the ordinary course of business to any other Supermarket owned or operated by Respondents.

IX.

IT IS FURTHER ORDERED that:

A. Within thirty (30) days after the date Respondents signed the Agreement Containing Consent Order and every thirty (30) days thereafter until Respondents have fully complied with the provisions of Paragraphs II, III, IV, V, and VI of this Order, Respondents shall submit to the Commission verified written reports setting forth in detail the manner and form in which they intend to comply, are complying, and have complied with Paragraphs II, III, IV, V, and VI of this Order. Respondents shall include in their compliance reports, among other things that are required from time to time, a full description of the efforts being made to comply with Paragraphs II, III, and V of the Order, including a description of all substantive contacts or negotiations for divestitures and the identity of all parties contacted. Respondents shall include in their compliance reports copies of all written communications to and from such parties, all internal memoranda, and all reports and recommendations concerning divestiture.

B. One (1) year from the date this Order becomes final, annually for the next nine (9) years on the anniversary of the date this Order becomes final, and at other times as the Commission may require, Respondents shall file verified written reports with

the Commission setting forth in detail the manner and form in which they have complied and are complying with this Order.

X.

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

XI.

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

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

B. Without restraint or interference from Respondents and Certified Grocers, to interview officers, directors, or employees of Respondents or Certified Grocers in the presence of counsel.

XII.

IT IS FURTHER ORDERED that, if (i) Respondents have fully complied with all terms of Paragraphs III - XI of this Order; (ii) Respondents within forty-five (45) days after final issuance of

this Order by the Commission have submitted a complete application in support of the divestiture of the Assets To Be Divested pursuant to Paragraph II of this Order, as the case may be (including the buyer, manner of divestiture and all other matters subject to Commission approval); and (iii) the Commission has approved the divestiture and has not withdrawn its acceptance; but (iv) Respondents have certified to the Commission within ten (10) days after the Commission=s approval of the divestiture that a State, notwithstanding timely and complete application by Respondents to the State, has failed to approve the divestiture under an Applicable Consent Decree of the particular assets or businesses whose divestiture is also required under this Order, then with respect to the particular divestiture that remains unconsummated, the time in which the divestiture is required under this Order to be completed shall be extended for sixty (60) days. During such sixty (60) day period, Respondents shall exercise utmost good faith and best efforts to resolve the concerns of the particular State.

By the Commission, Commissioner Leary not participating.

Schedule A

Supermarkets Divested to Certified Grocers

Supermarket in the Apple Valley/Hesperia/Victorville, California Market:

1. Albertson=s store no. 1609 operating under the AAlbertson=s@ trade name, which is located at 20801 Bear Valley Road, Apple Valley, California 92307 (San Bernardino County).

Supermarket in the Greater Bakersfield, California Market:

Schedules

1. American Stores store no. 281 operating under the ALucky@ trade name, which is located at 4801 White Lane, Bakersfield, California 93309 (Kern County).

Schedules

Supermarkets in the Claremont/Pomona/Rancho Cucamonga, California Market:

1. Albertson=s store no. 1675 operating under the AAlbertson=s@ trade name, which is located at 2340 Foothill Boulevard, Laverne, California 91750 (Los Angeles County);

2. Albertson=s store no. 1983 operating under the AMax Grocery Warehouse@ trade name, which is located at 1445 East Foothill Boulevard, Upland, California 91785 (San Bernardino County);

3. American Stores store no. 431 operating under the ALucky@ trade name, which is located at 4200 Chino Hills Parkway 400, Chino Hills, California 91709 (San Bernardino County);

4. American Stores store no. 670 operating under the ALucky@ trade name, which is located at 685 West Foothill Boulevard, Upland, California 91786 (San Bernardino County); and

5. American Stores store no. 679 operating under the ALucky@ trade name, which is located at 6351 Haven Avenue, Rancho Cucamonga, California 91737 (San Bernardino County).

Supermarket in the Escondido, California Market:

1. American Stores store no. 211 operating under the ALucky@ trade name, which is located at 606 North Escondido Boulevard, Escondido, California 92025 (San Diego County).

Supermarket in the La Mesa/El Cajon, California Market:

1. American Stores store no. 565 operating under the ALucky@ trade name, which is located at 7908 El Cajon Boulevard, La Mesa, California 91641 (San Diego County).

Schedules

Supermarket in the Lancaster/Palmdale, California Market:

1. Albertson=s store no. 1963 operating under the AMax Grocery Warehouse@ trade name, which is located at 1111 West Avenue I, Lancaster, California 93534 (Los Angeles County).

Supermarket in the Murrieta/Temecula, California Market:

1. Albertson=s store no. 1611 operating under the AAlbertson=s@ trade name, which is located at 29530 Rancho California Road, Temecula, California 92591 (Riverside County).

Supermarkets in the Northern Covina, California Market:

1. American Stores store no. 620 operating under the ALucky@ trade name, which is located at 1385 North Citrus Avenue, Covina, California 91722 (Los Angeles County);

2. American Stores store no. 873 operating under the ALucky@ trade name, which is located at 13925 Amar Road, La Puente, California 90746 (Los Angeles County); and

3. American Stores store no. 884 operating under the ALucky Sav-On@ trade name, which is located at 543 North Azusa, Covina, California 91723 (Los Angeles County).

Supermarkets in the Oxnard, California Market:

1. Albertson=s store no. 682 operating under the AAlbertson=s@ trade name, which is located at 450 South Ventura Road, Oxnard, California 93030 (Ventura County); and

2. Albertson=s store no. 1953 operating under the AMax Grocery Warehouse@ trade name, which is located at 2800 Saviers Road, Oxnard, California 93030 (Ventura County).

Schedules

Schedules

Supermarket in the Petaluma, California Market:

1. Albertson=s store no. 720 operating under the AAlbertson=s@ trade name, which is located at 169 North McDowell Boulevard, Petaluma, California 94954 (Sonoma County).

Supermarket in the Rialto/Fontana, California Market:

1. Albertson=s store no. 1978 operating under the AMax Grocery Warehouse@ trade name, which is located at 515 South Riverside Avenue, Rialto, California 92376 (San Bernardino County).

Supermarket in the Riverside/Corona, California Market:

1. Albertson=s store no. 1613 operating under the AAlbertson=s@ trade name, which is located at 430 McKinley, Corona, California 91719 (Riverside County).

Supermarket in the Santa Barbara/Goleta, California Market:

1. Albertson=s store no. 622 operating under the AAlbertson=s@ trade name, which is located at 3305 State Street, Santa Barbara, California 93105 (Santa Barbara County).

Supermarket in the Simi Valley, California Market:

1. American Stores store no. 650 operating under the ALucky@ trade name, which is located at 3963 Cochran, Simi Valley, California 93063 (Ventura County).

Supermarkets in the South Los Angeles County/North Orange County, California Market:

1. Albertson=s store no. 1650 operating under the AAlbertson=s@ trade name, which is located at 1720 East 17th Street, Santa Ana, California 92701 (Orange County);

2. Albertson=s store no. 1905 operating under the AMax Grocery Warehouse@ trade name, which is located at 4700 Cherry Avenue, Long Beach, California 90807 (Los Angeles County);

3. Albertson=s store no. 1906 operating under the AMax Grocery Warehouse@ trade name, which is located at 15300 Goldenwest, Westminster, California 92683 (Orange County);

4. Albertson=s store no. 1909 operating under the AMax Grocery Warehouse@ trade name, which is located at 12120 Carson Street, Hawaiian Gardens, California 90716 (Los Angeles County); and

5. Albertson=s store no. 1930 operating under the AMax Grocery Warehouse@ trade name, which is located at 12891 Harbor Boulevard, Garden Grove, California 92640 (Orange County).

Supermarket in the South Orange County, California Market:

1. Albertson=s store no. 609 operating under the AAlbertson=s@ trade name, which is located at 602 El Camino Real, San Clemente, California 92672 (Orange County).

Supermarket in the Southern Covina, California Market:

1. Albertson=s store no. 1666 operating under the AAlbertson=s@ trade name, which is located at 21080 Golden Springs, Walnut, California 91789 (Los Angeles County).

Supermarkets in the Thousand Oaks/Newbury Park/Casa Conejo, California Market:

1. American Stores store no. 286 operating under the ALucky@ trade name, which is located at 740 Moorpark Avenue, Thousand Oaks, California 91360 (Ventura County); and

2. American Stores store no. 674 operating under the ALucky@ trade name, which is located at 2100 Newbury Road, Newbury Park, California 91320 (Ventura County).

Supermarket in the Torrance, California Market:

1. American Stores store no. 630 operating under the ALucky@ trade name, which is located at 4848 West 190th Street, Torrance, California 90503 (Los Angeles County).

Schedule B

Supermarkets and Land Site Divested to Raley=s

Supermarkets and Land Site in the Greater Las Vegas/Henderson, Nevada Market:

1. Albertson=s store no. 611 operating under the AAlbertson=s@ trade name, which is located at 4015 South Buffalo Drive, Las Vegas, Nevada 89117 (Clark County);

2. Albertson=s store no. 614 operating under the AAlbertson=s@ trade name, which is located at 55 South Valle Verde Drive, Henderson, Nevada 89012 (Clark County);

3. Albertson=s store no. 634 operating under the AAlbertson=s@ trade name, which is located at 4790 East Flamingo Road, Las Vegas, Nevada 89121 (Clark County);

4. Albertson=s store no. 637 operating under the AAlbertson=s@ trade name, which is located at 1570 North Eastern Avenue, Las Vegas, Nevada 89101 (Clark County);

5. Albertson=s store no. 686 operating under the AAlbertson=s@ trade name, which is located at 260 East Lake Mead Drive, Henderson, Nevada 89015 (Clark County);

6. Albertson=s store no. 1606 operating under the AAlbertson=s@ trade name, which is located at 1421 North Jones Boulevard, Las Vegas, Nevada 89108 (Clark County);

7. Albertson=s store no. 1616 operating under the AAlbertson=s@ trade name, which is located at 3160 North Rainbow, Las Vegas, Nevada 89107 (Clark County);

8. Albertson=s store no. 1618 operating under the AAlbertson=s@ trade name, which is located at 2271 North Green Valley Parkway, Henderson, Nevada 89014 (Clark County);

9. Albertson=s store no. 1621 operating under the AAlbertson=s@ trade name, which is located at 9200 West Sahara Avenue, Las Vegas, Nevada 89117 (Clark County);

10. Albertson=s store no. 1628 operating under the AAlbertson=s@ trade name, which is located at 8570 West Lake Mead Boulevard, Las Vegas, Nevada 89128 (Clark County);

11. Albertson=s store no. 1638 operating under the AAlbertson=s@ trade name, which is located at 4821 West Craig Road, Las Vegas, Nevada 89129 (Clark County);

12. Albertson=s store no. 1642 operating under the AAlbertson=s@ trade name, which is located at 3864 West Sahara Avenue, Las Vegas, Nevada 89102 (Clark County);

13. Albertson=s store no. 1659 operating under the AAlbertson=s@ trade name, which is located at 2545 South Eastern Avenue, Las Vegas, Nevada 89109 (Clark County);

14. Albertson=s store no. 1660 operating under the AAlbertson=s@ trade name, which is located at 8150 South Eastern Avenue, Las Vegas, Nevada 89123 (Clark County);

15. Albertson=s store no. 1664 operating under the AAlbertson=s@ trade name, which is located at 120 South Rainbow, Las Vegas, Nevada 89128 (Clark County);
16. Albertson=s store no. 1665 operating under the AAlbertson=s@ trade name, which is located at 1255 South Lamb Boulevard, Las Vegas, Nevada 89104 (Clark County);

17. Albertson=s store no. 1678 operating under the AAlbertson=s@ trade name, which is located at 1955 North Nellis Boulevard, Las Vegas, Nevada 89115 (Clark County);

18. Albertson=s store no. 1681 operating under the AAlbertson=s@ trade name, which is located at 6150 West Flamingo Road, Las Vegas, Nevada 89103 (Clark County);

19. Albertson=s store no. 1684 operating under the AAlbertson=s@ trade name, which is located at 2475 East Tropicana Avenue, Las Vegas, Nevada 89121 (Clark County); and

20. Land Site for Albertson=s store no. 633, which is located at the northwest corner of Eastern and Maryland Parkway, Henderson, Nevada 89012 (Clark County).

Supermarkets in the East Albuquerque, New Mexico Market:

1. Albertson=s store no. 905 operating under the AAlbertson=s@ trade name, which is located at 2200 Juan Tabo Boulevard NE, Albuquerque, New Mexico 87112 (Bernalillo County);

2. Albertson=s store no. 906 operating under the AAlbertson=s@ trade name, which is located at 4401 Wyoming Boulevard NE, Albuquerque, New Mexico 87111 (Bernalillo County);

3. Albertson=s store no. 912 operating under the AAlbertson=s@ trade name, which is located at 5555 Zuni SE, Albuquerque, New Mexico 87108 (Bernalillo County); and

4. Albertson=s store no. 923 operating under the AAlbertson=s@ trade name, which is located at 13150 Central Avenue SE, Albuquerque, New Mexico 87123 (Bernalillo County).

Supermarkets in the Rio Rancho/Northwest Albuquerque, New Mexico Market:

1. Albertson=s store no. 915 operating under the AAlbertson=s@ trade name, which is located at 6200 Coors Boulevard NW, Albuquerque, New Mexico 87120 (Bernalillo County); and

2. Albertson=s store no. 920 operating under the AAlbertson=s@ trade name, which is located at 1660 Rio Rancho Drive SE, Rio Rancho, New Mexico 87124 (Sandoval County).

Supermarkets in the Las Cruces, New Mexico Market:

1. American Stores store no. 668 operating under the ALucky@ trade name, which is located at 320 Wyatt Drive, Las Cruces, New Mexico 88001 (Dona Ana County); and

3. American Stores store no. 698 operating under the ALucky@ trade name, which is located at 3861 North Main, Las Cruces, New Mexico 88005 (Dona Ana County).

Schedule C

Schedules

Supermarkets and Land Sites Divested to Ralphs

Supermarket in the Antioch/Pittsburg, California Market:

1. American Stores store no. 122 operating under the ASuperSaver@ trade name, which is located at 300 Atlantic Avenue, Pittsburg, California 94565 (Contra Costa County).

Schedules

Supermarket in the Atascadero, California Market:

1. American Stores store no. 273 operating under the ALucky@ trade name, which is located at 8665 El Camino Real, Atascadero, California 93422 (San Luis Obispo County).

Supermarket in the Auburn, California Market:

1. Albertson=s store no. 759 operating under the AAlbertson=s@ trade name, which is located at 2795 Bell Road, Auburn, California 95603 (Placer County).

Supermarket in the Greater Bakersfield, California Market:

1. American Stores store no. 280 operating under the ALucky@ trade name, which is located at 1121 Olive Drive, Bakersfield, California 93308 (Kern County).

Supermarkets in the Danville/San Ramon/Dublin/Pleasanton, California Market:

1. Albertson=s store no. 703 operating under the AAlbertson=s@ trade name, which is located at 9100 Alcosta Avenue, San Ramon, California 94583 (Contra Costa County); and

2. Albertson=s store no. 733 operating under the AAlbertson=s@ trade name, which is located at 7333 Regional Street, Dublin, California 94568 (Alameda County).

Supermarket in the Davis, California Market:

1. Albertson=s store no. 725 operating under the AAlbertson=s@ trade name, which is located at 1800 East 8th Street, Davis, California 95616 (Yolo County).

Schedules

Supermarket in the Grass Valley, California Market:

1. American Stores store no. 323 operating under the ALucky@ trade name, which is located at 11867 Sutton Way, Grass Valley, California 95945 (Nevada County).

Supermarket in the Grover City/Arroyo Grande, California Market:

1. Albertson=s store no. 1688 operating under the AAlbertson=s@ trade name, which is located at 829 Oak Park Boulevard, Pismo Beach, California 93449 (San Luis Obispo County).

Supermarket in the Jackson, California Market:

1. American Stores store no. 193 operating under the ALucky@ trade name, which is located at 555 Highway 49, Jackson, California 95642 (Amador County).

Supermarket in the Laguna Beach, California Market:

1. Albertson=s store no. 612 operating under the AAlbertson=s@ trade name, which is located at 700 South Coast Highway, Laguna Beach, California 92651 (Orange County).

Supermarket in the Livermore, California Market:

1. Albertson=s store no. 763 operating under the AAlbertson=s@ trade name, which is located at 919 East Stanley Boulevard, Livermore, California 94550 (Alameda County).

Supermarket in the Monterey/Seaside/Del Rey Oaks/Pacific Grove, California Market:

Schedules

1. Albertson=s store no. 794 operating under the AAlbertson=s@ trade name, which is located at 815 Canyon Del Ray, Monterey, California 93940 (Monterey County).

Schedules

Land Site in the Morro Bay/Los Osos, California Market:

1. Land Site for American Stores store no. 592, which is located at the northwest corner of Los Osos Valley Road and Southbay Boulevard, Los Osos, California 93402 (San Luis Obispo County).

Supermarket in the Napa, California Market:

1. Albertson=s store no. 750 operating under the AAlbertson=s@ trade name, which is located at 3682 Bel Aire Plaza, Napa, California 94558 (Napa County).

Supermarket in the Paso Robles, California Market:

1. American Stores store no. 266 operating under the ALucky@ trade name, which is located at 2121 Spring Street, Paso Robles, California 93446 (San Luis Obispo County).

Supermarkets in the Greater Sacramento, California Market:

1. Albertson=s store no. 702 operating under the AAlbertson=s@ trade name, which is located at 5001 Foothills Boulevard, Roseville, California 95678 (Placer County);

2. Albertson=s store no. 761 operating under the AAlbertson=s@ trade name, which is located at 2280 Sunrise Boulevard, Rancho Cordova, California 95670 (Sacramento County);

3. Albertson=s store no. 762 operating under the AAlbertson=s@ trade name, which is located at 9522 Greenback Lane, Folsom, California 95630 (Sacramento County);

4. Albertson=s store no. 765 operating under the AAlbertson=s@ trade name, which is located at 6737 Watt Avenue, North Highlands, California 95660 (Sacramento County);

5. Albertson=s store no. 766 operating under the AAlbertson=s@ trade name, which is located at 3615 Bradshaw Road, Sacramento, California 95827 (Sacramento County);

6. Albertson=s store no. 769 operating under the AAlbertson=s@ trade name, which is located at 5330 Stockton Boulevard, Sacramento, California 95820 (Sacramento County);

7. Albertson=s store no. 770 operating under the AAlbertson=s@ trade name, which is located at 4560 Mack Road, Sacramento, California 95823 (Sacramento County);

8. Albertson=s store no. 771 operating under the AAlbertson=s@ trade name, which is located at 4080 Douglas Boulevard, Granite Bay, California 95746 (Placer County);

9. Albertson=s store no. 774 operating under the AAlbertson=s@ trade name, which is located at 6124 San Juan, Citrus Heights, California 95610 (Sacramento County);

10. Albertson=s store no. 777 operating under the AAlbertson=s@ trade name, which is located at 8122 Gerber Road, Sacramento, California 95828 (Sacramento County);

11. Albertson=s store no. 783 operating under the AAlbertson=s@ trade name, which is located at 5025 Marconi Avenue, Carmichael, California 95608 (Sacramento County);

12. Albertson=s store no. 788 operating under the AAlbertson=s@ trade name, which is located at 25000 Blue Ravine Road, Folsom, California 95630 (Sacramento County);

13. American Stores store no. 179 operating under the ASuperSaver@ trade name, which is located at 2351 Northgate Boulevard, Sacramento, California 95833 (Sacramento County); and

14. American Stores store no. 195 operating under the ALucky@ trade name, which is located at 8539 Elk Grove Boulevard, Elk Grove, California 95624 (Sacramento County).

Supermarket in the Salinas, California Market:

1. Albertson=s store no. 795 operating under the AAlbertson=s@ trade name, which is located at 1030 East Alisal, Salinas, California 93905 (Monterey County).

Supermarket in the San Luis Obispo, California Market:

1. American Stores store no. 271 operating under the ALucky@ trade name, which is located at 201 Madonna Road, San Luis Obispo, California 93401 (San Luis Obispo County).

Supermarket in the Santa Cruz/Capitola, California Market:

1. Albertson=s store no. 719 operating under the AAlbertson=s@ trade name, which is located at 1710 41st Avenue, Capitola, California 95010 (Santa Cruz County).

Supermarket in the Santa Maria/Orcutt, California Market:

1. American Stores store no. 262 operating under the ALucky@ trade name, which is located at 4869 South Bradley, Orcutt, California 93455 (Santa Barbara County).

Supermarkets in the Santa Rosa, California Market:

1. Albertson=s store no. 760 operating under the AAlbertson=s@ trade name, which is located at 461 Stony Point Road, Santa Rosa, California 95401 (Sonoma County); and

2. American Stores store no. 29 operating under the ALucky@ trade name, which is located at 390 Coddingtown Center, Santa Rosa, California 95401 (Sonoma County).

Supermarket in the Sonoma, California Market:

1. Albertson=s store no. 756 operating under the AAlbertson=s@ trade name, which is located at 201 West Napa Street, Sonoma, California 95476 (Sonoma County).

Supermarket in the Vacaville, California Market:

1. American Stores store no. 399 operating under the ALucky@ trade name, which is located at 615 Elmira Road, Vacaville, California 95687 (Solano County).

Supermarket in the Watsonville/Freedom, California Market:

1. Albertson=s store no. 786 operating under the AAlbertson=s@ trade name, which is located at 2010 Freedom Boulevard, Freedom, California 95019 (Santa Cruz County).

Supermarket and Land Site in the Santa Fe, New Mexico Market:

1. American Stores store no. 688 operating under the ALucky@ trade name, which is located at 2308 Cerrillos Road, Santa Fe, New Mexico 87505 (Santa Fe County); and

2. Land Site for American Stores store no. 701, which is located at the northeast corner of Airport and South Meadows, Santa Fe, New Mexico 87505 (Santa Fe County).

Schedules

Schedule D

Supermarkets and Land Site Divested to Stater

Supermarket in the Encinitas, California Market:

1. Albertson=s store no. 613 operating under the AAlbertson=s@ trade name, which is located at 1048 North El Camino Real, Encinitas, California 92024 (San Diego County).

Supermarkets in the Escondido, California Market:

1. Albertson=s store no. 1672 operating under the AAlbertson=s@ trade name, which is located at 635 North Broadway, Escondido, California 92025 (San Diego County); and

2. American Stores store no. 561 operating under the ALucky@ trade name, which is located at 1330 Mission Road, San Marcos, California 92069 (San Diego County).

Land Site for Supermarket in the Fallbrook, California Market:

1. Land Site for Albertson=s store no. 1692, which is located at Mission and Pepper, Fallbrook, California 92028 (San Diego County).

Supermarkets in the Lancaster/Palmdale, California Market:

1. Albertson=s store no. 1619 operating under the AAlbertson=s@ trade name, which is located at 1840 East Avenue J, Lancaster, California 93536 (Los Angeles County);

2. Albertson=s store no. 1634 operating under the AAlbertson=s@ trade name, which is located at 37218 47th Street East, Palmdale, California 93550 (Los Angeles County);

3. Albertson=s store no. 1670 operating under the AAlbertson=s@ trade name, which is located at 2845 West Avenue L, Lancaster, California 93536 (Los Angeles County); and

4. American Stores store no. 458 operating under the ALucky@ trade name, which is located at 2535 East Avenue South, Palmdale, California 93550 (Los Angeles County).

Supermarkets in the Murrieta/Temecula, California Market:

1. Albertson=s store no. 619 operating under the AAlbertson=s@ trade name, which is located at 31813 Highway 79 South, Temecula, California 92592 (Riverside County); and

2. American Stores store no. 504 operating under the ALucky@ trade name, which is located at 25050 Hancock Avenue, Murrieta Hot Springs, California 92563 (Riverside County).

Supermarkets in the Oceanside/Vista/Carlsbad, California Market:

1. Albertson=s store no. 1631 operating under the AAlbertson=s@ trade name, which is located at 1451 North Santa Fe Avenue, Vista, California 92083 (San Diego County);
2. Albertson=s store no. 1687 operating under the AAlbertson=s@ trade name, which is located at 780 Sycamore Avenue, Vista, California 92083 (San Diego County);

3. American Stores store no. 231 operating under the ASuperSaver@ trade name, which is located at 3770 Mission Avenue, Oceanside, California 92054 (San Diego County); and

4. American Stores store no. 298 operating under the ALucky@ trade name, which is located at 2170 Vista Way, Oceanside, California 92054 (San Diego County).

Schedules

Schedules

Supermarkets in the Palm Springs/Indio, California Market:

1. Albertson=s store no. 683 operating under the AAlbertson=s@ trade name, which is located at 1717 Vista Chino, Palm Springs, California 92262 (Riverside County);

2. Albertson=s store no. 1623 operating under the AAlbertson=s@ trade name, which is located at 69255 Ramon Road, Cathedral City, California 92234 (Riverside County); and

3. Albertson=s store no. 1627 operating under the AAlbertson=s@ trade name, which is located at 78-630 Highway 111, La Quinta, California 92253 (Riverside County).

Supermarkets in the Poway/North San Diego, California Market:

1. Albertson=s store no. 1644 operating under the AAlbertson=s@ trade name, which is located at 13589 Poway Road, Poway, California 92064 (San Diego County); and

2. American Stores store no. 553 operating under the ALucky@ trade name, which is located at 9909 Carmel Mountain Road, San Diego, California 92129 (San Diego County).

Supermarket in the Ramona, California Market:

1. Albertson=s store no. 1630 operating under the AAlbertson=s@ trade name, which is located at 1674 Main Street, Ramona, California 92065 (San Diego County).

Supermarket in the Santa Clarita, California Market:

1. Albertson=s store no. 681 operating under the AAlbertson=s@ trade name, which is located at 26900 Sierra Highway, Santa Clarita, California 91355 (Los Angeles County).

Schedules

Supermarkets in the South Los Angeles County/North Orange County, California Market:

1. Albertson=s store no. 607 operating under the AAlbertson=s@ trade name, which is located at 3325 East Chapman Avenue, Orange, California 92669 (Orange County);

2. Albertson=s store no. 620 operating under the AAlbertson=s@ trade name, which is located at 610 South Brookhurst, Anaheim, California 92804 (Orange County);

3. Albertson=s store no. 627 operating under the AAlbertson=s@ trade name, which is located at 8640 East Alondra Boulevard, Paramount, California 90723 (Los Angeles County);

4. Albertson=s store no. 629 operating under the AAlbertson=s@ trade name, which is located at 851 North Harbor Boulevard, La Habra, California 90631 (Orange County);

5. Albertson=s store no. 651 operating under the AAlbertson=s@ trade name, which is located at 11815 Artesia Boulevard, Artesia, California 90701 (Los Angeles County);

6. Albertson=s store no. 666 operating under the AAlbertson=s@ trade name, which is located at 1131 State College Boulevard, Anaheim, California 92806 (Orange County);

7. Albertson=s store no. 1601 operating under the AAlbertson=s@ trade name, which is located at 7814 East Firestone Boulevard, Downey, California 90241 (Los Angeles County);

8. Albertson=s store no. 1604 operating under the AAlbertson=s@ trade name, which is located at 1111 East Imperial Highway, Placentia, California 92670 (Orange County);

9. Albertson=s store no. 1608 operating under the AAlbertson=s@ trade name, which is located at 10051 Valley View, Cypress, California 90630 (Orange County);

10. Albertson=s store no. 1635 operating under the AAlbertson=s@ trade name, which is located at 1040 East Bastanchury Road, Fullerton, California 92635 (Orange County);

11. Albertson=s store no. 1641 operating under the AAlbertson=s@ trade name, which is located at 6501 East Spring, Long Beach, California 90808 (Los Angeles County);

12. Albertson=s store no. 1648 operating under the AAlbertson=s@ trade name, which is located at 7511 East Orangethorp, Buena Park, California 90621 (Orange County);

13. Albertson=s store no. 1652 operating under the AAlbertson=s@ trade name, which is located at 12800 La Mirada Boulevard, La Mirada, California 90638 (Los Angeles County);

14. Albertson=s store no. 1656 operating under the AAlbertson=s@ trade name, which is located at 10114 Adams Street, Huntington Beach, California 92646 (Orange County);

15. Albertson=s store no. 1668 operating under the AAlbertson=s@ trade name, which is located at 7101 Warner Avenue, Huntington Beach, California 92647 (Orange County);

16. Albertson=s store no. 1674 operating under the AAlbertson=s@ trade name, which is located at 11300 Firestone Boulevard, Norwalk, California 90650 (Los Angeles County);

17. American Stores store no. 425 operating under the ALucky@ trade name, which is located at 333 North Euclid Avenue, Fullerton, California 92632 (Orange County);

18. American Stores store no. 442 operating under the ALucky@ trade name, which is located at 17220 South Lakewood Boulevard, Bellflower, California 90706 (Los Angeles County); and

19. American Stores store no. 473 operating under the ALucky@ trade name, which is located at 11750 East Whittier Boulevard, Whittier, California 90601 (Los Angeles County).

Supermarkets in the South Orange County, California Market:

1. Albertson=s store no. 1673 operating under the AAlbertson=s@ trade name, which is located at 22351 El Toro Road, El Toro, California 92630 (Orange County);

2. Albertson=s store no. 1677 operating under the AAlbertson=s@ trade name, which is located at 26892 La Paz Road, Laguna Hills, California 92653 (Orange County); and

3. American Stores store no. 624 operating under the ALucky@ trade name, which is located at 616 Camino de los Mares, San Clemente, California 92673 (Orange County).

Supermarket in the Southern Covina, California Market:

1. Albertson=s store no. 1662 operating under the AAlbertson=s@ trade name, which is located at 20677 Amar Road, Walnut, California 91789 (Los Angeles County).

Schedule E

Supermarkets and Land Site Divested to Vons

Schedules

Supermarket in the Moorpark, California Market:

1. American Stores store no. 558 operating under the ALucky@ trade name, which is located at 4241 Tierra Rejada, Moorpark, California 93021 (Ventura County).

Schedules

Supermarket in the Redlands, California Market:

1. Albertson=s store no. 1605 operating under the AAlbertson=s@ trade name, which is located at 522 North Orange, Redlands, California 92374 (San Bernardino County).

Land Site for Supermarket in the Rialto/Fontana, California Market:

1. Land Site for Albertson=s store no. 628, which is located at Cherry and Baseline, Fontana, California 92336 (San Bernardino County).

Supermarket in the Riverside/Corona, California Market:

1. Albertson=s store no. 1622 operating under the AAlbertson=s@ trade name, which is located at 1130 West 6th Street, Corona, California 91720 (Riverside County).

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

I. Introduction

The Federal Trade Commission ("Commission") has accepted for public comment from Albertson=s, Inc. ("Albertson=s") and American Stores Company ("American Stores") (collectively "the Proposed Respondents") an Agreement Containing Consent Order ("the proposed consent order"). The Proposed Respondents have also reviewed a draft complaint that the Commission contemplates issuing. The proposed consent order is designed to remedy likely anticompetitive effects arising from Albertson=s proposed stock-for-stock acquisition of all of the outstanding securities of American Stores.

II. Description of the Parties and the Proposed Acquisition

Albertson=s, a Delaware corporation headquartered in Boise, Idaho, operates approximately 994 supermarkets in 25 Western, Midwestern, and Southern states. Albertson=s supermarkets operate primarily under the "Albertson=s,@ "Max Grocery Warehouse,@ ASeessel=s@ and ASmitty=s@ trade names. Albertson=s competes with American Stores in California, Nevada and New Mexico. Albertson=s operates 177 supermarkets in California, 31 supermarkets in Nevada, and 19 supermarkets in New Mexico. Albertson=s total sales for the fiscal year that ended on January 28, 1999, were approximately $16.0 billion. Albertson=s is the fourth largest supermarket chain in the United States, based on total sales. After the merger with American Stores, Albertson=s will become the second largest supermarket chain in the United States.

American Stores, a Delaware corporation headquartered in Salt Lake City, Utah, operates approximately 802 supermarkets and 773 stand-alone pharmacies in 31 states. American Stores operates supermarkets, including combination supermarket and pharmacies, in 12 Western, 2 Midwestern and Eastern states under

the ALucky,@ ALucky Sav-On,@ ASuperSaver,@ AAcme Markets,@ and AJewel Food Stores@ trade names. American Stores operates approximately 411 supermarkets in California, 25 supermarkets in Nevada, and 11 supermarkets in New Mexico. These American Stores supermarkets are all in the company=s Lucky Division and operate under the ALucky,@ ASuperSaver@ and ALucky Sav-On@ trade names. American Stores= total sales for the fiscal year that ended on January 30, 1999, were $19.9 billion. Based on total sales, American Stores is the second largest supermarket chain in the United States.

On August 2, 1999, Albertson=s, Abacus Holdings, Inc. (AAbacus@), a wholly owned subsidiary of Albertson=s, and American Stores entered into an Agreement and Plan of Merger pursuant to which Abacus will acquire all of the outstanding securities of American Stores. Under the merger agreement, Abacus will convert the American Stores stock into Albertson=s stock based on a 0.63 exchange rate. As a result, 100 shares of American Stores stock will be converted to 63 shares of Albertson=s stock. The transaction, at the time it was negotiated, had a total value of approximately $11.7 billion, including an equity value of $8.3 billion and debt of $3.4 billion. Today, the acquisition is valued at approximately $13 billion.

III. The Draft Complaint

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

are large stores that typically have at least 10,000 square feet of selling space. Supermarkets in California, Nevada and New Mexico tend to have at least 20,000 square feet and carry at least 20,000 SKUs.

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

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

The draft complaint alleges that the relevant sections of the country (*i.e.*, the geographic markets) in which to analyze the acquisition are the areas in and near the following cities and towns: (a) Antioch/Pittsburg, California; (b) Apple Valley/Hesperia/Victorville, California; (c) Atascadero, California; (d) Auburn, California; (e) Greater Bakersfield, California; (f) Claremont/Pomona/Rancho Cucamonga, California; (g) Danville/San Ramon/Dublin/Pleasanton, California; (h) Davis, California; (i) Encinitas, California; (j) Escondido, California; (k) Fallbrook, California; (l) Grass Valley, California; (m) Grover City/Arroyo Grande, California; (n)

Jackson, California; (o) La Mesa/El Cajon, California; (p) Laguna Beach, California; (q) Lancaster/Palmdale, California; (r) Livermore, California; (s) Lompoc, California; (t) Monterey/Seaside/Del Rey Oaks/Pacific Grove, California; (u) Moorpark, California; (v) Morro Bay/Los Osos, California; (w) Murrieta/Temecula, California; (x) Napa, California; (y) Northern Covina, California, an area that includes Azusa, Baldwin Park, Charter Oak, Citrus, Covina, Glendora, La Puente, Valinda, Vincent, West Covina, and West Puente; (z) Oceanside/Vista/Carlsbad, California; (aa) Oxnard, California;(bb) Palm Springs/Indio, California; (cc) Paso Robles, California; (dd) Petaluma, California; (ee) Poway/North San Diego, California; (ff) Ramona, California; (gg) Redlands, California; (hh) Rialto/Fontana, California; (ii) Riverside/Corona, California; (jj) Greater Sacramento, California, and narrower markets contained therein; (kk) Salinas, California; (ll) San Luis Obispo, California; (mm) Santa Barbara/Goleta, California; (nn) Santa Clarita, California; (oo) Santa Cruz/Capitola, California; (pp) Santa Maria/Orcutt, California; (qq) Santa Rosa, California; (rr) Simi Valley, California; (ss) Sonoma/Hot Springs, California; (tt) South Los Angeles County/North Orange County, California, and narrower markets contained therein;[1] (uu) South Orange County, California, and narrower markets contained therein; (vv) Southern Covina, California, an area that includes the communities of Diamond Bar, Hacienta Heights, South San Jose Hills, and Walnut; (ww) Thousand Oaks/Newbury Park/Casa Conejo, California; (xx) Torrance, California; (yy) Vacaville, California; (zz) Watsonville/Freedom, California; (aaa) Eastern Albuquerque, New Mexico; (bbb) Las Cruces, New Mexico; (ccc) Rio Rancho/Northwest Albuquerque, New Mexico; (ddd) Santa

[1] The draft complaint defines ASouth Los Angeles County/North Orange County@ as an area bordered on the north by the Santa Monica and San Jose Hills/Puente Hills/Chino Hills, on the west by Interstate 710 and the Pacific Ocean, on the east by the Santa Ana Mountains, and on the south by the Laguna Hills and El Toro Marine Corps Air Base.

Fe, New Mexico; and (eee) Greater Las Vegas/Henderson, Nevada, and narrower markets contained therein.

Albertson=s and American Stores are actual and direct competitors in all of the above listed markets other than Antioch/Pittsburg, Atascadero, Fallbrook, Morro Bay/Los Osos, and Santa Maria/Orcutt. Albertson=s is an actual potential competitor against American Stores in and near Antioch/Pittsburg, Atascadero, Fallbrook, and Santa Maria/Orcutt, California. American Stores is an actual potential competitor against Albertson=s in Morro Bay/Los Osos, California. But for the acquisition, Albertson=s and American Stores would have become direct competitors in and near Antioch/Pittsburg, Atascadero, Fallbrook, Morro Bay/Los Osos, and Santa Maria/Orcutt, California. The acquisition will eliminate that competition.

The draft complaint alleges that the post-merger markets would all be highly concentrated, whether measured by the Herfindahl-Hirschman Index (commonly referred to as "HHI") or by four-firm concentration ratios.[2] The acquisition would substantially increase concentration in each market. The post-acquisition HHIs in the geographic markets would range from 2,000 to 8,090. Concentration levels in the geographic markets alleged in the draft complaint would not be materially different even if club stores and limited assortment stores were included in the product market.

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

The draft complaint also alleges that Albertson=s proposed acquisition of all of the outstanding securities of American Stores, if consummated, may substantially lessen competition in the

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

relevant markets in violation of Section 7 of the Clayton Act, as amended, 15 U.S.C. ' 18, and Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. ' 45, by eliminating direct competition between supermarkets owned or controlled by Albertson=s and supermarkets owned or controlled by American Stores; by eliminating actual potential competition between supermarkets owned or controlled by Albertson=s and supermarkets owned or controlled by American Stores; by increasing the likelihood that Albertson=s will unilaterally exercise market power; and by increasing the likelihood of, or facilitating, collusion or coordinated interaction among the remaining supermarket firms. Each of these effects increases the likelihood that the prices of food, groceries or services will increase, and the quality and selection of food, groceries or services will decrease, in the geographic markets alleged in the proposed complaint.

IV. Terms of the Agreement Containing Consent Order ("the proposed consent order")

The proposed consent order will remedy the Commission's competitive concerns about the proposed acquisition. Under the terms of the proposed consent order, Albertson=s and American Stores must divest 144 identified supermarkets and five identified supermarket sites in the relevant markets to five different upfront buyers. The supermarkets and sites that the Proposed Respondents must divest consist of 104 Albertson=s supermarkets and three Albertson=s sites, and 40 American Stores supermarkets and two American Stores sites. The 104 Albertson=s supermarkets consist of 96 stores that operate under the "Albertson=s" trade name and eight stores that operate under the "Max Grocery Warehouse" trade name. The 40 American Stores supermarkets consist of 36 stores that operate under the "Lucky" trade name, three stores that operate under the "SuperSaver" trade name, and one store that operates under the ALucky Sav- On@ trade name.

In 37 of the 57 geographic markets, the Proposed Respondents will divest either all of the Albertson=s supermarkets or all of the American Stores supermarkets to buyers who do not currently operate supermarkets in these markets. In the remaining markets, the Proposed Respondents will divest some combination of Albertson=s and American Stores supermarkets or sites or both. Divesting all of one party=s assets within a particular market achieves several important competitive goals that the proposed consent order is designed to achieve. It ensures that the merger will not result in any increase in concentration in that market. The divestiture will result in the same number of players in the market holding the same relative shares of the market as existed before the merger.

However, the Commission is willing to evaluate and, under certain conditions, accept other divestiture packages if and when the parties can satisfy the Commission that the divestiture will eliminate the anticompetitive effects of concern. In order to do so, the Commission will analyze the financial and competitive condition of the proposed divestiture assets and that of the stores the Proposed Respondents intend to retain. In this instance, the Commission has declined to accept divestiture of supermarkets that are not profitable or are declining in sales or profitability, and has required that Amix-and-match@ divestitures consist solely of competitively viable stores.

In 13 of the markets in which the Proposed Respondents are not divesting either all of the Albertson=s or all of the American Stores supermarkets to buyers who do not currently operate supermarkets in these markets, there will be no significant increase in concentration. In the remaining seven markets, although there is nominally an increase in concentration from the combined effect of the merger and divestiture, the proposed increase in concentration is significant in only one market (Bakersfield). In markets where the Proposed Respondents are not divesting either all of the Albertson=s or all of the American Stores supermarkets, the proposed divestiture assets consist of

more profitable stores, rather than a divestiture of sales volume from unprofitable stores.

The Commission=s goal in evaluating possible purchasers of divested assets is to maintain the competitive environment that existed prior to the acquisition. When divestiture is an appropriate remedy for a supermarket merger, the Commission requires the merging parties to find a buyer for the divested stores. A proposed buyer must not itself present competitive problems. For example, the Commission is less likely to approve a buyer that already has a large retail presence in the relevant geographic area than a buyer without such a presence. The Commission is preliminarily satisfied that the purchasers presented by the parties are well qualified to run the divested stores and that divestiture to these purchases poses no separate competitive issues. Public comments may address the suitability of the designated acquirers to acquire the supermarkets at issue.

The five upfront buyers and the number of stores each is acquiring are as follows: 31 stores to Certified Grocers of California; 27 stores and one land site to Raley=s; 40 stores and two land sites to Ralphs (a Kroger/Fred Meyer subsidiary); 43 stores and one land site to Stater Bros.; and three stores and one land site to Vons (a Safeway subsidiary). A list of the specific supermarkets that Albertson=s and American Stores must divest to each of the upfront buyers is attached at the end of this Analysis to Aid Public Comment. The proposed consent order also requires Certified Grocers, which is acquiring 31 stores, to divest at least 20 of the stores within 90 days from the time the order becomes final. Certified Grocers is a food wholesaler that does not operate many corporate-owned stores. Certified Grocers must seek prior approval from the Commission to divest, within three years of the final order, any supermarkets to any firms not preapproved in the proposed consent order to acquire specific stores. Certified Grocers is made a party to the proposed consent

order for relief purposes and is subject to civil penalties if it does not meet its obligations under the order.

The preapproved independent buyers that Certified Grocers plans to sell identified supermarkets to include the following: A.J. Markets, Inc. (d/b/a Amar Ranch); Arden Group (d/b/a Gelsons and Mayfair); Berberian Enterprises (d/b/a Jons Market); Bianchini=s Apple Market (d/b/a Apple Market); Ceiland Coast, Inc.; Colonial Shopping Center, a general partnership (d/b/a Young=s Market); El Tigre Inc. (d/b/a El Tigre Market); Goodwin & Sons, Inc. (d/b/a Village Market); Hope Mart, Inc. (d/b/a Best Value Grocery Warehouse); K.V. Mart Co. (d/b/a Top Valu and Valu Plus Food Warehouse); Rodd Mart, Inc. (d/b/a Payless Foods); Stump=s Apple Markets (d/b/a Apple Market); UKA=s Big Saver Food, Inc. (d/b/a Big Saver Foods); Vallarta Foods Enterprises, Inc. (d/b/a Vallarta Super Markets); and Ronald Ziff.

The supermarkets that Certified Grocers plans to sell to each preapproved buyer are identified by location in the proposed consent order.

The proposed consent order requires that the divestitures must occur no later than the earlier of (1) 30 to 120 days from when the Commission accepts the agreement for public comment, depending on the business plans of the specific upfront buyer, or (2) four months after the Commission accepts the agreement for public comment.[3] The amount of time required for the divestitures varies with each of the acquirers based on the acquirer=s need to convert large numbers of new stores into its operations. The proposed consent order also requires Albertson=s to include rescission provisions in its upfront buyer agreements that allow it to rescind the transaction(s) if the Commission, after the comment period, decides to reject any of the upfront buyers. If, at the time the Commission decides to make the proposed

[3] The Acceptance of the proposed consent order for public comment terminates the Hart-Scott- Rodino waiting period and enables Albertson=s to immediately acquire the American Stores stock.

consent order final, the Commission notifies Albertson=s that any of the upfront buyers to which Albertson=s has divested a supermarket or site is not an acceptable acquirer, or that any upfront buyer agreement is not an acceptable manner of divestiture, then Albertson=s must immediately rescind the transaction in question and divest those assets within three months after the proposed consent order becomes final. At that time, Albertson=s must divest those assets only to an acquirer that receives the prior approval of the Commission and only in a manner that receives the prior approval of the Commission. In the event that any Commission-approved buyer is unable to take or keep possession of any of the supermarkets identified for divestiture, a trustee that the Commission may appoint has the power to divest any additional ancillary assets and effect such arrangements as are necessary to satisfy the requirements of the proposed consent order.

The proposed consent order specifically requires the Proposed Respondents to: (1) maintain the viability, competitiveness and marketability of the assets to be divested; (2) not cause the wasting or deterioration of the assets to be divested; (3) not sell, transfer, encumber, or otherwise impair their marketability or viability; (4) maintain the supermarkets consistent with past practices; (5) use best efforts to preserve existing relationships with suppliers, customers and employees; and (6) keep the supermarkets open for business and maintain the inventory of products in each store consistent with past practice. The proposed consent order also contains more specific details relating to maintaining store operations.

The proposed consent order also enables the Commission to appoint an interim auditor trustee to ensure that the parties expeditiously perform their respective responsibilities as required by the agreement, including the asset maintenance provisions. This provision is included in the proposed consent order because such a large number of stores must be divested and because the

last of these divestitures may not occur for 120 days. The interim auditor trustee shall serve until the parties have completed all of the required divestitures. The interim auditor trustee does not have any responsibilities relating to the stores being divested to Certified Grocers once such divestitures have been accomplished, even if Certified Grocers later divests 20 or more of these store to other retail operators.

The proposed consent order also enables the Commission to appoint a trustee to divest any supermarkets or sites identified in the order that Albertson=s and American Stores have not divested to satisfy the requirements of the proposed consent order. The proposed consent order also enables the Commission to seek civil penalties against Albertson=s for non-compliance with the proposed consent order. For a period of 10 years from the date the proposed consent order becomes final, the Proposed Respondents are required to provide written notice to the Commission prior to acquiring supermarket assets located in, or any interest (such as stock) in any entity that owns or operates a supermarket located in, Alameda, Amador, Contra Costa, Kern, Los Angeles, Monterey, Napa, Nevada, Orange, Placer, Riverside, Sacramento, San Bernardino, San Diego, San Luis Obispo, Santa Barbara, Santa Cruz, Solano, Sonoma, Ventura, or Yolo counties in California; Clark County in Nevada; or Bernalillo, Dona Ana, Sandoval, or Santa Fe counties in New Mexico. Proposed Respondents may not complete such an acquisition until they have provided information requested by the Commission. This provision does not restrict the Proposed Respondents from constructing new supermarket facilities on their own; nor does it restrict the Proposed Respondents from leasing facilities not operated as supermarkets within the previous six months.

For a period of 10 years, the proposed consent order also prohibits the Proposed Respondents from entering into or enforcing any agreement that restricts the ability of any person that acquires any supermarket, any leasehold interest in any supermarket, or any interest in any retail location used as a supermarket on or after January 1, 1998, to operate a supermarket

at that site if such supermarket was formerly owned or operated by the Proposed Respondents in Alameda, Amador, Contra Costa, Kern, Los Angeles, Monterey, Napa, Nevada, Orange, Placer, Riverside, Sacramento, San Bernardino, San Diego, San Luis Obispo, Santa Barbara, Santa Cruz, Solano, Sonoma, Ventura, or Yolo counties in California; Clark County in Nevada; or Bernalillo, Dona Ana, Sandoval, or Santa Fe counties in New Mexico. In addition, the Proposed Respondents may not remove fixtures or equipment from a store or property owned or leased in these counties that is no longer in operation as a supermarket, except (1) prior to a sale, sublease, assignment, or change in occupancy or (2) to relocate such fixtures or equipment in the ordinary course of business to any other supermarket owned or operated by Proposed Respondents.

The Proposed Respondents are required to provide to the Commission a report of compliance with the proposed consent order within thirty days following the date on which they signed the proposed consent, every thirty days thereafter until the divestitures are completed, and annually for a period of 10 years.

The proposed consent order also has a provision relating to the settlement agreements negotiated by California, Nevada and New Mexico. If a State fails to approve any divestiture that has not been completed, even though the parties are in compliance with the other provisions of the proposed consent order, the time period in which the divestiture must be completed will be extended 60 days, during which the parties must exercise utmost good faith and best efforts to resolves the concerns of that particular State.

V. Opportunity for Public Comment

The proposed consent order has been placed on the public record for 60 days for receipt of comments by interested persons. Comments received during this period will become part of the public record. After 60 days, the Commission will again review the proposed consent order and the comments received and will

decide whether it should withdraw from the agreement or make the proposed consent order final.

By accepting the proposed consent order subject to final approval, the Commission anticipates that the competitive problems alleged in the complaint will be resolved. The purpose of this analysis is to invite public comment on the proposed consent order, including the proposed sale of supermarkets to Certified Grocers, Raley=s, Ralphs, Stater, and Vons, and the proposed divestitures by Certified Grocers to the various independent buyers listed above, in order to aid the Commission in its determination of whether to make the proposed consent order final. This analysis is not intended to constitute an official interpretation of the proposed consent order nor is it intended to modify the terms of the proposed consent order in any way.

Schedule A

Supermarkets Divested to Certified Grocers

Supermarket in the Apple Valley/Hesperia/Victorville, California Market:

1. Albertson=s store no. 1609 operating under the AAlbertson=s@ trade name, which is located at 20801 Bear Valley Road, Apple Valley, California 92307 (San Bernardino County).

Supermarket in the Greater Bakersfield, California Market:

1. American Stores store no. 281 operating under the ALucky@ trade name, which is located at 4801 White Lane, Bakersfield, California 93309 (Kern County).

Supermarkets in the Claremont/Pomona/Rancho Cucamonga, California Market:

1. Albertson=s store no. 1675 operating under the AAlbertson=s@ trade name, which is located at 2340 Foothill Boulevard, Laverne, California 91750 (Los Angeles County);

2. Albertson=s store no. 1983 operating under the AMax Grocery Warehouse@ trade name, which is located at 1445 East Foothill Boulevard, Upland, California 91785 (San Bernardino County);

3. American Stores store no. 431 operating under the ALucky@ trade name, which is located at 4200 Chino Hills Parkway 400, Chino Hills, California 91709 (San Bernardino County);

4. American Stores store no. 670 operating under the ALucky@ trade name, which is located at 685 West Foothill Boulevard, Upland, California 91786 (San Bernardino County); and

5. American Stores store no. 679 operating under the ALucky@ trade name, which is located at 6351 Haven Avenue, Rancho Cucamonga, California 91737 (San Bernardino County).

Supermarket in the Escondido, California Market:

1. American Stores store no. 211 operating under the ALucky@ trade name, which is located at 606 North Escondido Boulevard, Escondido, California 92025 (San Diego County).

Supermarket in the La Mesa/El Cajon, California Market:

1. American Stores store no. 565 operating under the ALucky@ trade name, which is located at 7908 El Cajon Boulevard, La Mesa, California 91641 (San Diego County).

Supermarket in the Lancaster/Palmdale, California Market:

1. Albertson=s store no. 1963 operating under the AMax Grocery Warehouse@ trade name, which is located at 1111 West Avenue I, Lancaster, California 93534 (Los Angeles County).

Supermarket in the Murrieta/Temecula, California Market:

1. Albertson=s store no. 1611 operating under the AAlbertson=s@ trade name, which is located at 29530 Rancho California Road, Temecula, California 92591 (Riverside County).

Supermarkets in the Northern Covina, California Market:

1. American Stores store no. 620 operating under the ALucky@ trade name, which is located at 1385 North Citrus Avenue, Covina, California 91722 (Los Angeles County);

2. American Stores store no. 873 operating under the ALucky@ trade name, which is located at 13925 Amar Road, La Puente, California 90746 (Los Angeles County); and

3. American Stores store no. 884 operating under the ALucky Sav-On@ trade name, which is located at 543 North Azusa, Covina, California 91723 (Los Angeles County).

Supermarkets in the Oxnard, California Market:

1. Albertson=s store no. 682 operating under the AAlbertson=s@ trade name, which is located at 450 South Ventura Road, Oxnard, California 93030 (Ventura County); and

2. Albertson=s store no. 1953 operating under the AMax Grocery Warehouse@ trade name, which is located at 2800 Saviers Road, Oxnard, California 93030 (Ventura County).

Supermarket in the Petaluma, California Market:

1. Albertson=s store no. 720 operating under the AAlbertson=s@ trade name, which is located at 169 North McDowell Boulevard, Petaluma, California 94954 (Sonoma County).

Supermarket in the Rialto/Fontana, California Market:

1. Albertson=s store no. 1978 operating under the AMax Grocery Warehouse@ trade name, which is located at 515 South Riverside Avenue, Rialto, California 92376 (San Bernardino County).

Analysis to Aid Public Comment

Supermarket in the Riverside/Corona, California Market:

1. Albertson=s store no. 1613 operating under the AAlbertson=s@ trade name, which is located at 430 McKinley, Corona, California 91719 (Riverside County).

Supermarket in the Santa Barbara/Goleta, California Market:

1. Albertson=s store no. 622 operating under the AAlbertson=s@ trade name, which is located at 3305 State Street, Santa Barbara, California 93105 (Santa Barbara County).

Supermarket in the Simi Valley, California Market:

1. American Stores store no. 650 operating under the ALucky@ trade name, which is located at 3963 Cochran, Simi Valley, California 93063 (Ventura County).

Supermarkets in the South Los Angeles County/North Orange County, California Market:

1. Albertson=s store no. 1650 operating under the AAlbertson=s@ trade name, which is located at 1720 East 17th Street, Santa Ana, California 92701 (Orange County);

2. Albertson=s store no. 1905 operating under the AMax Grocery Warehouse@ trade name, which is located at 4700 Cherry Avenue, Long Beach, California 90807 (Los Angeles County);

3. Albertson=s store no. 1906 operating under the AMax Grocery Warehouse@ trade name, which is located at 15300 Goldenwest, Westminster, California 92683 (Orange County);

4. Albertson=s store no. 1909 operating under the AMax Grocery Warehouse@ trade name, which is located at 12120 Carson Street, Hawaiian Gardens, California 90716 (Los Angeles County); and

5. Albertson=s store no. 1930 operating under the AMax Grocery Warehouse@ trade name, which is located at 12891 Harbor Boulevard, Garden Grove, California 92640 (Orange County).

Supermarket in the South Orange County, California Market:

1. Albertson=s store no. 609 operating under the AAlbertson=s@ trade name, which is located at 602 El Camino Real, San Clemente, California 92672 (Orange County).

Supermarket in the Southern Covina, California Market:

1. Albertson=s store no. 1666 operating under the AAlbertson=s@ trade name, which is located at 21080 Golden Springs, Walnut, California 91789 (Los Angeles County).

Supermarkets in the Thousand Oaks/Newbury Park/Casa Conejo, California Market:

1. American Stores store no. 286 operating under the ALucky@ trade name, which is located at 740 Moorpark Avenue, Thousand Oaks, California 91360 (Ventura County); and

2. American Stores store no. 674 operating under the ALucky@ trade name, which is located at 2100 Newbury Road, Newbury Park, California 91320 (Ventura County).

Supermarket in the Torrance, California Market:

1. American Stores store no. 630 operating under the ALucky@ trade name, which is located at 4848 West 190th Street, Torrance, California 90503 (Los Angeles County).

Schedule B

Supermarkets and Land Site Divested to Raley=s

Supermarkets and Land Site in the Greater Las Vegas/Henderson, Nevada Market:

1. Albertson=s store no. 611 operating under the AAlbertson=s@ trade name, which is located at 4015 South Buffalo Drive, Las Vegas, Nevada 89117 (Clark County);

2. Albertson=s store no. 614 operating under the AAlbertson=s@ trade name, which is located at 55 South Valle Verde Drive, Henderson, Nevada 89012 (Clark County);

3. Albertson=s store no. 634 operating under the AAlbertson=s@ trade name, which is located at 4790 East Flamingo Road, Las Vegas, Nevada 89121 (Clark County);

4. Albertson=s store no. 637 operating under the AAlbertson=s@ trade name, which is located at 1570 North Eastern Avenue, Las Vegas, Nevada 89101 (Clark County);

5. Albertson=s store no. 686 operating under the AAlbertson=s@ trade name, which is located at 260 East Lake Mead Drive, Henderson, Nevada 89015 (Clark County);

6. Albertson=s store no. 1606 operating under the AAlbertson=s@ trade name, which is located at 1421 North Jones Boulevard, Las Vegas, Nevada 89108 (Clark County);

7. Albertson=s store no. 1616 operating under the AAlbertson=s@ trade name, which is located at 3160 North Rainbow, Las Vegas, Nevada 89107 (Clark County);

8. Albertson=s store no. 1618 operating under the AAlbertson=s@ trade name, which is located at 2271 North Green Valley Parkway, Henderson, Nevada 89014 (Clark County);

9. Albertson=s store no. 1621 operating under the AAlbertson=s@ trade name, which is located at 9200 West Sahara Avenue, Las Vegas, Nevada 89117 (Clark County);

10. Albertson=s store no. 1628 operating under the AAlbertson=s@ trade name, which is located at 8570 West Lake Mead Boulevard, Las Vegas, Nevada 89128 (Clark County);

11. Albertson=s store no. 1638 operating under the AAlbertson=s@ trade name, which is located at 4821 West Craig Road, Las Vegas, Nevada 89129 (Clark County);

12. Albertson=s store no. 1642 operating under the AAlbertson=s@ trade name, which is located at 3864 West Sahara Avenue, Las Vegas, Nevada 89102 (Clark County);

13. Albertson=s store no. 1659 operating under the AAlbertson=s@ trade name, which is located at 2545 South Eastern Avenue, Las Vegas, Nevada 89109 (Clark County);

14. Albertson=s store no. 1660 operating under the AAlbertson=s@ trade name, which is located at 8150 South Eastern Avenue, Las Vegas, Nevada 89123 (Clark County);

15. Albertson=s store no. 1664 operating under the AAlbertson=s@ trade name, which is located at 120 South Rainbow, Las Vegas, Nevada 89128 (Clark County);

16. Albertson=s store no. 1665 operating under the AAlbertson=s@ trade name, which is located at 1255 South Lamb Boulevard, Las Vegas, Nevada 89104 (Clark County);

17. Albertson=s store no. 1678 operating under the AAlbertson=s@ trade name, which is located at 1955 North Nellis Boulevard, Las Vegas, Nevada 89115 (Clark County);
18. Albertson=s store no. 1681 operating under the AAlbertson=s@ trade name, which is located at 6150 West Flamingo Road, Las Vegas, Nevada 89103 (Clark County);

19. Albertson=s store no. 1684 operating under the AAlbertson=s@ trade name, which is located at 2475 East Tropicana Avenue, Las Vegas, Nevada 89121 (Clark County); and

20. Land Site for Albertson=s store no. 633, which is located at the northwest corner of Eastern and Maryland Parkway, Henderson, Nevada 89012 (Clark County).

Supermarkets in the East Albuquerque, New Mexico Market:

1. Albertson=s store no. 905 operating under the AAlbertson=s@ trade name, which is located at 2200 Juan Tabo Boulevard NE, Albuquerque, New Mexico 87112 (Bernalillo County);

2. Albertson=s store no. 906 operating under the AAlbertson=s@ trade name, which is located at 4401 Wyoming Boulevard NE, Albuquerque, New Mexico 87111 (Bernalillo County);

3. Albertson=s store no. 912 operating under the AAlbertson=s@ trade name, which is located at 5555 Zuni SE, Albuquerque, New Mexico 87108 (Bernalillo County); and

4. Albertson=s store no. 923 operating under the AAlbertson=s@ trade name, which is located at 13150 Central Avenue SE, Albuquerque, New Mexico 87123 (Bernalillo County).

Supermarkets in the Rio Rancho/Northwest Albuquerque, New Mexico Market:

1. Albertson=s store no. 915 operating under the AAlbertson=s@ trade name, which is located at 6200 Coors Boulevard NW, Albuquerque, New Mexico 87120 (Bernalillo County); and

2. Albertson=s store no. 920 operating under the AAlbertson=s@ trade name, which is located at 1660 Rio Rancho Drive SE, Rio Rancho, New Mexico 87124 (Sandoval County).

Supermarkets in the Las Cruces, New Mexico Market:

1. American Stores store no. 668 operating under the ALucky@ trade name, which is located at 320 Wyatt Drive, Las Cruces, New Mexico 88001 (Dona Ana County); and

2. American Stores store no. 698 operating under the ALucky@ trade name, which is located at 3861 North Main, Las Cruces, New Mexico 88005 (Dona Ana County).

Schedule C

Supermarkets and Land Sites Divested to Ralphs

Supermarket in the Antioch/Pittsburg, California Market:

1. American Stores store no. 122 operating under the ASuperSaver@ trade name, which is located at 300 Atlantic Avenue, Pittsburg, California 94565 (Contra Costa County).

Supermarket in the Atascadero, California Market:

1. American Stores store no. 273 operating under the ALucky@ trade name, which is located at 8665 El Camino Real, Atascadero, California 93422 (San Luis Obispo County).

Supermarket in the Auburn, California Market:

1. Albertson=s store no. 759 operating under the AAlbertson=s@ trade name, which is located at 2795 Bell Road, Auburn, California 95603 (Placer County).

Supermarket in the Greater Bakersfield, California Market:

1. American Stores store no. 280 operating under the ALucky@ trade name, which is located at 1121 Olive Drive, Bakersfield, California 93308 (Kern County).

Supermarkets in the Danville/San Ramon/Dublin/Pleasanton, California Market:

1. Albertson=s store no. 703 operating under the AAlbertson=s@ trade name, which is located at 9100 Alcosta Avenue, San Ramon, California 94583 (Contra Costa County); and

2. Albertson=s store no. 733 operating under the AAlbertson=s@ trade name, which is located at 7333 Regional Street, Dublin, California 94568 (Alameda County).

Supermarket in the Davis, California Market:

1. Albertson=s store no. 725 operating under the AAlbertson=s@ trade name, which is located at 1800 East 8th Street, Davis, California 95616 (Yolo County).

Supermarket in the Grass Valley, California Market:

1. American Stores store no. 323 operating under the ALucky@ trade name, which is located at 11867 Sutton Way, Grass Valley, California 95945 (Nevada County).

Supermarket in the Grover City/Arroyo Grande, California Market:

1. Albertson=s store no. 1688 operating under the AAlbertson=s@ trade name, which is located at 829 Oak Park Boulevard, Pismo Beach, California 93449 (San Luis Obispo County).

Supermarket in the Jackson, California Market:

1. American Stores store no. 193 operating under the ALucky@ trade name, which is located at 555 Highway 49, Jackson, California 95642 (Amador County).

Supermarket in the Laguna Beach, California Market:

1. Albertson=s store no. 612 operating under the AAlbertson=s@ trade name, which is located at 700 South Coast Highway, Laguna Beach, California 92651 (Orange County).

Supermarket in the Livermore, California Market:

1. Albertson=s store no. 763 operating under the AAlbertson=s@ trade name, which is located at 919 East Stanley Boulevard, Livermore, California 94550 (Alameda County).

Supermarket in the Monterey/Seaside/Del Rey Oaks/Pacific Grove, California Market:

1. Albertson=s store no. 794 operating under the AAlbertson=s@ trade name, which is located at 815 Canyon Del Ray, Monterey, California 93940 (Monterey County).

Land Site in the Morro Bay/Los Osos, California Market:

1. Land Site for American Stores store no. 592, which is located at the northwest corner of Los Osos Valley Road and Southbay Boulevard, Los Osos, California 93402 (San Luis Obispo County).

Supermarket in the Napa, California Market:

Analysis to Aid Public Comment

1. Albertson=s store no. 750 operating under the AAlbertson=s@ trade name, which is located at 3682 Bel Aire Plaza, Napa, California 94558 (Napa County).

Analysis to Aid Public Comment

Supermarket in the Paso Robles, California Market:

1. American Stores store no. 266 operating under the ALucky@ trade name, which is located at 2121 Spring Street, Paso Robles, California 93446 (San Luis Obispo County).

Supermarkets in the Greater Sacramento, California Market:

1. Albertson=s store no. 702 operating under the AAlbertson=s@ trade name, which is located at 5001 Foothills Boulevard, Roseville, California 95678 (Placer County);

2. Albertson=s store no. 761 operating under the AAlbertson=s@ trade name, which is located at 2280 Sunrise Boulevard, Rancho Cordova, California 95670 (Sacramento County);

3. Albertson=s store no. 762 operating under the AAlbertson=s@ trade name, which is located at 9522 Greenback Lane, Folsom, California 95630 (Sacramento County);

4. Albertson=s store no. 765 operating under the AAlbertson=s@ trade name, which is located at 6737 Watt Avenue, North Highlands, California 95660 (Sacramento County);

5. Albertson=s store no. 766 operating under the AAlbertson=s@ trade name, which is located at 3615 Bradshaw Road, Sacramento, California 95827 (Sacramento County);

6. Albertson=s store no. 769 operating under the AAlbertson=s@ trade name, which is located at 5330 Stockton Boulevard, Sacramento, California 95820 (Sacramento County);

7. Albertson=s store no. 770 operating under the AAlbertson=s@ trade name, which is located at 4560 Mack Road, Sacramento, California 95823 (Sacramento County);

8. Albertson=s store no. 771 operating under the AAlbertson=s@ trade name, which is located at 4080 Douglas Boulevard, Granite Bay, California 95746 (Placer County);

9. Albertson=s store no. 774 operating under the AAlbertson=s@ trade name, which is located at 6124 San Juan, Citrus Heights, California 95610 (Sacramento County);

10. Albertson=s store no. 777 operating under the AAlbertson=s@ trade name, which is located at 8122 Gerber Road, Sacramento, California 95828 (Sacramento County);

11. Albertson=s store no. 783 operating under the AAlbertson=s@ trade name, which is located at 5025 Marconi Avenue, Carmichael, California 95608 (Sacramento County);

12. Albertson=s store no. 788 operating under the AAlbertson=s@ trade name, which is located at 25000 Blue Ravine Road, Folsom, California 95630 (Sacramento County);

13. American Stores store no. 179 operating under the ASuperSaver@ trade name, which is located at 2351 Northgate Boulevard, Sacramento, California 95833 (Sacramento County); and

14. American Stores store no. 195 operating under the ALucky@ trade name, which is located at 8539 Elk Grove Boulevard, Elk Grove, California 95624 (Sacramento County).

Supermarket in the Salinas, California Market:

1. Albertson=s store no. 795 operating under the AAlbertson=s@ trade name, which is located at 1030 East Alisal, Salinas, California 93905 (Monterey County).

Supermarket in the San Luis Obispo, California Market:

1. American Stores store no. 271 operating under the ALucky@ trade name, which is located at 201 Madonna Road, San Luis Obispo, California 93401 (San Luis Obispo County).

Supermarket in the Santa Cruz/Capitola, California Market:

1. Albertson=s store no. 719 operating under the AAlbertson=s@ trade name, which is located at 1710 41st Avenue, Capitola, California 95010 (Santa Cruz County).

Supermarket in the Santa Maria/Orcutt, California Market:

1. American Stores store no. 262 operating under the ALucky@ trade name, which is located at 4869 South Bradley, Orcutt, California 93455 (Santa Barbara County).

Supermarkets in the Santa Rosa, California Market:

1. Albertson=s store no. 760 operating under the AAlbertson=s@ trade name, which is located at 461 Stony Point Road, Santa Rosa, California 95401 (Sonoma County); and

2. American Stores store no. 29 operating under the ALucky@ trade name, which is located at 390 Coddingtown Center, Santa Rosa, California 95401 (Sonoma County).

Supermarket in the Sonoma, California Market:

1. Albertson=s store no. 756 operating under the AAlbertson=s@ trade name, which is located at 201 West Napa Street, Sonoma, California 95476 (Sonoma County).

Supermarket in the Vacaville, California Market:

1. American Stores store no. 399 operating under the ALucky@ trade name, which is located at 615 Elmira Road, Vacaville, California 95687 (Solano County).

Supermarket in the Watsonville/Freedom, California Market:

1. Albertson=s store no. 786 operating under the AAlbertson=s@ trade name, which is located at 2010 Freedom Boulevard, Freedom, California 95019 (Santa Cruz County).

Supermarket and Land Site in the Santa Fe, New Mexico Market:

1. American Stores store no. 688 operating under the ALucky@ trade name, which is located at 2308 Cerrillos Road, Santa Fe, New Mexico 87505 (Santa Fe County); and

2. Land Site for American Stores store no. 701, which is located at the northeast corner of Airport and South Meadows, Santa Fe, New Mexico 87505 (Santa Fe County).

Schedule D

Supermarkets and Land Site Divested to Stater

Supermarket in the Encinitas, California Market:

1. Albertson=s store no. 613 operating under the AAlbertson=s@ trade name, which is located at 1048 North El Camino Real, Encinitas, California 92024 (San Diego County).

Analysis to Aid Public Comment

Supermarkets in the Escondido, California Market:

1. Albertson=s store no. 1672 operating under the AAlbertson=s@ trade name, which is located at 635 North Broadway, Escondido, California 92025 (San Diego County); and

2. American Stores store no. 561 operating under the ALucky@ trade name, which is located at 1330 Mission Road, San Marcos, California 92069 (San Diego County).

Land Site for Supermarket in the Fallbrook, California Market:

1. Land Site for Albertson=s store no. 1692, which is located at Mission and Pepper, Fallbrook, California 92028 (San Diego County).

Supermarkets in the Lancaster/Palmdale, California Market:

1. Albertson=s store no. 1619 operating under the AAlbertson=s@ trade name, which is located at 1840 East Avenue J, Lancaster, California 93536 (Los Angeles County);

2. Albertson=s store no. 1634 operating under the AAlbertson=s@ trade name, which is located at 37218 47th Street East, Palmdale, California 93550 (Los Angeles County);

3. Albertson=s store no. 1670 operating under the AAlbertson=s@ trade name, which is located at 2845 West Avenue L, Lancaster, California 93536 (Los Angeles County); and

4. American Stores store no. 458 operating under the ALucky@ trade name, which is located at 2535 East Avenue South, Palmdale, California 93550 (Los Angeles County).

Analysis to Aid Public Comment

Supermarkets in the Murrieta/Temecula, California Market:

1. Albertson=s store no. 619 operating under the AAlbertson=s@ trade name, which is located at 31813 Highway 79 South, Temecula, California 92592 (Riverside County); and

2. American Stores store no. 504 operating under the ALucky@ trade name, which is located at 25050 Hancock Avenue, Murrieta Hot Springs, California 92563 (Riverside County).

Supermarkets in the Oceanside/Vista/Carlsbad, California Market:

1. Albertson=s store no. 1631 operating under the AAlbertson=s@ trade name, which is located at 1451 North Santa Fe Avenue, Vista, California 92083 (San Diego County);

2. Albertson=s store no. 1687 operating under the AAlbertson=s@ trade name, which is located at 780 Sycamore Avenue, Vista, California 92083 (San Diego County);

3. American Stores store no. 231 operating under the ASuperSaver@ trade name, which is located at 3770 Mission Avenue, Oceanside, California 92054 (San Diego County); and

4. American Stores store no. 298 operating under the ALucky@ trade name, which is located at 2170 Vista Way, Oceanside, California 92054 (San Diego County).

Supermarkets in the Palm Springs/Indio, California Market:

1. Albertson=s store no. 683 operating under the AAlbertson=s@ trade name, which is located at 1717 Vista Chino, Palm Springs, California 92262 (Riverside County);

2. Albertson=s store no. 1623 operating under the AAlbertson=s@ trade name, which is located at 69255 Ramon Road, Cathedral City, California 92234 (Riverside County); and

3. Albertson=s store no. 1627 operating under the AAlbertson=s@ trade name, which is located at 78-630 Highway 111, La Quinta, California 92253 (Riverside County).

Supermarkets in the Poway/North San Diego, California Market:

1. Albertson=s store no. 1644 operating under the AAlbertson=s@ trade name, which is located at 13589 Poway Road, Poway, California 92064 (San Diego County); and

2. American Stores store no. 553 operating under the ALucky@ trade name, which is located at 9909 Carmel Mountain Road, San Diego, California 92129 (San Diego County).

Supermarket in the Ramona, California Market:

1. Albertson=s store no. 1630 operating under the AAlbertson=s@ trade name, which is located at 1674 Main Street, Ramona, California 92065 (San Diego County).

Supermarket in the Santa Clarita, California Market:

1. Albertson=s store no. 681 operating under the AAlbertson=s@ trade name, which is located at 26900 Sierra Highway, Santa Clarita, California 91355 (Los Angeles County).

Supermarkets in the South Los Angeles County/North Orange County, California Market:

1. Albertson=s store no. 607 operating under the AAlbertson=s@ trade name, which is located at 3325 East Chapman Avenue, Orange, California 92669 (Orange County);

2. Albertson=s store no. 620 operating under the AAlbertson=s@ trade name, which is located at 610 South Brookhurst, Anaheim, California 92804 (Orange County);

3. Albertson=s store no. 627 operating under the AAlbertson=s@ trade name, which is located at 8640 East Alondra Boulevard, Paramount, California 90723 (Los Angeles County);

4. Albertson=s store no. 629 operating under the AAlbertson=s@ trade name, which is located at 851 North Harbor Boulevard, La Habra, California 90631 (Orange County);

5. Albertson=s store no. 651 operating under the AAlbertson=s@ trade name, which is located at 11815 Artesia Boulevard, Artesia, California 90701 (Los Angeles County);

6. Albertson=s store no. 666 operating under the AAlbertson=s@ trade name, which is located at 1131 State College Boulevard, Anaheim, California 92806 (Orange County);

7. Albertson=s store no. 1601 operating under the AAlbertson=s@ trade name, which is located at 7814 East Firestone Boulevard, Downey, California 90241 (Los Angeles County);

8. Albertson=s store no. 1604 operating under the AAlbertson=s@ trade name, which is located at 1111 East Imperial Highway, Placentia, California 92670 (Orange County);

9. Albertson=s store no. 1608 operating under the AAlbertson=s@ trade name, which is located at 10051 Valley View, Cypress, California 90630 (Orange County);

10. Albertson=s store no. 1635 operating under the AAlbertson=s@ trade name, which is located at 1040 East Bastanchury Road, Fullerton, California 92635 (Orange County);

11. Albertson=s store no. 1641 operating under the AAlbertson=s@ trade name, which is located at 6501 East Spring, Long Beach, California 90808 (Los Angeles County);

12. Albertson=s store no. 1648 operating under the AAlbertson=s@ trade name, which is located at 7511 East Orangethorp, Buena Park, California 90621 (Orange County);

13. Albertson=s store no. 1652 operating under the AAlbertson=s@ trade name, which is located at 12800 La Mirada Boulevard, La Mirada, California 90638 (Los Angeles County);

14. Albertson=s store no. 1656 operating under the AAlbertson=s@ trade name, which is located at 10114 Adams Street, Huntington Beach, California 92646 (Orange County);

15. Albertson=s store no. 1668 operating under the AAlbertson=s@ trade name, which is located at 7101 Warner Avenue, Huntington Beach, California 92647 (Orange County);

16. Albertson=s store no. 1674 operating under the AAlbertson=s@ trade name, which is located at 11300 Firestone Boulevard, Norwalk, California 90650 (Los Angeles County);

17. American Stores store no. 425 operating under the ALucky@ trade name, which is located at 333 North Euclid Avenue, Fullerton, California 92632 (Orange County);

18. American Stores store no. 442 operating under the ALucky@ trade name, which is located at 17220 South Lakewood Boulevard, Bellflower, California 90706 (Los Angeles County); and

19. American Stores store no. 473 operating under the ALucky@ trade name, which is located at 11750 East Whittier Boulevard, Whittier, California 90601 (Los Angeles County).

Supermarkets in the South Orange County, California Market:

1. Albertson=s store no. 1673 operating under the AAlbertson=s@ trade name, which is located at 22351 El Toro Road, El Toro, California 92630 (Orange County);

2. Albertson=s store no. 1677 operating under the AAlbertson=s@ trade name, which is located at 26892 La Paz Road, Laguna Hills, California 92653 (Orange County); and

3. American Stores store no. 624 operating under the ALucky@ trade name, which is located at 616 Camino de los Mares, San Clemente, California 92673 (Orange County).

Supermarket in the Southern Covina, California Market:

1. Albertson=s store no. 1662 operating under the AAlbertson=s@ trade name, which is located at 20677 Amar Road, Walnut, California 91789 (Los Angeles County).

Schedule E

Supermarkets and Land Site Divested to Vons

Supermarket in the Moorpark, California Market:

1. American Stores store no. 558 operating under the ALucky@ trade name, which is located at 4241 Tierra Rejada, Moorpark, California 93021 (Ventura County).

Supermarket in the Redlands, California Market:

Analysis to Aid Public Comment

1. Albertson=s store no. 1605 operating under the AAlbertson=s@ trade name, which is located at 522 North Orange, Redlands, California 92374 (San Bernardino County).

Land Site for Supermarket in the Rialto/Fontana, California Market:

1. Land Site for Albertson=s store no. 628, which is located at Cherry and Baseline, Fontana, California 92336 (San Bernardino County).

Supermarket in the Riverside/Corona, California Market:

1. Albertson=s store no. 1622 operating under the AAlbertson=s@ trade name, which is located at 1130 West 6th Street, Corona, California 91720 (Riverside County).

Complaint

IN THE MATTER OF

WEBTV NETWORKS, INC.

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

Docket C-3988; File No. 9723162
Complaint, December 8, 2000--Decision, December 8, 2000

This consent order addresses WebTV Networks' promotion of the WebTV system, consisting of a set-top box and an Internet service, which, together allow users to connect to the Internet through a telephone line and a television. The complaint alleges that the Respondent falsely claimed that the WebTV system was the equivalent of a personal computer providing access to all of the Internet's content and that upgrades would keep users current with the latest Internet technology. The complaint also alleged that WebTV failed to adequately disclose that a significant percentage of U.S. consumers would incur long distance telephone charges while connected to the Internet through the WebTV service. The consent order prohibits the Respondent from making the previously made false representations that WebTV system provides access to all internet content; that the WebTV system was the equivalent to a personal computer in terms of web access; and that upgrades to their system would keep users current with the latest internet technology, as well as any other misrepresentation about access to internet or the functionality of any internet related product or service. The order also prohibits the Respondent from representing the price of internet access without a clear and conspicuous disclosure of all material information regarding that price and all related charges including potential long distance charges. Additionally, the order requires the disclosure of information regarding long distance charges to include that users are likely to incur the charges, how they can determine if they will incur these charges, a source of information about how, if possible, to avoid these charges.

Participants

For the Commission: *Dean C. Forbes, L. Mark Eichorn, Tara A. Hurley, Toby Milgrom Levin, Joel Winston, C. Lee Peeler, and BE.*

For the Respondents: *Charles Buffon, Covington & Burling and Scott Maples, WebTV Networks.*

COMPLAINT

The Federal Trade Commission, having reason to believe that WebTV Networks, 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 WebTV Networks, Inc. is a California corporation with its principal office or place of business at 1065 La Avenida, Mountain View, CA 94043.

2. Respondent has patents pending for the technology and design of WebTV set-top boxes, devices used in conjunction with a telephone line, a television, and respondent's Internet service to connect to the Internet. Respondent licenses the WebTV set-top box technologies to various companies, including Sony, Philips Electronics, and Mitsubishi, which manufacture and sell WebTV set-top boxes. Respondent sells the Internet service called WebTV Network, for which it charges a monthly fee.

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

4. Respondent has disseminated or has caused to be disseminated advertisements and promotional materials for the WebTV Network Internet service and WebTV set-top boxes, including but not limited to the attached Exhibits A through G. These advertisements and promotional materials contain the following statements:

A. (Exhibit A: advertising template)

"WebTV service offers

- Complete and affordable Internet access

. . . .

[Fine print disclosure]: WebTV Network service is not available as a local call everywhere. Toll charges may apply."

B. (Exhibit B: brochure)

"And you'll pay a flat fee of $19.95 a month with no extra charges for long distance e-mail.**

. . . .

With WebTV you can turn your TV into a powerful rocket ship any time you feel like exploring new places and ideas. There=s virtually no place on earth you can't travel to; no person, place or thing you can=t easily find out more about. . . . WebTV even offers free automatic service upgrades that keep the Network as up to date as possible.

. . . .

[Fine print disclosure on back of brochure]: **WebTV Network service is not available as a local call everywhere. Toll charges may apply."

C. (Exhibit C: brochure)

"[Consumer] [Bill M] 'Now that WebTV came along, heck, who needs a computer. For almost a fraction of the cost, I can visit any city in the world, learn facts and even send e-mail. And best of all, I won't have to worry about software upgrades since WebTV handles that.'"

D. (Exhibit D: promotional video)

"[Will Shriner]: With WebTV, the Internet is finally fast, easy, and affordable. You don't need a computer. There

is no software to install. Plus you always get free automatic upgrades.

. . . .

For entertainment, information, communication, and help just getting things done, WebTV is all you need.

. . . .

To stay connected with family and friends, WebTV offers e-mail. You can even make new friends all over the world without paying expensive long distance phone bills.

[Visual disclosure (fine print)]: WebTV Network service is not available as a local call everywhere. Toll charges may apply.

. . . .

Its only $19.95. Surf the Net as often as you want on WebTV.

[Visual disclosure (large)]: Monthly subscription only $19.95

[Visual disclosure (fine print)]: WebTV Network Service is not available as a local call everywhere. Toll charges may apply.]"

E. (Exhibit E: letter to consumers accompanying promotional video) (emphasis in original)

"WebTV brings all the incredible entertainment and information of the Internet right to your TV.

. . . .

Buy your WebTV Internet Terminal at your local consumer electronics store for about $250. Then, pay a flat rate of only $19.95 a month to enjoy easy access to the Internet right on your TV.*

. . . .

But ultimately, the best reason of all to subscribe to WebTV is that it opens up new worlds of entertainment, information and fun like nothing else can. With easy access to the Internet on your TV, you can visit thousands of fascinating web sites, quickly research almost any topic, person, place or thing that catches your fancy, even receive e-mail with people across the street or across the ocean.

. . . .

The Internet is one of the most important innovations of our time, and its incredible content should be readily available to anyone and everyone. With a WebTV Internet Terminal from Sony or Philips Magnavox and a low-cost subscription to WebTV*, it finally is.

. . . .

[Fine print disclosure on back of letter]: *WebTV Network Service is not available as a local call everywhere. Toll charges may apply."

F. (Exhibit F: television infomercial)

"[Moderator/Announcer (Wil Shriner)]: You have heard of e-mail? That's electronic mail that lets you send and receive messages anywhere in the world, without the hassle of stamps or the cost of long distance calls.

. . . .

[Announcer (Unidentified)]: And you don't need a computer. . . . Whether it's entertainment, communication or education, it's all on WebTV.

. . . .

[Visual disclosure (large)]: Only 19.95 a month.

[Announcer (Unidentified)]: Then, get hooked up to the WebTV Network and surf all you want for only $19.95 a month.

[Visual disclosure (fine print, no corresponding audio)] WebTV Network Service is not available as a local call everywhere. Toll charges may apply.

. . . .

[Shriner]: Great. So, Christina, you know, one of the things I like to do is chat. You can go on and you can find anything you want to talk about, any subject matter, you go into a chat room. I understand you like that as well.

[Consumer (Christina)]: Yeah, I do, because it saves a lot of money on phone bills. I call up my friend in Washington, talk for about a minute or two and tell him to go downstairs in his dorm, go online, and we start chatting.

. . . .

[Shriner]: I mean, having WebTV is like having a huge resource library, the Internet, the World Wide Web, all of that is available for you right now.

. . . .

[Consumer (Anita)]: Whatever you are into, it's there.

. . . .

[Shriner]: . . . So, Pete and Cammi have an interesting story. They knew each other, then they moved apart, and now they have come back together to get married, all with the help of WebTV. . . . So, you both have WebTV boxes. . . . The living 500 miles apart, does it make you feel closer? . . . . How much money do you think you've saved on phone bills?

[Consumers (Pete and Cammi)] [Cammi]: Oh, on our phone bill? Hundreds of dollars."

G. (Exhibit G: Web page)

"6. Why WebTV instead of a computer?

WebTV offers a variety of special entertainment features you can't get on a computer, only TV. Unlike a computer, WebTV comes with free service upgrades so you don't have to worry about new software. . . .

. . . .

25. What is the cost of service, and what are the terms of commitment?

The WebTV Network is a flat rate of $19.95 per month and WebTV Plus Network is $24.95 a month. . . .

. . . .

40. Looks like WebTV now supports a lot of Internet standards. Is this significant?

> Absolutely. The Internet changes constantly, and WebTV is committed to enhancing the user experience by regularly delivering new functionality. WebTV's free periodic service upgrades keep the WebTV Network current with Internet standards. . . .”

5. Through the means described in Paragraph 4, respondent has represented, expressly or by implication, that:

A. The WebTV set-top box is equivalent to a personal computer with respect to its Internet-related performance;

B. The WebTV set-top box and respondent’s Internet service provides access to all of the Internet’s content, including all of the entertainment and information available on the Internet; and

C. Respondent’s upgrades to the WebTV set-top box and respondent’s Internet service keeps users current with the latest Internet technology.

6. In truth and in fact:

A. The WebTV set-top box is not equivalent to a personal computer with respect to its Internet-related performance. For example, WebTV set-top box users are unable to download, store, or run software available on the Internet, display certain Web pages or play certain Web files, or open email attachments in certain common formats;

B. The WebTV set-top box and respondent’s Internet service do not provide access to all of the Internet’s content, including all of the entertainment and information available on the Internet. For example, WebTV users are unable to access files on Web sites that use popular formats or programming languages, including popular Internet technologies for Web site audio, video,

interactivity, and multimedia used for online entertainment and information communication; and

C. Respondent's upgrades to the WebTV set-top box and respondent's Internet service have not kept users current with the latest Internet technology. For example, upgrades have failed to provide certain commonly used Internet technologies for audio, video, interactivity, and multimedia.

Therefore, the representations set forth in Paragraph 5 were, and are, false or misleading.

7. In its advertising and sale of the WebTV Network Internet service and its advertising of WebTV set-top boxes, respondent has represented, expressly or by implication, that the total cost to consumers of using the WebTV Network Internet service and the WebTV set-top box is the initial purchase price of the WebTV set-top box hardware plus the flat monthly subscription fee for its WebTV Network Internet service. Respondent has failed to disclose adequately before purchase that a significant percentage of U.S. consumers will incur toll charges while connected via the WebTV Network Internet service to the Internet. This fact would be material to those consumers in their purchase or use of the service or product. The failure to adequately disclose this fact, in light of the representation made, was, and is, a deceptive practice.8. The acts and practices of respondent as alleged in this complaint constitute unfair or deceptive acts or practices in or affecting commerce in violation of Section 5(a) of the Federal Trade Commission Act.

THEREFORE, the Federal Trade Commission this eighth day of December, 2000, has issued this complaint against respondent.

By the Commission.

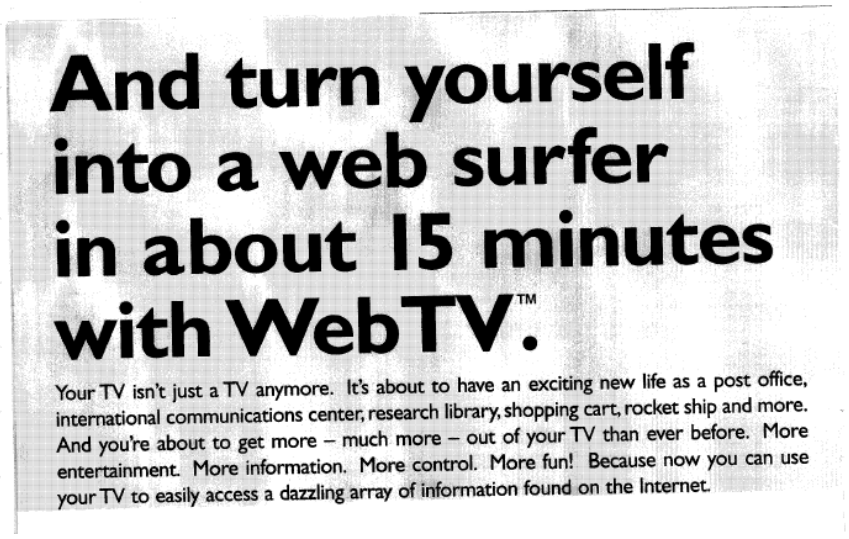
Complaint Exhibits

Exhibit A

Generic WebTV/Classic – 1/2 page ad
9.22.98 - Printed at 100%

Complaint Exhibits

Exhibit B



Complaint Exhibits

Use your TV to access the Internet – without a computer or computer skills.

With WebTV, anyone can access the Internet without a computer or any computer experience at all. Now all you need is a TV, your current phone line, a WebTV Internet Terminal from Sony or Philips Magnavox and a flat $19.95 per-month subscription to the WebTV Network.™** It takes most people about 15 minutes to get set up and connected. Then, you're ready to surf the Internet as easily as you surf the channels on your TV.

Enjoy immediate access to in-depth information on any subject you can imagine.

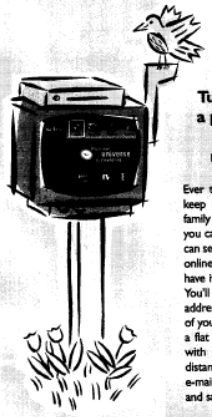
Say you read a magazine ad about a product or place you're interested in knowing more about. At the bottom of the ad is a www address. Now you can visit that web site on your TV and find out everything you need to know.* Or you're watching a baseball game and want to check a player's current stats. With the touch of a button, you can switch to the Internet and uncover a wealth of information in just moments. With WebTV, the possibilities are endless!

With WebTV, you can surf the net on your set.

Now you can quickly, easily and affordably access the incredible content of the Internet right on your TV. Think about it. You can research your hobby. Send and receive e-mail worldwide. Chat online with other browsers. Follow big news stories. Find a great vacation spot or spa – then make your reservations right on your TV. The Internet isn't off-limits anymore – you can explore it on your television!

webtv

See the enclosed WebTV Demonstration Card for the addresses of two consumer electronics stores in your area – and to find your WebTV Personal Identification Code. Be sure to bring the card along when you visit the store. Then, see for yourself how easy and fun WebTV is to use – and find out instantly if you've got the winning number to $10,000 in cash or to one of the other great prizes in the WebTV Instant Win Sweepstakes!

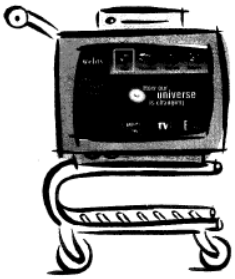


Turn your TV into a post office when you send and receive e-mail.

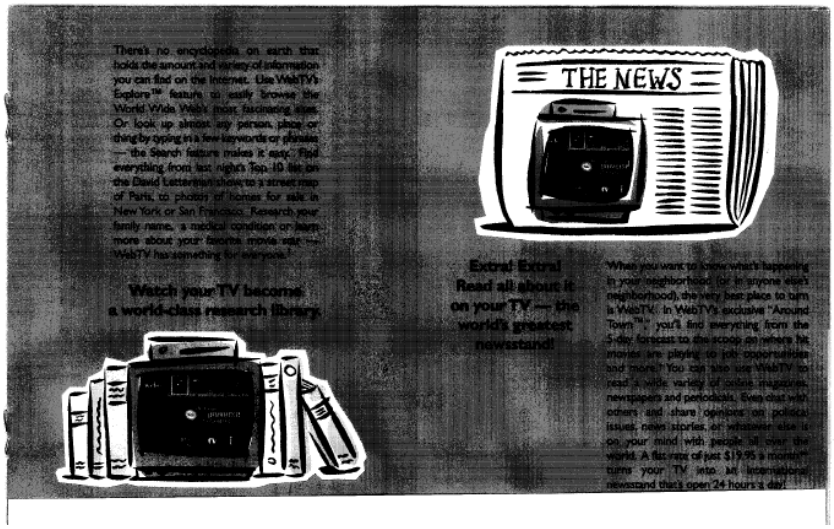
Ever think you'd use your TV to keep in touch with friends and family around the world? Now you can. With WebTV e-mail, you can send a letter to almost anyone online anywhere in the world and have it delivered within moments. You'll even get six separate e-mail addresses for different members of your household. And you'll pay a flat fee of just $19.95 a month with no extra charges for long distance e-mail.** With WebTV e-mail, you'll enjoy spontaneity and savings!

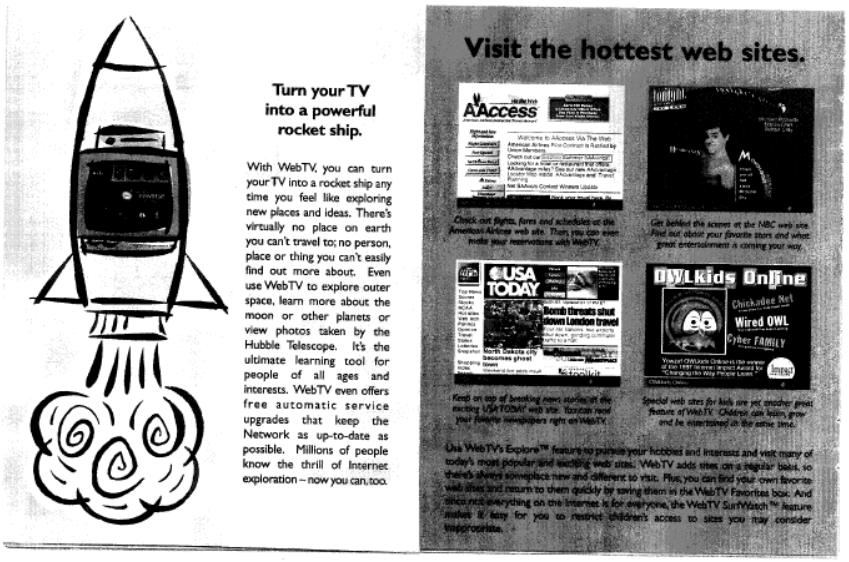
Your TV makes a great shopping cart for online savings and convenience.

Discover the convenience of using WebTV to shop for everything from travel bargains to hit CDs to sports equipment to furniture and more. Plus, use the Internet to research a product by checking out consumer report information before you spend a penny. WebTV also makes it easy and fun to find new vacation destinations. You can pull up pictures and information on cities, resorts, even hotel rooms. Then, you can make your travel and room reservations online!



Complaint Exhibits





Complaint Exhibits

Now surfing the net is as easy as changing the channels on your TV!

You don't have to be a "computer person" to access the Internet anymore. In fact, you don't need any computer skills or experience at all. With WebTV, surfing the net is as easy as surfing the channels on your TV. And you've been doing that for years! You can do it easily with the WebTV Remote Control or optional Wireless Keyboard. And with WebTV, you can surf the net from the comfort of your couch or favorite chair!

Get The Optional Wireless Keyboard FREE When You Purchase And Register A WebTV™ Internet Terminal By August 31, 1997.

It's up to a $79 value, but this convenient optional Wireless Keyboard is yours FREE when you buy a WebTV Internet Terminal from Philips Magnavox or Sony. It's also a great way to compose your e-mail. Take advantage of this valuable extra before this special offer ends! To receive your FREE Wireless Keyboard, you must call 1-800-627-3175 after you purchase and register your WebTV Internet Terminal. Then give us your Personal Identification Code and new e-mail address, and we'll send your Wireless Keyboard to you. This exclusive offer from WebTV Networks, Inc. is not valid at retail or in conjunction with any other offers.

Check out WebTV™ for yourself at your local consumer electronics store.

Find out if you have the winning number to the $10,000 Grand Prize!

You've already been assigned a number — and it may be the winning one to $10,000 in cash. To find out, go to the consumer electronics store in your area (you'll find the names and addresses of two on the Demonstration Card enclosed), try WebTV for yourself — and find out instantly if you've won $10,000 in cash, a $2,500 consumer electronics shopping spree or a FREE WebTV Internet Terminal with six months free WebTV Network service. But to find out, you must go in and try WebTV for yourself! (See the back of this brochure for complete details.)

With WebTV™, you can surf the Internet on your set!

Stop into your local consumer electronics store today to check out WebTV™ for yourself and to find out if you've won $10,000 in the WebTV™ Instant Win Sweepstakes!

webtv

* Like any Internet access device, WebTV does not support all Internet data formats. ** WebTV Network service is not available as a local call everywhere. Toll charges may apply. 'Around Town™ is not available in all cities. © 1997 WebTV Networks, Inc. WebTV™ refers to the WebTV™ Internet Terminal, which, along with the WebTV Network™, are trademarks of WebTV Networks, Inc. Sony and Philips Magnavox are trademarks of their respective companies. © American Airlines and AAdvantage are registered trademarks and AAccess and Net SAAver Fares are trademarks of American Airlines, Inc. © Copyright 1997 USA TODAY, a division of Gannett Co. Inc. NBC.com "The Tonight Show" web page © NBC Multimedia 1997.

WebTV™ Instant Win Sweepstakes Official Rules

No Purchase Necessary

How to enter: Bring the WebTV Demonstration Card with your WebTV Personal Identification Code to one of the participating resellers for the WebTV Networks Demonstration. (Your tester has the names and addresses of local participating retailers.) Or, if you prefer, on a 3" x 5" plain card hand print "WebTV™ Instant Win Sweepstakes" with your WebTV Personal Identification Code (which can be found on the WebTV™ Demonstration Card), along with your name, address, city, state, zip code and daytime phone number, and mail your entry to WebTV™ Instant Win Sweepstakes, P.O. Box 1998, Santa Monica, CA 90406-9814. All entries must be received by 12/31/97. No photocopied or mechanically reproduced entries will be accepted. Sponsor not responsible for lost, late, misdirected, illegible, incomplete or damaged entries or postage-due mail or printer errors. **The random prize drawing** of the winning WebTV Personal Identification Codes will be conducted under the supervision of an independent judging organization whose decisions are final and binding. **Prizes:** One (1) Grand Prize: $10,000 Cash. Five (5) First Prizes: $2,500 Consumer Electronic Shopping Sprite. Fifty (50) Second Prizes: WebTV Internet Terminal and 6 Months of Free WebTV Network Service (approximate retail value $400). No cash substitution for first or second prize. **The prizes** are not transferable. Payment of federal, state, and local taxes, if any, will be the obligation of the winners. Odds of winning 5,179 to 1. **Grand prize winner, first prize winners, and second prize winners** will be notified within 3 business days of how to claim their prize. Winners must provide date, social security number and sign an affidavit of eligibility and release of liability/publicity which must be returned within 14 days after mailing to the winner. On acceptance of prize, winner grants exclusive permission to use his or her name, address, biographical data and photograph or likeness for any promotional purposes without additional compensation, to the extent permitted by law. Unclaimed prizes will not be awarded. In the event more prizes than those designated herein are claimed, a random drawing from among all valid claims will be held to award the prizes set forth above. **Any winner** agrees that WebTV Networks, Inc., its judging organization, and their respective affiliates and employees shall have no liability in connection with the acceptance, quality or use of Prizes. **Entry** into the WebTV Instant Win Sweepstakes constitutes acceptance of Official Rules, void where prohibited. **All entries** become the exclusive property of WebTV Networks, Inc. and will not be returned. Information provided by entrants may be used for such purposes as WebTV Networks, Inc. may deem appropriate. **For a winner's list,** send a self-addressed, stamped envelope before 12/31/97 to: WebTV™ Instant Win Sweepstakes, P.O. Box 1998, Santa Monica, CA 90406-9814. Do not send other correspondence to this box number. **Eligibility:** Sweepstakes open to residents of the 50 U.S. states and the District of Columbia only. 21 years and older to whom this mailing is addressed. Employees of WebTV Networks Inc., its affiliated companies and agencies and members of immediate families or households of such employees are not eligible.

B-A1

Complaint Exhibits

Exhibit C

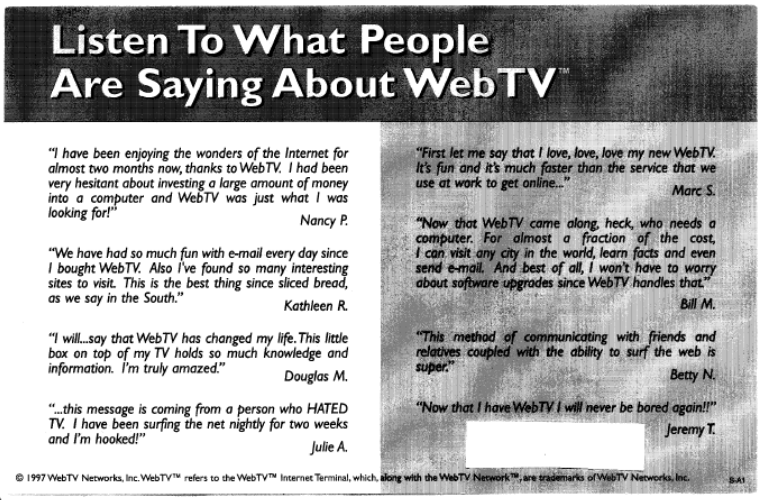


EXHIBIT
C

Complaint Exhibits

Exhibit D

A VIDEO GUIDE TO WebTV
(transcription)

ANNOUNCER: You've got a television set. You've got a telephone. So, why is your life like this when it could be like this?

[Various Internet screens depicted]

Wil Shriner: Hi everybody! I'm Wil Shriner and you just saw a fraction of what's available on the Internet with the WebTV network. So, if you want to bring your television to a whole new level, stick around. I'm going to tell you everything you need to know about WebTV and how to get a world of entertainment and information in your home right away. All you need is your television and a current phone line. Then, with a WebTV Internet terminal and a subscription to the WebTV network, you and your family can access the Internet.

1st woman: I would strongly recommend it to anyone strongly. It's easy.

2nd woman: If you can use a remote, you can use WebTV.

1st woman: It's fun.

1st girl: It's just like getting an education with fun.

1st woman: And you can also get a lot accomplished.

Man: Hotel reservations, car rentals, I can do with WebTV.

2nd girl: I can go from watching TV, to chatting on the Internet, looking up the websites on TV shows, music.

3rd woman: Stocks.

2nd man: Sports.

3rd man: E-Mail.

4th woman: Recipes.

3rd girl: Beanie Babies.

4th man: Information about things you might want to buy.

Complaint Exhibits

5th woman: Different fashion sites.

Male teen: Research a college or applications, anything.

4th woman: There's nothing that's not on there.

3rd woman: We love our WebTV.

3rd man: We love it!

Wil Shriner: With WebTV, the Internet is finally fast, easy, and affordable. You don't need a computer and there's no software to install. Plus, you always get free automatic up-grades.

[Small print disclosure: 3 secs: Free upgrades limited to the WebTV Network service.]

All you need is your television and a comfortable place to sit. Then you can go from watching regular TV to WebTV with the push of a button. So, if a favorite show says, "E-Mail Us," you can do it without leaving your seat. For entertainment, information, communication, and help just getting things done, WebTV is all you need. In just a few minutes I'll show you how you may be eligible to win one of those many exciting prizes from WebTV including a $10,000 grand prize.

Now the first step involves choosing a WebTV, Internet terminal. This one is made by Philips-Magnavox and this one is made by Sony. You can get either one at your nearest consumer electronics store.

So, let's connect our WebTV. These 3 cords are all you need to bring the world-wide web into your living room. This one goes from the Internet terminal to your television set; this one goes into your current phone jack; and this one plugs right into the wall.

Then, press the "power" button and you are on your way.

It's easy to sign on for the WebTV network. You'll walk through every step. In minutes you're on-line. Ta-da!

For only $19.95 a month you'll get E-Mail, including six separate E-mail

[Small print disclosure: 3 secs: "WebTV Network service is not available as a local call everywhere. Toll charges may apply."}

accounts. And you'll also love how you can do everything with your remote.

If you're planning on sending a lot of E-mail, you may wanna purchase one of these -- the optional wireless keyboard. You can sit across the room, on the couch, in bed, wherever, and find out what everybody's been talkin' about.

Now, this is the homepage. From here you can send E-Mail, go to your favorite websites, type in a word for a broad search, or explore by subject. Let's see how. From the "Explore" page, you can click on all these different categories to easily find out about anything you're interested in. For example, highlight the word "entertainment," and click on your remote. Now look at all these cool categories. You want to check out TV Guide? Or maybe you prefer to go to a museum. From "Explore," we can link to the Smithsonian. From the "Search" page, you can also search for more information by typing in a word or phrase. Now, say you want information on the Grand Canyon. Just type it in and voilà! Everything you want to know, from guided tours to history to photographs. Besides using "Explore" or "Search," another way to go anywhere on the entire Internet is to use "Go To." So if you see a "WWW.something address" like this Honda commercial, you can switch to WebTV, type it in, and you are there. You can save any site as a favorite with the touch of a button so it's always easy to find right from your home page. You just have to try WebTV. Even people who have never used a computer find it incredibly simple. Now, people with computers say it's easier and it's faster, and kids love it. And for you moms and dads concerned about what your kids can access, WebTV comes with "Surf Watch" so you can limit what your young surfers see on the Internet. (phone rings) Oh, that reminds me. If you've got call waiting, WebTV's line-share feature lets you still receive calls while you're using WebTV. (answers phone) Hello, no, no I won't be needing the paper anymore. It was always in the bushes and, besides, I've got a WebTV.

Look, I could pick up a WebTV right where I left off and continue surfing. Now, the "Around Town" feature lets you check out the scene in your town. Here's a five-day weather forecast, information on restaurants, and movie show times. You can even buy your tickets right here. If instead of the movies you want to go on vacation, you can see if you'll need to bring an umbrella. Just change the zip code to check out any city you like. And there's also a national telephone directory so you can look up virtually anyone in the U.S. To stay connected with family and friends, WebTV offers E-Mail. You can even make new friends all over the world without paying expensive long-distance phone bills.

[Small print disclosure: 3 secs: "WebTV Network service is not available as local call everywhere. Toll charges may apply"]

Complaint Exhibits

If you look on your Internet terminal, a little red light tells you you have Mail. Hey, I got a message. Let's check it out. Ah, it's from my son Nick. "Dear Dad, thanks for the WebTV. I love it." You know, it is so important to have an electronic father-son bond like this. Now, to return an E-Mail, I hit "reply." Alright, and "glad you're enjoying your WebTV. See you tonight. Love, Dad." Now I hit "send" and it automatically goes right back to him. To write to someone else, I just type in their E-Mail address and send them a message. It's that simple.

There's no more hassle; buying stamps, licking envelopes, going to the post office. You can conveniently keep in touch from that comfort of your own home. Let's take a look at news. You get summaries of the top headlines updated constantly and you can get more information on the stories you want whenever you want. If you'd like to print a specific article or anything from the Internet, it's easy to do with the optional printer adapter and printer.

[Small print disclosure: "available Summer 1997"]

It's truly a new world. With WebTV, your television can do things you never thought were possible. It can be your mailbox, your library, and your travel agent. The Internet has revolutionized the way we live. Don't be left behind. With a subscription to the WebTV network and your Internet terminal, you can access thousands of sites around the globe for entertainment, information, money-saving tips and time-saving features. You can join chat groups, play games, and send E-Mail. And you can do it with the greatest of ease from the comfort of your own home. It's only $19.95 to surf the net on WebTV as much as you want.

[Large print disclosure: approximately 5 secs]: "Monthly subscription Only $19.95.
[Small print disclosure: approximately 5 secs]: "Web TV service is not available as a local call everywhere. Toll charges may apply."

Woman: There's so much value. You have no idea what you're getting until you start playing with it.

Teen girl: With WebTV there's always something new.

Man: Do my home banking, do investment research on-line.

Next man: Our TV has a picture-in-picture, ah, function on it so we're able to watch the games and track the stats at the same time.

Male teen: Stuff for my homework and everything.

Complaint Exhibits

Woman: All of the garden sites.

1st woman: We've actually been looking for homes.

3rd woman: I got into a website called, called the Kelly Bluebook to find out how much my car was worth.

Next woman: I like to look at a lot of, of fashion magazines.

Man: It helps me to catch up on current events.

Woman: It's easier to read, it's easy to access. There's no reason not to get WebTV.

Wil Shriner: Well, as you've seen, WebTV has something for everyone, but see for yourself. Visit your nearest consumer electronics store. You'll find the closest location to you in the materials that came with this video. In the same package you'll find your demonstration card with your personal identification code. You may have already won $10,000, a free WebTV Internet terminal, or other fabulous prizes. At your local electronics store, you can check out the world of WebTV. Now you'll be amazed at how much fun it is. To find out if you've won our sweepstakes, follow the simple steps on your demonstration card. Your demonstration card walks you through every step. Just type in "WebTV WIN" to find out if you've already won our $10,000 grand prize or one of our many other great prizes. Keep your demonstration card, then when you purchase WebTV you can call the 800 number to redeem a special offer from WebTV networks. So, what are you waiting for? Stop by and check us out. Happy surfing! Maybe we'll meet in a chat room some time. Until then, this is Wil Shriner for WebTV Networks. I'll see you on-line.

Complaint Exhibits

Exhibit E

webtv

New CHOICE. New CONTROL.
And a new way to win $10,000 instantly.

Check out WebTV™ at your local electronics store — and find out on the spot if you have the winning number to a $10,000 Cash Grand Prize!

<John. Q. Prospect
123 Main Street
Hometown, State 23456>

Dear <Mr. Prospect>.

Thank you for your recent request for more information on WebTV.

You recently received a package of information, so you know that we also promised to send you a special video on exciting WebTV. That video is enclosed.

WebTV brings all the incredible entertainment and information of the Internet right to your TV. You don't need a computer. And you don't need any computer experience, software or skills. All you need is a WebTV Internet Terminal made by Sony or Philips Magnavox, your TV, current phone line, and a monthly subscription to the WebTV Network.

Then, in about 15 minutes, you can be set up and online, ready to surf the Internet as easily as you surf the channels on your TV.

Buy your WebTV Internet Terminal at your local consumer electronics store for about $250. Then, pay a flat rate of only $19.95 a month to enjoy easy access to the Internet right on your TV.*

If you haven't already tried WebTV for yourself, it's important that you visit your local consumer electronics store and try out WebTV now for two big reasons.

1) You can find out immediately if you have the winning number to a $10,000 Cash Grand Prize in the WebTV Instant Win Sweepstakes, and...

2) When you buy your WebTV Internet Terminal before August 31, 1997, we'll send you the optional WebTV Wireless Keyboard worth up to $79, FREE!

But ultimately, the best reason of all to subscribe to WebTV is that it opens up new worlds of entertainment, information and fun like nothing else can. With easy access to the Internet on your TV, you can visit thousands of fascinating web sites, quickly research almost any topic, person, place or thing that catches your fancy, even send and receive e-mail with people across the street or across the ocean.

(continued on back)

L-FF2A

WebTV™ Try-It-Yourself Instructions & Instant Win Sweepstakes Entry Card

Your Personal Identification Code:
<12345-67-8910>

Is this the winning number to a $10,000 Cash Grand Prize? There's only one way to find out!

webtv

<Mr. Direct Partner
910 Colorado Avenue
Santa Monica, CA 90401>

Here are the names of two consumer electronics stores in your area:

<Acme Electronics
200 Big Street
City, State 23456
000-000-0000>

<Top Name
300 Main Street
City, State 34567
000-000-0000>

EXHIBIT
E

The Internet is one of the most important innovations of our time, and its incredible content should be readily available to anyone and everyone. With a WebTV Internet Terminal from Sony or Philips Magnavox and a low-cost subscription to WebTV*, it finally is.

Visit one of the consumer electronics stores listed to check out WebTV for yourself — and, of course, take your Personal Identification Code to find out on the spot if you've won $10,000 in cash, or one of our other valuable prizes. (See sweepstakes rules for complete details.) It's fast, fun and easy! Stop in now and find out for yourself how exciting and easy WebTV is to use — and whether you're suddenly $10,000 richer!

Sincerely,

Chip Herman

Chip Herman
Vice President, Marketing

P.S. Remember, too, that when you buy a WebTV Internet Terminal and subscribe to the WebTV Network now, we'll send you the optional Wireless Keyboard absolutely FREE — a value of up to $79!

NOTE: To receive your FREE Wireless Keyboard, you must call 1-800-627-3175 after you purchase and register your WebTV Internet Terminal. Then, give us your Personal Identification Code and your new WebTV e-mail address, and we'll send your Wireless Keyboard to you. Remember, this offer is only available from WebTV Networks, Inc. and is not valid at retail locations or in conjunction with any other offers.

WebTV™ Instant Win Sweepstakes Official Rules

No Purchase Necessary

How to enter: Bring the WebTV Sweepstakes Entry Card with your WebTV Personal Identification Code to one of the participating retailers for the WebTV Networks Demonstration. (Your letter has the names and addresses of local participating retailers.) Or, if you prefer, on a 3" x 5" plain card hand-print "WebTV™ Instant Win Sweepstakes" with your WebTV Personal Identification Code (which can be found on the WebTV Sweepstakes Entry Card), along with your name, address, city, state, zip code and daytime phone number, and mail your entry to: WebTV™ Instant Win Sweepstakes, P.O. Box 1008, Santa Monica, CA 90406-9814. All entries must be received by 12/31/97. No photocopied or mechanically reproduced entries will be accepted. Sponsor not responsible for lost, late, misdirected, illegible, incomplete or damaged entries, or postage-due mail or printer errors. **The random pre-selection** of the winning WebTV Personal Identification Codes will be conducted under the supervision of an independent judging organization whose decisions are final and binding. **Prizes:** One (1) Grand Prize: $10,000 Cash. Five (5) First Prizes: $2,500 Consumer Electronic Shopping Spree. Fifty (50) Second Prizes: WebTV Internet Terminal and 6 Months of Free WebTV Network Service (approximate retail value $400). No cash substitution for first or second prize. **The prizes** are not transferable. Payment of federal, state, and local taxes, if any, will be the obligation of the winners. Odds of winning 5,179 to 1. **Grand prize winner, first prize winners, and second prize winners** will be notified within 3 business days of how to claim their prize. Winners must provide their social security number and sign an affidavit of eligibility and release of liability/publicity which must be returned within 14 days after mailing to the winner. On acceptance of prize, winner grants sponsor permission to use his or her name, address, biographical data and photograph or likeness for any promotional purposes without additional compensation, to the extent permitted by law. Unclaimed prizes will not be awarded. In the event more prizes than those designated herein are claimed, a random drawing from among all valid claims will be held to award the prizes set forth above. **Any winner** agrees that WebTV Networks, Inc., its judging organization, and their respective affiliates and employees shall have no liability in connection with the acceptance, quality or use of Prizes. **Entry** into the WebTV Instant Win Sweepstakes constitutes acceptance of Official Rules. Void where prohibited. **All entries** become the exclusive property of WebTV Networks, Inc. and will not be returned. Information provided by entrants may be used for such purposes as WebTV Networks, Inc. may deem appropriate. **For a winner's list**, send a self-addressed, stamped envelope before 12/31/97 to: WebTV™ Instant Win Sweepstakes, P.O. Box 1008, Santa Monica, CA 90406-9814. **Do not send other correspondence to this box number. Eligibility:** Sweepstakes open to residents of the 50 U.S. states and the District of Columbia only, 21 years and older to whom this mailing is addressed. Employees of WebTV Networks Inc., its affiliated companies and agencies and members of immediate families or households of such employees are not eligible.

* WebTV Network service is not available as a local call everywhere. Toll charges may apply

INSTRUCTIONS: Take this card to one of the two stores listed, and locate the stores WebTV display. Use the WebTV Remote Control or optional Wireless Keyboard to begin your Internet adventure.

1. To get started, hit the "Home" button on the WebTV remote.
2. Using the center button and arrows on the remote control, highlight the "Explore™" icon and "click" on the remote's center button. Now, using the arrows, find a category that interests you and surf away. Or check out what's happening in your city by clicking on "Around Town™*" from the Home page.
3. To see if you've won $10,000, hit the "Options" button on the remote control. Then highlight the "go to" box and click on the center button twice to activate the WebTV on-screen keyboard. Using the arrows and center button type in "webtown" (w, "center button," e, "center button," and so on), or use the optional Wireless Keyboard. Finally, click on the return key and WebTV will take you to the WebTV Instant Win Sweepstakes site. Follow the instructions to see if you're a winner.

ONE LAST THING: If your store does not feature a display or is unable to offer assistance, please call the WebTV Help Line, **1-800-GO-WEBTV**, for assistance.

* Around Town™ is not available in all cities.

Complaint Exhibits

Exhibit F

OFFICIAL TRANSCRIPT PROCEEDING

FEDERAL TRADE COMMISSION

MATTER NO. **9723162**

TITLE **WEB TV NETWORKS, INC.**

DATE **RECORDED: AUGUST 21, 1997**
TRANSCRIBED: MAY 6, 1998

PAGES **1 THROUGH 39**

WEBTV DOCUMERCIAL

FOR THE RECORD, INC.
603 POST OFFICE ROAD, SUITE 309
WALDORF, MARYLAND 20602
(301)870-8025

Complaint Exhibits

FEDERAL TRADE COMMISSION

I N D E X

FEDERAL TRADE COMMISSION

In the Matter of:)
WebTV Networks, Inc.) File No. 9723162
----------)

August 21, 1997

DOCUMERCIAL WITH

WIL SHRINER OF WEBTV NETWORKS, INC.

APPEARANCES:

ON BEHALF OF THE FEDERAL TRADE COMMISSION:

No investigator named.

For The Record, Inc.
Waldorf, Maryland
(301)870-8025

PROCEEDINGS

- - - - - -

[ANNOUNCER (Unidentified)]: The following is a paid presentation for WebTV Networks, Incorporated.

[Visual disclosure (large)]: WebTV.

[ANNOUNCER (Wil Shriner)]: Hi, I'm Wil Shriner, coming to you from living rooms all across the country. Why? Because this and this and this and this is where people, just like you and me, surf the worldwide web with the WebTV Network. With what? WebTV Networks, the company that brings your TV to life with the internet.

You know, the internet, where you can communicate with people you know and make friends with people you'd never meet otherwise. You have heard of e-mail? That's electronic mail that lets you send and receive messages anywhere in the world without the hassle of stamps or the cost of long distance calls.

And you know what else you can do on your TV and WebTV? Get up-to-the-minute news, sports and financial information; check out all sorts of entertainment, like celebrity sites of your favorite stars; take care of personal business, like making travel plans, banking or buying movie tickets right from your television. You get the idea.

[Visual disclosure (large)]: WebTV.

[ANNOUNCER (Wil Shriner)]: With the WebTV Network, your television set becomes more than just a place to watch your favorite shows. It's a place to customize your program and a place to check out whatever you're into from your favorite room with your family and friends.

So, why do you need the WebTV Network on your television? Because with WebTV, the worldwide web becomes your personalized TV channel. Hey, millions of people are on the internet, and if you're not one of them, you're missing out, but the great news is with the WebTV Network, the internet is now showing on your TV. Yes, the TV you're watching right now.

And if you can use a remote control, you can use WebTV. It's fun, it's easy and affordable, and you don't need a computer to watch it, you don't need a Ph.D. to work it and you don't need a stock portfolio to afford it. Hey, you've got interests, you've got ambitions, you've got dreams. You can use the WebTV Network to get closer to all of them.

Think of the incredible people you can meet, the places you can go and the things you can buy and the stuff you can get done all on your television.

[CONSUMER (Unidentified Male)]: I love my WebTV to do my home banking, to do investment research on

line. I also travel quite a bit out of town, so I use it to find out the best air fares and the best restaurants.

[CONSUMER (Unidentified Female)]: I use my WebTV for searching all of the garden sites.

[CONSUMER (Unidentified Male)]: I hold a black belt in Tae Kwan Do right now, and I like to go on the WebTV and look at different styles.

[CONSUMER (Unidentified Female)]: I especially like to look at a lot of fashion magazines on the WebTV, because that way I don't have to go out and buy them.

[CONSUMER (Unidentified Male)]: I have been able to travel to other countries, Spain, in Costa Rica, in some of the Caribbean Islands.

[CONSUMER (Unidentified Female)]: I like the feature from WebTV for the live camera for the St. Louis home page, because it shows the arch and everything. It doesn't make me feel so much homesick.

[CONSUMER (Unidentified Male)]: It's opened up a new world to me, a world I didn't even know exist, honestly.

[ANNOUNCER (Wil Shriner)]: It's WebTV, easy to use, affordable and the most dependable way to surf the net. All you need is your television and your current phone line. Then you buy this little box called an

internet terminal made by Philips Magnavox or Sony. Then you sign up for the WebTV Network, and boom, in seconds, you're surfing the web.

It's the best way to the internet, and it's playing on TVs all over the country. But what do you do with WebTV? You want to see? You want to go inside other people's living rooms, check out with what they do with their WebTV, see how it's changing their lives? Well, okay, America, show us your WebTV.

This is Anita and Joe's house. I'll get the mail for 'em. Hi, Anita, Wil from WebTV.

[CONSUMERS (Anita and Joe)][Anita]: Hi, Wil, how are you?

[SHRINER]: I've got your mail. I see there's a number of overdue bills here, but -- sorry.

May I come in and talk to you about how you're using WebTV?

[CONSUMERS (Anita and Joe)[Anita]:: Yes, sure.

[SHRINER]: So, Anita, you're a little like Columbus, you like to do some exploring.

[CONSUMERS (Anita and Joe)][Anita]: Yes, I do. That was one of the first things I noticed on the home page. It gives you topics, so whatever you are into, it's there. There was one on the community, there's a financial section, entertainment, sports, health, mind

and body and on and on. I mean, whatever you felt like looking at, it was so easy to get to.

[SHRINER]: What convinced you to get WebTV?

[CONSUMERS (Anita and Joe][Joe]: I think the main thing is, is that we didn't have to get a computer.

[CONSUMERS (Anita and Joe)][Anita]: When you get home, I don't want to get on my computer. It's much more comfortable to sit on the couch and to be able to play with WebTV. It's just -- it's -- it's more fun.

[CONSUMERS (Anita and Joe)[Joe]: It's just another way of using the TV that I think is very comfortable.

[SHRINER]: Tony, how do you fit into this?

[CONSUMERS (Anita, Joe and Tony)][Tony]: Anita's my daughter.

[SHRINER]: Your daughter. How do you guys use WebTV?

[CONSUMERS (Anita, Joe and Tony)][Tony]: Well, I have six children and ten grandchildren, so it keeps me in touch with the kids, their birthdays and the little parties they are having, but the e-mail back and forth between the children and myself is really a great communications tool.

[SHRINER]: Now, when you send an e-mail for

their birthday, do you still enclose a couple of bucks in the card?

Tony, what else do you like about WebTV?

[CONSUMERS (Anita, Joe and Tony)][Tony]: I travel a lot, so I get home at the end of the week and I always feel like I'm behind on current events. So, WebTV to me is like a catcher's mitt. It helps me to catch up to the events that were going on while I was away.

I am no longer intimidated by it, you know, I -- I always felt the computer market went beyond me, but WebTV makes me feel like technology caught up with me.

[SHRINER]: What have you found to explore with the kids?

[CONSUMERS (Anita, Joe and Tony)][Anita]: PBS Online was great. They loved that, because they are so familiar with all those morning shows, and there are a lot of really fun sites for kids to look at. For them, they are going to grow up with the TV being very interactive for them rather than just something that you sit in front of, and I like that, too, because I think it -- it seems to be more educational.

[SHRINER]: Let's just check out and see if these folks know about the SurfWatch feature, they have got kids.

Have you tried SurfWatch, Joe, Anita?

[CONSUMERS (Anita, Joe and Tony)][Joe]: Yeah, we have. It's a good way to protect, you know, what our kids are watching.

[CONSUMERS (Anita, Joe and Tony)][Anita]: Makes you feel comfortable, the fact that there are things on the internet that we don't want them getting access to.

[SHRINER]: Now, do you have SurfWatch for grandpa?

[CONSUMERS (Anita, Joe and Tony)][Anita]: We should. A lot of things you shouldn't be looking at.

We love WebTV.

[SHRINER]: No, come on, really.

[CONSUMERS (Anita, Joe and Tony)][Anita]: Really, it is -- there is so much value. You have no idea what you're getting until you start playing with it. I mean, it's like taking your favorite magazine, your favorite newspapers and half a library and combining it all together, and that's only the beginning.

[SHRINER]: A family that stays in touch through WebTV.

[CONSUMERS (Anita, Joe and Tony)][Anita]: We love our WebTV.

[CONSUMERS (Anita, Joe and Tony)][Tony]: We

love it.

[CONSUMERS (Anita, Joe and Tony)][Joe]: We love it.

[ANNOUNCER (Wil Shriner)]: Well, as you've seen, once you've experienced WebTV, you'll wonder how you ever got along without it. There is so much to see, so much to do. So, if your TV is not connected to the WebTV Network, you're missing out on the worldwide web.

[Visual disclosure (large)]: WebTV.

[ANNOUNCER (Wil Shriner)]: Hey, Terrence? Terrence, you home?

[CONSUMER (Terrence)][TERRENCE]: Yeah, I'm home.

[SHRINER]: Hi, man, Wil from WebTV.

[TERRENCE]: Hey, how you doing, man?

[SHRINER]: Good. We thought we would check out how you're using your WebTV.

[TERRENCE]: All right, man, come on.

[SHRINER]: Okay. I like your door, it's like that Mr. Ed house.

All right, so, let's see the room where you watch WebTV.

[TERRENCE]: This is it right here, man, this is where it all happens.

[SHRINER]: All right, got your home page off

and running.

[TERRENCE]: : Go ahead, grab a seat.

[SHRINER]: Why did you pick WebTV?

[TERRENCE]: I knew I wanted to get on the internet, and I didn't want to go through the expense of getting a computer, and so I went with WebTV, because it was so simple. You hook it up in about five minutes, ten minutes you're rolling. It's just very simple.

[SHRINER]: What kind of stuff do you like to do?

[TERRENCE]: Basically what I like to do is I like to just jump in and get on the sports page.

[SHRINER]: Do you find yourself going back and forth between regular TV sports and then WebTV?

[TERRENCE]: Absolutely, dude, I mean, you know, you are watching the game, and at any time, you can just stop. You can click from WebTV. You can get additional information from players, games, scores and highlights from the sports page, any kind of fact that you want you can get right there while it's fresh in your mind with the click of a button. So, you have more control over what you actually watch.

[SHRINER]: There is a spot for favorite sites. What have you got on your favorite sites?

[TERRENCE]: My favorite sites, I have -- I have

Wheel of Fortune on there, you can actually play the game. Your board comes up, you can see it. They will actually show you the letters you have already used, just like the regular game. You can actually play with people who are playing on WebTV around the world.

[SHRINER]: So, you are playing in real time against real opponents.

[TERRENCE]: Absolutely.

[SHRINER]: All right, Terrence, well, I know we have taken a little time away from your game. I'll let you get back to your game. Good to see you.

[TERRENCE]: Thanks.

[ANNOUNCER (Wil Shriner)]: Are you still just watching sports on television? Well, with the WebTV Network, you can play armchair quarterback, you can check stats, you can even chat with other sports enthusiasts. With WebTV, there's something for everyone. You can tune into whatever you're into.

[Visual disclosure (large)]: WebTV.

[ANNOUNCER (Wil Shriner)]: Oh, hey, Karen, I'm Wil.

[CONSUMER (Karen)[KAREN]: Wil, nice to meet you.

[SHRINER]: Nice to meet you. Is it okay if we come in? We came to see how you're using WebTV. We

want to find out how it's changed your life.

[KAREN]: Oh, it's changed my life quite a bit.

[SHRINER]: Sit down and find out how you're using WebTV.

So, Karen, I understand the biggest influence WebTV has had on your life is e-mail.

[KAREN]: The e-mail is phenomenal. I -- that is basically what led me into getting WebTV. My best friend, we met in nursing school, and she lives in Charleston, South Carolina, and now we have a relationship where we talk every day. I come home -- it's real exciting, you come home, the red light's on, you go, "Mail!"

[SHRINER]: Oh, look, you've got an e-mail here from your friend. "Congratulations on your new sports car." Let's write her back. Just scroll down and hit "reply." Just going to type in a little note here. "I'm with my new best friend Wil Shriner." Isn't it easy to send e-mail with WebTV?

[KAREN]: It's great.

[SHRINER]: Now, I'll just hit "send," and it's off to your friend.

You know, the old ways of sending a letter was kind of like snail mail. Let's just recreate the old way you used to send a letter.

You have got to go through your desk. What are you looking for? Stationery. You write a little letter.

[KAREN]: And I'll write it to Brian.

[SHRINER]: Dear Brian. How's your handwriting?

[KAREN]: Perfect.

[SHRINER]: You would never be a doctor.

So, do you have any stamps in there?

[KAREN]: I thought I did. Let me check. No, I don't see any.

[SHRINER]: No stamps? Oh, we have got to go to the post office.

All right, we will buy some stamps, Karen, let's let WebTV pay for these. It's a hassle, isn't it? Okay, B-4. There we go. There's your stamps.

[KAREN]: Thank you.

[SHRINER]: And stamped mail, there we go.

Boy, was that a hassle, wasn't it?

[KAREN]: Sure was. Much easier to just sit on your couch.

[SHRINER]: Send e-mail.

[KAREN]: Definitely.

[SHRINER]: All right, let's get out of here.

[Visual disclosure (large)]: WebTV.

[ANNOUNCER (Unidentified)]: TV just got better with WebTV. It's so easy.

(Visual disclosure (fine print, no corresponding audio)]: This is a paid ad for WebTV Networks, Inc.

[CONSUMER (Theresa)][THERESA]: So simple to use. If you can use a remote, you can use WebTV.

[ANNOUNCER (Unidentified)]: Fast.

[Visual disclosure (large)]: WebTV.

[CONSUMER (Terrence)[TERRENCE]: You hook it up in five minutes, ten minutes, you're rolling.

[ANNOUNCER (Unidentified)]: Fun way to surf the net.

[Visual disclosure (large)]: WebTV.

[CONSUMER (Young Female)[YOUNG FEMALE]: Just like getting an education with fun.

[ANNOUNCER (Unidentified)]: And you don't need a computer. WebTV works with your TV and current phone line. Whether it's entertainment, communication or education, it's all on WebTV. Beginning with the WebTV home page, your starting point for WebTV's exclusive services, like WebTV e-mail, where you can send and receive messages virtually anywhere in the world.

And WebTV's Explore, an exclusive directory of amazing places to go on the internet, covering every topic imaginable; or WebTV's Search, so you can find

places to go by subject matter in a flash. Then, when you find a site you like, stash it in your WebTV favorites.

[Visual disclosure (fine print, no corresponding audio)]: AroundTown is not available in all cities.

[ANNOUNCER (Unidentified)]: Click on Around Town for the five-day weather forecast in your city or in any city you choose. Find a restaurant or check for starting movie times at a theater near you. WebTV even comes with SurfWatch, so you can control what sites and e-mail are seen by your kids.

With WebTV, you can receive phone calls while you're surfing.

[Visual disclosure (large)]: Coming Soon! Optional Printer Adapter and Printer.

[ANNOUNCER (Unidentified)]: And soon you'll be able to print e-mail messages or web sites, and you control everything right from your remote. Or, if you want to send lots of e-mail to friends and family, an optional wireless keyboard is available.

[Visual disclosure (large)]: Optional Keyboard. Call Now. Only $249.

[ANNOUNCER (Unidentified)]: WebTV takes your TV to a whole new level. All you need to get started is a WebTV internet terminal made by Philips Magnavox or Sony

for a fraction of the cost of a computer.

[Visual disclosure (large)]: Only $19.95 a month.

[ANNOUNCER (Unidentified)]: Then, get hooked up to the WebTV Network and surf all you want for only $19.95 a month.

[Visual disclosure (fine print, no corresponding audio)]: WebTV Network Service is not available as a local call everywhere. Toll charges may apply.

[CONSUMER (Pete)[PETE]: You can literally get connected to anybody in the world.

[CONSUMER (Anita)[ANITA]: Whatever you're into, it's there.

[CONSUMER (Theresa)[THERESA]: There is no reason not to get WebTV.

[Visual disclosure (large)]: Free Video.

[ANNOUNCER (Unidentified)]: Call now and we'll rush you a free video that will show you how easy and affordable it is to get WebTV in your home right away and how you could win $10,000 in the instant-win sweepstakes.

[Visual disclosure (large)]: $10,000 Grand Prize, call for details.

[ANNOUNCER (Unidentified)]: So, call the toll-free number on your screen right now and bring your

television to a whole new level. Go on, make your TV a WebTV.

[Visual disclosure (large)]: 30 Day/Money Back Guarantee on WebTV Network Service.

[CONSUMER (Unidentified Male)[MALE]: With WebTV I'm able to travel better by selecting the seat -- actual diagram on WebTV, I can look at and see exactly where on the plane I'd like to sit, I'm able to book on-line, and my seat is waiting for me when I get to the airport. I probably saved at least a thousand dollars on air fare alone.

[CONSUMER (Unidentified Male)[MALE]: We wanted to get a swing set for the kids, and I typed in swing set and got back from the search pages, you know, every possible variation on swings, and we found this company from Maine.

[CONSUMER (Unidentified Female)[FEMALE]: I am so glad he did. It was great just to be able to decide we wanted to find out some information right then and there, and get on WebTV and there it was.

[CONSUMER (Young Female)[YOUNG FEMALE]: One of the things I put in my favorites box was Xena, Warrior Princess. Right after I watched the show, I'd go on to search, and I know what's more behind the scenes of Xena.

[CONSUMER (Unidentified Male)[MALE]: Our TV has a picture-in-picture function on it. So, we are able to watch the games and we will be checking out the statistics as they are -- as the game is in progress and maybe as other games are in progress.

[CONSUMER (Unidentified Female)[FEMALE]: It's definitely had an impact on the family. Now we're sitting together, not just, like, couch potatoes in front of the television letting it entertain us, but we are actually working together as a group.

[ANNOUNCER (Wil Shriner)]: Hey, welcome back.

Now, you see these TVs behind me? They used to be regular TVs, but they are something much more, because they are connected to the WebTV Network. Now, if you're just joining us, the future is here, and the buzz in homes all over the country is WebTV, the easy, fast, fun way for everyone to get on the internet.

I am joined by a delightful woman who is 90 years young. This is Evelyn, but that's not her real name. Her real name is Cyber-Gram. Is that right?

[CONSUMER (Evelyn)[EVELYN]: Yes.

[SHRINER]: How do you like WebTV so far?

[EVELYN]: I just love WebTV. It has just opened a whole wide world for me that has been marvelous.

[SHRINER]: You e-mail post cards with WebTV?

[EVELYN]: Yes. I have a lot more friends. I have friends in Canada now, and I have some friends in Holland now that I didn't have before, and I'm a lot closer to my family than I've ever been, because I say good night to them every night.

[SHRINER]: I understand you e-mailed the president of WebTV?

[EVELYN]: Yes, I did. He told me to, so I did.

[SHRINER]: Would you like to read it for us?

[EVELYN]: Okay. "At 90 I am enjoying searching the web. It is the most exciting thing to happen to me for a long time. I could not see how a 90-year-old could use a computer. Now I am hooked. Thanks. Cyber-Gram."

[Visual disclosure (large)]: Dr. Pamela Wendt, USC Andrus Gerontology.

[MS. WENDT]: I have a research project teaching seniors to use the internet. We have found that as our seniors learn to use WebTV, their lives have taken on a whole new meaning. People have been -- I don't really know the word, but have just been warmed by the fact that they get regular e-mail from grandchildren.

Getting connected to the internet using WebTV

has just made such a difference in people's lives, because it has allowed them to be at home where their body needs to be but let their mind find the world once again.

[ANNOUNCER (Wil Shriner)]: Are you still wondering what all those "www.somethings" are? Well, with the WebTV Network, they become places to go, things to do, stuff to buy, people to meet.

[Visual disclosure (large)]: WebTV.

[ANNOUNCER (Wil Shriner)]: We thought we'd check with a typical teenager and see how she's using her WebTV.

Hi, Christina, Wil with WebTV.

[CONSUMER (Christina)][CHRISTINA]: Hi, come on in.

[SHRINER]: Great.

So, Christina, you know, one of the things I like to do is chat. You can go on and you can find anything you want to talk about, any subject matter, you go into a chat room. I understand you like that, as well.

[CHRISTINA]: Yeah, I do, because it saves a lot of money on phone bills. I call up my friend in Washington, talk for about a minute or two and tell him to go downstairs in his dorm, go online, and we start

chatting.

[SHRINER]: Tell me about some of your favorite TV shows.

[CHRISTINA]: Well, I like looking up Star Trek. There's a lot of -- there's an official and then there's a lot of unofficial sites.

[SHRINER]: What other TV show web sites do you like to visit?

[CHRISTINA]: Well, there is X-Files, which is a very great show, I love that show, and the official site has the reviews for the episodes, what they are about, pictures, just everything you need to know. Sometimes I miss the episode, and I'm -- I would be totally lost if I missed an episode. So, I can just find out what the episode was about in detail.

[SHRINER]: Let's show people how -- how easy it is to research something. What do you think? Let's pick a topic. What are you into? Are you into art?

[CHRISTINA]: Yeah.

[SHRINER]: Let's pick a painter, say Earl Scheib. No, how about Monet?

CHRISTINA: Monet, okay.

[SHRINER]: Click up to search.

[CHRISTINA]: And just type in Monet.

[SHRINER]: M O N E T, right.

[CHRISTINA]: Monet.

[SHRINER]: Pronounced Monet.

Wow, look at all these web sites we found. Hey, look at this, there are paintings and -- well, his biography, let's take a look.

Let's see, there he is. He could use a little trim on that beard, I think. All right, let's check out some of his paintings. Go to, say, "Women in the Garden." Okay, there's women in a garden. Oh, yeah, yeah, the famous "Waterlilies," right there.

This is so easy. Could you imagine doing it the old-fashioned way?

[CHRISTINA]: No.

[SHRINER]: I mean, having WebTV is like having a huge resource library, the internet, the worldwide web, all of that is available for you right now. Let's just for kicks do it the old-fashioned way.

[CHRISTINA]: Do we have to?

[SHRINER]: Yeah, come on.

So, we go to the library, and we look up Monet on the computer. Then we have to hunt all over the place for the book, better make sure we return it on time. It is so much easier to get all the information you need with WebTV.

[Visual disclosure (large)]: Steve Perlman,

President & CEO, WebTV Networks, Inc.

[MR. PERLMAN]: We have taken this wonderful thing, the internet, which until now has really been limited to kind of a very small percentage of the population, that A, has a technical ability to make their way through it, and B, can afford it, we have taken this wonderful thing and brought it to the masses, and I tell you, if I don't do anything else in life, I can say that I have done this, and I think it really makes a difference.

[Visual disclosure (large)]: WebTV.

[ANNOUNCER (Unidentified)]: TV just got better with WebTV, the fast, easy, fun way to surf the net.

[Visual disclosure (fine print, no corresponding audio)]: This is a paid ad for WebTV Network, Inc.

[CONSUMER (Anita)][ANITA]: Whatever you are into, it's there.

[CONSUMER (Terrence)][TERRENCE]: You hook it up in about five minutes, ten minutes you're rolling.

[CONSUMER (Theresa)][THERESA]: It's so simple to use.

[ANNOUNCER (Unidentified)]: WebTV works with your TV and current phone line, and it's as simple to use as your remote control. Whether it's entertainment, communication or education, it's all on WebTV.

Beginning with the WebTV home page, where you can send and receive e-mail messages virtually anywhere in the world.

[Visual disclosure (fine print, no corresponding audio)]: AroundTown is not available in all cities.

[ANNOUNCER (Unidentified)]: With Around Town, you can check out the local scene in your neighborhood. And WebTV comes with SurfWatch, so you can control what sites and e-mail are seen by your kids.

[Visual disclosure (large)]: Optional Keyboard.

[ANNOUNCER (Unidentified)]: An optional wireless keyboard makes it easy to send lots of e-mail, and soon you'll be able to print e-mail messages or web sites.

[Visual disclosure (large)]: Coming Soon! Optional Printer Adapter and Printer.

[Visual disclosure (fine print, no corresponding audio)]: Only $19.95 a month. WebTV Network Service is not available as a local call everywhere. Toll charges may apply.

[ANNOUNCER (Unidentified)]: Get started with a WebTV internet terminal, then get hooked up to the WebTV service for only $19.95 per month.

[Visual disclosure (large)]: Free Video.

[ANNOUNCER (Unidentified)]: Call now and we'll

rush you a free video that'll show you everything you need to know about getting WebTV in your home right away.

[Visual disclosure (large)]: 30 Day Money Back Guarantee on WebTV Network Service.

[ANNOUNCER (Unidentified)]: So, call the toll-free number on your screen right now and make your TV a WebTV.

[ANNOUNCER (Wil Shriner): WebTV is, well, in a word, simple. It brings the internet to your TV, letting you switch between channel surfing and web surfing without leaving your couch.

So, Pete and Cammi have an interesting story. They knew each other, then they moved apart, and now they have come back together to get married, all with the help of WebTV.

[CONSUMERS (Pete and Cammi)[CAMMI]: That's right.

[SHRINER]: So, you both have WebTV boxes. How easy were they to hook up?

[CAMMI]: Extremely. In fact, we both hooked up our own.

[CONSUMERS (Pete and Cammi)[PETE]: It takes about 15 minutes. It's pretty easy. It's as easy as -- actually, it's easier than setting up a VCR, plug it

right in.

[CAMMI]: And they do offer a help line that you can call. I'm proud to say I didn't need to call it, but it's nice to know that it's there, that if you have any problems, you can call it.

[SHRINER]: So, living 500 miles apart, does it make you feel closer?

[CAMMI]: It's made it a lot easier. One of the things that's so great for me and I think Pete would agree is that just being able to e-mail back and forth, it -- it makes us feel that much closer. We're, you know, 500 miles away, and one of the nice things when I get home at night and I flip on the TV, if he's been good, my light's blinking and I have an e-mail, which there is something really neat about that.

[SHRINER]: How much money do you think you have saved on phone bills?

[CAMMI]: Oh, on our phone bill? Hundreds of dollars.

[SHRINER]: So, you have been planning your wedding with WebTV?

[CAMMI]: Right. What's great is that I get home from work, I get in my comfy clothes, and I've been able so far to find florists, wedding dress options, musicians. For me, that's huge. That saves a ton of

time.

[SHRINER]: What about the honeymoon?

[CAMMI]: That's Pete's area.

[PETE]: That's my department.

[SHRINER]: So tell us, Pete.

[PETE]: Actually it was really helpful for our honeymoon, because we are going to Africa. So, I used the WebTV to send out an e-mail, basically I contacted multiple safari companies out in Kenya, and I would wake up in the morning and see the light blinking, and I'd get information, and then I'd take that information and forward it to Cammi.

[SHRINER]: So, you live in northern California. Are you going to move up north? Have you been looking for a place on the web?

[CAMMI]: We have been. We have actually been looking for homes.

[PETE]: WebTV's helped, because I can just get on there, look at the listings, and then we send e-mails back and forth, and when she comes up on the weekend, we can look at the houses.

[SHRINER]: When you guys move in and finally settle down together, what are you going to do with the extra box?

[CAMMI]: Oh, that's easy, mom and dad get it.

My dad is already on the internet, and I can't get my mom on, and I think this will be the thing that will keep us in touch.

[SHRINER]: What happens when the minister says I now pronounce you man and wife?

[CAMMI]: This is what happens. (Kisses Pete).

[SHRINER]: The WebTV Network, it's the evolution of your television from regular TV to WebTV.

[Visual disclosure (large)]: WebTV.

[CONSUMER (Ellis)][ELLIS]: Hey, Wil, how are you?

[SHRINER]: Ellis, good to see you.

[ELLIS]: Good to see you. I got the WebTV on now. Come on in.

[SHRINER]: Hey, all right. Oh, look, I see you have got your Around Town feature up to check out the local weather, movies, restaurants.

So, Ellis, tell us, how do you like your WebTV?

[ELLIS]: It's just something so terrific. Everything you want to think about, you can do with this. I am watching regular TV, and then at the same time I can go right to the internet, and I can find additional things that you can't see on TV.

For instance, if I'm watching something on sports, I get a ball game score, and then I get to

ESPN-Net or one of the other internet sites, and I get the whole line score, everything that's going on play by play, and it's easy. It's for people like myself who know how to plug in a microwave. I mean, it's that simple.

[SHRINER]: Okay, so, I notice you have landed there on the TV Guide site.

[ELLIS]: TV Guide has become a whole different thing to me. Normally it would be the little book you would get in the check-out line. My TV has now become something more to me, it's interactive. I can actually program in, if I want see a favorite actor, actress, a director, a genre type of movie, this tells me. It feeds me through an e-mail and tells me when it's going to be on.

[SHRINER]: Oh, so you are really sending a request for information, and then they are dropping it into your mailbox.

[ELLIS]: Right, and again, with my thumb on this remote, it programs it, and it tells me if something is going to be on this week, next week or whatever.

[SHRINER]: How do you think WebTV, then, in the big picture has changed your life?

[ELLIS]: Well, TV is not TV anymore. The TV

set as we knew it as we were growing up is different now. This is interactive. You can do almost anything your mind can think about.

[SHRINER]: All right, Ellis, good to see you.

[ELLIS]: Thank you. Thanks, Wil, nice to see you today.

[SHRINER]: There you go, a happy user of WebTV.

With one push of the button, you can go from watching your favorite movie or TV program to visiting the web site of your favorite star, and all you need is the WebTV Network to make it happen.

[Visual disclosure (large)]: WebTV.

[ANNOUNCER (Wil Shriner)]: Hi, I'm Wil with WebTV.

[CONSUMERS (Theresa with family)[THERESA]: Hi, Wil, come on in.

[SHRINER]: You sure? So, Theresa, I understand this is really a real WebTV family.

[THERESA]: Yeah, it is.

[SHRINER]: Who's the biggest fan of WebTV?

[THERESA'S SON]: I use WebTV a lot. I'm a college-bound junior, and any time I need to research a college or applications or anything, I go in through WebTV.

[SHRINER]: What are you finding out about where you want to go?

[THERESA'S SON]: The population, the diversity, cost, housing, everything.

[SHRINER]: Bobby, what do you like to do on WebTV?

[BOBBY]: I like to look up stuff for my homework and everything.

[SHRINER]: Give me an example.

[THERESA]: He did a report on Cesar Chavez and got an A-plus. All the research and everything was done on WebTV.

[SHRINER]: Do you think this is where everything is going?

[THERESA]: Oh, definitely, everything you turn on, the newspaper, the radio, the TV, everything is "ww.something." I mean, this is the wave of the future, and with WebTV, you can get it now, it's affordable, and it being on your TV screen instead of a little 14-inch computer screen, it's easier to read, it's easy to access. There's no reason not to get WebTV.

[SHRINER]: Well, Theresa, I understand instead of upgrading your old computer, you got WebTV. Tell me why.

[THERESA]: Why? My brother is a computer tech. He told me it would cost me $800 just to upgrade my computer to get on the internet, not including software and hardware and all that other stuff that I would have to buy. Well, for less than $300, I'm on the internet with WebTV. So, it's perfect.

[SHRINER]: Theresa, what kind of sites do the kids like?

[THERESA]: Well, like Dr. Seuss, they can go through the books, and there is games on there where they can enter a contest, and it keeps them active, and what helps a lot is they are reading it, so it's improved their reading skills a great deal.

[SHRINER]: What do you think of WebTV is of value?

[THERESA]: Their grades. These two have jumped from Cs to As. Just that alone was worth it. They do their homework. I don't have to cart them to the library anymore. I've got half the neighborhood coming over and doing their homework on my TV. Before I used to tell them, turn off the TV and go do your homework. Now it's turn on the TV and go do your homework.

[ANNOUNCER (Wil Shriner)]: As you can see, WebTV isn't just a remarkable thing to happen to your television. It's remarkable what happens to your life.

Complaint Exhibits

It gets even better. Everything's easier, from keeping yourself and your family entertained to changing your television from one-way monotony to interactive excitement. Look, it's simple. I mean, the internet, it really is simple with WebTV. It's accessible with the push of a button on a remote.

WebTV is available today at consumer electronic stores just like this, or you can call the WebTV toll-free number and let them send you, free of charge, a video that will explain everything from how to get the WebTV internet terminal of your choice to how to subscribe instantly and start surfing the net on your TV. Go on, make your TV a WebTV.

[Visual disclosure (large)]: WebTV.

[ANNOUNCER (Unidentified)]: TV just got better with WebTV. It's so easy.

[Visual disclosure (fine print, no corresponding audio)]: This is a paid ad for WebTV Networks, Inc.

[CONSUMER (Theresa)[THERESA]: So simple to use. If you can use a remote, you can use WebTV.

[Visual disclosure (large)]: WebTV.

[ANNOUNCER (Unidentified)]: Fast.

[CONSUMER (Terrence)][TERRENCE]: You hook it up in about five minutes, ten minutes you're rolling.

[Visual disclosure (large)]: WebTV.

[ANNOUNCER (Unidentified)]: Fun way to surf the net.

[CONSUMER (Young Female)[YOUNG FEMALE]: It's just like getting an education with fun.

[ANNOUNCER (Unidentified)]: And you don't need a computer. WebTV works with your TV and current phone line. Whether it's entertainment, communication or education, it's all on WebTV. Beginning with the WebTV home page, your starting point for WebTV's exclusive services, like WebTV e-mail, where you can send and receive messages virtually anywhere in the world. And WebTV's Explore, an exclusive directory of amazing places to go on the internet, covering every topic imaginable. Or WebTV Search, so you can find places to go by subject matter in a flash.

Then, when you find a site you like, stash it in your WebTV favorites.

[Visual disclosure (fine print, no corresponding audio)]: AroundTown is not available in all cities.

[ANNOUNCER (Unidentified)]: Click on Around Town for the five-day weather forecast in your city or any city you choose. Find a restaurant or check for starting movie times at a theater near you. WebTV even comes with SurfWatch, so you can control what sites and e-mail are seen by your kids.

[Visual disclosure (fine print, no corresponding audio)]: Requires call waiting.

[ANNOUNCER (Unidentified)]: With WebTV, you can receive phone calls while you're surfing.

[Visual disclosure (large)]: Optional Printer Adapter and Printer.

[ANNOUNCER (Unidentified)]: And soon you'll be able to print e-mail messages or web sites, and you control everything right from your remote. Or, if you want to send lots of e-mail to friends and family, an optional wireless keyboard is available.

[Visual disclosure (large)]: Optional Keyboard.

[ANNOUNCER (Unidentified)]: WebTV takes your TV to a whole new level.

[Visual disclosure (large)]: Call Now, Only $249.

[ANNOUNCER (Unidentified)]: All you need to get started is a WebTV internet terminal made by Philips Magnavox or Sony for a fraction of the cost of a computer.

[Visual disclosure (fine print, no corresponding audio)]: Only $19.95 per month. WebTV Network Service is not available as a local call everywhere. Toll charges may apply.

[ANNOUNCER (Unidentified)]: Then get hooked up

to the WebTV Network and surf all you want for only $19.95 a month.

[CONSUMER (Pete)[PETE]: You can literally get connected to anybody in the world.

[CONSUMER (Anita)[ANITA]: Whatever you're into, it's there.

[CONSUMER (Theresa)[THERESA]: There is no reason not to get WebTV.

[Visual disclosure (large)]: Free Video.

[ANNOUNCER (Unidentified)]: Call now and we'll rush you a free video that will show you how easy and affordable it is to get WebTV in your home right away and how you could win $10,000 in the instant-win sweepstakes.

[Visual disclosure (large)]: $10,000 Grand Prize, call for details. 30 Day Money Back Guarantee on WebTV Network Service.

[ANNOUNCER (Unidentified)]: So, call the toll-free number on your screen right away and bring your television to a whole new level. Go on, make your TV a WebTV.

[Visual disclosure (large)]: The preceding has been a paid announcement for WebTV Networks, Incorporated.

[ANNOUNCER (Unidentified)]: The preceding has

been a paid announcement for WebTV Networks, Incorporated.

(Whereupon, the videotape was concluded.)

CERTIFICATION OF TYPIST

DOCKET/FILE NUMBER: 9723162

CASE TITLE: WEBTV NETWORKS, INC.

TAPING DATE: AUGUST 21, 1997

I HEREBY CERTIFY that the transcript contained herein is a full and accurate transcript of the tapes transcribed by me on the above cause before the FEDERAL TRADE COMMISSION to the best of my knowledge and belief.

DATED: 5/5/98

Susanne Q. Tate

SUSANNE Q. TATE

CERTIFICATION OF PROOFREADER

I HEREBY CERTIFY that I proofread the transcript for accuracy in spelling, hyphenation, punctuation and format.

Diane Quade

DIANE QUADE

Complaint Exhibits

Exhibit G

WebTV -- FAQs
http://www.webtv.com/ns/tune/faq.html (as of 9/9/98)

1. What does WebTV® have to offer me?

Simply, better TV. Because of the way WebTV and television work together, since you decide what to watch. You're in control of your viewing experience. With access to the Internet, e-mail, and special WebTV features, a whole new world of entertainment and information is available to you at any time.

2. How do I hook up WebTV to my television?

WebTV is so easy to install, most subscribers are browsing the Internet within 15 minutes of opening the box. WebTV®'s Internet Terminal and WebTV® Plus Receiver hooks up just like a VCR to any standard audiovisual (composite) or high-resolution (S-video) input. WebTV can work with cable, VCR and DSS. On some older TVs, an optional RF adapter is required. Then simply plug in your phone jack and use the remote control. That's all it takes.

3. Will I need to install a special phone line?

No. The Internet Terminal and the WebTV Plus Receiver are both designed to hook up to your current phone line.

4. What is the cost of a WebTV Internet Terminal and WebTV Plus Receiver?

A WebTV Internet Terminal is around $99. A WebTV Plus Receiver is around $199. Both include a wireless remote control, audio/video cable, 25 feet of phone line and an RJ11 phone-line splitter. An optional, wireless keyboard is available for about $70. It also comes with the required batteries.

5. Do I need a computer to use WebTV?

With WebTV, you don't need a computer. WebTV is designed to hook up to your television and current phone line.

6. Why WebTV instead of a computer?

WebTV offers a variety of special entertainment features you can't get on a computer, only TV. Unlike a computer, WebTV comes with free service upgrades so you don't have to worry about new

software. Most important, WebTV is a fun and affordable way to explore television and the Internet at the same time.

7. What is the WebTV® Plus System?

The WebTV Plus system is comprised of the WebTV Plus Receiver, distributed by Sony, Philips and Mitsubishi, and the WebTV Plus Network. The WebTV Plus System provides an Enhanced Television experience by giving people a better way to choose which shows to watch and to enjoy more entertainment, information and services that uniquely complement those shows.

The key benefits of the WebTV Plus System:
Gives viewers more control over what to watch
· Offline TV Listings provide instant access to full 24 hours of TV Listings
· Updated daily and customized to local cable and broadcast system
Improved Internet experience
· A 1.1 GB hard drive enables local storage of information and applications for immediate access to information and features without having to connect to the network service and wait for the information to be downloaded.
· Fast connection speeds through a 56Kflex Rockwell modem
· Integrated printer port supports popular HP and Canon printers
Enhanced TV programming through integration of TV and Internet
· WebPIP lets users view Web pages and TV programming simultaneously on the same screen, without a special picture-in-picture TV
· TV Crossover Links complement and enhance TV programs by providing an instant way for viewers to access integrated Web sites that are directly related to many of the most popular TV programs.

8. How is the WebTV Plus System different than the original WebTV System?

The original WebTV Internet Terminal remains an easy, affordable way to access entertainment and information on your TV using the power of the Internet. The new WebTV Plus system more tightly integrates Internet and television programming to dramatically enhance the TV viewing experience. It is a higher performance system that does all of what WebTV does plus it provides: TV Listings to help users find out what's on TV and go there quickly; WebPIP to give the ability to simultaneously view the Internet and TV; and TV Crossover Links for direct access to entertainment and information that uniquely complements TV shows.

Complaint Exhibits

9. If I already have a WebTV can I access the WebTV Plus Network?

The WebTV Plus Network is only available in conjunction with the WebTV Plus Receiver. The Receiver has several key components, such as a cable-ready tuner, hard drive, and 3D graphics engine, that enable it to exclusively run the WebTV Plus Network.

10. Does WebTV Plus support everything the original product does?

Yes, the WebTV Plus Network has everything in WebTV plus TV Listings, WebPIP, and TV Crossover Links. The WebTV Plus Receiver supports everything the WebTV Internet Terminal supports except for a PC keyboard input.

11. If my TV does not have PIP capabilities can I still take advantage of WebPIP?

WebPIP works with any TV and enables customers to simultaneously view Web and TV programming on the same screen through a picture-in-picture window.

12. What's the difference between TV Home and TV Listings?

TV Home is the launch pad for the WebTV Plus Network and helps you find out what to watch NOW. TV Listings provides a full 24 hours of listings and helps you PLAN what to watch.

13. What's the difference between TV Home and Web Home?

TV Home is the launch pad for the WebTV Plus Network and is instantly available. It provides access to all the WebTV Plus features, including direct access to the Internet. Web Home is reached after connecting online and provides a no-compromise Internet experience, with email, local services, a best of the web directory and search.

14. If I'm in a remote area of the US will I still get localized TV listings?

Yes. WebTV Plus detects which area you are in and which cable system you are likely to be using. Users can verify and change this information to ensure accuracy.

15. What if I do not have cable? Will the TV integration still work?

What channels will I see?

If you don't have cable, WebTV Plus will work with the standard over the air broadcast you receive.

16. Why an IR Blaster in WebTV Plus Receivers? What does it do for me?

The IR Blaster feature of the WebTV Plus Receiver enables the receiver to control other devices connected to your television. For example, when you use the WebTV Plus Receiver to tune your TV to a premium cable channel like HBO, the receiver will automatically send the appropriate commands to your cable box -- you don't need to fumble with multiple remote controls. In the future, the IR Blaster functionality will allow you to simply and easily program your VCR using the TV Listings feature.

17. Why did you include a tuner in WebTV Plus Receivers?

The built-in, 3-in-1 cable-ready stereo tuner not only gives viewers instant channel tuning on the TV Home page and TV Listings page, it also is a key element of the picture-in-picture feature that allows viewers to simultaneously view TV programs and Web pages.

18. Why a hard drive? Will users be able to download and store files like they do on a computer?

The hard drive provides a number of benefits including increased performance, local storage of information received by the Video Modem, and in the future, offline access to key applications such as email and interactive games.

Users cannot download files to the hard drive in the same way that they do on a computer. WebTV Plus provides the management and storage of information for users.

19. Will users be able to read and compose email offline?

Not at this time. This is a capability we're considering for delivery next year.

20. What is video email?

Early next year, WebTV Plus will allow customer to send video from their camcorders and digital cameras to people all over the world.

Complaint Exhibits

21. What happens if I receive a phone call while I'm using WebTV?

If you have call waiting and receive a phone call while you're online, both the Internet Terminal and the WebTV Plus Receiver can be set up to pause, allowing your phone to ring. After you complete your call, you can simply reconnect and return to the Web page you were previously viewing.

22. Will I see any special charges on my phone bill?

In most cases, WebTV is a local call.

23. How does WebTV know where I am?

When WebTV is first turned on, it automatically dials an 800 number. Using a form of Caller ID, WebTV determines your location, hangs up, then dials a local access number to connect you with the Internet. Check the WebTV phone book to find out if local access is available in your area. In some cases, local access is not available or is a toll call, in which case, the OpenISP feature is the best way to get WebTV. You can find out more about OpenISP at http://www.webtv.net/openisp/.

24. Are there additional charges for more than one user?

No. The WebTV Network and WebTV Plus services support up to six individual e-mail accounts as part of our monthly service fee.

25. What is the cost of service, and what are the terms of commitment?

The WebTV Network is a flat rate of $19.95 per month and WebTV Plus Network is $24.95 a month. There are no service contracts. The WebTV Network and WebTV Plus Network includes up to six e-mail accounts.

26. How do I sign up with WebTV?

After simple hook-up to the television and phone line, customers need only press the "Web" button (or "Power" button for the Philips Magnavox remotes), and WebTV will guide you through a simple sign-on process. To register, you will be asked for your name, address, phone number, your preferred e-mail address and credit card number.

27. How can I prevent my child from accessing certain sites on the Internet?

There are two WebTV features that restrict access to mature content on the Internet; SurfWatch® and Kid Friendly. Either can be selected for a child's account in order to limit access to mature content on the Internet.

28. What is SurfWatch?

SurfWatch is a special content-filtering software available in the WebTV Network and WebTV Plus Network. When activated, SurfWatch software limits access to Web sites that may contain inappropriate content for children. Additional security enables parents to prevent children from sending and/or receiving e-mail. These features are free to all WebTV Network subscribers.

29. What is Kid Friendly?

Kid Friendly is a complimentary service from WebTV that makes the Internet a fun and safe environment for children. Here, kids can browse a multitude of Web sites that have all been pre-screened for children's viewing. Complete with games and rich learning material, grown-ups may just get a kick out of Kid Friendly too.

30. How do WebTV's Internet Terminal and the WebTV Plus Receiver compare to a PC?

The WebTV Internet Terminal was not designed to replace or compete with a computer. Rather, WebTV gives you the optimal combination and integration of television and the Internet. However, if we compare the speed and quality of Internet access, the WebTV unit is superior in many ways.

First, the Internet Terminal comes equipped with a 33.6 Kbps modem, the WebTV Plus Receiver a 56k capable modem. No software to load and no configuration required means faster operation overall. WebTV caches, transcodes and reorganizes Web data and more efficiently utilizes the telephone line so that in many cases the experience is faster than a PC. Secondly, the WebTV unit was designed to work in concert with the WebTV Network so that the system is optimized for high performance.

The WebTV unit also delivers D-1 studio master (broadcast quality) images to any television and uses a state-of-the-art 64-bit MIPS,

RISC processor. All of which means exceptionally high-quality Internet access.

31. Can I choose my own Internet Service Provider?

Yes. WebTV's OpenISP™ feature allows users to choose any compatible Internet Service Provider (ISP) if they are located in a rural area or if they already have an Internet Service Provider for their personal computers. OpenISP is especially helpful to subscribers who would normally pay toll-call charges to connect to the WebTV Network. Customers who choose to access the WebTV Network service through the OpenISP option will receive a reduced rate of $9.95 per month, in addition to their Internet Service Provider rate. For more information about this service, just go to http://www.webtv.net/openisp/.

32. Does the unit use Netscape® or Microsoft Internet Explorer®?

Neither. WebTV uses a browser designed exclusively for the TV, and is compatible with virtually all Web pages formatted for Netscape Navigator 4.0, and for Microsoft Internet Explorer for Windows® 4.0 and Macintosh 3.0. WebTV service updates will ensure that WebTV remains compatible with these standards. See Features and Specs for more information on Internet compatibility.

33. Why is access to the Internet or a specific Web site sometimes slow?

As the popularity of the Internet increases and more people come online, you may experience periods of slower access speeds. A comparison may be drawn to a sports car in rush-hour traffic. The car may be capable of high speeds, but road conditions will not allow you to pass. The more people who attempt to access a particular site, the slower the site. A poor-quality phone connection will also cause a slight delay.

34. Can I store information from the Internet?

Yes. WebTV allows you to store up to 600 links to Web sites in an area called Favorites. Just select your favorite site from the saved list and you'll instantly go to that Web site.

35. What are the lights on the front of the machine for?

Green (Power) -- lets the user know the Internet Terminal is on.

Yellow (Connected) -- lets the user know when and if the terminal is connected to the Internet. Red (Message) -- notifies the user of unread or new e-mail messages.

36. Can I hook up a printer?

Yes. With a recent upgrade, printer drivers were downloaded directly to customers WebTV units providing them with the software needed to activate the printing option. WebTV subscribers with an Internet Terminal need to purchase a printer adapter from Sony or Philips, a 1284-compliant parallel printer cable, and any Hewlett-Packard DeskJet 400 or 600 series color printer. Users will then be able to easily print e-mail, news articles and favorite Web pages in full-color.

The WebTV Plus Receiver provides a built-in parallel port (and thus does not require a printer adapter) with full support of Hewlett-Packard 400- or 600 DeskJet color printers, and later this year will support Canon 200, 600 and 4000 BubbleJet printers. WebTV Networks is the only provider to work closely with leaders HP and Canon for printing solutions for the television.

37. Can I hook up a keyboard to a WebTV unit?

An optional wireless keyboard for both WebTV units is available in consumer electronics stores. Also, any standard PS2 compatible keyboard can be plugged into a WebTV Internet Terminal.

38. What is an Electronic Programming Guide?

The WebTV Network's WebTV's Electronic Programming Guide gives you information on what's on television through TV Guide® Online. Here you can view broadcast, cable and premium TV listings.

WebTV Plus has TV Home, which is the launch pad for the WebTV Plus Network, and helps you find out what to watch now. TV Listings lets you view what's on right now as well as browse program listings for the next 24 hours. You can also find background information on movies or programs with specific actors that you like.

39. What is the slot on the front of the WebTV for?

In the future, this smart-card-reader slot will allow customers the opportunity to purchase goods or services online by using smart cards.

40. Looks like WebTV now supports a lot of Internet standards. Is this significant?

Absolutely. The Internet changes constantly, and WebTV is committed to enhancing the user experience by regularly delivering new functionality. WebTV's free periodic service upgrades keep the WebTV Network current with Internet standards. For a listing of the latest supported standards, please see Features and Specs.

41. Who do I call for help?

WebTV Customer Care representatives are happy to help. If you have questions regarding the service, please call 1-800-GOWEBTV. For questions regarding the WebTV Internet Terminal, please call:

Sony Electronics: 1-888-772-7669
Philips/Magnavox: 1-888-813-7069

42. Who created WebTV and WebTV Networks?

WebTV Networks was founded in June of 1995 by three former Apple® technologists and multimedia pioneers--Steve Perlman, Bruce Leak and Phil Goldman. WebTV Networks was recently acquired by Microsoft corporation and will operate as a subsidiary from the current headquarters in Palo Alto, California.

43. How secure are transactions through the Internet?

WebTV supports Secure Socket Layer (SSL), the Internet encryption standard, which allows WebTV to offer secure online banking and commerce to its subscribers, making at-home banking transactions and shopping online simple and convenient. In addition, WebTV now offers Terisa Systems' Thin SSL Client, which provides the highest level of protection for electronic commerce with support for SSL versions 2 and 3.

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

The Commission having thereafter considered the matter and having determined that it had reason to believe that the respondent has violated the said Act, and that complaint should issue stating its charges in that respect, and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of thirty (30) days, 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 WebTV Networks, Inc., is a corporation organized, existing, and doing business under and by virtue of the laws of the State of California, with its office or principal place of

business located at 1065 La Avenida, Mountain View, California 94043.

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

ORDER

DEFINITIONS

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

1. AInternet access product@ shall mean AWebTV Classic,@ AWebTV Plus,@ any other version(s) of the WebTV set-top box, or any other Internet appliance or access product licensed or sold by respondent for connection to respondent=s Internet access service(s). AInternet access service@ shall mean the AWebTV Network@ service, including the services for the WebTV Classic and WebTV Plus devices, or any other version of respondent=s service for connection to the Internet.

2. AClear(ly) and conspicuous(ly)@ 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 if the claim triggering the disclosure is presented by both audio and video means. In any claim presented solely through visual or audio means, the disclosure may be made through the same means in which the claim is presented. Any audio disclosure shall be delivered in a volume and cadence sufficient for an ordinary consumer to hear and comprehend it. Any visual disclosure shall be of a size and shade, and shall appear on the screen for a duration,

sufficient for an ordinary consumer to read and comprehend it.

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

C. On a product package, 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, on any package, or on any log-on screen, dialog box, or other similar device.

3. Unless otherwise specified, Arespondent@ shall mean WebTV Networks, Inc., its successors and assigns and its officers, agents, representatives, and employees.

4. ACommerce@ shall mean as defined in Section 4 of the Federal Trade Commission Act, 15 U.S.C. ' 44.

ORDER

I.

IT IS ORDERED that respondent, directly or through any corporation, subsidiary, division, or other device, in connection with the manufacturing, packaging, advertising, promotion, offering for sale, sale, or distribution of any Internet access product or any Internet access service, in or affecting commerce,

shall not make any representation, in any manner, expressly or by implication:

A. That the Internet access product and a computer are equivalent in their ability to provide access to content available on the Internet;

B. That the Internet access product or the Internet access service provides access to all of the Internet=s content, including all of the entertainment and information available on the Internet;

C. Regarding any other characteristic relating to access to the Internet=s content or functionality provided by the Internet access product or the Internet access service; or

D. That respondent=s upgrades to the Internet access product or the Internet access service keep users current with all the latest Internet content or functionality,

unless the representation is true.

II.

IT IS ORDERED that respondent, directly or through any corporation, subsidiary, division, or other device, in connection with the manufacturing, packaging, advertising, promotion, offering for sale, sale, or distribution of any Internet access product or any Internet access service, in or affecting commerce, shall not make any representation, expressly or by implication, about the cost of such product or service, unless it discloses, clearly and conspicuously, that using such product or service to access the Internet may result in long distance telephone toll charges for consumers, if that is the case, and how consumers can determine whether they would be subject to long distance telephone toll charges for use of such service.

III.

IT IS FURTHER ORDERED that respondent, directly or through any corporation, subsidiary, division, or other device, shall disclose, clearly and conspicuously, on a log-on screen, dialog box, or other similar device, that appears prior to any Internet access product dialing a telephone number for which there is a long distance telephone toll charge:

A. either that the user will incur such a charge, or that respondent=s communications system indicates that the user will likely incur such a charge, which will accrue while such product is connected to the Internet access service if that telephone number is dialed;

B. how the user can determine whether in fact (s)he will incur such a charge, and the amount of the charge (*e.g.*, notifying the user of the telephone number that such product will dial to connect to such service, and advising the user to contact his or her local and/or long distance telephone service provider(s) to confirm that (s)he will incur such a charge for dialing that telephone number and the amount of such a charge); and

C. a source of information about means, if any, of avoiding such a charge.

In accordance with this Part, respondent must employ a procedure designed to ensure that the user expressly consents to proceed to connect on a toll basis, on the same screen as the disclosures required by this Part, before a long distance telephone toll charge is incurred.

IV.

IT IS FURTHER ORDERED that respondent, directly or through any corporation, subsidiary, division, or other device, shall disclose, clearly and conspicuously, in any document stating

respondent=s Terms of Service, or its equivalent, and in any introductory kit, or its equivalent, that respondent provides to new subscribers upon signing up for any Internet access service, that consumers may incur long distance telephone toll charges as a result of using such service, if that is the case, and how consumers can determine whether they would be subject to long distance telephone toll charges for use of such service.

V.

IT IS FURTHER ORDERED that respondent, directly or through any corporation, subsidiary, division, or other device, shall offer reimbursement to certain former subscribers to the WebTV Network Internet access service as provided in this Part.

A. Respondent shall reimburse any former WebTV Network Internet access service subscriber, within thirty (30) days of receipt of the subscriber=s AReimbursement Application Form,@ appended to Attachment A to this order, as required under either subpart B or subpart C of this Part, who:

1. prior to March 1, 1999, incurred long distance telephone toll charges through use of the WebTV Classic and/or WebTV Plus Internet access product(s) and WebTV Network Internet access service within sixty (60) days of subscription to such service;

2. has not been previously reimbursed for long distance telephone charges;

3. canceled his or her subscription(s) to such service prior to April 1, 1999, within ninety (90) days after initiating subscription(s) to such service, and identified long distance telephone toll charges as a reason for the cancellation(s); and

4. within sixty (60) days of receipt of Attachment A provides respondent with proof of the long distance telephone toll charge(s) incurred (*e.g.*, a copy of the subscriber=s telephone bill(s) reflecting the long distance telephone toll charge(s) incurred, a copy of a check or other form of payment for the long distance telephone charges, or a written declaration from the subscriber to respondent indicating the long distance telephone toll charge(s) incurred). *Provided, however*, that in the event that a former subscriber who applies for reimbursement provides a copy of a check (or checks) or other form of payment for the long distance telephone charges and not a copy of the subscriber=s telephone bill(s) reflecting the long distance telephone toll charge(s) incurred, the subscriber=s reimbursement shall be limited to the amount of the long distance telephone charges incurred but no more than one hundred dollars ($100). Provided, further, that in the event that a former subscriber who applies for reimbursement does not provide any proof (as described above) reflecting the long distance telephone toll charge(s) other than a declaration, the subscriber=s reimbursement shall be limited to fifty dollars ($50).

B. Respondent shall send, within ninety (90) days after the date of service of this order, by first class mail, exact copies of the AReimbursement Offer Notification Letter and Application Form,@ attached hereto as Attachment A, to the last known address of any former WebTV Network Internet access service subscriber who, according to WNI=s records, canceled his or her subscription(s) to the WebTV Network Internet access service prior to April 1, 1999, within ninety (90) days after initiating the subscription(s) to such service, and identified long distance telephone toll charges as a reason for the cancellation(s).

The front of the envelope transmitting Attachment A shall be in the form set forth in Attachment B to this order. The phrase "ATTENTION: WEBTV LONG DISTANCE CHARGE REFUND NOTICE" shall appear on the front of the envelope in typeface equal or larger in size to 14 point. The words "FORWARD & ADDRESS CORRECTION REQUESTED" shall appear in the upper left-hand corner, one-quarter of an inch beneath the return address. Except as otherwise provided by this order, no information other than that required by this Part shall be included in or added to the above items, nor shall any other material be transmitted therewith.

Respondent shall also mail the AReimbursement Offer Notification Letter and Application Form@ to any such former subscriber whose mailing is returned by the U.S. Postal Service as undeliverable and for whom respondent thereafter obtains a corrected address via the National Change of Address (ANCOA@) registry. Respondent shall retain a NCOA licensee to update its list of such former subscribers under this subpart by processing the list through the NCOA database. The mailing required by this subpart shall be made within ten (10) days of respondent's receipt of a corrected address or information identifying each such former subscriber.

C. Respondent shall send, by first class mail, exact copies of the AReimbursement Offer Notification Letter and Application Form,@ attached hereto as Attachment A, to any former WebTV Network Internet access service subscriber who canceled his or her subscription(s) to such service prior to April 1, 1999, within ninety (90) days after initiating subscription(s) to such service, and identified long distance telephone toll charges as a reason for the cancellation(s), and who contacts respondent to request reimbursement within one hundred and eighty (180) days after the date of service of this order. Respondent shall

mail Attachment A to the address provided by such former subscriber within ten (10) days after the date of the request. The front of the envelope transmitting Attachment A shall be in the form set forth in Attachment B to this order.

D. Respondent shall send reimbursement checks to former WebTV Network Internet access service subscribers, under either subpart B or subpart C of this Part, who complete and return to respondent the AReimbursement Application Form@ section of Attachment A to this order, postmarked within sixty (60) days of receiving it, and who fulfill the requirements set forth in subpart A of this Part. Respondent shall send each reimbursement check by first-class mail, postage prepaid, within thirty (30) days of receipt of each former subscriber=s properly completed AReimbursement Application Form.@ The front of the envelope transmitting reimbursement checks shall be in the form set forth in Attachment C to this order.

E. Respondent shall notify any former WebTV Network and WebTV Plus Network Internet access service subscriber under subparts B or C of this Part who indicates on the AReimbursement Application Form@ that (s)he is attaching proof of the long distance telephone toll charge(s) incurred and fails to do so, or who fails to otherwise apply properly for a reimbursement, of any error in the former subscriber=s AReimbursement Application Form,@ and shall provide a reasonable opportunity for the former subscriber to rectify any such error.

F. Within one (1) year after the date of service of this order, respondent shall furnish to the Commission separate lists of the former WebTV Network and WebTV Plus Network Internet access service subscribers who have applied for reimbursement pursuant to subparts B and C of this Part, the amount of each reimbursement request, and the date of mailing and amount of the reimbursement provided to each applicant.

G. Respondent shall, for three (3) years after the date of service of this order, maintain and upon request make available to the Federal Trade Commission or its staff for inspection and copying:

1. Sufficient records to identify:

a. The name and last known address of each person sent a notification pursuant to this order and the date the notification was mailed; and

b. The name and address of each person who is notified by respondent that his or her reimbursement application is deficient;

2. Sample copies of all letters, descriptions, applications and forms sent to former WebTV Network Internet access service subscribers or others pursuant to this order; and

3. Each and every reimbursement application received.

VI.

IT IS FURTHER ORDERED that respondent WebTV Networks, Inc., and its successors and assigns, shall within thirty (30) days after the date of service of this order and for a period of five (5) years after the date of service of this order, send by first class certified mail, return receipt requested, to each current and future:

A. advertising agency and retailer, exact copies of the notice attached hereto as Attachment D and this order. The mailing shall include no other document; and

B. manufacturer, exact copies of the notice attached hereto as Attachment E and this order. The mailing shall include no other document.

For purposes of this Part, Amanufacturer@ shall mean each company or individual that manufactures, through an agreement with respondent, any Internet access product, for sale. ARetailer@ shall mean each company or individual that sells any Internet access product or Internet access service with whom respondent has a cooperative advertising agreement, including, but not limited to, consumer electronics stores and direct marketing companies.

If consumers may incur long distance telephone charges as a result of using respondent's Internet access service, respondent shall maintain and staff during normal business hours the toll-free telephone number to which consumers are referred in Attachments D and E in a manner adequate to:

1. handle inquiries regarding such charges;

2. inform callers how they can determine whether they will incur such charges and the amount of such charges; and

3. the means, if any, by which consumers can avoid such charges.

VII.

IT IS FURTHER ORDERED THAT respondent WebTV Networks, Inc., and its successors and assigns, shall conduct a consumer education program, as set forth in this Part, about the limitations of Internet access products in their ability to access content available on the Internet.

A. Consumer Brochure

1. Within sixty (60) days after the date of service of this order, respondent shall produce, print and begin to distribute a color consumer brochure (Athe brochure@) in the form and content set forth in Attachment F to this order.

2. Respondent shall distribute the brochure, in quantities sufficient to meet reasonably anticipated demand, to every WebTV retailer that respondent visits as part of its regular retailer site visits (either directly or through an agency retained by respondent for such purpose).

3. Respondent shall submit a production-ready copy of the brochure to Commission staff at least twenty (20) days prior to the first scheduled distribution of the brochure to retailers.

4. Respondent shall distribute the brochure to WebTV retailers at no cost to such retailers or to the public. Respondent shall use its best efforts to encourage WebTV retailers to make the brochure available in a prominent and readily accessible location in the area of the retail location where the Internet access products are sold.

5. Respondent shall monitor the demand for and supply of the brochure, and shall continue to produce and distribute the brochure as necessary to meet reasonably anticipated demand for a period of one (1) year after the date of service of this order.

6. Respondent shall provide to Commission staff written reports detailing the total number of brochures printed and distributed to WebTV retailers, including any additional distributions of brochures to WebTV retailers subsequent to the initial distribution. Respondent shall submit such reports six (6) months

and twelve (12) months after the initial distribution of brochures to WebTV retailers.

B. Internet Availability of the Brochure

Within sixty (60) days after the date of service of this order, respondent shall place a hypertext link to the brochure on its AWebTV Products@ index Web pages (*i.e.*, http://www.webtv.com/products/index.html and http://www.webtv.net/products/index.html), or on any other Web page(s) on respondent=s primary Web site(s) for its Internet access product(s) and/or Internet access service(s) (*e.g.*, http://www.webtv.com and http://www.webtv.net) that serves as the index Web page(s) for providing information regarding any characteristic relating to access to the Internet=s content or functionality provided by the Internet access product(s). The hypertext link shall itself be clear and conspicuous, clearly identified as a hypertext link, and clearly labeled to convey the nature and relevance of the information it leads to, and shall take the consumer directly to the brochure on the click-through electronic page or other display window or panel. The brochure and hypertext link shall remain on such Web page(s) for a period of two (2) years from the date they were first placed on the site(s).

C. Print Advertisement

Respondent shall place a one-half page print advertisement, in the form and content set forth in Attachment G to this order, and in the publications and according to the dissemination schedule contained in Attachment H to this order.

VIII.

IT IS FURTHER ORDERED that respondent WebTV Networks, 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, all of

respondent=s advertisements and promotional materials containing any representation covered by this order.

IX.

IT IS FURTHER ORDERED that respondent WebTV Networks, Inc., and its successors and assigns, shall deliver a copy of this order to all current and future officers and to all current and future managers having responsibilities with respect to the subject matter of this order. Respondent shall also deliver a copy of this order, or in lieu thereof a detailed, written summary of the requirements of this order, to all employees, agents and representatives having responsibilities with respect to the subject matter of this order. Respondent shall deliver this order, or the written summary, 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.

X.

IT IS FURTHER ORDERED that respondent WebTV Networks, 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, Washington, D.C. 20580.

Decision and Order

XI.

IT IS FURTHER ORDERED that respondent WebTV Networks, 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.

XII.

This order will terminate on December 8, 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.

Attachments

ATTACHMENT A

LETTER TO FORMER WNI CUSTOMERS WHO CANCELED THEIR SERVICE AND NAMED TOLL CHARGES AS A REASON

[To be printed on WNI letterhead]

[Date]

[Name and address of recipient]

Re: REIMBURSEMENT OFFER FOR WEBTV SUBSCRIBERS
DEADLINE: [Insert date]

Dear [recipient's name]:

You may be eligible for a reimbursement from WebTV Networks, Inc. ("WNI") for certain long-distance charges.

WNI recently settled a dispute with the Federal Trade Commission that dealt with, among other things, the adequacy of advertising disclosures about the possibility of incurring long-distance charges while connected to the Internet via the WebTV Network Service or WebTV Plus Network Service ("WebTV service"). As part of the settlement, WNI will reimburse certain customers who canceled their service subscriptions for long-distance charges on up to the first two monthly telephone bills they received after subscribing to the WebTV Service.

You are eligible for a reimbursement if you:

- canceled your WebTV service on or before April 1, 1999;
- canceled your WebTV service within 90 days of subscribing to the service;
- identified long-distance charges as a reason for canceling;
- have not already received a reimbursement for long-distance charges from WNI; AND
- provide proof of the long-distance charges (**Note**: reimbursement is limited to charges on telephone bills received in the first two months after subscribing).

Here's how to apply for your reimbursement:

1. Complete the attached form.
2. Attach proof of the long-distance charges. You can either:

- Provide a **copy of your telephone bill(s)** showing the amount of the long-distance charges you paid. If you don't have a copy of your bill(s), ask your telephone company because they may have a copy on file. **OR**
- Provide **proof that you paid the long-distance charges** -- for example, a copy of a check. If you don't have a copy of your check(s), ask your bank because they

Attachments

may have a copy on file. **OR**

- Provide a **written statement** indicating the amount of the long-distance charges you paid.

Please Note: If you cannot provide a copy of a telephone bill showing the amount of the long-distance charges you paid, the amount of your reimbursement will be limited. **So, you should provide a copy of your telephone bill if you can.** If you provide proof of payment such as a copy of a check, your reimbursement will be limited to a maximum of $100. If you only provide a written statement indicating the amount of the long-distance charges you paid, your reimbursement will be limited to a maximum of $50.

3. Return the completed form and your proof of payment to:
   [Insert fulfillment address here].

YOU MUST APPLY FOR YOUR REIMBURSEMENT WITHIN [INSERT DATE 60 DAYS AFTER MAILING HERE]. We will honor all eligible claims within 30 days after receiving them.

If you have questions, please call us, toll-free, at 1- 800-___-_____ .

Sincerely,

Bruce Leak
President and Chief Executive Officer
WebTV Networks, Inc.

Attachments

To: WebTV Networks, Inc.
[Address to Be Inserted]
From:

_____
(Name)

_____
(Mailing Address)

_____
(City, State, and Zip Code)

_____
(Telephone Number)

Please reimburse me in the amount of $_____ for long-distance charge(s) I incurred after subscribing to the WebTV service. As proof of my claim I am attaching:

☐ a copy of my **telephone bill(s)** showing the amount of the long-distance charges;

☐ a copy of a **check or other form of payment** for the long-distance charges. I recognize that, if I check this box and do not attach a copy of my telephone bill, my reimbursement will be limited to a maximum of $100; or

☐ **I am not attaching any other proof of claim**, but I declare under penalty of perjury, to the best of my knowledge, that I was billed long-distance charges of $_____ to connect to the WebTV service. I recognize that, if I check this box and do not attach a copy of my telephone bill or other proof of claim, my reimbursement will be limited to a maximum of $50.

I confirm that:

- I incurred the long-distance telephone charges based on my use of WebTV;
- I have not previously been reimbursed by WebTV Networks, Inc. for long-distance telephone charges based on my use of WebTV;
- One reason that I canceled my subscription to WebTV Networks, Inc. was the long-distance telephone charges I incurred;
- I canceled my subscription to WebTV Networks, Inc. within 90 days of initiating such subscriptions and on or before April 1, 1999.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct to the best of my knowledge.

_____ _____ _____
Date Signature Name (printed)

Attachments

ATTACHMENT B

REIMBURSEMENT NOTICE LETTER ENVELOPE

WebTV Networks, Inc.
[address]

FORWARD & ADDRESS CORRECTION REQUESTED

Window Envelope

[The following statement is to appear in a box, on the left hand side of the envelope in red, in extra large, bold type face]

**ATTENTION: IMPORTANT
WEBTV LONG DISTANCE
REIMBURSEMENT PROGRAM
INFORMATION INSIDE**

ATTACHMENT C

REIMBURSEMENT CHECK ENVELOPE

WebTV Networks, Inc.
[address]

FORWARD & ADDRESS CORRECTION REQUESTED

Window Envelope

[indicates a check is enclosed]

Attachments

ATTACHMENT D

BY CERTIFIED MAIL, RETURN RECEIPT REQUESTED

[To be printed on WebTV Networks, Inc., letterhead]

[date]

Dear [advertising agency, or retailer with whom WNI has a cooperative advertising agreement]:

This letter is to inform you that WebTV Networks, Inc. has settled a civil dispute with the Federal Trade Commission regarding certain advertising claims for the WebTV set-top boxes ("WebTV") and the accompanying WebTV Network Internet service ("WebTV service"). As part of that settlement, we have agreed to send this letter to advise our advertising agencies and retailers not to use or distribute any advertisements or promotional materials containing any of the claims challenged as deceptive by the FTC, and to clearly and conspicuously place certain information in advertisements and promotional materials that you distribute that states or describes the price of WebTV or the WebTV service.

The advertising claims challenged by the FTC

The FTC challenged as deceptive certain claims we made in our advertising regarding access to Internet content through the WebTV service. More specifically, the FTC charged that WNI made the following deceptive claims:

- WebTV and a computer are equivalent in their ability to provide access to content available on the Internet;
- WebTV or the WebTV service provide access to all of the Internet's content, including all of the entertainment and information available on the Internet; and
- WNI's upgrades to WebTV or the WebTV service keep users current with the latest Internet technology.

Examples of the advertising language that the FTC challenged include the following:

- "WebTV service offers complete and affordable Internet access."
- "WebTV brings all the incredible entertainment and information of the Internet right to your TV."
- "With WebTV [to access] the Internet . . . You don't need a computer. There is no software to install. . . . For entertainment, information, communication, and help just getting things done, WebTV is all you need."

Attachments

- "WebTV's free periodic service upgrades keep the WebTV Network current with Internet standards."

The FTC also alleged that, in advertising the cost of using WebTV, we failed to provide sufficient information regarding long distance telephone toll charges some consumers might incur in connecting to the Internet via the WebTV service.

The Consent Order prohibits WNI from making the claims listed above unless they are true. It also requires WNI to make clear and conspicuous disclosures in advertisements and on the log-on screen that using the WebTV service to access the Internet may result in long distance charges, and how consumers can determine whether they would incur such charges.

Compliance with the FTC order

We deny the FTC's allegations, but in order to avoid protracted litigation we entered into the settlement agreement with the FTC. We request your assistance by asking you to not use or distribute any WebTV or WebTV service advertising or promotional materials (including point of sale material) currently in your possession, or in the future, that make any of the claims the FTC challenged. We also request that you place the following information, in a clear and conspicuous manner, in any advertising or promotional materials that you distribute that states or describes the price of WebTV or the WebTV service:

- Connecting to the Internet through the WebTV Internet service may result in long distance telephone charges; and

- Consumers may contact WebTV's toll-free 800 number (or other similar WebTV mechanism that is free to consumers) for further information.

Thank you for your assistance. If you have any questions about this letter, please call 1-800-___-_____ .

Sincerely,

[ ]
WebTV Networks, Inc.

Attachments

ATTACHMENT E

BY CERTIFIED MAIL, RETURN RECEIPT REQUESTED

[To be printed on WebTV Networks, Inc., letterhead]

[date]

Dear [manufacturer]:

This letter is to inform you that WebTV Networks, Inc. has settled a civil dispute with the Federal Trade Commission regarding certain advertising claims for the WebTV set-top boxes ("WebTV") and the accompanying WebTV Network Internet service ("WebTV service"). As part of that settlement, we have agreed to send this letter to advise manufacturers not to use or distribute any advertisements or promotional materials containing any of the claims challenged as deceptive by the FTC, and to clearly and conspicuously place certain information on all packaging for WebTV, and in advertisements and promotional materials for WebTV and the WebTV service, that you distribute that states or describes the price of WebTV or the WebTV service.

The advertising claims challenged by the FTC

The FTC challenged as deceptive certain claims we made in our advertising regarding access to Internet content through the WebTV service. More specifically, the FTC charged that WNI made the following deceptive claims:

- WebTV and a computer are equivalent in their ability to provide access to content available on the Internet;
- WebTV or the WebTV service provide access to all of the Internet's content, including all of the entertainment and information available on the Internet; and
- WNI's upgrades to WebTV or the WebTV service keep users current with the latest Internet technology.

Examples of the advertising language that the FTC challenged include the following:

- "WebTV service offers complete and affordable Internet access."
- "WebTV brings all the incredible entertainment and information of the Internet right to your TV."
- "With WebTV [to access] the Internet . . . You don't need a computer. There is no software to install. . . . For entertainment, information, communication, and help just getting things done, WebTV is all you need."

Attachments

- "WebTV's free periodic service upgrades keep the WebTV Network current with Internet standards."

The FTC also alleged that, in advertising the cost of using WebTV, we failed to provide sufficient information regarding long distance telephone toll charges some consumers might incur in connecting to the Internet via the WebTV service.

The Consent Order prohibits WNI from making the claims listed above unless they are true. It also requires WNI to make clear and conspicuous disclosures in advertisements and on the log-on screen that using the WebTV service to access the Internet may result in long distance charges, and how consumers can determine whether they would incur such charges.

Compliance with the FTC order

We deny the FTC's allegations, but in order to avoid protracted litigation we entered into the settlement agreement with the FTC. We request your assistance by asking you to not use or distribute any WebTV or WebTV service advertising or promotional materials (including point of sale material) currently in your possession, or in the future, that make any of the claims the FTC challenged. We also request that you place the following information, in a clear and conspicuous manner, on the principal display panel of all packaging for WebTV:

- Connecting to the Internet through the WebTV Internet service may result in long distance telephone charges; and

- Consumers may contact WebTV's toll-free 800 number (or other similar WebTV mechanism that is free to consumers) for further information.

Finally, if you distribute any advertisement or promotional material that states or describes the price of WebTV or the WebTV service, you should include the same information, in a clear and conspicuous manner.

Thank you for your assistance. If you have any questions about this letter, please call 1-800-___-_____ .

Sincerely,

[ ]
WebTV Networks, Inc.

Attachments

Attachment F

Getting Online: Using Internet Access Products

Looking to surf the Internet? Email family and friends? Check the weather in Tahiti?

There was a time when you needed a personal computer to get on the Internet. Now, consumers have more choices: set-top receivers, like WebTV,® that connect to your television, handheld computers or "personal digital assistants," dedicated email terminals, game consoles, and even some wireless phones. When these products are advertised as providing Internet "access", find out what "access" means.

In many cases, Internet access products are easier to use and less expensive to purchase than many personal computers, and they provide other unique benefits. But the fact is that these products are not PC's and they don't provide all the same features as a PC. There are important differences.

Before you buy a product that claims to provide Internet access, find out what the product can do and what it can't. Think about how you plan to use it. Do you want to see and hear music videos or late-breaking news? Play games alone or with others? Participate in chat rooms? Receive email with photos attached? Connect with your friends through instant messaging? Some Internet access devices may not allow you to do these things. Ask the manufacturer or retailer if the product you're considering can provide the features you're looking for.

Attachments

If you're shopping for a product that will give you Internet access, consider these questions and answers:

Q. Can you do the same things online with an Internet access product that you can with a personal computer?

A. Probably not. In most cases, a computer lets you access more information and entertainment than an Internet access product. An Internet access product, however, may provide all of the features you are looking for. It is important to compare the capabilities of Internet access products to each other and to personal computers.

Q. What are the limitations of an Internet access product?

A. Limitations vary, depending on the product and, in some cases, the service it uses to connect to the Internet. For example, a small display screen on a cellular phone won't give you the same view of a website as a computer monitor or TV. Internet access products may not let you play certain games, use some audio or video features, send or receive certain attachments to email messages, or view information in formats like Java or PDF (Portable Document Format). You may be able to access information in a text format only. In addition, you may not be able to download information or software from the Internet to add features to your product the same way you can with a PC. You may have to wait for product upgrades from the manufacturer or Internet service provider.

Q. Will your ability to access the Internet be limited in any way using WebTV®?

A. WebTV, like all Internet access products, is not a PC. Although it will connect you to the Internet and provide a broad range of features, like email, instant messaging and an enhanced TV experience, it will not let you access all content on the Internet. For more information about the features and limitations of WebTV, call 1-800-726-9387, or visit our website at www.webtv.com. We also encourage you to take WebTV for a "test drive" at the store before you buy.

Attachments

Attachment G

Know your options for Internet Access

Looking to surf the Internet? Email family and friends? Check the weather in Tahiti?

There was a time when you needed a personal computer to get on the Internet. Now there are more products that you can use to go online—such as set-top receivers that connect to your television, handheld devices, dedicated email terminals, and some wireless phones. There may be tradeoffs between these devices and a PC in their ability to access material on the Internet. Internet access products may give you an easy-to-use way to get a lot of the content on the Internet and may provide other unique benefits. But these products may not allow you to download software, play some games, watch videos, or send and receive email attachments.

Before you buy, it pays to know what your Internet access product can do—and what it can't. For a free informational brochure call toll-free, 1-800-726-9387, or look for the brochure where Internet access devices are sold.

Attachments

ATTACHMENT H

DISSEMINATION OF PRINT ADVERTISEMENT

WNI shall place a one-half page print advertisement, in the form and content set forth in Attachment G to this order in the following periodicals:

(a) Good Housekeeping, in the first monthly issue published following the end of the twelfth week after this order becomes final;

(b) Modern Maturity, in the first six-week issue published following the end of the fourteenth week after this order becomes final; and

(c) Newsweek, in the first weekly issue published following the end of the twelfth week after this order becomes final.

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 WebTV Networks, Inc. (AWNI@).

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.

WNI advertises and promotes the WebTV system, consisting of a set-top box and an Internet service which, together, allows users to connect to the Internet through a telephone line and a television. WNI licenses the set-top box technology to various companies, including Sony, Philips Electronics, and Mitsubishi, which manufacture and sell the boxes. WNI sells the Internet service for a flat monthly fee.

This matter concerns allegedly false and deceptive advertising for the WebTV system. The Commission=s proposed complaint alleges that WNI falsely claimed that:

$ the WebTV system provides access to all of the Internet=s content, including all of the entertainment and information available on the Internet. In fact, WebTV users are unable, for example, to access files on Web sites that use popular formats or programming languages, including technologies for Web site audio, video, interactivity, and multimedia used for online entertainment and information communication.

$ the WebTV set-top box is equivalent to a personal computer with respect to its Internet-related performance. In fact, in contrast to a computer, WebTV users are unable, for example, to download, store, or run software available on the Internet; display certain Web pages or play certain Web files; or open email attachments in certain common formats.

$ WNI=s upgrades to the WebTV system keep users current with the latest Internet technology. In fact, those upgrades have failed to provide certain commonly used Internet technologies for audio, video, interactivity, and multimedia.

The complaint also alleges that, in advertising the total cost of using the WebTV system, WNI failed to disclose adequately that a significant percentage of U.S. consumers will incur long distance telephone toll charges while connected to the Internet through the WebTV Internet service. The complaint alleges that this is a deceptive practice.

The proposed consent order contains provisions designed to prevent WNI from engaging in similar acts and practices in the future.

Part I of the proposed order prohibits the three alleged false representations, as well as any false representation related to access to Internet content or functionality of any Internet access product or service.

Part II of the proposed order prohibits WNI from making any representation about the cost of any Internet access product or service unless it discloses certain material information. If using such product or service to access the Internet may result in telephone toll charges, this fact must be disclosed, clearly and conspicuously, along with how consumers can determine whether they would be subject to these charges.

Part III of the proposed order requires that WNI make clear and conspicuous disclosures about long distance charges on a log-on screen, dialog box, or other similar device that appears prior to any Internet access product dialing a telephone number for which there is a toll charge. The disclosures must state the following: (a) that the user will or will likely incur such a charge while connected to the Internet access service; (b) how the user can determine whether in fact (s)he will incur such a charge, and the amount of the charge; and (c) a source of information about means, if any, of avoiding the charge. Under this provision, WNI must use a procedure designed to ensure that the user expressly consents to connecting on a toll basis, before a toll charge is incurred.

Part IV of the proposed order requires that WNI clearly and conspicuously disclose in its Terms of Service and introductory kit, or the equivalent documents it provides to new subscribers, that users may incur toll charges while using the Internet service, if that is the case, and how users can determine whether they would incur these charges.

Part V of the proposed order requires that WNI offer reimbursement to certain former subscribers to its Internet service for toll charges they incurred. Subscribers eligible for reimbursement are those who: (a) incurred toll charges before March 1, 1999, and within sixty days of subscribing to the service; (b) have not been previously reimbursed; (c) canceled their subscription before April 1, 1999, and within ninety days of subscribing to the service; (d) identified toll charges as a reason for canceling; and (e) provide proof of the charges. Eligible subscribers may receive reimbursement for toll charges incurred in the first two months of their subscription. Subscribers who cannot provide phone bills as proof of the charges would receive reimbursement up to a maximum dollar amount, which depends on the type of proof submitted.

Part VI of the proposed order requires WNI to notify its advertising agencies, manufacturers, and retailers to discontinue

making any of the advertising claims prohibited by the order. WNI must also set up, staff, and refer consumers to a toll-free customer service telephone number (or a similar mechanism that is free to consumers) that would handle inquiries regarding telephone toll charges.

Part VII describes a consumer education campaign that WNI must undertake to inform consumers about the limitations of Internet access devices as compared to computers. The campaign will include one-half page advertisements in three national magazines, as well as a brochure that WNI will (a) distribute to retailers selling WebTV set-top boxes for posting in the stores and (b) post on its Web site.

Parts VIII through XI of the proposed order are reporting and compliance provisions. Part XII is a provision Asunsetting@ the order after twenty years, with certain exceptions.

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

NOVARTIS AG, 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-3979; File No. 0010082
Complaint, November 1, 2000--Decision, December 15, 2000

This consent order addresses Respondents Novartis AG and AstraZeneca PLC=s agreement to combine their crop protection and seed businesses. The complaint alleges that the proposed transaction, if consummated, would substantially lessen competition in the markets for corn herbicides and fungicides in the United States. The order requires Astra Zeneca to divest its acetochlor herbicide business to Dow AgroSciences including the intellectual property, know-how, registrations, trademarks, rights to technical assistance, and rights under the joint venture contracts with Monsanto that are necessary to the manufacture and sale of acetochlor-based corn herbicides. Respondent Novartis will divest its strobilurin fungicide business to Bayer AG including its trifloxystrobin production facilities in Muttenz, Switzerland, and intellectual property, know-how, and registrations, and trademarks necessary to manufacture the divested strobilurin fungicides.

Participants

For the Commission: *Frederick J. Horne, Richard Liebeskind, Morris A. Bloom, Daniel P. Ducore, Christopher T. Taylor, Louis Silvia,* and *Daniel O=Brien.*

For the Respondents: *Ronan P. Harty, Davis Polk & Wardwell* and *Kenneth S. Prince, Shearman & Sterling.*

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act and of the Clayton Act, and by virtue of the authority vested in it by said Acts, the Federal Trade Commission (the ACommission@), having reason to believe that respondents Novartis AG (ANovartis@), a corporation, and AstraZeneca PLC (AZeneca@), a corporation, both subject to the jurisdiction of the

Commission, have agreed to combine Novartis= crop protection and seeds businesses with Zeneca=s crop protection business to form Syngenta AG (ASyngenta@), a corporation, in violation of Section 7 of the Clayton Act, as amended, 15 U.S.C. ' 18, and Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. ' 45, and it appearing to the Commission that a proceeding in respect thereof would be in the public interest, hereby issues its Complaint, stating its charges as follows:

I. RESPONDENTS

1. Respondent Novartis AG is a corporation organized, existing and doing business under and by virtue of the laws of Switzerland, with its office and principal place of business located at Lichtstrasse 35, CH-4002, Basel, Switzerland. Novartis owns a variety of subsidiaries, including Novartis US Co., Novartis Agribusiness Biotechnology Research, Inc., Novartis BCM North America, Inc., Novartis Crop Protection, Inc., Novartis Seeds, Inc., Novartis Specialty Crops, Inc., and Wilson Genetics, LLC, which engage in crop protection and seed businesses in the United States. Novartis is engaged in the discovery, development, manufacture and sale of crop protection chemicals, seeds, proprietary and generic pharmaceutical products, and human and animal health products.

2. Respondent AstraZeneca PLC is a corporation organized, existing and doing business under and by virtue of the laws of the United Kingdom, with its office and principal place of business located at 15 Stanhope Gate, London W1K 1LN, United Kingdom. AstraZeneca owns a variety of subsidiaries, including Zeneca Holdings, Inc., and Zeneca Ag Products, Inc., which engage in the crop protection business in the United States. Zeneca is engaged in the discovery, development, manufacture and sale of crop protection chemicals and proprietary and generic pharmaceutical products.

Complaint

3. Respondent Syngenta AG will be formed as a corporation organized, existing and doing business under and by virtue of the laws of Switzerland with its office and principal place of business located in Basel, Switzerland.

II. JURISDICTION

4. Novartis and Zeneca, and/or their subsidiaries, are, and at all times relevant herein have been, 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 affect commerce as Acommerce@ is defined in Section 4 of the Federal Trade Commission Act, as amended, 15 U.S.C. ' 44.

III. THE PROPOSED MERGER

5. On or about December 2, 1999, Novartis and Zeneca executed a Master Agreement pursuant to which Zeneca will contribute its agricultural chemicals business and Novartis will contribute its agricultural chemicals and seeds businesses to a newly formed Swiss company, Syngenta AG. Novartis shareholders will own 61 percent of Syngenta and Zeneca shareholders will own 39 percent of Syngenta. Syngenta will have annual sales of approximately $8 billion.

IV. THE RELEVANT MARKETS

6. One relevant line of commerce in which to analyze the effects of the proposed transaction is the research, development, manufacture, and sale of herbicides applied prior to weed emergence for control of grassy weeds in corn. Such herbicides contain active chemical ingredients that inhibit the growth of grassy weeds. Preventing early competition between growing corn and grassy weeds is essential to economic production of

corn. There are no economic substitutes for pre-emergence grass herbicides for use on corn.

7. Other relevant lines of commerce in which to analyze the effects of the proposed merger are the research, development, manufacture, and sale of foliar fungicides for treatment of diseases in cereals, foliar fungicides for treatment of diseases in peanuts, foliar fungicides for treatment of diseases in potatoes, foliar fungicides for treatment of diseases in rice, foliar fungicides for treatment of diseases in turf, and foliar fungicides for treatment of diseases in vegetables. Foliar fungicides, which are applied predominantly to the foliage of plants, contain active chemical ingredients that kill or inhibit the growth of certain types of organisms that cause disease. Such fungicides are essential to economic production of crops and have no economic substitutes.

8. The United States is a relevant geographic area in which to analyze the effects of the merger. United States law requires that herbicides and fungicides undergo a rigorous registration process with the U.S. Environmental Protection Agency (AEPA@) before they may be used or sold in this country. Other countries have similar registration requirements. The patchwork of regulatory regimes creates national markets.

V. STRUCTURE OF THE MARKETS

Corn Herbicides

9. The market for pre-emergence grass herbicides for use on corn is highly concentrated, as measured by the Herfindahl-Hirschman Index (AHHI@) and other measures of concentration. United States sales of corn herbicides for pre-emergent control of grasses were more than $770 million in 1999. Novartis is the leading developer, manufacturer and seller of corn herbicides for pre-emergent control of grasses in the United States with a share of about 50 percent of sales. Zeneca has approximately 15 percent of the market. The proposed merger would increase concentration, as measured by the HHI, by nearly 1400 points to over 4600.

Complaint

10. The pre-emergence grass herbicides used by growers of corn belong predominantly to a class of chemicals known as acetanilides. Herbicides based on one of three active ingredients from this group of chemicals, metolachlor, acetochlor, and dimethenamid, account for nearly all sales. Novartis= metolachlor herbicides, sold under the brands Dual and Bicep, are the leading products in the market.

11. Herbicides containing the active ingredient acetochlor are the second best selling products in the market, as well as the second choice for most growers who use Novartis= metolachlor herbicides. Zeneca and Monsanto Company (now known as Pharmacia Corporation) both sell acetochlor herbicides, with all of the active ingredient produced at a Monsanto facility in Muscatine, Iowa, pursuant to a production and registration joint venture between Zeneca and Monsanto. Zeneca=s acetochlor herbicides are sold under the brands Fultime, Surpass, Doubleplay, and TopNotch. Taken together, acetanilide herbicides sold by Novartis, Zeneca, and Monsanto account for nearly 90% of sales.

Fungicides

12. Novartis and Zeneca are the leading sellers of fungicides in the U.S. market, and account for a combined total of approximately 40% of yearly fungicide sales. Typically, for a given crop, there are only 2 or 3 significant sellers of fungicides. In cereals, peanuts, potatoes, rice, and turf, sales by the top 2 or 3 fungicide sellers range from nearly 70% to more than 90% of all sales. In vegetables, sales by the top 5 sellers account for approximately 70% of all sales.

13. Novartis= primary foliar fungicide products are based on the active ingredients propiconazole and trifloxystrobin. Novartis= propiconazole fungicides are sold under the brands Banner, Break, Orbit, and Tilt. Novartis obtained U.S. registration for its trifloxystrobin fungicides in 2000. They are sold under the brands Flint and Compass. In addition, a

combination product of propiconazole and trifloxystrobin is sold under the brand Stratego.

14. Zeneca=s primary foliar fungicide products are based on the active ingredients chlorothalonil and azoxystrobin. Zeneca=s chlorothalonil fungicides are sold under the brands Bravo and Daconil. Zeneca=s azoxystrobin fungicides, which were registered in the U.S. in 1997, are sold under the brands Abound, Heritage, and Quadris.

15. The most significant recent development in terms of foliar fungicides has been the introduction of a new class of fungicides known as strobilurins. Fungicides of this class are effective against a broad spectrum of diseases on a wide variety of crops and are more environmentally friendly than most traditional fungicides. The effectiveness and environmental profile of strobilurin fungicides have created strong demand for the products among growers. Strobilurins introduced to the market have quickly achieved significant market share and have taken sales away from traditional foliar fungicides. Zeneca=s azoxystrobin fungicides and Novartis= trifloxystrobin fungicides are both strobilurins.

16. Zeneca=s and Novartis= strobilurin fungicides are direct competitors. Zeneca and Novartis, along with BASF Corporation, are the only companies with strobilurin fungicides registered for sale in the United States. No company other than Zeneca, Novartis, or BASF is likely to introduce a new strobilurin fungicide into the U.S. market within the next 3 or 4 years.

VI. ENTRY CONDITIONS

17. Entry into the relevant markets would not be timely, likely, or sufficient in its magnitude, character, and scope to deter or counteract anticompetitive effects of the merger. The need for extensive research and development and registration requirements

create long lead times for the introduction of new products. Additionally, patents and other intellectual property create large and potentially insurmountable barriers to entry.

18. Developing a new herbicide or fungicide can take six to ten years from the time when a potentially attractive active ingredient is identified. Extensive testing in the field is necessary to evaluate efficacy and use requirements. In addition, several years of testing for negative environmental and toxicological impact is necessary to achieve registration.

VII. EFFECTS OF THE PROPOSED MERGER

19. The proposed transaction, if consummated, may substantially lessen competition or tend to create a monopoly in the relevant markets in violation of Section 7 of the Clayton Act, as amended, 15 U.S.C. ' 18, and Section 5 of the FTC Act, as amended, 15 U.S.C. ' 45. Specifically the merger will:

Corn Herbicides

a. eliminate Zeneca and Novartis as substantial, independent competitors;

b. eliminate actual, direct, and substantial competition between Zeneca and Novartis;

c. reduce innovation competition among researchers and developers of pre-emergence grass herbicides for use on corn, including the reduction in, delay of, or redirection of research and development projects;

d. increase the level of concentration in the relevant market;

e. increase barriers to entry into the relevant market;

f. increase the merged firm=s ability to exercise market power unilaterally by combining two of the three closest substitutes in the market;

g. increase the likelihood and degree of coordinated interaction between or among competitors in the market;

Fungicides

h. eliminate Zeneca and Novartis as substantial, independent competitors;

i. eliminate actual, direct, and substantial competition between Zeneca and Novartis;

j. reduce innovation competition among researchers and developers of foliar fungicides, including the reduction in, delay of, or redirection of research and development projects;

k. increase the level of concentration in the relevant markets;

l. increase barriers to entry into the relevant markets;

m. increase the merged firm=s ability to exercise market power unilaterally by combining two of the three closest substitutes in the markets; and

n. increase the likelihood and degree of coordinated interaction between or among competitors in the markets.

VIII. VIOLATIONS CHARGED

20. The merger agreement described in Paragraph 5 constitutes a violation of Section 5 of the FTC Act, 15 U.S.C. ' 45.

21. The merger, if consummated, would constitute a violation of Section 5 of the FTC Act, 15 U.S.C. ' 45, and Section 7 of the Clayton Act, 15 U.S.C. ' 18.

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

ORDER TO MAINTAIN ASSETS

The Federal Trade Commission (ACommission@), having initiated an investigation of the proposed combination of Novartis AG=s (ANovartis@) crop protection and seeds businesses and AstraZeneca PLC=s (AZeneca@) crop protection business to form Syngenta AG (ASyngenta@), and Respondents having been furnished thereafter with a copy of a draft Complaint that the Bureau of Competition intended to present to the Commission for its consideration and which, if issued by the Commission, would charge Respondents with violations of Section 7 of the Clayton Act, as amended, 15 U.S.C. ' 18, and Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. ' 45; and

Respondents, their attorneys, and counsel for the Commission having thereafter executed an Agreement Containing Consent Orders (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 alleged in such Complaint, or that the facts as alleged in such Complaint, other than jurisdictional facts, are true, and waivers and other provisions as required by the Commission=s Rules; and

The Commission having thereafter considered the matter and having determined that it had reason to believe that Respondents have violated the said Acts, and that a Complaint should issue stating its charges in that respect, and having determined to accept the executed Consent Agreement and to place such Consent Agreement on the public record for a period of thirty (30) days, the Commission hereby issues its Complaint, makes the following jurisdictional findings and issues the following Order to Maintain Assets:

1. Novartis is a corporation organized, existing and doing business under and by virtue of the laws of Switzerland, with its office and principal place of business located at Lichtstrasse 35, CH-4002, Basel, Switzerland.

2. Zeneca is a corporation organized, existing and doing business under and by virtue of the laws of the United Kingdom, with its office and principal place of business located at 15 Stanhope Gate, London W1K 1LN, United Kingdom.

3. Syngenta will be formed as a corporation organized, existing and doing business under and by virtue of the laws of Switzerland with its office and principal place of business located in Basel, Switzerland.

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

ORDER

I.

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

D. AAcetochlor Acquirer@ means Dow or, in the event Dow is not approved as the Acetochlor Acquirer or for any other reason does not acquire the Acetochlor Assets, any other Person who acquires the Acetochlor Assets, after approval by the Commission.

E. AAcetochlor Assets@ means all assets and rights owned or held by Zeneca and relating to and/or used in the operation of the Acetochlor Business, including, without limitation, the assets listed below and including, without limitation, the assets specified in the Acetochlor Divestiture Agreement (which agreement shall not be construed to vary or contradict the terms of this Order):

1. Zeneca=s rights under and title and interest in the Monsanto Contracts;

2. Zeneca=s rights, title, and interest in all EPA, state, and foreign registrations and approvals relating to the manufacture or sale of all products of the Acetochlor Business;

3. Zeneca=s rights, title, and interest in all Acetochlor Registration Data (except in the case of Safener 29148, which Zeneca shall exclusively license for uses relating to all products of the Acetochlor Business), submissions and supporting data and documents, including, without limitation, all labels, label extensions, or planned or pending label extensions for any application;

4. Zeneca=s rights, title, and interest in all trademarks and trade names for all products of the Acetochlor Business;

5. Zeneca=s rights, title, and interest in the Acetochlor Intellectual Property;

6. exclusive, perpetual, royalty-free, and transferable licenses under the Zeneca Intellectual Property for uses relating to all products of the Acetochlor Business and copies of all research materials and know-how relating thereto;

7. an exclusive, perpetual, royalty-free, and transferable license for the Glutathione Transferase (GST27) resistance gene to produce plants which are labeled as acetochlor tolerant;

8. Zeneca=s rights under and title and interest in all contracts or agreements with customers, suppliers, sales representatives, distributors, agents, licensors, licensees, consignors, and consignees other than multi-product contracts as defined in the Acetochlor Divestiture Agreement;

9. all inventories of all products of the Acetochlor Business;

10. all research materials and know-how of the Acetochlor Business;

11. all Mesotrione rights as set forth in Section 5.04 of the Acetochlor Divestiture Agreement;

12. the Mesotrione Supply Agreement as defined in the Acetochlor Divestiture Agreement; and

13. all books, records, and files, customer lists, customer records and files, vendor lists, catalogs, sales promotion literature, advertising materials, technical information, management information systems, software, inventions, specifications, designs, drawings, processes, and quality control data related to and primarily used in the Acetochlor Business.

F. AAcetochlor Business@ means the research, development, registration, manufacture, formulation, licensing, sale, and distribution by Zeneca of all unmixed and mixed acetochlor products, in any market anywhere in the world, except for the following mixtures: (1) Zeneca=s mixtures of acetochlor and EPTC, (2) Zeneca=s mixtures of acetochlor and

fluorochlorodone (including twin/co-packs of acetochlor and fluorochlorodone), and (3) Zeneca=s proposed mixtures of acetochlor and mesotrione.

G. AAcetochlor Divestiture Agreement@ means the Asset Purchase Agreement between Zeneca and Dow dated as of October 17, 2000, and its related agreements, schedules, exhibits and appendices.

H. ACommission@ means the Federal Trade Commission.

I. ADecision and Order@ means the Decision and Order incorporated with this Order to Maintain Assets into the Consent Agreement.

J. ANovartis@ means Novartis AG, its directors, officers, employees, agents, representatives, successors, and assigns; its subsidiaries, divisions, groups, and affiliates controlled by Novartis, and the respective directors, officers, employees, agents, representatives, successors, and assigns of each.

K. APerson@ means any individual, partnership, firm, corporation, association, trust, unincorporated organization or other entity.

L. ARespondents@ means Novartis, Zeneca, and Syngenta, respectively and collectively.

M. AStrobilurin Acquirer@ means Bayer or, in the event Bayer is not approved as the Strobilurin Acquirer or for any other reason does not acquire the Strobilurin Assets, any other Person who acquires the Strobilurin Assets, after approval by the Commission.

N. AStrobilurin Assets@ means all assets and rights owned or held by Novartis and relating to and/or used in the operation

of the Strobilurin Business, including, without limitation, the assets listed below and including, without limitation, those assets specified in the Strobilurin Divestiture Agreement (which agreement shall not be construed to vary or contradict the terms of this Order):

1. Novartis= rights, title, and interest in all machinery, furniture, fixtures, equipment, tools, and other tangible personal property at the Muttenz Production Facility used for or necessary for the manufacture of trifloxystrobin, trifloxystrobin intermediates, or compounds containing trifloxystrobin;

2. all rights, licenses, permits, registrations, know-how, technical information, and other permissions or expertise necessary to manufacture trifloxystrobin, trifloxystrobin intermediates, or compounds containing trifloxystrobin at the Muttenz Production Facility;

3. Novartis= lease with Clariant for the land and buildings of the Muttenz Plant, infrastructure and support services;

4. Novartis= rights, title, and interest in all United States Environmental Protection Agency, state, and foreign registrations and approvals relating to the manufacture or sale of strobilurin fungicides or compounds containing strobilurin fungicides;

5. Novartis= rights, title, and interest in all Strobilurin Registration Data, submissions and supporting data and documents, including, without limitation, all labels, label extensions, or planned or pending label extensions for any application;

6. Novartis= rights, title, and interest in all trademarks and trade names for trifloxystrobin, any compound

containing trifloxystrobin, or any other strobilurin fungicide;

7. Novartis= rights, title, and interest in the Strobilurin Intellectual Property, *provided*, *however*, that Novartis may receive (i) an exclusive (except as to the Strobilurin Acquirer), perpetual, royalty-free, and transferable license back from the Strobilurin Acquirer to use the Strobilurin Intellectual Property identified in confidential Appendix 3 of the Decision and Order outside of the field of strobilurin fungicides, and (ii) a non-exclusive perpetual, royalty-free and transferable license from the Strobilurin Acquirer to use the Strobilurin Intellectual Property not identified in confidential Appendix 3 outside of the field of strobilurin fungicides;

8. exclusive, perpetual, royalty-free, and transferable licenses under the Novartis Intellectual Property for fungicidal uses relating to trifloxystrobin, compounds containing trifloxystrobin, or any other strobilurin fungicide of the Strobilurin Business, and copies of all research materials and know-how relating thereto;

9. non-exclusive, perpetual, royalty-free, and transferable licenses under the Novartis Intellectual Property for non-fungicidal uses relating to trifloxystrobin, compounds containing trifloxystrobin, or any other strobilurin fungicide of the Strobilurin Business, and copies of all research materials and know-how relating thereto;

10. Novartis= rights under and title and interest in all contracts or agreements with customers, suppliers, sales representatives, distributors, agents, licensors, licensees, consignors, and consignees related to and primarily used in the Strobilurin Business;

11. all inventories of trifloxystrobin and compounds containing trifloxystrobin;

12. all research materials and know-how of the Strobilurin Business; and

13. all books, records, and files, customer lists, customer records and files, vendor lists, catalogs, sales promotion literature, advertising materials, technical information, management information systems, software, inventions, specifications, designs, drawings, processes, and quality control data related to and primarily used in the Strobilurin Business.

O. AStrobilurin Business@ means the research, development, registration, manufacture, formulation, licensing, sale and distribution of the existing strobilurin fungicide products and product developments of Novartis, in any market anywhere in the world, including all existing straight products or combinations therewith.

P. AStrobilurin Divestiture Agreement@ means the Asset Purchase Agreement between Novartis and Bayer dated as of September 7, 2000, and its related agreements, schedules, exhibits and appendices.

Q. AZeneca@ means AstraZeneca PLC, its directors, officers, employees, agents, representatives, successors, and assigns; its subsidiaries, divisions, groups, and affiliates controlled by Zeneca, and the respective directors, officers, employees, agents, representatives, successors, and assigns of each.

provided, however, any term used in this Order to Maintain Assets that is not defined in this Paragraph I has the same meaning as defined in the Decision and Order.

II.

IT IS FURTHER ORDERED that:

O. Between the date Respondents sign the Consent Agreement and the date the Acetochlor Assets are completely divested, Respondents shall:

1. Maintain the Acetochlor Assets in substantially the same condition (except for normal wear and tear and sales of inventory in the ordinary course) existing at the time respondent signs the Consent Agreement; preserve intact the Acetochlor Assets; keep available the services of the current officers, employees, and agents of such businesses; and maintain the relations and good will with suppliers, customers, landlords, creditors, employees, agents, and others having business relationships with such businesses;

2. Take such action that is consistent with the past practices of Respondents in connection with the Acetochlor Business and is taken in the ordinary course of the normal day-to-day operations of Respondents; and

3. Not take any affirmative action, or fail to take any action within their control, as a result of which the viability, competitiveness, and marketability of the Acetochlor Assets would be diminished.

P. The purpose of this Order to Maintain Assets is to: (i) preserve the Acetochlor Assets as a viable, competitive, and ongoing business and (ii) prevent interim harm to competition.

III.

IT IS FURTHER ORDERED that:

A. Between the date Respondents sign the Consent Agreement and the date the Strobilurin Assets are completely divested, Respondents shall:

1. Maintain the Strobilurin Assets in substantially the same condition (except for normal wear and tear and sales of inventory in the ordinary course) existing at the time respondent signs the Consent Agreement; preserve intact the Strobilurin Assets; keep available the services of the current officers, employees, and agents of such businesses; and maintain the relations and good will with suppliers, customers, landlords, creditors, employees, agents, and others having business relationships with such businesses;

2. Take such action that is consistent with the past practices of Respondents in connection with the Strobilurin Business and is taken in the ordinary course of the normal day-to-day operations of Respondents; and

3. Not take any affirmative action, or fail to take any action within their control, as a result of which the viability, competitiveness, and marketability of the Strobilurin Assets would be diminished.

B. The purpose of this Order to Maintain Assets is to: (i) preserve the Strobilurin Assets as a viable, competitive, and ongoing business and (ii) prevent interim harm to competition.

IV.

IT IS FURTHER ORDERED that:

A. At any time after Respondents sign the Consent Agreement, the Commission may appoint one or more persons to serve as Monitor Trustee to ensure that Respondents expeditiously perform their obligations as required by this Order to Maintain Assets and the Decision and Order.

B. If a Monitor Trustee is appointed pursuant this Paragraph, Respondents shall consent to the following terms and

conditions regarding the powers, duties, authorities, and responsibilities of the Monitor Trustee:

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

2. The Monitor Trustee shall have the power and authority to monitor Respondents= compliance with the terms of this Order to Maintain Assets and the terms of the Decision and Order and shall exercise such power and authority and carry out the duties and responsibilities of the Monitor Trustee in a manner consistent with the purposes of such orders and in consultation with the Commission.

3. Within ten (10) business days after appointment of the Monitor Trustee, Respondents shall execute a trust agreement that, subject to the approval of the Commission, confers on the Monitor Trustee all the rights and powers necessary to permit the Monitor Trustee to monitor Respondents= compliance with the terms of this Order to Maintain Assets and the Decision and Order in a manner consistent with the purposes of such orders. Respondents may require the Monitor Trustee to sign a confidentiality agreement prohibiting the use, or disclosure to anyone other than the Commission, of any competitively sensitive or proprietary information gained as a result of his or her role as Monitor Trustee.

4. The Monitor Trustee shall serve until Respondents have completed all obligations under (a) this Order to Maintain Assets and (b) the initial term of any supply agreement

required by Paragraphs II and III of the Decision and Order (except for any supply agreement relating to Paragraph II.B.5. of the Decision and Order).

5. The Monitor Trustee shall have full and complete access to Respondents= books, records, documents, personnel, facilities and technical information relating to compliance with this Order to Maintain Assets and the Decision and Order , or to any other relevant information, as the Monitor Trustee may reasonably request. Respondents shall cooperate with any reasonable request of the Monitor Trustee. Respondents shall take no action to interfere with or impede the Monitor Trustee's ability to monitor Respondents= compliance with this Order to Maintain Assets and the Decision and Order.

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

7. Respondents shall indemnify the Monitor Trustee and hold the Monitor Trustee harmless against any losses, claims, damages, liabilities or expenses arising out of, or in connection with, the performance of the Monitor 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 Monitor Trustee.

8. If at any time the Commission determines that the Monitor Trustee has ceased to act or failed to act diligently, or is unwilling or unable to continue to serve, the Commission may appoint a substitute to serve as Monitor Trustee in the same manner as provided in this Paragraph.

9. The Commission may on its own initiative or at the request of the Monitor Trustee issue such additional orders or directions as may be necessary or appropriate to assure compliance with the requirements of this Order to Maintain Assets and the Decision and Order.

10. The Monitor Trustee shall report in writing to the Commission concerning Respondents= compliance with this Order to Maintain Assets and the Decision and Order (i) every sixty (60) days for a period of six months from the date Respondent signs the Consent Agreement and (ii) annually thereafter on the anniversary of the date this Order to Maintain Assets becomes final during the remainder of the Monitor Trustee=s period of appointment.

V.

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

VI.

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

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

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

VII.

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

A. Three (3) business days after the Commission withdraws its acceptance of the Consent Agreement pursuant to the provisions of Commission Rule 2.34, 16 C.F.R. ' 2.34; or

B. Three (3) business days after termination of the duties of the Monitor Trustee appointed pursuant to this Order to Maintain Assets.

By the Commission.

DECISION AND ORDER

The Federal Trade Commission (ACommission@), having initiated an investigation of the proposed combination of Novartis AG=s (ANovartis@) crop protection and seeds businesses and AstraZeneca PLC=s (AZeneca@) crop protection business to form Syngenta AG (ASyngenta@), and Respondents having been furnished thereafter with a copy of a draft Complaint that the Bureau of Competition intended to present to the Commission for its consideration and which, if issued by the Commission, would charge Respondents with violations of Section 7 of the Clayton Act, as amended, 15 U.S.C. ' 18, and Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. ' 45; and

Respondents, their attorneys, and counsel for the Commission having thereafter executed an Agreement Containing Consent Orders (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 alleged in such Complaint, or that the facts as alleged in such Complaint, other than jurisdictional facts, are true, and waivers and other provisions as required by the Commission=s Rules; and

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

1. Novartis is a corporation organized, existing and doing business under and by virtue of the laws of Switzerland, with its office and principal place of business located at Lichtstrasse 35, CH-4002, Basel, Switzerland.

2. Zeneca is a corporation organized, existing and doing business under and by virtue of the laws of the United Kingdom, with its office and principal place of business located at 15 Stanhope Gate, London W1K 1LN, United Kingdom.

3. Syngenta will be formed as a corporation organized, existing and doing business under and by virtue of the laws of Switzerland with its office and principal place of business located in Basel, Switzerland.

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

ORDER

I.

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

A. AAcetochlor Acquirer@ means Dow or, in the event Dow is not approved as the Acetochlor Acquirer or for any other reason does not acquire the Acetochlor Assets, any other Person who acquires the Acetochlor Assets, after approval by the Commission.

B. AAcetochlor Assets@ means all assets and rights owned or held by Zeneca and relating to and/or used in the operation of the Acetochlor Business, including, without limitation, the assets listed below and including, without limitation, the

assets specified in the Acetochlor Divestiture Agreement (which agreement shall not be construed to vary or contradict the terms of this Order):

1. Zeneca=s rights under and title and interest in the Monsanto Contracts;

2. Zeneca=s rights, title, and interest in all EPA, state, and foreign registrations and approvals relating to the manufacture or sale of all products of the Acetochlor Business;

3. Zeneca=s rights, title, and interest in all Acetochlor Registration Data (except in the case of Safener 29148, which Zeneca shall exclusively license for uses relating to all products of the Acetochlor Business), submissions and supporting data and documents, including, without limitation, all labels, label extensions, or planned or pending label extensions for any application;

4. Zeneca=s rights, title, and interest in all trademarks and trade names for all products of the Acetochlor Business;

5. Zeneca=s rights, title, and interest in the Acetochlor Intellectual Property;

6. exclusive, perpetual, royalty-free, and transferable licenses under the Zeneca Intellectual Property for uses relating to all products of the Acetochlor Business and copies of all research materials and know-how relating thereto;

7. an exclusive, perpetual, royalty-free, and transferable license for the Glutathione Transferase (GST27) resistance gene to produce plants which are labeled as acetochlor tolerant;

8. Zeneca=s rights under and title and interest in all contracts or agreements with customers, suppliers, sales

representatives, distributors, agents, licensors, licensees, consignors, and consignees other than multi-product contracts as defined in the Acetochlor Divestiture Agreement;

9. all inventories of all products of the Acetochlor Business;

10. all research materials and know-how of the Acetochlor Business;

11. all Mesotrione rights as set forth in Section 5.04 of the Acetochlor Divestiture Agreement;

12. the Mesotrione Supply Agreement as defined in the Acetochlor Divestiture Agreement; and

13. all books, records, and files, customer lists, customer records and files, vendor lists, catalogs, sales promotion literature, advertising materials, technical information, management information systems, software, inventions, specifications, designs, drawings, processes, and quality control data related to and primarily used in the Acetochlor Business.

C. AAcetochlor Business@ means the research, development, registration, manufacture, formulation, licensing, sale, and distribution by Zeneca of all unmixed and mixed acetochlor products, in any market anywhere in the world, except for the following mixtures: (1) Zeneca=s mixtures of acetochlor and EPTC, (2) Zeneca=s mixtures of acetochlor and fluorochlorodone (including twin/co-packs of acetochlor and fluorochlorodone), and (3) Zeneca=s proposed mixtures of acetochlor and mesotrione.

D. AAcetochlor Divestiture Agreement@ means the Asset Purchase Agreement between Zeneca and Dow dated as of

October 17, 2000, and its related agreements, schedules, exhibits and appendices.

E. AAcetochlor Intellectual Property@ means any form of intellectual property predominantly relating to the research, development, manufacture, sale, or use of any product of the Acetochlor Business, owned, licensed or controlled by Zeneca, including, but not limited to, the patents and trademarks listed in or issuing on applications listed in confidential Appendix 1 hereto, trade secrets, research materials, technical information, inventions, test data, technological know-how, product efficacy data, safety data, production and formulation know-how, licenses, registrations, submissions, approvals, technology, specifications, designs, drawings, processes, recipes, protocols, formulas, quality control data, books, records, and files. Acetochlor Intellectual Property does not include Zeneca Intellectual Property.

F. AAcetochlor Non-Public Information@ means any information disclosed by the Acetochlor Acquirer to Respondents, or otherwise obtained by Respondents, in connection with any Acetochlor Supply Agreement. Non-Public Information shall not include: (i) information in the public domain, (ii) information that subsequently falls within the public domain through no violation of this Order by Respondents, or (iii) information that subsequently becomes known to Respondents from a third party not in breach of a confidential disclosure agreement.

G. AAcetochlor Registration Data@ means all data relating to any product of the Acetochlor Business, and all data relating to safeners used with such products, that has been, or will be, submitted to the United States Environmental Protection Agency or to any state or foreign regulatory agency for purposes of obtaining or maintaining any registration or authorization for any product of the Acetochlor Business.

H. AAcetochlor Supply Agreement@ means any agreement describing the terms agreed to by Respondents and an Acetochlor Acquirer and approved by the Commission relating to the supply of any product required by Paragraph II.B. of this Order.

I. AAcetochlor Technical Services@ means (1) provision of expert advice, assistance and training in technical and regulatory areas relating to the Acetochlor Business, including, but not limited to, such services in (a) non-microencapsulated formulations, (b) Monsanto ARM arrangements, (c) the process for the manufacture of safeners, (d) micro-encapsulated formulations, (e) the transfer or licensing of product registration and regulatory data, (f) proprietary on-going studies, and (g) bulk sales and logistics in the United States, and (2) reasonable access to Zeneca=s manufacturing sites.

J. ABayer@ means Bayer AG, a corporation organized, existing and doing business under and by virtue of the laws of Germany, with its office and principal place of business located at Werk Leverkusen, S1368 Leverkusen, Germany.

K. AClariant@ means Clariant AG, a company organized, existing and doing business under and by virtue of the laws of Switzerland, with its office and principal place of business located at Rothausstrasse 61, CH-4132 Muttenz, Switzerland.

L. ACommission@ means the Federal Trade Commission.

M. ADow@ means Dow AgroSciences LLC, a corporation organized, existing and doing business under and by virtue of the laws of Delaware, with its office and principal place of business located in Indianapolis, Indiana.

N. AMonsanto Contracts@ means the contracts and agreements between Monsanto Company, Zeneca, and their predecessors or successors, relating to production and supply of acetochlor, listed in confidential Appendix 2 hereto.

O. AMuttenz Production Facility@ means the facilities located in Muttenz, Switzerland, owned by Clariant, at which Novartis produces cyproconazole and trifloxystrobin.

P. ANovartis@ means Novartis AG, its directors, officers, employees, agents, representatives, successors, and assigns; its subsidiaries, divisions, groups, and affiliates controlled by Novartis, and the respective directors, officers, employees, agents, representatives, successors, and assigns of each.

Q. ANovartis Intellectual Property@ means any form of intellectual property relating to or used in the research, development, manufacture, sale, or use of trifloxystrobin, any compound containing trifloxystrobin, or any other compound consisting of or containing a strobilurin fungicide, licensed to, owned, or controlled by Novartis.

R. APerson@ means any individual, partnership, firm, corporation, association, trust, unincorporated organization or other entity.

S. ARespondents@ means Novartis, Zeneca, and Syngenta, respectively and collectively.

T. AStrobilurin Acquirer@ means Bayer or, in the event Bayer is not approved as the Strobilurin Acquirer or for any other reason does not acquire the Strobilurin Assets, any other Person who acquires the Strobilurin Assets, after approval by the Commission.

U. AStrobilurin Assets@ means all assets and rights owned or held by Novartis and relating to and/or used in the operation of the Strobilurin Business, including, without limitation, the assets listed below and including, without limitation, those assets specified in the Strobilurin Divestiture Agreement (which agreement shall not be construed to vary or contradict the terms of this Order):

1. Novartis= rights, title, and interest in all machinery, furniture, fixtures, equipment, tools, and other tangible personal property at the Muttenz Production Facility used for or necessary for the manufacture of trifloxystrobin, trifloxystrobin intermediates, or compounds containing trifloxystrobin;

2. all rights, licenses, permits, registrations, know-how, technical information, and other permissions or expertise necessary to manufacture trifloxystrobin, trifloxystrobin intermediates, or compounds containing trifloxystrobin at the Muttenz Production Facility;

3. Novartis= lease with Clariant for the land and buildings of the Muttenz Plant, infrastructure and support services;

4. Novartis= rights, title, and interest in all United States Environmental Protection Agency, state, and foreign registrations and approvals relating to the manufacture or sale of strobilurin fungicides or compounds containing strobilurin fungicides;

5. Novartis= rights, title, and interest in all Strobilurin Registration Data, submissions and supporting data and documents, including, without limitation, all labels, label extensions, or planned or pending label extensions for any application;

6. Novartis= rights, title, and interest in all trademarks and trade names for trifloxystrobin, any compound containing trifloxystrobin, or any other strobilurin fungicide;

7. Novartis= rights, title, and interest in the Strobilurin Intellectual Property, *provided*, *however*, that Novartis may receive (i) an exclusive (except as to the Strobilurin Acquirer), perpetual, royalty-free, and transferable license back from the Strobilurin Acquirer to use the Strobilurin Intellectual Property identified in confidential Appendix 3 hereto outside of the field of strobilurin fungicides, and (ii) a non-exclusive perpetual, royalty-free and transferable license from the Strobilurin Acquirer to use the Strobilurin Intellectual Property not identified in confidential Appendix 3 outside of the field of strobilurin fungicides;

8. exclusive, perpetual, royalty-free, and transferable licenses under the Novartis Intellectual Property for fungicidal uses relating to trifloxystrobin, compounds containing trifloxystrobin, or any other strobilurin fungicide of the Strobilurin Business, and copies of all research materials and know-how relating thereto;

9. non-exclusive, perpetual, royalty-free, and transferable licenses under the Novartis Intellectual Property for non-fungicidal uses relating to trifloxystrobin, compounds containing trifloxystrobin, or any other strobilurin fungicide of the Strobilurin Business, and copies of all research materials and know-how relating thereto;

10. Novartis= rights under and title and interest in all contracts or agreements with customers, suppliers, sales representatives, distributors, agents, licensors, licensees, consignors, and consignees related to and primarily used in the Strobilurin Business;

11. all inventories of trifloxystrobin and compounds containing trifloxystrobin;

12. all research materials and know-how of the Strobilurin Business; and

13. all books, records, and files, customer lists, customer records and files, vendor lists, catalogs, sales promotion literature, advertising materials, technical information, management information systems, software, inventions, specifications, designs, drawings, processes, and quality control data related to and primarily used in the Strobilurin Business.

V. AStrobilurin Business@ means the research, development, registration, manufacture, formulation, licensing, sale and

distribution of the existing strobilurin fungicide products and product developments of Novartis, in any market anywhere in the world, including all existing straight products or combinations therewith.

W. AStrobilurin Divestiture Agreement@ means the Asset Purchase Agreement between Novartis and Bayer dated as of September 7, 2000, and its related agreements, schedules, exhibits and appendices.

X. AStrobilurin Intellectual Property@ means any form of intellectual property relating predominantly to the research, development, manufacture, sale, or use of trifloxystrobin, any compound containing trifloxystrobin, or any other compound consisting of or containing a strobilurin fungicide, owned, licensed or controlled by Novartis, including, but not limited to, the patents and trademarks listed in or issuing on applications listed in confidential Appendix 4 hereto, trade secrets, research materials, technical information, inventions, test data, technological know-how, product efficacy data, safety data, production and formulation know-how, licenses, registrations, submissions, approvals, technology, specifications, designs, drawings, processes, recipes, protocols, formulas, quality control data, books, records, and files. Strobilurin Intellectual Property does not include Novartis Intellectual Property.

Y. AStrobilurin Non-Public Information@ means any information disclosed by the Strobilurin Acquirer to Respondents, or otherwise obtained by Respondents, in connection with any Strobilurin Supply Agreement. Non-Public Information shall not include: (i) information in the public domain, (ii) information that subsequently falls within the public domain through no violation of this Order by Respondents, or (iii) information that subsequently becomes known to Respondents from a third party not in breach of a confidential disclosure agreement.

Z. AStrobilurin Registration Data@ means all data, owned or controlled by Novartis, relating to any compound consisting of or containing trifloxystrobin or any other strobilurin fungicide that has been, or will be, submitted to the United States Environmental Protection Agency or to any state or foreign regulatory agency for purposes of obtaining or maintaining any registration or authorization for any product consisting or containing trifloxystrobin or any other strobilurin fungicide.

AA. AStrobilurin Supply Agreement@ means any agreement describing the terms agreed to by Respondents and a Strobilurin Acquirer and approved by the Commission relating to the supply of any product required by Paragraph III.B. of this Order.

BB. AStrobilurin Technical Services@ means (1) provision of expert advice, assistance and training in technical and regulatory areas relating to the Strobilurin Business, including, but not limited to, such services in toxicology, environmental, ecotex, metabolism, residues, general matters, field biology, process development for Muttenz processes, quality control, analytical matters, and formulation technology, and (2) reasonable access to Respondents= manufacturing facilities used to produce the products to be supplied under Paragraph III.B.(1), (2), and (3) of this Order.

CC. ASyngenta@ means Syngenta AG, its directors, officers, employees, agents, representatives, successors, and assigns; its subsidiaries, divisions, groups, and affiliates controlled by Syngenta, and the respective directors, officers, employees, agents, representatives, successors, and assigns of each.

DD. ASyngenta Formation@ means the spin-off and merger of Novartis= crop protection and seeds businesses and Zeneca=s crop protection business to create a new company, Syngenta

AG, as described in the December 2, 1999, Master Agreement between Novartis and AstraZeneca.

EE. AZeneca@ means AstraZeneca PLC, its directors, officers, employees, agents, representatives, successors, and assigns; its subsidiaries, divisions, groups, and affiliates controlled by Zeneca, and the respective directors, officers, employees, agents, representatives, successors, and assigns of each.

FF. AZeneca Intellectual Property@ means any form of intellectual property relating to or used in the research, development, manufacture, sale, or use of any product of the Acetochlor Business (*e.g.*, process technology, safener technology, microencapsulation technology), licensed to, owned, or controlled by Zeneca, listed in confidential Appendix 5 hereto.

II.

IT IS FURTHER ORDERED that:

A. Respondents shall divest the Acetochlor Assets, absolutely and in good faith, at no minimum price to Dow pursuant to the Acetochlor Divestiture Agreement, no later than (i) ten business days after the Syngenta Formation or (ii) ten business days after receipt by Respondents of all necessary governmental approvals from Germany, and in any event, no later than six (6) months from the date the Commission places the Consent Agreement on the record for public comment; *provided, however*, that in the event Dow does not acquire the Acetochlor Assets because of Dow=s breach of the Acetochlor Divestiture Agreement, Respondents shall divest the Acetochlor Assets to another Person that receives the prior approval of the Commission and in a manner that receives the prior approval of the Commission, within six (6) months from the date the Commission places the Consent Agreement on the record for public comment; provided, further, that if at the time the Commission determines to make the Order final, the Commission notifies Respondents that Dow is not approved as the Acetochlor Acquirer or that the Acetochlor Divestiture

Agreement is not an acceptable manner of divestiture, Respondents shall divest the Acetochlor Assets to another Person that receives the prior approval of the Commission and in a manner that receives the prior approval of the Commission, within five (5) months from the date this Order becomes final.

B. Respondents shall supply to the Acetochlor Acquirer, in a timely manner and in quantities reasonably required to operate the Acetochlor Assets, the following products necessary to enable the Acetochlor Acquirer to conduct the Acetochlor Business in substantially the same manner as Respondents: (1) emulsifiable concentrate and granular formulations of acetochlor and acetochlor mixtures; (2) microencapsulated formulations of acetochlor and acetochlor mixtures; (3) Safener 29148, (4) Safener 25788, and (5) mesotrione. Respondents shall supply any product required by this Paragraph II.B. pursuant to an Acetochlor Supply Agreement.

C. Respondents shall make representations and warranties that any products supplied under an Acetochlor Supply Agreement meet the product and quality specifications, and are contained, packaged and labeled in accordance with the specifications required by applicable governmental laws, rules, and regulations and agreed to between Respondents and the Acetochlor Acquirer.

D. Except for events of force majeure, Respondents shall be liable for any damages to the Acetochlor Acquirer resulting from Respondents= breach of any obligation or warranty contained in any Acetochlor Supply Agreement, including liability for any indirect, consequential, special, or incidental damages; *provided, however*, that nothing in this Paragraph shall preclude Respondents from raising any applicable defenses.

E. Respondents shall not terminate any Acetochlor Supply Agreement for any reason; *provided, however*, that Respondents may terminate an Acetochlor Supply Agreement due to an alleged material breach by the Acetochlor Acquirer, but only after Respondents (i) have provided the Acetochlor Acquirer with 60 days notice to cure the breach, (ii) have submitted their claim to arbitration, and (iii) the arbitrator has fully resolved the claim in Respondents= favor.

F. Respondents shall provide the Acetochlor Acquirer an opportunity to:

1. Enter into employment contracts with any individual identified in confidential Appendix 6 of this Order, or any other individuals subsequently identified by agreement between Respondents and an Acetochlor Acquirer; and

2. Inspect the personnel files and other documentation relating to the individuals identified in Paragraph II.F.1. of this Order, to the extent permissible under applicable laws, no later than twenty (20) days from the date Respondents sign the Consent Agreement, or no later than the date on which an Acetochlor Acquirer other than Dow signs an agreement to acquire the Acetochlor Assets.

G. From the date Respondents sign the Consent Agreement until the divestiture required by Paragraph II.A. is completed, Respondents shall take steps, including implementation of appropriate incentive plans (such as payment of all current and accrued benefits and pensions, to which the employees are entitled) and appropriate bonuses, to cause the individuals identified in Paragraph II.F.1. of this Order to accept offers of employment from the Acetochlor Acquirer.

H. Respondents shall not interfere with the employment by the Acetochlor Acquirer of the individuals identified in Paragraph II.F.1. of this Order; shall not offer any incentive to such individuals to decline employment with the Acetochlor Acquirer to accept other employment with Respondents; and shall remove any contractual impediments with Respondents that may deter such individuals from accepting employment with the Acetochlor Acquirer, including, but not limited to, any non-compete provisions of employment or other contracts with Respondents that would affect the ability of those individuals to be employed by the Acetochlor Acquirer.

Decision and Order

I. Respondents shall not make employment offers to any individual identified in Paragraph II.F.1. of this Order for a period of one (1) year from the date this Order becomes final if such individual has accepted an employment offer from the Acetochlor Acquirer, unless such individual has been involuntarily separated from employment by such Acetochlor Acquirer.

J. For a period up to twelve (12) months from the date the Acetochlor Assets are divested, at the request of the Acetochlor Acquirer at any time during the twelve (12) month period, Respondents shall provide Acetochlor Technical Services to enable the Acetochlor Acquirer to conduct the Acetochlor Business in substantially the same manner as Respondents.

K. Respondents shall use their reasonable best efforts to transfer to the Acetochlor Acquirer, or assist the Acetochlor Acquirer in obtaining, any approval, consent, ratification, waiver, or other authorization (including governmental) that is or will become necessary to complete the divestitures required by Paragraph II.A. of this Order.

L. The Acetochlor Divestiture Agreement, or any other asset purchase agreement approved by the Commission, shall be incorporated into this Order and made a part hereof. Any failure to comply with the terms of the Acetochlor Divestiture Agreement or such other asset purchase agreement shall constitute a violation of this Order.

M. The purpose of the divestiture required by this Paragraph II is to ensure the continued use of the Acetochlor Assets in the same business in which such assets are engaged at the time of the proposed merger between Respondents and to remedy the lessening of competition alleged in the Commission=s complaint.

III.

IT IS FURTHER ORDERED that:

A. Respondents shall divest the Strobilurin Assets, absolutely and in good faith, at no minimum price to Bayer pursuant to the Strobilurin Divestiture Agreement, no later than (i) ten business days after the Syngenta Formation or (ii) ten business days after receipt by Respondents of all necessary governmental approvals from the United Kingdom and Germany, and in any event, no later than six (6) months from the date the Commission places the Consent Agreement on the record for public comment; *provided, however*, that in the event Bayer does not acquire the Strobilurin Assets because of Bayer=s breach of the Strobilurin Divestiture Agreement, Respondents shall divest the Strobilurin Assets to another Person that receives the prior approval of the Commission and in a manner that receives the prior approval of the Commission, within six (6) months from the date the Commission places the Consent Agreement on the record for public comment; provided, further, that if at the time the Commission determines to make the Order final, the Commission notifies Respondents that Bayer is not approved as the Strobilurin Acquirer or that the Strobilurin Divestiture Agreement is not an acceptable manner of divestiture, Respondents shall divest the Strobilurin Assets to another Person that receives the prior approval of the Commission and in a manner that receives the prior approval of the Commission, within five (5) months from the date this Order becomes final.

B. Respondents shall supply to the Strobilurin Acquirer, in a timely manner and in quantities reasonably required to operate the Strobilurin Business, the following products necessary to enable the Strobilurin Acquirer to conduct the Strobilurin Business in substantially the same manner as Respondents: (1) Intermediate step 1, (2) Intermediate step 2, (3) formulations of the products described in confidential Appendix 7 of this Order, and (4) propiconazole for use in mixtures with trifloxystrobin. Respondents shall supply any product required by this Paragraph III.B. pursuant to a Strobilurin Supply Agreement.

C. Respondents shall make representations and warranties that any products supplied under a Strobilurin Supply Agreement meet the product and quality specifications, and are contained, packaged and labeled in accordance with the specifications required by applicable governmental laws, rules, and regulations and agreed to between Respondents and the Strobilurin Acquirer.

D. Except for events of force majeure, Respondents shall be liable for all damages to the Strobilurin Acquirer resulting from Respondents= breach of any obligation or warranty contained in any Strobilurin Supply Agreement, including liability for any indirect, consequential, special, or incidental damages; *provided, however*, that nothing in this Paragraph shall preclude Respondents from raising any applicable defenses.

E. Respondents shall not terminate any Strobilurin Supply Agreement, during its initial term, for any reason; *provided, however*, that Respondents may terminate a Strobilurin Supply Agreement during its initial term due to an alleged material breach by the Strobilurin Acquirer, but only after Respondents have (i) provided the Strobilurin Acquirer with 60 days notice to cure the breach, (ii) have submitted their claim to arbitration, and (iii) the arbitrator has fully resolved the claim in Respondents= favor.

F. Respondents shall provide the Strobilurin Acquirer an opportunity to:

1. Enter into employment contracts with any individual identified in confidential Appendix 8 of this Order, or any other individuals subsequently identified by agreement between Respondents and a Strobilurin Acquirer, in the event the Strobilurin Acquirer is a Person other than Bayer; and

2. Inspect the personnel files and other documentation relating to the individuals identified in Paragraph III.F.1. of this Order, to the extent permissible under applicable laws, no later than twenty (20) days from the date Respondents sign the Consent Agreement, or no later than the date on which a Strobilurin Acquirer other than Bayer signs an agreement to acquire the Strobilurin Assets.

G. From the date Respondents sign the Consent Agreement until the divestiture required by Paragraph III.A. is completed, Respondents shall take steps, including implementation of appropriate incentive plans (such as payment of all current and accrued benefits and pensions, to which the employees are entitled) and appropriate bonuses, to cause the individuals identified in Paragraph III.F.1. of this Order to accept offers of employment from the Strobilurin Acquirer.

H. Respondents shall not interfere with the employment by the Strobilurin Acquirer of the individuals identified in Paragraph III.F.1. of this Order; shall not offer any incentive to such individuals to decline employment with the Strobilurin Acquirer or to accept other employment with Respondents; and shall remove any contractual impediments with Respondents that may deter such individuals from accepting employment with the Strobilurin Acquirer, including, but not limited to, any non-compete provisions of employment or other contracts with Respondents that would affect the ability of those individuals to be employed by the Strobilurin Acquirer.

I. Respondents shall not make employment offers to any individual identified in Paragraph III.F.1. of this Order for a period of one (1) year from the date this Order becomes final if such individual has accepted an employment offer from the Strobilurin Acquirer, unless such individual has been

involuntarily separated from employment by such Strobilurin Acquirer.

J. For a period up to twelve (12) months from the date the Strobilurin Assets are divested, at the request of the Strobilurin Acquirer at any time during the twelve (12) month period, Respondents shall provide Strobilurin Technical Services to enable the Strobilurin Acquirer to conduct the Strobilurin Business in substantially the same manner as Respondents.

K. For a period up to six (6) months from the date the Strobilurin Assets are divested, at the request of the Strobilurin Acquirer at any time during the six (6) month period, Respondents shall provide payroll administration services and pension administration services to enable the Strobilurin Acquirer to conduct the Strobilurin Business in substantially the same manner as Respondents.

L. Respondents shall use their reasonable best efforts to transfer to the Strobilurin Acquirer, or to assist the Strobilurin Acquirer in obtaining, any approval, consent, ratification, waiver, or other authorization (including governmental) that are or will become necessary to complete the divestitures required by Paragraph III.A. of this Order.

M. The Strobilurin Divestiture Agreement, or any other asset purchase agreement approved by the Commission, shall be incorporated into this Order and made a part hereof. Any failure to comply with the terms of the Strobilurin Divestiture Agreement or such other asset purchase agreement shall constitute a violation of this Order.

N. The purpose of the divestiture required by this Paragraph III is to ensure the continued use of the Strobilurin Assets in the same business in which such assets are engaged at the time of the proposed merger between Respondents and to remedy the

lessening of competition alleged in the Commission=s complaint.

IV.

IT IS FURTHER ORDERED that:

A. Absent the prior written consent of the proprietor of any Acetochlor Non-Public Information or any Strobilurin Non-Public Information, Respondents shall hold and safeguard Acetochlor Non-Public Information and Strobilurin Non-Public Information apart from all other information held by Respondents.

B. Absent the prior written consent of the proprietor of any Acetochlor Non-Public Information, Respondents shall:

1. Subject to Paragraph IV.B.2., not provide, disclose or otherwise make available any Acetochlor Non-Public Information to any of Respondents= businesses relating to the research, development, registration, manufacture, formulation, licensing, distribution, use or sale of any herbicide products; and

2. Use any Acetochlor Non-Public Information solely in activities necessary for Respondents to perform their obligations pursuant to any Acetochlor Supply Agreement.

C. Absent the prior written consent of the proprietor of any Strobilurin Non-Public Information, Respondents shall:

1. Subject to Paragraph IV.C.2., not provide, disclose or otherwise make available any Strobilurin Non-Public Information to any of Respondents= businesses relating to the research, development, registration, manufacture, formulation, licensing, distribution, use or sale of any fungicide products; and

2. Use any Strobilurin Non-Public Information solely in activities necessary for Respondents to perform their obligations pursuant to any Strobilurin Supply Agreement.

D. Respondents shall make available Acetochlor Non-Public Information and Strobilurin Non-Public Information only to those persons employed by Respondent having a need to know and who agree in writing to be bound by the terms of this Paragraph IV.

E. Upon the written request of any proprietor of Acetochlor Non-Public Information or Strobilurin Non-Public Information, Respondents shall return to such proprietor, within fifteen (15) days from the date the request is received, all copies, in any form whatsoever, of such information provided to Respondents.

F. Respondents shall, within thirty (30) days from the date this Order becomes final:

1. Develop and/or maintain policies and procedures necessary to implement the requirements of this Paragraph IV and incorporate such policies and procedures into Respondents= policy and operations manuals;

2. Conduct training for all persons employed by Respondents relating to the requirements of this Paragraph IV; and

3. Develop and/or maintain disciplinary policies in the event any person employed by Respondents fails to comply with any of the policies relating to this Paragraph IV.

V.

IT IS FURTHER ORDERED that Respondents shall provide a copy of this Order to each of Respondents= officers,

employees, or agents having managerial responsibility for any activity related to Respondents= obligations under Paragraphs II through IV of this Order.

VI.

IT IS FURTHER ORDERED that:

A. If Respondents have not divested, absolutely and in good faith the Acetochlor Assets or the Strobilurin Assets within the time and manner required by Paragraphs II and III of this Order, the Commission may at any time appoint a Divestiture Trustee to divest such assets. Such trustee may be the same person appointed by the Commission to serve as Monitor Trustee under Paragraph IV of the Order to Maintain 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 Order.

C. If a Divestiture Trustee is appointed by the Commission or a court pursuant to this Paragraph VI, Respondents shall consent to the following terms and conditions regarding the trustee's powers, duties, authority, and responsibilities:

   1. The Commission shall select the Divestiture 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) business days after receipt of written notice by the staff of the Commission to Respondents of the identity of any proposed trustee, Respondents shall be deemed to have consented to the selection of the proposed trustee.

2. Subject to the prior approval of the Commission, the Divestiture Trustee shall have the exclusive power and authority to effect the divestiture for which he or she has been appointed.

3. Within ten (10) business days after appointment of the Divestiture 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 Divestiture Trustee all rights and powers necessary to permit the trustee to effect the divestiture for which he or she has been appointed.

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

5. The Divestiture Trustee shall have full and complete access to the personnel, books, records and facilities related to 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 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 Divestiture 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 shall be accomplished only in a manner that receives the prior approval of the Commission; *provided, however*, if the Divestiture Trustee receives bona fide offers from more than one acquiring entity, and if the Commission determines to approve more than one such acquiring entity, the trustee shall divest to the acquiring entity or entities selected by Respondents from among those approved by the Commission; provided, further, that Respondents shall select such entity within five (5) business days of receiving written notification of the Commission=s approval.

7. The Divestiture 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 Divestiture 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 Divestiture Trustee shall account for all monies derived from the divestiture and all expenses incurred. After

approval by the Commission and, in the case of a court-appointed trustee, by the court, of the account of the trustee, including fees for his or her services, all remaining monies shall be paid at the direction of the Respondent, and the trustee's power shall be terminated. The Divestiture Trustee's compensation shall be based at least in significant part on a commission arrangement contingent on the trustee's divesting the assets.

8. Respondents shall indemnify the Divestiture 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 Divestiture Trustee ceases to act or fails to act diligently, a substitute trustee shall be appointed in the same manner as provided in this Paragraph VI.

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 Divestiture Trustee issue such additional orders or directions as may be necessary or appropriate to accomplish the divestitures required by this Order.

11. The Divestiture Trustee shall have no obligation or authority to operate or maintain the assets to be divested.

12. The Divestiture Trustee shall report in writing to Respondents and the Commission every sixty (60) days

concerning the trustee's efforts to accomplish the divestiture.

VII.

IT IS FURTHER ORDERED that within sixty (60) days after the date this Order becomes final and annually thereafter, on the anniversary of the date this Order becomes final, until the Order terminates, and at other times as the Commission may require, Syngenta (or Novartis and Zeneca prior to the Syngenta Formation) shall file a verified written report with the Commission setting forth in detail the manner and form in which it intends to comply, is complying, and has complied with this Order and the Order to Maintain Assets. 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 this Order and the Order to Maintain Assets.

VIII.

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

IX.

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

A. Access, during office hours of Respondents and in the presence of counsel, to all facilities, and access to inspect and

copy all books, ledgers, accounts, correspondence, memoranda, and all other records and documents in the possession or under the control of the Respondents relating to compliance with this Order; and

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

X.

IT IS FURTHER ORDERED that this Order shall terminate on December 15, 2010.

By the Commission.

CONFIDENTIAL APPENDICES I-VIII

[Redacted from Public Record Version]

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

I. Introduction

The Federal Trade Commission (ACommission@) has accepted for public comment an Agreement Containing Consent

Order (Aproposed order@) with Novartis AG (ANovartis@) and AstraZeneca PLC (AZeneca@). The proposed order seeks to remedy the anticompetitive effects of the combination of Novartis=s and Zeneca=s agricultural chemical businesses. The proposed order requires Novartis to divest its worldwide fungicide business based on the strobilurin chemical class to Bayer AG and requires Zeneca to divest its worldwide corn herbicide business based on the active chemical ingredient acetochlor to Dow Agrosciences LLC.

II. Description of the Parties and the Proposed Merger

Novartis, a Swiss company, is engaged in the discovery, development, manufacture and sale of crop protection chemicals, seeds, proprietary and generic pharmaceutical products, and human and animal health products. Novartis operates its crop protection and seed businesses in the United States through a variety of subsidiaries, including Novartis US Co., Novartis Agribusiness Biotechnology Research, Inc., Novartis BCM North America, Inc., Novartis Crop Protection, Inc., Novartis Seeds, Inc., Novartis Specialty Crops, Inc., and Wilson Genetics, LLC.

Zeneca is headquartered in the United Kingdom and is also engaged in the discovery, development, manufacture and sale of crop protection chemicals and proprietary and generic pharmaceutical products. Zeneca operates its crop protection business in the United States through several subsidiaries, including Zeneca Holdings, Inc., and Zeneca Ag Products, Inc.

Pursuant to an agreement, Novartis will contribute its agricultural chemical and seed businesses and Zeneca will contribute its agricultural chemical business to a newly-formed Swiss company, Syngenta AG. The merger of these businesses will result in Syngenta having approximately $8 billion in worldwide sales. Novartis=s shareholders will own 61 percent of Syngenta and Zeneca=s shareholders will own 39 percent. Syngenta will be organized and will do business under the laws of Switzerland.

Analysis to Aid Public Comment

III. The Proposed Complaint

The proposed complaint alleges that there are several relevant lines of commerce (i.e., product markets) in which to analyze this transaction: 1) the research, development, manufacture, and sale of herbicides applied before weed emergence (Apre-emergent herbicides@) for control of grassy weeds in corn; and 2) the research, development, manufacture, and sale of foliar fungicides for the treatment of diseases in cereal, citrus, cotton, peanuts, potatoes, rice, vegetables, and turf. The proposed complaint alleges that the United States is the appropriate geographic market to analyze the effects of the combination of Zeneca and Novartis= agricultural chemical businesses. United States law requires that herbicides and fungicides undergo a rigorous registration process with the U.S. Environmental Protection Agency (AEPA@) before they may be used or sold in this country.

Corn Herbicides

Most pre-emergent herbicides used by corn growers to control grassy weeds belong to a class of chemicals known as acetanilides. The major active ingredients within this class are metolachlor, acetochlor, and dimenthenamid. These products are used by growers because preventing early competition between the growing corn and grassy weeds for water and nutrients is essential to the economic production of corn. Failure to reduce weeds can significantly reduce the volume of corn produced per acre (yield) and farmers have no economic substitutes for acetanilide herbicides.

Novartis=s metolachlor-based herbicides are sold under the brand names Dual and Bicep. Zeneca sells an acetochlor-based herbicide under the brand names Fultime, Surpass, Doubleplay, and TopNotch. Zeneca obtains its acetochlor for these products from a Monsanto facility in Muscatine, Iowa, pursuant to a production and registration joint venture between Zeneca and Monsanto.

Novartis is the leading developer, manufacturer, and seller of corn herbicides for pre-emergent control of grasses in the United States. Novartis has a market share of about 50 percent. Zeneca has approximately 15 percent of sales in this market. The proposed merger would increase concentration, as measured by the HHI, by nearly 1400 points to over 4600.

Fungicides

Foliar fungicides, which are applied predominantly to the foliage of plants, contain active chemical ingredients that kill or inhibit the growth of organisms that cause disease. Each crop has an EPA approved fungicide and label restrictions on the fungicide for one crop prohibit its use on another. Therefore, a grower with a disease problem on rice cannot turn to a fungicide labeled only for use on peanuts.

The most significant recent development in foliar fungicides has been the introduction of a new class of fungicides known as strobilurins. Fungicides of this class are effective against a broad spectrum of diseases on a wide variety of crops and are more environmentally friendly than most traditional fungicides. The effectiveness and environmental profile of strobilurin fungicides have created strong demand for the products among growers. Strobilurins introduced to the market have quickly achieved significant market share and have taken sales away from traditional foliar fungicides. Zeneca=s azoxystrobin fungicides and Novartis=s trifloxystrobin fungicides are both strobilurins and are in direct competition.

Novartis obtained U.S. registration for its trifloxystrobin fungicides in 2000. They are sold under the brands Flint and Compass. In addition, Novartis sells a combination product of propiconazole and trifloxystrobin under the brand Stratego. Zeneca=s azoxystrobin fungicides, which were registered in the

U.S. in 1997, are sold under the brands Abound, Heritage, and Quadris.

Zeneca and Novartis, along with BASF Corporation, are the only companies with strobilurin fungicides registered for sale in the United States. No company other than Zeneca, Novartis, or BASF is likely to introduce a new strobilurin fungicide into the U.S. market within the next three or four years.

Novartis and Zeneca are the leading sellers of foliar fungicides in the U.S. market, and account for a combined total of approximately 40% of yearly sales. Typically, for a given plant, there are only two or three significant sellers of these fungicides. In cereals, peanuts, potatoes, rice, and turf, sales by the top two or three fungicide sellers range from nearly 70% to more than 90% of all sales. In vegetables, the top five account for 70%.

According to the Commission=s complaint, entry into the relevant markets would not be timely, likely, or sufficient in its magnitude, character, and scope to deter or counteract anticompetitive effects of the merger. The need for extensive research and development and registration requirements create long lead times for the introduction of new products. Developing a new herbicide or fungicide can take six to ten years from the time when a potentially attractive active ingredient is identified. Extensive testing in the field is necessary to evaluate efficacy and use requirements. In addition, several years of testing for negative environmental and toxicological impact is necessary to achieve registration. Finally, patents and other intellectual property create large and potentially insurmountable barriers to entry.

The complaint alleges that if the proposed transaction were consummated, it may substantially lessen competition or tend to create a monopoly in the relevant markets in violation of Section 7 of the Clayton Act, as amended, 15 U.S.C. ' 18, and Section 5 of the FTC Act, as amended, 15 U.S.C. ' 45. Specifically the merger will in both relevant markets:

a. eliminate Zeneca and Novartis as substantial, independent competitors;

b. eliminate actual, direct, and substantial competition between Zeneca and Novartis;

c. reduce innovation competition among researchers and developers of herbicides and fungicides, including the reduction in, delay of, or redirection of research and development projects;

d. increase the level of concentration in the relevant markets;

e. increase barriers to entry into the relevant markets;

f. increase the merged firm=s ability to exercise market power unilaterally by combining two of the three closest substitutes in each of the markets; and

g. increase the likelihood and degree of coordinated interaction between or among competitors in the markets.

IV. Terms of the Agreement Containing Consent Order

The proposed order is designed to remedy the alleged anticompetitive effects of the proposed merger. Under the terms of the proposed order, Proposed Respondent Zeneca will divest its worldwide acetochlor herbicide business to Dow AgroSciences LLC, a wholly-owned subsidiary of Dow Chemical Company. Specifically, Zeneca will divest to Dow Agro the intellectual property, know-how, registrations, trademarks, rights to technical assistance, and rights under the joint venture contracts with Monsanto that are necessary to the manufacture and sale of acetochlor-based corn herbicides. Zeneca is also required to provide certain services and inputs on a transitional basis.

Dow Agro is a Delaware corporation with its principal place of business in Indianapolis, Indiana. Dow Agro provides pest management, agricultural, and biotechnology products worldwide and had 1999 sales of more than $2 billion. Dow Agro sells numerous herbicides, but it does not produce a product with acetochlor as an active ingredient.

Proposed Respondent Novartis will divest its worldwide strobilurin fungicide business to Bayer AG. Specifically, Novartis will divest its trifloxystrobin production facilities in Muttenz, Switzerland, and intellectual property, know-how, and registrations, and trademarks necessary to manufacture the divested strobilurin fungicides. Novartis is required to provide certain services and inputs on a transitional basis.

Bayer is organized and based in Germany. Bayer is a global company that operates in four business segments: healthcare, agriculture, polymers, and chemicals. In 1999, it had sales of over $20 billion. Bayer does not sell or produce a strobilurin fungicide approved by the EPA.

The order requires both Zeneca and Novartis to provide opportunities for Dow Agro and Bayer to enter into employment contracts with the individuals that are key to the operation of the divested businesses and must remove any contractual limits to deter these individuals from accepting employment with Bayer or Dow Agro. Zeneca and Novartis are also prohibited from making employment offers to these employees for a period of one year.

Proposed Respondents must divest the assets no later than ten business days after the formation of Syngenta or ten days after gaining necessary foreign governmental approvals for the transfer of the divested assets. The order requires, however, that the divestitures must be made within six months from the date the Commission places the proposed order on the public record for comment. The Commission has issued an Order to Maintain Assets that requires Zeneca, Novartis, and Syngenta to preserve the assets as an ongoing business pending the divestitures.

To ensure that Proposed Respondents expeditiously and completely divest their respective businesses to Dow Agro and Bayer and maintain the assets pending divestiture, the Commission is allowed to appoint a trustee. The trustee will report to the Commission on Proposed Respondents= compliance with their obligations under the Order and the Order to Maintain Assets every sixty days for a period of six months from the date Respondents sign the consent agreement and annually until expiration of the initial term for the supply agreements.

Proposed Respondents must provide the Commission with a report of compliance with the proposed order within sixty days after the proposed order becomes final and every ninety days thereafter until they have complied with their divestiture obligations. Respondents are also required to provide annual reports during the term of the proposed order.

In the event that Proposed Respondents fail to divest the assets 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 thirty days for receipt of comments by interested persons. Comments received during this period will become part of the public record. After thirty days, the Commission will again review the 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

THE BOEING COMPANY

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-3992; File No. 0010092
Complaint, December 29, 2000--Decision, December 29, 2000

This consent order addresses the $3.75 billion acquisition by The Boeing Company of Hugh Space and Communications from General Motors Corporation. The complaint alleges that the transaction, if consummated, would give Boeing anticompetitive advanges in the markets for satellites and satellite technologies and systems engineering and technical assistance ("SETA") services to the United States Department of Defense. The order prohibits respondent from performing certain SETA services for the classified program in the future. To prevent the exchange of anticompetitive information the order also requires respondent to use non-public SETA services information only its capacity as provider of technical assistance to DoD, or for the provision of SETA services not prohibited by the Order and erect a Afirewall@ between its SETA services division and Boeing=s satellite division. In addition, respondent is required to assist DoD in transferring the SETA services to one of its own research and development centers by providing technical assistance, at the request of DoD, for a period not to exceed one year and providing to DoD all documents relating to certain SETA services that Boeing has received in its role as SETA contractor. The order also prohibits Respondent=s satellite business from providing any non-public launch information to Respondents launch vehicle business, and likewise providing and non-public information from its launch vehicle business to its satellite business. The order requires that for any satellite manufactured by Boeing/Hughes prior to the date the agreement becomes final, Boeing must provide satellite interface information, to any launch vehicle supplier within thirty days from the date Boeing receives a request for such information and provide satellite interface information relating to any of its satellite buses, models, or product lines manufactured after the date this agreement becomes final, to any launch vehicle supplier that requests such information or to whom Boeing previously supplied satellite interface information. For each satellite manufactured for the United States Government, Boeing shall only be required to provide satellite interface information to any launch vehicle supplier specified by the United States Government. In addition, the order requires Boeing/Hughes to provide satellite interface information to any launch vehicle supplier specified by any satellite

customer no later than Boeing provides such information to its own launch vehicle businesses.

Participants

For the Commission: *Norman A. Armstrong, Jr., Rodney B. Choo, Tamara L. Bond.*

For the Respondents: *Benjamin S. Sharp* and *Thomas L. Boeder, Perkins Coie, Peter D. Standish, Alan R. Kusinitz,* and *Fiona A. Schaeffer, Weil, Gotshal & Manges, Raymond A. Jacobsen* and *Jon B. Dubrow, McDermott, Will & Emery,* and *Douglas F. Broeder* and *Kevin M. King, Coudert Brothers.*

COMPLAINT

The Federal Trade Commission (ACommission@), having reason to believe that Respondent The Boeing Company (ABoeing@), a corporation subject to the jurisdiction of the Commission, has agreed to acquire certain assets of General Motors Corporation, a company subject to the jurisdiction of the Commission, in violation of Section 7 of the Clayton Act, as amended, 15 U.S.C. ' 18, and Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. ' 45, and it appearing to the Commission that a proceeding in respect thereof would be in the public interest, hereby issues its Complaint, stating its charges as follows:

I. DEFINITIONS

1. ASETA Services@ means systems engineering, technical assistance and support services relating to a certain classified contract between the United States Department of Defense and Boeing identified for purposes of this Complaint as Contract 4208.

2. ASatellite@ means an unmanned machine that is launched from the Earth's surface for the purpose of transmitting data back

to Earth and is designed either to orbit the Earth or to travel away from the Earth.

3. ACommercial Low Earth Orbit Satellite@ means a Satellite that is designed to orbit at approximately 100 miles to 300 miles above the Earth=s surface in low earth orbit for the purpose of transmitting data back to Earth, which is sold to any customer other than the U.S. government.

4. ACommercial Medium Earth Orbit Satellite@ means a Satellite that is designed to orbit approximately 10,000 miles above the Earth=s surface in medium earth orbit for the purpose of transmitting data back to Earth, which is sold to any customer other than the U.S. government.

5. ACommercial Geosynchronous Earth Orbit Satellite@ means a Satellite that is designed to orbit approximately 22,300 miles above the Earth=s surface in geosynchronous earth orbit for the purpose of transmitting data back to Earth, which is sold to any customer other than the U.S. government.

6. AGovernment Satellite@ means an unmanned machine that is launched from the Earth's surface for the purpose of transmitting data back to Earth and is designed either to orbit the Earth or to travel away from the Earth and is sold to the U.S. government.

7. ALaunch Vehicle@ means any vehicle designed to launch one or more Satellites from the Earth=s surface into space.

8. ARespondent@ means Boeing.

9. AHughes" means Hughes Space and Communications Company, Hughes Space and Communications International, Hughes Space and Communications International Service Company, Spectrolab, Inc., Hughes Electron Dynamics, Hughes

Telecommunications and Space Company=s 2.69% interest in ICO Global Communications Ltd., and Hughes Telecommunications and Space Company=s 2% interest in Thuraya Satellite Telecommunications Private Joint Stock Company.

II. RESPONDENT

10. Respondent Boeing 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 7755 E. Marginal Way South, Seattle, Washington 98108. Respondent Boeing is engaged in, among other things, the research, development, manufacture and sale of: Satellites, including Commercial Low Earth Orbit Satellites and Government Satellites, and Launch Vehicles.

11. Respondent is, and at all times relevant herein has been, 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.

III. ACQUIRED COMPANY

12. General Motors 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 100 Renaissance Center, P.O. Box 100, Detroit, Michigan 48265-1000. General Motors, through its subsidiary Hughes, is engaged in, among other things, the research, development, manufacture, and sale of Satellites, including Commercial Geosynchronous Earth Orbit Satellites, Commercial Medium Earth Orbit Satellites, and Government Satellites.

13. General Motors is, and all times herein has been, 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.

IV. THE ACQUISITION

14. On January 13, 2000, Boeing and General Motors Corporation subsidiaries, Hughes Electronics Corporation and Hughes Telecommunications and Space Company, entered into a Stock Purchase Agreement under which Boeing is to acquire certain assets of General Motors Corporation, including Hughes, for approximately $3.75 billion (AAcquisition@).

V. THE RELEVANT MARKETS

15. For purposes of this Complaint, the relevant lines of commerce in which to analyze the effects of the Acquisition are:

a. the provision of SETA Services;

b. a certain classified program for which Respondent is providing SETA Services;

c. the research, development, manufacture and sale of Commercial Geosynchronous Earth Orbit Satellites;

d. the research, development, manufacture and sale of Commercial Medium Earth Orbit Satellites;

e. the research, development, manufacture and sale of Commercial Low Earth Orbit Satellites;

f. the research, development, manufacture and sale of Government Satellites; and

g. the research, development, manufacture and sale of Launch Vehicles.

16. For purposes of this Complaint, the United States is the relevant geographic area in which to analyze the effects of the Acquisition on the provision of SETA Services and a certain classified program for which Respondent is providing SETA Services.

17. For purposes of this Complaint, the world is the relevant geographic area in which to analyze the effects of the Acquisition on the research, development, manufacture and sale of Commercial Geosynchronous Earth Orbit Satellites, Commercial Medium Earth Orbit Satellites, and Commercial Low Earth Orbit Satellites.

18. For purposes of this Complaint, the United States is the relevant geographic area in which to analyze the effects of the Acquisition on the research, development, manufacture and sale of Government Satellites.

19. For purposes of this Complaint, the United States or the world is the relevant geographic area in which to analyze the effects of the Acquisition on the research, development, manufacture and sale of Launch Vehicles, depending on the customer.

VI. STRUCTURE OF THE MARKETS

20. The market for the provision of SETA Services is highly concentrated as measured by the Herfindahl-Hirschman Index (AHHI@). Respondent has been the only provider of SETA Services.

21. Respondent, through the Acquisition, would be engaged in the provision of SETA Services, while at the same time would be a competing bidder, for a certain classified program.

22. The research, development, manufacture and sale of Satellites, including Commercial Geosynchronous Earth Orbit Satellites, Commercial Medium Earth Orbit Satellites, Commercial Low Earth Orbit Satellites, and Government Satellites, are all highly concentrated markets as measured by the HHI.

23. The market for Launch Vehicles is highly concentrated as measured by the HHI.

24. Respondent, through the Acquisition, would be engaged in the research, development, manufacture and sale of Launch Vehicles and a wide range of Satellites, which are launched from the Earth=s surface by Launch Vehicles.

VII. BARRIERS TO ENTRY

25. Entry into the market for the provision of SETA Services would not occur in a timely manner to deter or counteract the adverse competitive effects described in Paragraph 28 because of, among other things, the time required to develop the experience and expertise necessary to effectively provide these services.

26. Entry into the markets for the research, development, manufacture and sale of Commercial Geosynchronous Earth Orbit Satellites, Commercial Medium Earth Orbit Satellites, Commercial Low Earth Orbit Satellites, and Government Satellites, is difficult, unlikely and would not occur in a timely manner to deter or counteract the adverse competitive effects described in Paragraph 28 because of, among other things, the time and expense required to research and develop a competitive product, acquire the necessary manufacturing equipment and facilities, and establish a reputation for high quality products among customers in these markets.

27. Entry into the market for the research, development, manufacture and sale of Launch Vehicles is difficult, unlikely and

would not occur in a timely manner to deter or counteract the adverse competitive effects described in Paragraph 28 because of, among other things, the time and expense required to research and develop a competitive product, acquire the necessary manufacturing equipment and facilities, and establish a reputation for high quality products among customers in these markets.

VIII. EFFECTS OF THE ACQUISITION

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

(a) Respondent, as a supplier of SETA Services, may be in a position to disadvantage or raise the costs of other competitors for a certain classified program, whereby actual competition between Respondent and other competitors for that program would be reduced;

(b) Respondent may gain access to competitively sensitive non-public information concerning other Satellite suppliers, whereby:

(1) actual competition between Respondent and Satellite suppliers would be reduced; and

(2) the research, development, innovation and quality of Satellites may be reduced;

(c) Respondent may gain access to competitively sensitive non-public information concerning other Launch Vehicle suppliers, whereby:

(1) actual competition between Respondent and Launch Vehicle suppliers would be reduced; and

(2) the research, development, innovation and quality of Launch Vehicles may be reduced; and

(d) Respondent, as a supplier of Satellites and Launch Vehicles, may be in a position to disadvantage or raise the costs of other Launch Vehicle suppliers by withholding Satellite information necessary to make a Satellite compatible with a Launch Vehicle.

IX. VIOLATIONS CHARGED

29. The Acquisition agreement described in Paragraph 14 constitutes a violation of Section 5 of the FTC Act, as amended 15 U.S.C. ' 45.

30. The Acquisition described in Paragraph 14, if consummated, would constitute a violation of Section 7 of the Clayton Act, as amended, 15 U.S.C. ' 18, and Section 5 of the FTC Act, as amended, 15 U.S.C. ' 45.

WHEREFORE, THE PREMISES CONSIDERED, the Federal Trade Commission on this twenty-ninth day of December, 2000, issues its Complaint against said Respondent.

By the Commission.

DECISION AND ORDER

The Federal Trade Commission (ACommission@), having initiated an investigation of the proposed acquisition by Respondent The Boeing Company (ABoeing@) of certain assets of

General Motors Corporation, and Respondent having been furnished thereafter with a copy of a draft of Complaint which the Bureau of Competition presented to the Commission for its consideration and which, if issued by the Commission, would charge Respondent with violations of Section 7 of the Clayton Act, as amended, 15 U.S.C. ' 18, and Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. ' 45; and

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

The Commission having thereafter considered the matter and having determined that it has reason to believe that Respondent has violated the 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, and having duly considered the comments received from interested persons pursuant to Commission Rule 2.34, 16 C.F.R. ' 2.34, and having determined to modify the Decision and Order in certain respects, now in further conformity with the procedure described in Commission Rule 2.34, 16 C.F.R. ' 2.34, the Commission hereby issues its Complaint, makes the following jurisdictional findings and issues the following Decision and Order (AOrder@):

1. Respondent Boeing 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 7755 E. Marginal Way South, Seattle, Washington 98108.

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

ORDER

I.

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

A. ARespondent@ or ABoeing@ means The Boeing Company, its directors, officers, employees, agents, representatives, predecessors, successors and assigns; its subsidiaries, divisions, groups, affiliates, partnerships and joint ventures controlled by Boeing, and the respective directors, officers, employees, agents, representatives, successors and assigns of each.

B. AHughes" means Hughes Space and Communications Company, Hughes Space and Communications International, Hughes Space and Communications International Service Company, Spectrolab, Inc., Hughes Electron Dynamics, Hughes Telecommunications and Space Company=s 2.69% interest in ICO Global Communications Ltd., and Hughes Telecommunications and Space Company=s 2% interest in Thuraya Satellite Telecommunications Private Joint Stock Company.

C. AAcquisition@ means the proposed acquisition of Hughes by Boeing pursuant to the Stock Purchase Agreement dated January 13, 2000.

D. ACommission@ means the Federal Trade Commission.

E. ASatellite Interface Information@ means any information necessary for a Launch Vehicle Supplier to research, develop, manufacture or modify any Launch Vehicle for use with Respondent=s Satellites.

F. Launch Vehicle" means any vehicle with the lift capability to launch any Satellite manufactured by Respondent.

G. ALaunch Vehicle Supplier@ means any entity engaged in the research, development, manufacture or sale of Launch Vehicles, including any Boeing Launch Vehicle Business or Sea Launch.

H. "Satellite" means an unmanned machine that is launched from the Earth's surface for the purpose of transmitting data back to Earth and which is designed either to orbit the Earth or to travel away from the Earth. The term Satellite does not include missiles and unmanned aerial vehicles.

I. ASatellite Manufacturer@ means any entity engaged in the research, development, manufacture or sale of Satellites.

J. ASea Launch@ means the Launch Vehicle company jointly owned by Boeing, Kvaerner Maritime A.S., RSC Energia, and KB Yuzhnoye/PO Yuzmash, which is headquartered at Sea Launch Home Port, 2700 Nimitz Road, Long Beach, California 90802-1047.

K. "Boeing Launch Vehicle Business" means any Boeing entity engaged in the research, development, manufacture or sale of Launch Vehicles.

L. "Boeing Satellite Business" means any Boeing entity engaged in the research, development, manufacture or sale of Satellites.

M. "Non-Public Launch Vehicle Information" means any information disclosed by any Launch Vehicle Supplier to any Boeing Satellite Business. Non-Public Launch Vehicle Information shall not include: (1) information already within the public domain; (2) information that falls within the public domain through no violation of this Order by Respondent; (3) information disclosed by any

Boeing Launch Vehicle Business; (4) information that becomes known to Respondent from a third party not in breach of a confidentiality or non-disclosure agreement with respect to such information; and (5) information after six (6) years from the date of disclosure of such Non-Public Launch Vehicle Information to Boeing=s Satellite Business, or such other period as agreed to in writing by Respondent and a provider of the information.

N. "Non-Public Satellite Information" means any information disclosed by any Satellite Manufacturer or owner to Boeing=s Launch Vehicle Business or Sea Launch. Non-Public Satellite Information shall not include: (1) information already within the public domain; (2) information that falls within the public domain through no violation of this Order by Respondent; (3) information disclosed by any Boeing Satellite Business; (4) information that becomes known to Respondent from a third party not in breach of a confidentiality or non-disclosure agreement with respect to such information; and (5) information after six (6) years from the date of disclosure of such Non-Public Satellite Information to any Boeing Launch Vehicle Business or Sea Launch, or such other period as agreed to in writing by Respondent and a provider of the information.

O. ASETA Services@ means systems engineering, technical assistance, and support services relating to a certain classified contract between the United States Department of Defense and Boeing identified for purposes of this Order as Contract 4208.

P. ANon-Public SETA Services Information@ means any information not in the public domain disclosed by the United States Department of Defense or any company, other than Hughes, to Respondent in its capacity as the provider of SETA Services.

II.

IT IS FURTHER ORDERED that:

A. Respondent shall provide no further SETA Services on classified programs identified in Section 3.2 of a modification dated August 1, 2000, to a certain classified contract between the United States Department of Defense and Respondent, identified for purposes of this Order as Contract 4208.

B. Upon reasonable notice from the United States Department of Defense, Respondent shall provide such training and assistance to the United States Department of Defense as is reasonably necessary to enable the United States Department of Defense to provide SETA Services in substantially the same manner and quality as provided by Respondent prior to the Acquisition. Such assistance shall include reasonable consultation with knowledgeable employees and training at a facility designated by the United States Department of Defense for a period of time sufficient to satisfy the United States Department of Defense that its personnel are appropriately trained in the skills necessary to perform SETA Services in substantially the same manner and quality provided by Respondent prior to the Acquisition. However, Respondent shall not be required to continue providing such technical assistance for more than one (1) year from the date the Respondent signs the Consent Agreement. Respondent shall charge the United States Department of Defense at a rate no more than its own costs for providing such technical assistance.

C. Respondent shall use any Non-Public SETA Services Information only in Respondent=s capacity as provider of technical assistance to the United States Department of Defense, pursuant to Paragraph II.B. of this Order, or SETA work authorized by the August 1, 2000,

modification to a certain classified contract between the United States Department of Defense and Respondent, identified for purposes of this Order as Contract 4208.

D. Respondent shall not provide, disclose, or otherwise make available Non-Public SETA Services Information to any Boeing Satellite Business.

E. Within ten (10) days of the date the Commission accepts the Consent Agreement for public comment, Respondent shall return or submit to the United States Department of Defense all documents, including all copies, in the possession of Respondent that were received or created by Respondent in its capacity as a provider of the SETA Services identified in Section 3.2 of a modification dated August 1, 2000, to a certain classified contract between the United States Department of Defense and Respondent, identified for purposes of this Order as Contract 4208, except for documents necessary to provide the technical assistance identified in Paragraph II.B.

III.

IT IS FURTHER ORDERED that:

A. Respondent shall not, absent the prior written consent of the proprietor of Non-Public Satellite Information, provide, disclose or otherwise make available to any Boeing Satellite Business any Non-Public Satellite Information.

B. Respondent shall use any Non-Public Satellite Information only in Respondent=s capacity as a Launch Vehicle Supplier, absent the prior written consent of the proprietor of Non-Public Satellite Information.

IV.

IT IS FURTHER ORDERED that:

A. Respondent shall not, absent the prior written consent of the proprietor of Non-Public Launch Vehicle Information, provide, disclose or otherwise make available to any Boeing Launch Vehicle Business or Sea Launch any Non-Public Launch Vehicle Information.

B. Respondent shall use any Non-Public Launch Vehicle Information only in Respondent=s capacity as a Satellite Manufacturer, absent the prior written consent of the proprietor of Non-Public Launch Vehicle Information.

V.

IT IS FURTHER ORDERED that within thirty (30) days from the date on which the Respondent signs the Consent Agreement, Respondent shall take steps to ensure that all employees of any Boeing Launch Vehicle Business and any Boeing Satellite Business comply with Paragraphs II., III. and IV. of this Order. Such steps shall include without limitation: (1) distribution of this Order to Sea Launch, and to the directors, officers, and employees of any Boeing Launch Vehicle Business and any Boeing Satellite Business; (2) development of procedures, policies, and practices relating to the receipt, identification, custody, use, and disposal of any Non-Public Satellite Information, Non-Public Launch Vehicle Information, and Non-Public SETA Services Information; (3) incorporation of such procedures, policies, and practices into Respondent=s operations manuals or other systems used for disseminating such procedures, policies, and practices; (4) in-person training of the employees of any Boeing Launch Vehicle Business and any Boeing Satellite Business; and (5) development of new procedures or incorporation into existing procedures measures to

be used in the event an employee of any Boeing Launch Vehicle Business or any Boeing Satellite Business fails to comply with such procedures, policies, and practices.

VI.

IT IS FURTHER ORDERED that:

A. Respondent shall notify all Launch Vehicle Suppliers, in writing, that Satellite Interface Information relating to any Respondent Satellite bus, model, or product line is available upon request for any Respondent Satellite; ***provided, however,*** Respondent shall not provide such notification for any United States Government Satellite. Respondent shall make such notification:

1. Within thirty (30) days from the date this Order becomes final for each Satellite manufactured prior to the date this Order becomes final; and

2. No later than thirty (30) days before the date Respondent provides any Satellite Interface Information to any Boeing Launch Vehicle Business or to Sea Launch for any Respondent Satellite bus, model, or product line manufactured after the date this Order becomes final.

B. Respondent shall furnish each Launch Vehicle Supplier with instructions for requesting Satellite Interface Information relating to any Respondent Satellite bus, model or product line at the same time Respondent notifies the Launch Vehicle Supplier pursuant to Paragraph VI.A.

C. Respondent shall provide all Satellite Interface Information relating to any Respondent Satellite bus, model, or product line to any Launch Vehicle Supplier:

1. For any Satellite manufactured prior to the date this Order becomes final, within thirty (30) days from the date Respondent receives a request from such Launch

Vehicle Supplier; ***provided, however,*** that Respondent shall not be required by this Paragraph VI.C.1 to provide Satellite Interface Information for any Satellite manufactured for the United States Government prior to the date this Order becomes final.

2. For any Satellite manufactured after the date this Order becomes final, (i) who requests such information, or (ii) to whom Respondent has previously supplied such information, at a time no later than Respondent provides any Satellite Interface Information to any Boeing Launch Vehicle Business or to Sea Launch; ***provided, however,*** that if Respondent receives a request for Satellite Interface Information after it has provided such information to any Boeing Launch Vehicle Business or Sea Launch pursuant to the requirements of this Paragraph, Respondent shall provide the Satellite Interface Information within twenty (20) days after receiving the request; **provided, further,** that for each Satellite manufactured for the United States Government, Respondent shall only be required to provide Satellite Interface Information to any Launch Vehicle Suppliers specified by the United States Government.

D. Respondent shall provide to any Launch Vehicle Supplier to whom Satellite Interface Information relating to any Respondent Satellite bus, model, or product line has been previously supplied any revisions to such Satellite Interface Information at a time no later than it provides such revisions to any Boeing Launch Vehicle Business or Sea Launch.

E. Respondent shall provide Satellite Interface Information to any Launch Vehicle Supplier specified by any Satellite customer at a time no later than Respondent provides such

information to any Boeing Launch Vehicle Business or to Sea Launch.

F. All obligations of this Paragraph shall be subject to Respondent=s compliance with the export licensing laws, rules and regulations of the United States that may be applicable to Respondent=s export of Satellite Interface Information. Respondent shall use its best efforts to obtain permission pursuant to such export licensing laws, rules and regulations relating to the export of Satellite Interface Information required by this Paragraph.

G. Respondent may make the receipt of Satellite Interface Information subject to a Launch Vehicle Supplier=s prior execution of a confidentiality agreement comparable to industry standards of confidentiality.

H. Respondent shall create and maintain records sufficient to identify: (1) the contents of any Satellite Interface Information provided to each Launch Vehicle Supplier for each of Respondent=s Satellites, and (2) all Launch Vehicle Suppliers to whom Respondent has provided Satellite Interface Information or notification pursuant to this Paragraph. Such Launch Vehicle Supplier records shall include the name of the Launch Vehicle Supplier, its address, the name and telephone number of the contact person, and the date on which Respondent provided Satellite Interface Information.

I. Nothing in this Paragraph shall preclude Respondent from entering into any agreement for the purpose of facilitating integration between any Respondent Satellite and any Launch Vehicle.

VII.

IT IS FURTHER ORDERED that:

A. Sheila Widnall is hereby appointed to serve as Monitor Trustee to assure that Respondent fully performs its responsibilities in a timely manner as required by this Order.

B. Respondent shall consent to the following terms and conditions regarding the powers, duties, authorities, and responsibilities of the Monitor Trustee:

1. The Monitor Trustee shall have the power and authority to monitor Respondent=s compliance with the terms of this Order and shall exercise such power and authority and carry out the duties and responsibilities of the Monitor Trustee in a manner consistent with the purposes of this Order and in consultation with the Commission.

2. Within twenty (20) days after it signs the Consent Agreement, Respondent shall execute a trust agreement that, subject to the approval of the Commission, confers on the Monitor Trustee all the rights and powers necessary to permit the Monitor Trustee to monitor Respondent=s compliance with the terms of this Order in a manner consistent with the purposes of this Order. The Monitor Trustee shall sign a confidentiality agreement prohibiting the use, or disclosure to anyone other than the Commission, of any competitively sensitive or proprietary information gained as a result of his or her role as Monitor Trustee.

3. The Monitor Trustee shall serve for ten (10) years from the date the trust agreement is approved by the Commission.

4. The Monitor Trustee shall have full and complete access to Respondent=s personnel, books, records,

documents, facilities and technical information relating to compliance with this Order, or to any other relevant information, as the Monitor Trustee may reasonably request, to the extent permissible under applicable governmental security procedures. Respondent shall cooperate with any reasonable request of the Monitor Trustee, including any request for assistance to obtain any necessary security clearances. Respondent shall take no action to interfere with or impede the Monitor Trustee's ability to monitor Respondent=s compliance with this Order.

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

6. Respondent shall indemnify the Monitor Trustee and hold the Monitor Trustee harmless against any losses, claims, damages, liabilities or expenses arising out of, or in connection with, the performance of the Monitor 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 Monitor Trustee.

7. If at any time the Commission determines that the Monitor Trustee has ceased to act or failed to act

diligently, or is unwilling or unable to continue to serve, the Commission may appoint a substitute to serve as Monitor Trustee. The Commission shall select a substitute Monitor Trustee subject to the consent of Respondent, which consent shall not be unreasonably withheld. If Respondent has not opposed, in writing, including the reasons for opposing, the selection of any proposed trustee within ten (10) days after notice by the staff of the Commission to Respondent of the identity of any proposed substitute Monitor Trustee, Respondent shall be deemed to have consented to the selection of the proposed substitute. Respondent shall execute the trust agreement required by Paragraph VII.B.2 of this Order within ten (10) days after the Commission appoints a substitute Monitor Trustee. The substitute Monitor Trustee shall serve according to the terms and conditions of this Paragraph VII.

8. The Commission may on its own initiative or at the request of the Monitor Trustee issue such additional orders or directions as may be necessary or appropriate to assure compliance with the requirements of this Order.

9. The Monitor Trustee shall report in writing to the Commission concerning Respondent=s compliance with this Order:

    a. Every sixty (60) days for a period of six months from the date Respondent signs the Consent Agreement; and

    b. Annually thereafter on the anniversary of the date this Order becomes final during the remainder of

the Monitor Trustee=s period of appointment pursuant to this Order.

VIII.

IT IS FURTHER ORDERED that:

A. Respondent shall deliver a copy of this Order to any Launch Vehicle Supplier prior to obtaining from the Launch Vehicle Supplier any Non-Public Launch Vehicle Information relating to that Launch Vehicle Supplier=s Launch Vehicles. Within ten (10) days of the date the Commission accepts the Consent Agreement for public comment, Respondent shall deliver a copy of this Order to any Launch Vehicle Supplier that has previously supplied Non-Public Launch Vehicle Information to Hughes.

B. Respondent shall deliver a copy of this Order to any Satellite Manufacturer prior to obtaining from the Satellite Manufacturer any Non-Public Satellite Information relating to that Satellite Manufacturer=s Satellites.

IX.

IT IS FURTHER ORDERED that within sixty (60) days after the date this Order becomes final and annually for the next ten (10) years on the anniversary of the date this Order becomes final, and at such times as the Commission may require, respondent shall submit to the Commission a verified written report setting forth in detail the manner and form in which it intends to comply, is complying, and has complied with Paragraphs II. through VIII. of this Order. Respondent shall include in its compliance reports, among other things that are required from time to time, a full description of the efforts being made to comply with Paragraphs II. through VIII. of this Order.

X.

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

XI.

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

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

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

XII.

IT IS FURTHER ORDERED that this Order shall terminate on December 29, 2020.

Analysis of Proposed Consent Order to Aid Public Comment

The Federal Trade Commission (ACommission@) has accepted, subject to final approval, an Agreement Containing Consent Order (AConsent Agreement@) from The Boeing Company (ABoeing@) designed to remedy the anticompetitive effects resulting from Boeing=s acquisition of certain assets of General Motors Corporation. The proposed Consent Agreement prohibits Boeing from providing systems engineering and technical assistance (ASETA@) services to the United States Department of Defense (ADoD@) for a certain classified program. The proposed Consent Agreement also prohibits Boeing=s launch vehicle division from gaining access to any non-public information that Boeing=s satellite division receives from competing launch vehicle suppliers when those competing suppliers launch Boeing=s satellites. Similarly, the proposed Consent Agreement prohibits Boeing=s satellite division from gaining access to any non-public information that Boeing=s launch vehicle business receives from competing satellite suppliers. In addition, the proposed Consent Agreement requires Boeing to make available all necessary satellite interface information, which is used to make a satellite compatible with a launch vehicle, to all launch vehicle suppliers.

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

Pursuant to a Stock Purchase Agreement entered into on January 13, 2000, Boeing agreed to acquire certain assets of General Motors Corporation, including Hughes Space and Communications Company, Hughes Space and Communications

International, Hughes Space and Communications International Service Company, Spectrolab, Inc., Hughes Electron Dynamics, Hughes Telecommunications and Space Company=s 2.69% interest in ICO Global Communications Ltd., and Hughes Telecommunications and Space Company=s 2% interest in Thuraya Satellite Telecommunications Private Joint Stock Company, for approximately $3.75 billion. The Commission=s Complaint alleges that the transaction, if consummated, would violate Section 7 of the Clayton Act, as amended, 15 U.S.C. ' 45, and Section 5 of the FTC Act, as amended, 15 U.S.C. ' 18, in the following markets:

(1) a certain classified program for which Boeing is providing SETA services;[1]

(2) the research, development, manufacture, and sale of commercial geosynchronous earth orbit satellites;

(3) the research, development, manufacture, and sale of commercial medium earth orbit satellites;

(4) the research, development, manufacture, and sale of commercial low earth orbit satellites;

(5) the research, development, manufacture, and sale of government satellites; and

---

[1] The complaint includes an additional line of commerce, the provision of SETA Services, in which to analyze the effects of the transaction. This line of commerce is included in the complaint because the proposed merger results in the integration of Boeing into two non-horizontal markets: (1) the provision of SETA Services; and (2) a competitor for a certain classified program for which Boeing is providing SETA services. It is necessary to analyze the competitive conditions in the market for the provision of SETA Services in order to determine whether there would be anticompetitive effects in the related market for a certain classified program for which Boeing is providing SETA services.

(6) the research, development, manufacture, and sale of launch vehicles.

The proposed Consent Agreement remedies the alleged violations in each market. First, Boeing is the sole supplier of SETA services to DoD for a certain classified program. Boeing provides these services to DoD under a classified contract identified for purposes of the Complaint as Contract 4208. Hughes is one of two competing contractors for the classified program for which Boeing is providing SETA services. Thus, as a result of the proposed acquisition, Boeing would be both the provider of SETA services and a competing contractor for this classified program.

As a SETA contractor, Boeing must receive a great deal of competitively sensitive information, including detailed cost and bidding data, from contractors competing for the classified program. With access to such information, Boeing may be able to raise prices for the classified program by bidding less aggressively than it otherwise would. In addition, Boeing=s position as SETA contractor could enable it anticompetitively to favor itself and/or disfavor its competitors in a number of ways, such as submitting unfair evaluations of its competitors= proposals.

The proposed Consent Agreement remedies the proposed acquisition=s potential anticompetitive effects in this classified program by prohibiting Boeing from performing certain SETA services for this classified program in the future. To prevent the anticompetitive exchange of information, the Consent Agreement requires Boeing to: (1) use non-public SETA services information only its capacity as provider of technical assistance to DoD, or for the provision of SETA services not prohibited by the Order; and (2) erect a Afirewall@ between its SETA services division and Boeing=s satellite division. In addition, to assist DoD in the transition of these SETA services responsibilities to one of its own research and development centers, the Consent Agreement further requires Boeing to: (1) provide technical

assistance, at the request of DoD, for a period not to exceed one year; and (2) provide to DoD all documents relating to certain SETA services that Boeing has received in its role as SETA contractor.

Second, Hughes is a significant supplier of satellites and Boeing is a significant supplier of launch vehicles, which are used to launch satellites from the Earth=s surface into space. In order for a launch vehicle to launch a satellite, launch vehicle suppliers and satellite suppliers must work closely together and share a substantial amount of proprietary and competitively sensitive information to integrate the two products. Thus, as a significant supplier of launch vehicles, Boeing/Hughes would have access to competitively sensitive information of competing satellite manufacturers which it could share with its satellite divisions. If Boeing=s satellite divisions gained access to this information, Boeing would be able to determine the cost and technology involved in its competitors= satellite proposals. This could have immediate anticompetitive consequences on upcoming satellite procurements by allowing Boeing to bid less aggressively than it otherwise would. In addition, the incentives of other satellite suppliers to invest in future technological advancements could be reduced due to concerns that Boeing would be able to Afree-ride@ off its competitors= technological innovations. As a significant supplier of satellites, Boeing/Hughes likewise would have access to sensitive information of competing launch vehicle providers. If Boeing=s launch vehicle division were to gain access to this information, it could allow Boeing to bid less aggressively in upcoming launch vehicle procurements and reduce incentives of competitors to invest in technological innovation.

The proposed Consent Agreement is designed to protect the proprietary and competitively sensitive information of launch vehicle and satellite suppliers. Specifically, the Consent Agreement prohibits Boeing=s satellite business from making any non-public launch vehicle information obtained from any launch

vehicle provider available to Boeing=s launch vehicle business. Under the proposed Consent Agreement, Boeing may only use such information as a provider of satellites. Similarly, the proposed Consent Agreement prohibits Boeing=s launch vehicle business from making any non-public satellite information obtained from any satellite supplier available to Boeing=s satellite business. Under the terms of the Consent Agreement, Boeing may only use such information in its capacity as a launch vehicle provider. The Commission has issued similar orders limiting potentially anticompetitive information transfers following mergers or acquisitions, including: Lockheed Martin, (C-3685) (September 20, 1996); Raytheon Company, (C-3681) (September 10, 1996); Lockheed Corporation/Martin Marrietta Corporation, (C-3576) (May 9, 1995); Alliant Techsystems Inc., (C-3567) (April 7, 1995); Martin Marietta, (C-3500) (June 28, 1994).

Third, the proposed acquisition raises concern that Boeing could withhold satellite interface information, which is necessary to integrate a satellite with a launch vehicle, from its launch vehicle competitors. If Boeing were to withhold such satellite interface information, it could potentially disadvantage or raise the costs of other launch vehicle suppliers that are competing to launch Boeing=s satellites, and ultimately to customers. The proposed Consent Agreement remedies this concern by requiring that for any satellite manufactured by Boeing/Hughes prior to the date the Consent Agreement becomes final, Boeing must provide satellite interface information, as that term is defined in the Consent Agreement, to any launch vehicle supplier within thirty (30) days from the date Boeing receives a request for such information. The Order also requires Boeing to notify all launch vehicle suppliers, in writing, that satellite interface information relating to any Boeing/Hughes satellite bus, model, or product line is available upon request. Boeing/Hughes is also required to provide each launch vehicle supplier with instructions on how to request such information. The Consent Agreement further requires Boeing to provide satellite interface information relating to any of its satellite buses, models, or product lines manufactured after the date this Consent Agreement becomes final, to any

launch vehicle supplier that requests such information or to whom Boeing previously supplied satellite interface information. However, for each satellite manufactured for the United States Government, Boeing shall only be required to provide satellite interface information to any launch vehicle supplier specified by the United States Government. In addition, the Consent Agreement requires Boeing/Hughes to provide satellite interface information to any launch vehicle supplier specified by any satellite customer no later than Boeing provides such information to its own launch vehicle businesses.

Fourth, the Commission has appointed Sheila Widnall as a monitor trustee pursuant to the proposed Consent Agreement to ensure that Boeing complies with the provisions of the Order. The monitor trustee will, among other things, assist the Commission in monitoring Boeing=s compliance with the firewall requirements of the Order and Boeing=s efforts to provide satellite interface information to other launch vehicle competitors. Because satellite interface information often involves technical information, the monitor trustee will aid in evaluating the contents of the satellite interface information that is to be distributed. Under the provisions of the Consent Agreement, the monitor trustee will serve for a period of ten (10) years and provide, among other things, written reports sixty (60) days after she is appointed detailing Boeing=s compliance with the proposed Consent Agreement and annually thereafter for the next ten (10) on the anniversary of the date the Decision and Order becomes final.

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

INTERLOCUTORY, MODIFYING, VACATING, AND MISCELLANEOUS ORDERS

IN THE MATTER OF

ALLIANT TECHSYSTEMS INC.

Docket No. 9254. Order, October 2, 2000

Order reopening and modifying order.

ORDER REOPENING AND MODIFYING ORDER

On June 13, 2000, Alliant Techsystems Inc. ("Alliant") filed its *Petition of Alliant Techsystems Inc. to Reopen and Modify Final Order* ("Petition") requesting that the Federal Trade Commission ("Commission") reopen the order in Docket No. 9254 ("Order") and replace the prior approval requirement with a prior notice requirement to be in effect until the Order is scheduled to terminate.[1] Alliant made its Petition pursuant to Section 5(b) of the Federal Trade Commission Act, 15 U.S.C. § 45(b), Section 2.51 of the Commission's Rules of Practice and Procedure, 16 C.F.R. § 2.51, and the *FTC Policy Statement Concerning Prior Approval and Prior Notice Provisions,* issued on June 21, 1995, and published at 60 Fed. Reg. 39,745-47 (August 3, 1995) *("Prior Approval Policy Statement"* or *"Policy Statement").* The Petition was on the public record for thirty days. No comments were received.

The Commission, in its *Prior Approval Policy Statement,* "concluded that a general policy of requiring prior approval is no longer needed," citing the availability of the premerger notification and waiting period requirements of Section 7A of the Clayton Act, commonly referred to as the Hart-Scott-Rodino ("HSR") Act, 15 U.S.C. § 18a, to protect the public interest in

1 The Order was issued on March 16, 1993, and became final on March 25, 1993, the date on which the Order was served on Alliant. Accordingly, the prior notification provisions will terminate on March 25, 2003.

effective merger law enforcement. *Prior Approval Policy Statement* at 2. The Commission announced that it will "henceforth rely on the HSR process as its principal means of learning about and reviewing mergers by companies as to which the Commission had previously found a reason to believe that the companies had engaged or attempted to engage in an illegal merger." As a general matter, "Commission orders in such cases will not include prior approval or prior notification requirements." Id.

The Commission stated that it will continue to fashion remedies **as** needed in the public interest, including ordering narrow prior approval or prior notification requirements in certain limited circumstances. The Commission said in its *Prior Approval Policy Statement* that "a narrow prior approval provision may be used where there is a credible risk that a company that engaged or attempted to engage in an anticompetitive merger would, but for the provision, attempt the same or approximately the same merger." The Commission also said that "a narrow prior notification provision may be used where there is a credible risk that a company that engaged or attempted to engage in an anticompetitive merger would, but for an order, engage in an otherwise unreportable anticompetitive merger." Id. at 3. As explained in the *Prior Approval Policy Statement*, the need for a prior notification requirement will depend on circumstances such as the structural characteristics of the relevant markets, the size and other characteristics of the market participants, and other relevant factors.

The Commission in its *Prior Approval Policy Statement* announced its intention "to initiate a process for reviewing the retention or modification of these existing requirements" and invited respondents subject to such requirements "to submit a request to reopen the order." Id. at 4. The Commission determined that, "when a petition is filed to reopen and modify an order pursuant to . . . [the *Prior Approval Policy Statement*], the Commission will apply a rebuttable presumption that the public

interest requires reopening of the order and modification of the prior approval requirement consistent with the policy announced" in the *Policy Statement*. Id.

Consistent with the Commission's *Prior Approval Policy Statement,* the presumption is that the prior approval requirement in this Order should be terminated. Nothing to overcome the presumption having been presented, the Commission has determined to reopen the proceedings and modify the Order in Docket No. 9254 to set aside the prior approval requirement.

The record in this case shows a credible risk that the respondent could engage in transactions that might be anticompetitive, but not reportable under the HSR Act. In addition, Alliant 's Petition specifically seeks a modification that substitutes a prior notice provision for prior approval. Accordingly, pursuant to the *Prior Approval Policy Statement,* the Commission has determined to reopen the proceeding in Docket No. 9254 and modify the Order to delete the prior approval requirements of Paragraphs II and 111 and substitute prior notification provisions.

ACCORDINGLY, IT IS ORDERED that this matter be, and it hereby is, reopened; and

IT IS FURTHER ORDERED that Paragraphs II and III of the Order in Docket No. 9254, be and hereby are modified, as of the effective date of this order to read as follows:

II.

IT IS FURTHER ORDERED, that for a period commencing on the date this order becomes final and continuing for ten (10) years, Alliant shall not, without providing advance written notification to the Commission, directly or indirectly, through subsidiaries or otherwise, acquire: (1) any interest in the whole or any part of the stock, share capital, or equity of any systems contractor for 30mm lightweight ammunition or 120mm tank ammunition; or (2) any assets of a systems contractor for 30mm

lightweight ammunition or 120mm tank ammunition. ***Provided however,*** that this paragraph II shall not apply to the sale of products or services in the ordinary course of business.

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 Alliant and not of any other party to the transaction. Alliant shall provide the Notification to the Commission at least thirty (30) days prior to consummating any such transaction (hereinafter referred to as the "first waiting period"). If, within the first waiting period, representatives of the Commission make a written request for additional information or documentary material (within the meaning of 16 C.F.R. § 803.20), Alliant shall not consummate the transaction until twenty (20) days after substantially complying with such request. Early termination of the waiting periods in this Paragraph may be requested and, where appropriate, granted by letter from the Bureau of Competition. ***Provided, however***, that prior notification shall not be required by this Paragraph for a transaction for which notification is required to be made, and has been made, pursuant to Section 7A of the Clayton Act, 15 U.S.C. § 18a.

III.

IT IS FURTHER ORDERED that, for a period commencing on the date this order becomes final and continuing for ten (10) years, Alliant shall not, without providing advance written notification to the Commission, directly or indirectly, through subsidiaries or otherwise, sell or otherwise transfer to any systems contractor for 30mm lightweight ammunition or 120mm tank ammunition: (1) any interest in or any part of the stock, share

capital, or equity of Alliant, or (2) any assets used for or previously used for (and still suitable for use for) systems contracting of 30mm lightweight ammunition or 120 mm tank ammunition. ***Provided however,*** that this paragraph III shall not apply to the sale of products or services in the ordinary course of business.

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 Alliant and not of any other party to the transaction. Alliant shall provide the Notification to the Commission at least thirty (30) days prior to consummating any such transaction (hereinafter referred to as the "first waiting period"). If, within the first waiting period, representatives of the Commission make a written request for additional information or documentary material (within the meaning of 16 C.F.R. § 803.20), Alliant shall not consummate the transaction until twenty (20) days after substantially complying with such request. Early termination of the waiting periods in this Paragraph may be requested and, where appropriate, granted by letter from the Bureau of Competition. ***Provided, however***, that prior notification shall not be required by this Paragraph for a transaction for which notification is required to be made, and has been made, pursuant to Section 7A of the Clayton Act, 15 U.S.C. § 18a.

By the Commission.

Interlocutory Orders, etc.

IN THE MATTER OF

HOECHST MARION ROUSSEL, INC., ET AL.

Docket No. 9293 Order, November 28, 2000

On November 27, 2000, Complaint Counsel and Counsel for Hoechst Marion Roussel, Inc., Carderm Capital L.P., and Andrx Corporation filed a joint motion to withdraw this matter from adjudication for the purpose of allowing the Commission to consider a consent agreement in disposition of this matter.

ORDER WITHDRAWING MATTER FROM ADJUDICATION

This matter is before the Commission upon the joint motion filed by Complaint Counsel and Counsel for Respondents that this matter be withdrawn from adjudication -- pursuant to Sections 3.25 (b) and (c) of the Commission Rules of Practice, 16 C.F.R. §§ 3.25(b),(c) (2000) -- for the purpose of considering a proposed consent agreement executed by Complaint Counsel and Counsel for Respondents. Counsel represent that in their views the agreement is appropriate to settle the issues in this proceeding and that it conforms to the requirements of Rule 2.32 of the Commission Rules of Practice.

IT IS ORDERED that the aforesaid motion to withdraw this matter from adjudication be, and it hereby is, granted.

By the Commission.