FEDERAL TRADE COMMISSION DECISIONS

FINDINGS, OPINIONS, AND ORDERS JANUARY 1, 2003 TO JUNE 30, 2005

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MEMBERS OF THE FEDERAL TRADE COMMISSION

DURING THE PERIOD JANUARY 1, 2003 TO JUNE 30, 2003

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Took oath of office June 4, 2001.

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

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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.

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Appointed August 28, 1998.

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Complaint

IN THE MATTER OF

NATIONAL ACADEMY OF ARBITRATORS

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

Docket C-4070; File No. 0110242
Complaint, January 13, 2003--Decision, January 13, 2003

This consent order, among other things, prohibits the Respondent National Academy of Arbitrators – an honorary association for labor-management arbitrators (who hear and decide disputes between labor unions and employers), with approximately 600 members, many of whom arbitrate labor-management disputes for a fee – from maintaining or enforcing any policy, ethics rule, interpretation or guideline that impedes or restricts arbitrators from engaging in advertising truthful information about their services, including the prices, terms and conditions of sale of their services. The order also prohibits the respondent from maintaining or enforcing any policy, ethics rule, interpretation or guideline against solicitation of arbitration work. In addition, the order requires the respondent to remove the provisions that are inconsistent with the order from its Code of Professional Responsibility for Arbitrators of Labor-Management Disputes; from its Advisory Opinions; from any policy statement or guideline; and from its website, and to publish a copy of the order and complaint in its newsletter and on its Web site.

Participants

For the Commission: *L. Barry Costilo, Harry Schwirck, Richard B. Dagen, Russell Porter,* and *Louis Silvia, Jr.*

For the Respondent: *Veronica Kayne, Wilmer, Cutler, and Pickering.*

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, as amended, 15 U.S.C. § 41 et seq., and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that the National Academy of Arbitrators ("Respondent NAA" or "NAA"), a corporation, has violated and is violating 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 National Academy of Arbitrators, is a corporation organized and existing under the laws

of the State of Michigan, with its principal office and place of business at Suite 600-A, 1121 Boyce Road, Pittsburgh, Pennsylvania 15241.

PARAGRAPH TWO: Respondent NAA is a national professional association of Arbitrators of labor-management disputes. NAA has approximately 600 members, many of whom arbitrate labor-management disputes for a fee.

PARAGRAPH THREE: The general business practices of Respondent NAA and its members, including the acts and practices herein alleged, are in or affecting "commerce" as defined in the Federal Trade Commission Act, as amended, 15 U.S.C. § 45.

PARAGRAPH FOUR: Respondent NAA engages, among its various activities, in substantial economic activities for the benefit of its members. At all times relevant to this Complaint, NAA is and has been organized in part for the profit of its members, and is therefore a corporation within the meaning of Section 4 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 44.

PARAGRAPH FIVE: Except to the extent that competition has been restrained as herein alleged, many of NAA's members have been and are now in competition among themselves and with other Arbitrators of labor-management disputes.

PARAGRAPH SIX: Respondent NAA, acting as a combination of its members, and in agreement with at least some of its

members, has acted to restrain competition by restricting advertising and solicitation by its members.

PARAGRAPH SEVEN: The combination and agreement alleged in Paragraph Six consists of Respondent NAA adopting and maintaining provisions in its *Code of Professional Responsibility for Arbitrators of Labor-Management Disputes* and *Formal Advisory Opinions* that restrain Arbitrators from engaging in truthful, non-deceptive advertising and solicitation, regardless of whether such advertising or solicitation compromises or appears to compromise Arbitrators' impartiality.

PARAGRAPH EIGHT: The acts or practices described in Paragraphs Six and Seven restrain competition unreasonably and injure consumers by depriving consumers of Arbitrators' services for labor-management disputes of truthful, non-deceptive information and of the benefits of free and open competition among Arbitrators.

PARAGRAPH NINE: The combination, agreement, acts and practices described above constitute unfair methods of competition and unfair acts and practices in violation of Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45. Such combination, agreement, acts and practices, or the effects thereof, are continuing and will continue or recur in the absence of the relief herein requested.

WHEREFORE, THE PREMISES CONSIDERED, the Federal Trade Commission on this thirteenth day of January, 2003, issues its Complaint against Respondent NAA.

DECISION AND ORDER

The Federal Trade Commission ("Commission") having initiated an investigation of certain acts and practices of the National Academy of Arbitrators ("NAA"), hereinafter sometimes referred to as "Respondent," and Respondent having been furnished thereafter with a copy of the draft of Complaint that the Bureau of Competition proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge Respondent with violations of Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45; and

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

The Commission having thereafter considered the matter and having determined that it had reason to believe that Respondent has violated the said 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 comments received from an interested party pursuant to Section 2.34 of its Rules, 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 Decision and Order ("Order"):

1. Respondent National Academy of Arbitrators, is a corporation organized and existing under the laws of the State of

Michigan with its principal office and place of business at Suite 600-A, 1121 Boyce Road, Pittsburgh, Pennsylvania 15241.

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

ORDER

I.

IT IS ORDERED, that for the purposes of this Order, the following definitions shall apply:

A. "Respondent" or "NAA" means the National Academy of Arbitrators, its officers, Executive Committee, Board of Governors, directors, committees, foundations, regions, representatives, agents, employees, successors and assigns;

B. "Arbitrator" means someone who engages in arbitrating labor-management disputes;

C. "Regulating" means (1) adopting, maintaining or enforcing any rule, regulation, interpretation, ethics ruling, policy or guideline; (2) taking, threatening to take or suggesting formal or informal disciplinary action; or (3) conducting formal or informal investigations or inquiries**.**

II.

IT IS FURTHER ORDERED that Respondent, directly or indirectly, or through any corporate or other device, in or in connection with Respondent's activities as a professional association in or affecting commerce, as “commerce” is defined in Section 4 of the Federal Trade Commission Act, 15 U.S.C. § 44, do forthwith cease and desist from:

A. Regulating, restricting, impeding, declaring unethical, interfering with, or advising against the advertising or publishing by any person of the prices, terms or conditions of sale of Arbitrators' services, or of information about Arbitrators' services that are offered

for sale or made available by Arbitrators or by any organization with which Arbitrators are affiliated;

B. Regulating, restricting, impeding, declaring unethical, interfering with, or advising against solicitation of arbitration work, through advertising or other means, by any Arbitrator or by any organization with which Arbitrators are affiliated.

PROVIDED THAT nothing contained in this Part shall prohibit Respondent from formulating, adopting, disseminating to its members, and enforcing reasonable ethics guidelines governing the conduct of its members with respect to representations that Respondent reasonably believes would be false or deceptive within the meaning of Section 5 of the Federal Trade Commission Act, and

PROVIDED FURTHER THAT nothing contained in this Part shall prohibit Respondent from formulating, adopting, disseminating to its members and enforcing reasonable ethics guidelines governing conduct that Respondent reasonably believes would compromise or appear to compromise the impartiality of Arbitrators. Such guidelines shall not prevent Arbitrators from disseminating or transmitting truthful information about themselves through brochures and letters, among other means; provided further, however, that in the event that the NAA determines that the dissemination or transmission of such material may create an appearance of partiality, the NAA may promulgate reasonable guidelines that require, in a manner that is not unduly burdensome, that such material and information be disclosed, disseminated or transmitted in good faith to representatives of both management and labor.

III.

IT IS FURTHER ORDERED that Respondent shall:

A. From the date this Order becomes final, not enforce any parts of NAA's Code of Professional Responsibility for Arbitrators of Labor-Management Disputes, NAA's Advisory Opinions, or any NAA policy statement or guideline that is inconsistent with Paragraph II of this Order, and, within ninety (90) days after this Order becomes final, publish in a prominent position on NAA's website and in the next issue of *The Chronicle*, or any successor publications, an announcement that states: "NAA will not enforce Code of Professional Responsibility provisions and Advisory Opinions relating to advertising or solicitation that do not comply with FTC Consent Order."

B. Within ninety (90) days after the date on which this Order becomes final, remove from NAA's Advisory Opinions or any NAA policy statement or guideline (including but not limited to those appearing on the NAA website) any statement that is inconsistent with Paragraph II of this Order.

C. Within ninety (90) days after the date on which this Order becomes final, publish on NAA's website and in the next issue of *The Chronicle*, or in any successor publications, a copy of the Order and Complaint under the heading "NAA promises changes to the Code of Professional Responsibility and will not enforce challenged provisions" with such prominence as is accorded feature articles and announcements that are regularly published on the website and *The Chronicle*. For at least one (1) year after this Order becomes final, retain a copy of the Complaint and Order on NAA's website with a link placed in a prominent position on NAA's homepage entitled "NAA Consent Order with the FTC regarding advertising and solicitation."

D. By the close of NAA's next Annual Meeting, but not later than July 10, 2003, remove any provision in NAA's Code of Professional Responsibility for Arbitrators of Labor-Management Disputes that is inconsistent with this Order.

E. Within ninety (90) days after the close of NAA's next annual meeting, but not later than September 7, 2003, publish and maintain the changes required by Paragraph III D on NAA's website, in *The Chronicle*, or any successor publication, and in any other place NAA publishes its Code of Professional Responsibility.

IV.

IT IS FURTHER ORDERED that Respondent shall file written reports within ninety (90) days after the date on which this Order became final, every sixty (60) days thereafter until the requirements set forth in Paragraph III of this Order have been met, and annually thereafter for five (5) years on the anniversary of the date on which this Order became final, and at such other times as the Commission may by written notice require, setting forth in detail the manner and form in which it has complied and is complying with the Order. Such reports should include in detail, but not be limited to, any action taken in connection with the activities covered by Paragraph II of this Order.

V.

IT IS FURTHER ORDERED that for a period of five (5) years after the date this Order is entered, Respondent shall maintain and make available to the Commission staff for inspection and copying upon reasonable notice, records adequate to describe in detail any action taken in connection with the activities covered by Paragraph II of this Order, including but not limited to any enforcement, advisory opinions, advice or interpretations relating to advertising or solicitation.

VI.

IT IS FURTHER ORDERED that, Respondent shall notify the Commission at least thirty (30) days prior to any proposed change in the Respondent, such as dissolution, assignment, sale resulting in the emergence of a successor corporation or association, the creation or dissolution of subsidiaries or any other change in Respondent that may affect compliance obligations arising out of this Order, including but not limited to any rule-making, advice or interpretations relating to advertising or solicitation.

VII.

IT IS FURTHER ORDERED that this Order shall terminate on January 13, 2023.

Analysis

Analysis of Proposed Consent Order to Aid Public Comment

The Federal Trade Commission has accepted an agreement to a proposed consent order from the National Academy of Arbitrators ("NAA"). NAA has its principal place of business in Pittsburgh, Pennsylvania.

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 decide whether it should withdraw from the agreement or make final the agreement's proposed order.

NAA is an honorary association for labor-management arbitrators. Labor-management arbitrators hear and decide disputes between labor unions and employers. The complaint alleges that NAA engages in substantial activities for the economic benefit of its members. The complaint further alleges that NAA has approximately 600 members, many of whom arbitrate labor-management disputes for a fee.

The complaint charges that NAA has violated Section 5 of the Federal Trade Commission Act by acting as a combination of its members and in agreement with some of its members to restrain competition by restricting advertising and solicitation by its members. The complaint alleges that in furtherance of the combination and agreement NAA has adopted and maintained a *Code of Professional Responsibility for Arbitrators of Labor-Management Disputes* and *Formal Advisory Opinions* that restrain arbitrators from engaging in truthful, non-deceptive advertising and solicitation, regardless of whether such advertising or solicitation compromises or appears to compromise the impartiality of Arbitrators. The *Code of Professional Responsibility* states:

Analysis

> An arbitrator must not solicit arbitration assignments. Solicitation, as prohibited by this section, includes the making of requests for arbitration work through personal contacts with individual parties, orally or in writing.

In addition to prohibiting solicitation, the previous version of the *Code* prohibited virtually all advertising. The advertising restriction was recently amended to restrict only false and misleading advertising. However, NAA's *Formal Advisory Opinions*, which serve as official interpretations of the *Code*, often do not draw a distinction between advertising and solicitation and continue to restrict members from distributing truthful information. For example, Opinion 14 deems an arbitrator's unsolicited mailing to *both* labor and management representatives that contains truthful biographical information to be a violation of NAA's ethics provisions on advertising and solicitation. Opinion 16 concludes that it is unethical solicitation and advertising for an arbitrator to send out announcements of the change of address of his office, which include his resume (including the fact that he is a lawyer) and state his fee schedule. Opinion 18 declares it unethical for an arbitrator to "distribute his business cards, except on request, to potential clients." And Opinion 19 holds that an arbitrator who gives potential clients ball point pens to inform them of his change of address runs afoul of the proscriptions on advertising and solicitation. Given these *Formal Advisory Opinions*, the narrowing of the advertising restrictions in the *Code* to false and misleading advertising does not eliminate competitive concerns.

The complaint alleges that the above acts and practices constitute unfair methods of competition which have restrained competition unreasonably. It further alleges that the effects of the acts and practices are to injure consumers by depriving consumers of the services of labor-management arbitrators of the benefits of truthful, non-deceptive information and of free and open competition among arbitrators.

Analysis

NAA has signed a consent agreement containing the proposed consent order. The proposed consent order would prohibit NAA from maintaining or enforcing any policy, ethics rule, interpretation or guideline that impedes or restricts arbitrators from engaging in advertising truthful information about their services, including the prices, terms and conditions of sale of their services. The proposed consent order would also prohibit NAA from maintaining or enforcing any policy, ethics rule, interpretation or guideline against solicitation of arbitration work. The order permits NAA to adopt and promulgate reasonable ethics guidelines governing the conduct of its members with respect to representations that NAA reasonably believes would be false or deceptive or governing conduct that NAA reasonably believes would compromise or appear to compromise the impartiality of arbitrators.

To ensure and monitor compliance, the consent order provides, among other things, that within certain time frames NAA shall remove the provisions that are inconsistent with the order from NAA's Code of Professional Responsibility for Arbitrators of Labor-Management Disputes, NAA's Advisory Opinions, any NAA policy statement or guideline and NAA's website. The order requires NAA to publish a copy of the order and complaint in its newsletter. It further provides that the order and complaint shall be published on the NAA web site, with a link placed in a prominent position on the web site's home page. The proposed consent order also contains other provisions to monitor compliance.

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

Complaint

IN THE MATTER OF

THE NATIONAL RESEARCH CENTER FOR COLLEGE AND UNIVERSITY ADMISSIONS, INC., ET AL.

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

Docket C-4071; File No. 0223005
Complaint, January 3, 2003--Decision, January 3, 2003

This consent order addresses representations by Respondent The National Research Center for College and University Admissions, Inc. – a student survey company that supplies student data to colleges and universities and other entities for recruitment and marketing purposes, and that distributes a survey to high school teachers and guidance counselors with the request that they have their students complete the survey – and its officer, Respondent, Don M. Munce, about how detailed, personal information collected from high school students through a survey would be used. The order, among other things, prohibits the respondents – in connection with the collection of personally identifiable information from an individual – from misrepresenting (1) how such information is collected or will be used or disclosed, or (2) how the collection of such information is funded. The order also prohibits the respondents – in connection with the collection of personally identifiable information from students for any "noneducational-related marketing purpose" – from using or disclosing such information unless they disclose (1) the existence and nature of such noneducational-related marketing purpose, and (2) the types or categories of any entities to which the information will be disclosed. In addition, the order prohibits the respondents from using or disclosing for any noneducational-related marketing purpose any personally identifiable information that was collected through surveys distributed prior to the date of service of the order.

Participants

For the Commission: *Laura Mazzarella, Gregory A. Ashe, Jessica L. Rich,* and *Joel Winston.*

For the Respondents: *Joan Z. Bernstein,* and *Dana Rosenfeld, Bryan Cave LLP.*

COMPLAINT

The Federal Trade Commission, having reason to believe that The National Research Center for College and University Admissions, Inc. and American Student List, LLC, corporations, and Don M. Munce, individually and as an officer of The National Research Center for College and University Admissions, Inc. ("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 The National Research Center for College and University Admissions, Inc. ("NRCCUA") is a Missouri corporation with its principal office or place of business at 900 SW Oldham Parkway, Lees Summit, Missouri 64081.

2. Respondent Don M. Munce is an officer and director of NRCCUA. Individually or in concert with others, he formulates, directs, controls, or participates in the policies, acts, or practices of NRCCUA, including the acts or practices alleged in this Complaint. His principal office or place of business is the same as that of NRCCUA.

3. Respondent American Student List, LLC ("ASL") is a New York limited liability company with its principal office or place of business at 330 Old Country Road, Mineola, New York 11501.

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. Since at least 1988, Respondents have collected personal information from high school students through a survey (the "Survey"). Respondents market and distribute the Survey to high school teachers and guidance counselors with the request that they have their students complete the Survey. Students may also complete the Survey online at NRCCUA's Web site, www.nrccua.org. Last year, Respondents collected personal

information from more than 2 million high school students who completed the Survey.

6. The Survey collects from high school students personal information, including, but not limited to, name, address, gender, grade point average, date of birth, academic and occupational interests, athletic and extracurricular interests, racial or ethnic background, and religious affiliation (the "Survey Data").

7. Respondents create, market, and distribute the Survey, and compile and use Survey Data. Respondents NRCCUA and ASL each pay a substantial portion of the cost to produce and distribute the Survey.

8. Survey Data is used by Respondents. Respondent NRCCUA markets Survey Data primarily to colleges and universities, which use the information to target high school students for recruitment purposes. Respondent ASL uses Survey Data to create lists of college-bound students that it sells to commercial entities for use in marketing. Such entities include, but are not limited to, consumer products manufacturers, credit card companies, direct marketers, list brokers, database marketing companies, and advertising agencies.

9. Respondents have disseminated or caused to be disseminated marketing materials and privacy statements, including but not limited to the attached Exhibits A through D. These marketing materials and privacy statements contain the following statements regarding the use and disclosure of personal information collected through the Survey:

A. "As you know, NRCCUA is a membership organization that represents over 850 colleges and universities. These universities use the NRCCUA survey to contact your students, whose interests and abilities match the institution's offerings. Your priority is to help your students succeed, and this survey is one more way you can boost your students' chances.

By completing this survey now, your students will receive the information they need to help them make an informed college choice." (Exhibit A, cover letter to educators accompanying Survey).

B. "This data is used by colleges, universities and other organizations to assist students and their families by providing them with valuable information. The National Research Center for College and University Admissions advocates responsible and secure use of the information obtained voluntarily through this survey." (Exhibit B, privacy statement found on the Survey).

C. "Use of this survey data is authorized by the National Research Center for College and University Admissions for the purposes of research and dissemination of college and career information, and other information helpful to students and their families in the transition from high school to college." (Exhibit C, privacy statement found on the NRCCUA Web site).

D. "The National Research Center for College and University Admissions builds educational bridges by providing a communications link between high schools, college-bound high school students, and our member colleges and universities. NRCCUA is a non-profit organization serving the needs of each.

Since 1972 our mission has been to make the important process of selecting a college education or career path easier for students. Our annual surveys enable more than 4 million high school students to indicate their unique college and career preferences to over 1000 member colleges and universities." (Exhibit D, NRCCUA Web site home page).

10. Respondents have disseminated or caused to be disseminated marketing materials that accompany the Survey, including but not limited to the attached Exhibits E through G.

These marketing materials contain the following statements regarding the funding of the Survey:

A. "Assisting educators and their students with the college selection process has been our mission for over 25 years. As a result of completing the survey last year, over 2 million students from 24,000 high schools are receiving information that will be invaluable to them as they plan for the future. With your assistance, this year's effort will be even more significant.

This service is provided at no cost to you or your students! It is completely funded by our members, 850 colleges and universities who include most of the top national and regional colleges and universities as ranked by *U.S. News & World Report.*" (Exhibit E, cover letter to educators accompanying Survey) (emphasis in original).

B. "Please read the brief instructions, and pass out the enclosed surveys to the sophomore, junior and freshmen students in all of your classes. Your students will receive valuable information on admissions, financial planning, scholarships, and other relevant information to help them plan intelligently for their future. All of this is free to your students because it is funded by our member educational institutions." (Exhibit F, cover letter to educators accompanying Survey) (emphasis in original).

C. "These survey results are provided at no cost to participating high schools, NRCCUA is funded by its member colleges and universities for the purpose of distributing helpful educationally-related literature to students." (Exhibit G, report to educators).

11. Through the means described in Paragraphs 9 - 10, Respondents have represented, expressly or by implication, that:

A. Information collected from high school students through the Survey is shared only with colleges, universities, and other entities providing education-related services.

B. The Survey is funded solely by educational institutions.

12. In truth and in fact:

A. Information collected from high school students through the Survey is shared not only with colleges, universities, and other entities providing education-related services, but also with commercial entities for marketing purposes.

B. The survey is not funded solely by educational institutions, but also receives substantial funding from ASL and others for commercial purposes.

Therefore, the representations set forth in Paragraph 11 were, and are, false or misleading.

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

THEREFORE, the Federal Trade Commission this twenty-eighth day of January, 2003, has issued this Complaint against Respondents.

DECISION AND ORDER

The Federal Trade Commission having initiated an investigation of certain acts and practices of the Respondents named in the caption hereof, and the Respondents having been furnished thereafter with a copy of a draft Complaint that the Bureau of Consumer Protection proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge the Respondents with violation of the Federal Trade Commission Act, 15 U.S.C. § 45 et seq;

The Respondents, their attorney, and counsel for the Commission having thereafter executed an Agreement Containing Consent Order ("Consent Agreement"), an admission by the Respondents of all the jurisdictional facts set forth in the aforesaid draft 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 has 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 Consent Agreement on the public record for a period of thirty (30) days, and having duly considered the comments filed thereafter by interested persons pursuant to Section 2.34 of its Rules, now in further conformity with the procedure described in Section 2.34 of its Rules, the Commission hereby issues its Complaint, makes the following jurisdictional findings and enters the following Order:

1. Respondent The National Research Center for College and University Admissions, Inc. ("NRCCUA") is a Missouri not-for-profit corporation with its principal office or place of business at 900 SW Oldham Parkway, Lees Summit, Missouri 64081.

2. Respondent Don M. Munce is an officer and director of NRCCUA. Individually or in concert with others, he formulates, directs, controls, or participates in the policies, acts, or practices of NRCCUA. His principal office or place of business is the same as that of NRCCUA.

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. "Personally identifiable information" or "personal information" shall mean individually identifiable information from or about an individual including, but not limited to: (a) a first and last name; (b) a home or other physical address, including street name and name of city or town; (c) an email address or other online contact information, such as an instant messaging user identifier or a screen name that reveals an individual's email address; (d) a telephone number; (e) a Social Security Number; (f) an Internet Protocol ("IP") address or host name that identifies an individual; (g) a persistent identifier, such as a customer number held in a "cookie" or processor serial number, that is combined with other available data that identifies an individual; or (h) any information, including, but not limited to, grade point average, date of birth, academic or occupational interests, athletic or extracurricular interests, racial or ethnic background, or religious affiliation, that is combined with any of (a) through (g) above.

2. "Noneducational-related marketing purpose" shall mean for the purpose of marketing products or services, or selling personally identifiable information from or about an individual for use in marketing products or services to individuals. Provided, however, that "noneducational-related marketing purpose" does not apply to

the collection, disclosure or use of personally identifiable information from or about a student for the exclusive purpose of developing, evaluating, or providing to students or educational institutions (a) college or postsecondary education recruitment, or military recruitment; (b) book clubs, magazines, and programs providing access to low-cost literary products; (c) curriculum and instructional materials used by elementary schools and secondary schools; (d) student recognition programs; or (e) any other activity expressly determined under 20 U.S.C. §1232h(c)(4)(A) or its implementing regulations to be an "educational product or service." Provided further that, for purposes of determining whether any specific activity is covered by subsections (a) through (e) above, or should be deemed to be an "educational product or service," any official written interpretation disseminated to the public by the Department of Education regarding such activity shall be controlling.

3. "Survey" shall mean the survey that is distributed or caused to be distributed by Respondents under the name "National Research Center for College and University Admissions."

4. "Student" shall mean any elementary school or secondary school student.

5. Unless otherwise specified, "Respondents" shall mean NRCCUA and its successors and assigns and its officers; Don M. Munce, individually and as an officer of the above corporation; and each of the above's agents, representatives, and employees.

6. "Clearly and conspicuously" shall mean as follows:

A. In print communications, the message 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.

B. In communications disseminated orally, the message shall be delivered in a volume and cadence sufficient for an ordinary consumer to hear and comprehend it.

C. In communications made through an electronic medium (such as television, video, radio, and interactive media such as the Internet, online services and software), the message shall be presented simultaneously in both the audio and visual portions of the communication. In any communication presented solely through visual or audio means, the message may be made through the same means in which the communication is presented. Any audio message shall be delivered in a volume and cadence sufficient for an ordinary consumer to hear and comprehend it. Any visual message shall be of a size and shade, with a degree of contrast to the background against which it appears, and shall appear on the screen for a duration and in a location, sufficiently noticeable for an ordinary consumer to read and comprehend it.

The message shall be in understandable language and syntax. Nothing contrary to, inconsistent with, or in mitigation of the message shall be used in any communication.

7. "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, in connection with the collection of personally identifiable information from an individual, shall not misrepresent in any manner, expressly or by implication, (a) how personally identifiable information is collected or will be used or disclosed; or (b) how the collection of personally identifiable information is funded.

II.

IT IS FURTHER ORDERED that Respondents, in connection with the collection of personally identifiable information from students, shall not use or disclose such information for any noneducational-related marketing purpose, unless they disclose clearly and conspicuously (a) the existence and nature of such

noneducational-related marketing purpose; and (b) the types or categories of any entities to which the information will be disclosed. Such disclosures shall be made in the following locations:

(1) in all privacy statements published by Respondents that refer or relate to the collection of personally identifiable information from students;

(2) in all communications to students, parents, educators, or educational institutions that refer or relate to the collection of personally identifiable information from students; and

(3) in all questionnaires, survey instruments, or other documents through which Respondents collect personally identifiable information from students.

Provided that the disclosures required by this Part II are in addition to, and not in lieu of, any other disclosures that Respondents may be required to make, including but not limited to any disclosure required by state or federal law.

III.

IT IS FURTHER ORDERED that Respondents shall not use or disclose for any noneducational-related marketing purpose any personally identifiable information collected through surveys distributed prior to the date of service of this Order. For purposes of this Part only, "noneducational-related marketing purpose" shall exclude use or disclosure for the purpose of (a) job recruitment, (b) the provision of student loans, or (c) the provision of standardized test preparation services.

IV.

IT IS FURTHER ORDERED that Respondent NRCCUA, and its successors and assigns, and Respondent Don M. Munce shall, for a period of five (5) years after the date of issuance of this Order, maintain and upon request make available to the Federal Trade

Commission for inspection and copying a print or electronic copy of all documents demonstrating their compliance with the terms and provisions of this Order, including, but not limited to:

A. a sample copy of each different survey form, privacy statement, or communication relating to the collection of personally identifiable information to students, parents, educators, or educational institutions containing representations about (a) how personally identifiable information will be used or disclosed or (b) how the collection of personally identifiable information is funded. Each Web page copy shall be dated and contain the full URL of the Web page where the material was posted online. Electronic copies shall include all text and graphics files, audio scripts, and other computer files used in presenting the information on the Web;

B. a sample copy of each different document containing the disclosure required by Part II of this Order; and

C. all invoices, communications, and records relating to the use or disclosure of personally identifiable information for any noneducational-related marketing purpose.

V.

IT IS FURTHER ORDERED that Respondent NRCCUA, and its successors and assigns, and Respondent Don M. Munce 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. 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.

VI.

IT IS FURTHER ORDERED that Respondent NRCCUA 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 a Respondent learns less than thirty (30) days prior to the date such action is to take place, the 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.

VII.

IT IS FURTHER ORDERED that Respondent Don M. Munce, for a period of five (5) 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 collection of personally identifiable information for use in marketing products or services. The notice shall include Respondent's new business address and telephone number and a description of the nature of the business or employment and his duties and responsibilities. All notices required by this Part shall be sent by certified mail to the Associate Director, Division of Enforcement, Bureau of Consumer Protection, Federal Trade Commission, Washington, D.C. 20580.

VIII.

IT IS FURTHER ORDERED that Respondent NRCCUA, and its successors and assigns, and Respondent Don M. Munce 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 January 28, 2023, 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 a 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.

Analysis of Proposed Consent Orders to Aid Public Comment

The Federal Trade Commission has accepted agreements, subject to final approval, to (1) a proposed consent order from The National Research Center for College and University Admissions, Inc. ("NRCCUA") and its officer Don M. Munce ("Munce"), and (2) a proposed consent order from American Student List, LLC ("ASL"). The proposed orders are substantively identical. NRCCUA is a student survey company that supplies student data to colleges and universities and other entities for recruitment and marketing purposes. ASL is a commercial list broker that supplies names for youth marketing campaigns.

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

This matter concerns representations made about how detailed, personal information collected from high school students through a survey would be used, and how the survey is funded. The proposed respondents distribute a survey to high school teachers and guidance counselors with the request that they have their students complete the survey. The survey collects from students personal information including name, address, age, race, religious affiliation, and academic, career, and athletic interests. NRCCUA and Munce then market personal information collected through the survey primarily to colleges and universities, which use the information to target high school students for recruitment purposes. NRCCUA also provides survey information to ASL. ASL uses survey information to create lists of college-bound students that it sells to commercial entities for use in marketing.

Such entities include, but are not limited to, consumer products manufacturers, credit card companies, direct marketers, list brokers, database marketing companies, and advertising agencies.

The Commission's complaint charges that the proposed respondents falsely represented that information collected from high school students through the survey is shared only with colleges, universities, and other entities providing education-related services when, in fact, such information is also shared with commercial entities for marketing purposes. The complaint also alleges that the proposed respondents falsely represented that the survey is funded solely by educational institutions when, in fact, the survey also receives substantial funding from ASL, a commercial entity.

Part I of the consent orders prohibits the proposed respondents, in connection with the collection of personally identifiable information from an individual, from misrepresenting (1) how such information is collected or will be used or disclosed, or (2) how the collection of such information is funded. Part II of the orders prohibits the proposed respondents, in connection with the collection of personally identifiable information from students for any "noneducational-related marketing purpose," from using or disclosing such information unless they disclose (1) the existence and nature of such noneducational-related marketing purpose, and (2) the types or categories of any entities to which the information will be disclosed.

The proposed orders define "noneducational-related marketing purpose" to mean for the purpose of marketing products or services, or selling personally identifiable information from or about an individual for use in marketing products or services to individuals. The definition specifically excludes the use of personal information in connection with certain activities determined to be "educational products or services" under the recently enacted No Child Left Behind Act, namely (a) college or postsecondary education recruitment, or military recruitment; (b) book clubs, magazines, and programs providing access to low-

cost literary products; (c) curriculum and instructional materials used by elementary schools and secondary schools; (d) student recognition programs; or (e) any other activity expressly determined under the No Child Left Behind Act or its implementing regulations to be an "educational product or service." In addition, the proposed orders provide that when determining whether any specific activity is an "educational product or service," any official, written, publicly-disseminated interpretation by the Department of Education regarding such activity shall be controlling.

Part III of the orders prohibits the proposed respondents from using or disclosing for any noneducational-related marketing purpose any personally identifiable information that was collected through surveys distributed prior to the date of service of the orders. In addition to the educational purposes excepted from the definition of "noneducational-related marketing purpose," Part III also permits the proposed respondents to use such information for the purpose of (a) job recruitment, (b) the provision of student loans, or (c) the provision of standardized test preparation services.

The remainder of the proposed orders contains standard requirements that the proposed respondents maintain copies of privacy statements and other documents relating to the collection, use or disclosure of personally identifiable information; distribute copies of the orders to certain company officials and employees; notify the Commission of any change in the corporation that may affect compliance obligations under the order; and file one or more reports detailing their compliance with the orders. Part VIII of the proposed orders is a provision whereby the orders, absent certain circumstances, terminate twenty years from the date of issuance.

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

Analysis

These proposed orders, if issued in final form, will resolve the claims alleged in the complaint against the named respondents. It is not the Commission's intent that acceptance of these consent agreements and issuance of final decisions and orders will release any claims against any unnamed persons or entities associated with the conduct described in the complaint.

Complaint

IN THE MATTER OF

AMERICAN STUDENT LIST, LLC

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

Docket C-4072; File No. 0223005
Complaint, January 28, 2003--Decision, January 28, 2003

This consent order addresses representations by Respondent American Student List, LLC – a commercial list broker that supplies names for youth marketing campaigns, and uses the information collected from a survey distributed to high school teachers and guidance counselors, with the request that they have their students complete the survey to create lists of college-bound students that it sells to commercial entities for use in marketing – about how detailed, personal information collected from high school students through a survey would be used. The order, among other things, prohibits the respondent – in connection with the collection of personally identifiable information from an individual – from misrepresenting (1) how such information is collected or will be used or disclosed, or (2) how the collection of such information is funded. The order also prohibits the respondent – in connection with the collection of personally identifiable information from students for any "noneducational-related marketing purpose" – from using or disclosing such information unless it discloses (1) the existence and nature of such noneducational-related marketing purpose, and (2) the types or categories of any entities to which the information will be disclosed. In addition, the order prohibits the respondent from using or disclosing for any noneducational-related marketing purpose any personally identifiable information that was collected through surveys distributed prior to the date of service of the order.

Participants

For the Commission: *Laura Mazzarella, Gregory A. Ashe, Jessica L. Rich,* and *Joel Winston.*

For the Respondents: *William D'Amico,* and *Kenneth A. Caruso, Chadbourne & Parke LLP.*

COMPLAINT

The Federal Trade Commission, having reason to believe that The National Research Center for College and University Admissions, Inc. and American Student List, LLC, corporations, and Don M. Munce, individually and as an officer of The National Research Center for College and University Admissions, Inc. ("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 The National Research Center for College and University Admissions, Inc. ("NRCCUA") is a Missouri corporation with its principal office or place of business at 900 SW Oldham Parkway, Lees Summit, Missouri 64081.

2. Respondent Don M. Munce is an officer and director of NRCCUA. Individually or in concert with others, he formulates, directs, controls, or participates in the policies, acts, or practices of NRCCUA, including the acts or practices alleged in this Complaint. His principal office or place of business is the same as that of NRCCUA.

3. Respondent American Student List, LLC ("ASL") is a New York limited liability company with its principal office or place of business at 330 Old Country Road, Mineola, New York 11501.

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. Since at least 1988, Respondents have collected personal information from high school students through a survey (the "Survey"). Respondents market and distribute the Survey to high school teachers and guidance counselors with the request that they have their students complete the Survey. Students may also complete the Survey online at NRCCUA's Web site, www.nrccua.org. Last year, Respondents collected personal

information from more than 2 million high school students who completed the Survey.

6. The Survey collects from high school students personal information, including, but not limited to, name, address, gender, grade point average, date of birth, academic and occupational interests, athletic and extracurricular interests, racial or ethnic background, and religious affiliation (the "Survey Data").

7. Respondents create, market, and distribute the Survey, and compile and use Survey Data. Respondents NRCCUA and ASL each pay a substantial portion of the cost to produce and distribute the Survey.

8. Survey Data is used by Respondents. Respondent NRCCUA markets Survey Data primarily to colleges and universities, which use the information to target high school students for recruitment purposes. Respondent ASL uses Survey Data to create lists of college-bound students that it sells to commercial entities for use in marketing. Such entities include, but are not limited to, consumer products manufacturers, credit card companies, direct marketers, list brokers, database marketing companies, and advertising agencies.

9. Respondents have disseminated or caused to be disseminated marketing materials and privacy statements, including but not limited to the attached Exhibits A through D. These marketing materials and privacy statements contain the following statements regarding the use and disclosure of personal information collected through the Survey:

A. "As you know, NRCCUA is a membership organization that represents over 850 colleges and universities. These universities use the NRCCUA survey to contact your students, whose interests and abilities match the institution's offerings. Your priority is to help your students succeed, and this survey is one more way you can boost your students' chances.

By completing this survey now, your students will receive the information they need to help them make an informed college choice." (Exhibit A, cover letter to educators accompanying Survey).

B. "This data is used by colleges, universities and other organizations to assist students and their families by providing them with valuable information. The National Research Center for College and University Admissions advocates responsible and secure use of the information obtained voluntarily through this survey." (Exhibit B, privacy statement found on the Survey).

C. "Use of this survey data is authorized by the National Research Center for College and University Admissions for the purposes of research and dissemination of college and career information, and other information helpful to students and their families in the transition from high school to college." (Exhibit C, privacy statement found on the NRCCUA Web site).

D. "The National Research Center for College and University Admissions builds educational bridges by providing a communications link between high schools, college-bound high school students, and our member colleges and universities. NRCCUA is a non-profit organization serving the needs of each.

Since 1972 our mission has been to make the important process of selecting a college education or career path easier for students. Our annual surveys enable more than 4 million high school students to indicate their unique college and career preferences to over 1000 member colleges and universities." (Exhibit D, NRCCUA Web site home page).

10. Respondents have disseminated or caused to be disseminated marketing materials that accompany the Survey, including but not limited to the attached Exhibits E through G.

These marketing materials contain the following statements regarding the funding of the Survey:

A. "Assisting educators and their students with the college selection process has been our mission for over 25 years. As a result of completing the survey last year, over 2 million students from 24,000 high schools are receiving information that will be invaluable to them as they plan for the future. With your assistance, this year's effort will be even more significant.

This service is provided at no cost to you or your students! It is completely funded by our members, 850 colleges and universities who include most of the top national and regional colleges and universities as ranked by *U.S. News & World Report.*" (Exhibit E, cover letter to educators accompanying Survey) (emphasis in original).

B. "Please read the brief instructions, and pass out the enclosed surveys to the sophomore, junior and freshmen students in all of your classes. Your students will receive valuable information on admissions, financial planning, scholarships, and other relevant information to help them plan intelligently for their future. All of this is free to your students because it is funded by our member educational institutions." (Exhibit F, cover letter to educators accompanying Survey) (emphasis in original).

C. "These survey results are provided at no cost to participating high schools, NRCCUA is funded by its member colleges and universities for the purpose of distributing helpful educationally-related literature to students." (Exhibit G, report to educators).

11. Through the means described in Paragraphs 9 - 10, Respondents have represented, expressly or by implication, that:

A. Information collected from high school students through the Survey is shared only with colleges, universities, and other entities providing education-related services.

B. The Survey is funded solely by educational institutions.

12. In truth and in fact:

A. Information collected from high school students through the Survey is shared not only with colleges, universities, and other entities providing education-related services, but also with commercial entities for marketing purposes.

B. The survey is not funded solely by educational institutions, but also receives substantial funding from ASL and others for commercial purposes.

Therefore, the representations set forth in Paragraph 11 were, and are, false or misleading.

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

THEREFORE, the Federal Trade Commission this twenty-eighth day of January, 2003, has issued this Complaint against Respondents.

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 that the Bureau of Consumer Protection proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge the Respondent with violation of the Federal Trade Commission Act, 15 U.S.C. § 45 et seq;

The Respondent, its attorney, and counsel for the Commission having thereafter executed an Agreement Containing Consent Order ("Consent Agreement"), an admission by the Respondent of all the jurisdictional facts set forth in the aforesaid draft 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 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 Consent Agreement on the public record for a period of thirty (30) days, and having duly considered the comments filed thereafter by interested persons pursuant to Section 2.34 of its Rules, now in further conformity with the procedure described in Section 2.34 of its Rules, the Commission hereby issues its Complaint, makes the following jurisdictional findings and enters the following Order:

1. Respondent American Student List, LLC ("ASL") is a Delaware limited liability company with its principal office or place of business at 330 Old Country Road, Mineola, New York 11501.

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. "Personally identifiable information" or "personal information" shall mean individually identifiable information from or about an individual including, but not limited to: (a) a first and last name; (b) a home or other physical address, including street name and name of city or town; (c) an email address or other online contact information, such as an instant messaging user identifier or a screen name that reveals an individual's email address; (d) a telephone number; (e) a Social Security Number; (f) an Internet Protocol ("IP") address or host name that identifies an individual; (g) a persistent identifier, such as a customer number held in a "cookie" or processor serial number, that is combined with other available data that identifies an individual; or (h) any information, including, but not limited to, grade point average, date of birth, academic or occupational interests, athletic or extracurricular interests, racial or ethnic background, or religious affiliation, that is combined with any of (a) through (g) above.

2. "Noneducational-related marketing purpose" shall mean for the purpose of marketing products or services, or selling personally identifiable information from or about an individual for use in marketing products or services to individuals. Provided, however, that "noneducational-related marketing purpose" does not apply to the collection, disclosure or use of personally identifiable information from or about a student for the exclusive purpose of developing, evaluating, or providing to students or educational institutions (a) college or postsecondary education recruitment, or military recruitment; (b) book clubs, magazines, and programs providing access to low-cost literary products; (c) curriculum and

instructional materials used by elementary schools and secondary schools; (d) student recognition programs; or (e) any other activity expressly determined under 20 U.S.C. §1232h(c)(4)(A) or its implementing regulations to be an "educational product or service." Provided further that, for purposes of determining whether any specific activity is covered by subsections (a) through (e) above, or should be deemed to be an "educational product or service," any official written interpretation disseminated to the public by the Department of Education regarding such activity shall be controlling.

3. "Survey" shall mean the survey that is distributed or caused to be distributed by Respondent under the name "National Research Center for College and University Admissions."

4. "Student" shall mean any elementary school or secondary school student.

5. Unless otherwise specified, "Respondent" shall mean ASL and its successors and assigns and its officers, and its agents, representatives, and employees.

6. "Clearly and conspicuously" shall mean as follows:

A. In print communications, the message 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.

B. In communications disseminated orally, the message shall be delivered in a volume and cadence sufficient for an ordinary consumer to hear and comprehend it.

C. In communications made through an electronic medium (such as television, video, radio, and interactive media such as the Internet, online services and software), the message shall be presented simultaneously in both the audio and visual portions of the communication. In any communication presented solely through visual or audio means, the message may be made

through the same means in which the communication is presented. Any audio message shall be delivered in a volume and cadence sufficient for an ordinary consumer to hear and comprehend it. Any visual message shall be of a size and shade, with a degree of contrast to the background against which it appears, and shall appear on the screen for a duration and in a location, sufficiently noticeable for an ordinary consumer to read and comprehend it.

The message shall be in understandable language and syntax. Nothing contrary to, inconsistent with, or in mitigation of the message shall be used in any communication.

7. "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, in connection with the collection of personally identifiable information from an individual, shall not misrepresent in any manner, expressly or by implication, (a) how personally identifiable information is collected or will be used or disclosed; or (b) how the collection of personally identifiable information is funded.

II.

IT IS FURTHER ORDERED that Respondent, in connection with the collection of personally identifiable information from students, shall not use or disclose such information for any noneducational-related marketing purpose, unless it discloses clearly and conspicuously (a) the existence and nature of such noneducational-related marketing purpose; and (b) the types or categories of any entities to which the information will be disclosed. Such disclosures shall be made in the following locations:

(1) in all privacy statements published by Respondent that refer or relate to the collection of personally identifiable information from students;

(2) in all communications to students, parents, educators, or educational institutions that refer or relate to the collection of personally identifiable information from students; and

(3) in all questionnaires, survey instruments, or other documents through which Respondent collects personally identifiable information from students.

Provided that the disclosures required by this Part II are in addition to, and not in lieu of, any other disclosures that Respondent may be required to make, including but not limited to any disclosure required by state or federal law.

III.

IT IS FURTHER ORDERED that Respondent shall not use or disclose for any noneducational-related marketing purpose any personally identifiable information collected through surveys distributed prior to the date of service of this Order. For purposes of this Part only, "noneducational-related marketing purpose" shall exclude use or disclosure for the purpose of (a) job recruitment, (b) the provision of student loans, or (c) the provision of standardized test preparation services.

IV.

IT IS FURTHER ORDERED that Respondent ASL and its successors and assigns shall, for a period of five (5) years after the date of issuance of this Order, maintain and upon request make available to the Federal Trade Commission for inspection and copying a print or electronic copy of all documents demonstrating their compliance with the terms and provisions of this Order, including, but not limited to:

A. a sample copy of each different survey form, privacy statement, or communication relating to the collection of personally identifiable information to students, parents, educators, or educational institutions containing representations about (a) how personally identifiable information will be used or disclosed or (b) how the collection of personally identifiable information is funded. Each Web page copy shall be dated and contain the full URL of the Web page where the material was posted online. Electronic copies shall include all text and graphics files, audio scripts, and other computer files used in presenting the information on the Web;

B. a sample copy of each different document containing the disclosure required by Part II of this Order; and

C. all invoices, communications, and records relating to the use or disclosure of personally identifiable information for any noneducational-related marketing purpose.

V.

IT IS FURTHER ORDERED that Respondent ASL 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 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.

VI.

IT IS FURTHER ORDERED that Respondent ASL 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, the 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.

VII.

IT IS FURTHER ORDERED that Respondent ASL 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 it has complied with this Order.

VIII.

This Order will terminate on January 28, 2023, 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 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.

Analysis of Proposed Consent Orders to Aid Public Comment

The Federal Trade Commission has accepted agreements, subject to final approval, to (1) a proposed consent order from The National Research Center for College and University Admissions, Inc. ("NRCCUA") and its officer Don M. Munce ("Munce"), and (2) a proposed consent order from American Student List, LLC ("ASL"). The proposed orders are substantively identical. NRCCUA is a student survey company that supplies student data to colleges and universities and other entities for recruitment and marketing purposes. ASL is a commercial list broker that supplies names for youth marketing campaigns.

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

This matter concerns representations made about how detailed, personal information collected from high school students through a survey would be used, and how the survey is funded. The proposed respondents distribute a survey to high school teachers and guidance counselors with the request that they have their students complete the survey. The survey collects from students personal information including name, address, age, race, religious affiliation, and academic, career, and athletic interests. NRCCUA and Munce then market personal information collected through the survey primarily to colleges and universities, which use the information to target high school students for recruitment purposes. NRCCUA also provides survey information to ASL. ASL uses survey information to create lists of college-bound students that it sells to commercial entities for use in marketing.

Such entities include, but are not limited to, consumer products manufacturers, credit card companies, direct marketers, list brokers, database marketing companies, and advertising agencies.

The Commission's complaint charges that the proposed respondents falsely represented that information collected from high school students through the survey is shared only with colleges, universities, and other entities providing education-related services when, in fact, such information is also shared with commercial entities for marketing purposes. The complaint also alleges that the proposed respondents falsely represented that the survey is funded solely by educational institutions when, in fact, the survey also receives substantial funding from ASL, a commercial entity.

Part I of the consent orders prohibits the proposed respondents, in connection with the collection of personally identifiable information from an individual, from misrepresenting (1) how such information is collected or will be used or disclosed, or (2) how the collection of such information is funded. Part II of the orders prohibits the proposed respondents, in connection with the collection of personally identifiable information from students for any "noneducational-related marketing purpose," from using or disclosing such information unless they disclose (1) the existence and nature of such noneducational-related marketing purpose, and (2) the types or categories of any entities to which the information will be disclosed.

The proposed orders define "noneducational-related marketing purpose" to mean for the purpose of marketing products or services, or selling personally identifiable information from or about an individual for use in marketing products or services to individuals. The definition specifically excludes the use of personal information in connection with certain activities determined to be "educational products or services" under the recently enacted No Child Left Behind Act, namely (a) college or postsecondary education recruitment, or military recruitment; (b) book clubs, magazines, and programs providing access to low-

cost literary products; (c) curriculum and instructional materials used by elementary schools and secondary schools; (d) student recognition programs; or (e) any other activity expressly determined under the No Child Left Behind Act or its implementing regulations to be an "educational product or service." In addition, the proposed orders provide that when determining whether any specific activity is an "educational product or service," any official, written, publicly-disseminated interpretation by the Department of Education regarding such activity shall be controlling.

Part III of the orders prohibits the proposed respondents from using or disclosing for any noneducational-related marketing purpose any personally identifiable information that was collected through surveys distributed prior to the date of service of the orders. In addition to the educational purposes excepted from the definition of "noneducational-related marketing purpose," Part III also permits the proposed respondents to use such information for the purpose of (a) job recruitment, (b) the provision of student loans, or (c) the provision of standardized test preparation services.

The remainder of the proposed orders contains standard requirements that the proposed respondents maintain copies of privacy statements and other documents relating to the collection, use or disclosure of personally identifiable information; distribute copies of the orders to certain company officials and employees; notify the Commission of any change in the corporation that may affect compliance obligations under the order; and file one or more reports detailing their compliance with the orders. Part VIII of the proposed orders is a provision whereby the orders, absent certain circumstances, terminate twenty years from the date of issuance.

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

Analysis

These proposed orders, if issued in final form, will resolve the claims alleged in the complaint against the named respondents. It is not the Commission's intent that acceptance of these consent agreements and issuance of final decisions and orders will release any claims against any unnamed persons or entities associated with the conduct described in the complaint.

Complaint

IN THE MATTER OF

BAXTER INTERNATIONAL INC., ET AL.

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

Docket C-4068; File No. 0210171
Complaint, December 20, 2002--Decision, February 3, 2003

This consent order addresses the acquisition by Respondent Baxter International Inc. from Wyeth of substantially all of the assets related to Respondent Wyeth's generic injectable pharmaceutical business, operated by Wyeth and its ESI Lederle division. The order, among other things, requires the respondents to divest all of Wyeth's assets relating to propofol – a general anesthetic commonly used for the induction and maintenance of anesthesia during surgical procedures and as a sedative for patients who are mechanically ventilated – to Faulding Pharmaceutical Company, or another Commission-approved acquirer, no later than ten business days after the acquisition. The order also requires the respondents to terminate all rights and interests in GensiaSicor's (1) pancuronium, (2) vecuronium, and (3) metoclopramide products – which are respectively (1) a rapid-onset, long-acting neuromuscular blocking agent used to temporarily freeze muscles during surgery or mechanical ventilation and to assist in the intubation process; (2) an intermediate-acting neuromuscular blocking agent that temporarily freezes muscles during surgery, mechanical ventilation, or intubation; and (3) an antiemetic used for the prevention and treatment of nausea and vomiting for patients undergoing certain types of chemotherapy and for post-operative treatment – and divest all of their pancuronium, vecuronium, and metoclopramide assets to GensiaSicor. In addition, the order requires the respondents to terminate Baxter's co-marketing agreement with Watson Pharmaceuticals, Inc., pursuant to which Baxter promotes Ferrlecit®, – an injectable iron gluconate product used to treat iron deficiency in patients undergoing hemodialysis – by March 14, 2004, in order to give Baxter the incentive to continue developing and ultimately launch the iron gluconate product it acquired from Wyeth.

Participants

For the Commission: *Yolanda R. Gruendel, Joanne C. Lewers, Stephanie C. Bovee, Jennifer Clarke-Smith, Sylvia M. Brooks, Ann Malester, Jeff Dahnke, Roberta S. Baruch, John Howell,* and *Mary T. Coleman.*

For the Respondents: *Michael Sennett* and *Pam Taylor, Bell Boyd & Lloyd LLC,* and *Charles E. Koob,* and *Ann Rappleye, Simpson, Thacher and Bartlett.*

COMPLAINT

The Federal Trade Commission ("Commission"), having reason to believe that Respondent Baxter International Inc. ("Baxter"), a corporation subject to the jurisdiction of the Commission, has agreed to acquire certain assets of Respondent Wyeth, 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. "Commission" means the Federal Trade Commission.

2. "FDA" means the United States Food and Drug Administration.

3. "ESI" means ESI Lederle, a division of Wyeth that, among other things, researches, develops, manufactures and sells human generic injectable pharmaceuticals. ESI is 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 Five Giralda Farms, Madison, New Jersey 07940.

4. "Respondents" means Baxter and Wyeth individually and collectively.

5. "Metoclopramide" means any injectable pharmaceutical composition containing any formulation or dosage of the active ingredient generically known as metoclopramide or metoclopramide hydrochloride.

6. "New Injectable Iron Replacement Therapies" or "NIIRTs" means any injectable pharmaceutical composition containing any formulation or dosage of the active ingredient generically known as iron gluconate or iron sucrose.

7. "Pancuronium" means any injectable pharmaceutical composition containing any formulation or dosage of the active ingredient generically known as pancuronium or pancuronium bromide.

8. "Propofol" means any injectable pharmaceutical composition containing any formulation or dosage of the active ingredient generically known as propofol.

9. "Vecuronium" means any injectable pharmaceutical composition containing any formulation or dosage of the active ingredient generically known as vecuronium or vecuronium bromide.

II. RESPONDENTS

10. Respondent Baxter 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 One Baxter Parkway, Deerfield, Illinois 60015. Baxter, among other things, is engaged in the research, development, manufacture and/or sale of generic injectable pharmaceuticals, including: Pancuronium, Vecuronium, Metoclopramide, Propofol and NIIRTs.

11. Respondent Wyeth is a corporation organized, existing, and doing business under and by virtue of the laws of the state of Delaware with its office and principal place of business located at

Five Giralda Farms, Madison, New Jersey 07940. Wyeth, through ESI, is engaged in the research, development, manufacture and/or sale of generic injectable pharmaceuticals, including: Pancuronium, Vecuronium, Metoclopramide, Propofol and NIIRTs.

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

III. THE PROPOSED ACQUISITION

13. On June 8, 2002, Baxter and Wyeth entered into an Asset Purchase Agreement whereby Baxter agreed to acquire substantially all of the assets relating to Wyeth's human generic injectable pharmaceutical business, operated by Wyeth's ESI Lederle division (hereinafter "Acquisition").

IV. THE RELEVANT MARKETS

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

1. the manufacture and sale of Pancuronium;

2. the manufacture and sale of Vecuronium;

3. the manufacture and sale of Metoclopramide;

4. the manufacture and sale of Propofol; and

5. the manufacture and sale of NIIRTs.

15. 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 lines of commerce.

V. THE STRUCTURE OF THE MARKETS

16. Baxter and ESI are the two leading U.S. suppliers of Pancuronium, a neuromuscular blocking agent. The Acquisition would create a duopoly in the market for the manufacture and sale of Pancuronium. After the acquisition, the combined company would account for 74% of annual sales of Pancuronium in the United States, and the post-acquisition Herfindahl-Hirschman Index ("HHI") would be 6,152, representing a 2,496 point increase in the HHI.

17. The market for the manufacture and sale of Vecuronium is also highly concentrated. Baxter and ESI were the two leading suppliers of Vecuronium in the United States, with a combined market share of 53%, until ESI temporarily suspended sales of Vecuronium in 2001. The post-acquisition HHI would be 3,598, representing a 1,364 point increase in the HHI. Prior to the announcement of the Acquisition, ESI had planned to relaunch its Vecuronium product.

18. The market for the manufacture and sale of Metoclopramide is highly concentrated as measured by the HHI. Baxter and ESI are two of only four suppliers of Metoclopramide. Baxter and ESI, respectively, represent approximately 12% and 39% of the market. As a result of the Acquisition, Baxter would account for 51% of the market and the post-Acquisition HHI would be 3,852, an increase of 936 points above the pre-Acquisition HHI.

19. The market for the manufacture and sale of Propofol is highly concentrated. Currently, AstraZeneca Pharmaceuticals LP and Baxter market the only Propofol products in the United States. ESI is seeking FDA approval for its own Propofol product and is one of the two best-positioned firms to enter the market. Other

firms that have undertaken efforts to develop Propofol have either failed in their efforts or lag well behind ESI.

20. The market for the manufacture and sale of NIIRTs is highly concentrated. Currently, Watson Pharmaceuticals, Inc. and Baxter jointly market one of only two NIIRT products approved for use in the United States. ESI has the most advanced development effort for a NIIRT and appears to be the best-positioned firm to enter the market for the manufacture and sale of NIIRTs.

VI. ENTRY CONDITIONS

21. Entry into any of the relevant product markets described in Paragraph 14 would not be timely, likely, or sufficient in its magnitude, character, and scope to deter or counteract the anticompetitive effects of the Acquisition. Developing and obtaining approval for even the simplest generic injectable takes at least two years and significantly longer for more complex products. Additionally, patents and other intellectual property create large and potentially insurmountable barriers to entry in some of the product markets.

VII. EFFECTS OF THE ACQUISITION

22. The effects of the Acquisition, if consummated, may be 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:

1. by eliminating actual, direct, and substantial competition between Baxter and Wyeth, and reducing the number of competitors, in the market for the manufacture and sale of Pancuronium, thereby (a) increasing the likelihood of a unilateral exercise of market power in the market for the manufacture and sale of Pancuronium, or (b) increasing the likelihood of coordinated interaction, and

(c) increasing the likelihood that Pancuronium customers would be forced to pay higher prices;

2. by eliminating potential competition between Baxter and Wyeth in the market for the manufacture and sale of Vecuronium, thereby (a) increasing the likelihood that the combined entity would forego or delay the relaunch of ESI's Vecuronium and (b) increasing the likelihood that the combined entity would delay or eliminate the additional price competition that would have resulted from ESI's re-entry into the market for the manufacture and sale of Vecuronium;

3. by eliminating actual, direct, and substantial competition between Baxter and Wyeth, and reducing the number of competitors, in the market for the manufacture and sale of Metoclopramide, thereby (a) increasing the likelihood of a unilateral exercise of market power in the market for the manufacture and sale of Metoclopramide, or (b) increasing the likelihood of coordinated interaction, and (c) increasing the likelihood that Metoclopramide customers would be forced to pay higher prices;

4. by eliminating potential competition between Baxter and Wyeth in the market for the manufacture and sale of Propofol, thereby (a) increasing the likelihood that the combined entity would forego or delay the launch of ESI's Propofol and (b) increasing the likelihood that the combined entity would delay or eliminate the additional price competition that would have resulted from ESI's entry into the market for the manufacture and sale of Propofol; and

5. by eliminating potential competition between Baxter and Wyeth in the market for the manufacture and sale of NIIRTs, thereby (a) increasing the likelihood that the combined entity would forego or delay the launch of ESI's NIIRT and (b) increasing the likelihood that the

combined entity would delay or eliminate the additional price competition that would have resulted from ESI's entry into the market for the manufacture and sale of NIIRTs.

VIII. VIOLATIONS CHARGED

23. The Asset Purchase Agreement described in Paragraph 13 constitutes a violation of Section 5 of the FTC Act, as amended, 15 U.S.C. § 45.

24. The Acquisition described in Paragraph 13, 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 twentieth day of December, 2002, issues its Complaint against said Respondents.

DECISION AND ORDER

The Federal Trade Commission ("Commission") having initiated an investigation of the proposed acquisition by Respondent Baxter International Inc. ("Baxter") of certain assets of Respondent Wyeth, hereinafter referred to as "Respondents," and Respondents having been furnished thereafter with a copy of a draft of 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 7 of the Clayton Act, as amended, 15 U.S.C. § 18, and Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45; and

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

The Commission having thereafter considered the matter and having determined that it had reason to believe that Respondents have violated the said Acts, and that a Complaint should issue stating its charges in that respect, and having thereupon issued its Complaint and an Order to Maintain Assets, and having accepted the executed Consent Agreement and placed such Consent Agreement on the public record for a period of thirty (30) days for the receipt and consideration of public comments, and having duly considered the comment filed thereafter by an interested party pursuant to § 2.34 of the Commission Rules, the Commission hereby makes the following jurisdictional findings and issues the following Decision and Order ("Order"):

1. Respondent Baxter 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 One Baxter Parkway, Deerfield, Illinois 60015.

2. Respondent Wyeth is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware, with its office and principal place of business located at Five Giralda Farms, Madison, New Jersey 07940.

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. "Baxter" means Baxter International Inc., its directors, officers, employees, agents, representatives, predecessors, successors, and assigns; its joint ventures, subsidiaries, divisions, groups and affiliates controlled by Baxter International Inc. (including, but not limited to, Baxter Healthcare Corporation), and the respective directors, officers, employees, agents, representatives, successors, and assigns of each.

B. "Wyeth" means Wyeth, its directors, officers, employees, agents, representatives, predecessors, successors, and assigns; its joint ventures, subsidiaries, divisions, groups and affiliates controlled by Wyeth (including, but not limited to, Wyeth Pharmaceuticals Inc.), and the respective directors, officers, employees, agents, representatives, successors, and assigns of each.

C. "Respondents" means Baxter and Wyeth individually and collectively.

D. "Acquisition" means the proposed acquisition by Baxter of certain assets of Wyeth's human generic injectable pharmaceutical business, operated by Wyeth's ESI Lederle division, pursuant to an Asset Purchase Agreement dated June 8, 2002, by and among Wyeth, Wyeth Pharmaceuticals Inc. and Baxter Healthcare Corporation.

E. "Commission" means the Federal Trade Commission.

F. "Faulding" means Faulding Pharmaceutical Co., 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 650 From Road (Mack-Cali Centre II), 5th Floor South, Paramus, New Jersey, 07652.

G. "Acquisition Date" means the date the Acquisition is consummated.

H. "Access Period" means the period described in Paragraph II.H. of this Order.

I. "Agency" means any governmental, legislative, regulatory, judicial or other authority in the world responsible for granting approvals, consents, licenses, registrations, permits, waivers or other authorizations for any aspect of the research, development, manufacture, finishing, packaging, validation, distribution, marketing or sale of any of Respondents' products. The term "Agency" includes, but is not limited to, the FDA.

J. "ANDA" means an Abbreviated New Drug Application filed or to be filed with the FDA pursuant to 21 C.F.R. 314, or its foreign Agency equivalent, and all supplements, amendments and revisions thereto.

K. "Anesthesia/Sedation Product" means any pharmaceutical product indicated for the induction or maintenance of general anesthesia or sedation in connection with a surgical procedure or an invasive non-surgical procedure (including, but not limited to, sedation of intubated, mechanically ventilated individuals), but excluding any product marketed by Wyeth on the day following the Divestiture Date.

L. "Business Day" means any day excluding Saturday, Sunday and any United States Federal holiday.

M. "Confidential Propofol Information" means all information that is not in the public domain relating to Propofol that was obtained in any manner by Respondent Wyeth. "Confidential Propofol Information" does not include (1) any information that Respondent Baxter demonstrates it obtained without the assistance of Respondent Wyeth prior to the Acquisition Date or (2) the Propofol Licensed Intellectual Property.

N. "Confidential PV&M Information" means all information that is not in the public domain relating to Sicor's Pancuronium, Vecuronium, and Metoclopramide that was obtained in any manner by Respondent Baxter.

O. "Copyrights" means all rights to all original works of authorship of any kind in any form related to any of Respondents' products, and any registrations and applications for registrations thereof.

P. "Direct Cost" means the pro rata share of salary or wages and reasonable expenses.

Q. "Divestiture Agreement" means the Faulding Divestiture Agreement or any other agreement to divest the Propofol Assets that has been approved by the Commission to accomplish the requirements of this Order, between Respondents and a Propofol Acquirer (or between a trustee appointed pursuant to Paragraph

VI. of this Order and a Propofol Acquirer) and all amendments, exhibits, attachments, agreements, and schedules thereto.

R. "Divestiture Date" means the date on which Respondents and a Propofol Acquirer close on a transaction to divest, license, or otherwise convey relevant assets pursuant to this Order.

S. "Divestiture Trustee" means the trustee appointed by the Commission pursuant to Paragraph VI.A. of this Order.

T. "Drug Master Files" means the information required by the FDA as described in 21 C.F.R. Part 314.420 related to Propofol.

U. "Faulding Divestiture Agreement" means the Asset Purchase Agreement (including all related agreements, amendments, schedules, exhibits, and appendices) by and between Respondent Baxter and Faulding dated November 20, 2002 that is attached hereto as Confidential Appendix I.

V. "FDA" means the United Stated Food and Drug Administration.

W. "Iron Gluconate" means any injectable pharmaceutical composition containing any formulation or dosage of the active ingredient generically known as iron gluconate or sodium ferric gluconate.

X. "Iron Gluconate Agreement" means the Ferrlecit® Co-Promotion Agreement dated June 28, 2002, between Baxter Healthcare Corporation and Watson Pharmaceuticals, Inc. relating to Watson's product Ferrlecit®.

Y. "Know-how" means any product specifications, processes, product designs, plans, trade secrets, ideas, concepts, manufacturing, engineering, and other manuals and drawings, chemical, pharmacological, toxicological, pharmaceutical, physical and analytical, safety, quality control and clinical data, technical information, test results, data, research records,

invention disclosures, literature, supplier lists and similar data and information and all other confidential and proprietary technical or business information in each case in whatever medium (electronic, magnetic or otherwise), and all rights in any jurisdiction to limit the use or disclosure thereof.

Z. "Metoclopramide" means any injectable pharmaceutical composition containing any formulation or dosage of the active ingredient generically known as metoclopramide or metoclopramide hydrochloride.

AA. "NDA" means the New Drug Application filed or to be filed with the FDA pursuant to C.F.R. Part 314, or its foreign Agency equivalent, and all supplements, amendments and revisions thereto.

BB. "NDC Numbers" means the National Drug Code numbers(s) assigned by the FDA.

CC. "Pancuronium" means any injectable pharmaceutical composition containing any formulation or dosage of the active ingredient generically known as pancuronium or pancuronium bromide.

DD. "Patents" means all patents, patent applications, and statutory invention registrations, including all reissues, renewals, divisions, continuations, continuations-in-part, supplementary protection certificates, extensions and reexaminations thereof, all inventions disclosed therein, all rights therein provided by international treaties and conventions, and all rights to obtain and file for patents and registrations thereto in the world, related to any of Respondents' products.

EE. "Person" includes the company and means any natural person, incorporated or unincorporated entity, partnership, association, joint venture, government entity, non-profit organization, university, trust or other entity.

FF. "Product Registrations" means all registrations, permits, licenses, consents, authorizations and other approvals, and pending applications and requests therefore, required by applicable Agencies related to the research, development, manufacture, finishing, packaging, distribution, marketing or sale of any of Respondents' products, including all NDAs and ANDAs. "Product Registrations" includes all underlying information, data, filings, reports, correspondence or other materials used to obtain or apply for any of the foregoing, including, without limitation, all data submitted to and all correspondence with the FDA and other Agencies.

GG. "Propofol" means any pharmaceutical composition containing any formulation or dosage of the active ingredient generically known as propofol.

HH. "Propofol Acquirer" means an entity approved by the Commission to acquire the Propofol Assets.

II. "Propofol Assets" means all of Respondent Wyeth's rights, title and interest, in and to all assets, tangible or intangible, related to Propofol in any market anywhere in the world, in existence as of the Acquisition Date, including the research, development, registering, manufacture, packaging, distribution, marketing or sale of Propofol, including, without limitation, the following:

1. all personal property owned, leased or otherwise held by Wyeth;

2. all Propofol Intellectual Property;

3. all Confidential Propofol Information;

4. all Product Registrations;

5. at the Propofol Acquirer's option, any of the Propofol Contracts;

6. all Propofol Manufacturing Technology, Propofol Scientific and Regulatory Materials, and Propofol Marketing Materials;

7. a list of all of the NDC Numbers related to Propofol;

8. all Drug Master Files including all rights of reference to the Drug Master Files and rights of reference (if such rights exist) to information similar to the Drug Master Files submitted to any Agency other than the FDA;

9. all inventories, stores, and supplies held by, or under the control of, Wyeth, including, but not limited to, raw materials, goods in process, finished goods, and Propofol specific packaging and labels; and

10. all books, records and files.

Provided, however, that "Propofol Assets" does not include (i) any assets exclusively relating to Sicor's Propofol that Baxter markets pursuant to an agreement dated September 30, 1993 between Baxter and Sicor, (ii) any real property relating to Wyeth's Propofol Assets, and (iii) any Propofol Licensed Intellectual Property.

JJ. "Propofol Contracts" means all contracts and agreements relating to Propofol between Wyeth and any Person, including, but not limited to, contracts and agreements with manufacturers, raw material suppliers, customers, and group purchasing organizations.

KK. "Propofol Employees" means all of Respondent Wyeth's employees who participated (irrespective of the portion of working time involved), within the eighteen (18) month period immediately prior to the Divestiture Date, in the following activities: (i) the regulatory approval process, including clinical, bioequivalence or stability studies of Propofol; (ii) the planning, engineering, procurement, or analysis of the means to produce

Propofol; (iii) the manufacture of (or attempt to manufacture) Propofol, including, but not limited to, those involved in the quality assurance and quality control of Propofol; or (iv) legal work on Patents or litigation related to Propofol. "Propofol Employees" also includes all of Respondent Wyeth's employees who participated (irrespective of the portion of working time involved), within the five (5) year period immediately prior to the Divestiture Date, in the research and development of Propofol. These employees are identified in Confidential Appendix II, attached hereto.

LL. "Propofol Intellectual Property" means all of each of the following that relate to Propofol:

1. inventions and discoveries related to Propofol that are or may be patentable, and rights to obtain or file for Patents and registrations thereof;

2. Patents, including, but not limited to (a) U.S. Patents 6,177,477 and 6,028,108 and (b) all pending applications in Brazil, Canada, and the European Patent Office, that are the counterparts to U.S. Patents 6,177,477 and 6,028,108, and any patents issuing therefrom;

3. Copyrights, including, without limitation, all such rights relating to Propofol Marketing Materials, Propofol Manufacturing Technology, and Propofol Scientific and Regulatory Materials;

4. Software;

5. Trademarks, Trade Dress, and mask works;

6. Know-how; and

7. rights to sue and recover damages or obtain injunctive relief for infringement, dilution, misappropriation, violation or breach of any of the foregoing.

Provided, however, that "Propofol Intellectual Property" does not include any Propofol Licensed Intellectual Property.

MM. "Propofol Launch Date" means the earliest date on which the Proposed Acquirer (1) obtains all final approvals from any Agency necessary to manufacture and sell 20 ml, 50 ml, and 100 ml dosage forms of Propofol, each as a finished good, in the United States and (2) is able to legally sell 20 ml, 50 ml, and 100 ml dosage forms of Propofol, each as a finished good, in the United States.

NN. "Propofol Licensed Intellectual Property" means all of Respondent Wyeth's rights, title, and interest, in and to all Know-how that relates to (but does not exclusively relate to) Propofol as of the Divestiture Date.

OO. "Propofol Manufacturing Technology" means all technology, trade secrets, know-how, techniques, processes, practices, methods, and proprietary information, materials, or data relating to the manufacture, engineering, safety, quality control, validation, packaging, finishing, release testing, stability or shelf life of Propofol, and any rights thereto, in all jurisdictions, including, but not limited to, all Propofol specifications, formulations, manufacturing and engineering records, manuals, and drawings, all sampling records, standard operating procedures, batch records, stability studies, supplier lists, and all specifications for commercial field equipment.

PP. "Propofol Marketing Materials" means all marketing information, materials or data used (or that Wyeth planned for use) anywhere in the world relating to Propofol, including, but not limited to (i) all advertising, promotional, educational, training, display, and sales (*e.g.*, forecasting models, detailing reports, sales force call activity reports) information, materials, or data, (ii) all vendor lists, price lists, and reimbursement data, (iii) all market, competitor, and customer information (*e.g.*, customer lists, customer contact information, mailing lists, research data and market intelligence reports), (iv) all statistical programs (if any)

used for marketing and sales research, (v) all artwork for packaging, and (vi) all marketing, strategic, sales or other plans.

QQ. "Propofol Patent Litigation" means the action filed by AstraZeneca Pharmaceuticals LP and AstraZeneca UK Ltd. against Wyeth for patent infringement in the United States District Court for the Southern District of New York (Case No. 02 CV 7936) relating to the Propofol Assets.

RR. "Propofol Scientific and Regulatory Materials" means all technical, scientific, clinical, pharmaceutical, chemical, pharmacological, toxicological, physical, analytical, regulatory, process development, bioequivalence, and stability information, materials, or data relating to Propofol, and all rights thereto, in any and all jurisdictions, including, but not limited to, all information, data, and materials used in or relating to the research, development, registration, and Agency approval of Propofol, including (i) all raw data used to support any information submitted to an Agency (*e.g.*, clinical or bioequivalence data), (ii) all case report forms, (iii) all statistical programs developed (or modified in a manner material to the use or function thereof (other than through user references)) to analyze data, (iv) all data contained in laboratory notebooks, and (v) all adverse experience reports, files, and underlying data (including source documentation).

SS. "Propofol Services" means the services described in Paragraph II.E. of this Order.

TT. "PV&M Assets" means all of Respondent Baxter's right, title and interest, in and to all assets, tangible or intangible, related to Pancuronium, Vecuronium, and Metoclopramide, in existence as of the date Respondents sign the Consent Agreement, including, but not limited to:

1. all Confidential PV&M Information;

2. at Sicor's option, any of the PV&M Contracts;

3. all Copyrights, including, without limitation, all such rights relating to the PV&M Marketing Materials;

4. all PV&M Marketing Materials;

5. all inventories, stores, and supplies held by, or under the control of, Respondent Baxter; and

6. all books, records and files.

UU. "PV&M Contracts" means all of the contracts and agreements relating to Pancuronium, Vecuronium, and Metoclopramide between Respondent Baxter and any Person, including, but not limited to, group purchasing organizations and hospitals.

VV. "PV&M Customers" means all of Baxter's Pancuronium, Vecuronium, and Metoclopramide customers as of the date Respondents sign the Consent Agreement.

WW. "PV&M Marketing Materials" means all marketing information, materials or data used anywhere in the world relating to Pancuronium, Vecuronium, and Metoclopramide, including, but not limited to (i) all advertising, promotional, educational, training, display, and sales (*e.g.*, forecasting models, detailing reports, sales force call activity reports) information, materials, or data, (ii) all vendor lists, price lists, and reimbursement data, (iii) all market, competitor, and customer information (*e.g.*, customer lists, customer contact information, mailing lists, research data and market intelligence reports), (iv) all statistical programs (if any) used for marketing and sales research, (v) all artwork for packaging, and (vi) all marketing, strategic, sales or other plans.

XX. "PV&M Services" means the term described in Paragraph III.D. of this Order.

YY. "PV&M Term" means the term described in Paragraph III.D. of this Order.

ZZ. "Restricted Period" means the period described in Paragraph III.E. of this Order.

AAA. "Sicor" means Sicor Inc. (including Gensia Sicor Pharmaceuticals, Inc. and Gensia Sicor Pharmaceuticals Sales, 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 19 Hughes Irvine, CA 92618.

BBB. "Software" means computer programs (including all software implementations of algorithms, models, and methodologies whether in source code or object code form), databases and compilations, including any and all data and collections of data, all documentation, including user manuals and training materials, related to any of the foregoing and the content and information contained on any website; provided, however, that "Software" does not include software that is readily purchasable or licensable and which has not been modified in a manner material to the use or function thereof (other than through user preference settings).

CCC. "Trade Dress" means any current or planned trade dress related to any of Respondents' products, including, but not limited to, product packaging associated with the sale of the product worldwide and the lettering of the product's trade name or brand name.

DDD. "Trademarks" means all (i) trademarks, trade names and brand names, including registrations and applications for registration therefor, (ii) all renewals, modifications, and extensions thereof, and (iii) all common law rights, and the goodwill symbolized thereby and associated therewith.

EEE. "Vecuronium" means any injectable pharmaceutical composition containing any formulation or dosage of the active ingredient generically known as vecuronium or vecuronium bromide.

FFF. "Watson" means Watson Pharmaceuticals, Inc., a corporation organized, existing and doing business under and by virtue of the laws of the State of Nevada, with its corporate headquarters located at 311 Bonnie Circle, Corona, California, 92880.

II.

IT IS FURTHER ORDERED that:

A. No later than ten (10) Business Days after the Acquisition Date, Respondents shall divest the Propofol Assets, absolutely and in good faith, at no minimum price to Faulding.

1. To the extent that any of the Propofol Assets are conveyed to Respondent Baxter on the Acquisition Date, Respondent Baxter shall divest all such Propofol Assets to Faulding in accordance with Paragraph II.A. of this Order. The Faulding Divestiture Agreement is incorporated by reference into this Order and made a part hereof, and shall not be construed to vary or contradict the terms of this Order. Any failure to comply with the terms of the Faulding Divestiture Agreement shall constitute a violation of this Order by Respondent Baxter.

2. To the extent that any of the Propofol Assets are not conveyed to Respondent Baxter on the Acquisition Date, Respondent Wyeth shall divest all such Propofol Assets to Faulding in accordance with Paragraph II.A. of this Order.

B. Provided, however, that, if, at the time the Commission determines to make this Order final, the Commission notifies Respondent Baxter that Faulding is not an acceptable purchaser of the Propofol Assets or that the Faulding Divestiture Agreement is not an acceptable manner of divestiture: (i) Respondent Baxter shall immediately rescind the Faulding Divestiture Agreement; (ii) Respondents shall divest the Propofol Assets at no minimum price, absolutely and in good faith, no later than ninety (90) Business Days from the date this Order becomes final, to a Person that receives the prior approval of the Commission and only in a manner that receives the prior approval of the Commission; and (iii) Respondents shall comply with all terms of the Divestiture Agreement. The Divestiture Agreement shall not be construed to vary or contradict the terms of this Order, and any breach by Respondents of any term of the Divestiture Agreement shall constitute a violation of this Order.

C. No later than the date Respondents divest the Propofol Assets, Respondents shall grant to the Propofol Acquirer a worldwide, royalty-free, fully paid-up, perpetual, irrevocable, transferable, assignable license (with the right to grant sublicenses) to the Propofol Licensed Intellectual Property to make, distribute, offer for sale, promote, advertise, sell, import or export or have used, made, distributed, offered for sale, promoted, advertised, sold, imported or exported, any product anywhere in the world. Such license shall be (i) exclusive (even as to Respondents) for any Propofol product and (ii) non-exclusive for any other product; provided, however, that Respondents may require that the Propofol Acquirer not sublicense the Propofol Intellectual Property to any Person (other than third-party manufacturing contractor(s) or third-party developer(s) working on behalf of the Propofol Acquirer), to make, distribute, offer for sale, promote, advertise, sell, import or export or have used, made, distributed, offered for sale, promoted, advertised, sold, imported or exported, any non-Propofol or non-Anesthesia/Sedation product. Respondents shall disclose, provide or otherwise make available all of the Propofol Licensed Intellectual Property to the Propofol Acquirer no later than the Divestiture Date.

D. Nothing in this Order shall prohibit the Propofol Acquirer from granting to Wyeth a non-exclusive license to any Know-how conveyed to the Propofol Acquirer pursuant to this Order; provided, however, that Respondent Wyeth shall not use any such Know-how licensed from the Propofol Acquirer for (1) any Propofol product or (2) any Anesthesia/Sedation Product.

E. Upon request and reasonable notice from the Propofol Acquirer to Respondents, Respondents shall provide the following services (hereinafter "Propofol Services") in a timely manner:

1. assistance and training from knowledgeable Propofol Employees to enable the Propofol Acquirer (or its designee) to obtain all necessary approvals from any Agency to manufacture and sell all formulations and dosages of Propofol, including, but not limited to, conducting stability studies, preparing filings, addressing FDA deficiency letters, and assisting with pre-approval inspections, until the Propofol Acquirer (or its designee) obtains all such necessary approvals; provided, however, that such assistance and training may be limited to applications for approvals that were filed, or requests for approvals that were made, on or before the Propofol Launch Date;

2. assistance and training from knowledgeable Propofol Employees at a facility chosen by the Propofol Acquirer, until the Propofol Acquirer or its designee is able to manufacture all formulations and dosages of Propofol for commercial sale, including, but not limited to, assistance with production batches, scale-up, commercial field equipment, and transferring Know-how related to Propofol; and

3. assistance from knowledgeable personnel to enable the Propofol Acquirer to defend against, respond to, or otherwise participate in any litigation (including the Propofol Patent Litigation), investigation, audit, process,

subpoena or other proceeding relating to Propofol, until the litigation (including the Propofol Patent Litigation), investigation, audit, process, subpoena or other proceeding relating to Propofol is settled or finally disposed of without any right to appeal; provided, however, that such assistance may be limited to litigation, investigations, audits, processes, subpoenas or other proceedings relating to Propofol that are initiated on or before the Propofol Launch Date.

Provided, further, however, that Respondents shall not: (i) require the Propofol Acquirer to pay compensation for Propofol Services that exceeds the Direct Cost of providing such services; (ii) terminate its obligation to provide Propofol Services because of a material breach by the Propofol Acquirer of any agreement to provide such services, in the absence of a final order of a court of competent jurisdiction; or (iii) seek to limit the damages (such as indirect, special or consequential damages) that the Propofol Acquirer would be entitled to receive in the event of Respondents' breach of any agreement to provide Propofol Services.

F. At the time of divestiture, Respondents shall also divest any additional, incidental assets of Respondents and make any further arrangements for transitional services that may be reasonably necessary to ensure the marketability, viability and competitiveness of the Propofol Assets.

G. Respondents shall secure, prior to the Divestiture Date, all consents and waivers from all Persons that are necessary for the divestiture of the Propofol Assets to the Propofol Acquirer, or for the continued research, development, manufacture, sale, marketing or distribution of Propofol by the Propofol Acquirer.

H. For a period of six (6) months from the Divestiture Date (hereinafter "Access Period"), Respondents shall allow the Propofol Acquirer an opportunity to enter into an employment contract with any Propofol Employee, provided that such

contracts are contingent upon the Commission's approval of the Divestiture Agreement. Provided, further, that:

1. At the request of the Propofol Acquirer, any time during the Access Period, Respondents shall (i) allow the Propofol Acquirer an opportunity to interview any Propofol Employee, and (ii) allow the Propofol Acquirer to inspect the personnel files and other documentation relating to any Propofol Employee, to the extent permissible under applicable laws.

2. During the Access Period, Respondents shall (i) not interfere with the hiring or employing by the Propofol Acquirer of Propofol Employees, (ii) remove any impediments within the control of Respondents that may deter these employees from accepting employment with the Propofol Acquirer, 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 the Propofol Acquirer, and (iii) not make any counteroffer to a Propofol Employee who receives a written offer of employment from the Propofol Acquirer. Provided, however, that Paragraph II.H.2. does not prohibit Respondents from making offers of employment to or employing any Propofol Employee during the Access Period where the Propofol Acquirer has notified Respondents in writing that the Propofol Acquirer does not intend to make an offer of employment to that employee.

3. Respondents shall provide all Propofol Employees with reasonable financial incentives to continue in their positions until the Divestiture Date. Such incentives shall include a continuation of all employee benefits offered by Respondents until the Divestiture Date, including regularly scheduled raises and bonuses, and a vesting of all pension benefits (as permitted by law).

4. Respondents shall provide to each Propofol Employee incentives to accept employment with the Propofol Acquirer. Such incentives shall include a bonus equal to 10% of the employee's current salary and commissions (including any annual bonuses), to any Propofol Employee as of the Divestiture Date, who accepts an offer of employment from the Propofol Acquirer during the Access Period, and remains employed by the Propofol Acquirer for a period of one (1) year, payable by Respondents one (1) year after the commencement of the employee's employment with the Propofol Acquirer.

5. For a period of one (1) year following the Divestiture Date, Respondents shall not, directly or indirectly, hire or enter into any arrangement for the services of any employee employed by the Propofol Acquirer with any amount of responsibility related to Propofol, unless the individual's employment has been terminated by the Propofol Acquirer.

I. Respondents shall take all necessary steps to maintain the confidentiality of the Confidential Propofol Information. Provided, further, that:

1. Except as permitted under the Divestiture Agreement or this Order, Respondents shall not (i) provide, disclose, or otherwise make available any Confidential Propofol Information to any Person or (ii) use any Confidential Propofol Information for any reason or purpose.

2. If use of any Confidential Propofol Information is permitted under this Order, Respondents shall provide, disclose, or otherwise make available such information (i) only to those Persons who require such information for the permitted purposes, (ii) only such part of the Confidential Propofol Information that is so required, and (iii) only to those Persons who agree in writing to maintain the confidentiality of such information.

3. Respondents shall (i) require that any Propofol Employee who continues his or her employment with either Respondent sign a confidentiality agreement pursuant to which such employee shall be required to maintain the confidentiality of all Confidential Propofol Information, including the obligation not to disclose such information to any other employee, executive, consultant, agent or other personnel of Respondents, and (ii) enforce the terms of this Paragraph II.I. as to any Person and take such action as is necessary to cause each such Person to comply with the terms of this Paragraph II.I., including notification and training of employees and all other actions that Respondents would take to protect their own trade secrets and proprietary information.

4. Nothing in this Order prohibits Respondents from disclosing Confidential Propofol Information if required by United States federal or state law, regulation, court order, or subpoena; provided, however, that Respondents shall use their best efforts to protect the confidentiality of such information, including, but not limited to, obtaining a protective order during an adjudication.

J. The purpose of the divestiture of the Propofol Assets and of related obligations is to ensure the continued use of the Propofol Assets in the same business in which the Propofol Assets were used by Respondent Wyeth at the time of the announcement of the 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 five (5) Business Days after the Acquisition Date, Respondent Baxter shall (i) terminate all of its rights and interests in Sicor's Pancuronium, Vecuronium, and Metoclopramide, and (ii) divest the PV&M Assets to Sicor.

B. Respondent Baxter shall secure, prior to the Acquisition Date, all consents and waivers from all Persons that are necessary for the divestiture of the PV&M Assets to Sicor.

C. No later than five (5) Business Days after the date Respondents sign the Consent Agreement, Respondent Baxter shall notify in writing all PV&M Customers that (i) Baxter intends to transfer all of its rights and interests in Pancuronium, Vecuronium, and Metoclopramide back to Sicor, (ii) Baxter intends to transfer all contracts relating to these products to Sicor, and (iii) following a transition period not to exceed ninety (90) Business Days, PV&M Customers will be able to purchase these products under the Sicor label. Respondent Baxter shall provide Sicor with a copy of such notification, together with a list of the names and addresses of all PV&M Customers to whom such notification was sent, no later than five (5) Business Days after the date Respondents sign the Consent Agreement. Prior to the date Respondent Baxter terminates all of its rights and interests in Sicor's Pancuronium, Vecuronium, and Metoclopramide pursuant to Paragraph III.A. of this Order, Respondent Baxter shall permit Sicor to contact the PV&M Customers solely for the purpose of (i) introducing Sicor and its sales representatives to the PV&M Customers, (ii) informing such customers of how orders may be placed during the transition period, and (iii) addressing ways to ensure the uninterrupted supply of Pancuronium, Vecuronium, and Metoclopramide.

D. For a period not to exceed ninety (90) Business Days after the Acquisition date (hereinafter "PV&M Term"), at the request of Sicor, Respondent Baxter shall provide to Sicor at no cost and in a timely manner the following services (hereinafter "PV&M Services"):

1. Baxter shall continue to take customer orders, ship product, invoice customers, collect customer remittances, and provide any other additional services that are necessary to ensure an uninterrupted supply of Sicor's

Pancuronium, Vecuronium, and Metoclopramide (including any such Baxter-labeled products); provided, however, that for the term of the PV&M Services, Baxter may share a dual award on any group purchasing organization contracts for the sole purpose of performing its obligations under this Paragraph III.D.; provided further, however, that Respondent Baxter shall not market, distribute, sell or otherwise convey Pancuronium, Vecuronium, or Metoclopramide manufactured by Sicor after the PV&M Term.

2. Respondent Baxter shall not: (i) terminate its obligation to provide PV&M Services because of a material breach by Sicor of any agreement to provide such services, in the absence of a final order of a court of competent jurisdiction; or (ii) seek to limit the damages (such as indirect, special or consequential damages) that Sicor would be entitled to receive in the event of Respondent Baxter's breach of any agreement to provide PV&M Services.

E. For a period of six (6) months from the Acquisition Date (hereinafter "Restricted Period"), Respondent Baxter shall not solicit, induce or attempt to induce any PV&M Customer to transfer to Respondent Baxter any business relating to Pancuronium, Vecuronium, or Metoclopramide; provided, however, that nothing in this paragraph shall prevent Respondent Baxter from responding to an unsolicited invitation to bid on a contract from any Person during the Restricted Period.

F. For a period of ten (10) years beginning on the date this Order becomes final, Respondent Baxter shall not enter into any agreements with Sicor relating to Pancuronium, Vecuronium or Metoclopramide without the prior approval of the Commission.

G. Respondent Baxter shall take all necessary steps to maintain the confidentiality of the Confidential PV&M - Information. Provided, further, that:

1. Except as permitted under this Order, Respondent Baxter shall not (i) provide, disclose, or otherwise make available any Confidential PV&M Information to any Person or (ii) use any Confidential PV&M Information for any reason or purpose.

2. If use of any Confidential PV&M Information is permitted under this Order, Respondent Baxter shall provide, disclose, or otherwise make available such information (i) only to those Persons who require such information for the permitted purposes, (ii) only such part of the Confidential PV&M Information that is so required, and (iii) only to those Persons who agree in writing to maintain the confidentiality of such information.

3. Respondent Baxter shall (i) require that each of its employees with any responsibility for Pancuronium, Vecuronium, and Metoclopramide sign a confidentiality agreement pursuant to which such employee shall be required to maintain the confidentiality of all Confidential PV&M Information, including the obligation not to disclose such information to any other employee, executive, consultant, agent or other personnel of Respondent Baxter, and (ii) enforce the terms of this Paragraph III.G. as to any Person and take such action as is necessary to cause each such Person to comply with the terms of this Paragraph III.G., including notification and training of employees and all other actions that Respondent Baxter would take to protect its own trade secrets and proprietary information.

H. The purpose of the requirements in Paragraph III. is to ensure the continued use of the PV&M Assets and related obligations in the same business in which the PV&M Assets were used by Respondent Baxter 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. No later than ten (10) Business Days after the Acquisition Date, Respondent Baxter shall notify Watson in writing of Respondent Baxter's intention to terminate the Iron Gluconate Agreement by March 14, 2004.

B. Respondent Baxter shall terminate the Iron Gluconate Agreement no later than March 14, 2004.

C. For a period of ten (10) years beginning on the date this order becomes final, Respondent Baxter shall not enter into any agreement with Watson relating to Iron Gluconate without the prior approval of the Commission.

D. The purpose of the requirements in Paragraph IV. is to ensure the continued development of Respondent Wyeth's Iron Gluconate in the market, and to remedy the lessening of competition resulting from the Acquisition as alleged in the Commission's Complaint.

V.

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 to ensure that Respondents expeditiously perform their obligations as required by this Order and the Order to Maintain Assets.

B. If a Monitor is appointed pursuant to this Paragraph, Respondents shall consent to the following terms and conditions

regarding the powers, duties, authorities, and responsibilities of the Monitor:

1. The Commission shall select the Monitor, 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 Monitor within fourteen (14) days after notice by the staff of the Commission to Respondents of the identity of any proposed Monitor, Respondents shall be deemed to have consented to the selection of the proposed Monitor.

2. The Monitor shall have the power and authority to monitor Respondents' compliance with the terms of this Order and the Order to Maintain Assets and shall exercise such power and authority and carry out the duties and responsibilities of the Monitor pursuant to the terms of this Order and in a manner consistent with the purposes of this Order and the Order to Maintain Assets.

3. Within fourteen (14) days after appointment of the Monitor, Respondents shall execute an agreement that, subject to the approval of the Commission, confers on the Monitor all the rights and powers necessary to permit the Monitor to monitor Respondents' compliance with the terms of this Order and the Order to Maintain Assets in a manner consistent with the purposes of such Orders. Respondents may require the Monitor 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.

4. The Monitor's power and duties under this Paragraph V. shall terminate sixty (60) days after the Monitor has completed his or her final report pursuant to Paragraph V.B.9., or at such other time as directed by the Commission.

5. The Monitor shall have full and complete access to Respondents' books, records, documents, personnel, facilities, and technical information relating to compliance with this Order and the Order to Maintain Assets, or to any other relevant information, as the Monitor may reasonably request. Respondents shall cooperate with any reasonable request of the Monitor. Respondents shall take no action to interfere with or impede the Monitor's ability to monitor Respondents' compliance with this Order and the Order to Maintain Assets.

6. The Monitor 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 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's duties and responsibilities. The Monitor 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 and hold the Monitor harmless against any losses, claims, damages, liabilities, or expenses arising out of, or in connection with, the performance of the Monitor'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 the Monitor's gross negligence or

willful misconduct. For purposes of this Paragraph V.B.7., the term "Monitor" shall include all Persons retained by the Monitor pursuant to Paragraph V.B.6. of this Order.

8. If at any time the Commission determines that the Monitor has ceased to act or failed to act diligently, or is unwilling or unable to continue to serve, the Commission may appoint a substitute in the same manner as provided in this Paragraph V.

9. The Monitor shall report in writing to the Commission (i) every sixty (60) days from the date this Order becomes final, (ii) no later than thirty (30) days from the date Respondents have completed all obligations required by Paragraphs II. through IV. of this Order, and (iii) at any other time as requested by the staff of the Commission, concerning Respondents' compliance with this Order.

C. The Commission may on its own initiative or at the request of the Monitor issue such additional orders or directions as may be necessary or appropriate to assure compliance with the requirements of this Order.

VI.

IT IS FURTHER ORDERED that:

A. If Respondents have not divested, absolutely and in good faith, the Propofol Assets within the time and in the manner required by Paragraph II. of this Order, the Commission may at any time appoint one or more Persons as Divestiture Trustee to divest such assets to an acquirer and to execute a Divestiture Agreement that satisfies the requirements and purposes of this Order.

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 Divestiture Trustee in such action. Neither the appointment of a Divestiture Trustee nor a decision not to appoint a Divestiture 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 Divestiture 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, Respondents shall consent to the following terms and conditions regarding the Divestiture 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 Divestiture Trustee shall be a Person with experience and expertise in acquisitions and divestitures and may be the same Person as the Monitor appointed pursuant to Paragraph V. of this Order. If Respondents have not opposed, in writing, including the reasons for opposing, the selection of any proposed Divestiture Trustee within fourteen (14) days after receipt of written notice from the staff of the Commission to Respondents of the identity of any proposed Divestiture Trustee, Respondents shall be deemed to have consented to the selection of the proposed Divestiture Trustee.

2. Subject to the prior approval of the Commission, the Divestiture Trustee shall have the exclusive power and authority to accomplish the divestiture for which he or she has been appointed pursuant to the terms of this Order and in a manner consistent with the purposes of this Order and to enter into a Divestiture Agreement with another acquirer.

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

4. The Divestiture Trustee shall have twelve (12) months from the date the Commission approves the agreement described in Paragraph VI.C.3. of this Order 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 Divestiture 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 the assets to be divested, or to any other relevant information, as the Divestiture Trustee may request. Respondents shall develop such financial or other information as the Divestiture Trustee may reasonably request and shall cooperate with the Divestiture Trustee. Respondents shall take no action to interfere with or impede the Divestiture 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 Divestiture 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 for the assets required to be divested from more than one acquiring entity, and if the Commission determines to approve more than one such acquiring entity, the Divestiture Trustee shall divest to the acquiring entity selected by 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 Divestiture Trustee's duties and responsibilities. The Divestiture Trustee shall account for all monies derived from the divestiture and all expenses incurred. After approval by the Commission and, in the case of a court-appointed Divestiture Trustee, by the court, of the account of the Divestiture Trustee, including fees for his or her services, all remaining monies shall be paid at the direction of the Respondents, and the Divestiture 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 Divestiture Trustee's divesting the assets required to be divested by this Order.

8. Respondents shall indemnify the Divestiture Trustee and hold the Divestiture Trustee harmless against any losses, claims, damages, liabilities, or expenses arising out of, or in connection with, the performance of the Divestiture Trustee's duties, including all reasonable fees of counsel and other expenses incurred in connection with the preparation for, or defense of any claim, whether or not resulting in any liability, except to the extent that such liabilities, losses, damages, claims, or expenses result from gross negligence or willful misconduct by the Divestiture Trustee. For purposes of this Paragraph VI.C.8., the term "Divestiture Trustee" shall include all Persons retained by the Divestiture Trustee pursuant to Paragraph VI.C.7. of this Order.

9. If the Divestiture Trustee ceases to act or fails to act diligently, the Commission may appoint a substitute Divestiture Trustee in the same manner as provided in Paragraph VI.A. for appointment of the initial Divestiture Trustee.

10. In the event that the Divestiture Trustee determines that he or she is unable to divest the relevant assets required to be divested in a manner that preserves their marketability, viability and competitiveness and ensures their continued use in the research, development, manufacture, distribution, marketing, promotion, sale, or after-sales support of Propofol, the Divestiture Trustee may divest such additional assets of Respondents and effect such arrangements as are necessary to satisfy the requirements of this Order.

11. The Commission or, in the case of a court-appointed Divestiture 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 divestiture required by this Order.

12. The Divestiture Trustee shall have no obligation or authority to operate or maintain the assets required to be divested by this Order.

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

VII.

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 Paragraphs II. through IV., 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 Monitor, if any Monitor 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 IV. of the Order, including a description of all substantive contacts or negotiations related to the divestiture of the Propofol Assets 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 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 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 purpose of determining or securing compliance with this Order, and subject to any legally recognized privilege, and upon written request with reasonable notice, 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 Respondents' officers, directors, or employees, who may have counsel present, regarding any such matters.

X.

IT IS FURTHER ORDERED that this Order will terminate on February 3, 2013.

APPENDIX I (non-public)
Faulding Divestiture Agreement

APPENDIX II (non-public)
Propofol Employees

ORDER TO MAINTAIN ASSETS

The Federal Trade Commission ("Commission") having initiated an investigation of the proposed acquisition by Respondent Baxter International Inc. ("Baxter") of certain assets of Respondent Wyeth, hereinafter referred to as "Respondents," and the Respondents having been furnished thereafter with a copy of a draft of 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 7 of the Clayton Act, as amended, 15 U.S.C. § 18, and Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45; and

Respondents, their attorneys, and counsel for the Commission having thereafter executed an Agreement Containing Consent Orders ("Consent Agreement"), containing 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 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 this Order to Maintain Assets:

1. Respondent Baxter 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 One Baxter Parkway, Deerfield, Illinois 60015.

2. Respondent Wyeth is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware, with its office and principal place of business located at Five Giralda Farms, Madison, New Jersey 07940.

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.

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

A. With respect to the PV&M Assets Respondent Baxter shall:

1. Take such actions as are reasonably necessary to maintain the viability, marketability, and competitiveness of the PV&M Assets and to prevent the destruction, removal, wasting, deterioration, sale, disposition, transfer or impairment of any of the PV&M Assets, except for ordinary wear and tear and as would otherwise occur in the ordinary course of business.

2. Preserve the PV&M Assets intact and not take any affirmative action, or fail to take any action within its control, as a result of which the viability, marketability, or competitiveness of the PV&M Assets would be diminished.

3. Maintain relations and good will with suppliers, distributors, customers, employees, Agencies, and others having relationships with the business relating to the PV&M Assets.

B. With respect to the Propofol Assets:

1. Respondents shall take such actions as are reasonably necessary to maintain the viability, marketability, and competitiveness of the Propofol Assets and to prevent the destruction, removal, wasting, deterioration, sale, disposition, transfer or impairment of any of the Propofol Assets, except for ordinary wear and tear and as would otherwise occur in the ordinary course of business.

2. Respondents shall preserve the Propofol Assets intact and not take any affirmative action, or fail to take any action within their control, as a result of which the viability, marketability, or competitiveness of the Propofol Assets would be diminished.

3. Respondents shall maintain relations and good will with suppliers, distributors, customers, employees, Agencies, and others having relationships with the business relating to the Propofol Assets.

4. Respondents shall provide all Propofol Employees with reasonable financial incentives to continue in their positions until the Divestiture Date, including, but not limited to, a continuation of all employee benefits offered by Respondents until the Divestiture Date, including

regularly scheduled raises and bonuses, and a vesting of all pension benefits (as permitted by law).

5. Respondent Wyeth shall: (i) keep Faulding (or the Propofol Acquirer) timely and reasonably informed on an on-going basis as to the defense of the Propofol Patent Litigation; (ii) promptly provide Faulding (or the Propofol Acquirer) and its counsel copies of all court filings relating to the Propofol Patent Litigation; (iii) defend the Propofol Patent Litigation in a commercially reasonably manner until the Divestiture Date; (iv) not take any action or position in defending the Propofol Patent Litigation that would be prejudicial in any material respect to Faulding's (or the Proposed Acquirer's) ability to successfully defend the Propofol Patent Litigation after the Divestiture Date; (v) upon request of Faulding (or the Proposed Acquirer), discuss with Faulding (or the Proposed Acquirer) and its counsel proposed litigation strategy, proposed action, responses or replies; (vi) not settle or otherwise dispose of the Propofol Patent Litigation in a manner that would have a material adverse effect on Wyeth's Propofol Assets after the Acquisition Date without the prior written consent of Faulding (or the Propofol Acquirer), which consent shall not be unreasonably withheld or delayed; (vii) pay any and all costs, damages, and expenses relating to the Propofol Patent Litigation prior to the Divestiture Date; and (viii) prior to the Divestiture Date, take reasonably appropriate and necessary action to assist in the transition to Faulding (or the Propofol Acquirer) and its counsel of the defense of the Propofol Patent Litigation.

III.

IT IS FURTHER ORDERED that Respondents shall notify the Commission at least thirty (30) days prior to any proposed change in the corporate Respondents such as dissolution, assignment, sale resulting in the emergence of a successor

corporation, or the creation or dissolution of subsidiaries or any other change in the corporation that may affect compliance obligations arising out of this Order to Maintain Assets.

IV.

IT IS FURTHER ORDERED that for the purposes of determining or securing compliance with this Order to Maintain Assets, and subject to any legally recognized privilege, and upon written request with reasonable notice to Respondents made to their principal United States 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 Respondents relating to compliance with this Order to Maintain Assets; and

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

V.

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

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

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

Analysis

Analysis of Agreement Containing Consent Orders to Aid Public Comment

The Federal Trade Commission has accepted, subject to final approval, an Agreement Containing Consent Orders ("Consent Agreement") from Baxter International Inc. and Wyeth. The Consent Agreement contains an Order to Maintain Assets to preserve, among other things, the viability, marketability, and competitiveness of the assets to be divested pending their divestiture. The Consent Agreement also contains a Decision and Order that is designed to remedy the anticompetitive effects of Baxter's proposed acquisition of the generic injectable pharmaceutical business of Wyeth. Under the terms of the Consent Agreement, the companies will be required to: (1) divest all of Wyeth's assets relating to propofol to a Commission-approved acquirer; (2) terminate all of Baxter's rights and interests in GensiaSicor's pancuronium, vecuronium, and metoclopramide products, and divest all of its pancuronium, vecuronium, and metoclopramide assets to GensiaSicor; and (3) terminate Baxter's co-marketing agreement with Watson Pharmaceuticals, Inc. by March 14, 2004.

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

Pursuant to an asset purchase agreement dated June 8, 2002 between Baxter and Wyeth, Baxter proposes to acquire from Wyeth substantially all of the assets related to Wyeth's generic injectable pharmaceutical business operated by Wyeth's ESI Lederle division for a total of $316 million in cash and assumed liabilities. The Commission's Complaint alleges that the proposed acquisition, 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 Federal Trade Commission Act, as amended, 15 U.S.C. § 45, in the markets for the manufacture and sale of: (1) propofol; (2) pancuronium; (3) vecuronium; (4) metoclopramide; and (5) new injectable iron replacement therapies ("NIIRTs"). The proposed Consent Agreement would remedy the alleged violations by replacing in each of these markets the lost competition that would result from the merger.

Propofol

Propofol is a general anesthetic commonly used for the induction and maintenance of anesthesia during surgical procedures and as a sedative for patients who are mechanically ventilated. Although there are other anesthetic agents, there are many benefits associated with propofol including the ability to quickly adjust the amount of sedation and its superior safety profile. Because propofol has a short duration profile, it is the preferred anesthetic agent for out-patient surgery. Annual U.S. sales of propofol total between $375 and $400 million.

The market for propofol is highly concentrated. AstraZeneca sells Diprivan®, the branded propofol product. Baxter markets the only generic propofol product, which is manufactured by GensiaSicor. Wyeth is seeking approval from the Food and Drug Administration ("FDA") for its own propofol product, and it is one of the two best-positioned firms to enter the market.

Entry into the propofol market requires lengthy development efforts because of the product's unique characteristics. Propofol is considered to be one of the most difficult injectable products to develop. Indeed, only one company has been able to introduce a generic propofol product. Propofol is manufactured using a complex process, and it requires the use of a preservative. The preserved formulation used for Diprivan® and the preserved formulation used for the generic propofol marketed by Baxter are both protected by patents. For this reason, any new entrant would have to develop a propofol product using a different preservative that does not infringe existing patents. Once a company has

developed a viable product, it is also required to conduct studies and obtain approval from the FDA to market propofol. Clinical development and FDA approval for this particular generic drug takes several years.

The proposed acquisition would cause significant anticompetitive harm in the U.S. market for the manufacture and sale of propofol by eliminating potential competition between Baxter and Wyeth. With only two firms currently supplying propofol to customers in this market (Baxter and AstraZeneca), entry by Wyeth and the one other firm well-positioned to enter would likely increase competition and reduce propofol prices. Accordingly, allowing Baxter to acquire Wyeth's generic injectable business likely would reduce the number of rivals in the future from four to three and force customers to pay higher prices for propofol.

The proposed Consent Agreement preserves future competition in the market for propofol by requiring the parties to divest Wyeth's propofol assets to Faulding Pharmaceutical Company no later than ten business days after the acquisition. Faulding is well-positioned to continue Wyeth's development efforts and poses no separate competitive concerns as the acquirer of the propofol assets. If the Commission determines that Faulding is not an acceptable purchaser, or that the manner of divestiture is not acceptable, Baxter and Wyeth must divest the propofol assets to a Commission-approved buyer no later than ninety business days from the date the Order becomes final. Should they fail to do so, the Commission may appoint a trustee to divest the propofol assets. The Consent Agreement also requires the parties to license certain additional know-how that relates, but does not exclusively relate, to propofol to the propofol acquirer.

The Consent Agreement contains several provisions designed to ensure that the divestiture is successful. Baxter and Wyeth are required to provide transitional services to the propofol acquirer relating to regulatory approvals and manufacturing, and in responding to, and defending against, any lawsuit, investigation or

proceeding relating to propofol. The Consent Agreement also requires Baxter and Wyeth to provide incentives to certain employees to continue in their positions until the divestiture is accomplished. For a period of six months from the date the assets are divested, Baxter and Wyeth will provide the propofol acquirer an opportunity to enter into employment contracts with individuals who have experience relating to Wyeth's propofol product. Baxter and Wyeth are also required to provide incentives to these individuals to accept employment with the propofol acquirer. For a period of one year following the divestiture date, Baxter and Wyeth are prohibited from hiring any employees of the acquirer of the propofol assets who have responsibility related to propofol. Finally, Baxter and Wyeth must take steps to maintain the confidentiality of confidential information related to propofol.

Pancuronium

Pancuronium is a rapid-onset, long-acting neuromuscular blocking agent used to temporarily freeze muscles during surgery or mechanical ventilation and to assist in the intubation process. Although pancuronium is an older drug, doctors continue to use it because it is an effective and inexpensive product with a known side-effect profile. The market for pancuronium in the United States is approximately $2 million.

Pancuronium is a small and highly concentrated market. Baxter, Wyeth and Abbott are the only suppliers of generic injectable pancuronium in the United States. Currently, Baxter, which markets pancuronium pursuant to an exclusive agreement with GensiaSicor, accounts for almost half of U.S. sales of the drug. Post-acquisition, Baxter would account for 74% of the sales of pancuronium in the United States, and the post-acquisition Herfindahl-Hirschman Index ("HHI") would be 6,152 points, representing a 2,496 point increase in the HHI. Post-acquisition, Abbott would be the only other supplier of pancuronium in the United States.

Analysis

The market for the manufacture and sale of pancuronium is unlikely to attract new entrants because pancuronium is an older drug whose usage and price have declined over time. Although pancuronium is still an important drug, companies are unlikely to devote resources to developing an older drug with limited sales. Even if a supplier of other injectable drugs decided to develop pancuronium, it would be costly and time consuming to complete the necessary research and development, and to obtain the requisite approval from the FDA. Consequently, entry into the pancuronium market is not likely to occur in a timely manner, if at all.

The proposed acquisition would create a duopoly in the market for the manufacture and sale of pancuronium in the United States. Post-acquisition, Baxter and Abbott would be the only remaining suppliers of pancuronium. This is likely to lead to higher prices of pancuronium.

The proposed Consent Agreement preserves competition in the pancuronium market by requiring Baxter to terminate all of its rights and interests in GensiaSicor's pancuronium product and divest all of its pancuronium assets to GensiaSicor no later than five days after the acquisition. GensiaSicor is capable of marketing and selling its own pancuronium. It is a well recognized and respected company in the injectable pharmaceutical industry, and will be an able competitor in the market for the manufacture and sale of pancuronium.

Vecuronium

Vecuronium is an intermediate-acting neuromuscular blocking agent that temporarily freezes muscles during surgery, mechanical ventilation, or intubation. Vecuronium is a popular neuromuscular blocking agent with a superior side effect profile. The market for the manufacture and sale of vecuronium in the United States is approximately $21 million.

Analysis

The market for the manufacture and sale of vecuronium is highly concentrated. Baxter markets vecuronium under an exclusive supply agreement with GensiaSicor. Baxter and Wyeth were the two leading suppliers of vecuronium in the United States, with a combined market share of 53%, until Wyeth temporarily suspended its vecuronium production in 2001. Prior to the announcement of the acquisition, Wyeth planned to re-enter the vecuronium market in the near future. Post-acquisition, the HHI would be 3,598 points, representing a 1,364 point increase in the HHI. There are only three other suppliers of vecuronium in the United States. Organon continues to market its branded vecuronium, and Abbott and Bedford supply generic vecuronium products.

Entry into the market for the manufacture and sale of vecuronium is unlikely because it is an older drug with established suppliers, and it is a difficult drug to manufacture. Although vecuronium continues to be an important drug, companies are unlikely to devote resources to entering this market because existing suppliers have become entrenched, making it difficult for new entrants to capture meaningful market share. In addition, vecuronium is a complicated drug to manufacture. Because of the unique manufacturing process involved in making vecuronium, entry would take longer than two years and cost hundreds of thousands of dollars.

The proposed acquisition is likely to result in anticompetitive harm in the U.S. market for the manufacture and sale of vecuronium. Absent the proposed acquisition, Wyeth would have re-entered this market. By acquiring Wyeth's vecuronium, Baxter would likely delay or forego the re-launch of Wyeth's vecuronium and eliminate any associated price competition.

The proposed Consent Agreement preserves future competition in the market for vecuronium by requiring Baxter to terminate all of its rights and interests in GensiaSicor's vecuronium product and divest all of its vecuronium assets to GensiaSicor no later than five days after the acquisition.

Metoclopramide

Metoclopramide is an antiemetic used for the prevention and treatment of nausea and vomiting for patients undergoing certain types of chemotherapy and for post-operative treatment. Metoclopramide is an older antiemetic that continues to be used because it is effective, has a known safety profile, and is considerably cheaper than newer antiemetics. Annual U.S. sales of metoclopramide total approximately $13 million.

The market for metoclopramide is highly concentrated. Wyeth developed the branded metoclopramide product, Reglan®. Baxter is the exclusive supplier of GensiaSicor's metoclopramide product. Wyeth and Baxter together represent over half of the sales of metoclopramide in the United States. Post-acquisition, the HHI would be 3,852 points, an increase of 936 points above the pre-Acquisition HHI. Only two other companies supply metoclopramide in the United States: Abbott and Faulding.

New entry into the market for the manufacture and sale of metoclopramide is difficult, expensive and unlikely to occur. Metoclopramide is an older drug with small sales relative to newer injectable anti-emetics. Therefore, firms do not consider the market for the manufacture and sale of metoclopramide to be an attractive entry opportunity. Several manufacturers have already exited the market and none are interested in re-entering. Even if firms that have exited were interested in re-launching their drugs, re-entry would likely take such firms an estimated two years or more.

The proposed acquisition would cause significant anticompetitive harm in the U.S. market for the manufacture and sale of metoclopramide by reducing the number of suppliers from four to three. The combined entity would account for over half of all sales of metoclopramide in the United States. The proposed acquisition is likely to lead to higher prices.

The proposed Consent Agreement preserves competition in the metoclopramide market by requiring Baxter to terminate all of its interests in GensiaSicor's metoclopramide and divest all of its metoclopramide assets to GensiaSicor no later than five days after the acquisition.

New Injectable Iron Replacement Therapies

NIIRTs are used to treat iron deficiency in patients undergoing hemodialysis. NIIRTs include both injectable iron gluconate and iron sucrose. Annual U.S. sales of NIIRTs total approximately $225 million.

The market for the manufacture and sale of NIIRTs is highly concentrated. Watson markets Ferrlecit®, the only injectable iron gluconate product available in the United States. American Regent markets Venofer®, the only injectable iron sucrose product in the United States. Watson recently entered into a co-promotional agreement with Baxter, pursuant to which Baxter promotes Ferrlecit®.

Entry into the market for the manufacture and sale of NIIRTs is very difficult and time consuming. Because of FDA-imposed New Chemical Entity exclusivity periods, the earliest that any company could file for regulatory approval of a generic iron gluconate product is February 2004. Similar provisions protect iron sucrose, though its exclusivity period expires in November 2003. Entry into the market for the manufacture and sale of NIIRTs is further complicated by a lack of raw material suppliers. Even if a new entrant were to locate a raw material supplier, both iron gluconate and iron sucrose are difficult products that would take more than two years to develop. Wyeth is the best-positioned firm to successfully develop a NIIRT product.

The proposed acquisition is likely to have anticompetitive effects in the market for the manufacture and sale of NIIRTs in the United States because it would eliminate potential competition

between Baxter and Wyeth. The proposed acquisition would remove Wyeth as the best-positioned independent entrant into this market and prevent all associated price competition.

The proposed Consent Agreement preserves future competition in the market for the manufacture and sale of NIIRTs by requiring Baxter to terminate its co-marketing agreement with Watson within weeks of the expiration of Ferrlicit®'s New Chemical Entity exclusivity. This termination provides an incentive for Baxter to continue developing and ultimately launch the iron gluconate product that it will acquire from Wyeth.

Pursuant to the terms of the Order, the Commission has appointed William E. Hall as a Monitor Trustee to ensure Baxter's and Wyeth's compliance with all of the requirements of the Order. Mr. Hall has over 30 years of experience in the pharmaceutical industry and is well-respected in the industry. In order to ensure that the Commission remains informed about the status of the proposed divestitures and the transfers of assets, the Consent Agreement requires Baxter and Wyeth to file reports with the Commission periodically until the divestitures are accomplished.

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

Complaint

IN THE MATTER OF

CONOCO INC. AND PHILLIPS PETROLEUM COMPANY

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

Docket C-4058; File No. 0210040
Complaint, August 30, 2002--Decision, February 7, 2003

This consent order addresses the merger of Respondents Phillips Petroleum Company and Conoco Inc., both integrated oil companies – respectively headquartered in Bartlesville, Oklahoma and Houston, Texas – engaged in worldwide exploration for and production, and transportation of crude oil and natural gas; gathering of natural gas; fractionation of raw mix into specification products; and refining, marketing, and transporting petroleum products. The order, among other things, requires the respondents to divest (1) the Phillips refinery located at Woods Cross, Utah, and all of Phillips' related marketing assets served by that refinery; (2) the Conoco refinery located at Commerce City, Colorado and serving Denver, Colorado, and all of Phillips' marketing assets in Eastern Colorado, and (3) the Phillips light petroleum products terminal in Spokane, Washington. The order also requires the respondents to divest the Phillips propane terminal assets in Jefferson City, Missouri, and East St. Louis, Illinois; and to provide a long-term propane supply agreement. In addition, the order requires the respondents to divest certain Conoco natural gas gathering assets in New Mexico and Texas – including the Conoco Maljamar processing facility – and to enter into a long-term agreement to process natural gas gathered in Texas.

Participants

For the Commission: *Mark Menna, Arthur J. Nolan, Frank Lipson, Stephen Y. Wu, Brian S. Wheeler, John C. Weber, Christopher L. Marvine, Samuel I. Sheinberg, Evelyn J. Boynton, Jordan Coyle, Elizabeth Pelkofski, William R. Vigdor, Phillip L. Broyles, Naomi, Licker, Eric D. Rohlck, Daniel P. Ducore, Mark Williams, Daniel Gaynor, Louis Silvia Jr.* and *Mary T. Coleman.*

For the Respondents: *Ilene Knable Gotts, George Conway,* and *Nelson O. Fitts, Wachtell, Lipton, Rosen & Katz, J. Bryan Whitworth, Phillips Petroleum Company, George S. Cary* and

Brian Byrne, Cleary, Gottlieb, Steen & Hamilton, Richard Harrington, and *Conoco.*

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 Phillips Petroleum Company has entered into an agreement to merge with Conoco Inc., all subject to the jurisdiction of the Commission, in violation of Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45, that such merger, if consummated, would violate Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18, and Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45, and that a proceeding in respect thereof would be in the public interest, hereby issues this complaint, stating its charges as follows.

I. RESPONDENTS

Phillips Petroleum Company

1. Respondent Phillips Petroleum Company ("Phillips") is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Delaware, with its office and principal place of business at Phillips Building, Bartlesville, Oklahoma 74004.

2. Respondent Phillips is, and at all times relevant herein has been, engaged in, among other things, the bulk supply, terminaling and marketing of light petroleum products, the bulk supply of propane, the gathering of natural gas and the fractionation of raw mix in the United States.

3. Respondent Phillips had total revenues of $47.7 billion in 2001.

Conoco, Inc.

4. Respondent Conoco Inc., ("Conoco") 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 600 North Dairy Ashford Road, Houston, Texas 77079.

5. Respondent Conoco is, and at all times relevant herein has been, engaged in, among other things, the bulk supply, terminaling and marketing of light petroleum products, the bulk supply of propane, the gathering of natural gas, and the fractionation of raw mix in the United States.

6. Respondent Conoco had total revenues of $39.5 billion in 2001.

II. THE MERGER

7. Respondents Phillips and Conoco plan a "merger of equals" in a transaction executed and announced on November 18, 2001. Under the terms of the agreement, Phillips shareholders will own about 56.6 percent and Conoco shareholders will own about 43.4 percent of the new company. Phillips shareholders will receive one share of new ConocoPhillips common stock for each share of Phillips they own and Conoco shareholders will receive 0.4677 shares of new ConocoPhillips common stock for each share of Conoco they own (the "Merger"). Phillips' market capitalization is approximately $18.5 billion and Conoco's is approximately $16.5 billion. The total dollar value of the Merger is approximately $35 billion.

III. TRADE AND COMMERCE

Eastern Colorado

8. A line of commerce in which to analyze the effect of the Merger is the bulk supply of light petroleum products

("LPPs"). LPPs include motor gasoline, diesel fuel, kerosene and jet fuel. For each product, there is no economic substitute.

9. A section of the country in which to analyze the effect of the Merger is the portion of Colorado east of the Continental Divide, a natural barrier between the eastern and western parts of Colorado ("Eastern Colorado"). This area includes the metropolitan statistical areas ("MSAs") of Denver, Colorado Springs, Fort Collins, and Boulder, Colorado.

10. The major buyers of LPPs in Eastern Colorado include wholesalers, known as jobbers or marketers. These entities buy large quantities of LPPs to resell to dealers (a person unaffiliated with a marketer or refiner that operates a gasoline outlet) or to sell directly to consumers.

11. Refineries produce LPPs and either deliver them into storage tanks or terminals on the premises or into large diameter refined products pipelines that, in turn, deliver LPPs into storage tanks or terminals located near the consuming public. Refineries and large diameter pipelines are direct horizontal competitors to provide bulk supplies of LPPs.

12. Jobbers delivering LPPs in Eastern Colorado have no effective alternative to using local refineries or pipeline transportation that deliver LPPs into Eastern Colorado. Jobbers cannot economically access refineries and pipelines located outside of Eastern Colorado. Transporting LPPs into Eastern Colorado by truck is costly and is not a commercially reasonable substitute.

13. Bulk suppliers can identify and price differently to buyers ("targeted buyers") located in densely populated areas, like Denver and Colorado Springs, and raise price by a small but significant and nontransitory amount. Other jobbers in outlying areas are not capable of buying product and reselling to the targeted buyers. Bulk suppliers limit

supplies that jobbers and marketers can buy and can identify where those supplies are delivered. Within Eastern Colorado, there are more narrow discrimination markets composed of densely populated areas, like Denver, Colorado.

14. Phillips owns a 70 percent undivided interest in the Borger-Denver pipeline that transports LPPs to Eastern Colorado from Phillips' Borger, Texas, refinery. Phillips is one of five interstate pipeline operators currently transporting LPPs to Eastern Colorado.

15. Conoco owns a refinery in Commerce City, Colorado, outside of Denver, which produces LPPs for Eastern Colorado. Conoco is one of two local refiners in Eastern Colorado.

16. Phillips and Conoco are direct horizontal competitors in Eastern Colorado. Phillips' owns a pipeline and Conoco owns a refinery that provide bulk supplies of LPPs into Eastern Colorado.

17. Together, respondents will own or control about 30 percent of the LPP bulk supply capacity in Eastern Colorado. The market, as measured by shipments or capacity, is highly concentrated with the HHI rising by over 500 points to above 2600.

18. After the Merger, the combined firm could effectively coordinate to raise prices in the market for LPP bulk supply in Eastern Colorado.

19. There are substantial barriers to entering the relevant market in Eastern Colorado. Building additional refineries locally or additional pipelines from refineries located outside of Eastern Colorado would be unlikely, take over two years, and therefore would not prevent respondents from raising prices above pre-Merger levels.

Northern Utah

20. A line of commerce in which to analyze the effect of the Merger is the bulk supply of LPPs. For each LPP, there is no economic substitute.

21. A section of the country in which to analyze the effect of the Merger is the portion of Utah north of the 39th parallel ("Northern Utah"). This area includes the Salt Lake City-Ogden and Provo-Orem MSAs.

22. The major buyers of LPPs in Northern Utah include wholesalers, known as jobbers or marketers. These entities buy large quantities of LPPs to resell to dealers or to sell directly to consumers.

23. Refineries produce LPPs and either deliver them into storage tanks or terminals on the premises or into large diameter refined products pipelines that, in turn, deliver into storage tanks or terminals located near the consuming public. Refineries and large diameter pipelines are direct horizontal competitors to provide bulk supplies of LPPs.

24. Jobbers delivering LPPs in Northern Utah have no effective alternative to using local refineries or pipeline transportation that deliver LPPs into Northern Utah. Jobbers cannot economically access refineries and pipelines located outside of Northern Utah. Transporting LPPs into Northern Utah by truck is costly and is not a commercially reasonable substitute.

25. Bulk suppliers can identify and price differently to targeted buyers located in densely populated areas, like Salt Lake City, and raise price by a small but significant and nontransitory amount. Other jobbers in outlying areas are not capable of buying product and reselling to the targeted buyers. Bulk suppliers limit supplies that jobbers and

marketers can buy and can identify where those supplies are delivered. Within Northern Utah, there are more narrow discrimination markets composed of densely populated areas, like Salt Lake City.

26. Phillips owns a refinery in Woods Cross, Utah, outside of Salt Lake City. The refinery produces LPPs for distribution in Northern Utah.

27. Conoco owns more than 50 percent of the Pioneer Pipeline. The Pioneer Pipeline carries LPPs to Northern Utah. Conoco owns more than 50 percent of the terminal connected to the Pioneer Pipeline. Conoco operates the Pioneer Pipeline and connected terminals. By virtue of its majority stake and operatorship, Conoco controls the pricing of LPPs on the Pioneer Pipeline.

28. Phillips and Conoco are direct horizontal competitors in Northern Utah. Phillips owns a refinery and Conoco owns a pipeline that provide bulk supplies of LPPs into Northern Utah.

29. Together, respondents will account for about 25 percent of the LPP bulk supply capacity in Northern Utah. The market, as measured by shipments or capacity, is highly concentrated with the HHI rising by about 300 points to above 2100.

30. After the Merger, the combined firm could effectively coordinate to reduce supply, slow growth of supply, and raise prices in the market for LPP bulk supply in Northern Utah.

31. There are substantial barriers to entering the relevant market in Northern Utah. Building additional refineries locally or additional pipelines from refineries located outside of Northern Utah would be unlikely, take over two years, and

therefore would not prevent respondents from raising prices above pre-Merger levels.

Spokane MSA

32. A line of commerce in which to analyze the effect of the Merger is the terminaling services for LPPs. LPP terminals are specialized facilities with large storage tanks used for the receipt and local distribution of LPPs by tank truck. There are no substitutes for terminals for the storage and local distribution of gasoline and other light petroleum products.

33. A section of the country in which to analyze the effect of the Merger is the MSA of Spokane, Washington. LPP marketers in Spokane only can receive terminaling services from terminals located in Spokane, Washington. LPP marketers in Spokane have no effective alternative to terminals located within Spokane and cannot economically access more distant terminals or other LPP pipelines outside of Spokane.

34. Phillips owns a terminal in Spokane, Washington, which provides terminaling services for Spokane.

35. Conoco owns a terminal in Spokane, Washington, which provides terminaling services for Spokane.

36. The market for terminal services in Spokane is highly concentrated with the HHI rising by over 1600 points to 5000. Conoco and Phillips are two of three suppliers of terminal services.

37. After the Merger, the combined firm could effectively coordinate or unilaterally raise prices of terminal services in Spokane.

38. There are substantial barriers to entering the relevant market in Spokane. Building additional terminals in Spokane would be unlikely, take over two years and therefore would not prevent respondents from raising prices above pre-Merger levels.

Wichita, Kansas

39. A line of commerce in which to analyze the effect of the Merger is the terminaling services for LPPs. LPP terminals are specialized facilities with large storage tanks used for the receipt and local distribution of LPPs by tank truck. There are no substitutes for terminals for the storage and local distribution of gasoline and other light petroleum products.

40. A section of the country in which to analyze the effect of the Merger is the MSA of Wichita, Kansas. LPP marketers in Wichita only can receive terminaling services from terminals located in Wichita. LPP marketers in Wichita have no effective alternative to terminals located within Wichita and cannot economically access more distant terminals or other LPP pipelines outside of Wichita .

41. Phillips owns a terminal in Wichita, which provides terminaling services for Wichita.

42. Conoco owns a terminal in Wichita, which provides terminaling services for Wichita.

43. The market for terminal services in Wichita is highly concentrated with the HHI rising by over 750 points to over 3600.

44. After the Merger, the combined firm could effectively coordinate or unilaterally raise prices of terminal services in Wichita.

45. There are substantial barriers to entering the relevant market in Wichita. Building additional terminals in Wichita would be unlikely, take over two years and therefore would not prevent respondents from raising prices above pre-Merger levels.

Southern Missouri

46. A line of commerce in which to analyze the effect of the Merger is the bulk supply of propane. Consumers use propane for, among other things, space heating and industrial processes. There is no economic substitute for propane.

47. A section of the country in which to analyze the effect of the Merger is the area located in southern Missouri – south and west of St. Louis ("Southern Missouri"). Propane wholesalers in Southern Missouri can only receive bulk quantities of propane from propane terminals in Southern Missouri. Propane wholesalers cannot economically access refineries and pipelines located outside of Southern Missouri.

48. Phillips owns terminals located in Jefferson City, Missouri.

49. Conoco owns a propane terminal in Belle, Missouri.

50. Phillips and Conoco are two of four suppliers of bulk quantities of propane in Southern Missouri. The market is highly concentrated in Southern Missouri. The HHI increases by over 1200 points to 3700.

51. After the Merger, the combined firm could effectively coordinate or unilaterally raise prices of bulk supplies of propane in Southern Missouri.

52. There are substantial barriers to entering the relevant market in Southern Missouri. Building additional refineries or

pipelines to transport propane to Southern Missouri would be unlikely, take over two years and therefore would not prevent respondents from raising prices above pre-Merger levels.

St. Louis, Missouri MSA

53. A line of commerce in which to analyze the effect of the Merger is the bulk supply of propane. Consumers use propane for, among other things, space heating and industrial processes. There is no economic substitute for propane.

54. A section of the country in which to analyze the effect of the Merger is the MSA of St. Louis, Missouri. Propane wholesalers and local gas distribution companies in St. Louis can only receive bulk quantities of propane from local refineries and propane terminals in Southern Missouri. Propane wholesalers cannot economically access refineries and pipelines located outside of St. Louis, Missouri.

55. Phillips owns a propane terminal located in East St. Louis, Illinois. It also owns a refinery in Wood River, Illinois.

56. Conoco owns a propane terminal in Wood River, Illinois.

57. Phillips and Conoco are two of three suppliers of bulk quantities of propane in St. Louis. The market is highly concentrated in St. Louis. The HHI increases by over 1000 points to over 7700.

58. After the Merger, the combined firm could effectively coordinate or unilaterally raise prices of bulk supplies of propane in St. Louis.

59. There are substantial barriers to entering the relevant market in St. Louis. Building additional refineries or pipelines to transport propane to St. Louis would be unlikely, take over

two years and therefore would not prevent respondents from raising prices above pre-Merger levels.

Southern Illinois

60. A line of commerce in which to analyze the effect of the Merger is the bulk supply of propane. Consumers use propane for, among other things, space heating and industrial processes. There is no economic substitute for propane.

61. A section of the country in which to analyze the effect of the Merger is the area of Southern Illinois, approximately 100 miles to the east of the St. Louis MSA ("Southern Illinois"). Propane wholesalers in Southern Illinois can only receive bulk quantities of propane from local refineries and propane terminals in Southern Illinois. Propane wholesalers cannot economically access refineries and pipelines located outside of Southern Illinois.

62. Phillips owns a propane terminal located in East St. Louis, Illinois. It also owns a refinery in Wood River, Illinois.

63. Conoco owns a propane terminal in Wood River, Illinois.

64. Phillips and Conoco are two of three suppliers of bulk quantities of propane in Southern Illinois. The market is highly concentrated in Southern Illinois. The HHI increases by over 1000 points to over 7700.

65. After the Merger, the combined firm could effectively coordinate or unilaterally raise prices of bulk supplies of propane in Southern Illinois.

66. There are substantial barriers to entering the relevant market in Southern Illinois. Building additional refineries or pipelines to transport propane to Southern Illinois would be unlikely, take over two years and therefore would not

prevent respondents from raising prices above pre-Merger levels.

The Permian Basin

67. A line of commerce in which to analyze the effect of the Merger is natural gas gathering. Permian Basin natural gas producers contract with natural gas gatherers to transport and/or process the natural gas from the wells to processing plants. Permian Basin producers have no economic alternative to using natural gas gatherers to transport the natural gas.

68. Sections of the country in which to analyze the effect of the Merger are local areas within Lea County, Eddy County and Chavez County, New Mexico, and Schleicher County, Texas ("Permian Basin Markets"). Consumption of natural gas in those areas of the Permian Basin is well below natural gas production levels. Most production is processed and transported to fractionators. Permian Basin producers cannot access gathering pipelines more the a few miles from their wells because of low production levels and the relatively high cost of building gathering pipelines. Small areas within the Permian Basin are relevant markets.

69. Phillips owns approximately 30 percent of Duke Energy Field Services ("DEFS"). DEFS owns significant natural gas gathering systems in the Permian Basin Markets.

70. Conoco owns significant gathering systems in the Permian Basin Markets.

71. DEFS and Conoco are the only two gatherers in the Permian Basin Markets. Those markets are highly concentrated.

72. After the Merger, the combined firm and DEFS would likely bid less aggressively to provide gathering services,

resulting in higher gathering fees and less natural gas production.

73. There are substantial barriers to entering the relevant market in the Permian Basin Markets. Building additional pipelines in the Permian Basin Markets would be unlikely, take over two years, and therefore would not prevent respondents and DEFS from being able to maintain a price increase over pre-Merger levels.

Mont Belvieu, Texas

74. A line of commerce in which to analyze the effects of the Merger is fractionation. Fractionators are specialized facilities that separate raw mix natural gas liquids into specification products such as ethane or ethane-propane, propane, iso-butane, normal-butane, and natural gasoline by means of a series of distillation processes. These specification products are ultimately used in the manufacture of petrochemicals, in the refining of gasoline, and as bottled fuel, among other uses. There are no substitutes for fractionators for the conversion of raw mix into individual specification products.

75. A section of the country in which to analyze the effects of this transaction is Mont Belvieu, Texas. Mont Belvieu, Texas is an active fractionation center and natural gas liquids trading hub. Companies with pipeline access to Mont Belvieu have no economic alternative to using fractionation services in Mont Belvieu.

76. Phillips owns 30 percent of DEFS. Phillips may appoint two members of the DEFS board of directors. DEFS owns an interest in the Enterprise and Mont Belvieu I fractionators. By virtue of its ownership in DEFS, Phillips has access to competitively sensitive information of the Enterprise and Mont Belvieu I fractionators, and significant voting interests.

77. Conoco partially owns and operates Gulf Coast Fractionators. Conoco has access to competitively sensitive information of Gulf Coast Fractionators.

78. The market for fractionation in Mont Belvieu is highly concentrated.

79. After the Merger, the combined firm would have access to competitively sensitive information of Mont Belvieu fractionators accounting for more than 70 percent of the market capacity. The combined firm will also have veto rights over significant expansion decisions.

80. The Merger likely would reduce competition by allowing fractionation competitors to share information and exercise veto rights over expansion decisions.

81. Entry is unlikely to be timely or sufficient to defeat a price increase. Fractionation expansion is costly and would take more than two years.

COUNT I:
LOSS OF COMPETITION IN EASTERN COLORADO

82. Paragraphs 1 - 81 are incorporated by reference as if fully set forth herein.

83. One relevant product market in which to assess the effect of the Merger is the bulk supply of light petroleum products.

84. One relevant geographic market in which to assess the effect of the Merger is Eastern Colorado.

85. The Eastern Colorado market is highly concentrated and the Merger, if consummated, will substantially increase that concentration.

86. Entry into the Eastern Colorado market would not be timely, likely or sufficient to deter or counteract likely anticompetitive effects arising from the Merger.

87. The Merger will eliminate ongoing competition between respondents with the likely result of reducing the output of LPPs in Eastern Colorado.

COUNT II:
LOSS OF COMPETITION IN NORTHERN UTAH

88. Paragraphs 1 - 87 are incorporated by reference as if fully set forth herein.

89. One relevant product market in which to assess the effect of the Merger is bulk supply of light petroleum products.

90. One relevant geographic market in which to assess the effect of the Merger is Northern Utah.

91. The Northern Utah market is highly concentrated and the Merger, if consummated, will substantially increase that concentration.

92. Entry into any of the Northern Utah market would not be timely, likely or sufficient to deter or counteract likely anticompetitive effects arising from the Merger.

93. The Merger will eliminate ongoing competition in between the respondents in the Northern Utah market with the likely result of raising rates and reducing output of LPPs.

COUNT III:
LOSS OF COMPETITION IN SPOKANE, WASHINGTON

94. Paragraphs 1 - 93 are incorporated by reference as if fully set forth herein.

95. One relevant product market in which to assess the effect of the Merger is the provision of terminaling services of LPPs.

96. One relevant geographic market in which to assess the effect of the Merger is Spokane, Washington.

97. The Spokane market is highly concentrated and the Merger, if consummated, will substantially increase that concentration.

98. Entry into the Spokane market would not be timely, likely or sufficient to deter or counteract likely anticompetitive effects arising from the Merger.

99. The Merger will threaten ongoing competition between the respondents in the Spokane market with the likely result of increasing terminaling services fees and reducing output of terminaling services in the relevant market, and thereby increasing the cost of LPPs.

COUNT IV:
LOSS OF COMPETITION IN WICHITA, KANSAS

100. Paragraphs 1 - 99 are incorporated by reference as if fully set forth herein.

101. One relevant product market in which to assess the effect of the Merger is the provision of terminaling services of LPPs.

102. One relevant geographic market in which to assess the effect of the Merger is Wichita, Kansas.

103. The Wichita, Kansas, market is highly concentrated and the Merger, if consummated, will substantially increase that concentration.

104. Entry into the Wichita, Kansas, market would not be timely, likely or sufficient to deter or counteract likely anticompetitive effects arising from the Merger.

105. The Merger will threaten ongoing competition between the respondents in the Wichita, Kansas, market with the likely result of increasing terminaling services fees and reducing output of terminaling services in the relevant market, and thereby increasing the price of LPPs.

COUNT V:
LOSS OF COMPETITION IN SOUTHERN MISSOURI

106. Paragraphs 1 - 105 are incorporated by reference as if fully set forth herein.

107. One relevant product market in which to assess the effect of the Merger is the bulk supply of propane.

108. One relevant geographic market in which to assess the effect of the Merger is Southern Missouri.

109. The Southern Missouri market is highly concentrated and the Merger, if consummated, will substantially increase that concentration.

110. Entry into the Southern Missouri market would not be timely, likely, or sufficient to deter or counteract likely anticompetitive effects arising from the Merger.

111. The Merger will eliminate ongoing competition between respondents with the likely result of raising rates and reducing supplies of propane in the Southern Missouri market and thereby increasing the cost of propane for industrial and agricultural consumers.

COUNT VI:
LOSS OF COMPETITION IN THE ST. LOUIS, MSA

112. Paragraphs 1 - 111 are incorporated by reference as if fully set forth herein.

113. One relevant product market in which to assess the effect of the Merger is the bulk supply of propane.

114. One relevant geographic market in which to assess the effect of the Merger is the MSA of St. Louis, Missouri.

115. The St. Louis MSA is highly concentrated and the Merger, if consummated, will substantially increase that concentration.

116. Entry into the St. Louis MSA would not be timely, likely, or sufficient to deter or counteract likely anticompetitive effects arising from the Merger.

117. The Merger will eliminate ongoing competition between respondents with the likely result of raising rates and reducing output of propane in the St. Louis MSA and thereby increasing the cost of propane and natural gas utility services.

COUNT VII:
LOSS OF COMPETITION IN SOUTHERN ILLINOIS

118. Paragraphs 1 - 117 are incorporated by reference as if fully set forth herein.

119. One relevant product market in which to assess the effect of the Merger is the bulk supply of propane.

120. One relevant geographic market in which to assess the effect of the Merger is Southern Illinois.

121. The Southern Illinois market is highly concentrated and the Merger, if consummated, will substantially increase that concentration.

122. Entry into the Southern Illinois market would not be timely, likely, or sufficient to deter or counteract likely anticompetitive effects arising from the Merger.

123. The Merger will eliminate ongoing competition between respondents with the likely result of raising rates and reducing output of propane in the Southern Illinois market and thereby increasing the cost of propane for industrial and agricultural consumers.

COUNT VIII:
LOSS OF COMPETITION IN THE PERMIAN BASIN

124. Paragraphs 1 - 123 are incorporated by reference as if fully set forth herein.

125. One relevant product market in which to assess the effect of the Merger is gathering of natural gas.

126. Several geographic markets in which to assess the effect of the Merger are in the Permian Basin.

127. Each Permian Basin Market is highly concentrated and the Merger, if consummated, will substantially increase that concentration.

128. Entry into each Permian Basin Market would not be timely, likely, or sufficient to deter or counteract likely anticompetitive effects arising from the Merger.

129. The Merger will eliminate ongoing, actual potential and perceived potential competition between respondents with the likely result of raising rates and reducing output of

processed natural gas from the Permian Basin, and diminishing production of natural gas in the Permian Basin.

COUNT IX:
LOSS OF COMPETITION IN MONT BELVIEU

130. Paragraphs 1 - 129 are incorporated by reference as if fully set forth herein.

131. One relevant product market in which to assess the effect of the Merger is fractionation of natural gas.

132. The relevant geographic market in which to assess the effect of the Merger is Mont Belvieu, Texas.

133. The Mont Belvieu market is highly concentrated, and the merger, if consummated, will substantially increase that concentration.

134. Entry into Mont Belvieu would not be timely, likely, or sufficient to deter or counteract likely anticompetitive effects arising from the Merger.

135. The Merger will eliminate ongoing competition between respondents with the likely result of raising prices and reducing output of fractionated specification products in Mont Belvieu, Texas.

IV. VIOLATIONS CHARGED

136. The merger agreement entered into by respondents Phillips and Conoco constitutes a violation of Section 5 of the FTC Act, as amended, 15 U.S.C. § 45.

137. The Merger, if consummated, would violate 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 WITNESS WHEREOF, the Federal Trade Commission, having caused this Complaint to be signed by the Secretary and its official seal affixed, at Washington, D.C., this thirtieth day of August, 2002, issues its complaint against respondents.

DECISION AND ORDER

The Federal Trade Commission ("Commission"), having initiated an investigation of the proposed merger involving Respondents, Conoco Inc. ("Conoco") and Phillips Petroleum Company ("Phillips"), and Respondents having been furnished thereafter with a draft of Complaint that the Bureau of Competition proposed to present to the Commission for its consideration and that, if issued by the Commission, would charge Respondents with violations of Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18, and Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45; and

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

The Commission having thereafter considered the matter and having determined that it had reason to believe that the Respondents have violated the said Acts, and that a Complaint should issue stating its charges in that respect, and having thereupon issued its Complaint and its Order to Hold Separate and Maintain Assets and 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, 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 ("Order"):

1. Respondent Conoco 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 600 North Dairy Ashford, Houston, TX 77079.

2. Respondent Phillips Petroleum Company is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware, with its office and principal place of business located at 411 South Keeler, Bartlesville, OK 74004.

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. "Conoco" means Conoco Inc., its directors, officers, employees, agents and representatives, predecessors, successors, and assigns; its joint ventures, subsidiaries, divisions, groups and affiliates controlled by Conoco, and the respective directors, officers, employees, agents, representatives, successors, and assigns of each. Conoco does not include Phillips.

B. "Phillips" means Phillips Petroleum Company, its directors, officers, employees, agents and representatives, predecessors, successors, and assigns; its joint ventures, subsidiaries, divisions, groups and affiliates controlled by Phillips, and the respective directors, officers, employees, agents, representatives, successors, and assigns of each. Phillips does not include: (1) Conoco or (2) DEFS as long as Phillips' proportionate ownership and other interests and rights in DEFS do not increase relative to what they were at the time Respondents executed the Agreement Containing Consent Orders.

C. "ConocoPhillips" means the entity resulting from the merger involving Conoco and Phillips, its directors, officers, employees, agents and representatives, predecessors, successors, and assigns; its joint ventures, subsidiaries, divisions, groups and affiliates controlled by ConocoPhillips, and the respective directors, officers, employees, agents, representatives, successors, and assigns of each. ConocoPhillips does not include DEFS as long as

ConocoPhillips' proportionate ownership and other interests and rights in DEFS do not increase relative to what Phillips' proportionate ownership and other interests and rights were at the time Respondents executed the Agreement Containing Consent Orders.

D. "Respondents" means Conoco and Phillips, individually and collectively, and, after the Merger, ConocoPhillips.

E. "Commission" means the Federal Trade Commission.

F. "Agreement Containing Consent Orders" means the agreement executed by Respondents in this matter.

G. "Ancillary Products" means any product that is commonly sold in Gasoline Outlets other than Motor Fuels or Aviation Fuels.

H. "Aviation Fuels" means aviation gasoline and jet fuels.

I. "Assets To Be Divested" means (1) Phillips Woods Cross Assets, (2) Colorado Assets, (3) Propane Assets, (4) Phillips Spokane Terminal, (5) New Mexico Assets, and (6) Texas Assets.

J. "Blue Line" means the common carrier pipeline currently owned by the Phillips Pipe Line Company that extends from Borger, Texas, to East St. Louis, Illinois, and that serves the Propane Terminal Assets as delivery intermediate destinations.

K. "Branded Ancillary Products" means any Ancillary Product that is sold under a brand name owned by or licensed to Respondents.

L. "Branded Aviation Fuels" means Aviation Fuels that are sold under a brand name owned by or licensed to Respondents.

M. "Branded Fuels" means Motor Fuels that are sold under a brand name owned by or licensed to Respondents.

N. "Colorado Assets" means the (1) Conoco Denver Refinery Assets; and (2) Phillips Colorado Retail Assets.

O. "Conoco Branded Fuels" means Branded Fuels sold under a brand name owned by or licensed to Conoco.

P. "Conoco Branded Seller" means any Person (other than Conoco) that has, by virtue of contract or agreement in effect at the time Respondents executed the Agreement Containing Consent Order, the right to sell Motor Fuels using any trademark, trade name, or logo owned or licensed by Conoco, or to resell Motor Fuels to any such Person. "Conoco Branded Seller" includes marketers, distributors, jobbers, contract dealers and open dealers.

Q. "Conoco Denver Refinery Assets" means Conoco's refinery located at Commerce City, Colorado, and includes:

1. all of Conoco's interest in all tangible assets used in the operation of the refinery, including any leasehold, ownership, fee, or any other interest in real estate at the refinery grounds in Commerce City, Colorado, and in the production or distribution of the products produced at the refinery (excluding those used solely in the marketing, distribution, or sale of Conoco Branded Fuels as branded products), and includes, but is not limited to,
   a. the main plant;
   b. the asphalt plant;
   c. Conoco's Lance Creek Gathering System;
   d. Conoco's Rocky Mountain Crude System, which runs from Lance Creek to Denver;
   e. all of Conoco's interest in the Centennial Pipeline System;
   f. any other crude oil pipelines connected to the refinery;
   g. any refined products pipelines into or from the refinery, which includes the products pipeline to Union Pacific Railroad;
   h. loading facilities;
   i. lubricants distribution facilities adjacent to the refinery, subject to existing leases to Rex Oil and other third parties; and
   j. at the acquirer's option, Conoco's interest in crude oil storage tanks located at Guernsey, Wyoming, constituting up to 70% of Conoco's crude oil storage tankage capacity and crude oil tankage throughput capacity at Guernsey;
2. all books, records, and documents (excluding those related solely to the marketing, distribution, or sale of

Conoco Branded Fuels as branded products) relating to the refinery and to the production, marketing, distribution, or sale of products produced at the refinery; provided, however, that if any such books, records, or documents also include matters not related to the refinery or products produced at the refinery, then only those portions of the books records and documents that relate to the refinery or the products produced at the refinery shall be included;

3. an exclusive right to all intellectual property used solely in the operation of the refinery or in the production, marketing, distribution, or sale of the products produced at the refinery (excluding that used solely in the marketing, distribution, or sale of Conoco Branded Fuels as branded products), and a non-exclusive right to use in the operation of the refinery and in the production, marketing, distribution, and sale of products produced at the refinery all other intellectual property used in the operation of the refinery and in the production, marketing, distribution, or sale of the products produced at the refinery (excluding that used solely in the marketing, distribution, or sale of Conoco Branded Fuels as branded products);
4. all licenses and permits used in the operation of the refinery and in the production, marketing, distribution, or sale of the products produced at the refinery (excluding those used solely in the marketing, distribution, or sale of Conoco Branded Fuels as branded products);
5. all contracts, agreements, and understandings relating to the transportation, storage, Terminaling, marketing, distribution, or sale of the products produced at the refinery (excluding those relating solely to the marketing, distribution, or sale of Conoco Branded Fuels as branded products), which includes but is not limited to all agreements under which Conoco receives crude oil or other inputs at or for the refinery; the resid processing agreement with Frontier Refining, Inc.; Phillips' contractual right to receive refined products from Conoco at Conoco's Grand Junction, Colorado, terminal pursuant to an exchange agreement, and, at the acquirer's option, all exchange agreements involving the refinery (but only to the extent the exchange agreement involve products produced at the refinery); provided, however, that if any such contract, agreement, or understanding includes matters, terms, or locations not related to the

Conoco Denver Refinery Assets, then only those provisions relating to the Conoco Denver Refinery Assets shall be included;

6. all joint ventures relating to the operation of the refinery and in the production, marketing, distribution, or sale of the products produced at the refinery (excluding those relating solely to the marketing, distribution, or sale of Conoco Branded Fuels as branded products);
7. all plans (including proposed and tentative plans, whether or not adopted), specifications, drawings, and other assets (including the non-exclusive right to use patents, know-how, and other intellectual property relating to such plans) related to the operation of the Denver refinery.

"Conoco Denver Refinery Assets" does not include:

a. the assets listed in Exhibit A;
b. Conoco's lease of a connecting line from Stapleton Airport to Chases's Aurora, Colorado, terminal (which is connected by common carrier pipeline to Denver International Airport), provided that, Respondents instead establish and divest to the acquirer a pipeline connection to an existing Phillips line to provide access to Chase's Aurora, Colorado, terminal (which is connected by common carrier pipeline to Denver International Airport) at a capacity equal to or greater than the capacity Conoco had to Chase's Aurora, Colorado, terminal, and Respondents enter into a connection agreement with or assignable to acquirer at terms consistent with standard industry practices;
c. Conoco's interest in the KPAC Joint Venture, subject to the requirements of Paragraph III.I.;
d. Conoco's interests in the Jupiter Joint Venture, subject to the requirements of Paragraph III.J.; and
e. any books and records that Respondents are required by law to retain, provided that Respondents deliver at least one copy of such books and records to the acquirer.

R. "Conoco Existing Supply Agreements" means all agreements, in effect as of the date Respondents executed the Agreement Containing Consent Orders, between Conoco and Conoco Branded Sellers relating to such Person's right

or obligation to sell or resell Branded Fuels using any trademark, trade name, or logo owned by or licensed to Conoco at a Gasoline Outlet, including but not limited to, each Branded Fuels supply contract, distributor agreement, dealer agreement, image agreement, amortization agreement, jobber outlet incentive program contract.

S. "ConocoPhillips DEFS Board Members" means all board members appointed by ConocoPhillips, Conoco, or Phillips to the board of directors of DEFS.

T. "ConocoPhillips Non-Public GCF Information" means Non-Public Information relating to GCF.

U. "Cost" means all direct costs, including raw materials, labor, utilities, and third-party contract services actually used to provide services to the acquirer of the relevant business. "Cost" also includes the pro rata share of the cost of the capital employed in the relevant facility and those indirect costs related to operating the relevant facility, including taxes, depreciation, overhead, and third-party contracts. When calculating the pro rata shares of the costs of a facility, Respondents shall use the following formula: the amount of capacity used by the acquirer of the relevant business divided by the then-current total capacity utilization of the relevant facility.

V. "DEFS" means Duke Energy Field Services, LLC, a limited liability company, 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 370 17th Street, Suite 900, Denver, Colorado 80202, its directors, officers, employees, agents and representatives.

W. "DEFS Non-Public Fractionation Information" means Non-Public Information relating to Enterprise or Mont Belvieu I.

X. "Duke" means Duke Energy Corporation, a corporation, organized, existing and doing business under and by virtue of the laws of the State of North Carolina, with its offices and principal place of business located at 526 South Church Street, Charlotte, North Carolina 28202, its directors, officers, employees, agents and representatives.

Y. "Duke DEFS Board Members" means all board members appointed by Duke to the board of directors of DEFS.

Z. "Effective Date of Divestiture" means the date on which the applicable divestiture is consummated. Each Asset To Be Divested may have its own Effective Date of Divestiture.

AA. "Enterprise" means the fractionating facility located at 10207 Farm Road, FM 1942, Mont Belvieu, Chambers County, Texas.

AB. "FERC" means the United States Federal Energy Regulatory Commission.

AC. "Gas Gathering" means pipeline transportation, for oneself or other persons, of natural gas over any part or all of the distance between a well and a gas transmission pipeline or gas processing plant.

AD. "Gasoline Outlet" means a business establishment from which Motor Fuels are sold to the general public.

AE. "GCF" means the fractionating facility owned by Gulf Coast Fractionators and located 1.5 miles west of Highway 146 on Farm Road FM 1942, Mont Belvieu, Chambers County, Texas.

AF. "KPAC Joint Venture" means the asphalt joint venture (known as the Koch Performance Asphalt Company ("KPAC")) between Conoco and Koch.

AG. "Maljamar Processing Plant" means Conoco's gas processing facility located at 1001 Conoco Road, Maljamar, New Mexico, and includes:

1. all of Conoco's interest in all tangible assets used in the operation of the facility, including, but not limited to, all facilities, physical assets and pipelines used in the operation of the facility;
2. all books, records, and documents relating to the facility and to the products processed at the facility; provided, however, that if any such books, records, or documents also include matters not related to the facility or to products processed at the facility, then only those portions of the books records and documents that relate to the facility or to the products processed at the facility

shall be included;

3. on an exclusive basis, all easements, rights of way, or other rights used solely in the operation of the facility, and on a non-exclusive basis, all other easements, rights of way, or other rights used in the operation of the facility;
4. all licenses and permits used in the operation of the facility;
5. an exclusive right to all intellectual property used solely at the facility, and a non-exclusive right to use at the facility all other intellectual property used at the facility; and
6. all contracts, agreements or understandings relating to the operation of the facility and relating to the operation of any physical assets or pipelines used in the operation of the facility; provided, however, that if any such contract, agreement or understanding includes matters or terms not relating to the operation of the facility or to the operation of the other physical assets or pipelines used in the operation of the facility, then only those provisions relating to the Maljamar Processing Plant shall be included.

"Maljamar Processing Plant" does not include the assets listed in Exhibit B.

AH. "Merger" means the proposed merger of Conoco and Phillips.

AI. "Merger Date" means the date on which the Merger is consummated.

AJ. "Mertzon Facility" means Conoco's gas processing facility located seven miles southwest of Mertzon, Texas, on Highway 67, Irion County, Texas 76941.

AK. "Mont Belvieu I" means the fractionating facility located at 9900 Farm Road FM 1942, Mont Belvieu, Chambers County, Texas.

AL. "Motor Fuels" means gasoline or diesel fuel (including any kerosene sold at Gasoline Outlets, such as kerosene typically used for blending with on-road diesel). "Motor Fuels" does not include Aviation Fuels.

AM. "New Mexico Assets" means (1) all of Conoco's tangible assets located in the New Mexico Specified Area used for the gathering, compression, processing, transportation, or sale of natural gas; (2) all contracts, agreements and understandings relating to the tangible assets defined in (1), above; provided, however, that if any such contract, agreement or understanding includes matters or terms not related to the tangible assets defined in (1), above, then only those provisions relating to the tangible assets defined in (1), above, shall be included; (3) the Maljamar Processing Plant; and (4) on an exclusive basis, all easements, rights of way, or other rights used solely in the operation of the New Mexico Assets, and on a non-exclusive basis, all other easements, rights of way, or other rights used in the operation of the New Mexico Assets. "New Mexico Assets" does not include: (1) the assets listed in Exhibit B; or (2) any of Conoco's ownership interest in real estate related to the assets described in (1), above, provided that Respondents shall grant the acquirer of the New Mexico Assets all easements, rights of way, or other rights necessary to operate the New Mexico Assets.

AN. "New Mexico Specified Area" means, in the State of New Mexico, all sections within the township and ranges of 16S/30E-33E; all sections within 17S/31E-33E; all sections within 18S/32E-33E; sections 3-10, 15-22 and 27-34 of 16S-17S/34E; sections 3-10, 15-22 and 27-32 of 18S/34E; sections 3-7 and 17-20 of 19S/34E; section 6 of 20S/34E; section 1 of 20S/33E; sections 1-12, 14-23, 26-32 and 35-36 of 19S/33E; sections 1-6, 8-17, 22-26, 30-31 and 36 of 19S/32E; sections 1-3, 12-13, 15-17, 19-25 and 27-28 of 19S/31E; sections 1-18, 20-27 and 34-36 of 18S/31E; sections 1-17, 20-26 and 34-36 of 17S/30E; sections 1-4, 9-16 and 21-23 of 18S/30E; sections 1, 12, 13, 24, 25, and 36 of 16S/29E; sections 1 and 12 of 17S/29E; section 35 of 15S/33E; sections 9, 16, 21, 28, 29, 32 and 33 of 15S/32E; sections, 4-9, 15-22 and 27-34 of 15S/30E; sections 1-5, 8-17, 20-29 and 32-36 of 15S/29E; sections 20-29 and 32-36 of 14S/29E; and sections 19-21 and 28-33 of 14S/30E. "New Mexico Specified Area" is depicted on the map that is attached as Confidential Exhibit B-1.

AO. "Non-Public Information" means any information not in

the public domain. "Non-Public Information" shall not include information that was publicly available prior to the date Respondents executed the Agreement Containing Consent Orders or that thereafter becomes publicly available or is disclosed to Respondents without any violation of this Order by Respondents and without violation of law or regulation by or known to Respondents.

AP. "Non-Public Propane Information" means any Non-Public Information relating to the Propane Business.

AQ. "OPIS" means the Oil Price Information Service, or such replacement publication as ConocoPhillips and the acquirer may agree to if OPIS ceases to be published or ceases to provide the information to be obtained therefrom pursuant to this Order.

AR. "Order to Hold Separate and Maintain Assets" means the Order to Hold Separate and Maintain Assets issued by the Commission in this matter.

AS. "Person" means any individual, partnership, association, company or corporation.

AT. "Phillips Branded Fuels" means Branded Fuels sold under a brand name owned by or licensed to Phillips.

AU. "Phillips Branded Seller" means any Person (other than Phillips) that has, by virtue of contract or agreement in effect at the time Respondents executed the Agreement Containing Consent Orders, the right to sell Motor Fuels using any trademark, trade name, or logo owned or licensed by Phillips, or to resell Motor Fuels to any such Person. "Phillips Branded Seller" includes marketers, distributors, jobbers, contract dealers and open dealers.

AV. "Phillips Colorado Retail Assets" means all of Phillips Retail Assets in Colorado as of the date Respondents executed the Agreement Containing Consent Orders, except those Gasoline Outlets subject to an agreement dated June 13, 2002, between Phillips and Phillips Investment Company, LLC.

AW. "Phillips Colorado Supply Agreements" means

1. all agreements in effect as of the date Respondents executed the Agreement Containing Consent Orders between Phillips and Phillips Branded Sellers; and
2. all agreements in effect as of the Effective Date of Divestiture of the Colorado Assets between Phillips and Phillips Investment Company, LLC, relating to such Person's right or obligation to sell or resell Phillips Branded Fuels at Gasoline Outlets in Colorado, including but not limited to, each Branded Fuels supply contract, distributor agreement, dealer agreement, image agreement, amortization agreement, jobber outlet incentive program contract, and the Phillips 66 Branded Marketer Agreement.

AX. "Phillips Spokane Terminal" means Phillips' petroleum storage and distribution terminal in Spokane, Washington, and includes:

1. all of Phillips' interest in all tangible assets that are used in Terminaling in Spokane, including but not limited to:
   a. real estate;
   b. storage tanks;
   c. local connector pipelines;
   d. loading and unloading facilities;
   e. equipment, machinery, fixtures, tools, and spare parts;
   f. and, to the extent used in Terminaling, offices, buildings, and warehouses;
2. an exclusive right to all intellectual property used solely in the operation of the terminal, and a non-exclusive right to use in the operation of the terminal all other intellectual property used in the operation of the terminal;
3. all licenses and permits used in the operation of the terminal; and
4. all contracts, agreements or understandings relating to the operation of the terminal.

"Phillips Spokane Terminal" does not include the assets listed in Exhibit C.

AY. "Phillips Wichita Terminal Assets" means an undivided 50% interest in Phillips' assets relating to Terminaling in Wichita, Kansas. "Phillips Wichita Terminal Assets" does not include Phillips proprietary trade names, trademarks

and identification signs, any real estate, any refined petroleum products inventory, any refined petroleum products storage tanks that support or are used for or by Phillips in the operation of its Blue Line, Gold Line, or Standish Line, or any intellectual property.

AZ. "Phillips Woods Cross Assets" means the (1) Phillips Woods Cross Refinery Assets; and (2) Phillips Woods Cross Retail Assets.

BA. "Phillips Woods Cross Refinery Assets" means Phillips refinery located at Woods Cross, Utah, and includes:

1. all of Phillips' interest in all tangible assets used in the operation of the refinery, including any leasehold, ownership, fee, or any other interest in real estate at the refinery grounds in Woods Cross, Utah, and in the production, marketing, distribution, or sale of the products produced at the refinery, including, but not limited to:
   a. the plant;
   b. all of Phillips' interest in the Phillips Woods Cross refinery tanks;
   c. the 4-mile crude oil pipeline between Chevron Salt Lake Station and the refinery;
   d. any other crude oil pipelines connected to the refinery;
   e. the refined products pipeline from the refinery to the Chevron manifold;
   f. the truck loading rack;
   g. all other refined products pipelines into or from the refinery;
   h. Phillips' interests in the Boise terminal and the Burley terminal (subject to Paragraph II.K,);
   i. loading facilities; and
   j. at the acquirer's option, Phillips' allocation on the Chevron pipeline;
2. all books, records, and documents relating to the refinery and to the production, marketing, distribution, or sale of products produced at the refinery; provided, however, that if any such books, records, or documents also include matters not related to the refinery or products produced at the refinery, then only those portions of the books records and documents that relate to the refinery or the products produced at the refinery shall be

included;

3. an exclusive right to all intellectual property used solely in the operation of the refinery or in the production, marketing, distribution, or sale of the products produced at the refinery, and a non-exclusive right to use in the operation of the refinery and in the production, marketing, distribution, or sale of the products produced at the refinery all other intellectual property used in the operation of the refinery and in the production, marketing, distribution, or sale of the products produced at the refinery;
4. all licenses, agreements, contracts, and permits used in the operation of the refinery and in the production, marketing, distribution, or sale of the products produced at the refinery;
5. all contracts, agreements, and understandings relating to the transportation, storage, Terminaling, marketing, distribution, or sale of the products produced at the refinery, including, but not limited to, all agreements under which Phillips receives crude oil or other inputs at or for the refinery; and at the acquirer's option, all exchange agreements involving the refinery (but only to the extent the exchange agreements involve products produced at the refinery);
6. all joint ventures relating to the operation of the refinery and in the production, marketing, distribution, or sale of the products produced at the refinery; and
7. all plans (including proposed and tentative plans, whether or not adopted), specifications, drawings, and other assets (including the non-exclusive right to use patents, know-how, and other intellectual property relating to such plans) related to the operation of the refinery.

"Phillips Woods Cross Refinery Assets" does not include:

a. any books and records located at the Phillips Woods Cross refinery that Respondents are required by law to retain, provided that Respondents deliver at least one copy thereof to the acquirer; or
b. the assets listed in Exhibit D.

BB. "Phillips Woods Cross Retail Assets" means all of Phillips' Retail Assets in Utah, Wyoming, Idaho, and Montana as of the date Respondents executed the Agreement Containing Consent Orders.

BC. "Phillips Woods Cross Supply Agreements" means all agreements, in effect as of the date Respondents executed the Agreement Containing Consent Orders, between Phillips and Phillips' Branded Sellers relating to such Person's right or obligation to sell or resell Phillips Branded Fuels at Gasoline Outlets in Utah, Wyoming, Montana, or Idaho, including but not limited to, each Branded Fuels supply contract, distributor agreement, dealer agreement, image agreement, amortization agreement, jobber outlet incentive program contract, and the Phillips 66 Branded Marketer Agreement.

BD. "Propane Alternate Assets" means (1) Respondents' interests in that portion of the Blue Line extending from the Blue Line's connection with the Shocker Line to East St. Louis, Illinois; (2) Respondents' interests in the Shocker Line; (3) Respondents' interests in the Shocker Station; (4) an undivided 50% ownership interest in that portion of the Blue Line extending from Borger, Texas, to the Shocker Line (at or near Wichita, Kansas), with Respondents retaining the right to operate that portion; (5) the entirety of the Ringer, Kansas, terminal; and (6) an undivided 50% ownership interest in the Jefferson City, Missouri, and East St. Louis, Illinois, terminals, including the right to operate these terminals or, at the option of the acquirer, that portion of the terminal(s) used in Propane Terminaling.

BE. "Propane Business" means (1) the Propane Terminal Assets and (2) all propane supply agreements between Phillips and its customers at, and to the extent they relate to the supply of propane from, Phillips' terminals in Jefferson City, Missouri, and East St. Louis, Illinois, effective as of the date Respondents executed the Agreement Containing Consent Orders, including, but not limited to, all present and historical reports, data and information relating to those supply agreements.

BF. "Propane Support Personnel" means persons, employees, agents, contractors or affiliates of Respondents who are involved, directly or indirectly, in satisfying Respondents' obligations under propane supply agreements or otherwise in the transport of propane or the operation of the Propane Terminal Assets. "Propane Support Personnel" also

includes persons, employees, agents, contractors or affiliates who have access to Non-Public Propane Information of the acquirer of the Propane Business.

BG. "Propane Terminal Assets" means all of Phillips' interest in Phillips' propane terminal operations from the Jefferson City, Missouri, and East St. Louis, Illinois, terminals, and includes:

1. all of Phillips' interest in all tangible assets used exclusively in Propane Terminaling, including the transportation of propane from the Blue Line, including, but not limited to
   a. offices, buildings, warehouses;
   b. equipment, machinery, fixtures, tools, spare parts; and
   c. all other property used exclusively in Propane Terminaling at the Jefferson City, Missouri, and East St. Louis, Illinois, terminals;
2. odorizing facilities;
3. existing easements and rights of way held by Phillips for operation of the Propane Terminal Assets;
4. propane storage tanks;
5. local connector pipelines from the Blue Line to any propane storage tank, between propane storage tanks, and from any propane storage tank to any propane truck rack;
6. propane truck racks;
7. all licenses and permits necessary for the acquirer's ownership of the Propane Terminal Assets;
8. the contracts, agreements, and understandings relating to and necessary for the acquirer's ownership of the Propane Terminal Assets;
9. a general right to use common assets owned by Respondents at each propane terminal location that exist in support of the propane terminal operations and are required on a normal and routine basis to own the Propane Terminal Assets; and
10. an exclusive right to all intellectual property used solely in the operation of the Propane Terminal Assets or in the production, marketing, distribution, or sale of propane at the Propane Terminal Assets, and a non-exclusive right to use at the Propane Terminal Assets all other intellectual property used in the operation of the Propane Terminal Assets and in the production, marketing, distribution, or sale of propane.

"Propane Terminal Assets" does not include

a. Phillips' proprietary trade names, trademarks and identification signs;
b. Phillips' proprietary equipment, computer hardware and software used to monitor and verify product specifications, unless otherwise required in this Order; or
c. any interest in real estate, other than the rights to (a) existing easements and rights of way described above at Item 3; and (b) all easements and rights of way to provide the acquirer, now and in the future, an unqualified right to use and expand the Propane Terminal Assets consistent with the requirements of this Order.

BH. "Propane Terminaling" means the services performed by a facility that provides temporary storage of propane products received from a pipeline, and the redelivery of propane products from storage tanks into tank trucks or transport trailers.

BI. "Retail Assets" means, for each Gasoline Outlet, all of Respondents' interests in the Gasoline Outlet, and includes:

1. all of Respondents' interest in all tangible assets that are used at that Gasoline Outlet, including, but not limited to, any leasehold, ownership, fee, or any other interest in real estate;
2. all permits, licenses, consents, contracts, understandings, and agreements used in the operation of the Gasoline Outlet;
3. the exclusive right to all intellectual property used solely in the operation of the Gasoline Outlet, and the non-exclusive right to use in the operation of the Gasoline Outlet all other intellectual property used in the operation of the Gasoline Outlet;
4. all of Respondents' interest in all assets relating to all ancillary businesses (including, but not limited to, automobile mechanical service, convenience store, restaurant or car wash) operated in connection with each Gasoline Outlet, including
   a. all permits, licenses, consents, contracts, understandings, and agreements used in the operation

of the ancillary businesses;

b. the exclusive right to all intellectual property used solely in the operation of the ancillary business, and the non-exclusive right to use in the operation of the ancillary businesses all other intellectual property in the operation of the ancillary businesses.

For purposes of this definition only, "Retail Assets" does not include:

a. Respondents' proprietary trademarks, trade names, logos, trade dress, or identification signs;
b. additized product inventory;
c. credit card agreements; or
d. satellite-based or centralized credit card processing equipment not located at the Gasoline Outlet.

BJ. "Shocker Line" means the common carrier pipeline owned by Phillips Pipe Line Company that originates at Conway, Kansas, and that connects to the Blue Line at a point at or near Wichita, Kansas.

BK. "Shocker Station" means the pipeline station owned and operated by the Phillips Pipe Line Company and located at or near Conway, Kansas.

BL. "Terminaling" means the services performed by a facility that provides temporary storage of refined petroleum products received via pipeline, tank trucks, rail, or transport trailers, and the redelivery of refined products from storage tanks into pipeline, tank trucks, rail, or transport trailers.

BM. "Texas Assets" means (1) all of Conoco's tangible assets located in the Texas Specified Area used for the gathering, compression, processing, transportation, or sale of natural gas; (2) all contracts, agreements and understandings relating to the tangible assets defined in (1), above; provided, however, that if any such contract, agreement or understanding includes matters or terms not related to the tangible assets defined in (1), above, then only those provisions relating to the tangible assets defined in (1), above, are included; and (3) on an exclusive basis, all easements, rights of way, or other rights used solely in the operation of the Texas Assets,

and on a non-exclusive basis, all other easements, rights of way, or other rights used in the operation of the Texas Assets. "Texas Assets" does not include (1) the assets listed in Exhibit E; or (2) any of Conoco's ownership interest in real estate related to the assets described in (1), above, provided that Respondents shall grant the acquirer of the Texas Assets all easements, rights of way, or other rights necessary to operate the Texas Assets.

BN. "Texas Specified Area" means

1. in Sutton County, Texas, T.W.N.G.R.R. Co. Block A-9, sections 7, 8 and 10; T.W.N.G.R.R. Co. Block 9, sections 26-29, 31-39, 43-46, 72 and 100; H.E.&W.T.R.R. Block A, sections 1, 31-35 and 63; G.C.&S.F.R.R. Co., sections 10-15; H.E.&T.R.R. Co. Block B, sections 14, 15, 23, 24, 48, 59, 69-72 and 134-138; E.L.&R.R.R.R. Co., sections 13-20; and G.C.&S.F.R.R. Co. Block D, sections 68-74;

2. in Schleicher County, Texas, G.C.&S.F.R.R. Co. Block 2, sections 18, 23, 24 and 27; G.C.&S.F.R.R. Co. Block 5, sections 4-8; G.C.&S.F.R.R. Co. Block A, sections 4, 13-28, 31-37, 40-44 and 56½; G.C.&S.F.R.R. Co. Block D, sections 5, 57, 59-61 and 64-68; E.L.&R.R.R.R. Co., sections 2 and 194½; H.E.&W.T.R.R. Block A, sections 1, 2, 5-7, 25-29, 41-51, 75-82, 104-112, 136-141, 161, 165-172, 176, 191 and 195-202; G.H.&S.A.R.R. Co., section 23; G.H.&S.A.R.R. Co. Block L, sections 34, 36 and 37; G.H.&S.A.R.R. Co. Block EEE, section 6; G.H.&S.A.R.R. Co. Block I, sections 4, 5, 8, 21, 24, 36, 37, 39-41, 53-55, 70 and 71; G.H.&S.A.R.R. Co. Block M, sections 3, 10, 11, 14-16, 19-23, 25-35, 37-42, 48, 67 and 78-80; G.H.&S.A.R.R. Co. Block H, sections 65, 67-70, 72-74 and 79; T.W.N.G.R.R. Block 8, section 39; Block TT, sections 3-27, 32-51, 53, 54 and 58-84; Block LL, sections 1-56, 59, 61, 63, 75, 76, 83 and 84; University Land Block 54, sections 20-22; TC R.R. Co., section 1213; Tom Green Co. School Land, sections 3, 3½ and 5; G. Roeder, section 1891; F. Kloepper, section 1892; M.E. Ratcliff, section 16; and Concho School Land, sections 2, 7, and 8;

3. in Schleicher County, Texas, the following sections, for which survey references are not available: sections 79½

and 1, located south of G.H.&S.A.R.R. Co. Block M, section 80; sections 3 ¼, 99, 100, 7, 7¼, 20¾, 1031 and two adjoining sections labelled 7¾, all of which are located to the west of Block LL and to the east of Block AA; section 41, located to the north of H.E.&W.T.R.R. Block A, sections 199, 198, 169, 168, 139, 138, 109, 108, 79, 78, 49 and 48; and

4. in Tom Green County, Texas, G. Roeder, sections 1890 and 1891; M.E. Ratcliff, section 16; and Tom Green Co. School Land, section 3.

"Texas Specified Area" is depicted on the map that is attached as Confidential Exhibit E-1.

BO. "Wichita Refined Products Throughput Agreement" means the agreement between Respondents and a single throughput customer subject to the prior approval of the Commission, for the receipt, storage, handling, and redelivery of refined products from storage tanks into tank trucks or transport trailers for the throughput customer at Phillips' refined products terminal in Wichita, Kansas.

II.

IT IS FURTHER ORDERED that:

A. Respondents shall divest the Phillips Woods Cross Assets to a single acquirer that receives the prior approval of the Commission and only in a manner that receives the prior approval of the Commission, absolutely and in good faith and at no minimum price, within twelve (12) months from the date Respondents executed the Agreement Containing Consent Orders.

B. Respondents shall, upon the Effective Date of Divestiture of the Phillips Woods Cross Assets, assign to the acquirer of the Phillips Woods Cross Assets all Phillips Woods Cross Supply Agreements.

C. Respondents shall provide the acquirer of the Phillips Woods Cross Assets (and shall enter into an agreement with the acquirer of the Phillips Woods Cross Assets, to be effective upon the Effective Date of Divestiture of the Phillips Woods Cross Assets, which shall be subject to the

prior approval of the Commission, that includes terms that provide for) the following:

1. for a period of ten (10) years from the Effective Date of Divestiture of the Phillips Woods Cross Assets, at no payment by the acquirer to the Respondents:

   a. in connection with the sale of Motor Fuels, the exclusive right to use in Utah, Idaho, Wyoming or Montana all brand names that are (i) owned by or licensed to Phillips, and (ii) used by Phillips or Phillips Branded Sellers in Utah, Idaho, Wyoming, and Montana as of the date Respondents executed the Agreement Containing Consent Orders, including the exclusive rights to use Phillips' identification signs, trademarks, and other trade indicia, and the non-exclusive right to accept and process Phillips credit cards in connection with such sales of Phillips Branded Fuels;
   b. in connection with the sale of Ancillary Products, the exclusive right to use all brand names that are (i) owned by or licensed to Phillips, and (ii) used by Phillips or Phillips Branded Sellers in Utah, Idaho, Wyoming, and Montana as of the date Respondents executed the Agreement Containing Consent Orders, at all Gasoline Outlets owned or operated by the acquirer in Utah, Idaho, Wyoming, and Montana; and the non-exclusive right to use all brand names that are (i) owned by or licensed to Phillips, and (ii) used by Phillips or Phillips Branded Sellers in Utah, Idaho, Wyoming, and Montana as of the date Respondents executed the Agreement Containing Consent Orders, in connection with the sale of Ancillary Products elsewhere in Utah, Idaho, Wyoming, and Montana;

   Provided, however, that Respondents shall not otherwise interfere with the acquirer's right to sell Aviation Fuels under any brand name owned by or licensed to a Person other than Respondents or under no brand; and provided further that the rights granted under this Paragraph II.C.1. shall include any modifications, upgrades, improvements, or changes to a brand name, identification sign, trademark, or other trade indicia made by Respondents after the Merger for use in other states, except in circumstances in which a brand name, identification sign, trademark, or other trade indicia, includes the name "Conoco" or uses

any brand name, identification sign, trademark, or other trade indicia used by Conoco or Conoco Branded Sellers as of the date Respondents executed the Agreement Containing Consent Orders.

2. at the end of the ninth year after the Effective Date of Divestiture of the Phillips Woods Cross Assets, Respondents shall offer to meet with the acquirer to discuss a renewal of the agreement;
3. Phillips' proprietary branded and other non-proprietary credit card services, additive, and such brand support as the acquirer may choose to purchase at Phillips' costs in connection with the provision of credit card services, additive, and brand support; and
4. Ancillary Products acquired from Respondents for resale in Utah, Idaho, Wyoming, and Montana at commercial, arms'-length terms no less favorable than those given by Respondents to other wholesale purchasers who buy Ancillary Products of like quantity, grade, and quality from Respondents, but permitting differences in price that arise from Respondents' differences in manufacturing, purchasing, shipping or storage costs, if any.

D. Respondent may include in the agreement with the acquirer of the Phillips Woods Cross Assets a requirement that the acquirer:

1. take commercially reasonable steps to protect the integrity of any trademark, tradename or logo licensed to the acquirer of the Phillips Woods Cross Assets pursuant to this Paragraph; and
2. comply with all standards and requirements relating to the display and presentation of trademarks, tradenames, or logos licensed to the acquirer of the Phillips Woods Cross Assets pursuant to this Paragraph if such standards or requirements are also imposed on Respondents' sellers of Phillips Branded Fuels in other geographies.

E. Respondents shall divest the Phillips Woods Cross Assets, assign all Phillips Woods Cross Supply Agreements, and enter into the agreements as required by Paragraphs II.A., II.B., II.C., and II.D. only to a single acquirer that receives the prior approval of the Commission and only in a manner that receives the prior approval of the Commission.

F. Respondents shall offer the acquirer of the Phillips Woods Cross Assets an indemnity, subject to the prior approval of the Commission and to be effective upon the Effective Date of Divestiture of the Phillips Woods Cross Assets, which indemnity shall allocate among Respondents and the acquirer, on such terms as the Respondents and the acquirer agree, responsibility with respect to potential claims and liabilities arising out of failure to comply with local, state, and federal environmental obligations in connection with the Phillips Woods Cross Assets that are divested or assigned pursuant to this Paragraph.

G. Notwithstanding the provisions of Paragraph II.C., in the event that the acquirer of the Phillips Woods Cross Assets ceases using any Phillips brand in Utah, Idaho, Wyoming and Montana pursuant to the agreement conveying the right to use that Phillips brand described in Paragraph II.C., Respondents shall have the right to use that Phillips brand in Utah, Idaho, Wyoming and Montana beginning two (2) years after the acquirer of the Phillips Woods Cross Assets ceases to use that Phillips brand in Utah, Idaho, Wyoming and Montana.

H. If, at any time from the date Respondents executed the Agreement Containing Consent Orders until the Effective Date of Divestiture of the Phillips Woods Cross Assets, Respondents terminate or enter into discussions with any Person relating to construction of or plans to construct a pipeline that will deliver light petroleum products into Utah or Western Colorado, Respondents shall, at the same time they terminate or enter into such discussions: (1) provide a copy of this Order to such Person; and (2) notify all Persons who have expressed to Respondents an interest in acquiring the Phillips Woods Cross Assets that they have terminated or entered into such discussions.

I. Until the Effective Date of Divestiture of the Phillips Woods Cross Assets, Respondents shall take such actions as are necessary to maintain the viability and marketability of the Phillips Woods Cross Assets and to prevent the destruction, removal, wasting, deterioration, or impairment of the Phillips Woods Cross Assets, except for ordinary wear and tear, including, but not limited to, continuing in effect and maintaining all proprietary trademarks, trade names, logos,

trade dress, identification signs, and renewing or extending any base leases or ground leases that expire or terminate prior to the Effective Date of Divestiture of the Phillips Woods Cross Assets. Until the assignments of the Phillips Woods Cross Supply Agreements provided by Paragraph II.B. occur, Respondents shall not attempt in any way to encourage any Phillips Branded Seller to terminate, and shall not terminate (except for reasons set out in § 2802(c) of the Petroleum Marketing Practices Act, 15 U.S.C. § 2802(c)) or intentionally interfere with compliance with any Phillips Woods Cross Supply Agreement, and Respondents shall continue in effect all programs and other business practices aimed at maintaining existing relationships with parties to any Phillips Woods Cross Supply Agreement and shall otherwise seek to preserve such relationships as diligently as was done prior to the time Respondents executed the Agreement Containing Consent Orders.

J. In the event that Respondents are unable to satisfy all conditions necessary to divest any intangible asset, Respondents shall: (1) with respect to permits, licenses, or other rights granted by governmental authorities (other than patents), provide such assistance as the acquirer may reasonably request in the acquirer's efforts to obtain comparable permits, licenses or rights, and (2) with respect to other intangible assets (including patents and contractual rights), substitute equivalent assets or arrangements, subject to the prior approval of the Commission. A substituted asset or arrangement will not be deemed equivalent unless it enables the Woods Cross refinery to perform the same function at the same or less cost.

K. In the event that Respondents are unable to divest the Phillips interest in the Boise or Burley terminals solely due to the failure of any co-owner to waive its preferential rights should those rights exist (and only after Respondents have used best efforts to obtain such waiver), Respondents shall enter into a substitute equivalent arrangement or agreement, subject to the prior approval of the Commission, such as a throughput arrangement, a lease agreement, or any other arrangement to enable the acquirer of the Phillips Woods Cross Assets to obtain the same commercial benefit it would have obtained if it had purchased Phillips' interest in the Boise or Burley terminals. A substituted arrangement or agreement will not be deemed equivalent unless it enables

the Woods Cross refinery to perform the same function at the same or less cost and unless it provides supply of refined petroleum products and Terminaling at the same or less cost than Phillips' cost.

L. For any obligation of Respondents pursuant to this Paragraph that is at the option of the acquirer, Respondents need not fulfill such obligation only if the following two conditions are satisfied: (1) the acquirer exercises its option not to have Respondents fulfill the obligation; and (2) the Commission approves the divestiture without the fulfillment of that obligation.

M. The purpose of this Paragraph is to ensure that the Phillips Woods Cross Assets remain in the market and to remedy the lessening of competition in the refining, terminaling and bulk supply of Motor Fuels and other petroleum products resulting from the proposed Merger as alleged in the Commission's Complaint. A further purpose of this Paragraph is to ensure that the acquirer of the Phillips Woods Cross Assets has the same capabilities and incentives as did Phillips prior to the Merger to expand and develop alternative sources of Motor Fuels and other light petroleum products for the Northern Utah market as alleged in theCommission's Complaint and is able to take control of the assets and, with minimal additional investment, compete as aggressively as did Phillips prior to the Merger.

III.

IT IS FURTHER ORDERED that:

A. Respondents shall divest the Colorado Assets to a single acquirer that receives the prior approval of the Commission and only in a manner that receives the prior approval of the Commission, absolutely and in good faith and at no minimum price, within twelve (12) months from the date Respondents executed the Agreement Containing Consent Orders.

B. Respondents shall, upon the Effective Date of Divestiture of the Colorado Assets, assign to the acquirer of the Colorado Assets all Phillips Colorado Supply Agreements.

C. Respondents shall provide the acquirer of the Colorado Assets (and shall enter into an agreement with the acquirer of the Colorado Assets, to be effective upon the Effective Date of Divestiture of the Colorado Assets, which shall be subject to the prior approval of the Commission, that includes terms that provide for) the following:

1. for a period of ten (10) years from the Effective Date of Divestiture of the Colorado Assets, at no payment by the acquirer to the Respondents:
   a. in connection with the sale of Motor Fuels, the exclusive right to use in Colorado all brand names that are (i) owned by or licensed to Phillips, and (ii) used by Phillips or Phillips Branded Sellers in Colorado as of the date Respondents executed the Agreement Containing Consent Orders, including the exclusive rights to use Phillips' identification signs, trademarks, and other trade indicia, and the non-exclusive right to accept and process Phillips credit cards in connection with such sales of Phillips Branded Fuels;
   b. in connection with the sale of Ancillary Products, the exclusive right to use all brand names that are (i) owned by or licensed to Phillips, and (ii) used by Phillips or Phillips Branded Sellers in Colorado as of the date Respondents executed the Agreement Containing Consent Orders, at all Gasoline Outlets owned or operated by the acquirer in Colorado; and the non-exclusive right to use all brand names that are (1) owned by or licensed to Phillips, and (2) used by Phillips or Phillips Branded Sellers in Colorado as of the date Respondents executed the Agreement Containing Consent Orders, in connection with the sale of Ancillary Products elsewhere in Colorado;

Provided, however, that Respondents shall not otherwise interfere with the acquirer's right to sell Aviation Fuels under any brand name owned by or licensed to a Person other than Respondents or under no brand; and provided further that the rights granted under this Paragraph III.C.1. shall include any modifications, upgrades, improvements, or changes to a brand name, identification sign, trademark, or other trade indicia made by Respondents after the Merger for use in other states, except in circumstances in which a brand name, identification sign, trademark, or

other trade indicia, includes the name "Conoco" or uses any brand name, identification sign, trademark, or other trade indicia used by Conoco or Conoco Branded Sellers as of the date Respondents executed the Agreement Containing Consent Orders.

2. at the end of the ninth year after the Effective Date of Divestiture of the Colorado Assets, Respondents shall offer to meet with the acquirer to discuss a renewal of the agreement;

3. Phillips' proprietary branded and other non-proprietary credit card services, additive, and such brand support as the acquirer may choose to purchase at Phillips' costs in connection with the provision of credit card services, additive, and brand support; and

4. Ancillary Products acquired from Respondents for resale in Colorado at commercial, arms'-length terms no less favorable than those given by Respondents to other wholesale purchasers who buy Ancillary Products of like quantity, grade, and quality from Respondents, but permitting differences in price that arise from Respondents' differences in manufacturing, purchasing, shipping or storage costs, if any.

D. Respondent may include in the agreement with the acquirer of the Colorado Assets a requirement that the acquirer:

1. take commercially reasonable steps to protect the integrity of any trademark, tradename or logo licensed to the acquirer of the Colorado Assets pursuant to this Paragraph; and
2. comply with all standards and requirements relating to the display and presentation of trademarks, tradenames, or logos licensed to the acquirer of the Colorado Assets pursuant to this Paragraph if such standards or requirements are also imposed on Respondents' sellers of Phillips Branded Fuels in other geographies.

E. Respondents shall divest the Colorado Assets, assign all Phillips Colorado Supply Agreements, and enter into the agreements as required by Paragraphs III.A., III.B., III.C., and III.D. only to a single acquirer that receives the prior approval of the Commission and only in a manner that

receives the prior approval of the Commission; provided, however, that, with respect to assets that are to be divested or agreements entered into pursuant to this Paragraph at the acquirer's option, Respondents need not divest such assets or enter into such agreements if the acquirer chooses not to acquire such assets or enter into such agreements and the Commission approves the divestiture without such assets or agreements.

F. Respondents shall offer the acquirer of the Colorado Assets an indemnity, subject to the prior approval of the Commission and to be effective upon the Effective Date of Divestiture of the Colorado Assets, which indemnity shall allocate among Respondents and the acquirer, on such terms as the Respondents and the acquirer agree, responsibility with respect to potential claims and liabilities arising out of failure to comply with local, state, and federal environmental obligations in connection with the Colorado Assets that are divested or assigned pursuant to this Paragraph.

G. Notwithstanding the provisions of Paragraph III.C., in the event that the acquirer of the Phillips Colorado Retail Assets ceases using any Phillips brand in Colorado pursuant to the agreement conveying the right to use that Phillips brand described in Paragraph III.C., Respondents shall have the right to use that Phillips brand in Colorado beginning two (2) years after the acquirer of the Colorado Assets ceases to use that Phillips brand in Colorado.

H. Respondents shall, at the acquirer's option and subject to the prior approval of the Commission, establish and divest to the acquirer a pipeline connection to an existing Phillips line to provide access to Denver International Airport at a capacity equal to or greater than the capacity Conoco had to Denver International Airport, and Respondents shall enter into a connection agreement relating to the Phillips line with or assignable to the acquirer at terms consistent with standard industry practices.

I. Respondents shall, at the acquirer's option and subject to the prior approval of the Commission, assign the asphalt supply agreement for the Conoco Denver Refinery Assets between Conoco and K.C. Asphalt, LLC, to the acquirer.

J. Respondents shall, at the acquirer's option and subject to the prior approval of the Commission, enter into a substitute agreement or arrangement with the acquirer that provides at least an equivalent commercial benefit to that which Conoco receives from the portion of the Jupiter Joint Venture relating to the Conoco Denver Refinery Assets.

K. Until the Effective Date of Divestiture of the Colorado Assets, Respondents shall take such actions as are necessary to maintain the viability and marketability of the Colorado Assets and to prevent the destruction, removal, wasting, deterioration, or impairment of the Colorado Assets, except for ordinary wear and tear, including, but not limited to, continuing in effect and maintaining all proprietary trademarks, trade names, logos, trade dress, identification signs, and renewing or extending any base leases or ground leases that expire or terminate prior to the Effective Date of Divestiture of the Colorado Assets. Until the assignments of Phillips Colorado Supply Agreements provided by Paragraph III.B. occur, Respondents shall not attempt in any way to encourage any Phillips Branded Seller to terminate, and Respondents shall not terminate (except for reasons set out in § 2802(c) of the Petroleum Marketing Practices Act, 15 U.S.C. § 2802(c)) or intentionally interfere with the compliance with a Phillips Existing Supply Agreement with respect to a Gasoline Outlet in Colorado, and Respondents shall continue in effect all programs and other business practices aimed at maintaining existing relationships with parties to any Phillips Colorado Supply Agreement and shall otherwise seek to preserve such relationships as diligently as was done prior to the time Respondents executed the Agreement Containing Consent Orders.

L. In the event that Respondents are unable to satisfy all conditions necessary to divest any intangible asset, Respondents shall: (1) with respect to permits, licenses, or other rights granted by governmental authorities (other than patents), provide such assistance as the acquirer may reasonably request in the acquirer's efforts to obtain comparable permits, licenses or rights, and (2) with respect to other intangible assets (including patents and contractual rights), substitute equivalent assets or arrangements, subject to the prior approval of the Commission. A substituted asset or arrangement will not be deemed equivalent unless it

enables the Colorado Assets to perform the same function at the same or less cost.

M. For any obligation of Respondents pursuant to this Paragraph that is at the option of the acquirer, Respondents need not fulfill such obligation only if the following two conditions are satisfied: (1) the acquirer exercises its option not to have Respondents fulfill the obligation; and (2) the Commission approves the divestiture without the fulfillment of that obligation.

N. The purpose of this Paragraph is to ensure the continued use of the Conoco Denver Refinery Assets in the same business in which the Conoco Denver Refinery Assets were engaged at the time of the announcement of the Merger and to remedy the lessening of competition in the refining and bulk supply of Motor Fuels and other petroleum products resulting from the proposed Merger as alleged in the Commission's draft Complaint.

IV.

IT IS FURTHER ORDERED that:

A. Respondents shall divest the Propane Business absolutely and in good faith and at no minimum price by January 15, 2003.

B. Respondents shall divest the Propane Business to and enter into the agreements required by Paragraph IV.D. with a single acquirer who receives the prior approval of the Commission and only in a manner that receives the prior approval of the Commission.

C. Respondents shall:

1. ensure that the acquirer of the Propane Business has access to the Blue Line, the Shocker Line, and the Shocker Station to ship propane to the Jefferson City, Missouri, or East St. Louis, Illinois, terminals on the same terms as any similarly situated Blue Line and Shocker Line shipper, including but not limited to any affiliate of Respondents;
2. not impede, deter, delay, prevent, or otherwise inhibit, directly or indirectly, (including discriminating against or

disfavoring relative to any other similarly situated Blue Line and Shocker Line shipper) the acquirer of the Propane Business from shipping, under its own name, on the Blue Line and Shocker Line to the Jefferson City, Missouri, or East St. Louis, Illinois, terminals;

3. submit to the Commission, at the same time Respondents submit to the FERC, a copy of any rate filing that may result in an increase in the tariff rate for the transportation of propane on the Blue Line and the Shocker Line from any point of origin to the Jefferson City, Missouri, and East St. Louis, Illinois, terminals;
4. not seek authority from the FERC to charge or set market-based rates on the Blue Line or Shocker Line without the prior approval of the Commission;
5. file for and make reasonable efforts to obtain FERC approval for a published tariff rate to transport propane on the Blue Line from East St. Louis, Illinois, to Jefferson City, Missouri. Such published tariff rate shall apply only to westward transportation of propane during the period in which other westward published tariff rates on the Blue Line apply. Such filing shall not seek market-based rates; and
6. provide the acquirer of the Propane Business an unqualified right to expand the propane storage and throughput capacity of the Propane Terminal Assets within a defined area agreed to by Respondents and the acquirer, subject to the prior approval of the Commission. The acquirer shall bear only direct costs related to expanding the Propane Terminal Assets, including the costs of obtaining all necessary permits and licenses. Respondents shall bear any and all other costs associated with the expansion, including but not limited to costs to remove and/or relocate any facilities or assets from the designated and agreed expansion areas that would interfere with such expansion.

D. Respondents shall, by the Effective Date of Divestiture of the Propane Business, subject to the prior approval of the Commission, enter into:

1. A propane supply contract with the acquirer of the Propane Business containing, among other things, the following provisions:
   a. an option to purchase propane or acquire propane

through exchanges in an amount of up to no less than the capacity of the Blue Line and the Shocker Line, to be delivered to each of the Jefferson City, Missouri, and East St. Louis, Illinois, terminals consistent with usual and customary practices;

b. a restriction on Respondents' scheduling and undertaking regular maintenance on the Blue Line, the Shocker Line or Shocker Station during the time period from November 1 through March 1, except for maintenance required by law to be undertaken at specific times, maintenance that does not cause any shut-down or slow-down of these facilities or maintenance that does not impede the acquirer's access to these facilities;

c. a propane purchase price no greater than the weekly average Conway OPIS spot price plus the Blue Line and Shocker Line published tariff rates to transport propane from Conway, Kansas, to the Jefferson City, Missouri, and East St. Louis, Illinois, terminals

d. procedures and protections preventing Respondents from receiving and using Non-Public Propane Information except as specified in this Paragraph IV.E.; and

e. a dispute resolution mechanism, to be invoked at the acquirer's option (that includes protections against disclosure of Non-Public Propane Information).

2. A Propane Terminal Assets operating agreement that describes the rights of the acquirer and the obligations of Respondent, as operator of the Jefferson City, Missouri, and East St. Louis, Illinois, terminals, including, among other things, the following provisions:

a. to provide for the maintenance, upkeep, repair, security, and operation of the Jefferson City, Missouri, and East St. Louis, Illinois, terminals consistent with standard industry practice, but no less than the standard Respondents apply to the remainder of the Jefferson City, Missouri, and East St. Louis, Illinois, terminals;

b. a dispute resolution mechanism, to be invoked at the acquirer's option (that includes protections against disclosure of Non-Public Propane Information); and

c. a fee for maintenance, upkeep, repair, security, and operation that is at or less than the actual costs of maintenance, upkeep, repair, security, and operation of the Propane Terminal Assets; provided, however,

that the fee shall not be calculated using any Non-Public Propane Information.

E. Respondents shall not provide, disclose, or otherwise make available Non-Public Propane Information to persons who are not Propane Support Personnel, except for the purpose of complying with Respondents' financial, tax reporting, legal, health, safety, and environmental obligations. Respondents' personnel receiving such information pursuant to this Paragraph IV.E. shall not otherwise disclose the Non-Public Propane Information.

F. Before the Effective Date of Divestiture, Respondents shall provide fully independent and secure computer systems at the Jefferson City, Missouri, and East St. Louis, Illinois, terminals for exclusive use by the acquirer, to monitor all aspects of the Propane Business including, but not limited to, customer accounts and information, propane deliveries and sales. Respondents shall not retain or use any customer information relating to the supply of propane from the Jefferson City, Missouri, and East St. Louis, Illinois, terminals.

G. At any time after the Commission issues the Order to Hold Separate and Maintain Assets, the Commission may appoint a Monitor to assure that Respondents comply with their obligations under this Paragraph, and Respondents shall consent to the terms and conditions regarding the powers, duties, authorities and responsibilities of the Monitor appointed pursuant to the Order to Hold Separate and Maintain Assets.

H. The purpose of this Paragraph is to ensure the continued use of the Propane Business assets in the same business in which they were engaged at the time of the announcement of the proposed Merger, to establish a propane competitor with competitive costs, to allow the acquirer of the Propane Business access to sources of propane from the market in Conway, Kansas, by shipping propane from Conway, Kansas, through the Blue Line and Shocker Line to the Jefferson City, Missouri, and East St. Louis, Illinois, terminals on a competitive and non-discriminatory basis or to have Respondents provide propane at Jefferson City, Missouri, or East St. Louis, Illinois, terminals at a price equal to or less than the price of accessing propane at

Conway, Kansas, and to remedy the lessening of competition in the bulk supply and marketing of propane resulting from the proposed Merger, as alleged in the Commission's Complaint.

V.

IT IS FURTHER ORDERED that:

A. Respondents shall divest the Phillips Spokane Terminal absolutely and in good faith and at no minimum price, within nine (9) months from the date Respondents executed the Agreement Containing Consent Orders.

B. Respondents shall divest the Phillips Spokane Terminal to an acquirer that receives the prior approval of the Commission and only in a manner that receives the prior approval of the Commission.

C. Until the Effective Date of Divestiture of the Phillips Spokane Terminal, Respondents shall take such actions as are necessary to maintain the viability and marketability of the Phillips Spokane Terminal and to prevent the destruction, removal, wasting, deterioration, or impairment of the Phillips Spokane Terminal, except for ordinary wear and tear.

D. Respondents shall offer the acquirer of the Phillips Spokane Terminal an indemnity, subject to the prior approval of the Commission and to be effective upon the Effective Date of Divestiture of the Phillips Spokane Terminal, which indemnity shall allocate among Respondents and the acquirer, on such terms as the Respondents and the acquirer agree, responsibility with respect to potential claims and liabilities arising out of failure to comply with local, state, and federal environmental obligations in connection with the Phillips Spokane Terminal that are divested or assigned pursuant to this Paragraph.

E. In the event that Respondents are unable to satisfy all conditions necessary to divest any intangible asset, Respondents shall: (1) with respect to permits, licenses or other rights granted by governmental authorities (other than patents), provide such assistance as the acquirer may reasonably request in the acquirer's efforts to obtain

comparable permits, licenses or rights, and (2) with respect to other intangible assets (including patents and contractual rights), substitute equivalent assets or arrangements, subject to the prior approval of the Commission. A substituted asset or arrangement will not be deemed to be equivalent unless it enables the terminal to perform the same function at the same or less cost.

F. The purpose of this Paragraph is to ensure the continued use of the Phillips Spokane Terminal in the same business in which it was engaged at the time of the announcement of the proposed Merger, and to remedy the lessening of competition in the Terminaling of gasoline and other petroleum products resulting from the proposed Merger, as alleged in the Commission's Complaint.

VI.

IT IS FURTHER ORDERED that:

A. Respondents shall, within six (6) months from the date Respondents executed the Agreement Containing Consent Orders, enter into a Wichita Refined Products Throughput Agreement that receives the prior approval of the Commission with Williams Pipe Line Company, LLC (or another designated subsidiary of The Williams Companies Inc.) or with a single throughput customer that receives the prior approval of the Commission.

B. The Wichita Refined Products Throughput Agreement shall include, subject to the prior approval of the Commission, without limitation, the following terms:
   1. no minimum volume requirement;
   2. a maximum throughput volume of 8,500 barrels per day;
   3. a term of no less than ten (10) years;
   4. for the acquisition of additive and information technology services; and
   5. an option to purchase the Phillips Wichita Terminal Assets, including if the acquirer exercises such option, a right to expand the capacity of such loading racks and storage tanks on the terminal property at the acquirer's own risk, cost, and expense; provided, however, that Phillips may remain the operator of the Phillips Wichita Terminal Assets.

C. The purpose of this Paragraph is to ensure the continued use of the Phillips Wichita Terminal Assets in the same business in which they were engaged at the time of the announcement of the proposed Merger, and to remedy the lessening of competition in the Terminaling of gasoline and other petroleum products in Wichita, Kansas, resulting from the proposed Merger, as alleged in the Commission's Complaint.

VII.

IT IS FURTHER ORDERED that:

A. Respondents shall divest the New Mexico Assets absolutely and in good faith and at no minimum price within nine (9) months from the date Respondents executed the Agreement Containing Consent Orders.

B. Respondents shall divest the New Mexico Assets to an acquirer that receives the prior approval of the Commission and only in a manner that receives the prior approval of the Commission.

C. Until the Effective Date of Divestiture of the New Mexico Assets, Respondents shall take such actions as are necessary to maintain the viability and marketability of such assets and to prevent the destruction, removal, wasting, deterioration or impairment of such assets, except for ordinary wear and tear.

D. The purpose of this Paragraph is to ensure the continued use of the New Mexico Assets in the same business in which they were engaged at the time of the announcement of the proposed Merger, and to remedy the lessening of competition in Gas Gathering resulting from the Merger, as alleged in the Commission's Complaint.

VIII.

IT IS FURTHER ORDERED that:

A. Respondents shall divest the Texas Assets absolutely and in good faith and at no minimum price within nine (9) months from the date Respondents executed the Agreement Containing Consent Orders.

B. Respondents shall divest the Texas Assets to an acquirer that receives the prior approval of the Commission and only in a manner that receives the prior approval of the Commission.

C. Respondents shall, at the acquirer's option and subject to the prior approval of the Commission, enter into an agreement with the acquirer of the Texas Assets to process natural gas gathered by the Texas Assets, such agreement to include, without limitation, the following terms:

1. the natural gas shall be processed at the Mertzon Facility;
2. the processing fee shall not exceed Cost of processing;
3. the amount to be processed on a daily basis shall be up to the amount gathered on the Texas Assets as of the date Respondents executed the Agreement Containing Consent Orders;
4. the term shall be no less than seven (7) years;
5. the agreement shall be subject to cancellation by the acquirer with no more than twelve (12) months' notice; and
6. at the acquirer's option and subject to the prior approval of the Commission, the agreement shall provide for the transportation at Cost to the Mertzon Facility of natural gas gathered on the Texas Assets.

D. Until the Effective Date of Divestiture of the Texas Assets, Respondents shall take such actions as are necessary to maintain the viability and marketability of such assets and to prevent the destruction, removal, wasting, deterioration or impairment of such assets, except for ordinary wear and tear.

E. The purpose of this Paragraph is to ensure the continued use of the Texas Assets in the same business in which they were engaged at the time of the announcement of the proposed Merger, and to remedy the lessening of competition in Gas Gathering resulting from the Merger, as alleged in the Commission's Complaint.

IX.

IT IS FURTHER ORDERED that:

A. Beginning at the date of execution of the Agreement Containing Consent Orders, Respondents shall not provide, disclose or otherwise make available to Duke, DEFS, or any member of the DEFS board of directors any ConocoPhillips Non-Public GCF Information.

B. Beginning at the date of execution of the Agreement Containing Consent Orders, Respondents and ConocoPhillips DEFS Board Members shall not receive from Duke, DEFS, or any individual member of the DEFS board of directors any DEFS Non-Public Fractionation Information.

C. ConocoPhillips DEFS Board Members shall not participate in any discussions with DEFS or Duke relating to GCF, Enterprise, or Mont Belvieu I.

D. ConocoPhillips DEFS Board Members shall not participate, directly or indirectly, in any vote of the DEFS board of directors pertaining to Enterprise or Mont Belvieu I; provided, however, with respect to any matter to be voted on by the DEFS Board Members pertaining to Enterprise or Mont Belvieu I that requires the approval of one or more of the ConocoPhillips DEFS Board Members, the ConocoPhillips DEFS Board Members may participate in such vote and shall cast their votes in the same way as the majority of the Duke DEFS Board Members.

E. No later than twenty (20) days after Respondents executed the Agreement Containing Consent Orders, Respondents shall institute procedures and guidelines to comply with this Paragraph.

F. No later than ten (10) days after Respondents executed the Agreement Containing Consent Orders, Respondents shall submit to the Commission a copy of written procedures and guidelines that will be instituted by Respondents pursuant to Paragraph IX.E. above.

X.

IT IS FURTHER ORDERED that:

A. If Respondents fail to complete one or more of the divestitures required by Paragraphs II through VIII of this Order within the time period specified therein, the Commission may appoint one or more Divestiture Trustees to divest the Assets To Be Divested that have not been divested to an acquirer or acquirers approved by the Commission in a manner approved by the Commission. The Divestiture Trustee will have the authority and responsibility to divest the Assets To Be Divested absolutely and in good faith and at no minimum price, and with the Commission's prior approval; provided, however, that if Respondents fail to comply with its obligations under Paragraph IV.A. within the time period specified therein, the Divestiture Trustee appointed by the Commission pursuant to this Paragraph X. shall divest the Propane Alternate Assets subject to Respondents' right to lease back from the acquirer of the Propane Alternate Assets the Ringer, Kansas, terminal and all other tangible and non-tangible assets included in the Propane Alternate Assets other than the Propane Business, on commercially reasonable terms agreed to by the acquirer and subject to the prior approval of the Commission. Neither the decision of the Commission to appoint a Divestiture Trustee, nor the decision of the Commission not to appoint a Divestiture Trustee, to divest any of the assets under this Paragraph X 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, 15 U.S.C. § 45 (*l*), or any other statute enforced by the Commission, for any failure by the Respondents to comply with this Order.

B. If a Divestiture Trustee is appointed by the Commission or a court pursuant to Paragraph X of this Order to divest the Assets To Be Divested, Respondents shall consent to the following terms and conditions regarding the Divestiture Trustee's powers, duties, authority, and responsibilities:

1. The Commission shall select the trustee or trustees, subject to the consent of Respondents, which consent

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

2. Subject to the prior approval of the Commission, the trustee shall have the exclusive power and authority to divest the Assets To Be Divested.
3. Within ten (10) days after appointment of the trustee, Respondents shall execute a trust agreement that, subject to the prior approval of the Commission and, in the case of a court-appointed trustee, of the court, transfers to the trustee all rights and powers necessary to permit the trustee to effect the divestitures required by this Order.
4. The trustee shall have twelve (12) months from the date the Commission approves the trust agreement described in Paragraph X.B.3. to accomplish the divestiture, which shall be subject to the prior approval of the Commission. If, however, at the end of the twelve-month period, the trustee has submitted a plan of divestiture or believes that divestiture can be achieved within a reasonable time, the divestiture period may be extended by the Commission, or, in the case of a court-appointed trustee, by the court, provided; however, the Commission may extend this period only two (2) times.
5. The trustee shall have full and complete access to the personnel, books, records and facilities related to the Assets To Be Divested or to any other relevant information, as the trustee may request. Respondents shall develop such financial or other information as such trustee may request and shall cooperate with the trustee. Respondents shall take no action to interfere with or impede the trustee's accomplishment of the divestiture.
6. The trustee shall use his or her best efforts to negotiate the most favorable price and terms available in each contract that is submitted to the Commission, subject to Respondents' absolute and unconditional obligation to divest expeditiously at no minimum price. The divestiture shall be made in the manner and to the acquirer or acquirers as set out in Paragraphs II through VIII of this Order, as applicable; 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.

7. The trustee shall serve, without bond or other security, at the cost and expense of Respondents, on such reasonable and customary terms and conditions as the Commission or a court may set. The trustee shall have the authority to employ, at the cost and expense of Respondents, such consultants, accountants, attorneys, investment bankers, business brokers, appraisers, and other representatives and assistants as are necessary to carry out the trustee's duties and responsibilities. The trustee shall account for all monies derived from the divestiture and all expenses incurred. After approval by the Commission and, in the case of a court-appointed trustee, by the court, of the account of the trustee, including fees for his or her services, all remaining monies shall be paid at the direction of the Respondents, and the trustee's power shall be terminated. The trustee's compensation shall be based at least in significant part on a commission arrangement contingent on the trustee's divesting the Assets To Be Divested.
8. Respondents shall indemnify the trustee and hold the trustee harmless against any losses, claims, damages, liabilities, or expenses arising out of, or in connection with, the performance of the trustee's duties, including all reasonable fees of counsel and other expenses incurred in connection with the preparation for, or defense of any claim, whether or not resulting in any liability, except to the extent that such 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 X.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. The trustee shall have no obligation or authority to

operate or maintain the Assets To Be Divested.

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

13. Respondents may require the trustee to sign a customary confidentiality agreement; provided, however, such agreement shall not restrict the trustee from providing any information to the Commission.

XI.

IT IS FURTHER ORDERED that:

A. Within sixty (60) days from 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.A., V through VIII, and X 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, III, IV.A, V through VIII, and X 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 these Paragraphs, including a description of all substantive contacts or negotiations for the 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 a verified written report with the Commission setting forth in detail the manner and form in which they have complied and are complying with each provision of this Order.

XII.

IT IS FURTHER ORDERED that Respondents shall notify the Commission at least thirty (30) days prior to any proposed change in the corporate Respondents, such as dissolution,

assignment, sale resulting in the emergence of a successor corporation, or the creation or dissolution of subsidiaries or any other change in the corporation that may affect compliance obligations arising out of this Order.

XIII.

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 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 each Respondent relating to any matters contained in this Order; and

B. Upon five (5) days' notice to each 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.

XIV.

IT IS FURTHER ORDERED that, if (1) within the time period required for divestiture or other relief pursuant to Paragraphs II, III, IV.A., and V through VIII of this Order, Respondents have submitted a complete application in support of the divestiture or other relief (including the acquirer, manner of divestiture and all other matters subject to Commission approval) as required by Paragraphs II, III, IV.A., and V through VIII; and (2) the Commission has approved the divestiture or other relief and has not withdrawn its acceptance; but (3) Respondents have certified to the Commission prior to the expiration of the applicable time period that (a) notwithstanding timely and complete application for approval by Respondents to the State or District under an applicable consent decree to which the State (or District) and Respondents are parties, the State or District has failed to approve the divestiture or other relief that is also required under this Order, or (b) a State or District has filed a timely motion in court seeking to enjoin the proposed divestiture or other relief under an applicable consent decree to which the State (or

District) and Respondents are parties, then, (4) with respect to the particular divestiture or other relief that remains unconsummated, the time in which the divestiture or other relief is required under this Order to be complete shall be extended (a) for ninety (90) days or (b) until the disposition of the motion filed by the State or District pertaining to the proposed divestiture or other relief, whichever is later. During such period of extension, Respondents shall exercise utmost good faith and commercially reasonable best efforts to resolve the concerns of the particular State.

XV.

IT IS FURTHER ORDERED that this Order shall terminate on February 7, 2013.

EXHIBIT A

The following assets are not included in the definition of "Conoco Denver Refinery Assets."

1. cash and cash equivalents;

2. any insurance policies or insurance coverage, except as otherwise agreed between Respondents and the Commission-approved acquirer;

3. all refunds, rebates or similar payments of taxes to the extent such taxes were paid by or on behalf of Conoco prior to the Effective Date of Divestiture of the Colorado Assets;

4. Conoco's interests in the following crude oil pipelines: Glacier Pipeline, Big Horn Pipeline Beartooth Pipeline and Little Missouri Pipeline;

5. Conoco's interests in crude oil storage tanks located at Guernsey, WY, which, subject to the prior approval of the Commission, the acquirer approved by the Commission chooses not to acquire, consistent with the requirements on Paragraph I.Q.1.j.;

6. Conoco's interests in the following refined products pipelines (and product terminals along these systems): Seminoe Pipeline, Pioneer Pipeline, Yellowstone Pipeline and Cheyenne/North Platte Pipeline;

7. Conoco's terminal located in Grand Junction, CO and all facilities and assets related to its operation;

8. any rail cars owned or used by Respondents;

9. Conoco's Retail Assets in Colorado and all associated proprietary trademarks, trade names, logos, trade dress, identification signs, additized product inventory and petroleum supply, and any tangible or intangible assets relating solely to the marketing, distribution, or sale of Conoco Branded Fuels;

10. Conoco Existing Supply Agreements;

11. all rights of Conoco to receive product pursuant to any

existing exchange agreement (even if the acquirer of the Colorado Assets assumes Conoco's obligations to supply product from the Denver refinery to a third party under any such agreement);

12. Conoco's interests in Sentinel Transportation, a joint venture between Conoco and DuPont that provides truck transportation for crude oil and delivery of refined products to Conoco direct-served outlets;

13. any system-wide software, databases, operations centers, know-how, patents, or, intellectual property rights that are not unique to the Conoco Denver Refinery (except to the extent that patents, know-how, or intellectual property are required by this Order to be licensed on an non-exclusive basis);

14. Conoco/Flying J ("CFJ"), a Conoco joint venture with Flying J Inc., including CFJ's Gasoline Outlets and/or truck stops, and the right to supply refined product to CFJ;

15. Conoco's proprietary trade names and trademarks;

16. Conoco's interest in Onvance LP;

17. accounts receivable or exchange balances owed to or by Respondents by reason of deliveries made by or to Respondents or on account of the Conoco Denver Refinery Assets prior to the Effective Date of Divestiture of the Conoco Denver Refinery Assets;

18. personnel, employment and other records of Respondents as to their former employees, other than those records necessary for continuing operations;

19. any claims or other rights to receive monies arising prior to or after the Effective Date of Divestiture of the Conoco Denver Refinery Assets that Respondents have or may have that are attributable to its ownership of the Conoco Denver Refinery Assets prior to the Effective Date of Divestiture of the Conoco Denver Refinery Assets;

20. company-wide contracts for goods and services received (except to the extent that any portion of any contract relating to the Conoco Denver Refinery Assets can be

assigned to the Commission-approved acquirer);

21. any litigation or rights to make claims against third parties arising prior to or after the Effective Date of Divestiture of the Conoco Denver Refinery Assets that Respondents have or may have which are attributable to its ownership of the Conoco Denver Refinery Assets prior to the Effective Date of Divestiture of the Conoco Denver Refinery Assets;

22. any property owned by third parties located at or used by the Conoco Denver Refinery Assets;

23. Conoco's 6" crude transfer pipeline from the Guernsey crude tank farm to the Platte crude tank farm, from which crude is originated onto the segment of the Platte crude oil pipeline that runs from Guernsey, Wyoming to Wood River, Illinois; and

24. Conoco's 4" crude transfer pipeline from the Guernsey crude tank farm to third party crude oil storage in Ft. Laramie, Wyoming.

CONFIDENTIAL EXHIBIT B

[Redacted From Public Record Version]

EXHIBIT C

The following assets are not included in the definition of "Phillips Spokane Terminal."

1. cash, cash equivalents, deposits and bank accounts;

2. Phillips' proprietary trade names, trademarks and identification signs;

3. accounts receivable or exchange balances owed to or by Respondents by reason of deliveries made by or to Respondents prior to the Effective Date of Divestiture of Phillips Spokane Terminal;

4. personnel, employment and other records of Respondents as to their former employees, other than those records necessary for continuing operations;

5. any claims or other rights to receive monies arising prior to or after the Effective Date of Divestiture of Phillips Spokane Terminal that Respondents have or may have that are attributable to their ownership of the Phillips Spokane Terminal prior to the Effective Date of Divestiture of Phillips Spokane Terminal;

6. all insurance policies or insurance coverage, except as otherwise agreed between Respondents and the Commission-approved acquirer;

7. any books and records located at the Phillips Spokane Terminal that Respondents are required by law to retain, provided that Respondents deliver to the acquirer at least one copy thereof;

8. all refunds, rebates or similar payments of taxes to the extent such taxes were paid by or on behalf of Respondents prior to the Effective Date of Divestiture of the Phillips Spokane Terminal;

9. any rail cars owned, leased or used by Respondents;

10. any system-wide software, databases, operations centers, know-how, patents, or intellectual property rights that are not unique to the Phillips Spokane Terminal (except to the

extent that patents, know-how, or intellectual property are required by this Order to be licensed on a non-exclusive basis);

11. company-wide contracts for goods and services received (except to the extent that any portion of any contract relating to the Phillips Spokane Terminal can be assigned to the Commission-approved acquirer);

12. any litigation or rights to make claims against third parties arising prior to or after the Effective Date of Divestiture of Phillips Spokane Terminal that Respondents have or may have which are attributable to their ownership of the Phillips Spokane Terminal prior to the Effective Date of Divestiture of Phillips Spokane Terminal; and

13. any property owned by third parties located at or used by the Phillips Spokane Terminal.

EXHIBIT D

The following assets are not included in the definition of "Phillips Woods Cross Refinery Assets."

1. cash, cash equivalents, deposits and bank accounts;

2. Phillips' proprietary trade names and trademarks, except as required to be licensed pursuant to this Order;

3. accounts receivable or exchange balances owed to or by Respondents by reason of deliveries made by or to Respondents or on account of the Phillips Woods Cross Refinery Assets prior to the Effective Date of Divestiture of the Phillips Woods Cross Refinery Assets;

4. personnel, employment and other records of Respondents as to their former employees, other than those records necessary for continuing operations;

5. any claims or other rights to receive monies arising prior to or after the Effective Date of Divestiture of the Phillips Woods Cross Refinery Assets that Respondents have or may have that are attributable to its ownership of the Phillips Woods Cross Refinery Assets prior to the Effective Date of Divestiture of the Phillips Woods Cross Refinery Assets;

6. any insurance policies or insurance coverage except as otherwise agreed between Respondents and the Commission-approved acquirer;

7. all refunds, rebates or similar payments of taxes to the extent such taxes were paid by or on behalf of Respondents prior to the Effective Date of Divestiture of the Phillips Woods Cross Refinery Assets;

8. any rail cars owned, leased or used by Respondents;

9. any system-wide software, databases, operations centers, know-how, patents, or intellectual property rights that are not unique to the Phillips Woods Cross Refinery Assets (except to the extent that patents, know-how, or intellectual property are required by this Order to be licensed on an non-exclusive basis);

10. company-wide contracts for goods and services received (except to the extent that any portion of any contract relating to the Phillips Woods Cross Refinery Assets can be assigned to the Commission-approved acquirer);

11. any litigation or rights to make claims against third parties arising prior to or after the Effective Date of Divestiture of the Phillips Woods Cross Refinery Assets that Respondents have or may have which are attributable to its ownership of the Phillips Woods Cross Refinery Assets prior to the Effective Date of Divestiture of the Phillips Woods Cross Refinery Assets; and

12. any property owned by third parties located at or used by the Phillips Woods Cross Refinery Assets.

Exhibits to Decision and Order
[Public Record Version]

EXHIBIT A

The following assets are not included in the definition of "Conoco Denver Refinery Assets."

1. cash and cash equivalents;

2. any insurance policies or insurance coverage, except as otherwise agreed between Respondents and the Commission-approved acquirer;

3. all refunds, rebates or similar payments of taxes to the extent such taxes were paid by or on behalf of Conoco prior to the Effective Date of Divestiture of the Colorado Assets;

4. Conoco's interests in the following crude oil pipelines: Glacier Pipeline, Big Horn Pipeline Beartooth Pipeline and Little Missouri Pipeline;

5. Conoco's interests in crude oil storage tanks located at Guernsey, WY, which, subject to the prior approval of the Commission, the acquirer approved by the Commission chooses not to acquire, consistent with the requirements on Paragraph I.Q.1.j.;

6. Conoco's interests in the following refined products pipelines (and product terminals along these systems): Seminoe Pipeline, Pioneer Pipeline, Yellowstone Pipeline and Cheyenne/North Platte Pipeline;

7. Conoco's terminal located in Grand Junction, CO and all facilities and assets related to its operation;

8. any rail cars owned or used by Respondents;

9. Conoco's Retail Assets in Colorado and all associated proprietary trademarks, trade names, logos, trade dress, identification signs, additized product inventory and petroleum supply, and any tangible or intangible assets relating solely to the marketing, distribution, or sale of Conoco Branded Fuels;

10. Conoco Existing Supply Agreements;

11. all rights of Conoco to receive product pursuant to any existing exchange agreement (even if the acquirer of the Colorado Assets assumes Conoco's obligations to supply product from the Denver refinery to a third party under any such agreement);

12. Conoco's interests in Sentinel Transportation, a joint venture between Conoco and DuPont that provides truck transportation for crude oil and delivery of refined products to Conoco direct-served outlets;

13. any system-wide software, databases, operations centers, know-how, patents, or, intellectual property rights that are not unique to the Conoco Denver Refinery (except to the extent that patents, know-how, or intellectual property are required by this Order to be licensed on an non-exclusive basis);

14. Conoco/Flying J ("CFJ"), a Conoco joint venture with Flying J Inc., including CFJ's Gasoline Outlets and/or truck stops, and the right to supply refined product to CFJ;

15. Conoco's proprietary trade names and trademarks;

16. Conoco's interest in Onvance LP;

17. accounts receivable or exchange balances owed to or by Respondents by reason of deliveries made by or to Respondents or on account of the Conoco Denver Refinery Assets prior to the Effective Date of Divestiture of the Conoco Denver Refinery Assets;

18. personnel, employment and other records of Respondents as to their former employees, other than those records necessary for continuing operations;

19. any claims or other rights to receive monies arising prior to or after the Effective Date of Divestiture of the Conoco Denver Refinery Assets that Respondents have or may have that are attributable to its ownership of the Conoco Denver Refinery Assets prior to the Effective Date of Divestiture of the Conoco Denver Refinery Assets;

20. company-wide contracts for goods and services received (except to the extent that any portion of any contract relating to the Conoco Denver Refinery Assets can be assigned to the Commission-approved acquirer);

21. any litigation or rights to make claims against third parties arising prior to or after the Effective Date of Divestiture of the Conoco Denver Refinery Assets that Respondents have or may have which are attributable to its ownership of the Conoco Denver Refinery Assets prior to the Effective Date of Divestiture of the Conoco Denver Refinery Assets;

22. any property owned by third parties located at or used by the Conoco Denver Refinery Assets;

23. Conoco's 6" crude transfer pipeline from the Guernsey crude tank farm to the Platte crude tank farm, from which crude is originated onto the segment of the Platte crude oil pipeline that runs from Guernsey, Wyoming to Wood River, Illinois; and

24. Conoco's 4" crude transfer pipeline from the Guernsey crude tank farm to third party crude oil storage in Ft. Laramie, Wyoming.

CONFIDENTIAL EXHIBIT B

[Redacted From Public Record Version]

EXHIBIT C

The following assets are not included in the definition of "Phillips Spokane Terminal."

1. cash, cash equivalents, deposits and bank accounts;

2. Phillips' proprietary trade names, trademarks and identification signs;

3. accounts receivable or exchange balances owed to or by Respondents by reason of deliveries made by or to Respondents prior to the Effective Date of Divestiture of Phillips Spokane Terminal;

4. personnel, employment and other records of Respondents as to their former employees, other than those records necessary for continuing operations;

5. any claims or other rights to receive monies arising prior to or after the Effective Date of Divestiture of Phillips Spokane Terminal that Respondents have or may have that are attributable to their ownership of the Phillips Spokane Terminal prior to the Effective Date of Divestiture of Phillips Spokane Terminal;

6. all insurance policies or insurance coverage, except as otherwise agreed between Respondents and the Commission-approved acquirer;

7. any books and records located at the Phillips Spokane Terminal that Respondents are required by law to retain, provided that Respondents deliver to the acquirer at least one copy thereof;

8. all refunds, rebates or similar payments of taxes to the extent such taxes were paid by or on behalf of Respondents prior to the Effective Date of Divestiture of the Phillips Spokane Terminal;

9. any rail cars owned, leased or used by Respondents;

10. any system-wide software, databases, operations centers, know-how, patents, or intellectual property rights that are not unique to the Phillips Spokane Terminal (except to the extent that patents, know-how, or intellectual property are required by this Order to be licensed on a non-exclusive basis);

11. company-wide contracts for goods and services received (except to the extent that any portion of any contract relating to the Phillips Spokane Terminal can be assigned to the Commission-approved acquirer);

12. any litigation or rights to make claims against third parties arising prior to or after the Effective Date of Divestiture of Phillips Spokane Terminal that Respondents have or may have which are attributable to their ownership of the Phillips Spokane Terminal prior to the Effective Date of Divestiture of Phillips Spokane Terminal; and

13. any property owned by third parties located at or used by the Phillips Spokane Terminal.

EXHIBIT D

The following assets are not included in the definition of "Phillips Woods Cross Refinery Assets."

1. cash, cash equivalents, deposits and bank accounts;

2. Phillips' proprietary trade names and trademarks, except as required to be licensed pursuant to this Order;

3. accounts receivable or exchange balances owed to or by Respondents by reason of deliveries made by or to Respondents or on account of the Phillips Woods Cross Refinery Assets prior to the Effective Date of Divestiture of the Phillips Woods Cross Refinery Assets;

4. personnel, employment and other records of Respondents as to their former employees, other than those records necessary for continuing operations;

5. any claims or other rights to receive monies arising prior to or after the Effective Date of Divestiture of the Phillips Woods Cross Refinery Assets that Respondents have or may have that are attributable to its ownership of the Phillips Woods Cross Refinery Assets prior to the Effective Date of Divestiture of the Phillips Woods Cross Refinery Assets;

6. any insurance policies or insurance coverage except as otherwise agreed between Respondents and the Commission-approved acquirer;

7. all refunds, rebates or similar payments of taxes to the extent such taxes were paid by or on behalf of Respondents prior to the Effective Date of Divestiture of the Phillips Woods Cross Refinery Assets;

8. any rail cars owned, leased or used by Respondents;

9. any system-wide software, databases, operations centers, know-how, patents, or intellectual property rights that are not unique to the Phillips Woods Cross Refinery Assets (except to the extent that patents, know-how, or intellectual property are required by this Order to be licensed on an non-exclusive basis);

10. company-wide contracts for goods and services received (except to the extent that any portion of any contract relating to the Phillips Woods Cross Refinery Assets can be assigned to the Commission-approved acquirer);

11. any litigation or rights to make claims against third parties arising prior to or after the Effective Date of Divestiture of the Phillips Woods Cross Refinery Assets that Respondents have or may have which are attributable to its ownership of the Phillips Woods Cross Refinery Assets prior to the Effective Date of Divestiture of the Phillips Woods Cross Refinery Assets; and

12. any property owned by third parties located at or used by the Phillips Woods Cross Refinery Assets.

ORDER TO HOLD SEPARATE AND MAINTAIN ASSETS

The Federal Trade Commission ("Commission"), having initiated an investigation of the proposed merger involving Respondents, Conoco Inc. ("Conoco") and Phillips Petroleum Company ("Phillips"), and Respondents having been furnished thereafter with a draft of Complaint that the Bureau of Competition proposed to present to the Commission for its consideration and that, if issued by the Commission, would charge Respondents with violations of Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45, and Section 7 of the Clayton Act, as amended, 15 U.S.C. §18; and

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

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

1. Respondent Conoco 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 600 North Dairy Ashford, Houston, TX 77079.

2. Respondent Phillips Petroleum Company is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware, with its office and principal place of business located at 411 South Keeler, Bartlesville, OK 74004.

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 Hold Separate Order, the following definitions and provisions shall apply:

A. Unless otherwise defined herein, any capitalized term in this Hold Separate Order shall have the same meaning as in the Decision and Order.

B. "Decision and Order" means the Decision and Order contained in the Agreement Containing Consent Orders executed by Respondents in this matter.

C. "Held Separate Business" means

1. Phillips Woods Cross Assets, as defined in the Decision and Order;

2. Colorado Assets, as defined in the Decision and Order;

3. Phillips Spokane Terminal, as defined in the Decision and Order;

4. Propane Marketing Operations; and

5. All personnel of Respondents listed on Confidential Attachment D.

D. "Hold Separate Period" means the time period during which the Hold Separate Order is in effect, which shall begin no later than ten (10) days after the date the Hold Separate Order becomes final and terminates pursuant to Paragraph VI. hereof.

E. "Material 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, or other trade secrets. The Held Separate Business shall be considered an entity separate from ConocoPhillips (as defined in the Decision and Order) for this purpose.

F. "Propane Marketing Operations" means the management and oversight responsibilities for marketing, pricing, and the supply of propane to customers from the Propane Terminal Assets, effective as of the date Respondents executed the Consent Agreement.

II.

IT IS FURTHER ORDERED that:

A. During the Hold Separate Period, Respondents shall hold the Held Separate Business separate, apart, and independent as required by this Hold Separate Order and shall vest the Held Separate Business with all rights, powers, and authority necessary to conduct its business; Respondents shall not exercise direction or control over, or influence directly or indirectly, the Held Separate Business or any of its operations, or the Hold Separate Trustee, except to the extent that Respondents must exercise direction and control over the Held Separate Business as is necessary to assure compliance with this Hold Separate Order, the Consent Agreement, and with all applicable laws, including, in consultation with the Hold Separate Trustee, continued oversight of the Held Separate Business' compliance with policies and standards concerning the safety, health, and

environmental aspects of their operations and the integrity of their financial controls; and Respondents shall have the right to defend any legal claims, investigations or enforcement actions threatened or brought against any Held Separate Business.

B. Until the Effective Date of Divestiture, Respondents shall take such actions as are necessary to maintain the viability and marketability of the (1) Held Separate Business (2) New Mexico Assets, (3) Texas Assets, and (4) Propane Business to prevent the destruction, removal, wasting, deterioration, or impairment of any of the assets, except for ordinary wear and tear, including, but not limited to, continuing in effect and maintaining proprietary trademarks, trade names, logos, trade dress, identification signs, franchise agreements, and renewing or extending any base leases or ground leases that expire or terminate prior to the Effective Date of Divestiture.

C. The purpose of this Hold Separate Order is to: (1) preserve the Held Separate Business as a viable, competitive, and ongoing business independent of Respondents until the divestitures required by the Decision and Order are achieved; (2) assure that the purpose of the Decision and Order is achieved; (3) assure that no Material Confidential Information is exchanged between Respondents and the Held Separate Business, except in accordance with the provisions of this Hold Separate Order; (4) prevent interim harm to competition pending the relevant divestitures and other relief; and (5) help remedy any anticompetitive effects of the proposed Merger.

D. Respondents shall hold the Held Separate Business separate, apart, and independent on the following terms and conditions:

1. A person, having received the prior approval of the Commission, shall serve as Hold Separate Trustee, pursuant to the Hold Separate Trustee Agreement executed by the Hold Separate Trustee and Respondents and

attached as Confidential Attachment C ("HS Trustee Agreement").

a. The HS Trustee Agreement shall require that, no later than ten (10) days after this Hold Separate Order becomes final, Respondents transfer to the Hold Separate Trustee all rights, powers, and authorities necessary to permit the Hold Separate Trustee to perform his/her duties and responsibilities, pursuant to this Hold Separate Order and consistent with the purposes of the Decision and Order.

b. No later than ten (10) days after this Hold Separate Order becomes final, Respondents shall, pursuant to the HS Trustee Agreement, transfer to the Hold Separate Trustee all rights, powers, and authorities necessary to permit the Hold Separate Trustee to perform his/her duties and responsibilities, pursuant to this Hold Separate Order and consistent with the purposes of the Decision and Order.

c. The Hold Separate Trustee shall have the responsibility, consistent with the terms of this Hold Separate Order and the Decision and Order, for monitoring the organization of the Held Separate Business; for managing the Held Separate Business through the Manager; for maintaining the independence of the Held Separate Business; and for monitoring Respondents' compliance with their obligations pursuant to this Hold Separate Order and the Decision and Order.

d. The Hold Separate Trustee shall have full and complete access, subject to any legally recognized privilege of Respondents, to all personnel, books, records, documents and facilities of the Held Separate Business or to any other relevant information as the Hold Separate Trustee may reasonably request including, but not limited to, all documents and records kept by Respondents in the ordinary course of business that relate to the Held Separate Business. Respondents shall develop such financial or other information as the Hold

Separate Trustee may request and shall cooperate with the Hold Separate Trustee. Respondents shall take no action to interfere with or impede the Hold Separate Trustee's ability to monitor Respondents' compliance with this Hold Separate Order and the Consent Agreement or otherwise to perform his/her duties and responsibilities consistent with the terms of this Hold Separate Order.

e. The Hold Separate Trustee shall have the authority to employ, at the reasonable cost and expense of Respondents, such consultants, accountants, attorneys, and other representatives and assistants as are reasonably necessary to carry out the Hold Separate Trustee's duties and responsibilities.

f. The Commission may require the Hold Separate Trustee to sign an appropriate confidentiality agreement relating to Commission materials and information received in connection with performance of the Hold Separate Trustee's duties.

g. Respondents may require the Hold Separate Trustee to sign a confidentiality agreement prohibiting the disclosure of any Material Confidential Information gained as a result of his or her role as Hold Separate Trustee to anyone other than the Commission.

h. Thirty (30) days after the Hold Separate Order becomes final, and every thirty (30) days thereafter until the Hold Separate Order terminates, the Hold Separate Trustee shall report in writing to the Commission concerning the efforts to accomplish the purposes of this Hold Separate Order. Included within that report shall be the Hold Separate Trustee's assessment of the extent to which the businesses comprising the Held Separate Business are meeting (or exceeding) their projected goals as are reflected in operating plans, budgets, projections or any other regularly prepared financial statements.

i. If the Hold Separate Trustee ceases to act or fails to act diligently and consistent with the purposes of this Hold Separate Order, the Commission may appoint a substitute Hold Separate Trustee consistent with the terms of this Paragraph, 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 the substitute Hold Separate Trustee within five (5) days after notice by the staff of the Commission to Respondents of the identity of any substitute Hold Separate Trustee, Respondents shall be deemed to have consented to the selection of the proposed substitute trustee. Respondents and the substitute Hold Separate Trustee shall execute a HS Trustee Agreement, subject to the approval of the Commission, consistent with this Paragraph.

2. No later than ten (10) days after this Hold Separate Order becomes final, Respondents shall enter into a management agreement with, and transfer all rights, powers, and authorities necessary to manage and maintain the Held Separate Business to an individual approved by the Commission (the "Manager").

a. In the event that the individual appointed as Manager ceases to act as Manager, then Respondents shall select a substitute Manager, subject to the approval of the Commission, and transfer to the substitute Manager all rights, powers and authorities necessary to permit the substitute Manager to perform his/her duties and responsibilities, pursuant to this Hold Separate Order.

b. The Manager shall report directly and exclusively to the Hold Separate Trustee and shall manage the Held Separate Business independently of the management of Respondents. The Manager shall not be involved, in any way, in the operations of the other businesses of Respondents during the term of this Hold Separate Order.

c. The Manager shall have no financial interests affected by Respondents' revenues, profits or profit margins, except that the Manager's compensation for managing the Held Separate Business may include economic incentives dependent on the financial performance of the Held Separate Business if there are also sufficient incentives for the Manager to operate the Held Separate Business at no less than current rates of operation (including, but not limited to, current rates of production and sales) and to achieve the objectives of this Hold Separate Order.

d. The Manager shall make no material changes in the present operation of the Held Separate Business except with the approval of the Hold Separate Trustee, in consultation with the Commission staff.

e. The Manager shall have the authority, with the approval of the Hold Separate Trustee, to remove employees and replace them with others of similar experience or skills. If any person ceases to act or fails to act diligently and consistent with the purposes of this Hold Separate Order, the Manager, in consultation with the Hold Separate Trustee, may request Respondents to, and Respondents shall, appoint a substitute person, which person the Manager shall have the right to approve.

f. In addition to those employees within the Held Separate Business, the Manager may employ such employees as are reasonably necessary to assist the Manager in managing the Held Separate Business, including, without limitation, pricing services personnel, employee relations personnel, legal services personnel, public relations personnel, supply personnel, earnings consolidation and analysis personnel, business performance personnel (balanced scorecard, expense, volume, shared services reporting), customer relations personnel, and marketing administration personnel.

g. The Hold Separate Trustee shall be permitted, in consultation with the Commission staff, to remove the Manager for cause. Within fifteen (15) days after such removal of the Manager, Respondents shall appoint a replacement Manager, subject to the approval of the Commission, on the same terms and conditions as provided in Paragraph II.D.2 of this Hold Separate Order.

3. The Held Separate Business shall be staffed with sufficient employees to maintain the viability and competitiveness of the Held Separate Business. Employees of the Held Separate Business shall include, but not be limited to: (i) all personnel listed on Confidential Attachment D, and (ii) any persons transferred to the Held Separate Business by Respondents or hired from other sources. To the extent that any employees of the Held Separate Business leave or have left the Held Separate Business prior to the Effective Date of Divestiture, the Manager, with the approval of the Hold Separate Trustee, may replace departing or departed employees with persons who have similar experience and expertise or determine not to replace such departing or departed employees.

4. In connection with support services or products not included within the Held Separate Business, Respondents shall continue to provide, or offer to provide, the same support services to the Held Separate Business as are being provided to such business by Respondents as of the date the Consent Agreement is signed by Respondent. For services that Conoco or Phillips previously provided to the Held Separate Business, Respondents may charge the same fees, if any, charged by Respondents for such support services as of the date this Consent Agreement is signed by Respondents. For any other services or products that Respondents may provide the Held Separate Business, Respondents may charge no more than the same price they charge others for the same services or products. Respondents' personnel providing such services or products must retain and maintain all Material Confidential Information of the Held Separate Business on

a confidential basis, and, except as is permitted by this Hold Separate Order, 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' businesses, other than the Held Separate Business. Such personnel shall also execute confidentiality agreements prohibiting the disclosure of any Material Confidential Information of the Held Separate Business.

a. Respondents shall offer and the Held Separate Business shall obtain the following services and products only from Respondents:

(1) National brand advertising and promotion programs;

(2) Federal and state regulatory policy development and compliance;

(3) Human resources administrative services, including but not limited to labor relations support, pension administration, and health benefits;

(4) Environmental health and safety services, which develops corporate policies and insures compliance with federal and state regulations and corporate policies;

(5) Preparation of tax returns; and

(6) Audit services.

b. Respondents shall offer to the Held Separate Business any services and products that Respondents provide to their other businesses directly or through third party contracts, or that they have provided directly or through third party contracts to the businesses constituting the Held Separate Business at any time since January 1, 2002. The Held Separate Business may, at the option of the Manager with the approval of the Hold Separate

Trustee, obtain such services and products from Respondents. The services and products that Respondents shall offer the Held Separate Business shall include, but shall not be limited to, the following:

(1) Refined fuels scheduling, trading, acquisition, supply, transportation, pipeline operations, and distribution;

(2) Crude oil scheduling, trading, acquisition, supply, transportation, pipeline operations, and distribution;

(3) Engineering services, including engineering, design, and maintenance;

(4) Convenience store category management;

(5) Credit card processing;

(6) Information systems services, including construction, maintenance, and support of all computer systems;

(7) Public affairs, including media and community relations services;

(8) Processing of accounts payable;

(9) Security services;

(10) Technical support;

(11) Finance and financial accounting services;

(12) Procurement of supplies (*e.g.* catalysts, chemicals, repair services, maintenance);

(13) Procurement of goods and services utilized in the ordinary course of business by the Held Separate Business;

(14) Legal services;

(15) Service station design, maintenance, and construction;

(16) Real estate services, including the identification and development of new sites; and

(17) Communication services, including electronic data gathering and transmission systems.

c. In connection with services and products other than those listed in a. above, and including but not limited to those listed in b. above, the Held Separate Business shall have, at the option of the Manager with the approval of the Hold Separate Trustee, the ability to acquire services and products from third parties unaffiliated with Respondents.

5. Respondents shall cause the Hold Separate Trustee, the Manager, and each employee of the Held Separate Business having access to Material Confidential Information to submit to the Commission a signed statement that the individual will maintain the confidentiality required by the terms and conditions of this Hold Separate Order. These individuals must retain and maintain all Material Confidential Information relating to the Held Separate Business on a confidential basis and, except as is permitted by this Hold Separate Order, 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 Held Separate Business. These persons shall not be involved in any way in the management, production, distribution, sale, marketing, or financial operations of the competing products of Respondents.

6. No later than ten (10) days after the date this Hold Separate Order becomes final, Respondents shall establish written procedures, subject to the approval of the Hold

Separate Trustee, covering the management, maintenance, and independence of the Held Separate Business consistent with the provisions of this Hold Separate Order.

7. No later than ten (10) days after the date this Hold Separate Order becomes final, Respondents shall circulate to employees of the Held Separate Business and to Respondents' employees who are responsible for the sale or distribution of Motor Fuels in the Colorado, Utah, Idaho, Montana, or Wyoming, a notice of this Hold Separate Order and the Consent Agreement, in the form attached as Attachments A and B.

8. The Hold Separate Trustee and the Manager 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.

9. Respondents shall indemnify the Hold Separate Trustee and Manager and hold each harmless against any losses, claims, damages, liabilities, or expenses arising out of, or in connection with, the performance of the Hold Separate Trustee's or the Manager'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 Hold Separate Trustee or the Manager.

10. Respondents shall provide the Held Separate Business with sufficient financial resources:

a. as are appropriate in the judgment of the Hold Separate Trustee to operate the Held Separate Business at no less than current rates of operation (including, but not limited to, current (or, for seasons other than summer, recent seasonal) rates of refinery production and product sales) and at no less than the rates of operation projected

in the Denver Refinery 2002 0+12 Ops Plan of September 2001 and the 2002-2007 Five Year Refinery Statistics Plan for the Woods Cross Business Unit, as amended (including, but not limited to, the rates of refinery production and product sales projected in such plans), subject to any additional documentation as requested by the Hold Separate Trustee; provided that failure to achieve production or sales goals projected in such plans shall not be deemed to be a violation of this Hold Separate Order;

b. to perform all maintenance to, and replacements of, the assets of the Held Separate Business;

c. to carry on capital projects and business plans as reflected in Conoco's Denver Refinery Capex 2002 5+7 document and the 2002-2007 Five Year Capital Plan for the Woods Cross Business Unit, as amended, subject to any additional documentation as requested by the Hold Separate Trustee, and

d. to maintain the viability, competitive vigor, and marketability of the Held Separate Business.

e. Such financial resources to be provided to the Held Separate Business shall include, but shall not be limited to, (i) general funds, (ii) capital, (iii) working capital, and (iv) reimbursement for any operating losses, capital losses, or other losses; provided, however, that, consistent with the purposes of the Decision and Order, the Manager may reduce in scale or pace any capital or research and development project, or substitute any capital or research and development project for another of the same cost.

11. Respondents shall not, during the Hold Separate Period, offer the employees listed on Confidential Attachment D positions with Respondents. The acquirer approved by the Commission pursuant to the Decision and Order shall have the option of offering employment to any employees of the Held Separate Business. Respondents

shall not interfere with the employment, by the Commission-approved acquirer, of such employees; shall not offer any incentive to such employees to decline employment with the Commission-approved acquirer or to accept other employment with the Respondents; and shall remove any impediments that may deter such employees from accepting employment with the Commission-approved acquirer including, but not limited to, any non-compete or confidentiality provisions of employment or other contracts that would affect the ability of such employees to be employed by the Commission-approved acquirer, and the payment, or the transfer for the account of the employee, of all current and accrued bonuses, pensions and other current and accrued benefits to which such employees would otherwise have been entitled had they remained in the employment of the Respondents.

12. For a period of one (1) year commencing on the Effective Date of Divestiture, Respondents shall not employ or make offers of employment to employees of the Held Separate Business who have accepted offers of employment with the Commission-approved acquirer unless the individual has been terminated by the acquirer.

13. Notwithstanding the requirements of Paragraph II.D.11, Respondents shall offer a bonus or severance to employees included in the Held Separate Business who continue their employment with the Held Separate Business until termination of the Hold Separate Period, (in addition to any other bonus or severance to which the employees would otherwise be entitled).

14. Except for the Manager, employees of the Held Separate Business, and support services employees involved in providing services to the Held Separate Business pursuant to Paragraph II.D.4., and except to the extent provided in Paragraph II.A., Respondents shall not permit any other of its employees, officers, or directors to be involved in the operations of the Held Separate Business.

15. Respondents shall assure that employees of the Held Separate Business receive, during the Hold Separate Period, their salaries, all current and accrued bonuses, pensions and other current and accrued benefits to which those employees would otherwise have been entitled.

16. Except as required by law, and except to the extent that necessary information is exchanged in the course of consummating the Merger; negotiating agreements to divest assets pursuant to the Consent Agreement and engaging in related due diligence; complying with this Hold Separate Order or the Consent Agreement; overseeing compliance with policies and standards concerning the safety, health and environmental aspects of the operations of the Held Separate Business and the integrity of the Held Separate Business' financial controls; defending legal claims, investigations or enforcement actions threatened or brought against or related to the Held Separate Business; or obtaining legal advice, Respondents' employees (excluding support services employees involved in providing support to the Held Separate Business pursuant to Paragraph II.D.4.) shall not receive, or have access to, or use or continue to use any Material Confidential Information of the Held Separate Business not in the public domain. Nor shall the Manager or employees of the Held Separate Business receive or have access to, or use or continue to use, any Material Confidential Information not in the public domain about Respondents and relating to Respondents' businesses, except such information as is necessary to maintain and operate the Held Separate Business. Respondents may receive aggregate financial and operational information relating to the Held Separate Business only to the extent necessary to allow Respondents to prepare United States consolidated financial reports, tax returns, reports required by securities laws, and personnel reports. Any such information that is obtained pursuant to this subparagraph shall be used only for the purposes set forth in this subparagraph.

17. Respondents and the Held Separate Business shall jointly implement, and at all times during the Hold Separate Period maintain in operation, a system, as approved by the Hold Separate Trustee, of access and data controls to prevent unauthorized access to or dissemination of Material Confidential Information of the Held Separate Business, including, but not limited to, the opportunity by the Hold Separate Trustee, on terms and conditions agreed to with Respondents, to audit Respondents' networks and systems to verify compliance with this Hold Separate Order.

III.

IT IS FURTHER ORDERED that:

A. At any time after the Commission issues this Hold Separate Order, the Commission may appoint a Monitor to assure that Respondents comply with their obligations under Paragraph IV. of the Decision and Order.

B. Respondents shall consent to the following terms and conditions regarding the powers, duties, authorities and responsibilities of the Monitor appointed pursuant to this Paragraph:

1. The Monitor shall have the power and authority to monitor Respondents' compliance with the terms of Paragraph IV. of the Decision and Order and all referenced agreements required by that Paragraph.

2. Within ten (10) days after appointment of the Monitor, Respondents shall execute an agreement that, subject to the prior approval of the Commission, confers on the Monitor all the rights and powers necessary to permit the Monitor to monitor Respondents' compliance with Paragraph IV. of the Decision and Order and all referenced agreements required by that Paragraph.

3. The Monitor shall serve for such time as is necessary to monitor Respondents' compliance with the provisions of

Paragraph IV. of the Decision and Order and all referenced agreements required by that Paragraph.

4. The Monitor 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 any relevant information, as the Monitor may reasonably request, including, but not limited to, all documents and records kept in the normal course of business that relate to the Propane Business. Respondents shall cooperate with any reasonable request of the Monitor. Respondents shall take no action to interfere with or impede the Monitor's ability to monitor Respondents' compliance with Paragraph IV. of the Decision and Order and all referenced agreements required by that Paragraph.

5. The Monitor 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 shall have authority to employ, at the reasonable expense of Respondents, such consultants, accountants, attorneys and other representatives and assistants as are necessary to carry out the Monitor's duties and responsibilities.

6. Respondents shall indemnify the Monitor and hold the Monitor harmless against any losses, claims, damages, liabilities or expenses arising out of, or in connection with, the performance of the Monitor'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 Monitor.

7. If the Commission determines that the Monitor has ceased to act or failed to act diligently, or if the individual appointed pursuant to Paragraph III.A. is unable to serve as Monitor, the Commission may appoint a substitute

Monitor. The Commission shall select the substitute Monitor, 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 substitute Monitor within ten (10) days after receipt of written notice by the staff of the Commission to Respondents of the identity of any proposed substitute Monitor, Respondents shall be deemed to have consented to the selection of the proposed substitute Monitor.

8. The Commission may on its own initiative or at the request of the Monitor issue such additional orders or directions as may be necessary or appropriate to assure compliance with the requirements of Paragraph IV. of the Decision and Order and any agreements required by that Paragraph.

9. The Monitor shall report in writing to the Commission, concerning compliance by Respondents with the provisions of the Decision and Order and any agreements required by that Paragraph, within twenty (20) days from the date of appointment and every sixty days thereafter for the first six (6) months, and then every six (6) months thereafter throughout the Monitor's term. Such report shall include at least the following:

a. whether Respondents have given the Monitor reports and access to all information and records pursuant to this Order;

b. what Respondents have done to maintain non-public information; and

c. any other information that is requested by the Commission in determining whether Respondents are complying with the terms of the Decision and Order.

10. Respondents may require the Monitor to sign a customary confidentiality agreement; provided, however, such agreement shall not restrict the Monitor from providing any information to the Commission.

IV.

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

V.

IT IS FURTHER ORDERED that for the purposes of determining or securing compliance with this Hold Separate Order, and subject to any legally recognized privilege, and upon written request with reasonable notice to Respondents, 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 Hold Separate Order; and

B. Upon five (5) days' notice to each 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.

VI.

IT IS FURTHER ORDERED that this Hold Separate Order shall terminate at the earlier of:

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

B. the day after the last of the divestitures required by the Consent Agreement is completed; provided, however, that when an Asset to be Divested (as defined in the Decision and Order) that is included within the Held Separate Business is divested pursuant to the Consent Agreement, that asset shall cease to be held by the Held Separate Business.

Attachments to Order to Hold Separate and Maintain Assets

ATTACHMENT A

NOTICE OF DIVESTITURE AND REQUIREMENT FOR CONFIDENTIALITY

COLORADO ASSETS

Conoco Inc. ("Conoco") and Phillips Petroleum Company ("Phillips"), hereinafter referred to as "Respondents," have entered into an Agreement Containing Consent Orders ("Consent Agreement") with the Federal Trade Commission relating to the divestiture of certain assets, including the "Colorado Assets."

The term "Colorado Assets" as defined in the Federal Trade Commission's Decision and Order ("Decision and Order"), means the (1) Conoco Denver Refinery Assets and (2) Phillips Colorado Retail Assets. The term "Conoco Denver Refinery Assets" as defined in the Decision and Order, means, Conoco's refinery located at Commerce City, Colorado and other related assets specified in the Decision and Order. The term "Phillips Colorado Retail Assets" as defined in the Decision and Order, means all of Phillips' Retail Assets in Colorado as of the date Conoco and Phillips executed the Consent Agreement.

Under the terms of the Consent Agreement, if the Respondents fail to divest the Colorado Assets within twelve (12) months from the date upon which Conoco and Phillips execute the Consent Agreement, a trustee will be appointed to divest the Colorado Assets.

The Colorado Assets must be managed and maintained as a separate, ongoing business, independent of all other businesses of the Respondents or ConocoPhillips, until the Colorado Assets are divested. All competitive information relating to the Colorado Assets must be retained and maintained by the persons involved in the operation of the Colorado Assets on a confidential basis, and

such persons shall be prohibited from providing, discussing, exchanging, circulating, or otherwise furnishing any such information to or with any other person whose employment involves any other business of the Respondents or ConocoPhillips, except as is necessary to fulfill the purposes of the Decision and Order. Persons involved in similar activities at Conoco, Phillips or ConocoPhillips shall be prohibited from providing, discussing, exchanging, circulating, or otherwise furnishing any similar information to or with any other person whose employment involves the Colorado Assets. Any violation of the Consent Agreement may subject Respondents or ConocoPhillips to civil penalties and other relief as provided by law.

ATTACHMENT B

NOTICE OF DIVESTITURE AND REQUIREMENT FOR CONFIDENTIALITY

PHILLIPS WOODS CROSS ASSETS

Conoco Inc. ("Conoco") and Phillips Petroleum Company ("Phillips"), hereinafter referred to as "Respondents," have entered into an Agreement Containing Consent Orders ("Consent Agreement") with the Federal Trade Commission relating to the divestiture of certain assets, including the "Phillips Woods Cross Assets."

The term "Phillips Woods Cross Assets" as defined in the Federal Trade Commission's Decision and Order ("Decision and Order"), means the (1) Phillips Woods Cross Refinery Assets and (2) Phillips Woods Cross Retail Assets. The term "Phillips Woods Cross Refinery Assets" as defined in the Decision and Order, means, Phillips' refinery located at Woods Cross, Utah and other related assets specified in the Decision and Order. The term "Phillips Woods Cross Retail Assets" as defined in the Decision and Order, means all of Phillips' Retail Assets in Wyoming, Utah, Idaho, and Montana as of the date Conoco and Phillips executed the Consent Agreement.

Under the terms of the Consent Agreement, if the Respondents fail to divest the Phillips Woods Cross Assets within twelve (12) months from the date upon which Conoco and Phillips execute the Consent Agreement, a trustee will be appointed to divest the Phillips Woods Cross Assets.

The Phillips Woods Cross Assets must be managed and maintained as a separate, ongoing business, independent of all other businesses of the Respondents or ConocoPhillips, until the Phillips Woods Cross Assets are divested. All competitive information relating to the Phillips Woods Cross Assets must be retained and maintained by the persons involved in the operation

of the Phillips Woods Cross Assets on a confidential basis, and such persons shall be prohibited from providing, discussing, exchanging, circulating, or otherwise furnishing any such information to or with any other person whose employment involves any other business of the Respondents or ConocoPhillips, except as is necessary to fulfill the purposes of the Decision and Order. Persons involved in similar activities at Conoco, Phillips or ConocoPhillips shall be prohibited from providing, discussing, exchanging, circulating, or otherwise furnishing any similar information to or with any other person whose employment involves the Phillips Woods Cross Assets. Any violation of the Consent Agreement may subject Respondents or ConocoPhillips to civil penalties and other relief as provided by law.

CONFIDENTIAL ATTACHMENT C

TRUSTEE AGREEMENT

[Redacted From Public Record Version]

CONFIDENTIAL ATTACHMENT D

EMPLOYEES

[Redacted From Public Record Version]

Analysis

Analysis of Proposed Consent Order to Aid Public Comment

I. Introduction

The Federal Trade Commission ("Commission" or "FTC") has issued a complaint ("Complaint") alleging that the proposed merger of Phillips Petroleum Company ("Phillips") and Conoco Inc. ("Conoco") (collectively "Respondents") would violate Section 7 of the Clayton Act, 15 U.S.C. § 18, and Section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45. The Commission and Respondents have entered into an agreement containing consent orders ("Agreement Containing Consent Orders") pursuant to which Respondents agree to be bound by a proposed consent order that requires divestiture of certain assets and certain other relief ("Proposed Order") and a hold separate order that requires Respondents to hold separate and maintain certain assets pending divestiture ("Hold Separate Order"). The Proposed Order remedies the likely anti-competitive effects arising from Respondents' proposed merger, as alleged in the Complaint. The Order to Hold Separate and Maintain Assets preserves competition pending divestiture.

II. Description of the Parties and the Transaction

Phillips, headquartered in Bartlesville, Oklahoma, is an integrated oil company engaged in the worldwide exploration, production, and transportation of crude oil and natural gas; gathering of natural gas; fractionation of raw mix into specification products; refining, marketing, and transportation of petroleum products; and production and marketing of chemicals. Phillips is the nation's third largest refiner and fourth largest gasoline marketer, with approximately 10 percent of the United States refining capacity and 9 percent of gasoline marketing. In 2001, Phillips had revenues of $47.7 billion. Phillips has significant terminal facilities that it uses to distribute gasoline and other petroleum products to its customers. Phillips owns or licenses several gasoline brands under which gasoline is sold at approximately 11,700 stations throughout the United States. Phillips owns approximately 1,700 outlets in the Mid-Atlantic and

Northeastern areas of the United States. These outlets currently sell gasoline under the Exxon and Mobil brands. Of the approximate 10,000 other outlets, primarily located outside the Mid-Atlantic and Northeastern United States, the great majority are owned and operated by independent marketers and dealers. Phillips also owns slightly more than 30 percent of Duke Energy Field Services, LLC ("DEFS"). DEFS is a significant gatherer of natural gas throughout the United States and has interests in many fractionation facilities throughout the United States.

Conoco, headquartered in Houston, Texas, is a fully integrated petroleum company engaged in the worldwide exploration, production, and transportation of crude oil and natural gas; gathering of natural gas; fractionation of raw mix into specification products; and refining, marketing, and transportation of petroleum products. In 2001, Conoco had revenues and net income of $39.5 billion and $1.6 billion, respectively. Conoco has approximately 3 percent of refining capacity and 3 percent of gasoline sales in the United States, making it approximately the nation's eleventh largest refiner and ninth largest gasoline seller. Conoco owns petroleum product terminals throughout the United States. Conoco brand gasoline is sold through approximately 5,000 stations primarily located in the Southeast, Southwest, Mid-continent, and Rocky Mountain areas of the United States. The great majority of these stations are owned and operated by independent distributors and dealers.

On November 18, 2001, Phillips and Conoco entered into an agreement to merge the two firms into a corporation to be known as ConocoPhillips, the estimated capital value of which, as of the date of the agreement, was approximately $35 billion. ConocoPhillips would be the third-largest integrated U.S. energy company based on market capitalization, and oil and gas reserves and production. Worldwide, it will be the sixth-largest energy company based on hydrocarbon reserves and the fifth-largest global refiner.

Analysis

II. The Complaint

The Complaint alleges that the proposed merger and its consummation 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 Complaint alleges that the merger will lessen competition in each of the following markets: (1) the bulk supply of light petroleum products (a) in Eastern Colorado and (b) in Northern Utah; (2) light petroleum product terminaling services in the metropolitan statistical areas ("MSAs") of Spokane, Washington and Wichita, Kansas; (3) the bulk supply of propane in (a) Southern Missouri, (b) the St. Louis MSA, and (c) Southern Illinois; (4) natural gas gathering in more than 50 sections of the Permian Basin; (5) and fractionation in Mont Belvieu, Texas.

Count I of the Proposed Complaint concerns the bulk supply of light petroleum products for sale in Eastern Colorado. Both Phillips and Conoco compete within this market. The Complaint alleges that the merged firm would have more than 30 percent of the market, which will be highly concentrated post-merger. The Complaint further alleges that the proposed merger would lead to higher prices for light petroleum products because the merged firm, in combination with other similarly situated firms, could profitably coordinate to raise prices and reduce output in Eastern Colorado. Successful coordination is likely because: (1) prices for bulk supplies are transparent; (2) the merged firm and its similarly situated competitors have the ability to inexpensively divert bulk supplies away from Eastern Colorado to other markets; (3) other sources of bulk supply to Eastern Colorado are already largely at capacity (products pipelines and local refineries) or suppliers have no economic incentive to divert light petroleum products from more lucrative areas in the Rockies to Eastern Colorado; and (4) cheating on the coordination could be detected and punished by coordinating firms. Furthermore, there is some evidence that some degree of coordination has been lifting prices in areas of the Rockies outside of Eastern Colorado.

Analysis

Count II of the Proposed Complaint concerns the bulk supply of light petroleum products for sale in Northern Utah. Phillips competes in this market through its ownership of a refinery in Salt Lake City, and Conoco competes in this market through its 50 percent undivided ownership interest in Pioneer Pipeline, the only pipeline bringing bulk supplies of light petroleum products into Northern Utah. The Complaint alleges that the merged firm would own or control about 24 percent of the refining and pipeline capacity serving Northern Utah, and that Northern Utah will be highly concentrated after the merger. The Complaint asserts that in highly concentrated markets, increasing concentration is likely to facilitate and more completely give effect to tacit coordination. With respect to entry into the bulk supply market, the Complaint alleges that in either Eastern Colorado or Northern Utah, entry is difficult and would not be timely, likely, or sufficient to deter or counteract anticompetitive effects that may result from the merger.

Count III of the Proposed Complaint concerns terminaling services in the Spokane, Washington MSA. Petroleum terminals are facilities that provide temporary storage of gasoline and other petroleum products received from a pipeline, and then redeliver these products from the terminal's storage tanks into trucks or transport trailers for ultimate delivery to retail gasoline stations or other buyers. There are no economic substitutes for petroleum terminals. The Complaint alleges that Conoco and Phillips are two of the only three providers of terminal services in Spokane. The Complaint further alleges that the merged firm would be able to unilaterally, or in concert with others, raise prices of terminaling services in Spokane. Entry into the terminaling of light petroleum products is difficult and would not be timely, likely, or sufficient to deter or counteract anticompetitive effects that may result from the merger.

Count IV of the Proposed Complaint concerns terminaling services in the Wichita, Kansas MSA. There are five firms currently providing terminaling services in the Wichita market. Some of these competitors are unlikely to restrain a price increase in the future. The Complaint charges that the terminaling of light petroleum products in Wichita is highly concentrated, and would

become significantly more concentrated as a result of the merger. The Complaint alleges that the merged firm would be able coordinate or raise prices unilaterally in Wichita. Entry into the terminaling of light petroleum products is difficult and would not be timely, likely, or sufficient to deter or counteract anticompetitive effects that may result from the merger.

Count V of the Proposed Complaint concerns the bulk supply of propane in Southern Missouri. Propane is a versatile fuel used by residential, industrial and agricultural consumers. It is produced as part of the crude refining process or extracted from natural gas. Bulk supply of propane is the provision of large quantities of propane to an area for distribution by wholesale distributors. In most of its applications, propane is used where natural gas is not available. The Complaint charges that Phillips and Conoco are two of four bulk suppliers of propane in Southern Missouri. There is reason to believe that other competitors are unlikely to effectively constrain the merged firm's pricing. In Southern Missouri, the merged firm would control the vast majority of the propane market. The Complaint alleges that the merger likely would enable ConocoPhillips to unilaterally raise prices (or reduce output) or to coordinate with other suppliers in the bulk supply of propane in Southern Missouri. Entry into the bulk supply of propane is difficult and would not be timely, likely, or sufficient to deter or counteract anticompetitive effects that may result from the merger.

Counts VI and VII of the Proposed Complaint concern the bulk supply of propane in the St. Louis MSA and Southern Illinois areas, respectively. There are four bulk suppliers in St. Louis and Southern Illinois. There is reason to believe that other competitors are unlikely to effectively constrain the merged firm's pricing. The Complaint alleges that ConocoPhillips could raise prices unilaterally or in concert with others. The Complaint further alleges that entry into the bulk supply of propane is difficult and would not be timely, likely, or sufficient to deter or counteract anticompetitive effects that may result from the merger.

Analysis

Count VIII of the Proposed Complaint concerns natural gas gathering in several areas of the Permian Basin. The Permian Basin is an oil and gas rich area of western Texas and southeastern New Mexico. The relevant markets are limited to many small areas within Eddy, Chavez and Lea counties in New Mexico and Schleicher County, Texas. The likely production rates of the natural gas fields in the overlap areas and cost of building gathering lines in the Permian Basin limit the markets to areas with a radius of no more than three miles. Phillips owns about 30 percent of DEFS. Conoco is a substantial competitor in providing gathering services in the Permian Basin. The Complaint alleges that DEFS and Conoco are the only competitors in the areas identified by the Commission. The Complaint alleges that after the merger, ConocoPhillips' complete or partial ownership of the only two gathering systems would likely reduce competition. The Complaint alleges that there are substantial costs to entering the gathering business such that entry would not be timely, likely, or sufficient to deter or counteract anticompetitive effects that may result from the merger.

Count IX of the Proposed Complaint concerns fractionation of raw mix into specification products, such as butane and ethane. The Complaint alleges that there is no alternative to fractionation services. Many pipelines deliver raw mix and transport fractionated specification products from Mont Belvieu, Texas. There are four fractionators in Mont Belvieu. Mont Belvieu is an active trading hub for each specification product. DEFS owns an interest in two fractionators and Conoco has an interest in a third fractionator. The Complaint alleges that the combined firm would have access to competitively sensitive information of Mont Belvieu fractionators accounting for more than 70 percent of the market capacity and would have veto rights over significant expansion decisions. The Complaint further alleges the merger would reduce competition by allowing fractionation competitors to share information and exercise veto rights over expansion decisions. The Complaint charges that there are substantial entry barriers in fractionation in Mont Belvieu such that entry would not be timely, likely, or sufficient to deter or counteract anticompetitive effects that may result from the merger.

IV. The Proposed Consent Order

The Proposed Order is designed to remedy the alleged anti-competitive effects of the proposed merger. Under the terms of the Proposed Order, the merged firm must: (1) divest the Phillips refinery located at Woods Cross, Utah, and all of Phillips' related marketing assets served by that refinery; (2) divest Conoco's Denver refinery located at Commerce City, Colorado, and all of Phillips' marketing assets in Eastern Colorado; (3) divest Phillips light petroleum products terminal in Spokane, Washington; (4) enter into a petroleum products throughput agreement that includes an option to buy a 50 percent undivided interest in Phillips' Wichita, Kansas, light petroleum products terminal; (5) (a) divest Phillips' propane terminal assets in Jefferson City, Missouri, and East St. Louis, Illinois; and (b) provide a long-term propane supply agreement; (6) divest certain Conoco natural gas gathering assets in New Mexico and Texas, including Conoco's Maljamar processing facility and enter into a long-term agreement to process natural gas gathered in Texas; and (7) create firewalls that prevent the transfer of competitively sensitive information among Mont Belvieu fractionators.

A. Phillips Woods Cross Assets

Paragraph II of the Proposed Order requires the divestiture of the Phillips Woods Cross assets to restore competition in the bulk supply of light petroleum products in Northern Utah. The assets to be divested include Phillips' refinery located in Woods Cross, Utah, and substantially all of the related distribution, marketing and retail operations. This includes the refinery, crude oil supply pipelines, truck loading racks, light petroleum product pipelines and storage terminals used in the operation of the refinery. The assets to be divested also include all gasoline retail stations currently owned by Phillips and served by the Woods Cross refinery and, by assignment, all Phillips' agreements with marketers served by the Woods Cross refinery. Respondents will

also be required to provide to the buyer of the assets Phillips proprietary (branded) and non-proprietary credit card services, Phillips additive, and brand support at Phillips' costs.

The Proposed Order will require Respondents to grant to the acquirer an exclusive 10-year royalty free license to use brands currently used by Phillips in Utah, Wyoming, Montana and Idaho to sell gasoline, kerosene, diesel fuel and any other product typically sold at a gasoline station through the gasoline outlet channel of distribution and a nonexclusive 10-year royalty free license to use brands currently used by Phillips in Utah, Wyoming, Montana and Idaho to sell those products typically sold in gasoline stations (e.g, motor oil) outside of the gasoline outlet channel of distribution.

The assets must be divested to a buyer receiving prior approval from the Commission within 12 months of the date Respondents executed the Agreement Containing Consent Orders, and Respondents must maintain the viability and the marketability of the assets until they are divested.

B. Colorado Assets

Paragraph III of the Proposed Order requires the divestiture of refinery and marketing assets to restore competition in the bulk supply of light petroleum products in Eastern Colorado. The assets to be divested include Conoco's refinery located in Commerce City, Colorado, and all of the related distribution assets, including crude oil supply pipelines, truck loading racks, light petroleum product pipelines and storage terminals used in the operation of the refinery, and pipeline assets ensuring the distribution of jet fuel.

The assets to be divested also include: (1) all gasoline retail stations that are currently owned by Phillips located in Colorado and, by assignment, all Phillips' agreements with marketers served by Phillips' Eastern Colorado bulk supply assets; (2) an exclusive 10-year royalty free license to use brands currently used by Phillips in Colorado to sell gasoline, kerosene, diesel fuel and any

other product typically sold at a gasoline station through the gasoline outlet channel of distribution; (3) a nonexclusive 10-year royalty free license to use brands currently used by Phillips in Colorado to sell products typically sold at gasoline stations (e.g, motor oil) through channels outside of gasoline outlets; and (4) provision of Phillips proprietary (branded) and non-proprietary credit card services, Phillips additive, and brand support at Phillips' costs.

These refinery and marketing assets must be divested to a buyer receiving prior approval from the Commission within 12 months of the date Respondents executed the Agreement Containing Consent Orders, and Respondents must maintain the viability and the marketability of the assets until they are divested.

C. Phillips' Propane Assets

Paragraph IV of the Proposed Order restores competition in bulk supplies of propane by requiring Respondents to divest the Phillips propane business and associated assets to a buyer receiving prior approval of the Commission by January 15, 2003. Respondents must divest all the physical assets (storage, truck racks, pipelines connecting the storage tanks to common carrier pipelines and truck racks) related to Phillips' propane terminal operations in Jefferson City, Missouri, and East St. Louis, Illinois. Phillips must also assign all propane supply agreements between Phillips and its customers from those terminals. The acquirer will have the unqualified ability to expand the propane terminal assets. The Proposed Order also imposes restrictions on Respondents to ensure that the buyer of the propane business obtains nondiscriminatory access to the Blue and Shocker Lines. With access to the Blue Line and Shocker Line common carrier pipelines, the acquirer will be able to ship propane to the Jefferson City or East St. Louis terminals from the propane market in Conway, Kansas. Until the propane assets are divested, Respondents must maintain the viability and the marketability of those assets.

Paragraph IV.D. requires Respondents to, by the date of divesting the Propane Business, enter into a propane supply contract with the acquirer of the divested propane business. The contract must give the acquirer the ability to purchase propane at a price equal to the price at Conway, Kansas, plus the Blue Line and Shocker Line tariffs from Conway to the applicable terminal.

Respondents must also enter into a terminal operating agreement with the buyer of the propane business. The agreement must provide for the maintenance, upkeep, repair, security, and operation of the Jefferson City, Missouri, and East St. Louis, Illinois, terminals at Respondents' actual costs.

In the event that Respondents are unable to divest the propane business by January 15, 2003, to a buyer receiving prior approval of the Commission and in a manner approved by the Commission, Respondents must divest: (1) a 50 percent undivided interest in the Blue Line between Borger, Texas, and the connection to the Shocker Line (near Wichita, Kansas); (2) the Shocker Line; (3) Respondents' entire interest in the Blue Line from the connection with the Shocker Line to the East St. Louis, Illinois terminal; (4) the East St. Louis terminal; (5) the Jefferson City, Missouri terminal, and (5) the Ringer, Kansas terminal.

D. Phillips' Spokane Terminal

Paragraph V of the Proposed Order requires the Respondents to divest the Phillips terminal in Spokane, Washington, no later than six months after the date Respondents execute the Agreement Containing Consent Orders. The acquirer of the Phillips Spokane Terminal must have the prior approval of the Commission. Until Phillips Spokane Terminal is effectively divested, Respondents will be required to maintain the viability and the marketability of the terminal. The purpose for the sale of Phillips Spokane Terminal is to maintain the existing level of competition.

E. Phillips' Wichita Terminal

Paragraph VI of the Proposed Order requires the parties to enter into a 10-year products throughput agreement with Williams Pipe Line Company, LLC ("Williams"), or another firm, receiving the prior approval of the Commission, within nine months of Respondents' execution of the Agreement Containing Consent Orders. Williams owns and operates common carrier refined products pipelines and terminals serving, among others, the Mid-continent areas of the United States. The throughput agreement must provide for at least 8,500 barrels per day and cannot specify a minimum volume. The agreement must also provide for the acquisition of additive and information technology services, and provide an option to purchase a 50 percent undivided interest in Phillips terminal assets in Wichita, Kansas.

F. Natural Gas Gathering

Paragraph VII of the Proposed Order requires the Respondents to divest all of Conoco's natural gas gathering, compression, processing and transportation assets within specified areas of Chavez, Lea and Eddy Counties in New Mexico, within nine months from the date Respondents execute the Agreement Containing Consent Orders. These assets include Conoco's Maljamar Processing Plant, and all necessary agreements or contracts related to the operation of that plant. The Commission must give its prior approval before any acquirer may purchase these assets. Until these assets are sold, they will be placed into an Order to Hold Separate and Maintain Assets.

Paragraph VIII of the Proposed Order requires the Respondents to divest all of Conoco's assets related to the gathering, compression, transportation or sale of natural gas within Schleicher County, Texas, within nine months from the date Respondents execute the Agreement Containing Consent Orders. This includes all gathering pipelines and any related contracts or agreements. The Commission must give its prior approval before any acquirer may purchase these assets. Until these assets are sold, they will be placed into an Order to Hold Separate and

Maintain Assets. In addition, Respondents must enter into a processing agreement with the buyer of the divested assets. The processing agreement must allow the buyer to process at least the same volume of natural gas that is currently gathered on the system at Conoco's cost. This cost includes all direct costs, including raw materials, labor, utilities and third-party contract services actually used to provide services to the acquirer of the gathering assets. In addition, cost may include the pro rata share of the cost of the capital employed in the processing plant and indirect costs related to operating the processing plant, including taxes, depreciation, overhead and third-party contracts.

G. Fractionation

Paragraph IX of the Proposed Order contains four provisions ensuring that Respondents cannot transfer competitively sensitive information among fractionators or exercise voting rights to thwart expansion. First, beginning at the date of execution of the Agreement Containing Consent Orders, the Proposed Order prohibits Respondents from sharing competitively sensitive fractionation information with DEFS, Duke (owner of approximately 70 percent of DEFS), or any DEFS Board Member. Second, Respondents may not receive from Duke, DEFS, or any DEFS board member any competitively sensitive fractionation information of DEFS. Third, ConocoPhillips DEFS board members may not participate in any discussions with DEFS or Duke relating to the three fractionators in which Respondents and DEFS own an interest. Fourth, ConocoPhillips DEFS Board Members may not participate in any vote of the DEFS board, unless such a vote is necessary and, if such a vote is necessary, then the ConocoPhillips DEFS Board Members must vote in the same way as the majority of the Duke DEFS Board Members.

H. Other Terms

Paragraph X sets the guidelines for the appointment and powers of a Divestiture Trustee should the Respondents fail to complete one or more of the divestitures discussed above. Paragraph XI requires the Respondents to provide the Commission with a report

of compliance with the Proposed Order every sixty days until the divestitures are completed. Paragraph XII provides for notification to the Commission in the event of any changes in the Respondents. Paragraph XIII requires the Respondents to provide the Commission with access to their facilities and employees for the purposes of determining or securing compliance with the Proposed Order. Paragraph XIV provides, among other things, that if a State fails to approve any of the divestitures contemplated in the Proposed Order, then the period of time required under the Proposed Order for such divestiture will be extended for ninety days. Finally, Paragraph XV provides that the Proposed Order will terminate ten years after the date the Order becomes final.

V. Gasoline Retail and Marketing Assets

In this instance, the Commission is not seeking gasoline marketing relief outside the bulk supply areas discussed above (Eastern Colorado and Northern Utah). After a thorough investigation, the Commission concluded that the proposed merger of Phillips and Conoco is not likely to have any anticompetitive effect on gasoline marketing in the Mid-continent, Southeastern, or Southwestern United States. The Commission considered several factors in reaching its decision not to seek retail relief in those areas. First, Phillips and Conoco own and/or operate few retail outlets. With the exception of a small number of cities, Phillips and Conoco gasoline distribution relies significantly on independent gasoline marketers. Further, Conoco and Phillips, unlike the other major refiners, have not imposed significant costs of switching brands or de-branding on the predominant share of their marketers. Neither Phillips nor Conoco engage in redlining or zone pricing in areas investigated in this merger. Thus, the degree of vertical control over jobbers by Conoco and Phillips in these regions is significantly less than that exercised by other refiners in other parts of the country. Further, the Commission has found significant growth of low-priced gasoline retailing by supermarkets, club stores and mass merchandisers. The entry of these gasoline distribution competitors likely will prevent the merging firm from raising

prices in the Mid-continent, Southeast and Southwest. In addition, entry by these low-priced competitors has induced jobbers to switch brands and de-brand. Entry and growth by low-priced formats are likely to continue in these areas, in part, because of a plentiful supply of gasoline and diesel fuel. Areas under investigation in this merger have common carrier pipelines and terminals delivering and storing gasoline to both branded and unbranded jobbers. For these and other reasons, the Commission does not have reason to believe that the merger of Conoco and Phillips would lessen competition substantially in the Mid-continent, Southeast and Southwest.

VI. 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 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

WAL-MART STORES, INC., ET AL.

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

Docket C-4066; File No. 0210090
Complaint, November 20, 2002--Decision, February 27, 2003

This consent order addresses the acquisition by Respondent Wal-Mart Stores, Inc. – a global food and general merchandise retailer headquartered in Arkansas – of Respondent Supermercados Amigo Inc., headquartered in San Juan, Puerto Rico, and the largest supermarket chain in Puerto Rico in terms of dollar sales. The order, among other things, requires the respondents to divest four Supermercados Amigo supermarkets – in Cidra, Ponce, Manati, and Vega Baja, Puerto Rico – to Supermercados Maximo, Inc. (headquartered in Hato Rey, Puerto Rico) or to another acquirer approved by the Commission. The order also requires the respondents to maintain the viability of the four supermarkets pending their divestiture. In addition, the order prohibits the respondents for ten years from acquiring – without providing the Commission with prior notice – any supermarket, supercenter, or club store, or any interest in any supermarket, supercenter, or club store located in the municipalities that include Cayey, Cidra, Ponce, Juana Diaz, Barceloneta, Manati, and Vega Baja, Puerto Rico.

Participants

For the Commission: *Michael J. Bloom, Susan E. Raitt, Barbara Anthony, D. Bruce Hoffman, Joseph Eckhaus, Roberta S. Baruch, Alan A. Fisher, Charrisa P. Wellford* and *Mary T. Coleman.*

For the Respondents: *Peter Standish, Theodore Bolema,* and *Fiona Schaeffer, Weil Gotshal & Manges*, *Anthony George, Wal-Mart Stores, Inc.,* and *William Berkowitz* and *Stephen Brook, Bingham McCutchen LLP*.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act and the Clayton Act, and by virtue of the authority vested in it by

said Acts, the Federal Trade Commission ("Commission"), having reason to believe that respondent Wal-Mart Stores, Inc. ("Wal-Mart") has entered into an agreement to acquire 100% of the outstanding voting securities of respondent Supermercados Amigo, Inc. ("Amigo"), 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:

Wal-Mart Stores, Inc.

PARAGRAPH ONE: Respondent Wal-Mart 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 702 Southwest 8th Street, Bentonville, Arkansas 72716.

PARAGRAPH TWO: Respondent Wal-Mart, through Wal-Mart Puerto Rico, Inc., its wholly-owned subsidiary, is, and at all times relevant hereto has been, engaged in the sale of general merchandise and food and grocery items in Puerto Rico. Wal-Mart and its wholly-owned subsidiary operate eighteen stores in Puerto Rico under the Wal-Mart and SAM's Clubs trade names, including nine traditional Wal-Mart discount stores, eight Club Stores, and one Supercenter. Wal-Mart had substantial sales in Puerto Rico in the fiscal year ending January 31, 2001.

PARAGRAPH THREE: Respondent Wal-Mart is, and at all times relevant hereto 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.

Supermercados Amigo, Inc.

PARAGRAPH FOUR: Respondent Amigo is a corporation organized, existing, and doing business under and by virtue of the laws of the Commonwealth of Puerto Rico, with its office and principal place of business located at Mercado Central Zona Portuaria, Edificio A-1, Puerto Nuevo, San Juan, Puerto Rico 00920.

PARAGRAPH FIVE: Respondent Amigo is, and at all times relevant hereto has been, engaged in the operation of supermarkets in Puerto Rico. Amigo operates thirty-six supermarkets under the Amigo trade name. Amigo had substantial sales in Puerto Rico in the fiscal year ending September 30, 2001.

PARAGRAPH SIX: Respondent Amigo is, and at all times relevant hereto 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.

The Acquisition

PARAGRAPH SEVEN: On or about February 5, 2002, Wal-Mart Puerto Rico, Inc., W-M Puerto Rico Acquisition Corp., a Delaware corporation and a wholly-owned subsidiary of Wal-Mart, Amigo, and Steven C. Lausell, as stockholders' representative, entered into a Merger Agreement. Pursuant to this Merger Agreement, Wal-Mart will acquire all of the outstanding voting securities of Amigo by merger of W-M Puerto Rico Acquisition with and into Amigo, with Amigo continuing as the surviving corporation. As a result of the merger, Wal-Mart will hold 100% of the voting securities of Amigo.

Trade and Commerce

PARAGRAPH EIGHT: 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 stores that carry a

wide selection and deep inventory of food and grocery products in a variety of brands and sizes, enabling consumers to purchase substantially all of their weekly food and grocery shopping requirements in a single shopping visit. Thus, stores in the relevant line of commerce have substantial offerings in each of the following product categories: 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.

PARAGRAPH NINE: In Puerto Rico, full-service supermarkets, "supercenters" (which are co-located full-service supermarkets and mass merchandise outlets), and "club stores" (which are stores that offer a wide selection and deep inventory of food and grocery products and general merchandise–often in large-sized packages or in packages of two or more conventional-sized items–to businesses and individuals that have purchased club memberships) offer a distinctive set of products and services that enables them to compete in the relevant line of commerce described in Paragraph Eight above.

PARAGRAPH TEN: In Puerto Rico, a substantial portion of retail purchasers regard full-service supermarkets, supercenters, and club stores as reasonably interchangeable for the purpose of purchasing substantially all of their weekly food and grocery shopping requirements in a single shopping visit.

PARAGRAPH ELEVEN: In Puerto Rico, full-service supermarkets, supercenters, and club stores compete primarily with each other. Operators of full-service supermarkets, supercenters, and club stores in Puerto Rico often price-check and modify the prices of their food and grocery products based on the prices of food and grocery products at nearby full-service supermarkets, supercenters, and club stores. They do not often price-check and modify the prices of food and grocery products based on the prices at other types of stores. In

Puerto Rico, most consumers shopping for food and grocery products at full-service supermarkets, supercenters, and club stores are not likely to shop at other types of stores in response to a small price increase by full-service supermarkets, supercenters, and club stores.

PARAGRAPH TWELVE: In Puerto Rico, retail stores other than full-service supermarkets, supercenters, and club stores, such as limited assortment stores, convenience stores, specialty food stores (*e.g.*, seafood markets, bakeries, etc.), military commissaries, and mass merchandise outlets (including those with pantries not offering a wide selection and deep inventory of food and grocery products), do not effectively constrain prices in the relevant line of commerce described in Paragraph Eight above. In Puerto Rico, none of these stores offers a full-service supermarket's, supercenter's, or club store's distinct set of products and services that enables a retail customer to engage in one-stop shopping for food and grocery products.

PARAGRAPH THIRTEEN: The relevant sections of the country (*i.e.*, the geographic markets) in which to analyze the acquisition described herein are the areas of Puerto Rico in and near Cayey and Cidra (the "Cayey" market), Ponce and Juana Diaz (the "Ponce" market), and Barceloneta, Manati, and Vega Baja (the "Manati" market).

Market Structure

PARAGRAPH FOURTEEN: The Cayey, Ponce, and Manati markets are highly concentrated, whether measured by the Herfindahl-Hirschman Index (commonly referred to as the "HHI") or by two-firm and four-firm concentration ratios. The acquisition would substantially increase concentration in each such market. The post-acquisition HHI in the Cayey market would increase 1,056 points, from 2,500 to 3,556; in the Ponce market it would increase 603 points, from 1,912 to 2,515; and in the Manati market it would increase 1,782 points, from 2,173 to 3,955. In the Cayey market, Wal-Mart and Amigo would have a combined market share greater

than 47%; in the Ponce market, the parties' combined market share would exceed 38%; and in the Manati market, the combined market share would be greater than 59%.

Entry Conditions

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

Actual Competition

PARAGRAPH SIXTEEN: Wal-Mart Supercenters and/or SAM's Clubs are, or are about to become, actual and direct competitors of Amigo Supermarkets in the Cayey, Ponce, and Manati markets.

Effects

PARAGRAPH SEVENTEEN: 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 United States in violation of Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18, and Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45, in the following ways, among others:

a. by eliminating direct competition between the Wal-Mart Supercenters and SAM's Clubs owned or controlled by Wal-Mart and supermarkets owned or controlled by Amigo;

b. by increasing the likelihood that the combined Wal-Mart/Amigo will unilaterally exercise market power; and

c. by increasing the likelihood of, or facilitating, collusion or coordinated interaction,

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

Violations Charged

PARAGRAPH EIGHTEEN: The Merger Agreement dated as of February 5, 2002 among Wal-Mart Puerto Rico, Inc., W-M Puerto Rico Acquisition Corp., Supermercados Amigo, Inc., and Steven C. Lausell, 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 twentieth day of November, 2002, issues its complaint against said respondents.

DECISION AND ORDER

The Federal Trade Commission ("Commission") having initiated an investigation of the proposed acquisition of 100% of the outstanding voting securities of Respondent Supermercados Amigo, Inc. by Respondent Wal-Mart Stores, Inc., hereinafter referred to as "Respondents," and Respondents having been furnished thereafter 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 7 of the Clayton Act, as amended, 15 U.S.C. § 18, and Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45; and

Respondents, their attorneys, and counsel for the Commission having thereafter executed an Agreement Containing Consent Orders ("Consent Agreement"), containing an admission by Respondents of all the jurisdictional facts set forth in the aforesaid draft of Complaint, a statement that the signing of said Consent Agreement is for settlement purposes only and does not constitute an admission by Respondents that the law has been violated as alleged in such Complaint, or that the facts 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 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, and having duly considered the comments received pursuant to Commission Rule 2.34, 16 C.F.R. § 2.34 (2003), now in further conformity with the procedure described in Commission Rule 2.34, the Commission hereby makes the following jurisdictional findings and issues the following Decision and Order ("Order"):

1. Respondent Wal-Mart Stores, 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 702 Southwest 8th Street, Bentonville, Arkansas 72716.

2. Respondent Supermercados Amigo, Inc. is a corporation organized, existing, and doing business under and by virtue of the laws of the Commonwealth of Puerto Rico, with its office and principal place of business located at Mercado Central Zona Portuaria, Edificio A-1, Puerto Nuevo, San Juan, Puerto Rico 00920.

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

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

C. "Respondents" means Wal-Mart and Amigo, individually and collectively.

D. "Acquisition" means Wal-Mart's proposed acquisition of the outstanding voting securities of Amigo pursuant to the "Merger Agreement Dated as of February 5, 2002 among Wal-Mart Puerto Rico, Inc., W-M Puerto Rico Acquisition Corp., Supermercados Amigo, Inc. and Steven C. Lausell, as the Stockholder Representative."

E. "Assets To Be Divested" means the Cidra Assets, the Ponce Assets and the Manati-Vega Baja Assets.

F. "Business Day" means any day excluding Saturday, Sunday and any United States federal holiday.

G. "Commission-approved Acquirer" means any entity approved by the Commission to acquire any or all of the Assets To Be Divested pursuant to this Order.

H. "Divestiture Agreement" means any agreement between the Respondents and a Commission-approved Acquirer (or a trustee appointed pursuant to Paragraph III. of this Order and a Commission-approved Acquirer) and all amendments, exhibits, attachments, agreements, and schedules thereto, related to the Assets To Be Divested that have been approved by the Commission to accomplish the requirements of this Order. The term "Divestiture Agreement" includes, as appropriate, the Purchaser Agreement.

I. "Divestiture Trustee(s)" means any person or entity appointed by the Commission pursuant to Paragraph III. of the Decision and Order to act as a trustee in this matter.

J. "Purchaser" means Supermercados Maximo, Inc., a corporation organized, existing and doing business under and by virtue of the laws of the Commonwealth of Puerto Rico, with its offices and principal place of business located at Popular Center, Suite 1822, Hato Rey, Puerto Rico 00918.

K. "Purchaser Agreement" means the "Asset Purchase Agreement Dated as of November 12, 2002 among Supermercados Amigo, Inc., Supermercados Maximo, Inc. and Wal-Mart Puerto Rico, Inc.," and all amendments, exhibits, attachments, related agreements, and schedules thereto, that have been approved by the Commission to accomplish the requirements of this Order.

L. "Cidra Assets" means the Supermarket currently operated by Respondent Amigo under the Amigo trade name located at the intersection of State Road 787 and State Road 172, Barrio Bayamon, Cidra, Puerto Rico 00739, and all assets, leases, properties, government permits (to the extent transferable), customer lists, businesses and goodwill, tangible and intangible, related to or used in the Supermarket business operated at that location, but shall not include those assets consisting of or pertaining to any of the Respondents' trademarks, trade dress, service marks, or trade names. Provided, however, the inventory of consumer goods and merchandise owned by the Respondents for sale in the ordinary course of the Supermarket business may be excluded from the divestiture at the option of the Commission-approved Acquirer.

M. "Ponce Assets" means the Supermarket currently operated by Respondent Amigo under the Amigo trade name located at Carretera #2 Kilometer 257.04, Barrio Canas, Ponce, Puerto Rico 00731, and all assets, leases, properties, government permits (to the extent transferable), customer lists, businesses and goodwill, tangible and intangible, related to or used in the Supermarket business operated at that location, but shall not include those assets consisting of or pertaining to any of the Respondents' trademarks, trade dress, service marks, or trade names. Provided,

however, the inventory of consumer goods and merchandise owned by the Respondents for sale in the ordinary course of the Supermarket business may be excluded from the divestiture at the option of the Commission-approved Acquirer.

N. "Manati-Vega Baja Assets" mean the Supermarkets currently operated by Respondent Amigo under the Amigo trade name located at Carretera 149 and Carretera 668, Hacia Morovis, Centro Comercial Plaza Monaco, Urbanación Jardines de Monaco, Manati, Puerto Rico 00674, and Carretera Estatal 2 Kilometer 39.5, Centro Comercial Las Vegas, Vega Baja, Puerto Rico 00693, and all assets, leases, properties, government permits (to the extent transferable), customer lists, businesses and goodwill, tangible and intangible, related to or used in the Supermarket business operated at those locations, but shall not include those assets consisting of or pertaining to any of the Respondents' trademarks, trade dress, service marks, or trade names. Provided, however, the inventory of consumer goods and merchandise owned by the Respondents for sale in the ordinary course of the Supermarket business may be excluded from the divestiture at the option of the Commission-approved Acquirer.

O. "Supermarket" means any store that offers a Wide Selection and Deep Inventory of Food and Grocery Products, enabling consumers to purchase substantially all of their weekly food and grocery shopping requirements in a single shopping visit.

P. "Supercenter" means any Supermarket that is co-located with a mass merchandise outlet.

Q. "Club Store" means any store that offers a Wide Selection and Deep Inventory of Food and Grocery Products and general merchandise–in large-sized packages or in packages of two or more conventional-sized items–to businesses and individuals that have purchased club memberships, enabling consumers to purchase substantially all of their weekly food and grocery shopping requirements in a single shopping visit.

R. "Wide Selection and Deep Inventory of Food and Grocery Products" means substantial offerings in each of the following product categories: 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.

S. "Third Party Consents" means all consents from any person other than the Respondents, including all landlords, that are necessary to effect the complete transfer to the Commission-approved Acquirer(s) of the Assets To Be Divested.

II.

IT IS FURTHER ORDERED that:

A. Not later than ten (10) Business Days after the date on which the Acquisition is consummated, Respondents shall divest, absolutely and in good faith, the Cidra Assets, Ponce Assets, and Manati-Vega Baja Assets, as ongoing businesses to Purchaser pursuant to and in accordance with the Purchaser Agreement (which agreement shall not vary or contradict, or be construed to vary or contradict, the terms of this Order), and such agreement, if approved by the Commission, is incorporated by reference into this Order and made part hereof as non-public Appendix I. Any failure by Respondents to comply with all terms of any Divestiture Agreement related to the Cidra Assets, Ponce Assets, or Manati-Vega Baja Assets shall constitute a failure to comply with this Order.

Provided, however, that if Respondents have divested the Cidra Assets, Ponce Assets, or Manati-Vega Baja Assets to Purchaser pursuant to the Purchaser Agreement 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 Purchaser is not an acceptable purchaser of the Cidra Assets, Ponce Assets, or Manati-Vega Baja Assets or that the manner in which the divestiture was accomplished is not acceptable, then Respondents shall immediately rescind the transaction with Purchaser and shall divest the Cidra Assets, Ponce Assets, and Manati-Vega Baja Assets within three (3) months of the date the Order becomes final, absolutely and in good faith, at no minimum price, to a Commission-approved Acquirer and only in a manner that receives the prior approval of the Commission.

B. Respondents shall obtain all required Third Party Consents prior to the closing of the Divestiture Agreement pursuant to which the Assets To Be Divested are divested to a Commission-approved Acquirer.

C. Any Divestiture Agreement between Respondents (or a trustee appointed pursuant to Paragraph III. of this Order) and a Commission-approved Acquirer of the Assets To Be Divested that has been approved by the Commission shall be deemed incorporated by reference into this Order, and any failure by Respondents to comply with the terms of such Divestiture Agreement shall constitute a failure to comply with this Order.

D. The purpose of the divestitures is to ensure the continuation of the Cidra Assets, the Ponce Assets and the Manati-Vega Baja Assets as ongoing viable enterprises engaged in the Supermarket business and to remedy the lessening of competition resulting from the Acquisition alleged in the Commission's Complaint.

III.

IT IS FURTHER ORDERED that:

A. If Respondents have not fully complied with the obligations specified in Paragraph II. of this Order, the Commission may appoint a trustee or trustees to divest the relevant Assets To Be Divested pursuant to Paragraph II. in a manner that satisfies the requirements of Paragraph II. The Commission may appoint a different Divestiture Trustee to accomplish each of the divestitures required in Paragraph II. 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 Divestiture Trustee in such action. Neither the appointment of a Divestiture Trustee nor a decision not to appoint a Divestiture 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 Divestiture 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 Divestiture Trustee is appointed by the Commission or a court pursuant to Paragraph III.A. of this Order, Respondents shall consent to the following terms and conditions regarding the Divestiture Trustee's powers, duties, authority, and responsibilities:

1. The Commission shall select the Divestiture Trustee, subject to the consent of Respondents, which consent shall not be unreasonably withheld. The Divestiture 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 Divestiture

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

2. Subject to the prior approval of the Commission, the Divestiture Trustee shall have the exclusive power and authority to divest the relevant assets that are required by this Order to be divested.

3. Within ten (10) 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 Divestiture Trustee, of the court, transfers to the Divestiture Trustee all rights and powers necessary to permit the Divestiture Trustee to effect the relevant divestiture(s) required by the Order.

4. The Divestiture Trustee shall have twelve (12) months from the date the Commission approves the trust agreement described in Paragraph III.B.3. to accomplish the divestiture(s), 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 the divestiture(s) can be achieved within a reasonable time, the divestiture period may be extended by the Commission, or, in the case of a court-appointed Divestiture Trustee, by the court; provided, however, the Commission may extend the divestiture period only two (2) times.

5. The Divestiture Trustee shall have full and complete access to the personnel, books, records and facilities relating to the relevant assets that are required to be divested by this Order or to any other relevant

information, as the Divestiture Trustee may request. Respondents shall develop such financial or other information as the Divestiture Trustee may request and shall cooperate with the Divestiture Trustee. Respondents shall take no action to interfere with or impede the Divestiture Trustee's accomplishment of the divestiture(s). 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 Divestiture 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, subject to Respondents' absolute and unconditional obligation to divest at no minimum price. The divestiture(s) shall be made in the manner and to a Commission-approved Acquirer as required by this Order; provided, however, if the Divestiture Trustee receives bona fide offers from more than one acquiring entity, and if the Commission determines to approve more than one such acquiring entity, the Divestiture Trustee shall divest to the acquiring entity selected by 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 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 Divestiture Trustee's duties and responsibilities. The Divestiture Trustee shall account for all monies derived from the divestiture(s) and all expenses incurred. After approval by the Commission and, in the case of a court-appointed Divestiture Trustee, by the court, of the account of the Divestiture Trustee, including fees for his or her services, all remaining monies shall be paid at the direction of the Respondents, and the Divestiture Trustee's power shall be terminated. The compensation of the Divestiture Trustee shall be based at least in significant part on a commission arrangement contingent on the divestiture of all of the Assets To Be Divested.

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

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

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

11. In the event that the Divestiture Trustee determines that he or she is unable to divest the relevant Assets To Be Divested pursuant to the relevant Paragraph(s) in a manner that preserves their marketability, viability and competitiveness and ensures their continued use as Supermarket businesses, the Divestiture Trustee may divest such additional assets related to the relevant Supermarket businesses of the Respondents and effect such arrangements as are necessary to satisfy the requirements of this Order.

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

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

14. Respondents may require the Divestiture Trustee to sign a customary confidentiality agreement; provided, however, such agreement shall not restrict the Divestiture Trustee from providing any information to the Commission.

IV.

IT IS FURTHER ORDERED that, for a period of ten (10) years commencing on 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, Supercenter, or Club Store within six (6) months prior to the date of such

proposed acquisition in the municipalities of Cayey, Cidra, Ponce, Juana Diaz, Barceloneta, Manati, or Vega Baja in Puerto Rico.

B. Acquire any stock, share capital, equity, or other interest in any entity that owns any interest in or operates any Supermarket, Supercenter, or Club Store or owned any interest in or operated any Supermarket, Supercenter, or Club Store within six (6) months prior to such proposed acquisition in the municipalities of Cayey, Cidra, Ponce, Juana Diaz, Barceloneta, Manati, or Vega Baja in Puerto Rico.

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

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, 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

thirty (30) 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.

V.

IT IS FURTHER ORDERED that, for a period of ten (10) years commencing on the date this Order becomes final, 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, Supercenter, or Club Store, any leasehold interest in any Supermarket, Supercenter, or Club Store, or any interest in any retail location used as a Supermarket, Supercenter, or Club Store on or after January 1, 2002, in the municipalities of Cayey, Cidra, Ponce, Juana Diaz, Barceloneta, Manati, or Vega Baja in Puerto Rico, to operate a Supermarket, Supercenter, or Club Store at that site if such Supermarket, Supercenter, or Club Store was formerly owned or operated by Respondents.

VI.

IT IS FURTHER ORDERED that:

A. Within thirty (30) days after the date this Order becomes final and every thirty (30) days thereafter until the Respondents have fully complied with the provisions of Paragraphs II. and III. of this Order, Respondents shall submit to the Commission verified written reports setting forth in detail the manner and form in which they intend to comply, are complying, and have complied with Paragraphs II. and III. of this Order. 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. and III. of this 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; and

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.

VII.

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

VIII.

IT IS FURTHER ORDERED that, for the purpose of determining or securing compliance with this Order, and subject to any legally recognized privilege, 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.

CONFIDENTIAL APPENDIX I

[Redacted from Public Record Version]

ORDER TO MAINTAIN ASSETS

The Federal Trade Commission ("Commission") having initiated an investigation of the proposed acquisition of 100% of the outstanding voting securities of Respondent Supermercados Amigo, Inc. ("Amigo") by Respondent Wal-Mart Stores, Inc. ("Wal-Mart"), hereinafter referred to as "Respondents," and Respondents having been furnished thereafter with a copy of a draft Complaint that the Bureau of Competition presented to the Commission for its consideration and which, if issued by the Commission, would charge Respondents with violations of Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18, and Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45; and

Respondents, their attorneys, and counsel for the Commission having thereafter executed an Agreement Containing Consent Orders ("Consent Agreement"), containing the proposed Decision and Order, an admission by Respondents of all the jurisdictional facts set forth in the aforesaid draft 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 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 Wal-Mart 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 702 Southwest 8th Street, Bentonville, Arkansas 72716.

2. Respondent Amigo is a corporation organized, existing, and doing business under and by virtue of the laws of the Commonwealth of Puerto Rico, with its office and principal place of business located at Mercado Central Zona Portuaria, Edificio A-1, Puerto Nuevo, San Juan, Puerto Rico 00920.

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. In addition, "Supermarket To Be Maintained" means any Supermarket business identified as a part of the Assets To Be Divested.

II.

IT IS FURTHER ORDERED that:

A. 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

the attached Decision and 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 reasonable 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.

B. Respondents shall not terminate the operation of any Supermarket To Be Maintained. Respondents shall continue to maintain the inventory of each Supermarket To Be Maintained 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 Maintained 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 Maintained;

2. not transfer inventory from any Supermarket To Be Maintained, 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 associated with any Supermarket To Be Maintained, in each case in a manner consistent with past practice;

4. maintain the books and records of each Supermarket To Be Maintained;

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 at a Supermarket To Be Maintained to another location, or that indicates a Supermarket To Be Maintained 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 Maintained; and

7. not change or modify in any material respect the existing advertising practices, programs and policies for any Supermarket To Be Maintained, other than changes in the ordinary course of business consistent with past practice for Supermarkets of the Respondents not being closed or relocated.

III.

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

IV.

IT IS FURTHER ORDERED that for the purposes of determining or securing compliance with this Order to Maintain Assets, and subject to any legally recognized privilege, and upon written request with reasonable notice to Respondents made to their principal United States 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 Respondents relating to compliance with this Order to Maintain Assets; and

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

V.

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

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

B. With respect to each Supermarket To Be Maintained, the day after Respondents' completion of the divestiture of Assets to Be Divested related to such Supermarket, as described in and required by the attached Decision and Order.

Provided, however, that if the Commission, pursuant to Paragraph II.A. or II.B. of the Decision and Order, requires the Respondents to rescind any or all of the divestitures contemplated by the Purchaser Agreement, then, upon rescission, the requirements of this Order shall again be in effect with respect to the relevant Assets To Be Divested until the day after Respondents' completion of the divestiture(s) of the relevant Assets To Be Divested, as described in and required by the attached Decision and Order.

Analysis of the Complaint and Proposed Decision and Order to Aid Public Comment

I.Introduction

The Federal Trade Commission ("Commission") has accepted for public comment from Wal-Mart Stores, Inc. ("Wal-Mart") and Supermercados Amigo, Inc. ("Amigo") (collectively, "the Proposed Respondents") an Agreement Containing Consent Orders ("the proposed consent order"). The Proposed Respondents have also reviewed the complaint issued by the Commission. The proposed consent order is designed to remedy likely anticompetitive effects arising from Wal-Mart's proposed acquisition of all of the outstanding voting stock of Amigo.

II. Description of the Parties and the Proposed Acquisition

Wal-Mart is a global food and general merchandise retailer headquartered in Arkansas. The company operates or services approximately 4,200 stores in the United States, Europe, Latin America, and Asia and had sales of over $191 billion in 2001. In the Commonwealth of Puerto Rico, Wal-Mart, through its subsidiary Wal-Mart Puerto Rico, Inc., operates nine traditional Wal-Mart Stores, one Wal-Mart Supercenter, and eight SAM's Clubs.

Amigo, headquartered in San Juan, Puerto Rico, is the largest supermarket chain in Puerto Rico in terms of dollar sales. With annual sales in 2001 of approximately $542 million, Amigo operates 36 supermarkets under the Amigo trade name in Puerto Rico.

On February 5, 2002, Wal-Mart and Amigo signed an agreement whereby Wal-Mart will purchase all of the outstanding voting securities of Amigo through the merger of W-M Puerto Rico Acquisition Corp., an indirect wholly owned subsidiary of Wal-Mart, with and into Amigo. Amigo will continue as the surviving

corporation. As a result of the merger, Wal-Mart will hold 100% of the voting securities of Amigo.

III. The Complaint

The complaint alleges that the relevant line of commerce (*i.e.*, the product market) in which to analyze the acquisition is the retail sale of food and grocery products in stores that carry a wide selection and deep inventory of food and grocery products in a variety of brands and sizes, enabling consumers to purchase substantially all of their weekly food and grocery shopping requirements in a single shopping visit. Thus, stores in the relevant line of commerce have substantial offerings in each of the following product categories: 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.

Unlike prior supermarket investigations by the Commission, this investigation involves geographic markets in Puerto Rico. The evidence obtained in our investigation indicated that the markets at issue here have characteristics that support a broader relevant product market than those identified in past supermarket investigations by the Commission. There are approximately 250 supermarkets across Puerto Rico, with the majority located in the San Juan metropolitan area. There are numerous small and mid-sized supermarket chains throughout the island, and in general, competition appears robust. In Puerto Rico, full-service supermarkets, "supercenters" (which are co-located full-service supermarkets and mass merchandise outlets), and "club stores" (which are stores that offer a wide selection and deep inventory of food and grocery products and general merchandise–often in large-sized packages or in packages of two or more conventional-

sized items–to businesses and individuals that have purchased club memberships) offer a distinct set of products and services that enables them to compete in the relevant line of commerce described above. Information provided by several club store and supermarket operators in Puerto Rico indicates that many Puerto Rico consumers regard club stores as apt substitutes for supermarkets. A substantial portion of retail purchasers in Puerto Rico regard full-service supermarkets, supercenters, and club stores as reasonably interchangeable for the purpose of purchasing substantially all of their weekly food and grocery shopping requirements in a single shopping visit.

In Puerto Rico, full-service supermarkets, supercenters, and club stores compete primarily with each other. Supermarkets in Puerto Rico compete with club stores in a variety of ways. Operators of Puerto Rico full-service supermarkets, supercenters, and club stores often price-check and modify the prices of their food and grocery products based on the prices of food and grocery products at nearby full-service supermarkets, supercenters, and club stores. They do not often price-check and modify the prices of food and grocery products based on the prices at other types of stores, such as limited assortment stores, convenience stores, specialty food stores (*e.g.*, seafood markets, bakeries, etc.), military commissaries, and mass merchandise outlets (including those with pantries not offering a wide selection and deep inventory of food and grocery products). In Puerto Rico, most consumers shopping for food and grocery products at full-service supermarkets, supercenters, and club stores are not likely to shop at other types of stores in response to a small price increase by full-service supermarkets, supercenters, and club stores.

Many supermarket operators lose substantial sales when club stores open near to their own stores, and some engage in aggressive promotions in the weeks before and following the opening of a club store to blunt that sales loss. Some have remodeled stores in advance of their plans so as to ward off defections to club stores. Some have reacted to competition from club stores by adding additional multi-packs to their product

offering and enhancing customer service. At the same time, club stores in Puerto Rico have introduced increased numbers of conventional package configurations. Ordinary-course-of-business documents of supermarket operators often refer to club stores as substantial competitors.

Studies also provide support for the inclusion of club stores in the relevant product market. For example, a 2001 study, based on "extensive in-home interviews among female heads of household . . . throughout the island," found that 37% of the subjects spontaneously mentioned SAM's Club when asked to identify a supermarket or food retailer that operates in Puerto Rico. The "brand awareness" of the four leading supermarket operators (and especially Amigo (with 72%) and Pueblo (with 58%)), was substantially greater than that of SAM's Club (with 37%), but the smaller Puerto Rico supermarket chains such as Ralph's (with 6%), Supermercado Del Este (5%), and Plaza Gigante (5%) had significantly less brand awareness among Puerto Rico consumers. That same study found that 5% of interviewees reported that SAM's Club was their "regular store" for their "large grocery shopping of the month." That is comparable to or greater than the numbers reported for Mr. Special (6%), Supermercado Del Este (3%), and Ralph's (4%). These findings are consistent with those of a recurring consumer survey conducted by the Puerto Rico food retailing trade association. The 2001 study found that 13% of consumers identified club stores as the place where they make their main food purchases.

In Puerto Rico, retail stores other than full-service supermarkets, supercenters, and club stores, such as limited assortment stores, convenience stores, specialty food stores (*e.g.*, seafood markets, bakeries, etc.), military commissaries, and mass merchandise outlets (including those with pantries not offering a wide selection and deep inventory of food and grocery products), do not effectively constrain prices in the relevant line of commerce as described above. In Puerto Rico, none of these stores offers a full-service supermarket's, supercenter's, or club store's distinct set of

products and services that enables a retail customer to engage in one-stop shopping for food and grocery products.

Ample testimonial and documentary evidence indicates that a significant portion of Puerto Rico consumers use full-service supermarkets and club stores interchangeably. Accordingly, the relevant product market within which to assess the effects in Puerto Rico of the proposed transaction is a market consisting of full-service supermarkets, supercenters, and retail sales of supermarket-type items at club stores, or in general, stores that carry and offer at retail a wide selection and deep inventory of food and grocery products in a variety of brands and sizes, enabling consumers to purchase substantially all of their weekly food and grocery shopping requirements in a single shopping visit. The determination that club stores are included in the relevant product market in this proceeding does not, of course, determine what the relevant product market will be in future supermarket investigations by the Commission.

The complaint alleges that the relevant sections of the United States (*i.e.*, the geographic markets) in which there are competitive problems related to the acquisition are the areas of Puerto Rico in and near Cayey and Cidra (the "Cayey" market), Ponce and Juana Diaz (the "Ponce" market), and Barceloneta, Manati, and Vega Baja (the "Manati" market). The Cayey, Ponce, and Manati markets are highly concentrated, whether measured by the Herfindahl-Hirschman Index (commonly referred to as the "HHI") or by two-firm and four-firm concentration ratios.[1] The post-acquisition HHI in the Cayey market would increase 1,056 points, from 2,500 to 3,556; in the Ponce market it would increase 603 points, from 1,912 to 2,515; and in the Manati market, taking into account a Wal-Mart supercenter that will open shortly, it would increase 1,782 points, from 2,173 to 3,955. In the Cayey market, Wal-Mart and Amigo would have a combined market share greater than 47%; in the Ponce market, the parties' combined market share would exceed 38%; and in the Manati market, the combined market share would be greater than 59%.

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

The complaint also alleges that Wal-Mart's acquisition of all of the outstanding voting securities of Amigo, if consummated, may substantially lessen competition in the relevant line of commerce in the relevant markets in violation of Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18, and Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45, by eliminating direct competition between supercenters and club stores owned or controlled by Wal-Mart and supermarkets owned and controlled by Amigo; by increasing the likelihood that Wal-Mart will unilaterally exercise market power; and 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 that the quality and selection of food, groceries or services will decrease, in the relevant geographic markets of Puerto Rico.

IV. The Terms of the Agreement Containing Consent Orders

The proposed consent order will remedy the Commission's competitive concerns about the proposed acquisition. Under the terms of the proposed consent order, Proposed Respondents must divest four Amigo supermarkets, in Cidra, Ponce, Manati, and Vega Baja, Puerto Rico. In each region, Wal-Mart owns or plans to open at least one supercenter or club store. The divestitures are to an up-front newly-formed entity founded by experienced supermarket owners which would be a new entrant in the relevant geographic markets and which the Commission has evaluated for competitive and financial viability. The Commission's evaluation process consisted of analyzing the financial condition of the proposed acquirer to determine that it is well qualified to operate the divested stores.

Proposed Respondents will sell the four Amigo stores to Supermercados Maximo, Inc. ("Purchaser"), which is headquartered in Hato Rey, Puerto Rico. Purchaser includes as its founders and management two former long-time members of Amigo's board of directors. All of the managers at the four stores are expected to remain in place (and each store is headed by management teams that have worked together for over three years).

The proposed consent order requires that the divestitures occur no later than ten business days after the acquisition is consummated. However, if Proposed Respondents consummate the divestitures to Purchaser during the public comment period, and if, at the time the Commission decides to make the order final, the Commission notifies Proposed Respondents that Purchaser is not an acceptable acquirer or that the asset purchase agreement with Purchaser is not an acceptable manner of divestiture, then Proposed Respondents must immediately rescind the transaction in question and divest those assets to another buyer within three months of the date the order becomes final. At that time, Proposed Respondents 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.

The proposed consent order also enables the Commission to appoint a trustee to divest any supermarkets or sites identified in the order that Proposed Respondents have not divested to satisfy the requirements of the order. In addition, the order enables the Commission to seek civil penalties against Proposed Respondents for non-compliance with the order.

The proposed consent order further requires Proposed Respondents to maintain the viability of the supermarkets identified for divestitures. Among other requirements related to maintaining operations at these supermarkets, the proposed consent order specifically requires 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 the supermarkets' marketability or viability; (4) maintain the supermarkets consistent with past practices; (5) use best efforts to preserve the supermarkets' existing relationships with suppliers, customers, and employees; and (6) keep the supermarkets open for business and maintain the inventory at levels consistent with past practices.

The proposed consent order prohibits Proposed Respondents from acquiring, without providing the Commission with prior notice, any supermarket, supercenter, or club store, or any interest in any supermarket, supercenter, or club store located in the municipalities that include Cayey, Cidra, Ponce, Juana Diaz, Barceloneta, Manati, and Vega Baja for ten years. These are the areas from which the supermarkets to be divested draw customers. The provisions regarding prior notice are consistent with the terms used in prior Orders. The proposed consent order does not restrict the Proposed Respondents from constructing new supermarkets, supercenters, or club stores in the above areas; nor does it restrict the Proposed Respondents from leasing facilities not operated as supermarkets, supercenters, or club stores within the previous six months.

The proposed consent order further prohibits Proposed Respondents, for a period of ten years, from entering into or enforcing any agreement that restricts the ability of any person acquiring any location or interest in any location used as a supermarket, supercenter, or club store in Puerto Rico, to operate a supermarket, supercenter, or club store at that site, if that site is or was formerly owned or operated by Proposed Respondents in any of the above areas.

The Proposed Respondents are required to file compliance reports with the Commission, the first of which is due within thirty days of the date on which Proposed Respondents signed the proposed consent order, and every thirty days thereafter until the divestitures are completed, and annually for ten years.

V. Opportunity for Public Comment

The proposed consent order has been placed on the public record for thirty days for receipt of comments by interested persons. Comments received during this period will become part of the public record. After thirty days, the Commission will again review the 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 the supermarkets to Purchaser, in order to aid the Commission in its determination of whether to make the proposed consent order final. This analysis is not intended to constitute an official interpretation of the proposed consent order nor is it intended to modify the terms of the proposed consent order in any way.

Endnotes

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

Complaint

IN THE MATTER OF

DAINIPPON INK AND CHEMICALS, INCORPORATED

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

Docket C-4073; File No. 0210100
Complaint, January 31, 2003--Decision, March 13, 2003

This consent order addresses the acquisition by Respondent Dainippon Ink and Chemicals, Incorporated – a diversified global chemicals company based in Tokyo, Japan that manufactures and sells a full range of organic pigments, primarily through its wholly-owned U.S. subsidiary, Sun Chemical Corporation – of the high performance pigments business of Bayer Corporation, headquartered in Pittsburgh, Pennsylvania. The order, among other things, requires the respondent to divest the portion of Sun Chemical that produces perylenes – a class of high performance organic pigments that impart unique shades of red, such as maroon and violet; offer a particularly high degree of transparency; and are primarily used in automotive coatings, plastics, and carpet fibers – to Ciba Specialty Chemicals Inc. and Ciba Specialty Chemicals Corporation, or to another acquirer approved by the Commission. The order also requires the respondent, through its Sun Chemical subsidiary, to permit Ciba to hire one or more Sun Chemical employees who have key responsibilities in connection with the company's perylene business, and to provide technical assistance to Ciba for a period of one year following the divestiture, to help Ciba successfully take over Sun Chemical's perylene product line.

Participants

For the Commission: *Katherine A. Havely, Jay C. Campbell, Sean G. Dillon, Stephanie A. Parks, Robert Pickett, Ann Malester, Kenneth A. Libby, Daniel P. Ducore, Shawn W. Ulrick, Louis Silvia, Jr.,* and *Mary T. Coleman.*

For the Respondent: *Steven Newborn* and *John E. Scribner, Clifford Chance US LLP.*

COMPLAINT

Pursuant to 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 Dainippon Ink and Chemicals, Incorporated ("Dainippon"), a corporation, subject to the jurisdiction of the Commission, has agreed to acquire certain assets of Bayer Corporation ("Bayer"), 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 ("FTC Act"), as amended, 15 U.S.C. § 45, and it appearing to the Commission that a proceeding in respect thereof would be in the public interest, hereby issues its Complaint, stating its charges as follows:

I. RESPONDENT

1. Respondent Dainippon is a corporation organized, existing and doing business under and by virtue of the laws of Japan, with its offices and principal place of business located at DIC Building 7-20 Nihonbashi 3-Chome, Chou-ku Tokyo 103 Japan. Dainippon's principal subsidiary in the United States, Sun Chemical Corporation ("Sun Chemical"), is located at 222 Bridge Plaza South, Fort Lee, New Jersey 07024.

2. Respondent Dainippon is engaged in, among other things, the research, development, manufacture, and sale of perylenes.

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

II. THE ACQUIRED COMPANY

4. Bayer is a corporation organized, existing and doing business under and by virtue of the laws of Indiana, with its offices and principal place of business located at 100 Bayer Road, Pittsburgh, Pennsylvania 15205.

5. Bayer is engaged in, among other things, the research, development, manufacture, and sale of perylenes.

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

III. THE ACQUISITION

7. Pursuant to an asset purchase agreement dated February 15, 2002 (the "Purchase Agreement"), Dainippon, through Sun Chemical, agreed to acquire the high performance organic pigment business of Bayer for approximately $57.8 million in cash (the "Acquisition").

IV. THE RELEVANT MARKET

8. For the purposes of this Complaint, the relevant line of commerce in which to analyze the effects of the Acquisition is the research, development, manufacture, and sale of perylenes. Perylenes are a class of high performance organic pigments that generate unique shades of highly transparent red. Perylenes are primarily used to impart color to automotive coatings.

9 For the purposes of this Complaint, the world is the relevant geographic area in which to analyze the effects of the Acquisition.

V. THE STRUCTURE OF THE MARKET

10. As Dainippon and Bayer are two of only four viable suppliers of perylenes in the world, the market for the research, development, manufacture, and sale of perylenes is highly concentrated as measured by the Herfindahl-Hirschman Index ("HHI"). The Acquisition would significantly increase concentration in the market to an HHI level of 4,856, an increase of 680 points.

VI. BARRIERS TO ENTRY

11. Entry into the research, development, manufacture, and sale of perylenes is a difficult process because of, among other things, the time and cost associated with researching and developing perylene technology; building a perylene manufacturing facility; perfecting the art of manufacturing perylenes; and coordinating the marketing, qualification, and sale of perylenes to potential customers.

12. New entry into the relevant market is unlikely to deter or counteract the adverse competitive effects of the Acquisition because the costs of entering the market are high relative to the potential sales opportunities available to an entrant.

13. New entry into the relevant market would not occur in a timely manner to deter or counteract the adverse competitive effects of the Acquisition because it would take over two years for an entrant to accomplish the steps required for entry and achieve a significant market impact.

VII. EFFECTS OF THE ACQUISITION

14. The effects of the Acquisition, if consummated, may be substantially to lessen competition and to tend to create a monopoly in the relevant market in violation of Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18, and Section 5 of the

FTC Act, as amended, 15 U.S.C. § 45, in the following ways, among others:

a. by eliminating actual, direct, and substantial competition between Dainippon and Bayer in the relevant market;

b. by increasing the likelihood that Dainippon will unilaterally exercise market power in the relevant market;

c. by further consolidating an already concentrated market, thereby substantially increasing the likelihood of collusion and coordinated interaction in the relevant market;

d. by reducing existing incentives to improve service or product quality or to pursue further innovation in the relevant market; and

e. by increasing the likelihood that customers of perylenes would be forced to pay higher prices.

VIII. VIOLATIONS CHARGED

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

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

WHEREFORE, THE PREMISES CONSIDERED, the Federal Trade Commission on this thirty-first day of January, 2003, issues its Complaint against said Respondent.

DECISION AND ORDER

The Federal Trade Commission ("Commission") having initiated an investigation of the proposed acquisition by Respondent Dainippon Ink and Chemicals, Incorporated ("Dainippon"), hereinafter referred to as "Respondent," of certain assets of Bayer Corporation ("Bayer"), and Respondent having been furnished thereafter with a copy of a draft of Complaint that the Bureau of Competition proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge Respondent with violations of Section 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 Orders ("Consent Agreement"), containing an admission by Respondent of all the jurisdictional facts set forth in the aforesaid draft of Complaint, a statement that the signing of said Consent Agreement is for settlement purposes only and does not constitute an admission by Respondent that the law has been violated as alleged in such Complaint, or that the facts as alleged in such Complaint, other than jurisdictional facts, are true, and waivers and other provisions as required by the Commission's Rules; and

The Commission having thereafter considered the matter and having determined that it had reason to believe that Respondent has violated the said Acts, and that a Complaint should issue stating its charges in that respect, and having thereupon issued its Complaint and 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 Decision and Order ("Order"):

1. Respondent Dainippon is a corporation organized, existing and doing business under and by virtue of the laws of Japan, with its office and principal place of business located at DIC Building 7-20 Nihonbashi 3-Chome, Chou-ku Tokyo 103 Japan.

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. "Dainippon" or "Respondent" means Dainippon Ink and Chemicals, Incorporated, its directors, officers, employees, agents, representatives, predecessors, successors, and assigns; its joint ventures, subsidiaries, divisions, groups and affiliates controlled by Dainippon Ink and Chemicals, Incorporated (including, but not limited to, Sun Chemical Group B.V. and Sun Chemical Corporation), and the respective directors, officers, employees, agents, representatives, successors, and assigns of each.

B. "Bayer" means Bayer Corporation, a corporation organized, existing, and doing business under and by virtue of the laws of Indiana, with its offices and principal place of business located at 100 Bayer Road, Pittsburgh, Pennsylvania 15205; and joint ventures, subsidiaries, divisions, groups, and affiliates controlled by Bayer Corporation.

C. "Acquisition" means the proposed acquisition by Sun Chemical Corporation, a wholly-owned subsidiary of Dainippon, of certain assets of Bayer by means of an Asset Purchase Agreement dated as of February 15, 2002, by and between Bayer and Sun Chemical Corporation.

D. "Commission" means the Federal Trade Commission.

E. "Ciba" means, collectively, Ciba Specialty Chemicals Inc., a corporation organized, existing and doing business under and by virtue of the laws of Switzerland, with its offices and principal place of business located at Klybeckstrasse 141, 4057 Basel, Switzerland, and Ciba Specialty Chemicals 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 560 White Plains Road, Tarrytown, New York 10591-9005.

F. "Agency(ies)" means any governmental regulatory authority or authorities in the world responsible for granting approval(s), clearance(s), qualification(s), license(s) or permit(s) for any aspect of the research, development, manufacture, marketing, distribution or sale of Perylenes.

G. "Ciba Asset Purchase Agreement" means the Asset Purchase Agreement by and between Respondent as Seller, and Ciba as Purchaser, dated as of December 19, 2002, and all amendments, exhibits, attachments, agreements, and schedules thereto, related to the Sun Perylene Assets to be divested to accomplish the requirements of this Order. The Ciba Asset Purchase Agreement is attached to this Order as non-public Appendix II.

H. "Closing Date" means the date on which Respondent divests, licenses or otherwise conveys to the Commission-approved Acquirer the Sun Perylene Assets completely and as required by Paragraph II.A. of this Order.

I. "Commission-approved Acquirer" means an entity approved by the Commission to acquire the Sun Perylene Assets, including Ciba if Ciba acquires the Sun Perylene Assets pursuant to Paragraph II.A. of this Order.

J. "Costs" means all direct costs, including, but not limited to, direct labor, cost of raw materials, and depreciation of capital equipment, but "Costs" does not include general administrative or overhead expenses.

K. "Divestiture Agreement" means any agreement between Respondent and a Commission-approved Acquirer (or between a trustee appointed pursuant to Paragraph IV.A. of this Order and a Commission-approved Acquirer), including the Ciba Asset Purchase Agreement, and all amendments, exhibits, attachments, agreements, and schedules thereto, related to the Sun Perylene Assets intended to accomplish the requirements of this Order.

L. "Divestiture Trustee" means the trustee appointed by the Commission pursuant to Paragraph IV.A. of this Order.

M. "Effective Date" means the date the Acquisition is consummated.

N. "Forth Technologies" means Forth Technologies Inc., a corporation organized, existing and doing business under and by virtue of the laws of Kentucky, with its offices and principal place of business at 600 Bergman Street, Louisville, Kentucky 40203; and joint ventures, subsidiaries, divisions, groups, and affiliates controlled by Forth Technologies Inc.

O. "Governmental Entity" means any Federal, state, local or non-U.S. government or any court, legislature, governmental agency or governmental commission or any judicial or regulatory authority of any government.

P. "Interim Monitor" means any trustee appointed pursuant to Paragraph III of this Decision and Order or Paragraph III of the Order to Maintain Assets.

Q. "Lobeco Products" means Lobeco Products Inc., a corporation organized, existing and doing business under and by virtue of the laws of South Carolina, with its offices and principal place of business at 23 John Meeks Way, Lobeco, South Carolina 29931; and joint ventures, subsidiaries, divisions, groups, and affiliates controlled by Lobeco Products Inc.

R. "Non-perylene Product" means any product researched, developed, manufactured, used or sold by Respondent other than Perylenes before the Effective Date.

S. "Patents" means all patents, patent applications and statutory invention registrations, in each case possessed or owned by Respondent prior to the Effective Date, including all reissues, divisions, continuations, continuations-in-part, supplementary protection certificates, extensions and reexaminations thereof, all inventions disclosed therein, all rights therein provided by international treaties and conventions, and all rights to obtain and file for patents and registrations thereto in the world, related to the manufacture, use, sale, research and/or development of any Perylenes.

T. "Perylenes" means organic pigments based on the perylene chemical structure and researched, developed, manufactured, or sold by Respondent before the Effective Date, including, but not limited to, the products of Respondent designated by the following code numbers: 229-0079, 229-1179, 229-2179, 229-2273, 229-3379, 229-3380, 229-4000, 229-9029, 429-0230, 429-3179, and 429-5079.

U. "Perylene Assumed Contracts" means all contracts or agreements existing before the Effective Date to which Respondent is a party:

1. pursuant to which any third party purchases Perylenes from Respondent;

2. pursuant to which Respondent purchases any materials from any third party for use in connection with the manufacture, use, sale, research and/or development of Perylenes, including, but not limited to, raw materials;

3. relating to the manufacture and/or finishing of Perylenes, including, but not limited to, contracts or agreements with Lobeco Products and Forth Technologies;

4. constituting confidentiality agreements involving Perylenes; or

5. involving any royalty, licensing or similar arrangement involving Perylenes.

V. "Perylene Intellectual Property" means all of the following possessed or owned by Respondent before the Effective Date and related to Perylenes:

1. Patents;

2. Perylene Manufacturing Technology;

3. Perylene Scientific and Regulatory Material;

4. Perylene Trade Dress;

5. Perylene Trademarks, including the goodwill of the business symbolized thereby and associated therewith; and

6. rights to sue and recover damages or obtain injunctive relief for infringement, dilution, misappropriation, violation or breach of any of the foregoing.

Provided, however, "Perylene Intellectual Property" does not include the names "Dainippon," "Sun Chemical," or "Sunfast."

W. "Perylene Manufacturing Technology" means all technology, trade secrets, know-how, software, inventions, practices, methods and other confidential or proprietary information related to the formulation, manufacture, finishing, quality assurance and quality control, and packaging of Perylenes, in existence and in the possession of Respondent before the Effective Date, including, but not limited to, manufacturing records, sampling records, standard operating procedures and batch records related to the manufacturing process, and supplier lists.

X. "Perylene Scientific and Regulatory Material" means all technological, scientific, chemical, materials and information related to Perylenes, and all rights thereto, in any and all jurisdictions.

Y. "Perylene Trade Dress" means all trade dress of Perylenes distributed, marketed, or sold by or on behalf of Respondent before the Effective Date, including, but not limited to, product packaging associated with the sale of such Perylenes worldwide and the lettering of such Perylenes' trade names or brand names.

Z. "Perylene Trademarks" means all trademarks, trade names and brand names including registrations and applications for registration therefor (and all renewals, modifications, and extensions thereof) and all common law rights, and the goodwill symbolized thereby and associated therewith, for Perylenes researched, developed, distributed, marketed, or sold by or on behalf of Respondent before the Effective Date.

AA. "Perylene Registrations" means all registrations, permits, licenses, consents, authorizations and other approvals, and pending applications and requests therefor, required

by applicable Agencies related to the research, development, manufacture, distribution, finishing, packaging, marketing or sale of Perylenes worldwide.

BB. "Sun Perylene Assets" means all of Respondent's rights, title and interest held before the Effective date, in and to all assets related to Perylenes to the extent legally transferable, including the research, development, manufacture, use, finishing, distribution, marketing or sale of Perylenes including, without limitation, the following:

1. all Perylene Intellectual Property;

2. Perylene Registrations;

3. the existing lists of all customers of Perylenes during the period from January 1, 1999, to the Effective Date and detailed information as to the pricing, product mix, and other terms (including, but not limited to, supply or rebate agreements) of Perylenes for such customers;

4. at the Commission-approved Acquirer's option, each of the Perylene Assumed Contracts;

5. all unfilled customer orders for Perylenes existing before the Effective Date (a list of such orders is to be provided to the Commission-approved Acquirer within two (2) days after the Closing Date);

6. at the Commission-approved Acquirer's option, all inventories of Perylenes in existence before the Effective Date, including, but not limited to, raw materials, goods in process, and finished goods; and

7. all documents (including, but not limited to, computer files, electronic mail, and written, recorded, and graphic materials) related to the foregoing, including, but not

limited to, the following specified documents: the Perylene Registrations; reports relating to the research and development of Perylenes or of any materials used in the research, development, manufacture, marketing or sale of Perylenes; all market research data and market intelligence reports; customer information; all records relating to employees that accept employment with the Commission-approved Acquirer (excluding any personnel records the transfer of which is prohibited by applicable law); all records, including customer lists, sales force call activity reports, vendor lists, sales data, reimbursement data, manufacturing records, manufacturing processes, and supplier lists; all data contained in laboratory notebooks relating to Perylenes; all analytical and quality control data; and all correspondence with Agencies relating to Perylenes.

CC. "Sun Perylene Employees" means the employees of Respondent identified in non-public Appendix I attached to this Order.

II.

IT IS FURTHER ORDERED that:

A. Not later than ten (10) days after the Effective Date, Respondent shall divest the Sun Perylene Assets as an ongoing business to Ciba pursuant to and in accordance with the Ciba Asset Purchase Agreement (which agreement shall not vary or contradict, or be construed to vary or contradict, the terms of this Order, it being understood that nothing in this Order shall be construed to reduce any rights or benefits of Ciba or to reduce any obligations of Respondent under such agreement), and such agreement is incorporated by reference into this Order and made part hereof as non-public Appendix II.

Provided, however, that to the extent Respondent uses any

of the Perylene Intellectual Property in connection with the research, development, manufacture, use, or finishing of Non-perylene Products, Respondent shall have the right to obtain from the Commission-approved Acquirer a license to use such Perylene Intellectual Property to make, have made, use, and sell such Non-perylene Products.

Provided further, that if Respondent divests the Sun Perylene Assets to Ciba pursuant to this Order, Respondent may obtain from Ciba a license to manufacture, use, and sell the Perylene designated by product code number 229-2273.

Provided further, that to the extent Respondent is required by this Order to assign Perylene Assumed Contracts to the Commission-approved Acquirer, where any such Perylene Assumed Contract also relates to Non-perylene Product(s), Respondent shall assign the Commission-approved Acquirer all such rights under the contract or agreement as are related to Perylenes, but concurrently may retain similar rights as are related to the Non-perylene Product(s). After the Closing Date, Respondent may not have Perylenes manufactured or finished for it by either Forth Technologies or Lobeco Products for a period of five (5) years.

Provided further, that in cases in which documents or other materials included in the Sun Perylene Assets contain information that (i) relates both to Perylenes and to Non-perylene Product(s), and (ii) cannot be segregated in a manner that preserves the usefulness of the information as it relates to Perylenes, Respondent shall be required only to provide copies of the documents and materials containing this information. In instances where such copies are provided to the Commission-approved Acquirer, the Commission-approved Acquirer shall have access to original documents under circumstances where copies of documents are insufficient for evidentiary or regulatory purposes.

Provided further, that if Respondent has divested the Sun Perylene Assets to Ciba prior to the date this Order becomes final, and if, at the time the Commission determines to make this Order final, the Commission notifies Respondent that Ciba is not an acceptable acquirer of the Sun Perylene Assets or that the manner in which the divestiture was accomplished is not acceptable, then Respondent shall immediately rescind the transaction with Ciba and shall divest the Sun Perylene Assets within ninety (90) days of rescission to a Commission-approved Acquirer in a manner that satisfies the requirements of Paragraph II of this Order.

B. Any failure to comply with the terms of the Ciba Asset Purchase Agreement (or any other Divestiture Agreement) shall constitute a failure to comply with this Order. Any Divestiture Agreement between Respondent (or a Divestiture Trustee) and a Commission-approved Acquirer of the Sun Perylene Assets shall be deemed incorporated by reference into this Order, and any failure by Respondent to comply with the terms of such Divestiture Agreement shall constitute a failure to comply with this Order.

C. Respondent shall include in any Divestiture Agreement related to the Sun Perylene Assets the following provisions, and Respondent shall commit that, upon reasonable notice and at the request of the Commission-approved Acquirer to the Respondent, Respondent shall promptly:

1. provide assistance and advice to enable the Commission-approved Acquirer to obtain all necessary permits and approvals from any Agency or Governmental Entity to manufacture and sell Perylenes;

2. provide such personnel, assistance, and training at a facility chosen by the Commission-approved Acquirer as the Commission-approved Acquirer might need to manufacture Perylenes, including, but not limited to, technical assistance relating to process and finishing

technology, formulation information, quality assurance, and quality control, and shall continue providing such assistance and training until the Commission-approved Acquirer is reasonably satisfied that it can manufacture Perylenes in substantially the same manner and quality employed or achieved by or on behalf of Respondent, but no longer than eighteen (18) months following the Closing Date;

3. provide the Commission-approved Acquirer with access to any equipment used in the formulation, manufacture, finishing, quality assurance or quality control of Perylenes that is owned or controlled by Respondent and located at any contract manufacturer, including, but not limited to, Forth Technologies and Lobeco Products, for use in the formulation, manufacture, finishing, quality assurance or quality control of Perylenes after the Closing Date. Such access shall be sufficient to allow the Commission-approved Acquirer to have made its full demand for Perylenes, and the Commission-approved Acquirer's access to such equipment shall take precedence over Respondent's use of the equipment. Respondent may charge the Commission-approved Acquirer for such access an amount that does not exceed the Costs to Respondent of acquiring and operating such equipment, and such Costs shall be apportioned between the Respondent and the Commission-approved Acquirer according to the percentage of time devoted to the products of each company; and

4. divest any additional, incidental assets of Respondent and make any further arrangements for transitional services within the first twelve (12) months after divestiture that may be reasonably necessary to assure the viability and competitiveness of the Sun Perylene Assets.

For the services listed above in Paragraphs II.C.1. and II.C.2., Respondent shall charge the Commission-approved Acquirer a

rate no greater than the Costs incurred by Respondent in rendering such services. Moreover, to the extent Respondent outsources any of the services listed in Paragraphs II.C.1. and II.C.2. to a third party, Respondent shall charge the Commission-approved Acquirer a rate no greater than the Costs Respondent would have incurred had Respondent provided such services directly.

D. Respondent shall provide the Commission-approved Acquirer with the opportunity to enter into employment contracts with the Sun Perylene Employees for a period of six (6) months from the Closing Date ("the Access Period"), provided that such contracts are contingent upon the Commission's approval of the Divestiture Agreement.

E. Respondent shall provide the Commission-approved Acquirer an opportunity to inspect the personnel files and other documentation related to the Sun Perylene Employees to the extent permissible under applicable laws, at the request of the Commission-approved Acquirer, at any time after execution of the Divestiture Agreement until the end of the Access Period.

F. During the Access Period, Respondent shall not interfere with the hiring or employing by the Commission-approved Acquirer of Sun Perylene Employees, and shall remove any impediments within the control of Respondent that may deter these employees from accepting employment with the Commission-approved Acquirer, including, but not limited to, any non-compete provisions of employment or other contracts with Respondent that would affect the ability or incentive of those individuals to be employed by the Commission-approved Acquirer. In addition, Respondent shall not make any counteroffer to a Sun Perylene Employee who receives a written offer of employment from the Commission-approved Acquirer.

Provided, however, that this Paragraph II.F. does not prohibit Respondent from making offers of employment to or

employing any Sun Perylene Employee during the Access Period where the Commission-approved Acquirer has notified Respondent in writing that the Commission-approved Acquirer does not intend to make an offer of employment to that employee.

Provided further, however, that this Paragraph II.F. does not prohibit Respondent from maintaining an existing (or concluding a new) non-disclosure provision of employment with the Sun Perylene Employees that is limited to Non-perylene Products.

G. Respondent shall provide all Sun Perylene Employees with reasonable financial incentives to continue in their positions until the Closing Date. Such incentives shall include a continuation of all employee benefits offered by Respondent until the Closing Date for the divestiture of the Sun Perylene Assets has occurred, including regularly scheduled raises and bonuses, and a vesting of all pension benefits (as permitted by law). In addition to the foregoing, Respondent shall provide to each Sun Perylene Employee who accepts employment with the Commission-approved Acquirer, an incentive equal to three (3) months of such employee's base annual salary to be paid upon the employee's completion of one (1) year of employment with the Commission-approved Acquirer.

Provided further, that if Ciba enters into an employment contract with one or more Sun Perylene Employee(s) of its choice before the Commission accepts the Consent Agreement, Respondent divests the Sun Perylene assets to Ciba pursuant to Paragraph II, and Respondent is not required to rescind the transaction with Ciba pursuant to Paragraph II.A., then Respondent shall be deemed to have satisfied the requirements of Paragraph II.G. of this Order.

H. For a period of one (1) year following the date the divestiture is accomplished, Respondent shall not, directly

or indirectly, solicit or otherwise attempt to induce any employees of the Commission-approved Acquirer with any amount of responsibility related to Perylenes to terminate their employment relationship with the Commission-approved Acquirer; *provided*, *however*, a violation of this provision will not occur if: (i) Respondent advertises for employees in newspapers, trade publications or other media not targeted specifically at the employees, or (ii) Respondent hires employees who apply for employment with Respondent, as long as such employees were not solicited by Respondent in violation of this paragraph.

I. Respondent shall secure, prior to divestiture, all consents and waivers from all private entities that are necessary for the divestiture of the Sun Perylene Assets to the Commission-approved Acquirer, or for the continued research, development, manufacture, sale, marketing or distribution of Perylenes by the Commission-approved Acquirer.

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

K. Counsel for Respondent (including in-house counsel under appropriate confidentiality arrangements) may retain unredacted copies of all documents or other materials provided to the Commission-approved Acquirer and may have access to original documents (under circumstances where copies of documents are insufficient or otherwise unavailable) provided to the Commission-approved Acquirer in order to:

1. comply with any Divestiture Agreement, this Order, any law (including, without limitation, any requirement to

obtain regulatory licenses or approvals), any data retention requirement of any applicable Governmental Entity, or any taxation requirements; or

2. defend against, respond to, or otherwise participate in any pending litigation, investigation, audit, process, subpoena or other proceeding relating to the divestiture or any other aspect of the Sun Perylene Assets or Perylene business; *provided*, *however*, that Respondent may disclose such information only as necessary for the purposes set forth in this Paragraph pursuant to an appropriate confidentiality order, agreement or arrangement.

Provided further, *however*:

1. Respondent shall require those who view such unredacted documents or other materials to enter into confidentiality agreements with the Commission–approved Acquirer; *provided, however,* that Respondent shall not be deemed to have violated this Paragraph if the Commission-approved Acquirer withholds such agreement unreasonably; and

2. Respondent shall use its best efforts to obtain a protective order to protect the confidentiality of such information during any adjudication.

L. The purpose of the divestiture of the Sun Perylene Assets is to ensure the continued use of the Sun Perylene Assets in the same business in which the Sun Perylene Assets were engaged at the time of the announcement of the 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. At any time after Respondent signs the Consent Agreement, the Commission may appoint an Interim Monitor to assure that Respondent expeditiously complies with all of its obligations and performs all of its responsibilities as required by this Order and by the Order to Maintain Assets (collectively, "the Orders").

B. If an Interim Monitor is appointed pursuant to this Paragraph or pursuant to Paragraph III.A. of the Order to Maintain Assets in this matter, Respondent shall consent to the following terms and conditions regarding the powers, duties, authorities, and responsibilities of the Interim Monitor:

1. The Commission shall select the Interim Monitor, 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 a proposed Interim Monitor within ten (10) days after receipt of written notice by the staff of the Commission to Respondent of the identity of any proposed Interim Monitor, Respondent shall be deemed to have consented to the selection of the proposed Interim Monitor.

2. The Interim Monitor shall have the power and authority to monitor Respondent's compliance with the terms of the Orders, and shall exercise such power and authority and carry out the duties and responsibilities of the Interim Monitor in a manner consistent with the purposes of the Orders and in consultation with the Commission.

3. Within ten (10) days after appointment of the Interim Monitor, Respondent shall execute a trust agreement that,

subject to the prior approval of the Commission, confers on the Interim Monitor all the rights and powers necessary to permit the Interim Monitor to monitor Respondent's compliance with the relevant terms of the Orders in a manner consistent with the purposes of the Orders.

4. The Interim Monitor shall serve until the later of:

   a. when the Sun Perylene Assets have been divested in a manner that fully satisfies the requirements of the Orders and the Commission-approved Acquirer is fully capable of, independently of Respondent, producing Perylenes acquired pursuant to a Divestiture Agreement; or

   b. when all the obligations under the Orders pertaining to the Interim Monitor's service have been fully performed.

Provided, however, that the Commission may extend or modify this period as may be necessary or appropriate to accomplish the purposes of the Orders.

5. Subject to any demonstrated legally recognized privilege of Respondent, the Interim Monitor shall have full and complete access to Respondent's personnel, books, documents, records kept in the normal course of business, facilities and technical information, and such other relevant information as the Interim Monitor may reasonably request, related to Respondent's compliance with its obligations under the Orders, including, but not limited to, its obligations related to the Sun Perylene Assets. Respondent shall cooperate with any reasonable request of the Interim Monitor and shall take no action to interfere with or impede the Interim Monitor's ability to monitor Respondent's compliance with the Orders.

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

7. Respondent shall indemnify the Interim Monitor and hold the Interim Monitor harmless against any losses, claims, damages, liabilities, or expenses arising out of, or in connection with, the performance of the Interim Monitor's duties, including all reasonable fees of counsel and other reasonable 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 Monitor.

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

9. The Commission may on its own initiative or at the request of the Interim Monitor issue such additional orders or directions as may be necessary or appropriate to assure compliance with the requirements of the Orders.

10. Respondent shall report to the Interim Monitor in accordance with the requirements of Paragraph V of this Order and/or as otherwise provided in any agreement approved by the Commission. The Interim Monitor shall evaluate the reports submitted to the Interim Monitor by Respondent and any reports submitted by the Commission-approved Acquirer with respect to the performance of Respondent's obligations under the Orders or the Divestiture Agreement. Within one (1) month from the date the Interim Monitor receives these reports, the Interim Monitor shall report in writing to the Commission concerning compliance by Respondent with the provisions of the Orders.

11. Respondent may require the Interim Monitor and each of the Interim Monitor's consultants, accountants, attorneys and other representatives and assistants to sign a customary confidentiality agreement; *provided, however,* that such agreement shall not restrict the Interim Monitor from providing any information to the Commission.

C. The Interim Monitor appointed pursuant to Paragraph III.A. of this Order or Paragraph III.A. of the Order to Maintain Assets in this matter may be the same person appointed as Divestiture Trustee pursuant to Paragraph IV.A. of this Order.

IV.

IT IS FURTHER ORDERED that:

A. If Respondent has not divested the Sun Perylene Assets within the time required by Paragraph II.A. of this Order,

the Commission may appoint a Divestiture Trustee to divest the Sun Perylene Assets in a manner that satisfies the requirements of Paragraph II. In the event that the Commission or the Attorney General brings an action pursuant to § 5(*l*) of the Federal Trade Commission Act, 15 U.S.C. § 45(*l*), or any other statute enforced by the Commission, Respondent shall consent to the appointment of a Divestiture Trustee in such action to divest the relevant assets. Neither the appointment of a Divestiture Trustee nor a decision not to appoint a Divestiture 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 Divestiture Trustee, pursuant to § 5(*l*) of the Federal Trade Commission Act, or any other statute enforced by the Commission, for any failure by Respondent to comply with this Order.

B. If a Divestiture 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 Divestiture Trustee's powers, duties, authority, and responsibilities:

1. The Commission shall select the Divestiture Trustee, subject to the consent of Respondent, which consent shall not be unreasonably withheld. The Divestiture 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 Divestiture Trustee within ten (10) days after notice by the staff of the Commission to Respondent of the identity of any proposed Divestiture Trustee, Respondent shall be deemed to have consented to the selection of the proposed Divestiture Trustee.

2. Subject to the prior approval of the Commission, the Divestiture Trustee shall have the exclusive power and

authority to divest the assets that are required by this Order to be divested.

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

4. The Divestiture Trustee shall have twelve (12) months from the date the Commission approves the trust agreement described in Paragraph IV.B.3. to accomplish the divestiture, which shall be subject to the prior approval of the Commission. If, however, at the end of the twelve-month period, the Divestiture 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 Divestiture Trustee, by the court; *provided, however,* the Commission may extend the divestiture period only two (2) times.

5. Subject to any demonstrated legally recognized privilege, the Divestiture Trustee shall have full and complete access to the personnel, books, records and facilities related to the relevant assets that are required to be divested by this Order and to any other relevant information, as the Divestiture Trustee may request. Respondent shall develop such financial or other information as the Divestiture Trustee may request and shall cooperate with the Divestiture Trustee. Respondent shall take no action to interfere with or impede the Divestiture Trustee's accomplishment of the divestiture. Any delay in accomplishing the 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 Divestiture Trustee, by the court.

6. The Divestiture Trustee shall use 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 and at no minimum price. The divestiture shall be made in the manner and to an acquirer as required by this Order; *provided, however*, if the Divestiture Trustee receives bona fide offers from more than one acquiring entity, and if the Commission determines to approve more than one such acquiring entity, the Divestiture Trustee shall divest to the acquiring entity selected by Respondent from among those approved by the Commission; *provided further, however*, that Respondent shall select such entity within five (5) days after receiving notification of the Commission's approval.

7. The Divestiture 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 Divestiture 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 Divestiture Trustee's duties and responsibilities. The Divestiture Trustee shall account for all monies derived from the divestiture and all expenses incurred. After approval by the Commission and, in the case of a court-appointed Divestiture Trustee, by the court, of the account of the Divestiture Trustee, including fees for the Divestiture Trustee's services, all remaining monies shall be paid at the direction of the Respondent, and the Divestiture Trustee's power shall be terminated. The compensation of the Divestiture Trustee shall be

based at least in significant part on a commission arrangement contingent on the divestiture of all of the relevant assets that are required to be divested by this Order.

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

9. If the Divestiture Trustee ceases to act or fails to act diligently, a substitute Divestiture 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 Divestiture 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 divestiture required by this Order.

11. The Divestiture Trustee shall have no obligation or authority to operate or maintain the relevant assets required to be divested by this Order.

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

13. Respondent may require the Divestiture Trustee and each of the Divestiture Trustee's consultants, accountants, attorneys and other representatives and assistants to sign a customary confidentiality agreement; *provided, however,* such agreement shall not restrict the Divestiture Trustee from providing any information to the Commission.

C. The Divestiture Trustee appointed pursuant to Paragraph IV.A. of this Order may be the same Person appointed as Interim Monitor pursuant to Paragraph III.A. of this Order or Paragraph III.A. of the Order to Maintain Assets in this matter.

V.

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 Paragraphs II.A. through II.I. of this Order, Respondent shall submit to the Commission a verified written report setting forth in detail the manner and form in which it intends to comply, is complying, and has complied with this Order. Respondent shall submit at the same time a copy of its report concerning compliance with this Order to the Interim Monitor, if any Interim Monitor has been appointed.

VI.

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

VII.

IT IS FURTHER ORDERED that, for the purpose of determining or securing compliance with this Order, and subject to any legally recognized privilege, and upon written request with reasonable notice to Respondent made to its counsel's principal United States offices, Respondent shall permit any duly authorized representative 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 related 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.

By the Commission.

CONFIDENTIAL APPENDICES I AND II REDACTED FROM PUBLIC RECORD VERSION

ORDER TO MAINTAIN ASSETS

The Federal Trade Commission ("Commission") having initiated an investigation of the proposed acquisition by Respondent Dainippon Ink and Chemicals, Incorporated ("Dainippon"), hereinafter referred to as "Respondent," of certain assets of Bayer Corporation ("Bayer"), and Respondent having been furnished thereafter with a copy of a draft of Complaint that the Bureau of Competition proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge Respondent with violations of Section 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 Orders ("Consent Agreement"), containing the proposed Decision and Order, an admission by Respondent of all the jurisdictional facts set forth in the aforesaid draft of Complaint, a statement that the signing of said 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 Section 5 of the Federal Trade Commission Act, and that the Acquisition, if consummated, would violate Section 7 of the Clayton Act and Section 5 of the Federal Trade Commission Act, 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 Maintain Assets:

1. Respondent Dainippon is a corporation organized, existing and doing business under and by virtue of the laws of Japan, with its office and principal place of business located at DIC Building 7-20 Nihonbashi 3-Chome, Chou-ku Tokyo 103 Japan.

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 to Maintain Assets, the following definitions shall apply:

A. "Dainippon" or "Respondent" means Dainippon Ink and Chemicals, Incorporated, its directors, officers, employees, agents, representatives, predecessors, successors, and assigns; its joint ventures, subsidiaries, divisions, groups and affiliates controlled by Dainippon Ink and Chemicals, Incorporated (including, but not limited to, Sun Chemical Group B.V. and Sun Chemical Corporation), and the respective directors, officers, employees, agents, representatives, successors, and assigns of each.

B. "Bayer" means Bayer Corporation, a corporation organized, existing, and doing business under and by virtue of the laws of Indiana, with its offices and principal place of business located at 100 Bayer Road, Pittsburgh, Pennsylvania 15205; and joint ventures, subsidiaries, divisions, groups, and affiliates controlled by Bayer Corporation.

C. "Commission" means the Federal Trade Commission.

D. "Acquisition" means the proposed acquisition by Sun Chemical Corporation, a wholly-owned subsidiary of

Dainippon, of certain assets of Bayer by means of an Asset Purchase Agreement dated as of February 15, 2002, by and between Bayer and Sun Chemical Corporation.

E. "Ciba" means, collectively, Ciba Specialty Chemicals Inc., a corporation organized, existing and doing business under and by virtue of the laws of Switzerland, with its offices and principal place of business located at Klybeckstrasse 141, 4057 Basel, Switzerland, and Ciba Specialty Chemicals 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 560 White Plains Road, Tarrytown, New York 10591-9005.

F. "Ciba Asset Purchase Agreement" means the Asset Purchase Agreement by and between Respondent as Seller, and Ciba as Purchaser, dated as of December 19, 2002, and all amendments, exhibits, attachments, agreements, and schedules thereto, related to the Sun Perylene Assets to be divested to accomplish the requirements of this Order. The Ciba Asset Purchase Agreement is attached to the Decision and Order as non-public Appendix II.

G. "Commission-approved Acquirer" means an entity approved by the Commission to acquire the Sun Perylene Assets, including Ciba if Ciba acquires the Sun Perylene Assets pursuant to Paragraph II.A. of the Decision and Order.

H. "Divestiture Agreement" means any agreement between Respondent and a Commission-approved Acquirer (or between a trustee appointed pursuant to Paragraph IV.A. of the Decision and Order and a Commission-approved Acquirer), including the Ciba Asset Purchase Agreement, and all amendments, exhibits, attachments, agreements, and schedules thereto, related to the Sun Perylene Assets to be divested that have been approved by the Commission to accomplish the requirements of the Decision and Order.

I. "Divestiture Trustee" means the trustee appointed by the Commission pursuant to Paragraph IV.A. of the Decision and Order.

J. "Interim Monitor" means any trustee appointed pursuant to Paragraph III of this Order to Maintain Assets or Paragraph III of the Decision and Order.

K. "Material 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.

L. "Sun Perylene Assets" shall have the same meaning as in the Decision and Order.

PROVIDED, HOWEVER, any term used in this Order to 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 Maintain Assets becomes final:

A. Respondent shall take such actions as are reasonably necessary to maintain the viability and marketability of the Sun Perylene Assets, and to prevent the destruction, removal, wasting, deterioration, sale, disposition, transfer or impairment of any of the Sun Perylene Assets, except for ordinary wear and tear and as would otherwise occur in the ordinary course of business.

B. Except to the extent necessary to assure compliance with this Order to Maintain Assets, the Consent Agreement, and the Decision and Order, Respondent shall not allow any person not

involved in the management or operations of the Sun Perylene Assets to have access to any Material Confidential Information concerning the Sun Perylene Assets.

III.

IT IS FURTHER ORDERED that:

A. At any time after the Commission issues this Order to Maintain Assets, the Commission may appoint an Interim Monitor to ensure that Respondent expeditiously complies with its obligations relating to the Sun Perylene Assets under the terms of Paragraph II of this Order to Maintain Assets and of any corresponding terms in the Consent Agreement and the Decision and Order.

B. Respondent shall consent to the following terms and conditions regarding the powers, duties, authorities and responsibilities of the Interim Monitor appointed pursuant to Paragraph III.A. of this Order to Maintain Assets or Paragraph III.A. of the Decision and Order:

1. The Commission shall select the Interim Monitor, 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 a proposed Interim Monitor within ten (10) days after receipt of written notice by the staff of the Commission to Respondent of the identity of any proposed Interim Monitor, Respondent shall be deemed to have consented to the selection of the proposed Interim Monitor.

2. The Interim Monitor shall have the power and authority to monitor Respondent's compliance with the terms of Paragraph II of this Order to 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 Interim Monitor, Respondent shall execute a trust agreement that, subject to the prior approval of the Commission, confers on the Interim Monitor all the rights and powers necessary to permit the Interim Monitor to monitor Respondent's compliance with the terms of this Order to Maintain Assets, the Consent Agreement, and the Decision and Order.

4. For purposes of this Order to Maintain Assets, the Interim Monitor shall serve for such time as is necessary to monitor Respondent's compliance with the provisions of Paragraph II of this Order.

5. Subject to any demonstrated legally recognized privilege, the Interim Monitor shall have full and complete access to Respondent's personnel, books, documents, records kept in the normal course of business, facilities and technical information, and such other relevant information as the Interim Monitor may reasonably request, related to Respondent's compliance with its obligations under this Order to Maintain Assets, the Consent Agreement, and the Decision and Order, including, but not limited to, its obligations related to the Sun Perylene Assets. Respondent shall cooperate with any reasonable request of the Interim Monitor and shall take no action to interfere with or impede the Interim Monitor's ability to monitor Respondent's compliance with the this Order to Maintain Assets, the Consent Agreement, and the Decision and Order.

6. The Interim Monitor shall serve, without bond or other security, at the expense of the Respondent, or as set out in the Ciba Asset Purchase Agreement, on such reasonable and customary terms and conditions as the Commission may set. The Interim Monitor shall have the 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 Interim Monitor's duties and responsibilities. The Commission may, among

other things, require the Interim Monitor and each of the Monitor's consultants, accountants, attorneys and other representatives and assistants to sign an appropriate confidentiality agreement related to Commission materials and information received in connection with the performance of the Interim Monitor's duties.

7. Respondent shall indemnify the Interim Monitor and hold the Interim Monitor harmless against any losses, claims, damages, liabilities or expenses arising out of, or in connection with, the performance of the Interim Monitor's duties, including all reasonable fees of counsel and other reasonable 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 Monitor.

8. If the Commission determines that the Interim Monitor has ceased to act or failed to act diligently, the Commission may appoint a substitute Interim Monitor in the same manner as provided in Paragraph III.A. of this Order to Maintain Assets or Paragraph III.A. of the Decision and Order.

9. The Commission may on its own initiative or at the request of the Interim Monitor issue such additional orders or directions as may be necessary or appropriate to assure compliance with the requirements of this Order to Maintain Assets, the Consent Agreement and the Decision and Order.

10. Respondent shall report to the Interim Monitor in accordance with the requirements of Paragraph V.A. of the Decision and Order and/or as otherwise provided in any agreement approved by the Commission. The Interim Monitor shall evaluate the reports submitted to the Interim Monitor by Respondent, and any reports submitted by the Commission-approved Acquirer with respect to the

performance of Respondent's obligations under this Order to Maintain Assets, the Consent Agreement, the Decision and Order, or the Divestiture Agreement. Within one (1) month from the date the Interim Monitor receives these reports, the Interim Monitor shall report in writing to the Commission concerning compliance by Respondent with the provisions of this Order to Maintain Assets, the Consent Agreement, the Decision and Order, and the Divestiture Agreement.

C. The Interim Monitor appointed pursuant to Paragraph III.A. of this Order to Maintain Assets or Paragraph III.A. of the Decision and Order may be the same person appointed as the Divestiture Trustee pursuant to Paragraph IV.A. of the Decision and Order in this matter.

IV.

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

V.

IT IS FURTHER ORDERED that for the purposes of determining or securing compliance with this Order to Maintain Assets, and subject to any legally recognized privilege, and upon written request with reasonable notice to Respondent, 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 to Maintain Assets; 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.

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. Three (3) business days after the divestiture of the Sun Perylene Assets pursuant to Paragraph II or Paragraph V of the Decision and Order. *Provided, however,* that if Respondent divests the Sun Perylene Assets to Ciba prior to the date the Commission issues the Decision and Order, and if at the time the Commission issues the Decision and Order it notifies Respondent that Ciba is not an acceptable acquirer of the Sun Perylene Assets or that the manner in which the divestiture was accomplished was not acceptable, then this Order to Maintain Assets shall terminate three (3) business days after the subsequent divestiture of the Sun Perylene Assets pursuant to Paragraph II.A. or IV of the Decision and Order.

By the Commission.

Analysis of Proposed Consent Order to Aid Public Comment

The Federal Trade Commission ("Commission") has accepted, subject to final approval, an Agreement Containing Consent Orders ("Consent Agreement") from Dainippon Ink and Chemicals, Incorporated ("Dainippon"), which is designed to remedy the anticompetitive effects resulting from Dainippon's acquisition of Bayer Corporation's ("Bayer") high performance pigments business. Under the terms of the Consent Agreement, Dainippon will be required to divest its perylene business to Ciba Specialty Chemicals Inc. and Ciba Specialty Chemicals Corporation (collectively, "Ciba").

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 it final.

Pursuant to an asset purchase agreement dated February 15, 2002, Dainippon, through its wholly-owned U.S. subsidiary, Sun Chemical Corporation ("Sun Chemical"), agreed to acquire Bayer's high performance pigments business for approximately $57.8 million (the "Proposed Acquisition"). The Commission's Complaint alleges that the Proposed Acquisition, if consummated, would violate Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18, and Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45, in the worldwide market for the research, development, manufacture, and sale of perylenes.

The Parties

Dainippon is a diversified global chemicals company based in Tokyo, Japan. Primarily through Sun Chemical, Dainippon manufactures and sells a full range of organic pigments, including perylenes. Sun Chemical is the third largest supplier of perylenes

in the world. Sun Chemical's perylenes are produced through two third-party, "toll" manufacturers, Lobeco Products and Forth Technologies, which are located in South Carolina and Kentucky, respectively. Sun Chemical provides these toll manufacturers the intellectual property, manufacturing know-how, and raw materials, as well as some of the equipment, to produce perylenes.

Bayer is a subsidiary of Bayer AG, a diversified, international healthcare and chemicals group based in Leverkusen, Germany. Headquartered in Pittsburgh, Pennsylvania, Bayer engages in the healthcare, life sciences, polymers, and chemicals industries. Bayer manufactures organic pigments at its facilities located in Bushy Park, South Carolina, and Lerma, Mexico. Bayer primarily participates in the high performance pigments segment and is considered a leader in the production of perylenes, which it manufactures at the Bushy Park plant. Bayer is currently the second largest supplier of perylenes in the world.

The Perylene Market

Pigments are small particles that are used to impart color to a wide variety of products, including inks, coatings (such as automotive coatings and housepaints), plastics, and fibers. Broadly speaking, there are two main categories of pigments: organic and inorganic. Organic pigments are chemically synthesized, carbon-based compounds that generate a broad spectral range of brilliant, transparent, or opaque color shades. Inorganic pigments, on the other hand, are generally based on metal oxides and tend to impart a narrower range of dull, opaque earth tones. Because of these differences, organic and inorganic pigments often are blended together to achieve a particular color shade and effect, and thus are used as complements rather than substitutes.

Organic pigments can be further categorized into two main groups: commodity (or classical) organic pigments and "high performance" pigments. High performance pigments offer far superior durability and light-fastness compared to commodity

organic pigments. Accordingly, high performance pigments are necessary to prevent color fading in products that endure prolonged exposure to sunlight and weather, such as automotive coatings. Commodity organic pigments, because of their lower quality, cannot substitute for high performance pigments in such demanding applications. High performance pigments are significantly more expensive than commodity organic pigments.

Perylenes are a class of high performance pigments that impart unique shades of red, such as maroon and violet, and offer a particularly high degree of transparency. Perylenes are primarily used to impart color to automotive coatings, and are used to a lesser degree in plastics and carpet fibers. Because no other pigment or colorant offers the same combination of unique color shades and high performance characteristics that perylenes provide, perylene customers could not achieve the same colors and performance levels in their products without perylenes. Thus, there are no substitute products that perylene customers could turn to, even if faced with a significant price increase for perylenes.

As Sun Chemical and Bayer are two of only four viable suppliers of perylenes in the world, the perylene market is already highly concentrated, as measured by the Herfindahl-Hirschman Index ("HHI"). The Proposed Acquisition would significantly increase concentration in the market to an HHI level of 4,856, an increase of 680 points. The Proposed Acquisition would also eliminate the vigorous head-to-head competition between Sun Chemical and Bayer that has benefitted perylene customers in the past. By eliminating competition between Sun Chemical and Bayer in the market for perylenes, the Proposed Acquisition would allow the combined firm to unilaterally exercise market power, as well as increase the likelihood of coordinated interaction among the remaining perylene suppliers. As a result, the Proposed Acquisition would increase the likelihood that purchasers of perylenes would be forced to pay higher prices for perylenes and that innovation and service in this market would decrease.

Entry into the perylene market is not likely and would not be timely to deter or counteract the anticompetitive effects that would result from the Proposed Acquisition. It would take a new entrant well over two years to complete all of the requisite steps for entry, including: researching and developing perylene technology; building a perylene manufacturing facility; perfecting the art of manufacturing perylenes; and passing the rigorous battery of tests required for customer approval. Additionally, new entry into the perylene market is unlikely to occur because the capital investment required to become a viable perylene supplier is high relative to the limited sales opportunities available to new entrants.

The Consent Agreement

The Consent Agreement requires Dainippon to divest Sun Chemical's perylene business to Ciba, a diversified specialty chemicals company that is a leading supplier of pigments (but does not manufacture or sell perylenes). This divestiture would fully remedy the Proposed Acquisition's anticompetitive effects in the perylene market for several reasons. First, Ciba is the best-positioned acquirer of Sun Chemical's perylene business. Second, under the terms of the Consent Agreement, Ciba will receive everything it needs to step into the shoes of Sun Chemical in the perylene market. Finally, the Consent Agreement includes certain measures that will help ensure an effective transition of the Sun Chemical perylene assets to Ciba.

Ciba is the best-positioned acquirer of Sun Chemical's perylene business for several reasons. First, Ciba is committed to the high performance pigments market. Ciba is already a leading supplier of other high performance pigments, such as quinacridones and diketo pyrollo pyrrols. As a result, Ciba has the ability and incentive to take over and further develop Sun Chemical's perylene business, because the divestiture will enable Ciba to offer a wide range of high performance pigments. Second, because Ciba already has a reputation for quality and consistency with the customers of high performance pigments

(such as automotive coatings manufacturers), it will be relatively easy for Ciba to convince these customers that it can be a viable supplier of perylenes. Finally, customers that have expressed concern about the Proposed Acquisition's likely harmful effects on the perylene market feel that a divestiture of Sun Chemical's perylene business to Ciba would resolve their concern.

Ciba will receive all of the assets it needs to replace the competition offered by Sun Chemical in the perylene market before the Proposed Acquisition. Under the Consent Agreement, Sun Chemical will divest its entire perylene business to Ciba. The divestiture includes: all of Sun Chemical's current perylene products; all perylene research and development; manufacturing technology; scientific know-how; technical assistance and expertise; customer lists; raw material, intermediate, and finished product inventory; and perylene product names, codes, and trade dress. Because Sun Chemical manufactures perylenes through toll manufacturers, no manufacturing equipment or facilities are included in the divestiture. Instead, as required by the Consent Agreement, Ciba has entered into contracts with Sun Chemical's perylene toll manufacturers – Lobeco Products and Forth Technologies – that will become effective upon closing the divestiture.

Additionally, the Consent Agreement includes several measures to ensure an effective transition of the tangible and intangible assets related to the perylene business from Sun Chemical to Ciba. First, Ciba will have the opportunity to hire one or more Sun Chemical employees who have key responsibilities in connection with the company's perylene business. These former Sun Chemical employees will help Ciba not only to understand Sun Chemical's perylene manufacturing, research, and development process, but also to identify any missing or incomplete assets in the divestiture. Second, the Consent Agreement requires Sun Chemical to provide technical assistance to Ciba for a period of one year following the divestiture to help Ciba successfully take over Sun Chemical's perylene product line. Third, under the Consent Agreement, the

Commission may appoint an interim monitor to supervise the transfer of assets and assure that Sun Chemical provides adequate technical assistance to Ciba.

Finally, in the event that the divestiture of Sun Chemical's perylene business to Ciba fails, the Consent Agreement includes certain contingent provisions to remedy the Proposed Acquisition's anticompetitive effects. If, before the Commission finalizes the Consent Order in this matter, the Commission notifies Dainippon that Ciba is not an acceptable acquirer of Sun Chemical's perylene business or that the manner in which the divestiture to Ciba was accomplished was not acceptable, the Consent Agreement requires Dainippon to rescind the transaction with Ciba and divest Sun Chemical's perylene business to an acquirer that receives the prior approval of the Commission within ninety (90) days of the rescission. Additionally, if Dainippon does not divest Sun Chemical's perylene business to either Ciba or a Commission-approved acquirer within the time required by the Consent Agreement, the Commission may appoint a trustee to divest Sun Chemical's perylene business in a manner that satisfies the requirements of the Consent Agreement.

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

Quinacridones

Sun Chemical and Bayer also manufacture quinacridones, another class of red-shade high performance organic pigments. Unlike for perylenes, however, the Proposed Acquisition would not increase the likelihood that customers would pay higher prices for quinacridones, or that service and innovation for these products would decrease. Two companies – Ciba and Clariant – are by far the largest manufacturers of quinacridones in the world, and they are the top two choices for many customers. With respect to quinacridones, Sun Chemical and Bayer are each less

than half the size of Ciba or Clariant. Unlike for perylenes, where Sun Chemical and Bayer often vigorously compete head-to-head for business, the parties are less likely to face each other in head-to-head competition for quinacridone business. Many customers believe that, after the Proposed Acquisition, the combined Sun Chemical/Bayer will become a stronger quinacridone competitor, able to compete more effectively against Ciba and Clariant. In addition, several new quinacridone suppliers recently have entered the market, and those suppliers will provide increasing competition.

Complaint

IN THE MATTER OF

LENTEK INTERNATIONAL, INC., ET AL.

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

Docket 9303; File No. 0123117
Complaint, August 27, 2002--Decision, March 14, 2003

This consent order addresses practices used by Respondent Lentek International, Inc. and individual Respondents Joseph Durek and Lou Lentine related to the advertising, offering for sale, sale, and distribution of various air cleaning products and ultrasonic/electromagnetic pest control devices. The order, among other things, prohibits the respondents from representing – unless they possess competent and reliable scientific evidence that substantiates the representation – (1) that any air cleaning product will eliminate, remove, clear, clean, neutralize, sanitize, oxidize, control, or reduce any indoor air pollutant, or that use of such product will prevent, reduce the incidence of, or provide relief from any medical or health-related condition; (2) that their PestContro products, or similar pest control products, will repel, control, or eliminate, temporarily or indefinitely, any rodent, insect, or other animal pest, or that they will do so in an area of a certain size; (3) that PestContro products, or substantially similar products, will alter the electromagnetic field inside the walls or wiring of a home in a manner that drives away insects, rodents, and other animal pests; or (4) that their MosquitoContro products, or substantially similar products, will repel mosquitoes from a user's body, or that such products are an effective alternative to the use of chemical pesticides or other products formulated to kill or repel mosquitoes. The order also prohibits the respondents from making unsubstantiated representations about the benefits, performance, or efficacy of any product.

Participants

For the Commission: *Elena Paoli, Carol Jennings, Constance M. Vecellio, Edwin Rodriguez, Joni Lupovitz, Robert Frisby, Elaine D. Kolish* and *Susan Braman.*

For the Respondent: *Alicia Batts, L. Christian Marlin,* and *Vineeta A. Bathia, Foley & Lardner.*

COMPLAINT

The Federal Trade Commission, having reason to believe that Lentek International, Inc., a corporation, and Joseph Durek and Lou Lentine, individually and as officers of the corporation ("respondents"), have violated the provisions of the Federal Trade Commission Act, and it appearing to the Commission that this proceeding is in the public interest, alleges:

1. Respondent Lentek International, Inc., is a Florida corporation with its principal office or place of business at 1629 Prime Court, Suite 800, Orlando, Florida 32859.

2. Respondent Joseph Durek is Chairman and Chief Executive 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 Lentek International, Inc.

3. Respondent Lou Lentine is President 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 Lentek International, Inc.

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.

Sila Air Cleaning Products

5. Respondents have manufactured, advertised, labeled, offered for sale, sold, and distributed air cleaning products to the public, including the Sila Plug-In Compact Air Purifier, the Sila Clean Air, the Sila Fresh Air, the Sila My Air Personal Purifier, the Sila My Air Personal Air Source, the My Air Mini Personal Air

Purifier, the Sila Ionic Fresh Home and the Sila Auto Air Purifier & Deodorizer (collectively, "Sila Air Cleaning Products"). The Sila Air Cleaning Products purport to use ozone and ionization to remove pollutants and clean indoor air. They also purport to provide relief from allergies and other ailments. The Sila Air Cleaning Products are "devices," within the meaning of Sections 12 and 15 of the Federal Trade Commission Act.

6. Respondents have disseminated or have caused to be disseminated advertisements for the Sila Air Cleaning Products, including but not necessarily limited to the attached Exhibits A through J. These advertisements contain the following statements:

A. "People are now able to breathe clean and safe indoor air with our new **Sila™ Air Purifiers/Cleaners.** This innovative line of air purifiers neutralizes unpleasant odors and airborne pollutants, and brings a breath of clean 'mountain-fresh' air into the home or workplace using the natural processes that Nature uses to clean outdoor air. Lentek's 'Zyonic Technology™' energizes stale indoor air and cleans it with a Super-Oxidizing sanitizing process called ionization."
(www.lentek.com/products/AirPurifiers/) (3/9/01) [Exhibit A]

B. "Do you have allergies? Is the air in your office or home clean?"
(www.lentek.com/products/AirPurifiers/) (3/9/01) [Exhibit B]

C. "Create 'Mountain Fresh' air with the use of Lentek's Zyonic Technology™! Sila™ Air Purifiers and Deodorizers recreate the natural process that nature uses to combat air pollution by generating low levels of super oxygenated air (O_3) and ionization – at prices everyone will love!"
(www.lentek.com/products/AirPurifiers/true.asp) (6/13/01)

[Exhibit C]

D. "***Why should you be concerned about the quality of the air you're breathing?***
Many people are aware of the damage that outdoor air pollution can cause to your health. What they may not know is that indoor air pollution exists, and can have a significant effect on their health also.
According to EPA studies, certain levels of air pollution indoors may be
2-5 times higher than outdoors, and on occasion more than 100 times higher.
Now consider this ... most people spend 90% of their time indoors.
All of these pollutants could be contributing to those frequent unexplained headaches or the sleepless nights.
What can the Sila IO-31 do to help eliminate indoor air pollution?
By introducing negative ions, using Lentek's ***'Zyonic™' Air Energizing Technology***, to pollutants, such as dust, smoke, soot and pollen, the combined molecules drop to the ground, significantly reducing the number of airborne pollutants.
Lentek has developed 'Zyonic Technology™' to help breakdown the impurities in the air. It helps to destroy pollen, flying dust, mold, mildew, fungi, bacteria and more.
For allergy and hay-fever sufferers this is great news.
...
GREAT USES: ... Help remove the germs & bacteria in public places. Help remove second-hand cigarette smoke."
(Sila™ My Air™ Personal Air Source instruction guide)
[Exhibit D]

E. "Plug in your **Auto Air Purifier** to any standard cigarette lighter to produce a cleaner, healthier driving environment. As you know, airborne toxins are present everywhere, especially in the car when it [sic] is concentrated in a small area. The Auto Air Purifier uses Lentek's exclusive Zyonic Technology™ to neutralize pollen, dust, smog,

exhaust, fumes and other outdoor pollutants from your car's environment.

Zyonic Technology™ electronically oxidates the air sending the odor-neutralizing technology through the air ducts to remove the pollutants from your driving environment. This will help keep you alert while driving." (www.lentek.com/Archive/ELetterfiles/feb01.html) (3/09/01) [Exhibit E]

F. "Sila™ Clean Air uses Zyonic Technology™ to improve the air you breathe!

Indoor air pollution, according to the EPA, is the biggest pollution problem in the United States today. The average person spends 90% of his or her time indoors where pollutants such as bacteria and dust remain trapped. You are much more likely to get sick from the air you breathe indoors than outdoors. How can you fight indoor air pollution and improve the air you breathe? With Sila™ by Lentek.

The effective Zyonic Technology is contained in a compact, portable, and economical device. Remove Odors using Super Oxidating Sanitizer (SOS) technology [sic] actually refreshes oxygen molecules in the air. Great for kitchens, litter box area, or anywhere odor may hide. The Sila Clean Air fights these indoor pollutants: bacteria, mold, mildew, dust, pet dander, fungus, dust mites, dead skin flakes, chemical odors, pet odors, human odors and more. Ideal for people with allergies, hay fever, unexplained headaches and fatigue." (www.lentek.com/shopping) (10/10/01) [Exhibit F]

G. "Lentek's new My Air™ Personal Purifier with Pollution Sensor monitors and controls the air quality around you while keeping you energized and stress-free by neutralizing airborne pollutants. Lentek's Zyonic

Technology produces ions to clean and neutralize odors in the air you breathe. ...

Ideal for:
Allergies
Areas with stale air
Hay fever sufferers ..." (www.lentek.com/shopping) (10/10/01) [Exhibit G]

H. "Sila™ Fresh Air by Lentek uses Zyonic Technology™ to improve the air you breathe!

Indoor air pollution, according to the EPA, is the biggest pollution problem in the United States today. The average person spends 90% of his or her time indoors where pollutants such as bacteria and dust remain trapped. You are much more likely to get sick from the air you breathe indoors than outdoors. How can you fight indoor air pollution and improve the air you breathe? With Sila™ by Lentek.

This effective Zyonic Technology is contained in a compact portable, and economical device. The Sila Fresh Air purifies and cleans the air with trillions of negative ions. The negative ions attach to airborne pollutants such as dust, smoke, soot and pollen, dropping them to the ground. This significantly reduces the pollutants in the air, cleaning the air you breathe. ... Ideal for people with allergies, hay fever, unexplained headaches, and fatigue." (www.lentek.com/shopping) (10/10/01) [Exhibit H]

I. "My Air™ Mini Personal Air Purifier

Clean and Neutralize Your Air

Allergies getting you down?
Tired of breathing in second-hand smoke?

Everywhere you go you are in danger of air pollution these days. But now you can take fresh air with you whereever [sic] you go. **'My Air'™ Mini Personal Air Purifier** keeps you energized and stress-free by cleaning and neutralizing airborne pollutants and odors. Lentek's Zyonic Technology produces ions to clean and neutralize odors in the air you breathe."
www.lentek.com/shopping/ (10/10/01) [Exhibit I]

J. "Sila – PURE, CLEAN AIR

Possible indoor pollutants:

Mildew	Mold	Aerosol sprays
Fungus	Dust	Air Fresheners
Dust Mites	Pet Dander	Cleaning Supplies
Dead Skin Flakes	Bacteria	Plastics

PLUS MANY CHEMICALS!

Pollutants	**Sources**	**Symptoms**
Benzene	Paint, new carpets, new drapes and upholstery	Headaches, eye/skin irritation, fatigue, cancer
Ammonia	Tobacco smoke, cleaning supplies	Eye/skin irritation, headaches, nosebleeds, sinus problems
Chloroform	Paint, new drapes, upholstery, new carpeting	Headaches, asthma attack, dizziness, eye/skin irritation

Formaldehyde	Tobacco smoke, plywood, furniture, particle board, office dividers, new carpets, new drapes, wallpaper, paneling	Headaches, eye/skin irritation, drowsiness, fatigue, respiratory problems, memory loss, depression, gynecological problems, cancer
Benzopyrene	Tobacco smoke	Asthma attacks, eye/skin irritation, respiratory irritation
Hydrocarbons	Tobacco smoke, gas burners, furnaces	Headaches, fatigue, nausea, dizziness, breathing difficulty
Trichloroetylene [sic]	Paint, glues, furniture, wallpaper	Headaches, eye/skin irritation, respiratory irritation
Xylene	Paint, new drapes, new carpets, cleaning supplies	Headaches, dizziness, fatigue

HOW DOES Sila™ HELP ELIMINATE INDOOR AIR POLLUTION?

Lentek has developed a process called 'Zyonic™ Technology.' This technology has two processes that occur simultaneously. The first is called 'Super Oxidating Sanitizer' (SOS). SOS restores freshness and neutralizes odors and pollutants by introducing super oxygenated molecules (O_3). The SOS process takes oxygen (O_2) and forces them into O_3 molecules. The third oxygen molecule then splits off and neutralizes the odor or pollutant and leaves the other two oxygen molecules behind as fresh breathable O_2.
The second process is called Zyonic™ Air Energizing Technology. This process introduces negative ions to the pollutants, such as dust, smoke, soot and pollen. The combined molecules then drop to the ground, significantly reducing the number of airborne pollutants. For allergy and hay fever sufferers, this is ideal!"
(Sila Air Cleaning products brochure) [Exhibit J]

7. Through the means described in Paragraph 6, respondents have represented, expressly or by implication, that the Sila Air Cleaning Products eliminate, remove, clear, clean, or substantially reduce airborne pollutants, dust, smoke, soot, pollen, mold, mildew, fungi, bacteria, germs, cigarette smoke, smog, car exhaust, car fumes, pet dander, dust mites, dead skin flakes, chemical fumes, benzene, ammonia, chloroform, formaldehyde, benzopyrene, hydrocarbons, trichloroethylene, and xylene from a user's breathing zone.

8. Through the means described in Paragraph 6, respondents have represented, expressly or by implication, that the Sila Air Cleaning Products prevent or provide relief from allergies, insomnia, hayfever, headaches and fatigue.

9. Through the means described in Paragraphs 6, respondents have represented, expressly or by implication, that they possessed and relied upon a reasonable basis that substantiated the

representations set forth in Paragraphs 7 and 8, at the time the representations were made.

10. In truth and in fact, respondents did not possess and rely upon a reasonable basis that substantiated the representations set forth in Paragraphs 7 and 8, at the time the representations were made. Therefore, the representation set forth in Paragraph 9 was, and is, false or misleading.

PestContro Products

11. Respondents have manufactured, advertised, labeled, offered for sale, sold, and distributed pest repelling products to the public, including the PestContro Original, PestContro Deluxe, PestContro 1000, PestContro Ultrasonics 1000, PestContro Ultrasonics 2000, PestContro Closet, Select-A-Pest, MoleContro, MoleContro Deluxe, FleaContro Ultrasonic, Digital PestContro II, Ultrasonic 500, PestContro Ultrasonic Dual, PestContro Portable Ultrasonics, XContro, YardContro+, and PestContro Outdoor (collectively, "PestContro Products").

12. Respondents have disseminated or have caused to be disseminated advertisements for the PestContro Products, including but not necessarily limited to the attached Exhibits K through P. These advertisements contain the following statements:

A. "PestContro Ultrasonic Dual - Advanced innovative indoor/outdoor tabletop design ultrasonic pest repeller technology covers up to 3000 square feet to repel pests but is completely inaudible to humans.
Dual transducers provide increased ultrasonic coverage for your home, including a BOOST mode for extra pest repelling power. The adjustable frequency helps you to target your pest problem.
PestContro's innovative ultrasonic technology repels pests but is inaudible to humans. Adjustable design allows you to select frequency level to target your pest problem. One

setting has higher frequencies to affect small insect pests, while the second setting can be used for larger rodent pests. Using 'Sweep Sound Technology' (SST), the unit creates a fluctuating ultrasonic sound to target pests within these ranges. This creates a very uncomfortable environment for pests, driving them from their hiding places within your home. ...
Repels Unwanted Insect [sic] and Rodents, such as: Rats, Mice, Ants, Roaches, Flies, Crickets, Squirrels, Bees, Spiders, Fleas."
(www.lentek.com/shopping/) (10/10/01) [Exhibit K]

B. "Lentek's Original PestContro is award-winning and our best seller. Plug into a [sic] AC outlet and our MagnetoSonic technology goes to work. This technology works within the walls and wiring of your home creating a very unfriendly place for pests. **Sweeping Sound Ultrasonic Technology** works within the living areas of the home creating a constant change in the audio frequency preventing the pest from becoming accustomed to the sounds.
Designed to repel: **ants, mice, rats, cockroaches, squirrels, bats, fleas, crickets, spiders, bees and waterbugs.**
Effective coverage 2500 sq. ft."
(www.lentek.com/shopping/) (10/10/01) [Exhibit L]

C. "The new PestContro Deluxe allows you to make adjustments to suit your home's specific needs.
Effectively chases away **rats, mice, squirrels, ants, fleas, roaches, waterbugs, and other household pests.**
Only one unit needed per household (coverage approximately 5000 sq. ft.) ...
Adjustable dual, ultrasonic frequency transducers transmit in stereo to maximize coverage area in the room that the unit is in. This technology is used to alter the normal electrical field around wiring in your home's walls to chase pests from areas you can't access."

(www.lentek.com/shopping/) (10/10/01) [Exhibit M]

D. "FleaContro 1000 - Help control your flea problem within a single room. Using **Ultra-Sonic Technology™,** this unique pest repeller is aimed specifically at fleas. Unit blasts harsh, ultrasonic siren (inaudible to humans) which helps repel fleas and control them within the area. ... Covers up to 1000 square feet."
(www.lentek.com/shopping/) (10/10/01) [Exhibit N]

E. "Lentek's new PestContro Ultrasonics 1000 is our latest ultrasonic powered pest repeller using advanced technology to miniaturize the size. ... Designed for **rats, mice, ants, flies, crickets, squirrels, bees, bats, waterbugs, spiders, and fleas.** Sound output will cover up to 1,000 square feet."
(www.lentek.com/shopping) (10/10/01) [Exhibit O]

F. "Lentek Pest Repelling Products ...
PESTCONTRO'S UNIQUE SYSTEM: PestContro® utilizes Lentek's patented **Magneto-Sonic™ Technology**. This combines Electro-Magnetic Interference and Ultrasonic Sound Waves. By plugging a Pest Contro® device into any electrical outlet, the **Electro-Magnetic Interference** ... alters the normal field around the existing wiring already within the walls. This effects [sic] the central nervous system of the pests that dwell there and drives them out. The **Ultrasonic Sound** feature ... using Lentek's exclusive 'Sweep Sound Technology' (SST), blasts a constantly changing sound pattern that causes auditory stress to any pests within the living area.
There is no opportunity for these pests to get comfortable enough to nest in your home. They just don't stand a chance against the one-two punch that only Lentek's PestContro® can deliver!"
(Pest Repelling Products brochure, p. 1) [Exhibit P]

G. "**XContro™ – Radar Sensor System**
• Keeps most insect pests, mice, cats, squirrels, skunks, raccoons and other rodents away using a slide ultrasonic switch ..."
(Pest Repelling Products Brochure, p. 4) [Exhibit P]

H. "**YardContro+™ – Radar Sensor System**
• Repels most animals, including deer, raccoons, skunks, squirrels, rabbits, dogs, cats, rats, using a slide ultrasonic switch ..."
(Pest Repelling Products Brochure, p. 5) [Exhibit P]

13. Through the means described in Paragraph 12, respondents have represented, expressly or by implication, that:

A. When used indoors, PestContro Products effectively repel or eliminate rats, mice, ants, cockroaches, flies, crickets, squirrels, bees, spiders, fleas, ants, bats, waterbugs, and other pests from a user's home;

B. When used outdoors, PestContro Products effectively repel or eliminate insects, mice, cats, squirrels, skunks, raccoons, deer, rabbits, dogs, rats and other pests and rodents from a user's outdoor space;

C. One FleaContro 1000 or PestContro Ultrasonics 1000 effectively repels or eliminates pests throughout a 1000 square foot home;

D. One PestContro Original effectively repels or eliminates pests throughout a 2500 square foot home;

E. One PestContro Ultrasonic Dual effectively repels or eliminates pests throughout a 3000 square foot home or outdoor area; and

F. One PestContro Deluxe effectively repels or eliminates pests throughout an approximately 5000 square foot home.

14. Through the means described in Paragraph 12, respondents have represented, expressly or by implication, that they possessed and relied upon a reasonable basis that substantiated the representations set forth in Paragraph 13, at the time the representations were made.

15. In truth and in fact, respondents did not possess and rely upon a reasonable basis that substantiated the representations set forth in Paragraph 13, at the time the representations were made. Therefore, the representation set forth in Paragraph 14 was, and is, false or misleading.

16. Through the means described in Paragraph 12, respondents have represented, expressly or by implication, that certain of the PestContro Products, including, without limitation, PestContro Original and PestContro Deluxe, use electromagnetic technology to alter the electromagnetic field inside a home's walls and wiring in a manner that drives away insects, rodents, and other pests.

17. In truth and in fact, these Pest Contro Products do not alter the electromagnetic field inside a home's walls and wiring in a manner that drives away insects, rodents, and other pests. Therefore, the representation in Paragraph 16 was, and is, false or misleading.

18. Through the means described in Paragraph 12, respondents have represented, expressly or by implication, that they possessed and relied upon a reasonable basis that substantiated the representation set forth in Paragraph 16, at the time the representation was made.

19. In truth and in fact, respondents did not possess and rely upon a reasonable basis that substantiated the representation set forth in Paragraph 16, at the time the representation was made. Therefore, the representation set forth in Paragraph 18 was, and is, false or misleading.

MosquitoContro Products

20. Respondents have manufactured, advertised, labeled, offered for sale, sold, and distributed mosquito repelling products to the public, including the MosquitoContro Card, MosquitoContro Portable, MosquitoContro Plus, and MosquitoContro Plug-in/Portable (collectively, "MosquitoContro Products").

21. Respondents have disseminated or have caused to be disseminated advertisements for the MosquitoContro Products, including but not necessarily limited to the attached Exhibits P through T. These advertisements contain the following statements:

A. "The recent detection of the lethal West Nile virus in New York City and Boston has prompted city officials to begin spraying pesticide to kill the mosquitoes. This has angered some because of the problems insecticides may impose on humans' endocrine and immune systems. City health officials also warned that pesticides might affect asthmatics and those with allergies as well.

Consumers no longer have to risk their health and the environment with toxic chemicals. Lentek International, a leader in the chemical free pest control industry, offers a product that repels mosquitoes without the use of hazardous chemical sprays or lotions. MosquitoContro Plus™ ingeniously combines the laws of nature and technology.

Using the most advanced Ultra-Sound technology, MosquitoContro Plus™ replicates sounds known in nature to repel the female mosquitoes, the only sex that bites humans. One sound replicates the wing speed frequency of the dragonfly, the mosquito's natural predator. The other sound replicates the wing speed frequency of the aggressive male mosquito ..."
(www.lentek.com) (3/13/01) [Exhibit Q]

B. "Bugged by Mosquitos?

... This year start planning ahead for mosquito season by giving the kids or the outdoor adventurer in the family the environmentally safe and wearable MosquitoContro™ Plus from Lentek International. It uses Ultra Sound Technology to repel the biting female mosquito and best of all, you can wear it like a watch or attach it to a belt or pocket for easy pest repelling. Combining the laws of nature and technology, the MosquitoContro™ Plus replicates both the wing-beat frequency of the Dragonfly, the mosquito's most feared predator, and the wing-speed sound of the aggressive male mosquito, which the blood-thirsty female mosquito instinctively steers clear of after mating."
(www.lentek.com) (10/11/01) [Exhibit R]

C. "News and Events
Pesticide Exposure Linked to Parkinson's Disease
Date: 11/14/00 - (Orlando, FL) - A recent study published in Nature Neuroscience indicates that exposure to a widely used gardening pesticide may cause the debilitating physical symptoms of Parkinson's, as well as killing brain cells. ... Lentek International, a leader in the chemical free pest control industry, offers products that repel various household and garden pests without the use of hazardous pesticides. By not using pesticides, there is a lessened chance of ingesting any chemicals that could lead to Parkinson's or another deadly disease."
(www.lentek.com) (3/03/01) [Exhibit S]

D. "MosquitoContro™ emits a frequency that matches the wing speed (noise) of a male mosquito. Female mosquitoes instinctively steer clear of male mosquitoes, and since female mosquitoes are the only ones that bite humans, by replicating this sound the female mosquito is repelled from biting within the area."
(Lentek products brochure, p. 8) [Exhibit P]

E. "Lentek -- A World Leader in Electronic Pest Control Technology™

MosquitoContro™
Repels mosquitoes from your personal space."
...
"MosquitoContro+ is an environmentally friendly, electronic repeller that replicates the wing-beat frequency of the dragonfly, the foremost predator of the mosquitoes that bite. Taking advantage of the mosquitoes [sic] natural avoidance of the dragonfly, the MosquitoContro+ keeps them at a distance without odors, oils, creams or chemicals. In addition, in order to provide protection for various mosquito species (over 2,000), MosquitoContro+ is the first electronic repellent that also mimics the wing beat frequency of a male mosquito. Female mosquitoes are the only ones that bite humans and animals, by replicating this sound the MosquitoContro+ helps to repel the female mosquitoes within the area. The combination of both dragonfly and male mosquito frequencies makes ***MosquitoContro+ the most effective electronic repellent available."***
(MosquitoContro+ product packaging) [Exhibit T]

22. Through the means described in Paragraph 21, respondents have represented, expressly or by implication, that the MosquitoContro Products effectively repel mosquitoes from a user's body.

23. In truth and in fact, the MosquitoContro Products do not effectively repel mosquitoes from a user's body. Therefore, the representation set forth in Paragraph 22 was, and is, false or misleading.

24. Through the means described in Paragraph 21, respondents have represented, expressly or by implication, that the MosquitoContro Products are an effective alternative to the use of

chemical pesticides or other products formulated to kill or repel mosquitoes in the prevention of the West Nile Virus.

25. In truth and in fact, the MosquitoContro Products are not an effective alternative to the use of chemical pesticides or other products formulated to kill or repel mosquitoes in the prevention of the West Nile Virus. Therefore, the representation set forth in Paragraph 24 was, and is, false or misleading.

26. Through the means described in Paragraph 21, respondents have represented, expressly or by implication, that they possessed and relied upon a reasonable basis that substantiated the representations set forth in Paragraphs 22 and 24, at the time the representations were made.

27. In truth and in fact, respondents did not possess and rely upon a reasonable basis that substantiated the representations set forth in Paragraphs 22 and 24, at the time the representations were made. Therefore, the representation set forth in Paragraph 26 was, and is, false or misleading.

28. 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.

NOTICE

Proceedings on the charges asserted against you in this complaint will be held before an Administrative Law Judge (ALJ) of the Federal Trade Commission, under Part 3 of the Commission's Rules of Practice, 16 C.F.R. Part 3. A copy of Part 3 of the Rules is enclosed with this complaint.

You may file an answer to this complaint. Any such answer must be filed within 20 days after service of the complaint on you. If you contest the complaint's allegations of fact, your answer

must concisely state the facts constituting each ground of defense, and must specifically admit, deny, explain, or disclaim knowledge of each fact alleged in the complaint. You will be deemed to have admitted any allegations of the complaint that you do not so answer.

If you elect not to contest the allegations of fact set forth in the complaint, your answer shall state that you admit all of the material allegations to be true. Such an answer will constitute a waiver of hearings as to the facts alleged in the complaint and, together with the complaint, will provide a record basis on which the ALJ will file an initial decision containing appropriate findings and conclusions and an appropriate order disposing of the proceeding. Such an answer may, however, reserve the right to submit proposed findings and conclusions and the right to appeal the initial decision to the Commission under Section 3.52 of the Commission's Rules of Practice.

If you do not answer within the specified time, you waive your right to appear and contest the allegations of the complaint. The ALJ is then authorized, without further notice to you, to find that the facts are as alleged in the complaint and to enter an initial decision and a cease and desist order.

The ALJ will schedule an initial prehearing scheduling conference to be held not later than 14 days after the last answer is filed by any party named as a respondent in the complaint. Unless otherwise directed by the ALJ, the scheduling conference and further proceedings will take place at the Federal Trade Commission, 600 Pennsylvania Avenue, N.W., Washington, D.C. 20580. Rule 3.21(a) requires a meeting of the parties' counsel as early as practicable before the prehearing scheduling conference, and Rule 3.31(b) obligates counsel for each party, within 5 days of receiving a respondent's answer, to make certain initial disclosures without awaiting a formal discovery request.

A hearing on the complaint will begin on December 2, 2002, at 10:00 A.M. in Room 532, or such other date as determined by the

ALJ. At the hearing, you will have the right to contest the allegations of the complaint and to show cause why a cease and desist order should not be entered against you.

The following is the form of order which the Commission has reason to believe should issue if the facts are found to be as alleged in the complaint. If, however, the Commission should conclude from the record facts developed in any adjudicative proceedings in this matter that the proposed order provisions as to Lentek International, Inc., and Joseph Durek and Lou Lentine, individually and as officers of Lentek International, Inc., might be inadequate to fully protect the consuming public, the Commission may order such other relief as it finds necessary or appropriate, including corrective advertising or other affirmative disclosure.

Moreover, the Commission has reason to believe that, if the facts are found as alleged in the complaint, it may be necessary and appropriate for the Commission to seek relief to redress injury to consumers, or other persons, partnerships or corporations, in the form of restitution and refunds for past, present, and future consumers and such other types of relief as are set forth in Section 19(b) of the Federal Trade Commission Act. The Commission will determine whether to apply to a court for such relief on the basis of the adjudicative proceedings in this matter and such other factors as are relevant to consider the necessity and appropriateness of such action.

ORDER

DEFINITIONS

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

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. Pest-control product" shall mean any PestContro, YardContro, MoleContro, FleaContro, or MosquitoContro product, or any other product designed, advertised, or intended to repel, control, or eliminate any animal pest, including but not limited to, rodents and insects.

3. "Air cleaning product" shall mean any Sila Air Cleaning product or any other product designed, advertised, or intended to remove, treat, or reduce the level of any pollutant(s) in the air.

4. "Indoor air pollutant(s)" or "pollutant(s)" shall mean one or more of the following: dust, smoke, soot, pollen, mold, mildew, fungi, bacteria, germs, cigarette smoke, smog, car exhaust, car fumes, pet dander, dust mites, dead skin flakes, chemical fumes, benzene, ammonia, chloroform, formaldehyde, benzopyrene, hydrocarbons, trichloroethylene, and xylene, or any other gaseous, microbial, or particulate matter found in indoor or vehicular air.

5. Unless otherwise specified, "respondents" shall mean Lentek International, Inc., a corporation, its successors and assigns and its officers; Joseph Durek and Lou Lentine, individually and as officers of the corporation; and each of the above's agents, representatives, and employees.

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

I.

IT IS ORDERED that respondents, directly or through any corporation, subsidiary, division, or other device, in connection with the manufacturing, labeling, advertising, promotion, offering for sale, sale, or distribution of any air cleaning product, in or affecting commerce, shall not represent, in any manner, expressly or by implication, that:

A. such product will eliminate, remove, clear, clean, neutralize, sanitize, oxidize, control or reduce any indoor air pollutant in a user's environment; or

B. use of such product prevents, reduces the incidence of, or provides relief from any medical or health-related condition,

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

II.

IT IS FURTHER ORDERED that respondents, 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 pest-control product, in or affecting commerce, shall not make any representation, in any manner, expressly or by implication, that such pest-control product will:

A. repel, control, or eliminate, temporarily or indefinitely, any rodent, insect, or other animal pests; or

B. repel, control, or eliminate any rodent, insect, or other animal pest in a desired area or an area of a certain size,

unless, at the time of making such representation, 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 the PestContro Original, PestContro Deluxe, or any substantially similar product,

in or affecting commerce, shall not misrepresent, in any manner, expressly or by implication, that such product will alter the electromagnetic field inside the walls or wiring of a home in a manner that drives away insects, rodents, and other animal pests. For purposes of this Part, "substantially similar product" shall mean any pest-control product that uses or purports to use electromagnetic technology.

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 the MosquitoContro products, or any substantially similar product, in or affecting commerce, shall not misrepresent, in any manner, expressly or by implication, that:

A. such product repels mosquitoes from a user's body; or

B. such product is an effective alternative to the use of chemical pesticides or other products formulated to kill or repel mosquitoes.

For purposes of this Part, "substantially similar product" shall mean any product that uses or purports to use ultrasonic technology to repel mosquitoes from the user's body.

V.

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 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 evidence, which when appropriate must be competent and reliable scientific evidence, that substantiates the representation.

VI.

IT IS FURTHER ORDERED that respondent Lentek International, Inc., and its successors and assigns, and respondents Joseph Durek and Lou Lentine 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 respondent Lentek International, Inc., and its successors and assigns, and respondents Joseph Durek and Lou Lentine 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 retain the signed, dated statements acknowledging receipt of the order for a period of five (5) years and upon request make them available to the Federal Trade Commission for inspection and copying.

VIII.

IT IS FURTHER ORDERED that respondent Lentek International, 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.

IX.

IT IS FURTHER ORDERED that respondents Joseph Durek and Lou Lentine, for a period of ten (10) years after the date of issuance of this order, shall notify the Commission of the discontinuance of their current business or employment, or of their affiliation with any new business or employment. The notice shall include the respondent's new business address and telephone number and a description of the nature of the business or employment and his duties and responsibilities. All notices required by this Part shall be sent by certified mail to the

Associate Director, Division of Enforcement, Bureau of Consumer Protection, Federal Trade Commission, Washington, D.C. 20580.

X.

IT IS FURTHER ORDERED that respondent Lentek International, Inc., and its successors and assigns, and respondents Joseph Durek and Lou Lentine 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 twenty (20) years from the date of its issuance, or twenty (20) years from the most recent date that the United States or the Federal Trade Commission files a complaint (with or without an accompanying consent decree) in federal court alleging any violation of the order, whichever comes later; provided, however, that the filing of such a complaint will not affect the duration of:

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

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

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

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

will not terminate between the date such complaint is filed and the later of the deadline for appealing such dismissal or ruling and the date such dismissal or ruling is upheld on appeal.

THEREFORE, the Federal Trade Commission this twenty-seventh day of August, 2002, has issued this complaint against respondents.

DECISION AND ORDER

The Commission having heretofore issued its Complaint charging the Respondents named in the caption hereof with violation of Sections 5(a) and 12 of the Federal Trade Commission Act, 15 U.S.C. §§ 45(a) and 52, as amended, and Respondents having been served with a copy of that Complaint, together with a notice of contemplated relief; and

Respondents, their attorneys, and counsel for the Commission having thereafter executed an Agreement Containing Consent Order, an admission by Respondents of all the jurisdictional facts set forth in the Complaint, a statement that the signing of said Agreement is for settlement purposes only and does not constitute an admission by Respondents 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 Secretary of the Commission having thereafter withdrawn this matter from adjudication in accordance with §§ 3.25(c) of its Rules; and

The Commission having considered the matter and having thereupon accepted the executed Consent Agreement and placed such Agreement on the public record for a period of thirty (30) days, now in further conformity with the procedure prescribed in § 3.25(f) of its Rules, the Commission hereby makes the following jurisdictional findings and enters the following Order:

1. Respondent Lentek International, Inc., is a Florida corporation with its principal office or place of business at 1629 Prime Court, Suite 800, Orlando, Florida 32859.

2. Respondent Joseph Durek was the Chairman and Chief Executive Officer of the corporate respondent while the respondents engaged in the practices alleged in the complaint issued by the Federal Trade Commission. He exercised

managerial responsibilities with respect to administrative and accounting functions; international operations; press releases and media relations; evaluation and testing of Lentek products; and labeling, packaging, and advertising of Lentek products. He resides at 5404 Monterrey Club Court, Windermere, FL 34786.

3. Respondent Lou Lentine is President of the corporate respondent. He has exercised managerial responsibilities with respect to domestic sales and operations; the manufacturing, purchasing and development of Lentek products; and the advertising of Lentek products. His principal office or place of business is the same as that of Lentek International, Inc.

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

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. "Pest control product" shall mean any PestContro, YardContro, MoleContro, FleaContro, or MosquitoContro product, or any other product utilizing sonic, ultrasonic, and/or electromagnetic technology, which is designed, advertised, or intended to repel, control, or eliminate any animal pest, including but not limited to, rodents and insects.

3. "Air cleaning product" shall mean any Sila Air Cleaning product or any other product designed, advertised, or intended to remove, treat, or reduce the level of any pollutant(s) in the air.

4. "Indoor air pollutant(s)" or "pollutant(s)" shall mean one or more of the following: dust, smoke, soot, pollen, mold, mildew, fungi, bacteria, germs, cigarette smoke, smog, car exhaust, car fumes, pet dander, dust mites, dead skin flakes, chemical fumes, benzene, ammonia, chloroform, formaldehyde, benzopyrene, hydrocarbons, trichloroethylene, and xylene, or any other gaseous, microbial, or particulate matter found in indoor or vehicular air.

5. Unless otherwise specified, "respondents" shall mean Lentek International, Inc., a corporation, its successors and assigns and its officers; Joseph Durek, individually; Lou Lentine, individually and as an officer of the corporation; and each of the above's agents, representatives, and employees.

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

I.

IT IS ORDERED that respondents, directly or through any corporation, subsidiary, division, or other device, in connection with the manufacturing, labeling, advertising, promotion, offering for sale, sale, or distribution of any air cleaning product, in or affecting commerce, shall not represent, in any manner, expressly or by implication, that:

A. such product will eliminate, remove, clear, clean, neutralize, sanitize, oxidize, control or reduce any indoor air pollutant in a user's environment; or

B. use of such product prevents, reduces the incidence of, or provides relief from any medical or health-related condition,

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

II.

IT IS FURTHER ORDERED that respondents, 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 pest control product, in or affecting commerce, shall not make any representation, in any manner, expressly or by implication, that such pest control product will:

A. repel, control, or eliminate, temporarily or indefinitely, any rodent, insect, or other animal pests; or

B. repel, control, or eliminate, any rodent, insect, or other animal pest in a desired area or an area of a certain size,

unless, at the time of making such representation, 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 the PestContro Original, PestContro Deluxe, or any substantially similar product, in or affecting commerce, shall not make any representation, in any manner, expressly or by implication, that such product will alter the electromagnetic field inside the walls or wiring of a home in a manner that drives away insects, rodents, and other animal pests, unless the representation is true and, at the time it is made, respondents possess and rely upon competent and reliable scientific evidence that substantiates the representation. For

purposes of this Part, "substantially similar product" shall mean any pest control product that uses or purports to use electromagnetic technology.

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 the MosquitoContro products, or any substantially similar product, in or affecting commerce, shall not make any representation, in any manner, expressly or by implication, that:

A. such product repels mosquitoes from a user's body; or

B. such product is an effective alternative to the use of chemical pesticides or other products formulated to kill or repel mosquitoes,

unless the representation is true and, at the time it is made, respondents possess and rely upon competent and reliable scientific evidence that substantiates the representation. For purposes of this Part, "substantially similar product" shall mean any product that uses or purports to use sonic or ultrasonic technology to repel mosquitoes from the user's body.

V.

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 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 evidence, which when appropriate must be

competent and reliable scientific evidence, that substantiates the representation.

VI.

IT IS FURTHER ORDERED that respondent Lentek International, Inc., and its successors and assigns, and respondents Joseph Durek and Lou Lentine 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 respondent Lentek International, Inc., and its successors and assigns, and respondents Joseph Durek and Lou Lentine shall deliver a copy of this order to all current and future principals, officers, directors, and managers, and to all current and future employees 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, by certified mail return receipt requested, a copy of this order to all current and future agents and representatives having responsibilities with respect to the subject matter of this order, and

shall maintain a record of all such agents and representatives to whom the order was delivered. 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 retain the signed, dated statements acknowledging receipt of the order, and the records, including return receipts, showing the agents and representatives to whom the order was delivered by mail, for a period of five (5) years and upon request make these documents available to the Federal Trade Commission for inspection and copying.

VIII.

IT IS FURTHER ORDERED that respondent Lentek International, 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.

IX.

IT IS FURTHER ORDERED that respondents Joseph Durek and Lou Lentine, for a period of ten (10) years after the date of issuance of this order, shall notify the Commission of the

discontinuance of their current business or employment, or of their affiliation with any new business or employment involving the sale of consumer products or services. The notice shall include the respondent's new business address and telephone number and a description of the nature of the business or employment and his duties and responsibilities. All notices required by this Part shall be sent by certified mail to the Associate Director, Division of Enforcement, Bureau of Consumer Protection, Federal Trade Commission, Washington, D.C. 20580.

X.

IT IS FURTHER ORDERED that respondent Lentek International, Inc., and its successors and assigns, and respondents Joseph Durek and Lou Lentine 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 March 14, 2023, 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

Analysis of Proposed Consent Order to Aid Public Comment

The Federal Trade Commission has accepted, subject to final approval, an agreement to a proposed consent order by respondents Lentek International, Inc., Joseph Durek, individually, and Lou Lentine, individually and as an officer of the corporation.

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

This matter concerns practices related to the advertising, offering for sale, sale, and distribution of various air cleaning products and ultrasonic/electromagnetic pest control devices. The Commission's complaint charged that respondents violated the Federal Trade Commission Act, 15 U.S.C. § 41 *et seq.*, by making numerous representations that were false and/or for which they lacked a reasonable basis of substantiation. These representations concerned the following: the ability of Lentek's Sila Air Cleaning Products to eliminate various pollutants from indoor air; the health benefits of using the Sila Air Cleaning Products; the ability of Lentek's PestContro products to repel or eliminate various animal or insect pests from a user's home or outdoor space; the ability of various PestContro products to eliminate animal or insect pests within a space of a given size; the ability of the electromagnetic devices to drive away pests by altering the electromagnetic field inside the walls and wiring of a home; the ability of Lentek's MosquitoContro Products to repel mosquitoes from a user's body; and that the MosquitoContro Products are an effective alternative to the use of chemical pesticides or other products formulated to kill or repel mosquitoes in the prevention of West Nile Virus.

Analysis

Part I of the proposed order prohibits any representation that any air cleaning product will eliminate, remove, clear, clean, neutralize, sanitize, oxidize, control, or reduce any indoor air pollutant, or that use of such product will prevent, reduce the incidence of, or provide relief from any medical or health-related condition, unless respondents possess competent and reliable scientific evidence that substantiates the representation.

Part II of the proposed order prohibits any representation that PestContro products (or similar pest control products utilizing sonic, ultrasonic, and/or electromagnetic technology) will repel, control, or eliminate, temporarily or indefinitely, any rodent, insect, or other animal pest, or that they will do so in an area of a certain size, unless respondents possess competent and reliable scientific evidence that substantiates the representation.

Part III of the proposed order prohibits any representation that PestContro products, or substantially similar products, will alter the electromagnetic field inside the walls or wiring of a home in a manner that drives away insects, rodents, and other animal pests, unless the representation is true and respondents possess competent and reliable scientific evidence that substantiates the representation.

Part IV of the proposed order prohibits any representation that MosquitoContro products, or substantially similar products, will repel mosquitoes from a user's body, or that such products are an effective alternative to the use of chemical pesticides or other products formulated to kill or repel mosquitoes, unless the representation is true and respondents possess competent and reliable scientific evidence that substantiates the representation.

Part V of the proposed order prohibits unsubstantiated representations about the benefits, performance, or efficacy of any product.

Part VI of the proposed order is a record keeping provision that requires the respondents to maintain certain records for five (5)

years after the last date of dissemination of any representation covered by the order. These records include: (1) all advertisements and promotional materials containing the representation; (2) all materials relied upon in disseminating the representation; and (3) all evidence in respondents' possession or control that contradicts, qualifies, or calls into question the representation or the basis for it.

Part VII of the proposed order requires distribution of the order to current and future principals, officers, directors, and managers, and to current and future employees, agents, and representatives having responsibilities with respect to the subject matter of the order.

Part VIII of the proposed order requires that the Commission be notified of any change in the corporation that might affect compliance obligations under the order. Part IX of the proposed order requires that for a period of ten (10) years, each individual respondent notify the Commission of the discontinuance of his current business or employment or of his affiliation with any new business or employment involving the sale of consumer products or services.

Part X of the proposed order requires the respondents to file a compliance report with the Commission.

Part XI of the proposed order states that, absent certain circumstance, the order will terminate twenty (20) years from the date it is issued.

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

Complaint

IN THE MATTER OF

QUEST DIAGNOSTICS INCORPORATED, ET AL.

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

Docket C-4074; File No. 0210140
Complaint, February 21, 2003--Decision, April 3, 2003

This consent order addresses the acquisition by Respondent Quest Diagnostics Incorporated – the largest supplier of clinical laboratory testing services in the United States,, headquartered in Teterboro, New Jersey – of Respondent Unilab Corporation, the largest supplier of clinical laboratory testing services in California, and headquartered in Tarzana, California. The order, among other things, requires the respondents to divest assets used to provide clinical laboratory testing services to physician groups in Northern California – including in particular 46 patient service centers; five stat laboratories; one Unilab and all Quest capitated contracts with physician groups; and all related assets necessary for the provision of laboratory services to physician groups, including customer lists and information – to Laboratory Corporation of America, or a more extensive package of assets to another acquirer approved by the Commission. The order also requires Respondent Quest to maintain the viability, marketability, and competitiveness of its laboratory services business assets in Northern California pending transfer of the divested assets, and to provide transitional services that the acquirer of the divested assets may need until the assets are completely divested and transferred. In addition, the order prohibits Respondent Quest, for one year, from soliciting any employees of Quest or Unilab that accept offers of employment from the acquirer of the divested assets.

Participants

For the Commission: *Jaqueline Mendel, Jill Frumin, Norris Washington, James Southworth, Goldie Veronica Walker, Shai Littlejohn, Valicia Spriggs-Hutchinson, Elizabeth Vail, Michael G. Cowie, Naomi Licker, Elizabeth A. Piotrowski, Robert Kneuper, Laura Bivins, Leslie Farber* and *Mary T. Coleman.*

For the Respondents: *Richard Parker, Michael Antalics,* and *Gregg Vicinanza, O'Melveny & Myers LLP.*

COMPLAINT

The Federal Trade Commission ("Commission"), having reason to believe that Respondent Quest Diagnostics Incorporated ("Quest"), a corporation subject to the jurisdiction of the Commission, has agreed to merge with Respondent Unilab Corporation ("Unilab"), 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 ("FTC Act"), as amended, 15 U.S.C. § 45, and it appearing to the Commission that a proceeding in respect thereof would be in the public interest, hereby issues its Complaint, stating its charges as follows:

I. DEFINITIONS

1. "Clinical laboratory testing services" means the full range of products and services provided by a clinical laboratory, including, but not limited to, the drawing, collection, and transportation of specimens over a coordinated courier route system; stat, routine, and esoteric clinical testing; the computerized tracking of specimens for testing, record-keeping, and billing functions; and the electronic communication of test results and other necessary data to customers.

2. "Physician group" means any group medical practice, individual practice association, physician service organization, management service organization, medical foundation, or physician/hospital organization, that provides, or through which physicians contract to provide, physician services to enrollees of pre-paid health plans.

3. "Respondents" means Quest and Unilab individually and collectively.

II. RESPONDENTS

4. Respondent Quest 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 One Malcolm Avenue, Teterboro, New Jersey 07608. Respondent Quest is engaged in, among other things, the provision of clinical laboratory testing services.

5. Respondent Unilab 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 18448 Oxnard Street, Tarzana, California 91356. Respondent Unilab is engaged in, among other things, the provision of clinical laboratory testing services.

6. Respondents are, and at all times herein have been, engaged in commerce, as "commerce" is defined in Section 1 of the Clayton Act, as amended, 15 U.S.C. § 12, and are corporations whose business is in or affects commerce, as "commerce" is defined in Section 4 of the FTC Act, as amended, 15 U.S.C. § 44.

III. THE PROPOSED MERGER

7. On April 2, 2002, Quest and Unilab entered into an Agreement and Plan of Merger ("Merger Agreement") whereby Quest agreed to acquire all of the issued and outstanding voting securities of Unilab in exchange for cash, stock of Quest, or a combination of cash and stock of Quest ("Proposed Merger"). After completion of the Proposed Merger, Quest will be the surviving corporate entity. At the time of the Merger Agreement, the value of the transaction was approximately $877 million. On January 4, 2003, Quest and Unilab agreed to amend the Merger Agreement to extend the termination date and to reduce the purchase price for the overall transaction by approximately $60 million.

IV. THE RELEVANT MARKET

8. For the purposes of this Complaint, the relevant line of commerce in which to analyze the effects of the Proposed Merger is the provision of clinical laboratory testing services to physician groups.

9. Clinical laboratory testing services are basic health care services. Physicians rely on clinical laboratories to provide accurate and timely testing information to diagnose, assess, and treat their patients' health conditions. In Northern California, physician groups frequently assume the financial risk for providing clinical laboratory testing services for their patients who are affiliated with pre-paid health plans. For this reason, these physician groups often directly contract with clinical laboratories to purchase such services, usually under a capitated arrangement.

10. Physician groups require a clinical laboratory that offers, among other things, a comprehensive menu of clinical diagnostic tests; stat, or urgent, testing capabilities; as well as an extensive field collection and distribution system that includes conveniently located patient service centers and courier networks.

11. Most physician groups do not regard the internal performance of clinical laboratory testing services as a competitively viable or cost-effective substitute. Although physicians can perform a limited number of simple diagnostic tests in their own offices, this type of testing is generally not a substitute for the testing services provided by clinical laboratories. Physician groups that do not have their own clinical laboratories are unlikely to develop such capabilities, even in the event of a significant increase in the price of clinical laboratory testing services.

12. For the purposes of this Complaint, the relevant geographic market within which to analyze the effects of the Proposed Merger is Northern California, consisting of the counties in California north of, but not including, San Luis Obispo, Kern, and San

Bernardino counties, where the transaction would reduce competition for the sale of clinical laboratory testing services to physician groups, as alleged below.

V. THE STRUCTURE OF THE MARKET

13. Quest and Unilab are the two leading providers of clinical laboratory testing services to physician groups in Northern California. If the Proposed Merger were to be consummated, Quest would have a market share of more than 70% in a highly concentrated market. Quest's next largest competitor in the relevant market would have a market share of approximately 4%. The Proposed Merger would increase concentration in the relevant market by more than 1,500 points to a Herfindahl-Hirschman Index level above 5,300.

VI. ENTRY CONDITIONS

14. Substantial and effective expansion by smaller competitors in the relevant market sufficient to deter or counteract the anticompetitive effects of the Proposed Merger is unlikely to occur.

15. New entry into the relevant market sufficient to deter or counteract the anticompetitive effects of the Proposed Merger is unlikely to occur.

VII. EFFECTS OF THE MERGER

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

a. by eliminating actual, direct, and substantial competition between Quest and Unilab in the relevant market;

b. by increasing the likelihood that the merged firm will unilaterally exercise market power in the relevant market; and

c. by increasing the likelihood that physician groups would be forced to pay higher prices for clinical laboratory testing services in the relevant section of the country.

VIII. VIOLATIONS CHARGED

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

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

WHEREFORE, THE PREMISES CONSIDERED, the Federal Trade Commission on this twenty-first day of February, 2003, issues its Complaint against said Respondents.

DECISION AND ORDER

The Federal Trade Commission ("Commission"), having initiated an investigation of the proposed acquisition by Respondent Quest Diagnostics Incorporated ("Quest Diagnostics") of Respondent Unilab Corporation ("Unilab"), hereinafter referred to as "Respondents," and Respondents having been furnished thereafter with a copy of a draft of 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 7 of the Clayton Act, as amended, 15 U.S.C. § 18, and Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45; and

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

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

1. Respondent Quest Diagnostics 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 One Malcolm Avenue, Teterboro, New Jersey, 07608.

2. Respondent Unilab 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 18448 Oxnard Street, Tarzana, California, 91356.

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

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

C. "Acquisition" means the exchange offer contemplated by Agreement and Plan of Merger dated April 2, 2002, and all amendments thereto, whereby Quest Diagnostics agreed to acquire all of the issued and outstanding voting securities of Unilab in exchange for cash, stock of Quest Diagnostics, or a combination of cash and stock of Quest Diagnostics.

D. "Acquisition Date" means the date the Acquisition is consummated.

E. "Agency(ies)" means any governmental regulatory authority or authorities in the United States responsible for granting approval(s), clearance(s), qualification(s), license(s), or permit(s) for any aspect of the research, development, manufacture, marketing, distribution, or sale of Clinical Laboratory Testing Services.

F. "Clinical Laboratory Testing Services" means the full range of products and services provided by a clinical laboratory, including, but not limited to, the drawing, collection, and transportation of specimens over a coordinated courier route system; stat, routine, and esoteric clinical testing; the computerized tracking of specimens for testing, record-keeping, and billing functions; and the electronic communication of test results and other necessary data to Customers.

G. "Clinical Laboratory Testing Services Managerial Employees" means the current senior managers of Respondent Quest Diagnostics, identified in non-public Appendix A, attached to this Order.

H. "Closing Date" means the date on which Respondents and the Commission-approved Acquirer consummate the transactions contemplated by the Divestiture Agreement.

I. "Commission" means the Federal Trade Commission.

J. "Commission-approved Acquirer" means the Person approved by the Commission to acquire assets pursuant to this Order, including LabCorp as the acquirer of the Purchased Assets pursuant to the LabCorp Purchase Agreement, if the Commission does not require that, pursuant to Paragraphs II.C. or II.D. of this Order, Respondents rescind the divestiture and transfer of the Purchased Assets.

K. "Confidential Business Information" means all customer-specific pricing information, customer-specific discounts, and customer-specific supply or service requirements or preferences relating to the provision of Clinical Laboratory Testing Services by Quest Diagnostics in Northern California prior to the Acquisition Date (or the Closing Date as applicable if either the Outpatient Clinical Laboratory Testing Services Assets or Quest Diagnostics' Northern California Clinical Laboratory Testing Services Assets are divested).

L. "Customer" means any Person who orders or refers Clinical Laboratory Testing Services.

M. "Divestiture Agreement" means any agreement between Respondents and a Commission-approved Acquirer (or between Divestiture Trustee and a Commission-approved Acquirer), as well as all amendments, exhibits, attachments, agreements, and schedules thereto, related to the divestiture of the Purchased Assets (or the Outpatient Clinical Laboratory Testing Services Assets or Quest Diagnostics' Northern California Clinical Laboratory Testing Services Assets, if divested) that has been approved by the Commission to accomplish the requirements of this Order.

N. "Divestiture Trustee" means the trustee appointed by the Commission pursuant to Paragraph IV. of this Order.

O. "Firewalled Employees" means all employees of Respondents that remain in the employment of Respondents after the Acquisition Date who, after the Acquisition Date, directly participate (irrespective of the portion of working time involved) in the marketing, contracting, or sales of Clinical Laboratory Testing Services to Customers or Payers in Northern California.

P. "LabCorp" means Laboratory Corporation of America Holdings, 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 358 South Main Street, Burlington, North Carolina 27215.

Q. "LabCorp Purchase Agreement" means the Asset Purchase Agreement entered into between Quest Diagnostics Clinical Laboratories, Inc. and Laboratory Corporation of America Holdings, as well as all amendments, exhibits, attachments, agreements, and schedules thereto, dated February 3, 2003. The LabCorp Purchase Agreement is attached to this Order as non-public Appendix B.

R. "Northern California" means all counties in California north of, but not including, San Luis Obispo, Kern, and San Bernardino counties.

S. "Outpatient Clinical Laboratory Testing Services Assets" means the following:

1. at the option of the Commission-approved Acquirer, any or all of Quest Diagnostics' assets, tangible and intangible, relating to Quest Diagnostics' Northern California Outpatient Clinical Laboratory Testing Services Business, including, without limitation, the following:

a. all PSCs, Stat Labs, and the full-service clinical laboratory located in Dublin, California, and all related assets, including, without limitation, all:
(1) real property interests (including fee simple interests and real property leasehold interests), together with all buildings and other structures, facilities, or improvements, currently or hereafter located thereon;
(2) easements, rights, and appurtenances;
(3) to the extent assignable, licenses, permits, registrations, certificates, consents, orders, accreditations, certificates of need, approvals, franchises, and similar authorizations required under applicable law or by applicable Agencies for the operation of the PSCs, Stat Labs, and the full-service clinical laboratory as currently operated by Quest Diagnostics;
(4) equipment and instruments related to providing Clinical Laboratory Testing Services; and
(5) other equipment, supplies, furniture, fixtures, vehicles, and other tangible personal property;
b. all assets relating to the provision of courier services;
c. all agreements with Payers (except hospital clinical laboratories and independent clinical laboratories) in effect as of the Acquisition Date, and all rights related thereto, to the extent such agreements are assignable;
d. a copy of all books, records, and files (electronic and hard-copy) related to the foregoing; and

2. at the option of the Commission-approved Acquirer, the Managed Care Laboratory Services Agreement between Unilab and Sutter Medical Foundation-North Bay, dated November 1, 2002, and all of Unilab's assets, tangible and intangible, relating to that agreement, including, without limitation, the following:
a. all PSCs and Stat Labs relating to that agreement located in Sonoma County, California; and all related assets, including, without limitation, all:
(1) real property interests (including fee simple interests and real property leasehold interests), together with all

buildings and other structures, facilities, or improvements, currently or hereafter located thereon;

(2) easements, rights, and appurtenances;

(3) to the extent assignable, licenses, permits, registrations, certificates, consents, orders, accreditations, certificates of need, approvals, franchises, and similar authorizations required under applicable law or by applicable Agencies for the operation of such PSCs and Stat Labs;

(4) equipment and instruments related to providing Clinical Laboratory Testing Services; and

(5) other equipment, supplies, furniture, fixtures, vehicles, and other tangible personal property;

provided, however, that, for purposes of this subparagraph I.S.2.a. only, "Outpatient Clinical Laboratory Testing Services Assets" does not include any PSCs or Stat Labs located outside of Sonoma County, California;

b. all assets relating to the provision of courier services to such PSCs and Stat Labs; and

c. a copy of all books, records, and files (electronic and hard-copy) related to the foregoing.

"Outpatient Clinical Laboratory Testing Services Assets" does not include:

a. rights to the name Quest Diagnostics, SmithKline Beecham Clinical Laboratories, Unilab, or any variations of the foregoing names;

b. any tangible personal property located outside of Northern California or in the offices of Customers;

c. Respondents' Medicare and Medicaid licenses and provider agreements;

d. the Nichols Institute;

e. any computers, servers, or other hardware that are used throughout Quest Diagnostics; and

f. any computer programs and other software, patents, trade secrets, know-how, or proprietary information owned or licensed by the Respondents or their

affiliates, including without limitation Quest Diagnostics' laboratory information systems and billing system; *provided, however,* that Respondents shall convey to the Commission-approved Acquirer (to the extent permitted by the third-party licensee if Respondents license the computer programs and other software, patents, trade secrets, know-how, or proprietary information from a third party) the right to use any software, patents, trade secrets, know-how, or proprietary information that is needed to operate the assets divested to the Commission-approved Acquirer and that the Commission-approved Acquirer is unable, using commercially-reasonable efforts, to obtain from other third parties on commercially-reasonable terms and conditions.

Provided, however, that, with respect to assets that are to be divested pursuant to this Order, Respondents need not divest assets that the Commission-approved Acquirer chooses not to acquire only if the acquirer chooses not to acquire such assets and the Commission approves the divestiture without such assets.

T. "PSC" means a patient service center or any other facility where specimens are drawn and collected for the purpose of providing Clinical Laboratory Testing Services.

U. "Payer" means any Person that pays for Clinical Laboratory Testing Services including, without limitation, the following: (1) the Customer; (2) the patient; (3) Medicare or Medicaid; or (4) a third party who pays the bill on behalf of the patient, such as an insurance company, employer, or managed-care provider, including Physician Groups.

V. "Person" means any natural person, partnership, association, or corporate or governmental organization or entity.

W. "Physician Group" means any group medical practice, individual practice association, physician service organization, management service organization, medical foundation, or physician/hospital organization, that provides, or through which physicians contract to provide, physician services to enrollees of pre-paid health plans.

X. "Purchased Assets" means the assets described in the LabCorp Purchase Agreement.

Y. "Quest Diagnostics Firewalled Employees" means the employees of Respondent Quest Diagnostics who, at the time Respondents executed the Agreement Containing Consent Orders, directly participated (irrespective of the portion of working time involved) in the marketing, contracting, or sales of Clinical Laboratory Testing Services to Customers or Payers in Northern California and who have not been or who are not being offered employment by LabCorp pursuant to the LabCorp Purchase Agreement and who, after the Acquisition Date, will directly participate (irrespective of the portion of working time involved) in the marketing, contracting, or sales of Clinical Laboratory Testing Services to Customers or Payers in Northern California.

Z. "Quest Diagnostics' Northern California Outpatient Clinical Laboratory Testing Services Business" means Quest Diagnostics' business of providing Clinical Laboratory Testing Services (regardless of type of Payer) in Northern California to Customers, other than hospital clinical laboratories and independent clinical laboratories, as that business existed prior to the Acquisition Date.

AA. "Quest Diagnostics' Northern California Clinical Laboratory Testing Services Business" means Quest Diagnostics' business of providing Clinical Laboratory Testing Services (regardless of type of Payer) in Northern California to Customers, including hospital clinical

laboratories and independent clinical laboratories, as that business existed prior to the Acquisition Date.

BB. "Quest Diagnostics' Northern California Clinical Laboratory Testing Services Assets" means:

1. all of the Outpatient Clinical Laboratory Testing Services Assets, and
2. other assets, tangible and intangible, relating to Quest Diagnostics' Northern California Clinical Laboratory Testing Services Business.

"Quest Diagnostics' Northern California Clinical Laboratory Testing Services Assets" does not include:

a. rights to the name Quest Diagnostics, SmithKline Beecham Clinical Laboratories, Unilab, or any variations of the foregoing names;
b. any tangible personal property located outside of Northern California or in the offices of Customers;
c. Respondents' Medicare and Medicaid licenses and provider agreements;
d. the Nichols Institute;
e. any computers, servers, or other hardware that are used throughout Quest Diagnostics; and
f. any computer programs and other software, patents, trade secrets, know-how, or proprietary information owned or licensed by the Respondents or their affiliates, including without limitation Quest Diagnostics' laboratory information systems and billing system; *provided, however,* that Respondents shall convey to the Commission-approved Acquirer (to the extent permitted by the third-party licensee if Respondents license the computer programs and other software, patents, trade secrets, know-how, or proprietary information from a third party) the right to use any software, patents, trade secrets, know-how, or proprietary information that is needed to operate the assets divested to the Commission-approved Acquirer

and that the Commission-approved Acquirer is unable, using commercially-reasonable efforts, to obtain from other third parties on commercially-reasonable terms and conditions.

CC. "Respondents" means Quest Diagnostics and Unilab, individually and collectively.

DD. "Stat Lab" means a clinical laboratory testing facility with rapid response capability, in which clinical laboratory tests can be quickly performed for Customers that require rapid turn-around (less than 24 hours).

II.

IT IS FURTHER ORDERED that:

A. Not later than ten (10) days after the Acquisition Date, Respondents shall cause the closing to occur pursuant to the LabCorp Purchase Agreement, and, not later than six (6) months after the Acquisition Date, Respondents shall divest and complete the transfer of, absolutely and in good faith and at no minimum price, the Purchased Assets to LabCorp, pursuant to and in accordance with the LabCorp Purchase Agreement (which agreement shall not vary or contradict, or be construed to vary or contradict, the terms of this Order, it being understood that nothing in this Order shall be construed to reduce any rights or benefits of LabCorp pursuant to the LabCorp Purchase Agreement or to reduce any obligations of Respondents under such agreement). Failure by Respondents to comply with any term of the LabCorp Purchase Agreement, if approved by the Commission, shall constitute a failure to comply with this Order.

B. If Respondents do not consummate the closing pursuant to the LabCorp Purchase Agreement pursuant to and in accordance with that agreement no later than ten (10) days

after the Acquisition Date, then the Commission may appoint a Divestiture Trustee pursuant to Paragraph IV. of this Order to divest either the Outpatient Clinical Laboratory Testing Services Assets or Quest Diagnostics' Northern California Clinical Laboratory Testing Services Assets, at no minimum price, to an acquirer that receives the prior approval of the Commission and in a manner that receives the prior approval of the Commission, and subject to the requirements of this Order.

C. If, at the time the Commission determines to make this Order final, the Commission notifies Respondents in writing that LabCorp is not an acceptable purchaser of the Purchased Assets or that the manner in which the divestiture was accomplished is not acceptable, then, after receipt of such written notification:

1. Respondents shall immediately notify LabCorp of the notice received from the Commission and shall as soon as practicable effect the rescission of the acquisition and transfer of the Purchased Assets as provided in the LabCorp Purchase Agreement (to the extent any of the Purchased Assets have been transferred to LabCorp);

2. Respondents shall divest the Outpatient Clinical Laboratory Testing Services Assets pursuant to a Divestiture Agreement, at no minimum price, to an acquirer that receives the prior approval of the Commission and in a manner that receives the prior approval of the Commission no later than six (6) months from the date the Commission notifies Respondents that they are required to rescind the transaction with LabCorp; and

3. If Respondents do not divest the Outpatient Clinical Laboratory Testing Services Assets in the time period required by subparagraph II.C.2., above, the Commission may appoint a Divestiture Trustee pursuant to Paragraph

IV. of this Order to divest either the Outpatient Clinical Laboratory Testing Services Assets or Quest Diagnostics' Northern California Clinical Laboratory Testing Services Assets, at no minimum price, to an acquirer that receives the prior approval of the Commission and in a manner that receives the prior approval of the Commission, and subject to the requirements of this Order.

D. If, after Respondents have closed on the LabCorp Purchase Agreement pursuant to and in accordance with that agreement, but before Respondents have divested and transferred all of the Purchased Assets to LabCorp pursuant to the LabCorp Purchase Agreement, an Interim Monitor appointed by the Commission pursuant to Paragraph III. of this Order determines that LabCorp has abandoned its efforts to acquire and operate the Purchased Assets in a manner consistent with the purposes of this Order and reports such determination to the Commission, and the Commission agrees with such determination and so notifies Respondents and LabCorp, then:

1. Respondents shall as soon as practicable effect the rescission of the acquisition and transfer of the Purchased Assets as provided in the LabCorp Purchase Agreement;

2. Respondents shall divest the Outpatient Clinical Laboratory Testing Services Assets pursuant to a Divestiture Agreement, at no minimum price, to an acquirer that receives the prior approval of the Commission and in a manner that receives the prior approval of the Commission no later than six (6) months from the date the Commission notifies Respondents and LabCorp that Respondents are required to rescind the transaction with LabCorp; and

3. If Respondents do not divest the Outpatient Clinical Laboratory Testing Services Assets in the time period

required by subparagraph II.D.2. above, then the Commission may appoint a Divestiture Trustee pursuant to Paragraph IV. of this Order to divest either the Outpatient Clinical Laboratory Testing Services Assets or Quest Diagnostics' Northern California Clinical Laboratory Testing Services Assets, at no minimum price, to an acquirer that receives the prior approval of the Commission and in a manner that receives the prior approval of the Commission and subject to the requirements of this Order.

E. Any Divestiture Agreement that has been approved by the Commission shall be deemed incorporated by reference into this Order, and any failure by Respondents to comply with the terms of such Divestiture Agreement shall constitute a failure to comply with this Order.

F. No later than the Closing Date**,** Respondents shall, at the option of the Commission-approved Acquirer, create and transfer to the Commission-approved Acquirer a database, in a format acceptable to the Commission-approved Acquirer, that includes information relating to each physician who has referred specimens to the PSCs to be divested to the Commission-approved Acquirer any time during the most recently completed three months for which such information is available and to the extent such information is maintained in any of the Respondents' applicable systems. Such information shall include, without limitation: (1) name, address, and phone number of account, (2) name of physician, (3) billing name and address, if different, (4) office contact, (5) UPIN, (6) licenses, (7) pick-up times, (8) custom panels, if any, (9) client-specific alert values, (10) requirements regarding delivery of test results, (11) same-day testing requirements, (12) special services, (13) pre-printed test names, (14) special supply requirements, (15) form of requisition, (16) net discounted and all special fees for all clinical laboratory services billed to the Customer during such three-month period, (18)

special service fees, and (19) special billing agreements; *provided, however,* that if Respondents create and transfer to LabCorp a database as described in the LabCorp Purchase Agreement, and if the Commission does not require rescission of the divestiture and transfer of the Purchased Assets, then the Respondents shall have no further obligation pursuant to this Paragraph II.F.

G. From the Closing Date through the date six (6) months following the last transfer of the Purchased Assets (or the Outpatient Clinical Laboratory Testing Services Assets or Quest Diagnostics' Northern California Clinical Laboratory Testing Services Assets, if divested):

1. Respondents shall not disclose or convey, directly or indirectly, to Firewalled Employees any Confidential Business Information relating to the assets divested and transferred to the Commission-approved Acquirer pursuant to this Order; and

2. Firewalled Employees shall not solicit or access any Confidential Business Information relating to the assets divested and transferred to the Commission-approved Acquirer pursuant to this Order from any other of Respondents' employees; *provided, however,* that nothing contained herein shall prohibit Respondents' employees from using Confidential Business Information to respond to inquiries from Customers requesting information relating to that Customer's own account; and *provided, further,* that only for purposes of the divestiture of the Purchased Assets, nothing contained herein shall prohibit Quest Diagnostics Firewalled Employees (and, following the completion of the divestiture and transfer of all of the Purchased Assets, all other Firewalled Employees) from using, soliciting, or having access to Confidential Business Information relating to any physician not included in the database that Respondents are required to create and transfer to

LabCorp pursuant to the LabCorp Purchase Agreement as contemplated by Paragraph II.F. of this Order.

3. Prior to the Closing Date, Respondents shall develop and implement procedures to assure that such Confidential Business Information is not disclosed or conveyed to Firewalled Employees and that Firewalled Employees do not solicit or access such Confidential Business Information from any other of Respondents' employees consistent with the requirements of this Paragraph II.G.

H. Respondents shall, promptly following the Closing Date, provide written or electronic notification to the Firewalled Employees and all of Respondents' employees who have access to Confidential Business Information relating to the assets divested to the Commission-approved Acquirer pursuant to this Order of the restrictions on the disclosure and solicitation of Confidential Business Information relating to the Purchased Assets (or the Outpatient Clinical Laboratory Testing Services Assets or Quest Diagnostics' Northern California Clinical Laboratory Testing Services Assets, if divested) by Respondents' personnel. At the same time, if not provided earlier, Respondents shall provide a copy of such notification to employees by e-mail with return receipt requested or similar transmission and keep an electronic file of such receipts for one (1) year after the Closing Date. Respondents shall provide a copy of the form of such notification to the Commission-approved Acquirer, the Interim Monitor, and the Commission. Respondents shall also obtain from the Firewalled Employees an agreement to abide by the applicable restrictions. Such agreement and notification shall be in substantially the form set forth in the "Notice of the Divestiture and Employee Agreement to Maintain Confidential Business Information" attached to the Order to Maintain Assets issued in this matter.

I. Respondents shall not, in connection with divestiture and transfer of the Purchased Assets (or the Outpatient Clinical Laboratory Testing Services Assets or Quest Diagnostics' Northern California Clinical Laboratory Testing Services Assets, if divested), interfere with the employment by the Commission-approved Acquirer of any employee of Respondents with responsibilities relating primarily to the Purchased Assets (or the Outpatient Clinical Laboratory Testing Services Assets or Quest Diagnostics' Northern California Clinical Laboratory Testing Services Assets, if divested), shall not offer any incentive to such employees to decline employment with the Commission-approved Acquirer or to accept other employment with Respondents in lieu of accepting employment with the Commission-approved Acquirer, and shall remove any other impediments that may deter such employees from accepting employment with the Commission-approved Acquirer, including, but not limited to, any confidentiality provisions relating to the Purchased Assets (or the Outpatient Clinical Laboratory Testing Services Assets or Quest Diagnostics' Northern California Clinical Laboratory Testing Services Assets, if divested) or any non-compete or confidentiality provisions of employment or other contracts with Respondents that would affect the ability of those individuals to be employed by the Commission-approved Acquirer*; provided, however,* that if Respondents comply with the terms of the LabCorp Purchase Agreement relating to the solicitation and employment by LabCorp of employees of the Respondents, and if the Commission does not require rescission of the divestiture and transfer of the Purchased Assets, then the Respondents shall have no further obligations pursuant to this Paragraph II.I.; and *provided, further,* that nothing in this Paragraph II.I. shall be construed to require the Respondents to terminate the employment of any employee.

J. For a period of one (1) year following the date the divestiture and transfer are completed, Respondents shall not, directly or indirectly, solicit, induce, or attempt to

solicit or induce any employees of Respondent who have accepted offers of employment with the Commission-approved Acquirer to terminate their employment relationship with the Commission-approved Acquirer unless the individual has been terminated by the Commission-approved Acquirer; *provided, however,* a violation of this provision will not occur if: (1) Respondents advertise for employees in newspapers, trade publications, or other media not targeted specifically at the employees, or (2) Respondents hire employees who apply for employment with Respondents, as long as such employees were not solicited by Respondents in violation of this Paragraph II.J.

K. Respondents shall provide all Clinical Laboratory Testing Services Managerial Employees with reasonable financial incentives to continue in their positions until the Closing Date. Such incentives shall include a continuation of all employee benefits offered by Respondents until the Closing Date for the divestiture of the Purchased Assets (or the Outpatient Clinical Laboratory Testing Services Assets or Quest Diagnostics' Northern California Clinical Laboratory Testing Services Assets, if divested), including regularly scheduled raises and bonuses, and a vesting of all pension benefits (as permitted by law). In addition, Respondents shall provide a retention incentive to the Clinical Laboratory Testing Services Managerial Employees who accept employment with the Commission-approved Acquirer equal to ten (10) percent of such employee's total annual cash compensation for the year 2002 under the following terms:

1. five (5) percent of the incentive to be paid upon the employee's completion of six (6) months of continuous employment with the Commission-approved Acquirer after the Closing Date, and

2. the remaining five (5) percent to be paid upon the employee's completion of one (1) year of continuous

employment with the Commission-approved Acquirer after the Closing Date.

L. Respondents shall, consistent with all applicable federal and state laws and regulations, secure all actual or constructive consents and waivers from all entities that are necessary for the divestiture of, or for the continued operation or use of, the Purchased Assets (or the Outpatient Clinical Laboratory Testing Services Assets or Quest Diagnostics' Northern California Clinical Laboratory Testing Services Asset, if divested) by the Commission-approved Acquirer. In the event that Respondents are unable to obtain all consents and waivers, Respondents may substitute equivalent assets, subject to Commission approval; *provided, however*, that Respondents shall not be required to divest substitute assets for an asset that Respondents are unable to convey because of a failure to obtain all applicable consents and waivers if the failure to obtain the necessary consents and waivers is a direct result of a refusal by the Commission-approved Acquirer to agree to commercially reasonable terms, including an extension of a lease reasonably requested by a landlord, or any other inaction by or action by the Commission-approved Acquirer inconsistent with customary industry practice. A substituted asset will not be deemed to be equivalent unless it enables the Commission-approved Acquirer to operate the Purchased Assets (or the Outpatient Clinical Laboratory Testing Services Assets or Quest Diagnostics' Northern California Clinical Laboratory Testing Services Assets, if divested) at commercially reasonable terms.

M. From the date Respondents execute the Agreement Containing Consent Orders, until such time as the Commission-approved Acquirer has completed its transition, including installation of all necessary software and hardware (but in no event later than six (6) months after the Outpatient Clinical Laboratory Testing Services Assets (or Quest Diagnostics' Northern California Clinical

Laboratory Testing Services Assets, if divested) are divested and transferred), Respondents shall provide to the Commission-approved Acquirer such personnel, services, assistance, and training as the Commission-approved Acquirer reasonably needs to transfer the Outpatient Clinical Laboratory Testing Services Assets (or Quest Diagnostics' Northern California Clinical Testing Services Assets, if divested) or conduct the business (including billing support). Respondents shall not require the Commission-approved Acquirer to pay compensation for the personnel, services, assistance, or training in excess of Respondents' direct costs of providing such services; *provided, however,* that if Respondents provide assistance pursuant to the LabCorp Purchase Agreement, and if the Commission does not require rescission of the divestiture and transfer of the Purchased Assets, then the Respondents shall have no further obligation pursuant to this Paragraph II.M.

N. Pending divestiture and transfer of the Purchased Assets (or the Outpatient Clinical Laboratory Testing Services Assets or Quest Diagnostics' Northern California Clinical Laboratory Testing Services Assets, if divested), Respondents shall take such actions as are necessary to maintain the viability, marketability, and competitiveness of Quest Diagnostics' Northern California Clinical Laboratory Testing Services Assets and to prevent the destruction, removal, wasting, deterioration, sale, disposition, transfer, or impairment of any of Quest Diagnostics' Northern California Clinical Laboratory Testing Services Assets except for ordinary wear and tear.

O. The purpose of the divestiture and transfer of the Purchased Assets (or the Outpatient Clinical Laboratory Testing Services Assets or Quest Diagnostics' Clinical Laboratory Testing Services Assets, if divested) is to ensure the continued use of the Purchased Assets (or the Outpatient Clinical Laboratory Testing Services Assets or Quest

Diagnostics' Clinical Laboratory Testing Services Assets, if divested) in the same business in which the Purchased Assets (or the Outpatient Clinical Laboratory Testing Services Assets or Quest Diagnostics' Clinical Laboratory Testing Services Assets, if divested) were engaged at the time of the announcement of the 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. At any time after Respondents sign the Consent Agreement, the Commission may appoint an Interim Monitor to assure that Respondents expeditiously comply with all of their obligations and perform all of their responsibilities as required by this Order and the Order to Maintain Assets (collectively, "the Orders"), and to monitor the Commission-approved Acquirer's reasonable diligence in effectuating the divestiture and transfer of assets pursuant to a Divestiture Agreement.

B. If an Interim Monitor is appointed pursuant to Paragraph III.A. of this Order or Paragraph III.A of the Order to Maintain Assets issued in this matter, Respondents shall consent to the following terms and conditions regarding the powers, duties, authorities, and responsibilities of the Interim Monitor:

1. The Commission shall select the Interim Monitor, subject to the consent of Respondents, which consent shall not be unreasonably withheld. If neither Respondent has opposed, in writing, including the reasons for opposing, the selection of a proposed Interim Monitor within ten (10) days after notice by the staff of the Commission to Respondents of the identity of any proposed Interim

Monitor, Respondents shall be deemed to have consented to the selection of the proposed Interim Monitor.

2. The Interim Monitor shall have the power and authority to monitor the Respondents' compliance with the terms of the Orders and the Commission-approved Acquirer's reasonable diligence in effectuating the divestiture and transfer of assets pursuant to the Divestiture Agreement, and shall exercise such power and authority and carry out the duties and responsibilities of the Interim Monitor in a manner consistent with the purposes of the Orders and in consultation with the Commission.

3. Not later than ten (10) days after appointment of the Interim Monitor, Respondents shall execute an agreement that, subject to the prior approval of the Commission, confers on the Interim Monitor all the rights and powers necessary to permit the Interim Monitor to monitor Respondents' compliance with the relevant terms of the Orders and the Commission-approved Acquirer's reasonable diligence in effectuating the divestiture and transfer of assets pursuant to the Divestiture Agreement in a manner consistent with the purposes of the Orders.

4. The Interim Monitor shall serve until the last obligation under the Orders pertaining to the Interim Monitor's service has been fully performed; *provided, however,* that the Commission may extend or modify this period as may be necessary or appropriate to accomplish the purposes of the Orders.

5. Subject to any legally recognized privilege, the Interim Monitor shall have full and complete access to Respondents' personnel, books, documents, or records kept in the normal course of business, facilities and technical information, and any other relevant information as the Interim Monitor may reasonably request, relating

to Respondents' compliance with their obligations under the Orders, including, but not limited to, their obligations relating to the Purchased Assets (or the Outpatient Clinical Laboratory Testing Services Assets or Quest Diagnostics' Northern California Clinical Laboratory Testing Services Assets, if divested). Respondents shall cooperate with any reasonable request of the Interim Monitor and shall take no action to interfere with or impede the Interim Monitor's ability to monitor Respondents' compliance with the Orders.

6. The Interim Monitor 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 Monitor shall have authority to employ, at the expense of the Respondents, such consultants, accountants, attorneys and other representatives and assistants as are reasonably necessary to carry out the Interim Monitor's duties and responsibilities. The Interim Monitor shall account for all expenses incurred, including fees for services rendered, subject to the approval of the Commission. The Commission may, among other things, require the Interim Monitor and each of the Interim Monitor's consultants, accountants, attorneys, and other representatives and assistants to sign an appropriate confidentiality agreement relating to Commission materials and information received in connection with the performance of the Interim Monitor's duties.

7. Respondents shall indemnify the Interim Monitor and hold the Interim Monitor harmless against any losses, claims, damages, liabilities, or expenses arising out of, or in connection with, the performance of the Interim Monitor's duties, including all reasonable fees of counsel and other reasonable 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 Monitor.

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

9. The Commission may on its own initiative, or at the request of the Interim Monitor, issue such additional orders or directions as may be necessary or appropriate to assure compliance with the requirements of the Orders.

10. Respondents shall report to the Interim Monitor in accordance with the requirements of Paragraph V. of this Order and Paragraph IV. of the Order to Maintain Assets and/or as otherwise provided in any agreement approved by the Commission. The Interim Monitor shall evaluate the reports submitted to the Interim Monitor by Respondents, and any reports submitted by the Commission-approved Acquirer with respect to the performance of its or Respondents' obligations under the Orders or the Divestiture Agreement. Within one (1) month from the date the Interim Monitor receives these reports, the Interim Monitor shall report in writing to the Commission concerning compliance by Respondents with the provisions of the Orders.

11. Respondents may require the Interim Monitor and each of the Interim Monitor's consultants, accountants, attorneys, and other representatives and assistants to sign a customary confidentiality agreement; *provided, however,* such agreement shall

not restrict the Interim Monitor from providing any information to the Commission.

IV.

IT IS FURTHER ORDERED that:

A. If Respondents have not fully complied with the obligations specified in Paragraph II.A., B., C., or D, as applicable, of this Order, the Commission may appoint a Divestiture Trustee to divest either the Outpatient Clinical Laboratory Testing Services Assets or Quest Diagnostics' Northern California Clinical Laboratory Testing Services Assets in a manner that satisfies the requirements of Paragraph II of this Order. In the event that the Commission or the Attorney General brings an action pursuant to § 5(*l*) of the Federal Trade Commission Act, 15 U.S.C. § 45(*l*), or any other statute enforced by the Commission, Respondents shall consent to the appointment of a Divestiture Trustee in such action to divest the relevant assets in accordance with the terms of this Order. Neither the appointment of a Divestiture Trustee nor a decision not to appoint a Divestiture 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 Divestiture 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 Divestiture Trustee is appointed by the Commission or a court pursuant to Paragraph IV.A. of this Order, Respondents shall consent to the following terms and conditions regarding the Divestiture Trustee's powers, duties, authority, and responsibilities:

1. The Commission shall select the Divestiture Trustee, subject to the consent of Respondents, which consent

shall not be unreasonably withheld. The Divestiture 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 Divestiture Trustee within ten (10) days after notice by the staff of the Commission to Respondents of the identity of any proposed Divestiture Trustee, Respondents shall be deemed to have consented to the selection of the proposed Divestiture Trustee.

2. Subject to the prior approval of the Commission, the Divestiture Trustee shall have the exclusive power and authority to divest or transfer the relevant assets that are required by this Order to be divested or transferred.

3. Within ten (10) 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 Divestiture Trustee, of the court, transfers to the Divestiture Trustee all rights and powers necessary to permit the Divestiture Trustee to effect the relevant divestiture(s) or transfer(s) required by the Order.

4. The Divestiture Trustee shall have twelve (12) months from the date the Commission approves the trust agreement described in Paragraph IV.B.3. to accomplish the divestiture(s), 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 the divestiture(s) can be achieved within a reasonable time, the divestiture period may be extended by the Commission, or, in the case of a court-appointed Divestiture Trustee, by the court; *provided, however,* the Commission may extend the divestiture period only two (2) times.

5. The Divestiture Trustee shall have full and complete access to the personnel, books, records, and facilities relating to the relevant assets that are required to be divested by this Order or to any other relevant information, as the Divestiture Trustee may request. Respondents shall develop such financial or other information as the Divestiture Trustee may request and shall cooperate with the Divestiture Trustee. Respondents shall take no action to interfere with or impede the Divestiture Trustee's accomplishment of the divestiture(s). 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 Divestiture 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, subject to Respondents' absolute and unconditional obligation to divest at no minimum price. The divestiture(s) shall be made in the manner and to an acquirer as required by this Order; *provided, however,* if the Divestiture Trustee receives bona fide offers from more than one acquiring entity, and if the Commission determines to approve more than one such acquiring entity, the Divestiture Trustee shall divest to the acquiring entity selected by 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 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 Divestiture Trustee's duties and responsibilities. The Divestiture Trustee shall account for all monies derived from the divestiture(s) and all expenses incurred. After approval by the Commission and, in the case of a court-appointed Divestiture Trustee, by the court, of the account of the Divestiture Trustee, including fees for his or her services, all remaining monies shall be paid at the direction of the Respondents, and the Divestiture Trustee's power shall be terminated. The compensation of the Divestiture Trustee shall be based at least in significant part on a commission arrangement contingent on the divestiture of all of the relevant assets that are required to be divested by this Order.

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

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

10. The Commission or, in the case of a court-appointed Divestiture 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 divestiture(s) required by this Order.

11. The Divestiture Trustee shall have no obligation or authority to operate or maintain the relevant assets required to be divested by this Order.

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

V.

IT IS FURTHER ORDERED that

A. Beginning thirty (30) days after the initial report is required to be filed pursuant to the Agreement Containing Consent Orders in this matter, and every sixty (60) days thereafter until Respondents have fully complied with these obligations pursuant to this Order, Respondents shall submit to the Commission and the Interim Monitor 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.A. (or Paragraphs II.B., C., or D., or Paragraph IV., if applicable) and Paragraphs II.F., G., H., I., L., M., and N.; and

B. Beginning six (6) months after the initial report is required to be filed, and every six (6) months thereafter, for the duration of Respondents' obligation, Respondents shall submit to the Commission verified written reports setting forth in detail the manner and form in which they are

complying and have complied with Paragraphs II.J. and K. of this Order.

C. 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 this Order, subject to any legally recognized privilege, including copies of all written and electronic communications to and from the parties, all internal memoranda, and all reports and recommendations concerning the completion of such obligations.

VI.

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

VII.

IT IS FURTHER ORDERED that, for the purpose of determining or securing compliance with this Order, 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 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.

By the Commission.

NON-PUBLIC APPENDIX A
TO THE DECISION AND ORDER

Management Employees

[Redacted From Public Record Version]

NON-PUBLIC APPENDIX B
TO THE DECISION AND ORDER

LabCorp Purchase Agreement

[Redacted From Public Record Version]

ORDER TO MAINTAIN ASSETS

The Federal Trade Commission ("Commission"), having initiated an investigation of the proposed acquisition by Respondent Quest Diagnostics Incorporated ("Quest Diagnostics") of Respondent Unilab Corporation ("Unilab"), hereinafter referred to as "Respondents," and Respondents having been furnished thereafter with a copy of a draft of 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 7 of the Clayton Act, as amended, 15 U.S.C. § 18, and Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45; and

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

The Commission having thereafter considered the matter and having determined that it had reason to believe that Respondents have violated the said Acts, and that a Complaint should issue stating its charges in that respect, and having determined to accept the executed Consent Agreement and to place 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 finding and issues this Order to Maintain Assets:

1. Respondent Quest Diagnostics 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 One Malcolm Avenue, Teterboro, New Jersey, 07608.

2. Respondent Unilab 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 18448 Oxnard Street, Tarzana, CA, 91356.

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

ORDER

I.

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

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

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

C. "Acquisition" means the exchange offer contemplated by Agreement and Plan of Merger dated April 2, 2002, and all amendments thereto, whereby Quest Diagnostics agreed to acquire all of the issued and outstanding voting securities of Unilab in exchange for cash, stock of Quest Diagnostics, or a combination of cash and stock of Quest Diagnostics.

D. "Acquisition Date" means the date the Acquisition is consummated.

E. "Agency(ies)" means any governmental regulatory authority or authorities in the United States responsible for granting approval(s), clearance(s), qualification(s), license(s), or permit(s) for any aspect of the research, development, manufacture, marketing, distribution, or sale of Clinical Laboratory Testing Services.

F. "Clinical Laboratory Testing Services" means the full range of products and services provided by a clinical laboratory, including, but not limited to, the drawing, collection, and transportation of specimens over a coordinated courier route system; stat, routine, and esoteric clinical testing; the computerized tracking of specimens for testing, record-keeping, and billing functions; and the electronic communication of test results and other necessary data to Customers.

G. "Clinical Laboratory Testing Services Managerial Employees" means the current senior managers of Respondent Quest Diagnostics, identified in non-public Appendix A, attached to this Order to Maintain Assets.

H. "Closing Date" means the date on which Respondents and the Commission-approved Acquirer consummate the transactions contemplated by the Divestiture Agreement.

I. "Commission" means the Federal Trade Commission.

J. "Commission-approved Acquirer" means the Person approved by the Commission to acquire assets pursuant to the Decision and Order, including LabCorp as the acquirer of the Purchased Assets pursuant to the LabCorp Purchase Agreement, if the Commission does not require that, pursuant to Paragraphs II.C. or II.D. of the Decision and Order, Respondents rescind the divestiture and transfer of the Purchased Assets.

K. "Confidential Business Information" means all customer-specific pricing information, customer-specific discounts, and customer-specific supply or service requirements or

preferences relating to the provision of Clinical Laboratory Testing Services by Quest Diagnostics in Northern California prior to the Acquisition Date (or the Closing Date as applicable if either the Outpatient Clinical Laboratory Testing Services Assets or Quest Diagnostics' Northern California Clinical Laboratory Testing Services Assets are divested).

L. "Customer" means any Person who orders or refers Clinical Laboratory Testing Services.

M. "Divestiture Agreement" means any agreement between Respondents and a Commission-approved Acquirer (or between Divestiture Trustee and a Commission-approved Acquirer), as well as all amendments, exhibits, attachments, agreements, and schedules thereto, related to the divestiture of the Purchased Assets (or the Outpatient Clinical Laboratory Testing Services Assets or Quest Diagnostics' Northern California Clinical Laboratory Testing Services Assets, if divested) that has been approved by the Commission to accomplish the requirements of the Decision and Order.

N. "Divestiture Trustee" means the trustee appointed by the Commission pursuant to Paragraph IV. of the Decision and Order.

O. "Firewalled Employees" means all employees of Respondents that remain in the employment of Respondents after the Acquisition Date who, after the Acquisition Date, directly participate (irrespective of the portion of working time involved) in the marketing, contracting, or sales of Clinical Laboratory Testing Services to Customers or Payers in Northern California.

P. "LabCorp" means Laboratory Corporation of America Holdings, 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 358 South Main Street, Burlington, North Carolina 27215.

Q. "LabCorp Purchase Agreement" means the Asset Purchase Agreement entered into between Quest Diagnostics Clinical

Laboratories, Inc. and Laboratory Corporation of America Holdings, as well as all amendments, exhibits, attachments, agreements, and schedules thereto, dated February 3, 2003. The LabCorp Purchase Agreement is attached to this Order to Maintain Assets as non-public Appendix B.

R. "Northern California" means all counties in California north of, but not including, San Luis Obispo, Kern, and San Bernardino counties.

S. "Outpatient Clinical Laboratory Testing Services Assets" means the following:

1. at the option of the Commission-approved Acquirer, any or all of Quest Diagnostics' assets, tangible and intangible, relating to Quest Diagnostics' Northern California Outpatient Clinical Laboratory Testing Services Business, including, without limitation, the following:
   a. all PSCs, Stat Labs, and the full-service clinical laboratory located in Dublin, California, and all related assets, including, without limitation, all:
      (1) real property interests (including fee simple interests and real property leasehold interests), together with all buildings and other structures, facilities, or improvements, currently or hereafter located thereon;
      (2) easements, rights, and appurtenances;
      (3) to the extent assignable, licenses, permits, registrations, certificates, consents, orders, accreditations, certificates of need, approvals, franchises, and similar authorizations required under applicable law or by applicable Agencies for the operation of the PSCs, Stat Labs, and the full-service clinical laboratory as currently operated by Quest Diagnostics;
      (4) equipment and instruments related to providing Clinical Laboratory Testing Services; and
      (5) other equipment, supplies, furniture, fixtures, vehicles, and other tangible personal property;
   b. all assets relating to the provision of courier services;

c. all agreements with Payers (except hospital clinical laboratories and independent clinical laboratories) in effect as of the Acquisition Date, and all rights related thereto, to the extent such agreements are assignable;
d. a copy of all books, records, and files (electronic and hard-copy) related to the foregoing; and

2. at the option of the Commission-approved Acquirer, the Managed Care Laboratory Services Agreement between Unilab and Sutter Medical Foundation-North Bay, dated November 1, 2002, and all of Unilab's assets, tangible and intangible, relating to that agreement, including, without limitation, the following:
   a. all PSCs and Stat Labs relating to that agreement located in Sonoma County, California; and all related assets, including, without limitation, all:
      (1) real property interests (including fee simple interests and real property leasehold interests), together with all buildings and other structures, facilities, or improvements, currently or hereafter located thereon;
      (2) easements, rights, and appurtenances;
      (3) to the extent assignable, licenses, permits registrations, certificates, consents, orders, accreditations, certificates of need, approvals, franchises and similar authorizations required under applicable law or by applicable Agencies for the operation of such PSCs and Stat Labs;
      (4) equipment and instruments related to providing Clinical Laboratory Testing Services; and
      (5) other equipment, supplies, furniture, fixtures, vehicles, and other tangible personal property; *provided, however,* that, for purposes of this subparagraph I.S.2.a. only, "Outpatient Clinical Laboratory Testing Services Assets" does not include any PSCs or Stat Labs located outside of Sonoma County, California;
   b. all assets relating to the provision of courier services to such PSCs and Stat Labs; and
   c. a copy of all books, records, and files (electronic and hard-copy) related to the foregoing.

"Outpatient Clinical Laboratory Testing Services Assets" does not include:

a. rights to the name Quest Diagnostics, SmithKline Beecham Clinical Laboratories, Unilab, or any variations of the foregoing names;
b. any tangible personal property located outside of Northern California or in the offices of Customers;
c. Respondents' Medicare and Medicaid licenses and provider agreements;
d. the Nichols Institute;
e. any computers, servers, or other hardware that are used throughout Quest Diagnostics; and
f. any computer programs and other software, patents, trade secrets, know-how, or proprietary information owned or licensed by the Respondents or their affiliates, including without limitation Quest Diagnostics' laboratory information systems and billing system; *provided, however,* that Respondents shall convey to the Commission-approved Acquirer (to the extent permitted by the third-party licensee if Respondents license the computer programs and other software, patents, trade secrets, know-how, or proprietary information from a third party) the right to use any software, patents, trade secrets, know-how, or proprietary information that is needed to operate the assets divested to the Commission-approved Acquirer and that the Commission-approved Acquirer is unable, using commercially-reasonable efforts, to obtain from other third parties on commercially-reasonable terms and conditions.

Provided, however, that, with respect to assets that are to be divested pursuant to this Order, Respondents need not divest assets that the Commission-approved Acquirer chooses not to acquire only if the acquirer chooses not to acquire such assets and the Commission approves the divestiture without such assets.

T. "PSC" means a patient service center or any other facility where specimens are drawn and collected for the purpose of providing Clinical Laboratory Testing Services.

U. "Payer" means any Person that pays for Clinical Laboratory Testing Services including, without limitation, the following: (1) the Customer; (2) the patient; (3) Medicare or Medicaid; or (4) a third party who pays the bill on behalf of the patient, such as an insurance company, employer, or managed-care provider, including Physician Groups.

V. "Person" means any natural person, partnership, association, or corporate or governmental organization or entity.

W. "Physician Group" means any group medical practice, individual practice association, physician service organization, management service organization, medical foundation, or physician/hospital organization, that provides, or through which physicians contract to provide, physician services to enrollees of pre-paid health plans.

X. "Purchased Assets" means the assets described in the LabCorp Purchase Agreement.

Y. "Quest Diagnostics Firewalled Employees" means the employees of Respondent Quest Diagnostics who, at the time Respondents executed the Agreement Containing Consent Orders, directly participated (irrespective of the portion of working time involved) in the marketing, contracting, or sales of Clinical Laboratory Testing Services to Customers or Payers in Northern California and who have not been or who are not being offered employment by LabCorp pursuant to the LabCorp Purchase Agreement and who, after the Acquisition Date, will directly participate (irrespective of the portion of working time involved) in the marketing, contracting, or sales of Clinical Laboratory Testing Services to Customers or Payers in Northern California.

Z. "Quest Diagnostics' Northern California Outpatient Clinical Laboratory Testing Services Business" means Quest

Diagnostics' business of providing Clinical Laboratory Testing Services (regardless of type of Payer) in Northern California to Customers, other than hospital clinical laboratories and independent clinical laboratories, as that business existed prior to the Acquisition Date.

AA. "Quest Diagnostics' Northern California Clinical Laboratory Testing Services Business" means Quest Diagnostics' business of providing Clinical Laboratory Testing Services (regardless of type of Payer) in Northern California to Customers, including hospital clinical laboratories and independent clinical laboratories, as that business existed prior to the Acquisition Date.

AB. "Quest Diagnostics' Northern California Clinical Laboratory Testing Services Assets" means:

1. all of the Outpatient Clinical Laboratory Testing Services Assets, and
2. all other assets, tangible and intangible, relating to Quest Diagnostics' Northern California Clinical Laboratory Testing Services Business.

"Quest Diagnostics' Northern California Clinical Laboratory Testing Services Assets" does not include:

a. rights to the name Quest Diagnostics, SmithKline Beecham Clinical Laboratories, Unilab, or any variations of the foregoing names;
b. any tangible personal property located outside of Northern California or in the offices of Customers;
c. Respondents' Medicare and Medicaid licenses and provider agreements;
d. the Nichols Institute;
e. any computers, servers, or other hardware that are used throughout Quest Diagnostics; and
f. any computer programs and other software, patents, trade secrets, know-how, or proprietary information owned or licensed by the Respondents or their affiliates, including without limitation Quest Diagnostics' laboratory information systems and billing system; *provided, however,* that Respondents

shall convey to the Commission-approved Acquirer (to the extent permitted by the third-party licensee if Respondents license the computer programs and other software, patents, trade secrets, know-how, or proprietary information from a third party) the right to use any software, patents, trade secrets, know-how, or proprietary information that is needed to operate the assets divested to the Commission-approved Acquirer and that the Commission-approved Acquirer is unable, using commercially-reasonable efforts, to obtain from other third parties on commercially-reasonable terms and conditions.

AC. "Respondents" means Quest Diagnostics and Unilab, individually and collectively.

AD. "Stat Lab" means a clinical laboratory testing facility with rapid response capability, in which clinical laboratory tests can be quickly performed for Customers that require rapid turn-around (less than 24 hours).

II.

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

A. Respondents shall take such actions as are necessary to maintain the viability, marketability, and competitiveness of Quest Diagnostics' Northern California Clinical Laboratory Testing Services Assets, and shall prevent the destruction, removal, wasting, deterioration, sale, disposition, transfer, or impairment of Quest Diagnostics' Northern California Clinical Laboratory Testing Services Assets, except for ordinary wear and tear.

B. Respondents shall maintain the operations of Quest Diagnostics' Northern California Clinical Laboratory Testing Services Assets in the ordinary course of business and in accordance with past practice (including regular repair and maintenance of Quest Diagnostics' Northern California Clinical Laboratory Testing Services Assets) and shall use their

best efforts to preserve the existing relationships with physicians, Payers, suppliers, vendors, Customers, employees, and others having business relations with Quest Diagnostics' Northern California Clinical Laboratory Testing Services Assets. Respondents' responsibilities shall include, but are not limited to:

1. providing Quest Diagnostics' Northern California Clinical Laboratory Testing Services Assets with sufficient working capital to operate Quest Diagnostics' Northern California Clinical Laboratory Testing Services Assets at least at current rates of operation, to the extent that those assets have not been transferred, to meet all capital calls with respect to Quest Diagnostics' Northern California Clinical Laboratory Testing Services Assets and to carry on, at least at their scheduled pace, to the extent that those assets have not been transferred, all capital projects, business plans and promotional activities for Quest Diagnostics' Northern California Clinical Laboratory Testing Services Assets;

2. continuing, at least at their scheduled pace, to the extent that those assets have not been transferred, any additional expenditures for Quest Diagnostics' Northern California Clinical Laboratory Testing Services Assets authorized as of the Closing Date;

3. making available for use by Quest Diagnostics' Northern California Clinical Laboratory Testing Services Assets funds sufficient to perform all necessary routine maintenance to, and replacements of, Quest Diagnostics' Northern California Clinical Laboratory Testing Services Assets;

4. providing Quest Diagnostics' Northern California Clinical Laboratory Testing Services Assets with such funds as are necessary to maintain the viability, marketability, and competitiveness of Quest Diagnostics' Northern California Clinical Laboratory Testing Services Assets;

5. providing such support services to Quest Diagnostics' Northern California Clinical Laboratory Testing Services Assets as were being provided to this business by Respondents on the Closing Date;

6. continuing to provide Clinical Laboratory Testing Services, at the same quality and level of service as Respondents provided during the twelve (12) months prior to the date the Consent Agreement was signed by Respondents, satisfying all regulatory requirements and consistent with standard industry practices, until such time as the Interim Monitor, in consultation with Commission staff and the Commission-approved Acquirer, determines that the transfer of the Purchased Assets (or the Outpatient Clinical Laboratory Testing Services Assets or Quest Diagnostics' Northern California Clinical Laboratory Testing Services Assets, if divested) is complete; and

7. cooperate with the Interim Trustee in the performance of his or her obligations pursuant to Paragraph III. of this Order to Maintain Assets.

C. From the Closing Date through the date six (6) months following the last transfer of the Purchased Assets (or the Outpatient Clinical Laboratory Testing Services Assets or Quest Diagnostics' Northern California Clinical Laboratory Testing Services Assets, if divested):

1. Respondents shall not disclose or convey, directly or indirectly, to Firewalled Employees any Confidential Business Information relating to the assets divested and transferred to the Commission-approved Acquirer pursuant to this Order to Maintain Assets; and

2. Firewalled Employees shall not solicit or access any Confidential Business Information relating to the assets divested and transferred to the Commission-approved Acquirer pursuant to this Order to Maintain Assets from any other of Respondents' employees;

provided, however, that nothing contained herein shall prohibit Respondents' employees from using Confidential Business Information to respond to inquiries from Customers requesting information relating to that Customer's own account; and *provided, further,* that only for purposes of the divestiture of the Purchased Assets, nothing contained herein shall prohibit Quest Diagnostics Firewalled Employees (and, following the completion of the divestiture and transfer of all of the Purchased Assets, all other Firewalled Employees) from using, soliciting, or having access to Confidential Business Information relating to any physician not included in the database that Respondents are required to create and transfer to LabCorp pursuant to the LabCorp Purchase Agreement as contemplated by Paragraph II.F. of the Decision and Order.

3. Prior to the Closing Date, Respondents shall develop and implement procedures to assure that such Confidential Business Information is not disclosed or conveyed to Firewalled Employees and that Firewalled Employees do not solicit or access such Confidential Business Information from any other of Respondents' employees consistent with the requirements of this Paragraph II.C.

D. Respondents shall, promptly following the Closing Date, provide written or electronic notification to the Firewalled Employees and all of Respondents' employees who have access to Confidential Business Information relating to the assets divested to the Commission-approved Acquirer pursuant to this Order to Maintain Assets of the restrictions on the disclosure and solicitation of Confidential Business Information relating to the Purchased Assets (or the Outpatient Clinical Laboratory Testing Services Assets or Quest Diagnostics' Northern California Clinical Laboratory Testing Services Assets, if divested) by Respondents' personnel. At the same time, if not provided earlier, Respondents shall provide a copy of such notification to employees by e-mail with return receipt requested or similar transmission, and keep an electronic file of such receipts for one (1) year after the Closing Date. Respondents shall provide a copy of the form of

such notification to the Commission-approved Acquirer, the Interim Monitor, and the Commission. Respondents shall also obtain from the Firewalled Employees an agreement to abide by the applicable restrictions. Such agreement and notification shall be in substantially the form set forth in the "Notice of the Divestiture and Employee Agreement to Maintain Confidential Business Information" attached as Appendix C to this Order to Maintain Assets.

E. For a period of one (1) year following the date the divestiture and transfer are completed, Respondents shall not, directly or indirectly, solicit, induce, or attempt to solicit or induce any employees of Respondent who have accepted offers of employment with the Commission-approved Acquirer to terminate their employment relationship with the Commission-approved Acquirer unless the individual has been terminated by the Commission-approved Acquirer; *provided, however,* a violation of this provision will not occur if: (1) Respondents advertise for employees in newspapers, trade publications, or other media not targeted specifically at the employees, or (2) Respondents hire employees who apply for employment with Respondents, as long as such employees were not solicited by Respondents in violation of this Paragraph II.E.

F. Respondents shall provide all Clinical Laboratory Testing Services Managerial Employees with reasonable financial incentives to continue in their positions until the Closing Date. Such incentives shall include a continuation of all employee benefits offered by Respondents until the Closing Date for the divestiture of the Purchased Assets (or the Outpatient Clinical Laboratory Testing Services Assets or Quest Diagnostics' Northern California Clinical Laboratory Testing Services Assets, if divested), including regularly scheduled raises and bonuses, and a vesting of all pension benefits (as permitted by law). In addition, Respondents shall provide a retention incentive to the Clinical Laboratory Testing Services Managerial Employees who accept employment with the Commission-approved Acquirer equal to ten (10) percent of such employee's total annual cash compensation for the year 2002 under the following terms:

1. five (5) percent of the incentive to be paid upon the employee's completion of six (6) months of continuous employment with the Commission-approved Acquirer after the Closing Date, and

2. the remaining five (5) percent to be paid upon the employee's completion of one (1) year continuous employment with the Commission-approved Acquirer after the Closing Date.

G. Respondents shall not, in connection with divestiture and transfer of the Purchased Assets (or the Outpatient Clinical Laboratory Testing Services Assets or Quest Diagnostics' Northern California Clinical Laboratory Testing Services Assets, if divested), interfere with the employment by the Commission-approved Acquirer of any employee of Respondents with responsibilities relating primarily to the Purchased Assets (or the Outpatient Clinical Laboratory Testing Services Assets or Quest Diagnostics' Northern California Clinical Laboratory Testing Services Assets, if divested), shall not offer any incentive to such employees to decline employment with the Commission-approved Acquirer or to accept other employment with Respondents in lieu of accepting employment with the Commission-approved Acquirer, and shall remove any other impediments that may deter such employees from accepting employment with the Commission-approved Acquirer, including, but not limited to, any confidentiality provisions relating to the Purchased Assets (or the Outpatient Clinical Laboratory Testing Services Assets or Quest Diagnostics' Northern California Clinical Laboratory Testing Services Assets, if divested) or any non-compete or confidentiality provisions of employment or other contracts with Respondents that would affect the ability of those individuals to be employed by the Commission-approved Acquirer*; provided, however,* that if Respondents comply with the terms of the LabCorp Purchase Agreement relating to the solicitation and employment by LabCorp of employees of the Respondents, and if the Commission does not require rescission of the divestiture and transfer of the Purchased Assets, then the Respondents shall have no further obligations pursuant to this Paragraph II.G.; and *provided, further,* that

nothing in this Paragraph II.G. shall be construed to require the Respondents to terminate the employment of any employee.

H. Respondents shall adhere to and abide by the Divestiture Agreement incorporated by reference into this Order to Maintain Assets and made a part hereof.

III.

IT IS FURTHER ORDERED that:

A. At any time after Respondents sign the Consent Agreement, the Commission may appoint an Interim Monitor to assure that Respondents expeditiously comply with all of their obligations and perform all of their responsibilities as required by this Order to Maintain Assets and by the Decision and Order (collectively, "the Orders") and to monitor the Commission-approved Acquirer's reasonable diligence in effectuating the divestiture and transfer of assets pursuant to a Divestiture Agreement.

B. If an Interim Monitor is appointed pursuant to Paragraph III.A. of this Order to Maintain Assets or Paragraph III.A. of the Decision and Order in this matter, Respondents shall consent to the following terms and conditions regarding the powers, duties, authorities, and responsibilities of the Interim Monitor:

1. The Commission shall select the Interim Monitor, subject to the consent of Respondents, which consent shall not be unreasonably withheld. If neither Respondent has opposed, in writing, including the reasons for opposing, the selection of a proposed Interim Monitor within ten (10) days after notice by the staff of the Commission to Respondents of the identity of any proposed Interim Monitor, Respondents shall be deemed to have consented to the selection of the proposed Interim Monitor.

2. The Interim Monitor shall have the power and authority to monitor the Respondents' compliance with the terms of the Orders and the Commission-approved Acquirer's

reasonable diligence in effectuating the divestiture and transfer of assets pursuant to a Divestiture Agreement, and shall exercise such power and authority and carry out the duties and responsibilities of the Interim Monitor in a manner consistent with the purposes of the Orders and in consultation with the Commission.

3. Not later than ten (10) days after appointment of the Interim Monitor, Respondents shall execute an agreement that, subject to the prior approval of the Commission, confers on the Interim Monitor all the rights and powers necessary to permit the Interim Monitor to monitor Respondents' compliance with the relevant terms of the Orders and the Commission-approved Acquirer's reasonable diligence in effectuating the divestiture and transfer of assets pursuant to a Divestiture Agreement in a manner consistent with the purposes of the Orders.

4. The Interim Monitor shall serve until the last obligation under the Orders pertaining to the Interim Monitor's service has been fully performed; *provided, however,* that the Commission may extend or modify this period as may be necessary or appropriate to accomplish the purposes of the Orders.

5. Subject to any legally recognized privilege, the Interim Monitor shall have full and complete access to Respondents' personnel, books, documents, or records kept in the normal course of business, facilities and technical information, and any other relevant information as the Interim Monitor may reasonably request, relating to Respondents' compliance with their obligations under the Orders, including, but not limited to, their obligations relating to the Purchased Assets (or the Outpatient Clinical Laboratory Testing Services Assets or Quest Diagnostics' Northern California Clinical Laboratory Testing Services Assets, if divested). Respondents shall cooperate with any reasonable request of the Interim Monitor and shall take no action to interfere with or

impede the Interim Monitor's ability to monitor Respondents' compliance with the Orders.

6. The Interim Monitor 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 Monitor shall have authority to employ, at the expense of the Respondents, such consultants, accountants, attorneys and other representatives and assistants as are reasonably necessary to carry out the Interim Monitor's duties and responsibilities. The Interim Monitor shall account for all expenses incurred, including fees for services rendered, subject to the approval of the Commission. The Commission may, among other things, require the Interim Monitor and each of the Monitor's consultants, accountants, attorneys, and other representatives and assistants to sign an appropriate confidentiality agreement relating to Commission materials and information received in connection with the performance of the Interim Monitor's duties.

7. Respondents shall indemnify the Interim Monitor and hold the Interim Monitor harmless against any losses, claims, damages, liabilities, or expenses arising out of, or in connection with, the performance of the Interim Monitor's duties, including all reasonable fees of counsel and other reasonable 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 Monitor.

8. If the Commission determines that the Interim Monitor has ceased to act or failed to act diligently, the Commission may appoint a substitute Interim Monitor in the same manner as provided in Paragraph III.A. of this Order to Maintain Assets or Paragraph III.A. of the Decision and Order in this matter.

9. The Commission may on its own initiative, or at the request of the Interim Monitor, issue such additional orders or directions as may be necessary or appropriate to assure compliance with the requirements of the Orders.

10. Respondents shall report to the Interim Monitor in accordance with the requirements of Paragraph IV. of this Order to Maintain Assets and Paragraph V. of the Decision and Order and/or as otherwise provided in any agreement approved by the Commission. The Interim Monitor shall evaluate the reports submitted to the Interim Monitor by Respondents, and any reports submitted by the Commission-approved Acquirer with respect to the performance of Respondents' obligations under the Orders or the Divestiture Agreement. Within one (1) month from the date the Interim Monitor receives these reports, the Interim Monitor shall report in writing to the Commission concerning compliance by Respondents with the provisions of the Orders.

11. Respondents may require the Interim Monitor and each of the Interim Monitor's consultants, accountants, attorneys, and other representatives and assistants to sign a customary confidentiality agreement; *provided, however,* such agreement shall not restrict the Interim Monitor from providing any information to the Commission.

C. The Interim Monitor appointed pursuant to Paragraph III.A. of this Order to Maintain Assets may be the same Person appointed as Divestiture Trustee pursuant to Paragraph IV. of the Decision and Order in this matter.

IV.

IT IS FURTHER ORDERED that, beginning thirty (30) days after the initial report is required to be filed pursuant to the Agreement Containing Consent Orders in this matter, and every sixty (60) days thereafter until Respondents have fully complied

with these obligations pursuant to this Order to Maintain Assets, Respondents shall submit to the Commission and the Interim Monitor verified written reports setting forth in detail the manner and form in which they intend to comply, are complying, and have complied with Paragraph II. of this Order. 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 this Order to Maintain Assets, subject to any legally recognized privilege, including copies of all written and electronic communications to and from the parties, all internal memoranda, and all reports and recommendations concerning the completion of such obligations.

V.

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

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

B. Upon five (5) days' notice to Respondents and without restraint or interference from Respondents, to interview

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

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. The day after the divestiture and transfer of all of the Purchased Assets (or the Outpatient Clinical Laboratory Testing Services Assets or Quest Diagnostics' Northern California Clinical Laboratory Testing Services Assets, if divested), as described in and required by the attached Decision and Order, is completed and the Interim Monitor, in consultation with Commission staff and the Commission-approved Acquirer, notifies the Commission that the Commission-approved Acquirer's transition is complete.

By the Commission.

NON-PUBLIC APPENDIX A
TO THE ORDER TO MAINTAIN ASSETS

Management Employees

[Redacted From Public Record Version]

NON-PUBLIC APPENDIX B
TO THE ORDER TO MAINTAIN ASSETS

LabCorp Purchase Agreement

[Redacted From Public Record Version]

APPENDIX C
TO THE ORDER TO MAINTAIN ASSETS
Notice of the Divestiture and Employee Agreement to Maintain Confidential Business Information

SALES EMPLOYEE NOTICE AND SALES EMPLOYEE AGREEMENT

On [date], Quest Diagnostics Incorporated and Unilab Corporation entered into an agreement with the Federal Trade Commission in connection with Quest Diagnostics' acquisition of Unilab. Pursuant to that agreement, the Federal Trade Commission will issue a number of Orders imposing obligations on the combined company and its employees. As an employee of the combined company, you must comply with certain provisions of the Orders.

In general, the Orders require Quest Diagnostics to transfer to Laboratory Corporation of America Holdings ("LabCorp"):

- 46 patient service centers ("PSCs"), four of which are rapid response laboratories
- An assignment of three Quest Diagnostics IPA agreements (Alta Bates Medical Group, Brown & Toland Medical Group, and Affinity Medical Group) and one Unilab IPA agreement (Sutter Medical Foundation- North Bay)
- Account information for physicians whose patients have used the PSCs being transferred to LabCorp, as discussed below.

The Orders require that the PSCs and rapid response laboratories and the IPA agreements be transferred to LabCorp during a six-month period, and that during the course of that six-month period, no actions can be taken that detract from the value or the competitive viability of the assets to be transferred or of any remaining assets of Quest Diagnostics in Northern California. In addition, the Orders require Quest Diagnostics to allow LabCorp to make employment offers to certain employees of Quest Diagnostics and Unilab.

Under the Orders, Quest Diagnostics will be required to provide LabCorp with account set-up information (including pricing, service and logistics) for all physicians who are affiliated with any of the four IPAs listed above and all physicians who referred at least 8 specimens to the 46 patient service centers during either October, November or December 2002. The Orders provide that All Quest Diagnostics employees who are involved with marketing, contracting or sales in Northern California ("sales employees") may not solicit or have access to any customer-specific pricing information, customer-specific discounts and customer-specific supply or service requirements or preferences with respect to these physician accounts prior to the acquisition of Unilab. There are approximately ____ accounts, including ___ IPA accounts, at Quest Diagnostics that are covered by this restriction, including certain accounts for which you may be currently responsible. All Unilab sales employees are prohibited from soliciting or having access to any of this Quest Diagnostics' customer-specific information on any customer of Quest Diagnostics (regardless of whether any of the customer's patients utilized the PSCs), even if the customer is also a customer of Unilab.

All Quest Diagnostics sales employees will be informed of the names of the accounts to which the this prohibition applies. Sales employees will not have access to this customer-specific information on these physician accounts from the company's computer systems. Note that the prohibition applies to all customer-specific information, whether in paper or electronic format. If you have any documents or electronic files containing any of this information in your possession, please contact _____ so that we may remove that information from your files. Do not attempt to access customer-specific information on these physicians accounts from any source, including the Company's computer systems or any paper files, or from any non-sales employees who have access to this information as discussed below.

If any of your (or any other) customers have any questions regarding their account, they may continue to call their customer solutions contact or other service personnel as may be appropriate. Customers solutions employees, as well as billing and certain

other employees, will continue to have access to the above-mentioned customer specific information with respect to these physician accounts for billing purposes, for customer service purposes, or for any other non-sales purpose. However, these employees are prohibited from supplying any customer-specific information to sales employees. Accordingly, please do not request customer-specific information regarding any of the physician accounts covered by the Orders. Instead, if any physician account covered by the Orders has any questions that you cannot answer because of this restriction, please refer the account to a person who has access to the information and may answer their questions.

By receiving this notice, you hereby acknowledge that you have been informed of the above prohibitions. We will notify you when Quest Diagnostics' obligations under the Orders are completed and the prohibitions on certain conduct discussed above come to an end.

Please note that you are not prohibited from making any sales calls on any of the physicians covered by this prohibition or from obtaining from these physician customers any information that is otherwise covered by the Orders. You can turn such information over to [customer solutions] to be input in the Company's information systems.

You must sign this acknowledgment and agree to abide by the above prohibitions.

Any violation of the FTC's Orders may subject Quest Diagnostics, Unilab or the combined company to civil penalties and will lead to disciplinary action, including termination of employment.

CONTACT PERSON

If you have questions regarding the contents of this notice or whether information in your possession should be removed from your files, you should contact

_____at ____-___-_____,

e-mail address:_____.

ACKNOWLEDGMENT

I, _____ (print name), hereby acknowledge that I have read the above notification and agree to abide by its provisions.

Analysis

Analysis of Agreement Containing Consent Orders to Aid Public Comment

The Federal Trade Commission ("Commission") has accepted, subject to final approval, an Agreement Containing Consent Order ("Consent Agreement") from Quest Diagnostics Incorporated ("Quest") and Unilab Corporation ("Unilab") (collectively "Respondents"). The Consent Agreement is designed to remedy the anticompetitive effects resulting from Quest's proposed acquisition of Unilab. The Consent Agreement includes a proposed Decision and Order (the "Order"), which would require the Respondents to divest to Laboratory Corporation of America ("LabCorp") assets used to provide clinical laboratory testing services to physician groups in Northern California.

The Consent Agreement 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 Consent Agreement and the comments received, and will decide whether it should withdraw from the proposed Consent Agreement or make it final.

Pursuant to an Agreement and Plan of Merger dated April 2, 2002 ("Merger Agreement"), Quest proposes to acquire all of the issued and outstanding voting securities of Unilab in exchange for cash, stock of Quest, or a combination of cash and stock of Quest. The value of the transaction was approximately $877 million at the time the Merger Agreement was announced. On January 4, 2003, Quest and Unilab agreed to amend the Merger Agreement to extend the termination date and to reduce the purchase price for the overall transaction by approximately $60 million. The Commission's complaint alleges that the proposed acquisition, if consummated, would violate Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18, and Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45, in the market for providing clinical laboratory testing services to physician groups in Northern California.

The Merging Parties

Headquartered in Teterboro, New Jersey, Quest is the largest supplier of clinical laboratory testing services in the United States, with a nationwide network of 30 full-service laboratories located in major metropolitan areas throughout the United States, approximately 100 smaller "stat," or rapid response, laboratories, and approximately 1,350 patient service centers ("PSCs"). Quest had sales of approximately $4.1 billion in 2002. Quest's operations in Northern California consist of a full-service testing laboratory located in Dublin, California, 5 stat labs, and approximately 76 PSCs.

Unilab, headquartered in Tarzana, California, is the largest supplier of clinical laboratory testing services in California. Unilab had sales of approximately $390 million in 2001. It operates 3 full-service laboratories, located in Los Angeles, San Jose, and Sacramento; 39 stat laboratories; and approximately 386 PSCs. About 23 of the stat labs and 230 of the PSCs are located in Northern California.

The Clinical Laboratory Testing Services Market

Clinical laboratory testing services ("Laboratory Services") are a critical element in the delivery of quality health care in the United States. Clinical laboratory tests are used to detect and analyze the presence, concentrations or composition of chemical, biological or cellular components in human body fluids and tissue in order to help physicians diagnose, monitor, and treat their patients' health conditions. They include thousands of individual test procedures in the areas of hematology, blood chemistry, urine chemistry, endocrinology, and microbiology, among others. Examples of commonly ordered tests include red and white blood cell counts, blood chemistry panels, urinalyses, microbiology cultures, HIV screening tests, and pregnancy tests. Most of these high-volume, "routine" tests are performed by automated equipment and the results are generally reported electronically to

the physician within a 24-hour period. Other tests, including most immunological and genetic tests, are performed less frequently and require more sophisticated and specialized knowledge or equipment. Two examples of such "esoteric" tests are immunoelectrophoresis (used for the diagnosis of autoimmune disorders and myelomas) and polymerase chain reaction tests for hepatitis C.

Delivery of health care in California is distinguished by high penetration by managed health care. Under the managed care model prevalent in the state, health plans often delegate the financial risk for providing primary, specialty, and ancillary medical services to physician groups, such as independent practice associations and medical groups, under a capitated arrangement, pursuant to which the physician group receives a prospective payment to care for the enrollees of the health plan. That is, rather than receive payments for each service provided by the physician group, the physician group receives a per member per month ("PMPM") payment designed to cover the expected costs of care by the physicians. The physicians then bear the risk of whether the capitation payments will cover the actual costs of care -- including, in many cases, the cost of providing Laboratory Services.

Physician groups in Northern California that assume the financial risk for Laboratory Services under this California delegated model constitute a significant category of purchasers of Laboratory Services. Generally, these physician groups pursue exclusive or semi-exclusive contracts with laboratories to purchase such services, most often under a capitated arrangement in which the physician group pays a set amount (PMPM) to the laboratory to perform Laboratory Services for the physician group's patients who are affiliated with pre-paid health plans.

In general, three types of providers may perform clinical laboratory testing: independent clinical laboratories, such as Quest and Unilab; hospital-affiliated laboratories; and physician office laboratories. While individual physicians can perform a

limited number of relatively simple diagnostic tests in their own offices, this testing is not a substitute for the clinical testing performed in a laboratory. Physician groups require that a clinical laboratory offer, among other things, a comprehensive menu of routine and esoteric tests; stat testing capabilities; and an extensive field collection and distribution system that includes conveniently located patient service centers and courier networks.

Hospital laboratories that supply physician groups in Northern California are treated as market participants in the proposed complaint. Most acute-care hospitals maintain on-site laboratories to provide quick-response testing for patients in the hospital. In addition, many hospital laboratories have established outreach programs to obtain additional business by providing outpatient Laboratory Services to physicians in the communities surrounding the hospitals. In some instances, hospital laboratory outreach programs in Northern California supply Laboratory Services under capitated arrangements to physician groups. Hospital laboratories have been most successful when competing to supply physician groups that are affiliated with the hospital and whose physicians are located in medical buildings on or near the hospital campus.

The proposed complaint alleges that the relevant market does not include physician office laboratories. Some medical groups operate laboratories that perform many stat and routine tests exclusively for doctors in the medical group. Physician groups do not view these physician office laboratories as viable substitute suppliers of Laboratory Services, because these laboratories do not offer the array of tests, capabilities, and services that are offered by independent clinical laboratories, including convenient patient access through PSCs. Furthermore, physician groups that do not have their own clinical laboratories are unlikely to develop such capabilities, even in the event of a significant increase in the price of Laboratory Services.

The draft complaint alleges that the relevant section of the country (*i.e.*, the geographic market) within which to analyze the effects of the proposed acquisition is Northern California. The

relevant geographic market is local in nature because physician groups prefer to have specimens collected at PSCs located where they are convenient and accessible to all plan enrollees. Physicians also require prompt reporting of routine test results, generally within 24 hours. In addition, physicians require even more rapid reporting of results for stat testing, generally within a few hours. For these reasons, a clinical laboratory must have stat testing facilities and PSCs proximate to the physicians' offices. Physician groups in California have service areas that vary from a single town to multiple counties; however, none has a service area that spans both northern and southern California.

Quest and Unilab are the two leading providers of Laboratory Services to physician groups in Northern California, based on the total patient lives covered under physician group capitated contracts. If the proposed merger were to be consummated, Quest would have a market share of more than 70 percent. Quest's next largest competitor in the relevant market is a hospital laboratory that would have a market share of about 4 percent. The proposed acquisition would increase concentration in the relevant market by more than 1,500 points to a Herfindahl-Hirschman Index level above 5,300.

Quest and Unilab compete vigorously against each other for contracts to supply Laboratory Services to physician groups, and this competition has benefitted customers in Northern California. Many physician groups in Northern California regard Quest and Unilab to be the closest competitors bidding for their Laboratory Services business in terms of both price and service offerings. The proposed acquisition would thus allow the combined firm to exercise market power unilaterally by eliminating competition between the two largest, and frequently lowest-cost, providers of Laboratory Services to physician groups in Northern California. As a result, the proposed acquisition would increase the likelihood that physician groups in Northern California would be forced to pay higher prices for Laboratory Services.

Substantial and effective expansion by smaller competitors, as well as new entry, sufficient to deter or counteract the anticompetitive effects of the proposed acquisition in the market for providing Laboratory Services to physician groups in Northern California, is unlikely. Expansion by hospital laboratories or small independent clinical laboratories located in Northern California is unlikely to be sufficient to avert the anticompetitive effects from the merger. In general, large regional and national independent clinical laboratory companies like Unilab and Quest enjoy significant cost advantages over hospital laboratories and small independent clinical laboratories. As a result, the large independent laboratories are able more effectively to compete for and service price-sensitive customers such as physician groups seeking services under capitated arrangements.

It is also unlikely that new independent clinical laboratories will enter the relevant market. There are significant costs associated with establishing the staffed PSCs, courier routes, and sales force and other infrastructure necessary to serve the needs of a physician group. New entry is unlikely to occur because a new entrant would have significantly higher incremental costs of serving a particular physician group than an independent clinical laboratory that has an existing infrastructure in or near the area served by the physician group. Also, it is difficult to recoup the required incremental investments through a single physician group contract without charging higher than current rates, and opportunities to bid on multiple physician group contracts in the same area do not occur frequently. Thus, bidding at current rates in the hopes of winning future business would be risky for a new entrant.

The risk for an entrant would be further increased because "pull-through" business is an important determinant of the profitability of capitated contracts. Physician groups that participate in capitated plans for some of their customers also frequently participate in fee-for-service plans for other customers. Under fee-for-service plans, physicians are paid for each procedure. When Laboratory Services are needed for a patient

with a fee-for-service plan, the health plan pays the laboratory directly but the physician chooses which laboratory covered by the plan will be used. The Laboratory Services provider for the capitated business of a physician group frequently has a significant advantage in winning a substantial amount of the "pull-through" fee-for-service business of the group, because physicians are familiar with the laboratory and it is easier to deal with one laboratory for all patients. Laboratory Services providers take into account the potential for pull-through business when determining their bids for capitated contracts. A new entrant to an area would not have a reputation or relationships with the physicians in the group and thus may have difficulty achieving similar pull-through rates as incumbent firms. As a result, because a new entrant would be cost-disadvantaged in competing against independent clinical labs that already have an existing infrastructure, it would be unlikely to secure capitated contracts with physician groups at pre-merger price levels.

The Proposed Order

The proposed Order effectively remedies the Commission's competitive concerns about the proposed acquisition by requiring the companies to divest Laboratory Services assets in Northern California to LabCorp, including 46 PSCs; 5 stat laboratories; all of Quest's, and one of Unilab's, capitated contracts with physician groups; and all related assets necessary for the provision of Laboratory Services to physician groups, including customer lists and information. With these assets and LabCorp's experience as a provider of Laboratory Services in Southern California and elsewhere in the United States, LabCorp will be able to replicate Quest's operations, thus replacing the competition that would be lost as a result of the proposed acquisition. The Commission required that the Respondents make all of Quest's Northern California outpatient Laboratory Services business available to prospective buyers but has approved LabCorp's proposed acquisition of a smaller package of assets because LabCorp will be able to replicate the competition that Quest represents today with the smaller package of assets. As a result, after the

divestiture, competition in the market for providing Laboratory Services to physician groups in Northern California will remain virtually unchanged by the proposed acquisition. Furthermore, the proposed Order includes measures designed to help ensure an effective transition of the divested assets to LabCorp.

LabCorp is a well-positioned acquirer of the divested assets for several reasons. As the second largest provider of Laboratory Services in the United States, LabCorp offers an extensive range of more than 4,000 routine and esoteric clinical tests, as well as other services that physician groups require, such as patient encounter data and test result reporting information technology. LabCorp currently provides Laboratory Services throughout most areas of the country, but has a limited presence in Northern California, where its business consists primarily of providing clinical reference testing to hospitals and esoteric HIV-related testing. Due to its operations in Southern California, however, LabCorp has substantial experience satisfying the requirements of physician groups in California's managed care environment. Furthermore, LabCorp has the financial resources to purchase the assets and operate the business in a competitive manner.

Pursuant to the proposed Order, Quest is required to consummate its transaction with LabCorp within ten days of the date that Quest and Unilab consummate the Merger Agreement ("Acquisition Date") and to complete the transfer of the assets to LabCorp within six months of the Acquisition Date. If Quest fails to comply with either of these obligations, the Commission may appoint a trustee to divest Quest's outpatient Laboratory Services business in Northern California or its entire Laboratory Services business in Northern California. In the event that Quest transfers some of the assets to LabCorp, but LabCorp abandons its efforts to complete the transfer of the remaining assets and the interim monitor so notifies the Commission, the Commission may require Quest to rescind the transaction with LabCorp and order Quest to divest its Northern California outpatient Laboratory Services business to a Commission-approved acquirer within six months. Should Quest fail to do so, the Commission may appoint a trustee

to divest either Quest's outpatient Laboratory Services business in Northern California or its entire Laboratory Services business in Northern California. The purpose of these provisions is to assure the Commission's ability to secure an acceptable buyer – able to maintain and restore competition in the relevant market – in the event that LabCorp does not acquire the divested assets. The provisions require divestiture of a more extensive package of assets consisting of either Quest's outpatient Laboratory Services business or its entire Laboratory Services business in Northern California because a prospective buyer other than LabCorp may require additional assets to fully restore competition in the relevant market.

The proposed Order contains several provisions designed to ensure that the divestiture is successful. The proposed Order requires Quest to maintain the viability, marketability, and competitiveness of its Laboratory Services business assets in Northern California pending transfer of the divested assets. It also requires Quest to provide transitional services that the acquirer of the divested assets may need until the assets are completely divested and transferred. The proposed Order also prohibits Quest from interfering with the employment of any employees relating to the divested assets by the acquirer and requires Quest to provide incentives to certain employees to continue in their positions until the divestiture and to accept employment with the acquirer. For a period of one year following the date that the transfer of the divested assets is accomplished, Quest is prohibited from soliciting any employees of Quest or Unilab that accept offers of employment from the acquirer of the divested assets. Additionally, the proposed Order requires Quest to take steps to maintain the confidentiality of certain confidential information relating to the divested assets.

Pursuant to the terms of the proposed Order, the Commission has approved the appointment of Bruce K. Farley as an interim monitor trustee to ensure that Quest expeditiously transfers the divested assets and complies with its obligations under the proposed Order. Mr. Farley has over 13 years of experience in the

Laboratory Services industry. In addition, he has significant experience supervising the integration of business operations subsequent to mergers and acquisitions.

Finally, in order to ensure that the Commission remains informed about the status of Quest's clinical laboratory testing business in Northern California pending divestiture, and about efforts being made to accomplish the transfer of the divested assets, the proposed Order requires Quest to report to the Commission within 30 days, and every 30 days thereafter until the divestiture is fully accomplished. In addition, Quest is required to report to the Commission every six months regarding its confidentiality obligations, as well as its obligations regarding non-solicitation of employees of the acquirer of the divested assets.

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 proposed Order or to modify the terms of the Consent Agreement or proposed Order in any way.

Complaint

IN THE MATTER OF

QUICKEN LOANS INC.

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATIONS OF SEC. 5 OF THE FEDERAL TRADE COMMISSION ACT AND SEC. 615(A) OF THE FAIR CREDIT REPORTING ACT

Docket 9304; File No. 0223103
Complaint, November 5, 2002--Decision, April 8, 2003

This consent order addresses allegations that Respondent Quicken Loans violated Section 615(a) of the Fair Credit Reporting Act ("FCRA") and Section 5 of the Federal Trade Commission Act. The consent order, among other things, requires the respondent – whenever it takes adverse action with respect to a consumer's application for credit, based either wholly or partly on information in a consumer report – to provide the consumer with a notice that complies with Section 615(a) of the FCRA. The order also provides that the Commission will not view the respondent's failure to grant an online request for preapproval as an adverse action if, among other things, (1) the respondent clearly and conspicuously discloses, in close proximity to the preapproval offer, that preapproval may be granted online or offline; and (2) if the respondent determines that it cannot grant preapproval online because it needs additional information, it notifies the consumer (a) that the request for preapproval has not been denied, but rather that the respondent needs additional information from the consumer, and (b) that if the consumer submits the additional information, the respondent will determine whether to grant the request and will communicate the decision to the consumer.

Participants

For the Commission: *Thomas E. Kane, Sandra Farrington, Bradley H. Blower, Joel Winston, Margaret Patterson,* and *Susan Braman.*

For the Respondent: *Jonathan D. Jerison, Thomas M. Hefferon,* and *Jeremiah S. Buckley, Goodwin Procter LLP.*

COMPLAINT

The Federal Trade Commission, having reason to believe that Quicken Loans Inc., a corporation ("respondent"), has violated provisions of the Federal Trade Commission Act, 15 U.S.C. § 41

et seq., and the Fair Credit Reporting Act, 15 U.S.C. § 1681 et seq., and it appearing to the Commission that this proceeding is in the public interest, alleges:

1. Respondent Quicken Loans Inc. is a Michigan corporation, with its principal place of business in Livonia, Michigan.

2. 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.

3. Respondent offered loans to consumers. Over approximately a one-year period, respondent maintained an Internet web site at which it provided information about its mortgage loans to "consumers," as that term is defined in Section 603(c) of the Fair Credit Reporting Act, 15 U.S.C. § 168la(c). Respondent offered approximately 35 different loan products on its website ("online loan products") for which consumers might qualify. In addition, respondent offered approximately 65 loan products that could only be obtained offline. On its website, respondent invited consumers to submit information, such as their income and assets, and the loan amount, down payment and type of loan sought.

4. During the online application process, respondent invited consumers to request that respondent either "prequalify" the consumer for a loan based solely on information the consumer entered, or "preapprove" the consumer for a loan based on the consumer's consumer report as well as the consumer-supplied information. In selecting the preapproval option, consumers were required to click a radio button next to the statement "Order my credit report and use it to preapprove me for a loan." Through these means, respondent communicated the message that by selecting the preapproval option, consumers were filing applications for preapproval of a loan, as "application" is defined in Section 202.2(f) of Regulation B, 12 C.F.R. § 202.2(f).

5. For those consumers who requested preapproval, respondent obtained "consumer reports," as that term is defined in Section

603(d) of the Fair Credit Reporting Act, 15 U.S.C. § 168la(d), from "consumer reporting agencies," as that term is defined in Section 603(f) of the Fair Credit Reporting Act, 15 U.S.C. § 168la(f), and used the consumer reports among other information to evaluate the consumers' creditworthiness for any of its online loan products.

6. For those consumers whom respondent preapproved for one of its online loan products, respondent provided an online preapproval letter containing the specific terms (*e.g.*, loan amount, interest rate, points, and APR) of the loans for which the consumers were preapproved.

7. Those consumers whom respondent did not preapprove for one of its online loan products received an online advisory informing them that, "[b]ased on the information you have provided, it appears that you have unique borrowing needs." Quicken invited these consumers to click a button reading "NEXT STEP" to permit a Quicken loan consultant to contact them about other possible Quicken loan options. The message communicated through the advisory was that consumers' online applications for preapproval had been denied. As a result, many consumers who received this advisory left the website without submitting contact information. Consumers who received the "unique borrowing needs" advisory but did not then submit contact information online received no further contact from respondent.

8. Section 615 of the Fair Credit Reporting Act, 15 U.S.C. § 168lm, requires credit grantors who take "adverse action," as that term is defined in Section 603(k) of the Fair Credit Reporting Act, 15 U.S.C. § 168la(k), based in whole or in part on information in a consumer's consumer report, to notify the consumer of the action taken; the name, address, and telephone number of the consumer reporting agency from which the consumer report was obtained; the consumer's right to obtain a free copy of the consumer report; and the consumer's right to dispute the accuracy or completeness of information in the consumer report.

9. Through the practices described in Paragraphs 3 through 7, respondent took adverse action with respect to consumers in some instances based in whole or in part on information contained in a consumer report, but failed to notify the consumer of the action taken; the name, address, and telephone number of the consumer reporting agency from which the consumer report was obtained; the consumer's right to obtain a free copy of the consumer report; and the consumer's right to dispute the accuracy or completeness of information in the consumer report.

10. By and through the use of the practices described in Paragraphs 3 through 7, respondent has violated Section 615(a) of the Fair Credit Reporting Act, 15 U.S.C. § 1681m(a).

11. By its violations of Section 615(a) of the Fair Credit Reporting Act and pursuant to Section 621(a) thereof, respondent has engaged in unfair and deceptive acts or practices in or affecting commerce in violation of Section 5(a)(1) of the Federal Trade Commission Act.

NOTICE

Proceedings on the charges asserted against you in this complaint will be held before an Administrative Law Judge (ALJ) of the Federal Trade Commission, under Part 3 of the Commission's Rules of Practice, 16 C.F.R. Part 3. A copy of Part 3 of the Rules is enclosed with this complaint.

You may file an answer to this complaint. Any such answer must be filed within 20 days after service of the complaint on you. If you contest the complaint's allegations of fact, your answer must concisely state the facts constituting each ground of defense, and must specifically admit, deny, explain, or disclaim knowledge of each fact alleged in the complaint. You will be deemed to have admitted any allegations of the complaint that you do not so answer.

If you elect not to contest the allegations of fact set forth in the complaint, your answer shall state that you admit all of the material allegations to be true. Such an answer will constitute a waiver of hearings as to the facts alleged in the complaint and, together with the complaint, will provide a record basis on which the ALJ will file an initial decision containing appropriate findings and conclusions and an appropriate order disposing of the proceeding. Such an answer may, however, reserve the right to submit proposed findings and conclusions and the right to appeal the initial decision to the Commission under Section 3.52 of the Commission's Rules of Practice.

If you do not answer within the specified time, you waive your right to appear and contest the allegations of the complaint. The ALJ is then authorized, without further notice to you, to find that the facts are as alleged in the complaint and to enter an initial decision and a cease and desist order.

The ALJ will schedule an initial prehearing scheduling conference to be held not later than 14 days after the last answer is filed by any party named as a respondent in the complaint. Unless otherwise directed by the ALJ, the scheduling conference and further proceedings will take place at the Federal Trade Commission, 600 Pennsylvania Avenue, N.W., Washington, D.C. 20580. Rule 3.21(a) requires a meeting of the parties' counsel as early as practicable before the prehearing scheduling conference, and Rule 3.31(b) obligates counsel for each party, within 5 days of receiving a respondent's answer, to make certain initial disclosures without awaiting a formal discovery request.

A hearing on the complaint will begin on February 5, 2003, at 10:00 A.M. in Room 532, or such other date as determined by the ALJ. At the hearing, you will have the right to contest the allegations of the complaint and to show cause why a cease and desist order should not be entered against you.

The following is the form of order which the Commission has reason to believe should issue if the facts are found to be as

alleged in the complaint. If, however, the Commission should conclude from record facts developed in any adjudicative proceedings in this matter that the proposed order provisions might be inadequate to fully protect the consuming public, the Commission may order such other relief as it finds necessary or appropriate.

ORDER

DEFINITIONS

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

1. "Consumer," "consumer report" and "consumer reporting agency" shall be defined as provided in Sections 603(c), 603(d) and 603(f) respectively, of the Fair Credit Reporting Act ("FCRA"), 15 U.S.C. §§ 168la(c), 168la(d) and 168la(f).

2. "Application" shall be defined as provided in Sections 202.2(f) of Regulation B, 12 C.F.R. § 202.2(f).

3. "Adverse action" shall be defined as provided in Section 603(k) of the FCRA,
15 U.S.C. § 168la(k), Section 701(d)(6) of the Equal Credit Opportunity Act, 15 U.S.C. § 1691(d)(6), and Section 202.2(c) of Regulation B, 12 C.F.R. § 202.2(c).

4. "Respondent" shall mean Quicken Loans Inc., a corporation, its successors and assigns, and its officers, agents, representatives, and employees.

5. "Preapproval" shall mean a determination by respondent, after receiving a request for credit from a consumer and analyzing the consumer's creditworthiness, that the consumer appears to be eligible for credit from respondent in a specified amount on stated terms, subject to limited conditions, that is conveyed to the consumer in a written statement.

I.

IT IS ORDERED that respondent, directly or through any corporation, subsidiary, division, or other device, in connection with any application by a consumer for credit, whenever respondent takes adverse action with respect to such application, either wholly or partly because of information contained in a consumer report from a consumer reporting agency, unless alternative credit is offered and accepted by the applicant, shall, as required by Section 615 of the FCRA, 15 U.S.C. § 1681m, provide to the applicant at the time such adverse action is communicated to the applicant or within thirty (30) days thereafter, orally, in writing, or electronically (1) notice of the adverse action; (2) the name, address, and telephone number of the consumer reporting agency (including a toll-free telephone number established by the agency if the agency compiles and maintains files on consumers on a nationwide basis) that furnished the report to the person; (3) a statement that the consumer reporting agency did not make the decision to take the adverse action and is unable to provide the consumer the specific reasons why the adverse action was taken; and (4) notice of the consumer's right

(A) to obtain, under Section 612 of the FCRA, 15 U.S.C. § 1681j, a free copy of a consumer report on the consumer from the consumer reporting agency referred to at (2) above, which notice shall include an indication of the 60-day period under that section for obtaining such a copy; and

(B) to dispute, under Section 611 of the FCRA, 15 U.S.C. § 1681i, with a consumer reporting agency the accuracy or completeness of any information in a consumer report furnished by the agency.

For purposes of this Part, it shall be considered an adverse action when respondent denies preapproval of a loan in response to a

request by a consumer, or the consumer otherwise does not qualify for the requested credit.

II.

IT IS FURTHER ORDERED that respondent shall, for five (5) years maintain and upon request make available to the Federal Trade Commission for inspection and copying documents demonstrating compliance with the requirements of Part I of this order, such documents to include, but not be limited to, all credit evaluation criteria relating to consumer reports, written or electronic instructions given to employees regarding compliance with the provisions of this order, all notices or a written or electronically stored notation of the description of the form of notice and the date such notice was provided to applicants pursuant to any provisions of this order, and the complete application files for all applicants for whom consumer reports were obtained to whom offers of credit are not made or have been withheld, withdrawn, or rescinded based, in whole or in part, on information contained in a consumer report.

III.

IT IS FURTHER ORDERED that respondent Quicken Loans Inc. 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.

IV.

IT IS FURTHER ORDERED that respondent Quicken Loans Inc. and its successors and assigns shall notify the Commission at

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

V.

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

VI.

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

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

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

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

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

THEREFORE, the Federal Trade Commission this fifth day of November 2002, has issued this complaint against respondent.

DECISION AND ORDER

The Commission having heretofore issued its Complaint charging the Respondent named in the caption hereof with violations of Section 615(a) of the Fair Credit Reporting Act, 15 U.S.C. § 1681(m), as amended, and Section 5(a)(1) of the Federal Trade Commission Act, 15 U.S.C. § 45(a)(1), as amended, and Respondent having been served with a copy of that Complaint, together with a notice of contemplated relief; and

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

The Secretary of the Commission having thereafter withdrawn this matter from adjudication in accordance with § 3.25(c) of its Rules; and

The Commission having considered the matter and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of thirty (30) days, now in further conformity with the procedure prescribed in § 3.25(f) of its Rules, the Commission hereby makes the following jurisdictional findings and enters the following Order:

1. Respondent Quicken Loans Inc. is a Michigan corporation with its principal office or place of business at 20555 Victor Parkway, Livonia, Michigan 48152.

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

DEFINITIONS

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

1. "Consumer," "consumer report" and "consumer reporting agency" shall be defined as provided in Sections 603(c), 603(d) and 603(f) respectively, of the Fair Credit Reporting Act ("FCRA"), 15 U.S.C. §§ 168la(c), 168la(d) and 168la(f).

2. "Application" shall be defined as provided in Sections 202.2(f) of Regulation B, 12 C.F.R. § 202.2(f), or as amended in the future.

3. "Adverse action" shall be defined as provided in Section 603(k) of the FCRA, 15 U.S.C. § 168la(k), Section 701(d)(6) of the Equal Credit Opportunity Act, 15 U.S.C. § 1691(d)(6), and Section 202.2(c) of Regulation B, 12 C.F.R. § 202.2(c), or as those provisions are amended in the future.

4. "Respondent" shall mean Quicken Loans Inc., a corporation, its successors and assigns, and its officers, agents, representatives, and employees.

5. "Preapproval" shall mean a written or electronic statement by Respondent, after receiving a request from a consumer and analyzing the consumer's creditworthiness, that the consumer appears to be eligible for a loan from Respondent in a stated amount and on stated terms, subject to conditions. If Regulation B or any appropriate final findings, decisions, commentary, or orders issued under section 701(d)(6) of the Equal Credit Opportunity Act by the Board of Governors of the Federal Reserve System are hereafter amended to include a definition of or a reference to "preapproval" that is inconsistent with this definition, then that definition or reference shall be substituted for this definition to the extent of the inconsistency.

I.

IT IS ORDERED that Respondent, directly or through any corporation, subsidiary, division, or other device, in connection with any application by a consumer for credit, whenever Respondent takes any adverse action with respect to such application, either wholly or partly because of information contained in a consumer report from a consumer reporting agency, unless alternative credit is offered to and accepted by the applicant, shall, as required by Section 615 of the FCRA, 15 U.S.C. § 1681m, provide to the applicant at the time such adverse action is communicated to the applicant or within thirty (30) days thereafter, orally, in writing, or electronically (1) notice of the adverse action; (2) the name, address, and telephone number of the consumer reporting agency (including a toll-free telephone number established by the agency if the agency compiles and maintains files on consumers on a nationwide basis) that furnished the report to the person; (3) a statement that the consumer reporting agency did not make the decision to take the adverse action and is unable to provide the consumer the specific reasons why the adverse action was taken; and (4) notice of the consumer's right

(A) to obtain, under Section 612 of the FCRA, 15 U.S.C. § 1681j, a free copy of a consumer report on the consumer from the consumer reporting agency referred to at (2) above, which notice shall include an indication of the 60-day period under that section for obtaining such a copy; and

(B) to dispute, under Section 611 of the FCRA, 15 U.S.C. § 1681i, with a consumer reporting agency the accuracy or completeness of any information in a consumer report furnished by the agency.

Provided that, Respondent's failure to grant a request for preapproval that is initiated online shall not be considered an adverse action for purposes of this Part, if Respondent satisfies all of the following requirements:

A. At the time it offered the preapproval, Respondent disclosed, clearly and conspicuously and in close proximity to the offer, that (i) preapproval may be granted online or offline, and (ii) the failure to obtain preapproval online would not prevent the consumer from obtaining preapproval offline;

B. Respondent's online system has not determined, based on the information available online, whether to approve the request for preapproval; and

C. Respondent provides a clear and conspicuous online notice in response to the request for preapproval stating that:

1. The consumer's request for preapproval has not been declined;

2. Respondent requires additional information from the consumer, including the specific type or types of information required, to the extent it is feasible for Respondent to identify such information, given the technological limitations of Respondent's online system and the loan products that are available on that system, before determining whether to grant the request for preapproval;

3. The manner by which that additional information may be provided;

4. After obtaining the additional information, Respondent will determine whether to grant or decline the request for preapproval, but if, within seven (7) days or a longer time designated by Respondent, the consumer does not provide the requested information, the consumer will have to submit a new request for preapproval if the consumer would like Respondent to give the request further consideration; and

5. If, after receiving the additional information, Respondent determines to deny the request for preapproval based in

whole or in part on information in the consumer's credit file at a consumer reporting agency, Respondent will communicate this fact to the consumer.

In the event that Respondent takes adverse action against a consumer after providing the foregoing notice and obtaining a completed application from that consumer, Respondent shall comply with all applicable requirements of Section 615(a) of the FCRA.

II.

IT IS FURTHER ORDERED that Respondent shall, for five (5) years, maintain and upon request make available to the Federal Trade Commission for inspection and copying documents demonstrating compliance with the requirements of Part I of this Order, such documents to include, but not be limited to, all credit evaluation criteria relating to consumer reports, written or electronic instructions given to employees regarding compliance with the provisions of this Order, all notices or a written or electronically stored notation of the description of the form of notice and the date such notice was provided to applicants pursuant to any provisions of this Order, and the complete application files for all applicants for whom consumer reports were obtained to whom offers of credit are not made or have been withheld, withdrawn, or rescinded based, in whole or in part, on information contained in a consumer report.

III.

IT IS FURTHER ORDERED that Respondent Quicken Loans Inc. shall deliver a copy of this Order to all current and future principals, officers, and directors, and to all current and future managers, employees, agents, and representatives having decision-making 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 to such future personnel within thirty (30) days after the person assumes such position or responsibilities.

IV.

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

V.

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

VI.

This Order will terminate on April 8, 2023, 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, subject to final approval, to a proposed consent order from Quicken Loans Inc. The proposed order would settle charges that Quicken Loans violated Section 615(a) of the Fair Credit Reporting Act ("FCRA"), 15 U.S.C. § 168lm(a), and Section 5 of the Federal Trade Commission Act. Section 615(a) requires that a credit grantor who takes adverse action with respect to a consumer, based in whole or in part on information contained in a credit report ("consumer report"), notify the consumer of the adverse action as well as the identity of the credit bureau ("consumer reporting agency") that produced the report, so the consumer can identify and correct any inaccuracies in the report.

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 and take other appropriate action or make final the agreement's proposed order.

According to the Commission's Complaint, for a period of approximately one year, Quicken Loans offered loans to consumers through its website. Quicken Loans invited consumers to submit information, such as their income and assets, and the loan amount, down payment and type of loan sought. Consumers then were invited to request that Quicken Loans either "prequalify" the consumer for a loan based solely on information the consumer had entered, or "preapprove" the consumer for a loan based on the consumer's consumer report, as well as the consumer-supplied information. To select the preapproval option, consumers were required to click a radio button next to the statement "Order my credit report and use it to preapprove me for a loan." According to the Complaint, by selecting this option, consumers were filing applications for preapproval of a loan.

Analysis

For those consumers who requested preapproval, Quicken Loans obtained consumer reports from consumer reporting agencies and used the reports, along with consumer-supplied information, to evaluate the consumers' creditworthiness for any of its online loan products. For those consumers whom Quicken Loans preapproved for one of its online loan products, respondent provided an online preapproval letter containing the specific terms (*e.g.*, loan amount, interest rate, points, and APR) of the loans for which the consumers were preapproved.

Those consumers whom respondent did not preapprove for one of its online loan products received an online advisory informing them that, "[b]ased on the information you have provided, it appears that you have unique borrowing needs." Quicken Loans invited these consumers to click a button reading "NEXT STEP" to permit a Quicken Loans loan consultant to contact them about other possible Quicken Loans loan options. The Commission's Complaint alleges that the message communicated through the advisory was that consumers' online applications for preapproval had been denied. As a result, many consumers who received this advisory left the website without submitting contact information. Consumers who received the "unique borrowing needs" advisory but did not then submit contact information online received no further contact from respondent. The Complaint alleges that, through the actions described above, Quicken Loans took adverse action with respect to consumers in some instances, based in whole or in part on information contained in consumer reports, but failed to provide the notice required by Section 615.

Part I of the proposed order requires that whenever Quicken Loans takes adverse action with respect to a consumer's application for credit, based either wholly or partly on information in a consumer report, Quicken Loans must provide the consumer with a notice that complies with Section 615(a). Part I also provides that the Commission would not view Quicken Loans' failure to grant an online request for preapproval as an adverse

action if the company meets certain specific requirements, which include that (1) Quicken Loans provides a clear and conspicuous disclosure in close proximity to the preapproval offer that preapproval may be granted online or offline; and (2) if Quicken Loans determines it cannot grant preapproval online because it needs additional information, it will notify the consumer that (a) the request for preapproval has not been denied, but rather that Quicken Loans needs additional information from the consumer, and (b) if the consumer submits the additional information, Quicken Loans will determine whether to grant the request and communicate the decision to the consumer.

Parts II through VI of the proposed order are reporting and compliance provisions. Part II requires that Quicken Loans maintain and make available for Federal Trade Commission inspection and copying documents demonstrating compliance with Part I of the order. Part III requires dissemination of the order now and in the future to persons with responsibilities relating to the subject matter of the order. Part IV ensures notification to the FTC of changes in corporate status. Part V mandates compliance reports within sixty (60) days after service of the order and at such other times as the FTC may require. Part VI is a provision "sunsetting" the order after twenty (20) years, with certain exceptions.

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

This proposed order, if issued in final form, will resolve the claims alleged in the complaint against the named respondent. It is not the Commission's intent that acceptance of this consent agreement and issuance of a final decision and order will release any claims against any unnamed persons or entities associated with the conduct described in the complaint.

Complaint

IN THE MATTER OF

BRISTOL-MYERS SQUIBB COMPANY

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

Docket C-4076; File No. 0010221, 0110046, 0210181
Complaint, April 14, 2003--Decision, April 14, 2003

This consent order addresses practices used by Respondent Bristol-Myers Squibb Corporation ("BMS") with respect to generic versions – that is, versions that contain the same active ingredients as, and are bioequivalent to, their brand-name counterparts – of three of its major drug products, including BuSpar, used to treat persistent anxiety; Taxol , used to treat cancers of the ovaries, breasts and lungs, and AIDS-related Kaposi's sarcoma; and Platinol, used in chemotherapy to treat various forms of cancer. The order, among other things, prohibits the respondent from seeking to list the '365 patent relating to BuSpar in the Orange Book – in relation to any New Drug Application ("NDA") in which the active ingredient is buspirone – and restricts the extent to which the respondent can attempt to enforce the '365 patent. The order also prohibits the respondent from seeking to enforce, or collecting royalties on, any patent covering any BMS paclitaxel drug product sold as of October 2002. In addition, the order prohibits the respondent from taking any action to obtain or maintain a statutory 30-month stay on Food and Drug Administration approval with respect to an Abbreviated New Drug Application ("ANDA") that references BuSpar or Taxol. The order also prohibits the respondent from securing Orange Book listings that are contrary to the statutes and regulations governing such listings, such as listing patents in the Orange Book that do not actually claim the drug products at issue. In addition, the order prohibits the respondent from triggering a 30-month stay when the patent at issue is listed after the filing of any ANDA referencing the NDA. The order also prohibits the respondent from making false and misleading statements to the FDA that are material to the approvability or sale of a generic version of a BMS brand-name drug product, unless BMS has a reasonable belief that the statement is neither false nor misleading; from asserting any objectively baseless patent infringement claim; and from seeking to enforce a patent that BMS knows is invalid, unenforceable, or not infringed. In addition, the order prohibits the respondent from being a party to an agreement, with an ANDA filer who has received anything of value, to settle a patent infringement claim, or to refrain from the sale of the ANDA product during litigation of a patent infringement claim, unless, among other provisos, the respondent, pursuant to a request for an advisory opinion, receives a response from the Commission that the agreement would not raise issues under Section 5 of the Federal Trade Commission Act.

Participants

For the Commission: *Gary H. Schorr, Randall David Marks, Bradley S. Albert, Ellen Connelly, Seth Silber, George Bellack, David Dudley, Steve Vieux, Matthew Odette, Andrew Ginsberg, Tim Abbott, Jerod Klein, Natasha Moskvina, Suzanne Michel, David R. Pender, Jeffrey W. Brennan, Chul Pak, Anne R. Schenof, Roberta S. Baruch, Malcolm B. Coate, Louis Silvia, Jr.,* and *Mary T. Coleman.*

For the Respondent: *Evan R. Chesler, Richard J. Stark,* and *Elizabeth L. Grayer, Cravath, Swaine, & Moore.*

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, 15 U.S.C. § 45, and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that respondent Bristol-Myers Squibb Company ("BMS") has violated and violates Section 5 of the Federal Trade Commission ("FTC") Act, 15 U.S.C. § 45, and it appearing to the Commission that a proceeding in respect thereof would be in the public interest, hereby issues this complaint, stating its charges in that respect as follows:

I. Nature of the Case

1. This matter concerns BMS's continuing pattern of anticompetitive conduct that delayed the entry of generic drugs capable of competing with BMS's lucrative branded drug monopolies: BuSpar, Taxol, and Platinol. When threatened with imminent generic competition to these branded drug franchises – which collectively garnered nearly $2 billion a year in revenues – BMS acted in a predatory fashion to forestall those competitive threats. BMS knew that generic entry would decimate its sales, and that any delay in such entry would be highly profitable for BMS, but very costly for consumers.

2. Over the course of the past decade, BMS engaged in a series of anticompetitive acts across the BuSpar, Taxol, and Platinol product lines. Among other things, BMS: paid a would-be generic competitor millions of dollars to abandon its patent challenge and agree to withhold competition until patent expiry; misled the United States Food and Drug Administration ("FDA") about the scope, validity, and enforceability of its patents and abused FDA regulations to block generic entry; breached its duty of candor and good faith before the Patent and Trademark Office ("PTO") while pursuing patent applications purportedly related to the branded BMS products; and filed objectively baseless patent infringement lawsuits in federal court against would-be generic competitors. BMS's pattern of conduct evidences a scheme to abuse competitive and government processes for the purpose of maintaining its branded drug monopolies. As a result of these anticompetitive acts, BMS thwarted low-cost generic competition to these monopolies for many months or years, forcing consumers to overpay by hundreds of millions of dollars for vital prescription drug products.

II. Respondent Bristol-Myers Squibb Company

3. BMS is a for-profit 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 345 Park Avenue, New York, N.Y. 10154. Among other things, BMS is engaged in the discovery, development, manufacturing, and distribution of prescription pharmaceutical products (including BuSpar, Taxol, and Platinol) and other consumer healthcare products. For the year 2001, BMS's total net sales worldwide were approximately $19.4 billion, and its total net U.S. sales were approximately $13.1 billion.

4. BuSpar is a brand-name prescription drug containing buspirone hydrochloride ("buspirone") as its active pharmaceutical ingredient. In 1986, BMS obtained FDA approval to market BuSpar for the management of anxiety disorders or short-term

relief of the symptoms of anxiety. In 2000, the last full year before FDA approval of generic buspirone products, BMS's U.S. BuSpar sales were over $600 million. With entry of generic buspirone in the U.S. market in late March 2001, BMS's U.S. BuSpar sales declined by more than 50% for the remainder of the year.

5. Taxol is a brand-name prescription drug containing paclitaxel as its active pharmaceutical ingredient. In 1992, BMS obtained FDA approval to market Taxol for the treatment of ovarian cancer. Subsequently, Taxol was approved to treat breast and lung cancers and AIDS-related Kaposi's sarcoma. Prior to generic entry in 2000, BMS's annual U.S. Taxol sales were over $1 billion. Within the first year of entry of generic paclitaxel, BMS's sales dropped by almost 50%.

6. Platinol and Platinol-AQ are brand-name prescription drugs containing cisplatin as their active pharmaceutical ingredient. BMS received FDA approval to market Platinol and Platinol-AQ (collectively "Platinol") for the treatment of various forms of cancer in 1978 and 1988, respectively. Prior to generic entry in 1999, BMS's annual U.S. Platinol sales were about $100 million. Within the first year of generic entry, BMS's U.S. sales dropped by almost 50%.

III. Jurisdiction and Interstate Commerce

7. BMS is, and at all relevant times herein has been, a corporation within the meaning of Section 4 of the FTC Act, 15 U.S.C. § 44.

8. BMS's general business activities, including the unfair methods of competition alleged below, are "in or affecting commerce" within the meaning of Section 4 of the FTC Act, 15 U.S.C. § 44.

IV. Statutory and Regulatory Background

9. The Federal Food, Drug and Cosmetic Act, 21 U.S.C. § 301 et seq., as amended by the Drug Price Competition and Patent Term Restoration Act of 1984, codified at 21 U.S.C. § 355(j) and 35 U.S.C. § 271(e), commonly known as "Hatch-Waxman," requires FDA approval before a company may market or sell a pharmaceutical product in the United States. To obtain approval to make and sell a new (or branded) drug, a company must file a new drug application ("NDA") with the FDA.

10. A generic drug is one that the FDA has found to be "bioequivalent" to a branded drug. Two drugs are considered bioequivalent if they contain the same active pharmaceutical ingredient and if there is no significant difference in the rate, and extent to which, the products are absorbed in the human body under similar experimental conditions, when administered at the same dose. *See* Food, Drug, and Cosmetic Act, 21 U.S.C. § 355(j)(8)(B).

11. Hatch-Waxman establishes a procedure for a branded-drug company to identify to prospective generic competitors all patents that it believes claim the branded drug. It also establishes a process for a branded-drug company to address potential claims of patent infringement against the manufacturer of a proposed generic product.

12. The FDA makes public the patents identified by branded-drug companies as claiming a given product in a publication entitled "Approved Drug Products with Therapeutic Equivalence Evaluations," which is commonly referred to as the "Orange Book."

13. The FDA views its role in listing patents in the Orange Book as purely ministerial, because it has neither the expertise nor the resources to resolve complex patent coverage issues. Consequently, the FDA does not scrutinize

a party's bases for listing patents in the Orange Book, as long as all the information required by statute has been submitted. Should one company challenge the validity of the NDA holder's Orange Book listing, the FDA requests only that the NDA holder provide written confirmation that the patent is properly listed.

14. To obtain approval to make and sell a generic version of a branded drug, a company can file an Abbreviated New Drug Application ("ANDA") with the FDA. With its ANDA, the generic drug applicant must provide certification to the FDA with respect to each patent listed in the Orange Book relating to the branded drug.

15. This certification must make one of the following statements: (I) no patent information on the drug product that is the subject of the ANDA has been submitted to FDA; (II) the patent has expired; (III) the patent will expire on a particular date; or (IV) the patent is invalid or will not be infringed by the manufacture, use, or sale of the drug product for which the ANDA is submitted. This last certification is known as a Paragraph IV Certification.

16. Upon making a Paragraph IV Certification, the generic applicant must provide notice of that certification to the branded-drug company and to the owner of each patent listed in the Orange Book for the branded drug product that the ANDA references. This notice must include a detailed statement of the factual and legal basis for the ANDA applicant's opinion that the patent is not valid or will not be infringed by marketing of the generic product.

17. Hatch-Waxman contains provisions that govern the timing of FDA approval of generic applications containing a Paragraph IV Certification, based on whether and when a patent infringement suit is initiated. If neither the patent holder nor the branded-drug company files a patent infringement suit against the generic drug applicant within

45 days of receipt of notification of a Paragraph IV Certification, then the FDA approval process may proceed. Upon final FDA approval of the ANDA, the generic applicant is free to market its product.

18. If, however, the patent owner or branded drug company files a patent infringement suit against the generic drug applicant within the 45-day period, then final FDA approval of the ANDA is automatically stayed until the earliest of: (a) patent expiration; (b) a final court determination of non-infringement or patent invalidity; or (c) the expiration of a 30-month period from the time the patent holder receives notification of a Paragraph IV Certification. This 30-month period, which effectively is an automatic statutory injunction to final FDA approval of an ANDA, is commonly referred to as the "30-month stay."

19. The first ANDA filer to submit a Paragraph IV Certification for a branded drug product receives a period of market exclusivity, commonly referred to as "the 180–day Exclusivity Period," during which it is the exclusive generic drug rival to the branded drug. This 180–day Exclusivity Period begins after the earlier of the date on which (1) the first ANDA filer begins commercial marketing of its generic version of the drug, or (2) a court finds the patents claiming the brand name drug are invalid or not infringed.

V. The Benefits of Generic Competition

20. Although therapeutically equivalent to their branded counterparts, generic drugs are typically sold at substantial discounts from the price of the referenced branded drug. The first generic drug to enter the market often does so at a price 25 percent or more below that of the branded product. As additional generic drugs enter the market, generic drug prices continue to fall, often to less than 50% of the branded drug's price.

21. Because of these large price advantages, government officials and private purchasers have adopted policies to encourage or require pharmacists to substitute a generic drug for its branded counterpart. Many third-party payers of prescription drugs (e.g., managed care plans, Medicaid programs), encourage or insist on the substitution of generic drugs in lieu of their branded counterparts, whenever possible.

22. As a result of this price difference and the ease of substitution, within the first year of generic entry, generic drug competition promptly causes a significant adverse impact on the branded drug's market share, unit sales, and dollar sales.

23. Generic drug competition generates large savings for consumers. A 1998 Congressional Budget Office Report estimates that in 1994 alone, purchasers saved $8-10 billion on prescriptions at retail pharmacies by purchasing generic drugs instead of the brand name product.

VI. BMS's Anticompetitive Campaign to Maintain its BuSpar Monopoly

24. The FDA approved BuSpar on September 29, 1986. At that time, two patents protected the product – U.S. Patent No. 3,976,776 ("the '776 patent") and U.S. Patent No. 4,182,763 ("the '763 patent"). The '776 patent, which expired in August 1993, stated, in pertinent part, that buspirone's tranquilizing effects were similar to those achieved with chlorpromazine, a tranquilizer used to treat anxiety. The '763 patent, which expired on November 21, 2000, claimed a method for using buspirone to treat anxiety.

A. BMS's Unlawful Agreement with Schein Pharmaceutical, Inc.

25. On December 2, 1994, BMS entered into an agreement with Schein Pharmaceutical, Inc. ("Schein") and Danbury Pharmacal, Inc. ("Danbury") settling patent infringement litigation concerning the '763 patent (the "Schein Agreement"). As a result of the Schein Agreement, BMS paid a would-be competitor to abandon its challenge to a BMS patent to maintain its monopoly in the United States over the sale of buspirone until expiration of the '763 patent.

26. In August 1992, Schein filed an ANDA with the FDA containing a Paragraph IV Certification, asserting that the '763 patent was invalid and unenforceable because it claimed a use anticipated in the previously issued '776 patent, i.e., using buspirone to treat anxiety. Schein served BMS with timely notice of its Paragraph IV Certification.

27. BMS sued Schein and its subsidiary, Danbury, for patent infringement in the United States District Court for the Southern District of New York. Because BMS filed its suit within 45 days of receiving Schein's notice of its Paragraph IV Certification, the FDA was precluded from approving Schein's ANDA for up to 30 months.

28. During the patent litigation, Schein filed a motion for summary judgment, asserting that the '763 patent was invalid because its invention was anticipated by the '776 patent. In opposing Schein's motion for summary judgment, BMS relied on expert affidavits stating that in 1969, when the '776 patent application had been filed, the buspirone uses described in the patent would have been interpreted to cover only anti-psychotic effects, and not anti-anxiety effects.

29. On June 30, 1993, the District Court granted Schein's summary judgment motion, finding BMS's '763 patent to be invalid. The District Court found that both the '776 patent's plain language and BMS's own submission to the FDA in 1972 demonstrated that the invention claimed in the '763 patent was anticipated by the earlier patent. The District Court concluded that "[i]n face of this clear evidence that the invention covered exactly what the plain meaning of the language suggests, plaintiffs' submissions of expert affidavits that ask the Court to ignore the plain language of the patent do not create an issue of fact precluding summary judgment."

30. BMS appealed the District Court's ruling to the United States Court of Appeals for the Federal Circuit. The Federal Circuit acknowledged that the expert affidavits on which BMS relied in opposing summary judgment "conflicted with statements made by Bristol-Myers to the FDA and with other evidence relied on by the district court." Nevertheless, the Federal Circuit held that the expert affidavits were sufficient to raise disputed issues of fact. For this reason, the Federal Circuit vacated the grant of summary judgment and remanded the case to the District Court for trial.

31. Faced with the substantial risk that the '763 patent – the only remaining patent claiming BuSpar – would be found invalid, BMS, on December 2, 1994, entered into an agreement with Schein to settle their patent litigation. Pursuant to this agreement, BMS paid Schein $72.5 million in four yearly installments between 1995 and 1998. In return, Schein agreed to refrain from competing with any generic bioequivalent version of BuSpar until the '763 patent's expiration, which occurred nearly six years later.

32. BMS also sought and obtained agreement from Schein to take steps that would help BMS maintain the perception that the '763 patent was valid and enforceable, thereby bolstering BMS's ability to deter any other potential generic

drug entrant from challenging its validity. Specifically, Schein agreed:

(a) to acknowledge that the '763 patent was valid and enforceable;

(b) to withdraw its Paragraph IV Certification challenging the validity of the '763 patent and to submit a Paragraph III Certification, certifying that it seeks ANDA approval to manufacture and sell its buspirone product only upon the '763 patent's expiration;

(c) to submit, along with BMS, a stipulated order of dismissal in a form that would "insure that the presumption of validity of the '763 patent remains intact and that BMS retains the full power to enforce the '763 patent to the same extent as though the Litigation had never commenced";

(d) not to disclose the Schein Agreement's existence or the terms therein, or share information concerning the '763 patent or the litigation related to the patent with any third party;

(e) not to aid or assist others in the purchase, manufacture, use, or sale of buspirone; and

(f) to cooperate with BMS in any legal actions, motions to quash, or motions for a protective order in the event that anyone sought to compel Schein to disclose the Schein Agreement's existence or information about the terms therein.

33. The Schein Agreement enabled BMS to maintain its BuSpar monopoly by eliminating Schein as a potential generic drug rival from the time of the agreement on December 2, 1994, until expiration of the '763 patent on November 21, 2000.

B. BMS's Efforts to Extend its Monopoly by Providing to the FDA False and Misleading Listing Information Concerning the '365 Patent

34. After successfully implementing its strategy through the Schein Agreement to keep would-be generic competitors off the market until expiration of the '763 patent in 2000, BMS developed a scheme to continue to thwart generic competition once the '763 patent expired. BMS sought issuance from the PTO of a new patent, and obtained the patent just as ANDA filers were poised to market and sell their generic buspirone products in competition with BuSpar. BMS submitted false and misleading information to the FDA to cause the FDA to list the new patent in the Orange Book, thereby preventing the FDA from granting final approval to the ready-to-market manufacturers of generic buspirone products.

35. By November 21, 2000, the day on which the '763 patent expired, the FDA had granted tentative approval to more than ten ANDA filers to sell generic buspirone. Schein (which Watson Pharmaceuticals, Inc. ("Watson") acquired in August 2000) was the first ANDA filer on two dosage strengths – the 5 mg and 10 mg products; Mylan Pharmaceuticals, Inc. ("Mylan") was the first filer on the 15 mg product; and Par Pharmaceuticals, Inc. was the first filer on the 7.5 mg product. Upon '763 patent expiry, each such ANDA filer would have received final FDA approval and the 180-day exclusivity period for the dose(s) for which they were first to file ANDAs. Following the exclusivity period, the other ANDA filers with tentative approval would have received final approval and been eligible to market their generic buspirone products.

36. As the '763 patent's expiry date approached, the first ANDA filers prepared to bring their products to market. Mylan, for example, had a fleet of trucks loaded with its generic buspirone product ready for shipment to customers,

and ultimate sale to consumers, beginning on November 22, 2000.

37. BMS, however, had already begun implementing its strategy to maintain its BuSpar monopoly beyond expiration of the '763 patent. On August 5, 1999, BMS filed patent application 09/368,842 ("the '842 application") with the PTO. This application claimed treatment of anxiety through two inventions: (1) the use of 6-Hydroxy-Metabolite of buspirone; and (2) the use of buspirone to create the metabolite. A metabolite is a new molecule created when an existing pharmaceutical agent, such as buspirone, breaks down in the body.

38. On August 9, 1999, BMS requested expedited treatment of its patent application. The PTO required BMS to choose between the two claimed inventions identified in the '842 application to qualify for expedited treatment. BMS decided to pursue the second claimed invention, involving the use of buspirone to create the metabolite.

39. On December 13, 1999, the PTO rejected the '842 application, in part because BMS had been making and selling BuSpar to treat anxiety in the United States for more than one year prior to the filing date, rendering this claimed invention unpatentable. BMS did not respond to the PTO's rejection of the '842 application and eventually abandoned it.

40. On January 18, 2000, BMS filed divisional application 09/484,161 ("the '161 application") with the PTO, containing claims directed to the use of the 6-Hydroxy-Metabolite of buspirone, but not to the use of buspirone itself.

41. On June 6, 2000, BMS filed four continuation-in-part ("CIP") applications. Two of these applications, 09/588,221 ("the '221 application") and 09/588,222 ("the '222

application"), like the '161 application, claimed only the use of the 6-Hydroxy-Metabolite of buspirone. The other two applications, 09/588,220 ("the '220 application") and 09/588,223 ("the '223 application"), claimed the use of buspirone to create the metabolite.

42. On September 8, 2000, the PTO rejected the two CIP applications that concerned the use of buspirone (the '220 and '223 applications), for the same reason that it had previously rejected the '842 application - *i.e.*, because BMS had been making and selling BuSpar to treat anxiety in the United States for nearly 14 years. With these rejections, the PTO had rejected all three BMS applications covering the use of buspirone to create the metabolite.

43. On September 12-13, 2000, the PTO rejected BMS's remaining applications – the '161 divisional application and the '221 and '222 CIP applications – because they contained identical or overlapping claims. On September 22, 2000, BMS abandoned the '161 and '222 applications, and asked the PTO to reconsider its rejection of the '221 application. The PTO agreed to do so. The '221 application, which eventually matured into U.S. Patent No. 6,150,365 ("the '365 patent"), claimed only the use of the 6-Hydroxy-Metabolite of buspirone, and not the use of buspirone itself.

44. On October 2, 2000, the PTO issued a Notice of Allowability for the '221 application. Thereafter, on October 5, 2000, BMS filed a petition to expedite the issuance of the patent, asserting that, "[i]n order to maintain its product position in what becomes a highly competitive market, assignee requires issuance of this patent prior to *November 22, 2000*" (emphasis in original). This is the date on which generic drug competition was poised to begin and erode BMS's monopoly profits for BuSpar.

45. Hours before the '763 patent's term was set to expire, on November 21, 2000, the PTO issued the '365 patent to

BMS. The sole claim in the '365 patent concerns the use of the 6-Hydroxy-Metabolite of buspirone. It does not recite any use of buspirone itself. The '365 patent states:

> A process for ameliorating an undesirable anxiety state in a mammal comprising systemic administration to the mammal of an effective but non-toxic anxiolytic dose of [the 6-Hydroxy-Metabolite of buspirone] or pharmaceutically acceptable acid addition salt or hydrate thereof.

46. Upon issuance of the '365 patent, BMS issued a press release stating the patent covers "a method of use of a metabolite produced by the administration of [buspirone]." Internal BMS documents also referred to the '365 patent as a patent for a buspirone metabolite.

47. Hours after the PTO issued the '365 patent, BMS submitted information to the FDA for listing the '365 patent in the Orange Book. As part of this submission, BMS declared that the '365 patent "is a method-use patent covering, among other things, a *method of using BuSpar* for all of its approved indications" (emphasis added). BMS submitted this information even though it knew that the patent covered only a method of using a metabolite, and not a method of using buspirone itself.

48. Various generic buspirone manufacturers thereafter filed Paragraph IV Certifications with the FDA and provided BMS with notice of these certifications. BMS filed suit against these generic manufacturers within 45 days of receiving the notices. In so doing, BMS triggered the automatic 30-month stay provision of Hatch-Waxman.

49. At least one generic company, Par, filed a Paragraph IV Certification, but did not notify BMS of its certification. Because Par failed to notify BMS of its Paragraph IV Certification, BMS's listing of the '365 patent, in and of

itself, prevented FDA approval of Par's generic buspirone ANDA.

50. BMS's '365 patent did not meet the statutory requirements for listing a patent in the Orange Book. Such requirements are set forth at 21 U.S.C.§§ 355 (c)(1) and (c)(2). The '365 patent was not properly listable because it (1) does not claim BuSpar or a method of using BuSpar, and (2) is not one with respect to which a claim of patent infringement could reasonably be asserted against someone selling BuSpar.

51. Following the FDA's listing of the '365 patent in the Orange Book, some of the ANDA filers who had been prevented from selling their generic buspirone products provided copies of BMS's press release to the FDA. One of the ANDA filers also asserted to the FDA that, under the Federal Circuit's ruling in *Hoechst-Roussel Pharms., Inc. v. Lehman*, 109 F.3d 756 (Fed. Cir. 1997), a patent for a metabolite could not "claim a listed drug" within the meaning of the patent laws, and therefore could not be listed in the Orange Book.

52. Thereafter, on November 30, 2000, the FDA asked BMS to provide "a declaration that the '365 patent issued by the PTO on November 21, 2000, contains a claim for an approved use of buspirone [the approved drug] that is separate from the claim for 6-hydroxy-buspirone [the metabolite] described in the November 21, 2000 Bristol-Myers Squibb press release." The FDA informed BMS that it considered the '365 patent "provisionally listed" pending BMS's submission of an additional declaration.

53. On December 4, 2000, BMS provided the declaration, sworn by Richard P. Ryan, BMS's in-house patent counsel, stating that "[the '365 patent] issued by the United States Patent and Trademark Office on November 21, 2000 contains a claim for the approved uses of buspirone hydrochloride." BMS's declaration was false. In reality,

the patent pertained to a use of the 6-Hydroxy-Metabolite of buspirone, and not to any use of buspirone itself.

54. BMS's sworn declaration to the FDA further represented that the '365 patent's sole claim was:

> a method for ameliorating an undesirable anxiety state comprising the direct administration of 6-hydroxy-buspirone or oral administration of a prodrug [buspirone] of 6-hydroxy-buspirone such as buspirone hydrochloride to provide an effective but non-toxic anxiolytic dose of 6-hydroxy-buspirone.

This representation was also false, because the actual patent claim does not refer to any use of the buspirone prodrug.

55. BMS's representations to the FDA that the '365 patent "contains a claim for the approved uses of buspirone hydrochloride" directly contradicted its representations to the PTO in prosecuting the patent. BMS knew that the PTO had already rejected three previous applications in which BMS claimed a use of buspirone, for the reason that BMS had been making and selling buspirone to treat anxiety in the United States for many years. The PTO had allowed only the '365 patent claim, which recited a use of the 6-Hydroxy-Metabolite of buspirone.

56. Moreover, during its unsuccessful effort to obtain a patent claiming a use of buspirone, BMS specifically distinguished that claimed use from the currently approved method of using buspirone. For example, BMS told the PTO that:

(a) the method of oral administration of buspirone claimed by the invention "improves upon and differs from the known standard of oral administration of buspirone";

(b) "[t]he improved method is directly counter to the past method of orally administering buspirone";

(c) the method of administration claimed by the patent "is in contradiction to currently accepted methods of administration";

(d) "dosing instructions should be changed to conditions favoring enzymatic production of [the metabolite]"; and

(e) "instead of dosing buspirone at mealtimes, the dosing should occur about two hours or more before or after a meal."

57. BMS's statements to the PTO are irreconcilable with BMS's sworn declaration to the FDA on December 4, 2000, that the '365 patent "contains a claim for the approved uses of buspirone hydrochloride." Nonetheless, consistent with its ministerial approach to Orange Book listings, the FDA did not review the propriety of BMS's sworn declaration. Instead, the FDA thereafter deemed the '365 patent listed in the Orange Book as of November 21, 2000. The FDA expressly noted that it listed the patent solely on the basis of BMS's declarations that the patent met the requirements for listing, and that it did not make an independent determination regarding the '365 patent's scope and coverage.

58. BMS obtained an Orange Book listing of the '365 patent only because it provided false and misleading information to the FDA concerning the scope and coverage of the '365 patent. BMS knew that its representations to the FDA – to the effect that the '365 patent claimed a method of using buspirone – were false and misleading. BMS made these misrepresentations purposely and intentionally, to obtain wrongfully an Orange Book listing of the '365 patent. Through its wrongful listing in the Orange Book of the '365

patent, BMS illegitimately acquired the ability to trigger a 30-month stay, thereby delaying entry of generic buspirone, and depriving consumers of lower prices and other benefits of competition.

C. BMS Files Objectively Baseless Patent Infringement Lawsuits

59. Following the listing of the '365 patent in the Orange Book, BMS filed patent infringement lawsuits against ANDA filers who had notified BMS of their Paragraph IV Certifications with respect to the '365 patent. These lawsuits were objectively baseless because, with respect to these competitors' ANDAs, the '365 patent could not be both valid and infringed. Were the patent claim interpreted to cover the currently-approved uses for which the generic applicants submitted their ANDAs, then the patent necessarily would be invalid, because those uses had been known long before BMS applied for the patent. Indeed, the United States District Court for the Southern District of New York granted summary judgment in favor of Mylan and Watson in BMS's patent infringement actions against these companies. The court found that Mylan's and Watson's ANDAs did not infringe the '365 patent, and determined that BMS's proposed construction of the '365 patent claim – which would have been needed to support an infringement holding – would render the patent invalid.

60. The intent and effect of BMS's multiple patent infringement lawsuits was to prevent generic buspirone manufacturers from marketing their products for as long as possible, through wrongful triggering of the 30-month stay.

D. The FDA De-lists the '365 Patent and Generic Entry Belatedly Occurs

61. On November 30, 2000, Mylan filed a lawsuit against BMS and the FDA in the U.S. District Court for the District of

Columbia requesting, among other things, the issuance of an injunction ordering de-listing of the '365 patent from the Orange Book. On March 14, 2001, the District Court granted Mylan's motion for a preliminary injunction, ordered BMS to request that the FDA de-list the patent, and further ordered the FDA to grant immediate approval of Mylan's ANDA for its generic buspirone. BMS and the FDA both complied with the Order. Shortly thereafter, Mylan, Watson, and Par launched their respective generic buspirone products into the marketplace.

62. Mylan, Watson, and Par entered the market substantially later than they would have absent BMS's anticompetitive acts. As a consequence, consumers suffered substantial economic detriment by paying monopoly prices for an unjustifiably extended period.

63. Because they were the first to submit Paragraph IV Certifications, Mylan, Watson, and Par were each entitled to the 180-day Exclusivity Period for certain dosages of generic buspirone. Each entered the market with prices substantially below BuSpar's price. Once the 180-day Exclusivity Period ended, other firms launched additional generic buspirone products, and generic buspirone prices declined even further. BMS's anticompetitive acts, therefore, not only delayed the entry of Mylan, Watson, and Par, but also that of these other firms. BMS's exclusionary conduct denied consumers timely access to the lower prices that result when multiple generic competitors compete in the market.

E. BMS Had Monopoly Power in the Relevant Market of Buspirone Sold in the United States

64. The relevant product market in which to assess the anticompetitive effects of BMS's conduct concerning BuSpar is the market for buspirone products, which consists of BuSpar and generic bioequivalent versions of BuSpar.

65. Entry of generic buspirone products significantly and immediately decreased BMS's BuSpar sales and market share, and led to a substantial reduction in the average market price paid for buspirone products. Before generic entry, BMS's U.S. BuSpar sales were over $600 million. In the year after generic entry, BMS's U.S. BuSpar sales declined by more than 50%.

66. Because of this competitive relationship between BuSpar and its generic bioequivalent drug rivals, such products comprise a distinct relevant product market for antitrust purposes. Other therapeutic agents can be used to treat anxiety, but the presence of these therapeutic agents is not sufficient to prevent the anticompetitive effects from BMS's conduct.

67. The relevant geographic market in which to assess the anticompetitive effects of BMS's conduct concerning BuSpar is the United States. The FDA's elaborate regulatory process for approving drugs for sale in the United States, and the fact that the marketing, sales, and distribution of pharmaceuticals occur on a nationwide basis, establish the boundaries of the geographic market.

68. At all times relevant to this complaint, and until March 2001, when generic buspirone manufacturers finally overcame BMS's anticompetitive efforts to keep their products off the market, BMS's share of the relevant market was 100%.

69. At all times relevant to this complaint, FDA processes, as well as BMS's exclusionary acts, restricted entry into the relevant market and protected BMS's monopoly.

VII. BMS's Anticompetitive Campaign to Maintain its Taxol Monopoly

A. The National Cancer Institute's Discovery of Taxol

70. Paclitaxel is a naturally occurring substance that has anti-cancer properties. BMS has marketed a paclitaxel product in the U.S. under the brand name Taxol since December 1992.

71. In the late 1980s, researchers at the United States National Cancer Institute ("NCI") discovered and developed paclitaxel anti-cancer properties. Prior to any involvement by BMS, the U.S. government spent more than $32 million to develop economically feasible techniques to extract paclitaxel from yew tree bark and to create a clinically acceptable formulation for treating cancer.

72. In 1991, pursuant to the Federal Technology Transfer Act, 15 U.S.C. § 3710a, *et seq.,* the NCI and BMS entered into a cooperative research and development agreement ("'CRADA") for the development of (a) a paclitaxel-based drug to treat refractory ovarian cancer and (b) alternative sources of paclitaxel. The CRADA gave BMS exclusive use of existing and future data necessary for FDA approval of paclitaxel, and exclusive access to the NCI's Investigative New Drug registration. In return, the CRADA required BMS to investigate and establish alternative sources of paclitaxel, develop supplies of paclitaxel, supply formulated paclitaxel for government sponsored clinical trials and compassionate distribution, assist in those trials for eighteen months, and prepare and file an NDA.

B. BMS Seeks to Patent Taxol Despite Knowing That it Was Not Patentable and Despite Public Statements That Taxol Had No Patent Protection

73. In 1990, BMS understood that paclitaxel was not patentable as either a composition of matter or as an anti-tumor agent in view of prior public use, public knowledge, and written publications regarding the drug.

74. On July 29, 1991, a subcommittee of the United States House of Representatives held a hearing on several issues associated with BMS's agreements with the NCI regarding Taxol. Responding to a concern expressed by the subcommittee that the "agreements offer no protection to cancer patients from price gouging," BMS told Congress that Taxol "has no patent protection. Thus, the degree of market protection typically available to new pharmaceutical products is lacking in this case."

75. On July 22, 1992, BMS filed an NDA seeking approval to market Taxol for the treatment of ovarian cancer. On December 27, 1992, the FDA approved BMS's application, triggering, pursuant to Hatch-Waxman, 21 U.S.C. § 355(c)(3)(D)(ii), an automatic, five-year period during which BMS had the exclusive right to market a paclitaxel product in the United States.

76. On August 3, 1992, notwithstanding BMS's statements to Congress that the protection "typically available to new pharmaceutical products is lacking" for Taxol, BMS filed a patent application in the PTO related to Taxol.

77. On December 3, 1992, while prosecuting a patent application for methods of administering Taxol, BMS told the House subcommittee that "near-term generic competition for TAXOL is a certainty because TAXOL is not a patented product. This absence of patent protection means that BMS only has protection against Abbreviated

New Drug Applications (ANDAs) filings for five years from the date of approval as provided under the Hatch-Waxman Act."

C. BMS Procures Two Taxol Patents Through Inequitable Conduct

78. BMS's five-year, exclusive right to sell Taxol, pursuant to 21 U.S.C. § 355(c)(3)(D)(ii), expired on December 27, 1997. Thereafter, absent exclusionary acts by BMS, generic paclitaxel rivals would have faced no regulatory stay on obtaining FDA approval to enter the market. BMS, however, succeeded, through exclusionary acts, in obtaining two patents that delayed generic competition to Taxol.

79. On June 24, 1997, the PTO issued to BMS U.S. Patent No. 5,641,803 ("the '803 patent"), and on September 23, 1997, it issued to BMS U.S. Patent No. 5,670,537 ("the '537 patent"). The claims of the '803 patent cover administering 135-175 mg/m^2 of Taxol to a patient over a period of about three hours. The claims of the '537 patent additionally require that the patient receive premedication, before Taxol is administered, to reduce hypersensitivity reactions.

80. When pursuing a patent, an applicant has a duty of candor and good faith in dealing with the PTO. This duty includes a requirement to disclose all information, of which the applicant is aware, that a reasonable patent examiner would find material in determining patentability. The failure to satisfy this duty is inequitable conduct that renders the patent unenforceable.

81. Because the NCI funded the discovery and initial development of paclitaxel as an anti-cancer drug, much of the research relating to Taxol was in the public domain and thus the results of that research were unpatentable. To obtain FDA approval of its NDA, BMS relied on several studies in the public domain to show that Taxol was safe

and effective. To obtain the patents, however, BMS needed to demonstrate to the PTO that its claimed method of administering Taxol differed from those methods used in the prior studies, including those on which it had earlier relied in seeking approval of its NDA. In prosecuting the '537 and '803 patents, BMS represented to the PTO that such differences existed, by failing to disclose, or by misrepresenting, to the PTO information that a reasonable patent examiner would find material in determining patentability.

82. Prior to entering the CRADA with BMS, the NCI sponsored clinical trials of Taxol, including Phase I trials designed to examine Taxol's safety. Researchers published the results of the Phase I trials in several articles. One of these articles – a 1986 article by Kris et al., *Phase I Trial Of Taxol Given As A 3-Hour Infusion Every 21 Days*, 70 Cancer Treatment Reports, Vol. 70, No. 5, pp. 605-607 (May 1986) ("*Kris*") – reported on the results of a Phase I trial conducted at Sloan-Kettering Hospital in New York. The trial involved giving Taxol as a 3-hour intravenous infusion every 21 days, in doses ranging from 15 to 230 mg/m^2, to 17 patients suffering from various forms of cancer. Another article reporting on the results of another Phase I trial was a 1987 article by Donehower et al., *Phase I Trial of Taxol In Patients With Advanced Cancer*, Cancer Treatment Reports, Vol. 71, No. 12, pp. 1171-1177 (December 1987) ("*Donehower*"). Dosages in that trial varied from 15 mg/m^2 to 265 mg/m^2, administered over either one or six hours.

83. BMS's 1992 pursuit of its NDA before the FDA relied on the *Donehower* and *Kris* studies as providing evidence of safety and efficacy. While pursuing the '537 and '803 patents before the PTO, however, BMS argued that *Donehower* and *Kris* did not provide evidence of safety and efficacy – statements directly contrary to those BMS made to the FDA. BMS's statements to the PTO concerning the *Donehower* and *Kris* references were material

misrepresentations of those references. BMS more accurately depicted the two reports in its statements to the FDA while pursuing the Taxol NDA.

84. In a report on the *Donehower* trials submitted in support of its NDA, BMS told the FDA that *Donehower* taught that, based on a promising showing of efficacy, an entire broad-based Phase II (efficacy) study should be undertaken. In contrast, BMS told the PTO that *Donehower* failed to suggest that Taxol as administered was effective or that further study of the relevant duration periods was warranted.

85. In a report on the *Kris* trials, submitted in support of its NDA, BMS told the FDA that doses of Taxol up to 160 mg/m^2 administered over a three-hour period "were well tolerated with no severe toxicity." BMS also told the FDA that the results in *Kris* indicated that further investigation of Taxol was warranted. In contrast, BMS told the PTO that *Kris* demonstrated that administering Taxol over a three hour period "would be unduly hazardous."

86. BMS made its statements to the PTO concerning the *Donehower* and *Kris* references in a declaration signed by Dr. Renzo Carretta, a BMS scientist who co-authored BMS's reports to the FDA concerning *Donehower* and *Kris*. BMS's and Dr. Carretta's statements to the FDA are irreconcilable with their false and misleading statements to the PTO.

87. BMS also deliberately failed to disclose to the PTO material prior art, as reported in O'Connell, et al., *"Phase I Trial of Taxol Given as a Three Hour Infusion Every Three Weeks*," published at 26 Proceedings of AACR, 169 (1985) ("*O'Connell*"). This 1985 abstract reports the results of a Phase I trial of Taxol and states that "for doses up to 160 mg/m^2," Taxol "can be safely given as a 3 hour infusion every 3 weeks." The *O'Connell* reference is a preliminary report of the complete trial reported in Kris, which added

higher dosage amounts of 190 mg/m^2 and 230 mg/m^2 to the dosages reported in *O'Connell*. Research observed hypersensitivity reactions only at the higher dosages observed in *Kris*.

88. *O'Connell* was material because it demonstrated that doses up to 160 mg/m^2, falling within the range of 135-175 mg/m^2 recited in BMS's claims, could be safely administered over three hours. This finding was consistent with BMS's position before the FDA, but was inconsistent with BMS's argument before the PTO that available prior art taught that three-hour infusions of paclitaxel in the claimed ranges of 135-175 mg/m^2 were "unsafe" and "would be unduly hazardous." The PTO would likely have given this argument less weight had BMS disclosed *O'Connell*.

89. In making false and misleading material statements to the PTO concerning *Donehower* and *Kris*, and by failing to disclose the material *O'Connell* reference, BMS breached its duty of candor and good faith in dealing with the PTO, and therefore engaged in inequitable conduct.

D. BMS Wrongfully Submits Unenforceable Patents For Orange Book Listing

90. Upon obtaining the '537 and '803 patents, BMS promptly submitted them to the FDA for listing in the Orange Book. BMS obtained the patents by inequitable conduct, however, rendering such patents unenforceable. Because of this inequitable conduct, BMS could not reasonably believe that the patents were listable under the FDA's Orange Book regulations.

91. Beginning on July 30, 1997, a number of generic pharmaceutical manufacturers filed ANDAs with the FDA for generic paclitaxel products and provided BMS with notice of Paragraph IV Certifications, claiming that the '803

and '537 patents were invalid or not infringed by their ANDAs.

92. Within 45 days of receiving the notices, BMS filed suit in the United States District Court for the District of New Jersey against these generic manufacturers – including IVAX Pharmaceuticals, Inc., Mylan Pharmaceuticals, Inc., and Bedford Laboratories – alleging infringement of the '803 and '537 patents. In so doing, BMS triggered Hatch-Waxman's automatic 30-month stay provision, insulating Taxol from potential generic drug competition over that period.

93. On March 2, 2000, the District Court granted in part motions for summary judgment that the asserted claims of the '803 and '537 patents were invalid. The Court found that those claims were anticipated by *Kris* – one of the articles BMS misrepresented to the PTO. The United States Court of Appeals for the Federal Circuit affirmed the District Court rulings on invalidity as to all of the appealed claims of the '803 patent, and four of the appealed six claims of the '537 patent, indicating skepticism about the validity of the remaining two '537 patent claims.

E. BMS's Agreement with ABI to Extend its Taxol Exclusivity

94. The 30-month stays that BMS obtained from its unlawful listings of the '537 and '803 patents ended in June 2000. Shortly after those stays expired, but before any ANDAs for generic paclitaxel obtained FDA approval, BMS conspired with American Bioscience, Inc. (ABI) to list improperly a third patent in the Orange Book – ABI's U.S. Patent No. 6,096,331 (the "'331 patent") – and thereby triggered again Hatch-Waxman's 30-month stay provision, and thus continued the BMS monopoly in the market for paclitaxel-based drugs.

95. In July 2000, BMS and ABI agreed on the terms of an option to license the '331 patent, whereby if BMS licensed the '331 patent, then ABI would receive royalties based on a significant percentage of BMS sales of Taxol. This license was nominally "non-exclusive," but ABI would have no incentive to license the '331 patent to anyone except BMS. If ABI also licensed the patent to BMS's generic competitors, then their entry at a lower price would have dramatically reduced BMS's Taxol sales and the royalties ABI would otherwise obtain from licensing the patent solely to BMS.

96. The PTO issued the '331 patent to ABI on August 1, 2000. Most of the '331 patent's claims cover a drug similar to paclitaxel, but which differs from BMS's Taxol NDA, and thus those claims are not a basis for listing. The few remaining claims relate to Taxol, because they simply cover administering specified dosages of Taxol, generally over specified time periods. These claims, if they were valid, could have provided a basis for listing the '331 patent in the Orange Book.

97. On August 1, BMS submitted the '331 patent to the FDA for listing in the Orange Book; later that day BMS withdrew the listing information. At all relevant times, BMS could not reasonably believe that the relevant claims of the '331 patent were valid, or consequently that the '331 patent should be listed in the Orange Book as claiming Taxol. In particular, BMS was well aware of the *O'Connell, Kris,* and *Donehower* references, which disclosed administering the claimed doses of Taxol prior to the '331 patent's earliest filing date of March 26, 1993. As with BMS's '803 and '537 patents, these references were prior art that invalidated the relevant claims of the '331 patent. Moreover, BMS's own experience with the sale and use of Taxol prior to that date invalidated the relevant claims of the '331 patent.

98. ABI filed suit against BMS on August 11, 2000 (the "listing suit") in the United States District Court for the Central District of California, alleging that BMS purportedly refused to list the '331 patent, and that such refusal was contrary to federal law. That same day, in rapid succession, BMS and ABI agreed to stipulate to entry of a temporary restraining order (TRO) under which BMS agreed to list the '331 patent in the FDA Orange Book, the District Court entered the requested order, and BMS again filed the '331 patent for listing in the Orange Book. The TRO provided that the parties would act to de-list the '331 patent if ABI failed to justify the entry of a preliminary injunction. This listing triggered the Hatch-Waxman requirement that ANDA filers certify to the patent.

99. On August 28, 2000, the FDA tentatively approved IVAX's pending ANDA for generic Taxol. In the absence of the Orange Book listing of the '331 patent, the FDA would have given final approval to IVAX's ANDA on that date.

100. The District Court held that ABI did not merit a preliminary injunction and dismissed the listing suit on September 7, 2000. The District Court orally advised the parties that its order would, consistent with the TRO, require them to take steps to delist the '331 patent. That day, ABI filed a lawsuit against IVAX (the "infringement suit"), alleging that its ANDA infringed the '331 patent. One day later, BMS, knowing that the court hearing the listing suit was about to order it to take actions to delist the '331 patent, informed the FDA of the infringement suit and claimed that the lawsuit barred the FDA from approving all pending ANDAs for thirty more months. The court hearing the infringement suit eventually found, on summary judgment, that all claims of the '331 patent asserted against IVAX for generic Taxol were invalid.

101. On September 11, 2000, BMS again submitted the '331 patent to the FDA for Orange Book listing. On September

14, 2000, the court hearing the listing suit ordered BMS to "use its best efforts to cause the delisting of [the] '331 patent from the Orange Book." On September 14, 2000, to comply with that order, BMS sent a letter to the FDA (1) asking for withdrawal of its August 11 listing of the '331 patent, but only "to the extent it was compelled" by the order, and (2) maintaining that it did not withdraw its earlier listing of the '331 patent and thus that a 30-month stay barred final FDA approval of the IVAX ANDA. Despite these efforts by BMS to maintain an invalid Orange Book listing, the FDA granted IVAX final approval of its ANDA on September 15, 2000, allowing IVAX to market its generic Taxol product.

102. In part because of BMS's conduct, IVAX did not ship its product until October 23, 2000, and the quantities then shipped were smaller than they likely would have been if BMS had not listed the '331 patent. For 180 days thereafter, IVAX was the only generic manufacturer permitted to market generic Taxol because of the Hatch-Waxman 180-day exclusivity period. This exclusivity period would not have existed absent the improper listing of the '537 and '803 patents, because there would have been no patent against which an ANDA applicant could have filed a Paragraph IV certification. Mylan, Bedford, and Abbott later entered with their generic Taxol products, further enhancing price competition.

103. BMS paid ABI $3.5 million to extend its option to license the '331 patent until December 31, 2000. But, as soon as generic paclitaxel products entered the market, despite BMS's and ABI's effort to use the patent to delay such competition, the patent no longer offered any value to BMS, and BMS did not exercise the option so as to avoid compensating ABI further.

F. BMS Had Monopoly Power in the Relevant Market of Paclitaxel-based Drugs Sold in the United States

104. The relevant antitrust product market in which to assess the anticompetitive effects of BMS's conduct concerning Taxol is the market for paclitaxel-based drugs, which consists of Taxol and generic versions of Taxol.

105. Entry of generic Taxol significantly decreased BMS's Taxol sales and market share, and led to a significant reduction in the average market price paid for paclitaxel-based drugs. Before generic entry, BMS's U.S. Taxol sales were $1.1 billion. In the year after generic entry, BMS's U.S. Taxol sales fell about 50% to $545 million.

106. Because of this competitive relationship between Taxol and its generic bioequivalent drug rivals, such products comprise a distinct relevant product market for antitrust purposes. Other therapeutic agents can be used to treat cancer, but the presence of these therapeutic agents is not sufficient to prevent the anticompetitive effects from BMS's conduct.

107. The relevant geographic market in which to assess the anticompetitive effects of BMS's conduct is the United States. The FDA's elaborate regulatory process for approving drugs for sale in the United States, and the fact that the marketing, sales, and distribution of pharmaceuticals occur on a nationwide basis, establish the boundaries of the geographic market.

108. At all times relevant to this complaint, and until October 23, 2000, when generic paclitaxel manufacturers finally overcame BMS's anticompetitive efforts to keep their products off the market, BMS's share of the relevant market was 100%.

109. At all times relevant to this complaint, FDA processes, as well as BMS's exclusionary acts, restricted entry into the relevant market and protected BMS's monopoly.

VIII. BMS's Anticompetitive Campaign to Maintain its Platinol Monopoly

A. BMS Wrongfully Submits the Invalid '925 Patent for Orange Book Listing

110. BMS distributes two cisplatin products (known by the brand names Platinol and Platinol-AQ) which are used in chemotherapy to treat various forms of cancer. BMS received FDA approval for Platinol in 1978 and Platinol-AQ in 1988.

111. By 1995, two patents protected BMS's cisplatin products from final FDA approval of competing generic versions: U.S. Patent Nos. 4,177,263 ("the '263 patent") and 4,339,437 ("the '437 patent"). Each patent claimed a method of treating tumor cells by administering a solution containing cisplatin or other platinum-based compounds. Each patent also claimed priority to, or the benefit of the filing date of, a patent application filed on April 20, 1970. BMS became the exclusive licensee to cisplatin in 1977, in an agreement with Research Corporation Technologies, Inc. ("RCT").

112. On May 26, 1995, the first ANDA-filer submitted its application seeking approval to market a generic cisplatin. Later that year, three other firms also filed ANDAs for generic cisplatin. Each applicant included what is referred to as a Paragraph III Certification, stating that it did not seek FDA approval for its generic product until the expiration of the '263 and '437 patents, which was to occur on December 4, 1996.

113. BMS thus faced potential competition from ANDA filers for the first time. BMS and RCT had a substantial interest in maintaining the cisplatin monopoly. In October 1995, the parties amended a continuation application at the PTO that claimed priority to the same 1970 application that led to the '263 and '437 patents. In April 1996, they told the PTO that the amendment claimed platinum complexes, including cisplatin, which purportedly had additional features not recited in the earlier '263 and '437 patents – i.e., that the complexes were to be "protected from light."

114. As early as 1967, however, it was well known from an article published by the inventors of what became U.S. Patent No. 5,562,925 ("the '925 patent"), that platinum complexes such as cisplatin were light sensitive, and that such complexes should be maintained in the dark. Nonetheless, the applicants asserted that the "claims of the present application [i.e, for the '925 patent] are . . . patentably distinguished," simply because the phrase "'protected from light' is not recited in connection with the methods claimed" in the '263 and '437 patents.

115. On October 8, 1996, the PTO issued the '925 patent. This patent matured from the tenth application in a series of continuation applications based on the original 1970 application. The '925 patent issued less than two months before expiration of the '263 and '437 patents, which would have permitted the FDA to grant final approval to the existing ANDAs.

116. Upon issuance of the '925 patent, BMS promptly submitted the patent to the FDA for listing in the Orange Book in connection with its Platinol products. As a result, the FDA was no longer permitted to grant final approval to any of the pending generic cisplatin ANDAs upon expiration of the '263 and '437 patents in December 1996. Instead, pursuant to Hatch-Waxman, the generic applicants were required to submit a new certification to the FDA concerning this newly

listed patent. Each of the generic applicants submitted a Paragraph IV Certification, asserting that their respective ANDAs did not infringe the '925 patent or that the '925 patent was invalid.

117. In response to these Paragraph IV Certifications, BMS filed patent infringement lawsuits against each generic applicant, alleging that the applicants' proposed generic versions of Platinol would infringe the '925 patent. These patent infringement suits were consolidated in the United States District Court for the District of New Jersey. By July 1997, at least three generic applicants had received tentative FDA approval for their generic cisplatin products. By filing these lawsuits, however, BMS triggered Hatch-Waxman's 30-month stay provision, preventing the FDA from granting final approval to each of the ANDAs until as late as July 1999.

118. On July 16, 1999, following expiration of the 30-month stay, American Pharmaceutical Partners – the first generic applicant to submit its Paragraph IV Certification with respect to the '925 patent, and thus the company eligible for the Hatch-Waxman 180-day Exclusivity Period – received final FDA approval.

119. On October 21, 1999, the District Court presiding over the consolidated patent infringement litigation found, by clear and convincing evidence, that the '925 patent was invalid for obviousness-type double patenting in light of the previously granted '263 and '437 patents. Based on controlling Federal Circuit precedent, and the prior art, which demonstrated that certain platinum complexes, including cisplatin, underwent chemical changes when exposed to light, the District Court concluded that "the '925 patent is an obvious modification of the '263 and '437 patents."

120. In November 1999, almost three years after expiration of the two unchallenged BMS patents, APP finally began selling to consumers its generic version of cisplatin.

121. On March 23, 2001, the Federal Circuit affirmed the District Court's ruling that the '925 patent was invalid, finding that the "'protected from light' language provides no distinguishing structure to the claim," amounting to nothing more than a "direction for care," and thus "cannot be a basis for distinguishing the composition claims over the prior method claims."

122. BMS did not reasonably and in good faith believe that the '925 patent was, in fact, valid. The "protected from light" language upon which BMS based its patent claim is nothing more than a "direction for care" that adds no distinguishing structure to the composition. Moreover, it had been reported as early as 1967 that platinum complexes including cisplatin were sensitive to the light, and no effort was made to claim patentability for the "protection from light" feature for nearly three decades thereafter – and not until generic entry against BMS's monopoly was imminent.

B. BMS Had Monopoly Power in the Relevant Market of Cisplatin Sold in the United States

123. The relevant antitrust product market in which to assess the anticompetitive effects of BMS's conduct is the market for cisplatin-based products, which consists of Platinol and generic bioequivalent versions of Platinol.

124. Entry of generic bioequivalent versions of Platinol resulted in a significant, immediate decrease in the sales of branded Platinol, and led to a significant reduction in the average market price paid for Platinol and its generic bioequivalents. Before generic entry, BMS's U.S. Platinol sales were about $100 million. In the year after generic entry, BMS's U.S. Platinol sales fell about 50% to $50 million.

125. Because of this competitive relationship between Platinol and its generic bioequivalent drug rivals, such products comprise a distinct relevant product market for antitrust purposes. Other therapeutic agents can be used to treat cancer, but the presence of these therapeutic agents is not sufficient to prevent the anticompetitive effects from BMS's conduct.

126. The relevant geographic market in which to assess the anticompetitive effects of BMS's conduct regarding Platinol is the United States. The FDA's elaborate regulatory process for approving drugs for sale in the United States, and the fact that the marketing, sales, and distribution of pharmaceuticals occur on a nationwide basis, establish the boundaries of the geographic market.

127. At all times relevant to this complaint, BMS had 100% of the sales in the United States market for Platinol and its generic bioequivalents.

128. At all times relevant to this complaint, FDA processes, as well as BMS's exclusionary acts, restricted entry into the relevant market and protected BMS's monopoly.

IX. The Anticompetitive Effect of BMS's Conduct

129. As a result of BMS's conduct as alleged herein, consumers were deprived, for a substantial period of time, of the benefits of lower-priced competition.

130. The purpose and effect of BMS's actions was to block generic drug products from entering the relevant markets for BuSpar, Taxol, and Platinol. Had generic competition occurred sooner, consumers would have been free to substitute – and, to a significant extent, would have substituted – a lower-priced, therapeutically equivalent, generic drug for the higher-priced BMS brand-name drug.

131. BMS's anticompetitive actions are not justified by any countervailing efficiencies or legitimate business reasons.

X. BMS's Conduct is Not Immune Under the *Noerr-Pennington* Doctrine

132. BMS is not shielded from antitrust liability pursuant to the *Noerr-Pennington* doctrine for numerous reasons as a matter of law and as a matter of fact including, but not limited to, the following: (i) Many of BMS's acts do not constitute "petitioning" behavior, including its entry into unlawful, anticompetitive agreements with Schein and ABI, and its wrongful submission for the Orange Book listing of the '365, '537, '803, '331 and '925 patents; (ii) BMS initiated and maintained objectively baseless "sham" litigation against its generic competitors; and (iii) BMS made misrepresentations or materially false and misleading statements to the PTO and FDA. In addition, the course of conduct alleged herein constitutes a pattern of abusive filings made without regard to the merits that used administrative and judicial processes (as opposed to the outcome of those processes) as an anticompetitive weapon. This pattern of abusive filings with respect to its buspirone, cisplatin, and paclitaxel-based drugs falls outside any petitioning privilege under the *Noerr-Pennington* doctrine.

XI. Violations Alleged

COUNT 1 - Agreement in Restraint of Trade on BuSpar

133. The Commission realleges paragraphs 1 to 33; 64 to 69; and 129 to 132.

134. The agreement between BMS and Schein, under which BMS paid Schein not to compete with any generic buspirone product until expiration of the '763 patent, unreasonably restrained competition and is, therefore, an

unfair method of competition in violation of Section 5 of the FTC Act, 15 U.S. C. § 45.

COUNT 2 - Monopolization of BuSpar

135. The Commission realleges paragraphs 1 to 69 and 129 to 132.

136. At all times relevant to this complaint, BMS had monopoly power in the market for buspirone products in the United States.

137. BMS willfully maintained its BuSpar monopoly by: (a) entering into an unlawful, anticompetitive agreement with Schein, pursuant to which it paid Schein millions of dollars to stay off the market with its generic buspirone product; (b) providing false and misleading information to the FDA in order to cause the FDA to list the '365 patent in the Orange Book and withhold approval for generic buspirone products; (c) wrongfully submitting the '365 patent for Orange Book listing without a reasonable good faith belief that the '365 patent met the statutory listing requirements; and (d) initiating and maintaining objectively baseless lawsuits against generic buspirone competitors, without regard to the merits of said lawsuits. By these acts, among others, BMS excluded competition and willfully maintained its BuSpar monopoly based not on the strength and scope of its patents, but rather by abusing competitive and government processes, including by strategically gaming the Hatch-Waxman 30-month provision to block FDA approval for any generic version of BuSpar.

138. BMS's monopolization raised substantial barriers to entry into the relevant market and gave BMS the power to exclude competition, thereby depriving consumers of the benefits of lower-priced generic competition.

139. BMS's acts and practices described above are anticompetitive in nature and tendency, and constitute an unfair method of competition in violation of Section 5 of the FTC Act, 15 U.S.C. § 45.

COUNT 3 - Monopolization of Taxol

140. The Commission realleges paragraphs 1 to 23; 70 to 109; and 129 to 132.

141. At all times relevant to this complaint, BMS had monopoly power in the market for paclitaxel-based drugs in the United States.

142. BMS willfully maintained its Taxol monopoly by: (a) securing the '537 and '803 patents through inequitable conduct at the PTO and wrongfully submitting them for Orange Book listing without a reasonable good faith belief that the patents were, in fact, enforceable and thus met the statutory listing requirements; and (b) conspiring with ABI to cause the FDA to list the '331 patent in the Orange Book without a reasonable good faith belief that the relevant claims of the patent were valid and thus met the statutory listing requirements. By these acts, among others, BMS excluded competition and willfully maintained its Taxol monopoly based not on the strength and scope of its patents, but rather by abusing competitive and government processes, including by strategically gaming the Hatch-Waxman 30-month provision to block FDA approval for any generic version of Taxol.

143. BMS's monopolization raised substantial barriers to entry into the relevant market and gave BMS the power to exclude competition, thereby depriving consumers of the benefits of lower-priced generic competition.

144. BMS's acts and practices described above are anticompetitive in nature and tendency, and constitute an

unfair method of competition in violation of Section 5 of the FTC Act, 15 U.S.C. § 45.

COUNT 4 – Agreement in Restraint of Trade on Taxol

145. The Commission realleges paragraphs 1 to 23; 94 to 109; and 129 to 132.

146. The agreement between BMS and ABI, under which BMS agreed to list the '331 patent without a reasonable good faith belief that said patent was valid and listable, unreasonably restrained competition, and is therefore an unfair method of competition in violation of Section 5 of the FTC Act, 15 U.S. C. § 45.

COUNT 5 - Monopolization of Platinol

147. The Commission realleges paragraphs 1 to132.

148. At all times relevant to this complaint, BMS had monopoly power in the market for Platinol in the United States.

149. BMS acted willfully maintain its Platinol monopoly. It did so by wrongfully submitting the invalid '925 patent for Orange Book listing without a reasonable good faith belief that the '925 patent – which issued from a 26-year old application, and just two months prior to expiration of the existing Platinol patent protection – was in fact valid. By this act, among others, BMS excluded competition and willfully maintained its Platinol monopoly based not on the strength and scope of its patent, but rather by abusing government processes, including by strategically gaming the Hatch-Waxman 30-month provision to block FDA approval for any generic version of Platinol.

150. BMS's monopolization raised substantial barriers to entry into the relevant market and gave BMS the power to exclude competition, thereby depriving consumers of the benefits of lower-priced generic competition.

151. BMS's acts and practices described above are anticompetitive in nature and tendency, and constitute an unfair method of competition in violation of Section 5 of the FTC Act, 15 U.S.C. § 45.

WHEREFORE, THE PREMISES CONSIDERED, the Federal Trade Commission on this fourteenth day of April, 2003, issues its Complaint.

DECISION AND ORDER

The Federal Trade Commission ("Commission") having initiated an investigation of certain acts and practices by Respondent Bristol-Myers Squibb Company ("Respondent BMS" or "Respondent"), and Respondent having been furnished thereafter with a copy of a draft of Complaint that the Bureau of Competition proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge Respondent with violations of Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45; and

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

The Commission, having thereafter considered the matter and having determined that it had reason to believe that Respondent has violated the said Act, and that a Complaint should issue stating its charges in that respect, and having accepted the executed Consent Agreement and placed such Consent Agreement on the public record for a period of thirty (30) days for the receipt and consideration of public comments, now in further conformity with the procedure prescribed 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 ("Order"):

1. Respondent BMS 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 345 Park Avenue, New York, N.Y. 10154.

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

A. "Respondent BMS" means Bristol-Myers Squibb Company, its directors, officers, employees, agents and representatives, predecessors, successors, and assigns; and the subsidiaries, divisions, groups, and affiliates controlled by Bristol-Myers Squibb Company, and the respective directors, officers, employees, agents and representatives, successors, and assigns of each.

B. "Commission" means the Federal Trade Commission.

C. "180-day Exclusivity Period" means the period of time established by 21 U.S.C. § 355(j)(5)(B)(iv) of the Federal Food, Drug, and Cosmetic Act (21 U.S.C. § 355 *et seq*.).

D. "6-Hydroxy-Metabolite of Buspirone" means 6-hydroxy-8-[4-[4-(2- pyrimidinyl)-piperazinyl]-butyl]-8-azaspiro[4.5]-7,9-dione.

E. "30-Month Stay" means the period of time, established by 21 U.S.C. § 355(j)(5)(B)(iii), during which the FDA may not grant final approval to an ANDA.

F. "AB-rated Generic Version" means an ANDA found by the FDA to be bioequivalent to the Referenced Drug Product, as defined under 21 U.S.C. § 355(j)(8)(B).

G. "Agreement" means anything that would constitute an agreement under Section 1 of the Sherman Act, 15 U.S.C. § 1, or Section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45.

H. "ANDA" means an Abbreviated New Drug Application, as defined under 21 U.S.C. § 355(j).

I. "ANDA Filer" means a person who has filed or submitted an ANDA with the FDA.

J. "ANDA First Filer" means the person whom the FDA determines is and remains entitled to, or eligible for, a 180-day Exclusivity Period that has not expired.

K. "ANDA Product" means the product to be manufactured under the ANDA that is the subject of the Patent Infringement Claim.

L. "Applicable Law" means the statutes and regulations governing Orange Book listings, including, but not limited to, 21 U.S.C. § 355(b)(1) and (c)(2) and 21 C.F.R. § 314.53(b) and (c).

M. "Drug Product" means a finished dosage form (e.g., tablet, capsule, or solution), as defined in 21 C.F.R. § 314.3(b), that contains a drug substance, generally, but not necessarily, in association with one or more other ingredients.

N. "Encourage" means suggest, advise, pressure, induce, attempt to induce, prompt, or otherwise influence.

O. "Exclusive License" means a license of intellectual property that (a) restricts the right of the licensor to license the intellectual property to other persons, (b) reduces the incentives of the licensor to license the intellectual property to other persons, or (c) grants to the licensee the right to enforce the intellectual property rights against other persons.

P. Expiration Date" means 180 days after the date that the ANDA First Filer commences commercial marketing of (1) the ANDA Product, (2) the Reference Drug Product, or (3) any other AB-Rated Generic Version of the Reference Drug Product.

Q. "FDA" means the United States Food and Drug Administration.

R. "Listing Information" means any statement or information of any type provided to the FDA in furtherance of the listing or continued listing of any patent in the Orange Book, however communicated or recorded and regardless of the subject matter, including, but not limited to, any factual or legal subject matter.

S. "Material Patent Information" means any statement or information of any type, however communicated or recorded, regardless of the subject matter, that is material to patentability, as defined in 37 C.F.R. § 1.56(b).

T. "NDA" means a New Drug Application, as defined under 21 U.S.C. § 355(b), including all changes or supplements thereto which do not result in the submission of a new NDA.

U. "NDA Holder" means: (1) the person that received FDA approval to market a Drug Product pursuant to an NDA, (2) a person owning or controlling the ability to enforce

the patent(s) listed in the Orange Book in connection with the NDA, or (3) the predecessors, subsidiaries, divisions, groups and affiliates controlled by, controlling, or under common control with any of the entities described in subparagraphs (1) and (2) above (such control to be presumed by direct or indirect share ownership of 50% or greater), as well as the licensees, licensors, successors, and assigns of each of the foregoing.

V. "Orange Book" means the FDA publication entitled "Approved Drug Products with Therapeutic Equivalence Evaluations."

W. "Patent Infringement" means infringement of any patent or of any filed patent application, extension, reissue, renewal, division, continuation, continuation in part, reexamination, patent term restoration, or patents of addition and extensions thereof.

X. "Patent Infringement Claim" means any allegation, whether threatened or included in a complaint filed with a court of law, that an ANDA Filer's ANDA or ANDA Product may infringe any U.S. patent held by, or exclusively licensed to, the NDA Holder of the Reference Drug Product.

Y. "Person" means both natural persons and artificial persons, including, but not limited to, corporations, unincorporated entities, and governments.

Z. "PTO" means the United States Patent and Trademark Office.

AA. "Reference Drug Product" means the Drug Product identified by the ANDA Filer as the Drug Product upon which the ANDA Filer bases its ANDA.

BB. "Relinquish" includes, but is not limited to, abandoning, waiving, or relinquishing.

CC. "Sale of Drug Products" means the sale of Drug Products in or affecting commerce, as commerce is defined in Section 4 of the Federal Trade Commission Act, 15 U.S.C. § 44.

DD. "Taxol" means any paclitaxel drug product as BMS sold it as of October 1, 2002, including, but not limited to, active ingredient and formulation.

EE. "Taxol Patent" means one or more of (i) U.S. Patent No. 5,670,537, (ii) U.S. Patent No. 5,641,803, or (iii) any other U.S. patent claiming Taxol as a composition of matter, or any method of using Taxol.

FF. "Use Patent" means a patent claiming an indication, dosage regimen, method of administration, or other condition of use.

II.

IT IS FURTHER ORDERED that Respondent BMS shall not seek, maintain, certify to, or take any other action in furtherance of, the listing or continued listing in the Orange Book of U.S. Patent No. 6,150,365 in connection with any NDA where the active ingredient is buspirone.

III.

IT IS FURTHER ORDERED that Respondent BMS shall not:

A. Make a Patent Infringement Claim that a Taxol Patent is infringed by any Drug Product or the use of any Drug Product where the subject of the Patent Infringement

Claim is the making, using, selling, offering to sell, or importing of Taxol; or

B. Receive royalties or other fees from another person pursuant to a license of a Taxol Patent to make, use, sell, offer to sell, or import Taxol.

PROVIDED, HOWEVER, nothing in this paragraph shall preclude BMS from engaging in the conduct described in this Paragraph in connection with a Taxol Patent claiming a method of using Taxol in combination with another oncological active ingredient or a composition of matter patent claiming Taxol in combination with another oncological active ingredient.

IV.

IT IS FURTHER ORDERED that Respondent BMS shall not take any action, or Encourage any other person to take any action, that initiates, maintains, or causes to be initiated or maintained, a 30-Month Stay of FDA approval of any ANDA referencing:

A. NDA No. 018731 (BuSpar); or

B. NDA No. 020262 (Taxol).

V.

IT IS FURTHER ORDERED that Respondent BMS shall not make a Patent Infringement Claim that U.S. Patent No. 6,150,365 is infringed by any Drug Product, or the use of any Drug Product, that contains the active ingredient buspirone, unless the Drug Product also contains the 6-Hydroxy-Metabolite of Buspirone and the Patent Infringement Claim is based on the 6-Hydroxy-Metabolite of Buspirone.

VI.

IT IS FURTHER ORDERED that Respondent BMS shall not seek, maintain, certify to, or take any other action in furtherance of, the listing or continued listing of any patent in the Orange Book where the listing of such patent in the Orange Book violates Applicable Law.

VII.

IT IS FURTHER ORDERED that Respondent BMS shall not, in connection with any patent listed in the Orange Book under any NDA for which Respondent BMS is the NDA Holder, take any action, or Encourage any other person to take any action, that initiates, maintains, or causes to be initiated or maintained, a 30-Month Stay of FDA approval of any ANDA referencing such NDA where:

A. The patent is listed in the Orange Book under such NDA after the filing of any ANDA referencing such NDA;

B. Respondent BMS, in obtaining the patent before the PTO, engaged in inequitable conduct as that term is judicially construed in the context of patent litigation;

C. Respondent BMS provided Listing Information that is false or misleading;

D. Respondent BMS provided Listing Information to the FDA and Material Patent Information to the PTO, where Respondent BMS cannot show that, at the time the statements were made, it had a reasonable belief that the Material Patent Information and the Listing Information were both accurate. A violation of this subparagraph VII.D can be established without the Commission proving whether it is the Listing Information or the Material Patent Information that is inaccurate;

E. The patent is a Use Patent, and at the time of its Orange Book listing, such patent did not claim an approved use of the Drug Product specified in the NDA referenced by such ANDA; or

F. The patent claims (1) a composition of matter that is a metabolite of an active ingredient listed in the NDA referenced by such ANDA, and/or (2) a method of use of such a metabolite.

PROVIDED, HOWEVER, it shall not be a violation of either Paragraph VII.E or VII.F if the following three conditions are met:

(1) the patent listed in the Orange Book contains a claim or portion of a claim distinct from those identified in paragraph VII.E and VII.F ("Additional Claim");

(2) an Orange Book listing based on the Additional Claim does not violate Applicable Law; and

(3) so long as BMS maintains a Patent Infringement Claim that the ANDA Filer infringes the Additional Claim.

VIII.

IT IS FURTHER ORDERED that Respondent BMS shall not make any statements to the FDA that are (1) false and misleading; and (2) material to either the approvability of an ANDA referencing an NDA for which BMS is the NDA Holder, or the sale of any product pursuant to such ANDA.

PROVIDED, HOWEVER, it shall not be a violation of Paragraph VIII if, at the time the statement was made, Respondent BMS had a reasonable belief that the statement was neither false nor misleading.

IX.

IT IS FURTHER ORDERED that Respondent BMS shall not, in connection with a Patent Infringement Claim:

A. Assert any fraudulent or objectively baseless claim, or otherwise engage in sham litigation for the purpose of injuring an ANDA Filer rather than to obtain a favorable outcome to the Patent Infringement Claim.

B. Enforce or seek to enforce any patent that it knows is invalid, unenforceable, or not infringed.

X.

IT IS FURTHER ORDERED that Respondent BMS shall not, without providing prior written notification to the Commission in the manner described in Paragraph XVI ("Notification"), acquire from another person a patent or an Exclusive License to a patent if Respondent BMS seeks or secures the patent's listing in the Orange Book for an NDA which has received FDA approval. For purposes of this Paragraph X only, the term acquire shall exclude the assignment or license of patents to Respondent BMS pursuant to an agreement existing at the time the NDA received FDA approval.

XI.

IT IS FURTHER ORDERED that Respondent BMS shall not, with respect to any patent for which BMS acquires a non-exclusive license from another person (the "Acquisition"), assist in, advise regarding, or act so as to affect in any manner the licensor's or any other person's (1) enforcement of the patent with respect to an ANDA, (2) licensing of the patent to an ANDA Filer with respect to an ANDA, or (3) determination of royalties or other fees paid for the patent by an ANDA Filer with respect to an ANDA.

PROVIDED, HOWEVER, nothing in this paragraph shall prohibit Respondent BMS from engaging in the conduct described in this Paragraph with respect to any ANDA filed with the FDA after the Acquisition, unless such ANDA references the same NDA as an ANDA filed with the FDA before the Acquisition.

XII.

IT IS FURTHER ORDERED that Respondent BMS shall cease and desist, directly or indirectly, in connection with the Sale of Drug Products, from being a party to any Agreement resolving or settling a Patent Infringement Claim in which:

A. An ANDA Filer receives anything of value; and

B. The ANDA Filer agrees not to research, develop, manufacture, market, or sell, the ANDA Product for any period of time.

PROVIDED, HOWEVER, that nothing in this Paragraph XII shall prohibit:

(1) A resolution or settlement of a Patent Infringement Claim in which:

(a) Respondent BMS is the NDA Holder;

(b) The value received by the ANDA Filer, in the resolution or settlement of the Patent Infringement Claim, is no more than (1) the right to market the ANDA Product prior to the expiration of the patent that is the basis for the Patent Infringement Claim, and (2) the lesser of the NDA Holder's expected future litigation costs to resolve the Patent Infringement Claim or $2 million; and

(c) Respondent BMS has notified the Commission, as described in Paragraph XVI.

(2) Respondent BMS from resolving or settling a Patent Infringement Claim after the Commission, in response to a request by Respondent BMS for an advisory opinion pursuant to Section 1.2 of the Commission Rules of Practice, 16 C.F.R. § 1.2, determines that the settlement Agreement would not raise issues under Section 5 of the Federal Trade Commission Act.

(3) Respondent BMS, without notice to the Commission, from seeking relief unilaterally from a court, including but not limited to, applying for permanent injunctive relief, or seeking to extend or reduce a 30-month stay pursuant to 21 U.S.C. § 355(j)(5)(B)(iii).

XIII.

IT IS FURTHER ORDERED that, when Respondent BMS makes a Patent Infringement Claim in which Respondent BMS is the NDA Holder, Respondent BMS shall cease and desist, in connection with the Sale of Drug Products, from being a party to any Agreement in which the ANDA Filer agrees to refrain from researching, developing, manufacturing, marketing, or selling any Drug Product that:

A. Could be approved for sale by the FDA pursuant to an ANDA; and

B. Is neither the subject of any written claim or allegation of Patent Infringement nor the subject of a written representation from the ANDA Filer's counsel that the Drug Product would be the subject of such a claim or allegation if disclosed to the NDA Holder.

XIV.

IT IS FURTHER ORDERED that Respondent BMS shall cease and desist, directly or indirectly, in connection with the Sale of Drug Products with respect to which Respondent BMS is an NDA Holder for the Reference Drug Product(s), from being a party to any Agreement in which:

A. One party is an NDA Holder and the other party is the ANDA First Filer for the Reference Drug Product; and

B. The ANDA First Filer is prohibited by such Agreement from Relinquishing, or is subject to a penalty, forfeiture, or loss of benefit, if it Relinquishes its right to the 180-day Exclusivity Period.

PROVIDED, HOWEVER, that nothing in this Paragraph shall prohibit any Agreement if and only if the following three conditions are all met:

(1) Within twenty (20) days of entering into the Agreement, the ANDA First Filer commences commercial marketing of the ANDA Product, the Reference Drug Product, or any other AB-rated Generic Version of the Reference Drug Product;

(2) One of the following two conditions has been satisfied:

(a) the 180-day Exclusivity Period, if any, has been triggered by the commercial marketing required by proviso subparagraph (1) above, and has begun to run with respect to the ANDA Product; or

(b) within ten (10) days of the commercial marketing of a Drug Product other than the one subject to the ANDA, the ANDA First Filer has notified the FDA, in

writing, that it will Relinquish any and all eligibility for, and entitlement to, a 180-day Exclusivity Period, if any, for the ANDA Product, beyond the Expiration Date; and

(3) Respondent BMS has notified the Commission, as described in Paragraph XVI.

XV.

IT IS FURTHER ORDERED that, in any instance where Respondent BMS is a party to a Patent Infringement Claim in which it is the NDA Holder, Respondent BMS shall cease and desist, directly or indirectly, in connection with the Sale of Drug Products, from being a party to any Agreement in which:

A. The parties do not agree to dismiss the litigation;

B. The NDA Holder provides anything of value to the alleged infringer; and

C. The ANDA Filer agrees to refrain during part or all of the course of the litigation from selling the ANDA Product, or any Drug Product containing the same active chemical ingredient as the ANDA Product.

PROVIDED, HOWEVER, such an Agreement is not prohibited by this Order when entered into in conjunction with a joint stipulation between the parties that the court may enter a preliminary injunction pursuant to Rule 65 of the Federal Rules of Civil Procedure, Fed. R. Civ. P. 65, if:

(1) Together with the stipulation for a preliminary injunction, Respondent BMS provides the court the proposed Agreement, as well as a copy of the Commission's complaint and order in this matter;

(2) Respondent BMS has notified the Commission, as described in Paragraph XVI, at least thirty (30) days prior to submitting the stipulation for a preliminary injunction;

(3) Respondent BMS does not oppose any effort by the Commission to participate, in any capacity permitted by the court, in the court's consideration of any such action for preliminary relief; and

(4) One of the following two conditions apply:

(a) the court issues an order and the parties' agreement conforms to said order; or

(b) the Commission, in response to a request by Respondent BMS for an advisory opinion, pursuant to Section 1.2 of the Commission Rules of Practice, 16 C.F.R. § 1.2, determines that entering into the stipulation would not raise issues under Section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45.

PROVIDED, HOWEVER, nothing in this Paragraph XV shall be interpreted to prohibit or restrict the right of Respondent BMS unilaterally to seek relief from the court (including but not limited to, applying for preliminary injunctive relief or seeking to extend, or reduce, the 30-Month Stay).

XVI.

IT IS FURTHER ORDERED that:

A. Respondent BMS shall notify the Commission as required by Paragraphs X, XII, XIV, and XV in the form of a letter ("Notification Letter") submitted to the Secretary of the Commission, which shall contain the following information:

(1) The docket number and caption name of this Order;

(2) A statement that the purpose of the Notification Letter is to give the Commission prior notification of a proposed Agreement as required by this Order;

(3) Identification of the parties involved in the proposed Agreement;

(4) Identification of all Drug Products involved in the proposed Agreement;

(5) Identification of all persons, to the extent known, who have filed an ANDA with the FDA (including the status of such application) for any Drug Product containing the same chemical entity(ies) as the Drug Product(s) involved in the proposed Agreement;

(6) A copy of the proposed Agreement;

(7) Identification of the court, and a copy of the docket sheet, for any legal action which involves either party to the proposed Agreement and relates to any Drug Product(s) containing the same chemical entity(ies) involved in the Agreement; and

(8) All documents which were prepared by or for any officer(s) or director(s) of Respondent BMS for the purpose of evaluating or analyzing the proposed Agreement, *provided that* documents subject to a valid claim of privilege or work product need not be produced pursuant to this provision, but shall be identified in a log.

B. Respondent BMS shall submit the Notification Letter to the Secretary of the Commission at least thirty (30) days prior to consummating the proposed Agreement ("First

Waiting Period"). If Respondent BMS so requests, the Commission shall keep the Notification Letter and accompanying information and documents confidential to the extent provided by law.

C. If the Notification Letter is provided pursuant to:

(1) Paragraph XII, representatives of the Commission may make a written request for additional information or documentary material (as if the request were within the meaning of 16 C.F.R. § 803.20) prior to expiration of the First Waiting Period. If such a request for additional information is made, Respondent BMS shall not execute the proposed Agreement until expiration of thirty (30) days following complete submission of such additional information or documentary material ("Second Waiting Period"). Receipt by the Commission from Respondent BMS of any notification, pursuant to this Paragraph XVI, is not to be construed as a determination by the Commission that any action described in such notification does or does not violate this Order or any law enforced by the Commission.

(2) Paragraphs X, XIV or XV, Respondent BMS may execute the proposed Agreement upon expiration of the First Waiting Period.

D. Early termination of the Waiting Periods in this Paragraph XVI may be requested from the Director of the Commission's Bureau of Competition.

XVII.

IT IS FURTHER ORDERED that Respondent BMS shall file a verified written report within sixty (60) days after the date this Order becomes final, annually thereafter for five (5) years on the

anniversary of the date this Order becomes final, and at such other times as the Commission may by written notice require, setting forth in detail the manner and form in which Respondent BMS intends to comply, is complying, and has complied with this Order. Respondent BMS shall include in its compliance reports, among other things that are required from time to time, a full description of the efforts being made to comply with this Order. As to Paragraph VII of this Order, this description shall identify all ANDAs subjected to a 30-Month Stay of FDA approval, and as to each of these 30-Month Stays, a description of BMS's efforts to comply with Paragraph VII of this Order.

XVIII.

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

XIX.

IT IS FURTHER ORDERED that, for the purpose of determining or securing compliance with this Order and subject to any legally recognized privilege or immunity, and upon written request with reasonable notice to Respondent BMS, Respondent BMS shall permit any duly authorized representative of the Commission:

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

B. To interview officers, directors, employees, agents, and other representatives of Respondent BMS, who may have counsel present, regarding such compliance issues.

XX.

IT IS FURTHER ORDERED that this Order shall terminate on April 14, 2013.

By the Commission.

Analysis to Aid Public Comment

The Federal Trade Commission has accepted for public comment an agreement and proposed consent order with Bristol-Myers Squibb Corporation (BMS). The proposed consent order would settle charges that BMS engaged in a series of unlawful acts to delay competition from generic versions of three of its major drug products. The proposed consent order has been placed on the public record for 30 days to receive comments by interested persons. The proposed consent order has been entered into for settlement purposes only and does not constitute an admission by BMS that it violated the law or that the facts alleged in the complaint, other than the jurisdictional facts, are true.

The complaint charges that BMS engaged in a series of anticompetitive acts over the past decade to obstruct the entry of low-cost generic competition to three highly profitable BMS prescription drug products: BuSpar, an anti-anxiety agent; and two anti-cancer drugs, Taxol and Platinol. According to the complaint, when confronted with imminent competition to these drugs through generic entry, BMS undertook a course of conduct that includes: paying a would-be competitor $72.5 million to abandon its challenge to a BMS patent and stay off the market until the patent expired; abusing Food and Drug Administration (FDA) regulations to block generic entry; making false statements to the FDA in connection with listing patents in the Orange Book; engaging in inequitable conduct before the U.S. Patent and Trademark Office (PTO) to obtain patents; and filing baseless patent infringement suits. As a result, the complaint alleges, consumers were forced to incur hundreds of millions of dollars in additional costs to obtain vital prescription drug products.

The proposed order is designed to remedy the pattern of unlawful conduct charged in the complaint and prevent recurrence of such conduct, while maintaining BMS's ability to engage in legitimate activities that may promote innovation and benefit consumers.

Background

The proposed consent order rests in substantial part on charges that BMS abused governmental processes to delay generic competition to three of its highly successful prescription drug products and, in particular, that it misused the regulatory scheme established by Congress to expedite the approval of generic drugs.

A generic drug is a pharmaceutical product that contains the same active ingredients as its brand-name counterpart and is "bioequivalent" to the branded drug, that is, the FDA has determined there is no significant difference in the rate and extent of absorption of the two products. Generic drugs typically are sold at substantial discounts from the branded drug's price. A Congressional Budget Office report estimates that purchasers saved $8-10 billion on prescriptions at retail pharmacies in 1994 by purchasing generic drugs instead of the brand-name product.[1]

Congress enacted the Drug Price Competition and Patent Term Restoration Act of 1984, commonly referred to as the "Hatch-Waxman Act," to facilitate the entry of lower-priced generic drugs, while maintaining incentives for companies to invest in research and development of new drugs. A company seeking approval from the FDA to market a new drug must file a New Drug Application (NDA) demonstrating the safety and efficacy of its product. To receive FDA approval to market a generic version of a branded drug, a company files an Abbreviated New Drug Application (ANDA) demonstrating that its product is bio-equivalent to its branded counterpart, but need not provide independent data on safety and efficacy.

The Hatch-Waxman Act established certain rights and procedures that apply when a company seeks approval from the

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[1] Congressional Budget Office, *How Increased Competition from Generic Drugs Has Affected Prices and Returns in the Pharmaceutical Industry* xiii, 13 (July 1998).

FDA to market a generic product prior to the expiration of a patent or patents relating to the branded drug upon which the generic is based. An NDA applicant is required to submit to the FDA information on certain types of patents relating to the approved drug. The FDA lists the approved drug and its related patents in a publication entitled "Approved Drug Products with Therapeutic Equivalence Evaluations," commonly known as the "Orange Book." If the PTO grants a patent relating to an approved drug after the NDA has been approved, and the NDA holder submits it for listing in the Orange Book, then the FDA will list it as well.

The listing of patents in the Orange Book plays a substantial role in the timing of FDA approval of generic drugs. As part of the ANDA process, the ANDA filer must certify to the FDA regarding its generic product and any patents listed in the Orange Book that claim the reference branded drug. If the ANDA filer seeks approval before the expiration of all listed patents, it must: (1) file what is known as a "Paragraph IV certification," declaring that the patents listed in the Orange Book either are invalid or will not be infringed by the manufacture, use, or sale of the drug products for which the ANDA is submitted; and (2) notify the patent holder of the filing of the certification. If the holder of patent rights files a patent infringement suit within 45 days of the notification, FDA approval to market the generic drug is automatically stayed for 30 months, regardless of the merits of the suit, unless before that time the patent expires or a court holds that the patent is invalid or not infringed.

Not all patents are eligible for listing in the Orange Book and the special statutory 30-month stay that the Hatch-Waxman Act provides. The statute provides for listing only if: (1) the patent "claims the drug . . . or a method of using such drug" and (2) the patent is one "with respect to which a claim of patent infringement could reasonably be asserted if a person not licensed by the owner of the patent engaged in the manufacture,

use, or sale of the drug."[2] In the case of patents not eligible for listing in the Orange Book, a branded firm still can sue a generic company for patent infringement, but under ordinary federal litigation procedures and without the benefit of an automatic 30-month stay. To prevent sale of the generic product before conclusion of the suit in such cases, a branded firm must obtain a preliminary injunction, which requires that it demonstrate a likelihood of success on the merits, among other factors.

Although Orange Book listings have significant legal and competitive implications, it is private parties, rather than the FDA, that in practice determine whether patents are listed. The FDA has repeatedly stated that its role in patent listings is solely ministerial and that it lacks the resources and expertise to scrutinize patent information in the Orange Book. Even when a generic applicant disputes a patent listing, the FDA merely asks the NDA holder to confirm that the listed patent information is correct. Unless the NDA holder itself withdraws or amends its listed patent information, the FDA will not remove the patent listings from the Orange Book.[3] Thus, as one court has stated, "the FDA's listing should not create any presumption that [a] patent was correctly listed."[4] In addition, the Federal Circuit has held that generic applicants have no right to bring a declaratory judgment action to challenge an NDA holder's Orange Book

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[2] 21 U.S.C. §§ 355(b)(1); 355(c)(2); 355(j)(7)(A)(iii) (2003).

[3] *See, e.g., American Bioscience, Inc. v. Thompson*, 269 F.3d 1077, 1080 (D.C. Cir. 2001) (recognizing that the FDA "has refused to become involved in patent listing disputes, accepting at face value the accuracy of NDA holders' patent declarations and following their listing instructions").

[4] *Ben Venue Labs., Inc. v. Novartis Pharm. Corp.*, 10 F. Supp. 2d 446, 456 (D.N.J. 1998).

listing as improper.[5] As long as the patent remains listed, the brand-name company can continue to benefit from the availability of an automatic 30-month stay of FDA approval of ANDAs, by initiating a patent suit against generic applicants.

The Commission's recent study, *Generic Drug Entry Prior to Patent Expiration* (July 2002), examined the potential for abuse of the Hatch-Waxman process for Orange Book listings and 30-month stays.[6] The data received by the Commission showed that brand-name companies are increasingly listing in the Orange Book, and suing on, multiple patents, and that these are frequently patents that have been listed after an ANDA has been filed. If patents issued to the brand-name company are listed before the generic applicant files its ANDA, then a brand-name company's suit on those patents will generate a single 30-month stay, even though multiple patents are at issue in the litigation. If the patent is obtained and listed after the generic applicant has filed its ANDA, however, then the brand-name company can obtain an additional 30-month stay (which may be consecutive to or overlap the first 30-month stay) following a generic applicant's certification that it does not infringe the later-issued patent. The FTC Study found that for drugs for which there were multiple 30-month stays, the additional delay of FDA approval (beyond the first 30 months) ranged from four to 40 months. The FTC Study also found that later-issued patents frequently raise listability or validity concerns. Of the eight drug products involving later-issued patents identified in the study, all four that had been adjudicated were found invalid or not infringed. Of the eight drug products involving later-issued patents identified in the study,

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[5] *See Mylan Pharms., Inc. v. Thompson*, 268 F.3d 1323, 1329-33 (Fed. Cir. 2001).

[6] Federal Trade Commission, *Generic Drug Entry Prior to Patent Expiration: An FTC Study* (July 2002), *available at* http://www.ftc.gov/os/2002/07/genericdrugstudy.pdf.

three involve the BMS products that are the subject of the complaint here.[7]

The Challenged Conduct

The complaint makes the following allegations:

A. BuSpar

BuSpar is used to treat persistent anxiety, a condition affecting an estimated 10 million Americans. BMS began selling BuSpar in 1986, and by 2000, the year before a generic version became available, BuSpar sales in the United States were over $600 million.

The complaint charges that BMS first entered into an unlawful patent settlement agreement, in which it agreed to pay a potential generic competitor over $70 million to withhold its generic version of BuSpar from the market until BMS's patent expired, and then provided false and misleading information to the FDA to induce the FDA to list a later patent on BuSpar in the Orange Book, one that did not meet either of the statutory requirements for listing. Additionally, the complaint alleges that BMS filed baseless patent infringement suits against generic applicants on BuSpar.

The settlement agreement arose out of patent litigation that BMS filed after Schein Pharmaceutical, Inc. submitted an ANDA for generic buspirone hydrochloride (buspirone), the active ingredient in BuSpar. Schein filed a Paragraph IV certification with the FDA in 1992, contending that BMS's '763 patent was invalid, because it claimed a use of buspirone that had been anticipated by an earlier BMS patent. BMS's suit triggered a 30-month stay on FDA approval of Schein's ANDA, which would have expired in early 1995.

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[7] *Generic Drug Study* at 39-40, 48-50.

Analysis

In December 1994, BMS entered into an agreement with Schein to settle their patent litigation. Pursuant to that agreement, BMS agreed to pay Schein $72.5 million over the next four years, and Schein agreed to refrain from marketing its ANDA product or any other generic version of BuSpar (regardless of whether such product would infringe BMS's patent), until the '763 patent expired. Schein also agreed to acknowledge the validity of the '763 patent, to refrain from assisting others in challenging the '763 patent or in developing generic buspirone, and to take other steps to help BMS protect its patent from another challenge to its validity.

Anticipating expiration of its '763 patent in November 2000, BMS filed a new patent application with the PTO in 1999, involving the use of buspirone to create the metabolite of buspirone (a metabolite is the new molecule created when a pharmaceutical agent breaks down in the body). The PTO, however, repeatedly rejected BMS's efforts because BMS had been making and selling BuSpar to treat anxiety in the United States for nearly 14 years. Only after BMS finally requested a patent that claimed solely the use of the metabolite of buspirone – not the use of buspirone itself – and only hours before the '763 patent was due to expire, did the PTO issue what became known as the '365 patent. BMS promptly submitted the '365 patent information to the FDA for listing in the Orange Book.

BMS's '365 patent did not meet either of the statutory requirements for listing a patent in the Orange Book, because it does not claim BuSpar or a method of using BuSpar, and it is not a patent with respect to which a claim of patent infringement could reasonably be asserted against someone selling BuSpar. Although BMS knew that it had only obtained a patent claiming a method of using a metabolite, it nonetheless submitted a declaration to the FDA affirming that the '365 patent claimed a method of using BuSpar, in order to list the patent in the Orange Book. Furthermore, BMS intentionally made an additional false and misleading statement after ANDA filers on BuSpar asserted to the FDA that the '365 patent did not meet the criteria for listing in

the Orange Book. The FDA asked BMS to provide a declaration that the '365 patent contains a claim for an approved use of buspirone. BMS responded with a declaration expressly affirming that the '365 patent does in fact claim the approved uses of buspirone, a statement that was false and directly contradicted representations BMS made to the PTO to obtain the '365 patent. Consistent with its ministerial approach to Orange Book listings, the FDA simply accepted BMS's statements and deemed the '365 patent listed in the Orange Book as of November 21, 2000. In so doing, FDA noted that it listed the patent solely on the basis of BMS's declarations that the patent met the requirements for listing and did not make any independent determination regarding the '365 patent's scope and coverage.

The complaint charges that BMS knew that its representations to the FDA – to the effect that the '365 patent claimed a method of using buspirone – were false and misleading. BMS made these misrepresentations purposely and intentionally, to obtain an improper Orange Book listing of the '365 patent. Through its wrongful listing in the Orange Book of the '365 patent, BMS illegitimately acquired the ability to trigger a 30-month stay, thereby delaying entry of generic buspirone and depriving consumers of lower prices and other benefits of competition.

Generic competition to BuSpar occurred only after the '365 patent was removed from the Orange Book in March 2001, following the decision by the district court in *Mylan Pharmaceuticals, Inc. v. Thompson,* 139 F. Supp. 2d 1 (D.D.C. 2001), ordering BMS to seek de-listing.[8] This competition occurred substantially later than it would have absent BMS's anticompetitive acts. As a consequence, consumers suffered

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[8] The Federal Circuit later reversed this ruling on jurisdictional grounds. *Mylan Pharms., Inc. v. Thompson,* 268 F.3d 1323, 1329-33 (Fed. Cir. 2001) (holding no private right of action under the Federal Food, Drug, and Cosmetic Act to seek de-listing).

substantial economic detriment by paying monopoly prices for an unjustifiably extended period.

The complaint also charges that the patent infringement suits BMS brought against ANDA filers for infringement of the '365 patent were objectively baseless and filed without regard to their merits. The '365 patent could not be both valid and infringed. If the patent claim were interpreted to cover the currently-approved uses for which the generic applicants submitted their ANDAs – necessary to demonstrate that the ANDA products infringed – then the patent necessarily would be invalid, because those uses had been known long before BMS applied for the patent. A court later so found on summary judgment.[9] The intent and effect of BMS's suits, the complaint states, was to wrongfully trigger the 30-month stay as a means of preventing generic buspirone manufacturers from marketing their products.

B. Taxol

Taxol is used to treat cancers of the ovaries, breasts and lungs, and AIDS-related Kaposi's sarcoma. The drug's active ingredient, paclitaxel, is a naturally-occurring substance whose antic-cancer properties were discovered and developed by scientists at the National Cancer Institute (NCI). In 1991, the NCI gave BMS the exclusive right to use existing and future data for FDA approval of paclitaxel, and BMS obtained FDA approval to market Taxol in 1992. Prior to generic entry in 2000, BMS's annual Taxol sales in the United States were over $1 billion.

The complaint charges that BMS used many of the same strategies to obstruct generic competition to Taxol that it used with BuSpar: improperly listing patents in the Orange Book (three patents in the case of Taxol); and abusing the regulatory

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[9] *In re Buspirone Patent Litig.*, 185 F. Supp. 2d 340, 359 (S.D.N.Y. 2002); *In re Buspirone Antitrust Litig.*, 183 F. Supp.2d 363, 376 (S.D.N.Y. 2002)..

process through the filing of misrepresentations. In addition, the complaint alleges that BMS entered into an unlawful agreement with another firm for the purpose of furthering its effort to obtain another 30-month stay on FDA approval of generic versions of Taxol.

In 1992, although it told a Congressional committee that "near-term generic competition for TAXOL is a certainty," because Taxol was not a patented product, BMS in fact was actively pursuing a patent application before the PTO on Taxol. In prosecuting that patent application before the PTO, BMS made representations that were directly contrary to what it had previously told the FDA in seeking approval of its NDA for Taxol.

To obtain FDA approval of its NDA, BMS had relied on several studies in the public domain to show that Taxol was safe and effective. Because the NCI funded the discovery and initial development of paclitaxel as an anti-cancer drug, much of the research relating to Taxol was in the public domain, so the results of that research were unpatentable. To obtain a patent, BMS had to demonstrate to the PTO that its claimed method of administering Taxol differed from the methods used in those prior studies.

BMS told the PTO that certain studies (ones it had relied on to obtain FDA approval for Taxol) did not provide evidence of safety and efficacy, and thus made various statements about the studies that are directly contrary to those BMS made to the FDA. In addition, BMS also deliberately failed to disclose to the PTO material prior art. In making false and misleading material statements to the PTO and by failing to disclose material prior art, BMS breached its duty of candor and good faith in dealing with the PTO. BMS therefore engaged in inequitable conduct, rendering the two patents that resulted (the '537 and '803 patents) unenforceable.

Because BMS knew that the '537 and '803 patents were obtained through inequitable conduct before the PTO, it could not reasonably believe that the patents were enforceable or consequently that they were listable under the FDA's Orange Book regulations. Nevertheless, BMS promptly submitted the patents to the FDA for listing in the Orange Book. Furthermore, after a number of generic pharmaceutical manufacturers filed ANDAs with Paragraph IV certifications, BMS brought patent infringement suits – based on patents it knew it had obtained through inequitable conduct – that triggered Hatch-Waxman's automatic 30-month stay provision, insulating Taxol from potential generic drug competition for that period.

Finally, BMS improperly listed a third patent in the Orange Book and thereby obtained the ability to trigger the Hatch-Waxman provision for another 30-month stay as a result of a conspiracy with American Bioscience, Inc. (ABI). Shortly after the 30-month stays that BMS had obtained from its unlawful listings of the '537 and '803 patents expired, but before any ANDAs for generic paclitaxel obtained FDA approval, BMS and ABI agreed on the terms of an option to license ABI's '331 patent. The agreement provided that ABI would receive royalties based on a significant percentage of BMS sales of Taxol, an arrangement that would be highly profitable to ABI if BMS continued to enjoy protection from generic competition to Taxol.

BMS submitted the '331 patent to the FDA for listing in the Orange Book, but it could not have reasonably believed that the relevant claims of the '331 patent were valid, or consequently that the '331 patent should be listed in the Orange Book as claiming Taxol. BMS knew of material prior art that invalidated the relevant claims of the '331 patent. Moreover, BMS's own experience with the sale and use of Taxol prior to that date invalidated the relevant claims of the '331 patent.

C. Platinol

Platinol is used in chemotherapy to treat various forms of cancer. BMS began selling Platinol in 1978 and Platinol-AQ in 1988, and annual United States sales of its Platinol products were $100 million by 1998. Platinol's active pharmaceutical ingredient is cisplatin.

Regarding Platinol, the complaint alleges that, as with BuSpar and Taxol, BMS wrongfully submitted a patent for listing in the Orange Book to obtain an unwarranted 30-month stay on FDA approval of competing generic products. By 1996, BMS's patent protection for its Platinol products was running out, and four would-be generic rivals were poised to enter with their lower-cost, bioequivalent products. Facing likely generic competition to its Platinol monopoly for the first time, BMS, which held an exclusive license to cisplatin, and the licensor decided to amend a patent application then pending at the PTO – an application that had been initially filed more than two decades earlier, in 1970. In October 1996 – just two months before BMS's other Platinol patents were to expire – the PTO issued the '925 patent based on this amended application. BMS promptly submitted this new patent for listing in the Orange Book. This listing, coupled with BMS's initiation of a patent infringement lawsuit in federal court against each generic cisplatin applicant, triggered an automatic statutory 30-month stay on FDA approval of the generic applications.

According to the complaint, BMS could not have reasonably believed that the '925 patent was valid, and its listing of the patent in the Orange Book was not made in good faith to comply with FDA regulations. In fact, in October 1999, a district court ultimately found, by clear and convincing evidence, that the '925 patent was invalid for obviousness-type double patenting, a ruling that the Federal Circuit later upheld. As a result of BMS's wrongful listing of the '925 patent, consumers were deprived, for about two years, of the benefits of a lower-priced generic alternative to BMS's branded cisplatin products.

Competitive Analysis

The complaint alleges that the relevant product markets in which to assess the competitive effects of BMS's conduct are:

> buspirone-based products (BuSpar and generic bioequivalent versions of BuSpar);
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> paclitaxel-based products (Taxol and generic bioequivalent versions of Taxol); and
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> cisplatin-based products (Platinol and generic bioequivalent versions of Platinol).

In each market, according to the complaint, entry of a lower-priced generic version of BMS's product resulted in a significant, immediate decrease in the sales of the BMS product and led to a significant reduction in the average price for products in the relevant market. Conversely, the complaint states that the availability of other therapeutic agents for the conditions that BuSpar, Taxol, and Platinol treat was not sufficient to prevent the effects from BMS's conduct. As a result of this competitive relationship between each of the three BMS branded products and its generic bioequivalents, each of these groups of products comprises a distinct relevant product market for purposes of analyzing the challenged conduct here.

According to the complaint, the relevant geographic market in which to assess the competitive effects of BMS's conduct is the United States, given the FDA's elaborate regulatory process for approving drugs for sale in the United States, and the fact that the marketing, sales, and distribution of pharmaceuticals such as those at issue here occur on a nationwide basis.

The complaint alleges that, prior to the entry of generic versions of its BuSpar, Taxol, and Platinol products, BMS had monopoly power in each of the three relevant antitrust markets. BMS is charged with engaging in acts that willfully maintained its

monopolies in buspirone, paclitaxel, and cisplatin products, thereby violating Section 5 of the FTC Act. In addition, the complaint charges that BMS agreed with Schein to settle patent litigation by paying Schein not to compete until the patent expired, and agreed with ABI to wrongfully list ABI's '331 patent, and challenges those agreements as acts of monopolization and as unreasonable restraints of trade in violation of Section 5.

Exclusionary conduct by a monopolist that is reasonably capable of significantly contributing to the maintenance of the firm's dominance gives rise to substantial competitive concerns.[10] The conduct alleged in the complaint creates such concerns.

By listing patents in the Orange Book that did not meet the statutory requirements for such listings, BMS, according to the complaint, acquired the ability to trigger the Hatch-Waxman 30-month stay provision on FDA approval of competing generic products. An NDA with monopoly power has an incentive to make improper listings to protect its monopolies. In addition, NDA holders have the ability to make wrongful listings because the FDA does not police listings to ensure they meet regulatory requirements prior to publishing them in the Orange Book.[11] The Orange Book listing scheme established by Congress assumes and requires that NDA holders act in good faith in listing patents.

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[10] *Barry Wright Corp. v. ITT Grinnell Corp.*, 724 F.2d 227, 230 (1st Cir. 1983) (Breyer, J.) (citing 3 P. Areeda & D. Turner, *Antitrust Law*, ¶ 626 at 83 (1978)); *see also Aspen Skiing Co. v. Aspen Highlands Skiing Co.*, 472 U.S. 585, 596 n.20 (1985); *Lorain Journal Co. v. United States*, 342 U.S. 143, 154 n.7 (1951).

[11] As a recent court decision expressly recognized, "[t]he duty to ensure that the Orange Book only lists patents that actually claim approved drugs . . . lies with NDA holders." *Purepac Pharm. v. Thompson*, 2002 WL 31840631, at *5 (D.D.C. Dec 16, 2002).

Listings that are not based on a reasonable, good faith belief that the patent is listable thus cannot be justified on grounds that the NDA holder was merely complying with Hatch-Waxman listing regulations.[12] The complaint alleges for each of the challenged listings that BMS lacked a reasonable belief that the patents were listable, and that it listed the patents to block generic competition, not in good faith compliance with FDA regulations.

Indeed, the complaint charges that BMS misled the FDA about the scope, validity, and enforceability of its patents. In listing the '365 patent on BuSpar, the complaint alleges, BMS intentionally made false and misleading statements to the FDA to obtain a wrongful Orange Book listing. Similarly, the charges concerning two of the Taxol patents (the '537 and '803 patents) involve allegations that BMS submitted the patents for listing knowing that it had engaged in inequitable conduct before the PTO, deliberately making misleading statements and concealing material prior art, as part of a scheme to abuse Hatch-Waxman processes and thereby extend its monopoly in paclitaxel. Under well-established patent law, inequitable conduct in obtaining a patent makes the patent unenforceable.[13] But the Orange Book listing scheme is susceptible to opportunistic behavior. The NDA holder can exploit the listing scheme by obtaining patents and listing them in the Orange Book to block FDA approvals of

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[12] *See, e.g., Southern Pac. Communications Co. v. AT&T*, 740 F.2d 980, 1009 (D.C. Cir. 1984) (AT&T's conduct in meeting regulations governing its obligations for interconnecting other long distance carriers with its local service network can only be justified if it "is reasonable and if AT&T actually made its decision at the time in good faith on that basis rather than solely on the basis of competitive considerations.").

[13] *Precision Instrument Mfg. Co. v. Automotive Maintenance Mach. Co.*, 324 U.S. 806 (1945).

generic rivals for 30 months, even when the NDA holder does not reasonably expect the patents to ultimately hold up in court.

Finally, with respect to two other patents (ABI's '331 patent on Taxol and the '925 patent on Platinol), the complaint alleges that BMS submitted the listings while fully aware of facts and law that made the patents invalid. Although the Hatch-Waxman Paragraph IV certification process contemplates that some patents that are listed may ultimately be found invalid or unenforceable, it does not contemplate NDA holders listing a patent without a reasonable belief that the patent meets the listing requirements in order to use the 30-month stay provision as a weapon against generic rivals. Moreover, the pattern of conduct that BMS is charged with having engaged in reinforces the charge that BMS acted with an intent to abuse the listing process to extend its monopolies in all three drugs.

BMS's alleged initiation of baseless lawsuits to trigger the 30-month stay provision and inflict competitive harm through the process, rather than through the outcome, of the suit likewise amounts to exclusionary conduct to maintain BMS's monopoly in buspirone products.

Two of BMS's challenged acts were taken in concert with other firms, and the complaint challenges these acts both as monopoly maintenance and as agreements that unreasonably restrain trade in violation of Section 5. First, BMS's settlement with Schein, in which BMS is alleged to have agreed to pay its potential competitor in the buspirone market to withhold competition until patent expiration, eliminated the only potential generic threat to BuSpar for the entire patent period. Such action not only would have deprived consumers of the potential, albeit uncertain, competition from Schein, but also would have given BMS time to implement what the complaint charges was a further strategy to obstruct competition to BuSpar, obtaining and wrongfully listing the '365 patent. The complaint alleges that the settlement agreement has no legitimate justification, harms consumers, and is unlawful.

BMS's agreement with ABI to list ABI's '331 patent likewise involves charges of an unjustified agreement to obstruct generic competition and share monopoly profits. As set forth in the complaint, for both parties, the value of the patent license that ABI agreed to sell to BMS lay in its ability to trigger a 30-month stay under Hatch-Waxman: Delayed generic entry would protect BMS's revenues, and the terms of the option to license meant that ABI would receive more in royalty payments from BMS if BMS continued to hold a monopoly in paclitaxel products.

Because most of the acts challenged in this matter involve use of governmental processes, the complaint also affirmatively pleads that BMS's conduct is not immune from antitrust liability under the *Noerr-Pennington* doctrine, which protects private parties' petitioning for governmental action. First, BMS's Orange Book submissions of five patents (one on BuSpar, three on Taxol, and one on Platinol) cannot qualify for *Noerr* immunity because they do not constitute petitioning behavior. As the court in *In re Buspirone Antitrust Litigation*, 185 F. Supp. 2d 363, 370 (S.D.N.Y. 2002), observed in rejecting BMS's claim of *Noerr* protection, Orange Book filings involve no petitioning because the FDA merely accepts the NDA holder's representations and exercises no intervening judgment. In addition, Orange Book filings are not entitled to *Noerr* protection as conduct incidental to petitioning by means of a patent infringement suit. The fact that infringement litigation triggers a statutory delay in FDA approval does not render the Orange Book listing incidental to the litigation. An NDA holder can bring an infringement suit regardless of whether its patents are listed in the Orange Book. *Id.* at 372.[14] Furthermore, BMS's filings and other statements to the

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[14] *See also* Memorandum of Law of *Amicus Curiae* Federal Trade Commission in Opposition to Defendant's Motion to Dismiss (Jan. 8, 2002) in *In re Buspirone Antitrust Litig.*, 185 F.Supp. 2d 363 (S.D.N.Y. 2002), *available at* http://www.ftc.gov/os/2002/01/busparbrief.pdf.

FDA are alleged to involve knowing and material misrepresentations, and would therefore fall outside the protection of the *Noerr* doctrine for that reason as well.

The challenged settlement agreement between BMS and Schein likewise is neither petitioning nor the kind of action incidental to petitioning that the *Noerr* doctrine immunizes.[15]

Second, with respect to challenged BMS actions that do involve petitioning of government (for example, the patent infringement suits involving BuSpar), the complaint alleges that BMS's actions fall outside the protections of the *Noerr* doctrine. Regarding the lawsuits, the complaint alleges that they were objectively baseless and brought to injure a competitor through the process, rather than the outcome, of the litigation. As a result, they satisfy the two-part test for the sham litigation exception to *Noerr* set forth in *Professional Real Estate Investors, Inc. v. Columbia Pictures Industries., Inc*., 508 U.S. 49 (1993).

Finally, the logic and policy underlying the Supreme Court's decision in *California Motor Transport Co. v. Trucking Unlimited*, 404 U.S. 508 (1972), which held a pattern of filings undertaken without regard to their merits to be outside the protections of *Noerr*, supports the application of a pattern exception for BMS's alleged pattern of conduct across its buspirone, paclitaxel, and cisplatin products, and thus provides a separate reason to reject *Noerr* immunity here. As is reflected in the complaint, the overall course of conduct challenged here constitutes a clear and systematic pattern of anticompetitive misuse of governmental processes, that is, abusive filings undertaken without regard to the merits, in order to use administrative and judicial processes – rather than the outcome of those processes – as a weapon to obstruct competition. Just as the

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[15] *See Andrx Pharms. v. Biovail Corp. Int'l*, 256 F.3d 799, 817-19 (D.C. Cir. 2001).

repeated filing of lawsuits brought without regard to the merits, and for the purpose of using the judicial process (as opposed to the outcome of the process), warrants rejection of *Noerr* immunity, so too do the alleged repeated filing of patents on the Orange Book without regard to their validity, enforceability, or listability; repeated filing of recklessly or deliberately false statements with government agencies; and filing of lawsuits brought with or without regard to the merits, also cause the actions challenged here to fall outside the scope of *Noerr*'s protection.

By issuing the complaint in this matter along with the proposed consent agreement, the Commission finds reason to believe that BMS engaged in the alleged violations of law set forth in the complaint.

The Proposed Order

The proposed order is designed to maintain BMS's incentives to engage in legitimate conduct that could promote innovation, while ensuring protection of consumers through:

prohibitions regarding the listing and enforcement of patents relating to specific BMS products at issue here;

general prohibitions concerning the listing and enforcement of patents; and

prohibitions concerning settlement of patent litigation and other agreements between an NDA holder and an ANDA filer.

Product-Specific Provisions

Paragraphs II through V directly address complaint charges concerning BMS's unlawful conduct regarding patents relating to BuSpar and Taxol. The proposed order does not provide similar specific relief for Platinol, because the only unexpired Platinol patent was conclusively held invalid.

Analysis

The complaint alleges that the '365 patent relating to BuSpar does not cover any uses of buspirone, and a district court has so held.[16] Accordingly, to prevent future abusive listing of the '365 patent,[17] Paragraph II bars BMS from seeking to list the '365 patent in the Orange Book in relation to any NDA in which the active ingredient is buspirone. This provision will prevent BMS from seeking to list the '365 patent in connection with another buspirone product, for example a new dosage strength or formulation of BuSpar, as well as with its current BuSpar NDA.

The limitation on attempts to enforce the '365 patent is similar, but allows for the possibility that BMS might in the future have a legitimate claim of infringement. Thus, Paragraph V bars BMS from seeking to enforce the '365 patent against a product, or use of a product, that contains buspirone, except that such enforcement is permitted if the drug product in question also contains the metabolite that is the subject of the '365 patent (the 6-Hydrodroxy-metabolite of Buspirone) and the infringement claim is based on that metabolite.[18] Should such a case arise, BMS would not obtain an automatic 30-month stay on FDA

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[16] *In re Buspirone Patent Litig.*, 185 F. Supp. 2d 340, 359 (S.D.N.Y. 2002).

[17] In March 2001, a district court ordered BMS to seek de-listing of the patent. *Mylan Pharms., Inc. v. Thompson,* 139 F. Supp. 2d 1 (D.D.C. 2001). The Federal Circuit later reversed this ruling. *Mylan Pharm., Inc. v. Thompson*, 268 F.3d 1323, 1329-33 (Fed. Cir. 2001) (holding no private right of action under the Food, Drug, and Cosmetic Act to seek de-listing). By that time, generic buspirone had entered the market, and BMS did not seek to re-list the '365 patent.

[18] The proposed order defines "Patent Infringement Claim" to include threats of enforcement and other allegations that an ANDA product infringes the NDA holder's patent.

approval (because of the bar on listing in Paragraph II), but, like any patent holder, it could seek a preliminary injunction from the court hearing the infringement case.

With respect to Taxol, the proposed order generally bars BMS from seeking to enforce, or collecting royalties on, any "Taxol Patent" if the infringement claim involves the use of "Taxol." The proposed order defines "Taxol" to be any BMS paclitaxel drug product sold as of October 2002. As a result, this provision would not apply to any new form of Taxol that BMS might develop, and thus it would maintain BMS's incentives to pursue such innovation. With respect to BMS's existing Taxol product, however, the proposed order's bar on enforcement and royalties would apply not only to BMS's '537 and '803 patents (patents that the complaint alleges are unenforceable because of inequitable conduct by BMS before the PTO), but also to any other U.S. patent claiming Taxol as a composition of matter or a method of using Taxol (by virtue of the definition of "Taxol Patent" in Paragraph I.EE). Any such patent for the existing Taxol product would almost certainly be invalid, as a result of the sale of Taxol since 1992 and the extensive prior art in the public domain.

Paragraph IV of the proposed order bars BMS from taking any action to obtain or maintain a statutory 30-month stay on FDA approval with respect to an ANDA that references BuSpar or Taxol. There have already been multiple 30-month stays in connection with both of these drugs, and this provision makes it clear that further stays would be improper. At the same time, the proposed order would preserve incentives to innovate by allowing 30-month stays on new NDAs, even if those NDAs are related to BuSpar and Taxol.

General Prohibitions Concerning the Listing and Enforcement of Patents

Because improper Orange Book listings have a significant potential to obstruct competition and harm consumers, the

proposed order contains general prohibitions designed to deter improper listings and to prevent BMS from triggering the Hatch-Waxman automatic 30-month stay in circumstances that could improperly block generic entry. Thus, the proposed order's Paragraph VI would bar BMS from Orange Book listings that are contrary to the statutes and regulations governing such listings. For example, this provision would prohibit listing patents in the Orange Book that do not actually claim the drug product at issue. This provision is similar to one contained in the consent order issued in *Biovail Corp*., FTC Dkt. No. C-4060 (Oct. 2, 2002).

In addition, Paragraph VII bars BMS from acting to obtain or maintain a Hatch-Waxman 30-month stay on FDA approval in certain specified situations. Because this provision does not bar Orange Book listings, ANDA filers would continue to get notice through the Orange Book of patents relating to the reference drug. Although the provision prohibits BMS from suing to trigger the automatic 30-month stay, BMS could still bring an infringement suit and avail itself of the procedures available to patent holders generally, including seeking a preliminary injunction against market entry by the generic applicant.

Paragraph VII.A prohibits BMS from triggering a 30-month stay when the patent is listed after the filing of any ANDA referencing the NDA. The Commission's *Generic Drug Study* found that the listing of patents after a generic applicant has filed its ANDA led to substantial delay of FDA approval. The report identified two reasons for this delay. First, "later-issued patents" often enabled the NDA holder to obtain multiple 30-month stays, resulting in an automatic stay period that significantly exceeds 30 months. BuSpar and Taxol involve allegations relating to improper efforts to obtain such additional stays. Second, later-issued patents also typically presented significant questions whether they met the criteria for listing, and, when courts had ruled, the later-issued patents had been found to be invalid or not

infringed.[19] BuSpar, Taxol, and Platinol all are alleged to have involved improper listings. By eliminating the availability of a 30-month stay on later-issued patents, this provision reduces the rewards for obtaining and listing patents improperly. Moreover, by denying BMS the benefit of the 30-month stay on later-issued patents, the proposed order should reduce BMS's incentives to engage in improper behavior before the PTO and the FDA to obtain and list a patent for the purpose of obtaining an unwarranted automatic 30-month stay. This remedy is consistent with the Commission's recommendation to Congress that, to reduce the possibility of abuse of the 30-month stay provision, an ANDA filer only be subject to a 30-month stay for patents listed in the Orange Book prior to the filing of its ANDA.

Paragraph VII also bars a 30-month stay, regardless of when the patent was listed, if BMS engages in certain types of misconduct in connection with obtaining or listing the patent: inequitable conduct before the PTO in obtaining the patent (VII.B); making a false or misleading statement to the FDA in connection with listing the patent (VII.C); or providing information about the patent to the FDA that is inconsistent with information it provided to the PTO (VII.D). These provisions reflect particular types of unlawful conduct charged in the complaint.

Finally, Paragraph VII would also prevent BMS from obtaining a 30-month stay when it has listed a patent that does not claim an approved use of the drug (VII.E) or when the patent is for a metabolite of an active ingredient listed in the NDA (VII.F). These provisions directly respond to the complaint allegations that BMS obstructed generic competition to BuSpar by listing the '365 patent, which did not comply with the standards for listing in the Orange Book. These provisions would not bar BMS from bringing a patent infringement action triggering a 30-month stay if the action is based on a patent claim that is distinct from those

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[19] *Generic Drug Study* at iii-iv, 40, 48-54.

identified in these two subparagraphs, and the listing of that distinct additional claim does not conflict with regulations governing Orange Book listings.

To ensure that BMS does not seek to obstruct generic competition through false statements to the FDA outside the Orange Book listing context, such as through the citizen petition process, the proposed order also contains a general prohibition on false statements to the FDA. Paragraph VIII bans false and misleading statements to the FDA that are material to the approvability or sale of a generic version of a BMS brand-name drug product, unless BMS had a reasonable belief that the statement was neither false nor misleading.

To address complaint allegations that BMS engaged in sham litigation, the proposed order's Paragraph IX bars BMS from: asserting any patent infringement claim that is objectively baseless; or seeking to enforce a patent that BMS knows is invalid, unenforceable, or not infringed.

Paragraphs X and XI deal with the acquisition of patents, patent licenses, and conduct in connection with such acquisitions or licenses. These two provisions address complaint allegations that, as one part of its unlawful scheme to delay generic competition to Taxol, BMS entered into an unlawful agreement with ABI that BMS acquire a license to and list an invalid ABI patent in the Orange Book to maintain BMS's monopoly in Taxol.

As in *Biovail Corp.*, FTC Dkt. No. C-4060 (Oct. 2, 2002), the proposed order would require BMS to provide notice to the Commission before it acquires a patent, or an exclusive license to a patent (whether exclusive by its terms or otherwise),[20] if BMS

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[20] The definition of "Exclusive License" in Paragraph I.O includes a license that "reduces the incentives of the licensor to license the intellectual property to other persons." This definition reflects that a license may be nominally non-exclusive, but its

intends to list that patent in the Orange Book. Patents obtained through internal development activities or research joint ventures existing at the time of NDA approval, however, do not present the competitive concerns that the arrangement between BMS and ABI does and are excluded from the proposed order's prior notice requirement.

If BMS acquires a non-exclusive license to a patent, Paragraph XI bars it from participating in enforcement of, licensing of, or setting royalties for, that patent with respect to an ANDA filer. This prohibition applies only to acquisitions that occur after an ANDA referencing the NDA to which the patent relates has been filed. It is intended to ensure that BMS does not attempt to obstruct generic competition by influencing the conduct of the patent holder.

Provisions Concerning Settlement of Patent Litigation and Other Agreements

Paragraphs XII though XV address the challenged settlement agreement between BMS and Schein Pharmaceutical, Inc., concerning generic BuSpar. Schein was acquired by Watson Pharmaceuticals in August 2000, and the Commission has determined that under the circumstances here it is not necessary to seek an order against Watson to ensure effective relief.

This aspect of the proposed order would essentially prohibit two categories of conduct:

> agreements in which the brand-name drug company (the NDA holder) makes payments to a potential generic competitor (an

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terms may be such (for example, when royalties paid to the patent holder would be higher if no generic entry occurs) that the patent holder would have no incentive to license the patent to anyone other than the manufacturer of the brand-name drug to which the patent relates.

ANDA filer) and the ANDA filer agrees not to market its product for some period of time (except in certain limited circumstances); and

agreements between the NDA holder and an ANDA filer in which the generic competitor agrees not to enter the market with a non-infringing generic product, or agrees not to relinquish exclusivity rights.

Paragraph XII of the proposed order covers agreements to resolve patent infringement disputes. It bars agreements wherein (1) the NDA holder makes payments or otherwise transfers something of value to the ANDA filer and (2) the ANDA filer agrees not to market its product for some period of time, subject to two exceptions described below. The ban in Paragraph XII includes not only final settlements of ongoing patent infringement litigation, but also agreements resolving claims of patent infringement that have not resulted in a lawsuit (see definition in Paragraph I.X.). In addition, by virtue of the definition of "Agreement" in Paragraph I.G., the proposed order makes it clear that the prohibition on payments for delayed generic entry would cover such arrangements even if they are achieved through separate agreements (for example, when one agreement resolves the patent infringement dispute and another provides for the payment for delayed entry).

The proposed order prohibits not merely cash payments to induce delayed entry, but, more broadly, agreements in which the NDA holder provides something of value to the potential generic entrant, and the ANDA filer agrees in some fashion not to sell its product. Although the pharmaceutical agreements that the Commission has challenged to date have involved cash payments, a company could easily evade a prohibition on such agreements by substituting other things of value for cash payments. Thus, to protect against a recurrent violation, the proposed order is not limited to cash payments.

Analysis

The proposed order would create two exceptions to Paragraph XII's ban on giving value for delayed entry. First, the ban would not apply if the value BMS provided to the ANDA filer was only: (1) the right to market the ANDA product prior to expiration of the patent that it is alleged to infringe; and/or (2) an amount representing BMS's expected future litigation costs, up to a maximum of two million dollars. This exception reflects that a payment limited to the NDA-holder's expected future litigation costs is not likely to result in a later generic entry date than would be expected to occur absent the payment. As a fencing-in provision, the proposed order sets a two-million dollar limit on expected litigation cost payments. In addition, the exception requires that BMS notify the Commission at least 30 days in advance of consummating such an agreement, to allow an assessment of potential harm to competition that could arise as a result of the exclusivity provisions of the Hatch-Waxman Act. Paragraph XVI sets forth a notification process similar to that used for mergers under the Hart-Scott-Rodino Act, which is designed to permit the Commission to obtain additional information when an agreement's potential effect on the triggering of the 180-day exclusivity period may raise competitive concerns.

A second exception addresses the possibility that there might be some agreements that fall within the terms of the prohibition in Paragraph XII that the Commission would not wish to prohibit. Thus, the proposed order includes a mechanism that would permit the Commission to consider and permit such arrangements.

Paragraph XIII prohibits agreements between an NDA holder and an ANDA filer in which the ANDA filer agrees not to develop or market a generic drug product that is not the subject of a claim of patent infringement. The complaint alleges that BMS's settlement agreement with Schein not only barred sale of the ANDA product, but also prohibited marketing of any other generic version of BuSpar, regardless of whether it infringed a BMS patent.

Analysis

The proposed order would also ban agreements in which a first ANDA filer agrees not to relinquish its right to the 180-day exclusivity period provided under Hatch-Waxman (Paragraph XIV). Under a proviso, however, such agreements are permitted in the context of a licensing arrangement if: (1) the first ANDA filer comes to market immediately with a generic version of the reference drug product; (2) the ANDA filer either triggers or relinquishes the 180-day exclusivity period; and (3) BMS complies with the notice requirements of Paragraph XVI. Although a ban on relinquishing exclusivity rights was not part of the challenged settlement agreement between BMS and Schein, such agreements have been used to thwart generic entry and the prohibition of such agreements will help to prevent future unlawful conduct.[21]

Paragraph XV bars agreements that involve payment to an ANDA filer and in which the ANDA filer agrees not to enter the market for a period of time, but the patent infringement litigation continues. As with Paragraph XII's treatment of final settlements, it extends beyond cash payments to cover the NDA holder's providing "anything of value" to the ANDA filer. The proposed order also provides for an exception to the provision on interim settlements if BMS presents the agreement to a court in connection with a joint stipulation for a preliminary injunction, and the following conditions are met:

> BMS must provide certain information to the Commission at least 30 days before submitting the joint stipulation to the court, and must also provide certain information to the court along with the joint stipulation;
>
> BMS may not oppose Commission participation in the court's consideration of the request for preliminary injunction; and

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[21] *See Abbott Labs.*, FTC Dkt. No. C-3945 (May 22, 2000); *Geneva Pharms*, FTC Dkt. No. C-3946 (May 22, 2000); *Hoechst Marion Roussel, et al.*, FTC Dkt. No. D.9293 (May 8, 2001).

Either: (1) the court issues a preliminary injunction and the parties' agreement conforms to the court's order; or (2) the Commission determines that the agreement does not raise issues under Section 5 of the FTC Act.

Notice and Compliance Provisions

The form and timing of the notice that BMS must provide to the Commission under Paragraphs X, XII, XIV, and XV of the proposed order is set forth in Paragraph XVI. In addition to supplying a copy of the proposed agreement at least 30 days in advance of its consummation, BMS is required to provide certain other information to assist the Commission in assessing the potential competitive impact of the agreement. Accordingly, the proposed order requires BMS to identify, among other things, all others known by BMS to have filed an ANDA for a product containing the same chemical entities as the product at issue, as well as the court that is hearing any relevant legal proceedings involving BMS. In addition, BMS must provide the Commission with certain documents that evaluate the proposed agreement.

The proposed order also provides a Hart-Scott-Rodino-type "second request" process in connection with the notice required by Paragraph XII.

The proposed order also contains certain reporting and other provisions that are designed to assist the Commission in monitoring compliance with the order and are standard provisions in Commission orders.

The proposed order would expire in 10 years.

Opportunity for Public Comment

The proposed order has been placed on the public record for 30 days in order to receive comments from interested persons. Comments received during this period will become part of the

public record. After 30 days, the Commission will again review the agreement and the comments received and will decide whether it should withdraw from the agreement or make the proposed order final.

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

Complaint

IN THE MATTER OF

INDIANA HOUSEHOLD MOVERS AND WAREHOUSEMEN, INC.

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

Docket C-4077; File No. 0210115
Complaint, April 25, 2003--Decision, April 25, 2003

This consent order, among other things, prohibits Respondent Indiana Household Movers and Warehousemen, Inc. – an association organized for and serving its members, which are approximately 70 household goods movers that conduct business within the State of Indiana – from filing tariffs that contain collective intrastate rates. The order also prohibits the respondent from engaging in activities such as exchanges of information that would facilitate member movers in agreeing on the rates contained in their intrastate tariffs. In addition, the order prohibits the respondent from maintaining a tariff committee or agreeing with movers to institute any automatic intrastate rate increases. The order also requires the respondent to cancel all tariffs it has filed that contain intrastate collective rates; to cancel any provisions in its governing documents that permit it to engage in activities prohibited by the order; and to send its members a letter explaining the terms of the order.

Participants

For the Commission: *Dana Abrahamsen, Peggy D. Bayer, Harry Schwirck, Ted Cruz, John Delacourt, Patrick J. Roach, Richard B. Dagen, Joseph Eckhaus, Roberta S. Baruch, John Howell* and *Mary T. Coleman.*

For the Respondent: *Daniel R. Barney, Scopelitis, Garvin, Light & Hanson, P.C.*

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act (15 U.S.C. § 41, et seq.) and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that Indiana Household Movers and Warehousemen, Inc. (hereinafter sometimes referred to as "respondent" or "IHM&W"),

a corporation, has violated and is now violating the provisions of Section 5 of said Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges as follows:

PARAGRAPH 1. Respondent Indiana Household Movers and Warehousemen, Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the State of Indiana, with its office and principal place of business located at 3039 West 39th Street, Indianapolis, Indiana 46228-3282.

PARAGRAPH 2. Respondent is an association organized for and serving its members' interests, including their economic interests, by promoting, fostering and advancing the household goods moving industry in the State of Indiana. One of the primary functions of respondent is the initiation, preparation, development, dissemination and filing with the Indiana Department of Revenue of tariffs and supplements thereto on behalf of and as agent for its members. Said tariffs and supplements contain rates and charges for the intrastate and local transportation of household goods and for related services including, inter alia, transporting bulky articles; packing boxes and crates; and extra charges for elevator, stair and long distance carrying of items. (For purposes of this complaint the term "tariff" means the publication stating the rates of a carrier for the transportation of property between points within the State of Indiana, including updates, revisions, and/or amendments, including general rules and regulations.)

PARAGRAPH 3. Pursuant to Indiana state law, each household goods mover is required to file a tariff with the Indiana Department of Revenue containing the carrier's rates, fares or charges for the intrastate transportation of household goods. By Indiana law, a household goods mover is not permitted to charge a different rate, fare or charge other than those contained in its tariff or supplements thereto once the Department of Revenue has accepted it.

PARAGRAPH 4. Members of respondent are engaged, inter

alia, in the business of providing transportation and other services for compensation as household goods movers between points within the State of Indiana. Except to the extent that competition has been restrained as herein alleged, members of respondent have been and are now in competition among themselves and with other household goods movers.

PARAGRAPH 5. The membership of IHM&W consists of approximately 70 household goods movers who conduct business within the State of Indiana. IHM&W members receive compensation for intrastate and local moves. Members of IHM&W are entitled to and do, among other things, vote for and elect the directors of the association. The control, direction and management of IHM&W is vested in the directors who elect a President, Vice President and Treasurer to carry on the day-to-day administration and management of IHM&W.

PARAGRAPH 6. The acts and practices of respondent set forth in Paragraph Seven have been and are now in or affecting commerce as "commerce" is defined in the Federal Trade Commission Act, as amended, and respondent is subject to the jurisdiction of the Federal Trade Commission. Among other things, the aforesaid acts and practices:

(A) Affect the flow of substantial sums of money from the federal government, business and other private parties to the respondent's members for rendering transportation services, which money flows across state lines;

(B) Affect the purchase and utilization of equipment and other goods and services by respondent's members which are shipped in interstate commerce;

(C) Include the use of the United States mail and other instruments of interstate commerce in furthering the agreements described below; and

(D) Are supported by the receipt of dues and fees for publications and services from out-of-state members and others.

PARAGRAPH 7. For many years and continuing up to and including the date of the filing of this complaint, respondent, its members, officers and directors and others have agreed to engage, and have engaged, in a combination and conspiracy, an agreement, concerted action or unfair and unlawful acts, policies and practices, the purpose or effect of which is, was or may be, to unlawfully hinder, restrain, restrict, suppress or eliminate competition among household goods movers in the intrastate Indiana household goods moving industry.

Pursuant to, and in furtherance of, said agreement and concert of action, respondent, its members and others have engaged and continue to engage in the following acts, policies and practices, among others:

(A) Initiating, preparing, developing, disseminating, and taking other actions to establish and maintain collective rates, which have the purpose or effect of fixing, establishing, stabilizing or otherwise tampering with rates and charges for the transportation of household goods between points within the State of Indiana;

(B) Participating in and continuing to participate in the collectively set rates;

(C) Filing collectively set rates with the Indiana Department of Revenue; and

(D) Initiating, organizing, coordinating and conducting meetings or providing a forum for any discussion or agreement between competing carriers concerning or affecting intrastate rates charged or proposed to be charged for the intrastate transportation of household goods; or otherwise influencing its members to raise their rates, charge the same or uniform rates,

participate in or continue to participate in the collectively set rates.

PARAGRAPH 8. The acts and practices of respondent, its members and others, as alleged in Paragraph Seven, have had and are now having the effects, among others, of:

(A) Raising, fixing, stabilizing, pegging, maintaining, or otherwise interfering or tampering with the prices of household goods moves;

(B) Restricting, restraining, hindering, preventing or frustrating price competition in the household goods moving industry; and

(C) Depriving consumers of the benefits of competition.

PARAGRAPH 9. The acts, policies and practices of respondent, its members and others, as herein alleged, were and are to the prejudice and injury of the public and constituted and constitute unfair methods of competition in or affecting commerce in violation of Section 5 of the Federal Trade Commission Act, as amended. The acts and practices, as herein alleged, are continuing and will continue in the absence of the relief herein requested.

WHEREFORE, THE PREMISES CONSIDERED, the Federal Trade Commission on this twenty-fifth day of April, 2003, issues its complaint against IHM&W.

By the Commission.

DECISION AND ORDER

The Federal Trade Commission ("Commission") having initiated an investigation of certain acts and practices of Indiana Household Movers and Warehousemen, Inc. ("IHM&W"), hereinafter sometimes referred to as "Respondent," 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 by the Commission, would charge Respondent with violations of Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45; and

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

The Commission having thereafter considered the matter and having determined that it had reason to believe that Respondent has violated the said 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 comment received pursuant to Commission Rule 2.34, 16 C.F.R. § 2.34 (2003), 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 Decision and Order ("Order"):

1. Respondent Indiana Household Movers and Warehousemen, Inc. is a corporation organized and existing under the laws of the state of Indiana with its principal office and place of business at 3039 West 39th Street, Indianapolis, Indiana 46228-3282.

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

A. "Respondent" or "IHM&W" means Indiana Household Movers and Warehousemen, its officers, executive board, committees, representatives, agents, employees, successors and assigns;

B. "Carrier" means a common carrier of property by motor vehicle;

C. "Intrastate transportation" means the pickup or receipt, transportation and delivery of property hauled between points within the State of Indiana for compensation by a carrier authorized by the Indiana Department of Revenue to engage therein;

D. "Member" means any carrier or other person that pays dues or belongs to IHM&W or to any successor corporation;

E. "Tariff" means the publication stating the rates of a carrier for the transportation of property between points within the State of Indiana, including updates, revisions, and/or amendments, including general rules and regulations;

F. "Rate" means a charge, payment or price fixed according to a ratio, scale or standard for direct or indirect transportation service;

G. "Collective rates" means any rate or charge established under any contract, agreement, understanding, plan, program, combination or conspiracy between two or more competing carriers, or between any two or more carriers and Respondent; and

H. "Person" means both natural persons and artificial persons, including, but not limited to, corporations, unincorporated entities, and governments.

II.

IT IS FURTHER ORDERED that Respondent, a corporation, its successors and assigns, and its officers, agents, representatives, directors and employees, directly or through any corporation, subsidiary, division or other device, shall forthwith cease and desist from entering into and within 120 days after service upon it of this Order cease and desist from adhering to or maintaining, directly or indirectly, any contract, agreement, understanding, plan, program, combination or conspiracy to fix, stabilize, raise, maintain or otherwise interfere or tamper with the rates charged by two or more carriers for the intrastate transportation of property or related services, goods or equipment, including but not limited to:

1. Knowingly preparing, developing, disseminating or filing a proposed or existing tariff that contains collective rates for the intrastate transportation of property or other related services, goods or equipment;

2. Providing information to any carrier about rate changes considered or made by any other carrier employing the publishing services of Respondent prior to the time at which such rate change becomes a matter of public record;

3. Inviting, coordinating or providing a forum (including publication of an informational bulletin) for any discussion or agreement between or among competing carriers concerning rates charged or proposed to be charged by carriers for the intrastate transportation of property or related services, goods or equipment;

4. Suggesting, urging, encouraging, persuading or in any way influencing members to charge, file or adhere to any existing or proposed tariff provision which affects rates, or otherwise to charge or refrain from charging any particular price for any services rendered or goods or equipment provided;

5. Maintaining any rate or tariff committee or other entity to consider, pass upon or discuss intrastate rates or rate proposals; and

6. Preparing, developing, disseminating or filing a proposed or existing tariff containing automatic changes to rates charged by two or more carriers.

III.

IT IS FURTHER ORDERED that Respondent shall, within 120 days after service upon it of this Order:

1. Cancel all tariffs and any supplements thereto on file with the Indiana Department of Revenue that establish rates for transportation of property or related services, goods or equipment by common carriers in Indiana and take such action as may be necessary to effectuate cancellation and withdrawal;

2. Terminate all previously executed powers of attorney and rate and tariff service agreements, between it and any carrier utilizing its services, authorizing the publication and/or filing of intrastate collective rates within the State of Indiana;

3. Cancel those provisions of its articles of incorporation, by-laws and procedures and every other rule, opinion, resolution, contract or statement of policy that has the purpose or effect of permitting, announcing, stating, explaining or agreeing to any business practice enjoined by the terms of this Order; and

4. Amend its by-laws to require members of IHM&W to observe the provisions of the Order as a condition of membership in IHM&W.

IV.

IT IS FURTHER ORDERED that, within fifteen (15) days after service upon it of this Order, Respondent shall mail or deliver a copy of this Order, under cover of the letter attached hereto as "Appendix," to each current member of Respondent, and for a period of three (3) years from the date of service of this Order, to each new member within ten (10) days of each such member's acceptance by Respondent.

V.

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

VI.

IT IS FURTHER ORDERED that Respondent shall file a written report within six (6) months of the date of service of this

Order, and annually on the anniversary date of the original report for each of the five (5) years thereafter, and at such other times as the Commission may require by written notice to Respondent, setting forth in detail the manner and form in which it has complied with this Order.

VII.

IT IS FURTHER ORDERED that this Order shall terminate on April 25, 2023.

By the Commission.

APPENDIX

(Letterhead of the Indiana Household Movers and Warehousemen, Inc.)

Dear Member:

The Federal Trade Commission has ordered Indiana Household Movers and Warehousemen, Inc. (IHM&W) to cease and desist its tariff and collective rate-making activities. A copy of the Commission's Decision and Order is enclosed.

In order that you may readily understand the terms of the Order, we have set forth its essential provisions, although you must realize that the Order itself is controlling, rather than the following explanation of its provisions:

(1) IHM&W is prohibited from engaging in any collective rate-making activities, including the proposal, development or filing of tariffs which contain any collectively formulated rates for intrastate transportation services. Each member carrier must independently set its own rates for transportation of property or related services, goods or equipment between points within the State of Indiana, but may use IHM&W as a tariff publishing agent.

(2) IHM&W is prohibited from providing a forum for its members for the purpose of discussing rates.

(3) IHM&W is prohibited from urging, suggesting, encouraging or attempting to influence in any way the rates members charge for their intrastate transportation services; IHM&W may not provide non-public information to any carrier about rate changes ordered by another carrier.

(4) IHM&W is prohibited from maintaining any rate or tariff committee which discusses or formulates intrastate rates or rate proposals.

(5) IHM&W is given 120 days to cancel all tariffs and tariff supplements currently in effect and on file at the Indiana Department of Revenue which were prepared, developed or filed by IHM&W.

(6) IHM&W is required to amend its by-laws to require its members to observe the provisions of the Order as a condition of membership in IHM&W.

Sincerely yours,

[appropriate IHM&W officer]

Enclosure

Analysis of Proposed Consent Order to Aid Public Comment

The Federal Trade Commission has accepted for public comment an Agreement Containing Consent Order with Indiana Household Movers and Warehousemen, Inc. ("IHM&W" or "Respondent"). The Agreement is for settlement purposes only and does not constitute an admission by IHM&W that the law has been violated as alleged in the Complaint or that the facts alleged in the Complaint, other than jurisdictional facts, are true.

I. The Commission's Complaint

The proposed Complaint alleges that Respondent Indiana Household Movers and Warehousemen, Inc., a corporation, has violated and is now violating Section 5 of the Federal Trade Commission Act. Specifically, the proposed Complaint alleges that Respondent has agreed to engage, and has engaged, in a combination and conspiracy, an agreement, concerted action or unfair and unlawful acts, policies and practices, the purpose or effect of which is to unlawfully hinder, restrain, restrict, suppress or eliminate competition among household goods movers in the household goods moving industry.

Respondent is an association organized for and serving its members, which are approximately 70 household goods movers that conduct business within the State of Indiana. One of the primary functions of Respondent is preparing, and filing with the Indiana Department of Revenue, tariffs and supplements on behalf of its members. These tariffs and supplements contain rates and charges for the intrastate and local transportation of household goods and for related services.

The proposed Complaint alleges that Respondent is engaged in initiating, preparing, developing, disseminating, and taking other actions to establish and maintain collective rates, which have the purpose or effect of fixing, establishing or stabilizing rates for the transportation of household goods in the State of Indiana. The

Respondent files uniform rates that are agreed upon by all of its members.

The proposed Complaint further alleges that Respondent organizes and conducts meetings that provide a forum for discussion or agreement between competing carriers concerning or affecting rates and charges for the intrastate transportation of household goods.

The proposed Complaint further alleges that Respondent's conduct is anticompetitive because it has the effect of raising, fixing, and stabilizing the prices of household goods moves. The acts of Respondent also have the effect of depriving consumers of the benefits of competition.

II. Terms of the Proposed Consent Order

The proposed Order would provide relief for the alleged anticompetitive effects of the conduct principally by means of a cease and desist order barring Respondent from continuing its practice of filing tariffs containing collective intrastate rates.

Paragraph II of the proposed Order bars Respondent from filing a tariff that contains collective intrastate rates. This provision will terminate Respondent's current practice of filing tariffs that contain intrastate rates that are the product of an agreement among movers in the State of Indiana. This paragraph also prohibits Respondent from engaging in activities such as exchanges of information that would facilitate member movers in agreeing on the rates contained in their intrastate tariffs. It also bars Respondent from maintaining a tariff committee or agreeing with movers to institute any automatic intrastate rate increases.

Paragraph III of the proposed Order requires Respondent to cancel all tariffs that it has filed that contain intrastate collective rates. This provision will ensure that the collective intrastate rates now on file in the State of Indiana will no longer be in force, allowing for competitive rates in future individual mover tariffs.

Paragraph III of the proposed Order also requires Respondent to cancel any provisions in its governing documents that permit it to engage in activities barred by the Order.

Paragraph IV of the proposed Order requires Respondent to send to its members a letter explaining the terms of the Order. This will make clear to members that they can no longer engage in collective rate-making activities.

Paragraphs V and VI of the proposed Order require Respondent to inform the Commission of any change in Respondent that could affect compliance with the Order and to file compliance reports with the Commission for a number of years. Paragraph VII of the proposed Order states that the Order will terminate in twenty years.

III. Opportunity for Modification of the Order

Respondent can seek to modify the proposed Order to permit it to engage in collective rate-making if it can demonstrate that the "state action" defense would immunize its conduct.[1] The state action doctrine dates back to the Supreme Court's 1943 opinion in *Parker v. Brown*, which held that, in light of the States' status as sovereigns, and given basic principles of federalism, Congress would not have intended the Sherman Act to apply to the activities of States themselves.[2] The defense also has been interpreted in limited circumstances to immunize from antitrust scrutiny private firms' activities that are conducted pursuant to state authority. States may not, however, simply authorize private parties to

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[1] 16 C.F.R. § 2.51. Because of this possibility, and because the issues raised by this case frequently arise, it is appropriate to address the state action defense in some detail.

[2] 317 U.S. 341 (1943).

violate the antitrust laws.[3] Instead, a State must substitute its own control for that of the market.

Thus, the state action defense would be available to Respondent only if it could demonstrate that its conduct satisfied the strict two-pronged standard the Supreme Court set out in *California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*: "the challenged restraint must be 'one clearly articulated and affirmatively expressed as state policy'" and "the policy must be 'actively supervised' by the state itself."[4]

Under the first prong of *Midcal's* two-part test, Respondent would be required to show that the State of Indiana had "clearly articulated and affirmatively expressed as state policy" the desire to replace competition with a regulatory scheme. With regard to this prong, it appears that Indiana law specifically contemplates common carriers' entering into "joint rates" under certain circumstances that do not appear to be applicable to the conduct at issue here.[5] Respondent would meet its burden only if it could

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[3] *Parker v. Brown*, 317 U.S. 341, 351 (1943) ("[A] state does not give immunity to those who violate the Sherman Act by authorizing them to violate it, or declaring that their action is lawful.").

[4] 445 U.S. 97, 105 (1980) ("*Midcal*") (*quoting City of Lafayette v. Louisiana Power & Light*, 435 U.S. 389, at 410 (1978)). The "restraint" in this instance is the collective rate-setting. This articulation of the state action doctrine was reaffirmed by the Supreme Court in *FTC v. Ticor Title Insurance Co.* ("*Ticor*"), where the Court noted that the gravity of the antitrust violation of price fixing requires exceptionally clear evidence of the State's decision to supplant competition. 504 U.S. 621, 633 (1992).

[5] *See* IND. CODE ANN. § 8-2.1-22-18(a) (Michie 2001). The state administrative code defines "joint rate" to mean "a rate that

show that this or some other provision of Indiana law constitutes a clear expression of state policy to displace competition and allow for collective rate-making among competitors.

Under the second prong of the *Midcal* test, Respondent would be required to demonstrate "active supervision" by state officials. The Supreme Court has made clear that the active supervision standard is a rigorous one. It is not enough that the State grants general authority for certain business conduct or that it approves private agreements with little review. As the Court held in *Midcal,* "The national policy in favor of competition cannot be thwarted by casting such a gauzy cloak of state involvement over what is essentially a private price-fixing arrangement."[6] Rather, active supervision is designed to ensure that a private party's anticompetitive action is shielded from antitrust liability only when "the State has effectively made [the challenged] conduct its own."[7]

In order for state supervision to be adequate for state action purposes, state officials must engage in a "pointed re-examination" of the private conduct.[8] In this regard, the State must "have *and* exercise ultimate authority" over the challenged

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applies over the lines or routes of two or more carriers and that is made by arrangement or agreement between such carriers." 45 IAC 16-3-2(3). This definition suggests that the term "joint rate" refers only to situations where more than one carrier is used to perform a single move rather than to situations where competing movers file collective rates.

[6] *Midcal,* 445 U.S. at 105-06.

[7] *Patrick v. Burget*, 486 U.S. 94, 106 (1988).

[8] *Midcal,* 445 U.S. at 106. *Accord*, *Ticor*, 504 U.S. at 634-35; *Patrick v. Burget*, 486 U.S. 94, 100-01 (1988).

anticompetitive conduct.[9] To do so, state officials must exercise "sufficient independent judgment and control so that the details of the rates or prices have been established as a product of deliberate state intervention, not simply by agreement among private parties."[10] One asserting the state action defense must demonstrate that the state agency has ascertained the relevant facts, examined the substantive merits of the private action, assessed whether that private action comports with the underlying statutory criteria established by the state legislature, and squarely ruled on the merits of the private action in a way sufficient to establish the challenged conduct as a product of deliberate state intervention rather than private choice.

IV. General Characteristics of Active Supervision

At its core, the active supervision requirement serves to identify those responsible for public policy decisions. The clear articulation requirement ensures that, if a State is to displace national competition norms, it must replace them with specific state regulatory standards; a State may not simply authorize private parties to disregard federal laws,[11] but must genuinely substitute an alternative state policy. The active supervision requirement, in turn, ensures that responsibility for the ultimate conduct can properly be laid on the State itself, and not merely on the private actors. As the Court explained in *Ticor*:

> States must accept political responsibility for actions they intend to undertake. . . . Federalism serves to assign political responsibility, not to obscure it. . . . For states which do choose to displace the free market with regulation, our insistence on real compliance with both parts of the *Midcal* test will serve to

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[9] *Patrick v. Burget*, 486 U.S. at 101 (emphases added).

[10] *Ticor,* 504 U.S. at 634-35.

[11] *Parker,* 317 U.S. at 351.

> make clear that the State is responsible for the price fixing it has sanctioned and undertaken to control.[12]

Through the active supervision requirement, the Court is furthering the fundamental principle of "accountability" that underlies federalism, by ensuring that, if allowing anticompetitive conduct proves to be unpopular with a State's citizens, the state legislators will not be "insulated from the electoral ramifications of their decisions."[13]

In short, clear articulation requires that a State enunciate an affirmative intent to displace competition and to replace it with a stated criterion. Active supervision requires the State to examine individual private conduct, pursuant to that regulatory regime, to ensure that it comports with that stated criterion. Only then can the underlying conduct accurately be deemed that of the State itself, and political responsibility for the conduct fairly be placed with the State.

Accordingly, under the Supreme Court's precedents, to provide meaningful active supervision, a State must (1) obtain sufficient information to determine the actual character of the private conduct at issue, (2) measure that conduct against the legislature's stated policy criteria, and (3) come to a clear decision that the private conduct satisfies those criteria, so as to make the final decision that of the State itself.

V. Standard for Active Supervision

There is no single procedural or substantive standard that the Supreme Court has held a State must adopt in order to meet the active supervision standard. Satisfying the Supreme Court's

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[12] 504 U.S. at 636.

[13] *See New York v. United States*, 505 U.S. 144, 168-69 (1992).

general standard for active supervision, described above, is and will remain the ultimate test for that element of state action immunity.

Nevertheless, in light of the foregoing principles, the Commission in this Analysis identifies the specific elements of an active supervision regime that it will consider in determining whether the active supervision prong of state action is met in future cases (as well as in any future action brought by Respondent to modify the terms of this proposed Order). They are three: (1) the development of an adequate factual record, including notice and opportunity to be heard; (2) a written decision on the merits; and (3) a specific assessment – both qualitative and quantitative – of how the private action comports with the substantive standards established by the state legislature. All three elements further the central purpose of the active supervision prong by ensuring that responsibility for the private conduct is fairly attributed to the State. Each will be discussed below.

A. Development of an Adequate Factual Record, Including Notice and Opportunity to Be Heard

To meet the test for active state supervision, in this case Respondent would need to show that the State had in place an administrative body charged with the necessary review of filed tariffs and capable of developing an adequate factual record to do so.[14] In *Ticor,* the Court quoted language from earlier lower court

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[14] At the time of any request for a modification, Respondent will be required to produce evidence of what the state reviewing agency is likely to do in response to collective rate-making. We recognize that this involves some prediction and uncertainty, particularly when the Respondent requests an order modification on the basis of a state review program that might be authorized but not yet operating, as the Respondent will still be under order. In such cases it may be appropriate for the Respondent to show what the state program is designed, directed, or organized to do.

cases setting out a list of organizational and procedural characteristics relevant as the "beginning point" of an effective state program:

> [T]he state's program is in place, is staffed and funded, grants to the state officials ample power and the duty to regulate pursuant to declared standards of state policy, is enforceable in the state's courts, and demonstrates some basic level of activity directed towards seeing that the private actors carry out the state's policy and not simply their own policy . . . .[15]

Moreover, that body would need to be capable of compiling, and actually compile, an adequate factual record to assess the nature of and impact of the private conduct in question. The precise factual record that would be required would depend on the substantive norm that the State has provided; the critical question is whether the record has sufficient facts for the reviewing body sensibly to determine that the State's substantive regulatory requirements have been achieved. In the typical case in which the State has articulated a criterion of consumer impact, obtaining reliable, timely, and complete economic data would be central to the board's ability to determine if the State's chosen criterion has been satisfied.[16] Timeliness in particular is an ongoing concern; if the private conduct is to remain in place for an extended period of time, then periodic state reviews of that private conduct using

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If a particular state agency is already conducting reviews in some related area, evidence of its approach to these tasks will be particularly relevant.

[15] *Ticor*, 504 U.S. at 637 (citations omitted).

[16] As the *Ticor* Court held, "state officials [must] have undertaken the necessary steps to determine the specifics of the price-fixing or ratesetting scheme." *Id.* at 638.

current economic data are important to ensure that the restraint remains that of the State, and not of the private actors.

Additionally, in assembling an adequate factual record, the procedural value of notice and opportunity to comment is well established. These procedural elements, which have evolved in various contexts through common law, through state and federal constitutional law, and through Administrative Procedure Act rulemakings,[17] are powerful engines for ensuring that relevant facts – especially those facts that might tend to contradict the proponent's contentions – are brought to the state decision-maker's attention.

B. A Written Decision

A second important element the Commission will look to in determining whether there has been active supervision is whether the state board renders its decision in writing. Though not essential, the existence of a written decision is normally the clearest indication that the board (1) genuinely has assessed whether the private conduct satisfies the legislature's stated standards and (2) has directly taken responsibility for that determination. Through a written decision, whether rejecting or (the more critical context) approving particular private conduct that would otherwise violate the federal antitrust laws, the state

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[17] The Administrative Procedure Act defines a rule, in part, as "the whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy." 5 U.S.C. § 551(4). Actions "concerned with the approval of 'tariffs' or rate schedules filed by public utilities and common carriers" are typical examples of rulemaking proceedings. E. Gellhorn & R. Levin, Administrative Law & Process 300 (1997).

board would provide analysis and reasoning, and supporting evidence, that the private conduct furthers the legislature's objectives.[18]

C. Qualitative and Quantitative Compliance with State Policy Objectives

In determining active supervision, the substance of the State's decision is critical. Its fundamental purpose must be to determine that the private conduct meets the state legislature's stated criteria. Federal antitrust law does not seek to impose federal substantive standards on state decision-making, but it does require that the States – in displacing federal law – meet their own stated standards. As the *Ticor* Court explained:

> Our decisions make clear that the purpose of the active supervision inquiry is not to determine whether the State has met some normative standard, such as efficiency, in its regulatory practices. Its purpose is to determine whether the State has exercised sufficient independent judgment and control so that the details of the rates or prices have been established as a product of deliberate state intervention, not simply by agreement among private parties. Much as in causation inquiries, the analysis asks whether the State has played a substantial role in determining the specifics of the economic policy. The question is not how well state regulation works but whether the anticompetitive scheme is the State's

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[18] A record preserved by other means, such as audio or video recording technology, might also suffice, provided that it demonstrated that the board had (1) genuinely assessed the private conduct and (2) taken direct responsibility. Such an audio or video recording, however, will be an adequate substitute for a written opinion only when it provides a sufficiently transparent and decipherable view of the decision-making proceeding to facilitate meaningful public review and comment.

own.[19]

Thus, a decision by a state board that assesses both qualitatively and quantitatively whether the "details of the rates or prices" satisfy the state criteria ensures that it is the State, and not the private parties, that determines the substantive policy. There should be evidence of the steps the State took in analyzing the rates filed and the criterion it used in evaluating those rates. There should also be evidence showing whether the State independently verified the accuracy of financial data submitted and whether it relied on accurate and representative samples of data. There should be evidence that the State has a thorough understanding of the consequences of the private parties' proposed action. Tariffs, for instance, can be complex, and there should be evidence that the State not only has analyzed the actual rates charged but also has analyzed the complex rules that may directly or indirectly impact the rates contained in the tariff.

If the State has chosen to include in its statute a requirement that the regulatory body evaluate the impact of particular conduct on "competition," or "consumer welfare," or some similar criteria, then – to meet the standard for active supervision – there should be evidence that the State has closely and carefully examined the likely impact of the conduct on consumers. Because the central purpose of the federal antitrust laws is also to protect competition and consumer welfare,[20] conduct that would run counter to those federal laws should not be lightly assumed to be consistent with parallel state goals. Especially when, as here, the underlying private conduct alleged is price fixing – which, as the *Ticor* Court noted, is possibly the most "pernicious" antitrust

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[19] *Ticor*, 504 U.S. at 634-35.

[20] Indeed, consideration of consumer impact is at the heart of "[a] national policy" that preserves "the free market and . . . a system of free enterprise without price fixing or cartels." *Ticor*, 504 U.S. at 632.

offense[21] – a careful consideration of the specific monetary impact on consumers is critical to any assessment of an overall impact on consumer welfare. That consideration, to the maximum extent practicable, should include an express quantitative assessment, based on reliable economic data, of the specific likely impact upon consumers.

It bears emphasizing that States need not choose to enact criteria such as promoting "competition" or "consumer welfare" – the central end of federal antitrust law. A State could instead enact a criterion such as maximizing the profits of members of a particular industry. Then, the State's decision would need to assess whether that objective had been met.

On the other hand, if a State does not disavow (either expressly or through the promulgation of wholly contrary regulatory criteria) that consumer welfare is state regulatory policy, it must address consumer welfare in its regulatory analysis. In claiming state action immunity, a Respondent would need to demonstrate that the state board, in evaluating arguably anticompetitive conduct, had carefully considered and expressly quantified the likely impact of that conduct on consumers as a central element of deciding whether to approve that conduct.[22]

In the present case, Indiana has expressly chosen to give significant consideration to, among other state interests, the interests of consumers when determining whether rates are "just and reasonable":

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[21] *Id.* at 639 ("No antitrust offense is more pernicious than price fixing.")

[22] This requirement is based on the principle that the national policy favoring competition "is an essential part of the economic and legal system within which the separate States administer their own laws." *Id.* at 632.

> In the exercise of its power to prescribe just and reasonable rates, fares and charges for the transportation of passengers and household goods . . . the department shall give due consideration, among other factors, to:
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> * * * *
>
> (3) The need, in the public interest, of adequate and efficient transportation service by such carrier at the lowest cost consistent with the furnishing of service.[23]

Thus, to establish active supervision, Respondent would be obligated to show that the State, when approving the rates at issue, performed an analysis and quantification of whether the rates to consumers were "at the lowest cost consistent with the furnishing of service."

VI. Opportunity for Public Comment

The standards of active supervision remain those laid out by the Supreme Court in *Midcal* and its progeny. Those standards have been explained in detail above to further illustrate how they would apply should Respondent seek to modify this proposed Order. Applying these standards, the Commission believes, will further the principles of federalism and accountability enunciated by the Supreme Court, will help clarify for States and private parties the reach of federal antitrust law, and will ultimately redound to the benefit of consumers.

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

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[23] IND. CODE ANN. § 8-2.1-22-21(a) (Michie 2001).

Analysis

By accepting the proposed Order subject to final approval, the Commission anticipates that the competitive issues described in the proposed Complaint will be resolved. The purpose of this analysis is to invite and facilitate public comment concerning the proposed Order. It is not intended to constitute an official interpretation of the Agreement and proposed Order or to modify their terms in any way.

Complaint

IN THE MATTER OF

THE TED WARREN CORPORATION, ET AL.

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

Docket C-4078; File No. 9923298
Complaint, April 29, 2003--Decision, April 29, 2003

This consent order addresses practices used by Respondents The Ted Warren Corporation, The Ken Roberts Institute, Inc., The Ken Roberts Company, and Ken Roberts (as an officer of the corporations) to advertise and sell materials ("Investment Courses") – such as the "TWC Stock Course" for trading stocks; the "KRI Investment Portfolio" for creating an investment portfolio; the "KRC Commodity Course" for trading commodity futures contracts and options; and the "Jim Banks Probate Course" for purchasing real estate and personal property through probate proceedings – through a number of Internet Web sites. The order, among other things, prohibits the respondents from misrepresenting that purchasers of "investment courses" who make profitable "paper trades" are likely to make profitable actual trades when their funds are invested in the market. The order also requires the respondents to disclose, for all investment courses, the warning that futures trading, stock trading, currency trading, and options trading, as applicable, "involves high risks and YOU can LOSE a lot of money." In addition, the order requires the respondents to disclose other warnings with respect to investment courses in particular areas.

Participants

For the Commission: *Dan Salsburg, Stephen Gurwitz, Tara M. Flynn,* and *Eileen Harrington.*

For the Respondents: *Michael R. Pinatelli, Jr.,* and *Neil Goteiner, Farella Braun & Martel, LLP.*

COMPLAINT

The Federal Trade Commission, having reason to believe that The Ted Warren Corporation, The Ken Roberts Institute, Inc., and The Ken Roberts Company, corporations, and Ken Roberts, as an officer of the corporations ("proposed 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.a. Respondent The Ted Warren Corporation ("TWC") is an Oregon corporation with its principal office or place of business at 128 S.W. "I" Street, Grants Pass, OR 97526.

1.b. Respondent The Ken Roberts Institute, Inc., ("KRI") is an Oregon corporation with its principal office or place of business at 333 S.W. 5th Street, Grants Pass, OR 97526.

1.c. Respondent The Ken Roberts Company ("KRC") is an Oregon corporation with its principal office or place of business at 333 S.W. 5th Street, Grants Pass, OR 97526.

1.d. Respondent Ken Roberts is an officer of TWC, KRI, and KRC. As an officer, Ken Roberts, individually or in concert with others, formulates, directs, or controls, the policies, acts, or practices of TWC, KRI, and KRC.

2. Respondents have advertised, offered for sale, sold, and distributed materials ("Investment Courses") that purport to teach purchasers how to profitably trade stocks, commodity futures and options, and real estate. The Investment Courses sold by respondents include the "TWC Stock Course" for trading stocks, the "KRI Investment Portfolio" for creating an investment portfolio, the "KRC Commodity Course" for trading commodity futures contracts and options, and the "Jim Banks Probate Course," pursuant to a marketing agreement with J.G. Banks, Inc., for purchasing real estate and personal property through probate proceedings. Respondents have sold these Investment Courses through the Internet web site www.kenroberts.net and related web sites.

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. In their Internet Advertisements, Respondents have represented by implication, that purchasers of the Investment Courses who make profitable "paper trades" – practice trades in which no funds are actually invested – using techniques described in the Investment Courses during one time period are likely to make profitable actual trades when their funds are invested in the market during a later time period.

5. In truth and in fact, successful "paper trading" during one time period does not predict successful actual trading during a later time period. Therefore, the representation set forth in Paragraph 4 was, and is, false or misleading.

6. In numerous instances, Respondents' Internet advertisements fail to disclose in a clear and conspicuous manner material facts concerning the likelihood that purchasers of the Investment Courses will make substantial profits trading stocks, commodity futures and options, and real estate and the significant risk of loss that accompanies investments in these markets/products. Specifically, the Respondents have failed to disclose that:

   (a) investments made pursuant to the Investment Courses involve high risks and that purchasers can lose a lot of money;

   (b) successful paper trading using techniques contained in the Investment Courses does not mean that purchasers will be able to trade successfully in actual market conditions when their funds are at risk;

   (c) investments in securities can result in the loss of all of the money invested;

   (d) investments involving commodity futures contracts or the granting of options can result in the loss of more than the money invested;

(e) investments in commodities entail significant risk of loss and that according to many experts most individual investors who trade commodity futures or options lose money; and

(f) past results are not necessarily indicative of future results.

The failure to disclose and/or failure to disclose adequately these material facts, in light of the representations made, was, and is, a deceptive practice.

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

THEREFORE, the Federal Trade Commission this twenty-ninth day of April, 2003, has issued this complaint against Respondents.

DECISION AND ORDER

The Federal Trade Commission ("Commission"), having initiated an investigation of certain acts and practices of the respondents named in the caption hereof, and the respondents having been furnished thereafter with a copy of a draft of the 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

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

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

1.Respondent The Ted Warren Corporation ("TWC") is an Oregon corporation with its principal office or place of business at 128 S.W. "I" Street, Grants Pass, OR 97526.

2.Respondent The Ken Roberts Institute, Inc., ("KRI") is an Oregon corporation with its principal office or place of business at 333 S.W. 5th Street, Grants Pass, OR 97526.

3.Respondent The Ken Roberts Company ("KRC") is an Oregon corporation with its principal office or place of business at 333 S.W. 5th Street, Grants Pass, OR 97526.

4.Respondent Ken Roberts is an officer of TWC, KRI, and KRC. As an officer, Ken Roberts, individually or in concert with others, formulates, directs, or controls, the policies, acts, or practices of TWC, KRI, and KRC. His principal places of business are the same as those of TWC, KRI, and KRC.

5.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

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

1. "Clearly and conspicuously" shall mean as follows:

    a. In an advertisement communicated through an electronic medium (such as television, video, radio, and interactive media such as the Internet and online services), the disclosure shall be presented simultaneously in both the audio and visual portions of the advertisement. *Provided, however*, that in any advertisement presented solely through visual or audio means, the disclosure may be made through the same means in which the ad is presented. The audio disclosure shall be delivered in a volume and cadence sufficient for an ordinary consumer to hear and comprehend it. The visual disclosure shall be of a size and shade, and shall appear on the screen for a duration sufficient for an ordinary consumer to read and comprehend it.

    b. In a print advertisement, promotional material, or instructional manual, the disclosure shall be in a type size

and location sufficiently noticeable for an ordinary consumer to read and comprehend it, in print that contrasts with the background against which it appears.

c. On a product label, the disclosure shall be in a type size and location on the principal display panel sufficiently noticeable for an ordinary consumer to read and comprehend it, in print that contrasts with the background against which it appears. The disclosure shall be in understandable language and syntax. Nothing contrary to, inconsistent with, or in mitigation of the disclosure shall be used in any advertisement or on any label.

2. In the case of advertisements disseminated by means of an interactive electronic medium such as the Internet or other online services, "in close proximity" shall mean on the same Web page and proximate to the triggering representation, and not on other portions of the Web site, accessed or displayed through hyperlinks or other means.

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

4. "Investment Course" shall mean any program, service, course, instruction, system, training, manual, computer software, or other materials involving the purchase or sale of stocks, currencies, commodity futures, options, real estate through probate proceedings, or other financial instruments or investments.

5. Unless otherwise specified, "respondents" shall mean: TWC, its successors, assigns, and its officers; KRI, its successors, assigns, and its officers; and KRC, its successors, assigns, and its officers; Ken Roberts, as an officer of TWC, KRI, and KRC; and each of the above's agents, representatives, and employees.

I.

IT IS ORDERED that respondents, directly or through any corporation, subsidiary, division, trade name, or other device, in connection with the advertising, promotion, offering for sale, sale, or distribution of any Investment Course, in or affecting commerce, shall not misrepresent, in any manner, expressly or by implication, that purchasers of Investment Courses who make profitable "paper trades" – practice trades in which no funds are actually invested – are likely to make profitable actual trades when their funds are invested in the market.

II.

IT IS FURTHER ORDERED that respondents, directly or through any corporation, subsidiary, division, trade name, or other device, in connection with the advertising, promotion, offering for sale, sale, or distribution of any Investment Course, in or affecting commerce, shall not make any representation, in any manner, expressly or by implication, about the financial benefits of such Investment Course, unless they disclose, clearly and conspicuously, and in close proximity to the representation,

A. For all Investment Courses: **"WARNING: [FUTURES TRADING, STOCK TRADING, CURRENCY TRADING, OPTIONS TRADING, ETC., as applicable] involves high risks and YOU can LOSE a lot of money.**"

B. For all Investment Courses in which purchasers are advised or instructed to "paper trade" or otherwise practice making investments without investing actual funds: **"Being a successful PAPER TRADER during one time period does <u>not</u> mean that you will make money when you actually invest during a later time period. Market conditions constantly change."**

C. For all Investment Courses involving securities or the purchasing of options: "**When investing in [securities or the purchasing of options, as applicable] you may lose all of the money you invested.**"

D. For all Investment Courses involving futures or the granting of options: **"When investing in (futures or the granting of options, as applicable) you may lose more than the funds you invested."**

E. For all Investment Courses involving futures and commodity options: "**Trading in commodity futures or options involves substantial risk of loss. According to many experts, most individual investors who trade commodity futures or options lose money.**"

F. For all Investment Courses in which claims are made regarding past performance: "**Past Results are not necessarily indicative of Future Results.**"

Provided, the disclosures required by this Part are in addition to, and not in lieu of, any other disclosure that respondents may be required to make, including but not limited to any disclosures required by state or federal law or by a self-regulatory organization. The requirements of this Part are not intended to, and shall not be interpreted to, exempt respondents from making any other disclosures.

III.

IT IS FURTHER ORDERED that respondents shall, for five (5) years after the last date of dissemination of any representation covered by this order, maintain and 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.

IV.

IT IS FURTHER ORDERED that respondents shall deliver a copy of this order to all current and future principals, officers, directors, and managers of TWC, KRI, and KRC, and to all current and future employees, agents, and representatives having responsibilities with respect to the subject matter of this order, and shall secure from each such person a signed and dated statement acknowledging receipt of the order. Respondents shall deliver this order to current personnel within thirty (30) days after the date of service of this order, and to future personnel within thirty (30) days after the person assumes such position or responsibilities. Respondents shall maintain and upon request make available to the Commission for inspection and copying each such signed and dated statement for a period of five (5) years after creation.

V.

IT IS FURTHER ORDERED that respondents shall notify the Commission at least thirty (30) days prior to any change in TWC, KRI, or KRC that may affect compliance obligations arising under this order, including but not limited to the formation of a corporation, the proposed filing of a bankruptcy petition, or a change in the company name or address.

VI.

IT IS FURTHER ORDERED that Ken Roberts, 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 his new business address and telephone number and a description of the nature of the business or employment and his duties and responsibilities.

VII.

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

VIII.

This order will terminate on April 29, 2023, 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.

IX.

All notices required to be sent to the Commission pursuant to this Order shall be sent by certified mail to the Associate Director, Division of Enforcement, Bureau of Consumer Protection, Federal Trade Commission, 600 Pennsylvania Avenue, N.W., Washington, D.C. 20580. Attn.: In the Matter of The Ted Warren Corporation, Inc.

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 The Ted Warren Corporation, The Ken Roberts Institute, Inc., and The Ken Roberts Company, corporations, and Ken Roberts, as an officer of the corporations (together, "respondents").

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

Respondents advertise and sell materials ("Investment Courses") that purport to teach purchasers how to profitably trade stocks, commodity futures and options, and real estate. The Investment Courses sold by respondents include the "TWC Stock Course" for trading stocks, the "KRI Investment Portfolio" for creating an investment portfolio, the "KRC Commodity Course" for trading commodity futures contracts and options, and the "Jim Banks Probate Course," pursuant to a marketing agreement with J.G. Banks, Inc., for purchasing real estate and personal property through probate proceedings. Respondents have sold these Investment Courses through the Internet web site www.kenroberts.net and related web sites.

This matter concerns respondents' allegedly deceptive representation that purchasers of the Investment Courses who make profitable "paper trades" – practice trades in which no funds are actually invested – using techniques described in the Investment Courses during one time period are likely to make profitable actual trades when their funds are invested in the market during a later time period. This matter also concerns the respondents' alleged failure to disclose the risks associated with the trading techniques described in the Investment Courses.

Analysis

The proposed consent order contains provisions designed to prevent respondents from engaging in similar acts and practices in the future.

Part I of the proposed consent order prohibits the respondents from misrepresenting that purchasers of "investment courses" who make profitable "paper trades" are likely to make profitable actual trades when their funds are invested in the market. The term "investment courses" is defined as "any program, service course, instruction, system, training, manual, computer software, or other materials involving the purchase or sale of stocks, currencies, commodity futures, options, real estate through probate proceedings, or other financial instruments or investments."

Part II of the proposed consent order requires the respondents to make the following six risk disclosures:

1. For all Investment Courses: **"WARNING: [FUTURES TRADING, STOCK TRADING, CURRENCY TRADING, OPTIONS TRADING, ETC., as applicable] involves high risks and YOU can LOSE a lot of money."**

2. For all Investment Courses in which purchasers are advised or instructed to "paper trade" or otherwise practice making investments without investing actual funds: **"Being a successful PAPER TRADER during one time period does <u>not</u> mean that you will make money when you actually invest during a later time period. Market conditions constantly change."**

3. For all Investment Courses involving securities or the purchasing of options: "**When investing in [securities or the purchasing of options, as applicable] you may lose all of the money you invested.**"

4. For all Investment Courses involving futures or the granting of options: **"When investing in (futures or the granting of options, as applicable) you may lose <u>more</u> <u>than</u> the funds you invested."**

5. For all Investment Courses involving futures and commodity options: "**Trading in commodity futures or options involves substantial risk of loss. According to many experts, most individual investors who trade commodity futures or options lose money.**

6. For all Investment Courses in which claims are made regarding past performance: "**Past Results are not necessarily indicative of Future Results.**"

Parts III and IV of the proposed order require respondents to keep copies of relevant advertisements and materials substantiating claims made in the advertisements and to provide copies of the order to certain personnel. Part V requires TWC, KRI and KRC to notify the Commission of any changes in their corporate structures that might affect compliance with the order. Part VI requires that the individual respondent notify the Commission of changes in his employment status for a period of ten years. Part VII requires TWC, KRI and KRC to file compliance reports with the Commission. Part VIII provides that the order will terminate after twenty (20) years under certain circumstances.

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

Complaint

IN THE MATTER OF

EDUCATIONAL RESEARCH CENTER OF AMERICA, INC., ET AL.

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

Docket C-4079; File No. 0223249
Complaint, May 6, 2003--Decision, May 6, 2003

This consent order addresses representations by Respondent Educational Research Center of America, Inc. – a student survey company that provides student data to colleges and universities and other entities for recruitment and marketing purposes – and its officer, Respondent Marian Sanjana, and Respondents Student Marketing Group, Inc. – a commercial list broker that supplies names for youth marketing campaigns – and their respective officers, Respondents Marian Sanjana and Jan Stumacher – about how detailed, personal information collected from middle, junior high, and high school students through a survey would be used. The order, among other things, prohibits the respondents – in connection with the collection of personally identifiable information from an individual – from misrepresenting how such information is collected or will be used or disclosed. The order also prohibits the respondents – in connection with the collection of personally identifiable information from students for any "noneducational-related marketing purpose" – from using or disclosing such information unless they disclose (1) the existence and nature of such noneducational-related marketing purpose, (2) the types or categories of any entities to which the information will be disclosed, and (3) that the information used or disclosed is personally identifiable. In addition, the order prohibits the respondents from using or disclosing for any noneducational-related marketing purpose any personally identifiable information that was collected through surveys distributed prior to July 30, 2002. The order also requires the respondents to delete all personally identifiable information collected through surveys from any student who was under the age of thirteen at the time of collection.

Participants

For the Commission: *Laura Mazzarella, Gregory A. Ashe, Jessica L. Rich,* and *Joel Winston.*

For the Respondents: *Patrick McElhinney, Kirkpatrick & Lockhart, LLP.*

COMPLAINT

The Federal Trade Commission, having reason to believe that Educational Research Center of America, Inc. and Student Marketing Group, Inc., corporations; Marian Sanjana, individually and as an officer of Educational Research Center of America, Inc.; and Jan Stumacher, individually and as an officer of Student Marketing Group, Inc. ("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 Educational Research Center of America, Inc. ("ERCA") is a Pennsylvania corporation with its principal office or place of business headquartered in Pittsburgh, Pennsylvania.

2. Respondent Marian Sanjana is an officer and director of ERCA. Individually or in concert with others, she formulates, directs, controls, or participates in the policies, acts, or practices of ERCA, including the acts or practices alleged in this complaint. Her principal office or place of business is the same as that of ERCA.

3. Respondent Student Marketing Group, Inc. ("SMG") is a New York corporation with its principal office or place of business at 300 Merrick Road, Suite 206, Lynbrook, New York 11563. SMG also does business as the College Bound Selection Service.

4. Respondent Jan Stumacher is an officer and director of SMG. Individually or in concert with others, he formulates, directs, controls, or participates in the policies, acts, or practices of SMG, including the acts or practices alleged in this complaint. His principal office or place of business is the same as that of SMG.

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

6. Since at least 1999, respondents have collected personal information from high school and middle and junior high school students through surveys (the "Surveys"). Respondents market and distribute the Surveys to the students' teachers and guidance counselors with the request that they have their students complete the Surveys. Respondents have collected personal information (the "Survey Data") from millions of high school students and from more than 300,000 middle and junior high school students who completed the Surveys.

7. The Surveys collect from high school students personal information including, but not limited to, name, address, gender, grade point average, date of birth, academic and occupational interests, athletic and extracurricular interests, religious affiliation, racial and ethnic background, and the name and grade of a sibling.

8. The Surveys collect from middle and junior high school students personal information including, but not limited to, name, address, gender, grade point average, date of birth, occupational interests, current athletic and extracurricular activities, religious affiliation, racial and ethnic background, the name and grade of a sibling, computer usage, and television viewing habits.

9. Respondents create, market and distribute the Surveys, as well as compile and use Survey Data. Respondent SMG funds the costs to create and distribute the Surveys. Respondent SMG uses Survey Data to create lists of students that it sells to commercial entities for use in marketing. Such entities include, but are not limited to, banks, insurance companies, consumer goods and services providers, and list brokers.

10. Respondents have disseminated or caused to be disseminated marketing materials and privacy statements, including but not limited to the attached Exhibits A through E. These marketing materials and privacy statements contain the following statements regarding the use and disclosure of personal information collected through the Surveys:

A. "ERCA is a non-profit corporation that conducts a voluntary survey of high school students throughout the United States. The survey is designed to help students further their education and professional development by enabling institutions of higher learning to identify potential students and to provide them with information about curricula, extracurricular activities and financial aid programs." (Exhibit A, ERCA Web site home page).

B. "As you may know, ERCA is administering this annual poll to more than 14 million students and will compile the information into a survey report that details the interests and trends among today's students. This information will be used by universities and colleges nationally in their ongoing efforts to communicate and keep in touch with the interests and trends among today's high school students. University financial aid offices and scholarship foundations may also utilize the information to evaluate and make funding available for students' post secondary education." (Exhibit B, cover letter to high school educators accompanying the Survey).

C. "At the beginning of each school year, high school educators nationally have administered an annual survey of senior high school students. In the last 2 years nearly 60,000 teachers and 4,000,000 students participated. The results are tabulated into a survey report that is utilized by colleges and universities in their ongoing efforts to keep in touch with the interests and trends among today's students.

As the trend toward colleges' student recruitment has moved earlier and earlier into the student's high school career, we must begin to administer this poll at the middle and junior high school level in order to provide a complete report. I am writing to request your cooperation in doing so.

ERCA is administering this annual poll to more than 14 million students and will compile the information into a survey report that details the interests and trends among today's students. This information will be used by both public and private universities and colleges. University financial aid offices and scholarship foundations may also utilize the information to make funding available for students' education." (Exhibit C, cover letter to middle and junior high school educators accompanying the Survey).

D&E. "ERCA will utilize this data for student related research and may make it available to Colleges, Universities, Educational Agencies and others wishing to learn about and communicate useful and pertinent information to students." (Exhibit D, Privacy Statement found on high school Survey; Exhibit E, Privacy Statement found on middle and junior high school Survey).

11. Through the means described in Paragraph 10, respondents have represented, expressly or by implication, that information collected from students through the Surveys is shared only with colleges, universities, and other entities providing education-related services.

12. In truth and in fact, information collected from students through the Surveys is shared not only with colleges, universities, and other entities providing education-related services, but also with commercial entities for marketing purposes. Therefore, the representation set forth in Paragraph 11 was, and is, false or misleading.

13. Through the means described in Paragraph 10, respondents have represented, expressly or by implication, that information collected from middle and junior high school students through the Survey is compiled into survey reports that are shared with colleges and universities.

14. In truth and in fact, little if any information collected from middle and junior high school students through the Survey is compiled into survey reports. Rather, the information is primarily shared with commercial entities for marketing purposes. Therefore, the representation set forth in Paragraph 13 was, and is, false or misleading.

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

THEREFORE, the Federal Trade Commission this sixth day of May, 2003, has issued this complaint against respondents.

By the Commission.

EXHIBIT A

Educational Research Center Of America

ERCA

MENU

- Directors Bio
- Scholarship Application
- Scholarship Awardees
- ERCA Survey Report
- Contact Us

ERCA is a non-profit corporation that conducts a voluntary survey of high school students throughout the United States. The survey is designed to help students further their education and professional development by enabling institutions of higher learning to identify potential students and to provide them with information about curricula, extracurricular activities and financial aid programs. The ERCA survey results are available free of charge, on the ERCA web site. ERCA will also provide a minimum of 25 scholarships per year to deserving students. Participation in the survey is not a prerequisite to receiving an ERCA scholarship.

ERCA's Privacy of Student Information Policy

Exhibit A

EXHIBIT B

A Nonprofit Entity

OFFICIAL TEACHER COMMUNICATION
Annual Student Survey

Educational Research Center of America, Inc.
2020 Pennsylvania Ave NW Room 7799 (202) 393-7799
Washington, D.C. 20006 www.Studentresearch.org

Dear Teacher,

As the school year begins, it's time for ERCA's annual survey of high school students. We appreciate the cooperation from nearly 60,000 high school educators, who previously have helped administer our survey. We urge you to join in and be equally cooperative. Previous student surveys have been successful because of the cooperation and help from high school educators just like you. Thank you.

As you may know, ERCA is administering this annual poll to more than 14 million students and will compile the information into a survey report that details the interests and trends among today's students. This information will be used by universities and colleges nationally in their ongoing efforts to communicate and keep in touch with the interests and trends among today's high school students. University financial aid offices and scholarship foundations may also utilize the information to evaluate and make funding available for students' post secondary education.

Your participation is critical to your students' post-secondary future. Upon compilation, a copy of this survey's results will be reserved for your review. Simply fill out and send in the reservation card enclosed with your students' completed forms, and the report will be made available to you immediately upon its completion.

ERCA is a nonprofit organization. This year we have set an aggressive goal of collecting completed surveys from at least 3 million high school students. Please help us meet this goal by distributing the enclosed forms to all of your students, in all of your classes. We encourage you to visit our web site at www.Studentresearch.org to learn more about the results from last year's high school student survey, and the ERCA scholarships that were awarded.

Please ask each of your students to fill out the survey ***clearly and completely*** and then place them in the postage-paid envelope and mail.

Please distribute the survey forms to all seniors and juniors.
Remaining forms should then be distributed to sophomores and freshmen.

We cannot compile our final report and make it available to the colleges and universities that will rely upon it until we receive <u>your</u> response. In order to achieve our goal, we may be writing to you several times to request your cooperation. Please have your students complete the enclosed survey within the next week, so that our nonprofit organization can save the costs associated with contacting you again.

On behalf of the Educational Research Center of America, and the universities and colleges that will rely upon the information collected, I want to thank you in advance for your cooperation.

Sincerely,

Marian Sanjana M.Ed.
Director of Student Research

Exhibit B

P.S. Reserve your ERCA annual survey report. Fill out and return the reservation card enclosed along with your students' completed surveys.

LF

EXHIBIT C

A Nonprofit Entity

OFFICIAL TEACHER COMMUNICATION
Annual Student Survey

Educational Research Center of America, Inc.
2020 Pennsylvania Ave NW Room 7799 (202) 393-7799
Washington, D.C. 20006 www.Studentresearch.org

Dear Teacher,

At the beginning of each school year, high school educators nationally have admininistered an annual survey of senior high school students. In the last 2 years nearly 60,000 teachers and 4,000,000 students participated. The results are tabulated into a survey report that is utilized by colleges and universities in their ongoing efforts to keep in touch with the interests and trends among today's students.

As the trend toward colleges' student recruitment has moved earlier and earlier into the student's high school career, we must begin to administer this poll at the middle and junior high school level in order to provide a complete report. I am writing to request your cooperation in doing so.

ERCA is administering this annual poll to more than 14 million students and will compile the information int a survey report that details the interests and trends among today's students. This information will be used by both public and private universities and colleges. University financial aid offices and scholarship foundations may also utilize the information to evaluate and make funding available for students' education.

Your participation is critical to your students' future. Upon compilation, a copy of this survey's results will be reserved for your review. Simply fill out and send in the reservation card enclosed with your students' completed forms, an the report will be made available to you immediately upon its completion.

ERCA is a nonprofit organization. This year we have set an aggressive goal of collecting completed surveys from at least 1 million middle and junior high school students. Please help us meet this goal by distributing the enclosed forms to all of your students, in all of your classes. Ask them to fill out the survey ***clearly and completely*** and the place them in the postage-paid envelope and mail.

Please distribute the survey forms to every student in each of your classes.

We cannot compile our final report and make it available to the colleges and universities that will rely upo it until we receive <u>your</u> response. We encourage you to visit our web site at www.Studentresearch.org to learn more abou the results from last year's high school student survey, and the ERCA scholarships that were awarded.

We are very concerned with paper (and tree) conservation and not wasting this natural resource needlessl ERCA will utilize over 750,000 pounds of paper in the administration of this survey. Many forms are wasted and trees needlessly killed as some teachers choose not to participate. Please pitch in, and have your class participate, and not let the enclosed forms go to waste. On behalf of the Educational Research Center of America, and the universities and colleges that will rely upon the information collected, I want to thank you in advance for your cooperation.

Sincerely,

Marian Santana M.Ed.
Director of Student Research

Exhibit C

P.S. Reserve your ERCA annual survey report. Fill out and return the reservation card enclosed along with your students' completed surveys.

EXHIBIT D

High School ID # 725996521

STUDENTS - PLEASE ANSWER EACH OF THE BELOW QUESTIONS ACCURATELY AND PRINT CLEARLY. THANK YOU FOR YOUR COOPERATION.

BACKGROUND INFORMATION:

First Name | Mi | Last Name

Permanent Home Address (use two lines if necessary)

Home Address (2nd Line) | Apartment #

City | State | Zip Code | Male | Female

2 0 0 ☐ H.S. Graduation Year

☐☐ / ☐☐ / 1 9 8 ☐ Month / Day / Year Birthdate

A+ A A- B+ B B- C+ C C- or Less

Approximate Grade Point Average:
Scale: A=4; B=3; C=2; D=1; Failing = 0

Permanent E-Mail Contact Address

First Name of one of your brothers or sisters in school.

☐ 4 ☐ 5 ☐ 6 ☐ 7 ☐ 8 ☐ 9 ☐ 10 ☐ 11 ☐ 12 His/Her School Grade

RESEARCH INFORMATION:

1. WHICH TYPE OF COLLEGE WOULD YOU LIKE TO ATTEND? (*DARKEN ONE*)

1. ○ 4 Yr. Private College
2. ○ 4 Yr. State College/University
3. ○ 2 Yr. Private College
4. ○ 2 Yr. Community College
5. ○ Information Technology School
6. ○ Religious or Ethnic College
7. ○ Technical College
8. ○ Trade /Vocational School
9. ○ Will not attend college

2. IF YOU HAD TO PURSUE YOUR EDUCATION AT A RELIGIOUS COLLEGE, WHICH WOULD YOU CHOOSE? (*DARKEN ONE*)

1. ○ Adventist
2. ○ African Methodist Episcopal
3. ○ Assemblies of God
4. ○ Baptist
5. ○ Bible
6. ○ Catholic
7. ○ Church of Christ
8. ○ Church of God
9. ○ Christian Science
10. ○ Disciples of Christ
11. ○ Episcopalian
12. ○ Evangelical
13. ○ Friends/Quakers
14. ○ Islam
15. ○ Judaism
16. ○ LDS / Mormon
17. ○ Lutheran
18. ○ Mennonite
19. ○ Methodist
20. ○ Nazarene
21. ○ Pentecostal
22. ○ Presbyterian
23. ○ Southern Baptist Conv.
24. ○ United Church of Christ
25. ○ Interdenominational
26. ○ None of the above

3. COLLEGES OFFER SPECIALIZED DEGREE PROGRAMS IN SELECTED AREAS. WHICH ONE CATEGORY WOULD YOU LIKE TO ATTEND? (*DARKEN ONE*)

1. ○ Agricultural College
2. ○ Architecture
3. ○ Arts College
4. ○ Bible College
5. ○ Business / Management
6. ○ College of Education
7. ○ Computer / Info Technology
8. ○ Communications
9. ○ Engineering College
10. ○ Fine Arts College
11. ○ Foreign Language
12. ○ Forestry College
13. ○ Health Related
14. ○ Law School
15. ○ Liberal Arts / General Education
16. ○ Mathematics / Statistics
17. ○ Medical School
18. ○ Military School / Academy
19. ○ Music College
20. ○ Nursing College
21. ○ Religion / Theology
22. ○ Sciences
23. ○ Social Studies
24. ○ Undecided/Other

(PLEASE CONTINUE ON OTHER SIDE)

4. PLEASE MARK THE 2 CHOICES BELOW THAT MOST ACCURATELY REPRESENT YOUR CURRENT INTERESTS OR FUTURE CAREER GOALS. (*DARKEN TWO*)

1. ○ Accounting
2. ○ Advertising / Marketing
3. ○ Aviation / Airline Industry
4. ○ Agriculture
5. ○ Animal Science
6. ○ Archeology
7. ○ Art (Painting, Drawing, Sculpture)
8. ○ Athletics / Coaching
9. ○ Automotive / Truck Technology
10. ○ Auto'Body Repair
11. ○ Banking
12. ○ Biological Science
13. ○ Broadcasting / Radio / TV
14. ○ Business / General
15. ○ Business / Management
16. ○ Chemistry
17. ○ Child Care
18. ○ Chiropractic
19. ○ Christian Services / Missionary
20. ○ Commercial Art / Design
21. ○ Computer Aided Drafting
22. ○ Computer / Data Processing
23. ○ Computer Programming/Networking
24. ○ Computer Repair
25. ○ Cosmetology
26. ○ Criminal Justice
27. ○ Culinary Arts
28. ○ Dental Field
29. ○ Drafting / Building Architecture
30. ○ Drama / Acting /Dance
31. ○ Education
32. ○ Electronics
33. ○ Engineering (General, Civil)
34. ○ Engineering (Electrical)
35. ○ Engineering (Electronic Tech.)
36. ○ Engineering (Mechanical)
37. ○ English / Writer
38. ○ Environmental / Conservation
39. ○ Environmental Technology
40. ○ Fashion Design Merchandising
41. ○ Finance
42. ○ Food Service Culinary Arts
43. ○ Foreign Language
44. ○ Forestry
45. ○ Graphic Design
46. ○ History
47. ○ Hospitality
48. ○ Hotel Management
49. ○ Information Technology
50. ○ Insurance
51. ○ Interior Design
52. ○ International Business
53. ○ Internet / E-Commerce Tech
54. ○ Journalism
55. ○ Law Enforcement
56. ○ Lawyer / Paralegal
57. ○ Math
58. ○ Medical Physician
59. ○ Medical/Lab Science Tech.
60. ○ Military Science
61. ○ Ministry / Theology
62. ○ Music (all types)
63. ○ Nursing / Health Care
64. ○ Optometry / Ophthalmology
65. ○ Pharmacist
66. ○ Photography / Studio Film
67. ○ Physical Education
68. ○ Physical Therapy
69. ○ Physics
70. ○ Political Science/Government
71. ○ Psychology / Psychiatry
72. ○ Real Estate
73. ○ Robotics
74. ○ Science
75. ○ Small Engine Technology
76. ○ Social Work
77. ○ Teacher
78. ○ Telecommunications
79. ○ Travel
80. ○ Tourism / Transportation
81. ○ Veterinary Medicine
82. ○ Web Design
83. ○ Wildlife Management
84. ○ Undecided / Other

5. WHICH 2 SPORTS OR ACTIVITIES MIGHT YOU PARTICIPATE IN DURING COLLEGE ? (*DARKEN TWO*)

1. ○ Academic
2. ○ Art
3. ○ Band
4. ○ Baseball
5. ○ Basketball
6. ○ Cheerleading
7. ○ Culinary Arts
8. ○ Dance
9. ○ Debate
10. ○ Diving
11. ○ Equestrian
12. ○ Fishing
13. ○ Football
14. ○ Golf
15. ○ Gymnastics
16. ○ Hockey
17. ○ Lacrosse
18. ○ Language
19. ○ Military / ROTC
20. ○ Music
21. ○ Skiing
22. ○ Soccer
23. ○ Softball
24. ○ Study Abroad
25. ○ Swimming
26. ○ Tennis
27. ○ Theatre / Drama
28. ○ Track
29. ○ Volleyball
30. ○ Weightlifting
31. ○ Wrestling
32. ○ Writing

6. YOU MAY BE ELIGIBLE FOR A GRANT OR A LOAN BASED ON YOUR ETHNIC BACKGROUND. PLEASE SPECIFY ONE:

1. ○ American Indian /Alaskan Native
2. ○ Asian/Asian American/Pacific Island
3. ○ Black/African American/Caribbean
4. ○ Latin American/South or Central American/Hispanic
5. ○ Mexican or Mexican American
6. ○ Puerto Rican
7. ○ White/Caucasian
8. ○ Prefer not to respond

7. IS ANOTHER LANGUAGE SPOKEN IN YOUR HOUSEHOLD OTHER THAN ENGLISH?

1. ○ Yes
2. ○ No

8. WHICH BRANCH OF THE ARMED SERVICES WOULD YOU CONSIDER JOINING TO HELP FINANCE YOUR COLLEGE EDUCATION? (*DARKEN ONE*)

1. ○ Air Force
2. ○ Army
3. ○ Coast Guard
4. ○ Marines
5. ○ National Guard
6. ○ Navy
7. ○ None

9. DO YOU HAVE A COMPUTER IN YOUR HOUSEHOLD? ○ Yes ○ No

10. WHERE DO YOU PLAN ON LIVING DURING YOUR FRESHMAN YEAR OF COLLEGE?

1. ○ At Home
2. ○ On-Campus Housing
3. ○ Off Campus
4. ○ Fraternity/Sorority
5. ○ Undecided

 BB112

All information answered on this questionnaire is offered voluntarily by each student. ERCA will utilize this data for student related research and may make it available to Colleges, Universities, Educational Agencies and others wishing to learn about and communicate useful and pertinent information to students.

EXHIBIT E

Please **PRINT CLEARLY** and answer each question **ACCURATELY.**
Your answers are important to the success of this national survey.

This survey is being conducted by Educational Research Center of America, Inc.
(A Non-Profit Student Research Entity.)

First Name _____ MI

Last Name _____

Home Address (use two lines if necessary) _____

Home Address (2nd Line) _____ Apt # _____

City _____ ☐ Male ☐ Female

State _____ Zip Code _____

Permanent E-Mail Contact Address *(Please Print Very Clearly)* _____

__ __ / __ __ / 19 __ __ ☐5th ☐6th ☐7th ☐8th ☐9th
Month Day Year Your current grade in school
Date of Birth

First Name of your oldest brother or sister that lives in your home _____

☐6th ☐7th ☐8th ☐9th ☐10th ☐11th ☐12th ☐Older than 12th
Current grade in school of the brother/sister above

Approximate Grade Point Average:
☐A+ ☐A ☐A- ☐B+ ☐B ☐B- ☐C+ ☐C ☐C- or less

1. Do you plan to attend college?
1.○ Will probably attend college 2.○ Will not attend college

2. If you were to join a church related organization; Which would you choose? *(Darken ONE)*

1.○ Adventist
2.○ African Methodist Episcopal
3.○ Assemblies of God
4.○ Baptist
5.○ Bible
6.○ Catholic
7.○ Church of Christ
8.○ Church of God
9.○ Christian Science
10.○ Disciples of Christ
11.○ Episcopalian
12.○ Evangelical
13.○ Friends/Quakers
14.○ Islam
15.○ Judaism
16.○ LDS / Mormon
17.○ Lutheran
18.○ Mennonite
19.○ Methodist
20.○ Nazarene
21.○ Pentecostal
22.○ Presbyterian
23.○ Southern Baptist Conv.
24.○ United Church of Christ
25.○ Interdenominational
26.○ None of the above

3. During this school year, which activities listed below, might you actively participate in? *(Darken up to TWO)*

1.○ Academic Honor Society
2.○ Art
3.○ Athletics
4.○ Ballet
5.○ Camping
6.○ Community Service
7.○ Chess Club
8.○ Dance
9.○ Debating Club
10.○ Foreign Exchange
11.○ Journalism
12.○ Music (vocal)
13.○ Music (instrumental)
14.○ Military
15.○ Political
16.○ Poetry
17.○ Photography
18.○ Public Speaking
19.○ Religious youth activities
20.○ Science Club
21.○ Student Government
22.○ Theatre
23.○ Volunteer work
24.○ Woodworking
25.○ Working for pay - part time
26.○ Writing

(Please continue ⇩)

represent your current interests for a future career. (Darken TWO)

1.○ Accounting
2.○ Advertising / Marketing
3.○ Aviation / Airline Industry
4.○ Agriculture
5.○ Animal Science
6.○ Archeology
7.○ Art (Painting, Drawing, Sculpture)
8.○ Athletics / Coaching
9.○ Automotive / Truck Technology
10.○ Auto Body Repair
11.○ Banking
12.○ Biological Science
13.○ Broadcasting / Radio / TV
14.○ Business / General
15.○ Business / Management
16.○ Chemistry
17.○ Child Care
18.○ Chiropractic
19.○ Christian Services / Missionary
20.○ Commercial Art / Design
21.○ Computer Aided Drafting
22.○ Computer / Data Processing
23.○ Computer Programming/Networking
24.○ Computer Repair
25.○ Cosmetology
26.○ Criminal Justice
27.○ Culinary Arts
28.○ Dental Field
29.○ Drafting / Building Architecture
30.○ Drama / Acting /Dance
31.○ Education
32.○ Electronics
33.○ Engineering (General, Civil)
34.○ Engineering (Electrical)
35.○ Engineering (Electronic Tech.)
36.○ Engineering (Mechanical)
37.○ English / Writer
38.○ Environmental / Conservation
39.○ Environmental Technology
40.○ Fashion Design / Merchandising
41.○ Finance
42.○ Food Service Culinary Arts
43.○ Foreign Language
44.○ Forestry
45.○ Graphic Design
46.○ History
47.○ Hospitality
48.○ Hotel Management
49.○ Information Technology
50.○ Insurance
51.○ Interior Design
52.○ International Business
53.○ Internet / E-Commerce Tech.
54.○ Journalism
55.○ Law Enforcement
56.○ Lawyer / Paralegal
57.○ Math
58.○ Medical Physician
59.○ Medical/Lab Science Tech.
60.○ Military Science
61.○ Ministry / Theology
62.○ Music (all types)
63.○ Nursing / Health Care
64.○ Optometry / Ophthalmology
65.○ Pharmacist
66.○ Photography / Studio Film
67.○ Physical Education
68.○ Physical Therapy
69.○ Physics
70.○ Political Science/Government
71.○ Psychology / Psychiatry
72.○ Real Estate
73.○ Robotics
74.○ Science
75.○ Small Engine Technology
76.○ Social Work
77.○ Teacher
78.○ Telecommunications
79.○ Travel
80.○ Tourism / Transportation
81.○ Veterinary Medicine
82.○ Web Design
83.○ Wildlife Management
84.○ Undecided / Other

5. Which 2 SPORTS or ACTIVITIES do you participate in? *(Darken TWO)*

1.○ Academic
2.○ Art
3.○ Band
4.○ Baseball
5.○ Basketball
6.○ Cheerleading
7.○ Culinary Arts
8.○ Dance
9.○ Debate
10.○ Diving
11.○ Equestrian
12.○ Fishing
13.○ Football
14.○ Golf
15.○ Gymnastics
16.○ Hockey
17.○ Lacrosse
18.○ Language
19.○ Military / ROTC
20.○ Music
21.○ Skiing
22.○ Soccer
23.○ Softball
24.○ Study Abroad
25.○ Swimming
26.○ Tennis
27.○ Theatre / Drama
28.○ Track
29.○ Volleyball
30.○ Weightlifting
31.○ Wrestling
32.○ Writing

6. Please tell us your ethnic background by checking ONE below:

1.○ American Indian
2.○ Asian
3.○ African American
4.○ Hispanic
5.○ Mexican American
6.○ Puerto Rican
7.○ White/Caucasian
8.○ Prefer not to respond

7. Is another language spoken in your home other than English?
1.○ Yes 2.○ No

8. Do you have a computer in your household? ○ Yes ○ No

9. How many hours do you spend on the computer each day?
1.○ Less than 1
2.○ 1 - 3 hours
3.○ 3 - 4 hours
4.○ More than 4 hours

10. How many hours of television do you watch per day?
1.○ Less than 1
2.○ 1 - 3 hours
3.○ 3 - 4 hours
4.○ More than 4 hours

All information answered on this questionnaire is offered voluntarily by each student. ERCA will utilize this data for student related research and may make it available to Colleges, Universities, Educational Agencies and others wishing to learn about and communicate useful and pertinent information to students.

Exhibit E

DECISION AND ORDER

The Federal Trade Commission having initiated an investigation of certain acts and practices of the Respondents named in the caption hereof, and the Respondents having been furnished thereafter with a copy of a draft Complaint that the Bureau of Consumer Protection proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge the Respondents with violation of the Federal Trade Commission Act, 15 U.S.C. § 45 et seq;

The Respondents, their attorney, and counsel for the Commission having thereafter executed an Agreement Containing Consent Order ("Consent Agreement"), an admission by the Respondents of all the jurisdictional facts set forth in the aforesaid draft 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 has 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 Consent Agreement on the public record for a period of thirty (30) days, and having duly considered the comments filed thereafter by interested persons pursuant to Section 2.34 of its Rules, now in further conformity with the procedure described in Section 2.34 of its Rules, the Commission hereby issues its Complaint, makes the following jurisdictional findings and enters the following Order:

1. Respondent Educational Research Center of America, Inc. ("ERCA") is a Pennsylvania corporation with its principal office or place of business headquartered in Pittsburgh, Pennsylvania.

2. Respondent Marian Sanjana is an officer of ERCA. Her principal office or place of business is the same as that of ERCA.

3. Respondent Student Marketing Group, Inc. ("SMG") is a New York corporation with its principal office or place of business at 300 Merrick Road, Suite 206, Lynbrook, New York 11563.

4. Respondent Jan Stumacher is an officer and director of SMG. His principal office or place of business is the same as that of SMG.

5. 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. "Personally identifiable information" or "personal information" shall mean individually identifiable information from or about an individual including, but not limited to: (a) a first and last name; (b) a home or other physical address, including street name and name of city or town; (c) an email address or other online contact information, such as an instant messaging user identifier or a screen name that reveals an individual's email address; (d) a telephone number; (e) a Social Security Number; (f) an Internet Protocol ("IP") address or host name that identifies an individual; (g) a persistent identifier, such as a customer number held in a "cookie" or processor serial number, that is combined with other available data that identifies an individual; or (h) any information, including, but not limited to, grade point average, date of birth, academic or occupational interests, athletic or extracurricular interests, racial or ethnic background, or religious affiliation, that is combined with any of (a) through (g) above.

2. "Noneducational-related marketing purpose" shall mean for the purpose of marketing products or services, or selling personally identifiable information from or about an individual for use in marketing products or services to individuals. Provided, however, that "noneducational-related marketing purpose" does not apply to the collection, disclosure or use of personally identifiable information from or about a student for the exclusive purpose of developing, evaluating, or providing to students or educational institutions (a) college or postsecondary education recruitment, or military recruitment; (b) book clubs, magazines, and programs providing access to low-cost literary products; (c) curriculum and instructional materials used by elementary schools and secondary schools; (d) student recognition programs; or (e) any other activity expressly determined under 20 U.S.C. §1232h(c)(4)(A) or its implementing regulations to be an "educational product or service." Provided further that, for purposes of determining whether any specific activity is covered by subsections (a) through (e) above, or should be deemed to be an "educational product or service," any official written interpretation disseminated to the public by the Department of Education regarding such activity shall be controlling.

3. "Survey" shall mean any survey that is distributed or caused to be distributed by Respondents under the name "Educational Research Center of America."

4. "Student" shall mean any elementary school or secondary school student.

5. Unless otherwise specified, "Respondents" shall mean ERCA and SMG, and each of the above's successors and assigns and their officers; Marian Sanjana and Jan Stumacher, individually and as officers of the above corporations; and each of the above's agents, representatives, and employees.

6. "Clearly and conspicuously" shall mean as follows:

A. In print communications, the message 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.

B. In communications disseminated orally, the message shall be delivered in a volume and cadence sufficient for an ordinary consumer to hear and comprehend it.

C. In communications made through an electronic medium (such as television, video, radio, and interactive media such as the Internet, online services and software), the message shall be presented simultaneously in both the audio and visual portions of the communication. In any communication presented solely through visual or audio means, the message may be made through the same means in which the communication is presented. Any audio message shall be delivered in a volume and cadence sufficient for an ordinary consumer to hear and comprehend it. Any visual message shall be of a size and shade, with a degree of contrast to the background against which it appears, and shall appear on the screen for a duration and in a location, sufficiently noticeable for an ordinary consumer to read and comprehend it.

The message shall be in understandable language and syntax. Nothing contrary to, inconsistent with, or in mitigation of the message shall be used in any communication.

7. "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, in connection with the collection of personally identifiable information from an individual, shall not misrepresent in any manner, expressly or by

implication, how personally identifiable information is collected or will be used or disclosed.

II.

IT IS FURTHER ORDERED that Respondents, in connection with the collection of personally identifiable information from students, shall not use or disclose such information for any noneducational-related marketing purpose, unless they disclose clearly and conspicuously (a) the existence and nature of such noneducational-related marketing purpose; (b) the types or categories of any entities to which the information will be disclosed; and (c) that the information used or disclosed is personally identifiable. Such disclosures shall be made in the following locations:

(1) in all privacy statements published by Respondents that refer or relate to the collection of personally identifiable information from students;

(2) in all communications to students, parents, educators, or educational institutions that refer or relate to the collection of personally identifiable information from students; and

(3) in all questionnaires, survey instruments, or other documents through which Respondents collect personally identifiable information from students.

Provided that the disclosures required by this Part II are in addition to, and not in lieu of, any other disclosures that Respondents may be required to make, including but not limited to any disclosure required by state or federal law.

III.

IT IS FURTHER ORDERED that Respondents shall not use or disclose for any noneducational-related marketing purpose any personally identifiable information collected through surveys

distributed prior to July 30, 2002, from any student who was thirteen years or older at the time of collection. For purposes of this Part only, "noneducational-related marketing purpose" shall exclude use or disclosure for the purpose of (a) job recruitment, (b) the provision of student loans, or (c) the provision of standardized test preparation products or services.

IV.

IT IS FURTHER ORDERED that Respondents shall delete all personally identifiable information collected through surveys distributed prior to the date of service of this order from any student who was under the age of thirteen at the time of collection.

V.

IT IS FURTHER ORDERED that Respondents ERCA and SMG, and their successors and assigns, and Respondents Marian Sanjana and Jan Stumacher shall, for a period of five (5) years after the date of issuance of this order, maintain and upon request make available to the Federal Trade Commission for inspection and copying a print or electronic copy of all documents demonstrating their compliance with the terms and provisions of this order, including, but not limited to:

A. a sample copy of each different survey form, privacy statement, or communication relating to the collection of personally identifiable information to students, parents, educators, or educational institutions containing representations about how personally identifiable information will be used or disclosed. Each Web page copy shall be dated and contain the full URL of the Web page where the material was posted online. Electronic copies shall include all text and graphics files, audio scripts, and other computer files used in presenting the information on the Web;

B. a sample copy of each different document containing the disclosure required by Part II of this order; and

C. all invoices, communications, and records relating to the use or disclosure of personally identifiable information for any noneducational-related marketing purpose.

VI.

IT IS FURTHER ORDERED that Respondents ERCA and SMG, and their successors and assigns, and Respondents Marian Sanjana and Jan Stumacher 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. 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.

VII.

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

Enforcement, Bureau of Consumer Protection, Federal Trade Commission, Washington, D.C. 20580.

VIII.

IT IS FURTHER ORDERED that Respondents Marian Sanjana and Jan Stumacher, for a period of five (5) years after the date of issuance of this order, shall notify the Commission of the discontinuance of their current business or employment, or of their affiliation with any new business or employment involving the collection of personally identifiable information for use in marketing products or services. 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.

IX.

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

X.

This order will terminate on May 6, 2023, 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 a 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

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 Educational Research Center of America, Inc., ("ERCA") and its officer Marian Sanjana ("Sanjana"), and Student Marketing Group, Inc., ("SMG") and its officer Jan Stumacher ("Stumacher"). ERCA is a student survey company that provides student data, through SMG, to colleges and universities and other entities for recruitment and marketing purposes. SMG is a commercial list broker that supplies names for youth marketing campaigns.

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 and take other appropriate action or make final the agreement's proposed order.

This matter concerns representations about how detailed, personal information collected from middle, junior high, and high school students through a survey would be used. The proposed respondents distribute a survey to middle, junior high, and high school teachers and guidance counselors with the request that they have their students complete the survey. The survey collects from students personal information including name, address, age, race, religious affiliation, and academic, career, and athletic interests. ERCA compiles personal information collected from high school students into a survey report that it provides to colleges and universities. It also provides personal information collected through the survey to SMG. SMG provides the survey information to colleges and universities, and also creates lists of students that it provides to commercial entities for use in marketing. Such entities include, but are not limited to, banks,

insurance companies, consumer goods and services providers, and list brokers.

The Commission's complaint charges that the proposed respondents falsely represented that information collected from students through the survey is shared only with colleges, universities, and other entities providing education-related services when, in fact, such information is also shared with commercial entities for marketing purposes. The complaint also alleges that the proposed respondents falsely represented that information collected from middle and junior high school students through the survey is compiled into survey reports when, in fact, little if any such information is compiled into survey reports; instead it is primarily shared with commercial entities for marketing purposes.

Part I of the consent order prohibits the proposed respondents, in connection with the collection of personally identifiable information from an individual, from misrepresenting how such information is collected or will be used or disclosed. Part II of the order prohibits the proposed respondents, in connection with the collection of personally identifiable information from students for any "noneducational-related marketing purpose," from using or disclosing such information unless they disclose (1) the existence and nature of such noneducational-related marketing purpose, (2) the types or categories of any entities to which the information will be disclosed, and (3) that the information used or disclosed is personally identifiable.

The proposed order defines "noneducational-related marketing purpose" to mean for the purpose of marketing products or services, or selling personally identifiable information from or about an individual for use in marketing products or services to individuals. The definition specifically excludes the use of personal information in connection with certain activities determined to be "educational products or services" under the No Child Left Behind Act of 2001, namely (a) college or postsecondary education recruitment, or military recruitment;

(b) book clubs, magazines, and programs providing access to low-cost literary products; (c) curriculum and instructional materials used by elementary schools and secondary schools; (d) student recognition programs; or (e) any other activity expressly determined under the No Child Left Behind Act or its implementing regulations to be an "educational product or service." In addition, the proposed order provides that when determining whether any specific activity is an "educational product or service," any official, written, publicly-disseminated interpretation by the Department of Education regarding such activity shall be controlling.

Part III of the order prohibits the proposed respondents from using or disclosing for any noneducational-related marketing purpose any personally identifiable information that was collected through surveys distributed prior to July 30, 2002. In addition to the educational purposes excepted from the definition of "noneducational-related marketing purpose," Part III also permits the proposed respondents to use such information for the purpose of (a) job recruitment, (b) the provision of student loans, or (c) the provision of standardized test preparation services.

To address respondents' collection of information from younger children, Part IV of the order requires the proposed respondents to delete all personally identifiable information collected through surveys from any student who was under the age of thirteen at the time of collection.

The remainder of the proposed order contains standard requirements that the proposed respondents maintain copies of privacy statements and other documents relating to the collection, use or disclosure of personally identifiable information; distribute copies of the order to certain company officials and employees; notify the Commission of any change in the corporation that may affect compliance obligations under the order; and file one or more reports detailing their compliance with the order. Part X of the proposed order is a provision whereby the order, absent certain circumstances, terminates twenty years from the date of issuance.

Analysis

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

This proposed order, if issued in final form, will resolve the claims alleged in the complaint against the named respondents. It is not the Commission's intent that acceptance of this consent agreement and issuance of a final decision and order will release any claims against any unnamed persons or entities associated with the conduct described in the complaint.

Complaint

IN THE MATTER OF

PFIZER INC., ET AL.

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

Docket C-4075; File No. 0210192
Complaint, April 11, 2003--Decision, May 27, 2003

This consent order addresses the acquisition by Respondent Pfizer Inc. of Respondent Pharmacia Corporation. The order, among other things, would require the respondents to divest (1) Pfizer's worldwide rights and assets relating to its overactive bladder drug, darifenacin, to Novartis AG; (2) Pfizer's worldwide rights and assets relating to its combination hormone replacement therapy, femhrt, to Galen Holdings plc; (3) Pharmacia's rights and assets in the field of sexual dysfunction relating to its D2 dopamine receptor agonist, PNU-142,774, to Neurocrine Biosciences, Inc.; (4) Pfizer's U.S. rights and assets relating to its lactating cow and dry cow mastitis products to Schering-Plough Corporation; (5) Pharmacia's worldwide rights and assets relating to Cortaid, its over-the-counter hydrocortisone-based cream, to Johnson & Johnson; (6) Pfizer's U.S. and Puerto Rican rights and assets relating to its over-the-counter motion sickness product, Bonine, to Insight Pharmaceuticals Corporation; and (7) Pfizer's worldwide rights and assets relating to its Halls over-the-counter cough drop business to Cadbury Schweppes plc. The order also requires the respondents to return to Nastech Pharmaceutical Company, Inc. all rights to make, use, and sell Nastech's intranasal apomorphine product for the treatment of erectile dysfunction. In addition, the order requires the respondents to renegotiate a 1999 license and supply agreement between Pharmacia and Novartis for deramaxx – Novartis's canine arthritis drug – to enable Novartis to operate as an independent competitor, rather than a partner, of the merged entity.

Participants

For the Commission: *Elizabeth A. Jex, Christina R. Perez, Yolanda R. Gruendel, Michael R. Barnett, Jeffrey H. Perry, Kari A. Wallace, Stephanie A. Parks, David von Nirschl, Ramon A. Gras, Michele M. Cerullo, Sylvia M. Brooks, Sara S. Brown, Karina B. Lubell, Emily R. Pitlick, Michael Christini, Kristen M. Gorzelany, Ann Malester, Elizabeth A. Piotrowski, Ron Levy, Charissa P. Wellford,* and *Mary T. Coleman.*

For the Respondents: *Michael N. Sohn* and *William J. Baer, Arnold & Porter, Scott A. Stempel, Morgan Lewis & Bockius LLP.*

COMPLAINT

Pursuant to 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 Pfizer Inc. ("Pfizer"), a corporation subject to the jurisdiction of the Commission, has agreed to merge with Respondent Pharmacia Corporation ("Pharmacia"), 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. "Asset Purchase Agreement" means the Agreement and Plan of Merger by and among Pfizer, Pilsner Acquisition Sub Corp., and Pharmacia, dated July 13, 2002.

2. "Canine arthritis" means a painful, inflammatory condition of dogs.

3. "Combination HRT" means any product indicated for the treatment of menopausal symptoms that contains fixed dosages of both estrogen and progestin.

4. "Commission" means Federal Trade Commission.

5. "Dry Cow Mastitis" means an infection of the udder affecting dairy cows during periods when those cows are not producing milk.

6. "Erectile Dysfunction" or "ED" means a condition which is diagnosed by the consistent inability to achieve and maintain a penile erection adequate to sustain sexual intercourse.

7. "Extended Release OAB Products" means once-a-day and twice-a-day formulations of products to treat overactive bladder.

8. "FDA" means the United States Food and Drug Administration.

9. "HRT" means Hormone Replacement Therapy.

10. "Johnson & Johnson" means Johnson & Johnson, a corporation organized, existing and doing business under and by virtue of the laws of the State of New Jersey, with its office and principal place of business located at 1 Johnson & Johnson Plaza, New Brunswick, New Jersey 08933.

11. "Lactating Cow Mastitis" means an infection of the udder affecting dairy cows when those cows are producing milk.

12. "Novartis" means Novartis AG, a corporation organized, existing and doing business under and by virtue of the laws of the Swiss Confederation, with its registered office located at Lichtstrasse 35, 4056, Basel, Switzerland.

13. "Overactive Bladder" or "OAB" means a symptomatic condition that includes urinary frequency, urinary urgency, and urinary incontinence.

14. "Respondents" means Pfizer and Pharmacia individually and collectively.

15. "Wyeth" means Wyeth, 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 5 Giralda Farms, Madison, New Jersey 07940.

II. RESPONDENTS

16. 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, manufacture and sale of human pharmaceutical products, animal pharmaceutical products, and over-the-counter products.

17. Respondent Pharmacia 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 Route 206 North, Peapack, New Jersey 07977. Pharmacia, among other things, is engaged in the research, development, manufacture, and sale of human pharmaceutical products, animal pharmaceutical products, and over-the-counter products.

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

III. THE PROPOSED ACQUISITION

19. On July 13, 2002, Pfizer and Pharmacia entered into an Asset Purchase Agreement whereby Pfizer agreed to acquire, through its wholly-owned subsidiary Pilsner Acquisition Sub Corp., 100 percent of the issued and outstanding shares of Pharmacia ("Acquisition"). Pfizer intends to pay consideration such that each issued and outstanding share of Pharmacia common stock will be converted into the right to receive 1.4 shares of Pfizer common stock. The parties estimate the aggregate value of the transaction to be approximately $60 billion. After the

completion of the transaction, Pfizer will be the surviving corporate entity.

IV. THE RELEVANT MARKETS

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

a. the research and development, and the manufacture and sale, of extended release prescription drugs for the treatment of OAB;

b. the research, development, manufacture, and sale of prescription combination HRT;

c. the research and development, and the manufacture and sale, of prescription drugs for the treatment of ED;

d. the research, development, manufacture, and sale of prescription drugs for the treatment of canine arthritis;

e. the research, development, manufacture, and sale of prescription drugs for the treatment of dry cow mastitis;

f. the research, development, manufacture, and sale of prescription drugs for the treatment of lactating cow mastitis;

g. the manufacture and sale of over-the-counter hydrocortisone creams and ointments;

h. the manufacture and sale of over-the-counter motion sickness medication; and

i. the manufacture and sale of over-the counter cough drops.

21. 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 lines of commerce.

V. THE STRUCTURE OF THE MARKETS

22. The markets for the research and development, and for the manufacture and sale, of extended release prescription drugs for OAB are highly concentrated. Currently, Pharmacia and Johnson & Johnson are the only companies that market extended release OAB products in the United States. Pfizer is currently seeking FDA approval for its own extended release OAB product, darifenacin. Pfizer is one of only two companies that are well-positioned to enter this market and compete successfully within the next two years.

23. The market for the research, development, manufacture, and sale of prescription combination HRT products is highly concentrated, with a pre-acquisition Herfindahl-Hirschman Index ("HHI") of 5906 points. Pfizer and Pharmacia are two of the three leading suppliers of combination HRT products in the United States, with their products femhrt and Activella, respectively. The Acquisition would leave only two significant players in this market, leaving Pfizer and Wyeth with almost 94% of total prescriptions. The post-acquisition HHI would be 6066 points, representing a 160 point increase in the HHI.

24. Pfizer dominates the markets for the research and development, and for the manufacture and sale, of prescription drugs for ED. With its well-known product, Viagra, Pfizer currently occupies a monopoly position in the ED market, with a share of over 95%. Pharmacia is the only significant potential competitor to Pfizer for many years with intranasal apomorphine and D2 dopamine receptor agonist (PNU-142,774) products, each in early clinical development.

25. Pfizer dominates the market for the research, development, manufacture, and sale of prescription drugs for the treatment of

canine arthritis, with its Rimadyl product that has a 70% share. There are only two other companies that sell prescription drugs for the treatment of canine arthritis: Wyeth, with its EtoGesic product that has a 30% market share; and Novartis, with its Deramaxx product that was launched in February 2003. However, Novartis markets Deramaxx under a licensing agreement with Pharmacia, which currently manufactures Deramaxx and supplies it to Novartis. Thus, after the Acquisition, Pfizer would control both the leading product in this market, Rimadyl, and the manufacturing and supply of Deramaxx for its chief competitor. Furthermore, under the existing licensing agreement between Novartis and Pharmacia, Pfizer would have access to Novartis's competitively sensitive information concerning Deramaxx pricing, forecasts, and marketing strategy.

26. The market for dry cow mastitis drugs is highly concentrated with a pre-acquisition HHI of 4120 points. There are only three significant competitors in this market: (1) Pharmacia; (2) Pfizer; and (3) Wyeth. Pharmacia and Wyeth currently account for 90% of this market. Pfizer is an important third competitor with a full range of mastitis products, including Orbenin DC for the treatment of dry cow mastitis. This acquisition would increase Pfizer's market share to 55%, and it would increase concentration by 672 points, resulting in a post-acquisition HHI of 4792 points. The fringe competitors that offer generic versions of older drugs for dry cow mastitis collectively account for less than 3% of the market.

27. The market for lactating cow mastitis drugs is also highly concentrated with a pre-acquisition HHI of 3800 points. As in the dry cow mastitis market, there are only three significant competitors in the lactating cow mastitis market: (1) Pharmacia; (2) Pfizer; and (3) Wyeth. Pharmacia and Wyeth currently account for 85% of this market. Pfizer is the only other significant competitor with a full range of mastitis products, including Dariclox and Amoximast for the treatment of lactating cow mastitis. This acquisition would increase Pfizer's market share to 50%, and it would increase concentration by 912 points,

resulting in a post-acquisition HHI of 4712 points. The fringe competitors that offer generic versions of older drugs for lactating cow mastitis collectively account for approximately 3% of the market.

28. Pfizer and Pharmacia are the two leading U.S. suppliers of branded over-the-counter hydrocortisone creams and ointments. Pfizer sells Cortizone and Pharmacia sells Cortaid. After the Acquisition, the combined company would account for 55% of the annual sales of over-the-counter hydrocortisone creams and ointments in the United States. The post-acquisition HHI would be 4,469 points, representing a 1,428 point increase in the HHI. Although over-the-counter hydrocortisone creams and ointments sold under private label brands also account for a significant share of the market, those products have limited influence on the pricing of the over-the-counter hydrocortisone creams and ointments sold by Pfizer and Pharmacia.

29. The market for the manufacture and sale of over-the-counter motion sickness medication is highly concentrated. Pfizer and Pharmacia are the two leading suppliers of over-the-counter motion sickness medication in the United States, with a combined market share of approximately 77%. Pfizer sells Bonine and Pharmacia sells Dramamine. The post-acquisition HHI would be 6,089 points, representing a 2,041 point increase in the HHI.

30. The market for the manufacture and sale of over-the-counter cough drops is highly concentrated as measured by the HHI. Pfizer and Pharmacia are the two leading suppliers of branded over-the-counter cough drops, and the only two such firms with more than 5% of the market. Pfizer sells Halls brand cough drops and Pharmacia sells Ludens. Pfizer and Pharmacia combined would account for approximately 64% of the market. The post-acquisition HHI would be 4,775 points, an increase of 1,130 points above the pre-acquisition HHI.

VI. ENTRY CONDITIONS

31. Entry into any of the relevant lines of commerce described in Paragraphs 20(a) through (f) would not be timely, likely, or sufficient in its magnitude, character, and scope to deter or counteract the anticompetitive effects of the Acquisition. Developing and obtaining FDA approval for even the simplest product takes at least two years and significantly longer for more complex products. Additionally, patents and other intellectual property create significant barriers to entry into these markets.

32. Entry into any of the relevant lines of commerce described in Paragraphs 20(g) through (i) would be unlikely and not timely to deter or counteract the effects of the Acquisition. Entry into these markets would require the investment of extremely high sunk costs, which would be difficult to justify given the limited sales opportunities in the affected markets. Even if a new entrant were willing to take on such investments, it would also face the difficult task of convincing retailers to take limited and valuable shelf space away from established brands. As a result, new entry into any of these markets sufficient to achieve a significant market impact within two years is unlikely.

VII. EFFECTS OF THE ACQUISITION

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

a. by eliminating actual, direct, and substantial competition between Pfizer and Pharmacia in the market for the research and development of extended release prescription drugs for the treatment of OAB, thereby reducing innovation in this market; and by eliminating potential competition between Pfizer and Pharmacia in the market for the manufacture and sale of extended

release prescription drugs for the treatment of OAB, thereby: (a) increasing the likelihood that the combined entity would delay or forego the launch of Pfizer's darifenacin product, and (b) increasing the likelihood that the combined entity would delay or eliminate the additional price competition that would have resulted from Pfizer's entry into the market for extended release OAB products;

b. by eliminating actual, direct, and substantial competition between Pfizer and Pharmacia, and lessening competition, in the market for the research, development, manufacture, and sale of prescription combination HRT products, thereby: (a) increasing the likelihood of coordinated interaction, and (b) increasing the likelihood that customers for prescription combination HRT products would be forced to pay higher prices;

c. by eliminating actual, direct, and substantial competition between Pfizer and Pharmacia in the market for the research and development of prescription drugs for the treatment of ED, thereby reducing innovation in this market; and by eliminating potential competition between Pfizer and Pharmacia in the market for the manufacture and sale of prescription drugs for the treatment of ED, thereby: (a) increasing the likelihood that the combined entity would delay or forego the launch of Pharmacia's intranasal apomorphine (IN APO) and D2 dopamine receptor agonist (PNU-142, 774) products, and (b) increasing the likelihood that the combined entity would delay or eliminate the additional price competition that would have resulted from Pharmacia's entry into the market for ED products;

d. by eliminating actual, direct, and substantial competition between Pfizer and Pharmacia, and lessening competition, in the market for the research, development, manufacture, and sale of prescription drugs for the

treatment of canine arthritis, thereby: (a) increasing the likelihood of a unilateral exercise of market power, (b) increasing the likelihood of coordinated interaction, (c) increasing the likelihood that customers for prescription drugs for the treatment of canine arthritis would be forced to pay higher prices, and (d) reducing innovation in the market;

e. by eliminating actual, direct, and substantial competition between Pfizer and Pharmacia, and lessening competition, in the market for the research, development, manufacture, and sale of prescription drugs for the treatment of dry cow mastitis, thereby: (a) increasing the likelihood of coordinated interaction, and (b) increasing the likelihood that customers for prescription drugs for the treatment of dry cow mastitis would be forced to pay higher prices;

f. by eliminating actual, direct, and substantial competition between Pfizer and Pharmacia, and lessening competition, in the market for the research, development, manufacture, and sale of prescription drugs for the treatment of lactating cow mastitis, thereby: (a) increasing the likelihood of coordinated interaction, and (b) increasing the likelihood that customers for prescription drugs for the treatment of lactating cow mastitis would be forced to pay higher prices;

g. by eliminating actual, direct, and substantial competition between Pfizer and Pharmacia, and lessening competition, in the market for the manufacture and sale of over-the-counter hydrocortisone creams and ointments, thereby: (a) increasing the likelihood of a unilateral exercise of market power, and (b) increasing the likelihood that customers for over-the-counter hydrocortisone creams and ointments would be forced to pay higher prices;

h. by eliminating actual, direct, and substantial competition between Pfizer and Pharmacia, and lessening competition, in the market for the manufacture and sale of over-the-counter motion sickness medication, thereby: (a) increasing the likelihood of a unilateral exercise of market power, and (b) increasing the likelihood that customers for over-the-counter motion sickness medication would be forced to pay higher prices; and

i. by eliminating actual, direct, and substantial competition between Pfizer and Pharmacia, and lessening competition, in the market for the manufacture and sale of over-the-counter cough drops, thereby: (a) increasing the likelihood of a unilateral exercise of market power, and (b) increasing the likelihood that customers for over-the-counter cough drops would be forced to pay higher prices.

VIII. VIOLATIONS CHARGED

34. The Acquisition Agreement described in Paragraph 19 constitutes a violation of Section 5 of the FTC Act, as amended, 15 U.S.C. § 45.

35. The Acquisition described in Paragraph 19, 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 eleventh day of April, 2003, issues its Complaint against said Respondents.

By the Commission.

DECISION AND ORDER

The Federal Trade Commission ("Commission") having initiated an investigation of the proposed merger of Respondent Pfizer Inc. ("Pfizer") and Respondent Pharmacia Corporation ("Pharmacia"), hereinafter referred to as "Respondents," and Respondents having been furnished thereafter with a copy of a draft of a 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 7 of the Clayton Act, as amended, 15 U.S.C. § 18, and Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45; and

Respondents, their attorneys, and counsel for the Commission having thereafter executed an Agreement Containing Consent Orders ("Consent Agreement"), containing an admission by Respondents of all the jurisdictional facts set forth in the aforesaid draft of a 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 Decision and Order ("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 offices and principal place of business located at 235 East 42nd Street, New York, New York 10017.

2. Respondent Pharmacia Corporation is 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 100 Route 206 North, Peapack, New Jersey 07977.

3. The Federal Trade Commission has jurisdiction over 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. (including, but not limited to, Warner-Lambert Company LLC), and the respective directors, officers, employees, agents, representatives, successors, and assigns of each.

B. "Pharmacia" means Pharmacia Corporation, its directors, officers, employees, agents, representatives, predecessors, successors, and assigns; its joint ventures, subsidiaries, divisions, groups and affiliates controlled by Pharmacia Corporation (including, but not limited to, G.D. Searle LLC, and Pharmacia & Upjohn Company), and the respective directors, officers, employees, agents, representatives, successors, and assigns of each.

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

D. "Merger" means the merger contemplated by the "Agreement and Plan of Merger" dated as of July 13, 2002, among Pfizer, Pilsner Acquisition Sub Corp. ("Pilsner") and Pharmacia ("Merger Agreement") pursuant to which Pilsner, a wholly-owned subsidiary of Pfizer formed for the purpose of the merger, will merge with and into Pharmacia. As a result, Pharmacia will survive the merger and become a wholly-owned subsidiary of Pfizer upon completion of the merger.

E. "Commission" means the Federal Trade Commission.

F. "Cadbury" means Cadbury Schweppes plc, a corporation organized, existing and doing business under and by virtue of the laws of England and Wales, with its offices and principal place of business located at 25 Berkeley Square, London W1J 6HB.

G. "Galen" means Galen (Chemicals) Limited, a corporation organized, existing and doing business under and by virtue of the laws of the Republic of Ireland, with its offices and principal place of business located at Seagoe Industrial Estate, Craigavon, BT635UA, United Kingdom. The term "Galen" includes Galen Holding plc, a public limited company organized under the laws of Northern Ireland.

H. "Insight" means Insight Pharmaceuticals 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 90 Montgomery Street, Suite 712, San Francisco, California 94105.

I. "J&J" means Johnson & Johnson Consumer Companies Inc., a corporation organized, existing and doing business under and by virtue of the laws of the State of New Jersey, with its offices and principal place of business located at 199 Grandview Road, Skillman, New Jersey 08558.

J. "Nastech" means Nastech Pharmaceuticals Company, 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 3450 Monte Villa Parkway, Bothell, Washington 98021.

K. "Neurocrine" means Neurocrine Biosciences 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 10555 Science Center Drive, San Diego, California 92121.

L. "Novartis" means Novartis Pharma AG, a corporation organized, existing and doing business under and by virtue of the laws of the Confederation of Switzerland, with its offices and principal place of business located at Lichtstrasse 35, 4002 Basel, Switzerland, and Novartis Pharmaceuticals Corporation, a corporation organized, existing and doing business under and by virtue of the laws of Delaware, with its offices and principal place of business located at 59 Route 10, East Hanover, New Jersey 07936.

M. "Novartis Animal Health" means Novartis Animal Health Inc., a corporation organized, existing and doing business under and by virtue of the laws of the Confederation of Switzerland, with its offices and principal place of business located at Schwarzwaldallee 215 CH-4088, Basil Switzerland. The term "Novartis Animal Health" includes Novartis Animal Health US Inc., a corporation organized, existing, and doing business by virtue of the laws of the

State of Delaware, with its offices and principal place of business located at 32000 Northline Avenue, Suite 300, Greensboro, NC 27408.

N. "Schering-Plough" means Schering-Plough Animal Health Corporation, a wholly-owned subsidiary of Schering-Plough Corporation and 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 1095 Morris Avenue, Union, New Jersey 07083.

O. "Activella" means all Products that contain the active pharmaceutical ingredient estradiol and norethindrone acetate marketed and sold under the Product Trademark "Activella" by Respondent Pharmacia.

P. "Agency(ies)" means any governmental regulatory authority or authorities in the world responsible for granting approval(s), clearance(s), qualification(s), license(s) or permit(s) for any aspect of the research, Development, manufacture, marketing, distribution or sale of a Product. The term "Agency" includes, but is not limited to, the United States Food and Drug Administration ("FDA").

Q. "Amoxi-Mast" means all Products that contain the active pharmaceutical ingredient generically known as amoxicillin trihydrate marketed and sold by Respondent Pfizer in the United States under the Product Trademark "Amoxi-Mast" prior to the divestiture of the Amoxi-Mast Assets. The term "Amoxi-Mast" also includes all intramammary Products marketed or in Development by Respondent Pfizer on or before the Effective Date that are planned to be marketed in the United States for use in the treatment of Lactating Cow Mastitis.

R. "Amoxi-Mast Assets" means all of Respondent Pfizer's rights, title and interest in and to all assets related to Respondent Pfizer's United States business related to the

Product "Amoxi-Mast," to the extent legally transferable, including the research, Development, manufacture, distribution, marketing or sale of Amoxi-Mast, including, without limitation, the following:

1. all Product Intellectual Property;

2. license(s) to all Product Licensed Intellectual Property to use, make, distribute, offer for sale, promote, advertise, sell, import or export, or have used, made, distributed, offered for sale, promoted, advertised, sold, imported or exported any product anywhere in the United States; *provided, however*, such license(s) shall be for the territory of the United States, perpetual, fully paid-up and royalty-free; *provided further, however*, such license(s) shall be on an exclusive basis (even as to Respondents) in accordance with the Divestiture Agreement(s);

3. the Product and Product Registrations;

4. the Product Trade Dress;

5. the existing lists of all current customers for the Product and the pricing of the Product for such customers;

6. at the Commission-approved Acquirer's option, each of the Product Assumed Contracts;

7. all Product Marketing Materials;

8. all Website(s) related to the Product;

9. a list of all of the NDC Numbers related to the Product;

10. rights of reference to the Drug Master Files including, but not limited to, the pharmacology and toxicology data contained in all NADAs and ANADAs;

11. rights of reference (if such rights exist) to information similar to the Drug Master Files submitted to any Agency other than the FDA;

12. Product Scientific and Regulatory Material;

13. all unfilled customer orders for finished goods as of the Closing Date (a list of such orders is to be provided to the Commission-approved Acquirer within two Business Days after the Closing Date);

14. Product Manufacturing Technology, and Product manufacturing and manufacturing processes;

15. at the Commission-approved Acquirer's option, all inventories in existence as of the Closing Date, including, but not limited to, raw materials, goods in process, finished goods, and Product specific packaging and labels; and

16. all Respondents' books, records and files related to the foregoing, including, but not limited to, the following specified documents: the Product Registrations; rights of reference to Drug Master Files, including, but not limited to, the pharmacology and toxicology data contained in all NADAs and ANADAs; all data submitted to and all correspondence with the FDA and other Agencies; all validation documents and data; all market studies; all sales histories, including, without limitation, clinical data, and sales force call activity, for Amoxi-Mast from January 1, 2000, through the Closing Date, and quality control histories pertaining to Amoxi-Mast owned by, or in the possession or control of, Respondents, or to which Respondents have a right of access, in each case such as is in existence as of the Closing Date;

provided, however, that in cases in which documents or other materials included in the Amoxi-Mast Assets contain

information that (i) relates both to Amoxi-Mast and to other Products or businesses of Respondent Pfizer, and (ii) cannot be segregated in a manner that preserves the usefulness of the information as it relates to Amoxi-Mast, Respondent Pfizer shall be required only to provide copies of the documents and materials containing this information. In instances where such copies are provided to the Commission-approved Acquirer, the Commission-approved Acquirer shall have access to original documents under circumstances where copies of documents are insufficient for evidentiary or regulatory purposes. The purpose of this proviso is to ensure that Respondents provide the Commission-approved Acquirer with the above-described information without requiring Respondents completely to divest themselves of information that, in content, also relates to Products and businesses other than Amoxi-Mast;

provided further, however, the term "Amoxi-Mast Assets" does not include any rights, titles and interests in or to owned or leased real property or buildings.

S. "Alpharma" means Alpharma, 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 One Executive Drive, Fort Lee, New Jersey 07024. Alpharma manufactures certain stock keeping unit(s) of Cortaid.

T. "Apomorphine" means the compound designated by the International Union of Pure and Applied Chemistry name (R)-; 5,6,6a,7-Tetrahydro-6-methyl-4H-dibenzo[de,g]quinoline-10,11-diol; Revanil 19875-60-6Apomorphine], together with any salts, esters, metabolites, derivatives, isomers, hydrates, solvates, ethers, quaternary amines, polymorphs and prodrugs thereof.

U. "Bonine" means all over-the-counter Products that contain the active pharmaceutical ingredient generically known as meclizine hydrochloride marketed and sold by Respondent

Pfizer in the United States under the Product Trademark "Bonine" prior to the divestiture of the Bonine Assets. "Bonine" also includes all over-the-counter Products marketed or in Development by Respondent Pfizer on or before the Effective Date that are planned to be marketed for use in treating the symptoms of motion sickness in the United States.

V. "Bonine Asset Purchase Agreement" means the "Purchase and Sale Agreement between Pfizer Inc. and Insight Pharmaceuticals Corporation" dated March 7, 2003, and all amendments, exhibits, attachments, agreements, and schedules thereto, related to the Bonine Assets to be divested, that have been approved by the Commission to accomplish the requirements of this Order. The Bonine Asset Purchase Agreement is attached to this Order as non-public Appendix IX.

W. "Bonine Assets" means all of Respondent Pfizer's rights, title and interest in and to all assets related to Respondent Pfizer's United States business related to the Product "Bonine," to the extent legally transferable, including the research, Development, manufacture, distribution, marketing or sale of Bonine, including, without limitation, the following:

1. all Product Intellectual Property;

2. license(s) to all Product Licensed Intellectual Property to use, make, distribute, offer for sale, promote, advertise, sell, import or export, or have used, made, distributed, offered for sale, promoted, advertised, sold, imported or exported any product anywhere in the United States; *provided, however*, such license(s) shall be for the territory of the United States, perpetual, fully paid-up and royalty-free; *provided further, however*, such license(s) shall be on an exclusive basis (even as to Respondents) in accordance with the Divestiture Agreement(s);

3. the Product and Product Registrations;

4. the Product Trade Dress;

5. the existing lists of all current customers for the Product and the pricing of the Product for such customers;

6. at the Commission-approved Acquirer's option, each of the Product Assumed Contracts;

7. all Product Marketing Materials;

8. all Website(s) related to the Product;

9. a list of all of the NDC Numbers related to the Product;

10. rights of reference (if such rights exist) to the Drug Master Files including, but not limited to, the pharmacology and toxicology data contained in all NDAs, ANDAs, SNDAs and MAAs;

11. rights of reference (if such rights exist) to information similar to the Drug Master Files submitted to any Agency other than the FDA;

12. Product Scientific and Regulatory Material;

13. all unfilled customer orders for finished goods as of the Closing Date (a list of such orders is to be provided to the Commission-approved Acquirer within two Business Days after the Closing Date);

14. Product Manufacturing Technology, and Product manufacturing and manufacturing processes;

15. at the Commission-approved Acquirer's option, all inventories in existence as of the Closing Date, including, but not limited to, raw materials, goods in process,

finished goods, and Product specific packaging and labels; and

16. all Respondents' books, records and files related to the foregoing, including, but not limited to, the following specified documents: the Product Registrations; rights of reference to Drug Master Files, including, but not limited to, the pharmacology and toxicology data contained in all NDAs, ANDAs, SNDAs and MAAs; all data submitted to and all correspondence with the FDA and other Agencies; all validation documents and data; all market studies; all sales histories, including, without limitation, clinical data, and sales force call activity, for Bonine from January 1, 2000, through the Closing Date, and quality control histories pertaining to Bonine owned by, or in the possession or control of, Respondents, or to which Respondents have a right of access, in each case such as is in existence as of the Closing Date;

provided, however, that in cases in which documents or other materials included in the Bonine Assets contain information that (i) relates both to Bonine and to other Products or businesses of Respondent Pfizer, and (ii) cannot be segregated in a manner that preserves the usefulness of the information as it relates to Bonine, the Respondent Pfizer shall be required only to provide copies of the documents and materials containing this information. In instances where such copies are provided to the Commission-approved Acquirer, the Commission-approved Acquirer shall have access to original documents under circumstances where copies of documents are insufficient for evidentiary or regulatory purposes. The purpose of this proviso is to ensure that Respondents provide the Commission-approved Acquirer with the above-described information without requiring Respondents completely to divest themselves of information that, in content, also relates to Products and businesses other than Bonine;

provided further, however, the term "Bonine Assets" does not include any rights, titles and interests in or to owned or leased real property or buildings.

X. "Business Day" means any day excluding Saturday, Sunday and any United States Federal holiday.

Y. "Closing Date" means the date on which Respondents (or a Divestiture Trustee) and a Commission-approved Acquirer close on a transaction to divest, license, or otherwise convey relevant assets pursuant to this Order.

Z. "Commission-approved Acquirer" means: 1) an entity that is specifically identified in this Order to acquire particular assets that the Respondents are required to assign, grant, license, divest, transfer, deliver or otherwise convey pursuant to this Order and that has been approved by the Commission to accomplish the requirements of this Order in connection with the Commission's determination to make this Order final; or 2) an entity approved by the Commission to acquire particular assets that the Respondents are required to assign, grant, license, divest, transfer, deliver or otherwise convey pursuant to this Order.

AA. "Confidential Business Information" means all information owned by, or in the possession or control of, Respondents that is not in the public domain related to the research, Development, manufacture, marketing, commercialization, distribution, importation, exportation, cost, pricing, supply, sales, sales support, or use of a Product.

BB. "Contract Manufacture" means the manufacture of a Product to be supplied by Respondents or a Designee specifically identified in this Order for sale to the Commission-approved Acquirer.

CC. "Cortaid" means all over-the-counter Products that contain the active pharmaceutical ingredient generically known as

hydrocortisone marketed and sold for topical use by Respondent Pharmacia in the United States under the Product Trademark "Cortaid" prior to the divestiture of the Cortaid Assets. The term "Cortaid" also includes all over-the-counter Products marketed or in Development by Respondent Pharmacia on or before the Effective Date that have the same active pharmaceutical ingredient and are planned to be marketed in the United States for a similar topical usage.

DD. "Cortaid Asset Purchase Agreement" means the "Asset Sale and Purchase Agreement by and between Pharmacia as Seller, and Johnson Consumer Products Company, division of J&J as Purchaser" dated February 28, 2003, and all amendments, exhibits, attachments, agreements, and schedules thereto, related to the Cortaid Assets to be divested, that have been approved by the Commission to accomplish the requirements of this Order. The Cortaid Asset Purchase Agreement is attached to this Order as non-public Appendix X.

EE. "Cortaid Assets" means all of Respondent Pharmacia's rights, title and interest in and to all assets related to Respondent Pharmacia's United States business related to the Product "Cortaid," to the extent legally transferable, including the research, Development, manufacture, distribution, marketing or sale of Cortaid, including, without limitation, the following:

1. all Product Intellectual Property;

2. license(s) to all Product Licensed Intellectual Property to use, make, distribute, offer for sale, promote, advertise, sell, import or export, or have used, made, distributed, offered for sale, promoted, advertised, sold, imported or exported any product anywhere in the United States; *provided, however*, such license(s) shall be for the territory of the United States, perpetual, fully paid-up and

royalty-free; *provided further, however*, such license(s) shall be on an exclusive basis (even as to Respondents) in accordance with the Divestiture Agreement(s);

3. the Product and Product Registrations;

4. the Product Trade Dress;

5. the existing lists of all current customers for the Product and the pricing of the Product for such customers;

6. at the Commission-approved Acquirer's option, each of the Product Assumed Contracts;

7. all Product Marketing Materials;

8. all Website(s) related to the Product;

9. a list of all of the NDC Numbers related to the Product;

10. rights of reference (if such rights exist) to the Drug Master Files including, but not limited to, the pharmacology and toxicology data contained in all NDAs, ANDAs, SNDAs and MAAs;

11. rights of reference (if such rights exist) to information similar to the Drug Master Files submitted to any Agency other than the FDA;

12. Product Scientific and Regulatory Material;

13. all unfilled customer orders for finished goods as of the Closing Date (a list of such orders is to be provided to the Commission-approved Acquirer within two Business Days after the Closing Date);

14. Product Manufacturing Technology, and Product manufacturing and manufacturing processes;

15. at the Commission-approved Acquirer's option, all inventories in existence as of the Closing Date, including, but not limited to, raw materials, goods in process, finished goods, and Product specific packaging and labels; and

16. all Respondents' books, records and files related to the foregoing, including, but not limited to, the following specified documents: the Product Registrations; rights of reference to Drug Master Files, including, but not limited to, the pharmacology and toxicology data contained in all NDAs, ANDAs, SNDAs and MAAs; all data submitted to and all correspondence with the FDA and other Agencies; all validation documents and data; all market studies; all sales histories, including, without limitation, clinical data, and sales force call activity, for Cortaid from January 1, 2000, through the Closing Date, and quality control histories pertaining to Cortaid owned by, or in the possession or control of, Respondents, or to which Respondents have a right of access, in each case such as is in existence as of the Closing Date;

provided, however, that in cases in which documents or other materials included in the Cortaid Assets contain information that (i) relates both to Cortaid and to other Products or businesses of Respondent Pharmacia, and (ii) cannot be segregated in a manner that preserves the usefulness of the information as it relates to Cortaid, Respondent Pharmacia shall be required only to provide copies of the documents and materials containing this information. In instances where such copies are provided to the Commission-approved Acquirer, the Commission-approved Acquirer shall have access to original documents under circumstances where copies of documents are insufficient for evidentiary or regulatory purposes. The purpose of this proviso is to ensure that Respondents provide the Commission-approved Acquirer with the above-described information without requiring Respondents completely to

divest themselves of information that, in content, also relates to Products and businesses other than Cortaid;

provided further, however, the term "Cortaid Assets" does not include any rights, titles and interests in or to owned or leased real property or buildings.

FF. "Cortizone" means all over-the-counter Products that contain the active pharmaceutical ingredient hydrocortisone marketed and sold for topical use under the Product Trademark "Cortizone" by Respondent Pfizer in the United States.

GG. "Cow Mastitis Products" means the Products Amoxi-Mast, Dariclox and Orbenin DC, individually and collectively.

HH. "Cow Mastitis Products Assets" means the Amoxi-Mast Assets, the Dariclox Assets and the Orbenin DC Assets, individually and collectively.

II. "Cow Mastitis Products Asset Purchase Agreement" means the "Purchase and Sale Agreement between Pfizer Inc. and Schering-Plough Animal Health Corporation" dated March 14, 2003, and all amendments, exhibits, attachments, agreements, and schedules thereto, related to the Cow Mastitis Products Assets to be divested, that have been approved by the Commission to accomplish the requirements of this Order. The Cow Mastitis Products Asset Purchase Agreement is attached to this Order as non-public Appendix VII.

JJ. "D2 Agonist 774" means the Product in Development by Respondent Pharmacia that contains the active pharmaceutical ingredient with the chemical name (5R)-5-(methylamino)-5,6dihydro-4H-imidazo[4,5,1-ij] quinoline-2(1H)-thione, together with any of its enantiomers, metabolites (excluding Sumanirole, *i.e.*, the Product in Development by Pharmacia that contains the active

pharmaceutical ingredient with the chemical name (5R)-5,6-Dihydro-5-(methylamino)-4-4H-imidazo[4,5,1-ij]-quinolin-2(1H)-one (z)-2-butenedioate (1:I)), and any salts or polymorphs of any of the foregoing. "D2 Agonist 774" includes all Products marketed or in Development by Respondent Pharmacia on or before the Effective Date that use an agonist for the human dopamine 2 receptor and are planned to be marketed for use in the treatment of Human Sexual Dysfunction, but does not include IN Apomorphine.

KK. "D2 Agonist 774 Assets" means all of Respondent Pharmacia's rights, title and interest in and to all assets related to Respondent Pharmacia's worldwide business in the Field of Human Sexual Dysfunction related to the Product "D2 Agonist 774," to the extent legally transferable, including the research, Development, manufacture, distribution, marketing or sale of D2 Agonist 774, including, without limitation, the following:

1. all Product Intellectual Property;

2. license(s) to all Product Licensed Intellectual Property to use, make, distribute, offer for sale, promote, advertise, sell, import or export, or have used, made, distributed, offered for sale, promoted, advertised, sold, imported or exported any product anywhere in the world; *provided, however*, such license(s) shall be worldwide, perpetual, fully paid-up and royalty-free; *provided further, however*, such license(s) shall be on an exclusive basis (even as to Respondents) in accordance with the Divestiture Agreement(s);

3. the Product and Product Registrations;

4. the Product Trade Dress;

5. a list of all targeted customers for the Product and the planned or proposed pricing of the Product for such customers;

6. at the Commission-approved Acquirer's option, each of the Product Assumed Contracts;

7. all Product Marketing Materials;

8. all Website(s) related to the Product;

9. a list of all of the NDC Numbers related to the Product;

10. rights of reference to the Drug Master Files including, but not limited to, the pharmacology and toxicology data contained in all NDAs, ANDAs, SNDAs and MAAs;

11. rights of reference (if such rights exist) to information similar to the Drug Master Files submitted to any Agency other than the FDA;

12. Product Scientific and Regulatory Material;

13. all unfilled customer orders for finished goods as of the Closing Date (a list of such orders is to be provided to the Commission-approved Acquirer within two Business Days after the Closing Date);

14. Product Manufacturing Technology, and Product manufacturing and manufacturing processes;

15. at the Commission-approved Acquirer's option, all inventories in existence as of the Closing Date, including, but not limited to, raw materials, goods in process, finished goods, and Product specific packaging and labels;

16. at the Commission-approved Acquirer's option (and, in the case of Neurocrine, to the extent exercised in the D2 Agonist 774 License Agreement), all manufacturing and other equipment located at the D2 Agonist 774 Manufacturing Facility that was used in, or suitable for use in, the research, Development or manufacture of D2 Agonist 774; and

17. all Respondents' books, records and files related to the foregoing, including, but not limited to, the following specified documents: the Product Registrations; rights of reference to Drug Master Files, including, but not limited to, the pharmacology and toxicology data contained in all NDAs, ANDAs, SNDAs and MAAs; all data submitted to and all correspondence with the FDA and other Agencies; all validation documents and data; all market studies; all sales histories, including, without limitation, clinical data, and sales force call activity, for D2 Agonist 774 from January 1, 2000, through the Closing Date, and quality control histories pertaining to D2 Agonist 774 owned by, or in the possession or control of, Respondents, or to which Respondents have a right of access, in each case such as is in existence as of the Closing Date;

provided, however, that in cases in which documents or other materials included in the D2 Agonist 774 Assets contain information that (i) relates both to D2 Agonist 774 and to other Products or businesses of Respondent Pharmacia, and (ii) cannot be segregated in a manner that preserves the usefulness of the information as it relates to D2 Agonist 774, Respondent Pharmacia shall be required only to provide copies of the documents and materials containing this information. In instances where such copies are provided to the Commission-approved Acquirer, the Commission-approved Acquirer shall have access to original documents under circumstances where copies of documents are insufficient for evidentiary or regulatory purposes. The purpose of this proviso is to ensure that Respondents provide the Commission-approved Acquirer

with the above-described information without requiring Respondents completely to divest themselves of information that, in content, also relates to Products and businesses other than D2 Agonist 774;

provided further, however, the term "D2 Agonist 774 Assets" does not include any rights, titles and interests in or to owned or leased real property or buildings.

LL. "D2 Agonist 774 License Agreement" means "The Amended and Restated License Agreement by and between Pharmacia & Upjohn Company and Neurocrine Biosciences, Inc." dated March 14, 2003, and all amendments, exhibits, attachments, agreements, and schedules thereto, related to the D2 Agonist 774 Assets to be divested, that have been approved by the Commission to accomplish the requirements of this Order. The D2 Agonist 774 License Agreement is attached to this Order as non-public Appendix V.

MM. "D2 Agonist 774 Manufacturing Facility" means Respondent Pharmacia's manufacturing and packaging facility located at Kalamazoo, Michigan used by Respondent Pharmacia to manufacture D2 Agonist 774.

NN. "Dariclox" means all Products that contains the active pharmaceutical ingredient generically known as sterile and non-sterile cloxacillin sodium marketed and sold by Respondent Pfizer in the United States under the Product Trademark "Dariclox" prior to the divestiture of the Dariclox Assets. The term "Dariclox" also includes all cloxacillin sodium-based intramammary Products marketed or in Development by Respondent Pfizer on or before the Effective Date that are planned to be marketed in the United States for use in the treatment of Lactating Cow Mastitis.

OO. "Dariclox Assets" means all of Respondent Pfizer's rights, title and interest in and to all assets related to Respondent

Pfizer's United States business related to the Product "Dariclox," to the extent legally transferable, including the research, Development, manufacture, distribution, marketing or sale of Dariclox, including, without limitation, the following:

1. all Product Intellectual Property;

2. license(s) to all Product Licensed Intellectual Property to use, make, distribute, offer for sale, promote, advertise, sell, import or export, or have used, made, distributed, offered for sale, promoted, advertised, sold, imported or exported any product anywhere in the United States; *provided, however*, such license(s) shall be for the territory of the United States, perpetual, fully paid-up and royalty-free; *provided further, however*, such license(s) shall be on an exclusive basis (even as to Respondents) in accordance with the Divestiture Agreement(s);

3. the Product and Product Registrations;

4. the Product Trade Dress;

5. the existing lists of all current customers for the Product and the pricing of the Product for such customers;

6. at the Commission-approved Acquirer's option, each of the Product Assumed Contracts;

7. all Product Marketing Materials;

8. all Website(s) related to the Product;

9. a list of all of the NDC Numbers related to the Product;

10. rights of reference to the Drug Master Files including, but not limited to, the pharmacology and toxicology data contained in all NADAs and ANADAs;

11. rights of reference (if such rights exist) to information similar to the Drug Master Files submitted to any Agency other than the FDA;

12. Product Scientific and Regulatory Material;

13. all unfilled customer orders for finished goods as of the Closing Date (a list of such orders is to be provided to the Commission-approved Acquirer within two Business Days after the Closing Date);

14. Product Manufacturing Technology, and Product manufacturing and manufacturing processes;

15. at the Commission-approved Acquirer's option, all inventories in existence as of the Closing Date, including, but not limited to, raw materials, goods in process, finished goods, and Product specific packaging and labels; and

16. all Respondents' books, records and files related to the foregoing, including, but not limited to, the following specified documents: the Product Registrations; rights of reference to Drug Master Files, including, but not limited to, the pharmacology and toxicology data contained in all NADAs and ANADAs; all data submitted to and all correspondence with the FDA and other Agencies; all validation documents and data; all market studies; all sales histories, including, without limitation, clinical data, and sales force call activity, for Dariclox from January 1, 2000, through the Closing Date, and quality control histories pertaining to Dariclox owned by, or in the possession or control of, Respondents, or to which Respondents have a right of access, in each case such as is in existence as of the Closing Date.

provided, however, that in cases in which documents or other materials included in the Dariclox Assets contain information

that (i) relates both to Dariclox and to other Products or businesses of Respondent Pfizer, and (ii) cannot be segregated in a manner that preserves the usefulness of the information as it relates to Dariclox, Respondent Pfizer shall be required only to provide copies of the documents and materials containing this information. In instances where such copies are provided to the Commission-approved Acquirer, the Commission-approved Acquirer shall have access to original documents under circumstances where copies of documents are insufficient for evidentiary or regulatory purposes. The purpose of this proviso is to ensure that Respondents provide the Commission-approved Acquirer with the above-described information without requiring Respondents completely to divest themselves of information that, in content, also relates to Products and businesses other than Dariclox;

provided further, however, the term "Dariclox Assets" does not include any rights, titles and interests in or to owned or leased real property or buildings.

PP. "Darifenacin" means all Products that contain the active pharmaceutical ingredient generically known as darifenacin that were in Development by Respondent Pfizer prior to the divestiture of the Darifenacin Assets. The chemical name of darifenacin is (S)-1-[2-(2,3-Dihydro-5-benzofuranyl)ethyl]-α,α-diphenyl-3-pyrrolidineacetamide. The term "Darifenacin" also includes all Products marketed or in Development by Respondent Pfizer on or before the Effective Date that are muscarinic receptor antagonists and are planned to be marketed for use in the Field of Overactive Bladder.

QQ. "Darifenacin Assets" means all of Respondent Pfizer's rights, title and interest in and to all assets related to Respondent Pfizer's worldwide business related to the Product "Darifenacin," to the extent legally transferable, including the research, Development, manufacture,

distribution, marketing or sale of Darifenacin, including, without limitation, the following:

1. all Product Intellectual Property;

2. license(s) to all Product Licensed Intellectual Property to use, make, distribute, offer for sale, promote, advertise, sell, import or export, or have used, made, distributed, offered for sale, promoted, advertised, sold, imported or exported any product anywhere in the world; *provided, however*, such license(s) shall be worldwide, perpetual, fully paid-up and royalty-free; *provided further, however*, such license(s) shall be on an exclusive basis (even as to Respondents) in accordance with the Divestiture Agreement(s);

3. the Product and Product Registrations;

4. the Product Trade Dress;

5. a list of all targeted customers for the Product and the planned or proposed pricing of the Product for such customers;

6. at the Commission-approved Acquirer's option, each of the Product Assumed Contracts;

7. all Product Marketing Materials;

8. all Website(s) related to the Product;

9. a list of all of the NDC Numbers related to the Product;

10. rights of reference to the Drug Master Files including, but not limited to, the pharmacology and toxicology data contained in all NDAs, ANDAs, SNDAs and MAAs;

11. rights of reference (if such rights exist) to information similar to the Drug Master Files submitted to any Agency other than the FDA;

12. Product Scientific and Regulatory Material;

13. all unfilled customer orders for finished goods as of the Closing Date (a list of such orders is to be provided to the Commission-approved Acquirer within two Business Days after the Closing Date);

14. Product Manufacturing Technology, and Product manufacturing and manufacturing processes;

15. at the Commission-approved Acquirer's option, all inventories in existence as of the Closing Date, including, but not limited to, raw materials, goods in process, finished goods, and Product specific packaging and labels;

16. at the Commission-approved Acquirer's option (and, in the case of Novartis, to the extent exercised in the Darifenacin Asset Purchase Agreement), all manufacturing and other equipment located at the Darifenacin Manufacturing Facility that was used in, or suitable for use in, the research, Development or manufacture of Darifenacin; and

17. all Respondents' books, records and files related to the foregoing, including, but not limited to, the following specified documents: the Product Registrations; rights of reference to Drug Master Files, including, but not limited to, the pharmacology and toxicology data contained in all NDAs, ANDAs, SNDAs and MAAs; all data submitted to and all correspondence with the FDA and other Agencies; all validation documents and data; all market studies; all sales histories, including, without limitation, clinical data, and sales force call activity, for Darifenacin from January

1, 2000, through the Closing Date, and quality control histories pertaining to Darifenacin owned by, or in the possession or control of, Respondents, or to which Respondents have a right of access, in each case such as is in existence as of the Closing Date.

provided, however, that in cases in which documents or other materials included in the Darifenacin Assets contain information that (i) relates both to Darifenacin and to other Products or businesses of Respondent Pfizer, and (ii) cannot be segregated in a manner that preserves the usefulness of the information as it relates to Darifenacin, Respondent Pfizer shall be required only to provide copies of the documents and materials containing this information. In instances where such copies are provided to the Commission-approved Acquirer, the Commission-approved Acquirer shall have access to original documents under circumstances where copies of documents are insufficient for evidentiary or regulatory purposes. The purpose of this proviso is to ensure that Respondents provide the Commission-approved Acquirer with the above-described information without requiring Respondents completely to divest themselves of information that, in content, also relates to Products and businesses other than Darifenacin;

provided further, however, the term "Darifenacin Assets" does not include any rights, titles and interests in or to owned or leased real property or buildings.

RR. "Darifenacin Asset Purchase Agreement" means the "Asset Purchase Agreement by and between Pfizer Inc. as Seller and Novartis International Pharmaceuticals Ltd as Buyer and Novartis Pharma AG" dated March 17, 2003, and all amendments, exhibits, attachments, agreements, and schedules thereto, related to the Darifenacin Assets to be divested, that have been approved by the Commission to accomplish the requirements of this Order. The Darifenacin Asset Purchase Agreement is attached to this Order as non-public Appendix II.

SS. "Darifenacin Global Development Team" means all employees of Respondent Pfizer that are a part of Pfizer's "Global Development Team" for the Product Darifenacin including, but not limited to, those employees on the "Rapid Response Team" related to the Product Darifenacin. These individuals are identified in non-public Appendix II attached to this Order.

TT. "Darifenacin Manufacturing Facility" means Respondent Pfizer's manufacturing and packaging facility located at Pottery Road, Ringaskiddy, County Cork, Dun Laoghaire, Ireland used by Respondent Pfizer to manufacture Darifenacin.

UU. "Deramaxx" means the Product that contains the active pharmaceutical ingredient deracoxib used in the treatment of pain in dogs and cats. The chemical name of deracoxib is [4-[5-(3-flouro-4-methoxyphenyl)-3-difluoromethyl-1H-pyrazol-1-yl]-benzenesulfonamide] CAS No. 16959-41-4.

VV. "Deramaxx License Agreement" means the "License Agreement between Novartis Animal Health, Inc. and G.D. Searle & Co." dated September 24, 1999, and all amendments (other than the Deramaxx Amended License Agreement), exhibits, attachments, agreements, and schedules thereto, related to the Product Deramaxx. The Deramaxx License Agreement is contained in non-public Appendix VI.

WW. "Deramaxx Amended License Agreement" means the "Amended License Agreement between Novartis Animal Health Inc. and the successor in interest to G.D. Searle & Co., with respect to this matter, Pharmacia & Upjohn Company" dated February 20, 2003, and all amendments, exhibits, attachments, agreements, and schedules thereto, related to the Product Deramaxx, that have been approved by the Commission to accomplish the requirements of this

Order. The Deramaxx Amended License Agreement is attached to this Order as non-public Appendix VI.

XX. "Designee" means any entity other than the Respondent(s) that will manufacture a Product for a Commission-approved Acquirer.

YY. "Detrol" means all Products that contain the active pharmaceutical ingredient tolterodine marketed and sold under the Product Trademark "Detrol" or "Detrol LA" by Respondent Pharmacia for treating the symptoms of Overactive Bladder.

ZZ. "Development" means all preclinical and clinical drug development activities (including formulation), including test method development and stability testing, toxicology, formulation, process development, manufacturing scale-up, development-stage manufacturing, quality assurance/quality control development, statistical analysis and report writing, conducting clinical trials for the purpose of obtaining any and all approvals, licenses, registrations or authorizations from any Agency necessary for the manufacture, use, storage, import, export, transport, promotion, marketing and sale of a Product (including any governmental price or reimbursement approvals), Product approval and registration, and regulatory affairs related to the foregoing. "Develop" means to engage in Development.

AAA. "Direct Cost" means the cost of direct labor and direct material used to provide the relevant assistance or service.

BBB. "Divestiture Agreement" means: 1) any agreement between a Respondent(s) and a Commission-approved Acquirer that is specifically referenced and attached to this Order and all amendments, exhibits, attachments, agreements, and schedules thereto, related to the relevant assets to be assigned, granted, licensed, divested, transferred, delivered or otherwise conveyed, and that have

been approved by the Commission to accomplish the requirements of the Order in connection with the Commission's determination to make this Order final; or 2) any agreement between a Respondent(s) and a Commission-approved Acquirer (or between a Divestiture Trustee and a Commission-approved Acquirer) that has been approved by the Commission to accomplish the requirements of this Order, and all amendments, exhibits, attachments, agreements, and schedules thereto, related to the relevant assets to be assigned, granted, licensed, divested, transferred, delivered or otherwise conveyed that have been approved by the Commission to accomplish the requirements of this Order.

CCC. "Divestiture Trustee" means a trustee appointed by the Commission pursuant to the relevant provisions of this Order.

DDD. "Domain Name" means the domain name(s) (universal resource locators), and registration(s) thereof, issued by any entity or authority who issues and maintains the domain name registration. "Domain Name" shall not include any trademark or service mark rights to such domain names other than the rights to the Product Trademarks required to be divested.

EEE. "Dramamine" means all over-the-counter Products marketed and sold by Respondent Pharmacia under the Product Trademark "Dramamine" for treating the symptoms of motion sickness.

FFF. "Dry Cow Mastitis" means an infection of the udder affecting dairy cows during periods when those cows are not producing milk.

GGG. "Drug Master Files" means the information submitted to the FDA as described in 21 C.F.R. Part 314.420 related to a Product.

HHH. "Duramed" means Duramed Pharmaceuticals Inc., a company organized, existing and doing business under and by virtue of the laws of the State of Ohio, with its offices and principal place of business located at 5040 Duramed Drive, Cleveland, Ohio 45213. "Duramed" includes Barr Laboratories, Inc.

III. "Effective Date" means the earlier of: 1) the date the Respondents close on the Merger Agreement, or 2) the date the Merger becomes effective by filing the certificate of merger with the Secretary of State of the State of Delaware.

JJJ. "Employee Notification" means the "Notice of Divestiture and Requirement for Confidentiality" attached to this Order as public Appendix I and to the Order to Maintain Assets as public Appendix A.

KKK. "Femhrt" means the Product that contains the active pharmaceutical ingredient generically known as ethinyl estradiol plus norethindrone acetate marketed and sold by Respondent Pfizer under the Product Trademark "femhrt" prior to the divestiture of the Femhrt Assets.

LLL. "Femhrt Assets" means all of Respondent Pfizer's rights, title and interest in and to all assets related to Respondent Pfizer's worldwide business related to the Product "Femhrt," to the extent legally transferable, including the research, Development, manufacture, distribution, marketing or sale of Femhrt, including, without limitation, the following:

1. all Product Intellectual Property;

2. license(s) to all Product Licensed Intellectual Property to use, make, distribute, offer for sale, promote, advertise, sell, import or export, or have used, made, distributed, offered for sale, promoted, advertised, sold, imported or

exported any product anywhere in the world; *provided, however*, such license(s) shall be worldwide, perpetual, fully paid-up and royalty-free; *provided further, however*, such license(s) shall be on an exclusive basis (even as to Respondents) in accordance with the Divestiture Agreement(s);

3. the Product and Product Registrations;

4. the Product Trade Dress;

5. the existing lists of all current customers for the Product and the pricing of the Product for such customers;

6. at the Commission-approved Acquirer's option, each of the Product Assumed Contracts;

7. all Product Marketing Materials;

8. all Website(s) related to the Product;

9. a list of all of the NDC Numbers related to the Product;

10. rights of reference to the Drug Master Files including, but not limited to, the pharmacology and toxicology data contained in all NDAs, ANDAs, SNDAs and MAAs;

11. rights of reference (if such rights exist) to information similar to the Drug Master Files submitted to any Agency other than the FDA;

12. Product Scientific and Regulatory Material;

13. all unfilled customer orders for finished goods as of the Closing Date (a list of such orders is to be provided to the Commission-approved Acquirer within two Business Days after the Closing Date);

14. Product Manufacturing Technology, and Product manufacturing and manufacturing processes;

15. at the Commission-approved Acquirer's option, all inventories in existence as of the Closing Date, including, but not limited to, raw materials, goods in process, finished goods, and Product specific packaging and labels; and

16. all Respondents' books, records and files related to the foregoing, including, but not limited to, the following specified documents: the Product Registrations; rights of reference to Drug Master Files, including, but not limited to, the pharmacology and toxicology data contained in all NDAs, ANDAs, SNDAs and MAAs; all data submitted to and all correspondence with the FDA and other Agencies; all validation documents and data; all market studies; all sales histories, including, without limitation, clinical data, and sales force call activity, for Femhrt from January 1, 2000, through the Closing Date, and quality control histories pertaining to Femhrt owned by, or in the possession or control of, Respondents, or to which Respondents have a right of access, in each case such as is in existence as of the Closing Date.

provided, however, that in cases in which documents or other materials included in the Femhrt Assets contain information that (i) relates both to Femhrt and to other Products or businesses of Respondent Pfizer, and (ii) cannot be segregated in a manner that preserves the usefulness of the information as it relates to Femhrt, Respondent Pfizer shall be required only to provide copies of the documents and materials containing this information. In instances where such copies are provided to the Commission-approved Acquirer, the Commission-approved Acquirer shall have access to original documents under circumstances where copies of documents are insufficient for evidentiary or regulatory purposes. The purpose of this proviso is to ensure that Respondents provide

the Commission-approved Acquirer with the above-described information without requiring Respondents completely to divest themselves of information that, in content, also relates to Products and businesses other than Femhrt;

provided further, however, the term "Femhrt Assets" does not include any rights, titles and interests in or to owned or leased real property or buildings.

MMM. "Femhrt Asset Purchase Agreement" means the "Purchase and Sale Agreement among Pfizer Inc., Galen (Chemicals) Limited and Galen Holdings plc" dated March 5, 2003, and all amendments, exhibits, attachments, agreements, and schedules thereto, related to the Femhrt Assets to be divested, that have been approved by the Commission to accomplish the requirements of this Order. The Femhrt Asset Purchase Agreement is attached to this Order as non-public Appendix III.

NNN. "Field" means the prevention, treatment, diagnosis, or control of a particular medical condition.

OOO. "GlaxoSmithKline" means GlaxoSmithKline PLC, a corporation organized, existing and doing business under and by virtue of the laws of the United Kingdom, with its offices and principal place of business located at 980 Great West Road, Brentford, Middlesex XO TW8 9GS, United Kingdom. GlaxoSmithKline manufactures the active pharmaceutical ingredients for the Cow Mastitis Products.

PPP. "Governmental Entity" means any Federal, state, local or non-U.S. government or any court, legislature, governmental agency or governmental commission or any judicial or regulatory authority of any government.

QQQ. "Halls Assets" means all of Respondent Pfizer's rights,

title and interest in and to all assets related to Respondent Pfizer's Halls Business worldwide, to the extent legally transferable. These assets are identified and described in Section 2.2 of the Halls Divestiture Agreement.

RRR. "Halls Business" means the worldwide business of researching, developing, manufacturing, marketing, distributing and selling any product under the Halls Trademarks.

SSS. "Halls Divestiture Agreement" means the "Stock and Asset Purchase Agreement by and between Pfizer Inc. and Cadbury Schweppes plc" dated December 16, 2002, and all amendments, exhibits, attachments, agreements, and schedules thereto, related to the Halls Business that have been approved by the Commission to accomplish the requirements of this Order. The Halls Divestiture Agreement is attached to this Order as non-public Appendix VIII.

TTT. "Halls Trademarks" means all trademarks owned or controlled by Respondent Pfizer that contain the "Halls" brand name including, but not limited to, "Halls," "Halls Mentho-Lyptus," "Halls Plus," "Halls Sugar Free," "Halls Defense," or "Halls Fruit Breezers."

UUU. "Hanford" means G.C. Hanford Manufacturing Company, a corporation organized, existing, and doing business under and by virtue of the laws of the State of New York with its offices and principal place of business located at 304 Oneida Street, Syracuse, New York 13201. Hanford produces the finished formulation of the Cow Mastitis Products.

VVV. "Human Sexual Dysfunction" means sexual dysfunction in humans including, but not limited to, male erectile dysfunction and female sexual dysfunction.

WWW. "IN Apomorphine" means all Products containing the active pharmaceutical ingredient generically known as Apomorphine and that are delivered Intranasally.

XXX. "IN Apomorphine Collaboration and License Agreement" means the "Collaboration and License Agreement by and between Pharmacia & Upjohn Company and Nastech Pharmaceutical Company, Inc." dated February 1, 2002, and all amendments, exhibits, attachments, agreements, and schedules thereto. The IN Apomorphine Collaboration and License Agreement is contained in non-public Appendix IV.

YYY. "IN Apomorphine Collaboration Product" means the Product that contains the active pharmaceutical ingredient generically known as Apomorphine delivered Intranasally that was in Development by Respondent Pharmacia prior to the Effective Date (including certain variations thereof, as described in the IN Apomorphine Disengagement Agreement).

ZZZ. "IN Apomorphine Disengagement Agreement" means the "Divestiture Agreement" by and between Pharmacia & Upjohn Company and Nastech Pharmaceutical Company, Inc. dated January 24, 2003, and all amendments, exhibits, attachments, agreements, and schedules thereto, related to IN Apomorphine, that have been approved by the Commission to accomplish the requirements of this Order. The IN Apomorphine Disengagement Agreement is attached to this Order as non-public Appendix IV.

AAAA. "IN Apomorphine Nastech Partner" means any entity that enters into any acquisition, alliance, collaboration, co-development or licensing arrangement with Nastech for the research, Development, distribution, manufacturing, marketing or sale of IN Apomorphine.

BBBB. "IN Apomorphine Nastech Releasee(s)" means Nastech or any entity controlled by or under common control with Nastech, or any licensees, sublicensees, manufacturers, suppliers, distributors, and customers of Nastech, or of such Nastech-affiliated entities.

CCCC. "Interim Monitor" means a monitor appointed by the Commission pursuant to the relevant provisions of this Order or the Order to Maintain Assets.

DDDD. "Intranasally" means delivery of a Product to the body by means of direct administration through the nostrils resulting in contact of the Product with the nasal mucosa or other aspects of the nasal cavity.

EEEE. "Investigational New Animal Drug Application" ("INADA") means the application for a Product filed or to be filed with the FDA pursuant to 21 C.F.R. part 514, or its foreign Agency equivalent, and all supplements, amendments, and revisions thereto, any preparatory work, drafts and data necessary for the preparation thereof, and all correspondence between Respondents and the FDA or other Agency relative thereto.

FFFF. "Investigational New Drug Application" ("IND") means the application filed with the FDA pursuant to 21 C.F.R. part 312.1, et seq., (as defined in 21 C.F.R. part 312.3), or its foreign Agency equivalent, and all supplements, amendments, and revisions thereto, any preparatory work, drafts and data necessary for the preparation thereof, and all correspondence between Respondents and the FDA or other Agency relative thereto.

GGGG. "Lactating Cow Mastitis" means an infection of the udder affecting dairy cows when those cows are producing milk.

HHHH. "Law" means all laws, statutes, rules, regulations,

ordinances and other pronouncements having the effect of law by any Governmental Entity.

IIII. "New Animal Drug Application" ("NADA") or "Abbreviated New Animal Drug Application" ("ANADA") mean the applications for a Product filed or to be filed with the FDA pursuant to 21 C.F.R. Part 514, or its foreign Agency equivalent, and all supplements, amendments, and revisions thereto, any preparatory work, drafts and data necessary for the preparation thereof, and all correspondence between Respondents and the FDA or other Agency relative thereto.

JJJJ. "NDC Numbers" means the National Drug Code numbers(s) assigned by the FDA to a Product.

KKKK. "New Drug Application" ("NDA"), "Abbreviated New Drug Application" ("ANDA"), "Supplemental New Drug Application" ("SNDA"), or "Marketing Authorization Application" ("MAA") mean the applications for a Product filed or to be filed with the FDA pursuant to 21 C.F.R. Part 314, or its foreign Agency equivalent, and all supplements, amendments, and revisions thereto, any preparatory work, drafts and data necessary for the preparation thereof, and all correspondence between Respondents and the FDA or other Agency relative thereto.

LLLL. "Orbenin DC" means all Products that contain the active pharmaceutical ingredient generically known as sterile benzathine cloxacillin marketed and sold by Respondent Pfizer in the United States under the Product Trademark "Orbenin DC" prior to the divestiture of the Orbenin DC Assets. The term "Orbenin DC" also includes all benzathine cloxacillin-based intramammary Products marketed or in Development by Respondent Pfizer on or before the Effective Date that are planned to be marketed in the United States for use in the treatment of Dry Cow

Mastitis.

MMMM. "Orbenin DC Assets" means all of Respondent Pfizer's rights, title and interest in and to all assets related to Respondent Pfizer's United States business related to the Product "Orbenin DC," to the extent legally transferable, including the research, Development, manufacture, distribution, marketing or sale of Orbenin DC, including, without limitation, the following:

1. all Product Intellectual Property;

2. license(s) to all Product Licensed Intellectual Property to use, make, distribute, offer for sale, promote, advertise, sell, import or export, or have used, made, distributed, offered for sale, promoted, advertised, sold, imported or exported any product anywhere in the United States; *provided, however*, such license(s) shall be for the territory of the United States, perpetual, fully paid-up and royalty-free; *provided further, however*, such license(s) shall be on an exclusive basis (even as to Respondents) in accordance with the Divestiture Agreement(s);

3. the Product and Product Registrations;

4. the Product Trade Dress;

5. the existing lists of all current customers for the Product and the pricing of the Product for such customers;

6. at the Commission-approved Acquirer's option, each of the Product Assumed Contracts;

7. all Product Marketing Materials;

8. all Website(s) related to the Product;

9. a list of all of the NDC Numbers related to the Product;

10. rights of reference to the Drug Master Files including but not limited to, the pharmacology and toxicology data contained in all NADAs and ANADAs;

11. rights of reference (if such rights exist) to information similar to the Drug Master Files submitted to any Agency other than the FDA;

12. Product Scientific and Regulatory Material;

13. all unfilled customer orders for finished goods as of the Closing Date (a list of such orders is to be provided to the Commission-approved Acquirer within two Business Days after the Closing Date);

14. Product Manufacturing Technology, and Product manufacturing and manufacturing processes;

15. at the Commission-approved Acquirer's option, all inventories in existence as of the Closing Date, including, but not limited to, raw materials, goods in process, finished goods, and Product specific packaging and labels; and

16. all Respondents' books, records and files related to the foregoing, including, but not limited to, the following specified documents: the Product Registrations; rights of reference to Drug Master Files, including, but not limited to, the pharmacology and toxicology data contained in all NADAs and ANADAs; all data submitted to and all correspondence with the FDA and other Agencies; all validation documents and data; all market studies; all sales histories, including, without limitation, clinical data, and sales force call activity, for Orbenin DC from January 1, 2000, through the Closing Date, and quality control histories pertaining to Orbenin DC owned by, or in the

possession or control of, Respondents, or to which Respondents have a right of access, in each case such as is in existence as of the Closing Date.

provided, however, that in cases in which documents or other materials included in the Orbenin DC Assets contain information that (i) relates both to Orbenin DC and to other Products or businesses of Respondent Pfizer, and (ii) cannot be segregated in a manner that preserves the usefulness of the information as it relates to Orbenin DC, the Respondent Pfizer shall be required only to provide copies of the documents and materials containing this information. In instances where such copies are provided to the Commission-approved Acquirer, the Commission-approved Acquirer shall have access to original documents under circumstances where copies of documents are insufficient for evidentiary or regulatory purposes. The purpose of this proviso is to ensure that Respondents provide the Commission-approved Acquirer with the above-described information without requiring Respondents completely to divest themselves of information that, in content, also relates to Products and businesses other than Orbenin DC;

provided further, however, the term "Orbenin DC Assets" does not include any rights, titles and interests in or to owned or leased real property or buildings.

NNNN. "Overactive Bladder" means a symptomatic condition that includes urinary frequency, urinary urgency and urinary incontinence.

OOOO. "Ownership Interest" means any and all rights, present or contingent, of Respondents to hold any voting or nonvoting stock, share capital, equity or other interests or beneficial ownership in an entity.

PPPP. "Patents" means all patents, patent applications and statutory invention registrations, in each case existing as of the Effective Date (*except* where this Order specifies a

different time), and includes all reissues, divisions, continuations, continuations-in-part, supplementary protection certificates, extensions and reexaminations thereof, all inventions disclosed therein, all rights therein provided by international treaties and conventions, and all rights to obtain and file for patents and registrations thereto in the world, related to any Product of or owned by Respondents as of the Closing Date.

QQQQ. "Pharmacia Cow Mastitis Products" means all Products marketed and sold by Respondent Pharmacia in the United States under the following Product Trademarks: "Quartermaster," "Biodry," "Albadry Plus," "Pirsue," "Pirsue Aqueous Gel," "Pirsue Sterile Solution," or "Albacillin," for the treatment of either Dry Cow Mastitis or Lactating Cow Mastitis.

RRRR. "Product" means any pharmaceutical, biological, or genetic composition containing any formulation or dosage of a compound referenced as its pharmaceutically, biologically or genetically active ingredient.

SSSS. "Product Assumed Contracts" means all contracts or agreements:

1. pursuant to which any Third Party purchases the Product(s) from the Respondent(s);

2. pursuant to which the Respondent(s) purchases any materials from any Third Party for use in connection with the manufacture of the Product(s);

3. relating to any clinical trial involving the Product(s);

4. constituting the material transfer agreements involving the transfer of the Product(s);

5. relating to the marketing of the Product(s) or educational matters relating to the Product(s);

6. relating to the manufacture of the Product(s);

7. constituting confidentiality agreements involving the Product(s);

8. involving any royalty, licensing or similar arrangement involving the Product(s);

9. pursuant to which any services are provided with respect to the Product(s) or the Product(s) business, including consultation arrangements; and/or

10. pursuant to which any Third Party collaborates with the Respondent(s) in the performance of research or Development of the Product(s) or the Product(s) business.

provided, however, that where any such contract or agreement also relates to Product(s) of Respondent(s) other than the Product(s) required to be divested pursuant to this Order, Respondents shall assign the Commission-approved Acquirer all such rights under the contract or agreement as are related to the Product(s) required to be divested pursuant to this Order, but concurrently may retain similar rights for the purposes of the other Product(s).

TTTT. "Product Copyrights" means rights to all original works of authorship of any kind related to the Product(s) and any registrations and applications for registrations thereof, including, but not limited to, the following: all promotional materials for healthcare providers; all promotional materials for patients; educational materials for the sales force; copyrights in all pre-clinical, clinical and process development data and reports relating to the research and Development of the Product(s) or of any materials used in the research, Development,

manufacture, marketing or sale of the Product(s), including all raw data relating to clinical trials of the Product(s), all case report forms relating thereto and all statistical programs developed (or modified in a manner material to the use or function thereof (other than through user references)) to analyze clinical data, all market research data, market intelligence reports and statistical programs (if any) used for marketing and sales research; customer information, promotional and marketing materials, the Product(s) sales forecasting models, medical education materials, sales training materials, Website content and advertising and display materials; all records relating to employees that accept employment with the Commission-approved Acquirer (excluding any personnel records the transfer of which is prohibited by applicable Law); all records, including customer lists, sales force call activity reports, vendor lists, sales data, reimbursement data, speaker lists, manufacturing records, manufacturing processes, and supplier lists; all data contained in laboratory notebooks relating to the Product(s) or relating to its biology; all adverse experience reports and files related thereto (including source documentation) and all periodic adverse experience reports and all data contained in electronic data bases relating to adverse experience reports and periodic adverse experience reports; all analytical and quality control data; and all correspondence with the FDA.

UUUU. "Product Employee Information" means the following:

1. a complete and accurate list containing the name of each relevant employee as of the execution date of the related Divestiture Agreement. This list shall be organized by the relevant respective employee categories defined in this Order, (*i.e.*, "Darifenacin Global Development Team," "Product Manufacturing Employees," "Product Marketing Employees," "Product Research and

Development Employees," or "Product Sales Employees," as applicable);

2. with respect to each such employee:

   a. the date of hire and effective service date;

   b. job title or position held;

   c. a specific description of the employee's responsibilities related to the relevant Product; *provided, however*, in lieu of this description, Respondents may provide the employee's most recent performance appraisal;

   d. the base salary or current wages;

   e. the most recent bonus paid, aggregate annual compensation for the relevant Respondent's last fiscal year and current target or guaranteed bonus, if any;

   f. employment status (*i.e.,* active or on leave or disability; full-time or part-time); and

   g. any other material terms and conditions of employment in regard to such employee that are not otherwise generally available to similarly situated employees; and

3. at the Commission-approved Acquirer's option or the Proposed Acquirer's option (as applicable), copies of all employee benefit plans and summary plan descriptions (if any) applicable to the relevant employees.

VVVV. "Product Intellectual Property" means all of the following related to the Product(s):

1. Patents;

2. Product Copyrights;

3. Product Software, other than Product Licensed Intellectual Property;

4. Product Trademarks;

5. trade secrets, know-how, techniques, data, inventions, practices, methods and other confidential or proprietary technical, business, research, Development and other information, and all rights in any jurisdiction to limit the use or disclosure thereof, other than Product Licensed Intellectual Property;

6. rights to obtain and file for Patents and registrations thereof; and

7. rights to sue and recover damages or obtain injunctive relief for infringement, dilution, misappropriation, violation or breach of any of the foregoing;

provided, however, "Product Intellectual Property" does not include the names "Pfizer," "Pharmacia," "Parke-Davis," "Warner-Lambert," "UpJohn," "Searle" or the names of any other corporations or companies owned by Respondents or related logos to the extent used on other of Respondent Pfizer's or Respondent Pharmacia's Products.

WWWW. "Product Licensed Intellectual Property" means:

1. Product Software that is used in connection with the analysis of clinical trial data for a Product that is the subject of a divestiture under this Order that Respondents can demonstrate has been routinely used, prior to the Effective Date, by either Respondent Pharmacia or Respondent Pfizer (as applicable) for Product(s) other

than the Product that is the subject of the relevant divestiture; and

2. trade secrets, know-how, techniques, data, inventions, practices, methods and other confidential or proprietary technical, business, research, Development and other information, and all rights in any jurisdiction to limit the use or disclosure thereof, that are related to a Product that is the subject of a divestiture under this Order that Respondents can demonstrate have been routinely used, prior to the Effective Date, by either Respondent Pharmacia or Respondent Pfizer (as applicable) for Product(s) other than the Product that is the subject of the relevant divestiture.

XXXX. "Product Manufacturing Employees" means all salaried employees of Respondent(s) who directly participated (irrespective of the portion of working time involved) in the manufacture of the Product(s), including, but not limited to, those involved in the quality assurance and quality control of the Product(s), within the eighteen (18) month period immediately prior to the Closing Date.

YYYY. "Product Manufacturing Technology" means all technology, trade secrets, know-how, and proprietary information related to the manufacture, validation, packaging, release testing, stability and shelf life of the Product(s), including the Product(s)' formulation, in existence and in the possession of Respondents as of the Closing Date, including, but not limited to, manufacturing records, sampling records, standard operating procedures and batch records related to the manufacturing process, and supplier lists.

ZZZZ. "Product Marketing Employees" means all management level employees of Respondent(s) who directly participated (irrespective of the portion of

working time involved) in the marketing, contracting, or promotion of the Product(s) in the United States within the eighteen (18) month period immediately prior to the Closing Date. These employees include, without limitation, all management level employees having any responsibilities in the areas of sales management, brand management, sales training, market research, managed care contracting, hospital market and other specialty markets, but excluding administrative assistants.

AAAAA. "Product Marketing Materials" means all marketing materials used anywhere in the world related to the Product(s) as of the Closing Date, including, without limitation, all advertising materials, training materials, product data, price lists, mailing lists, sales materials (e.g., detailing reports; vendor lists; sales data; reimbursement data), marketing information (e.g., competitor information; research data; market intelligence reports; statistical programs (if any) used for marketing and sales research; customer information, including customer sales information; sales forecasting models; medical educational materials; Website content and advertising and display materials; speaker lists), promotional and marketing materials, artwork for the production of packaging components, television masters and other similar materials related to the Product(s).

BBBBB. "Product Registrations" means all registrations, permits, licenses, consents, authorizations and other approvals, and pending applications and requests therefor, required by applicable Agencies related to the research, Development, manufacture, distribution, finishing, packaging, marketing or sale of the Product worldwide, including all INDs, INADAs, NDAs, ANDAs, SNDAs, MAAs, NADAs, or ANADAs in existence for the Product as of the Closing Date.

CCCCC. "Product Research and Development Employees" means all employees of Respondent(s) who directly participated (irrespective of the portion of working time involved) in the research, Development, regulatory approval process, or clinical studies of the Product(s) within the eighteen (18) month period immediately prior to the Closing Date.

DDDDD. "Product Sales Employees" means all employees of Respondent(s) who directly participated (irrespective of the portion of working time involved) in the detailing, marketing or promotion of the Product directly to physicians (or, in the case of Products used to treat animals, veterinarians), pharmacists, professional distributors, managed care or other insurance providers, hospitals, employers, or governmental entities within the eighteen (18) month period immediately prior to the Closing Date. This includes employees trained to perform such detailing for the Product within the eighteen (18) month period immediately prior to the Closing Date.

EEEEE. "Product Scientific and Regulatory Material" means all technological, scientific, chemical, biological, pharmacological, toxicological, regulatory and clinical trial materials and information related to the Product(s), and all rights thereto, in any and all jurisdictions.

FFFFF. "Product Software" means computer programs, including all software implementations of algorithms, models, and methodologies whether in source code or object code form, databases and compilations, including any and all data and collections of data, all documentation, including user manuals and training materials, related to any of the foregoing and the content and information contained on any Website; *provided, however,* that "Product Software" does not include software that is readily purchasable or licensable and which has not been modified in a manner

material to the use or function thereof (other than through user preference settings).

GGGGG. "Product Trade Dress" means the current trade dress of the Product(s), including, but not limited to, product packaging associated with the sale of the Product(s) worldwide and the lettering of the Product(s)' trade name or brand name.

HHHHH. "Product Trademark(s)" means all trademarks, trade names and brand names including registrations and applications for registration therefor (and all renewals, modifications, and extensions thereof) and all common law rights, and the goodwill symbolized thereby and associated therewith, for the Product(s).

IIIII. "Proposed Acquirer" means an entity proposed by the Respondents (or a Divestiture Trustee) to the Commission and submitted for the approval of the Commission as the acquirer for particular assets required to be assigned, granted, licensed, divested, transferred, delivered or otherwise conveyed by Respondents pursuant to this Order.

JJJJJ. "Rimadyl" means all Products marketed and sold by Respondent Pfizer under the Product Trademark "Rimadyl" for the treatment of pain in dogs and cats.

KKKKK. "Supply Cost" means the manufacturer's average direct per unit cost of manufacturing the Product plus costs of manufacturing the Product that are directly attributable to FDA regulatory, quality control and compliance. "Supply Cost" shall expressly exclude any intracompany business transfer profit.

LLLLL. "Third Party(ies)" means any private entity other than: (1) the Respondents, or (2) the Commission-approved Acquirer for the relevant assets to be divested related to a particular Product(s).

MMMMM. "Viagra" means all Products marketed and sold by Respondent Pfizer under the Product Trademark "Viagra" for treating the symptoms of male erectile dysfunction.

NNNNN. "Website" means the content of the Website(s) located at the Domain Names, the Domain Names, and all copyrights in such Website(s), to the extent owned by Respondents. "Website" shall not include (1) content owned by third parties and other Product Intellectual Property not owned by Respondents that are incorporated in such Website(s), such as stock photographs used in the Website(s), except to the extent that Respondents can convey their rights, if any, therein; or (2) content unrelated to the Product(s).

II.

IT IS FURTHER ORDERED that:

A. Not later than ten (10) Business Days after the Effective Date, Respondents shall divest the Darifenacin Assets, absolutely and in good faith, to Novartis pursuant to and in accordance with the Darifenacin Asset Purchase Agreement (which agreement shall not vary or contradict, or be construed to vary or contradict, the terms of this Order, it being understood that nothing in this Order shall be construed to reduce any rights or benefits of Novartis or to reduce any obligations of Respondents under such agreement), and such agreement, if it becomes the Divestiture Agreement for the Darifenacin Assets, is incorporated by reference into this Order and made a part hereof. If Respondents do not divest the Darifenacin Assets to Novartis within ten (10) Business Days after the Effective Date, the Commission may appoint a Divestiture Trustee to divest the Darifenacin Assets;

provided, *however*, that if Respondents have divested the Darifenacin Assets to Novartis 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 Novartis is not an acceptable purchaser of the Darifenacin Assets, or that the manner in which the divestiture was accomplished is not acceptable, then Respondents shall immediately rescind the transaction with Novartis and shall divest the Darifenacin Assets within six (6) months from the date the Order becomes final, absolutely and in good faith, at no minimum price, to a Commission-approved Acquirer and only in a manner that receives the prior approval of the Commission.

B. Any Divestiture Agreement that has been approved by the Commission between Respondents (or a Divestiture Trustee) and a Commission-approved Acquirer of the Darifenacin Assets shall be deemed incorporated into this Order, and any failure by Respondents to comply with any term of such Divestiture Agreement related to the Darifenacin Assets shall constitute a failure to comply with this Order.

C. Respondents shall include in any Divestiture Agreement related to the Darifenacin Assets the following provisions:

1. Respondents shall Contract Manufacture and deliver to the Commission-approved Acquirer, in a timely manner and under reasonable terms and conditions, a supply of Darifenacin, at Respondents' Supply Cost, for a period of time sufficient to allow the Commission-approved Acquirer (or the Designee of the Commission-approved Acquirer) to obtain all FDA approvals necessary to manufacture Darifenacin independently of Respondents.

2. After Respondents commence delivery of Darifenacin to the Commission-approved Acquirer pursuant to a Divestiture Agreement and for the term of the Contract Manufacture related to Darifenacin, Respondents will

make inventory of Darifenacin available for sale or resale only to the Commission-approved Acquirer.

3. Respondents shall make representations and warranties to the Commission-approved Acquirer that the Darifenacin supplied through Contract Manufacture pursuant to the Divestiture Agreement meets FDA-approved specifications. Respondents shall agree to indemnify, defend and hold the Commission-approved Acquirer harmless from any and all suits, claims, actions, demands, liabilities, expenses or losses alleged to result from the failure of the Darifenacin supplied to the Commission-approved Acquirer pursuant to the Divestiture Agreement by the Respondents to meet FDA specifications. This obligation shall be contingent upon the Commission-approved Acquirer giving Respondents prompt, adequate notice of such claim and cooperating fully in the defense of such claim. The Divestiture Agreement shall be consistent with the obligations assumed by Respondents under this Order; *provided, however*, Respondents may reserve the right to control the defense of any such litigation, including the right to settle the litigation, so long as such settlement is consistent with the Respondents' responsibilities to supply Darifenacin in the manner required by this Order; *provided further, however*, this obligation shall not require Respondents to be liable for any negligent act or omission of the Commission-approved Acquirer or for any representations and warranties, express or implied, made by the Commission-approved Acquirer that exceed the representations and warranties made by the Respondents to the Commission-approved Acquirer.

4. Respondents shall make representations and warranties to the Commission-approved Acquirer that Respondents will hold harmless and indemnify the Commission-approved Acquirer for any liabilities or loss of profits resulting from the failure by Respondents to deliver

Darifenacin in a timely manner as required by the Divestiture Agreement unless Respondents can demonstrate that their failure was entirely beyond the control of the Respondents and in no part the result of negligence or willful misconduct by Respondents.

5. During the term of the Contract Manufacture between Respondents and the Commission-approved Acquirer, upon request of the Commission-approved Acquirer or Interim Monitor (if applicable), Respondents shall make available to the Commission-approved Acquirer or the Interim Monitor all records that relate to the manufacture of Darifenacin that are generated or created after the Closing Date.

6. Upon reasonable notice and request from the Commission-approved Acquirer to the Respondents, Respondents shall provide in a timely manner at no greater than Direct Cost:

   a. assistance and advice to enable the Commission-approved Acquirer (or the Designee of the Commission-approved Acquirer) to obtain all necessary permits and approvals from any Agency or Governmental Entity to manufacture and sell Darifenacin;

   b. assistance to the Commission-approved Acquirer (or the Designee of the Commission-approved Acquirer) to manufacture Darifenacin in substantially the same manner and quality employed or achieved by Respondent Pfizer; and

   c. consultation with knowledgeable employees of Respondents and training, at the request of the Commission-approved Acquirer and at a facility chosen by the Commission-approved Acquirer, until the Commission-approved Acquirer (or the Designee

of the Commission-approved Acquirer) obtains all FDA approvals necessary to manufacture Darifenacin independently of the Respondents and sufficient to satisfy management of the Commission-approved Acquirer that its personnel (or the Designee's personnel) are adequately trained in the manufacture of Darifenacin.

D. Respondents shall submit to the Commission-approved Acquirer, at Respondents' expense, all Confidential Business Information related to Darifenacin; *provided, however,* this provision shall not apply to any Confidential Business Information related to Darifenacin that Respondent Pharmacia can demonstrate it obtained without the assistance of Respondent Pfizer prior to the Effective Date.

E. Respondents shall not use, directly or indirectly, any Confidential Business Information (other than as necessary to comply with requirements of this Order) related to the research, Development, manufacturing, marketing, or sale of Darifenacin, and shall not disclose or convey such Confidential Business Information, directly or indirectly, to any person except the Commission-approved Acquirer; *provided, however*, this provision shall not apply to any Confidential Business Information related to Darifenacin that Respondent Pharmacia can demonstrate it obtained without the assistance of Respondent Pfizer prior to the Effective Date.

F. For a period of eighteen (18) months from the Closing Date ("the Darifenacin Access Period"), Respondents shall provide the Commission-approved Acquirer with the opportunity to enter into employment contracts with the Darifenacin Global Development Team, Product Manufacturing Employees, Product Marketing Employees, and Product Research and Development Employees related to Darifenacin ("Darifenacin Core Employees").

G. Respondents shall provide any Proposed Acquirer with the

opportunity to enter into employment contracts with the Darifenacin Core Employees in connection with the divestiture of the Darifenacin Assets; *provided, however*, that any such employment contracts entered into prior to the Closing Date shall be contingent upon approval by the Commission of the agreements relating to the Darifenacin Assets (*i.e.,* those agreements proposed by Respondents (or the Divestiture Trustee) to the Commission) as the Divestiture Agreements for the Darifenacin Assets.

H. Not later than twenty-five (25) Business Days after the execution date of any proposed Divestiture Agreement related to Darifenacin Assets, Respondents shall provide the Commission-approved Acquirer or the Proposed Acquirer the Product Employee Information related to the Darifenacin Core Employees. Failure by Respondents to provide the Product Employee Information for any relevant employee within the time provided herein shall extend the Darifenacin Access Period with respect to that employee in an amount equal to the delay.

I. During the Darifenacin Access Period, Respondents shall not interfere with the hiring or employing by the Commission-approved Acquirer of Darifenacin Core Employees, and shall remove any impediments within the control of Respondents that may deter these employees from accepting employment with the Commission-approved Acquirer, 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 the Commission-approved Acquirer. In addition, Respondents shall not make any counteroffer to a Darifenacin Core Employee who receives a written offer of employment from the Commission-approved Acquirer;

provided, however, that these requirements shall not prohibit the Respondents from making offers of employment to or employing any Darifenacin Core Employee during the

Darifenacin Access Period where the Commission-approved Acquirer has notified the Respondents in writing that the Commission-approved Acquirer does not intend to make an offer of employment to that employee;

provided further, that if the Respondents notify the Commission-approved Acquirer in writing of their desire to make an offer of employment to a particular Darifenacin Core Employee and the Commission-approved Acquirer does not make an offer of employment to that employee within twenty (20) Business Days of the date the Commission-approved Acquirer receives such notice, the Respondents may make an offer of employment to that employee.

J. Respondents shall provide all Darifenacin Core Employees with reasonable financial incentives to continue in their positions until the Closing Date. Such incentives shall include a continuation of all employee benefits offered by Respondents until the Closing Date for the divestiture of the Darifenacin Assets has occurred, including regularly scheduled raises, bonuses, and vesting of pension benefits (as permitted by Law). In addition to the foregoing, Respondents shall provide to each Darifenacin Core Employee who accepts employment with the Commission-approved Acquirer, an incentive equal to three (3) months of such employee's base annual salary to be paid upon the employee's completion of one (1) year of employment with the Commission-approved Acquirer;

provided, however, that nothing in these requirements or in this Order requires or shall be construed to require the Respondents to terminate the employment of any employee.

K. For a period of one (1) year from the Closing Date, Respondents shall not:

1. directly or indirectly, solicit or otherwise attempt to induce any employee of the Commission-approved Acquirer with any amount of responsibility related to

Darifenacin ("Darifenacin Employee") to terminate his or her employment relationship with the Commission-approved Acquirer; *provided*, *however*, a violation of this provision will not occur by any of the following actions: (i) Respondents advertise for employees in newspapers, trade publications or other media not targeted specifically at the Darifenacin Employees, or (ii) a Darifenacin Employee contacts Respondents on his or her own initiative without any direct or indirect solicitation or encouragement from the Respondents; or

2. hire any Darifenacin Employee; *provided, however*, Respondents may hire any former Darifenacin Employee whose employment has been terminated by the Commission-approved Acquirer or who independently applies for employment with the Respondents, as long as such employee was not solicited in violation of the non-solicitation requirements contained herein.

L. Prior to the Closing Date, Respondents shall secure all consents and waivers from all Third Parties that are necessary for the divestiture of the Darifenacin Assets to the Commission-approved Acquirer, or for the continued research, Development, manufacture, sale, marketing or distribution of Darifenacin by the Commission-approved Acquirer.

M. For a period of one (1) year from the Closing Date, Respondents shall not market or promote Detrol in the United States using the services of any Product Marketing Employee related to Darifenacin.

N. Respondents shall require, as a condition of continued employment post-divestiture, that each Darifenacin Core Employee sign a confidentiality agreement pursuant to which such employee shall be required to maintain all Confidential Business Information related to Darifenacin strictly confidential, including the nondisclosure of such information to all other employees, executives or other

personnel of Respondents (other than as necessary to comply with the requirements of this Order).

O. Respondents shall provide written notification of the restrictions on the use of the Confidential Business Information related to Darifenacin by Respondents' personnel to all of Respondents' employees who (i) are or were involved in the research, Development, manufacturing, distribution, sale or marketing of Darifenacin, (ii) are involved in the research, Development, manufacturing, distribution, sale or marketing of Detrol and/or (iii) may have Confidential Business Information related to Darifenacin. Such notification shall be in substantially the form set forth in the Employee Notification. Respondents shall give such notification by e-mail with return receipt requested or similar transmission, and keep a file of such receipts for one (1) year after the Closing Date. Respondents shall provide a copy of such notification to the Commission-approved Acquirer. Respondents shall maintain complete records of all such agreements at Respondents' corporate headquarters and shall provide an officer's certification to the Commission, stating that such acknowledgment program has been implemented and is being complied with. Respondents shall provide the Commission-approved Acquirer with copies of all certifications, notifications and reminders sent to Respondents' personnel.

P. Upon reasonable notice and request by the Commission-approved Acquirer, Respondents shall make available to the Commission-approved Acquirer, at no greater than Direct Cost, such personnel, assistance and training as the Commission-approved Acquirer might reasonably need to transfer the Darifenacin Assets, and shall continue providing such personnel, assistance and training, at the request of the Commission-approved Acquirer, until the Commission-approved Acquirer (or the Designee of the Commission-approved Acquirer) is fully validated, qualified, and approved

by the FDA, and able to manufacture Darifenacin independently of the Respondents.

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

R. Counsel for Respondents (including in-house counsel under appropriate confidentiality arrangements) may retain unredacted copies of all documents or other materials provided to the Commission-approved Acquirer and may have access to original documents (under circumstances where copies of documents are insufficient or otherwise unavailable) provided to the Commission-approved Acquirer in order to:

1. comply with any Divestiture Agreement, this Order, any Law (including, without limitation, any requirement to obtain regulatory licenses or approvals), any data retention requirement of any applicable Governmental Entity, or any taxation requirements; or

2. defend against, respond to, or otherwise participate in any litigation, investigation, audit, process, subpoena or other proceeding relating to the divestiture or any other aspect of the Darifenacin Assets or Darifenacin business; *provided*, *however*, that Respondents may disclose such information as necessary for the purposes set forth in this Paragraph pursuant to an appropriate confidentiality order, agreement or arrangement;

provided further, *however*:

1. Respondents shall require those who view such unredacted documents or other materials to enter into confidentiality agreements with the Commission–approved Acquirer;

provided, however, that Respondents shall not be deemed to have violated this requirement if the Commission-approved Acquirer withholds such agreement unreasonably; and

2. Respondents shall use their best efforts to obtain a protective order to protect the confidentiality of such information during any adjudication.

S. Respondents shall maintain manufacturing facilities for Darifenacin production that are ready, validated, qualified and approved by the FDA, and fully capable of producing Darifenacin until the Commission-approved Acquirer (or the Designee of the Commission-approved Acquirer) is fully validated, qualified and approved by the FDA and able to manufacture Darifenacin independently of Respondents; *provided, however*, the Commission may eliminate, or limit the duration of, the Respondents' obligation under this provision should the Commission determine that the Commission-approved Acquirer is not using commercially reasonable best efforts to secure the FDA approvals necessary to manufacture Darifenacin independently of Respondents.

T. The purpose of the divestiture of the Darifenacin Assets is to ensure the continued use of the Darifenacin Assets in the same business in which the Darifenacin Assets were engaged at the time of the announcement 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) Business Days after the Effective Date, Respondents shall divest the Femhrt Assets, absolutely and in good faith, to Galen pursuant to and in accordance with the Femhrt Asset Purchase Agreement

(which agreement shall not vary or contradict, or be construed to vary or contradict, the terms of this Order, it being understood that nothing in this Order shall be construed to reduce any rights or benefits of Galen or to reduce any obligations of Respondents under such agreement), and such agreement, if approved by the Commission as the Divestiture Agreement for the Femhrt Assets, is incorporated by reference into this Order and made part hereof. If Respondents do not divest the Femhrt Assets to Galen within ten (10) Business Days after the Effective Date, the Commission may appoint a Divestiture Trustee to divest the Femhrt Assets;

provided, *however*, that if Respondents have divested the Femhrt Assets to Galen 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 Galen is not an acceptable purchaser of the Femhrt Assets, or that the manner in which the divestiture was accomplished is not acceptable, then Respondents shall immediately rescind the transaction with Galen and shall divest the Femhrt Assets within six (6) months from the date the Order becomes final, absolutely and in good faith, at no minimum price, to a Commission-approved Acquirer and only in a manner that receives the prior approval of the Commission.

B. Any Divestiture Agreement that has been approved by the Commission between Respondents (or a Divestiture Trustee) and a Commission-approved Acquirer of the Femhrt Assets shall be deemed incorporated into this Order, and any failure by Respondents to comply with any term of such Divestiture Agreement related to the Femhrt Assets shall constitute a failure to comply with this Order.

C. Respondents shall submit to the Commission-approved Acquirer, at Respondents' expense, all Confidential Business Information related to Femhrt; *provided, however,* this provision shall not apply to any Confidential Business

Information related to Femhrt that Respondent Pharmacia can demonstrate it obtained without the assistance of Respondent Pfizer prior to the Effective Date.

D. Respondents shall not use, directly or indirectly, any Confidential Business Information (other than as necessary to comply with requirements of this Order) related to the research, Development, manufacturing, marketing, or sale of Femhrt, and shall not disclose or convey such Confidential Business Information, directly or indirectly, to any person except the Commission-approved Acquirer; *provided, however*, this provision shall not apply to any Confidential Business Information related to Femhrt that Respondent Pharmacia can demonstrate it obtained without the assistance of Respondent Pfizer prior to the Effective Date.

E. For a period of six (6) months from the Closing Date ("the Femhrt Access Period"), Respondents shall provide the Commission-approved Acquirer with the opportunity to enter into employment contracts with the Product Marketing Employees and Product Research and Development Employees related to Femhrt ("Femhrt Core Employees") and the Product Sales Employees related to Femhrt ("Femhrt Sales Employees").

F. Respondents shall provide any Proposed Acquirer with the opportunity to enter into employment contracts with the Femhrt Core Employees and the Femhrt Sales Employees in connection with the divestiture of the Femhrt Assets; *provided, however*, that any such employment contracts entered into prior to the Closing Date shall be contingent upon approval by the Commission of the agreements relating to the Femhrt Assets (*i.e.,* those agreements proposed by Respondents (or the Divestiture Trustee) to the Commission) as the Divestiture Agreements for the Femhrt Assets.

G. Not later than twenty-five (25) Business Days after the

execution date of any proposed Divestiture Agreement related to Femhrt Assets, Respondents shall provide the Commission-approved Acquirer or the Proposed Acquirer the Product Employee Information related to the Femhrt Core Employees. At the Commission-approved Acquirer's option or the Proposed Acquirer's option and not later than twenty (20) Business Days after the notification to Respondents of the intention to exercise such option, Respondents also shall provide to the Commission-approved Acquirer, or the Proposed Acquirer, the Product Employee information related to the Femhrt Sales Employees. Failure by Respondents to provide the Product Employee Information for any relevant employee within the time provided herein shall extend the Femhrt Access Period with respect to that employee in an amount equal to the delay.

H. During the Femhrt Access Period, Respondents shall not interfere with the hiring or employing by the Commission-approved Acquirer of Femhrt Core Employees or Femhrt Sales Employees, and shall remove any impediments within the control of Respondents that may deter these employees from accepting employment with the Commission-approved Acquirer, 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 the Commission-approved Acquirer. In addition, Respondents shall not make any counteroffer to a Femhrt Core Employee or Femhrt Sales Employee who receives a written offer of employment from the Commission-approved Acquirer;

provided, however, that these requirements shall not prohibit the Respondents from making offers of employment to or employing any Femhrt Core Employee or any Femhrt Sales Employee during the Femhrt Access Period where the Commission-approved Acquirer has notified the Respondents in writing that the Commission-

approved Acquirer does not intend to make an offer of employment to that employee;

provided further, that if the Respondents notify the Commission-approved Acquirer in writing of their desire to make an offer of employment to a particular Femhrt Core Employee or Femhrt Sales Employee and the Commission-approved Acquirer does not make an offer of employment to that employee within twenty (20) Business Days of the date the Commission-approved Acquirer receives such notice, the Respondents may make an offer of employment to that employee.

I. Respondents shall provide all Femhrt Core Employees and all Femhrt Sales Employees with reasonable financial incentives to continue in their positions until the Closing Date. Such incentives shall include a continuation of all employee benefits offered by Respondents until the Closing Date for the divestiture of the Femhrt Assets has occurred, including regularly scheduled raises, bonuses, and vesting of pension benefits (as permitted by Law);

provided, however, that nothing in these requirements or in this Order requires or shall be construed to require the Respondents to terminate the employment of any employee.

J. For a period of one (1) year from the Closing Date, Respondents shall not:

1. directly or indirectly, solicit or otherwise attempt to induce any employee of the Commission-approved Acquirer with any amount of responsibility related to Femhrt ("Femhrt Employee") to terminate his or her employment relationship with the Commission-approved Acquirer; *provided*, *however*, a violation of this provision will not occur by any of the following actions: (i) Respondents advertise for employees in newspapers, trade publications or other media not targeted specifically

at the Femhrt Employees, or (ii) a Femhrt Employee contacts Respondents on his or her own initiative without any direct or indirect solicitation or encouragement from the Respondents; or

2. hire any Femhrt Employee; *provided, however*, Respondents may hire any former Femhrt Employee whose employment has been terminated by the Commission-approved Acquirer or who independently applies for employment with the Respondents, as long as such employee was not solicited in violation of the non-solicitation requirements contained herein.

K. Prior to the Closing Date, Respondents shall secure all consents and waivers from all Third Parties that are necessary for the divestiture of the Femhrt Assets to the Commission-approved Acquirer, or for the continued research, Development, manufacture, sale, marketing or distribution of Femhrt by the Commission-approved Acquirer. In addition, prior to the Effective Date, Respondents shall execute agreements (assignable to the Commission-approved Acquirer) with all Third Parties (including, but not limited to, all Third Parties used by Respondent Pfizer in connection with the manufacture of Femhrt within the twelve (12) month period immediately prior to the Effective Date) necessary to insure that any Commission-approved Acquirer will have a supply of Femhrt: (1) in quantities; (2) at prices; (3) in a timely manner; and (4) under reasonable terms and conditions, sufficient to enable any Commission-approved Acquirer to maintain the viability and competitiveness of the Femhrt Assets. Each such agreement shall provide that no additional consents or waivers of the respective Third Party are required in order to assign the agreement to the Commission-approved Acquirer; *provided, however*, Respondents may satisfy this requirement by certifying that the Commission-approved Acquirer has executed all such agreements directly with each of the relevant Third Parties.

For the purposes of these requirements "Third Parties" includes, but is not limited to, Duramed.

L. For a period of one (1) year from the Closing Date, Respondents shall not market or promote Activella in the United States using the services of any Product Marketing Employee related to Femhrt. In addition, for a period of six (6) months from the Closing Date, Respondents shall not market or promote Activella in the United States using the services of any Femhrt Sales Employee.

M. Respondents shall require, as a condition of continued employment post-divestiture, that each Femhrt Core Employee and each Femhrt Sales Employee sign a confidentiality agreement pursuant to which such employee shall be required to maintain all Confidential Business Information related to Femhrt strictly confidential, including the nondisclosure of such information to all other employees, executives or other personnel of Respondents (other than as necessary to comply with the requirements of this Order).

N. Respondents shall provide written notification of the restrictions on the use of the Confidential Business Information related to Femhrt by Respondents' personnel to all of Respondents' employees who (i) are or were involved in the research, Development, manufacturing, distribution, sale or marketing of Femhrt, (ii) are involved in the research, Development, manufacturing, distribution, sale or marketing of Activella and/or (iii) may have Confidential Business Information related to Femhrt. Such notification shall be in substantially the form set forth in the Employee Notification. Respondents shall give such notification by e-mail with return receipt requested or similar transmission, and keep a file of such receipts for one (1) year after the Closing Date. Respondents shall provide a copy of such notification to the Commission-approved Acquirer. Respondents shall maintain complete records of all such

agreements at Respondents' corporate headquarters and shall provide an officer's certification to the Commission, stating that such acknowledgment program has been implemented and is being complied with. Respondents shall provide the Commission-approved Acquirer with copies of all certifications, notifications and reminders sent to Respondents' personnel.

O. Upon reasonable notice and request of the Commission-approved Acquirer, Respondents shall make available to the Commission-approved Acquirer, at no greater than Direct Cost, such personnel, assistance and training as the Commission-approved Acquirer might reasonably need to transfer the Femhrt Assets, and shall continue providing such personnel, assistance and training, at the request of the Commission-approved Acquirer, until the Commission-approved Acquirer is fully validated, qualified, and approved by the FDA, and able to manufacture Femhrt independently of the Respondents.

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

Q. Counsel for Respondents (including in-house counsel under appropriate confidentiality arrangements) may retain unredacted copies of all documents or other materials provided to the Commission-approved Acquirer and may have access to original documents (under circumstances where copies of documents are insufficient or otherwise unavailable) provided to the Commission-approved Acquirer in order to:

1. comply with any Divestiture Agreement, this Order, any Law (including, without limitation, any requirement to obtain regulatory licenses or approvals), any data

retention requirement of any applicable Governmental Entity, or any taxation requirements; or

2. defend against, respond to, or otherwise participate in any litigation, investigation, audit, process, subpoena or other proceeding relating to the divestiture or any other aspect of the Femhrt Assets or Femhrt business; *provided*, *however*, that Respondents may disclose such information as necessary for the purposes set forth in this Paragraph pursuant to an appropriate confidentiality order, agreement or arrangement;

provided further, *however*:

1. Respondents shall require those who view such unredacted documents or other materials to enter into confidentiality agreements with the Commission-approved Acquirer; *provided, however,* that Respondents shall not be deemed to have violated these requirements if the Commission-approved Acquirer withholds such agreement unreasonably; and

2. Respondents shall use their best efforts to obtain a protective order to protect the confidentiality of such information during any adjudication.

R. The purpose of the divestiture of the Femhrt Assets is to ensure the continued use of the Femhrt Assets in the same business in which the Femhrt Assets were engaged at the time of the announcement 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) Business Days after the Effective Date, Respondents shall terminate the IN Apomorphine Collaboration and License Agreement with Nastech, absolutely and in good faith, in accordance with the IN Apomorphine Disengagement Agreement (which agreement shall not vary or contradict, or be construed to vary or contradict, the terms of this Order, it being understood that nothing in this Order shall be construed to reduce any rights or benefits of Nastech or to reduce any obligations of Respondents under such agreement), which requires, *inter alia*:

1. Respondents to grant to Nastech certain rights and immunities under Patents that are owned or licensed by Respondents as of immediately prior to the Effective Date sufficient to allow Nastech freedom to practice in the research, Development, manufacture, use, import, export, distribution and sale of IN Apomorphine in the Field of Human Sexual Dysfunction;

2. Respondent Pharmacia to grant an exclusive (even as to Respondents) fully paid-up, royalty-free, worldwide, irrevocable license (including the right to sublicense):

   a. to research, Develop, make, have made, use, import, export, offer for sale and sell the IN Apomorphine Collaboration Product in the Field of Human Sexual Dysfunction:

      (1) under certain types of confidential and proprietary information and know-how (as described in the IN Apomorphine Disengagement Agreement) owned or controlled by Respondent Pharmacia

immediately prior to the Effective Date, including:

(a) Products or chemical compounds;

(b) technical and non-technical data;

(c) information relating to the results of tests, assays, methods, and processes; and

(d) drawings, plans, diagrams, specifications, and other documents containing said information and data; to the extent that such information, know-how or data is useful or necessary for the research, Development, manufacture, testing, use or sale of IN Apomorphine in the Field of Human Sexual Dysfunction;

(2) under Patents owned or licensed (where Respondent Pharmacia has the right to sublicense) by Respondent Pharmacia; and

b. to research, Develop, make, have made, use, import, export, offer for sale and sell IN Apomorphine in the Field of Human Sexual Dysfunction under any Patent claiming any inventions or discoveries conceived or reduced to practice by Nastech or Respondent Pharmacia in the Development of IN Apomorphine pursuant to the IN Apomorphine Collaboration and License Agreement;

3. Respondents covenant not to join, or file, prosecute or maintain any suit, in law or equity, against IN Apomorphine Nastech Releasee(s) for the research, Development, manufacture, use, import, export, distribution, or sale of IN Apomorphine in the Field of Human Sexual Dysfunction under:

a. any Patents owned or licensed by Respondents as of the Effective Date that claim either the use of Apomorphine delivered Intranasally (whether used by itself or in combination with any other active ingredient) in the Field of Human Sexual Dysfunction, or a method of treating Human Sexual Dysfunction utilizing an agonist for the human dopamine 2 receptor; or

b. any Patents owned or licensed at any time after the Effective Date by Respondents, that claim any aspect of the research, Development, manufacture, use, import, export, distribution, or sale of the IN Apomorphine Collaboration Product in the Field of Human Sexual Dysfunction other than such Patents that claim inventions conceived by Respondents' employees after the Effective Date;

4. Respondents covenant that 1) any Third Party assignee, transferee or licensee of the above-described Patents shall agree to provide a covenant not to sue the IN Apomorphine Nastech Releasees, at least as protective as the foregoing, as a condition of such assignment, transfer or license and 2) with respect to any Third Party rights licensed to either or both of Respondents as of or after the Effective Date, and as to which Respondents do not control the right of prosecution of any suit, legal or other action, Respondents shall not actively induce, assist or participate in any suit, legal or other action or proceeding against the IN Apomorphine Nastech Releasees, unless required by Law or contract (such contract not to be solicited or entered into for the purpose of circumventing any of the requirements of this Order).

B. The IN Apomorphine Disengagement Agreement is incorporated by reference into this Order and made a part hereof, and any failure by Respondents to comply with any term of the IN Apomorphine Disengagement Agreement, if

such agreement is approved by the Commission in connection with the Commission's determination to make this Order final, shall constitute a failure to comply with this Order.

C. Respondents shall submit to Nastech, at Respondents' expense, all Confidential Business Information related to IN Apomorphine; *provided, however,* this provision shall not apply to any Confidential Business Information related to IN Apomorphine that Respondent Pfizer can demonstrate it obtained without the assistance of Respondent Pharmacia prior to the Effective Date.

D. Respondents shall not use, directly or indirectly, any Confidential Business Information (other than as necessary to comply with requirements of this Order) related to the research, Development, manufacturing, marketing, or sale of IN Apomorphine, and shall not disclose or convey such Confidential Business Information, directly or indirectly, to any person except Nastech. This provision shall not apply to any Confidential Business Information related to IN Apomorphine that Respondent Pfizer can demonstrate it obtained without the assistance of Respondent Pharmacia prior to the Effective Date.

E. For a period of twelve (12) months from the execution date of the IN Apomorphine Disengagement Agreement ("the IN Apomorphine Access Period"), Respondents shall provide Nastech and any IN Apomorphine Nastech Partner with the opportunity to enter into employment contracts with the Product Marketing Employees, Product Manufacturing Employees, and Product Research and Development Employees related to IN Apomorphine ("IN Apomorphine Core Employees") such employment contract to be for the purposes of the research, Development, distribution, manufacturing, marketing or sale of IN Apomorphine.

F. Not later than ten (10) Business Days after the date this Order becomes final, Respondents shall provide Nastech the Product

Employee Information related to the IN Apomorphine Core Employees. Failure by Respondents to provide the Product Employee Information for any relevant employee within the time provided herein shall extend the IN Apomorphine Access Period with respect to that employee in an amount equal to the delay.

G. During the IN Apomorphine Access Period, Respondents shall not interfere with the hiring or employing by Nastech, or any IN Apomorphine Nastech Partner, of IN Apomorphine Core Employees, and shall remove any impediments within the control of Respondents that may deter these employees from accepting employment with Nastech or any IN Apomorphine Nastech Partner, 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 Nastech or any IN Apomorphine Nastech Partner. In addition, Respondents shall not make any counteroffer to a IN Apomorphine Core Employee who receives a written offer of employment from Nastech or any IN Apomorphine Nastech Partner;

provided, however, that these requirements shall not prohibit the Respondents from making offers of employment to or employing any IN Apomorphine Core Employee during the IN Apomorphine Access Period where Nastech or any IN Apomorphine Nastech Partner has notified the Respondents in writing that Nastech or any IN Apomorphine Nastech Partner does not intend to make an offer of employment to that employee.

provided further, that if the Respondents notify Nastech or any IN Apomorphine Nastech Partner in writing of their desire to make an offer of employment to a particular IN Apomorphine Core Employee and Nastech or any IN Apomorphine Nastech Partner does not make an offer of employment to that employee within twenty (20) Business Days of the date

Nastech receives such notice, the Respondents may make an offer of employment to that employee.

H. For a period of one (1) year from the Closing Date, Respondents shall not:

1. directly or indirectly, solicit or otherwise attempt to induce any employee of Nastech or any IN Apomorphine Nastech Partner with any amount of responsibility related to IN Apomorphine ("IN Apomorphine Employee") to terminate his or her employment relationship with the Nastech or the IN Apomorphine Partner; *provided*, *however*, a violation of this provision will not occur by any of the following actions: (i) Respondents advertise for employees in newspapers, trade publications or other media not targeted specifically at the IN Apomorphine Employees, or (ii) an IN Apomorphine Employee contacts Respondents on his or her own initiative without any direct or indirect solicitation or encouragement from the Respondents; or

2. hire any IN Apomorphine Employee; *provided, however*, Respondents may hire any former IN Apomorphine Employee whose employment has been terminated by Nastech or any IN Apomorphine Nastech Partner or who independently applies for employment with the Respondents, as long as such employee was not solicited in violation of the non-solicitation requirements contained herein.

I. Respondents shall require, as a condition of continued employment post-divestiture, that each IN Apomorphine Core Employee sign a confidentiality agreement pursuant to which such employee shall be required to maintain all Confidential Business Information related to IN Apomorphine strictly confidential, including the nondisclosure of such information to all other employees, executives or other personnel of

Respondents (other than as necessary to comply with the requirements of this Order).

J. Respondents shall provide written notification of the restrictions on the use of the Confidential Business Information related to IN Apomorphine by Respondents' personnel to all of Respondents' employees who (i) are or were involved in the research, Development, manufacturing, distribution, sale or marketing of IN Apomorphine, (ii) are involved in the research, Development, manufacturing, distribution, sale or marketing of Viagra and/or (iii) may have Confidential Business Information related to IN Apomorphine. Such notification shall be in substantially the form set forth in the Employee Notification. Respondents shall give such notification by e-mail with return receipt requested or similar transmission, and keep a file of such receipts for one (1) year after the Closing Date. Respondents shall provide a copy of such notification to Nastech. Respondents shall maintain complete records of all such agreements at Respondents' corporate headquarters and shall provide an officer's certification to the Commission, stating that such acknowledgment program has been implemented and is being complied with. Respondents shall provide Nastech with copies of all certifications, notifications and reminders sent to Respondents' personnel.

K. Respondents shall divest all their Ownership Interest in Nastech, including, but not limited to, all of the shares of Nastech common stock owned by Respondent Pharmacia, in accordance with the IN Apomorphine Disengagement Agreement.

L. Respondents shall not, directly or indirectly:

1. exercise dominion or control over, or otherwise seek to influence, the management, direction or supervision of the business of Nastech, including, but not limited to, any participation in the formulation, determination or direction of any business decisions of Nastech;

2. propose corporate action requiring the approval of Nastech shareholders;

3. nominate candidates for, or in any other way seek to obtain or obtain representation on, the Board of Directors of Nastech;

4. have any of their directors, officers or employees serve simultaneously as an officer or director of Nastech;

5. exercise any voting rights attached to any Ownership Interest in Nastech; *provided, however*, that in any matter to be voted on by the shareholders of Nastech, Respondents shall cast the votes related to their Ownership Interest in each class of Nastech stock in an amount and manner proportional to the vote of all other votes cast by other Nastech shareholders entitled to vote on such matter;

6. seek or obtain access to any confidential, proprietary, or other non-public information of Nastech relating to the research or Development of IN Apomorphine and not otherwise necessary to comply with this Order; *provided, however,* that this shall not be construed to prohibit Respondents from seeking or obtaining discovery in any litigation or other proceeding to resolve a claim between Respondents and Nastech in accordance with the procedures of the forum before which the dispute is pending. With respect to any such discovery, Respondents shall enter into a protective order to prevent any information from being used for any purpose other than providing legal representation or evidence as to the particular dispute and to prevent any information from being disclosed to any person(s) not necessary to the resolution of such dispute; or

7. 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 Nastech.

The requirements of this Paragraph shall continue and remain in effect so long as Respondents retain any Ownership Interest in Nastech.

M. 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 additional or greater Ownership Interest in Nastech than that which exists as of the Closing Date, or any other interest(s), in whole or in part, in any Patents owned by Nastech and related to IN Apomorphine. 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 the Respondents and not of any other party to the transaction. Respondents shall provide two (2) complete copies (with all attachments and exhibits) of 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 thirty (30) 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.

N. The purpose of Paragraph IV of this Order is to ensure the continuation of IN Apomorphine research and Development for use in the treatment of Human Sexual Dysfunction 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) Business Days after the Effective Date, Respondents shall divest the D2 Agonist 774 Assets, absolutely and in good faith, to Neurocrine pursuant to and in accordance with the D2 Agonist 774 License Agreement (which agreement shall not vary or contradict, or be construed to vary or contradict, the terms of this Order, it being understood that nothing in this Order shall be construed to reduce any rights or benefits of Neurocrine or to reduce any obligations of Respondents under such agreement), and such agreement, if it becomes the Divestiture Agreement for the D2 Agonist 774 Assets, is incorporated by reference into this Order and made a part hereof. If Respondents do not divest the D2 Agonist 774 Assets to Neurocrine within ten (10) Business Days after the Effective Date, the Commission may appoint a Divestiture Trustee to divest the D2 Agonist 774 Assets;

provided, *however*, that if Respondents have divested the D2 Agonist 774 Assets to Neurocrine 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 Neurocrine is not an acceptable purchaser of the D2

Agonist 774 Assets, or that the manner in which the divestiture was accomplished is not acceptable, then Respondents shall immediately rescind the transaction with Neurocrine and shall divest the D2 Agonist 774 Assets within six (6) months from the date the Order becomes final, absolutely and in good faith, at no minimum price, to a Commission-approved Acquirer and only in a manner that receives the prior approval of the Commission.

B. Any Divestiture Agreement that has been approved by the Commission between Respondents (or a Divestiture Trustee) and a Commission-approved Acquirer of the D2 Agonist 774 Assets shall be deemed incorporated into this Order, and any failure by Respondents to comply with any term of such Divestiture Agreement related to the D2 Agonist 774 Assets shall constitute a failure to comply with this Order.

C. Respondents shall include in any Divestiture Agreement related to the D2 Agonist 774 Assets the following provisions:

1. Respondents shall Contract Manufacture and deliver to the Commission-approved Acquirer, in a timely manner and under reasonable terms and conditions, a supply of D2 Agonist 774, at no greater than Respondents' Supply Cost, for a period of time sufficient to allow the Commission-approved Acquirer (or the Designee of the Commission-approved Acquirer) to become certified by the FDA to manufacture D2 Agonist 774 independently of Respondents.

2. After Respondents commence delivery of D2 Agonist 774 to the Commission-approved Acquirer pursuant to a Divestiture Agreement and for the term of the Contract Manufacture related to D2 Agonist 774, Respondents will make inventory of D2 Agonist 774 available for sale or resale only to the Commission-approved Acquirer; *provided, however*, Respondents may make or have made a supply of D2 Agonist 774 for their own sale or resale

solely for use in Fields outside the Field of Human Sexual Dysfunction;

3. Respondents shall make representations and warranties to the Commission-approved Acquirer that the D2 Agonist 774 supplied through Contract Manufacture pursuant to the Divestiture Agreement meets all FDA specifications and other specifications for the compound consistent with current good manufacturing practices. Respondents shall agree to indemnify, defend and hold the Commission-approved Acquirer harmless from any and all suits, claims, actions, demands, liabilities, expenses or losses alleged to result from the failure of the D2 Agonist 774 supplied to the Commission-approved Acquirer pursuant to the Divestiture Agreement by the Respondents to meet such specifications. This obligation shall be contingent upon the Commission-approved Acquirer giving Respondents prompt, adequate notice of such claim and cooperating fully in the defense of such claim. The Divestiture Agreement shall be consistent with the obligations assumed by Respondents under this Order; *provided, however,* Respondents may reserve the right to control the defense of any such litigation, including the right to settle the litigation, so long as such settlement is consistent with the Respondents' responsibilities to supply D2 Agonist 774 in the manner required by this Order; *provided further, however*, this obligation shall not require Respondents to be liable for any negligent act or omission of the Commission-approved Acquirer or for any representations and warranties, express or implied, made by the Commission-approved Acquirer that exceed the representations and warranties made by the Respondents to the Commission-approved Acquirer.

4. Respondents shall make representations and warranties to the Commission-approved Acquirer that Respondents will hold harmless and indemnify the Commission-approved Acquirer for any liabilities or loss of profits

resulting from the failure by Respondents to deliver D2 Agonist 774 in a timely manner as required by the Divestiture Agreement unless Respondents can demonstrate that their failure was entirely beyond the control of the Respondents and in no part the result of negligence or willful misconduct by Respondents.

5. During the term of the Contract Manufacture between Respondents and the Commission-approved Acquirer, upon request of the Commission-approved Acquirer or Interim Monitor (if applicable), Respondents shall make available to the Commission-approved Acquirer or the Interim Monitor all records that relate to the manufacture of D2 Agonist 774.

6. Respondents shall commit that, upon reasonable notice and a request from the Commission-approved Acquirer to the Respondents, Respondents shall provide in a timely manner at no greater than Direct Cost:

   a. assistance and advice to enable the Commission-approved Acquirer (or the Designee of the Commission-approved Acquirer) to obtain all necessary permits and approvals from any Agency or Governmental Entity to manufacture and sell D2 Agonist 774;

   b. assistance to the Commission-approved Acquirer (or the Designee of the Commission-approved Acquirer) to manufacture D2 Agonist 774 in substantially the same manner and quality employed or achieved by Respondent Pharmacia; and

   c. consultation with knowledgeable employees of Respondents and training, at the request of the Commission-approved Acquirer and at a facility chosen by the Commission-approved Acquirer, until the Commission-approved Acquirer (or the Designee

of the Commission-approved Acquirer) receives certification from the FDA for the manufacture of D2 Agonist 774 sufficient to satisfy management of the Commission-approved Acquirer that its personnel (or the Designee's personnel) are adequately trained in the manufacture of D2 Agonist 774.

D. Respondents shall submit to the Commission-approved Acquirer, at Respondents' expense, all Confidential Business Information related to D2 Agonist 774; *provided, however,* this provision shall not apply to any Confidential Business Information related to D2 Agonist 774 that Respondent Pfizer can demonstrate it obtained without the assistance of Respondent Pharmacia prior to the Effective Date.

E. Respondents shall not use, directly or indirectly, any Confidential Business Information (other than as necessary to comply with requirements of this Order) related to the research, Development, manufacturing, marketing, or sale of D2 Agonist 774 in the Field of Human Sexual Dysfunction, and shall not disclose or convey such Confidential Business Information, directly or indirectly, as it relates to the Field of Human Sexual Dysfunction, to any person except the Commission-approved Acquirer; *provided, however*, this provision shall not apply to any Confidential Business Information related to D2 Agonist 774 that Respondent Pfizer can demonstrate it obtained without the assistance of Respondent Pharmacia prior to the Effective Date.

F. For a period of eighteen (18) months from the Closing Date ("the D2 Agonist 774 Access Period"), Respondents shall provide the Commission-approved Acquirer with the opportunity to enter into employment contracts with the Product Manufacturing Employees, Product Marketing Employees, and Product Research and Development Employees related to D2 Agonist 774 ("D2 Agonist 774 Core Employees").

G. Respondents shall provide any Proposed Acquirer with the opportunity to enter into employment contracts with the D2 Agonist 774 Core Employees in connection with the divestiture of the D2 Agonist 774 Assets; *provided, however*, that any such employment contracts entered into prior to the Closing Date shall be contingent upon approval by the Commission of the agreements relating to the D2 Agonist 774 Assets (*i.e.,* those agreements proposed by Respondents (or the Divestiture Trustee) to the Commission) as the Divestiture Agreements for the D2 Agonist 774 Assets.

H. Not later than twenty-five (25) Business Days after the execution date of any proposed Divestiture Agreement related to D2 Agonist 774 Assets, Respondents shall provide the Commission-approved Acquirer or the Proposed Acquirer the Product Employee Information related to the D2 Agonist 774 Core Employees. Failure by Respondents to provide the Product Employee Information for any relevant employee within the time provided herein shall extend the D2 Agonist 774 Access Period with respect to that employee in an amount equal to the delay.

I. During the D2 Agonist 774 Access Period, Respondents shall not interfere with the hiring or employing by the Commission-approved Acquirer of D2 Agonist 774 Core Employees, and shall remove any impediments within the control of Respondents that may deter these employees from accepting employment with the Commission-approved Acquirer, 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 the Commission-approved Acquirer. In addition, Respondents shall not make any counteroffer to a D2 Agonist 774 Core Employee who receives a written offer of employment from the Commission-approved Acquirer;

provided, however, that these requirements shall not prohibit the Respondents from making offers of employment to or employing any D2 Agonist 774 Core Employee during the D2 Agonist 774 Access Period where the Commission-approved Acquirer has notified the Respondents in writing that the Commission-approved Acquirer does not intend to make an offer of employment to that employee;

provided further, that if the Respondents notify the Commission-approved Acquirer in writing of their desire to make an offer of employment to a particular D2 Agonist 774 Core Employee and the Commission-approved Acquirer does not make an offer of employment to that employee within twenty (20) Business Days of the date the Commission-approved Acquirer receives such notice, the Respondents may make an offer of employment to that employee.

J. Respondents shall provide all D2 Agonist 774 Core Employees with reasonable financial incentives to continue in their positions until the Closing Date. Such incentives shall include a continuation of all employee benefits offered by Respondents until the Closing Date for the divestiture of the D2 Agonist 774 Assets has occurred, including regularly scheduled raises, bonuses, and vesting of pension benefits (as permitted by Law). In addition to the foregoing, Respondents shall provide to each D2 Agonist 774 Core Employee who accepts employment with the Commission-approved Acquirer, an incentive equal to three (3) months of such employee's base annual salary to be paid upon the employee's completion of one (1) year of employment with the Commission-approved Acquirer;

provided, however, that nothing in these requirements or in this Order requires or shall be construed to require the Respondents to terminate the employment of any employee.

K. For a period of one (1) year from the Closing Date, Respondents shall not:

1. directly or indirectly, solicit or otherwise attempt to induce any employee of the Commission-approved Acquirer with any amount of responsibility related to D2 Agonist 774 ("D2 Agonist 774 Employee") to terminate his or her employment relationship with the Commission-approved Acquirer; *provided*, *however*, a violation of this provision will not occur by any of the following actions: (i) Respondents advertise for employees in newspapers, trade publications or other media not targeted specifically at the D2 Agonist 774 Employees, or (ii) a D2 Agonist 774 Employee contacts Respondents on his or her own initiative without any direct or indirect solicitation or encouragement from the Respondents; or

2. hire any D2 Agonist 774 Employee; *provided, however*, Respondents may hire any former D2 Agonist 774 Employee whose employment has been terminated by the Commission-approved Acquirer or who independently applies for employment with the Respondents, as long as such employee was not solicited in violation of the non-solicitation requirements contained herein.

L. Prior to the Closing Date, Respondents shall secure all consents and waivers from all Third Parties that are necessary for the divestiture of the D2 Agonist 774 Assets to the Commission-approved Acquirer, or for the continued research, Development, manufacture, sale, marketing or distribution of D2 Agonist 774 for use in the Field of Human Sexual Dysfunction by the Commission-approved Acquirer.

M. Respondents shall require, as a condition of continued employment post-divestiture, that each D2 Agonist 774 Core Employee sign a confidentiality agreement pursuant to which such employee shall be required to maintain all Confidential Business Information related to D2 Agonist 774 strictly confidential, including the nondisclosure of such information to all other employees, executives or other

personnel of Respondents (other than as necessary to comply with the requirements of this Order).

N. Respondents shall provide written notification of the restrictions on the use of the Confidential Business Information related to D2 Agonist 774 by Respondents' personnel to all of Respondents' employees who (i) are or were involved in the research, Development, manufacturing, distribution, sale or marketing of D2 Agonist 774 (ii) are involved in the research, Development, manufacturing, distribution, sale or marketing of Viagra and/or (iii) may have Confidential Business Information related to D2 Agonist 774. Such notification shall be in substantially the form set forth in the Employee Notification. Respondents shall give such notification by e-mail with return receipt requested or similar transmission, and keep a file of such receipts for one (1) year after the Closing Date. Respondents shall provide a copy of such notification to the Commission-approved Acquirer. Respondents shall maintain complete records of all such agreements at Respondents' corporate headquarters and shall provide an officer's certification to the Commission, stating that such acknowledgment program has been implemented and is being complied with. Respondents shall provide the Commission-approved Acquirer with copies of all certifications, notifications and reminders sent to Respondents' personnel.

O. Upon reasonable notice and request by the Commission-approved Acquirer, Respondents shall make available to the Commission-approved Acquirer, at no greater than Direct Cost, such personnel, assistance and training as the Commission-approved Acquirer might reasonably need to transfer the D2 Agonist 774 Assets, and shall continue providing such personnel, assistance and training, at the request of the Commission-approved Acquirer, until the Commission-approved Acquirer (or the Designee of the Commission-approved Acquirer) is fully validated,

qualified, and approved by the FDA, and able to manufacture D2 Agonist 774 independently of the Respondents.

P. Pending divestiture of the D2 Agonist 774 Assets, Respondents shall take such actions as are necessary to maintain the viability and marketability of the D2 Agonist 774 Assets and to prevent the destruction, removal, wasting, deterioration, or impairment of any of the D2 Agonist 774 Assets except for ordinary wear and tear.

Q. Counsel for Respondents (including in-house counsel under appropriate confidentiality arrangements) may retain unredacted copies of all documents or other materials provided to the Commission-approved Acquirer and may have access to original documents (under circumstances where copies of documents are insufficient or otherwise unavailable) provided to the Commission-approved Acquirer in order to:

1. comply with any Divestiture Agreement, this Order, any Law (including, without limitation, any requirement to obtain regulatory licenses or approvals), any data retention requirement of any applicable Governmental Entity, or any taxation requirements; or

2. defend against, respond to, or otherwise participate in any litigation, investigation, audit, process, subpoena or other proceeding relating to the divestiture or any other aspect of the D2 Agonist 774 Assets or D2 Agonist 774 business; *provided*, *however*, that Respondents may disclose such information as necessary for the purposes set forth in this Paragraph pursuant to an appropriate confidentiality order, agreement or arrangement;

provided further, *however*:

1. Respondents shall require those who view such unredacted documents or other materials to enter into confidentiality agreements with the Commission-approved Acquirer; *provided, however,* that Respondents shall not be deemed to have violated these requirements if the Commission-approved Acquirer withholds such agreement unreasonably; and

2. Respondents shall use their best efforts to obtain a protective order to protect the confidentiality of such information during any adjudication.

R. Respondents may retain copies of all documents or other materials provided to the Commission-approved Acquirer to the extent that such documents or materials relate to D2 Agonist 774 for use outside the Field of Human Sexual Dysfunction. Respondents shall redact such documents and materials to be retained to remove all information that is primarily related to D2 Agonist 774 for use in the Field of Human Sexual Dysfunction and shall not retain such information other than as otherwise provided for in this Order.

S. The purpose of the divestiture of the D2 Agonist 774 Assets is to ensure the continued Development of the D2 Agonist 774 Assets for use in the Field of Human Sexual Dysfunction, 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. Not later than ten (10) Business Days after the Effective Date, Respondents shall amend the Deramaxx License Agreement in accordance with the Deramaxx Amended License Agreement (which agreement shall not vary or contradict, or be construed to vary or contradict, the terms of this Order, it being understood that nothing in this Order

shall be construed to reduce any rights or benefits of Novartis Animal Health or to reduce any obligations of Respondents under such agreement).

B. The Deramaxx Amended License Agreement is incorporated by reference into this Order and made a part hereof, and any failure by Respondents to comply with any term of the Deramaxx Amended License Agreement, if such agreement is approved by the Commission in connection with the Commission's determination to make this Order final shall constitute a failure to comply with this Order.

C. Respondents shall submit to Novartis Animal Health, at Respondents' expense, all Confidential Business Information related to the marketing or sale of Deramaxx; *provided, however,* this provision shall not apply to any Confidential Business Information related to the marketing or sale of Deramaxx that Respondent Pfizer can demonstrate it obtained without the assistance of Respondent Pharmacia prior to the Effective Date.

D. Respondents shall not use, directly or indirectly, any Confidential Business Information (other than as necessary to comply with requirements of this Order) related to the marketing or sale of Deramaxx, and shall not disclose or convey such Confidential Business Information, directly or indirectly, to any person except Novartis Animal Health; *provided, however*, this provision shall not apply to any Confidential Business Information related to the marketing or sale of Deramaxx that Respondent Pfizer can demonstrate it obtained without the assistance of Respondent Pharmacia prior to the Effective Date.

E. Respondents shall require, as a condition of continued employment post-divestiture, that each employee with access to any Confidential Business Information related to the marketing or sale of Deramaxx (including those employees with access to market research data, actual sales data, sales

forecasts, production orders, or pricing information) sign a confidentiality agreement pursuant to which such employee shall be required to maintain all such Confidential Business Information strictly confidential, including the nondisclosure of such information to all other employees, executives or other personnel of Respondents (other than as necessary to comply with the requirements of this Order).

F. Respondents shall provide written notification of the restrictions on the use of the Confidential Business Information related to Deramaxx by Respondents' personnel to all of Respondents' employees who (i) are or were involved in the manufacturing, distribution, sale or marketing of Deramaxx, (ii) are involved in the sale or marketing of Rimadyl and/or (iii) may have Confidential Business Information related to the marketing or sale of Deramaxx. Such notification shall be in substantially the form set forth in the Employee Notification. Respondents shall give such notification by e-mail with return receipt requested or similar transmission, and keep a file of such receipts for one (1) year after the Closing Date. Respondents shall provide a copy of such notification to Novartis Animal Health. Respondents shall maintain complete records of all such agreements at Respondents' corporate headquarters and shall provide an officer's certification to the Commission, stating that such acknowledgment program has been implemented and is being complied with. Respondents shall provide Novartis Animal Health with copies of all certifications, notifications and reminders sent to Respondents' personnel.

G. 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, terminate the Deramaxx Amended License Agreement. 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 the Respondents and not of any other party to the transaction. Respondents shall provide two (2) complete copies (with all attachments and exhibits) of the Notification to the Commission at least thirty (30) days prior to terminating the Deramaxx Amended License Agreement (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 terminate Deramaxx Amended License Agreement until thirty (30) 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.

H. Counsel for Respondents (including in-house counsel under appropriate confidentiality arrangements) may retain unredacted copies of all documents or other materials provided to Novartis Animal Health and may have access to original documents (under circumstances where copies of documents are insufficient or otherwise unavailable) provided to the Novartis Animal Health in order to:

1. comply with any Divestiture Agreement, this Order, any Law (including, without limitation, any requirement to obtain regulatory licenses or approvals), any data retention requirement of any applicable Governmental Entity, or any taxation requirements; or

2. defend against, respond to, or otherwise participate in any litigation, investigation, audit, process, subpoena or other proceeding relating to Deramaxx; *provided*, *however*, that Respondents may disclose such information as necessary for the purposes set forth in this Paragraph pursuant to an appropriate confidentiality order, agreement or arrangement;

provided further, *however*:

1. Respondents shall require those who view such unredacted documents or other materials to enter into confidentiality agreements with Novartis Animal Health; *provided, however,* that Respondents shall not be deemed to have violated this requirement if Novartis Animal Health withholds such agreement unreasonably; and

2. Respondents shall use their best efforts to obtain a protective order to protect the confidentiality of such information during any adjudication.

I. The purpose of Paragraph VI of this Order is to ensure the continued marketing and sale of Deramaxx independently of Respondents and for the same purposes which it was marketed and sold by Novartis Animal Health at the time of the announcement of the Merger, and to remedy the lessening of competition resulting from the Merger as alleged in the Commission's Complaint.

VII.

IT IS FURTHER ORDERED that:

A. Not later than ten (10) Business Days after the Effective Date, Respondents shall divest the Cow Mastitis Products Assets, absolutely and in good faith, to Schering-Plough pursuant to and in accordance with the Cow Mastitis Products Asset Purchase Agreement (which agreement shall

not vary or contradict, or be construed to vary or contradict, the terms of this Order, it being understood that nothing in this Order shall be construed to reduce any rights or benefits of Schering-Plough or to reduce any obligations of Respondents under such agreement), and such agreement, if approved by the Commission as the Divestiture Agreement for the Cow Mastitis Products Assets, is incorporated by reference into this Order and made part hereof. If Respondents do not divest the Cow Mastitis Products Assets to Schering-Plough within ten (10) Business Days after the Effective Date, the Commission may appoint a Divestiture Trustee to divest the Cow Mastitis Products Assets;

provided, *however*, that if Respondents have divested the Cow Mastitis Products Assets to Schering-Plough 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 Schering-Plough is not an acceptable purchaser of the Cow Mastitis Products Assets, or that the manner in which the divestiture was accomplished is not acceptable, then Respondents shall immediately rescind the transaction with Schering-Plough and shall divest the Cow Mastitis Products Assets within six (6) months from the date the Order becomes final, absolutely and in good faith, at no minimum price, to a Commission-approved Acquirer and only in a manner that receives the prior approval of the Commission.

B. Any Divestiture Agreement that has been approved by the Commission between Respondents (or a Divestiture Trustee) and a Commission-approved Acquirer of the Cow Mastitis Products Assets shall be deemed incorporated into this Order, and any failure by Respondents to comply with any term of such Divestiture Agreement related to the Cow Mastitis Products Assets shall constitute a failure to comply with this Order.

C. Upon reasonable notice and a request from the Commission-approved Acquirer to the Respondents, Respondents shall provide in a timely manner, at no greater than Direct Cost:

1. assistance and advice to enable the Commission-approved Acquirer (or the Designee of the Commission-approved Acquirer) to obtain all necessary permits and approvals from any Agency or Governmental Entity to manufacture and sell Cow Mastitis Products;

2. assistance to the Commission-approved Acquirer (or the Designee of the Commission-approved Acquirer) to manufacture Cow Mastitis Products in substantially the same manner and quality employed or achieved by GlaxoSmithKline; and

3. consultation with knowledgeable employees of Respondents and training, at the request of the Commission-approved Acquirer and at a facility chosen by the Commission-approved Acquirer, until the Commission-approved Acquirer (or the Designee of the Commission-approved Acquirer) obtains all FDA approvals necessary to manufacture the Cow Mastitis Products independently of GlaxoSmithKline and sufficient to satisfy management of the Commission-approved Acquirer that its personnel (or the Designee's personnel) are adequately trained in the manufacture of Cow Mastitis Products.

D. Respondents shall submit to the Commission-approved Acquirer, at Respondents' expense, all Confidential Business Information related to Cow Mastitis Products; *provided, however,* this provision shall not apply to any Confidential Business Information related to Cow Mastitis Products that Respondent Pharmacia can demonstrate it obtained without the assistance of Respondent Pfizer prior to the Effective Date.

E. Respondents shall not use, directly or indirectly, any Confidential Business Information (other than as necessary to comply with requirements of this Order) related to the research, Development, manufacturing, marketing, or sale of Cow Mastitis Products, and shall not disclose or convey such Confidential Business Information, directly or indirectly, to any person except the Commission-approved Acquirer. This provision shall not apply to any Confidential Business Information related to Cow Mastitis Products that Respondent Pharmacia can demonstrate it obtained without the assistance of Respondent Pfizer prior to the Effective Date.

F. For a period of six (6) months from the Closing Date ("the Cow Mastitis Products Access Period"), Respondents shall provide the Commission-approved Acquirer with the opportunity to enter into employment contracts with the Product Marketing Employees related to Cow Mastitis Products ("Cow Mastitis Products Core Employees").

G. Respondents shall provide any Proposed Acquirer with the opportunity to enter into employment contracts with the Cow Mastitis Products Core Employees in connection with the divestiture of the Cow Mastitis Products Assets; *provided, however*, that any such employment contracts entered into prior to the Closing Date shall be contingent upon approval by the Commission of the agreements relating to the Cow Mastitis Products Assets (*i.e.,* those agreements proposed by Respondents (or the Divestiture Trustee) to the Commission) as the Divestiture Agreements for the Cow Mastitis Products Assets.

H. Not later than twenty-five (25) Business Days after the execution date of any proposed Divestiture Agreement related to the Cow Mastitis Products Assets, Respondents shall provide the Commission-approved Acquirer or the Proposed Acquirer the Product Employee Information related to the Cow Mastitis Products Core Employees. Failure by Respondents to provide the Product Employee

Information for any relevant employee within the time provided herein shall extend the Cow Mastitis Products Access Period with respect to that employee in an amount equal to the delay.

I. During the Cow Mastitis Products Access Period, Respondents shall not interfere with the hiring or employing by the Commission-approved Acquirer of Cow Mastitis Products Core Employees, and shall remove any impediments within the control of Respondents that may deter these employees from accepting employment with the Commission-approved Acquirer, 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 the Commission-approved Acquirer. In addition, Respondents shall not make any counteroffer to a Cow Mastitis Products Core Employee who receives a written offer of employment from the Commission-approved Acquirer;

provided, however, that these requirements shall not prohibit the Respondents from making offers of employment to or employing any Cow Mastitis Products Core Employee during the Cow Mastitis Products Access Period where the Commission-approved Acquirer has notified the Respondents in writing that the Commission-approved Acquirer does not intend to make an offer of employment to that employee;

provided further, that if the Respondents notify the Commission-approved Acquirer in writing of their desire to make an offer of employment to a particular Cow Mastitis Products Core Employee and the Commission-approved Acquirer does not make an offer of employment to that employee within twenty (20) Business Days of the date the Commission-approved Acquirer receives such notice, the Respondents may make an offer of employment to that employee.

J. Respondents shall provide all Cow Mastitis Products Core Employees with reasonable financial incentives to continue in their positions until the Closing Date. Such incentives shall include a continuation of all employee benefits offered by Respondents until the Closing Date for the divestiture of the Cow Mastitis Products Assets has occurred, including regularly scheduled raises, bonuses, and vesting of pension benefits (as permitted by Law);

provided, however, that nothing in these requirements or in this Order requires or shall be construed to require the Respondents to terminate the employment of any employee.

K. For a period of one (1) year from the Closing Date, Respondents shall not:

1. directly or indirectly, solicit or otherwise attempt to induce any employee of the Commission-approved Acquirer with any amount of responsibility related to Cow Mastitis Products ("Cow Mastitis Products Employee") to terminate his or her employment relationship with the Commission-approved Acquirer; *provided*, *however*, a violation of this provision will not occur by any of the following actions: (i) Respondents advertise for employees in newspapers, trade publications or other media not targeted specifically at the Cow Mastitis Products Employees, or (ii) a Cow Mastitis Products Employee contacts Respondents on his or her own initiative without any direct or indirect solicitation or encouragement from the Respondents; or

2. hire any Cow Mastitis Products Employee; *provided, however*, Respondents may hire any former Cow Mastitis Products Employee whose employment has been terminated by the Commission-approved Acquirer or who independently applies for employment with the Respondents, as long as such employee was not solicited

in violation of the non-solicitation requirements contained herein.

L. Prior to the Closing Date, Respondents shall secure all consents and waivers from all Third Parties that are necessary for the divestiture of the Cow Mastitis Products Assets to the Commission-approved Acquirer, or for the continued research, Development, manufacture, sale, marketing or distribution of Cow Mastitis Products by the Commission-approved Acquirer. In addition, prior to the Effective Date, Respondents shall execute agreements (assignable to the Commission-approved Acquirer) with all Third Parties (including, but not limited to, all Third Parties used by Respondent Pfizer in connection with the manufacture of Cow Mastitis Products within the twelve (12) month period immediately prior to the Effective Date) necessary to insure that any Commission-approved Acquirer will have a supply of Cow Mastitis Products: (1) in quantities; (2) at prices; (3) in a timely manner; and (4) under reasonable terms and conditions sufficient to enable any Commission-approved Acquirer to maintain the viability and competitiveness of the Cow Mastitis Products Assets. Each such agreement shall provide that no additional consents or waivers of the respective Third Party are required in order to assign the agreement to the Commission-approved Acquirer; *provided, however*, Respondents may satisfy this requirement by certifying that the Commission-approved Acquirer has executed all such agreements directly with each of the relevant Third Parties. For the purposes of these requirements, "Third Parties" includes, but is not limited to, Hanford and GlaxoSmithKline.

M. For a period of one (1) year from the Closing Date, Respondents shall not market or promote the Pharmacia Cow Mastitis Products in the United States using the services of any Product Marketing Employee related to the Cow Mastitis Products.

N. Respondents shall require, as a condition of continued

employment post-divestiture, that each Cow Mastitis Products Core Employee sign a confidentiality agreement pursuant to which such employee shall be required to maintain all Confidential Business Information related to Cow Mastitis Products strictly confidential, including the nondisclosure of such information to all other employees, executives or other personnel of Respondents (other than as necessary to comply with the requirements of this Order).

O. Respondents shall provide written notification of the restrictions on the use of the Confidential Business Information related to Cow Mastitis Products by Respondents' personnel to all of Respondents' employees who (i) are or were involved in the research, Development, manufacturing, distribution, sale or marketing of Cow Mastitis Products, (ii) are involved in the research, Development, manufacturing, distribution, sale or marketing of the Pharmacia Cow Mastitis Products and/or (iii) may have Confidential Business Information related to the Cow Mastitis Products. Such notification shall be in substantially the form set forth in the Employee Notification. Respondents shall give such notification by e-mail with return receipt requested or similar transmission, and keep a file of such receipts for one (1) year after the Closing Date. Respondents shall provide a copy of such notification to the Commission-approved Acquirer. Respondents shall maintain complete records of all such agreements at Respondents' corporate headquarters and shall provide an officer's certification to the Commission, stating that such acknowledgment program has been implemented and is being complied with. Respondents shall provide the Commission-approved Acquirer with copies of all certifications, notifications and reminders sent to Respondents' personnel.

P. Upon reasonable notice and request by the Commission-approved Acquirer, Respondents shall make available to the Commission-approved Acquirer, at no greater than Direct Cost,

such personnel, assistance and training as the Commission-approved Acquirer might reasonably need to transfer the Cow Mastitis Products Assets, and shall continue providing such personnel, assistance and training, at the request of the Commission-approved Acquirer, until the Commission-approved Acquirer (or the Designee of the Commission-approved Acquirer) is fully validated, qualified, and approved by the FDA, and able to manufacture Cow Mastitis Products independently of GlaxoSmithKline and Respondents.

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

R. Counsel for Respondents (including in-house counsel under appropriate confidentiality arrangements) may retain unredacted copies of all documents or other materials provided to the Commission-approved Acquirer and may have access to original documents (under circumstances where copies of documents are insufficient or otherwise unavailable) provided to the Commission-approved Acquirer in order to:

1. comply with any Divestiture Agreement, this Order, any Law (including, without limitation, any requirement to obtain regulatory licenses or approvals), any data retention requirement of any applicable Governmental Entity, or any taxation requirements; or

2. defend against, respond to, or otherwise participate in any litigation, investigation, audit, process, subpoena or other proceeding relating to the divestiture or any other aspect of the Cow Mastitis Products Assets or Cow Mastitis Products business; *provided*, *however*, that Respondents may disclose such information as necessary for the purposes set forth in this Paragraph pursuant to an

appropriate confidentiality order, agreement or arrangement;

provided further, *however*:

1. Respondents shall require those who view such unredacted documents or other materials to enter into confidentiality agreements with the Commission-approved Acquirer; *provided, however,* that Respondents shall not be deemed to have violated these requirements if the Commission-approved Acquirer withholds such agreement unreasonably; and

2. Respondents shall use their best efforts to obtain a protective order to protect the confidentiality of such information during any adjudication.

S. The purpose of the divestiture of the Cow Mastitis Products Assets is to ensure the continued use of the Cow Mastitis Products Assets in the same business in which the Cow Mastitis Products Assets were engaged at the time of the announcement of the Merger, and to remedy the lessening of competition resulting from the Merger as alleged in the Commission's Complaint.

VIII.

IT IS FURTHER ORDERED that:

A. Not later than thirty (30) Business Days after the Effective Date, Respondents shall divest the Halls Assets (which are a part of the ongoing global Adams confectionery business of Pfizer that is being purchased by Cadbury), absolutely and in good faith, to Cadbury pursuant to and in accordance with the Halls Divestiture Agreement (which agreement shall not vary or contradict, or be construed to vary or contradict, the terms of this Order, it being understood that nothing in this Order shall be construed to reduce any rights or benefits of

Cadbury or to reduce any obligations of Respondents under such agreement), and such agreement, if approved by the Commission as the Divestiture Agreement for the Halls Assets, is incorporated by reference into this Order and made part hereof. If Respondents do not divest the Halls Assets to Cadbury within thirty (30) Business Days after the Effective Date, the Commission may appoint a Divestiture Trustee to divest the Halls Assets.

B. The purpose of the divestiture of the Halls Assets is to ensure the continued use of the Halls Assets in the same business in which the Halls Assets were engaged at the time of the announcement of the Merger, and to remedy the lessening of competition resulting from the Merger as alleged in the Commission's Complaint.

IX.

IT IS FURTHER ORDERED that:

A. Not later than ten (10) Business Days after the Effective Date, Respondents shall divest the Bonine Assets, absolutely and in good faith, to Insight pursuant to and in accordance with the Bonine Asset Purchase Agreement (which agreement shall not vary or contradict, or be construed to vary or contradict, the terms of this Order, it being understood that nothing in this Order shall be construed to reduce any rights or benefits of Insight or to reduce any obligations of Respondents under such agreement), and such agreement, if approved by the Commission as the Divestiture Agreement for the Bonine Assets, is incorporated by reference into this Order and made part hereof. If Respondents do not divest the Bonine Assets to Insight within ten (10) Business Days after the Effective Date, the Commission may appoint a Divestiture Trustee to divest the Bonine Assets;

provided, *however*, that if Respondents have divested the Bonine Assets to Insight 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 Insight is not an acceptable purchaser of the Bonine Assets, or that the manner in which the divestiture was accomplished is not acceptable, then Respondents shall immediately rescind the transaction with Insight and shall divest the Bonine Assets within six (6) months from the date the Order becomes final, absolutely and in good faith, at no minimum price, to a Commission-approved Acquirer and only in a manner that receives the prior approval of the Commission.

B. Any Divestiture Agreement that has been approved by the Commission between Respondents (or a Divestiture Trustee) and a Commission-approved Acquirer of the Bonine Assets shall be deemed incorporated into this Order, and any failure by Respondents to comply with any term of such Divestiture Agreement related to the Bonine Assets shall constitute a failure to comply with this Order.

C. If the Commission-approved Acquirer is an entity other than Insight (in which case Respondents' obligations shall be in accordance with the Bonine Asset Purchase Agreement) then, at such Commission-approved Acquirer's option, Respondents shall include in any Divestiture Agreement related to the Bonine Assets the following provisions:

1. Respondents shall Contract Manufacture and deliver to the Commission-approved Acquirer, in a timely manner and under reasonable terms and conditions, a supply of Bonine, at no greater than Respondents' Supply Cost, for a period of time sufficient to allow the Commission-approved Acquirer (or the Designee of the Commission-approved Acquirer) to become able to manufacture Bonine in accordance with the FDA requirements governing monograph Products independently of Respondents.

2. After Respondents commence delivery of Bonine to the Commission-approved Acquirer pursuant to a Divestiture Agreement and for the term of the Contract Manufacture related to Bonine, Respondents will make inventory of Bonine available for sale or resale only to the Commission-approved Acquirer.

3. Respondents shall make representations and warranties to the Commission-approved Acquirer that the Bonine supplied through Contract Manufacture pursuant to the Divestiture Agreement meets FDA-approved specifications. Respondents shall agree to indemnify, defend and hold the Commission-approved Acquirer harmless from any and all suits, claims, actions, demands, liabilities, expenses or losses alleged to result from the failure of the Bonine supplied to the Commission-approved Acquirer pursuant the Divestiture Agreement by the Respondents to meet FDA specifications. This obligation shall be contingent upon the Commission-approved Acquirer giving Respondents prompt, adequate notice of such claim and cooperating fully in the defense of such claim. The Divestiture Agreement shall be consistent with the obligations assumed by Respondents under this Order; *provided, however,* Respondents may reserve the right to control the defense of any such litigation, including the right to settle the litigation, so long as such settlement is consistent with the Respondents' responsibilities to supply Bonine in the manner required by this Order; *provided further, however*, this obligation shall not require Respondents to be liable for any negligent act or omission of the Commission-approved Acquirer or for any representations and warranties, express or implied, made by the Commission-approved Acquirer that exceed the representations and warranties made by the Respondents to the Commission-approved Acquirer.

4. Respondents shall make representations and warranties to the Commission-approved Acquirer that Respondents will hold harmless and indemnify the Commission-approved Acquirer for any liabilities or loss of profits resulting from the failure by Respondents to deliver Bonine in a timely manner as required by the Divestiture Agreement unless Respondents can demonstrate that their failure was entirely beyond the control of the Respondents and in no part the result of negligence or willful misconduct by Respondents.

5. During the term of the Contract Manufacture between Respondents and the Commission-approved Acquirer, upon request of the Commission-approved Acquirer or Interim Monitor (if applicable), Respondents shall make available to the Commission-approved Acquirer or the Interim Monitor all records that relate to the manufacture of Bonine.

6. Respondents shall commit that, upon reasonable notice and a request from the Commission-approved Acquirer to the Respondents, Respondents shall provide in a timely manner at no greater than Direct Cost:

    a. assistance and advice to enable the Commission-approved Acquirer (or the Designee of the Commission-approved Acquirer) to obtain all necessary permits and approvals from any Agency or Governmental Entity to manufacture and sell Bonine;

    b. assistance to the Commission-approved Acquirer (or the Designee of the Commission-approved Acquirer) to manufacture Bonine in substantially the same manner and quality employed or achieved by Respondent Pfizer; and

    c. consultation with knowledgeable employees of Respondents and training, at the request of the

Commission-approved Acquirer and at a facility chosen by the Commission-approved Acquirer, until the Commission-approved Acquirer (or the Designee of the Commission-approved Acquirer) fully validated, qualified, and approved by the FDA, and able to manufacture Bonine independently of the Respondents.

D. Respondents shall submit to the Commission-approved Acquirer, at Respondents' expense, all Confidential Business Information related to Bonine; *provided, however,* this provision shall not apply to any Confidential Business Information related to Bonine that Respondent Pharmacia can demonstrate it obtained without the assistance of Respondent Pfizer prior to the Effective Date.

E. Respondents shall not use, directly or indirectly, any Confidential Business Information (other than as necessary to comply with requirements of this Order) related to the research, Development, manufacturing, marketing, or sale of Bonine, and shall not disclose or convey such Confidential Business Information, directly or indirectly, to any person except the Commission-approved Acquirer. This provision shall not apply to any Confidential Business Information related to Bonine that Respondent Pharmacia can demonstrate it obtained without the assistance of Respondent Pfizer prior to the Effective Date.

F. For any Commission-approved Acquirer other than Insight (in which case the Respondents' obligations shall be in accordance with the Bonine Asset and Purchase Agreement), for a period of six (6) months from the Closing Date ("the Bonine Access Period"), and at such Commission-approved Acquirer's option, Respondents shall provide the Commission-approved Acquirer with the opportunity to enter into employment contracts with the Product Marketing Employees related to Bonine ("Bonine Core Employees").

G. For any Commission-approved Acquirer other than Insight (in which case the Respondents' obligations shall be in accordance with the Bonine Asset and Purchase Agreement), Respondents shall provide any Proposed Acquirer or Commission-approved Acquirer with the opportunity to enter into employment contracts with the Bonine Core Employees in connection with the divestiture of the Bonine Assets; *provided, however*, that any such employment contracts entered into prior to the Closing Date shall be contingent upon approval by the Commission of the agreements relating to the Bonine Assets (*i.e.,* those agreements proposed by Respondents (or the Divestiture Trustee) to the Commission) as the Divestiture Agreements for the Bonine Assets. In this regard, Respondents shall comply with the following requirements:

1. Not later than twenty-five (25) Business Days after the execution date of any proposed Divestiture Agreement related to the Bonine Assets, Respondents shall provide the Commission-approved Acquirer or the Proposed Acquirer the Product Employee Information related to the Bonine Core Employees. Failure by Respondents to provide the Product Employee Information for any relevant employee within the time provided herein shall extend the Bonine Access Period with respect to that employee in an amount equal to the delay.

2. During the Bonine Access Period, Respondents shall not interfere with the hiring or employing by the Commission-approved Acquirer of Bonine Core Employees, and shall remove any impediments within the control of Respondents that may deter these employees from accepting employment with the Commission-approved Acquirer, 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 the Commission-approved Acquirer. In addition,

Respondents shall not make any counteroffer to a Bonine Core Employee who receives a written offer of employment from the Commission-approved Acquirer;

provided, however, that these requirements shall not prohibit the Respondents from making offers of employment to or employing any Bonine Core Employee during the Bonine Access Period where the Commission-approved Acquirer has notified the Respondents in writing that the Commission-approved Acquirer does not intend to make an offer of employment to that employee;

provided further, that if the Respondents notify the Commission-approved Acquirer in writing of their desire to make an offer of employment to a particular Bonine Core Employee and the Commission-approved Acquirer does not make an offer of employment to that employee within twenty (20) Business Days of the date the Commission-approved Acquirer receives such notice, the Respondents may make an offer of employment to that employee.

3. For a period of one (1) year from the Closing Date, Respondents shall not:

   a. directly or indirectly, solicit or otherwise attempt to induce any employee of the Commission-approved Acquirer with any amount of responsibility related to Bonine ("Bonine Employee") to terminate his or her employment relationship with the Commission-approved Acquirer; *provided*, *however*, a violation of this provision will not occur by any of the following actions: (i) Respondents advertise for employees in newspapers, trade publications or other media not targeted specifically at the Bonine Employees, or (ii) a Bonine Employee contacts Respondents on his or her own initiative without any direct or indirect

solicitation or encouragement from the Respondents; or

b. hire any Bonine Employee; *provided, however*, Respondents may hire any former Bonine Employee whose employment has been terminated by the Commission-approved Acquirer.

H. For a period of one (1) year from the Closing Date, Respondents shall not market or promote Dramamine in the United States using the services of any Product Marketing Employee related to Bonine.

I. Respondents shall provide all Bonine Core Employees with reasonable financial incentives to continue in their positions until the Closing Date. Such incentives shall include a continuation of all employee benefits offered by Respondents until the Closing Date for the divestiture of the Bonine Assets has occurred, including regularly scheduled raises, bonuses, and vesting of pension benefits (as permitted by Law);

provided, however, that nothing in these requirements or in this Order requires or shall be construed to require the Respondents to terminate the employment of any employee.

J. Prior to the Closing Date, Respondents shall secure all consents and waivers from all Third Parties that are necessary for the divestiture of the Bonine Assets to the Commission-approved Acquirer, or for the continued research, Development, manufacture, sale, marketing or distribution of Bonine by the Commission-approved Acquirer.

K. Respondents shall require, as a condition of continued employment post-divestiture, that each Bonine Core Employee sign a confidentiality agreement pursuant to which such employee shall be required to maintain all Confidential Business Information related to Bonine strictly confidential, including the nondisclosure of such

information to all other employees, executives or other personnel of Respondents (other than as necessary to comply with the requirements of this Order).

L. Respondents shall provide written notification of the restrictions on the use of the Confidential Business Information related to Bonine by Respondents' personnel to all of Respondents' employees who (i) are or were involved in the research, Development, manufacturing, distribution, sale or marketing of Bonine, (ii) are involved in the research, Development, manufacturing, distribution, sale or marketing of Dramamine and/or (iii) may have Confidential Business Information related to Bonine. Such notification shall be in substantially the form set forth in the Employee Notification. Respondents shall give such notification by e-mail with return receipt requested or similar transmission, and keep a file of such receipts for one (1) year after the Closing Date. Respondents shall provide a copy of such notification to the Commission-approved Acquirer. Respondents shall maintain complete records of all such agreements at Respondents' corporate headquarters and shall provide an officer's certification to the Commission, stating that such acknowledgment program has been implemented and is being complied with. Respondents shall provide the Commission-approved Acquirer with copies of all certifications, notifications and reminders sent to Respondents' personnel.

M. Upon reasonable notice and request by the Commission-approved Acquirer, Respondents shall make available to the Commission-approved Acquirer at no greater than Direct Cost such personnel, assistance and training as the Commission-approved Acquirer might reasonably need to transfer the Bonine Assets, and shall continue providing such personnel, assistance and training, at the request of the Commission-approved Acquirer, until the Commission-approved Acquirer (or the Designee of the Commission-approved Acquirer) is fully validated, qualified, and

approved by the FDA, and able to manufacture Bonine independently of the Respondents.

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

O. Counsel for Respondents (including in-house counsel under appropriate confidentiality arrangements) may retain unredacted copies of all documents or other materials provided to the Commission-approved Acquirer and may have access to original documents (under circumstances where copies of documents are insufficient or otherwise unavailable) provided to the Commission-approved Acquirer in order to:

1. comply with any Divestiture Agreement, this Order, any Law (including, without limitation, any requirement to obtain regulatory licenses or approvals), any data retention requirement of any applicable Governmental Entity, or any taxation requirements; or

2. defend against, respond to, or otherwise participate in any litigation, investigation, audit, process, subpoena or other proceeding relating to the divestiture or any other aspect of the Bonine Assets or Bonine business; *provided*, *however*, that Respondents may disclose such information as necessary for the purposes set forth in this Paragraph pursuant to an appropriate confidentiality order, agreement or arrangement;.

provided further, *however*:

1. Respondents shall require those who view such unredacted documents or other materials to enter into confidentiality agreements with the Commission-approved Acquirer; *provided, however,* that Respondents shall not be deemed to have violated these requirements if the Commission-approved Acquirer withholds such agreement unreasonably; and

2. Respondents shall use their best efforts to obtain a protective order to protect the confidentiality of such information during any adjudication.

P. The purpose of the divestiture of the Bonine Assets is to ensure the continued use of the Bonine Assets in the same business in which the Bonine Assets were engaged at the time of the announcement of the Merger, and to remedy the lessening of competition resulting from the Merger as alleged in the Commission's Complaint.

X.

IT IS FURTHER ORDERED that:

A. Not later than ten (10) Business Days after the Effective Date, Respondents shall divest the Cortaid Assets, absolutely and in good faith, to J&J pursuant to and in accordance with the Cortaid Asset Purchase Agreement (which agreement shall not vary or contradict, or be construed to vary or contradict, the terms of this Order, it being understood that nothing in this Order shall be construed to reduce any rights or benefits of J&J or to reduce any obligations of Respondents under such agreement), and such agreement, if approved by the Commission as the Divestiture Agreement for the Cortaid Assets, is incorporated by reference into this Order and made part hereof. If Respondents do not divest the Cortaid Assets to J&J within ten (10) Business Days after the

Effective Date, the Commission may appoint a Divestiture Trustee to divest the Cortaid Assets;

provided, *however*, that if Respondents have divested the Cortaid Assets to J&J 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 J&J is not an acceptable purchaser of the Cortaid Assets, or that the manner in which the divestiture was accomplished is not acceptable, then Respondents shall immediately rescind the transaction with J&J and shall divest the Cortaid Assets within six (6) months from the date the Order becomes final, absolutely and in good faith, at no minimum price, to a Commission-approved Acquirer and only in a manner that receives the prior approval of the Commission.

B. Any Divestiture Agreement between Respondents (or a Divestiture Trustee) and a Commission-approved Acquirer of the Cortaid Assets that has been approved by the Commission shall be deemed incorporated into this Order, and any such failure by Respondents to comply with any term of such Divestiture Agreement related to the Cortaid Assets shall constitute a failure to comply with this Order.

C. If the Commission-approved Acquirer is an entity other than J&J (in which case Respondents' obligations shall be in accordance with the Cortaid Asset Purchase Agreement) then, at such other Commission-approved Acquirer's option, Respondents shall include in any Divestiture Agreement related to the Cortaid Assets the following provisions:

1. Respondents shall Contract Manufacture and deliver to the Commission-approved Acquirer, in a timely manner and under reasonable terms and conditions, a supply of Cortaid, at no greater than Respondents' Supply Cost, for a period of time sufficient to allow the Commission-approved Acquirer (or the Designee of the Commission-approved Acquirer) to become able to manufacture

Cortaid in accordance with the FDA requirements governing monograph Products to independently of Respondents.

2. After Respondents commence delivery of Cortaid to the Commission-approved Acquirer pursuant to a Divestiture Agreement and for the term of the Contract Manufacture related to Cortaid, Respondents will make inventory of Cortaid available for sale or resale only to the Commission-approved Acquirer.

3. Respondents shall make representations and warranties to the Commission-approved Acquirer that the Cortaid supplied through Contract Manufacture pursuant to the Divestiture Agreement meets FDA-approved specifications. Respondents shall agree to indemnify, defend and hold the Commission-approved Acquirer harmless from any and all suits, claims, actions, demands, liabilities, expenses or losses alleged to result from the failure of the Cortaid supplied to the Commission-approved Acquirer pursuant to the Divestiture Agreement by the Respondents to meet FDA specifications. This obligation shall be contingent upon the Commission-approved Acquirer giving Respondents prompt, adequate notice of such claim and cooperating fully in the defense of such claim. The Divestiture Agreement shall be consistent with the obligations assumed by Respondents under this Order; *provided, however,* Respondents may reserve the right to control the defense of any such litigation, including the right to settle the litigation, so long as such settlement is consistent with the Respondents' responsibilities to supply Cortaid in the manner required by this Order; *provided further, however*, this obligation shall not require Respondents to be liable for any negligent act or omission of the Commission-approved Acquirer or for any representations and warranties, express or implied, made by the Commission-approved Acquirer that exceed the

representations and warranties made by the Respondents to the Commission-approved Acquirer.

4. Respondents shall make representations and warranties to the Commission-approved Acquirer that Respondents will hold harmless and indemnify the Commission-approved Acquirer for any liabilities or loss of profits resulting from the failure by Respondents to deliver Cortaid in a timely manner as required by the Divestiture Agreement unless Respondents can demonstrate that their failure was entirely beyond the control of the Respondents and in no part the result of negligence or willful misconduct by Respondents.

5. During the term of the Contract Manufacture between Respondents and the Commission-approved Acquirer, upon request of the Commission-approved Acquirer or Interim Monitor (if applicable), Respondents shall make available to the Commission-approved Acquirer or the Interim Monitor all records that relate to the manufacture of Cortaid.

6. Respondents shall commit that, upon reasonable notice and a request from the Commission-approved Acquirer to the Respondents, Respondents shall provide in a timely manner, at no greater than Direct Cost:

    a. assistance and advice to enable the Commission-approved Acquirer (or the Designee of the Commission-approved Acquirer) to obtain all necessary permits and approvals from any Agency or Governmental Entity to manufacture and sell Cortaid;

    b. assistance to the Commission-approved Acquirer (or the Designee of the Commission-approved Acquirer) to manufacture Cortaid in substantially the same

manner and quality employed or achieved by Respondent Pharmacia; and

c. consultation with knowledgeable employees of Respondents and training, at the request of the Commission-approved Acquirer and at a facility chosen by the Commission-approved Acquirer, until the Commission-approved Acquirer (or the Designee of the Commission-approved Acquirer) is fully validated, qualified, and approved by the FDA, and able to manufacture Cortaid independently of the Respondents.

D. Respondents shall submit to the Commission-approved Acquirer, at Respondents' expense, all Confidential Business Information related to Cortaid.; *provided, however,* this provision shall not apply to any Confidential Business Information related to Cortaid that Respondent Pfizer can demonstrate it obtained without the assistance of Respondent Pharmacia prior to the Effective Date.

E. Respondents shall not use, directly or indirectly, any Confidential Business Information (other than as necessary to comply with requirements of this Order) related to the research, Development, manufacturing, marketing, or sale of Cortaid, and shall not disclose or convey such Confidential Business Information, directly or indirectly, to any person except the Commission-approved Acquirer. This provision shall not apply to any Confidential Business Information related to Cortaid that Respondent Pfizer can demonstrate it obtained without the assistance of Respondent Pharmacia prior to the Effective Date.

F. For any Commission-approved Acquirer other than J&J (in which case the Respondents' obligations shall be in accordance with the Cortaid Asset and Purchase Agreement), for a period of six (6) months from the Closing Date ("the Cortaid Access Period"), Respondents shall provide the Commission-approved

Acquirer with the opportunity to enter into employment contracts with the Product Marketing Employees related to Cortaid ("Cortaid Core Employees").

G. For any Commission-approved Acquirer other than J&J (in which case the Respondents' obligations shall be in accordance with the Cortaid Asset and Purchase Agreement), Respondents shall provide any Proposed Acquirer or Commission-approved Acquirer with the opportunity to enter into employment contracts with the Cortaid Core Employees in connection with the divestiture of the Cortaid Assets; *provided, however*, that any such employment contracts entered into prior to the Closing Date shall be contingent upon approval by the Commission of the agreements relating to the Cortaid Assets (*i.e.,* those agreements proposed by Respondents (or the Divestiture Trustee) to the Commission) as the Divestiture Agreements for the Cortaid Assets. In this regard, Respondents shall comply with the following requirements:

1. Not later than twenty-five (25) Business Days after the execution date of any proposed Divestiture Agreement related to the Cortaid Assets, Respondents shall provide the Commission-approved Acquirer or the Proposed Acquirer the Product Employee Information related to the Cortaid Core Employees. Failure by Respondents to provide the Product Employee Information for any relevant employee within the time provided herein shall extend the Cortaid Access Period with respect to that employee in an amount equal to the delay.

2. During the Cortaid Access Period, Respondents shall not interfere with the hiring or employing by the Commission-approved Acquirer of Cortaid Core Employees, and shall remove any impediments within the control of Respondents that may deter these employees from accepting employment with the Commission-approved Acquirer, 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 the Commission-approved Acquirer. In addition, Respondents shall not make any counteroffer to a Cortaid Core Employee who receives a written offer of employment from the Commission-approved Acquirer;

provided, however, that these requirements shall not prohibit the Respondents from making offers of employment to or employing any Cortaid Core Employee during the Cortaid Access Period where the Commission-approved Acquirer has notified the Respondents in writing that the Commission-approved Acquirer does not intend to make an offer of employment to that employee;

provided further, that if the Respondents notify the Commission-approved Acquirer in writing of their desire to make an offer of employment to a particular Cortaid Core Employee and the Commission-approved Acquirer does not make an offer of employment to that employee within twenty (20) Business Days of the date the Commission-approved Acquirer receives such notice, the Respondents may make an offer of employment to that employee.

3. For a period of one (1) year from the Closing Date, Respondents shall not directly or indirectly, solicit or otherwise attempt to induce any employee of the Commission-approved Acquirer with any amount of responsibility related to Cortaid ("Cortaid Employee") to terminate his or her employment relationship with the Commission-approved Acquirer; *provided*, *however*, a violation of this provision will not occur by any of the following actions: (i) Respondents advertise for employees in newspapers, trade publications or other media not targeted specifically at the Cortaid Employees, or (ii) a Cortaid Employee contacts Respondents on his or

her own initiative without any direct or indirect solicitation or encouragement from the Respondents; and

H. For a period of one (1) year from the Closing Date, Respondents shall not market or promote Cortizone in the United States using the services of any Product Marketing Employee relating to Cortaid.

I. Respondents shall provide all Cortaid Core Employees with reasonable financial incentives to continue in their positions until the Closing Date. Such incentives shall include a continuation of all employee benefits offered by Respondents until the Closing Date for the divestiture of the Cortaid Assets has occurred, including regularly scheduled raises, bonuses, and vesting of pension benefits (as permitted by Law);

provided, however, that nothing in these requirements or in this Order requires or shall be construed to require the Respondents to terminate the employment of any employee.

J. Prior to the Closing Date, Respondents shall secure all consents and waivers from all Third Parties that are necessary for the divestiture of the Cortaid Assets to the Commission-approved Acquirer, or for the continued research, Development, manufacture, sale, marketing or distribution of Cortaid by the Commission-approved Acquirer. In addition, prior to the Effective Date, Respondents shall execute agreements (assignable to the Commission-approved Acquirer) with all Third Parties (including, but not limited to, all Third Parties used by Respondent Pharmacia in connection with the manufacture of Cortaid within the twelve (12) month period immediately prior to the Effective Date) necessary to insure that any Commission-approved Acquirer will have a supply of Cortaid: (1) in quantities; (2) at prices; (3) in a timely manner; and (4) under reasonable terms and conditions sufficient to enable any Commission-approved Acquirer to maintain the viability and competitiveness of the Cortaid Assets. Each such agreement shall provide that no additional consents or waivers

of the respective Third Party are required in order to assign the agreement to the Commission-approved Acquirer; *provided, however*, Respondents may satisfy this requirement by certifying that the Commission-approved Acquirer has executed all such agreements directly with each of the relevant Third Parties. For the purposes of this these requirements, "Third Parties" includes, but is not limited to, Alpharma.

K. Respondents shall require, as a condition of continued employment post-divestiture, that each Cortaid Core Employee sign a confidentiality agreement pursuant to which such employee shall be required to maintain all Confidential Business Information related to Cortaid strictly confidential, including the nondisclosure of such information to all other employees, executives or other personnel of Respondents (other than as necessary to comply with the requirements of this Order).

L. Respondents shall provide written notification of the restrictions on the use of the Confidential Business Information related to Cortaid by Respondents' personnel to all of Respondents' employees who (i) are or were involved in the research, Development, manufacturing, distribution, sale or marketing of Cortaid, (ii) are involved in the research, Development, manufacturing, distribution, sale or marketing of Cortizone and/or (iii) may have Confidential Business Information related to Cortaid. Such notification shall be in substantially the form set forth in the Employee Notification. Respondents shall give such notification by e-mail with return receipt requested or similar transmission, and keep a file of such receipts for one (1) year after the Closing Date. Respondents shall provide a copy of such notification to the Commission-approved Acquirer. Respondents shall maintain complete records of all such agreements at Respondents' corporate headquarters and shall provide an officer's certification to the Commission, stating that such acknowledgment program has been implemented and is being complied with. Respondents shall provide the Commission-

approved Acquirer with copies of all certifications, notifications and reminders sent to Respondents' personnel.

M. Upon reasonable notice and request by the Commission-approved Acquirer, Respondents shall make available to the Commission-approved Acquirer at no greater than Direct Cost such personnel, assistance and training as the Commission-approved Acquirer might reasonably need to transfer the Cortaid Assets, and shall continue providing such personnel, assistance and training, at the request of the Commission-approved Acquirer, until the Commission-approved Acquirer (or the Designee of the Commission-approved Acquirer) is fully validated, qualified, and approved by the FDA, and able to manufacture Cortaid independently of the Respondents.

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

O. Counsel for Respondents (including in-house counsel under appropriate confidentiality arrangements) may retain unredacted copies of all documents or other materials provided to the Commission-approved Acquirer and may have access to original documents (under circumstances where copies of documents are insufficient or otherwise unavailable) provided to the Commission-approved Acquirer in order to:

1. comply with any Divestiture Agreement, this Order, any Law (including, without limitation, any requirement to obtain regulatory licenses or approvals), any data retention requirement of any applicable Governmental Entity, or any taxation requirements; or

2. defend against, respond to, or otherwise participate in any litigation, investigation, audit, process, subpoena or other proceeding relating to the divestiture or any other aspect of the Cortaid Assets or Cortaid business; *provided*, *however*, that Respondents may disclose such information as necessary for the purposes set forth in this Paragraph pursuant to an appropriate confidentiality order, agreement or arrangement;

provided further, *however*:

1. Respondents shall require those who view such unredacted documents or other materials to enter into confidentiality agreements with the Commission-approved Acquirer; *provided, however,* that Respondents shall not be deemed to have violated these requirements if the Commission-approved Acquirer withholds such agreement unreasonably; and

2. Respondents shall use their best efforts to obtain a protective order to protect the confidentiality of such information during any adjudication.

P. The purpose of the divestiture of the Cortaid Assets is to ensure the continued use of the Cortaid Assets in the same business in which the Cortaid Assets were engaged at the time of the announcement of the Merger, and to remedy the lessening of competition resulting from the Merger as alleged in the Commission's Complaint.

XI.

IT IS FURTHER ORDERED that:

A. At any time after Respondents sign the Consent Agreement in this matter, the Commission may appoint a monitor ("Interim Monitor") to assure that Respondents expeditiously comply with all of their obligations and

perform all of their responsibilities as required by this Order and the Order to Maintain Assets (collectively "the Orders"), and the Divestiture Agreements. The Commission may appoint one or more Interim Monitors to assure Respondents' compliance with the requirements of the Orders, and the related Divestiture Agreements.

B. The Commission shall select the Interim Monitor, subject to the consent of Respondents, which consent shall not be unreasonably withheld. If neither Respondent has opposed, in writing, including the reasons for opposing, the selection of a proposed Interim Monitor within ten (10) days after notice by the staff of the Commission to Respondents of the identity of any proposed Interim Monitor, Respondents shall be deemed to have consented to the selection of the proposed Interim Monitor.

C. Not later than ten (10) days after the appointment of the Interim Monitor, Respondents shall execute an agreement that, subject to the prior approval of the Commission, confers on the Interim Monitor all the rights and powers necessary to permit the Interim Monitor to monitor Respondents' compliance with the relevant requirements of the Orders in a manner consistent with the purposes of the Orders.

D. If one or more Interim Monitors are appointed pursuant to this Paragraph or pursuant to the relevant provisions of the Order to Maintain Assets in this matter, Respondents shall consent to the following terms and conditions regarding the powers, duties, authorities, and responsibilities of each Interim Monitor:

1. The Interim Monitor shall have the power and authority to monitor Respondents' compliance with the divestiture and asset maintenance obligations and related requirements of the Orders, and shall exercise such power and authority and carry out the duties and responsibilities of the Interim Monitor in a manner consistent with the

purposes of the Orders and in consultation with the Commission.

2. The Interim Monitor shall act in a fiduciary capacity for the benefit of the Commission.

3. The Interim Monitor shall serve until the later of:

   a. the completion by Respondents of the divestiture of all relevant assets required to be divested pursuant to this Order in a manner that fully satisfies the requirements of the Orders and notification by the Commission-approved Acquirer to the Interim Monitor that it is fully capable of producing the relevant Product(s) acquired pursuant to a Divestiture Agreement independently of Respondents (or, in the case of the Cow Mastitis Products, independently of GlaxoSmithKline); or

   b. the completion by Respondents of the last obligation under the Orders pertaining to the Interim Monitor's service.

   provided, however, that the Commission may extend or modify this period as may be necessary or appropriate to accomplish the purposes of the Orders.

4. Subject to any demonstrated legally recognized privilege, the Interim Monitor shall have full and complete access to Respondents' personnel, books, documents, records kept in the normal course of business, facilities and technical information, and such other relevant information as the Interim Monitor may reasonably request, related to Respondents' compliance with their obligations under the Orders, including, but not limited to, their obligations related to the relevant assets. Respondents shall cooperate with any reasonable request of the Interim Monitor and shall take no action to interfere with or

impede the Interim Monitor's ability to monitor Respondents' compliance with the Orders.

5. The Interim Monitor 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 Monitor shall have authority to employ, at the expense of the Respondents, such consultants, accountants, attorneys and other representatives and assistants as are reasonably necessary to carry out the Interim Monitor's duties and responsibilities.

6. Respondents shall indemnify the Interim Monitor and hold the Interim Monitor harmless against any losses, claims, damages, liabilities, or expenses arising out of, or in connection with, the performance of the Interim Monitor's duties, including all reasonable fees of counsel and other reasonable 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 Monitor.

7. Respondents shall report to the Interim Monitor in accordance with the requirements of this Order and/or as otherwise provided in any agreement approved by the Commission. The Interim Monitor shall evaluate the reports submitted to the Interim Monitor by Respondents, and any reports submitted by the Commission-approved Acquirer with respect to the performance of Respondents' obligations under the Orders or the Divestiture Agreement. Within one (1) month from the date the Interim Monitor receives these reports, the Interim Monitor shall report in writing to the Commission

concerning performance by Respondents of their obligations under the Orders.

8. Respondents may require the Interim Monitor and each of the Interim Monitor's consultants, accountants, attorneys and other representatives and assistants to sign a customary confidentiality agreement; *provided, however,* that such agreement shall not restrict the Interim Monitor from providing any information to the Commission.

E. The Commission may, among other things, require the Interim Monitor and each of the Interim Monitor's consultants, accountants, attorneys and other representatives and assistants to sign an appropriate confidentiality agreement related to Commission materials and information received in connection with the performance of the Interim Monitor's duties.

F. If the Commission determines that the Interim Monitor has ceased to act or failed to act diligently, the Commission may appoint a substitute Interim Monitor in the same manner as provided in this Paragraph or the relevant provisions of the Order to Maintain Assets in this matter.

G. The Commission may on its own initiative, or at the request of the Interim Monitor, issue such additional orders or directions as may be necessary or appropriate to assure compliance with the requirements of the Orders.

H. The Interim Monitor appointed pursuant to this Order or the relevant provisions of the Order to Maintain Assets in this matter may be the same person appointed as a Divestiture Trustee pursuant to the relevant provisions of this Order.

XII.

IT IS FURTHER ORDERED that:

A. If Respondents have not fully complied with the obligations to assign, grant, license, divest, transfer, deliver or otherwise convey relevant assets as required by this Order, the Commission may appoint a trustee or trustees ("Divestiture Trustee(s)") to assign, grant, license, divest, transfer, deliver or otherwise convey the assets required to be assigned, granted, licensed, divested, transferred, delivered or otherwise conveyed pursuant to each of the relevant Paragraphs in a manner that satisfies the requirements of each such Paragraph. The Commission may appoint a different Divestiture Trustee to accomplish each of the divestitures described in Paragraphs II, III, V, VII, VIII, IX, and X, respectively. 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 Divestiture Trustee in such action to assign, grant, license, divest, transfer, deliver or otherwise convey the relevant assets. Neither the appointment of a Divestiture Trustee nor a decision not to appoint a Divestiture 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 Divestiture Trustee, pursuant to § 5(*l*) of the Federal Trade Commission Act, or any other statute enforced by the Commission, for any failure by Respondents to comply with this Order.

B. The Commission shall select the Divestiture Trustee, subject to the consent of Respondents, which consent shall not be unreasonably withheld. The Divestiture 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 Divestiture Trustee within ten (10) days after notice by the staff of the Commission to Respondents of the identity of any proposed Divestiture Trustee, Respondents shall be deemed to have consented to the selection of the proposed Divestiture Trustee.

C. Not later than ten (10) days after the appointment of a 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 Divestiture Trustee, of the court, transfers to the Divestiture Trustee all rights and powers necessary to permit the Divestiture Trustee to effect the divestiture required by the Order.

D. If a Divestiture Trustee is appointed by the Commission or a court pursuant to this Paragraph, Respondents shall consent to the following terms and conditions regarding the Divestiture Trustee's powers, duties, authority, and responsibilities:

1. Subject to the prior approval of the Commission, the Divestiture Trustee shall have the exclusive power and authority to assign, grant, license, divest, transfer, deliver or otherwise convey the assets that are required by this Order to be assigned, granted, licensed, divested, transferred, delivered or otherwise conveyed.

2. The Divestiture Trustee shall have one (1) year after the date the Commission approves the trust agreement described in herein 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 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 Divestiture Trustee, by the court; *provided, however,* the

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

3. Subject to any demonstrated legally recognized privilege, the Divestiture Trustee shall have full and complete access to the personnel, books, records and facilities related to the relevant assets that are required to be assigned, granted, licensed, divested, delivered or otherwise conveyed by this Order and to any other relevant information, as the Divestiture Trustee may request. Respondents shall develop such financial or other information as the Divestiture Trustee may request and shall cooperate with the Divestiture Trustee. Respondents shall take no action to interfere with or impede the Divestiture 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 Divestiture Trustee, by the court.

4. The Divestiture Trustee shall use commercially reasonable 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 and at no minimum price. Each divestiture shall be made in the manner and to an acquirer as required by this Order; *provided, however*, if the Divestiture Trustee receives bona fide offers from more than one acquiring entity, and if the Commission determines to approve more than one such acquiring entity, the Divestiture Trustee shall divest to the acquiring entity selected by Respondents from among those approved by the Commission; *provided further, however*, that Respondents shall select such entity within five (5) Business Days after receiving notification of the Commission's approval.

5. 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 Divestiture Trustee's duties and responsibilities. The Divestiture Trustee shall account for all monies derived from the divestiture and all expenses incurred. After approval by the Commission and, in the case of a court-appointed Divestiture Trustee, by the court, of the account of the Divestiture Trustee, including fees for the Divestiture Trustee's services, all remaining monies shall be paid at the direction of the Respondents, and the Divestiture Trustee's power shall be terminated. The compensation of the Divestiture Trustee shall be based at least in significant part on a commission arrangement contingent on the divestiture of all of the relevant assets that are required to be divested by this Order.

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

7. In the event that the Divestiture Trustee determines that he or she is unable to assign, grant, license, divest, transfer, deliver or otherwise convey the relevant assets

required to be assigned, granted, licensed, divested, transferred, delivered or otherwise conveyed in a manner that preserves their marketability, viability and competitiveness and ensures their continued use in the research, Development, manufacture, distribution, marketing, promotion, sale, or after-sales support of the relevant Product, the Divestiture Trustee may assign, grant, license, divest, transfer, deliver or otherwise convey such additional assets of Respondents and effect such arrangements as are necessary to satisfy the requirements of this Order.

8. The Divestiture Trustee shall have no obligation or authority to operate or maintain the relevant assets required to be assigned, granted, licensed, divested, transferred, delivered or otherwise conveyed by this Order.

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

10. Respondents may require the Divestiture Trustee and each of the Divestiture Trustee's consultants, accountants, attorneys and other representatives and assistants to sign a customary confidentiality agreement; *provided, however,* such agreement shall not restrict the Divestiture Trustee from providing any information to the Commission.

E. If the Commission determines that a Divestiture Trustee has ceased to act or failed to act diligently, the Commission may a appoint a substitute Divestiture Trustee in the same manner as provided in this Paragraph.

F. The Commission or, in the case of a court-appointed Divestiture 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 divestiture required by this Order.

G. The Divestiture Trustee appointed pursuant to this Paragraph may be the same Person appointed as Interim Monitor pursuant to the relevant provisions of this Order or the relevant provisions of the Order to Maintain Assets in this matter.

XIII.

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 Paragraphs II.A., III.A., IV.A., V.A., VI.A., VII.A., VIII.A., IX.A., and X.A., 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 Monitor, if any Interim Monitor 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 the relevant Paragraphs of the Order, including a description of all substantive contacts or negotiations related to the divestiture of the relevant assets 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 after 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.

XIV.

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

XV.

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 offices, 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 related 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.

XVI.

IT IS FURTHER ORDERED that this Order will terminate on May 27, 2013.

By the Commission.

APPENDIX I
TO THE DECISION AND ORDER

NOTICE OF DIVESTITURE AND REQUIREMENT FOR CONFIDENTIALITY

On March 24, 2003, Pfizer Inc. ("Pfizer") and Pharmacia Corporation ("Pharmacia"), hereinafter referred to collectively as "Respondents," entered into an Agreement Containing Consent Orders ("Consent Agreement") with the Federal Trade Commission ("FTC") relating to the divestiture of certain assets. That Consent Agreement includes two orders: The Decision and Order and the Order to Maintain Assets.

The Decision and Order requires the divestiture of assets relating to the several marketed and pipeline Pfizer products including Darifenacin, femhrt, Pfizer's cow mastitis product line, Pfizer's Halls product line and Bonine. These assets are hereinafter referred to as the "Pfizer Divested Assets." The Decision and Order also requires the divestiture of assets relating to several marketed and pipeline Pharmacia products including Intranasal Apomorphine, the D2 Agonist 774 development compound, Deramaxx and Cortaid. These assets are hereinafter referred to as the "Pharmacia Divested Assets." Both the Decision and Order and the Order to Maintain Assets require Respondents to commit that no Confidential Business Information relating to the Pfizer Divested Assets or the Pharmacia Divested Assets will be disclosed to or used by any employee of the combined entity formed by the merger of Pfizer and Pharmacia ("Combined Entity"). In particular, this is to protect such information from being used in any way for the research, development, sale or manufacture of any product that competes or may compete with any product that is marketed by the Respondents after the proposed merger. The Decision and Order also requires the complete divestiture of ALL documents (including electronically stored material) that contain Confidential Business Information related to the Pfizer Divested Assets and Pharmacia Divested Assets. Accordingly, no employee of the

Combined Entity may maintain copies of documents containing such information.

Under the Decision and Order, the Respondents are required to divest the Pfizer Divested Assets and Pharmacia Divested Assets to an acquirer that must be approved by the FTC. Companies have been have been proposed to the FTC as the acquirers for these assets. Until a complete divestiture of all of the Pfizer Divested Assets and Pharmacia Divested Assets occurs, the requirements of the second order – the Order to Maintain Assets – are in place to insure the continued marketability, viability and competitive vigor of the Pfizer Divested Assets and Pharmacia Divested Assets. This includes preserving the work force that performs functions related to the Pfizer Divested Assets and Pharmacia Divested Assets. You are receiving this notice because you are either (i) an employee with work responsibilities related to the Pfizer Divested Assets, (ii) an employee with work responsibilities related to the Pharmacia Divested Assets, (iii) an employee for Pfizer, Pharmacia or the Combined Entity who has work responsibilities in some way related to products that compete or may compete with the Pfizer Divested Assets or Pharmacia Divested Assets, or (iv) an employee or former employee of Pharmacia or Pfizer who might have Confidential Business Information in your possession related to the Pfizer Divested Assets or Pharmacia Divested Assets.

All Confidential Business Information related to Pfizer Divested Assets and Pharmacia Divested Assets must be retained and maintained by the persons involved in the operation of that business on a confidential basis, and such persons must not provide, discuss, exchange, circulate, or otherwise disclose any such information to or with any other person whose employment involves responsibilities unrelated to the Pfizer Divested Assets or Pharmacia Divested Assets (such as persons with job responsibilities related to Pfizer or Pharmacia products that compete or may compete with the Pfizer Divested Assets or Pharmacia Divested Assets). In addition, any person who possesses such Confidential Business Information related to the

Pharmacia Divested Assets or Pfizer Divested Assets and who becomes involved in the Combined Entity's business related to any product that competes or may compete with the Pfizer Divested Assets or Pharmacia Divested Assets must not provide, discuss, exchange, circulate, or otherwise disclose any such information to or with any other person whose employment relates to such businesses. Finally, any Pfizer, Pharmacia or former Pfizer or Pharmacia employee with documents that contain information that he or she believes might be considered Confidential Business Information related to the Pharmacia Divested Assets or Pfizer Divested Assets and who has not received specific instructions as to how the documents in his or her possession should be disposed of should contact the contact person identified at the end of this notice.

Furthermore, the Decision and Order places restrictions upon the functions that management level employees of Pfizer or Pharmacia can perform for the Combined Entity for one (1) year from the closing of the Pfizer/Pharmacia transaction: (i) any employee of Pfizer who was involved in the marketing of Darifenacin may not perform a similar function for the Combined Entity relating to Detrol, (ii) any employee of Pfizer who was involved in the marketing of femhrt may not perform a similar function for the Combined Entity relating to Activella, (iii) any employee of Pfizer who was involved in the marketing of Pfizer's Cow Mastitis products may not perform a similar function for the Combined Entity relating to Cow Mastitis products, (iv) any employee of Pfizer who was involved in the marketing of Bonine may not perform a similar function for the Combined Entity relating to Dramamine. In addition, any employee involved in sales efforts for femhrt may not perform a similar function for the Combined Entity regarding Activella for six (6) months from the closing of the Pfizer/Pharmacia transaction.

Any violation of the Decision and Order, or the Order to Maintain Assets may subject Pfizer, Pharmacia, or the Combined Entity to civil penalties and other relief as provided by law.

ORDER TO MAINTAIN ASSETS

The Federal Trade Commission ("Commission"), having initiated an investigation of the proposed merger between Respondent Pfizer Inc. ("Pfizer") and Respondent Pharmacia Corporation ("Pharmacia"), hereinafter referred to as "Respondents," and the Respondents having been furnished thereafter with a copy of a draft of 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 7 of the Clayton Act, as amended, 15 U.S.C. § 18, and Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45; and

Respondents, their attorneys, and counsel for the Commission having thereafter executed an Agreement Containing Consent Orders ("Consent Agreement"), containing 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 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 this Order to Maintain Assets:

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

2. Respondent Pharmacia 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 100 Route 206 North, Peapack, New Jersey 07977.

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

ORDER

I.

IT IS ORDERED that, as used in this Order to Maintain Assets, the following definitions and the definitions used in the Consent Agreement and the proposed Decision and Order (and when made final, the final Decision and Order), which are attached hereto as Appendix B and incorporated herein by reference and made a part hereof, 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. (including, but not limited to, Warner-Lambert Company LLC), and the respective directors, officers, employees, agents, representatives, successors, and assigns of each.

B. "Pharmacia" means Pharmacia Corporation, its directors, officers, employees, agents, representatives, predecessors, successors, and assigns; its joint ventures, subsidiaries,

divisions, groups and affiliates controlled by Pharmacia Corporation (including, but not limited to, G.D. Searle LLC, and Pharmacia & Upjohn Company), and the respective directors, officers, employees, agents, representatives, successors, and assigns of each.

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

D. "Merger" means the merger contemplated by the "Agreement and Plan of Merger" dated as of July 13, 2002, among Pfizer, Pilsner Acquisition Sub Corp. ("Pilsner") and Pharmacia ("Merger Agreement") pursuant to which Pilsner, a wholly-owned subsidiary of Pfizer formed for the purpose of the merger, will merge with and into Pharmacia. As a result, Pharmacia will survive the merger and become a wholly-owned subsidiary of Pfizer upon completion of the merger.

E. "Commission" means the Federal Trade Commission.

F. "Agency(ies)" means any governmental regulatory authority or authorities in the world responsible for granting approval(s), clearance(s), qualification(s), license(s) or permit(s) for any aspect of the research, Development, manufacture, marketing, distribution or sale of a Product. The term "Agency" includes, but is not limited to, the United States Food and Drug Administration ("FDA").

G. "Business Day" means any day excluding Saturday, Sunday and any United States Federal holiday.

H. "Closing Date" means the date on which Respondents (or a Divestiture Trustee) and a Commission-approved Acquirer close on a transaction to divest, license, or otherwise convey relevant assets pursuant to the Decision and Order.

I. "Commission-approved Acquirer" means: 1) an entity that is specifically identified in the Decision and Order to acquire

particular assets that the Respondents are required to assign, grant, license, divest, transfer, deliver or otherwise convey pursuant to the Decision and Order and that has been approved by the Commission to accomplish the requirements of the Decision and Order in connection with the Commission's determination to make the Decision and Order final; or 2) an entity approved by the Commission to acquire particular assets that the Respondents are required to assign, grant, license, divest, transfer, deliver or otherwise convey pursuant to the Decision and Order.

J. "Confidential Business Information" means all information owned by, or in the possession or control of, Respondents that is not in the public domain related to the research, Development, manufacture, marketing, commercialization, distribution, importation, exportation, cost, pricing, supply, sales, sales support, or use of a Product, as defined in the Decision and Order.

K. "Divestiture Agreement" means: 1) any agreement between a Respondent(s) and a Commission-approved Acquirer that is specifically referenced and attached to the Decision and Order and all amendments, exhibits, attachments, agreements, and schedules thereto, related to the relevant assets to be assigned, granted, licensed, divested, transferred, delivered or otherwise conveyed, and that has been approved by the Commission to accomplish the requirements of the Orders in connection with the Commission's determination to make the Decision and Order final; or 2) any agreement between a Respondent(s) and a Commission-approved Acquirer (or between a Divestiture Trustee and a Commission-approved Acquirer) that has been approved by the Commission to accomplish the requirements of the Decision and Order and all amendments, exhibits, attachments, agreements, and schedules thereto, related to the relevant assets to be assigned, granted, licensed, divested, transferred, delivered or otherwise conveyed, that have been

approved by the Commission to accomplish the requirements of the Orders.

L. "Divestiture Businesses and Assets" means the Bonine Assets, the Cortaid Assets, the Cow Mastitis Products Assets, the D2 Agonist 774 Assets, the Darifenacin Assets, the Femhrt Assets, the Halls Assets, the Halls Business, and the IN Apomorphine Assets, individually and collectively, as defined in the Decision and Order.

M. "Divestiture Trustee(s)" means a trustee or trustees appointed by the Commission pursuant to the relevant provisions of the Decision and Order.

N. "Effective Date" means the earlier of: 1) the date the Respondents close on the Merger Agreement, or 2) the date the Merger becomes effective by filing the certificate of merger with the Secretary of State of the State of Delaware.

O. "Interim Monitor(s)" means a monitor appointed by the Commission pursuant to the relevant provisions of this Order to Maintain Assets or the Decision and Order.

P. "Orders" means the Decision and Order and this Order to Maintain Assets.

Q. "Product Confidential Business Information" means the Confidential Business Information relating to any product marketed or sold under the Halls Trademarks and the following Products as defined in the Decision and Order: Amoxi-Mast, Bonine, Cortaid, D2 Agonist 774, Dariclox, Darifenacin, Deramaxx, Femhrt, IN Apomorphine, and Orbenin DC.

R. "Product Core Employee(s)" means the Darifenacin Core Employees, the Femhrt Core Employees, the Femhrt Sales Employees, the IN Apomorphine Core Employees, the D2 Agonist 774 Core Employees, the Cow Mastitis Products

Core Employees, the Bonine Core Employees, and the Cortaid Core Employees, individually and collectively, as defined or otherwise identified in the Decision and Order.

S. "Proposed Acquirer" means an entity proposed by the Respondents (or a Divestiture Trustee) to the Commission and submitted for the approval of the Commission as the acquirer for particular assets required to be assigned, granted, licensed, divested, transferred, delivered or otherwise conveyed by Respondents pursuant to this Order.

II.

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

A. Respondents shall take such actions as are necessary to maintain the viability, marketability, and competitiveness of the Divestiture Businesses and Assets, and shall prevent the destruction, removal, wasting, deterioration, sale, disposition, transfer or impairment of the Divestiture Businesses and Assets, except for ordinary wear and tear and as otherwise would occur in the ordinary course of business.

B. Respondents shall maintain the operations of the Divestiture Businesses and Assets in the regular and ordinary course of business and in accordance with past practice (including regular repair and maintenance of the Divestiture Businesses and Assets) and shall use their best efforts to preserve the existing relationships with suppliers, vendors, customers, Agencies, employees, and others having business relations with the Divestiture Businesses and Assets. Respondents' responsibilities shall include, but are not limited to:

1. providing the Divestiture Businesses and Assets with sufficient working capital to operate the Divestiture Businesses and Assets at least at current rates of operation, to meet all capital calls with respect to the

Divestiture Businesses and Assets and to carry on, at least at their scheduled pace, all capital projects, business plans and promotional activities for the Divestiture Businesses and Assets;

2. continuing, at least at their scheduled pace, any additional expenditures for the Divestiture Businesses and Assets authorized prior to the date the Consent Agreement was signed by Respondents;

3. making available for use by the Divestiture Businesses and Assets funds sufficient to perform all routine maintenance and all other maintenance as may be necessary to, and all replacements of, the Divestiture Businesses and Assets;

4. providing the Divestiture Businesses and Assets with such funds as are necessary to maintain the viability, marketability and competitiveness of the Divestiture Businesses and Assets;

5. providing such support services to the Divestiture Businesses and Assets as were being provided to these businesses by Respondents as of the date the Consent Agreement was signed by Respondents;

6. maintaining a work force equivalent in size, training, and expertise to what has been associated with the Divestiture Businesses and Assets;

7. in connection with the Darifenacin Assets and the Commission-approved Acquirer of the Darifenacin Assets: (i) keeping the Commission-approved Acquirer informed on a timely and ongoing basis with respect to any material contacts with, or communications from, any Agency(ies) relating to Darifenacin; (ii) notifying the Commission-approved Acquirer of, and allowing its participation in, any meetings or discussions with any

Agency(ies) relating to Darifenacin; (iii) discussing with the Commission-approved Acquirer any proposed action, response or reply by Respondents to any Agency(ies) relating to Darifenacin in advance of Respondents taking such action or submitting such response or reply; and (iv) complying with all reasonable requests made by the Commission-approved Acquirer of the Darifenacin Assets concerning any proposed meetings, discussions, actions, or written or oral communications with any such Agency(ies); and

8. in connection with the Cow Mastitis Products Assets and the Commission-approved Acquirer of the Cow Mastitis Products Assets: (i) keeping the Commission-approved Acquirer informed on a timely and ongoing basis with respect to any material contacts with, or communications from, any Agency(ies) relating to qualification of an alternative supplier of the active pharmaceutical ingredients contained in the Cow Mastitis Products; (ii) notifying the Commission-approved Acquirer of, and allowing its participation in, any meetings or discussions with any Agency(ies) relating to qualification of an alternative supplier of the active pharmaceutical ingredients contained in the Cow Mastitis Products; (iii) discussing with the Commission-approved Acquirer any proposed action, response or reply by Respondents to any Agency(ies) relating to qualification of an alternative supplier of the active pharmaceutical ingredients contained in the Cow Mastitis Products in advance of Respondents taking such action or submitting such response or reply; and (iv) complying with all reasonable requests made by the Commission-approved Acquirer of the Cow Mastitis Products Assets concerning any proposed meetings, discussions, actions, or written or oral communications with any such Agency(ies).

C. Respondents shall cooperate with the Interim Monitor(s) in the performance of the Interim Monitor'(s) obligations pursuant to the Orders.

D. Respondents shall provide all Product Core Employees with reasonable financial incentives to continue in their positions until the Closing Date. Such incentives shall include a continuation of all employee benefits offered by Respondents until the Closing Date for the divestiture of the Divestiture Businesses and Assets has occurred, including regularly scheduled raises and bonuses, and a vesting of all pension benefits (as permitted by law).

Provided, however, this Paragraph shall not be construed to require the Respondents to terminate the employment of any employee.

E. Prior to the Closing Date, and consistent with the provisions of the Decision and Order, Respondents shall not interfere with the hiring or employing of any Product Core Employees by any Proposed Acquirer of any of the Divestiture Businesses and Assets, shall not offer any incentive to such employees to decline employment with the Proposed Acquirer or to accept other employment with Respondents in lieu of accepting employment with the Proposed Acquirer, and shall remove any other impediments within the control of Respondents that may deter these employees from accepting employment related to the Divestiture Businesses and Assets with the Proposed Acquirer, including, but not limited to, any confidentiality provisions relating to the Divestiture Businesses and Assets or 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 the Proposed Acquirer. In addition, Respondents shall not make any counteroffer to a Product Core Employee who receives a written offer of employment from the Proposed Acquirer.

Provided, however, that this Paragraph II.E. does not prohibit the Respondents from making offers to any Product Core Employee where the Commission-approved Acquirer has notified the Respondents in writing that it does not intend to make an offer of employment to that employee.

Provided further, that if the Respondents notify the Commission-approved Acquirer in writing of their desire to make an offer of employment to a particular Product Core Employee, and the Commission-approved Acquirer does not make an offer of employment to that employee within twenty (20) Business Days of the date the Commission-approved Acquirer receives such notice, the Respondents may make an offer of employment to that employee.

F. Promptly following the Effective Date, Respondents shall provide to all of Respondents' employees and other personnel who may have access to Product Confidential Business Information written or electronic notification of the restrictions on the use of the Product Confidential Business Information by Respondents' personnel. At the same time, if not provided earlier, Respondents shall provide a copy of such notification by e-mail with return receipt requested or similar transmission, and keep an electronic file of such receipts for one (1) year after the Closing Date. Respondents shall provide a copy of the form of such notification to the Commission-approved Acquirer, the Interim Monitor(s), and the Commission. Respondents shall also obtain from each employee covered by this Paragraph II. F. an agreement to abide by the applicable restrictions. Such agreement and notification shall be in substantially the form set forth in the "Notice of Divestiture and Requirement for Confidentiality" attached as Appendix A to this Order to Maintain Assets. Respondents shall maintain complete records of all such agreements at Respondents' corporate headquarters and shall provide an officer's certification to the Commission, stating that such acknowledgment program has been implemented and is being complied with. Respondents shall monitor the

implementation by their employees and other personnel of all applicable restrictions, and take corrective actions for the failure of such employees and personnel to comply with such restrictions or to furnish the written agreements and acknowledgments required by this Order. Respondents shall provide the Commission-approved Acquirer with copies of all certifications, notifications and reminders sent to Respondents' employees and other personnel.

G. Respondents shall adhere to and abide by the Divestiture Agreements (which agreements shall not vary or contradict, or be construed to vary or contradict, the terms of the Orders, it being understood that nothing in the Orders shall be construed to reduce any obligations of Respondents under such agreement(s)), which are incorporated by reference into this Order to Maintain Assets and made a part hereof.

H. The purpose of this Order to Maintain Assets is to ensure the continued viability, marketability, and competitiveness of the Divestiture Businesses and Assets in the same businesses in which the Divestiture Businesses and Assets were engaged at the time of the announcement of the Merger, and to prevent the destruction, removal, wasting, deterioration, or impairment of any of the Divestiture Businesses and Assets except for ordinary wear and tear.

III.

IT IS FURTHER ORDERED that:

A. At any time after Respondents sign the Consent Agreement in this matter, the Commission may appoint one or more Interim Monitors to assure that Respondents expeditiously comply with all of their obligations and perform all of their responsibilities as required by the Orders and the Divestiture Agreements.

B. The Commission shall select each Interim Monitor, subject to the consent of Respondents, which consent shall not be unreasonably withheld. If neither Respondent has opposed, in writing, including the reasons for opposing, the selection of a proposed Interim Monitor within ten (10) days after notice by the staff of the Commission to Respondents of the identity of any proposed Interim Monitor, Respondents shall be deemed to have consented to the selection of the proposed Interim Monitor.

C. Not later than ten (10) days after the appointment of an Interim Monitor, Respondents shall execute an agreement that, subject to the prior approval of the Commission, confers on the Interim Monitor all the rights and powers necessary to permit the Interim Monitor to monitor Respondents' compliance with the relevant requirements of the Orders in a manner consistent with the purposes of the Orders.

D. If one or more Interim Monitors are appointed pursuant to this Paragraph or pursuant to the relevant provisions of the Decision and Order in this matter, Respondents shall consent to the following terms and conditions regarding the powers, duties, authorities, and responsibilities of each Interim Monitor:

1. The Interim Monitor shall have the power and authority to monitor Respondents' compliance with the divestiture and asset maintenance obligations and related requirements of the Orders, and shall exercise such power and authority and carry out the duties and responsibilities of the Interim Monitor in a manner consistent with the purposes of the Orders and in consultation with the Commission.

2. The Interim Monitor shall act in a fiduciary capacity for the benefit of the Commission.

3. The Interim Monitor shall serve until the later of:

a. the completion by Respondents of the divestitures of the Divestiture Businesses and Assets in a manner that fully satisfies the requirements of the Orders and notification by the Commission-approved Acquirers to the Interim Monitor that they are fully capable of producing the relevant Product(s) acquired pursuant to a Divestiture Agreement(s) independently of Respondents (or, in the case of the Cow Mastitis Products, independently of GlaxoSmithKline); or

b. the completion by Respondents of the last obligation under the Orders pertaining to the Interim Monitor's service.

Provided, however, that the Commission may extend or modify this period as may be necessary or appropriate to accomplish the purposes of the Orders.

4. Subject to any demonstrated legally recognized privilege, the Interim Monitor shall have full and complete access to Respondents' personnel, books, documents, records kept in the normal course of business, facilities and technical information, and such other relevant information as the Interim Monitor may reasonably request, related to Respondents' compliance with their obligations under the Orders, including, but not limited to, their obligations related to the Divestiture Businesses and Assets. Respondents shall cooperate with any reasonable request of the Interim Monitor and shall take no action to interfere with or impede the Interim Monitor's ability to monitor Respondents' compliance with the Orders.

5. The Interim Monitor 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 Monitor shall have authority to employ, at the expense of the Respondents, such consultants, accountants, attorneys and other

representatives and assistants as are reasonably necessary to carry out the Interim Monitor's duties and responsibilities.

6. Respondents shall indemnify the Interim Monitor and hold the Interim Monitor harmless against any losses, claims, damages, liabilities, or expenses arising out of, or in connection with, the performance of the Interim Monitor's duties, including all reasonable fees of counsel and other reasonable 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 Monitor.

7. Respondents shall report to the Interim Monitor in accordance with the requirements of the Decision and Order and/or as otherwise provided in any agreement approved by the Commission. The Interim Monitor shall evaluate the reports submitted to the Interim Monitor by Respondents, and any reports submitted by the Commission-approved Acquirer with respect to the performance of Respondents' obligations under the Orders or the Divestiture Agreement(s). Within one (1) month from the date the Interim Monitor receives these reports, the Interim Monitor shall report in writing to the Commission concerning Respondents' performance of their obligations under the Orders.

8. Respondents may require the Interim Monitor and each of the Interim Monitor's consultants, accountants, attorneys and other representatives and assistants to sign a customary confidentiality agreement; *provided, however,* that such agreement shall not restrict the Interim Monitor from providing any information to the Commission.

E. The Commission may, among other things, require each Interim Monitor and each of the Interim Monitor's consultants, accountants, attorneys and other representatives and assistants to sign an appropriate confidentiality agreement related to Commission materials and information received in connection with the performance of the Interim Monitor's duties.

F. If the Commission determines that an Interim Monitor has ceased to act or failed to act diligently, the Commission may appoint a substitute Interim Monitor in the same manner as provided in this Paragraph or the relevant provisions of the Decision and Order in this matter.

G. The Commission may on its own initiative, or at the request of an Interim Monitor, issue such additional orders or directions as may be necessary or appropriate to assure compliance with the requirements of the Orders.

H. An Interim Monitor appointed pursuant to this Order to Maintain Assets or the relevant provisions of the Decision and Order in this matter may be the same person appointed as a Divestiture Trustee pursuant to the relevant provisions of the 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 either corporate Respondent such as dissolution, assignment, sale resulting in the emergence of a successor corporation, or the creation or dissolution of subsidiaries or any other change in the corporation that may affect compliance obligations arising out of this Order to Maintain Assets.

V.

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

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

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

VI.

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

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

B. The day after the divestiture of all of the Divestiture Businesses and Assets, as required by and described in the Decision and Order, has been completed and each Interim Monitor, in consultation with Commission staff and the Commission-approved Acquirer(s), notifies the Commission that all related assignments, conveyances, deliveries, grants, licenses, transactions, transfers and other transitions are

complete, or the Commission otherwise directs that this Order to Maintain Assets is terminated.

By the Commission.

APPENDIX A

TO THE ORDER TO MAINTAIN ASSETS

NOTICE OF DIVESTITURE AND REQUIREMENT FOR CONFIDENTIALITY

On March 24, 2003, Pfizer Inc. ("Pfizer") and Pharmacia Corporation ("Pharmacia"), hereinafter referred to collectively as "Respondents," entered into an Agreement Containing Consent Orders ("Consent Agreement") with the Federal Trade Commission ("FTC") relating to the divestiture of certain assets. That Consent Agreement includes two orders: The Decision and Order and the Order to Maintain Assets.

The Decision and Order requires the divestiture of assets relating to the several marketed and pipeline Pfizer products including Darifenacin, femhrt, Pfizer's cow mastitis product line, Pfizer's Halls product line and Bonine. These assets are hereinafter referred to as the "Pfizer Divested Assets." The Decision and Order also requires the divestiture of assets relating to several marketed and pipeline Pharmacia products including Intranasal Apomorphine, the D2 Agonist 774 development compound, Deramaxx and Cortaid. These assets are hereinafter referred to as the "Pharmacia Divested Assets." Both the Decision and Order and the Order to Maintain Assets require Respondents to commit that no Confidential Business Information relating to the Pfizer Divested Assets or the Pharmacia Divested Assets will be disclosed to or used by any employee of the combined entity formed by the merger of Pfizer and Pharmacia ("Combined Entity"). In particular, this is to protect such information from being used in any way for the research, development, sale or manufacture of any product that competes or may compete with any product that is marketed by the Respondents after the proposed merger. The Decision and Order also requires the complete divestiture of ALL documents (including electronically stored material) that contain Confidential Business Information related to the Pfizer Divested Assets and

Pharmacia Divested Assets. Accordingly, no employee of the Combined Entity may maintain copies of documents containing such information.

Under the Decision and Order, the Respondents are required to divest the Pfizer Divested Assets and Pharmacia Divested Assets to an acquirer that must be approved by the FTC. Companies have been have been proposed to the FTC as the acquirers for these assets. Until a complete divestiture of all of the Pfizer Divested Assets and Pharmacia Divested Assets occurs, the requirements of the second order – the Order to Maintain Assets – are in place to insure the continued marketability, viability and competitive vigor of the Pfizer Divested Assets and Pharmacia Divested Assets. This includes preserving the work force that performs functions related to the Pfizer Divested Assets and Pharmacia Divested Assets. You are receiving this notice because you are either (i) an employee with work responsibilities related to the Pfizer Divested Assets, (ii) an employee with work responsibilities related to the Pharmacia Divested Assets, (iii) an employee for Pfizer, Pharmacia or the Combined Entity who has work responsibilities in some way related to products that compete or may compete with the Pfizer Divested Assets or Pharmacia Divested Assets, or (iv) an employee or former employee of Pharmacia or Pfizer who might have Confidential Business Information in your possession related to the Pfizer Divested Assets or Pharmacia Divested Assets.

All Confidential Business Information related to Pfizer Divested Assets and Pharmacia Divested Assets must be retained and maintained by the persons involved in the operation of that business on a confidential basis, and such persons must not provide, discuss, exchange, circulate, or otherwise disclose any such information to or with any other person whose employment involves responsibilities unrelated to the Pfizer Divested Assets or Pharmacia Divested Assets (such as persons with job responsibilities related to Pfizer or Pharmacia products that compete or may compete with the Pfizer Divested Assets or Pharmacia Divested Assets). In addition, any person who

possesses such Confidential Business Information related to the Pharmacia Divested Assets or Pfizer Divested Assets and who becomes involved in the Combined Entity's business related to any product that competes or may compete with the Pfizer Divested Assets or Pharmacia Divested Assets must not provide, discuss, exchange, circulate, or otherwise disclose any such information to or with any other person whose employment relates to such businesses. Finally, any Pfizer, Pharmacia or former Pfizer or Pharmacia employee with documents that contain information that he or she believes might be considered Confidential Business Information related to the Pharmacia Divested Assets or Pfizer Divested Assets and who has not received specific instructions as to how the documents in his or her possession should be disposed of should contact the contact person identified at the end of this notice.

Furthermore, the Decision and Order places restrictions upon the functions that management level employees of Pfizer or Pharmacia can perform for the Combined Entity for one (1) year from the closing of the Pfizer/Pharmacia transaction: (i) any employee of Pfizer who was involved in the marketing of Darifenacin may not perform a similar function for the Combined Entity relating to Detrol, (ii) any employee of Pfizer who was involved in the marketing of femhrt may not perform a similar function for the Combined Entity relating to Activella, (iii) any employee of Pfizer who was involved in the marketing of Pfizer's Cow Mastitis products may not perform a similar function for the Combined Entity relating to Cow Mastitis products, (iv) any employee of Pfizer who was involved in the marketing of Bonine may not perform a similar function for the Combined Entity relating to Dramamine, and (v) any employee of Pharmacia who was involved in the marketing of Cortaid may not perform a similar function for the Combined Entity relating to Cortizone. In addition, any employee involved in sales efforts for femhrt may not perform a similar function for the Combined Entity regarding Activella for six (6) months from the closing of the Pfizer/Pharmacia transaction.

Any violation of the Decision and Order, or the Order to Maintain Assets may subject Pfizer, Pharmacia, or the Combined Entity to civil penalties and other relief as provided by law.

CONTACT PERSON

If you have questions regarding the contents of this notice, the confidentiality of information, the Decision and Order or the Order to Maintain Assets, you should contact Marc Brotman at 212-733-5029, e-mail address: marc.brotman@pfizer.com.

ACKNOWLEDGMENT

I, _____ (print name),

hereby acknowledge that I have read the above notification and

agree to abide by its provisions.

APPENDIX B

TO THE ORDER TO MAINTAIN ASSETS

[DECISION AND ORDER]

Analysis of Proposed Consent Order to Aid Public Comment

The Federal Trade Commission ("Commission") has accepted, subject to final approval, an Agreement Containing Consent Orders ("Consent Agreement") from Pfizer Inc. ("Pfizer") and Pharmacia Corporation ("Pharmacia") which is designed to remedy the anticompetitive effects of the acquisition of Pharmacia by Pfizer. Under the terms of the proposed Consent Agreement, the companies would be required to: (1) divest all of Pfizer's worldwide rights and assets relating to its overactive bladder drug, darifenacin, to Novartis AG; (2) divest Pfizer's worldwide rights and assets relating to its combination hormone replacement therapy, femhrt, to Galen Holdings plc; (3) return to Nastech Pharmaceutical Company, Inc. all rights to make, use, and sell Nastech's intranasal apomorphine product ("IN APO") for the treatment of erectile dysfunction; (4) divest all of Pharmacia's rights and assets in the field of sexual dysfunction relating to its D2 dopamine receptor agonist, PNU-142,774, to Neurocrine Biosciences, Inc.; (5) renegotiate a 1999 license and supply agreement between Pharmacia and Novartis for Deramaxx, Novartis's canine arthritis drug, to enable Novartis to operate as an independent competitor, rather than a partner, of the merged entity; (6) divest all of Pfizer's U.S. rights and assets relating to its lactating cow and dry cow mastitis products to Schering-Plough Corporation; (7) divest all of Pharmacia's worldwide rights and assets relating to its over-the-counter hydrocortisone-based cream, Cortaid, to Johnson & Johnson ("J&J"); (8) divest all of Pfizer's U.S. and Puerto Rican rights and assets relating to its over-the-counter motion sickness product, Bonine, to Insight Pharmaceuticals Corporation; and (9) divest all of Pfizer's worldwide rights and assets relating to its Halls over-the-counter cough drop business to Cadbury Schweppes plc.

The proposed Consent Agreement 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 Consent Agreement and the comments

received, and will decide whether it should withdraw from the proposed Consent Agreement or make final the Decision and Order ("Order").

Pursuant to an Agreement and Plan of Merger dated July 13, 2002, between Pfizer and Pharmacia, Pfizer proposes to acquire 100 percent of the issued and outstanding shares of Pharmacia in a stock-for-stock transaction valued at approximately $60 billion. The Commission's Complaint alleges that the proposed acquisition, 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 Federal Trade Commission Act, as amended, 15 U.S.C. § 45, in the markets for: (1) extended release treatments for overactive bladder; (2) combination hormone replacement therapy products; (3) treatments for erectile dysfunction; (4) treatments for canine arthritis; (5) treatments for lactating cow mastitis; (6) treatments for dry cow mastitis; (7) over-the-counter hydrocortisone creams and ointments; (8) over-the-counter motion sickness medications; and (9) over-the-counter cough drops. The proposed Consent Agreement will remedy the alleged violations by replacing the lost competition that would result from the merger in each of these markets.

Extended Release Treatments for Overactive Bladder

Extended release drugs for the treatment of overactive bladder ("OAB") are used by over 2.4 million Americans. Extended release OAB drugs help to reduce or eliminate the three primary symptoms of OAB – frequency, urgency, and urge incontinence – to enable OAB patients to live normal, active lives. Extended release products, dosed at once or twice-a-day, offer a more convenient dosing schedule and fewer side effects than older, generic products that must be taken three-times-a-day. Annual sales of extended release OAB products total $760 million in the United States, and the market is growing rapidly.

The U.S. market for extended release OAB products is a duopoly. Pharmacia markets Detrol and Detrol LA, twice and

once-a-day products, respectively. J&J markets Ditropan XL, the only other extended release OAB product available in the United States. Pfizer is seeking approval from the Food and Drug Administration ("FDA") to market its own extended release product, darifenacin, and is one of the two best-positioned firms seeking to enter the market.

Entry into the market for extended release OAB products is difficult, time-consuming, and costly. *De novo* entry is estimated to take at least eight years and cost upwards of $375 million. Pfizer, along with one other company, Yamanouchi Pharma America ("Yamanouchi"), are the only two firms well-positioned to enter the market within the next two years. Other firms that have undertaken efforts to develop an extended release OAB product are well behind Pfizer and Yamanouchi.

The proposed acquisition would cause significant anticompetitive harm in the U.S. market for extended release OAB products by eliminating potential competition between Pfizer and Pharmacia. With only two firms currently marketing extended release OAB products to customers in this market (Pharmacia and J&J), the entry of Pfizer and Yamanouchi would likely increase competition and reduce prices for extended release OAB products. Accordingly, allowing Pfizer to control both the Pharmacia extended release OAB products and its own competing product would reduce the number of rivals in the future from four to three and likely force customers to pay higher prices for extended release OAB products. The proposed acquisition would also reduce competition in the research and development of extended release OAB products.

The proposed Consent Agreement therefore requires the parties to divest Pfizer's extended release OAB product, darifenacin, to Novartis AG no later than ten business days after the Pharmacia acquisition is consummated. Novartis is well-positioned to continue Pfizer's development efforts and poses no separate competitive concerns as an acquirer of the darifenacin assets. If the Commission determines that Novartis is not an acceptable

purchaser, or if the manner of the divestiture is not acceptable, Pfizer and Pharmacia must divest the darifenacin assets to a Commission-approved buyer no later than six months from the date the Order becomes final. Should they fail to do so, the Commission may appoint a trustee to divest the darifenacin assets.

The proposed Consent Agreement contains several provisions designed to ensure that the divestiture is successful. Pfizer and Pharmacia are required to provide transitional services to the darifenacin buyer relating to regulatory approvals and manufacturing of darifenacin. Pfizer is required to continue contract manufacturing darifenacin until Novartis obtains the FDA approvals necessary to manufacture darifenacin independently from Pfizer. The proposed Consent Agreement also requires Pfizer and Pharmacia to provide incentives to certain employees to continue in their positions until the divestiture is accomplished. For a period of 18 months from the date the assets are divested, Pfizer and Pharmacia will provide the darifenacin buyer an opportunity to enter into employment contracts with individuals who have experience relating to darifenacin. Pfizer and Pharmacia are also required to provide incentives to these individuals to accept employment with the darifenacin acquirer. For a period of one year following the divestiture date, Pfizer and Pharmacia are prohibited from hiring any employees of the acquirer of the darifenacin assets who have responsibility related to darifenacin. Finally, Pfizer and Pharmacia must take steps to maintain the confidentiality of certain information related to darifenacin.

Combination Hormone Replacement Therapies

Combination hormone replacement therapies ("HRT"), which consist of both estrogen and progestin, are used by women with intact uteri to control moderate to severe menopausal symptoms. Although recent safety concerns have been raised by the National Institutes of Health ("NIH") about long term use of HRT, there are no effective substitute products available to control menopausal

symptoms. Total sales of combination HRT products in the United States in 2002 were approximately $807 million.

The market for combination HRT is highly concentrated. There are three significant competitors in the combination HRT market: Wyeth, Pfizer, and Pharmacia. Post-acquisition, the top two competitors – Wyeth and Pfizer – would control almost 94 percent of the combination HRT market.

Entry into the market for combination HRT products is difficult, time-consuming, and costly. Additionally, because of the safety concerns raised by the NIH's Women's Health Initiative study, a new entrant into the combination HRT market may need to meet higher standards to receive FDA approval. The expected entry of generic competitors for combination HRT products is more than two years away.

The proposed acquisition would further concentrate the market for combination HRT products and eliminate competition between Pfizer and Pharmacia. The loss of Pharmacia as an independent competitor in the combination HRT market would likely result in higher prices and fewer product choices for consumers.

The proposed Consent Agreement preserves competition in the combination HRT market by requiring the parties to divest Pfizer's combination HRT product, femhrt, to Galen Holdings plc no later than ten business days after the Pharmacia acquisition is consummated. Galen is well-positioned to market femhrt because it is a company that specializes in marketing women's health products, including an oral contraceptive and an estrogen-only HRT product. However, if the Commission determines that Galen is not an acceptable purchaser, or if the manner of the divestiture is not acceptable, Pfizer and Pharmacia must divest the femhrt assets to a Commission-approved buyer no later than six months from the date the Order becomes final. Should they fail to do so, the Commission may appoint a trustee to divest the femhrt assets.

Analysis

The proposed Consent Agreement contains several provisions designed to ensure that the divestiture of femhrt is successful by requiring the parties to divest all of Pfizer's rights and assets relating to femhrt, including all historical research and development data, sales and marketing materials, and intellectual property. For a period of six months from the date the assets are divested, Pfizer and Pharmacia will provide the femhrt buyer an opportunity to enter into employment contracts with individuals who have experience relating to femhrt. For a period of one year following the divestiture date, Pfizer and Pharmacia are prohibited from hiring any employees of the acquirer of the femhrt assets who have responsibility related to femhrt. Pfizer and Pharmacia must also take steps to maintain the confidentiality of certain information related to femhrt. Finally, Pfizer would continue to package femhrt at its Puerto Rico facility until another packager is brought online by the acquirer of the femhrt assets.

Treatments for Erectile Dysfunction

Erectile dysfunction ("ED") affects 30 million men in the United States and half of the male population between the ages of 40 and 70. Approximately 4 million men take prescription drugs to treat ED. The U.S. market for drugs to treat ED is valued at over $1 billion today and is expected to exceed $1.5 billion by 2005 as the population ages and as awareness of the condition increases.

Pfizer dominates the ED market with its well-known product, Viagra. Pfizer has a market share in the United States in excess of 95 percent. Pfizer also has a second-generation Viagra-like product in development for ED. Pharmacia currently has two products in clinical development for ED: IN APO and PNU-142,774.

With the exception of Pharmacia's two products in development, entry into the market for drugs to treat ED is unlikely. Pfizer owns an extensive patent portfolio which protects Viagra. Patent litigation initiated by Pfizer with the most

significant potential entrants is likely to prevent entry in the next two years.

The proposed acquisition would cause significant anticompetitive harm in the U.S. market for drugs to treat ED by eliminating potential competition between Pfizer and Pharmacia. Given Pfizer's position as a monopolist in the ED market, entry by Pharmacia would increase competition and reduce prices in the market. Accordingly, allowing Pfizer to acquire Pharmacia's two ED products in development would preserve Pfizer's monopoly in the ED market in the future.

The proposed Consent Agreement therefore requires Pharmacia to return all of its rights in one of its products, IN APO, to Nastech Pharmaceutical Company, Inc. and to divest all of its rights and interests in its other product, PNU-142,774, for the field of human sexual dysfunction to Neurocrine Biosciences, Inc., within ten business days after the Pharmacia acquisition is consummated. Both Nastech and Neurocrine have sufficient research and development expertise to continue development of the products that each is obtaining from Pharmacia.

The proposed Consent Agreement requires Pfizer and Pharmacia to ensure that the divestitures to Nastech and Neurocrine are successful. Pfizer and Pharmacia are required to provide Nastech and Neurocrine the opportunity to enter into employment contracts with individuals who have experience relating to IN APO or PNU-142,774. For a period of one year following the divestiture date, Pfizer and Pharmacia are prohibited from hiring any employees of the acquirers of the IN APO or PNU-142,774 assets who have responsibility related to the products. Pfizer and Pharmacia must also take steps to maintain the confidentiality of certain information related to IN APO or PNU-142-774.

Treatments for Canine Arthritis

Canine arthritis affects an estimated 8.5 million of all dogs in the United States. Approximately 1.8 million arthritic dogs are treated with prescription canine arthritis drugs. Sales for prescription canine arthritis drugs in the United States in 2001 totaled approximately $81 million, and the U.S. market is expected to grow to over $110 million by the end of 2003.

The market for prescription canine arthritis drugs is highly concentrated. Pfizer markets Rimadyl, the leading product in the U.S. market that held a 70 percent market share in 2001. Wyeth, through its Fort Dodge Animal Health division, markets EtoGesic. Through a license and supply agreement with Pharmacia, Novartis launched its own canine arthritis product, Deramaxx, in February 2003.

Entry into the market of drugs to treat canine arthritis is difficult, costly, and time-consuming. Besides the safety and efficacy testing required for FDA approval of canine arthritis drugs, firms entering the market must develop palatable dosing formulations for use at home. Achieving a palatable delivery mechanism for dogs is a difficult task and, if not done successfully, can compromise the success of a new drug.

Likely and timely entry is only possible by companies already in late stages of clinical development or awaiting regulatory approval. There are only two entities, Schering-Plough Corporation and a joint venture of Boehringer Ingelheim GmbH and Merial, that have prescription canine products approved in Europe and in late clinical development in the United States and are expected to enter in the U.S. market in the near future. Customers have stated that entry by these firms within the next year will not be sufficient to counter the anticompetitive effects posed by the acquisition of Pharmacia by Pfizer.

The proposed acquisition is likely to result in anticompetitive harm in the U.S. market for drugs to control the pain and

inflammation associated with canine arthritis. Because of the license and supply agreement with Novartis, Pfizer, the leading company in the market, would have undue control over the supply of product needed by Novartis, and access to the competitively sensitive information of its competitor. As a result, Pfizer would be in a position to undermine the competitive position of one of only two competitors in the market for prescription drugs to treat canine arthritis.

The proposed Consent Agreement preserves competition in the market for prescription canine arthritis drugs by requiring Pharmacia to renegotiate its pre-existing license and supply agreement with Novartis to allow Novartis to operate as an independent competitor rather than a business partner. Specifically, the proposed Consent Agreement: (1) eliminates the control that Pfizer would have over Novartis's product; (2) restricts the type of information Pfizer would be able to obtain about Deramaxx; and (3) allows Novartis to compete with Pfizer in the development of a second generation canine arthritis product.

Treatments for Lactating Cow and Dry Cow Mastitis

__Bovine mastitis, an infection of the udder of the cow, costs the U.S. dairy industry $2 billion annually. There are two different types of contagious bovine mastitis: (1) lactating cow mastitis; and (2) dry cow mastitis. Lactating cow mastitis occurs when the cow is producing milk, while dry cow mastitis occurs when the cow is not producing milk. Antibiotics used to treat lactating cow mastitis are different from those used to treat dry cow mastitis, and strict FDA regulations preclude the use of one product to treat the other type of infection. In the United States, $27 million worth of lactating cow mastitis antibiotic products and $25.5 million worth of dry cow mastitis antibiotic products are sold annually.

The U.S. market for bovine mastitis treatments is highly concentrated. There are only three significant competitors in the

markets for lactating cow and dry cow mastitis antibiotics products – Pharmacia, Wyeth, and Pfizer. Post-acquisition, Pfizer would account for 50 percent of the sales of lactating cow mastitis products and 55 percent of the sales of dry cow mastitis products. Wyeth would be the only other significant competitor in the markets for bovine mastitis treatments.

Entry into the markets for treatments for bovine mastitis is difficult, expensive, and time-consuming. Besides FDA approval of the drug, successful entry requires: (1) the ability to offer both lactating cow and dry cow products; (2) a dedicated veterinarian sales force experienced in selling and supporting dairy products; (3) a broad line of bovine health products other than mastitis treatments, such as parasiticides, vaccines, reproductive products, and antibiotics to treat other infections; and (4) a good reputation within the dairy community. Consequently, successful new entry into the market for bovine mastitis antibiotics treatments is not likely to occur in a timely fashion, if at all.

The proposed acquisition would further concentrate the market for antibiotics for the treatment of bovine mastitis in the United States. Post-acquisition, Pfizer and Wyeth would be the only significant suppliers. This is likely to lead to higher prices for drugs used to treat bovine mastitis.

The proposed Consent Agreement preserves competition in the market for antibiotics for the treatment of bovine mastitis by requiring Pfizer to divest all of its U.S. rights to its bovine mastitis antibiotic products to Schering-Plough Corporation no later than ten business days after the Pharmacia acquisition is consummated. Schering-Plough is well-positioned to replace Pfizer in the bovine mastitis treatment market because it is the fifth largest animal health company in the United States, has a veterinarian sales and support system, and already has established a good reputation in the dairy community. However, if the Commission determines that Schering-Plough is not an acceptable purchaser, or if the manner of the divestiture is not acceptable, Pfizer and Pharmacia must divest Pfizer's bovine mastitis assets to a Commission-

approved buyer no later than six months from the date the Order becomes final. Should they fail to do so, the Commission may appoint a trustee to divest the assets.

Over-the-Counter Hydrocortisone Creams and Ointments

Creams and ointments containing the active ingredient hydrocortisone are used to treat a variety of skin conditions, including chronic dry skin, seborrheic dermatitis, eczema, and psoriasis. Annual sales of over-the-counter ("OTC") hydrocortisone creams and ointments in the United States are approximately $160 million.

The U.S. market for OTC hydrocortisone creams and ointments is highly concentrated. There are only two branded competitors in the market: (1) Pfizer, with its Cortizone brand; and (2) Pharmacia, with its Cortaid brand. Although private label OTC hydrocortisone creams and ointments also account for a significant share of the market, these products have limited competitive significance and virtually no impact on the pricing of the products sold by Pfizer and Pharmacia. Post-acquisition, Pfizer would account for 55 percent of the OTC sales of hydrocortisone creams and ointments, and would be left with no significant branded competitor in this market.

Entry into the market for OTC hydrocortisone creams and ointments is unlikely to deter or counteract the effects the proposed transaction will have on competition. A new entrant would have to invest a significant amount of time and money to achieve any meaningful competitive presence in this market. Because of the limited sales opportunities and the difficult task of convincing retailers to take shelf space away from established brands, it is unlikely that a new entrant could enter the market and achieve any significant market impact within two years.

The proposed acquisition would cause significant anticompetitive harm in the U.S. market for OTC hydrocortisone creams and ointments by eliminating competition between Pfizer

and Pharmacia. The loss of Pharmacia as an independent competitor in this market would likely result in higher prices for consumers.

The proposed Consent Agreement preserves competition in the market for OTC hydrocortisone creams and ointments by requiring Pharmacia to divest its Cortaid business to J&J no later than ten business days after the Pharmacia acquisition is consummated. J&J is a well-positioned purchaser because it currently markets many other well-known OTC products and has established relationships with customers. However, if the Commission determines that J&J is not an acceptable purchaser, or if the manner of the divestiture is not acceptable, Pfizer and Pharmacia must divest Pharmacia's Cortaid business to a Commission-approved buyer no later than six months from the date the Order becomes final. Should they fail to do so, the Commission may appoint a trustee to divest the assets.

Over-the-Counter Motion Sickness Medications

Motion sickness is an ailment that occurs when the components of the brain that gauge motion, such as the inner ear and the eyes, send conflicting messages to the brain. When this occurs, symptoms such as dizziness, headache, sweating, and vomiting can occur. OTC motion sickness medications treat this ailment by using certain antihistamines to block the conflicting messages sent to the brain. Annual sales of OTC motion sickness medications total approximately $45 million in the United States.

The U.S. market for OTC motion sickness medications is highly concentrated. Pfizer, with its Bonine product, and Pharmacia, with its Dramamine product, are the two leading suppliers in this market, with a combined market share of 77 percent. Even after several years on the market, the third leading brand name product, Marezine, has less than 5 percent of the market. The remainder of the market is accounted for by private label products that do not constrain the pricing of the branded products.

Analysis

New entry into the market for OTC motion sickness medications is unlikely to be sufficient to counteract the anticompetitive effects of the proposed acquisition. The small size of the market, coupled with the significant investment needed to market and sell the products, make it unlikely that a new competitor will enter the market in the next two years.

Pfizer's proposed acquisition of Pharmacia would cause significant anticompetitive harm in the U.S. market for OTC motion sickness medications. The combined entity would account for 77 percent of all sales of OTC motion sickness medications, and the proposed acquisition is likely to lead to higher prices in this market.

The proposed Consent Agreement effectively remedies the proposed acquisition's anticompetitive harm in the U.S. market for OTC motion sickness medications by requiring Pfizer to divest its U.S. and Puerto Rican Bonine assets to Insight Pharmaceuticals Corporation no later than ten business days after the Pharmacia acquisition is consummated. Insight is a well-positioned purchaser of the Bonine assets because it already has a portfolio of more than fifteen OTC consumer healthcare products, including Allerest, Sucrets, Cepastat, Caldecort, Fiberall, N'Ice, and Nostrilla. Through these other brands, Insight already has significant experience in selling OTC medications and has strong relationships with drugstores, food stores, and mass merchandisers. However, if the Commission determines that Insight is not an acceptable purchaser, or if the manner of the divestiture is not acceptable, Pfizer and Pharmacia must divest the Bonine assets to a Commission-approved buyer no later than six months from the date the Order becomes final. Should they fail to do so, the Commission may appoint a trustee to divest the Bonine assets.

Over-the-Counter Cough Drops

Millions of people in the United States use cough drops to treat the coughing associated with colds or other ailments. Cough

drops are hard, candy-like confectionary products that contain medications such as menthol or dextromethorphan. Annual sales of cough drops in the United States are about $240 million.

The OTC cough drop market is highly concentrated, with only two significant competitors with brand name products: (1) Pfizer, with its Halls brand; and (2) Pharmacia, with its Ludens brand. Private label products, once again, have little competitive significance and do not constrain the pricing of the branded products. After the acquisition, Pfizer would account for approximately 63 percent of the OTC cough drop market.

Entry into the market for the manufacture and sale of OTC cough drops is unlikely to occur. Entry requires the investment of extremely high sunk costs which would be difficult to justify given the relatively limited sales opportunities. Thus, entry is not likely to deter or counteract the effect of the proposed acquisition.

The proposed acquisition would eliminate competition between Pfizer and Pharmacia in the U.S. market for OTC cough drops. The loss of Pharmacia as an independent competitor in the OTC cough drop market is likely to lead to higher prices for consumers.

The proposed Consent Agreement effectively remedies the acquisition's anticompetitive effects in the U.S. market for OTC cough drops by requiring Pfizer to divest its Halls cough drop business to Cadbury Schweppes no later than ten business days after the Pharmacia acquisition is consummated. Cadbury is acquiring Pfizer's entire Adams Division, which markets Halls cough drops, as well as many other confectionary products. Cadbury is one of the world's leading beverage and confectionary companies and as such, is well-positioned to market the Halls brand of cough drops.

Interim Monitor

The Commission has appointed Francis J. Civille as Interim Monitor to oversee the asset transfers and to ensure Pfizer and

Pharmacia's compliance with all of the provisions of the proposed Consent Agreement. Mr. Civille has over 33 years of experience in the pharmaceutical industry and is well-respected in the industry. In order to ensure that the Commission remains informed about the status of the proposed divestitures and the transfers of assets, the proposed Consent Agreement requires Pfizer and Pharmacia to file reports with the Commission periodically until the divestitures and transfers are accomplished.

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

Complaint

IN THE MATTER OF

INSTITUTE OF STORE PLANNERS

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

Docket C-4080; File No. 0210144
Complaint, May 27, 2003--Decision, May 27, 2003

This consent order addresses Respondent Institute of Store Planners ("ISP"), of Tarrytown, New York – which has approximately 800 members, many of whom are professional design practitioners who provide architectural, store design, store planning, merchandise planning, traffic flow planning fixture and lighting design, in-store graphics and visual presentation services to retail stores – and its adoption and maintenance of certain provisions in its Code of Ethics affecting competition among store planners. The order, among other things, prohibits the respondent from restricting, impeding, declaring unethical or unprofessional or advising against price competition among its members; that is, it prohibits the respondent from restricting its members from providing free or discounted services. The order also requires the respondent to remove – from its Code of Ethics, its constitution and bylaws, and any existing ISP policy statement, commentary or guideline – any provision, policy statement, commentary or guideline which is inconsistent with the order.

Participants

For the Commission: *L. Barry Costilo, Harry Schwirck, Richard B. Dagen, Russell Porter* and *Louis Silvia, Jr.*.

For the Respondent: *Alan Stanzler, Stanzler, Funderburk & Castellon, LLP.*

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, as amended, 15 U.S.C. § 41 et seq., and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that the Institute of Store Planners ("Respondent" or "ISP"), a corporation, has violated and is violating 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 Institute of Store Planners, is a corporation organized and existing under the laws of the State of New York with its principal office and place of business at 25 North Broadway, Tarrytown, New York 10591.

PARAGRAPH TWO: Respondent is a professional association organized for the purpose, among others, of serving the interests of its members. It has approximately 860 members. ISP's members consist of professional design practitioners who provide architectural, store design, store planning, merchandise planning, traffic flow planning, fixture design, lighting design, in-store graphics, and visual presentation services to retail stores. Its members also consist of trade members, such as, fabricators and suppliers of products and materials used in store design, as well as general contractors who provide labor and project management services and build the projects.

PARAGRAPH THREE: The general business practices of Respondent and its members, including the acts and practices herein alleged, are in or affecting "commerce" as defined in the Federal Trade Commission Act, as amended, 15 U.S.C. § 45.

PARAGRAPH FOUR: Respondent engages in substantial activities for the economic benefit of its members. At all times relevant to this Complaint, Respondent is and has been organized in substantial part for the profit of its members, and is therefore a corporation within the meaning of Section 4 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 44.

PARAGRAPH FIVE: Many of Respondent's members provide store planning services for a fee or are employed by store planning or design firms that provide store planning services for a fee. Except to the extent that competition has been restrained as herein

alleged, many of ISP's members have been and are now in competition among themselves and with others.

PARAGRAPH SIX: Respondent acting as a combination of its members, and in agreement with at least some of its members, has acted to restrain price and non-price competition among its members and others.

PARAGRAPH SEVEN: In furtherance of the combination and agreement alleged in Paragraph Six, Respondent has adopted and maintained provisions in its *ISP Code of Ethics* that state, among other things, "a member shall not render professional services without compensation" (*ISP Code of Ethics* Section 2) and "a member shall not knowingly compete with another member on the basis of professional charges, or use donations as a device for obtaining professional advantage" (*ISP Code of Ethics* Section 3). The Code further provides that "a member shall not offer his services in a competition except as provided by such competition codes as the Institute may establish" (*ISP Code of Ethics* Section 4).

PARAGRAPH EIGHT: The purpose, effects, tendency, or capacity of the combination, agreement, and acts or practices described in Paragraphs Six and Seven, have been and are to restrain competition unreasonably and to injure consumers by:

A. discouraging and restricting price competition among store planners; and

B. depriving consumers and other users of store planners' services of the benefit of free and open competition among store planners.

PARAGRAPH NINE: The combination, agreement, and acts or practices described above constitute unfair methods of competition and unfair acts and practices in violation of Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45. Such combination, agreement, and acts or practices, or the

effects thereof, are continuing and will continue or recur in the absence of the relief herein requested.

WHEREFORE, THE PREMISES CONSIDERED, the Federal Trade Commission on this twenty-seventh day of May, 2003, issues its Complaint against ISP.

By the Commission.

DECISION AND ORDER

The Federal Trade Commission ("Commission") having initiated an investigation of certain acts and practices of the Institute of Store Planners ("ISP"), hereinafter sometimes referred to as "Respondent," 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 by the Commission, would charge Respondent with violations of Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45; and

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

The Commission having thereafter considered the matter and having determined that it had reason to believe that Respondent has violated the said 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 received from interested persons pursuant to section 2.34 of its Rules, 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 Decision and Order ("Order"):

1. Respondent Institute of Store Planners, is a corporation organized and existing under the laws of the State of New York

with its principal office and place of business at 25 North Broadway, Tarrytown, New York 10591.

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

ORDER

I.

IT IS ORDERED, that for the purposes of this Order, the following definitions shall apply:

A. "Respondent" or "ISP" means the Institute of Store Planners, its officers, executive board, chapters, City Centers, committees, representatives, agents, employees, successors and assigns; and

B. "Regulating" means (1) adopting, maintaining or enforcing any rule, regulation, interpretation, ethical ruling, policy, commentary, or guideline; (2) taking or threatening to take formal or informal disciplinary action; or (3) conducting formal or informal investigations or inquiries**.**

II.

IT IS FURTHER ORDERED that Respondent, directly or indirectly, or through any corporate or other device, in or in connection with Respondent's activities as a professional association in or affecting commerce, as "commerce" is defined in Section 4 of the Federal Trade Commission Act, 15 U.S.C. § 44, do forthwith cease and desist from: Regulating, restricting, impeding, declaring unethical or unprofessional, interfering with or advising against price competition by its members, including, but not limited to, the provision of free or discounted services or restricting members from offering their services in a competition unless they conform to rules or regulations established by ISP.

III.

IT IS FURTHER ORDERED that Respondent shall:

A. Within ninety (90) days after the date on which this Order becomes final, remove from *ISP's Code of Ethics,* from the ISP's constitution and bylaws and any other existing ISP policy statement, commentary or guideline, including, but not limited to, those appearing on the ISP website, any provision, interpretation, policy statement, commentary or guideline which is inconsistent with Paragraph II of this Order and publish in the *ISP International News* or in any successor publications, and on ISP's website, the revised versions of such documents.

B. Within one hundred twenty (120) days after the date on which this Order becomes final, publish a copy of this Order and the Complaint in the *ISP International News* with such prominence as feature articles that are regularly published in the *ISP International News*.

C. Within sixty (60) days after the date on which this Order becomes final, publish and retain for at least one (1) year a copy of this Order and Complaint on the ISP website. The Order and Complaint, and the revised versions of the documents described in Paragraph III (A) of this Order, should be accessible with a link placed in a prominent position on the website's homepage, which should read "ISP changes its *Code of Ethics*."

IV.

IT IS FURTHER ORDERED that Respondent shall file written reports within sixty (60) days after the date on which this Order became final, every sixty (60) days thereafter until the requirements set forth in this Order have been met, and annually thereafter for four (4) years on the anniversary of the date on which this Order became final, and at such other times as the

Commission may by written notice require, setting forth in detail the manner and form in which it has complied and is complying with the Order. Such reports should include in detail, but not be limited to, any action taken in connection with the activities covered by Paragraph II.

V.

IT IS FURTHER ORDERED that for a period of five (5) years after the date this Order is entered, Respondent shall maintain and make available to the Commission staff for inspection and copying upon reasonable notice, records adequate to describe in detail any action taken in connection with the activities covered by Paragraph II of this Order.

VI.

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

VII.

IT IS FURTHER ORDERED that this Order shall terminate on May 27, 2023.

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 the Institute of Store Planners ("ISP"). ISP has its principal place of business in Tarrytown, New York.

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 decide whether it should withdraw from the agreement or make final the agreement's proposed order.

ISP's membership is composed of professional design practitioners who provide architectural, store design, store planning, merchandise planning, traffic flow planning fixture and lighting design, in-store graphics and visual presentation services to retail stores. Its membership is also comprised of trade members such as suppliers and fabricators of products and materials used in store design, as well as general contractors who provide labor and project management services and build the projects.

The complaint alleges that ISP engages in substantial activities for the economic benefit of its members. The complaint alleges that ISP has approximately 800 members, many of whom provide store planning services for a fee or who are employed by store planning or design firms that provide store planning services for a fee. It alleges that ISP is and has been organized in substantial part for the profit of its members.

The complaint charges that ISP has violated Section 5 of the Federal Trade Commission Act by acting as a combination of its members and in agreement with some of its members to restrain price and non-price competition among its members and others. The complaint alleges that in furtherance of the combination and

agreement, ISP has adopted and maintained provisions in its Code of Ethics that state, among other things, "a member shall not render professional services without compensation" (*ISP Code of Ethics*, Section 2) and "a member shall not knowingly compete with another member on the basis of professional charges, or use donations as a device for obtaining professional advantage" (*ISP Code of Ethics*, Section 3). The Code also provides that "a member shall not offer his services in competition except as provided by such competition codes as the Institute may establish" (ISP Code of Ethics, Section 4). Applicants for membership in ISP must agree in writing to follow ISP's By-laws, which contain its Code of Ethics.

The complaint alleges that the above acts and practices constitute unfair methods of competition which have restrained competition unreasonably and injured consumers by discouraging price competition among store planners and depriving consumers and users of store planners' services of the benefit of free and open competition among store planners.

ISP has signed a consent agreement containing the proposed consent order. The proposed consent order would prohibit ISP from restricting, impeding, declaring unethical or unprofessional or advising against price competition among its members. That is, ISP would no longer be able to restrict members from providing free or discounted services.

To ensure and monitor compliance, the consent order provides, among other things, that within 90 days after the order becomes final ISP shall remove from *ISP's Code of Ethics*, its constitution and bylaws and any existing ISP policy statement, commentary or guideline– including those appearing on ISP's website–any provision, policy statement, commentary or guideline which is inconsistent with the order. The order also requires that ISP publish in *ISP International News* and on its website, the revised versions of such documents. In addition, the order requires ISP to publish a copy of the order and complaint in the *ISP International News*. It further provides that the order and complaint shall be

published on the ISP website for at least one year, with a link placed in a prominent position on the website's home page. The proposed consent order also contains other provisions to monitor compliance.

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

CARLSBAD PHYSICIAN ASSOCIATION, INC. ET AL.

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

Docket 4081; File No. 0310002
Complaint, June 13, 2003--Decision, June 13, 2003

This consent order addresses practices used by nine Respondents, including the Carlsbad Physician Association ("CPA") – whose 38 physician members represent 76 percent of all physicians and 83 percent of the primary care physicians practicing in the Carlsbad, New Mexico area – its executive director, and seven physician members of CPA's Board of Directors and Contract Committee. The order, among other things, prohibits the respondents from entering into or facilitating agreements between or among any physicians (1) to negotiate on behalf of any physician with any payor; (2) to deal, refuse to deal, or threaten to refuse to deal with any payor; (3) regarding any term upon which any physicians deal, or are willing to deal, with any payor; and (4) not to deal individually with any payor, or to deal with any payor only through an arrangement involving the respondents. The order also prohibits the respondents from facilitating exchanges of information among physicians concerning whether, or on what terms, to contract with a payor. In addition, the order prohibits the respondents from attempting to engage in – or from inducing anyone to engage in – any action prohibited by the order. In addition, the order prohibits the respondents, for three years – in connection with physician health plan contracting – from either (1) acting as an agent for any physicians, or (2) using an agent who represents any other physician with respect to such contracting. The order also requires Respondent CPA – at any payor's request and without penalty or at the earliest termination or renewal date – to terminate its current contracts with respect to providing physician services. In addition, the order requires Respondent CPA to dissolve itself, following the expiration or termination of all payor contracts, and in the interim to cease all activities except those necessary to comply with the order and the winding down of its affairs.

Participants

For the Commission: *Steve Vieux, Rachel Hertzman, David R. Pender, Jeffrey W. Brennan, Anne R. Schenof, Roberta S. Baruch,* and *Louis Silvia, Jr.*.

For the Respondents: *W.T. Martin, Jr., Martin & Lara, LLP.*

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, as amended, 15 U.S.C. § 41 *et seq.*, and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that the Carlsbad Physician Association, Inc. ("CPA"), William J. Baggs, M.D., Srichand S. Dara, M.D., Glen Moore, James J. Purpura, D.O., Deborah J. Schenck, M.D., Charles L. Secora, M.D., Majid A. Syed, M.D., and Richard L. Zizza, M.D., hereinafter collectively referred to as "Respondents," have violated Section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues this Complaint stating its charges in that respect as follows:

I. NATURE OF THE CASE

1. This matter concerns horizontal agreements among competing physicians who constitute most of the physicians in the Carlsbad, New Mexico, area, to fix prices charged to health care plans and other third-party payors ("payors"), and to refuse to deal with payors except on collectively agreed-upon terms. The physicians orchestrated these price-fixing agreements and concerted refusals to deal through CPA, and their conduct had the purpose and effect of raising the prices of physician services in the Carlsbad area.

II. RESPONDENTS

2. CPA is a for-profit corporation, organized, existing, and doing business under and by virtue of the laws of the State of New Mexico, with its principal address at 2420 West Pierce St., Suite 100, Carlsbad, NM 88220. CPA's Board of Directors ("Board") consists of the organization's officers: the President, Vice President, Treasurer, Secretary, and Member-at-Large. The Contract Committee, which consists of all the Board members and certain other physician members of Respondent CPA, negotiates and reviews

proposed payor contracts before presenting contract information to CPA's physician members. Upon a majority vote of acceptance by CPA's physician members, the Board signs payor contracts on behalf of the members.

3. Glen Moore has been CPA's Executive Director since December 1999. His principal address is P.O. Box 381, Benton, MS 39039. Respondent Moore is CPA's principal negotiator of payor contracts on the physician members' behalf. Respondent Moore has participated in most, if not all, Board meetings, Contract Committee meetings, and general membership meetings in which CPA's physicians discuss and agree on the prices to charge payors. The Board and the Contract Committee often assist Respondent Moore in negotiating and reviewing proposed payor contracts.

4. The following individuals ("Physician Respondents") are physicians licensed to practice medicine in the State of New Mexico, and are engaged in the private practice of medicine for a fee in the Carlsbad, New Mexico area. The Physician Respondents are, or were, active members of CPA. Except to the extent that competition has been restrained as alleged herein, the Physician Respondents have been, and are now, in competition with each other, and with other physician members of CPA, for the provision of services. Their respective names, business addresses, and roles in CPA are as follows:

   a. William J. Baggs, M.D., 2410 W. Pierce St., Carlsbad, NM 88220, was one of CPA's founders, and has been a member of the Board and the Contract Committee at various times between 1998 and the present.

   b. Srichand S. Dara, M.D., 110 S. Halagueno, Carlsbad, NM 88220, was one of CPA's original Board members. Dr. Dara is a former Secretary of CPA, and has been a member of the Board and Contract Committee at various times between 1998 and the present.

c. James J. Purpura, D.O., 2330 West Pierce St., Carlsbad, NM 88220, is a former President of CPA, and has been a member of the Board and the Contract Committee at various times between 1998 and the present.

d. Deborah J. Schenck, M.D., 2420 West Pierce St., Suite 103, Carlsbad, NM 88220, is a former Treasurer of CPA, and has been a member of the Board and the Contract Committee at various times between 2000 and the present.

e. Charles L. Secora, M.D., 2402 West Pierce St., Suite 6F, Carlsbad, NM 88220, is a former Secretary and Vice President of CPA, and was a member of the Board and the Contract Committee at various times between 1998 and 2002. He is also a former Chairperson of the Contract Committee.

f. Majid A. Syed, M.D., 2402 West Pierce St., Suite 6D, Carlsbad, NM 88220, was a founder of CPA, is a former President of CPA, and has been a member of the Board and the Contract Committee at various times between 1998 and the present. He is also a former Chairperson of the Contract Committee.

g. Richard L. Zizza, M.D., 2420 West Pierce St., Suite 100, Carlsbad, NM 88220, has been CPA's President and the Chairperson of its Contract Committee since 2001. He has served on the Board and Contract Committee at various times between 2000 and the present.

III. THE FTC HAS JURISDICTION OVER RESPONDENTS

5. Respondents' general business practices, including the acts and practices herein alleged, are in or affecting "commerce" as defined in the Federal Trade Commission Act, as amended, 15 U.S.C. § 44.

IV. OVERVIEW OF MARKET AND PHYSICIAN COMPETITION

6. CPA has approximately 38 physician members, all of whom are licensed to practice allopathic, osteopathic, chiropractic, or podiatric medicine in the State of New Mexico, and are engaged in the business of providing physician services to patients in the Carlsbad, New Mexico, area. Approximately 83% of the primary care physicians and 76% of all physicians who practice in the Carlsbad area are members of CPA.

7. Carlsbad is in southeastern New Mexico. The closest major cities to Carlsbad are Roswell, New Mexico, 76 miles to the northwest of Carlsbad; El Paso, Texas, 162 miles to the southwest; and Lubbock, Texas, 179 miles to the northeast. To be competitively marketable in the Carlsbad area, a payor's health insurance plan must include in its physician network a large number of primary care physicians and specialists who practice in the Carlsbad area.

8. Physicians often contract with payors to establish the terms and conditions, including price terms, under which the physicians will render services to the payors' subscribers. Physicians entering into such contracts often agree to lower compensation in order to obtain access to additional patients made available by the payors' relationship with insureds. These contracts may reduce payors' costs and enable them to lower the price of insurance, and thereby result in lower medical care costs for subscribers to the payors' health insurance plans.

9. Absent agreements among competing physicians on the terms, including price, on which they will provide services to enrollees in payors' health care plans, competing physicians decide individually whether to enter into payor contracts to provide services to their subscribers or

enrollees, and what prices they will accept pursuant to such contracts.

10. Medicare's Resource Based Relative Value System ("RBRVS") is a system used by the United States Centers for Medicare and Medicaid Services to determine the amount to pay physicians for the services they render to Medicare patients. The RBRVS approach provides a method to determine fees for specific services. In general, payors in the Carlsbad area make contract offers to individual physicians or groups at a price level specified as some percentage of the RBRVS fee for a particular year (*e.g.*, "110% of 2003 RBRVS").

11. Competing physicians sometimes use a "messenger" to facilitate the establishment of contracts between themselves and payors in ways that do not constitute or facilitate an unlawful agreement on prices and other competitively significant terms. Such a messenger may not, however, consistent with a competitive model, negotiate prices and other competitively significant terms on behalf of the participating physicians. Nor should a messenger facilitate the physicians' coordinated responses to contract offers by, for example, electing not to convey a payor's offer to them based on the messenger's opinion on the appropriateness, or lack thereof, of the offer.

V. CPA WAS FORMED TO, AND DID, COLLECTIVELY NEGOTIATE HIGHER FEES

12. In July 1998, Drs. Baggs and Syed and two other physicians organized CPA. In February 1999, it was incorporated as a for-profit corporation and formally named the "Carlsbad Physician Association." CPA was formed to negotiate contracts for physician services between CPA physician members and payors. A "position statement" that CPA created to describe itself asserts that CPA's primary goal is "to negotiate contracts between

physicians and employers, insurers and administrators independent of influence from any Health [*sic*] care organization or facility." Similarly, at a May 12, 1999, meeting of CPA's Board, Dr. Secora stated that among CPA's main goals was to "[n]egotiate favorable reimbursement for physicians."

13. CPA's physician members each pay $500 annual membership dues. A physician becomes eligible to participate in CPA's contracts by entering into a "Participating Physician Agreement" with the organization.

14. Through Executive Director Moore, the Board, and the Contract Committee, CPA negotiates with payors on the prices and other contract terms pursuant to which CPA's members will provide medical care to subscribers of payors' health plans. CPA does not transmit any payor's contract offer to the members for their individual acceptance or rejection unless the Contract Committee approves the terms of the contract. Indeed, CPA told the public that it was operating as a legitimate messenger when, in fact, it repeatedly refused to messenger contract offers that it deemed deficient and engaged in collective price negotiations and refusals to deal.

15. Once the Contract Committee and Executive Director Moore negotiate payor contract terms acceptable to them, they present the contract to the general membership for a vote of approval; if approved, the Board signs it. Thereafter, CPA's members decide whether to opt into or out of the contract. CPA's Contract Committee and Board make recommendations to members about which offers the physicians should accept collectively, and the general membership usually follows these recommendations. At general membership meetings, CPA's members jointly decide whether to allow payor contracts to renew automatically, and whether to allow contract negotiations

with payors to move forward. At CPA's general membership meetings, the physicians frequently decide collectively the prices to demand from payors, and to terminate contract negotiations with those payors perceived to be making low proposals.

16. All Physician Respondents are or were members of CPA's Contract Committee and Board and participated in negotiations with payors over prices. On behalf of Physician Respondents and the entire CPA membership, Executive Director Moore actively bargains over price and other contract terms with payors, and dictates to payors the minimum compensation terms under which CPA's members will contract.

17. CPA's members, including Physician Respondents, refuse to entertain offers made to them individually, hindering payors' efforts to establish competitive physician networks in the Carlsbad area. Due to CPA's large share of the physicians in the Carlsbad area, its bargaining power with payors is substantial, with the result that payors have repeatedly acceded to Respondents' demands for supracompetitive fees for all CPA members.

18. Prices for physician services in New Mexico, on average, range from 120% to 150% of RBRVS. Through collective negotiations and threatened refusals to deal, Respondent CPA's physician members have successfully contracted for the highest prices in the state, with prices ranging from 160% to 200% of RBRVS.

A. BLUE CROSS & BLUE SHIELD OF NEW MEXICO

19. Blue Cross & Blue Shield of New Mexico is a payor doing business in the Carlsbad area. Blue Cross started contract negotiations with CPA in September 1999. The Board rejected Blue Cross' initial offer, without transmitting it to

the individual physician members of CPA for their unilateral acceptance or rejection.

20. In December 1999, Blue Cross responded with a new offer that was higher than its original offer but far below CPA's demand. At a January 4, 2000, Board meeting, the Board members unanimously rejected that proposal. Following that meeting, Dr. Secora prepared a letter to Blue Cross, on behalf of CPA's members, rejecting Blue Cross' latest offer.

21. In January 2000, CPA invited two Blue Cross representatives to a meeting of CPA's Board to negotiate the contract. After that meeting, Blue Cross submitted another contract offer to the Board, this time with even higher prices than what it previously offered. Through Executive Director Moore, however, the Board rejected this offer and advised Blue Cross of CPA's demand for still higher prices, to which Blue Cross ultimately agreed. The Board also demanded that Blue Cross agree to contract terms that guaranteed that payments to CPA physicians would not decline. Executive Director Moore and Drs. Secora and Syed jointly presented this demand to Blue Cross on the collective behalf of CPA's members. Blue Cross agreed to this demand, and the contract that the parties signed on March 1, 2000, included the language that CPA demanded. Through negotiations that Executive Director Moore and Dr. Secora led, CPA eventually received prices substantially in excess of 20% above Blue Cross' initial offer.

B. PRESBYTERIAN HEALTH PLAN

22. Presbyterian Health Plan is a payor doing business in the Carlsbad area. CPA began contract negotiations with Presbyterian in December 1998. In July 1999, the Board and Contract Committee agreed that Presbyterian's proposal on prices for its commercial plan was

unacceptable. CPA did not transmit Presbyterian's proposal to the members. Instead, it instructed Executive Director Moore to make a counter-proposal of 180% of RBRVS for non-surgical codes and 200% for surgical codes. Presbyterian rejected that offer and did not contract with CPA at that time. Instead, for services provided to subscribers in the Carlsbad area, Presbyterian either paid billed charges or amounts agreed upon under contracts with certain individual physicians.

23. In April 2002, CPA and Presbyterian reentered contract negotiations. On May 1, 2002, Executive Director Moore required that Presbyterian offer CPA's members uniform prices set at 210% of RBRVS for surgical codes and 190% of RBRVS for non-surgical codes. This was an 81% increase over the amount Presbyterian paid in the Carlsbad area the previous year. Presbyterian counter-proposed a contract containing lower prices, but Executive Director Moore, in a May 20, 2002, letter, rejected that offer on behalf of CPA's members.

24. In June 2002, Presbyterian proposed to contract with CPA's members at 125% of RBRVS for surgical codes and between 115% and 135% for various non-surgical codes. Dr. Dara made a motion at a general membership meeting on July 18, 2002, that CPA reject Presbyterian's latest offer. The motion was unanimously approved.

25. In September 2002, Presbyterian raised its offer to CPA to an amount equal to 122% of RBRVS for non-surgical codes and 148% of RBRVS for surgical codes. At the September 25, 2002, Contract Committee meeting, Dr. Zizza moved to recommend that the general membership reject Presbyterian's new proposal. Dr. Purpura seconded the motion, and it was approved by the Contract Committee. The general membership subsequently rejected Presbyterian's proposal, based upon the Contract Committee's recommendation. In October 2002,

Executive Director Moore informed Presbyterian's Contracts Manager that, to continue negotiations with CPA, Presbyterian's offer on price had to be higher - - "MUCH HIGHER." Currently, Presbyterian does not contract with CPA for its commercial plan in the Carlsbad area.

C. UNITED HEALTH CARE

26. United Health Care is a payor doing business in the Carlsbad area. CPA and United began contract negotiations in December 1998, and continued to negotiate price and other contract terms over the course of two years. CPA's Board and Contract Committee often made recommendations on the prices that CPA's Executive Director should demand from United. CPA's Board and Contract Committee proposed prices substantially higher than United's offers, without transmitting United's proposals to individual members. As a result, in October 1999, United complained to CPA that it was committing "FTC violation(s)."

27. At the culmination of these negotiations, in June 2000, Executive Director Moore, under Board and Contract Committee direction, insisted that United pay 160% of RBRVS for non-surgical codes and 185% for surgical codes, or else CPA would not deal with United. United gave in to this demand and, on September 1, 2000, entered into a uniform group contract with CPA.

28. In April 2002, the Contract Committee, including Drs. Schenck, Secora, Purpura, and Zizza, demanded, through Executive Director Moore, substantial increases in the prices United paid to CPA members. CPA stood firm in its demands from United through the Spring and Summer of 2002. At a May 15, 2002, meeting, the general CPA membership unanimously passed Dr. Dara's motion, which Dr. Baggs seconded, to threaten United with termination of its contract unless United increased the

prices paid to CPA's members and reinstated a CPA member into the United network. At a meeting on July 18, 2002, over which Dr. Zizza presided, CPA's general membership unanimously agreed with Dr. Dara's call for the termination of CPA's contract with United, due to its failure to accept CPA's collectively demanded terms. Soon thereafter, Executive Director Moore sent a letter to United, terminating CPA's contract. After a United representative requested that each CPA physician furnish United with an individual termination letter, Executive Director Moore provided each of the physician members with a copy of a letter of termination to sign and forward to United. All but six of the participating CPA physicians submitted that letter.

29. United does not have a contract with CPA, and it now pays the subset of CPA members with whom it has individual contracts the highest prices in United's New Mexico network.

D. OTHER PAYORS

30. CPA has orchestrated collective negotiations with all other payors that do business, or attempted to do business, in the Carlsbad area. With the assistance of the Board and Contract Committee, Executive Director Moore negotiated with these payors on price, making proposals and counter-proposals as well as accepting or rejecting offers without transmitting them to physician members for their individual acceptance or rejection. CPA's members collectively accepted or rejected these payor contracts, and refused to deal with these payors individually. Due to CPA's dominant market position in the Carlsbad area, such tactics have been highly successful. CPA has been able to extract far higher prices from these payors than what they pay other physicians in New Mexico.

VI. RESPONDENTS HAVE ENGAGED IN RESTRAINTS OF TRADE

31. Acting as a combination of competing physicians, the Physician Respondents, through CPA and in conspiracy with Executive Director Moore, have restrained competition by, among other things:

a. facilitating, negotiating, entering into, and implementing agreements among themselves and other members of CPA on price and other competitively significant terms;

b. refusing to deal with payors except on collectively agreed-upon terms; and

c. negotiating uniform prices and other competitively significant terms in payor contracts for CPA's members, and refusing to submit payor offers to CPA members that do not conform to CPA's standards for contracts.

VII. THERE ARE NO SIGNIFICANT EFFICIENCIES IN RESPONDENTS' CONDUCT

32. Respondents' joint negotiation of fees and other competitively significant terms has not been, and is not, reasonably related to any efficiency-enhancing integration.

VIII. RESPONDENTS' ACTIONS HAVE HAD SUBSTANTIAL ANTICOMPETITIVE EFFECTS

33. Respondents' actions described in Paragraphs 12 through 31 of this Complaint have had, or tend to have, the effect of restraining trade unreasonably and hindering competition in the provision of physician services in the Carlsbad area in the following ways, among others:

a. price and other forms of competition among Physician Respondents and other physician members of CPA were unreasonably restrained;

b. prices for physician services were increased; and

c. health plans, employers, and individual consumers were deprived of the benefits of competition among physicians.

34. The combination, conspiracy, acts, and practices described above constitute unfair methods of competition in violation of Section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45. Such combination, conspiracy, acts, and practices, or the effects thereof, are continuing and will continue or recur in the absence of the relief herein requested.

WHEREFORE, THE PREMISES CONSIDERED, the Federal Trade Commission on this thirteenth day of June, 2003, issues its Complaint against Respondents CPA, William J. Baggs, M.D., Srichand S. Dara, M.D., Glen Moore, James J. Purpura, D.O., Deborah J. Schenck, M.D., Charles L. Secora, M.D., Majid A. Syed, M.D., and Richard L. Zizza, M.D.

By the Commission.

DECISION AND ORDER

The Federal Trade Commission ("Commission"), having initiated an investigation of certain acts and practices of the Carlsbad Physician Association, Inc. ("CPA"), William J. Baggs, M.D., Srichand S. Dara, M.D., Glen Moore, James J. Purpura, D.O., Deborah J. Schenck, M.D., Charles L. Secora, M.D., Majid A. Syed, M.D., and Richard L. Zizza, M.D., hereinafter sometimes referred to as "Respondents," and Respondents having been furnished thereafter with a copy of the draft of Complaint that the counsel for the Commission proposed to present 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 attorney, and counsel for the Commission having thereafter executed an Agreement Containing Consent Order to Cease and Desist ("Consent Agreement"), containing an admission by Respondents of all the jurisdictional facts set forth in the aforesaid draft of Complaint, a statement that the signing of said Consent Agreement is for settlement purposes only and does not constitute an admission by Respondents that the law has been violated as alleged in such Complaint, or that the facts as alleged in such Complaint, other than jurisdictional facts, are true, and waivers and other provisions as required by the Commission's Rules; and

The Commission having thereafter considered the matter and having determined that it had reason to believe that Respondents have violated the said Act, and that a Complaint should issue stating its charges in that respect, and having accepted the executed Consent Agreement and placed such Consent Agreement on the public record for a period of thirty (30) days for the receipt and consideration of public comments, and having duly considered the comment received from interested persons pursuant to Commission Rule 2.34, 16 C.F.R. § 2.34, now in further conformity with the procedure described in Commission Rule 2.34, the Commission hereby issues its Complaint, makes

the following jurisdictional findings and issues the following Order:

1. Respondent CPA is a for-profit corporation, organized, existing, and doing business under and by virtue of the laws of the State of New Mexico, with its principal address at 2420 West Pierce St., Suite 100, Carlsbad, NM 88220.

2. Respondent William J. Baggs, M.D., is the Member-at-Large of CPA's Board of Directors, a former member of the Contract Committee, and one of the founders of CPA. His office and principal place of business is located at 2410 W. Pierce St., Carlsbad, NM 88220.

3. Respondent Srichand S. Dara, M.D., is an active member of CPA's Contract Committee, a former Secretary of CPA, and a member of CPA's initial Board of Directors. His office and principal place of business is located at 110 S. Halagueno, Carlsbad, NM 88220.

4. Respondent Glen Moore is the Executive Director of CPA. His principal address is P.O. Box 381, Benton, MS 39039.

5. Respondent James J. Purpura, D.O., is the immediate past President of CPA, its immediate past Secretary, and a member of its Contract Committee. His office and principal place of business is located at 2330 West Pierce St., Carlsbad, NM 88220.

6. Respondent Deborah J. Schenck, M.D., is a former Treasurer of CPA, and a current member of the Contract Committee. Her office and principal place of business is located at 2420 West Pierce St., Suite 103, Carlsbad, NM 88220.

7. Respondent Charles L. Secora, M.D., is a former Vice President and Secretary of CPA, a former Chairperson of the Contract Committee, and a former member of the Contract Committee. His office and principal place of business is

located at 2402 West Pierce St., Suite 6F, Carlsbad, NM 88220.

8. Respondent Majid A. Syed, M.D., is the founding President of CPA, a former Chairperson of the Contract Committee, and a member of the Contract Committee. His office and principal place of business is located at 2402 West Pierce St., Suite 6D, Carlsbad, NM 88220.

9. Respondent Richard L. Zizza, M.D., is the President of CPA, and the Chairperson of the Contract Committee. His office and principal place of business is located at 2420 West Pierce St., Suite 100, Carlsbad, NM 88220.

10. 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. "Respondent CPA" means Carlsbad Physician Association, Inc., its officers, directors, employees, agents, attorneys, representatives, successors, and assigns; and the subsidiaries, divisions, groups, and affiliates controlled by Carlsbad Physician Association, Inc., and the respective officers, directors, employees, agents, attorneys, representatives, successors, and assigns of each.

B. "Respondent Moore" means Glen Moore.

C. "Physician Respondents" means William J. Baggs, M.D., Srichand S. Dara, M.D., James J. Purpura, D.O., Deborah J. Schenck, M.D., Charles L. Secora, M.D., Majid A. Syed, M.D., and Richard L. Zizza, M.D.

D. "Respondents" means Respondent CPA, Respondent Moore, and the Physician Respondents.

E. "Medical group practice" means a bona fide, integrated firm in which physicians practice medicine together as partners, shareholders, owners, members, or employees, or in which only one physician practices medicine.

F. "Participate" in an entity means (1) to be a partner, shareholder, owner, member, or employee of such entity, or (2) to provide services, agree to provide services, or offer to provide services, to a payor through such entity. This definition also applies to all tenses and forms of the word "participate," including, but not limited to, "participating," "participated," and "participation."

G. "Payor" means any person that pays, or arranges for the payment, for all or any part of any physician services for itself or for any other person. Payor includes any person that develops, leases, or sells access to networks of physicians.

H. "Person" means both natural persons and artificial persons, including, but not limited to, corporations, unincorporated entities, and governments.

I. "Physician" means a doctor of allopathic medicine ("M.D."), a doctor of osteopathic medicine ("D.O."), a doctor of chiropractic medicine ("D.C."), or a doctor of podiatric medicine ("D.P.M.").

J. "Preexisting contract" means a contract that was in effect on the date of the receipt by a payor that is a party to such

contract of notice sent by Respondent CPA, pursuant to Paragraph III.B.2.b. of this Order, of such payor's right to terminate such contract.

K. "Principal address" means either (1) primary business address, if there is a business address, or (2) primary residential address, if there is no business address.

L. "Qualified clinically-integrated joint arrangement" means an arrangement to provide physician services in which:

1. all physicians who participate in the arrangement participate in active and ongoing programs of the arrangement to evaluate and modify the practice patterns of, and create a high degree of interdependence and cooperation among, the physicians who participate in the arrangement, in order to control costs and ensure the quality of services provided through the arrangement; and

2. any agreement concerning price or other terms or conditions of dealing entered into by or within the arrangement is reasonably necessary to obtain significant efficiencies through the joint arrangement.

M. "Qualified risk-sharing joint arrangement" means an arrangement to provide physician services in which:

1. all physicians who participate in the arrangement share substantial financial risk through their participation in the arrangement and thereby create incentives for the physicians who participate jointly to control costs and improve quality by managing the provision of physician services, such as risk-sharing involving:

   a. the provision of physician services to payors at a capitated rate,

b. the provision of physician services for a predetermined percentage of premium or revenue from payors,

c. the use of significant financial incentives (*e.g.*, substantial withholds) for physicians who participate to achieve, as a group, specified cost-containment goals, or

d. the provision of a complex or extended course of treatment that requires the substantial coordination of care by physicians in different specialties offering a complementary mix of services, for a fixed, predetermined price, where the costs of that course of treatment for any individual patient can vary greatly due to the individual patient's condition, the choice, complexity, or length of treatment, or other factors; and

2. any agreement concerning price or other terms or conditions of dealing entered into by or within the arrangement is reasonably necessary to obtain significant efficiencies through the joint arrangement.

II.

IT IS FURTHER ORDERED that Respondents, directly or indirectly, or through any corporate or other device, in connection with the provision of physician services in or affecting commerce, as "commerce" is defined in Section 4 of the Federal Trade Commission Act, 15 U.S.C. § 44, cease and desist from:

A. Entering into, adhering to, participating in, maintaining, organizing, implementing, enforcing, or otherwise facilitating any combination, conspiracy, agreement, or understanding between or among any physicians:

1. To negotiate on behalf of any physician with any payor,

2. To deal, refuse to deal, or threaten to refuse to deal with any payor,

3. Regarding any term, condition, or requirement upon which any physician deals, or is willing to deal, with any payor, including, but not limited to, price terms, or

4. Not to deal individually with any payor, or not to deal with any payor through any arrangement other than Respondent CPA;

B. Exchanging or facilitating in any manner the exchange or transfer of information among physicians concerning any physician's willingness to deal with a payor, or the terms or conditions, including price terms, on which the physician is willing to deal;

C. Attempting to engage in any action prohibited by Paragraph II.A. or II.B., above;

D. Encouraging, suggesting, advising, pressuring, inducing, or attempting to induce any person to engage in any action that would be prohibited by Paragraphs II.A through II.C above; and

E. For a period of three (3) years after the date this Order becomes final, acting as an intermediary or agent on behalf of any physicians, or using an intermediary or agent, who is also an intermediary or agent for any other physician, in dealing with health plans regarding contracts under which physicians would be compensated for the provision of services.

PROVIDED, HOWEVER, that nothing in this Paragraph II. shall prohibit any Respondent:

(i) from engaging in any agreement or other conduct that is reasonably necessary to form, participate in, or take any action in furtherance of a qualified risk-sharing joint arrangement or qualified clinically-integrated joint

arrangement, or that solely involves physicians in the same medical group practice; or

(ii) from securing legal services that constitute the practice of law, as defined by the laws of the State of New Mexico.

III.

IT IS FURTHER ORDERED that Respondent CPA shall:

A. Within thirty (30) days after the date on which this Order becomes final, cease and desist from all business and all other activities of any nature whatsoever, except those activities that are required in order to comply with the terms of this Order or that are necessary to effect a winding down of Respondent CPA's affairs and its dissolution;

B. Within thirty (30) days after the date on which this Order becomes final, and prior to the dissolution provided for in Paragraph III.D. below:

1. distribute by first-class mail, with delivery confirmation, a copy of this Order and the Complaint to each physician who participates, or has participated, in Respondent CPA;

2. distribute by first-class mail, return receipt requested, a copy of this Order and Complaint to:

a. each officer, director, manager, and employee of Respondent CPA;

b. the chief executive officer of each payor who, at any time since January 1, 1998, has communicated to Respondent CPA, or to whom Respondent CPA has communicated, with regard to any desire, willingness, or interest of such payor in contracting for physician services, and include in such mailing the notice specified in Appendix A to this Order; and

c. Carlsbad Medical Center, Carlsbad, New Mexico;

C. Terminate, without penalty or charge, and in compliance with any applicable laws of the State of New Mexico, any preexisting contract with any payor for the provision of physician services, at the earlier of: (1) the termination or renewal date (including any automatic renewal date) of such contract; or (2) receipt by Respondent CPA of a written request to terminate such contract from any payor that is a party to the contract; and

D. Dissolve itself within thirty (30) days after the termination or renewal date (including any automatic renewal date) of the last preexisting contract entered into with any payor, as provided for in Paragraph III.C.

IV.

IT IS FURTHER ORDERED that, if Respondent CPA fails to comply with all or any portion of Paragraph III.B. of this Order within sixty (60) days after the date on which this Order becomes final, then Respondent Moore shall, within ninety (90) days after the date on which this Order becomes final, comply with those portions of Paragraph III.B. of this Order with which Respondent CPA did not comply.

V.

IT IS FURTHER ORDERED that Respondent CPA shall:

A. Within ninety (90) days after the date on which this Order becomes final, and prior to the dissolution provided for in Paragraph III.D. above, file with the Commission a verified written report demonstrating how it has complied and is complying with this Order;

B. Prior to its dissolution, notify the Commission at least thirty (30) days prior to any proposed change in Respondent CPA,

such as assignment, sale resulting in the emergence of a successor, or any other change in Respondent CPA that may affect compliance obligations arising out of this Order; and

C. Upon dissolution, provide the Commission with evidence of that dissolution.

VI.

IT IS FURTHER ORDERED that Respondent Moore shall file verified written reports within sixty (60) days after the date this Order becomes final, annually thereafter for three (3) years on the anniversary of the date this Order becomes final, and at such other times as the Commission may by written notice require, setting forth:

A. in detail, the manner and form in which Respondent Moore has complied and is complying with this Order;

B. the name, address, and telephone number of each physician, medical group practice, and other group of physicians that Respondent Moore has represented or advised with respect to their dealings with any payor in connection with the provision of physician services;

C. the name, address, and telephone number of each payor with which Respondent Moore has dealt while representing any physician, medical group practice, or other group of physicians in connection with the provision of physician services;

D. any actions taken in furtherance of a qualified risk-sharing joint arrangement or qualified clinically-integrated joint arrangement provided for in Paragraph II of this Order; and

E. any arrangement under which Respondent Moore would act as an intermediary or agent on behalf of any physicians with health plans regarding contracts under which physicians

would be compensated for the provision of services, subject to Paragraph II.E. of this Order.

VII.

IT IS FURTHER ORDERED that each Physician Respondent shall file verified written reports within sixty (60) days after the date this Order becomes final, annually thereafter for three (3) years on the anniversary of the date this Order becomes final, and at such other times as the Commission may by written notice require, setting forth:

A. in detail, the manner and form in which the Physician Respondent has complied and is complying with this Order, including, but not limited to, any information necessary to demonstrate such compliance;

B. the name, address, and telephone number of each physician group, including any medical group practice, in which the Physician Respondent has participated;

C. the name, address, and telephone number of each person, who is not a member or employee of the Physician Respondent's medical group practice, that has represented or advised the Physician Respondent with respect to contracting with any payor for the provision of physician services;

D. the name, address, and telephone number of each payor, other than individual patients, that has communicated with the Physician Respondent for the purpose of contracting, or seeking to contract, for physician services;

E. the name, address, and telephone number of each payor, other than individual patients, with which the Physician Respondent has entered into a written agreement for the provision of physician services, and the nature of such agreement;

F. any actions taken in furtherance of a qualified risk-sharing joint arrangement or qualified clinically-integrated joint arrangement provided for in Paragraph II of this Order; and

G. any arrangement under which any Physician Respondent would act as an intermediary or agent on behalf of any physicians with health plans regarding contracts under which physicians would be compensated for the provision of services, subject to Paragraph II.E. of this Order.

VIII.

IT IS FURTHER ORDERED that each Respondent shall notify the Commission of any change in his, her, or its respective principal address within twenty (20) days of such change in address.

IX.

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

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

B. Upon five (5) days' notice to such Respondent, and in the presence of counsel, and without restraint or interference from it, to interview such Respondent or employees of such Respondent.

X.

IT IS FURTHER ORDERED that this Order shall terminate on June 13, 2023.

By the Commission.

Appendix A

[letterhead of Carlsbad Physician Association, Inc.]

[name of payor's CEO]
[address]

Dear _____:

Enclosed is a copy of a complaint and a consent order issued by the Federal Trade Commission against the Carlsbad Physician Association, Inc. ("CPA") and others.

Paragraph III.C. of the order gives you the right to terminate, without penalty or charge, any contracts with CPA that are in effect on the date you receive this letter. In accordance with Paragraph III.C., any contract will terminate at the renewal date (including any automatic renewal date of the contract), or any earlier date if you write to CPA requesting termination.

Sincerely,

Analysis

Analysis of Agreement Containing Consent Order to Aid Public Comment

The Federal Trade Commission has accepted, subject to final approval, an agreement containing a proposed consent order with the Carlsbad Physician Association (CPA), its executive director, and seven physicians. The agreement settles charges that these parties violated Section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45, by orchestrating and implementing agreements among members of CPA to fix prices and other terms on which they would deal with health plans, and to refuse to deal with such purchasers except on collectively-determined terms. The proposed consent order has been placed on the public record for 30 days to receive comments from interested persons. Comments received during this period will become part of the public record. After 30 days, the Commission will review the agreement and the comments received, and will decide whether it should withdraw from the agreement or make the proposed order final.

The purpose of this analysis is to facilitate public comment on the proposed order. The analysis is not intended to constitute an official interpretation of the agreement and proposed order, or to modify their terms in any way. Further, the proposed consent order has been entered into for settlement purposes only and does not constitute an admission by any respondent that said respondent violated the law or that the facts alleged in the complaint (other than jurisdictional facts) are true.

The Complaint Allegations

CPA was organized in 1998-1999 to be a vehicle for competing physicians to bargain collectively with health plans, in order to obtain "favorable reimbursement" for its members. Its 38 physician members represent 76 percent of all physicians and 83 percent of the primary care physicians practicing in the Carlsbad area, which is located in southeastern New Mexico.

Analysis

CPA members have refused to deal with health plans on an individual basis. Instead, CPA's executive director (Glen Moore), its five-member Board of Directors, and a "Contract Committee" consisting of Board members and additional physician members of CPA negotiate with health plans that desire to contract with CPA members. Each of the named physician respondents is or has been a member of CPA's Board of Directors and Contract Committee and actively participated in negotiations with payors.

Contracts that the CPA leadership negotiates are presented to the general membership, and members vote on whether CPA should accept the contract. The Board signs contracts that a majority of CPA members vote to accept. In accordance with this model, respondents have orchestrated collective agreements on fees and other terms of dealing with health plans, have carried out collective negotiations with several health plans, and have orchestrated refusals to deal and threats to refuse to deal with health plans that resisted respondents' desired terms. Although CPA purported to operate as a "messenger" -- that is, an arrangement that does not facilitate horizontal agreements on price -- it engaged in various actions that reflected or orchestrated such agreements.[1]

Since its inception, CPA has operated solely to exert the collective bargaining power of its members. It engages in no activities or functions other than health plan contracting. Further, in connection with health plan contracting, its members do not engage in any cooperative activities to benefit consumers.

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[1] An appropriate "messenger model" arrangement that can facilitate and minimize the costs involved in contracting between physicians and payors, without fostering an agreement among competing physicians on fees or fee-related terms, is described in the 1996 Statements of Antitrust Enforcement Policy in Health Care jointly issued by the Federal Trade Commission and U.S. Department of Justice. *See* http://www.ftc.gov/reports/hlth3s.htm.

Respondents have succeeded in forcing numerous health plans to raise fees paid to CPA members, and thereby raised the cost of medical care in the Carlsbad area. As a result of the challenged actions of respondents, CPA members receive the highest fees for physician services in New Mexico. By orchestrating agreements among CPA members to deal only on collectively-determined terms, together with actual or threatened refusals to deal with health plans that would not meet those terms, respondents have violated Section 5 of the FTC Act.

The Proposed Consent Order

The proposed order is designed to remedy the illegal conduct charged in the complaint and prevent its recurrence. It is similar to many previous consent orders that the Commission has issued to settle charges that physician groups engaged in unlawful agreements to raise fees they receive from health plans, with two exceptions. First, in addition to the core prohibitions, the proposed order in this matter requires that CPA dissolve itself. Such structural relief is not routinely imposed, but has been used in physician price-fixing consent orders in the past when circumstances warrant.[2] Here, the organization is alleged to have had no function other than unlawful collective bargaining activities. Second, the order includes temporary "fencing-in" relief to ensure that the alleged unlawful conduct does not continue through other means. Thus, for three years, it bars the respondents from acting as a messenger or agent in health plan contracting and limits the ability of the individual physician respondents to use the same agent in connection with health plan contracting.

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[2] *See Obstetrics and Gynecology Medical Corporation of Napa Valley*, Docket No. C-4048 (May 14, 2002); *Physician Group, Inc*. 120 F.T.C. 567 (1995); *Southbank IPA, Inc*. 114 F.T.C. 783 (1991).

Analysis

The proposed order's specific provisions are as follows:

Paragraph II.A prohibits the respondents from entering into or facilitating any agreement between or among any physicians: (1) to negotiate with payors on any physician's behalf; (2) to deal, not to deal, or threaten not to deal with payors; (3) on what terms to deal with any payor; or (4) not to deal individually with any payor, or to deal with any payor only through an arrangement involving the respondents.

Other parts of Paragraph II reinforce these general prohibitions. Paragraph II.B prohibits the respondents from facilitating exchanges of information among physicians concerning whether, or on what terms, to contract with a payor. Paragraph II.C bars attempts to engage in any action prohibited by Paragraph II.A or II.B. Paragraph II.D proscribes inducing anyone to engage in any action prohibited by Paragraphs II.A through II.C.

Paragraph II.E contains certain additional, "fencing-in" relief, which is imposed for three years. Under this provision, respondents may not, in connection with physician health plan contracting, either (1) act as an agent for any physicians; or (2) use an agent who represents any other physician with respect to such contracting. Such relief, designed to assure that respondents do not seek to use other arrangements to continue the challenged conduct, is warranted in light of complaint charges that respondents engaged in overt price-fixing behavior and respondents' assertion that their conduct was legitimate "messengering" of health plan contract offers. The prohibition on using the same agent as any other physician in connection with health plan contracting would not apply where respondents are obtaining bona fide legal services (that is, activities undertaken by an attorney that constitute the practice of law as defined by New Mexico law).

As in other orders addressing providers' collective bargaining with health care purchasers, certain kinds of agreements are excluded from the general bar on joint negotiations.

Analysis

First, respondents would not be precluded from engaging in conduct that is reasonably necessary to form or participate in legitimate joint contracting arrangements among competing physicians, whether a "qualified risk-sharing joint arrangement" or a "qualified clinically-integrated joint arrangement."

As defined in the proposed order, a "qualified risk-sharing joint arrangement" possesses two key characteristics. First, all physician participants must share substantial financial risk through the arrangement, such that the arrangement creates incentives for the participants to control costs and improve quality by managing the provision of services. Second, any agreement concerning reimbursement or other terms or conditions of dealing must be reasonably necessary to obtain significant efficiencies through the joint arrangement.

A "qualified clinically-integrated joint arrangement," on the other hand, need not involve any sharing of financial risk. Instead, as defined in the proposed order, physician participants must participate in active and ongoing programs to evaluate and modify their clinical practice patterns in order to control costs and ensure the quality of services provided, and the arrangement must create a high degree of interdependence and cooperation among physicians. As with qualified risk-sharing arrangements, any agreement concerning price or other terms of dealing must be reasonably necessary to achieve the efficiency goals of the joint arrangement.

Second, because the order is intended to reach agreements among horizontal competitors, Paragraph II would not bar agreements that only involve physicians who are part of the same medical group practice (defined in Paragraph I.E).

Paragraph III, which applies only to CPA, provides for the dissolution of the organization following the expiration or termination of all payor contracts, and in the interim requires that CPA cease all activities except those necessary to comply with the order and the winding down of its affairs. Further, Paragraph III.B

requires CPA to distribute the complaint and order to all physicians who have participated in CPA, to payors that negotiated contracts with CPA or indicated an interest in contracting, and to the Carlsbad Medical Center. Paragraph III.C requires CPA, at any payor's request and without penalty, to terminate its current contracts with respect to providing physician services.

In the event that CPA fails to comply with the requirement to send out the notices set forth in Paragraph III.B, Paragraph IV requires Mr. Moore to do so.

Paragraphs V through IX of the proposed order impose various obligations on respondents to report or provide access to information to the Commission to facilitate monitoring respondents' compliance with the order.

The proposed order will expire in 20 years.

ORDER REOPENING AND MODIFYING ORDER TO HOLD SEPARATE AND MAINTAIN ASSETS

On March 6, 2003, Solvay S.A. ("Solvay") filed with the Commission the Petition of Solvay S.A. to Reopen and Modify Hold Separate Order ("Petition"). In the Petition, Solvay asks that the Commission reopen and modify the Order To Hold Separate And Maintain Assets issued by the Commission on April 29, 2002, ("Hold Separate Order") to remove language that prohibits Solvay from hiring a former employee of the divested business that the acquirer has decided not to hire. For the reasons stated below, the Commission has determined to grant the Petition.

I. The Orders

The Hold Separate Order in this matter was issued by consent at the end of an investigation of Solvay's proposed acquisition of Ausimont. The Complaint alleges product markets that include polyvinylidene fluoride ("PVDF") used for coating building exteriors, coating wires and cables, manufacturing specialized pipes and tubing, and other applications. The Decision and Order (accepted for public comment on April 29, 2002, and issued on June 21, 2002) ("Decision and Order") requires Solvay to divest the Solvay Fluoropolymers Business, which includes two plants and related assets in Decatur, Alabama, used to manufacture PVDF. See Decision and Order ¶¶ I.EE. and II.A. The Decision and Order further requires Solvay to divest its interest in a joint venture that manufactures vinylidene fluoride monomer ("VF_2"), a key raw material used to manufacture PVDF. See Decision and Order ¶¶ I.JJ. and II.A. The Hold Separate Order obligated Solvay to hold the Solvay Fluoropolymers Business and Solvay's interest in the VF_2 manufacturing joint venture separate until divested. See Hold Separate Order ¶ II.A.

The Hold Separate Order required Solvay to operate the businesses held separate under the direction of a trustee ("Hold Separate Trustee") appointed by the Commission. See Hold Separate Order ¶¶ II. and III.B.3. The order also required Solvay

to contract with a Hold Separate Manager to manage the day-to-day operations of the business under the Hold Separate Trustee's direction. See Hold Separate Order ¶ III.C.1.

The Decision and Order encourages the employees of the divested PVDF business to continue employment with an acquirer. For example, the Order grants any acquirer the right to review a list of employees of the divested business, to review their personnel files, to interview them, and to offer employment to them. See Decision and Order ¶ II.D.6. The Decision and Order prohibits Solvay from interfering with an acquirer's attempts to hire these employees, and requires Solvay to pay a bonus to employees who accept an offer of employment from an acquirer. Id.

The Decision and Order and Hold Separate Order include special provisions to preserve the availability of the Hold Separate Manager for employment by an acquirer. Hold Separate Order ¶ III.C.5. provides:

> For a period of two (2) years beginning after the termination of this Hold Separate, Respondent shall not retain the services of the Solvay Fluoropolymers Manager.[1]

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[1] The Hold Separate Order terminates automatically on the divestiture of the Solvay Fluoropolymers Business. See Hold Separate Order ¶ VII.B. Solvay divested the Solvay Fluoropolymers Business and its interest in the VF_2 joint venture on January 21, 2003. However, the Decision and Order effectively incorporates this provision of the Hold Separate Order into the Decision and Order by requiring Solvay to "comply fully with all terms and provisions of the Hold Separate, including, but not limited to, provisions restricting [Solvay's] employment of Persons participating in the management of assets held separate." Decision and Order ¶ II.H.

The Commission appointed Rajiv Gupta as the Hold Separate Trustee on April 29, 2002, when the Commission approved the consent agreement and the proposed decision and order for public comment. As required by paragraph III.C. of the Hold Separate, Solvay obtained Mr. Gupta's approval to retain Gary Mularski as the Solvay Fluoropolymers Manager to operate the Solvay Fluoropolymers Business pending divestiture.

II. The Petition

Solvay has petitioned the Commission to reopen and modify the Hold Separate Order to remove the employment ban from Hold Separate Order ¶ III.C.5., so as to permit Solvay to re-hire Gary Mularski, the Solvay Fluoropolymers Manager. Solvay proposes to employ Mr. Mularski as the Southern Key Accounts Manager for Solvay Minerals, Inc., a subsidiary that manufactures and sells soda ash.[2] Petition at 2-3. Mr. Mularski's position "will not relate, directly or indirectly, to the research, development, manufacture, marketing, sale, or distribution of PVDF," id. at 3, and he will remain bound by provisions of the Decision and Order and Hold Separate Order prohibiting him from disclosing confidential information about the PVDF business to anyone at Solvay. See Order ¶ II.H. and Hold Separate Order ¶ ¶ III.C.2. and I.V.C. The Petition asserts that, based on these representations in the Petition, Dyneon does not object to the Petition. See Letter from James E. Gregory, President, Dyneon LLC, to Donald S. Clark, Esq., Secretary, Federal Trade Commission (March 3, 2003), attached as Exhibit A to the Petition.

III. Standard for Reopening and Modifying Final Orders

Section 5(b) of the Federal Trade Commission Act, 15 U.S.C. § 45(b), provides that the Commission shall reopen an Order to

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[2] There is no commercial relationship between soda ash and PVDF.

consider whether it should be modified if the Commission determines that the public interest so requires.[3] Respondents are therefore invited in petitions to reopen to show how the public interest warrants the requested modification.[4] In the case of "public interest" requests, FTC Rule of Practice 2.51(b) requires an initial "satisfactory showing" of how modification would serve the public interest before the Commission determines whether to reopen an Order and consider all of the reasons for and against its modification.

A "satisfactory showing" requires, with respect to public interest requests, that the requester make a *prima facie* showing of a legitimate public interest reason or reasons justifying relief. A request to reopen and modify will not contain a "satisfactory showing" if it is merely conclusory or otherwise fails to set forth by affidavit(s) specific facts demonstrating in detail the reasons why the public interest would be served by the modification.[5] This showing requires the requester to demonstrate, for example, that there is a more effective or efficient way of achieving the purposes of the Order, that the Order in whole or part is no longer needed, or that there is some other clear public interest that would be served if the Commission were to grant the requested relief.[6]

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[3] Section 5 of the FTC Act also provides that the Commission shall reopen an Order to consider whether it should be modified if the respondent "makes a satisfactory showing that changed conditions of law or fact" so require. The Petition does not allege any changed conditions of law or fact.

[4] Letter to John Hart (June 5, 1986) at 5; 16 C.F.R. § 2.51.

[5] 16 C.F.R. § 2.51.

[6] Thus, a requester's mere assertion of competitive injury or disadvantage will ordinarily not constitute a "satisfactory showing" where the requester is unable to demonstrate how the proposed modification would promote effective competition or

In addition, this showing must be supported by evidence that is credible and reliable.[7]

If, after determining that the requester has made the required showing, the Commission decides to reopen the Order, the Commission will then consider and balance all of the reasons for and against modification. In no instance does a decision to reopen an Order oblige the Commission to modify it,[8] and the burden remains on the requester in all cases to demonstrate why the Order should be reopened and modified. The petitioner's burden is not a light one in view of the public interest in repose and the finality of

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otherwise serve the broader public interest. *See, e.g., California & Hawaiian Sugar*, 119 F.T.C. at 44-45 (1995) (a requester cannot avoid order obligations just because its competitors are not so restricted; order was reopened and modified, however, to allow limited comparative claims that encouraged competition by enabling consumers to distinguish and choose among otherwise fungible products).

[7] The Statement of Basis and Purpose to Rule 2.51 states that, "[r]equests to reopen orders must not only allege facts that, if true, would constitute the necessary showing, but must also credibly demonstrate that the factual assertions are reliable. [The Rule] therefore specifically requires that requesters provide one or more affidavits to support facts alleged in requests to reopen and modify orders. This [requirement] will not only help the Commission in its decision making process but, by clarifying the applicable standard, aid requesters in presenting meritorious cases . . . This [requirement] specifies the procedural method for substantiating factual assertions." 53 FR 40867 (Oct. 19, 1988).

[8] See United States v. Louisiana-Pacific Corp., 967 F.2d 1372, 1376-77 (9th Cir. 1992) (reopening and modification are independent determinations).

Commission Orders.[9] All information and material that the requester wishes the Commission to consider shall be contained in the request at the time of filing.[10]

IV. It Is In The Public Interest To Grant The Petition

Solvay's Petition asks the Commission to reopen and modify the Hold Separate Order to eliminate the provision that prohibits Solvay from employing the Solvay Fluoropolymers Manager for two years after the divestiture. The Petition makes the requisite "public interest" showing to support reopening the Hold Separate Order by establishing that the 2-year employment ban found in the final sentence of Hold Separate Order ¶ III.C.5. is no longer needed. Moreover, the Petition establishes that a modification of the Hold Separate Order is warranted because Solvay has shown that the employment ban harms the personal interests of the former Solvay Fluoropolymers Manager without contributing to achieving the purposes of the Order.

Solvay's Petition includes a satisfactory showing of a legitimate public interest reason to reopen the Hold Separate Order. The Hold Separate Order's 2-year employment ban was one of several provisions in the Hold Separate Order and the Decision and Order designed to encourage the employees of the Solvay Fluoropolymers Business to remain with the business during the hold separate period and to accept employment with the acquirer of that business. The Hold Separate Order and Decision and Order defined a term, "Solvay Fluoropolymers Employees," to include all persons employed directly, full-time or part-time, by the divested business within one year of the divestiture, as well as all other Solvay employees anywhere in the world (including

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

[10] 16 C.F.R. § 2.51(b).

R&D and marketing staff) whose services were billed or paid, in whole or in part, by or to the divested business within one year of divestiture. See Decision and Order ¶ I.FF. and Hold Separate Order ¶ I.HH. Both orders also defined the term, "Solvay Fluoropolymers Key Employees," to mean the managers of the divested business when Solvay closed the Ausimont acquisition, together with additional employees designated by Solvay and an acquirer. See Decision and Order ¶ I.GG. and Hold Separate Order ¶ I.JJ.

The Hold Separate Order prohibited Solvay from employing or offering employment to any Solvay Fluoropolymer Employee and Solvay Fluoropolymers Key Employee during the hold separate period. See Hold Separate Order ¶ III.H.3. In addition, the Commission required Solvay to offer employees a bonus equal to 5% of their annual salaries to remain with the divested business during the hold separate period. Id. at ¶ III.H.5. These provisions preserved the work force of the Solvay Fluoropolymers Business so that Dyneon could select and hire any employees of the acquired business that Dyneon desired to employ.

Both the Decision and Order and the Hold Separate Order contain other provisions to help Dyneon retain the employees of the Solvay Fluoropolymers Business. Paragraph II.D.6. of the Decision and Order requires Solvay to provide a list of employees of the business, and an opportunity to review their personnel files, at least forty-five (45) days before the divestiture. The Decision and Order further requires Solvay to make those employees available to meet privately with Dyneon at least thirty (30) days prior to divestiture to offer employment to them, and prohibits Solvay from interfering with Dyneon's attempts to hire these employees. Id. Solvay also must pay a 10% bonus to any of the Solvay Fluoropolymers Key Employees who accept employment with Dyneon. Id. The orders prohibit Solvay from hiring any of these employees within one (1) year after the divestiture closes, unless Dyneon has terminated the person's employment. See Decision and Order ¶ II.F. and Hold Separate Order III.H.4.

As highlighted by Solvay's Petition, the Hold Separate Order singles out the Solvay Fluoropolymers Manager for special treatment. It was assumed that any acquirer likely would hire the manager to help run the divested business because he would be the day-to-day manager of the business, and perhaps the most knowledgeable person about the business, when the divestiture closed. Therefore, the Hold Separate Order explicitly prohibited Solvay from hiring the manager for two (2) years after the divestiture. See Hold Separate Order ¶ III.C.5. In marked contrast to all of the other restrictions limiting Solvay's rights to hire its former employees, this provision does not allow Solvay to re-hire the Solvay Fluoropolymers Manager *even if Dyneon terminated him*.

In fact, Dyneon has decided not to offer employment to Mr. Mularski. Although Dyneon has decided not to retain him, Dyneon has kept 35 out of 37 people employed by the business when it was divested. Dyneon's success at retaining the work force suggests that the provisions of the Decision and Order and Hold Separate Order designed to facilitate the transfer of employees from the respondent to the acquirer have been successful. The order provisions have worked well, and Dyneon has retained all of the employees that, in Dyneon's judgment, are necessary to operate the divested business successfully. These circumstances demonstrate that the two-year ban on Solvay hiring the Solvay Fluoropolymers Manager is no longer necessary, which satisfies the requirement for establishing a sufficient public interest to support reopening the Hold Separate Order.

However, Dyneon's decision leaves Mr. Mularski in a disadvantageous position to seek new employment. The orders prevent Solvay, the company most familiar with Mr. Mularski's work skills, from hiring him. From Mr. Mularski's standpoint, continued employment by Solvay is far more attractive than any other option, but the orders prevent that.

In determining whether to modify the Hold Separate Order, the Commission must consider and balance all the reasons for and

against the modification. Although the Hold Separate Order's two year ban on Solvay employing the Solvay Fluoropolymers Business promoted the important goal of encouraging the employees of the divested business to accept employment with Dyneon, its decision not to hire Mr. Mularski renders the employment ban obsolete and unnecessary. The employment ban now imposes an unintended harm to Mr. Mularski's personal financial and employment interests because the employment ban prevents Solvay from hiring Mr. Mularski. In balancing and weighing the reasons for and against modifying the Hold Separate Order, it appears that Mr. Mularski will suffer personal harm if the Hold Separate Order is not modified, but that declining to modify the Hold Separate Order will not promote any competitive or public purpose.

Accordingly, the Petition satisfies the standard for reopening and modifying the Hold Separate Order under the "public interest"provision of Rule 2.51(b) of the FTC Rules of Practice and Section 5 of the FTC Act. Solvay has established that reopening the Hold Separate Order is in the public interest and warranted because Hold Separate Order ¶ III.C.5. is no longer needed. Solvay has shown that the Hold Separate Order should be modified by demonstrating that Paragraph III.C.5. harms Mr. Mularski's personal interests without promoting any public or competitive interest at all.

Accordingly, **IT IS ORDERED** that the Hold Separate Order in this matter be, and it hereby is, reopened; and,

IT IS FURTHER ORDERED that the Hold Separate Order be, and it hereby is, modified to delete Hold Separate Order ¶ III.C.5. as found in the Hold Separate Order issued on April 29, 2002, and to substitute the following language:

> The Solvay Fluoropolymers Manager shall have no financial interests affected by Respondent's revenues, profits or profit margins, except that the Solvay Fluoropolymers Manager's compensation for managing the Solvay Fluoropolymers

Business and the Solvay VF_2 Joint Venture Business may include economic incentives dependent on the financial performance of the Solvay Fluoropolymers Business and the Solvay VF_2 Joint Venture Business if there are also sufficient incentives for the Solvay Fluoropolymers Manager to operate the Solvay Fluoropolymers Business and the Solvay VF_2 Joint Venture Business at no less than current rates of operations (including, but not limited to, current rates of production and sales) and to achieve the objectives of this Hold Separate.

By the Commission.