FEDERAL TRADE COMMISSION DECISIONS

FINDINGS, OPINIONS, AND ORDERS JANUARY 1, 2002 TO JUNE 30, 2002

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MEMBERS OF THE FEDERAL TRADE COMMISSION

DURING THE PERIOD JANUARY 1, 2002 TO JUNE 30, 2002

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Took oath of office June 4, 2001.

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

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

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

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

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

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PETITIONS TO QUASH

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Complaint

IN THE MATTER OF

CHEVRON CORPORATION, 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-4023; File No. 0110011
Complaint, September 7, 2001--Decision, January 2, 2002

This consent order addresses the merger of Respondent Chevron Corporation and Respondent Texaco Inc., both large integrated oil companies engaged in the exploration for, and production of, oil and natural gas; the pipeline transportation of crude oil, natural gas, and natural gas liquids; the refining of crude oil into refined petroleum products, including gasoline, aviation fuel, and other light petroleum products; the transportation, terminaling, and marketing of gasoline and aviation fuel; and other related businesses. The order, among other things, requires the respondents to divest, to Shell Oil Company, all of Respondent Texaco's interests in two joint ventures – Equilon Enterprises, LLC, jointly owned with Shell; and Motiva Enterprises, LLC, jointly owned with Shell and Saudi Refining, Inc. – that together own all of Texaco's United States petroleum refining, marketing and transportation businesses, including (a) gasoline marketing in 22 States; (b) the marketing of California Air Resources Board ("CARB") gasoline in California; (c) refining and bulk supply of CARB gasoline for sale in California; (d) refining and bulk supply of gasoline and jet fuel in the Pacific Northwest; (e) the Explorer Pipeline and the bulk supply of certain reformulated gasoline ("RFG II") into St. Louis; (f) terminaling of gasoline and other light products in ten metropolitan areas in five States; (g) the Equilon pipeline that transports crude oil from California's San Joaquin Valley; and (h) the Equilon crude oil pipeline in the Eastern Gulf of Mexico. The order also requires the respondents to divest Texaco's one-third interest in the Discovery Pipeline System and its interest in the Enterprise fractionating plant in Mont Belvieu, Texas, to acquirers approved by the Commission. In addition, the order requires the respondents to divest Texaco's general aviation business in fourteen states to Avfuel Corporation. An accompanying Order to Hold Separate requires the respondents to hold separate and maintain certain assets pending divestiture.

Participants

For the Commission: *Dennis F. Johnson, Renee S. Henning, Frank Lipson, Art Nolan, Peter A. Richman, Constance Salemi, Marc W. Schneider, W. Stephen Sockwell, Patricia V. Galvan,*

Karen Harris, Phillip L. Broyles, Elizabeth A. Piotrowski, Michael E. Antalics, Naomi Licker, Daniel P. Ducore, M. Sean Royall, Louis Silvia, David W. Meyer and *Daniel P. O'Brien.*

For the Respondents: *Terry Calvani, Al Boro, John Grenfell,* and *Cecil Chung, Pillsbury Winthrop,* and *Marc Schildkraut, Timothy Boyle,* and *Lisa Jose Fales, Howrey, Simon, Arnold & White.*

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 ("FTC" or "Commission"), having reason to believe that Respondent Chevron Corporation ("Chevron") and Respondent Texaco Inc. ("Texaco") have entered into an agreement and plan of merger whereby Chevron proposes to acquire all of the outstanding common stock of Texaco, that such agreement and plan of merger violates 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 it appearing to the Commission that a proceeding in respect thereof would be in the public interest, hereby issues its complaint, stating its charges as follows:

I. RESPONDENTS

Chevron Corporation

1. Respondent Chevron is a corporation organized, existing and doing business under and by virtue of the laws of the state of Delaware, with its office and principal place of business located at 575 Market Street, San Francisco, CA 94105.

2. Respondent Chevron is, and at all times relevant herein has been, a diversified energy company engaged, either directly or through affiliates, in the exploration for, and production of, oil and natural gas; the pipeline transportation of crude oil, natural gas, and natural gas liquids; the refining of crude oil into

refined petroleum products, including gasoline, aviation fuel, and other light petroleum products; the transportation, terminaling, and marketing of gasoline, diesel fuel, and aviation fuel; and other related businesses.

3. Respondent Chevron owns approximately 26% of Dynegy Inc. ("Dynegy"). Dynegy is engaged in the gathering, processing, fractionation, transmission, terminaling, storage, and marketing of natural gas and natural gas liquids. Chevron has a long-term strategic alliance with Dynegy for the marketing of Chevron's natural gas and natural gas liquids, and the supply of natural gas and natural gas liquids to Chevron's refineries in the lower 48 states of the United States. Chevron has three positions on Dynegy's Board of Directors. This relationship gives Chevron access to information concerning Dynegy's business and allows Chevron to participate in Dynegy's business decisions.

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

Texaco Inc.

5. Respondent Texaco 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 2000 Westchester Ave., White Plains, NY 10650.

6. Respondent Texaco is, and at all times relevant herein has been, a diversified energy company engaged, either directly or through affiliates, in the exploration for, and production of, oil and natural gas; the pipeline transportation of crude oil, natural gas and natural gas liquids; the refining of crude oil into refined petroleum products, including gasoline, aviation fuel, and other light petroleum products; the transportation,

terminaling, and marketing of gasoline, diesel fuel, and aviation fuel; and other related businesses.

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

8. In 1998, Texaco contributed its U.S. petroleum refining, marketing and transportation businesses to two joint ventures and retained an interest in the joint ventures. The joint ventures are Equilon Enterprises, LLC ("Equilon"), which is owned by Texaco and Shell Oil Company ("Shell"), and Motiva Enterprises, LLC ("Motiva"), which is owned by Texaco, Shell, and Saudi Refining, Inc. ("SRI").

9. Equilon consists of Texaco's and Shell's U.S. western and midwestern refining and marketing businesses, and their nationwide transportation and lubricants businesses. Texaco and Shell jointly control Equilon. Equilon's major assets include full or partial ownership in four refineries, seven lubricants plants, about 65 terminals, and various pipelines. Equilon markets through approximately 9,700 branded gasoline retail outlets in the U.S.

10. Motiva consists of Texaco's, Shell's, and SRI's U.S. eastern and Gulf Coast refining and marketing businesses. Texaco, Shell and SRI jointly control Motiva. Motiva's major assets include full or partial ownership in four refineries and about 50 terminals. Motiva markets through approximately 14,000 branded gasoline retail outlets.

II. THE PROPOSED MERGER

11. Pursuant to an agreement and plan of merger dated October 15, 2000, Chevron intends to acquire all of the outstanding common stock of Texaco in exchange for stock of Chevron. The value of the transaction at the time of the agreement was approximately $45 billion. The combined entity is to be called ChevronTexaco Corporation. As a result of the merger, Chevron's shareholders will hold approximately 61%, and Texaco's shareholders will hold approximately 39%, of the new combined entity.

III. TRADE AND COMMERCE

A. Relevant Product Markets

12. Relevant lines of commerce in which to analyze the effects of the proposed merger are:

a. the marketing of gasoline;

b. the marketing of gasoline that meets the specifications of the California Air Resources Board ("CARB" gasoline);

c. the refining of CARB gasoline;

d. the refining of gasoline and kerosene jet fuel;

e. the bulk supply of Phase II Reformulated Gasoline;

f. the terminaling of gasoline and other light petroleum products;

g. the pipeline transportation of crude oil;

h. the pipeline transportation of offshore natural gas;

i. the fractionation of natural gas liquids; and

j. the marketing of aviation fuel to general aviation customers.

13. Gasoline is a motor fuel used in automobiles and other vehicles. It is produced from crude oil at refineries in the United States and throughout the world. Gasoline is produced in various grades and types, including conventional unleaded gasoline, reformulated gasoline ("RFG"), California Air Resources Board ("CARB") gasoline, and others. There is no substitute for gasoline as a fuel for automobiles and other vehicles that are designed to use gasoline.

14. CARB gasoline is a motor fuel used in automobiles that meets the specifications of the California Air Resources Board ("CARB"). CARB gasoline is cleaner burning and causes less air pollution than conventional unleaded gasoline. Since 1996, the sale or use of any gasoline other than CARB gasoline has been prohibited in California. CARB gasoline is generally manufactured primarily at refineries in California and at one other refinery located in Anacortes, Washington. There are no substitutes for CARB gasoline as fuel for automobiles and other vehicles that use gasoline in California.

15. Jet fuel is a fuel used in jet engines. It contains a large amount of kerosene. Jet engines must use fuel that meets stringent specifications and cannot switch to any other type of fuel. There is no substitute for jet fuel for jet engines designed to use such fuel.

16. Phase II Reformulated Gasoline ("RFG II") is a motor fuel used in automobiles. RFG II is cleaner burning than some other types of gasoline and causes less air pollution. The United States Environmental Protection Agency requires the use of RFG II in certain areas (including, as relevant here, the St. Louis metropolitan area). RFG II is supplied in bulk from facilities that have the ability to deliver large quantities

of the product on a continuing basis, such as pipelines or local refineries. There are no substitutes for pipelines or refineries for the bulk supply of RFG II. Smaller facilities that deliver RFG II in small quantities, such as tank trucks, are not cost competitive with pipelines or refineries.

17. Terminals are specialized facilities with large storage tanks used for the receipt and local distribution by tank truck of large quantities of gasoline and other light petroleum products. There are no substitutes for terminals for the storage and local distribution of gasoline and other light petroleum products.

18. Crude oil pipelines are specialized pipelines for the transportation of crude oil from production fields to refineries or locations where the crude oil can be transported to refineries by other means. Chevron and Equilon each own a crude oil pipeline that transports crude oil out of the San Joaquin Valley in California. There are no alternatives to pipelines for the transportation of crude oil out of the San Joaquin Valley.

19. Two crude oil pipeline systems transport crude oil from locations in the Eastern Gulf of Mexico to on-shore terminals: the Delta Pipeline System and the Cypress Pipeline System. The Delta system is wholly owned by Equilon. Chevron owns 50% of the Cypress system and is the operator. There are no alternatives to these two pipelines for the transportation of crude oil from locations in the Eastern Gulf of Mexico to on-shore terminals.

20. Natural gas pipelines are used to transport natural gas from offshore producing platforms to shore for processing and distribution. There are no alternatives to pipelines for the transportation of natural gas from offshore gas producing platforms to shore. Chevron and Texaco own controlling interests in competing offshore natural gas pipelines. Chevron and its affiliate Dynegy own a combined 77%

interest in the Venice Gathering System. Texaco owns approximately 33% of the Discovery Gas Transmission System. Texaco's ownership share is sufficient to allow it to effectively exercise control over important aspects of the business of the Discovery pipeline.

21. 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 natural gas liquids into individual specification products.

22. Aviation fuel is used as fuel for aircraft. There are two types of aviation fuel: aviation gasoline and jet fuel. Aviation gasoline is used in piston-powered aircraft engines, while jet fuel is used in jet engines. There are no substitutes for aviation gasoline or jet fuel for aircraft designed to use such fuels. Aviation fuel is sold through several channels of distribution, including the general aviation channel, which includes fixed base operators ("FBOs") that sell aviation fuel to general aviation customers at airports and distributors that sell to FBOs.

B. Relevant Geographic Markets

23. Relevant sections of the country in which to analyze the proposed merger are the following:

    a. the State of California, and smaller areas contained therein, including, but not limited to, the following metropolitan areas: Bakersfield, Chico-Redding, Fresno-Visalia, Los Angeles, Modesto-Sacramento-Stockton, Monterey-Salinas, Oakland-San Francisco-San Jose, Palm Springs, San Diego,

and San Luis Obispo-Santa Barbara-Santa Maria, where the merger would reduce competition in the marketing of CARB gasoline, as alleged below;

b. the western United States (excluding California), including the States of Arizona, Idaho, Nevada, New Mexico, Oregon, Utah, Washington, and Wyoming, and smaller areas contained therein, including, but not limited to, the following metropolitan areas: Phoenix and Tucson, AZ; Boise, ID; Las Vegas and Reno, NV; Albuquerque-Santa Fe, NM; Eugene, Klamath Falls-Medford, and Portland, OR; Salt Lake City, UT; Seattle-Tacoma, Spokane, and Yakima, WA; and Casper-Riverton, WY; where the merger would reduce competition in the marketing of gasoline, as alleged below;

c. the southern United States, including the States of Alabama, Florida, Georgia, Kentucky, Louisiana, Mississippi, North Carolina, Oklahoma, Tennessee, Texas, Virginia, and West Virginia, and smaller areas contained therein, including, but not limited to, the following metropolitan areas: Anniston, Birmingham, Decatur-Huntsville, Dothan, and Montgomery, AL; Mobile-Pensacola, AL/FL; Fort Lauderdale-Miami, Fort Pierce-West Palm Beach, Gainesville, and Panama City, FL; Albany, Atlanta, Columbus, Macon, and Savannah, GA; Lexington and Paducah, KY; Alexandria, Baton Rouge, El Dorado-Monroe, Lafayette, Lake Charles, New Orleans, and Shreveport, LA; Biloxi-Gulfport, Columbus-Tupelo-West Point, Hattiesburg-Laurel, Jackson, and Meridian, MS; Greenville-New Bern-Washington, NC; Ada-Ardmore, OK; Lawton-Wichita Falls, OK/TX; Chattanooga, TN; Bristol-Johnson City-Kingsport, TN/VA; Abilene-Sweetwater, Amarillo, Austin, Beaumont-Port Arthur, Brownsville-Harlingen-Weslaco, Corpus Christi, Dallas, El Paso, Fort Worth, Houston, Lubbock, Midland-Odessa, San Angelo, San Antonio, Temple-Waco, and Tyler, TX; Lynchburg-Roanoke and Petersburg-Richmond, VA; and Beckley-

Bluefield-Oak Hill, WV; where the merger would reduce competition in the marketing of gasoline, as alleged below;

d. the State of Alaska, and smaller areas contained therein, including, but not limited to, Anchorage, Fairbanks, and the southeastern towns of Juneau, Ketchikan, and Sitka, where the merger would reduce competition in the marketing of gasoline, as alleged below;

e. the State of Hawaii, and smaller areas contained therein, including, but not limited to, the islands of Hawaii, Kauai, Maui, and Oahu, where the merger would reduce competition in the marketing of gasoline, as alleged below;

f. the State of California, where the merger would reduce competition in the refining and bulk supply of CARB gasoline, as alleged below;

g. the Pacific Northwest, *i.e.,* the States of Washington and Oregon west of the Cascade mountains, where the merger would reduce competition in the refining and bulk supply of gasoline and jet fuel, as alleged below;

h. the St. Louis metropolitan area, where the merger would reduce competition in the bulk supply of Phase II Reformulated Gasoline, as alleged below;

i. the metropolitan areas of Phoenix and Tucson, AZ; San Diego and Ventura, CA; Collins, MS; and El Paso, TX; and the islands of Hawaii, Kauai, Maui, and Oahu, HI; where the merger would reduce competition in the terminaling of gasoline and other light petroleum products, as alleged below;

j. the San Joaquin Valley in California, where the merger would reduce competition in the pipeline transportation of crude oil, as alleged below;

k. locations in the Eastern Gulf of Mexico, including, but not limited to, the Main Pass, Viosca Knoll, South Pass and West Delta Areas, as defined by the Department of Interior Minerals Management Service, where the merger would reduce competition in the pipeline transportation of crude oil, as alleged below;

l. locations in the Central Gulf of Mexico, including, but not limited to, certain individual lease blocks in the South Timbalier and Grand Isle Areas, and their South Additions, as defined by the Department of Interior Minerals Management Service, including South Timbalier Blocks 30, 37, 38, 44, 45, 58, 59, 61-63, 86-88, 123-35, 151-53, 157, 158, 178-80, 185-87, and 205-08; South Timbalier South Addition Blocks 223-27, 231, 233-37, 248, 251, 256, and 257; Grand Isle Blocks 52, 53, 59, 62, 63, 70-76, 84, and 85; and Grand Isle South Addition Block 86; where the merger would reduce competition for the offshore pipeline transportation of natural gas, as alleged below;

m. Mont Belvieu, Texas, where the merger would reduce competition for the fractionation of raw mix natural gas liquids, as alleged below;

n. the western United States, including the States of Alaska, Arizona, California, Idaho, Nevada, Oregon, Utah, and Washington, and smaller areas contained therein, where the merger would reduce competition in the marketing of aviation fuel to general aviation customers, as alleged below; and

o. the southeastern United States, including the States of Alabama, Florida, Georgia, Louisiana, Mississippi, and Tennessee, and smaller areas contained therein, where the merger would reduce competition in the marketing of aviation fuel to general aviation customers, as alleged below.

Market Structure

24. The marketing of gasoline in the markets described in Paragraphs 23b through 23e would become highly concentrated, or significantly more concentrated, as a result of the proposed merger. For example, in some markets in the States of Louisiana, Mississippi, Oregon, and Washington, the proposed merger would increase concentration by more than 1,000 points to HHI levels above 3,000. In many other markets, the proposed merger would result in significant increases in concentration to levels at which competition may be harmed.

25. The marketing of CARB gasoline in the markets described in Paragraph 23a would be highly concentrated following the proposed merger. The proposed merger would increase concentration in each of these markets by more than 50 points to HHI levels above 2,000.

26. The market for the refining and bulk supply of CARB gasoline for the State of California would be highly concentrated following the proposed merger. The proposed merger would increase concentration in this market by more than 500 points to an HHI level above 2,000.

27. The market for the refining and bulk supply of gasoline and jet fuel for the Pacific Northwest would be highly concentrated following the proposed merger. The proposed merger would increase concentration in this market by more than 600 points to an HHI level above 2,000.

28. Chevron and Texaco (directly and indirectly through Equilon) each hold substantial interests in the Explorer Pipeline, the largest pipeline provider of bulk RFG II supply into the St. Louis metropolitan area. Chevron owns approximately 16.7 % of Explorer Pipeline, and Equilon and Texaco combined own approximately 35.9% of Explorer. Equilon also has a long-term contract through which it

obtains supplies of RFG II for the St. Louis metropolitan area. The market for the bulk supply of RFG II into the St. Louis metropolitan area is highly concentrated and would become significantly more concentrated following the proposed merger. The proposed merger would increase concentration in this market by more than 1,600 points to an HHI level of 5,000.

29. The terminaling of gasoline and other light petroleum products in each of the markets identified in Paragraph 23i would be highly concentrated following the proposed merger. The proposed merger would increase concentration in each of these markets by more than 300 points to HHI levels at or above 2,000.

30. The market for the pipeline transportation of crude oil from the San Joaquin Valley in California is highly concentrated and would become significantly more concentrated as a result of the proposed merger. The proposed merger would increase concentration in this market by more than 800 points to an HHI level above 3,300.

31. The pipeline transportation of crude oil from markets in the Eastern Gulf of Mexico identified in Paragraph 23k is highly concentrated and would become significantly more concentrated as a result of the proposed merger. The proposed merger would give the combined Chevron/Texaco substantial ownership interests in the only two pipelines that compete to transport crude oil from the Eastern Gulf of Mexico.

32. The pipeline transportation of offshore natural gas to shore from each of the markets described in Paragraph 23l is highly concentrated and would become significantly more concentrated as a result of the proposed merger. The proposed merger would give the combined Chevron and Texaco controlling interests in the only two pipelines, or two of only three pipelines, in each of these markets.

33. Because of Chevron's affiliation with Dynegy, the acquisition of Texaco would give Chevron a financial interest in three of the four fractionators in Mont Belvieu, Texas.

34. The marketing of aviation fuel to general aviation customers in the markets described in Paragraphs 23n and 23o would be highly concentrated as a result of the merger. The proposed merger would increase concentration in the southeastern United States by more than 250 points to an HHI level above 1,900, and would increase concentration in the western United States by more than 1,600 points to an HHI level above 3,400.

Entry Conditions

35. Entry into the relevant lines of commerce in the relevant sections of the country is difficult and would not be timely, likely or sufficient to prevent anticompetitive effects resulting from the proposed merger.

IV. VIOLATIONS CHARGED

First Violation Charged

36. Chevron and Texaco are competitors in the marketing of gasoline in the following relevant sections of the country: (a) the western United States (excluding California), including the States of Arizona, Idaho, Nevada, New Mexico, Oregon, Utah, Washington, and Wyoming, and smaller areas contained therein, including, but not limited to, the following metropolitan areas: Phoenix and Tucson, AZ; Boise, ID; Las Vegas and Reno, NV; Albuquerque-Santa Fe, NM; Eugene, Klamath Falls-Medford, and Portland, OR; Salt Lake City, UT; Seattle-Tacoma, Spokane, and Yakima, WA; and Casper-Riverton, WY; (b) the southern United States, including the States of Alabama,

Florida, Georgia, Kentucky, Louisiana, Mississippi, North Carolina, Oklahoma, Tennessee, Texas, Virginia, and West Virginia, and smaller areas contained therein, including, but not limited to, the following metropolitan areas: Anniston, Birmingham, Decatur-Huntsville, Dothan, and Montgomery, AL; Mobile-Pensacola, AL/FL; Fort Lauderdale-Miami, Fort Pierce-West Palm Beach, Gainesville, and Panama City, FL; Albany, Atlanta, Columbus, Macon, and Savannah, GA; Lexington and Paducah, KY; Alexandria, Baton Rouge, El Dorado-Monroe, Lafayette, Lake Charles, New Orleans, and Shreveport, LA; Biloxi-Gulfport, Columbus-Tupelo-West Point, Hattiesburg-Laurel, Jackson, and Meridian, MS; Greenville-New Bern-Washington, NC; Ada-Ardmore, OK; Lawton-Wichita Falls, OK/TX; Chattanooga, TN; Bristol-Johnson City-Kingsport, TN/VA; Abilene-Sweetwater, Amarillo, Austin, Beaumont-Port Arthur, Brownsville-Harlingen-Weslaco, Corpus Christi, Dallas, El Paso, Fort Worth, Houston, Lubbock, Midland-Odessa, San Angelo, San Antonio, Temple-Waco, and Tyler, TX; Lynchburg-Roanoke and Petersburg-Richmond, VA; and Beckley-Bluefield-Oak Hill, WV; (c) the State of Alaska, and smaller areas contained therein, including, but not limited to, Anchorage, Fairbanks, and the southeastern towns of Juneau, Ketchikan, and Sitka; and (d) the State of Hawaii, and smaller areas contained therein, including, but not limited to, the islands of Hawaii, Kauai, Maui, and Oahu.

37. The effect of the proposed merger, if consummated, may be substantially to lessen competition in the marketing of gasoline in the relevant sections of the country identified in the previous paragraph, 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 in the marketing of gasoline between Chevron and Texaco; and

b. by increasing the likelihood of, or facilitating, collusion or coordinated interaction between the combination of Chevron and Texaco and their competitors in the relevant sections of the country;

each of which increases the likelihood that the price of gasoline will increase in the relevant sections of the country.

Second Violation Charged

38. Chevron and Texaco are competitors in the marketing of CARB gasoline for sale in the State of California, and smaller areas contained therein, including, but not limited to, the following metropolitan areas: Bakersfield, Chico-Redding, Fresno-Visalia, Los Angeles, Modesto-Sacramento-Stockton, Monterey-Salinas, Oakland-San Francisco-San Jose, Palm Springs, San Diego, and San Luis Obispo-Santa Barbara-Santa Maria.

39. The effect of the proposed merger, if consummated, may be substantially to lessen competition in the marketing of CARB gasoline for sale in the State of California, and smaller areas contained therein, 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 in the marketing of CARB gasoline between Chevron and Texaco;

b. by increasing the likelihood that the combination of Chevron and Texaco will unilaterally exercise market power; and

c. by increasing the likelihood of, or facilitating, collusion or coordinated interaction between the combination of Chevron and Texaco and their competitors in California;

each of which increases the likelihood that the price of CARB gasoline will increase in the relevant sections of the country.

Third Violation

40. Chevron and Texaco are competitors in the refining and bulk supply of CARB gasoline for sale in the State of California.

41. The effect of the proposed merger, if consummated, may be substantially to lessen competition in the refining and bulk supply of CARB gasoline for sale in the State of California, 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 in the refining and bulk supply of CARB gasoline between Chevron and Texaco;

    b. by increasing the likelihood that the combination of Chevron and Texaco will unilaterally exercise market power; and

    c. by increasing the likelihood of, or facilitating, collusion or coordinated interaction between the combination of Chevron and Texaco and their competitors in California;

    each of which increases the likelihood that the price of CARB gasoline will increase in the relevant section of the country.

Fourth Violation

42. Chevron and Texaco are competitors in the refining and bulk supply of gasoline and jet fuel in the Pacific Northwest, *i.e.,* the States of Washington and Oregon west of the Cascade mountains.

43. The effect of the proposed merger, if consummated, may be substantially to lessen competition in the refining and bulk supply of gasoline and jet fuel in the Pacific Northwest, 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 in the refining and bulk supply of gasoline and jet fuel between Chevron and Texaco; and

b. by increasing the likelihood of, or facilitating, collusion or coordinated interaction between the combination of Chevron and Texaco and their competitors in the Pacific Northwest;

each of which increases the likelihood that the price of gasoline and jet fuel will increase in the relevant section of the country.

Fifth Violation Charged

44. Chevron and Texaco (directly and indirectly through Equilon) each hold substantial interests in the market for the bulk supply of RFG II in the St. Louis metropolitan area.

45. The effect of the proposed merger, if consummated, may be substantially to lessen competition in the market for the bulk supply of RFG II in the St. Louis metropolitan area, 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 Chevron and Texaco in the bulk supply of RFG II in the St. Louis metropolitan area; and

b. by increasing the likelihood of, or facilitating, collusion or coordinated interaction between the combination of Chevron and Texaco/Equilon and their competitors in the bulk supply of RFG II in the St. Louis metropolitan area;

each of which increases the likelihood that the price of bulk supply of RFG II in the St. Louis metropolitan area will increase.

Sixth Violation Charged

46. Chevron and Texaco are competitors in the terminaling of gasoline and other light petroleum products in the metropolitan areas of Phoenix and Tucson, AZ; San Diego and Ventura, CA; Collins, MS; and El Paso, TX; and the islands of Hawaii, Kauai, Maui, and Oahu, HI.

47. The effect of the proposed merger, if consummated, may be substantially to lessen competition in the terminaling of gasoline and other light petroleum products in the relevant areas identified in the previous paragraph, 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 in the terminaling of gasoline and other light petroleum products between Chevron and Texaco;

b. by increasing the likelihood that the combination of Chevron and Texaco will unilaterally exercise market power; and

c. by increasing the likelihood of, or facilitating, collusion or coordinated interaction between the combination of Chevron and Texaco and their competitors in the

terminaling of gasoline and other light petroleum products in the relevant areas;

each of which increases the likelihood that the price for terminaling of gasoline and other light petroleum products will increase in the relevant sections of the country.

Seventh Violation Charged

48. Chevron and Texaco are competitors in the pipeline transportation of crude oil from the San Joaquin Valley in California.

49. The effect of the proposed merger, if consummated, may be substantially to lessen competition in the pipeline transportation of crude oil from the San Joaquin Valley 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 in the pipeline transportation of crude oil between Chevron and Texaco; and

b. by increasing the likelihood of, or facilitating, collusion or coordinated interaction between the combination of Chevron and Texaco and their competitors for the pipeline transportation of crude oil from the San Joaquin Valley;

each of which increases the likelihood that the price of crude oil pipeline transportation will increase in the relevant section of the country.

Eighth Violation Charged

50. Chevron and Texaco are competitors in the pipeline transportation of crude oil from portions of the Eastern Gulf of Mexico to on-shore terminals.

51. The effect of the proposed merger, if consummated, may be substantially to lessen competition in the pipeline transportation of crude oil from portions of the Eastern Gulf of Mexico to on-shore terminals 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 in the pipeline transportation of crude oil between Chevron and Texaco; and

    b. by increasing the likelihood that the combination of Chevron and Texaco will unilaterally exercise market power;

    each of which increases the likelihood that the price of crude oil pipeline transportation will increase in the relevant sections of the country.

Ninth Violation Charged

52. Chevron and Texaco are competitors for the pipeline transportation of offshore natural gas to shore from certain locations in the Central Gulf of Mexico, including the South Timbalier and Grand Isle Areas, and their South Additions, as defined by the Department of Interior Minerals Management Service, including, but not limited to, South Timbalier Blocks 30, 37, 38, 44, 45, 58, 59, 61-63, 86-88, 123-35, 151-53, 157, 158, 178-80, 185-87, 205-08; South

Timbalier South Addition Blocks 223-27, 231, 233-37, 248, 251, 256, and 257; Grand Isle Blocks 52, 53, 59, 62, 63, 70-76, 84, and 85; and Grand Isle South Addition Block 86.

53. The effect of the proposed merger, if consummated, may be substantially to lessen competition in offshore pipeline transportation of natural gas from the relevant areas identified in the previous paragraph, 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 Chevron and Texaco in the pipeline transportation of offshore natural gas;

b. by increasing the likelihood of, or facilitating, collusion or coordinated interaction between the combination of Chevron and Texaco and their competitors for the pipeline transportation of offshore natural gas; and

c. by increasing the likelihood that the combined Chevron and Texaco will unilaterally exercise market power;

each of which increases the likelihood that the price of offshore natural gas pipeline transportation will increase in the relevant sections of the country.

Tenth Violation Charged

54. Chevron and Texaco, either directly or through affiliates, each have ownership or financial interests in competing facilities used for the fractionation of natural gas liquids raw mix into natural gas liquids specification products at Mont Belvieu, Texas. By virtue of its ownership interest in one fractionator, Texaco obtains confidential information about the operations of that fractionator and also can affect the outcome of voting among owners of the fractionator.

Texaco's ownership interest in the fractionator gives Texaco the ability to prevent competition from that fractionator against the other fractionators at Mont Belvieu in which Chevron has a financial interest.

55. The effects of the acquisition, if consummated, may be substantially to lessen competition in the fractionation of natural gas liquids in the vicinity of Mont Belvieu 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 direct competition between Texaco and Chevron's affiliate Dynegy in the fractionation of natural gas liquids;

b. by providing Chevron's affiliate Dynegy with access to sensitive competitive information from one of its most important competitors at Mont Belvieu;

c. by providing Chevron, through its control of Texaco's voting at the fractionator in which Texaco has an interest, with the ability to prevent competition from that fractionator against the other fractionators in Mont Belvieu in which Chevron's affiliate Dynegy has an interest; and

d. by increasing the likelihood that the combination of Chevron and Texaco will unilaterally exercise market power;

each of which increases the likelihood that prices will increase for fractionation services in the vicinity of Mont Belvieu.

Eleventh Violation Charged

56. Chevron and Texaco are competitors in the marketing of aviation fuel to general aviation customers in the western United States, consisting of the States of Alaska, Arizona,

California, Idaho, Nevada, Oregon, Utah, and Washington, and smaller areas contained therein; and the southeastern United States, consisting of the States of Alabama, Florida, Georgia, Louisiana, Mississippi, and Tennessee, and smaller areas contained therein.

57. The effect of the proposed merger, if consummated, may be substantially to lessen competition in the marketing of aviation fuel to general aviation customers in the western United States, the southeastern United States, and in smaller areas contained therein, 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 Chevron and Texaco in the marketing of aviation fuel to general aviation customers;

b. by increasing the likelihood that the combination of Chevron and Texaco will unilaterally exercise market power; and

c. by increasing the likelihood of, or facilitating, collusion or coordinated interaction between the combination of Chevron and Texaco and their competitors in the relevant sections of the country;

each of which increases the likelihood that the price of aviation fuel will increase in the relevant sections of the country.

Statutes Violated

58. The proposed merger between Chevron and Texaco violates Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45, and would, if consummated,

violate Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18, and Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45.

WHEREFORE, THE PREMISES CONSIDERED, the Federal Trade Commission on this seventh day of September, 2001, issues its complaint against said Respondents.

By the Commission, Chairman Muris recused.

DECISION AND ORDER

The Federal Trade Commission ("Commission") having initiated an investigation of the proposed merger (the "Merger") of Respondent Chevron Corporation ("Chevron") and Respondent Texaco Inc. ("Texaco"), 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 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 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 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, 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 Chevron is a corporation organized, existing and doing business under and by virtue of the laws of the state of Delaware, with its office and principal place of business located at 575 Market Street, San Francisco, CA 94105.

2. Respondent Texaco 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 2000 Westchester Ave., White Plains, NY 10650.

3. The 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. "Chevron" means Chevron Corporation, its directors, officers, employees, agents, representatives, predecessors, successors, and assigns; its joint ventures, subsidiaries, divisions, groups, and affiliates controlled by Chevron, and the respective directors, officers, employees, agents, representatives, successors, and assigns of each.

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

C. "Avfuel" means Avfuel Corporation, a corporation organized, existing and doing business under and by virtue of the laws of the state of Michigan, with its office and principal place of business located at 47 West Ellsworth, Ann Arbor, Michigan 48108.

D. "Aviation Fuel" means Aviation Gasoline and Jet Fuel.

E. "Aviation Fuel Divestiture Agreement" means all agreements entered into between Respondents and AvFuel relating to the sale of Texaco's Overlap General Aviation Business Assets, including but not limited to the Purchase and Sale Agreement, the Trademark License Agreement, all supply agreements, and all other ancillary agreements, dated August 7, 2001, and attached hereto as Confidential Appendix B to this Order.

F. "Aviation Gasoline" or "AvGas" means gasoline intended for aviation use that meets the specifications set forth by the American Society for Testing and Materials, ASTM specification D910.

G. "Aviation Marketing Agreements" means all agreements or contracts between Texaco and any Person relating to such Person's right or obligation to sell, resell or distribute Aviation Fuel under the Texaco brand.

H. "Aviation Overlap State" means each of the following states: Alabama, Alaska, Arizona, California, Florida, Georgia, Idaho, Louisiana, Mississippi, Nevada, Oregon, Tennessee, Utah, and Washington.

I. "Aviation Supply Agreements" means all agreements or contracts between Texaco and any Person relating to an obligation to sell or supply Aviation Fuel to Texaco, including but not limited to supply agreements and exchange agreements.

J. "Aviation Terminal" means a facility that provides temporary storage of Aviation Fuel received from a pipeline, marine vessel, truck or railway and the redelivery of Aviation Fuel from storage tanks into tank trucks, transport trailers or railcars.

K. "Aviation Terminal Throughput Agreements" means all agreements or contracts between Texaco and any Person relating to Texaco's right to use or have another Person use any tanks, equipment, pipelines, trucks, or other services or facilities at an Aviation Terminal.

L. "Aviation Transportation Agreements" means all agreements or contracts between Texaco and any Person relating to the transportation of Aviation Fuel.

M. "Change of Control Provisions" means Section 12.04 of the Equilon LLC Agreement or the Motiva LLC Agreement.

N. "Concentration Levels" means market concentration, measured in annual volume (gallons) sold (or, if volume in gallons is not available, other standard industry measures), as determined by the Herfindahl Hirschmann Index.

O. "Disclose" means to convey by any means or otherwise make available information to any person or persons.

P. "Discovery Producer Services LLC" means the limited liability company established by the Second Amended and Restated Limited Liability Company Agreement dated May 15, 1998, between and among Texaco Discovery Holdings LLC, Mapco Energy L.L.C., and British-Borneo Pipeline LLC.

Q. "Discovery System" means Discovery Producer Services LLC, and all of its assets, including but not limited to Discovery Gas Transmission LLC and all of its assets, and including all pipelines of the system that transport natural gas offshore of Louisiana and onshore to the processing plant at LaRose, Louisiana; the processing plant at Larose, Louisiana; all pipelines that transport natural gas between the processing plant and natural gas transmission pipelines; all pipelines that transport raw mix between the processing plant and the fractionating plant at Paradis, Louisiana; the fractionating plant at Paradis, Louisiana; and equipment including but not limited to condensate stabilization facilities and pumping stations.

R. "Divestiture Trustee" means a trustee appointed pursuant to Paragraph III.B. of this Order with the obligation to divest TRMI and/or TRMI East pursuant to this Order.

S. "Enterprise Fractionating Plant" means the fractionating plant at Mont Belvieu, Texas, operated by Enterprise Products Company and partially owned by Texaco.

T. "Equilon" means Equilon Enterprises LLC, a joint venture formed pursuant to the Equilon LLC Agreement.

U. "Equilon Interest" means all of the ownership interests in Equilon owned directly or indirectly by Texaco, including the interests owned by TRMI and its wholly owned subsidiaries, Texaco Convent Refining Inc., and Texaco Anacortes Cogeneration Company.

V. "Equilon LLC Agreement" means the Limited Liability Company Agreement of Equilon Enterprises LLC dated as of January 15, 1998 among certain subsidiaries of Shell and Texaco, as amended.

W. "General Aviation Business Agreements" means all Aviation Supply Agreements, Aviation Terminal Throughput Agreements, Aviation Transportation Agreements, Aviation Marketing Agreements, and all other agreements or contracts related to Texaco's Domestic General Aviation Business, including but not limited to aviation retail sales agreements, aviation fuel agreements, aviation dealer support agreements, customer agreements, credit card agreements, distributor agreements, marketer agreements, supply agreements, rail contracts, railcar lease agreements, barge agreements, refueler agreements, loans, grants, or leases.

X. "Jet Fuel" means fuel intended for use in jet airplanes that meets the specifications set forth by the American Society for Testing and Materials, ASTM specification D1655.

Y. "JV Agreements" means the Equilon LLC Agreement and the Motiva LLC Agreement.

Z. "Members Committee" means the "Members Committee" as defined in Section 6.03 of the Equilon LLC Agreement and the Motiva LLC Agreement.

AA. "Merger" means any merger between Respondents, including the proposed merger contemplated by the Agreement and Plan of Merger dated October 15, 2000, as amended, among Respondents and Keepep Inc.

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

CC. "Metropolitan Area" means any Metropolitan Area (including Metropolitan Statistical Areas, Consolidated Metropolitan Statistical Areas, or Primary Metropolitan Statistical Areas) as defined by the U.S. Office of Management and Budget.

DD. "Motiva" means Motiva Enterprises LLC, a joint venture formed pursuant to the Motiva LLC Agreement.

EE. "Motiva Interest" means all of the ownership interests in Motiva owned directly or indirectly by Texaco, including the interest owned by TRMI East.

FF. "Motiva LLC Agreement" means the Limited Liability Company Agreement of Motiva Enterprises LLC dated as of July 1, 1998, among Shell, Shell Norco Refining Company, SRI and TRMI East.

GG. "Non-Public Equilon Or Motiva Information" means any information not in the public domain relating to Equilon or Motiva.

HH. "Operating Trustee" means each trustee appointed pursuant to Paragraph III.O. of this Order with the obligation to manage TRMI and/or TRMI East pursuant to this Order.

II. "Person" means any individual, partnership, firm, trust, association, corporation, joint venture, unincorporated organization, or other business or governmental entity.

JJ. "Relevant OCS Area" means the Grand Isle, Grand Isle South, South Timbalier, and South Timbalier South areas as defined by the Department of Interior Minerals Management Service.

KK. "Respondents" means Chevron and Texaco, individually and collectively, and any successors.

LL. "Section of the Country" means a Metropolitan Area in those cases where the retail outlets that Respondents have agreed to supply pursuant to Paragraph IV.F. are located in a Metropolitan Area, or a county in those cases where the retail outlets that Respondents have agreed to supply are located outside of a Metropolitan Area.

MM. "Shell" means Shell Oil Company, a Delaware corporation, with its principal place of business located at One Shell Plaza, Houston, Texas 77002, its parents, and its subsidiaries controlled by Shell.

NN. "SRI" means Saudi Refining, Inc., a Delaware corporation, with its principal place of business located at 9009 West Loop South, Houston, TX 77210, its parents, and its subsidiaries controlled by SRI.

OO. "Substitute Aviation Fuel Divestiture Agreement" means an agreement, other than the Aviation Fuel

Divestiture Agreement, approved by the Commission, for the divestiture of Texaco's Domestic General Aviation Business Assets to an acquirer approved by the Commission.

PP. "Texaco-Williams Contract" means the Product Sale, Purchase and Exchange Agreement dated February 1, 1997, between Mapco Energy L.L.C. and Bridgeline Gas Distribution LLC.

QQ. "Texaco's Domestic General Aviation Business" means the supply, distribution, marketing, transportation, and sale of Aviation Fuel by Texaco on a direct or distributor basis to customers (other than commercial airlines and military) in the United States (including the Aviation Overlap States), including but not limited to fixed base operators, airport dealers, distributors, jobbers, resellers, brokers, corporate accounts, or consumers.

RR. "Texaco's Domestic General Aviation Business Assets" means all assets, tangible or intangible, relating to Texaco's Domestic General Aviation Business in the United States, including but not limited to all General Aviation Business Agreements used in or relating to Texaco's Domestic General Aviation Business.

SS. "Texaco's Overlap General Aviation Business" means the supply, distribution, marketing, transportation, and sale of Aviation Fuel by Texaco on a direct or distributor basis to customers (other than commercial airlines and military) in the Aviation Overlap States, including but not limited to fixed base operators, airport dealers, distributors, jobbers, resellers, brokers, corporate accounts, or consumers, but excluding the assets

and agreements set forth on Schedule 2.3(c) of the Aviation Fuel Divestiture Agreement.

TT. "Texaco's Overlap General Aviation Business Assets" means all assets, tangible or intangible, relating to Texaco's Overlap General Aviation Business, including but not limited to all General Aviation Business Agreements used in or relating to Texaco's Overlap General Aviation Business, but excluding the assets and agreements set forth on Schedule 2.3(c) of the Aviation Fuel Divestiture Agreement.

UU. "TRMI" means Texaco Refining and Marketing Inc., a Delaware corporation and an indirect wholly owned subsidiary of Texaco, and its subsidiary, Texaco Convent Refining Inc., and Texaco's interest in all other subsidiaries, divisions, groups, joint ventures, or affiliates of Texaco that own or control any ownership interest in Equilon.

VV. "TRMI East" means Texaco Refining and Marketing (East) Inc., a Delaware corporation and an indirect wholly owned subsidiary of Texaco, and Texaco's interest in all other subsidiaries, divisions, groups, joint ventures, or affiliates of Texaco that own or control any ownership interest in Motiva.

WW. "Trust" means the trust established by the Trust Agreement.

XX. "Trust Agreement" means the Agreement and Declaration of Trust approved by the Commission and attached hereto and made part hereof as Appendix A to this Order.

YY. "Venice System" means Venice Energy Services Company, L.L.C., and all of its assets, including but not limited to (i) natural gas processing, fractionation and natural gas liquids storage and terminaling facilities at the Venice Complex (as that term is defined in the Second Amended and Restated Limited Liability Company Agreement of Venice Energy Services Company, L.L.C.), (ii) onshore and offshore natural gas pipelines upstream from the Venice Complex, known as the Venice Gathering System, (iii) compression, separation, dehydration, and residue gas and liquid gas handling facilities at or associated with the Venice Complex (excluding any residue gas pipelines and metering facilities owned by the downstream pipelines), and (iv) natural gas liquids facilities (excluding natural gas liquids pipelines downstream from the Venice Complex) related to such processing, fractionation, storage and termination facilities.

I.

IT IS FURTHER ORDERED that:

A. Respondents shall divest:

1. either (a) the Equilon Interest to Shell no later than the Merger Date, in a manner that receives the prior approval of the Commission, or (b) no later than eight (8) months after the Merger Date, in a manner that receives the prior approval of the Commission, either (i) the Equilon Interest to Shell or (ii) TRMI, absolutely and in good faith, at no minimum price, to an acquirer or acquirers that receive the prior approval of the Commission; and

2. either (a) the Motiva Interest to Shell and/or SRI no later than the Merger Date, in a manner that receives the prior approval of the Commission, or (b) no later than eight (8) months after the Merger Date, in a manner that receives the prior approval of the Commission, either (i) the Motiva Interest to Shell and/or SRI or (ii) TRMI East, absolutely and in good faith, at no minimum price, to an acquirer or acquirers that receive the prior approval of the Commission.

Such divestitures shall be accomplished by Respondents prior to or on the Merger Date or, after the Merger Date, by the Divestiture Trustee pursuant to the provisions of Paragraph III. of this Order or as otherwise approved by the Commission.

B. Respondents shall not consummate the Merger unless and until Texaco:

1. has either (a) divested the Equilon Interest pursuant to Paragraph II.A.1.(a) of this Order or (b) transferred TRMI to the Trust pursuant to Paragraph III. of this Order;

and

2. has either (a) divested the Motiva Interest pursuant to Paragraph II.A.2.(a) of this Order or (b) transferred TRMI East to the Trust pursuant to Paragraph III. of this Order.

Provided, however, if Texaco has triggered the Change of Control Provisions pursuant to either or both of the JV Agreements, then the transfer by Respondents to the Trust of TRMI and/or TRMI East shall not prevent Shell and/or SRI from exercising any rights they may have under the applicable JV Agreement to acquire the

Equilon Interest and/or the Motiva Interest pursuant to the valuation process described in Sections 12.04 and 12.05 of the JV Agreement; further, should Shell and/or SRI decline to exercise their rights to acquire the Equilon Interest and/or the Motiva Interest pursuant to Section 12.04 of the applicable JV Agreement, then Shell and/or SRI shall not be precluded, as a result of the transfer to the Trust or as a result of Shell and/or SRI declining to exercise their rights, from offering to acquire either the Equilon Interest or TRMI and/or the Motiva Interest or TRMI East pursuant to Paragraph III. of this Order.

C. If the Trust is rescinded, unwound, dissolved, or otherwise terminated at any time after the Merger but before Respondents have complied with Paragraph II.A. of this Order, then Respondents shall immediately upon such rescission, unwinding, dissolution, or termination, hold TRMI and TRMI East separate and apart from Respondents pursuant to the Order to Hold Separate and Maintain Assets issued in this matter.

D. The purpose of these divestitures is to ensure the continuation of Equilon and Motiva as ongoing, viable businesses engaged in the same businesses as Equilon and Motiva are presently engaged, to ensure the ownership of the Equilon Interest (or TRMI) and the Motiva Interest (or TRMI East) by a person other than Respondents that has been approved by the Commission, and to remedy the lessening of competition resulting from the Merger as alleged in the Commission's Complaint.

III.

IT IS FURTHER ORDERED that, if Respondents have not divested the Equilon Interest to Shell and/or the Motiva Interest to Shell and/or SRI pursuant to the requirements of Paragraph II. of this Order on or before the Merger Date:

A. Texaco shall, on or before the Merger Date: (1) enter into the Trust Agreement, and (2) transfer or

cause to be transferred (a) TRMI to the Trust if the Equilon Interest has not been divested to Shell, and/or (b) TRMI East to the Trust if the Motiva Interest has not been divested to Shell and/or SRI. Simultaneously with the Merger, Texaco shall cause its representatives to resign from the Members Committee of Equilon and Motiva.

B. Respondents shall agree to the appointment of Robert A. Falise as Divestiture Trustee and enter into the Trust Agreement no later than the Merger Date.

C. No later than the Merger Date, Respondents shall transfer to the Divestiture Trustee the sole and exclusive power and authority to divest TRMI and/or TRMI East or to divest the Equilon Interest to Shell and/or the Motiva Interest to Shell and/or SRI, consistent with the terms of Paragraph II. of this Order and subject to the prior approval of the Commission. After such transfer, the Divestiture Trustee shall have the sole and exclusive power and authority to divest such assets or interests, subject to the prior approval of the Commission, and the Divestiture Trustee shall exercise such power and authority and carry out the duties and responsibilities of the Divestiture Trustee in a manner consistent with the purposes of this Order in consultation with the Commission's staff.

D. The Divestiture Trustee shall have eight (8) months from the Merger Date to accomplish the divestitures required by Paragraph II. of this Order, which shall be subject to the prior approval of the Commission. If, however, at the end of the eight-month period, the Divestiture Trustee has submitted a plan of divestiture or believes that divestiture can be achieved within a reasonable time, the Divestiture Trustee's divestiture period

may be extended by the Commission. An extension of time by the Commission under this subparagraph shall not preclude the Commission from seeking any relief available to it for any failure by Respondents to divest the Equilon Interest or TRMI and/or the Motiva Interest or TRMI East consistent with the requirements of Paragraph II. of this Order.

E. If, on or prior to the Merger Date, Texaco has executed but has not consummated an agreement or agreements to divest the Equilon Interest to Shell and/or the Motiva Interest to Shell and/or SRI, and the Commission has approved such agreement or agreements, then Texaco shall, no later than the Merger Date, assign such agreement or agreements to the Trust and grant sole and exclusive authority to the Divestiture Trustee to consummate any divestiture contemplated thereby.

F. The Divestiture Trustee shall divest the Equilon Interest to Shell and/or the Motiva Interest to Shell and/or SRI, in a manner that receives the prior approval of the Commission, pursuant to the terms of the applicable agreement or agreements approved by the Commission, if either (1) Texaco has executed an agreement or agreements with Shell and/or SRI with respect to such divestiture or divestitures prior to the Merger Date, and such agreement or agreements have been approved by the Commission and have not been breached by Shell and/or SRI; or (2) Shell has exercised its right to acquire the Equilon Interest pursuant to the Equilon LLC Agreement and/or Shell and/or SRI have exercised their rights to acquire the Motiva Interest pursuant to the Motiva LLC Agreement.

G. Subject to Respondents' absolute and unconditional obligation to divest expeditiously at

no minimum price, the Divestiture Trustee shall use his or her best efforts to negotiate the most favorable price and terms available for the divestiture of (1) TRMI if the Divestiture Trustee has not divested the Equilon Interest pursuant to subparagraph F. of this Paragraph and/or (2) TRMI East if the Divestiture Trustee has not divested all or part of the Motiva Interest pursuant to subparagraph F. of this Paragraph. Each divestiture shall be made only in a manner that receives the prior approval of the Commission, and, unless the acquirers are Shell and/or SRI, the divestiture shall be made only to an acquirer or acquirers that receive the prior approval of the Commission; provided, however, if the Divestiture Trustee receives bona fide offers from more than one acquiring entity, and if the Commission determines to approve more than one such acquiring entity, the Divestiture Trustee shall divest to the acquiring entity or entities selected by Respondents from among those approved by the Commission; provided further, however, that Respondents shall select such entity within five (5) days of receiving notification of the Commission's approval.

H. The Divestiture Trustee shall have full and complete access to all personnel, books, records, documents, and facilities of Respondents, TRMI and TRMI East, as needed to fulfill the Divestiture Trustee's obligations, or to any other relevant information, as the Divestiture Trustee may reasonably request, including but not limited to all documents and records kept in the normal course of business that relate to Respondents' obligations under this Order. Respondents or the Operating Trustees, as appropriate, 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 ability to perform his or her responsibilities.

I. 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 may set. The Divestiture Trustee shall have the authority to employ, at the cost and expense of Respondents, such financial advisors, consultants, accountants, attorneys, and other representatives and assistants as are reasonably necessary to carry out the Divestiture Trustee's duties and responsibilities.

J. 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 misfeasance, gross negligence, willful or wanton acts, or bad faith by the Divestiture Trustee.

K. The Divestiture Trustee shall account for all monies derived from the sale and all expenses incurred, subject to the approval of the Commission. After approval by the Commission of the account of the Divestiture Trustee, all remaining monies shall be paid as directed in the Trust Agreement, and the Divestiture Trustee's powers shall be terminated.

L. The Divestiture Trustee shall report in writing to the Commission thirty (30) days after the Merger Date and every thirty (30) days thereafter concerning the Divestiture Trustee's efforts to accomplish the requirements of this Order until such time as the divestitures required by Paragraph II. of this Order have been accomplished and Respondents have notified the Commission that the divestitures have been accomplished.

M. If, for any reason, Robert A. Falise cannot serve or cannot continue to serve as Divestiture Trustee, or fails to act diligently, the Commission shall select a replacement Divestiture Trustee, subject to the consent of Respondents, which consent shall not be unreasonably withheld. If Respondents have not opposed, in writing, including the reasons for opposing, the selection of any replacement Divestiture Trustee within ten (10) days after notice by the staff of the Commission to Respondents of the identity of any proposed replacement Divestiture Trustee, Respondents shall be deemed to have consented to the selection of the proposed replacement Divestiture Trustee. The replacement Divestiture Trustee shall be a person with experience and expertise in acquisitions and divestitures.

N. The Commission 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 assure compliance with the requirements of this Order.

O. Respondents shall agree to the appointment of Joe B. Foster as Operating Trustee of TRMI (with respect to the Equilon Interest) and John Linehan as Operating Trustee of TRMI East (with respect to

the Motiva Interest) and enter into the Trust Agreement no later than the Merger Date.

P. The Operating Trustees shall have sole and exclusive power and authority to manage TRMI and/or TRMI East (as the case may be), as set forth in the Trust Agreement and specifically to cause TRMI and TRMI East respectively to exercise the rights of TRMI and TRMI East under the Equilon and Motiva LLC Agreements. Each Operating Trustee may engage in any other activity such Operating Trustee may deem reasonably necessary, advisable, convenient or incidental in connection therewith and shall exercise such power and authority and carry out the duties and responsibilities of the Operating Trustee in a manner consistent with the purposes of this Order in consultation with the Commission's staff.

Q. Each Operating Trustee shall have full and complete access to all personnel, books, records, documents, and facilities of TRMI and/or TRMI East as needed to fulfill such Operating Trustee's obligations, or to any other relevant information, as such Operating Trustees may reasonably request, including but not limited to all documents and records kept in the normal course of business that relate to Respondents' obligations under this Order. Respondents shall develop such financial or other information as such Operating Trustees may reasonably request and shall cooperate with the Operating Trustees. Respondents shall take no action to interfere with or impede the Operating Trustees' ability to perform his or her responsibilities.

R. The Operating Trustees 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 may set. Each Operating Trustee shall have the authority to employ, at the cost and expense of Respondents, such consultants, accountants, attorneys, and other representatives and assistants as are reasonably necessary to carry out such Operating Trustee's duties and responsibilities.

S. Respondents shall indemnify each Operating Trustee and hold each Operating Trustee harmless against any losses, claims, damages, liabilities, or expenses arising out of, or in connection with, the performance of such Operating 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 such Operating Trustee.

T. The Operating Trustees shall account for all expenses incurred, including fees for his or her services, subject to the approval of the Commission.

U. Each Operating Trustee shall report in writing to the Commission thirty (30) days after the Merger Date and every thirty (30) days thereafter concerning the Operating Trustee's performance of his or her duties under this Order and the Trust Agreement. The Operating Trustees shall serve until such time as Respondents have complied with their obligation to divest TRMI and/or TRMI East as required by this Order and Respondents have notified the Commission that the divestitures have been accomplished.

V. If for any reason Joe B. Foster cannot serve or cannot continue to serve as Operating Trustee of TRMI or John Linehan cannot serve or cannot continue to serve as Operating Trustee of TRMI East, or fails to act diligently, the Commission shall select a replacement Operating Trustee, subject to the consent of Respondents, which consent shall not be unreasonably withheld. If Respondents have not opposed, in writing, including the reasons for opposing, the selection of any replacement Operating Trustee within ten (10) days after notice by the staff of the Commission to Respondents of the identity of any proposed replacement Operating Trustee, Respondents shall be deemed to have consented to the selection of the proposed replacement Operating Trustee. The replacement Operating Trustee shall be a person with experience and expertise in the management of businesses of the type engaged in by Equilon and Motiva.

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

X. Except as provided herein or in the Trust Agreement, neither the Divestiture Trustee nor the Operating Trustees shall disclose any Non-Public Equilon Or Motiva Information to an employee of Respondents.

Y. Respondents may require the Divestiture Trustee or Operating Trustees to sign a confidentiality agreement prohibiting the disclosure of any information gained as a result of his or her role as Divestiture Trustee or Operating Trustee to anyone other than the Commission.

Z. The purpose of this Paragraph III. is to effectuate the divestitures required by Paragraph II. of this Order and to maintain operation of TRMI, TRMI East, Equilon and Motiva separate and apart from Respondents' operations pending the required divestitures.

IV.

IT IS FURTHER ORDERED that:

A. Respondents shall offer to extend the license provided to Equilon and Motiva, on terms and conditions comparable to those in existence as of the date the Consent Agreement is executed by Respondents, for the use of the Texaco brand for the marketing of motor fuels until June 30, 2002 for Equilon and until June 30, 2003, for Motiva (the "Brand License Date"). Provided however, the license for the marketing of motor fuels shall be provided on an exclusive basis in those areas of the United States where Equilon and Motiva respectively are currently licensed to market motor fuels.

B. For the purposes of this Paragraph IV., "Waives and Releases" shall mean to waive and release: (1) all amounts any Texaco branded dealer or wholesale marketer may be required to pay under any Facility Development Incentive Program Agreement (or any other agreement requiring that such dealer or marketer reimburse Equilon or Motiva) in existence as of the date the Commission accepts this Order for public comment, which amounts become due (or which Equilon or Motiva contends become due) as a result of the loss of the Texaco brand at any retail outlet; and (2) all deed restrictions prohibiting or restricting the sale of motor fuel not sold by Equilon or Motiva at any Texaco retail outlet for which Equilon or Motiva has not executed an agreement for the sale of Shell branded gasoline on or before the Brand License Date.

C. If Equilon Waives and Releases the amounts and deed restrictions set forth in Paragraph IV.B., Texaco shall further offer (1) to extend the license set forth in Paragraph IV.A. to Equilon on an exclusive basis until June 30, 2003 (which shall then become the new "Brand License Date" for Equilon), and (2) to extend the license on a nonexclusive basis for up to an additional three (3) years, until June 30, 2006, on terms and conditions comparable to those in existence as of the date the Consent Agreement is executed by Respondents, for all retail outlets for which Equilon has executed agreements with such retail outlets on or before the Brand License Date for the conversion of such retail outlets to the Shell brand.

D. If Motiva Waives and Releases the amounts and deed restrictions set forth in Paragraph IV.B., Texaco shall further offer to extend the license set forth in Paragraph IV.A. to Motiva on a nonexclusive basis for up to an additional three (3) years, until June 30, 2006, on terms and conditions comparable to those in existence as of the date the Consent Agreement is executed by Respondents, for all retail outlets for which Motiva has executed agreements with such retail outlets on or before the Brand License Date for the conversion of such retail outlets to the Shell brand.

E. If either Equilon or Motiva does not Waive and Release the amounts set forth in Paragraph IV.B., Respondents shall indemnify each Texaco dealer and wholesale marketer for all amounts such dealer or marketer may be required to pay under any Facility Development Incentive Program Agreement (or any other agreement requiring that such dealers or marketers reimburse Equilon or Motiva) in existence as of the date the Commission accepts this Order for public comment, which amounts become due (or which Equilon or Motiva contends become due) as a result of the loss of the Texaco brand at any retail outlet, together with any reasonable litigation or

arbitration expenses incurred by such dealer or marketer in contesting or defending against such payment, provided that (1) the dealer or marketer has declined a request for payment from Equilon or Motiva, (2) Equilon or Motiva has commenced litigation or arbitration to compel payment, and (3) the dealer or marketer has, at the Respondents' option, either (a) vigorously defended the litigation or arbitration or (b) afforded Respondents the right to defend the litigation or arbitration on the dealer's or marketer's behalf. Provided further, however, that no such indemnification need be provided for any retail outlet (a) as to which the dealer or marketer terminates its brand relationship prior to the Brand License Date, (b) which becomes a Shell branded outlet, or (c) which received or will receive compensation, directly or indirectly, for the amounts such dealer or marketer may be required to pay, but only to the extent of such compensation.

F. For a period of one (1) year following the date on which Equilon or Motiva stops supplying gasoline under the Texaco brand to any retail outlet branded Texaco as of the date this Consent Agreement is executed by Respondents, Respondents shall not enter into any agreement for the sale of branded gasoline to such retail outlet, sell branded gasoline to such retail outlet, or approve the branding of such retail outlet, under the Texaco brand or under any brand that contains the Texaco brand, unless either (1) such agreement**,** sale, or approval would not result in an increase in Concentration Levels in the sale of gasoline in any Section of the Country, based on market share data supplied to the Commission by Respondents that is verifiable by the Commission, or (2) there are no sales of Chevron branded gasoline in that Section of the Country. Respondents shall notify the Commission of each such agreement no later than sixty (60) days after the execution of the agreement**,** including in the notification: (1) a copy of the agreement, (2) the address (street, city, county, state) of each retail outlet covered by the agreement, and the most recent annual sales volume (in gallons) at each

such retail outlet, (3) the identity of the branded dealer or wholesale marketer that owns or supplies the retail outlets covered by the agreement, (4) the identity of each Section of the Country in which each such retail outlet is located, (5) the changes in Concentration Levels that Respondents believe will result from such agreement in each Section of the Country, together with the basis for such belief, (6) to the extent known or reasonably available, the annual sales volume and market shares of each of Shell, Texaco and Chevron branded gasoline, and the retail outlets subject to the agreement, in each Section of the Country affected by the agreement, both prior to and after execution of the agreement, measured by volume in gallons sold (or, if volume in gallons is not available, by other standard industry measures), and (7) all market survey data for such Section of the Country obtained from New Image, NPD, Lundberg, or any other independent third-party market surveyor, or conducted by Respondents, together with all other data relied upon by Respondents as the basis for their assessment of Concentration Levels or changes in Concentration Levels. This Paragraph IV.F. shall expire on June 30, 2007.

(1) It shall not be a violation of this Order if Respondents rescind any agreement for the sale of Texaco branded gasoline to a retail outlet that results in an increase in Concentration Levels under the standards set forth in this Paragraph IV.F., if Respondents rescind such agreement within thirty (30) days of being informed by the Commission that the Commission believes such agreement would result in such an increase.

(2) In any enforcement proceeding brought by or on behalf of the Commission, pursuant to Section 5(*l*) of the Federal Trade Commission Act, 15 U.S.C. Sec. 45(*l*), or

any other statute enforced by the Commission, Respondents shall have the burden of proving that the agreement does not result in an increase in Concentration Levels in the sale of gasoline in any Section of the Country.

V.

IT IS FURTHER ORDERED that:

A. Respondents shall, within six (6) months of the Merger Date, divest absolutely and in good faith, at no minimum price, all of Texaco's interest in the Discovery System.

B. Respondents shall divest all of Texaco's interest in the Discovery System only to an acquirer or acquirers that receives the prior approval of the Commission and only in a manner that receives the prior approval of the Commission.

C. Respondents shall, prior to divestiture of Texaco's interest in the Discovery System and subject to the prior approval of the Commission, enter into an agreement with the acquirer of Texaco's interest in the Discovery System for the purchase, sale or exchange of natural gas liquids that is no less favorable for the acquirer than the terms of the Texaco-Williams Contract; provided, however, that the volumes of natural gas liquids to be transported or exchanged under such agreement may be limited to volumes attributable to natural gas production transported by the Discovery System from natural gas producing wells originating from the Relevant OCS Area. The purpose of this agreement is to prevent Respondents from imposing rates or terms for pipeline transportation to markets from the

Discovery System's fractionating plant that would impede the ability of the Discovery System to compete for natural gas transportation from the Relevant OCS Area, and to fully preserve the viability of the Discovery System.

D. Respondents shall waive and not enforce Texaco's right to terminate the Texaco-Williams Contract pursuant to Section 1.1 of the Texaco-Williams Contract if Texaco owns less than a twenty percent (20%) interest in the Discovery System.

E. No later than five (5) business days following the Merger Date, Respondents shall, pursuant to the Agreement for the Operation and Management of the Larose Gas Processing Plant & Paradis Fractionation Facility dated February 1, 1997, and any other applicable agreements, give notice to the other owners of the Discovery System of Texaco's resignation as operator of the Discovery System. Texaco shall resign as operator of the Discovery System immediately after it obtains the approvals required by the Agreement for the Operation and Management of the Larose Gas Processing Plant & Paradis Fractionation Facility dated February 1, 1997, and any other applicable agreements, but in no event later than one (1) year from the date Respondents give notice of Texaco's resignation as operator of the Discovery System. Respondents shall use best efforts to obtain those approvals as early as possible.

F. The purpose of the divestiture of Texaco's interest in the Discovery System is to eliminate the overlap of ownership between the Discovery System and the Venice System and to remedy the lessening of competition resulting from the proposed Merger as alleged in the Commission's Complaint.

VI.

IT IS FURTHER ORDERED that:

A. Respondents shall divest, absolutely and in good faith and at no minimum price, within six (6) months from the Merger Date, all of Texaco's interest in the Enterprise Fractionating Plant.

B. Respondents shall divest all of Texaco's interest in the Enterprise Fractionating Plant 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.

C. The purpose of the divestiture of Texaco's interest in the Enterprise Fractionating Plant is to eliminate an overlap of ownership between the Enterprise Fractionating Plant and other fractionating plants at Mont Belvieu, Texas, in which Respondents or their affiliates own interests, and to remedy the lessening of competition resulting from the proposed Merger as alleged in the Commission's Complaint.

VII.

IT IS FURTHER ORDERED that:

A. No later than ten (10) days after the Merger Date, Respondents shall divest, absolutely and in good faith, Texaco's Overlap General Aviation Business Assets to Avfuel, pursuant to and in accordance with the Aviation Fuel Divestiture Agreement. Any failure by Respondents to comply with any provision of the Aviation Fuel Divestiture Agreement shall constitute a failure to comply with this Order; provided, however, that if Respondents fail to divest Texaco's Overlap General Aviation

Business Assets to Avfuel pursuant to and in accordance with the Aviation Fuel Divestiture Agreement within ten (10) days after the Merger Date, Respondents shall divest Texaco's Domestic General Aviation Business Assets, at no minimum price, to an acquirer or acquirers that receive the prior approval of the Commission in a manner that receives the prior approval of the Commission pursuant to a Substitute Aviation Fuel Divestiture Agreement. Divestiture of Texaco's Domestic General Aviation Business Assets to an acquirer or acquirers that receive the prior approval of the Commission in a manner that receives the prior approval of the Commission pursuant to a Substitute Aviation Fuel Divestiture Agreement shall not preclude the Commission or the Attorney General from seeking civil penalties or any other relief available 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 their obligation to divest Texaco's Overlap General Aviation Business Assets to Avfuel pursuant to the Aviation Fuel Divestiture Agreement.

B. If Respondents have divested Texaco's Overlap General Aviation Business Assets to Avfuel pursuant to the Aviation Fuel Divestiture Agreement, and at the time the Commission makes this Order final, it determines that Avfuel is not acceptable as the acquirer of Texaco's Overlap General Aviation Business Assets or that the Aviation Fuel Divestiture Agreement is not an acceptable manner of divestiture, and the Commission so notifies Respondents, Respondents shall within ten (10) days of such notification rescind the Aviation Fuel Divestiture Agreement with Avfuel.

C. If the Aviation Fuel Divestiture Agreement with Avfuel is rescinded pursuant to Paragraph VII.B. of this Order, then Respondents shall, within four (4) months of the Merger Date, divest Texaco's Domestic General Aviation Business Assets, at no minimum price, to an acquirer or acquirers that receive the prior approval of the Commission and in a manner that receives the prior approval of the Commission, pursuant to a Substitute Aviation Fuel Divestiture Agreement.

D. On or before the date of consummation of the Substitute Aviation Fuel Divestiture Agreement, Respondents shall assign to the acquirer all General Aviation Business Agreements used in or relating to Texaco's Domestic General Aviation Business; provided, however, should Respondents fail to obtain any such assignments, Respondents shall, subject to the prior approval of the Commission, substitute alternative agreements or arrangements sufficient to enable the acquirer approved by the Commission to operate Texaco's Domestic General Aviation Business in the same manner and at the same level and quality as Texaco operated it at the time of the announcement of the Merger.

E. Respondents shall include in the Substitute Aviation Fuel Divestiture Agreement, at the option of the acquirer, a license for a period of up to ten (10) years from the date of such Agreement to use the Texaco brand in connection with the acquirer's operation of Texaco's Domestic General Aviation Business Assets. The license shall be royalty free for five (5) years from the date of consummation of such Substitute Aviation Fuel Divestiture Agreement, but subject to Commission approval may provide for payments beginning five (5) years

after the date of the Agreement and escalating each year until the end of the ten-year term.

F. For a period of six (6) months after the date of consummation of any Substitute Aviation Fuel Divestiture Agreement, Respondents shall not solicit, engage in discussions concerning, participate in, offer to enter into, or enter into, any contract or agreement for the direct supply of branded Aviation Fuel to any fixed base operator or distributor that had a Marketing Agreement for the sale of Texaco-branded Aviation Fuel in the United States.

G. For a period of twelve (12) months after the acquirer pursuant to any Substitute Aviation Fuel Divestiture Agreement stops supplying Texaco-branded Aviation Fuel to a fixed base operator or distributor, Respondents shall not (1) enter into any contract or agreement for the direct or indirect supply of Texaco-branded Aviation Fuel to such fixed base operator or distributor, or (2) approve the branding of such fixed base operator or distributor with the Texaco brand.

H. The purpose of the divestiture of Texaco's Overlap General Aviation Business Assets, or of Texaco's Domestic General Aviation Business Assets, is to ensure the continuation of such assets in the same business in which the assets were engaged at the time of the announcement of the Merger by a Person other than Respondents, and to remedy the lessening of competition alleged in the Commission's Complaint.

VIII.

IT IS FURTHER ORDERED that:

A. If Respondents have divested neither: (1) Texaco's Overlap General Aviation Business Assets as required by Paragraph VII. of this Order, nor (2) Texaco's Domestic General Aviation Business Assets as required by Paragraph VII. of this Order within four (4) months of the Merger Date, the Commission may appoint a trustee to divest Texaco's Domestic General Aviation Business Assets. In the event that the Commission or the Attorney General brings an action pursuant to § 5(*l*) of the Federal Trade Commission Act, 15 U.S.C. § 45(*l*), or any other statute enforced by the Commission, Respondents shall consent to the appointment of a trustee in such action. Neither the appointment of a trustee nor a decision not to appoint a trustee under this Paragraph shall preclude the Commission or the Attorney General from seeking civil penalties or any other relief available to it, including a court-appointed trustee, pursuant to § 5(*l*) of the Federal Trade Commission Act, or any other statute enforced by the Commission, for any failure by the Respondents to comply with this Order.

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

1.1 The Commission shall select a trustee, subject to the consent of Respondents, which consent shall not be unreasonably withheld. The trustee shall be a Person with experience and expertise in

acquisitions and divestitures. If Respondents have not opposed, in writing, including the reasons for opposing, the selection of the 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.

1.2 Subject to the prior approval of the Commission, the trustee shall have the exclusive power and authority to divest the Texaco Domestic General Aviation Business Assets.

1.3 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.

1.4 The trustee shall have four (4) months from the date of appointment to accomplish the divestiture, which shall be subject to the prior approval of the Commission. If, however, at the end of the four-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. The decision by

the Commission to extend the time during which the trustee may accomplish the divestiture shall not preclude the Commission or the Attorney General from seeking civil penalties or any other relief available to it, including a court-appointed trustee, pursuant to § 5(*l*) of the Federal Trade Commission Act, or any other statute enforced by the Commission, for any failure by the Respondents to comply with this Order.

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

1.6 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 Paragraph VII. 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.

1.7 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.

1.8 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.

1.9 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 VIII.B.1. of this Order.

1.10 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.

1.11 The trustee shall have no obligation or authority to operate or maintain the assets to be divested.

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

IX.

IT IS FURTHER ORDERED that, within sixty (60) days after the date this Order becomes final and every sixty (60) days thereafter until Respondents have fully complied with the provisions of Paragraphs II., III., IV., V., VI., VII., VIII., and XI.

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 those provisions. Respondents shall include in their compliance reports, among other things that are required from time to time, a full description of all contacts or negotiations with prospective acquirers for the divestitures of assets or businesses specified in this Order, including the identity of all parties contacted. Respondents also shall include in their compliance reports copies of all written communications to and from such parties, and all internal memoranda, reports and recommendations concerning divestiture.

X.

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

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

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

XI.

IT IS FURTHER ORDERED that within five (5) business days after the date on which the Commission accepts this Order for public comment, but in no event less than thirty (30) days before the Merger Date, Respondents shall notify Shell and SRI of the projected Merger Date and shall serve on Shell and SRI, by overnight delivery, copies of the Agreement Containing Consent Orders and all documents attached thereto, including the Trust Agreement, omitting or redacting from such service any information contained therein or attached thereto that is confidential business information. Any omissions or redactions to such agreements or documents attached thereto shall be subject to the prior approval of the Commission.

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 the Order.

XIII.

IT IS FURTHER ORDERED that:

A. If (i) the Divestiture Trustee or Respondents have submitted a complete application in support of the divestiture of the assets, interests or businesses to be divested pursuant to Paragraph II. of this Order (including the buyer, manner of divestiture and all other matters subject to Commission approval) at least one month before the deadline for such divestiture; and (ii) the Commission has approved the divestiture and has not withdrawn its acceptance; but (iii) the Divestiture Trustee or

Respondents have certified to the Commission within ten (10) days after the Commission's approval of the divestiture that a State, notwithstanding timely and complete application by Respondents to the State, has failed to approve the divestiture under a consent decree in an action commenced by any State requiring such divestiture, then, with respect to that divestiture, the time in which the divestiture is required under this Order to be complete shall be extended for sixty (60) days. During such sixty (60) day period, Respondents or the Divestiture Trustee shall exercise utmost good faith and best efforts to resolve the concerns of the particular State.

B. If any Trustee or Respondents are unable to comply with any obligation of this Order, with the exception of the obligations of Paragraph II. of this Order, because of any failure to act or any action by any State or any court pursuant to a consent decree in an action commenced by any State in connection with the Merger, the time in which such obligation of this Order must be completed shall be extended for sixty (60) days. During such sixty (60) day period, Respondents or the applicable Trustee shall exercise utmost good faith and best efforts to resolve the concerns of the particular State or court.

By the Commission, Chairman Muris recused.

ORDER TO HOLD SEPARATE AND MAINTAIN ASSETS

The Federal Trade Commission ("Commission") having initiated an investigation of the proposed merger (the "Merger") of Respondent Chevron Corporation ("Chevron") and Respondent Texaco Inc. ("Texaco"), 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 the Consent Agreement is for settlement purposes only and does not constitute an admission by Respondents that the law has been violated as alleged in such Complaint, or that the facts as alleged in such Complaint, other than jurisdictional facts, are true, and waivers and other provisions as required by the Commission's Rules; and

The Commission having thereafter considered the matter and having determined that it had reason to believe that Respondents have violated said Acts, and that a Complaint should issue stating its charges in that respect, and having 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 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 Chevron is a corporation organized, existing and doing business under and by virtue of the laws of the state of Delaware, with its office and principal place of business located at 575 Market Street, San Francisco, CA 94105.

2. Respondent Texaco 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 2000 Westchester Ave., White Plains, NY 10650.

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 shall apply:

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

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

C. "Agreement Containing Consent Orders" means the agreement executed by Respondents in this matter containing the Decision and Order and this Hold Separate Order.

D. "Avfuel" means Avfuel Corporation, a corporation organized, existing and doing business under and by virtue of the laws of the state of Michigan, with its office and principal place of business located at 47 West Ellsworth, Ann Arbor, Michigan 48108.

E. "Aviation Fuel" means Aviation Gasoline and Jet Fuel.

F. "Aviation Fuel Divestiture Agreement" means all agreements entered into between Respondents and AvFuel relating to the sale of Texaco's Overlap General Aviation Business Assets, including but not limited to the Purchase and Sale Agreement, the Trademark License Agreement, all supply agreements, and all other ancillary agreements, dated August 7, 2001, and attached as Confidential Appendix B to the Decision and Order.

G. "Aviation Overlap State" means each of the following states: Alabama, Alaska, Arizona, California, Florida, Georgia, Idaho, Louisiana, Mississippi, Nevada, Oregon, Tennessee, Utah, and Washington.

H. "Decision and Order" means the Decision and Order contained in the Agreement Containing Consent Orders accepted by the Commission in this matter.

I. "Disclose" means to convey by any means or otherwise make available information to any person or persons.

J. "Discovery System" means Discovery Producer Services LLC, and all of its assets, including but not limited to Discovery Gas Transmission LLC and all of its assets, and including all pipelines of the system that transport natural

gas offshore of Louisiana and onshore to the processing plant at LaRose, Louisiana; the processing plant at Larose, Louisiana; all pipelines that transport natural gas between the processing plant and natural gas transmission pipelines; all pipelines that transport raw mix between the processing plant and the fractionating plant at Paradis, Louisiana; the fractionating plant at Paradis, Louisiana; and equipment including but not limited to condensate stabilization facilities and pumping stations.

K. "Divestiture Trustee" means a trustee appointed pursuant to Paragraph III.B. of the Decision and Order with the obligation to divest TRMI and/or TRMI East.

L. "Enterprise Fractionating Plant" means the fractionating plant at Mont Belvieu, Texas, operated by Enterprise Products Company and partially owned by Texaco.

M. "Equilon" means Equilon Enterprises LLC, a joint venture formed pursuant to the Equilon LLC Agreement.

N. "Equilon Interest" means all of the ownership interests in Equilon owned directly or indirectly by Texaco, including the interests owned by TRMI and its wholly owned subsidiaries, Texaco Convent Refining Inc. and Texaco Anacortes Cogeneration Company.

O. "Equilon LLC Agreement" means the Limited Liability Company Agreement of Equilon Enterprises LLC dated as of January 15, 1998 among certain subsidiaries of Shell and Texaco, as amended.

P. "Held Separate Business" means all of Respondents' interests and assets comprising the Trust, as defined and described in the Decision and Order, immediately before rescission of the Trust, including but not limited to TRMI and TRMI East to the extent they are assets of the Trust at such time.

Q. "Hold Separate Operating Trustees" means the same person as each of the Operating Trustees or any replacement Operating Trustees.

R. "Hold Separate Divestiture Trustee" means the same person as the Divestiture Trustee or any replacement Divestiture Trustee.

S. "Hold Separate Agreement" means the agreement between and among Respondents and the Hold Separate Operating Trustees and the Hold Separate Divestiture Trustee to effectuate the divestitures required by Paragraph II. of the Decision and Order, substantially similar to the Trust Agreement, and subject to the prior approval of the Commission.

T. "Hold Separate Period" means, if the Trust is rescinded, unwound, dissolved, or otherwise terminated at a time after the Merger but before Respondents have complied with Paragraph II.A. of the Decision and Order, the period beginning on the Rescission Date and lasting until the business day after the divestitures required by the Decision and Order in this matter have been accomplished and Respondents have so notified the Commission.

U. "JV Agreements" means the Equilon LLC Agreement and the Motiva LLC Agreement.

V. "Merger" means any merger between Respondents, including the proposed merger contemplated by the Agreement and Plan of Merger dated October 15, 2000, as amended, among Respondents and Keepep Inc.

W. "Motiva" means Motiva Enterprises LLC, a joint venture formed pursuant to the Motiva LLC Agreement.

X. "Motiva Interest" means all of the ownership interests in Motiva owned directly or indirectly by Texaco, including the interest owned by TRMI East.

Y. "Motiva LLC Agreement" means the Limited Liability Company Agreement of Motiva Enterprises LLC dated as of July 1, 1998, among Shell, Shell Norco Refining Company, SRI and TRMI East.

Z. "Non-Public Equilon Or Motiva Information" means any information not in the public domain relating to Equilon or Motiva.

AA. "Non-Public Discovery System Information" means any information not in the public domain relating to the Discovery System, including but not limited to information pertaining to the Relevant OCS Area Disclosed by customers or potential customers to employees or representatives of the Discovery System. Non-Public Discovery System Information shall not include information that was publicly available prior to the date this Hold Separate Order is signed by Respondents or that is thereafter Disclosed to Respondents without any violation of this Hold Separate Order by Respondents or violation of law by or known to Respondents.

BB. "Non-Public Venice System Information" means any information not in the public domain relating to the Venice System, including but not limited to information pertaining to the Relevant OCS Area Disclosed by customers or potential customers to employees or representatives of the Venice System. Non-Public Venice System Information shall not include information that was publicly available prior to the date this Hold Separate Order is signed by Respondents or that is thereafter Disclosed to Respondents without any violation of this Hold Separate Order by Respondents or violation of law by or known to Respondents.

CC. "Operating Trustee" means each trustee appointed pursuant to Paragraph III.O. of the Decision and Order with the obligation to manage TRMI and/or TRMI East pursuant to the Decision and Order.

DD. "Rescission Date" means the date on which the Trust was rescinded, unwound, dissolved, or otherwise terminated, if such rescission, unwinding, dissolution, or termination occurs.

EE. "Respondents" means Chevron and Texaco, individually and collectively, and any successors.

FF. "Shell" means Shell Oil Company, a Delaware corporation, with its principal place of business located at One Shell Plaza, Houston, Texas 77002, its parents, and its subsidiaries controlled by Shell.

GG. "SRI" means Saudi Refining, Inc., a Delaware corporation, with its principal place of business located at 9009 West Loop South, Houston, TX 77210, its parents, and its subsidiaries controlled by SRI.

HH. "Texaco's Domestic General Aviation Business" means the supply, distribution, marketing, transportation, and sale of Aviation Fuel by Texaco on a direct or distributor basis to customers (other than commercial airlines and military) in the United States (including the Aviation Overlap States), including but not limited to fixed base operators, airport dealers, distributors, jobbers, resellers, brokers, corporate accounts, or consumers

II. "Texaco's Domestic General Aviation Business Assets" means all assets, tangible or intangible, relating to Texaco's Domestic General Aviation Business in the United States, including but not limited to all General Aviation Business Agreements used in or relating to

Texaco's Domestic General Aviation Business.

JJ. "Texaco's Overlap General Aviation Business" means the supply, distribution, marketing, transportation, and sale of Aviation Fuel by Texaco on a direct or distributor basis to customers (other than commercial airlines and military) in the Aviation Overlap States, including but not limited to fixed base operators, airport dealers, distributors, jobbers, resellers, brokers, corporate accounts, or consumers, but excluding the assets and agreements set forth in Schedule 2.3(c) of the Aviation Fuel Divestiture Agreement.

KK. "Texaco's Overlap General Aviation Business Assets" means all assets, tangible or intangible, relating to Texaco's Overlap General Aviation Business, including but not limited to all General Aviation Business Agreements used in or relating to Texaco's Overlap General Aviation Business, but excluding the assets and agreements set forth in Schedule 2.3(c) of the Aviation Fuel Divestiture Agreement.

LL. "TRMI" means Texaco Refining and Marketing Inc., a Delaware corporation and an indirect wholly owned subsidiary of Texaco, and its subsidiary, Texaco Convent Refining Inc., and Texaco's interest in all other subsidiaries, divisions, groups, joint ventures, or affiliates of Texaco that own or control any ownership interest in Equilon.

MM. "TRMI East" means Texaco Refining and Marketing (East) Inc., a Delaware corporation and an indirect wholly owned subsidiary of Texaco, and Texaco's interest in all other subsidiaries, divisions, groups, joint ventures, or affiliates of Texaco that own or control any ownership interest in Motiva.

NN. "Trust" means the trust established by the Trust Agreement as required by the Decision and Order.

OO. "Trust Agreement" means the Agreement and Declaration of Trust approved by the Commission and attached as Appendix A to the Decision and Order.

PP. "Venice System" means Venice Energy Services Company, L.L.C., and all of its assets, including but not limited to (i) natural gas processing, fractionation and natural gas liquids storage and terminaling facilities at the Venice Complex (as that term is defined in the Second Amended and Restated Limited Liability Company Agreement of Venice Energy Services Company, L.L.C.), (ii) onshore and offshore natural gas pipelines upstream from the Venice Complex, known as the Venice Gathering System, (iii) compression, separation, dehydration, and residue gas and liquid gas handling facilities at or associated with the Venice Complex (excluding any residue gas pipelines and metering facilities owned by the downstream pipelines), and (iv) natural gas liquids facilities (excluding natural gas liquids pipelines downstream from the Venice Complex) related to such processing, fractionation, storage and termination facilities.

II.

IT IS FURTHER ORDERED that

A. Pending divestiture of Texaco's interest in the Discovery System, Respondents shall vote Texaco's interest in the Discovery System in accordance with the majority of votes cast by its other owners so long as Texaco's rights and obligations arising from the vote are commensurate with Texaco's ownership interest in the Discovery System.

B. Pending divestiture of Texaco's interest in the Enterprise Fractionating Plant, Respondents shall vote Texaco's

interest in the Enterprise Fractionating Plant in accordance with the majority of votes cast by its other owners, so long as Texaco's rights and obligations arising from the vote are commensurate with Texaco's ownership interest in the Enterprise Fractionating Plant.

C. From the date Respondents sign the Consent Agreement in this matter until the divestiture required by Paragraph V. of the Decision and Order has been completed or the Commission determines that no further relief pursuant to Paragraph V. of the Decision and Order is necessary, Respondents shall not Disclose any Non-Public Discovery System Information to (1) any employee of Respondents who receives any Non-Public Venice System Information, (2) any employees of the Venice System, or (3) any employees of any other owner of the Venice System.

D. From the date Respondents sign the Consent Agreement in this matter until the divestiture required by Paragraph V. of the Decision and Order has been completed or the Commission determines that no further relief pursuant to Paragraph V. of the Decision and Order is necessary, Respondents shall not Disclose any Non-Public Venice System Information to (1) any employee of Respondents who receives any Non-Public Discovery System Information, (2) any employees of the Discovery System, or (3) any employees of any other owner of the Discovery System.

E. Respondents shall take all steps to ensure that if, contrary to the requirements of Paragraph II.C. of this Hold Separate Order, Respondent employees who receive any Non-Public Venice System Information receive any Non-Public Discovery System Information during the time period described in Paragraph II.C., they will not use such information for any purpose.

F. Respondents shall take all steps to ensure that if, contrary to the requirements of Paragraph II.D. of this Hold Separate Order, Respondent employees who receive any Non-Public Discovery Information, receive any Non-Public Venice System Information during the time period described in Paragraph II.D., they will not use such information for any purpose.

III.

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 not exercise direction or control over, or influence directly or indirectly, the Held Separate Business or any of its operations, or the Hold Separate Operating Trustees, except to the extent that Respondents must exercise direction and control over the Held Separate Business to assure compliance with this Hold Separate Order, or with the Decision and Order issued in this matter, and except as otherwise provided in this Hold Separate Order or the Decision and Order, and shall vest the Held Separate Business with all rights, powers, and authority necessary to conduct its business.

B. The purpose of this paragraph of this Hold Separate Order is, in the event that the Trust is rescinded, unwound, dissolved, or otherwise terminated at any time after the Merger but before Respondents have complied with Paragraph II.A of the Decision and Order, to: (i) preserve the Held Separate Business, including TRMI and TRMI East, as viable, competitive, and ongoing businesses independent of Respondents until the divestitures required by the Decision and Order have been accomplished; (ii) prevent interim harm to competition pending the relevant divestitures; and (iii) help remedy any anticompetitive

effects of the proposed Merger.

C. Respondent shall hold the Held Separate Business separate, apart, and independent on the following terms and conditions:

1. No later than two (2) business days after the Rescission Date, Respondents shall agree to the appointment of Robert A. Falise as Hold Separate Divestiture Trustee and enter into an agreement substantially similar to the Trust Agreement, subject to the prior approval of the Commission, that transfers to the Hold Separate Divestiture Trustee the sole and exclusive power and authority to divest TRMI and/or TRMI East or to divest the Equilon Interest to Shell and/or the Motiva Interest to Shell and/or SRI, consistent with the terms of Paragraph II. of the Decision and Order and subject to the prior approval of the Commission as set forth in such Decision and Order. After such transfer, the Hold Separate Divestiture Trustee shall have the sole and exclusive power and authority to divest such assets or interests, subject to the prior approval of the Commission as set forth in such Decision and Order, and the Hold Separate Divestiture Trustee shall exercise such power and authority and carry out the duties and responsibilities of the Hold Separate Divestiture Trustee in a manner consistent with the purposes of this Hold Separate Order in consultation with the Commission's staff.

2. The Hold Separate Divestiture Trustee shall have eight (8) months from the Merger Date and such additional time as is provided pursuant to Paragraph XIII. of the Decision and Order to accomplish the divestitures required by Paragraph II. of the Decision and Order, which shall be

subject to the prior approval of the Commission as set forth in the Decision and Order. If, however, at the end of this period, the Hold Separate Divestiture Trustee has submitted a plan of divestiture or believes that divestiture can be achieved within a reasonable time, the Hold Separate Divestiture Trustee's divestiture period may be extended by the Commission. An extension of time by the Commission under this subparagraph shall not preclude the Commission from seeking any relief available to it for any failure by Respondents to divest the Equilon Interest or TRMI and/or the Motiva Interest or TRMI East consistent with the requirements of Paragraph II of the Decision and Order.

3. If, on or prior to the Rescission Date, Respondents have executed but have not consummated an agreement or agreements to divest the Equilon Interest to Shell and/or the Motiva Interest to Shell and/or SRI, then Respondents shall, no later than the Rescission Date, grant sole and exclusive authority to the Hold Separate Divestiture Trustee to consummate any divestiture contemplated thereby subject to the Commission's prior approval as set forth in the Decision and Order.

4. The Hold Separate Divestiture Trustee shall divest the Equilon Interest to Shell and/or the Motiva Interest to Shell and/or SRI, in a manner that receives the prior approval of the Commission, pursuant to the terms of the applicable agreement or agreements approved by the Commission, if either (a) Respondents have executed an agreement or agreements with Shell and/or SRI with respect to such divestiture or divestitures prior to the Rescission Date, and such agreement or agreements have been approved by the

Commission and have not been breached by Shell and/or SRI; or (b) Shell has exercised its right to acquire the Equilon Interest pursuant to the Equilon LLC Agreement and/or Shell and/or SRI have exercised their rights to acquire the Motiva Interest pursuant to the Motiva LLC Agreement.

5. Subject to Respondents' absolute and unconditional obligation to divest expeditiously at no minimum price, the Hold Separate Divestiture Trustee shall use his or her best efforts to negotiate the most favorable price and terms available for the divestiture of (a) TRMI, if the Hold Separate Divestiture Trustee has not divested the Equilon Interest pursuant to subparagraph 4 of this paragraph, and/or (b) TRMI East, if the Hold Separate Divestiture Trustee has not divested all or part of the Motiva Interest pursuant to subparagraph 4 of this paragraph. Each divestiture shall be made only in a manner that receives the prior approval of the Commission, and, unless the acquirers are Shell and/or SRI, the divestiture shall be made only to an acquirer or acquirers that receive the prior approval of the Commission; provided, however, if the Hold Separate 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 Hold Separate Divestiture Trustee shall divest to the acquiring entity or entities selected by Respondents from among those approved by the Commission; provided further, however, that Respondents shall select such entity within five (5) days of receiving notification of the Commission's approval.

6. The Hold Separate Divestiture Trustee shall have full and complete access to all personnel, books,

records, documents, and facilities of Respondents, TRMI and TRMI East, as needed to fulfill the Hold Separate Divestiture Trustee's obligations, or to any other relevant information, as the Hold Separate Divestiture Trustee may reasonably request, including but not limited to all documents and records kept in the normal course of business that relate to Respondents' obligations under this Hold Separate Order and the Decision and Order. Respondents or the Hold Separate Operating Trustees, as appropriate, shall develop such financial or other information as the Hold Separate Divestiture Trustee may reasonably request and shall cooperate with the Hold Separate Divestiture Trustee. Respondents shall take no action to interfere with or impede the Hold Separate Divestiture Trustee's ability to perform his or her responsibilities.

7. The Hold Separate 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 may set. The Hold Separate Divestiture Trustee shall have the authority to employ, at the cost and expense of Respondents, such financial advisors, consultants, accountants, attorneys, and other representatives and assistants as are reasonably necessary to carry out the Hold Separate Divestiture Trustee's duties and responsibilities.

8. Respondents shall indemnify the Hold Separate Divestiture Trustee and hold the Hold Separate Divestiture Trustee harmless against any losses, claims, damages, liabilities, or expenses arising out of, or in connection with, the performance of the Hold Separate Divestiture Trustee's duties,

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

9. The Hold Separate Divestiture Trustee shall account for all monies derived from the sale and all expenses incurred, subject to the approval of the Commission. After approval by the Commission of the account of the Hold Separate Divestiture Trustee, all remaining monies shall be paid as directed in the Hold Separate Agreement, and the Hold Separate Divestiture Trustee's powers shall be terminated.

10. The Hold Separate Divestiture Trustee shall report in writing to the Commission thirty (30) days after appointment and every thirty (30) days thereafter concerning the Hold Separate Divestiture Trustee's efforts to accomplish the requirements of this Hold Separate Order and the Decision and Order until such time as the divestitures required by Paragraph II. of the Decision and Order have been accomplished and Respondents have notified the Commission that the divestitures have been accomplished.

11. If, for any reason, Robert A. Falise cannot serve or cannot continue to serve as Hold Separate Divestiture Trustee, or fails to act diligently, the Commission shall select a replacement Hold Separate Divestiture Trustee, subject to the consent of Respondents, which consent shall not be unreasonably withheld. If Respondents have not

opposed, in writing, including the reasons for opposing, the selection of any replacement Hold Separate Divestiture Trustee within ten (10) days after notice by the staff of the Commission to Respondents of the identity of any proposed replacement Hold Separate Divestiture Trustee, Respondents shall be deemed to have consented to the selection of the proposed replacement Hold Separate Divestiture Trustee. The replacement Hold Separate Divestiture Trustee shall be a person with experience and expertise in acquisitions and divestitures.

12. The Commission may on its own initiative or at the request of the Hold Separate Divestiture Trustee issue such additional orders or directions as may be necessary or appropriate to assure compliance with the requirements of this Hold Separate Order or the Decision and Order.

13. No later than two (2) business days after the Rescission Date, Respondents shall agree to the appointment of Joe B. Foster as Hold Separate Operating Trustee of TRMI (with respect to the Equilon Interest) and John Linehan as Hold Separate Operating Trustee of TRMI East (with respect to the Motiva Interest) and enter into a Hold Separate Agreement substantially similar to the Trust Agreement, subject to the prior approval of the Commission, that transfers to the Hold Separate Operating Trustees sole and exclusive power and authority to manage TRMI and/or TRMI East (as the case may be).

14. The Hold Separate Operating Trustees shall have sole and exclusive power and authority to manage TRMI and/or TRMI East (as the case may be), as set forth in the Hold Separate Agreement and

specifically to cause TRMI and TRMI East respectively to exercise the rights of TRMI and TRMI East under the Equilon and Motiva LLC Agreements. Each Hold Separate Operating Trustee may engage in any other activity such Hold Separate Operating Trustee may deem reasonably necessary, advisable, convenient or incidental in connection therewith and shall exercise such power and authority and carry out the duties and responsibilities of the Hold Separate Operating Trustee in a manner consistent with the purposes of this Hold Separate Order and the Decision and Order in consultation with the Commission's staff.

15. Each Hold Separate Operating Trustee shall have full and complete access to all personnel, books, records, documents, and facilities of TRMI and/or TRMI East as needed to fulfill such Hold Separate Operating Trustee's obligations, or to any other relevant information, as such Hold Separate Operating Trustees may reasonably request, including but not limited to all documents and records kept in the normal course of business that relate to Respondents' obligations under this Hold Separate Order and the Decision and Order. Respondents shall develop such financial or other information as such Hold Separate Operating Trustees may reasonably request and shall cooperate with the Hold Separate Operating Trustees. Respondents shall take no action to interfere with or impede the Hold Separate Operating Trustees' ability to perform his or her responsibilities.

16. The Hold Separate Operating Trustees 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 may set. Each Hold Separate Operating Trustee shall have the authority to employ, at the cost and expense of Respondents, such consultants, accountants, attorneys, and other representatives and assistants as are reasonably necessary to carry out such Hold Separate Operating Trustee's duties and responsibilities.

17. Respondents shall indemnify each Hold Separate Operating Trustee and hold each Hold Separate Operating Trustee harmless against any losses, claims, damages, liabilities, or expenses arising out of, or in connection with, the performance of such Hold Separate Operating 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 such Hold Separate Operating Trustee.

18. The Hold Separate Operating Trustees shall account for all expenses incurred, including fees for his or her services, subject to the approval of the Commission.

19. Each Hold Separate Operating Trustee shall report in writing to the Commission thirty (30) days after the Rescission Date and every thirty (30) days thereafter concerning the Hold Separate Operating Trustee's performance of his or her duties under this Hold Separate Order, the Decision and Order, and the Hold Separate Agreement. The Hold Separate Operating Trustees shall serve until such time as Respondents have complied with their

obligation to divest TRMI and/or TRMI East as required by this Hold Separate Order and the Decision and Order, and Respondents have notified the Commission that the divestitures have been accomplished.

20. If for any reason Joe B. Foster cannot serve or cannot continue to serve as Hold Separate Operating Trustee of TRMI or John Linehan cannot serve or cannot continue to serve as Hold Separate Operating Trustee of TRMI East, or fails to act diligently, the Commission shall select a replacement Hold Separate Operating Trustee, subject to the consent of Respondents, which consent shall not be unreasonably withheld. If Respondents have not opposed, in writing, including the reasons for opposing, the selection of any replacement Hold Separate Operating Trustee within ten (10) days after notice by the staff of the Commission to Respondents of the identity of any proposed replacement Hold Separate Operating Trustee, Respondents shall be deemed to have consented to the selection of the proposed replacement Hold Separate Operating Trustee. The replacement Hold Separate Operating Trustee shall be a person with experience and expertise in the management of businesses of the type engaged in by Equilon and Motiva.

21. The Commission may on its own initiative or at the request of either Hold Separate Operating Trustee issue such additional orders or directions as may be necessary or appropriate to assure compliance with the requirements of this Hold Separate Order or the Decision and Order.

22. Except as provided herein or in the Hold Separate Agreement, neither the Hold Separate Divestiture

Trustee nor the Hold Separate Operating Trustees shall disclose any Non-Public Equilon or Motiva Information to an employee of Respondents.

23. Respondents may require the Hold Separate Divestiture Trustee or Hold Separate Operating Trustees to sign a confidentiality agreement prohibiting the disclosure of any information gained as a result of his or her role as Hold Separate Divestiture Trustee or Hold Separate Operating Trustee to anyone other than the Commission.

24. The purpose of this Paragraph III is to effectuate the divestitures required by Paragraph II. of the Decision and Order and to maintain operation of TRMI, TRMI East, Equilon and Motiva separate and apart from Respondents' operations pending the required divestitures.

IV.

IT IS FURTHER ORDERED that, pending divestiture of Texaco's Overlap General Aviation Business Assets (or Texaco's Domestic General Aviation Business Assets, as appropriate) pursuant to Paragraphs VII. or VIII. of the Decision and Order, Respondents shall take such actions as are necessary to maintain the viability, marketability, and competitiveness of Texaco's Domestic General Aviation Business Assets and to prevent the destruction, removal, wasting, or deterioration of Texaco's Domestic General Aviation Business Assets, except for ordinary wear and tear and as would otherwise occur in the ordinary course of business.

V.

IT IS FURTHER ORDERED that Respondents shall, within ten (10) days of the Rescission Date, circulate to all of

Respondents' employees a copy of this Hold Separate Order and shall post a notice accessible to all employees informing employees of Respondents' obligations pursuant to this Hold Separate Order.

VI.

IT IS FURTHER ORDERED that:

1. Within thirty (30) days after the Rescission Date and every sixty (60) days thereafter until Respondents have fully complied with Paragraphs II and III of the Decision and Order, Respondents shall submit to the Commission a verified written report setting forth in detail the manner and form in which they intend to comply, are complying, and have complied with those provisions. Respondents shall include in their compliance reports, among other things that are required from time to time, a full description of all contacts or negotiations with prospective acquirers for the divestitures of assets or businesses specified in this Hold Separate Order, including the identity of all parties contacted. Respondents also shall include in their compliance reports, copies of all written communications to and from such parties, and all internal memoranda, reports and recommendations concerning divestiture.

2. Within thirty (30) days after this Hold Separate Order is final, and every sixty (60) days thereafter until Respondents have fully complied with Paragraphs II. and IV. of this Hold Separate 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 those provisions.

3. With the agreement of the staff of the Commission, Respondents may submit one compliance report to the

Commission, at sixty (60) day intervals, including the information required by Paragraphs VI.A. and VI.B. of the Hold Separate Order, and Paragraph IX. of the Decision and Order, which will, if it includes all required information, be considered a timely filing of each of the compliance reports required by these provisions.

VII.

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, upon written request and on reasonable notice to Respondents made to its principal office, Respondents shall permit any duly authorized representatives of the Commission:

1. During office hours and in the presence of counsel, access to all facilities and access to inspect and copy all books, ledgers, accounts, correspondence, memoranda and other records and documents in the possession or under the control of Respondents relating to any matters contained in this Hold Separate Order; and

2. Upon five business days' notice to Respondents and without restraint or interference from Respondents, to interview officers or employees of Respondents who may have counsel present, regarding such matters.

By the Commission, Chairman Muris recused.

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 Chevron Corporation ("Chevron") and Texaco Inc. ("Texaco") (collectively "Respondents") 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 has 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 ("Proposed Consent 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 anticompetitive effects arising from Respondents' proposed merger, as alleged in the Complaint. The Hold Separate Order preserves competition pending divestiture.

II. Description of the Parties and the Transaction

Chevron, headquartered in San Francisco, California, is one of the world's largest integrated oil companies. Chevron is engaged, either directly or through affiliates, in the exploration for, and production of, oil and natural gas; the pipeline transportation of crude oil, natural gas, and natural gas liquids; the refining of crude oil into refined petroleum products, including gasoline, aviation fuel, and other light petroleum products; the transportation, terminaling, and marketing of gasoline and aviation fuel; and other related businesses. During fiscal year 1999, Chevron had worldwide revenues of approximately $35.4 billion and net income of approximately $2.1 billion.

Chevron sold its natural gas and natural gas liquids transportation, distribution and marketing operations to NGC Corporation in 1996 and retained a stock interest in the company. NGC subsequently became Dynegy Inc. Dynegy is engaged in

the gathering, processing, fractionation, transmission, terminaling, storage, and marketing of natural gas and natural gas liquids. Chevron owns approximately 26% of Dynegy. Chevron has a long-term strategic alliance with Dynegy for the marketing of Chevron's natural gas and natural gas liquids, and the supply of natural gas and natural gas liquids to Chevron's refineries in the lower 48 states of the United States. Chevron has three positions on Dynegy's Board of Directors. This relationship gives Chevron access to information concerning Dynegy's business and allows Chevron to participate in Dynegy's business decisions.

Texaco, headquartered in White Plains, New York, is one of the world's largest integrated oil companies. Among its other businesses, Texaco is engaged, either directly or through affiliates, in the exploration for, and production of, oil and natural gas; the pipeline transportation of natural gas and natural gas liquids; the pipeline transportation of crude oil; the refining of crude oil into refined petroleum products, including gasoline, aviation fuel, and other light petroleum products; the transportation, terminaling, and marketing of gasoline and aviation fuel; and other related businesses. During fiscal year 1999, Texaco had worldwide revenues of approximately $35.7 billion and net income of approximately $1.2 billion.

In 1998, Texaco contributed its U.S. petroleum refining, marketing and transportation businesses to two joint ventures and retained an interest in the ventures. The joint ventures are Equilon Enterprises, LLC ("Equilon"), which is owned by Texaco and Shell Oil Company ("Shell"), and Motiva Enterprises, LLC ("Motiva"), which is owned by Shell, Texaco, and Saudi Refining, Inc. ("SRI"). The two joint ventures are referred to collectively as "the Alliance."

Equilon consists of Texaco's and Shell's western and midwestern U.S. refining and marketing businesses, and their nationwide transportation and lubricants businesses. Texaco and Shell jointly control Equilon. Equilon's major assets include full or partial ownership in four refineries, seven lubricants plants, about 65 terminals, and various pipelines. Equilon markets

through approximately 9,700 branded gasoline retail outlets in the U.S.

Motiva consists of Texaco's, Shell's, and SRI's U.S. eastern and Gulf Coast refining and marketing businesses. Texaco, Shell and SRI jointly control Motiva. Motiva's major assets include full or partial ownership in four refineries and about 50 terminals. Motiva markets through approximately 14,000 branded gasoline retail outlets.

Pursuant to an agreement and plan of merger dated October 15, 2000, Chevron has agreed to acquire all of the outstanding common stock of Texaco in exchange for stock of Chevron. As a result of the merger, Chevron's shareholders will hold approximately 61%, and Texaco's shareholders will hold approximately 39%, of the new combined entity.

III. The Investigation and the Complaint

The Complaint alleges that the merger of Chevron and Texaco 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, by substantially lessening competition in each of the following markets: (1) the marketing of gasoline in the western United States (including the States of Arizona, Idaho, Nevada, New Mexico, Oregon, Utah, Washington, and Wyoming), the southern United States (including the States of Alabama, Florida, Georgia, Kentucky, Louisiana, Mississippi, North Carolina, Oklahoma, Tennessee, Texas, Virginia, and West Virginia), the States of Alaska and Hawaii, and smaller areas contained therein; (2) the marketing of CARB gasoline in the State of California; (3) the refining and bulk supply of CARB gasoline for sale in the State of California; (4) the refining and bulk supply of gasoline and jet fuel in the Pacific Northwest, *i.e.*, the States of Washington and Oregon west of the Cascade mountains; (5) the bulk supply of Phase II Reformulated Gasoline ("RFG II") in the St. Louis metropolitan area; (6) the terminaling of gasoline and other light petroleum products in Arizona (Phoenix and Tucson), California (San Diego

and Ventura), Mississippi (Collins), and Texas (El Paso), and the islands of Hawaii, Kauai, Maui, and Oahu in Hawaii; (7) the pipeline transportation of crude oil from California's San Joaquin Valley; (8) the pipeline transportation of crude oil from portions of the Eastern Gulf of Mexico; (9) the pipeline transportation of offshore natural gas to shore from locations in the Central Gulf of Mexico; (10) the fractionation of raw mix into natural gas liquids specification products in the vicinity of Mont Belvieu, TX; and (11) the marketing and distribution of aviation fuel, including aviation gasoline and jet fuel, to general aviation customers in the western United States, including the States of Alaska, Arizona, California, Idaho, Nevada, Oregon, Utah, and Washington, and the southeastern United States, including the States of Alabama, Florida, Georgia, Louisiana, Mississippi, and Tennessee, and smaller areas contained therein.

To remedy the alleged anticompetitive effects of the merger, the Proposed Order requires Respondents to divest all of Texaco's interests in the Alliance (including both Equilon and Motiva), which includes (among other businesses) all of Texaco's interests in the following: (a) gasoline marketing in the States of Alaska and Hawaii, in the Western United States (Arizona, Idaho, Nevada, New Mexico, Oregon, Utah, Washington, and Wyoming), and the Southern (Alabama, Florida, Georgia, Kentucky, Louisiana, Mississippi, North Carolina, Oklahoma, Tennessee, Texas, Virginia, and West Virginia); (b) marketing of CARB gasoline in California; (c) refining and bulk supply of CARB gasoline for sale in California; (d) refining and bulk supply of gasoline and jet fuel in the Pacific Northwest; (e) the Explorer Pipeline and the bulk supply of RFG II into St. Louis; (f) terminaling of gasoline and other light products in ten metropolitan areas in Arizona, California, Mississippi, and Texas, and four islands in Hawaii; (g) the Equilon pipeline that transports crude oil from California's San Joaquin Valley; and (h) the Equilon crude oil pipeline in the Eastern Gulf of Mexico. In addition to its interest in the Alliance, Texaco must divest its one-third interest in the Discovery pipeline system; its interest in the Enterprise fractionating plant in Mont Belvieu; and its general aviation business in fourteen states (Alaska, Alabama, Arizona,

California, Florida, Georgia, Idaho, Louisiana, Mississippi, Nevada, Oregon, Tennessee, Utah, and Washington) to Avfuel Corporation.

The Complaint alleges in 11 counts that the merger would violate the antitrust laws in various lines of business and sections of the country, each of which is discussed below.

A. Count I - Marketing of Gasoline

Chevron and Texaco, through its ownership interest in the Alliance (including Equilon and Motiva), are competitors in the marketing of gasoline in the Western and Southern United States and in the States of Alaska and Hawaii. The marketing of gasoline in numerous markets within these areas would become highly concentrated, or significantly more concentrated, as a result of the proposed merger.[1] For example, in some markets in the states of Louisiana, Mississippi, Oregon and Washington, the proposed merger would increase concentration by more than 1,000 points to HHI levels above 3,000. In many other markets, the proposed merger would result in significant increases in concentration to levels at which competition may be harmed. Complete divestiture of Texaco's ownership interest in the Alliance is the most practical solution to resolve the anticompetitive effects in these markets that would result from the proposed acquisition. This total divestiture will achieve relief in all markets where the merger would substantially lessen competition.

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[1] The Commission measures market concentration using the Herfindahl-Hirschman Index ("HHI"), which is calculated as the sum of the squares of the shares of all firms in the market. *FTC and Department of Justice Horizontal Merger Guidelines ("Merger Guidelines")* § 1.5. Markets with HHIs between 1000 and 1800 are deemed "moderately concentrated," and markets with HHIs exceeding 1800 are deemed "highly concentrated." *Merger Guidelines* § 1.51.

Analysis

The marketing of gasoline is a relevant line of commerce, *i.e.*, a relevant product market, for which the proposed merger may lead to an increase in price. Gasoline is a motor fuel used in automobiles and other vehicles. It is produced in various grades and types, including conventional unleaded gasoline, reformulated gasoline ("RFG"), California Air Resources Board ("CARB") gasoline, and others. There is no substitute for gasoline as a fuel for automobiles and other vehicles that are designed to use gasoline.

The Complaint alleges that the proposed transaction would lessen competition in the western United States (Arizona, Idaho, Nevada, New Mexico, Oregon, Utah, Washington, and Wyoming), the southern United States (Alabama, Florida, Georgia, Kentucky, Louisiana, Mississippi, North Carolina, Oklahoma, Tennessee, Texas, Virginia, and West Virginia), the States of the Alaska and Hawaii, and in smaller areas contained therein. Numerous metropolitan areas in the western United States[2] and the southern United States,[3] would be affected by the

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[2] Phoenix and Tucson, AZ; Boise, ID; Las Vegas and Reno, NV; Albuquerque-Santa Fe, NM; Eugene, Klamath Falls-Medford, and Portland, OR; Salt Lake City, UT; Seattle-Tacoma, Spokane, and Yakima, WA; and Casper-Riverton, WY. In addition, in Alaska, the relevant areas are Anchorage, Fairbanks, Juneau, Ketchikan, and Sitka. In Hawaii, there are four individual islands, Hawaii, Kauai, Maui, and Oahu, that would be affected by the proposed transaction.

[3] Anniston, Birmingham, Decatur-Huntsville, Dothan, and Montgomery, AL; Mobile-Pensacola, AL/FL; Fort Lauderdale-Miami, Fort Pierce-West Palm Beach, Gainesville, and Panama City, FL; Albany, Atlanta, Columbus, Macon, and Savannah, GA; Lexington and Paducah, KY; Alexandria, Baton Rouge, El Dorado-Monroe, Lafayette, Lake Charles, New Orleans, and Shreveport, LA; Biloxi-Gulfport, Columbus-Tupelo-West Point, Hattiesburg-Laurel, Jackson, and Meridian, MS; Greenville-New Bern-Washington, NC; Ada-Ardmore, OK; Lawton-Wichita Falls,

proposed acquisition. The Commission used metropolitan statistical areas ("MSAs") as a reasonable approximation of geographic markets for gasoline marketing in Shell Oil Co., C-3803 (1998), British Petroleum Co., C-3868 (1999), and Exxon, C-3907 (2000).

The marketing segment of the business involves the wholesale and retail sale of branded and unbranded gasoline. Branded gasoline is sold under an oil company trade name (or "flag") such as Chevron, Texaco, Exxon or Shell. Unbranded gasoline is typically sold under a private label or independent trade name. Gasoline is generally sold to the general public through several different types of retail outlets, including: (1) company-operated stations, which are owned and operated by the parent oil company; (2) lessee-dealers, stations leased from the parent oil company, but operated by independent dealers; (3) open dealers, stations owned and operated by independent dealers under a franchise agreement with the parent oil company or under a supply agreement with a distributor; and (4) distributors (or "jobbers"), who own and operate a network of stations in a particular area under a franchise agreement with the parent oil company.

Branded oil companies set the retail prices of gasoline on a station-by-station basis at the stores they operate. Lessee-dealers and many open dealers purchase from the branded company at a delivered price ("dealer tank wagon" or "DTW"). DTW prices charged by major oil companies are typically set using "price zones." Price zones, and the prices used within them, take account of the competitive conditions faced by particular stations

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OK/TX; Chattanooga, TN; Bristol-Johnson City-Kingsport, TN/VA; Abilene-Sweetwater, Amarillo, Austin, Beaumont-Port Arthur, Brownsville-Harlingen-Weslaco, Corpus Christi, Dallas, El Paso, Fort Worth, Houston, Lubbock, Midland-Odessa, San Angelo, San Antonio, Temple-Waco, and Tyler, TX; Lynchburg-Roanoke and Petersburg-Richmond, VA; and Beckley-Bluefield-Oak Hill, WV.

or groups of stations and are generally unrelated to the cost of hauling fuel from the terminal to the retail store. Distributors or jobbers typically purchase branded gasoline from the branded company at a terminal (paying a terminal "rack" price), and deliver the gasoline to their own stations or to jobber-supplied stations at prices set by the distributor.

New entry is unlikely to constrain anticompetitive behavior in the markets at issue. New entrants typically face significant obstacles to becoming effective competitors, including obtaining a reliable supply of gasoline at a competitive price, and gaining access to a sufficient number of retail outlets. As a result, it is unlikely that entry will constrain a price increase resulting from the merger.

The Complaint alleges that Texaco, through the Alliance, and Chevron are direct competitors in the marketing of motor gasoline in the relevant geographic areas. The Commission is concerned that the proposed merger would increase the likelihood of coordination among the few participants in the relevant areas, by effectively combining the Chevron, Texaco and Shell brands, which would lead to an increase in the price of gasoline in the affected areas. To address the overlap in gasoline marketing between Chevron and Texaco in the relevant markets, the Proposed Order requires Texaco to divest its interest in Equilon and Motiva.

B. Count II - Marketing of CARB Gasoline

Texaco, through Equilon, and Chevron are competitors in the marketing of CARB gasoline for sale throughout the State of California. The merger would result in highly concentrated markets throughout the State of California.[4] Concentration in

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[4] The metropolitan areas alleged in the Complaint are Bakersfield, Chico-Redding, Fresno-Visalia, Los Angeles, Modesto-Sacramento-Stockton, Monterey-Salinas, Oakland-San Francisco-San Jose, Palm Springs, San Diego, and San Luis

some markets, such as Bakersfield, Fresno-Visalia, and Palm Springs, would increase to HHI levels above 2,500. The proposed merger would increase concentration in each of the California markets alleged in the complaint by more than 100 points to HHI levels above 2,000.

The refining and marketing of gasoline in California is tightly integrated, and there are only a small number of independent retail outlets that might purchase from an out-of market firm attempting to take advantage of a price increase by incumbent refiner-marketers. The extensive integration of refining and marketing makes it more difficult for the few non-integrated marketers to turn to imports as a source of supply, since individual independents lack the scale to import cargoes economically and thus must rely on California refiners for their usual supply. Refiners that lack marketing in California, and marketers that lack refineries in these relevant markets, do not effectively constrain the price and output decisions of incumbent refiner-marketers. Entry is not likely to constrain an anticompetitive price increase.

The marketing of CARB gasoline in metropolitan areas in California is a relevant market. CARB gasoline is a motor fuel used in automobiles that meets the specifications of the California Air Resources Board ("CARB"). CARB gasoline is cleaner burning and causes less air pollution than conventional gasoline. Since 1996, the sale or use of any gasoline other than CARB gasoline has been prohibited in California. There are no substitutes for CARB gasoline as a fuel for automobiles and other vehicles that use gasoline in California. In the current investigation and in past decisions, the Commission concluded that the marketing of CARB gasoline in metropolitan areas in California is a relevant market.[5]

Obispo-Santa Barbara-Santa Maria.

[5] Shell Oil Co., C-3803 (1998); Exxon, C-3907 (2000).

More than 90% of the CARB gasoline sold in California is refined by seven vertically-integrated refiners (Chevron, Equilon, BP, Ultramar, Valero, ExxonMobil and Tosco). These seven firms also control more than 90% of retail sales of gasoline in California through gas stations under their brands.

CARB gasoline is a homogeneous product, and wholesale and retail prices are publicly available and widely reported to the industry. Integrated refiner-marketers carefully monitor the prices charged by their competitors' retail outlets, and therefore can readily identify firms that deviate from a coordinated or collusive price.

California is largely isolated from most external sources of supply. CARB gasoline is generally manufactured primarily at refineries in California and at one other refinery located in Anacortes, Washington. The next closest refineries, located in the U.S. Virgin Islands and in Texas and Louisiana, do not supply CARB gasoline to California except during supply disruptions at California refineries. Non-West Coast refineries are unlikely to supply CARB gasoline to California in response to a small but significant and nontransitory increase in price because of the price volatility risks associated with opportunistic shipments.

The Complaint charges that the proposed merger, absent relief, is likely to result in an increased likelihood of coordination in the marketing of CARB gasoline on the West Coast, and is likely to lead to higher prices of CARB gasoline in California. The Complaint further charges that Chevron/Texaco would likely be able to unilaterally increase prices in California in the absence of coordination. To remedy the likely harm, the Proposed Order requires Texaco to divest its interest in Equilon, which holds Texaco's marketing interests in the State of California.

C. Count III - Refining and Bulk Supply of CARB Gasoline

Texaco, through Equilon, and Chevron are competitors in the refining and bulk supply of CARB gasoline for sale in the State of

California.[6] The market for the refining and bulk supply of CARB gasoline would be highly concentrated following the proposed merger. Based on CARB refining capacity, the proposed merger would increase concentration for the refining of CARB gasoline by West Coast refineries by more than 500 points to an HHI level above 2,000.

The refining and bulk supply of CARB gasoline is a relevant product market, and the West Coast is a relevant geographic market. As explained in Count II, only CARB gasoline can be legally sold in the State of California. No refineries outside of California and one Washington refinery regularly produce CARB gasoline in significant quantities. The relevant geographic market is the West Coast. The West Coast is geographically isolated, and California's volatile wholesale gasoline prices discourage imports. Refiners outside of the West Coast are unlikely to bring in CARB gasoline to defeat a price increase. The extensive integration of refining and marketing makes it more difficult for the few non-integrated marketers to turn to imports as a source of supply, since individual independents lack the scale to import cargoes economically and thus must rely on California refiners for their usual supply.

Entry is difficult and unlikely. New refineries are not likely to be built, and the lack of independent buyers in California makes it unlikely that regular supplies would be brought to California by a non-West Coast refiner. A new refinery would face severe environmental constraints and substantial sunk costs.

The Complaint charges that the proposed merger would likely reduce competition in the refining and bulk supply of CARB gasoline in California, thereby increasing wholesale prices of CARB gasoline. The proposed merger increases the likelihood of coordination among refiners, as well as unilateral reduction in

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[6] A bulk supply market consists of firms that have the ability to deliver large quantities of gasoline on a regular and continuing basis, such as pipelines or local refineries.

output by Chevron/Texaco. The Proposed Order requires Texaco to divest its interest in Equilon, which holds Texaco's interest in the refineries that produce CARB gasoline for sale in California.

D. Count IV - Refining and Bulk Supply of Gasoline and Jet Fuel

Texaco, through Equilon, and Chevron are competitors in the refining and bulk supply of gasoline and jet fuel in the Pacific Northwest, *i.e.*, the States of Washington and Oregon west of the Cascade mountains. The market for the refining and bulk supply of gasoline and jet fuel for the Pacific Northwest would be highly concentrated following the proposed merger. The proposed merger would increase concentration in this market by more than 600 points to an HHI level above 2,000.

Gasoline and jet fuel constitute relevant product markets. There are no substitutes for gasoline in gasoline-fueled automobiles. Jet fuel is a motor fuel used in jet engines. Jet engines must use fuel that meets stringent specifications and cannot switch to any other type of fuel. There is no substitute for jet fuel for jet engines designed to use such fuel.

The Pacific Northwest is a relevant geographic market. Customers in the Pacific Northwest cannot practicably turn outside of the market to obtain supplies in sufficient quantities in response to a small but significant and nontransitory increase in price.

Entry by a refiner would not be likely, timely or sufficient to defeat an anticompetitive price increase. The West Coast as a whole is supply-constrained both in terms of available local production and its geographic isolation from other refining centers. A new entrant would face severe environmental constraints and substantial sunk costs.

The Complaint charges that the proposed merger would eliminate direct competition in the refining and bulk supply of gasoline and jet fuel between Chevron and Texaco, and would

increase the likelihood of collusion or coordinated interaction between Respondents and their competitors, which would likely result in increased prices for the refining and bulk supply of gasoline and jet fuel in the Pacific Northwest. The Proposed Order requires Texaco to divest its interest in Equilon, which holds Texaco's interest in the Alliance's West Coast refineries, to remedy the overlap presented by the merger.

E. Count V - Bulk Supply of Phase II Reformulated Gasoline

Phase II Reformulated Gasoline, referred to as "RFG II," is a motor fuel used in automobiles. RFG II is cleaner burning than some other types of gasoline and causes less air pollution. The United States Environmental Protection Agency requires the use of RFG II in certain areas, including the St. Louis metropolitan area. RFG II is supplied in bulk from facilities that have the ability to deliver large quantities of the product on a continuing basis, such as pipelines or local refineries.

The bulk supply of RFG II is a relevant product market. There are no substitutes for pipelines or refineries for the bulk supply of RFG II. Smaller facilities that deliver RFG II in small quantities, such as tank trucks, are not cost competitive with pipelines or refineries.

One area in which RFG II is required is the St. Louis metropolitan area. Customers in the St. Louis area cannot turn to RFG suppliers outside of the area in response to a small but significant and nontransitory increase in the price of RFG II in the St. Louis area.

Texaco, through Equilon, and Chevron each hold substantial interests in the market for the bulk supply of RFG II in the St. Louis metropolitan area. Chevron owns approximately 16.7% of Explorer Pipeline, and Texaco holds interests totaling approximately 35.9% of Explorer. The Explorer Pipeline is the largest pipeline provider of bulk RFG II supply in the St. Louis metropolitan area. Equilon also has a long-term contract through

which it obtains supplies of RFG II for the St. Louis metropolitan area.

The market for the bulk supply of RFG II into the St. Louis metropolitan area is highly concentrated and would become significantly more concentrated following the proposed merger. The proposed merger would increase concentration in this market by more than 1,600 points to an HHI level of 5,000. Entry would not be likely, timely or sufficient to prevent anticompetitive effects resulting from the proposed merger.

The Complaint charges that the proposed merger would substantially lessen competition in the market for the bulk supply of RFG II in the St. Louis metropolitan area by eliminating direct competition between Chevron and Texaco, and by increasing the likelihood of collusion or coordinated interaction in the bulk supply of RFG II in the St. Louis area. The Proposed Order requires Texaco to divest Equilon, which will prevent the increase in concentration that would result from the merger.

F. Count VI - Terminaling

Texaco, through the Alliance, and Chevron are competitors in the terminaling of gasoline and other light petroleum products in metropolitan areas in Arizona, California, Mississippi, and Texas, and on certain islands in the State of Hawaii. The terminaling of gasoline and other light petroleum products in each of these markets would be highly concentrated following the proposed merger. The proposed merger would increase concentration in each of these markets by more than 300 points to HHI levels above 2,000.

The terminaling of gasoline and other light petroleum products is a relevant product market. Terminals are specialized facilities with large storage tanks used for the receipt and local distribution of large quantities of gasoline and other products. There are no substitutes for terminals for these uses. The proposed merger would be likely to lessen competition in Phoenix and Tucson, AZ,

San Diego and Ventura, CA, Collins, MS, and El Paso, TX, and on the islands of Hawaii, Kauai, Maui, and Oahu, HI.

Entry is not likely to defeat an anticompetitive increase in the cost of terminaling in the affected areas. The combination of sunk costs, significant scale economies, and environmental regulations make terminal entry unlikely.

The Complaint alleges that the effect of the proposed merger would be to substantially lessen competition in the terminaling of gasoline and other light petroleum products in the relevant markets. Respondents, either unilaterally or in coordination with other terminal operators, would likely be able to increase the price of terminaling gasoline and other light petroleum products in the relevant sections of the country as a result of the merger. The Proposed Order requires Texaco to divest its interests in the Alliance, which holds its interests in the terminals in the relevant areas.

G. Count VII - Crude Oil Pipelines Out of San Joaquin Valley, CA

Texaco, through Equilon, and Chevron are competitors in the pipeline transportation of crude oil from California's San Joaquin Valley. This market is highly concentrated and would become significantly more concentrated as a result of the proposed merger. The proposed merger would increase concentration in this market by more than 800 points to an HHI level above 3,300.

Crude oil pipelines are specialized pipelines for the transportation of crude oil from production fields to refineries or to locations where the crude oil can be transported to refineries by other means. Chevron and Equilon each own a crude oil pipeline that transports crude oil out of the San Joaquin Valley in California. There are no alternatives to pipelines for the transportation of crude oil out of the San Joaquin Valley.

New entry is unlikely to constrain anticompetitive behavior in this market. New pipeline construction requires substantial sunk

costs, and existing pipelines have a significant cost advantage over new entrants.

The Complaint alleges that the proposed merger eliminates direct competition between Chevron and Texaco and that the merger, if consummated, increases the likelihood of coordinated interaction for the pipeline transportation of crude oil from the San Joaquin Valley. In order to remedy the anticompetitive effects arising from the proposed merger, the Proposed Order requires Texaco to divest its interest in Equilon, which owns one of the pipelines that transports crude oil from the San Joaquin Valley.

H. Count VIII - Crude Oil Pipelines from the Eastern Gulf of Mexico

Texaco, through Equilon, and Chevron are competitors in the pipeline transportation of crude oil from portions of the Eastern Gulf of Mexico to on-shore terminals. The pipeline transportation of crude oil from locations in the Eastern Gulf of Mexico is highly concentrated and would become significantly more highly concentrated as a result of the proposed merger. The proposed merger would give the combined Chevron/Texaco substantial ownership interests in the only two pipelines that compete to transport crude oil from certain locations in the Eastern Gulf of Mexico.

A relevant product market is the pipeline transportation of crude oil. A relevant geographic market consists of locations in the Eastern Gulf of Mexico, including the Main Pass, Viosca Knoll, South Pass and West Delta Areas, as defined by the Department of Interior Minerals Management Service. There are two pipeline systems that transport crude oil from locations in the Eastern Gulf of Mexico to on-shore terminals: the Delta Pipeline System and the Cypress Pipeline System. The Delta system is wholly owned by Equilon. Chevron owns 50% of the Cypress system and is the operator. There are no alternatives to these two pipelines for the transportation of crude oil from locations in the Eastern Gulf of Mexico to on-shore terminals. Moreover, new

entry into this market is unlikely because of the large economies of scale enjoyed by existing pipeline carriers.

The Complaint alleges that Chevron and Texaco are direct competitors in the pipeline transportation of crude oil from portions of the Eastern Gulf of Mexico to on-shore terminals, and that the proposed merger would give Respondents the ability to unilaterally raise prices for the pipeline transportation of crude oil from locations in the Eastern Gulf. To remedy the Commission's concerns, the Proposed Order requires Texaco to divest its interest in Equilon, which owns the Delta pipeline system.

I. Count IX - Offshore Pipeline Transportation of Natural Gas

Chevron and Texaco own interests in competing offshore natural gas pipelines in the Central Gulf of Mexico. Chevron and its affiliate Dynegy own a combined 77% interest in the Venice Gathering System. Texaco owns approximately 33% of the Discovery Gas Transmission System. Texaco's ownership share is sufficient to allow it to effectively exercise veto control over important aspects of the business of the Discovery pipeline. The pipeline transportation of offshore natural gas to shore from each of the markets alleged in the Complaint is highly concentrated and would become significantly more concentrated as a result of the proposed merger. The proposed merger would give the combined Chevron and Texaco controlling interests in the only two pipelines, or two of only three pipelines, in each of these markets.

The pipeline transportation of natural gas from locations in the Central Gulf of Mexico is a relevant market. Natural gas pipelines are specialized pipelines used to transport natural gas from offshore producing platforms to shore for processing and distribution. There are no alternatives to pipelines for the transportation of natural gas from offshore locations to shore.

The affected areas are certain individual lease blocks[7] in the Central Gulf of Mexico, in areas including the South Timbalier and Grand Isle Areas, and their South Additions, as defined by the Department of Interior Minerals Management Service. Producers within these areas have few or no alternatives to the Discovery and Venice pipelines for transporting natural gas to shore.

Entry is difficult and unlikely. New pipeline construction requires substantial sunk costs, giving existing pipelines a significant cost advantage over new entrants.

The Complaint alleges that the proposed merger will decrease competition in the offshore pipeline transportation of natural gas from the specified blocks in the affected areas. The proposed merger would enable the combined Chevron/Texaco to unilaterally increase price for those areas that have no alternative to Respondents' pipelines, and would increase the likelihood of coordination among pipelines for producers who have only limited alternatives to Respondents' pipelines. To remedy the Commission's competitive concerns, the Proposed Consent Order requires Respondents to divest Texaco's entire interest in the Discovery System, including the offshore natural gas pipeline, processing plant and fractionation plant.

J. Count X - Fractionation of Natural Gas Liquids at Mont Belvieu, TX

Texaco competes with Chevron's affiliate, Dynegy, in the market for the fractionation of natural gas liquids at Mont Belvieu, Texas. Fractionators are specialized facilities that separate raw mix natural gas liquids into specification products such as ethane or ethane-propane, propane, iso-butane, normal-

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[7] South Timbalier Blocks 30, 37, 38, 44, 45, 58, 59, 61-63, 86-88, 123-35, 151-53, 157, 158, 178-80, 185-87, and 205-08; South Timbalier South Addition Blocks 223-27, 231, 233-37, 248, 251, 256, and 257; Grand Isle Blocks 52, 53, 59, 62, 63, 70-76, 84, and 85; and Grand Isle South Addition Block 86.

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 natural gas liquids into individual specification products.

Mont Belvieu, TX, is an important hub for the fractionation of raw mix natural gas liquids and the subsequent sale of fractionated specification products. Producers of raw mix natural gas liquids throughout the areas served by Mont Belvieu, which includes much of Texas, New Mexico, and other states, would not likely turn to fractionators located outside Mont Belvieu for their fractionation needs.

There are four facilities providing fractionation services at Mont Belvieu. Chevron's affiliate Dynegy owns large interests in two of the Mont Belvieu fractionators, the Cedar Bayou fractionator and the Gulf Coast fractionator. Chevron's 26% ownership of Dynegy gives it representation on Dynegy's Board of Directors as well as a direct financial stake in Dynegy's prices and profits. Texaco owns a minority interest in another fractionator known as the Enterprise fractionator.

Competitive concern arises from the ability of a firm in Chevron's position to lessen competition among the few separate facilities in this market. Competitive vigor could be compromised if, for example, sensitive information about one competitor's plans or costs were to become known by another competitor in the market. Also, Texaco's minority interest could provide a swing vote that could prevent the Enterprise fractionating facility from making a competitive move against either of the other two facilities affiliated with Chevron.

The Complaint charges that the proposed merger would lessen competition by eliminating direct competition between Texaco and Chevron's affiliate Dynegy in the fractionation of natural gas liquids at Mont Belvieu; by providing Dynegy with access to sensitive competitive information about one of its most important

competitors in Mont Belvieu; by providing Chevron, through its control of Texaco's voting at the fractionator in which Texaco has an interest, with the ability to prevent competition from that fractionator against the other fractionators in Mont Belvieu in which Dynegy has an interest; and by increasing the likelihood that the combination of Chevron and Texaco will unilaterally exercise market power. The Proposed Order requires Chevron to divest Texaco's interest in the Enterprise fractionator within six months to a purchaser approved by the Commission.

K. Count XI - Marketing of Aviation Fuel

Chevron and Texaco are competitors in the marketing of aviation gasoline and jet fuel to general aviation customers in the western United States (Alaska, Arizona, California, Idaho, Nevada, Oregon, Utah, and Washington) and the southeastern United States (Alabama, Florida, Georgia, Louisiana, Mississippi, and Tennessee).

Aviation fuel is used as a motor fuel for aircraft. There are two types of aviation fuel: aviation gasoline and jet fuel. Aviation gasoline is used in piston-powered aircraft engines, while jet fuel is used in jet engines. There are no substitutes for aviation gasoline or jet fuel for aircraft designed to use such fuels. Aviation fuel is sold through several channels of distribution, including the general aviation channel. This channel consists of fixed base operators ("FBOs") that sell fuel at retail to customers at airports, and distributors that sell to FBOs. FBOs in turn sell fuel to general aviation customers such as corporate aircraft, crop dusters, owners of private airplanes, and similar users (other than commercial airlines and military aircraft).

Chevron and Texaco are among only a few marketers of aviation fuel to general aviation customers in the western and southeastern United States. The marketing of aviation fuel to general aviation customers in each of these markets would be highly concentrated as a result of the merger. The proposed merger would increase concentration in the southeastern United States by more than 250 points to an HHI level above 1,900, and

would increase concentration in the western United States by more than 1,600 points to an HHI level above 3,400.

The Complaint alleges that the proposed merger will likely lessen competition in the marketing and distribution of aviation fuel to general aviation customers in the western United States and the southeastern United States, by increasing the likelihood that the merged firm will unilaterally exercise market power, and by increasing the likelihood of collusion or coordinated interaction. The Proposed Consent Order requires Respondents to divest Texaco's general aviation business in the western and southeastern United States to an up-front buyer, Avfuel Corporation, within ten (10) days following the merger, to remedy the Commission's concerns.

IV. Resolution of the Competitive Concerns

The Commission has provisionally entered into the Agreement Containing Consent Orders with Chevron and Texaco in settlement of the Complaint. The Agreement Containing Consent Orders contemplates that the Commission would issue the Complaint and enter the Proposed Order and the Hold Separate Order for the divestiture of certain assets described below.

A. The Alliance

The proposed combination of Chevron and Texaco would effectively combine the downstream operations of Chevron, Shell, and Texaco in the United States. In order to deal with the overlap issues involving the downstream segments of the businesses, Paragraphs II - III of the Proposed Order require Respondents to divest Texaco's entire interest in the Alliance. Paragraph IV contains provisions dealing with the licensing of the Texaco brand and Chevron's ability to compete for dealers and distributors using the Texaco brand following the merger.

Paragraph II of the Proposed Order requires Respondents to divest either (a) the Alliance interests to Shell (and SRI in the case of Motiva) no later than the date of the Chevron/Texaco merger,

or (b) within eight months after the Chevron/Texaco merger, at no minimum price, either (i) the Alliance interests to Shell (and SRI in the case of Motiva), or (ii) the Texaco subsidiaries that own the Alliance interests (TRMI and TRMI East)[8] to an acquirer or acquirers approved by the Commission. Shell and SRI are appropriate buyers of the assets because they already are partners with Texaco in the Alliance. All assets in each portion of the Alliance already are under common ownership and control, and divestiture of these interests to Shell and SRI would closely maintain the situation that currently exists. If the required divestitures occur prior to or on the date of the Chevron/Texaco merger, they are to be accomplished by Respondents; if they occur after the merger date, they are to be accomplished by a divestiture trustee pursuant to the provisions of Paragraph III of the Proposed Order.

Paragraph II further provides that Chevron and Texaco may not consummate the merger unless and until Texaco has either divested the Alliance interests to Shell and/or SRI, or has transferred TRMI and TRMI East to a trustee. The paragraph also contains provisions that ensure that Shell's and SRI's rights under the agreements establishing the Alliance will be protected. It also provides that, if the trust is rescinded, unwound, dissolved or otherwise terminated at any time before the divestitures have been accomplished, then Respondents will hold TRMI and TRMI East separate and apart from Respondents pursuant to the Hold Separate Order.

If the divestiture has not occurred before the merger, Paragraph III of the Proposed Order requires Respondents to enter into a trust agreement and transfer TRMI and TRMI East to the trustee. A divestiture trustee will then have the sole and exclusive power and authority to divest the Alliance interests, subject to the prior

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[8] Texaco's interest in the Alliance is held by a Texaco subsidiary, Texaco Refining and Marketing, Inc. ("TRMI"). A subsidiary of TRMI, known as TRMI East, holds Texaco's interest in Motiva.

approval of the Commission. The trustee will have eight months to accomplish the divestitures, at no minimum price, to a buyer or buyers approved by the Commission (which could still include Shell and/or SRI). Respondents' transfer of the Alliance interests into trust does not prevent Shell and/or SRI from exercising any rights they may have under the applicable joint venture agreement to acquire Texaco's interests in Equilon or Motiva. Further, if Shell or SRI decline to exercise their rights to acquire Equilon or Motiva under the joint venture agreements, then they may offer to acquire the interests from the trustee, on equal footing with any other interested buyers.

The trust will have a divestiture trustee to accomplish the divestitures, and two operating trustees (one for TRMI and one for TRMI East) to manage and operate the Alliance interests separate and apart from Respondents' operations. The proposed Divestiture Trustee is Robert A. Falise, who most recently has been Chairman and Managing Trustee of the Manville Personal Injury Settlement Trust. Mr. Falise is an attorney and businessman with extensive experience in mergers and acquisitions. The proposed Operating Trustees are Joe B. Foster and John Linehan. Mr. Foster is the Chairman of Newfield Exploration Company, a Houston-based oil and gas exploration and production company that he founded in 1989. Mr. Linehan most recently served as Executive Vice President and Chief Financial Officer of Kerr-McGee Corporation. Both Mr. Foster and Mr. Linehan have extensive experience in the types of business engaged in by the Alliance.

Paragraph IV of the Proposed Order deals with issues concerning the licensing of the Texaco brand. It provides that Respondents shall offer to extend the license for the Texaco brand provided to Equilon and Motiva, on terms and conditions comparable to those in existence when the Agreement Containing Consent Orders was signed, on an exclusive basis until June 30, 2002 for Equilon and June 30, 2003 for Motiva. These dates correspond with the dates when the franchise agreements expire for many of the Equilon and Motiva distributors.

Analysis

If Equilon agrees to waive certain provisions in its contracts with distributors and dealers requiring the distributors and dealers to repay money that has been paid or reimbursed by Equilon for various Alliance programs during the past few years, such as station re-imaging, and if it agrees to waive any deed restrictions prohibiting or restricting the sale of motor fuel not sold by Equilon at any retail outlet that does not agree to become a Shell branded outlet, then Texaco shall offer Equilon an additional year of exclusivity (so exclusivity would expire at the same time for both Equilon and Motiva). If Equilon and Motiva waive the provisions described above, Texaco shall offer additional license extensions, on a non-exclusive basis, until June 30, 2006, for all retail outlets for which Equilon and Motiva have entered into agreements for re-branding under the Shell brand. If Equilon or Motiva do not waive the contract provisions requiring repayment from dealers and distributors, then Respondents are required to indemnify the dealers and distributors for all such amounts (plus litigation and arbitration costs), provided that (1) the dealer or distributor has declined a request for payment from Equilon or Motiva, (2) Equilon or Motiva has commenced litigation or arbitration to compel payment, and (3) the dealer or distributor has either defended the litigation or afforded Respondents the right to do so. In addition, no indemnification need be provided for any retail outlet (1) as to which the dealer or distributor terminates its brand relationship prior to the date on which Equilon and Motiva lose their license exclusivity for the Texaco brand (June 30, 2002 or June 30, 2003), (2) which becomes a Shell branded outlet, or (3) which receives compensation for such amounts from another source.

Paragraph IV also provides that, for a period of one year following the date on which Equilon or Motiva stops supplying gasoline under the Texaco brand to any retail outlet branded Texaco as of the date the Agreement Containing Consent Orders is executed by Respondents, Respondents shall not enter into any agreement for the sale of branded gasoline to such retail outlet, sell branded gasoline to such retail outlet, or approve the branding of such retail outlet, under the Texaco brand or under any brand that contains the Texaco brand, unless either (1) such agreement,

sale, or approval would not result in an increase in concentration in the sale of gasoline in any metropolitan area (or county outside a metropolitan area), or (2) there are no sales of Chevron branded gasoline in that market. The purpose of this provision is to prevent Respondents from defeating the purpose of the Proposed Order by supplying Texaco-branded gasoline to the same stations that resulted in the original violation.

By requiring divestiture of Texaco's interests in the Alliance, the Proposed Order remedies anticompetitive effects in the following markets: (a) gasoline marketing in markets in the western United States, the southern United States, and the States of Alaska and Hawaii; (b) the marketing of CARB gasoline in California; (c) the refining and bulk supply of CARB gasoline for sale in California; (d) the refining and bulk supply of gasoline and jet fuel in the Pacific Northwest; (e) the bulk supply of RFG II gasoline into St. Louis; (f) the terminaling of gasoline and other light products in markets in the States of Arizona, California, Hawaii, Mississippi, and Texas; (g) the pipeline transportation of crude oil from California's San Joaquin Valley; and (h) the transportation of crude oil from locations in the Eastern Gulf of Mexico.

B. The Non-Alliance Operations

Paragraphs V through VIII of the Proposed Order deal with the divestitures that are required outside of the Alliance.

1. Pipeline Transportation of Offshore Louisiana Natural Gas

Paragraph V of the Proposed Order requires Texaco to divest its interest in the Discovery pipeline, including the associated processing plant and fractionator (collectively the "Discovery System"), within six months of the date of the merger, at no minimum price, to a buyer or buyers that receive the approval of the Commission and only in a manner that receives the prior approval of the Commission. The purpose of the divestiture of Texaco's interest in the Discovery System is to eliminate the

overlap of ownership between the Discovery System and the Venice System and to remedy the lessening of competition resulting from the proposed merger as alleged in the Commission's Complaint.

The Proposed Order also provides that Texaco shall resign its position as operator of the Discovery System immediately after it obtains the approvals of the other partners in the Discovery System. In addition, prior to divestiture of Texaco's interest in the Discovery System, Respondents are to offer to enter into an agreement with the acquirer for the purchase, sale or exchange of natural gas liquids that is no less favorable for the acquirer than the terms of an existing contract with one of Texaco's partners in the Discovery System. Texaco owns a natural gas liquids pipeline that transports liquids away from the Discovery fractionator. Williams, a co-owner of the Discovery System, currently has a contract with Texaco for the disposition of its natural gas liquids that are processed at the Discovery fractionator. The purpose of this provision is to ensure that Respondents do not attempt to impose rates or terms for pipeline transportation to markets from the Discovery System's fractionating plant that would impede the ability of the Discovery System to compete for natural gas transportation from the relevant areas in the Central Gulf of Mexico.

2. Fractionation of Natural Gas Liquids at Mont Belvieu, Texas

Paragraph VI of the Proposed Order requires Respondents to divest Texaco's interest in the Enterprise fractionator at Mont Belvieu, at no minimum price, within six months after the merger, to an acquirer that receives the prior approval of the Commission and in a manner that receives the prior approval of the Commission. The purpose of the divestiture of Texaco's interest in the Enterprise fractionator is to eliminate the overlap of ownership between the Enterprise fractionator and other fractionating plants at Mont Belvieu, Texas, in which Respondents or their affiliates own interests, and to remedy the lessening of competition resulting from the proposed merger.

3. Marketing of Aviation Fuel

Paragraph VII of the Proposed Order requires Respondents to divest, within ten days of the merger date, Texaco's general aviation business in 14 states (Alabama, Alaska, Arizona, California, Florida, Georgia, Idaho, Louisiana, Mississippi, Nevada, Oregon, Tennessee, Utah, and Washington), to an up-front buyer, Avfuel Corporation ("Avfuel"). Respondents must sell Texaco's general aviation business to Avfuel pursuant to an agreement approved by the Commission.

Avfuel is an existing marketer of aviation fuel that, unlike most other marketers, is not vertically integrated into the production of aviation gasoline or jet fuel. The company is well regarded as an independent competitive force in the industry, and appears to be particularly well situated to purchase just the assets relating to these 14 states and successfully integrate them into its business. An up-front buyer is preferable for these assets because they consist largely of contractual relationships rather than an on-going divestible business. In addition, because the business being divested consists largely of contractual relationships, an existing participant in the business is likely to have advantages with respect to maintaining and growing these relationships.

In the event Respondents fail to divest Texaco's general aviation business in the relevant areas to Avfuel, the Proposed Order requires Respondents to divest an alternative asset package that is broader than the initial divestiture assets. The broader package consists of Texaco's entire general aviation marketing business in the United States. The package is broader than the package being divested to Avfuel because other buyers may need the entire business in order to be viable. If this broader package is divested, the Order requires that the divestiture be accomplished within four months of the merger date, at no minimum price, to an acquirer that receives the prior approval of the Commission. If neither the divestiture to Avfuel nor the divestiture of the broader package has occurred within four months after the merger, then the Commission will appoint a trustee to divest Texaco's entire general aviation marketing business in the United States.

If the business is not sold to Avfuel pursuant to the agreement, Respondents are required to assign to the other post-merger acquirer all agreements used in or relating to Texaco's domestic general aviation business. If Respondents fail to obtain any such assignments, Respondents are to substitute arrangements sufficient to enable the acquirer to operate the business in the same manner and at the same level and quality as Texaco operated it at the time of the merger's announcement. At the option of the acquirer, Respondents are to enter into an agreement that grants the acquirer, for a period of up to ten years from the date of such agreement, a license to use the Texaco brand in connection with the operation of Texaco's general aviation business in the U.S. For twelve months following the discontinuation of the supply of Texaco-branded aviation fuel to a fixed base operator or distributor, Respondents may not enter into any contract or agreement for the supply of Texaco-branded aviation fuel to such fixed base operator or distributor, or approve the branding of such fixed base operator or distributor with the Texaco brand. In addition, for six months following the consummation of any post-merger divestiture, Respondents are not to compete for the direct supply of branded aviation fuel to any fixed base operator or distributor that had an agreement for the sale of Texaco-branded aviation fuel in the U.S.

Pursuant to Paragraph VIII of the Proposed Order, if Respondents have failed to divest either: (1) Texaco's general aviation business in the relevant overlap areas, or (2) Texaco's domestic general aviation business within four months of the merger date, the Commission may appoint a trustee to divest Texaco's domestic general aviation business, at no minimum price, to a buyer approved by the Commission.

The purpose of the divestiture of Texaco's general aviation business in the affected areas, or of Texaco's entire domestic general aviation business, is to ensure the continuation of such assets in the same business in which the assets were engaged at the time of the announcement of the merger by a person other than Respondents, and to remedy the lessening of competition alleged in the Complaint.

C. Other Terms

Paragraphs IX - XIII of the Proposed Order detail certain general provisions. Pursuant to Paragraph IX, Respondents are required to provide the Commission with a report of compliance with the Proposed Order every sixty days until the divestitures are completed. Paragraph X requires that Respondents provide the Commission with access to their facilities and employees for the purposes of determining or securing compliance with the Proposed Order.

Paragraph XI provides that, no less than 30 days prior to the merger, Respondents must notify Shell and SRI of the projected merger date and provide copies of the Agreement Containing Consent Orders and all non-confidential documents attached thereto to Shell and SRI.

Paragraph XII provides for notification to the Commission in the event of any changes in the corporate Respondents. Finally, Paragraph XIII provides that if a State fails to approve any of the divestitures contemplated by the Proposed Order, then the period of time required under the Proposed Order for such divestiture shall be extended for sixty days.

V. Opportunity for Public Comment

The Proposed Order has been placed on the public record for thirty (30) days for receipt of comments by interested persons. The Commission, pursuant to a change in its Rules of Practice, has also issued its Complaint in this matter, as well as the Hold Separate Order. Comments received during this thirty day comment period will become part of the public record. After thirty (30) days, the Commission will again review the Proposed Order and the comments received and will decide whether it should withdraw from the Proposed Order or make final the agreement's Proposed Order.

Analysis

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, and to aid the Commission in its determination of whether it should make final the Proposed Order contained in the agreement. 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.

Statement of Commissioners Sheila F. Anthony and Mozelle W. Thompson

The Commission today voted to finalize a consent order enabling the $45 billion merger of Chevron and Texaco to proceed, subject to a number of divestitures affecting multiple relevant markets in the United States. While we concur in the Commission's decision, we write separately to highlight a concern relating to the divestiture of Texaco's interests in two joint ventures.

First, a bit of history is needed. In 1998, Texaco and Shell Oil Company contributed virtually all of their U.S. petroleum refining, transportation, and marketing operations to Equilon Enterprises, LLC[1] and Motiva Enterprises, LLC[2] (collectively, the "Alliance"). These joint ventures created what was, at the time, the single largest refiner and marketer of petroleum products in the United States. For antitrust purposes, the Commission evaluated the formation of the Alliance as if it were a complete merger of the downstream operations of Texaco and Shell. As a condition of approving the proposed joint ventures, the Commission required Texaco and Shell to divest a broad package of assets sufficient to remedy competitive overlaps in markets for gasoline, jet fuel, asphalt, and transportation of refined light

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[1] Equilon is currently owned 56% by Shell affiliates and 44% by Texaco affiliates. *See* Equilon/Motiva web site, *available at* <http://www.equilon.com/content/equilon_who_we_are_text.asp>.

[2] At the time of its formation, Motiva was owned 35% by Shell affiliates and 32.5% each by affiliates of Texaco and Saudi Refining, Inc. ("SRI"). The current provisional ownership percentages are 30% for Shell and 35% each for Texaco and SRI. *See* Equilon/Motiva web site, *available at* <http://www.equilon.com/content/motiva_who_we_are_text.asp>.

petroleum products.[3] In all subsequent oil merger investigations undertaken by the Commission, we have considered Texaco and Shell to be a single entity when evaluating downstream market concentration.

In late 2000, when Chevron and Texaco proposed to merge, it became apparent that Chevron and the Alliance had a number of unacceptable downstream overlaps, particularly in gasoline refining, transportation, and marketing. To remedy these overlaps, the Commission has required that Texaco divest its entire interest in the Alliance to Shell[4] or another buyer that is approved by the Commission.

After a careful analysis, the Commission has concluded that Shell's acquisition of Texaco's Alliance interest will eliminate the identified anticompetitive overlaps between Chevron and Texaco, and will not create additional competitive problems in any downstream markets. In the Analysis to Aid Public Comment that accompanied the proposed consent agreement, the Commission explained why it would be acceptable to allow Texaco to divest its interest in the Alliance to Shell:

> [a]ll assets in each portion of the Alliance already are under common ownership and control, and divestiture of these interests to Shell . . . would closely maintain the situation that currently exists.[5]

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[3] FTC Press Release, "Shell, Texaco To Divest Assets To Settle FTC Charges" (Dec. 19, 1997), *available at* <http://www.ftc.gov/opa/1997/9712/shell.htm>.

[4] In the case of Motiva, the Texaco interest would be divested to both Shell and SRI, the third joint venture partner.

[5] Chevron Corporation/Texaco Inc., Dkt. No. C-4023, "Analysis to Aid Public Comment" (Sept. 7, 2001), *available at* <http://www.ftc.gov/os/2001/09/chevtexana.htm>.

In short, the Commission has concluded that Texaco's transfer of its Alliance interest to Shell, Texaco's current joint venture partner, will remedy the problems posed by this merger and will not significantly change the competitive *status quo*, even under the rigorous concentration standards the Commission has applied to mergers in the oil industry in recent years.

While we are comfortable with the result in this matter, we remain concerned that the Chevron/Texaco consent order may have created a misimpression: that the Commission gives an automatic antitrust "pass" to transactions stemming from buy-outs of joint venture partners. In our view, this is far from true. It seems to us that when one joint venture partner buys out another partner's interest, that transaction should be subject to antitrust analysis under current market conditions – regardless of the analysis that may have been undertaken when the joint venture initially was formed.[6] Any other approach would risk permanently immunizing joint venturers from antitrust enforcement, regardless of subsequent changes in their relationship and in the marketplace. The resulting double standard would be unfair to merger parties not previously engaged in joint venture arrangements with each other, and such a double standard likely would lead to consumer harm as well.

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[6] Of course, the Commission would be entitled to review such a transaction even if it were not reportable under the Hart-Scott-Rodino premerger notification regime.

Complaint

IN THE MATTER OF

KONINKLIJKE AHOLD NV, 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-4027; File No. 0110247
Complaint, December 7, 2001--Decision, January 16, 2002

This consent order addresses the acquisition by Respondent Koninklijke Ahold NV ("Ahold"), a global food service and food retailer headquartered in The Netherlands, with more than 1,300 supermarkets and other retail food stores in the United States – of Respondent Bruno's Supermarkets Inc., the largest supermarket chain in the State of Alabama. The order, among other things, requires the respondents to divest a supermarket in Milledgeville, Georgia to The Kroger Company, and to divest a supermarket in Sandersville, Georgia to Winn-Dixie Stores, Inc. The order also requires the respondents to maintain the viability, marketability and competitiveness of the supermarkets identified for divestitures. In addition, the order requires Respondent Ahold, for ten years, to give the Commission prior notice before acquiring any supermarkets, or any interest in any supermarkets, located in the counties that include Milledgeville and Sandersville, Georgia.

Participants

For the Commission: *Susan Huber, David Von Nirschl, Ramon Gras, Morris Morkre, Sara Harkavy, Richard Liebeskind, Elizabeth A. Piotrowski, Mary T. Coleman* and *Charissa P. Wellford.*

For the Respondents: *J. Mark Gidley, George Paul,* and *Doug Jasinski, White & Case,* and *Michael Byowitz, Wachtell, Lipton, Rosen & Katz.*

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act and the Clayton Act, and by virtue of the authority vested in it by said Acts, the Federal Trade Commission ("Commission"), having reason to believe that respondent Koninklijke Ahold NV

("Ahold") has entered into an agreement to acquire 100% of the outstanding voting securities of respondent Bruno's Supermarket, Inc. ("Bruno's"), all subject to the jurisdiction of the Commission, in violation of Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45, that such acquisition, if consummated, would violate Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18, and Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45, and that a proceeding in respect thereof would be in the public interest, hereby issues its complaint, stating its charges as follows:

Definition

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

Koninklijke Ahold NV

PARAGRAPH TWO: Respondent Ahold is a corporation organized, existing, and doing business under and by virtue of the laws of The Netherlands, with its office and principal place of business located at Albert Heijnweg 1, 1507 EH Zaandam, The Netherlands.

PARAGRAPH THREE: Respondent Ahold, through Ahold USA, Inc., BI-LO Holdings, LLC Inc.; Giant-Carlisle Holding, LLC Entities; Giant Food, Inc. n/k/a Ahold U.S.A. Holdings, Inc.; The Stop & Shop Supermarket Company; and Tops Markets, LLC; its wholly-owned domestic subsidiaries, is, and at all times relevant

herein has been, engaged in the operation of supermarkets in Alabama, Connecticut, the District of Columbia, Delaware, Georgia, Maryland, Massachusetts, New Jersey, New York, North Carolina, Ohio, Pennsylvania, Rhode Island, South Carolina, Tennessee, Virginia, and West Virginia. Ahold and its wholly-owned domestic subsidiaries operate over 1,000 supermarkets, including 294 BI-LO stores, in these states under the BI-LO, Giant, MARTIN'S, Stop & Shop, and Tops Friendly Market trade names. Ahold had $27.8 billion in total United States sales in fiscal year 2000.

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

Bruno's Supermarkets, Inc.

PARAGRAPH FIVE: Respondent Bruno's is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Delaware, with its office and principal place of business located at 800 Lakeshore Parkway, Birmingham, Alabama.

PARAGRAPH SIX: Respondent Bruno's is, and at all times relevant herein has been, engaged in the operation of supermarkets in Alabama, Georgia, Florida and Mississippi. Bruno's operates approximately 169 supermarkets under the Bruno's, Food World, FoodMax, Food Fair and Fresh Value trade names. Bruno's had $1.6 billion in total sales for the fiscal year ending January 27, 2001.

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

Acquisition

PARAGRAPH EIGHT: On or about September 4, 2001, Ahold, New Bronco Acquisition Corp., a Delaware corporation and an indirect wholly owned subsidiary of Ahold, Bruno's, and Elway Advisors, LLC, as stockholder's representative, entered into an Agreement and Plan of Merger. Pursuant to this Agreement, Ahold will acquire all of the outstanding voting securities of Bruno's for approximately $500 million in cash by merger of New Bronco with and into Bruno's Supermarkets, with Bruno's Supermarkets continuing as the surviving corporation. As a result of the merger, Ahold will hold 100% of the voting securities of Bruno's.

Trade and Commerce

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

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

PARAGRAPH ELEVEN: Supermarkets compete primarily with other supermarkets that provide one-stop shopping for food and grocery products. Supermarkets base their food and grocery prices primarily on the prices of food and grocery products sold at nearby supermarkets. Supermarkets do not regularly price-check food and grocery products sold at other types of stores and do not significantly change their food and grocery prices in response to prices at other

types of stores. Most consumers shopping for food and grocery products at supermarkets are not likely to shop elsewhere in response to a small price increase by supermarkets.

PARAGRAPH TWELVE: Retail stores other than supermarkets that sell food and grocery products, such as neighborhood "mom & pop" grocery stores, limited assortment stores, convenience stores, specialty food stores (e.g., seafood markets, bakeries, etc.), club stores, military commissaries, and mass merchants, do not effectively constrain prices at supermarkets. These stores operate significantly different retail formats. None of these stores offers a supermarket's distinct set of products and services that enables 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 in and near Sandersville, Georgia and Milledgeville, Georgia.

Market Structure

PARAGRAPH FOURTEEN: The Sandersville, Georgia and Milledgeville, Georgia relevant markets are highly concentrated, whether measured by the Herfindahl-Hirschman Index (commonly referred to as "HHI") or by two-firm and four-firm concentration ratios. The acquisition would substantially increase concentration in each market. Ahold and Bruno's would have a combined market share of greater than 50% in each geographic market. The post-acquisition HHI in Milledgeville would exceed 5400 and, in Sandersville, would exceed 5500.

Entry Conditions

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

Actual Competition

PARAGRAPH SIXTEEN: Ahold and Bruno's are actual and direct competitors in Sandersville, Georgia and Milledgeville, Georgia.

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 country in violation of Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18, and Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45, in the following ways, among others:

a. by eliminating direct competition between supermarkets owned or controlled by Ahold and Supermarkets owned or controlled by Bruno's;

b. by increasing the likelihood that Ahold 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 country.

Violations Charged

PARAGRAPH EIGHTEEN: The Agreement and Plan of Merger between and among Ahold, New Bronco Acquisition Corp., Bruno's, and Elway Advisors, LLC, violates Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45, and the proposed acquisition would, if consummated, violate Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18, and Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45.

WHEREFORE, THE PREMISES CONSIDERED, the Federal Trade Commission on this Seventh day of December, 2001, issues its complaint against said respondents.

By the Commission.

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 Bruno's Supermarkets, Inc. ("Bruno's") by Respondent Koninklijke Ahold N.V. ("Ahold"), 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, now in further conformity with the procedure described 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 Ahold is a corporation organized, existing and doing business under and by virtue of the laws of the

Netherlands, with its office and principal place of business located at Albert Heijnweg 1, 1507 EH Zaandam, The Netherlands.

2. Respondent Bruno's is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Delaware, with its office and principal place of business located at 800 Lakeshore Parkway, Birmingham, AL.

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. "Ahold" means Koninklijke Ahold N.V., its directors, officers, employees, agents, representatives, predecessors, successors, and assigns; its joint ventures, subsidiaries, divisions, groups, and affiliates controlled by Koninklijke Ahold N.V. (including, but not limited to, BI-LO, LLC, and New Bronco Acquisition Corp.), and the respective directors, officers, employees, agents, representatives, successors, and assigns of each.

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

C. "Respondents" means Ahold and Bruno's, individually and collectively.

D. "Acquisition" means Ahold's proposed acquisition of the outstanding voting securities of Bruno's pursuant to the "Agreement and Plan of Merger Dated as of September 4, 2001 By and Among Koninklijke Ahold N.V., New Bronco Acquisition Corp., Bruno's Supermarkets, Inc. and Elway Advisors, LLC, as Stockholder's Representatives."

E. "Commission" means the Federal Trade Commission.

F. "Assets To Be Divested" means the Milledgeville Assets and the Sandersville Assets.

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

H. "Commission-approved Acquirer" means any entity approved by the Commission to acquire either or both of the Assets To Be Divested pursuant to this Order.

I. "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 Kroger Agreement, and/or the Winn-Dixie Agreement.

J. "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.

K. "Kroger" means The Kroger Co., a corporation 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 1014 Vine Street, Cincinnati, Ohio 45202-1100.

L. "Kroger Agreement" means the "Agreement of Purchase and Sale of Assets and Assignment and Assumption of Lease" by and between BI-LO, LLC and The Kroger Co. made and entered into on November 14, 2001, and all amendments, exhibits, attachments, related agreements, and schedules thereto, that have been approved by the Commission to accomplish the requirements of this Order.

M. "Milledgeville Assets" means the Supermarket currently operated by Respondent Ahold under the BI-LO trade name located at 1692 North Columbia Street, Milledgeville, Georgia, 31061, 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' trade marks, 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. "Sandersville Assets" means the Supermarket currently operated by Respondent Ahold under the BI-LO trade name located at 648 Harris Street, Sandersville, Georgia, 31082, 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' trade marks, 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 a full-line retail grocery store that carries a wide variety of food and grocery items in particular product categories, including bread and dairy products; refrigerated and

frozen food and beverage products; fresh and prepared meats and poultry; produce, including fresh fruits and vegetables; shelf-stable food and beverage products, including canned and other types of packaged products; staple foodstuffs, which may include salt, sugar, flour, sauces, spices, coffee, and tea; and other grocery products, including nonfood items such as soaps, detergents, paper goods, other household products, and health and beauty aids.

P. "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.

Q. "Winn-Dixie" means Winn-Dixie Stores, Inc., a corporation organized, existing and doing business under and by virtue of the laws of the State of Florida, with its offices and principal place of business located at 5050 Edgewood Court, Jacksonville, Florida 32254.

R. "Winn-Dixie Agreement" means "Agreement of Purchase and Sale of Assets and Assignment and Assumption of Lease" by and between BI-LO, LLC and Winn-Dixie Stores, Inc. made and entered into on November 13, 2001, and all amendments, exhibits, attachments, related agreements, and schedules thereto, that have been approved by the Commission to accomplish the requirements of this Order.

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 Milledgeville Assets as an ongoing business to Kroger pursuant to and in accordance with the Kroger 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 Milledgeville Assets shall constitute a failure to comply with this Order.

Provided, however, that if Respondents have divested the Milledgeville Assets to Kroger pursuant to the Kroger 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 Kroger is not an acceptable purchaser of the Milledgeville Assets or that the manner in which the divestiture was accomplished is not acceptable, then Respondents shall immediately rescind the transaction with Kroger and shall divest the Milledgeville Assets within three (3) months of the date the Order becomes final, absolutely and in good faith, at no minimum price, to an acquirer that receives the prior approval of the Commission and only in a manner that receives the prior approval of the Commission.

B. 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 Sandersville Assets as an ongoing business to Winn-Dixie pursuant to and in accordance with the Winn-Dixie 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 II. Any failure by Respondents to comply with all terms of any Divestiture Agreement related to the Sandersville Assets shall constitute a failure to comply with this Order.

Provided, however, that if Respondents have divested the Sandersville Assets to Winn-Dixie pursuant to the Winn-Dixie 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 Winn-Dixie is not an acceptable purchaser of the Sandersville Assets or that the

manner in which the divestiture was accomplished is not acceptable, then Respondents shall immediately rescind the transaction with Winn-Dixie and shall divest the Sandersville Assets within three (3) months of the date the Order becomes final, absolutely and in good faith, at no minimum price, to an acquirer that receives the prior approval of the Commission and only in a manner that receives the prior approval of the Commission.

C. Respondents shall obtain all required Third Party Consents prior to the closing of each Divestiture Agreement pursuant to which the Assets To Be Divested are divested to a Commission-approved Acquirer.

D. 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.

E. The purpose of the divestitures is to ensure the continuation of the Milledgeville Assets and the Sandersville 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 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 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 relevant assets required to be divested by this Order.

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 within six (6) months prior to the date of such proposed acquisition in Baldwin County or Washington County, Georgia.

B. Acquire any stock, share capital, equity, or other interest in any entity that owns any interest in or operates any Supermarket, or owned any interest in or operated any Supermarket within six (6) months prior to such proposed acquisition in Baldwin County or Washington County, Georgia.

Provided, however, that advance written notification shall not apply to the construction of new facilities by Respondents or the acquisition of or leasing a facility that has not operated as a Supermarket within six (6) months prior to Respondent's 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 (hereinafter referred to as "the Notification"), and shall be prepared and transmitted in accordance with the requirements of that part, except that no filing fee will be required for any such notification, notification shall be filed with the Secretary of the Commission, notification need not be made to the United States Department of Justice, and notification is required only of Respondents and not of any other party to the transaction. Respondents shall provide the Notification to the Commission at least thirty (30) days prior to consummating any such transaction (hereinafter referred to as the "first waiting period"). If, within the first waiting period, representatives of

the Commission make a written request for additional information or documentary material (within the meaning of 16 C.F.R. § 803.20), Respondents shall not consummate the transaction until 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:

A. Respondents shall neither enter into nor enforce any agreement that restricts the ability of any person (as defined in Section 1(a) of the Clayton Act, 15 U.S.C. § 12(a)) that acquires any Supermarket, any leasehold interest in any Supermarket, or any interest in any retail location used as a Supermarket on or after January 1, 2001, in Baldwin County or Washington County, Georgia to operate a Supermarket at that site if such Supermarket was formerly owned or operated by Respondents.

B. Respondents shall not remove any fixtures or equipment from a property owned or leased by Respondents in Baldwin County or Washington County, Georgia that is no longer in operation as a Supermarket, except (1) prior to and as part of a sale, sublease, assignment, or change in occupancy of such Supermarket; (2) to relocate such fixtures or equipment in the ordinary course of business to any other Supermarket 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.

By the Commission.

APPENDIX I

[Non-Public]

APPENDIX II

[Non-Public]

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 Bruno's Supermarkets, Inc. ("Bruno's") by Respondent Koninklijke Ahold N.V. ("Ahold"), 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 Ahold is a corporation organized, existing and doing business under and by virtue of the laws of the Netherlands, with its office and principal place of business

located at Albert Heijnweg 1, 1507 EH Zaandam, The Netherlands.

2. Respondent Bruno's is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Delaware, with its office and principal place of business located at 800 Lakeshore Parkway, Birmingham, AL.

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 the divestiture of Assets to Be Divested related to such Supermarket, as described in and required by the attached Decision and Order, is completed.

Provided, however, that if the Commission, pursuant to Paragraph II.A. or II.B. of the Decision and Order, requires the Respondents to rescind either or both of the divestitures contemplated by the Kroger Agreement or the Winn-Dixie 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 the divestiture(s) of the relevant Assets To Be Divested, as described in and required by the attached Decision and Order, are completed by the Respondents.

By the Commission.

Analysis of the Draft Complaint and Proposed Decision Order to Aid Public Comment

I. Introduction

The Federal Trade Commission ("Commission) has accepted for public comment from Koninklijke Ahold NV, ("Ahold"), and Bruno's Supermarkets Inc., ("Bruno's") (collectively "the Proposed Respondents") an Agreement Containing Consent Orders ("the proposed consent order"). The Proposed Respondents have also reviewed a draft complaint contemplated by the Commission. The proposed consent order is designed to remedy likely anticompetitive effects arising from Ahold's proposed acquisition of all of the outstanding voting stock of Bruno's.

II. Description of the Parties and the Proposed Acquisition

Ahold is a global food service and food retailer headquartered in the Netherlands. The company operates or services approximately 8,500 stores in the United States, Europe, Latin America and Asia and had sales of over $49 billion in 2000. In the United States, Ahold, through its U.S. subsidiary Ahold U.S.A., Inc., operates over 1,300 retail food stores, including supermarkets under the Giant, Stop & Shop, Tops and BI-LO trade names. In the southeastern United States, Ahold owns and operates 294 BI-LO supermarkets as well as a number of Golden Gallon convenience stores.

Bruno's, headquartered in Birmingham, is the largest supermarket chain in the state of Alabama. With annual sales in 2000 of over $1.5 billion, Bruno's operates 169 supermarkets in Alabama (123), Georgia (25), Florida (16) and Mississippi (2) as well as 13 liquor stores and two gas stations. Bruno's operates supermarkets under the trade names Bruno's Fine Foods, Food World, FoodMax, Food Fair and Fresh Value.

On September 4, 2001, Ahold and Bruno's signed an agreement whereby Ahold will purchase all of the outstanding voting securities of Bruno's through the merger of New Bronco Acquisition Corp., an indirect wholly owned subsidiary of Ahold, with and into Bruno's

Supermarkets. Bruno's Supermarkets will continue as the surviving corporation. The value of the transaction is approximately $500 million.

III. The Draft Complaint

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

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

Retail stores other than supermarkets that sell food and grocery products, such as neighborhood "mom & pop" grocery stores, limited assortment stores, convenience stores, specialty food stores (e.g., seafood markets, bakeries, etc.), club stores, military commissaries, and mass merchants, do not effectively constrain prices at supermarkets. The retail format and variety of items sold at these other stores are significantly different from that of supermarkets. None of these other retailers offer a sufficient quantity and variety of products to enable consumers to one-stop shop for food and grocery products.

The draft complaint alleges that the relevant sections of the country (*i.e.*, the geographic markets) in which to analyze the

acquisition are the areas in or near the towns of Milledgeville and Sandersville, Georgia. Ahold and Bruno's are direct competitors in both of the relevant markets. The draft complaint alleges that the post-merger markets would each be highly concentrated, whether measured by the Herfindahl-Hirschman Index (commonly referred to as "HHI") or four-firm concentration ratios. The acquisition would substantially increase concentration in each market. The post-acquisition HHI in each of the geographic markets would be above 5400.

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

The draft complaint also alleges that Ahold's acquisition of all of the outstanding voting securities of Bruno's, if consummated, may substantially lessen competition in the relevant line of commerce in the relevant markets in violation of Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18, and Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45, by eliminating direct competition between supermarkets owned or controlled by Ahold and supermarkets owned and controlled by Bruno's; by increasing the likelihood that Ahold will unilaterally exercise market power; and by increasing the likelihood of, or facilitating, collusion or coordinated interaction among the remaining supermarket firms. Each of these effects increases the likelihood that the prices of food, groceries or services will increase, and that the quality and selection of food, groceries or services will decrease, in the geographic markets alleged in the complaint.

IV. The Terms of the Agreement Containing Consent Orders

The Agreement Containing Consent Orders ("proposed consent order") will remedy the Commission's competitive concerns about the proposed acquisition. Under the terms of the proposed consent order, Ahold must divest two BI-LO supermarkets, one in Milledgeville and one in Sandersville, Georgia. In each community, Ahold owns only one supermarket. Both of the divestitures are to experienced up-front buyers who would be new entrants in the

relevant geographic markets and who the Commission has pre-evaluated for competitive and financial viability. The Commission's evaluation process consisted of analyzing the financial condition of the proposed acquirers and the locations of their current supermarkets to ensure that divestitures to them would not increase concentration or decrease competition in the relevant markets and to determine that these purchasers are well qualified to operate the divested stores.

In Milledgeville, Ahold will sell its BI-LO to The Kroger Co. ("Kroger"), which is headquartered in Cincinnati, Ohio. Kroger operates supermarkets in southeastern Georgia and throughout the United States. Ahold will sell its BI-LO in Sandersville to Winn-Dixie Stores, Inc. ("Winn-Dixie"), headquartered in Jacksonville, Florida. Winn-Dixie also operates supermarkets in southeastern Georgia and throughout the U.S.

Paragraph II.A. of the proposed consent order requires that the divestitures must occur no later than 10 business days after the merger is consummated. However, if Ahold consummates the divestitures to Kroger and Winn-Dixie during the public comment period, and if, at the time the Commission decides to make the order final, the Commission notifies Ahold that Kroger or Winn-Dixie is not an acceptable acquirer or that the asset purchase agreement with Kroger or Winn-Dixie is not an acceptable manner of divestiture, then Ahold 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, Ahold must divest those assets only to an acquirer that receives the prior approval of the Commission and only in a manner that receives the prior approval of the Commission. In the event that any Commission-approved buyer is unable to take or keep possession of any of the supermarkets identified for divestiture the Commission may appoint a trustee with the power to divest any assets that have not been divested to satisfy the requirements of the proposed consent order.

The proposed consent order also enables the Commission to appoint a trustee to divest any supermarkets or sites identified in the order that Ahold has not divested to satisfy the requirements of the

proposed consent order. In addition, the proposed order enables the Commission to seek civil penalties against Ahold for non-compliance with the proposed consent order.

The proposed consent also requires Proposed Respondents to maintain the viability, marketability and competitiveness of the supermarkets identified for divestitures. Among other requirements related to maintaining operations at these supermarkets, the proposed consent order also specifically requires the Proposed Respondents to: (1) maintain the viability, competitiveness and marketability of the assets to be divested; (2) not cause the wasting or deterioration of the assets to be divested; (3) not sell, transfer, encumber, or otherwise impair their marketability or viability; (4) maintain the supermarkets consistent with past practices; (5) use best efforts to preserve existing relationships with suppliers, customers, and employees; and (6) keep the supermarkets open for business and maintain the inventory at levels consistent with past practices.

The proposed consent order also prohibits Ahold from acquiring, without providing the Commission with prior notice, any supermarkets, or any interest in any supermarkets, located in the counties that include Milledgeville and Sandersville, Georgia 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, however, restrict the Proposed Respondents from constructing new supermarkets in the above areas; nor does it restrict the Proposed Respondents from leasing facilities not operated as supermarkets within the previous six months.

The proposed consent also prohibits Ahold, for a period of ten years, from entering into or enforcing any agreement that restricts the ability of any person acquiring any location used as a supermarket, or interest in any location used as a supermarket on or after January 1, 2001, to operate a supermarket at that site if that site was formerly owned or operated by Ahold or Bruno's in any of the above areas. In addition, the Proposed Respondents are prohibited from removing fixtures or equipment from a store or property owned or leased by Ahold or Bruno's in Sandersville or Milledgeville,

Georgia, that is no longer operated as a supermarket, except (1) prior to a sale, sublease, assignment, or change in occupancy or (2) to relocate such fixtures or equipment in the ordinary course of business to any other supermarket owned or operated by the Proposed Respondents.

The Proposed Respondents are required to file compliance reports with the Commission, the first of which is due within thirty days of the date on which Proposed Respondents signed the proposed consent, and every thirty days thereafter until the divestitures are completed, and annually for ten years.

V. Opportunity for Public Comment

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

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

Complaint

IN THE MATTER OF

DIAGEO PLC, 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-4032; File No. 0110057
Complaint, December 19, 2001--Decision, February 4, 2002

This consent order addresses the acquisition by Respondent Diageo plc ("Diageo"), a United Kingdom public limited company that operates a distilled spirits business in the United States through GuinnessUDV North America, Inc., and Pernod Ricard S.A. of the Seagram Wine and Spirits business – with Diageo to acquire, among other distilled spirits brands, Captain Morgan Original Spiced Rum and Captain Morgan's Parrot Bay Rum, and with Pernod Ricard to acquire Seagram's Gin, Chivas Regal Scotch, The Glenlivet Scotch, and Martell Cognac – from Respondent Vivendi S.A. ("Vivendi"), a French societe anonyme that operates a distilled spirits business in the United States through Joseph E. Seagram & Sons, Inc. The order, among other things, requires Respondent Diageo to divest its Malibu rum business, worldwide, to an acquirer approved by the Commission. The order also prohibits Diageo from obtaining or using any commercially sensitive business information relating to Seagram's Gin, Chivas Regal Scotch, The Glenlivet Scotch, or Martell Cognac. An accompanying Order to Hold Separate and Maintain Assets requires Respondent Diageo to preserve and maintain the Seagram Captain Morgan rum assets as a separate competitive entity pending the divestiture of the Malibu assets, and to preserve and maintain the competitive viability of the Malibu assets, pending their divestiture.

Participants

For the Commission: *Joseph S. Brownman, Stephen Y. Wu, Barbara K. Shapiro, W. Stephen Sockwell, Jr., Karen Mainor-Harris, Elizabeth B. Pelkofski, Anthony Low Joseph, Erika Brown-Lee, Gabe Dagen, Amy Swift, Clifton Smith, David Von Nirschl, Jennifer Lee, Catharine M. Moscatelli, Elizabeth A. Piotrowski, Phillip L. Broyles, Malcolm B. Coate, Elizabeth Callison* and *Mary T. Coleman.*

For the Respondents: *Ken Logan, David E. Vann, Jr.,* and *Ann Rappeley, Simpson Thacher & Bartlett, Raymond E. Jacobsen,*

James H. Sneed, Jon B. Dubrow, Craig P. Seebald, Christine L. White, Marcia Stuart-Ceplecha, Stefan M. Meisner, Joel R. Grosberg, Saralisa Brau, Sandra Muhlenbeck, and *Christopher Ondeck, McDermott, Will & Emery,* and *Theodore Edelman, Sullivan & Cromwell.*

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act and the Clayton Act, and by virtue of the authority vested in it by said Acts, the Federal Trade Commission, having reason to believe that Diageo plc and its subsidiaries ("Diageo")and Vivendi Universal S. A. and its subsidiaries ("Vivendi") have entered into an agreement in violation of Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45, and that the terms of such agreement, were they to be satisfied, would result in a violation of Section 5 of the Federal Trade Commission Act and Section 7 of the Clayton Act, 15 U.S.C. § 18, and it appearing to the Commission that a proceeding in respect thereof would be in the public interest, hereby issues its complaint, stating its charges as follows:

I. Respondent Diageo

1. Respondent Diageo is a public limited company organized, existing and doing business under and by virtue of the laws of England and Wales, with its office and principal place of business located at 8 Henrietta Place, London W1A 9AG, England.

2. Among other things, Respondent Diageo produces, distributes, and sells distilled spirits products from facilities that it owns or operates worldwide.

3. In the United States, Diageo operates its distilled spirits business through a wholly-owned subsidiary corporation, Guinness UDV North America, Inc., whose principal business offices are located at Six Landmark Square, Stamford,

Connecticut 06901.

4. Respondent Diageo had total revenues, from the sale of all products, of about $19 billion in 2000. Respondent Diageo's United States revenues from the sale of all products were about $8.5 billion in 2000.

5. Respondent Diageo is, and at all times relevant herein has been, engaged in the sale and distribution in the United States of various distilled spirits products, including (a) rum, (b) gin, (c) Scotch whisky, and (d) Cognac. The distilled spirits products that Diageo markets or sells solely or jointly in the United States include Malibu Rum, Gordon's Gin, Johnnie Walker Black Scotch whisky, Hennessy Cognac, and Oban, Lagavulin, Dalwhinnie, Cardhu, Talisker, Cragganmore, Knocando, Glenkinchie, and Glen Ord single malt Scotch whiskies.

6. Respondent Diageo is, and at all times relevant herein has been, engaged in commerce, or in activities affecting commerce, within the meaning of Section 1 of the Clayton Act, 15 U.S.C. § 12, and Section 4 of the Federal Trade Commission Act, 15 U.S.C. § 44.

II. Respondent Vivendi

7. Respondent Vivendi is a societe anonyme organized, existing and doing business under and by virtue of the laws of France, with its office and principal place of business located at 42, avenue de Friedland, 75380 Paris Cedex, France.

8. Among other things, Respondent Vivendi produces, distributes, and sells distilled spirits products from facilities that it and its subsidiaries own or operate worldwide as part of their Seagram Spirits and Wine Group ("Seagram").

9. In the United States, Respondent Vivendi operates its distilled spirits business principally through Joseph E. Seagram & Sons, Inc., a wholly-owned subsidiary corporation that has its

principal business offices located at 375 Park Avenue, New York, New York 10152-0192.

10. Respondent Vivendi had total sales, for all products, of about $39.7 billion in 2000. Respondent Vivendi's United States sales of all products totaled about $6.7 billion in 2000.

11. Respondent Vivendi is, and at all times relevant herein has been, engaged in the sale and distribution in the United States of various distilled spirits products, including (a) rum, (b) gin, (c) Scotch whisky, and (d) Cognac. The distilled spirits products that Vivendi markets or sells in the United States include Captain Morgan Original Spiced Rum, Seagram's Gin, Chivas Regal Scotch whisky, The Glenlivet single malt Scotch whisky, and Martell Cognac.

12. Respondent Vivendi is, and at all times relevant herein has been, engaged in commerce, or in activities affecting commerce, within the meaning of Section 1 of the Clayton Act, 15 U.S.C. § 12, and Section 4 of the Federal Trade Commission Act, 15 U.S.C. § 44.

III. Third Party Pernod Ricard

13. Third party Pernod Ricard S. A. and its subsidiaries ("Pernod Ricard") is a societe anonyme organized, existing and doing business under and by virtue of the laws of France, with its office and principal place of business located at 142 boulevard Haussmann, 75379 Paris, France.

14. In the United States, Pernod Ricard operates through a wholly-owned subsidiary corporation, Austin, Nichols & Co., Inc., with offices located at 156 East 46th Street, New York, New York 10017. Among other things, Pernod Ricard markets and sells distilled spirits in the United States.

15. Pernod Ricard had total revenues, from the sale of all products, of about $4 billion in 2000. Pernod Ricard's United

States sales of all products totaled about $250 million in 2000.

IV. The Proposed Acquisition and Transaction

16. On or about December 4, 2000, Respondent Diageo and Third Party Pernod Ricard entered into a Framework Agreement jointly to bid for the acquisition of all of Seagram's spirits and wine business. Diageo and Pernod Ricard agreed that if their bid was accepted by Respondent Vivendi, Diageo and Pernod Ricard would split between them the various Seagram companies and assets comprising the Seagram's spirits and wine business.

17. On or about December 19, 2000, Respondents Diageo and Vivendi, and third party Pernod Ricard, executed their Stock and Asset Purchase Agreement. Under this Agreement, Diageo and Pernod Ricard jointly undertook to acquire Seagram from Vivendi for a total of $8.15 billion. Pursuant to the Framework Agreement previously entered into between Diageo and Pernod Ricard, Respondent Diageo would contribute $5 billion and Pernod Ricard would contribute the remaining $3.15 billion for the acquisition of Seagram.

18. Under the terms of the Stock and Asset Purchase Agreement and the Framework Agreement:

(a) The Seagram businesses acquired by Diageo through purchases of corporations or assets would hold, among other brands and assets, all Seagram rum assets, including Captain Morgan Original Spiced Rum, Captain Morgan's Parrot Bay Rum, and Myers's Rum;

(b) The Seagram businesses acquired by Pernod Ricard through purchases of corporations or assets would hold, among other brands and some related assets, Seagram's Gin, Chivas Regal Scotch whisky, The Glenlivet Scotch whisky, and Martell Cognac;

(c) Diageo would operate the "back office" operation of Joseph E. Seagram & Sons, Inc., and, for up to one year, provide administrative services to Pernod Ricard for the Seagram brands that Pernod Ricard would be acquiring, including (1) order taking; (2) maintaining accounts receivable files; (3) inventory management, logistics planning, and customer shipping; and (4) the provision of information; and

(d) Diageo would acquire or have access to confidential commercially sensitive marketing and production material regarding all of the Seagram brands that Pernod Ricard would be acquiring.

19. On or about October 23, 2001, the Federal Trade Commission authorized its staff to file a complaint for temporary restraining order and preliminary injunction in United States District Court for an order blocking the proposed acquisition pending a determination by the Commission, after administrative proceedings, whether the proposed acquisition is anticompetitive.

V. Trade and Commerce

A. Relevant Product Markets

20. The relevant product markets in which it is appropriate to assess the effects of the proposed acquisition are: (a) premium rum, (b) popular gin, (c) deluxe Scotch whisky, (c) single malt Scotch whisky, and (e) Cognac. In addition to these relevant markets, broader or narrower relevant markets may also exist.

a. Premium Rum

21. Rum is a distilled spirit made from cane sugar or its byproducts. Premium rum is rum that is generally advertised, promoted, and available throughout the United States, and sold at retail at prices higher than most other rums. The most popular premium rum products sold in the United States include Bacardi

Light Rum, Captain Morgan Original Spiced Rum, Captain Morgan's Parrot Bay Rum, and Malibu Rum. Total United States premium rum sales in 2000 were about 12 million 9-liter equivalent cases, which represents about $1 billion in retail sales.

b. Popular Gin

22. Gin is a distilled spirit made from grain and botanicals, primarily juniper. Popular gin is gin that is principally made and bottled in North America, is generally advertised, promoted, and available throughout the United States, and sold at retail at prices that are lower than the premium gins, which are imported from the United Kingdom, but higher than the gins that are not widely advertised and promoted. The most popular gins sold in the United States include Seagram's Gin and Gordon's Gin. Total United States popular gin sales in 2000 were about 5.2 million 9-liter equivalent case, which represents about $650 million in retail sales.

c. Deluxe Scotch Whisky

23. Scotch whisky is a distilled spirit made in Scotland from malt, or malt and barley, and aged a minimum of three years. Deluxe Scotch whisky is a blend of malt and grain Scotch whiskies from many distilleries, typically aged at least 12 years, and bottled in Scotland. Deluxe Scotch whisky is generally advertised, promoted, and available throughout the United States, and sold at retail at prices higher than premium Scotch whisky products, but lower than single malt Scotch whiskies. The most popular deluxe Scotch whisky products sold in the United States are Chivas Regal Scotch whisky and Johnnie Walker Black Scotch whisky. Total sales of deluxe Scotch in the United States in 2000 were about 1.1 million 9-liter equivalent cases, which represents about $450 million in retail sales.

d. Single Malt Scotch Whisky

24. Single malt Scotch whisky is a Scotch that is produced from the malt of a single distillery, and is normally bottled in Scotland. The most popular single malt Scotch whiskies sold in the United States include The Glenlivet, Glenfiddich, Oban, Lagavulin, Dalwhinnie, Cardhu, and Talisker. Total sales of single malt Scotch whiskies in the United States in 2000 were about 700,000 9-liter equivalent cases, which represents about $250 million in retail sales.

e. Cognac

25. Cognac is a brandy, which is distilled wine, that is produced and bottled in southwestern France. The most popular Cognacs sold in the United States are Courvoisier, Hennessy, Martell, and Remy Martin. Total sales of Cognac in the United States in 2000 were about 2.8 million 9-liter equivalent cases, which represents about $1 billion in retail sales.

B. Relevant Geographic Markets

26. The relevant geographic markets in which it is appropriate to assess the effects of the proposed acquisition in each relevant market are (a) the United States and (b) individual states and territories of the United States.

C. Conditions of Entry

27. Entry into each of the relevant markets would not be timely, likely, or sufficient to prevent the anticompetitive effects from occurring.

VI. Market Structure

28. The relevant markets are highly concentrated, whether measured by the Herfindahl-Hirschman Index ("HHI") or by two-firm and four-firm concentration ratios.

a. Premium Rum

29. In the national premium rum market, Respondent Diageo and or its subsidiaries have about an 8% share and Respondent Vivendi and or its subsidiaries have about a 33% share. The only other significant seller of premium rum is Bacardi USA, which has about a 54% share. The proposed acquisition would increase the HHI by about 550 points, result in market concentration of about 4,600 points, and create a duopoly.

30. Concentration in many premium rum state and territory markets does not vary significantly from the high concentration in the national premium rum market.

b. Popular Gin

31. In the national popular gin market, Respondent Diageo and or its subsidiaries have about a 34% share and Respondent Vivendi and or its subsidiaries have about a 66% share. If Diageo were to acquire or control the marketing of Seagram's Gin, the HHI would increase by about 4,500 points, result in market concentration of about 10,000 points, and create a monopoly.

32. Concentration in many popular gin state and territory markets does not vary significantly from the high concentration in the national popular gin market.

c. Deluxe Scotch Whisky

33. In the national deluxe Scotch whisky market, Respondent Diageo and or its subsidiaries have about a 51% share and Respondent Vivendi and or its subsidiaries have about a 49% share. If Diageo were to acquire or control the marketing of Chivas Regal Scotch whisky, the HHI would increase by about 5,000 points, result in market concentration of about 10,000 points, and create a monopoly.

34. Concentration in many deluxe Scotch whisky state and territory markets does not vary significantly from the high concentration in the national deluxe Scotch whisky market.

d. Single Malt Scotch Whisky

35. In the national single malt Scotch market whisky, Respondent Diageo and or its subsidiaries have about a 6% share and Respondent Vivendi and or its subsidiaries have about a 26% share. If Diageo were to acquire or control the marketing of The Glenlivet Scotch whisky, the HHI would increase by about 300 points and result in market concentration of about 2,000 points.

36. Concentration in many single malt Scotch whisky state and territory markets does not vary significantly from the high concentration in the national single malt Scotch whisky market.

e. Cognac

37. In the Cognac market, Respondent Diageo and or its subsidiaries have about a 54% share and Respondent Vivendi and or its subsidiaries have about a 9% share. If Diageo were to acquire or control the marketing of Martell Cognac, the HHI would increase by about 900 points and result in market concentration of about 4,600 points.

38. Concentration in many Cognac state and territory markets does not vary significantly from the high concentration in the national Cognac market.

VII. Effects of the Acquisition

39. The proposed acquisition and transaction may substantially lessen competition in each of the relevant markets in the following ways, among others:

(a) by eliminating direct competition between Respondent Diageo and Respondent Vivendi;

(b) by increasing the likelihood that Respondent Diageo will unilaterally exercise market power; and

(c) by increasing the likelihood of, or facilitating, collusion or coordinated interaction;

each of which may result in higher prices or reduced consumer choice.

VIII. Violations Charged

40. The Stock and Asset Purchase Agreement dated as of December 19, 2000, as amended, entered into between Respondent Diageo (jointly with Third Party Pernod Ricard) and Respondent Vivendi for the sale of Seagram constitutes a violation of Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45.

41. If the proposed acquisition were consummated, Respondent Diageo would be in violation of Section 5 of the Federal Trade Commission Act and Section 7 of the Clayton Act, 15 U.S.C. § 18.

WHEREFORE, THE PREMISES CONSIDERED, the Federal Trade Commission on this nineteenth day of December, 2001, issues its Complaint against Respondents Diageo and Vivendi.

By the Commission.

DECISION AND ORDER

The Federal Trade Commission ("Commission"), having initiated an investigation of the proposed acquisition by Respondent Diageo plc ("Diageo") and Pernod Ricard S.A. ("Pernod Ricard") of certain voting securities and assets of the Seagram Spirits and Wine business conducted by various subsidiaries of Respondent Vivendi Universal S.A. ("Vivendi Universal"), 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 Diageo and Vivendi Universal 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 said Acts, and that a Complaint should issue stating its charges in that respect, and having thereupon issued its Complaint and an Order to Hold Separate and Maintain Assets, and having accepted the executed Consent Agreement and placed such Consent Agreement on the public record for a period of thirty (30) days for the receipt and consideration of public comments, now in further conformity with the procedure described in Commission Rule 2.34, 16 C.F.R. § 2.34, the Commission hereby makes the following jurisdictional finding and issues the following Decision and Order ("Order"):

1. Respondent Diageo is a public limited company organized, existing and doing business under and by virtue of the laws of England and Wales, with its office and principal place of business located at 8 Henrietta Place, London W1M 9AG, England. Diageo's principal subsidiary in the United States is headquartered at Six Landmark Square, Stamford, CT 06901.

2. Respondent Vivendi Universal is a societe anonyme organized, existing and doing business under and by virtue of the laws of France, with its office and principal place of business located at 42, avenue de Friedland, 75380 Paris Cedex, France. Vivendi Universal's principal subsidiary in the United States conducting its spirits, wine and beverages business is headquartered at 375 Park Avenue, New York, NY 10152.

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. "Diageo" means Diageo plc, its directors, officers, employees, agents and representatives, predecessors, successors, and assigns; its joint ventures, subsidiaries, divisions, groups and affiliates controlled by Diageo plc (including, but not limited to, Guinness UDV Amsterdam B.V. and Guinness UDV North America, Inc.), and the respective directors, officers, employees, agents, representatives, successors, and assigns of each.

B. "Vivendi Universal" means Vivendi Universal S.A., its directors, officers, employees, agents and representatives,

predecessors, successors, and assigns; its joint ventures, subsidiaries, divisions, groups and affiliates controlled by Vivendi Universal S.A. (including, but not limited to, The Seagram Company Ltd.), and the respective directors, officers, employees, agents, representatives, successors, and assigns of each.

C. "Respondents" means Diageo and Vivendi Universal, individually and collectively.

D. "Commission" means the Federal Trade Commission.

E. "Pernod Ricard" means Pernod Ricard S.A., a societe anonyme, organized, existing and doing business under and by virtue of the laws of France, with its office and principal place of business located at 142 boulevard Haussman, 75379 Paris, France; and its subsidiaries and affiliates, including without limitation Austin, Nichols & Co., Inc., a corporation organized, existing and doing business under and by virtue of the laws of Delaware, with its office and principal place of business located at 105 Corporate Park Drive, Suite 200, West Harrison, NY 10604.

F. "SSWG Acquisition" means the proposed acquisition of voting securities of various entities, as well as certain assets, of the Vivendi Universal SSWG Business, by Diageo and Pernod Ricard pursuant to the Stock and Asset Purchase Agreement.

G. "SSWG Acquisition Date" means the date on which Diageo and Pernod Ricard acquire the SSWG Business from Vivendi Universal, pursuant to the Stock and Asset Purchase Agreement.

H. "SSWG Business" means the business operated by Vivendi Universal as the Seagram Spirits and Wines Group that is engaged in, among other things, research, development, production, distribution and sale of distilled spirits, wine and other beverage products.

I. "Stock and Asset Purchase Agreement" means the Stock and Asset Purchase Agreement among Vivendi Universal, Diageo and Pernod Ricard, dated as of December 19, 2000, as amended, pursuant to which the SSWG Acquisition is to be accomplished.

J. "Framework Agreement" means the Framework and Implementation Agreement between Diageo and Pernod Ricard, dated as of December 4, 2000, as amended, which, among other things, defines the manner in which Diageo and Pernod Ricard are separating the businesses and assets of the SSWG Business to be acquired by each of them, and particularly, the allocation of the Non-Rum Overlap Companies and Assets to Pernod Ricard after the closing of the SSWG Acquisition. The Framework Agreement includes all amendments, exhibits, attachments, related agreements and schedules thereto, and is contained in Confidential Appendix III, attached hereto.

K. "Agreements" means the Trademark Agreement and the Transition Services Agreements.

L. "Back Office Services Agreement" means the agreement, contained in Confidential Appendix V, attached hereto, pursuant to which the JES Back Office will provide certain transitional administrative services to Pernod Ricard after the SSWG Acquisition Date.

M. "Business Day" means any day excluding Saturday, Sunday and any United States federal holiday.

N. "Captain Morgan Rum" means "Captain Morgan Original Spiced Rum" and any other brand or product that uses the trade name or trademark "Captain Morgan" in connection with rum or a rum-based beverage product.

O. "Captain Morgan Rum Business" means all of the operations and businesses related to the research, development,

production, marketing, advertising, promotion, distribution, sale or after-sales support for Captain Morgan Rum.

P. "Captain Morgan Rum Confidential Business Information" means all information that is not in the public domain relating to the Captain Morgan Rum Business, including the research, development, production, marketing, advertising, promotion, distribution, sale or after-sales support of Captain Morgan Rum.

Q. "Captain Morgan Rum Employee(s)" means:

1. all Persons employed by the JES U.S. Spirits Business with responsibility for, or who directly participated in (irrespective of the portion of working time involved), the research, development, production, marketing, advertising, promotion, distribution, sale or after-sales support of Captain Morgan Rum within the eighteen (18) month period prior to the SSWG Acquisition Date who become employed by Respondent Diageo at any time prior to the divestiture of the Malibu Rum Assets; and

2. all Persons employed by Respondent Diageo or who continue in the employ of JES with responsibility for, or who directly participate in (irrespective of the portion of working time involved), the research, development, production, marketing, advertising, promotion, distribution, sale or after-sales support of Captain Morgan Rum in the United States at any time after the SSWG Acquisition Date and prior to the divestiture of the Malibu Rum Assets.

R. "Chivas" means "Chivas," "Chivas Regal," "Chivas Brothers," and any other product owned or sold by the SSWG Business that uses the trade name or trademark "Chivas" in connection with Scotch whisky or a Scotch whisky product.

S. "Chivas Companies and Assets" means all of Respondent Vivendi Universal's rights, title and interests in and to the businesses and assets of the SSWG Business relating to Chivas that Pernod Ricard is entitled to acquire pursuant to the Framework Agreement, including, but not limited, to Chivas Brothers Limited and any Scotch whisky distilleries that produce whisky used in the blending of Chivas or exchanged to acquire other whisky used in the blending of Chivas.

T. "Closing Date" means the date on which Respondent Diageo and a Commission-approved Acquirer close on a transaction to divest the Malibu Rum Assets pursuant to this Order.

U. "Commission-approved Acquirer" means any entity approved by the Commission to acquire the Malibu Rum Assets that are required to be divested pursuant to this Order.

V. "Co-packing Agreement" means the agreement, contained in Confidential Appendix V, attached hereto, pursuant to which Diageo will provide transitional bottling services to Pernod Ricard for Seagram's Gin products and Seagram's Scotch Whisky products (as those products are identified in the Co-packing Agreement) in the United States.

W. "Cost" means direct cash cost of raw materials and labor.

X. "Diageo Disposals Team" means those individuals selected by Diageo to oversee the process of selling the "Pernod Ricard On-sale Businesses" and the "Seagram Venture Businesses," as defined in and pursuant to the terms of the Framework Agreement, to third parties, as that team is supplemented or reconstituted by Respondent Diageo from time to time. The individuals, and their titles, on the Diageo Disposals Team as of the date on which Respondent Diageo agreed to this Order are identified in Confidential Appendix VI.

Y. "Diageo/Pernod Ricard Supervisory Committee" means the committee of Diageo and Pernod Ricard executives established under the Framework Agreement, and as supplemented or reconstituted by Respondent Diageo and Pernod Ricard from time to time, that is responsible for overseeing the aspects of the Diageo - Pernod Ricard relationship specified in the Framework Agreement until all transactions and commitments specified in the Framework Agreement have been accomplished.

Z. "Diageo Firewalled Senior Executives" means Respondent Diageo's Chief Executive Officer, Chief Financial Officer and the executive responsible for the SSWG Acquisition, and their respective staffs.

AA. "Diageo U.S. Spirits Business" means Respondent Diageo's business engaged in the research, development, production, distribution, marketing, sale or after-sale support of distilled spirits in the United States, other than the Held Separate Business.

BB. "Diageo U.S. Spirits Employees" means all Persons employed by the Diageo U.S. Spirits Business with responsibility for, or who directly participate in (irrespective of the portion of working time involved), the research, development, production, distribution, marketing, sales or after-sales support of distilled spirits in the United States.

CC. "Divestiture Agreement" means any agreement between Respondent Diageo and a Commission-approved Acquirer (or between a trustee appointed pursuant to Paragraph VIII.A. of this Order and a Commission-approved Acquirer) and all amendments, exhibits, attachments, agreements, and schedules thereto, related to the Malibu Rum Assets to be divested that have been approved by the Commission to accomplish the requirements of this Order.

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

EE. "The Glenlivet" means "The Glenlivet" and any other product owned or sold by the SSWG Business that uses the trade name or trademark "The Glenlivet" in connection with Scotch whisky or a Scotch whisky product.

FF. "The Glenlivet Companies and Assets" means all of Respondent Vivendi Universal's rights, title and interests in and to the businesses and assets of the SSWG Business relating to The Glenlivet that Pernod Ricard is entitled to acquire pursuant to the Framework Agreement, including The Glenlivet Distillers Ltd.

GG. "Held Separate Business" means the JES U.S. Spirits Business.

HH. "Interim Monitor" means the Interim Monitor appointed by the Commission pursuant to Paragraph IV.A. of the Order to Hold Separate and Maintain Assets in this matter.

II. "JES" means Joseph E. Seagram & Sons, Inc. (U.S.A.), a corporation organized and existing under the laws of Indiana, with its principal place of business located at 375 Park Avenue, New York, NY 10152-0192, which is the primary entity responsible for the SSWG Business.

JJ. "JES Back Office" means those facilities, assets and personnel of JES and its subsidiaries that provide administrative services and that will provide such services for Pernod Ricard and its subsidiaries and affiliates following the SSWG Acquisition Date pursuant to the Back Office Services Agreement.

KK. "JES U.S. Spirits Business" means the JES business engaged in the research, development, production, distribution, marketing, sale or after-sale support of distilled spirits in the United States, which among other things, is responsible for developing global brand strategies for the Captain Morgan Rum Business.

LL. "Malibu Rum" means "Malibu Rum" and any other brand or product owned, produced or sold by Respondent Diageo that uses the trade name or trademark "Malibu" in connection with rum or any beverage product.

MM. "Malibu Rum Assets" means all of Respondent Diageo's rights, titles and interests, worldwide, as of the Closing Date, in and to all assets, tangible and intangible, of the Malibu Rum Business, including, without limitation, the following:

1. all Malibu Rum Intellectual Property;

2. all Malibu Rum Confidential Business Information;

3. all Malibu Rum Sales and Marketing Materials;

4. all assets relating to the research, development, production (*provided, however*, the only assets relating to production and manufacturing that are included in this definition are those identified in Paragraph I.MM.11.), distribution, marketing, promotion, sale, or after-sales support of Malibu Rum worldwide;

5. a copy of all vendor lists, and all names of manufacturers and suppliers under contract with Respondent Diageo who or which produce for, or supply to, Respondent Diageo in connection with the production or sale of Malibu Rum;

6. at the option of the Commission-approved Acquirer, all rights, title and interest in and to inventories of products, raw materials, supplies and parts, including work-in-process and finished case goods, packaging and point of sale materials specifically related to Malibu Rum;

7. at the option of the Commission-approved Acquirer and to the extent transferable, divisible or assignable, all rights, title and interest in and to agreements (except contracts of employment), express or implied, relating to

research, design, development, production, distribution, marketing, promotion, sale or after-sales support of Malibu Rum, regardless of whether such agreements relate exclusively to such purposes, including, but not limited to, warranties, guarantees, and contracts with customers (together with associated bid and performance bonds, if any), other rum distillers, joint venture partners, suppliers, sales representatives, distributors, agents, personal property lessors, personal property lessees, licensors, licensees, consignors, and consignees including, but not limited to, the Malibu Rum Input Supply Agreements;

8. all unfilled customer orders for finished Malibu Rum as of the Closing Date (a list of such orders for customers within the United States, Canada, Mexico, and the European Union to be provided to the Commission-approved Acquirer within twenty (20) Business Days after the Closing Date);

9. all rights under warranties and guarantees, express or implied, relating to Malibu Rum;

10. all books, records and files relating to Malibu Rum; and

11. at the Commission-approved Acquirer's option:

    a. all rights, titles and interests in and to the blending and bottling plant located at 283 Horner Avenue, Etobicoke, Ontario, Canada, ON M8Z 4Y4 ("Canadian Plant"), that is used in the production, blending, bottling or packaging of Malibu Rum or other distilled spirits;

    b. all machinery, fixtures, equipment, vehicles, furniture, tools and other personal property associated with the Canadian Plant, (except for those assets that are used exclusively in the manufacture of

products other than Malibu Rum and are listed on the attached Confidential Appendix I); and

c. all machinery, equipment, tools, and other personal property specifically relating to the bottle sleeving equipment at the blending and bottling plant located at Strada Statale 63, Santa Vittoria, D'Alba, 12069 Italy.

Provided, however, that the Malibu Rum Assets shall not include:

a. any rights to use Respondent Diageo's general business strategies or practices relating to product formulation or market research activities or methods or methodologies that Respondent Diageo uses on a company-wide basis for the purposes of formulating, marketing, promoting, managing, or selling its various brands. Except that, to the extent that documents or other materials relating to such business strategies or practices contain the results of product formulation or marketing research activities relating to Malibu Rum, Respondent Diageo shall divest those results to the Commission-approved Acquirer and the Commission-approved Acquirer shall be entitled to use such product formulation or marketing research results;

b. any rights, title and interest in or to any owned or leased real property and improvements, office space, office equipment and furniture, management information systems, software, and personal property used by Respondent Diageo (other than the assets included in the Malibu Rum Assets as a result of Paragraph I.MM.11.);

c. any interest in any distributor of beverage alcohol;

d. any Payables or Receivables;

e. any contracts for the procurement or receipt of goods or services for Respondent Diageo on a company-wide or portfolio-wide basis; and

f. that portion of any document or other material containing information solely relating to a brand or business other than Malibu Rum.

Provided further, however, in cases in which documents or other materials included in the Malibu Rum Assets contain information that (1) relates both to Malibu Rum and other brands or businesses of Respondent Diageo, and (2) such information cannot be segregated in a manner that preserves the usefulness of the information as it relates to Malibu Rum, then Respondent Diageo shall be required only to provide copies of the documents and materials containing this information. The purpose of this proviso is to ensure that Respondent Diageo provides the Commission-approved Acquirer with the above-described information without requiring Respondent Diageo completely to divest itself of information that, in content, also relates to brands and businesses other than Malibu Rum.

NN. "Malibu Rum Business" means all of the operations and businesses of Respondent Diageo related to the research, development, production, marketing, advertising, promotion, distribution, sale or after-sales support for Malibu Rum.

OO. "Malibu Rum Confidential Business Information" means all information owned by Respondent Diageo as of the Closing Date that is not in the public domain relating to the Malibu Rum Assets, including the research, development, production, marketing, advertising, promotion, distribution, sale or after-sales support of Malibu Rum. *Provided, however*, that where such confidential business information also relates to other brands or businesses of Respondent Diageo, Respondent Diageo shall grant the Commission-approved Acquirer the rights to use such confidential

business information on a non-exclusive basis in connection with the Malibu Rum Business.

PP. "Malibu Rum Employee(s)" means:

1. all Malibu Rum Key Employees; and

2. all persons designated as, or otherwise functioning as, brand managers for Malibu Rum, at any time from the date Respondent Diageo signs the Agreement Containing Consent Orders until the Closing Date. (A list of such individuals performing such roles as of the date Respondent Diageo signed the Agreement Containing Consent Orders is attached as Confidential Appendix II.C.)

QQ. "Malibu Rum Input Supply Agreements" means the following agreements:

1. West Indies Rum Distillery: Manufacturing Agreement dated 20 July 1993 between Twelve Islands Shipping Company Limited ("TISC") and West India Rum Refinery Limited, now called West Indies Rum Distillery Limited ("WIRD"), as amended by a Variation Agreement dated 25 February 1998 between TISC and WIRD, and as novated in favor of Guinness UDV Amsterdam B.V. ("GUDVA") by a Supply Novation Agreement dated 21 July 2000 between TISC, GUDVA, and WIRD;

2. any agreement with Haarmann & Reimer for the supply of flavorings for Malibu Rum; and

3. any agreement with Givaudan Canada Co. for the supply of flavorings for Malibu Rum.

RR. "Malibu Rum Intellectual Property" means all:

1. Malibu Rum Trademarks;

2. Malibu Rum Trade Dress;

3. trade secrets, know-how 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, anywhere in the world, relating to Malibu Rum;

4. Malibu Rum Patents;

5. Malibu Rum Production Technology; and

6. all research materials, technical information, and data contained in software, anywhere in the world, relating to Malibu Rum.

Provided, however, that where such intellectual property (other than Malibu Rum Trademarks or Malibu Rum Trade Dress) also relates to other brands or businesses of Respondent Diageo, Respondent Diageo shall grant the Commission-approved Acquirer the rights to use such intellectual property on a non-exclusive basis in connection with the Malibu Rum Business.

SS. "Malibu Rum Key Employee(s)" means those individuals identified in Confidential Appendix II.D. to this Order.

TT. "Malibu Rum Patents" means all patents, patents pending, patent applications and statutory invention registrations, including 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, anywhere in the world, related to Malibu Rum.

UU. "Malibu Rum Production Technology" means all recipes, formulas, blend specifications, technology, trade secrets, know-how, and proprietary information, anywhere in the world, relating to the production and bottling of Malibu Rum.

VV. "Malibu Rum Sales and Marketing Materials" means all marketing and promotional materials used anywhere in the world with respect to Malibu Rum or the Malibu Rum Assets as of the Closing Date, including, without limitation: all advertising materials; customer lists; contribution statements; Internet/Web sites and domain name(s) (uniform resource locators), and registration(s) thereof, and related materials; product data; profit and loss statements; price lists; mailing lists; sales materials; marketing information (*e.g.*, customer sales and competitor data); catalogs, sales promotion literature and other promotional materials; spend records related to advertising, marketing or promotion; training and other materials associated with the Malibu Rum Assets; and all copyrights in and to the Malibu Rum Sales and Marketing Materials.

WW. "Malibu Rum Trademarks" means all trademarks, trade names and brand names, including registrations and applications for registration thereof (and all renewals, modifications, and extensions thereof), and all common law rights, and the goodwill symbolized by and associated therewith, anywhere in the world, for or relating to Malibu Rum; but excluding any goodwill or other rights that are associated generally with Respondent Diageo or any of its businesses, products, or brands other than Malibu Rum, including, among other things, the trade names, trademarks, or logos "Diageo," "Guinness UDV," "Guinness," "United Distillers & Vintners," "UDV," "International Distillers & Vintners," "Jose Cuervo," "Moët Hennessy," "IDV," "Louis Vuitton," "LVMH," "Gilbey's," "Justerini & Brooks," "Schenley," and "Heublein."

XX. "Malibu Rum Trade Dress" means the current trade dress of Malibu Rum products, including, but not limited to, product packaging associated with the sale of Malibu Rum products anywhere in the world, logos, and the lettering of the Malibu Rum products' trade name or brand name; but excluding any portion of any such trade dress rights that is solely related to Respondent Diageo or to any of its businesses, products, or brands other than Malibu Rum.

YY. "Martell" means "Martell" and any other product owned or sold by Vivendi Universal or the SSWG Business that uses the trade name or trademark "Martell" in connection with brandy or Cognac.

ZZ. "Martell Companies and Assets" means all of Respondent Vivendi Universal's rights, title and interests in and to the businesses and assets of the SSWG Business relating to Martell that Pernod Ricard is entitled to acquire pursuant to the Framework Agreement, including, but not limited to, all of the issued and outstanding capital stock held by Vivendi Universal of Martell S.A., Martell & Co., Societe des Domaines Viticoles Martell S.A., Martell & Cie (South Africa) (Pty.) Ltd., Martell Inc. USA, Augier Robin Briand & Co., and any other dormant entities held by those entities.

AAA. "Non-Public Pernod Ricard Information" means: (a) any information relating to the Martell Companies and Assets, the Chivas Companies and Assets, the Glenlivet Companies and Assets, or the Seagram's Gin Businesses and Assets obtained by Respondent Diageo through the SSWG Acquisition or through Respondent Diageo's provision of services pursuant to the Co-packing Agreement, or through Respondent Diageo's provision of services to Pernod Ricard under the Back Office Services Agreement or similar transitional arrangements in other countries; and (b) information relating to the "Pernod Ricard On-Sale Businesses," as defined in the Framework Agreement, learned by the Diageo Disposals Team; *provided, however,* that Non-Public Pernod Ricard Information shall not include information already in the

public domain and information that subsequently enters the public domain through no violation of this Order by Diageo.

BBB. "Non-Rum Overlap Companies and Assets" means the Chivas Companies and Assets, The Glenlivet Companies and Assets, the Martell Companies and Assets and the Seagram's Gin Businesses and Assets.

CCC. "Payables" means trade and other creditors and accounts payable, including any part of such amount as relates to any tax.

DDD. "Person" means any individual, partnership, firm, corporation, association, trust, unincorporated organization or other entity.

EEE. "Receivables" means all outstanding payments due as of the Closing Date for goods or services supplied or rights licensed.

FFF. "Seagram's Gin" means "Seagram's Extra Dry Gin" and any other product owned or sold by the SSWG Business that uses the trade name or trademark "Seagram" or "Seagram's" in connection with gin.

GGG. "Seagram's Gin Businesses and Assets" means all of Respondent Vivendi Universal's rights, title and interests in and to the businesses and assets of the SSWG Business relating to Seagram's Gin that Pernod Ricard is entitled to acquire pursuant to the Framework Agreement.

HHH. "Trademark Agreement" means the Trademark Implementation Agreement (including any attachments to that agreement), contained in Confidential Appendix III, attached hereto, pursuant to which Pernod Ricard grants to Respondent Diageo a license to use the "Seagram's" trademark in connection with the production, marketing, promotion and sale of Canadian and American whiskey and whiskey-flavored alcoholic beverages.

III. "Transition Services Agreements" means the Back Office Services Agreement, the Co-packing Agreement, the Vivendi Universal Transition Services Agreement, and the Vivendi Universal Information Technology Transition Services Agreement.

JJJ. "Vivendi Universal Transition Services Agreement" means the agreement, contained in Confidential Appendix V, attached hereto, pursuant to which Vivendi Universal will provide transitional administrative services to Pernod Ricard and Respondent Diageo after the SSWG Acquisition Date.

KKK. "Vivendi Universal Information Technology Transition Services Agreement" means the agreement contained in Confidential Appendix V, attached hereto, pursuant to which Vivendi Universal will provide transitional information technology services to Pernod Ricard and Respondent Diageo after the SSWG Acquisition Date.

II.

IT IS FURTHER ORDERED that:

A. Respondent Diageo shall divest the Malibu Rum Assets, absolutely and in good faith and at no minimum price, within six (6) months after the SSWG Acquisition Date. Respondent Diageo shall divest the Malibu Rum 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.

B. Respondent Diageo shall, at the Commission-approved Acquirer's option, assign to the Commission-approved Acquirer any or all of the Malibu Rum Input Supply Agreements where permissible under applicable law and the terms of the contracts, and with respect to non-assignable Malibu Rum Input Supply Agreements, shall use best efforts to assist the Commission-approved Acquirer in securing contractual rights with such input suppliers, including, but

not limited to, any agreements related to the flavorings for Malibu Rum.

C. Respondent Diageo shall provide the Malibu Rum Employees with financial incentives to continue in their employment positions pending divestiture of the Malibu Rum Assets, including providing them with the same employee benefits offered by Respondent Diageo to similarly situated employees, regularly scheduled raises and bonuses, and a vesting of all pension benefits (as permitted by law) until the divestiture of the Malibu Rum Assets is completed.

D. Respondent Diageo shall provide the Malibu Rum Key Employees with the following;

1. a retention incentive equal to at least ten (10) percent of the employee's annual salary (including any bonuses) as of the date the Order to Hold Separate and Maintain Assets in this matter is issued by the Commission to be paid to those Malibu Rum Key Employees who continue their employment with Respondent Diageo until the divestiture of the Malibu Rum Assets is completed;

2. the Malibu Rum Key Employees who accept employment with the Commission-approved Acquirer shall be offered an additional retention incentive equal to twenty (20) percent of such employee's annual salary under the following terms:

   a. ten (10) percent to be paid at the beginning of the employee's employment with the Commission-approved Acquirer, and ten (10) percent to be paid upon the employee's completion of one (1) year of employment with the Commission-approved Acquirer; and

   b. a severance payment if, less than twelve (12) months after the date on which such employee commences employment with the Commission-approved

Acquirer, the Commission-approved Acquirer terminates the employment of such employee for reasons other than cause. The amount of such severance payment shall be equal to the payment that such employee would have received had he or she remained in the employ of Respondent Diageo and been terminated at such time, less any severance payment actually paid by the Commission-approved Acquirer.

E. Respondent Diageo shall provide the Commission-approved Acquirer with a complete list of the Malibu Rum Key Employees at the request of the Commission-approved Acquirer at any time after the execution of the Divestiture Agreement. Such list shall state each individual's name, position, address, telephone number and a description of the duties and work performed by the individual in connection with the Malibu Rum Assets. Respondent Diageo shall also provide the Commission-approved Acquirer with an opportunity to inspect the personnel files and other documentation relating to the Malibu Rum Key Employees at the request of the Commission-approved Acquirer at any time after the execution of the Divestiture Agreement. *Provided, however*, that in cases in which applicable law restricts access to the information required to be provided to the Commission-approved Acquirer pursuant to this Paragraph, Respondent Diageo shall use best efforts to ensure that such information is provided to the Commission-approved Acquirer consistent with applicable law.

F. Respondent Diageo shall provide the Commission-approved Acquirer with an opportunity to enter into employment contracts with the Malibu Rum Key Employees, contingent upon the divestiture of the Malibu Rum Assets. Respondent Diageo shall not interfere with the employment by the Commission-approved Acquirer of any Malibu Rum Key Employee, shall not offer any incentive to such employees to decline employment with the Commission-approved Acquirer or to accept other employment with Respondent

Diageo, and shall remove any impediments that may deter such employees from accepting employment with the Commission-approved Acquirer, including, but not limited to, any confidentiality provisions relating to Malibu Rum or any non-compete or confidentiality provisions of employment or other contracts with Respondent Diageo that would affect the ability of those individuals to be employed by the Commission-approved Acquirer.

G. For a period of one (1) year following the Closing Date, Respondent Diageo shall not, directly or indirectly, solicit or otherwise attempt to induce any employee of the Commission-approved Acquirer with any responsibility relating to Malibu Rum who is a former employee of Respondent Diageo to terminate their employment relationship with the Commission-approved Acquirer; *provided, however,* it shall not be deemed a violation of this provision if: (i) Respondent Diageo advertises for employees in newspapers, trade publications or other media not targeted specifically at the employees of the Commission-approved Acquirer, (ii) Respondent Diageo hires employees who apply for employment with Respondent Diageo, as long as such employees were not solicited by Respondent Diageo in violation of this Paragraph, or (iii) the Commission-approved Acquirer has terminated the individual's employment or has otherwise granted a release to the individual to permit the individual to be employed by Respondent Diageo.

H. Respondent Diageo shall require, as a condition of continued employment post-divestiture, that each Malibu Rum Employee sign a confidentiality agreement pursuant to which such employee shall be required to maintain all Malibu Rum Confidential Business Information (including, without limitation, all field experience) strictly confidential, including the nondisclosure of such information to all other employees, executives or other personnel of Respondent Diageo. Such agreement shall provide for the following:

1. restrictions on the use of trade secrets and Malibu Rum Confidential Business Information;

2. appropriate conduct relating to information that could be used to the detriment of competitors; and

3. sanctions for violation of the terms of the agreement. Respondent Diageo shall send such agreement by e-mail with return receipt requested or similar transmission, and keep a file of such return receipts for one (1) year after the Closing Date.

Respondent Diageo shall provide a copy of such agreement to the Commission-approved Acquirer. Respondent Diageo shall maintain complete records of all such agreements at Respondent Diageo's corporate headquarters and shall provide an officer's certificate to the Commission, stating that such acknowledgment program has been implemented and is being complied with. Respondent Diageo shall make available at the Commission-approved Acquirer's request copies of all certifications, notifications and reminders sent to Respondent Diageo's personnel. *Provided, however*, that nothing in this paragraph shall preclude Malibu Rum Employees who remain employed by Respondent Diageo following the Closing Date from working on any product, brand, or business of Respondent Diageo and from relying in the course of such work on any expertise or general knowledge or activities relating to rum, rum-based beverage products or other beverage alcohol.

I. Respondent Diageo shall institute procedures and requirements to ensure that all Diageo Firewalled Senior Executives do not:

1. disclose or make available, directly or indirectly, any Captain Morgan Rum Confidential Business Information to the Diageo U.S. Spirits Business or to any Malibu Rum Employee; or

2. disclose or otherwise make available, directly or indirectly, any Malibu Rum Confidential Business Information to the Held Separate Business or to any Captain Morgan Rum Employee.

Respondent Diageo shall require that each Diageo Firewalled Senior Executive execute a non-disclosure agreement pursuant to which each such Person agrees to comply with the terms of this Paragraph.

J. Respondent Diageo shall, at the request of the Commission-approved Acquirer, for a period of up to one (1) year following the Closing Date and at Cost to the Commission-approved Acquirer, provide such technical assistance and training, and make available such personnel, as are reasonably necessary to transfer the Malibu Rum Assets to the Commission-approved Acquirer and to enable the Commission-approved Acquirer to produce Malibu Rum in substantially the same manner and quality as that achieved by Respondent Diageo.

K. Respondent Diageo shall comply with all terms of the Divestiture Agreement approved by the Commission pursuant to which the Malibu Rum Assets are divested to the Commission-approved Acquirer. Any Divestiture Agreement between Respondent Diageo (or a trustee appointed pursuant to Paragraph VIII of this Order) and a Commission-approved Acquirer of the Malibu Assets that has been approved by the Commission shall be deemed incorporated by reference to this Order. Any failure by Respondent Diageo to comply with the terms of any Divestiture Agreement shall constitute a failure to comply with this Order.

L. Counsel for Respondent Diageo (including in-house counsel under appropriate confidentiality arrangements) may retain or have access to unredacted copies of all documents or other material provided to the Commission-approved Acquirer in order to:

1. comply with any Divestiture Agreement or this Order, any law, including without limitation, any requirement to obtain regulatory licenses or approvals or with any data retention requirement of any applicable government or jurisdiction, or any taxation requirements; or

2. to 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 Malibu Rum Business; *provided*, *however*, that Respondent Diageo 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*, Respondent Diageo shall require:

1. those who view such unredacted documents or other materials to enter into confidentiality agreements with the Commission–approved Acquirer; *provided, however,* that Respondent Diageo shall not be deemed to have violated this Paragraph if the Commission-approved Acquirer withholds such agreement unreasonably; and

2. Respondent Diageo shall use its best efforts to obtain a protective order to protect the confidentiality of such information during any adjudication.

M. The purpose of the divestiture of the Malibu Rum Assets is to ensure the continued use of the Malibu Rum Assets in the same business in which the Malibu Rum Assets were engaged at the time of the announcement of the SSWG Acquisition, and to remedy the lessening of competition resulting from the SSWG Acquisition as alleged in the Commission's complaint.

III.

IT IS FURTHER ORDERED that:

A. Respondent Diageo shall not acquire, directly or indirectly, any stock, share capital, equity or other interest in the Non-Rum Overlap Companies and Assets; *provided, however,* that, to the extent Respondent Diageo acquires any part of the stock, share capital, equity or other interest in any of the Non-Rum Overlap Companies and Assets as a result of transactions and legal requirements incident to the SSWG Acquisition, then Respondent Diageo: (i) shall divest and transfer full legal ownership and all other incidents of ownership to Pernod Ricard on, or as soon as practicable following, the SSWG Acquisition Date, and in any event no later than twenty (20) Business Days after the SSWG Acquisition Date (or such longer period as required by local law outside the United States, or, in the case of the countries of Columbia, Korea, Uruguay and Venezuela, Pernod Ricard's establishment of an infrastructure necessary to distribute the products of the Non-Rum Overlap Companies and Assets), and (ii) pending such divestiture or transfer, shall not exercise any incident of ownership over any of the Non-Rum Overlap Companies and Assets other than those necessary to transfer full legal ownership and all other incidents of ownership to Pernod Ricard, or to maintain distribution of products pending Pernod Ricard's receipt of legal authorization, or establishment of an infrastructure necessary, to distribute such products, subject to appropriate protections for any Non-Public Pernod Ricard Information; *and provided further* that Respondent Diageo may license from Pernod Ricard, pursuant to the Trademark Agreement, the exclusive rights to produce, promote and sell Canadian and American whiskey and whiskey-flavored alcoholic beverages under the "Seagram's" trademark. Respondent Diageo shall comply with the terms of the Framework Agreement relating to the Non-Rum Overlap Companies and Assets, which agreement shall be deemed incorporated by reference into this Order. Failure by Respondent Diageo to

comply with the provisions of the Framework Agreement relating to the Non-Rum Overlap Companies and Assets shall constitute a failure to comply with this Order.

B. Respondent Vivendi Universal shall not sell, transfer or otherwise convey, directly or indirectly, any stock, share capital, equity or other interest in the Non-Rum Overlap Companies and Assets to Respondent Diageo in a way that conflicts with Paragraph III.A. of this Order.

C. The purpose of the requirements of this Paragraph is to remedy the lessening of competition that would result if Respondent Diageo were to acquire the Non-Rum Overlap Companies and Assets from Respondent Vivendi Universal as alleged in the Commission's complaint.

IV.

IT IS FURTHER ORDERED that, for a period commencing on the date this Order becomes final and continuing for ten (10) years, Respondent Diageo shall not, without providing advance written notification to the Commission, acquire, directly or indirectly, through subsidiaries or otherwise, any ownership, leasehold, stock, share capital equity or other interest, in whole or in part, in the Non-Rum Overlap Companies and Assets.

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 Respondent Diageo and not of any other party to the transaction. Respondent Diageo 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), Respondent Diageo shall not consummate the transaction until thirty (30) days after submitting such additional information or documentary material. Early termination of the waiting periods in this Paragraph may be requested and, where appropriate, granted by letter from the Bureau of Competition. *Provided, however*, that prior notification shall not be required by this Paragraph for a transaction for which notification is required to be made, and has been made, pursuant to Section 7A of the Clayton Act, 15 U.S.C. § 18a.

V.

IT IS FURTHER ORDERED that Respondents shall provide transition services pursuant to the Transition Services Agreements as follows :

A. For a period of up to twelve (12) months after the SSWG Acquisition Date, Respondent Diageo shall provide to Pernod Ricard transition services as set forth below:

1. Respondent Diageo shall provide the services specified in the Back Office Services Agreement to Pernod Ricard on terms agreed to by Diageo and Pernod Ricard in the Back Office Services Agreement. Respondent Diageo shall provide the services required by this Paragraph in a non-discriminatory fashion to Pernod Ricard with service levels comparable to those JES provides to itself or its affiliates. Respondent Diageo shall comply with all the terms of the Back Office Services Agreement, and such agreement shall be deemed incorporated by reference into this Order. Failure to comply with the Back Office Services Agreement shall constitute a failure to comply with this Order.

2. Respondent Diageo shall provide transitional bottling and/or maturing services to Pernod Ricard on the terms

agreed to by Diageo and Pernod Ricard in the Co-packing Agreement. Respondent Diageo shall comply with all the terms of the Co-packing Agreement, and such agreement shall be deemed incorporated by reference into this Order. Failure to comply with the Co-packing Agreement shall constitute a failure to comply with this Order.

B. Respondent Vivendi Universal shall provide transition services on the terms agreed to by Respondent Vivendi Universal, Respondent Diageo and Pernod Ricard in: (i) the Vivendi Universal Transition Services Agreement, and (ii) the Vivendi Universal Information Technology Transition Services Agreement. Respondent Vivendi Universal shall comply with all the terms of the Vivendi Universal Transition Services Agreement and the Vivendi Universal Information Technology Transition Services Agreement, and such agreements shall be deemed incorporated by reference into this Order. Failure to comply with the Vivendi Universal Transition Services Agreement and the Vivendi Universal Information Technology Transition Services Agreement shall constitute a failure to comply with this Order.

VI.

IT IS FURTHER ORDERED that, for a period of two (2) years after the SSWG Acquisition Date, Respondent Diageo:

A. Shall not provide, disclose or otherwise make available any Non-Public Pernod Ricard Information to any Person - including, but not limited to, any of Diageo's employees, agents, or representatives, or any third-party - outside of the Held Separate Business (for as long as that business is held separate); shall not use any Non-Public Pernod Ricard Information for any reason or purpose other than those reasons or purposes permitted or required under the Agreements (or any similar arrangements in place in countries outside the United States), this Order and the Order to Hold Separate and Maintain Assets; and shall enforce the terms of this Paragraph VI.A. as to any Person and take such

reasonable action to the extent necessary to cause each such Person to comply with the terms of this Paragraph VI.A., including all actions that Respondent Diageo would take to protect its own trade secrets and confidential information;

B. *Provided, however*, that, in addition to the Persons who may receive or have access to Non-Public Pernod Ricard Information under Paragraph VI.A. of this Order, Respondent Diageo also may have access to and use of Non-Public Pernod Ricard Information for the following specified purposes:

1. Respondent Diageo may use Non-Public Pernod Ricard Information obtained through the SSWG Acquisition, or in the course of providing the services under the Co-packing Agreement (hereinafter "Confidential Co-packing Information") or the Back Office Services Agreement (hereinafter "Confidential Back Office Services Information") or their respective equivalents outside the United States to fulfill Respondent Diageo's obligations under the Back Office Services Agreement and the Co-packing Agreement; Respondent Diageo:

   a. shall make available Confidential Back Office Services Information and Confidential Co-packing Information only to:

      (1) Pernod Ricard;

      (2) those Persons working for Respondent Diageo having a need to know such information in order to provide transition services to Pernod Ricard, including those transition services covered under the Framework Agreement; and

      (3) those third parties that Pernod Ricard agrees should have access to the information; *provided, however,* that Respondent Diageo shall not be deemed to have violated this

Paragraph if Pernod Ricard withholds such agreement unreasonably.

b. shall take steps to ensure that all of its employees with access to Non-Public Pernod Ricard Information are aware of the confidentiality obligations and restrictions on the use of Non-Public Pernod Ricard Information; and

c. shall enforce the terms of this Paragraph VI.B.1. as to any Person and take such reasonable action to the extent necessary to cause each such Person to comply with the terms of this Paragraph VI.B.1., including all actions that Respondent Diageo would take to protect its own trade secrets and confidential information; and

2. the Diageo Disposals Team may have access to Non-Public Pernod Ricard Information relating to the disposal process. The Diageo Disposals Team shall not include Diageo employees who have ongoing, direct responsibility for the selling or marketing of any Diageo spirits products or individuals responsible for line management of business organizations that produce or sell any Diageo spirits products. Respondent Diageo may use Non-Public Pernod Ricard Information learned by the Diageo Disposals Team in the course of the disposal process of the Pernod Ricard On-sale Businesses (hereinafter "Confidential Disposals Team Information") only for the purposes of conducting that disposal process. Respondent Diageo:

a. shall make available Confidential Disposals Team Information only to:

(1) those Persons working for Respondent Diageo having a need to know and who agree in writing to maintain the confidentiality of such information;

(2) the Diageo/Pernod Ricard Supervisory Committee; and

(3) those third parties that Pernod Ricard agrees should have access to the Confidential Disposals Team Information; *provided, however,* that Respondent Diageo shall not be deemed to have violated this Paragraph if Pernod Ricard withholds such agreement unreasonably.

b. shall take such action to the extent necessary to cause each such Person to comply with the terms of this Paragraph VI.B.2., including all actions that Respondent Diageo would take to protect its own trade secrets and confidential information. Respondent Diageo shall require its members of the Diageo/Pernod Ricard Supervisory Committee to agree in writing to maintain the confidentiality of Confidential Disposals Team Information, or any other Non-Public Pernod Ricard Information they learn in their function of administering the Framework Agreement.

3. Counsel for Respondent Diageo (including in house counsel under appropriate confidentiality arrangements) may retain or have access to the Non-Public Pernod Ricard Information to the extent reasonably necessary in order to:

a. comply with the Framework Agreement, this Order, any law, including without limitation, any requirement to obtain regulatory licenses or approvals, any data retention requirement of any applicable government or jurisdiction, or any taxation requirements; or

b. 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 SSWG Business.

Provided, *however*, that Respondent Diageo 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*, Respondent Diageo shall require:

a. those who view such Non-Public Pernod Ricard Information to enter into confidentiality agreements with Pernod Ricard; *provided, however,* that Respondent Diageo shall not be deemed to have violated this Paragraph if Pernod Ricard withholds such agreement unreasonably; and

b. Respondent Diageo shall use its best efforts to obtain a protective order to protect the confidentiality of such information during any adjudication.

VII.

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:

1. Respondent Diageo expeditiously complies with all of its obligations and performs all of its responsibilities as required by this Order and by the Order to Hold Separate and Maintain Assets (collectively, "the Orders"); and

2. Respondent Vivendi Universal expeditiously complies with all of its obligations and performs all of its functions required by this Order.

B. If an Interim Monitor is appointed pursuant to Paragraph IV.A. of the Order to Hold Separate and Maintain Assets in this matter or this Paragraph, 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 each Respondent 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 each Respondent's respective 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, each Respondent 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 the 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:

   a. the Malibu Rum 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 Diageo, producing or procuring, directly or indirectly, Malibu Rum acquired pursuant to a Divestiture Agreement; and

b. 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 demonstrated legally recognized privilege, the Interim Monitor shall have full and complete access to each Respondent's personnel, books, records, documents, records kept in the normal course of business, facilities and technical information, and to such other relevant information as the Interim Monitor may reasonably request, relating to the Respondent's compliance with its obligations under the Orders, including, but not limited to, its obligations relating to the Malibu Rum Assets and the Held Separate Business. Each 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 the Respondent's compliance with the Orders.

6. The Interim Monitor shall serve, without bond or other security, at the expense of Respondent(s) 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 relevant 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 relating to Commission materials and information received in connection with the performance of the Interim Monitor's duties.

7. Each 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 IV.A. of the Order to Hold Separate and 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 Diageo shall report to the Interim Monitor in accordance with the requirements of Paragraph IX.A. of this Order and/or as otherwise provided in any agreement approved by the Commission. Respondent Vivendi Universal shall report to the Interim Monitor in accordance with the requirements of Paragraph IX.B of this Order. The Interim Monitor shall evaluate the reports

submitted to it by each Respondent, and any reports submitted by the Commission-approved Acquirer with respect to the performance of each 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 each Respondent with the provisions of the Orders.

11. Each 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,* such agreement shall not restrict the Interim Monitor from providing any information to the Commission.

C. The Interim Monitor appointed pursuant to Paragraph IV.A. of the Order to Hold Separate and Maintain Assets in this matter may be the same Person appointed as Divestiture Trustee pursuant to Paragraph VIII.A. of this Order.

VIII.

IT IS FURTHER ORDERED that:

A. If Respondent Diageo has not fully complied with the obligations specified in Paragraph II of this Order, the Commission may appoint a trustee to divest the Malibu Rum Assets required to be divested pursuant to Paragraph II 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 Diageo shall consent to the appointment of a Divestiture Trustee in such action to divest the Malibu Rum 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 Diageo to comply with this Order.

B. If a Divestiture Trustee is appointed by the Commission or a court pursuant to Paragraph VIII.A. of this Order, Respondent Diageo 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 Diageo, which consent shall not be unreasonably withheld. The Divestiture Trustee shall be a person with experience and expertise in acquisitions and divestitures. If Respondent Diageo 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 Diageo of the identity of any proposed Divestiture Trustee, Respondent Diageo 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 Diageo 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 VIII.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(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. Subject to any demonstrated legally recognized privilege, 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. Respondent Diageo shall develop such financial or other information as the Divestiture Trustee may request and shall cooperate with the Divestiture Trustee. Respondent Diageo shall take no action to interfere with or impede the Divestiture Trustee's accomplishment of the divestiture. Any delays in divestiture caused by Respondent Diageo 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 Diageo'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 Diageo from among those approved by the Commission; *provided further, however*, that Respondent Diageo shall select such entity within five (5) Business 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 Diageo, 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 Diageo, 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 Diageo, 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 Diageo 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 VIII.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. In the event that the Divestiture Trustee determines that he or she is unable to divest the Malibu Rum Assets required to be divested in a manner that preserves their marketability, viability and competitiveness and ensures their continued use in the research, development, production, distribution, marketing, promotion, sale, or after-sales support of the Malibu Rum Assets, the Divestiture Trustee may divest such additional assets of Respondent Diageo 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 Malibu Rum Assets required to be divested by this Order.

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

14. Respondent Diageo 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 VIII.A. of this Order may be the same Person appointed as Interim Monitor pursuant to Paragraph IV.A. of the Order to Hold Separate and Maintain Assets in this matter.

IX.

IT IS FURTHER ORDERED that:

A. Within thirty (30) days after the date this Order becomes final and every thirty (30) days thereafter until Respondent Diageo has fully complied with the provisions of Paragraphs II, III, VI.A. and VIII. of this Order and with the provisions of the Order to Hold Separate and Maintain Assets in this matter, Respondent Diageo shall submit to the Commission (with simultaneous copies to the Interim Monitor and Divestiture Trustee, as appropriate) verified written reports setting forth in detail the manner and form in which it intends to comply, is complying, and has complied with this Order and with the Order to Hold Separate and Maintain Assets, as applicable. Respondent Diageo shall include in its 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 divestiture and the identity of all parties contacted. Subject to any demonstrated legally recognized privilege, Respondent Diageo shall include in its reports copies of all written communications to and from such parties, all internal memoranda, and all reports and recommendations concerning the divestiture.

B. Within sixty (60) days after the date this Order becomes final and every sixty (60) days thereafter, and at other times as the Commission may require, until Respondent Vivendi Universal has fully complied with the provisions of Paragraphs III and V.B. of this Order, Respondent Vivendi Universal shall submit to the Commission verified written reports setting forth in detail the manner and form in which it has complied and is complying with the Paragraphs III and V.B. of this Order.

C. 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, Respondent Diageo shall file a verified written report with the Commission setting forth in detail the manner and form in which it has complied and is complying with this Order.

X.

IT IS FURTHER ORDERED that each Respondent shall notify the Commission at least thirty (30) days prior to any proposed change in that 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.

XI.

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

A. Access, during office hours of that 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 that Respondent relating to compliance with this Order; and

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

By the Commission.

ORDER TO HOLD SEPARATE AND MAINTAIN ASSETS

The Federal Trade Commission ("Commission"), having initiated an investigation of the proposed acquisition by Respondent Diageo plc ("Diageo") and Pernod Ricard S.A. of certain voting securities and assets of the Seagram Spirits and Wine business conducted by various subsidiaries of Respondent Vivendi Universal S.A. ("Vivendi Universal"), 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 Diageo and Vivendi Universal 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 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 Hold Separate and Maintain Assets:

1. Respondent Diageo is a public limited company organized, existing and doing business under and by virtue of the laws of England and Wales, with its office and principal place of business located at 8 Henrietta Place, London W1M 9AG, England. Diageo's principal subsidiary in the United States is headquartered at Six Landmark Square, Stamford, CT 06901.

2. Respondent Vivendi Universal is a societe anonyme organized, existing and doing business under and by virtue of the laws of France, with its office and principal place of business located at 42, avenue de Friedland, 75380 Paris Cedex, France. Vivendi Universal's principal subsidiary in the United States is headquartered at 375 Park Avenue, New York, NY, 10152.

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

ORDER

I.

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

II.

IT IS FURTHER ORDERED that, as of the SSWG Acquisition Date:

A. Respondent Diageo shall maintain the viability, marketability, and competitive vigor of the Malibu Rum Assets, and shall prevent the destruction, removal, wasting or deterioration of the Malibu Rum Assets, except for ordinary wear and tear and as otherwise would occur in the ordinary course of business. Respondent Diageo shall not sell,

transfer, encumber or otherwise impair the viability, marketability or competitiveness of the Malibu Rum Assets.

B. Respondent Diageo shall maintain the operations of the Malibu Rum Assets in the regular and ordinary course of business and in accordance with past practice (including regular repair and maintenance of the Malibu Rum Assets) and shall use its best efforts to preserve the existing relationships with suppliers, vendors, customers, employees, and others having business relations with the Malibu Rum Assets. Such responsibilities include, but are not limited to:

1. providing the Malibu Rum Assets with sufficient working capital to operate the Malibu Rum Assets at least at current rates of operation, to meet all capital calls with respect to the Malibu Rum Assets and to carry on, at least at their scheduled pace, all capital projects, business plans and promotional activities for the Malibu Rum Assets;

2. continuing, at least at their scheduled pace, any additional expenditures for the Malibu Rum Assets authorized prior to the date the Consent Agreement was signed by Respondents;

3. making available for use by the Malibu Rum Assets funds sufficient to perform all necessary routine maintenance to, and replacements of, the Malibu Rum Assets;

4. providing the Malibu Rum Assets with such funds as are necessary to maintain the viability, competitive vigor, and marketability of the Malibu Rum Assets;

5. providing such support services to the Malibu Rum Assets as are being provided to this business by Respondent Diageo as of the date the Consent Agreement was signed by Respondents; *provided, however*, Respondent Diageo's personnel providing such support services shall retain and maintain all Malibu Rum Confidential Business Information on a confidential

basis, and, except as is permitted by the Decision and Order in this matter and by this Order to Hold Separate and Maintain Assets, such persons shall be prohibited from providing, discussing, exchanging, circulating, or otherwise furnishing any such information to or with any person whose employment involves the Held Separate Business.

C. Respondent Diageo shall maintain a work force of equivalent size, training, and expertise as has been associated with the Malibu Rum Assets.

D. Respondent Diageo shall provide the Malibu Rum Employees with financial incentives to continue in their employment positions pending divestiture of the Malibu Rum Assets, including providing them with the same employee benefits offered by Respondent Diageo to similarly situated employees, regularly scheduled raises and bonuses, and a vesting of all pension benefits (as permitted by law) until the divestiture of the Malibu Rum Assets is completed.

E. Respondent Diageo shall provide the Malibu Rum Key Employees with the following;

1. a retention incentive equal to at least ten (10) percent of the employee's annual salary (including any bonuses) as of the date the Order to Hold Separate and Maintain Assets in this matter is issued by the Commission to be paid to those Malibu Rum Key Employees who continue their employment with Respondent Diageo until the divestiture of the Malibu Rum Assets is completed;

2. the Malibu Rum Key Employees who accept employment with the Commission-approved Acquirer shall be offered an additional retention incentive equal to twenty (20) percent of such employee's annual salary under the following terms:

a. ten (10) percent to be paid at the beginning of the employee's employment with the Commission-approved Acquirer, and ten (10) percent to be paid upon the employee's completion of one (1) year of employment with the Commission-approved Acquirer; and

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

F. Respondent Diageo shall not interfere with the employment by the Commission-approved Acquirer of any Malibu Rum Key Employee, shall not offer any incentive to such employees to decline employment with the Commission-approved Acquirer or to accept other employment with Respondent Diageo, and shall remove any impediments that may deter such employees from accepting employment with the Commission-approved Acquirer, including, but not limited to, any confidentiality provisions relating to Malibu Rum or any non-compete or confidentiality provisions of employment or other contracts with Respondent Diageo that would affect the ability of those individuals to be employed by the Commission-approved Acquirer.

III.

IT IS FURTHER ORDERED that:

A. Respondent Diageo shall, as of the SSWG Acquisition Date, hold the Held Separate Business as a separate and independent business apart from the Diageo U.S. Spirits Business and from all Malibu Rum Employees, except to the extent that Respondent Diageo must exercise direction and control over the Held Separate Business to assure compliance with this Order to Hold Separate and Maintain Assets, the Consent Agreement or the Decision and Order in this matter, and except as otherwise provided in this Order to Hold Separate and Maintain Assets.

B. Respondent Diageo:

1. shall not provide, disclose or otherwise make available, directly or indirectly, any Malibu Rum Confidential Business Information to the Held Separate Business or to any Captain Morgan Rum Employee;

2. shall prevent all Malibu Rum Employees and all Diageo U.S. Spirits Business Employees from soliciting, accessing, or using, directly or indirectly, any Captain Morgan Rum Confidential Business Information for any reason or purpose;

3. shall institute procedures and requirements to ensure that the Held Separate Business and the Captain Morgan Rum Employees:

   a. do not provide, disclose or otherwise make available, directly or indirectly, any Captain Morgan Rum Confidential Business Information to the Diageo U.S. Spirits Business or to any Malibu Rum Employee; and

b. do not solicit, access or use any Malibu Rum Confidential Business Information for any reason or purpose;

4. shall institute procedures and requirements to ensure that all Diageo Firewalled Senior Executives:

   a. do not provide, disclose or otherwise make available, directly or indirectly, any Captain Morgan Confidential Business Information to the Diageo U.S. Spirits Business or to any Malibu Rum Employee; and

   b. do not provide, disclose or otherwise make available, directly or indirectly, any Malibu Rum Confidential Business Information to the Held Separate Business or to any Captain Morgan Rum Employee, and shall within thirty (30) Business Days after the SSWG Acquisition Date require each Diageo Firewalled Senior Executive to sign a non-disclosure agreement pursuant to which each such Person agrees to comply with the terms of this Paragraph; and

5. shall enforce the terms of this Paragraph III.B. as to:

   a. the Diageo U.S. Spirits Business and Diageo U.S. Spirits Employees;

   b. all Malibu Rum Employees;

   c. the Held Separate Business; and

   d. all Captain Morgan Rum Employees,

and shall take such action to the extent necessary to cause each such Person to comply with the terms of this Paragraph III.B., including all actions that Respondent Diageo would take to protect its own trade secrets and confidential information.

C. Respondent Diageo shall, within thirty (30) Business Days of the SSWG Acquisition Date, require each Malibu Rum Employee to sign a non-disclosure/confidentiality agreement pursuant to which such Person(s) will be required to comply with the provisions of Paragraph III. of this Order to Hold Separate and Maintain Assets. These Persons must maintain all Malibu Rum Confidential Business Information on a confidential basis and they shall be prohibited from:

1. disclosing, providing, discussing, exchanging, circulating, or otherwise furnishing Malibu Rum Confidential Business Information to or with any Person whose employment involves the Held Separate Business; or

2. soliciting, accessing, or using, directly or indirectly, any Captain Morgan Rum Confidential Business Information for any reason or purpose.

These Persons shall not be involved in any way in the management, research, development, production, marketing, advertising, promotion, distribution, sales, after-sales support, or financial operations of any products of the Held Separate Business.

D. Respondent Diageo shall, within thirty (30) Business Days of the SSWG Acquisition Date, require each Captain Morgan Rum Employee to sign a non-disclosure/confidentiality agreement pursuant to which such Person(s) will be required to comply with the provisions of Paragraph III. of this Order to Hold Separate and Maintain Assets. These Persons must maintain all Captain Morgan Rum Confidential Business Information on a confidential basis and they shall be prohibited from:

1. disclosing, providing, discussing, exchanging, circulating, or otherwise furnishing any Captain Morgan Rum Confidential Business Information to or with any Malibu Rum Employee or any Diageo U.S. Spirits Employee; or

2. soliciting, accessing, or using, directly or indirectly, any Malibu Rum Confidential Business Information for any reason or purpose.

The Captain Morgan Rum Employees shall not be involved in any way in the management, research, development, production, marketing, advertising, promotion, distribution, sales, after-sales support, or financial operations of any products or businesses of Respondent Diageo other than the Held Separate Business.

E. Respondent Diageo shall, within ten (10) Business Days of the SSWG Acquisition Date, circulate to all Malibu Rum Employees, to all Diageo U.S. Spirits Employees, to all Diageo Firewalled Senior Executives, to all employees of any Diageo business outside the United States that will distribute or sell Captain Morgan Rum pending the divestiture of the Malibu Rum Assets, and to all employees of the Held Separate Business a notice of this Order to Hold Separate and Maintain Assets and Consent Agreement, in the form attached as Appendix A to this Order to Hold Separate and Maintain Assets.

F. Respondent Diageo shall, within thirty (30) Business Days of the date this Order to Hold Separate and Maintain Assets becomes final, establish written procedures, to be submitted for approval to any Interim Monitor the Commission may appoint, covering the management, maintenance, and independence of the Held Separate Business consistent with the provisions of this Order to Hold Separate and Maintain Assets.

G. *Provided, however,* this Order to Hold Separate and Maintain Assets does not prohibit Respondent Diageo from :

1. providing to, or procuring for, the Held Separate Business corporate or administrative services;

2. engaging in activities designed to achieve efficiencies resulting from the SSWG Acquisition, *provided that* any such activity: (i) does not reveal any Malibu Rum Confidential Business Information to any employee of the Held Separate Business, (ii) does not include any Malibu Rum Employees, and (iii) is conducted by employees who have no direct role in the sales, marketing or development of brand strategies of Malibu Rum or Captain Morgan Rum and who have signed a non-disclosure/confidentiality agreement pursuant to which such Person(s) have agreed to disclose such information only to other Persons who have signed the non-disclosure/confidentiality agreement pursuant to this Paragraph III.

H. The purpose of this Paragraph III is:

1. to ensure that, pending divestiture of the Malibu Rum Assets and except as otherwise provided in this Order to Hold Separate and Maintain Assets: (a) no Captain Morgan Rum Confidential Business Information is exchanged between the Held Separate Business and the Diageo U.S. Spirits Business or the Malibu Rum Employees; and (b) no Malibu Rum Confidential Business Information is exchanged between Respondent Diageo and the Held Separate Business;

2. to prevent interim harm to competition pending divestiture of the Malibu Rum Assets; and

3. to help remedy the lessening of competition resulting from the SSWG Acquisition alleged in the Commission's complaint.

IV.

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:

1. Respondent Diageo expeditiously complies with all of its obligations and performs all of its responsibilities as required by this Order to Hold Separate and Maintain Assets and by the attached Decision and Order (collectively, "the Orders"); and

2. Respondent Vivendi Universal expeditiously complies with all of its obligations and performs all of its functions required by the attached Decision and Order.

B. If an Interim Monitor is appointed pursuant to Paragraph IV.A. of this Order to Hold Separate and Maintain Assets or Paragraph VII.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 each Respondent 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 each Respondent's respective 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, each Respondent 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 the 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:

   a. the Malibu Rum 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 Diageo, producing or procuring, directly or indirectly, Malibu Rum acquired pursuant to a Divestiture Agreement; and

   b. 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 demonstrated legally recognized privilege, the Interim Monitor shall have full and complete access to each Respondent's personnel, books, records, documents, records kept in the normal course of business, facilities and technical information, and to any other relevant information as the Interim Monitor may reasonably request, relating to the Respondent's compliance with its obligations under the Orders, including, but not limited to, its obligations relating to the

Malibu Rum Assets and the Held Separate Business. Each 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 the Respondent's compliance with the Orders.

6. The Interim Monitor shall serve, without bond or other security, at the expense of Respondent(s) 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 relevant 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 relating to Commission materials and information received in connection with the performance of the Interim Monitor's duties.

7. Each 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 IV.A. of this Order to Hold Separate and Maintain Assets or Paragraph VII.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. Respondent Diageo shall report to the Interim Monitor in accordance with the requirements of Paragraph IX.A. of the Decision and Order and/or as otherwise provided in any agreement approved by the Commission. Respondent Vivendi Universal shall report to the Interim Monitor in accordance with the requirements of Paragraph IX.B of the Decision and Order. The Interim Monitor shall evaluate the reports submitted to it by each Respondent, and any reports submitted by the Commission-approved Acquirer with respect to the performance of each 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 each Respondent with the provisions of the Orders.

11. Each 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,* such agreement shall not restrict the Interim Monitor from providing any information to the Commission.

C. The Interim Monitor appointed pursuant to Paragraph IV.A. of this Order Hold Separate and Maintain Assets in this matter may be the same Person appointed as Divestiture

Trustee pursuant to Paragraph VIII.A. of the Decision and Order in this matter.

V.

IT IS FURTHER ORDERED that Respondent Diageo 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 Hold Separate and Maintain Assets.

VI.

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

A. Access, during office hours of Respondent Diageo 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 Diageo relating to compliance with this Order to Hold Separate and Maintain Assets; and

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

VII.

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

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

B. The day after the divestiture of all of the Malibu Rum Assets, as described in and required by the attached Decision and Order, is completed.

By the Commission.

APPENDIX A

TO THE ORDER TO HOLD SEPARATE AND MAINTAIN ASSETS
NOTICE OF DIVESTITURE AND REQUIREMENT FOR CONFIDENTIALITY

On **[date]**, Diageo plc ("Diageo") and Vivendi Universal S.A., 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 requires the divestiture of assets relating to the Malibu Rum business of Diageo. These assets are hereinafter referred to as the "Malibu Rum Assets." The Order to Hold Separate and Maintain Assets ("the Hold Separate Order") requires that the U.S. distilled spirits business of Joseph E. Seagram & Sons, Inc. ("JES"), which, among other things, is responsible for developing global brand strategies for the Captain Morgan Rum business in the U.S. and worldwide, be held separate and apart from Diageo's U.S. Spirits Business pending the divestiture of the Malibu Rum Assets under the Decision and Order. JES is hereinafter referred to as the Held Separate Business. The Hold Separate Order also requires Diageo to commit that no confidential information of the Captain Morgan Rum business will be disclosed to the Malibu brand team (designated as the "Malibu Rum Employees," on the attached list of employees), and that no confidential information relating to Malibu Rum will be disclosed to employees of the Held Separate Business.

Under the Decision and Order, Diageo is required to divest the Malibu Rum Assets to an acquirer that must be approved by the FTC. That divestiture, however, has not occurred, and certain requirements of the second order – the Hold Separate Order – are now in place to hold the Held Separate Business separate from Diageo's U.S. Spirits Business pending completion of the divestiture of the Malibu Rum Assets, and to prevent the disclosure of confidential Malibu Rum information to the Held

Separate Business, and to prevent the disclosure of confidential Captain Morgan Rum information to any Malibu Rum Employees on the attached list. You are receiving this notice because you are either (i) an employee for an entity that is part of the Held Separate Business, (ii) a Malibu Rum Employee, (iii) an employee of the Diageo U.S. Spirits Business (Guinness UDV North America), or (iv) an employee of a Diageo IMC outside of the United States that will be distributing both Captain Morgan Rum and Malibu Rum until the Malibu Rum Assets are divested.

The Held Separate Business must be managed and maintained as a separate, ongoing business, independent of Diageo's U.S. Spirits Business until the Malibu Rum Assets are divested. All competitive information relating to the Held Separate Business and, in particular, those operations related to Captain Morgan Rum, must be retained and maintained by the persons involved in the operation of those businesses on a confidential basis, and such persons must not provide, discuss, exchange, circulate, or otherwise furnish any such information to or with any other person whose employment involves Diageo's U.S. Spirits Business, or any other person who is a Malibu Rum Employee as shown on the attached list. In addition, persons involved in Diageo's Malibu Rum business must not provide, discuss, exchange, circulate, or otherwise furnish any similar information to or with any other person whose employment involves the Held Separate Business.

Any violation of the Decision and Order, or the Hold Separate Order may subject Diageo to civil penalties and other relief as provided by law. If you have questions regarding the contents of this notice, the confidentiality of information, the Decision and Order or the Hold Separate Order, you should contact _____ at ____-___-_____.

Analysis to Aid Public Comment on the Provisionally Accepted Consent Order

I. Introduction

The Federal Trade Commission has accepted for public comment from Diageo plc ("Diageo") and Vivendi S.A. ("Vivendi") an *Agreement Containing Consent Orders* ("Proposed Consent Order"). Among other things, the Proposed Consent Order requires Diageo, as a condition to acquiring its interest in Seagram, to divest its Malibu rum business to an acquirer approved by the Commission. Diageo and Vivendi ("Proposed Respondents") have also reviewed a Draft Complaint that the Commission contemplates issuing.

The Commission and the Proposed Respondents have also agreed to an Order To Hold Separate and Maintain Assets that requires the Proposed Respondents to maintain the competitive viability of certain assets pending divestiture. The Proposed Consent Order will remedy the likely anticompetitive effects arising from the proposed acquisition by Diageo and Pernod Ricard S.A. ("Pernod Ricard") of Vivendi's Seagram Wine and Spirits business ("Seagram") in five relevant product markets in the distilled spirits industry.

The Proposed Consent Order and the Order to Hold Separate and Maintain Assets were negotiated between the Commission's staff and Proposed Respondents after the Commission, on October 23, 2001, authorized its staff to seek a court order in United States District Court to preliminarily enjoin the proposed transaction, pending a Commission determination of the legality of the proposed transaction after a full trial on the merits in Commission administrative proceedings.

II. The Parties and The Transaction

Proposed Respondent Diageo is a public limited company organized, existing and doing business under and by virtue of the

laws of the United Kingdom with its office and principal place of business located at 8 Henrietta Place, London, England W1A 9AG. In the United States, Diageo's operates a distilled spirits business through a wholly-owned subsidiary corporation, GuinnessUDV North America, Inc., whose offices are located at Six Landmark Square, Stamford, Connecticut 06901.

Proposed Respondent Vivendi is a societe anonyme organized, existing and doing business under and by virtue of the laws of France, with its office and principal place of business located at 42, avenue de Friedland, 75380 Paris Cedex 08, France. In the United States, Respondent Vivendi operates a distilled spirits business through Joseph E. Seagram & Sons, Inc., a wholly-owned subsidiary corporation whose offices are located at 375 Park Avenue, New York, New York 10152-0192.

Third party Pernod Ricard is a societe anonyme organized, existing and doing business under and by virtue of the laws of France, with its office and principal place of business located at 142 boulevard Haussmann, 75379 Paris, France. In the United States, Pernod Ricard operates a distilled spirits business through Austin, Nichols & Co., Inc., a wholly-owned subsidiary corporation whose offices are located at 156 East 46th Street, New York, New York.

On December 19, 2000, Diageo, Pernod Ricard, and Vivendi entered into an agreement for Diageo and Pernod Ricard jointly to acquire Seagram. The value of the transaction is $8.15 billion. Diageo and Pernod Ricard had previously agreed that if their joint bid to acquire Seagram were successful, they would split the Seagram assets between them. Under their Framework Agreement, Diageo would pay $5 billion for its share of the Seagram assets and Pernod Ricard would pay $3.15 for the remaining share of Seagram.

Among the distilled spirits brands that Diageo and Pernod Ricard agreed would be acquired and held by Diageo were Captain Morgan Original Spiced Rum and Captain Morgan's

Parrot Bay Rum. Among the distilled spirits brands that Diageo and Pernod Ricard agreed would be acquired and held by Pernod Ricard were Seagram's Gin, Chivas Regal Scotch, The Glenlivet Scotch, and Martell Cognac.

Under the terms of the proposed transaction, Pernod Ricard will acquire Seagram's Gin, Chivas Regal Scotch, The Glenlivet Scotch, and Martell Cognac brands. These are brands that Diageo should not acquire because doing so would be anticompetitive. Also, Diageo will acquire Joseph E. Seagram & Sons, Inc., which is the Vivendi entity responsible for marketing all the Seagram-owned brands in the United States. For this reason, commercially sensitive information about Seagram's Gin, Chivas Regal Scotch, The Glenlivet Scotch, and Martell Cognac – information that Diageo should not acquire for competitive reasons — could remain with Joseph E. Seagram & Sons, Inc. and wind up in Diageo's possession.

Also, under the terms of the proposed transaction, Diageo will continue to operate, for up to one year, a "back office" administrative operation for Pernod Ricard in connection with the Seagram brands that Pernod Ricard will be acquiring. Here too, as the transaction was originally structured by the parties, Diageo could acquire and learn commercially sensitive information about Seagram's Gin, Chivas Regal Scotch, The Glenlivet Scotch, and Martell Cognac. The proposed transaction also provides that for up to one year, under a co-packing arrangement, Diageo will bottle for Pernod some of the Seagram's Gin and Scotch products sold in the United States.

III. The Proposed Complaint

According to the Draft Complaint that the Commission intends to issue, Diageo and Vivendi compete in the United States in connection with the distribution and sale of the following distilled spirits markets: (a) premium rum, (b) popular gin, (c) deluxe Scotch, (d) single malt Scotch, and (e) Cognac.

The Commission is concerned that the proposed transaction would eliminate substantial competition between Diageo and Vivendi in each relevant market, and result in higher prices. The Commission stated it has reason to believe that the proposed transaction would have anticompetitive effects and violate Section 7 of the Clayton Act and Section 5 of the Federal Trade Commission Act.

IV. The Commission's Competitive Concerns

A. Premium Rum

Total United States sales at retail of all premium rum products are about $1 billion. In this market, Bacardi USA, with its Bacardi Light and Bacardi Limon products, is the largest competitor with about a 54% share, Seagram, with its Captain Morgan Original Spiced Rum and Captain Morgan's Parrot Bay Rum products, has about a 33% share, and Diageo, with its Malibu Rum, has about an 8% share. After the proposed acquisition, Diageo and Bacardi USA together would have a combined market share of about 95% in the premium rum market in the United States. The proposed acquisition will increase the Herfindahl-Hirschman Index ("HHI") (the customary measure of market concentration) in the premium rum market by about 500 points, and result in market concentration of about 4600 points.

B. Popular Gin

Total United States sales of all popular gin products at retail are about $650 million. In this market, Diageo, through its ownership and marketing of Gordon's Gin (and interest in Gilbey's Gin), is the nation's second largest competitor, with about a 34% share, and Vivendi, through its ownership and marketing of Seagram's Gin (and interest in Burnett's White Satin Gin), is the nation's largest competitor, with about a 66% share. After the proposed transaction, Diageo will have access to highly sensitive commercial business information about Seagram's Gin, its principal competitor. Were Diageo actually to acquire

Seagram's Gin, it would have a market share of (or have a financial interest in) close to 100% of the popular gin market in the United States. Such an acquisition would increase the HHI by about 4500 points, and result in market concentration of about 10,000 points.

C. Deluxe Scotch

Total United States sales of all deluxe Scotch products at retail are about $450 million. In this market, Diageo, with its Johnnie Walker Black Scotch, is the nation's largest competitor, with about a 51% share, and Vivendi, with its Chivas Regal Scotch, is the nation's second largest competitor, with about a 49% share. After the proposed transaction, Diageo will have access to highly sensitive commercial business information about Chivas Regal Scotch, its principal competitor. Were Diageo actually to acquire Chivas Regal Scotch, it would have a market share of close to 100% of the deluxe Scotch market in the United States. Such an acquisition would increase the HHI by about 5,000 points, and result in market concentration of about 10,000 points.

D. Single Malt Scotch

Total United States sales of all single malt Scotch products at retail are about $250 million. In this market, Diageo, with its Oban, Lagavulin, Dalwhinnie, Cardhu, Talisker, Cragganmore, Knocando, Glenkinchie, and Glen Ord brands, is the nation's fourth largest competitor, with about a 6% share, and Vivendi, with it's The Glenlivet Scotch product, is the nation's largest competitor with about a 26% share. After the proposed transaction, Diageo will have access to highly sensitive commercial business information about The Glenlivet Scotch. Were Diageo actually to acquire The Glenlivet Scotch, it would have a market share of about 32% in the single malt Scotch market in the United States. Such an acquisition would increase the HHI by about 300 points, and result in market concentration of about 2,000 points.

E. Cognac

Total United States sales of all Cognac products at retail are about $1 billion. In this market, Diageo, with its Hennessy brand, is the largest competitor with about a 54% share, and Vivendi, with its Martell product, is the third largest competitor with about a 9% share. After the proposed transaction, Diageo will have access to highly sensitive commercial business information about Martell Cognac. Were Diageo actually to acquire Martell Cognac, it would have a market share of about 63% of the Cognac market in the United States. Such an acquisition would increase the HHI by about 900 points, and result in market concentration of about 4,600 points.

V. The Proposed Consent Order

A. The premium rum market

The Proposed Consent Order, if finally issued by the Commission, would settle all of the charges alleged in the Commission's Draft Complaint. Under the terms of the Proposed Consent Order, Diageo will be required to divest its Malibu rum business, worldwide, to an acquirer that is acceptable to the Commission.

Diageo will be required to complete the mandated divestiture within six (6) months from the date it (together with Pernod) acquires Seagram. In the event that Diageo does not complete the required divestiture in the time allowed, the Commission will appoint a trustee to sell the assets. The Proposed Consent Order empowers the trustee to sell such additional assets as may be necessary to assure the marketability, viability, and competitiveness of the businesses that are required to be divested. Pending Diageo's divestiture of the Malibu rum business to a Commission-approved acquirer, and to prevent competitive harm pending the divestiture and to ensure that the assets required to be divested will remain a competitively viable business, the Commission has appointed Theodore F. Martens of

PricewaterhouseCoopers LLP as an interim monitor. Among other things, the monitor will ensure that during the period of time that Diageo will own both the Malibu and Captain Morgan rum businesses, it will manage them separately.

B. The Popular Gin, deluxe Scotch, single malt Scotch, and Cognac markets

Under the terms of the Proposed Consent Order, Diageo will be prevented from obtaining or using any commercially sensitive business information relating to Seagram's Gin, Chivas Regal Scotch, The Glenlivet Scotch, or Martell Cognac. To ensure that this will not occur, Diageo has agreed to the following procedures:

First, to ensure that Diageo will not acquire pre-existing competitively sensitive information about Seagram's Gin, Chivas Regal Scotch, The Glenlivet Scotch, and Martell Cognac, Vivendi will hire an independent consultant to identify and segregate those materials. This will prevent Diageo from seeing the competitively sensitive business information in the materials that Diageo will be acquiring.

Second, Diageo will implement a series of firewalls to keep confidential information from the back office operation it will be operating in part for the benefit of Pernod, or confidential information that Diageo will learn because of its co-packing arrangement, from getting into the hands of Diageo marketing personnel.

C. The Order To Hold Separate and Maintain Assets

Accompanying the Proposed Consent Order is an Order to Hold Separate and Maintain Assets. This order requires Diageo to preserve and maintain the Seagram Captain Morgan rum assets as a separate competitive entity pending the divestiture of the Malibu assets. This will ensure that there will be no interim harm to

competition pending the divestiture by Diageo of the Malibu assets during the period (maximum of six months) that Diageo will be the owner of both Malibu Rum and Captain Morgan Rum.

The Order to Hold Separate and Maintain Assets also requires Diageo to preserve and maintain the competitive viability of the Malibu assets, pending their divestiture. This will ensure that the competitive value of these assets will be maintained after Diageo acquires the Seagram rum assets but before the Malibu Rum assets are actually divested.

VI. The Opportunity for Public Comment

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

By accepting the Proposed Consent Order subject to final approval, the Commission anticipates that the competitive problems alleged in the Draft Complaint will be resolved. The purpose of this analysis is to invite and facilitate public comment concerning the Proposed Consent Order. It is not intended to constitute an official interpretation of the Proposed Consent Order, nor is it intended to modify the terms of the orders in any way.

Complaint

IN THE MATTER OF

NESTLE HOLDINGS, 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-4028; File No. 0110083
Complaint, December 10, 2001--Decision, February 4, 2002

This consent order addresses the merger of Respondent Nestle Holdings, Inc. ("Nestle") – the largest food corporation in the world, which sells its pet food products in the United States through its Friskies division – and Respondent Ralston Purina Company ("Ralston"), the world's leading producer of dry dog and dry and soft-moist cat foods. The order, among other things, requires the respondents to divest all rights, titles, and interests in and to all assets relating to the Meow Mix and Alley Cat brands of dry cat food to J.W. Childs Equity Partners II, L.P., a Boston- based investment firm that owns the Hartz Mountain Corporation ("Hartz"), a leading manufacturer and distributor of pet supplies in the United States. The order also requires the respondents to grant a patent license to Childs for the coating applied to Meow Mix products – covering both current Meow Mix products and any pet product Childs chooses to manufacture in the future – and to provide Childs with technical assistance and a supply of Meow Mix and Alley Cat products for a period of up to two years from the date of the divestiture. In addition, the order requires Childs, for five years, to secure Commission approval before selling all or substantially all of the United States assets acquired in the divestiture. An accompanying Asset Maintenance Order requires the respondents to maintain certain assets pending divestiture.

Participants

For the Commission: *Jill M. Frumin, Anthony Low Joseph, Erika Lee, Jeff Dahnke, Evelyn J. Boynton, Amy Swift, Catharine M. Moscatelli, Roberta S. Baruch, Phillip L. Broyles, Elizabeth A. Schneirov, Hajime Hadeishi* and *Michael G. Vita.*

For the Respondents: *Roxanne E. Henry, Howrey Simon Arnold & White, 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, having reason to believe that Nestle Holdings, Inc. ("Nestle"), and Ralston Purina Company ("Ralston") have entered into an agreement in violation of Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45, and that the terms of such agreement, were they to be implemented, would result in a violation of Section 5 of the Federal Trade Commission Act and Section 7 of the Clayton Act, 15 U.S.C. § 18, and it appearing to the Commission that a proceeding in respect thereof would be in the public interest, hereby issues its complaint, stating its charges as follows:

I. Respondent Nestle

1. Respondent Nestle Holdings, 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 383 Main Avenue, Norwalk, Connecticut 06851. Nestle Holdings, Inc., is a subsidiary of, and controlled by, Nestle S.A., a corporation organized, existing, and doing business under and by virtue of the laws of Switzerland, with its principal executive offices located at Avenue Nestle 55, CH-1800 Vevey, Switzerland.

2. Respondent Nestle is, at all times relevant herein has been, among other things, engaged in the production, sales, and distribution of dry cat food products to customers located throughout the United States.

3. Respondent Nestle and its affiliates, in 2000, had total worldwide sales of all products of approximately $81.4 billion Swiss francs and United States sales of all products of approximately $ 7.8 billion. Respondent Nestle and its affiliates, in 2000, had total worldwide sales of all dry cat food products of approximately $ 600 million, and United States

sales of all dry cat food products of approximately $ 200 million.

4. Respondent Nestle is, and at all times relevant herein has been, engaged in commerce, or in activities affecting commerce, within the meaning of Section 1 of the Clayton Act, 15 U.S.C. § 12, and Section 4 of the Federal Trade Commission Act, 15 U.S.C. § 44.

II. Respondent Ralston

5. Respondent Ralston is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Missouri, with its principal place of business located at Checkerboard Square, St. Louis, Missouri 63164.

6. Respondent Ralston is, at all times relevant herein has been, among other things, engaged in the production, sales, and distribution of dry cat food products to customers located throughout the United States.

7. Respondent Ralston, in 2000, had total worldwide sales of all products of approximately $ 3 billion, and United States sales of all products of approximately $ 2.36 billion Respondent Ralston, in 2000, had total worldwide sales of all dry cat food products of approximately $ 752 million, and United States sales of all dry cat food products of approximately $ 617 million.

8. Respondent Ralston is, and at all times relevant herein has been, engaged in commerce, or in activities affecting commerce, within the meaning of Section 1 of the Clayton Act, 15 U.S.C. § 12, and Section 4 of the Federal Trade Commission Act, 15 U.S.C. § 44.

III. The Proposed Acquisition

9. On or about January 15, 2001, Respondents Nestle and Ralston executed an agreement for Nestle to acquire Ralston. The value of the proposed acquisition is approximately $10.3 billion.

IV. Trade and Commerce

10. Dry cat food products consist of a mixture of meat, fish, and grains. Dry cat food products are formulated and produced to be consumed by cats, rather than dogs, who are attracted to different flavors and product attributes. Dry cat food products are sold in paper bags or plastic containers. Wet cat food products are sold in cans, which must be refrigerated after they are opened. Wet cat food products have a much stronger odor, which is unattractive to humans.

11. Total United States sales (at retail) of all dry cat food products are approximately $ 2.2 billion. The parties sell dry cat food products through different retail channels of distribution, including supermarkets, mass merchants, club stores, and pet specialty stores.

V. The Relevant Product Market

12. The relevant product market in which it is appropriate to assess the effects of the proposed acquisition is the sale of dry cat food products, distributed through the channels of distribution described in paragraph 11 above.

VI. The Relevant Geographic Market

13. The relevant geographic market in which it is appropriate to assess the effects of the proposed acquisition is the United States.

VII. Concentration

14. The relevant market is moderately concentrated and the proposed acquisition, if consummated, will substantially increase that concentration, as follows.

(a) In the dry cat food products market, Nestle has approximately a 11.22% share across all channels. Ralston has approximately a 33.59% share across all channels.

(b) After the acquisition, Respondents will have a market share of approximately 44.81% of the dry cat food market identified in paragraphs 12 and 13 above.

(c) Across all channels, the acquisition raises the HHI from 1675 to 2429, an increase of 754 points.

VIII. Conditions of Entry

15. Entry into the relevant market would not be timely, likely, or sufficient to prevent the anti-competitive effects in the relevant market.

IX. Violations Charged

16. Nestle and Ralston compete in the sale of dry cat food in the United States.

17. The effect of the proposed acquisition, if consummated, may be to substantially lessen competition in the sale of dry cat food in the United States in violation of Section 5 of the Federal Trade Commission Act and Section 7 of the Clayton Act, 15 U.S.C. § 18, in the following ways, among others:

(a) by eliminating direct competition in the sale of dry cat food between Nestle and Ralston; and

(b) by increasing the likelihood that the combination of Nestle and Ralston will unilaterally exercise market power;

each of which increases the likelihood that prices will be higher with the acquisition than they would be absent the acquisition.

18. The Agreement entered into between Respondents Nestle and Ralston for Nestle to acquire Ralston constitutes a violation of Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45. Further, the agreement, if consummated, would be a violation of Section 5 of the Federal Trade Commission Act and Section 7 of the Clayton Act, 15 U.S.C. § 18.

WHEREFORE, THE PREMISES CONSIDERED, the Federal Trade Commission on this tenth day of December, 2001 issues its Complaint against Respondents Nestle and Ralston.

By the Commission.

DECISION AND ORDER

The Federal Trade Commission ("Commission") having initiated an investigation of the proposed acquisition by Respondent Nestle Holdings, Inc. of certain voting securities of Respondent Ralston Purina Company, and Respondents 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 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"), an admission by Respondents 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 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 its 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 Nestle Holdings, Inc., is a corporation organized, existing, and doing business under, and by virtue of, the laws of Delaware, with its office and principal place of business located at 383 Main Avenue, Norwalk, CT 06851. Nestle Holdings, Inc. is a subsidiary of and controlled by Nestle S.A., a corporation organized, existing, and doing business under, and by virtue of, the laws of Switzerland, with its principal executive offices located at Avenue Nestle 55, CH-1800 Vevey, Switzerland.

2. Respondent Ralston Purina Company, is a corporation organized, existing, and doing business under, and by virtue of, the laws of the State of Missouri, with its office and principal place of business located at Checkerboard Square, St. Louis, Missouri 63164.

3. J.W. Childs Associates, Inc., is a corporation organized, existing, and doing business under and by virtue of the laws of Delaware, with its office and principal place of business located at 111 Huntington Avenue, 29th Floor, Boston, Massachusetts 02199.

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

ORDER

I.

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

A. "Nestle" means Nestle Holdings, Inc., its parent Nestle S.A., its directors, officers, employees, agents, representatives, successors, and assigns; its subsidiaries, divisions, groups, and affiliates controlled by Nestle, and the respective directors, officers, employees, agents, representatives, successors, and assigns of each.

B. "Nestle S.A." means Nestle S.A., its directors, officers, employees, agents, representatives, successors, and assigns; its subsidiaries, divisions, groups, and affiliates controlled by Nestle S.A., and the respective directors, officers, employees, agents, representatives, successors, and assigns of each.

C. "Ralston Purina" means Ralston Purina Company, its directors, officers, employees, agents, representatives, successors, and assigns; its subsidiaries, divisions, groups, and affiliates controlled by Ralston Purina, and the respective directors, officers, employees, agents, representatives, successors, and assigns of each.

D. "Childs" means J.W. Childs Associates, Inc., its directors, officers, employees, agents, representatives, successors, and assigns; its subsidiaries, divisions, groups, and affiliates controlled by Childs, and the respective directors, officers, employees, agents, representatives, successors, and assigns of each.

E. "Commission" means the Federal Trade Commission.

F. "Acquisition" means the proposed acquisition described in the Agreement and Plan of Merger between Nestle and Ralston Purina, dated January 15, 2001, pursuant to which Nestle agreed to acquire certain voting securities of Ralston Purina.

G. "Acquisition Date" means the date of consummation of the Acquisition.

H. "Administrative Services" means provision of administrative services, including but not limited to, order processing, warehousing, shipping, accounting, and information transitioning services.

I. "Alley Cat Product" means the Alley Cat brand of dry cat food products.

J. "Childs Acquisition Agreement" means the Asset Purchase Agreement (including all related agreements, schedules, exhibits, and appendices) among Nestle Holdings, Inc., Ralston Purina Company and J.W. Childs Equity Partners II, L.P., dated October 17, 2001, as amended.

K. "Coating Patent" means the U.S. and foreign patents and patent applications identified in Appendix A of this Order.

L. "Consent Agreement" means the Agreement Containing Consent Orders executed by Respondents and the Commission in this matter.

M. "Cost" means (i) if in connection with Paragraph II.F. of this Order: (x) the cost of manufacturing an item, including the actual cost of raw materials (which includes packaging), direct labor, and reasonably allocated factory overhead; and (y) in the case of a Force Majeure Event as defined in Paragraph 19 of the Childs Co-Pack Agreement, reasonable out of pocket costs incurred for actual contracted services, provided that such costs shall not exceed the out of pocket costs incurred in connection with any alternative supply arrangements for Respondents' dry cat food products produced at the facility affected by the Force Majeure Event calculated on a non-discriminatory pro rata basis, and provided further that in making any alternative supply arrangements, Respondents shall not discriminate in any manner against Ralston Acquirer's products or in favor of the dry cat food products retained by Respondents after this Order goes into effect; or (ii) if in connection with Paragraphs II.G. and II.H. of this order, the cost of direct material, labor, and out of pocket expenses used to provide the relevant service.

N. "Divestiture Trustee" means the Divestiture Trustee appointed pursuant to Paragraph V of this Order.

O. "Intellectual Property" means, without limitation, (i) all trade names, registered and unregistered trademarks,

service marks and applications, domain names, trade dress, all copyrights, copyright registrations and applications, in both published works and unpublished works, and goodwill associated with each of them; (ii) all patents, patent applications, and inventions and discoveries that may be patentable, and goodwill associated with each of them; and (iii) all know-how, trade secrets, confidential information, software, technical information, data, processes and inventions, formulae, recipes, methods, and product and packaging specifications, and goodwill associated with each of them; provided, however that Intellectual Property shall not include customer lists or supplier lists.

P. "International Assets" means any right, title, and interest that Respondents may have, at the time the International Trademarks are divested, in, to, and under the International Trademarks.

Q. "International Trademarks" means any and all trademarks, service marks, trademark and service mark registrations and pending trademark and service mark registrations that relate exclusively to the Meow Mix Product or Alley Cat Product outside of the United States and Canada.

R. "Manufacturing Information" means know-how and procedures used in the manufacture of the Meow Mix Product and the Alley Cat Product in the United States or Canada as of the date the Ralston Assets are divested.

S. "Meow Mix Product" means the Meow Mix brand of dry cat food products (which does not include cat treats), including the brand extension Meow Mix Seafood Middles.

T. "Monitor" means the Monitor appointed pursuant to Paragraph IV of this Order.

U. "Non-Public Ralston Acquirer Information" means any propriety information of the Ralston Acquirer relating to the Ralston Assets or the Ralston Business obtained by

Respondents in the course of fulfilling the obligations required by Paragraphs II.F., II.G., and II.H. of this Order.

V. "Order to Maintain Assets" means the Order to Maintain Assets issued by the Commission in this matter.

W. "Person" means any individual, partnership, firm, corporation, association, trust, unincorporated organization or other entity.

X. "Ralston Acquirer" means the Person that acquires the Ralston Assets pursuant to this Order.

Y. "Ralston Acquisition Agreement" means either the Childs Acquisition Agreement or the acquisition agreement described in Paragraph II.C.2. of this Order.

Z. "Ralston Assets" means all of Respondents' right, title, and interest in and to all assets, tangible or intangible, relating to the operation of the Ralston Business, including, but not limited to:

1. All inventories and supplies held by, or under the control of Respondents;

2. All Intellectual Property owned by or licensed to Respondents;

3. Copies of all customer lists and supplier lists;

4. All rights of Respondents under any contract;

5. All governmental approvals, consents, licenses, permits, waivers, or other authorizations held by Respondents, to the extent transferable;

6. All rights of Respondents under any warranty and guarantee, express or implied; and

7. Copies of all relevant portions of books, records, and files held by, or under the control of, Respondents (subject to Respondents' rights to maintain attorney client privilege).

Provided, however, that the Ralston Assets shall not include (i) any assets of the kind described in Sections 1.02(b)(i) through (vii), (ix), (x), and (xii) of the Childs Acquisition Agreement, (ii) except for copies or portions thereof reasonably requested by the Ralston Acquirer for the purpose of operating the Ralston Business in a viable and competitive manner, any assets of the kind described in Section 1.02(b)(xi) of the Childs Acquisition Agreement, (iii) any real property (together with appurtenances, licenses and permits) owned, leased, or otherwise held by Respondents, (iv) any personal property (including rights under any contract) owned, leased, or otherwise held by Respondents that does not relate exclusively to operation of the Ralston Business, and (v) any Intellectual Property that does not relate exclusively to operation of the Ralston Business.

AA. "Ralston Business" means Respondent Ralston's business of researching, developing, manufacturing, distributing, marketing, and selling Meow Mix Product and Alley Cat Product, in any market anywhere in the United States and Canada, prior to the Acquisition Date.

BB. "Respondents" means Nestle and Ralston Purina, individually and collectively.

CC. "Technical Assistance" means providing (i) expert advice, assistance, and training with respect to the Manufacturing Information, and (ii) access to Manufacturing Information.

II.

IT IS FURTHER ORDERED that:

A. Respondents shall divest:

1. The Ralston Assets, absolutely and in good faith, to Childs pursuant to the Childs Acquisition Agreement, no later than twenty days from the date the Commission accepts the Consent Agreement for public comment or January 31, 2002, whichever is later.

2. The International Assets, absolutely and in good faith, to Childs pursuant to the Childs Acquisition Agreement, no later than180 days from the date the Ralston Assets are divested pursuant to Paragraph II.A.1. of this Order.

B. The Childs Acquisition Agreement is incorporated by reference and made a part of this Order as Confidential Appendix B. Respondents shall comply with all terms of the Childs Acquisition Agreement, and any breach by Respondents of any term of the Childs Acquisition Agreement shall constitute a violation of this Order. In the event any term of the Childs Acquisition Agreement contradicts any other terms of this Order, such other terms of this Order shall govern Respondents' obligations under this Order and the Childs Acquisition Agreement.

C. If, at the time the Commission determines to make this Order final, the Commission determines that Childs is not acceptable as the Ralston Acquirer or that the Childs Acquisition Agreement is not an acceptable manner of divestiture, and so notifies Respondents, Respondents shall immediately terminate or rescind the Childs Acquisition Agreement and divest the Ralston Assets and International Assets:

1. At no minimum price, absolutely and in good faith, to another Person that receives the prior approval of the

Commission, no later than 180 days from the date this Order becomes final;

2. In a manner that receives the prior approval of the Commission, including, but not limited to, entering into, and performing, an acquisition agreement (subject to Commission approval) with the Person that acquires the Ralston Assets and International Assets pursuant to Paragraph II.C.1. of this Order; and

3. Respondents shall comply with all terms of the acquisition agreement described in Paragraph II.C.2. of this Order, and any breach by Respondents of any term of such acquisition agreement shall constitute a violation of this Order. In the event the acquisition agreement varies from or contradicts any other terms of this Order, the terms of this Order shall govern Respondents' obligations under this Order.

D. No later than the date Respondents divest the Ralston Assets, Respondents shall grant a perpetual, non-exclusive, transferable, fully paid up, license to the Ralston Acquirer to use the Coating Patent (except in Spain, Italy, and Greece) (1) in the development, manufacture, marketing, distribution, or sale of any product manufactured by or for the Ralston Acquirer (or its successor) and sold for its account ("Ralston Acquirer Products"), and (2) in the manufacture by the Ralston Acquirer (or its successor) of any pet food products for any third parties. Neither Respondents nor Ralston Acquirer shall have the right to sublicense or license the Coating Patent except (i) for use in the development, manufacture, marketing, distribution, or sale of products manufactured by or for Respondents (in the case of Respondents) or the Ralston Acquirer Products (in the case of the Ralston Acquirer), and (ii) to the acquirer of any brand divested (whether by license for any period of time or sale) by Respondents if such divestiture relates to product that, at the time of such divestiture, uses the Coating Patent.

E. Respondents shall use their best efforts (1) to fully identify any registrations of the International Trademarks held by Respondents prior to divesting the International Assets to the Ralston Acquirer, and (2) to assist and cooperate with the Ralston Acquirer to obtain all governmental approvals, consents, licenses, permits, waivers, or other authorizations described in Paragraph I.Z., which are not transferable from Respondents to the Ralston Acquirer.

F. Upon the request of the Ralston Acquirer, for a period up to 24 months from the date Respondents divest the Ralston Assets, Respondents shall provide a supply of Meow Mix Product and Alley Cat Product to the Ralston Acquirer sufficient to enable the Ralston Acquirer to operate the Ralston Business in a viable and competitive manner.

G. Upon the request of the Ralston Acquirer, for a period up to 24 months from the date Respondents divest the Ralston Assets:

1. Respondents shall provide Technical Assistance to the Ralston Acquirer sufficient to enable the Ralston Acquirer to operate the Ralston Business in a viable and competitive manner.

2. In connection with the Technical Assistance required by Paragraph II.G.1. of this Order, Respondents shall allow the Ralston Acquirer reasonable and timely access to Respondents' manufacturing facilities for the purpose of inspecting manufacturing operations relating to the production of Meow Mix Product and Alley Cat Product.

H. Upon the request of the Ralston Acquirer, for a period up to 6 months from the date Respondents divest the Ralston Assets, Respondents shall provide Administrative Services to the Ralston Acquirer sufficient to enable the Ralston Acquirer to operate the Ralston Business in a viable and competitive manner.

I. Respondents shall enter into one or more agreements, subject to Commission approval, with the Ralston Acquirer incorporating the terms of Paragraphs II.F., II.G., and II.H. of this Order:

1. Any such agreement shall not require the Ralston Acquirer to pay compensation for the goods and services required by Paragraphs II.F., II.G., and II.H. of this Order that exceeds the Cost of providing such goods and services.

2. Any such agreement incorporating the terms of Paragraph II.F. of this Order shall not limit the damages (such as indirect and consequential damages) to which Ralston Acquirer would be entitled to receive in the event of Respondents' breach of the agreement.

3. Any such agreement incorporating the terms of Paragraphs II.G. and II.H. of this Order shall not limit the damages (such as indirect and consequential damages) to which Ralston Acquirer would be entitled to receive in the event of Respondents' breach of the agreement to an amount less than the damages that the Ralston Acquirer would recover in a breach of contract action (as opposed to an indemnity claim) based on such breach.

4. Any such agreement shall not allow Respondents to terminate such agreement for a material breach of the agreement by the Ralston Acquirer in the absence of a final order of a court of competent jurisdiction, regardless of whether such order is appealable.

J. The purpose of the divestiture of the Ralston Assets is to ensure the continued use of the assets in the same business in which the Ralston Assets were engaged at the time of the announcement of the proposed Acquisition by Respondents and to remedy the lessening of competition alleged in the Commission’s complaint.

III.

IT IS FURTHER ORDERED that:

A. Except in the course of performing their obligations under the Ralston Acquisition Agreement or this Order, Respondents shall not provide, disclose or otherwise make available any Non-Public Ralston Acquirer Information to any Person and shall not use any Non-Public Ralston Acquirer Information for any reason or purpose,

B. Respondents shall disclose Non-Public Ralston Acquirer Information only to those Persons who require such information for the purposes permitted under Paragraph III.A., and only such part of the Non-Public Ralston Acquirer Information that is so required.

C. Respondents shall enforce the terms of this Paragraph III 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, including all actions that Respondents would take to protect their own trade secrets and proprietary information.

D. The requirements of this Paragraph III do not apply to that part of the Non-Public Ralston Acquirer Information that Respondents demonstrate (i) was or becomes generally available to the public other than as a result of a disclosure by Respondents or (ii) was available, or becomes available, to Respondents on a non-confidential basis, but only if, to the knowledge of Respondents, the source of such information is not in breach of a contractual, legal, fiduciary, or other obligation to maintain the confidentiality of the information.

IV.

IT IS FURTHER ORDERED that:

A. Angele Thompson ("Monitor") is hereby appointed to monitor Respondents' compliance with Paragraphs II and III of this Order and Paragraphs II through IV of the Order to Maintain Assets:

B. Respondent shall consent to the following terms and conditions regarding the powers, duties, authorities, and responsibilities of the Monitor:

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

2. Within ten days after it signs the Consent Agreement, Respondent 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 Respondent's compliance with the terms of this Order in a manner consistent with the purposes of this Order. The Monitor shall sign a confidentiality agreement prohibiting the use, or disclosure to anyone other than the Commission, of any competitively sensitive or proprietary information gained as a result of his or her role as Monitor.

3. The Monitor's power and duties under this Paragraph IV shall terminate three business days after the Monitor has completed his or her final report pursuant to Paragraph IV.B.8.(ii), or at such other time as directed by the Commission.

4. 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 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 Order to Maintain Assets.

5. The Monitor shall serve, without bond or other security, at the expense of Respondent, on such reasonable and customary terms and conditions as the Commission may set. The Monitor shall have authority to employ, at the expense of Respondent, such consultants, accountants, attorneys and other representatives and assistants as are reasonably necessary to carry out the Monitor'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.

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 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 wilful misconduct. For purposes of this Paragraph IV.B.6., the term "Monitor" shall include all Persons retained by the Monitor pursuant to Paragraph IV.B.5. of this Order.

7. 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 to serve as Monitor. The Commission shall select a substitute 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 any proposed Monitor within ten days after notice by the staff of the Commission to Respondent (by delivery receipt acknowledged, to Respondents' counsel of record) of the identity of any proposed substitute Monitor, Respondent shall be deemed to have consented to the selection of the proposed substitute. Respondent shall execute the agreement required by Paragraph IV.B.2 of this Order within ten days after the Commission appoints a substitute Monitor. The substitute Monitor shall serve according to the terms and conditions of this Paragraph IV.

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

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.

V.

IT IS FURTHER ORDERED that:

A. If Respondents have not divested, absolutely and in good faith any of the Ralston Assets within the time and 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 in the manner provided in this Paragraph V.

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 V 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 V, 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 IV of this Order. If Respondents have not opposed, in writing, including the reasons for opposing, the selection of any proposed Divestiture Trustee within ten business days after receipt of written 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 effect 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.

3. Within ten 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 effect the divestiture for which he or she has been appointed.

4. The Divestiture Trustee shall have twelve months from the date the Commission approves the agreement described in Paragraph V.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 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 such 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 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 or entities selected by Respondents from among those approved by the Commission; provided, further, that Respondents shall select such entity within five 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.

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 V.C.8., the term "Divestiture Trustee" shall include all Persons retained by the Divestiture Trustee pursuant to Paragraph V.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 this Paragraph V for appointment of the initial Divestiture Trustee.

10. The Divestiture Trustee shall have no obligation or authority to operate or maintain the assets to be divested.

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

D. 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.

VI.

IT IS FURTHER ORDERED that if Childs acquires the Ralston Assets pursuant to Paragraph II.A. of this Order:

A. Childs shall not, for a period of five (5) years from the date this Order becomes final, sell or otherwise convey, directly or indirectly, all or substantially all of the Ralston Assets (excluding transactions in the ordinary course of business, such as sales of inventory to customers) to any Person without prior approval of the Commission and only in a

manner that receives the prior approval of the Commission; provided, however, that:

1. Notwithstanding anything in this Paragraph VI, Childs shall not sell or otherwise convey, directly or indirectly, for use with dry cat food in the United States, any Meow Mix Product or Alley Cat Product or related trademarks except 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

2. The obligations of this Paragraph VI shall not apply to a sale or conveyance of the Ralston Assets through a public placement of shares in which Childs retains 25% or more of the equity or other interest of the Person owning or operating the Ralston Assets, and no other Person owns, directly or indirectly, a greater percentage than Childs.

B. Because Childs' plans include the possibility of reselling the Ralston Assets, the purpose of this Paragraph VI is to ensure the continued use of the assets in the same business in which the Ralston Assets were engaged at the time of the announcement of the proposed Acquisition by Respondents and to remedy the lessening of competition alleged in the Commission's complaint.

VII.

IT IS FURTHER ORDERED that Respondents and Childs shall provide a copy of this Order to each of Respondents' and Childs' respective officers, employees, or agents having managerial responsibility for any obligations under Paragraphs II, III, IV, and VI of this Order, no later than ten days from the date this Order becomes final.

VIII.

IT IS FURTHER ORDERED that:

A. Respondents shall file a verified written report with the Commission setting forth in detail the manner and form in which they intend to comply, are complying, and have complied with this Order and the Order to Maintain Assets:

1. No later than sixty days from the date this Order becomes final and every sixty days thereafter (measured from the due date of the first report) until one year from the date this Order becomes final (for a total of six reports during the first year).

2. No later than ninety days from the due date of Respondents' sixth report as required by Paragraph VIII.A.1. of this Order, and every ninety days thereafter (measured from the due date of the seventh report) until two years from the date this Order becomes final (for a total of ten reports during the first two years).

3. No later than one year from the due date of Respondents' tenth report as required by Paragraph VIII.A.2. of this Order, and annually thereafter for the next seven years, on the anniversary of the date this Order becomes final.

Provided, however, that Respondents shall also file the report required by this Paragraph VIII.A. at any other time as the Commission may require.

B. If, at the time this Order becomes final, Respondents have not completed all of the obligations required by Paragraph II.A. of this Order, Respondents shall comply with Paragraph VIII.A. of this Order by filing a verified written report no later than thirty days from the date this Order becomes final, every thirty days thereafter (measured from the due date of the first report) until Respondents have complied with the obligation required by Paragraph II.A. of this Order. Thereafter, Respondents shall

assume the reporting schedule set forth in Paragraph VIII.A. of this Order and file subsequent reports in accordance therewith.

C. Respondents shall include in their compliance reports a full description of the efforts being made to comply with Paragraph II.A. (or Paragraph II.C., if applicable), of this Order, including a description of all substantive contacts or negotiations for the divestiture and the identity of all parties contacted. Respondents shall include in their compliance reports copies of all written communications to and from such parties, all internal memoranda, all reports and recommendations concerning divestiture, the date of divestiture, and a statement that the divestiture has been accomplished in the manner approved by the Commission.

IX.

IT IS FURTHER ORDERED that Respondents, Nestle S.A., or Childs, respectively, shall notify the Commission at least thirty days prior to any proposed change in the corporate Respondents, Nestle S.A., or Childs, as applicable, 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.

X.

IT IS FURTHER ORDERED that, for the purpose of determining or securing compliance with this Order, and subject to any legally recognized privilege, and upon written request with reasonable notice, Respondents, Nestle S.A., and Childs 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, Nestle S.A., or Childs relating to any matter contained in this Order; and

B. Upon five days' notice to Respondents, Nestle S.A., or Childs and without restraint or interference from them, to interview their officers, directors, or employees, who may have counsel present, regarding any such matters.

XI.

IT IS FURTHER ORDERED that this Order shall terminate on February 4, 2012.

By the Commission, Chairman Muris recused.

Confidential Appendix A

[Redacted From Public Record Version]

Confidential Appendix B

[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 Nestle Holdings, Inc., of certain voting securities of Respondent Ralston Purina Company and Respondents 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 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"), an admission by Respondents 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 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 Nestle Holdings, Inc., is a corporation organized, existing and doing business under and by virtue of the

laws of Delaware, with its office and principal place of business located at 383 Main Avenue, Norwalk, CT 06851. Nestle Holdings, Inc. is a subsidiary of and controlled by Nestle S.A., a corporation organized, existing and doing business under and by virtue of the laws of Switzerland, with its principal executive offices located at Avenue Nestle 55, CH-1800 Vevey, Switzerland.

2. Respondent Ralston Purina Company, is a corporation organized, existing and doing business under and by virtue of the laws of the State of Missouri, with its office and principal place of business located at Checkerboard Square, St. Louis, Missouri 63164.

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

A. "Nestle" means Nestle Holdings, Inc., its parent Nestle S.A., its directors, officers, employees, agents, representatives, successors, and assigns; its subsidiaries, divisions, groups, and affiliates controlled by Nestle, and the respective directors, officers, employees, agents, representatives, successors, and assigns of each.

B. "Nestle S.A." means Nestle S.A., its directors, officers, employees, agents, representatives, successors, and assigns; its subsidiaries, divisions, groups, and affiliates controlled by Nestle S.A., and the respective directors, officers, employees, agents, representatives, successors, and assigns of each.

C. "Ralston Purina" means Ralston Purina Company, its directors, officers, employees, agents, representatives, successors, and assigns; its subsidiaries, divisions, groups, and affiliates controlled by Ralston Purina, and the respective directors, officers, employees, agents, representatives, successors, and assigns of each.

D. "Commission" means the Federal Trade Commission.

E. "Acquisition" means the proposed acquisition described in the Agreement and Plan of Merger between Nestle and Ralston Purina, dated January 15, 2001, pursuant to which Nestle agreed to acquire certain voting securities of Ralston Purina.

F. "Acquisition Date" means the date of consummation of the Acquisition.

G. "Administrative Services" means provision of administrative services, including but not limited to, order processing, warehousing, shipping, accounting, and information transitioning services.

H. "Alley Cat Product" means the Alley Cat brand of dry cat food products.

I. "Childs Acquisition Agreement" means the Asset Purchase Agreement (including all related agreements, schedules, exhibits, and appendices) among Nestle Holdings, Inc., Ralston Purina Company and J.W. Childs Equity Partners II, L.P., dated October 17, 2001, as amended.

J. "Coating Patent" means the U.S. and foreign patents and patent applications identified in Appendix A of this Order to Maintain Assets.

K. "Consent Agreement" means the Agreement Containing Consent Orders executed by Respondents and the Commission in this matter.

L. "Cost" means (i) if in connection with Paragraph III.C. of this Order to Maintain Assets: (x) the cost of manufacturing an item, including the actual cost of raw materials (which includes packaging), direct labor, and reasonably allocated factory overhead; and (y) in the case of a Force Majeure Event as defined in Paragraph 19 of the Childs Co-Pack Agreement, reasonable out of pocket costs incurred for actual contracted services, provided that such costs shall not exceed the out of pocket costs incurred in connection with any alternative supply arrangements for Respondents' dry cat food products produced at the facility affected by the Force Majeure Event calculated on a non-discriminatory pro rata basis, and provided further that in making any alternative supply arrangements, Respondents shall not discriminate in any manner against Ralston Acquirer's products or in favor of the dry cat food products retained by Respondents after this Order to Maintain Assets goes into effect; or (ii) if in connection with Paragraphs III.D. and III.E. of this Order to Maintain Assets, the cost of direct material, labor, and out of pocket expenses used to provide the relevant service.

M. "Decision and Order" means the Decision and Order issued by the Commission in this matter.

N. "Intellectual Property" means, without limitation, (i) all trade names, registered and unregistered trademarks, service marks and applications, domain names, trade dress, all copyrights, copyright registrations and applications, in both published works and unpublished works, and goodwill associated with each of them; (ii) all patents, patent applications, and inventions and discoveries that may be patentable, and goodwill associated with each of them; and (iii) all know-how, trade secrets, confidential information, software, technical information, data, processes and inventions, formulae, recipes, methods, and product and packaging specifications, and goodwill associated with each of them; provided, however that Intellectual Property shall not include customer lists or supplier lists.

O. "International Assets" means any right, title, and interest that Respondents' may have, at the time the International Trademarks are divested, in, to, and under the International Trademarks.

P. "International Trademarks" means any and all trademarks, service marks, trademark and service mark registrations and pending trademark and service mark registrations that relate exclusively to the Meow Mix Product or Alley Cat Product outside of the United States and Canada.

Q. "Manufacturing Information" means know-how and procedures used in the manufacture of the Meow Mix Product and the Alley Cat Product in the United States or Canada as of the date the Ralston Assets are divested.

R. "Meow Mix Marketing Plan" means the F'02 Meow Mix Marketing Plan described in the Ralston Acquisition Agreement.

S. "Meow Mix Product" means the Meow Mix brand of dry cat food products (which does not include cat treats), including the brand extension Meow Mix Seafood Middles.

T. "Monitor" means the Monitor appointed pursuant to Paragraph V of this Order to Maintain Assets.

U. "Non-Public Ralston Acquirer Information" means any propriety information of the Ralston Acquirer relating to the Ralston Assets or the Ralston Business obtained by Respondents in the course of fulfilling the obligations required by Paragraphs III.C., III.D., and III.E. of this Order to Maintain Assets.

V. "Person" means any individual, partnership, firm, corporation, association, trust, unincorporated organization or other entity.

W. "Ralston Acquirer" means the Person that acquires the Ralston Assets pursuant to this Order to Maintain Assets.

X. "Ralston Acquisition Agreement" means either the Childs Acquisition Agreement or the acquisition agreement described in Paragraph II.C.2. of the Decision and Order.

Y. "Ralston Assets" means all of Respondents' right, title, and interest in and to all assets, tangible or intangible, relating to the operation of the Ralston Business, including, but not limited to:

1. All inventories and supplies held by, or under the control of Respondents;

2. All Intellectual Property owned by or licensed to Respondents;

3. Copies of all customer lists and supplier lists;

4. All rights of Respondents under any contract;

5. All governmental approvals, consents, licenses, permits, waivers, or other authorizations held by Respondents, to the extent transferable;

6. All rights of Respondents under any warranty and guarantee, express or implied; and

7. Copies of all relevant portions of books, records, and files held by, or under the control of, Respondents (subject to Respondents' rights to maintain attorney client privilege).

Provided, however, that the Ralston Assets shall not include (i) any assets of the kind described in Sections 1.02(b)(i) through (vii), (ix), (x), and (xii) of the Childs Acquisition Agreement, (ii) except for copies or portions thereof reasonably requested by the Ralston Acquirer for the purpose of operating the Ralston Business in a viable and competitive manner, any

assets of the kind described in Section 1.02(b)(xi) of the Childs Acquisition Agreement, (iii) any real property (together with appurtenances, licenses and permits) owned, leased, or otherwise held by Respondents, (iv) any personal property (including rights under any contract) owned, leased, or otherwise held by Respondents that does not relate exclusively to operation of the Ralston Business, and (v) any Intellectual Property that does not relate exclusively to operation of the Ralston Business.

Z. "Ralston Business" means Respondent Ralston's business of researching, developing, manufacturing, distributing, marketing, and selling Meow Mix Product and Alley Cat Product, in any market anywhere in the United States and Canada, prior to the Acquisition Date.

AA. "Respondents" means Nestle and Ralston Purina, individually and collectively.

BB. "Technical Assistance" means providing (i) expert advice, assistance, and training with respect to the Manufacturing Information, and (ii) access to Manufacturing Information.

II.

IT IS FURTHER ORDERED that:

A. Between the date Respondents sign the Consent Agreement and the date Respondents divest the Ralston Assets pursuant to Paragraph II.A. of the Decision and Order, Respondents shall maintain the viability, competitiveness, and marketability of the Ralston Assets and Ralston Business:

1. Respondents shall prevent the destruction, wasting, deterioration, disposition, or impairment of any of the Ralston Assets, except for ordinary wear and tear and as would otherwise occur in the ordinary course of business.

2. Respondents shall use their best efforts to maintain and increase sales in the ordinary course of the Ralston Business, and shall maintain at levels set forth in the Meow Mix Marketing Plan, all advertising and promotion, sales, technical assistance, marketing and merchandising support for the Ralston Business.

3. Respondents shall use their best efforts to maintain the relations and good will with suppliers, customers, landlords, creditors, agents, and others having business relationships with the Ralston Business.

4. Respondents shall not, except in the ordinary course of business or as part of a divestiture approved by the Commission pursuant to the Decision and Order, remove, sell, lease, assign, transfer, license, pledge for collateral or otherwise dispose of the Ralston Assets.

5. Respondents shall not take any affirmative action, or fail to take any action within their control, as a result of which the viability, competitiveness, or marketability of the Ralston Assets would be diminished or the divestiture of the Ralston Assets would be jeopardized.

B. Between the date Respondents sign the Consent Agreement and the date that is 180 days after the date the Ralston Assets are divested, Respondents shall not take any affirmative actions to convey to any Person other than the Ralston Acquirer any right, title, or interest that Respondents may have, as of the date the Respondents sign the Consent Agreement, in, to and under the International Trademarks.

C. The Childs Acquisition Agreement is incorporated by reference and made a part of this Order to Maintain Assets as Confidential Appendix B. Respondents shall comply with all terms of the Childs Acquisition Agreement, and any breach by Respondents of any term of the Childs Acquisition Agreement shall constitute a violation of this Order to Maintain Assets. In the event any term of the Childs Acquisition Agreement

contradicts any other terms of this Order to Maintain Assets, such other terms of this Order to Maintain Assets shall govern Respondents' obligations under this Order to Maintain Assets and the Childs Acquisition Agreement.

D. The purpose of this Order to Maintain Assets is (i) to preserve the Ralston Assets and the Ralston Business as a viable, competitive, and ongoing business and (ii) to prevent interim harm to competition.

III.

IT IS FURTHER ORDERED that:

A. No later than the date Respondents divest the Ralston Assets, Respondents shall grant a perpetual, non-exclusive, transferable, fully paid up, license to the Ralston Acquirer to use the Coating Patent (except in Spain, Italy, and Greece) (1) in the development, manufacture, marketing, distribution, or sale of any product manufactured by or for the Ralston Acquirer (or its successor) and sold for its account ("Ralston Acquirer Products"), and (2) in the manufacture by the Ralston Acquirer (or its successor) of any pet food products for any third parties. Neither Respondents nor Ralston Acquirer shall have the right to sublicense or license the Coating Patent except (i) for use in the development, manufacture, marketing, distribution, or sale of products manufactured by or for Respondents (in the case of Respondents) or the Ralston Acquirer Products (in the case of the Ralston Acquirer), and (ii) to the acquirer of any brand divested (whether by license for any period of time or sale) by Respondents if such divestiture relates to product that, at the time of such divestiture, uses the Coating Patent.

B. Respondents shall use their best efforts (1) to fully identify any registrations of the International Trademarks held by Respondents prior to divesting the International Assets to the Ralston Acquirer, and (2) to assist and cooperate with the

Ralston Acquirer to obtain all governmental approvals, consents, licenses, permits, waivers, or other authorizations described in Paragraph I.Y., which are not transferable from Respondents to the Ralston Acquirer.

C. Upon the request of the Ralston Acquirer, for a period up to 24 months from the date Respondents divest the Ralston Assets, Respondents shall provide a supply of Meow Mix Product and Alley Cat Product to the Ralston Acquirer sufficient to enable the Ralston Acquirer to operate the Ralston Business in a viable and competitive manner.

D. Upon the request of the Ralston Acquirer, for a period up to 24 months from the date Respondents divest the Ralston Assets:

1. Respondents shall provide Technical Assistance to the Ralston Acquirer sufficient to enable the Ralston Acquirer to operate the Ralston Business in a viable and competitive manner.

2. In connection with the Technical Assistance required by Paragraph III.D.1. of this Order to Maintain Assets, Respondents shall allow the Ralston Acquirer reasonable and timely access to Respondents' manufacturing facilities for the purpose of inspecting manufacturing operations relating to the production of Meow Mix Product and Alley Cat Product.

E. Upon the request of the Ralston Acquirer, for a period up to 6 months from the date Respondents divest the Ralston Assets, Respondents shall provide Administrative Services to the Ralston Acquirer sufficient to enable the Ralston Acquirer to operate the Ralston Business in a viable and competitive manner.

F. Respondents shall enter into one or more agreements, subject to Commission approval, with the Ralston Acquirer

incorporating the terms of Paragraphs III.C., III.D., and III.E. of this Order to Maintain Assets:

1. Any such agreement shall not require the Ralston Acquirer to pay compensation for the goods and services required by Paragraphs III.C., III.D., and III.E. of this Order to Maintain Assets that exceeds the Cost of providing such goods and services.

2. Any such agreement incorporating the terms of Paragraph III.C. of this Order to Maintain Assets shall not limit the damages (such as indirect and consequential damages) to which Ralston Acquirer would be entitled to receive in the event of Respondents' breach of the agreement.

3. Any such agreement incorporating the terms of Paragraphs III.D. and III.E. of this Order to Maintain Assets shall not limit the damages (such as indirect and consequential damages) to which Ralston Acquirer would be entitled to receive in the event of Respondents' breach of the agreement to an amount less than the damages that the Ralston Acquirer would recover in a breach of contract action (as opposed to an indemnity claim) based on such breach.

4. Any such agreement shall not allow Respondents to terminate such agreement for a material breach of the agreement by the Ralston Acquirer in the absence of a final order of a court of competent jurisdiction, regardless of whether such order is appealable.

IV.

IT IS FURTHER ORDERED that:

A. Except in the course of performing their obligations under the Ralston Acquisition Agreement or this Order to Maintain Assets, Respondents shall not provide, disclose or otherwise make available any Non-Public Ralston Acquirer

Information to any Person and shall not use any Non-Public Ralston Acquirer Information for any reason or purpose,

B. Respondents shall disclose Non-Public Ralston Acquirer Information only to those Persons who require such information for the purposes permitted under Paragraph IV.A. of this Order to Maintain Assets, and only such part of the Non-Public Ralston Acquirer Information that is so required.

C. Respondents shall enforce the terms of this Paragraph IV as to any Person and take such action as is necessary to cause each such Person to comply with the terms of this Paragraph IV, including all actions that Respondents would take to protect their own trade secrets and proprietary information.

D. The requirements of this Paragraph IV do not apply to that part of the Non-Public Ralston Acquirer Information that Respondents demonstrate (i) was or becomes generally available to the public other than as a result of a disclosure by Respondents or (ii) was available, or becomes available, to Respondents on a non-confidential basis, but only if, to the knowledge of Respondents, the source of such information is not in breach of a contractual, legal, fiduciary, or other obligation to maintain the confidentiality of the information.

V.

IT IS FURTHER ORDERED that:

A. Angele Thompson ("Monitor") is hereby appointed to monitor Respondents' compliance with Paragraphs II through IV of this Order to Maintain Assets and Paragraphs II and III of the Decision and Order:

B. Respondent shall consent to the following terms and conditions regarding the powers, duties, authorities, and responsibilities of the Monitor:

1. The Monitor shall have the power and authority to monitor Respondent's compliance with the terms of this 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 to Maintain Assets and in a manner consistent with the purposes of this Order to Maintain Assets.

2. Within ten days after it signs the Consent Agreement, Respondent 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 Respondent's compliance with the terms of this Order to Maintain Assets in a manner consistent with the purposes of this Order to Maintain Assets. The Monitor shall sign a confidentiality agreement prohibiting the use, or disclosure to anyone other than the Commission, of any competitively sensitive or proprietary information gained as a result of his or her role as Monitor.

3. The Monitor's power and duties under this Paragraph V shall terminate three business days after the Monitor has completed his or her final report pursuant to Paragraph V.B.8.(ii), or at such other time as directed by the Commission.

4. The Monitor shall have full and complete access to Respondents' books, records, documents, personnel, facilities and technical information relating to compliance with this Order to Maintain Assets and the Decision and Order, or to any other relevant information, as the Monitor 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 to Maintain Assets and the Decision and Order.

5. The Monitor shall serve, without bond or other security, at the expense of Respondent, on such reasonable and

customary terms and conditions as the Commission may set. The Monitor shall have authority to employ, at the expense of Respondent, such consultants, accountants, attorneys and other representatives and assistants as are reasonably necessary to carry out the Monitor'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.

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 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 wilful misconduct. For purposes of this Paragraph V.B.6., the term "Monitor" shall include all Persons retained by the Monitor pursuant to Paragraph V.B.5. of this Order to Maintain Assets.

7. 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 to serve as Monitor. The Commission shall select a substitute 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 any proposed Monitor within ten days after notice by the staff of the Commission to Respondent (by delivery receipt acknowledged, to Respondents' counsel of record) of the identity of any proposed substitute Monitor, Respondent shall be deemed to have consented to the selection of the proposed substitute. Respondent shall execute the agreement required by Paragraph V.B.2 of this Order to Maintain Assets within ten days after the Commission appoints a substitute Monitor.

The substitute Monitor shall serve according to the terms and conditions of this Paragraph V.

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

VI.

IT IS FURTHER ORDERED that Respondents shall provide a copy of this Order to Maintain Assets to each of Respondent's officers, employees, or agents having managerial responsibility for any of Respondent's obligations under Paragraphs II through IV of this Order to Maintain Assets, no later than ten days after Respondents sign the Consent Agreement.

VII.

IT IS FURTHER ORDERED that:

A. Respondents shall file a verified written report with the Commission setting forth in detail the manner and form in which they intend to comply, are complying, and have complied with this Order to Maintain Assets and the Decision and Order, no later than thirty days from the date this Order to Maintain Assets becomes final and every thirty days thereafter (measured from the due date of the first report) until the obligations required by Paragraphs II through VI of this Order to Maintain Assets have been

completed or the Decision and Order becomes final, whichever is earlier.

B. Respondents shall include in their compliance reports a full description of the efforts being made to comply with Paragraph II.A. (or Paragraph II.C., if applicable) of the Decision and Order, including a description of all substantive contacts or negotiations for the divestiture and the identity of all parties contacted. Respondents shall include in their compliance reports copies of all written communications to and from such parties, all internal memoranda, all reports and recommendations concerning divestiture, the date of divestiture, and a statement that the divestiture has been accomplished in the manner approved by the Commission.

VIII.

IT IS FURTHER ORDERED that Respondents and Nestle S.A. shall notify the Commission at least thirty days prior to any proposed change in the corporate Respondents or Nestle S.A. 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 the Decision and Order and this Order to Maintain Assets.

IX.

IT IS FURTHER ORDERED that for the purposes of determining or securing compliance with the Decision and Order and this Order to Maintain Assets, and subject to any legally recognized privilege, and upon written request with reasonable notice, Respondents and Nestle S.A. shall permit any duly authorized representatives 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 all other records and documents in the

possession or under the control of Respondents or Nestle S.A. relating to any matter contained in the Decision and Order and this Order to Maintain Assets; and

B. Upon five days' notice to Respondents or Nestle S.A. and without restraint or interference from them, to interview their officers, directors, or employees, who may have counsel present, regarding any such matters.

X.

IT IS FURTHER ORDERED that this Order to Maintain Assets shall terminate on the earlier of three business days from the date (i) the Commission withdraws its acceptance of the Consent Agreement pursuant to the provisions of Commission Rule 2.34, 16 C.F.R. § 2.34, (ii) Respondents complete their obligations required by this Order to Maintain Assets, or (iii) the Decision and Order becomes final.

By the Commission, Chairman Muris not participating.

Order

Confidential Appendix A

[Redacted From Public Record Version]

Confidential Appendix B

[Purchase agreement]

[Redacted From Public Record Version]

Analysis of Proposed Consent Order to Aid Public Comment

I. Introduction

The Federal Trade Commission ("Commission") has issued a complaint ("Complaint") alleging that the proposed merger of Nestle Holdings, Inc. ("Nestle"), and Ralston Purina Company ("Ralston") (collectively "Proposed Respondents") 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 has 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 ("Proposed Consent Order") and an order that requires Proposed Respondents to maintain certain assets pending divestiture ("Asset Maintenance Order"). The Proposed Order remedies the likely anticompetitive effects arising from Proposed Respondents' proposed merger, as alleged in the Complaint. The Asset Maintenance Order preserves competition pending divestiture.

II. Description of the Parties and the Transaction

Nestle Holdings, Inc., is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Delaware. This subsidiary of Nestle S.A. is the U.S. corporation that will be purchasing all of the outstanding Ralston shares. Nestle SA, the largest food corporation in the world, manufactures, distributes, and sells dairy products, soluble coffee, roast and ground coffee, mineral water, beverages, breakfast cereals, coffee creamers, infant foods and dietetic products, culinary products (seasonings, canned foods, pasta, sauces, etc.), frozen foods, ice cream, refrigerated products (*e.g.*, yogurt, desserts, pasta, sauces), chocolate, food services, ophthalmological products, cosmetics, and pet foods. Nestle sells its pet food products in the U.S. through its Friskies division, including Alpo, Come 'N Get It, Mighty Dog, Friskies, Fancy Feast, Jim Dandy, and Chef's Blend. Nestle had worldwide sales

of approximately 81.4 billion Swiss francs and United States sales of approximately $7.8 billion for all products in 2000.

Ralston is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Missouri. Ralston is the world's leading producer of dry dog and dry and soft-moist cat foods. The brands that Ralston manufacturers, distributes, and sells include Dog Chow, Puppy Chow, Cat Chow, Kitten Chow, Purina Special Care, Meow Mix, Purina O.N.E., Purina Pro Plan, Fit & Trim, Clinical Nutrition Management, Alley Cat, Deli-Cat, Thrive, Tender Vittles, Happy Cat, Chuck Wagon Stampede, and Main Stay. Ralston had worldwide sales of approximately $3 billion and United States sales of approximately $2.36 billion for all products for fiscal year 2000.

Pursuant to a merger agreement dated January 15, 2001, Nestle agreed to purchase all of Ralston's outstanding shares of common stock in a transaction valued at $ 10.3 billion. Nestle intends to call the merged entity Nestle Purina Pet Care.

III. The Complaint

The complaint alleges that the market in which to analyze the competitive effects of the proposed transaction is the sale of dry cat food in the United States. Wet and dry cat foods constitute separate product markets. Wet cat food differs from dry cat food in production, ingredients, appearance, packaging, aroma, price, and convenience. Ralston's share of the dry cat food market across all channels of distribution is approximately 34%. Nestle has a market share of approximately 11% of the dry cat food market across all channels of distribution. The dry cat food market in the United States is moderately concentrated. The merger of Nestle and Ralston would substantially increase concentration in this market, raising the HHI level to more than 2400, an increase of more than 750 points. Entry would not be timely, likely, or sufficient to prevent anti-competitive effects in the relevant market.

Analysis

The Complaint alleges that the merger of Nestle and Ralston would substantially lessen competition in the dry cat food market 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 in the sale of dry cat food between Nestle and Ralston; and (b) by increasing the likelihood that the combination of Nestle and Ralston will unilaterally exercise market power; each of which increases the likelihood that prices will be higher with the acquisition than they would be absent the acquisition.

The Proposed Consent Order requires Proposed Respondents to divest the Meow Mix and Alley Cat brands of dry cat food to an up-front buyer, J.W. Childs Equity Partners II, L.P. ("Childs"), no later than 20 days after the Commission accepts the Proposed Consent Agreement for public comment or January 31, 2002, whichever is later, to remedy the Commission's concerns. Childs is a Boston- based investment firm founded in 1995. Structured as a limited partnership, Childs has total committed capital of $982 million. The Commission is satisfied that Childs' acquisition of the divested assets will restore the competition lost as a result of the proposed merger of Nestle and Ralston. Childs has a past history of successfully developing the business of consumer products companies. The designated CEO of the businesses that will produce and sell the brands to be divested has expertise in manufacturing dry pet foods. Childs also owns the Hartz Mountain Corporation ("Hartz"), a leading manufacturer and distributor of pet supplies in the United States. Hartz sells its pet supplies and treats in the same retail outlets as the brands to be divested.

IV. Terms of the Proposed Order

The Proposed Order resolves the Commission's antitrust concerns with the merger as discussed below.

A. Divestiture Provisions

Paragraph II.A. of the Proposed Order requires Proposed Respondents to divest to Childs all of Proposed Respondents' rights, titles, and interests in and to all assets relating to the Meow Mix and Alley Cat brands. The Meow Mix brand includes the original Meow Mix product and Meow Mix Seafood Middles. Specifically, Proposed Respondents must divest all interests in the research, development, manufacture, distribution, marketing, and sales of the Meow Mix and Alley Cat brands of dry cat food products anywhere in the United States and Canada. Proposed Respondents also must divest any and all trademarks, service marks, trademark and service mark registrations, and pending trademark and service mark registrations that relate exclusively to the Meow Mix or Alley Cat brand of dry cat food products outside of the United States and Canada. Proposed Respondents must further divest all inventories and supplies held by, or under their control; all intellectual property owned by or licensed to Proposed Respondents; copies of all customer lists and supplier lists; all rights of Proposed Respondents under any contract; all governmental approvals, consents, licenses, permits, waivers, or other authorizations held by Proposed Respondents, to the extent transferable; all rights of Proposed Respondents under any warranty and guarantee, express or implied; and copies of all relevant portions of books, records, and files held by, or under the control of, Proposed Respondents.

Paragraph II.C. further provides that if the Commission determines that Childs is not an acceptable purchaser of the assets to be divested, Proposed Respondents shall immediately terminate or rescind the sale of the assets to be divested to Childs and divest these assets at no minimum price to another purchaser that receives the prior approval of the Commission no later than 180 days from the date that this Proposed Order becomes final.

Analysis

Paragraph II.D. of the Proposed Order requires that Proposed Respondents grant a patent license to Childs for the coating applied to Meow Mix products. The license covers current Meow Mix products as well as any pet product Childs chooses to manufacture in the future. Paragraph II.F. of the Proposed Order requires Proposed Respondents to provide Childs with a supply of Meow Mix and Alley Cat products for a period of up to two years from the date of the divestiture. Paragraph II.G. requires Proposed Respondents to provide technical assistance to Childs, as needed, for a period of up to two years from the date of divestiture, which includes expert advice, assistance, and training relating to the manufacture of the Meow Mix and Alley Cat brands.

Paragraph VI of the Proposed Order requires Childs, for a period of 5 years, to obtain the Commission's approval before selling all or substantially all of the United States assets acquired in the divestiture. The Commission does not routinely require acquirers of divested assets to obtain approval before subsequent sales. In cases, however, where the proposed acquirer's current plans indicate that there is a high probability that the assets will be resold, possibly within two-five years, it is appropriate for the Commission to include such a provision. *C.f.,* e.g., the Commission's final order in Albertson's, Inc., Docket No. C-3986.

B. Monitor Trustee Provisions

Paragraph IV of the Proposed Order appoints a Monitor Trustee to monitor compliance with the terms of the Order. The Proposed Consent Order provides the Monitor Trustee with the power and authority to monitor the Proposed Respondents' compliance with the terms of the Proposed Consent Order, and full and complete access to personnel, books, records, documents, and facilities of the Proposed Respondents to fulfill that responsibility. In addition, the Monitor Trustee may request any other relevant information that relates to the Proposed Respondents' obligations under the Proposed Consent Order. The Proposed Consent Order precludes Proposed Respondents from

taking any action to interfere with or impede the Monitor Trustee's ability to perform his or her responsibilities or to monitor compliance with the Proposed Consent Order.

The Monitor Trustee may hire such consultants, accountants, attorneys, and other assistants as are reasonably necessary to carry out the Monitor Trustee's duties and responsibilities. The Proposed Consent Order requires the Proposed Respondents to bear the cost and expense of hiring these assistants.

C. Other Terms

Paragraphs V and VII - X of the Proposed Consent Order detail certain general provisions. Paragraph V authorizes the Commission appoint a divestiture trustee in the event Nestle fails to divest the assets as required by the Proposed Consent Order. Paragraph VII requires Respondents to provide a copy of the Proposed Consent Order to each of their officers, employees, and agents with managerial responsibilities for any obligation under the Proposed Order. Paragraph VIII requires Proposed Respondents to provide the Commission with periodic reports of compliance with the Proposed Consent Order. Paragraph IX provides for notification to the Commission in the event of any changes in the corporate Proposed Respondents. Paragraph X requires Proposed Respondents to grant access to any authorized Commission representative for the purpose of determining or securing compliance with the Proposed Consent Order. Paragraph XI terminates the Proposed Consent Order after ten years from the date the Proposed Consent Order becomes final.

V. Opportunity for Public Comment

The Proposed Consent Order has been placed on the public record for thirty (30) days for receipt of comments by interested persons. The Commission has also issued its Complaint in this matter as well as the Asset Maintenance Order. Comments received during this thirty day comment 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 Proposed Consent Order or make final the agreement's Proposed Consent Order.

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 Agreement, to aid the Commission in its determination of whether it should make final the Proposed Order contained in the agreement. 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.

Statement of Commissioner Sheila F. Anthony

The Commission has now issued a final order in this case to resolve complaint allegations that the acquisition would lessen competition in the U.S. dry cat food market. To avert this harm to consumers of dry cat food, the parties agreed to divest Ralston's Meow Mix and Alley Cat brands to J.W. Childs, a private equity investment firm. While I concurred in the Commission's decision to accept this settlement, I write separately to express my concerns about some aspects of the divestiture.

The assets to be divested consist of two proven cat food brands and little else. Standing alone, these brands do not constitute a complete, ongoing business. Rather, J.W. Childs will have to create a new competitor largely from whole cloth. In order to turn the divested assets into a viable business entity, J.W. Childs will need to develop, among other things, its own research and development program, manufacturing facilities, distribution system, and sales and marketing operations. Such a prospect is daunting even when the purchaser is a participant in the same or a closely related business – which is why divestitures of stand-alone businesses present the most successful formula for restoring competition.[1]

The risk to consumers is further heightened where, as here, the proposed purchaser is a financial buyer. When compared to dedicated industry participants, investment firms may have quite different incentives and goals in operating a business. For example, a financial buyer's business plan often involves selling the acquired business within a relatively short period of time.

In the end, I am convinced that this is a rather unique situation and that consumers will be adequately protected by the relief set forth in the Commission's order. Manufacturing and distribution

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[1] *See, e.g.*, Federal Trade Commission Bureau of Competition Staff, *A Study of the Commission's Divestiture Process* (1999).

in this industry segment is routinely and economically contracted out through "co-packing" arrangements. Moreover, this particular financial buyer, J.W. Childs, is financially strong, has a proven track record of good management and growth of acquired firms, and has some experience in the pet industry with its Hartz Mountain line of pet care products. These factors led me to conclude that J.W. Childs is very likely to restore lost competition and preserve choices for dry cat food consumers.

I wish to make it clear, however, that I remain skeptical of divestiture plans that require a purchaser to take brands alone, then build a competitive company from scratch. In addition, I will closely examine divestiture proposals where the buyer is a financial company. In most cases, I would prefer to see divested assets go to a company with a stronger likelihood of operating the business for the long term.

Statement

Concurring Statement of Commissioner Mozelle W. Thompson

The Commission has voted to grant final approval to a Consent Order that remedies competitive concerns in the dry cat food market stemming from Nestle S.A.'s ("Nestle") proposed acquisition of Ralston Purina Co. ("Ralston"). Pursuant to the Consent Agreement and Order, Ralston would divest its top-selling Meow Mix brand and its Alley Cat brand to investment firm J.W. Childs Equity Partners II, L.P. ("Childs"), owners of the Hartz Mountain line of specialty pet care products. For me, this decision was difficult because the continued competitiveness of these brands is so important to consumers.

As always, the key issue facing the Commission in its analysis of a proposed remedy is whether or not the remedy will restore competition that would be lost as a result of the proposed merger. This is at its essence a factual inquiry, involving consideration of a multitude of factors, including the extent of the prospective buyer's industry know-how, its financial viability, its future marketing plans, and its capacity to research, develop, and make innovations to the relevant products.

Our analysis here was made all the more difficult in that we were presented with a buyer that does not have a record of experience in the market in question, therefore, historical indicia of market competitiveness were not available for the Commission's review. As such, the Commission undertook an extraordinarily rigorous analysis of Childs and its ability to be competitive with the assets in question. Ultimately, my primary reservation was not about Childs' ability to be competitive in the dry cat food marketplace, but rather that Childs, as a financial buyer, might in the near term re-sell the assets in question to a buyer who will operate the business poorly or not at all, thus defeating the purpose of the Commission's Order.

These concerns are addressed in Section VI of the Order, which provides that Childs will not sell the acquired assets within five years of the date of the Order without prior approval of the

Commission. While generally I am cautious about including lengthy oversight provisions in such orders, it is appropriate in this case because these provisions ensure that in the event of a resale by Childs, the Commission will be able to assure that the prospective buyer is committed to enhancing the assets in question, thus maintaining the integrity of the Commission's Order.

Statement

Concurring Statement of Commissioner Orson Swindle

The Commission has issued a final order to resolve complaint allegations that Nestle S.A.'s ("Nestle") acquisition of Ralston Purina Co. ("Ralston") may substantially lessen competition in the market for the sale of dry cat food in the United States. To remedy these competitive concerns, Ralston has agreed to divest its Meow Mix and Alley Cat brands to J.W. Childs Equity Partners II, L.P. ("J.W. Childs"), an investment firm that owns the Hartz line of pet care products. Because the divestiture to J.W. Childs is likely to replace the competition in the market for dry cat food that otherwise would have been lost due to the Nestle/Ralston merger, I have voted to issue the final order.

One provision in the final order is unusual and may raise concerns. Paragraph VI requires J.W. Childs, for a period of five years, to obtain Commission approval before selling all or substantially all of the assets acquired in the divestiture. The Analysis to Aid Public Comment explained that the Commission does not routinely impose such prior approval requirements but that it is appropriate to do so "where the proposed acquirer's current plans indicate that there is a high probability that the assets will be resold, possibly within two-five years." The purpose of the prior approval requirement is to make certain that whoever buys the resold assets from J.W. Childs would be a sufficient competitor to remedy the lessening of competition from the Nestle/Ralston transaction alleged in the complaint. *See* Paragraph VI.F. of the Order.

I agree that J.W. Childs warranted a hard look as a prospective buyer because it might resell the divested assets in the near future. It is possible that this close scrutiny would go for naught if J.W. Childs were promptly to resell the assets to a less qualified buyer. On the other hand, this risk is always present -- even had the assets remained in Ralston's hands. I think that our approval of J.W. Childs as the buyer means that we have determined that, in spite of any possible resale plans, the company will develop and employ the assets as vigorously as Ralston would have done. Once we have made this determination, I question the need for

imposing a prior approval requirement on J.W. Childs that we would not have imposed on a buyer that was less likely to resell the assets.

I also think that the prior approval requirement may require the Commission to make a difficult determination. For example, assume that J.W. Childs seeks prior approval to resell the assets four years after the Nestle/Ralston merger was consummated. The Commission presumably will have to determine whether the prospective buyer of the resold assets will compete as effectively as Ralston would have competed in the absence of the Nestle/Ralston merger. Given the passage of four years since the merger and the dynamic nature of markets, it may be difficult for the Commission to make this determination with a high degree of confidence.

Complaint

IN THE MATTER OF

TRU-VANTAGE INTERNATIONAL, L.L.C.

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-4034; File No. 0023210
Complaint, February 5, 2002--Decision, February 5, 2002

This consent order addresses advertising and promotional practices used by Respondent Tru-Vantage International, L.L.C., an infomercial producer, in connection with the sale of Snorenz, a dietary supplement consisting of oils and vitamins that is sprayed on the back of the throat of persons who snore. The order, among other things, requires the respondent to possess competent and reliable scientific evidence to substantiate representations that Snorenz – or any other food, drug, or dietary supplement – reduces or eliminates snoring or the sound of snoring, or eliminates, reduces or mitigates the symptoms of sleep apnea. The order also requires the respondent – whenever it represents that certain products are effective in reducing or eliminating snoring or the sounds of snoring – to affirmatively disclose a warning statement about sleep apnea and the need for physician consultation. In addition, the order requires the respondent to possess and rely upon adequate substantiation to support any representation about the benefits, performance, efficacy, or safety of Snorenz or any other product, service or program. The order also prohibits the respondent from making false claims about scientific support for any product, service, or program. In addition, the order requires the respondent – if it uses any consumer endorsement or testimonial to promote a product, service or program – either to possess competent and reliable scientific evidence that the testimonial represents the typical or ordinary experience of users, or to affirmatively disclose that the testimonial is not typical. The order also requires the respondent to affirmatively disclose any material connection between itself and any endorser, or between an endorser and the marketer.

Participants

For the Commission: *Lemuel W. Dowdy, Walter C. Gross, James Reilly Dolan, Elaine D. Kolish,* and *Randi M. Boorstein.*.

For the Respondent: *David J. Bradford* and *Theresa A. Chmara, Jenner & Block,* and *Craig B. Sherman, Sherman Law Offices.*

COMPLAINT

The Federal Trade Commission, having reason to believe that Tru-Vantage International, L.L.C., a limited liability company ("respondent"), has violated the provisions of the Federal Trade Commission Act, and it appearing to the Commission that this proceeding is in the public interest, alleges:

1. Respondent is an Illinois limited liability company, with its principal office or place of business at 7300 North Lehigh Avenue, Niles, Illinois 60714.

2. Respondent advertised, offered for sale, sold, and distributed products to the public, including but not limited to, SNORenz, a topical spray that purports to reduce or eliminate snoring or the sounds associated with snoring by lubricating the vibrating tissues in the throat with a combination of oils, vitamins, and trace ingredients. SNORenz is a "food," and/or “drug” within the meaning of Sections 12 and 15 of the Federal Trade Commission Act.

3. Respondent’s advertisements include, but are not limited to, program-length television commercials (“infomercials”) which run for 30 minutes or less and fit within normal television broadcasting time slots. Respondent’s television commercials were and are broadcast on network, independent and cable television stations throughout the United States.

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

5. Respondent has disseminated or has caused to be disseminated advertisements for SNORenz, including but not necessarily limited to television infomercials that were aired on various broadcast and cable channels. These advertisements contain the following statements:

INFOMERCIAL: TRU SNORENZ 1 - KT [Exhibit A]

A. KEVIN TRUDEAU: And this is a patented product. It has been clinically tested in double-blind studies –

JOHN ZIGLAR: Yes.

KEVIN TRUDEAU: Tell us about that.

JOHN ZIGLAR: What we did is we had two double-blind studies done in two separate locations. Basically, we had where the doctors did not know which was the placebo product nor did the patient know. And in each of the cases, the people that took the product that had the SNORenz product in it in 97 percent of the cases they quit snoring immediately.

B. KEVIN TRUDEAU: If you use this product one time, for the first time in years, you will get the best night's sleep you've ever had. You'll actually go and get deep sleep for the very first time. And you'll wake up the next morning probably with more energy than you've ever imagined having. Because, folks, if you snore, I can tell you right now you are not getting deep sleep and you are not full of the energy that you can be by just getting a full night's rest. You'll also be more pleasant, you won't be as irritable, your body could even function better, your immune system and all of your systems can work better when you've had a full-night's rest.

C. KEVIN TRUDEAU: -- just make sure you spray it at the back of your throat, we'll show you exactly how to do that, and make sure 30 minutes before you use the product, don't drink or eat anything, primarily alcohol, that way it will stay on the throat, then go to sleep and guaranteed to work or your money back. Double-blind studies -- two of them -- proved -- clinical research -- that 97 percent of the times this

was effective in eliminating the snoring noise all night long. It's all natural, it's patented and you can't beat the value.

D. KEVIN TRUDEAU: This is exclusive, it's a breakthrough, we're announcing it for the very first time, this is a revolutionary product that's patented, guaranteed to work, you get a three-month's supply -- this is your refill -- and this is the little squirter. You just put this by the bed stand and then all you do -- you can see how it sprays out here -- you just put three squirts in your mouth, on the back of your throat, just squirt it in right before you go to sleep, it tastes great, it's all natural, it's a patented product. In double-blind studies, clinical testing, guaranteed to work 97 percent of the time. And, you know, we have never seen it fail. And I think the reason it says 97 percent, if they put 100 percent people would think, oh, it sounds too good to be true. And it does sound too good to be true, but the double-blind studies, the people that use it, and you can find out for yourself –

E. KEVIN TRUDEAU: If you are a snorer or know somebody that is, it will eliminate the snoring just like that, guaranteed or your money back. It's a patented process, double-blind studies, clinical research. If it doesn't work, send it back for a full refund, no questions asked. But the statistics show, 97 percent effective in eliminating the noise of snoring the very first application. Folks, your life can be changed when you get a good night's rest.

INFOMERCIAL: VP SNORenz 2- JD [Exhibit B]

ON SCREEN: Dr. Bob Courier, Physician Surgeon

F. DR. BOB COURIER: Another side effect, a cute story, my brother's also a snorer, I think this is just something that runs in families, as well. Anyway, he has since tried the product, as I have, and I use it, and I think it's fantastic, because it does stop the snoring. . . .

G. JOHN ZIGLAR: Jon, what we've done is we have taken all natural oils, and we have taken and put them together in a liposome formulation, and we have taken it and so that you can actually spray this product into the back of your throat, and the process is really quite simple. Have you ever seen a car go down the road that didn't have enough oil in it, and you hear the clatter and the clanking?

ON SCREEN: John Ziglar, Master Strategies Researcher

JOHN ZIGLAR: Well, what happens is we took that same philosophy, that same technology, and we said, Hey, if we can oil the parts and we can take and make a topical solution that will stay in a place for an extended period of time, we can eliminate the noise of snoring. You're still going to have the same amount of air that's going to pass through the passage, but all we're going to do is we're going to lubricate the parts so that there is no noise associated so that you don't then wake up or wake up your neighbor.

H. DR. BOB COURIER: Well, to take this just a little bit further, a dentist has studied this and has actually sprayed this in models, and he actually used a dye at the time so he could see where it was applied. In the soft tissues, in the back of the throat, the ones that we see that flap and flutter and that need the lubrication, what -- it is applied there, but where the technology goes even further and better through this liposome technology is to apply it evenly, and the very neat thing about this is it stays. It stays there all night. That's where others have failed. And that's also where a lot of the appliances, that's where also a lot of the applications of surgeries, pills, other things that have been attempted and tried have failed. This product here stays there. It's easy application.

I. JON DENNY: If -- if you have a snoring problem, if you have problems sleeping next to a snorer, then SNORenz may be the answer you've been waiting for. Remember, snoring is a medical condition. Studies have shown that snoring can seriously reduce your energy levels, your concentration and can seriously affect your work habits, as well, and you can be sure your snoring is seriously bothering someone other than you. SNORenz is the first all-natural spray that has been proven to give you a healthy, natural, good night's sleep. It has no side effects. It's as easy as a few sprays before bed, and it lasts all night, and if you want more information on SNORenz, if you want to stop the snoring, if it's a snorer next to you or if you be the snorer, you may want to call the 800 number on your screen.

J. JON DENNY: We have I believe a caller on the line from Arizona, and I believe it's Tina Hines (phonetic). Tina, are you on the air with us?

. . .

TINA HINES: I'm listening to your show, and I have to tell you that snoring, you know, is a lot more dangerous that people think. My husband was a chronic snorer, he's a firefighter/paramedic, so I wasn't the only one affected by this. I mean, we didn't sleep together for years.

JON DENNY: Now, you've been married for how long, Tina?

TINA HINES: Sixteen years.

JON DENNY: Sixteen years, and this was a problem that occurred right from the start of your marriage?

TINA HINES: Oh, yeah.

JON DENNY: You found you were married to a snorer?

TINA HINES: Oh, absolutely, and the poor guy, it would be all night, John, turn over, turn over. It did not matter, he could be sleeping on his head, and he would still snore. Well, it got so bad that even at the fire department, he was being hassled at the fire department, because these guys sleep at different shifts, they don't all sleep at the same time, and when John was sleeping, he would be waking everybody else up, so they would be pounding on the walls and he'd come home all aggravated, he'd come home and want to sleep. They even built a partition around my husband's bunk bed to try to keep out the noise. Well, it got so bad he finally went to the doctor, and in order for the insurance company to pay for this surgery, they put him in the hospital, in the sleep center, and found out that he also had sleep apnea, which is very dangerous, because when you're snoring, you stop breathing, then you forget to sleep. So, they did the surgery, and needless to say, it lasted for a while, and then after that he started up again, and he would not even believe when I would tell him, John, you're snoring again. You don't want to go through surgery and find out that you're snoring again.

JON DENNY: So, this was after a surgery, he had -- the problem re-emerged.

TINA HINES: Right, they did surgery on all his sinuses, they went through his nose and removed all his polyps, thinking that was the problem. So, now he's in for the second surgery, and they decided they are going to remove part of his uvula, and the roof of his mouth, his tonsils and his adenoids, and this way it will give his tongue more room, I guess is what they said, so he wouldn't snore. Well, he went through this, and it was a horrible surgery. I really felt very, very bad for him. He was out of work for six weeks, and he had high hopes that this was going to work and our life was going to change, we could sleep in the same room together, go on vacation, the guys wouldn't be hassling him. Well, that did work for quite a while, and then it

started up again, and I'll tell you what, I was even afraid to tell him, because I couldn't believe it myself. It's aggravating, it's annoying, I don't get a good night's sleep, he doesn't get a good night's sleep. I hated to say it, but I was happier when he was at the fire department because I got a good night's sleep.

. . .

TINA HINES: And I was aggravated. You're talking two surgeries, what's it going to take? He tried those stupid nose strip things, they didn't work. So, one day I'm sitting here watching TV and I see a commercial out here in Phoenix and a couple is talking about the same thing, and I'm thinking, Well, what have I got to lose? Well, my husband tells me I'm nuts, because if two surgeries didn't work, the spray was not going to work. I figure, Well, I'm going to try it. So, I sent for it, put it on the nightstand, the first night he was home, I woke him up, I said, John, spray your throat. He said, Yeah, yeah, yeah, yeah. I said, John, please, spray your throat. So, we sprayed his throat, and I'm like waiting -- I'm laying there, I'm laying there, I'm like, Oh, wow, he was sleeping, there was no noise coming out of him. And I was -- I was pretty well hooked. And he still was not a believer. He said it was just a fluke. So, it took a few times of using the SNORenz. Now, I'll tell you what, he's taken it up to the fire department. I have the wives calling from the fire department asking me the 800 number. I've given away more bottles, I can't tell you, because I belong to the SNORenz Bottle of the Month Club, and I just gave one to my daughter last week, she came over, and she was like, Mom, I'm going crazy, Kenny's snoring. I said, Here, take my last bottle, take it home.

INFOMERCIAL: VP SNORENZ 3 - KT [Exhibit C]

K. KEVIN TRUDEAU: Now . . . was this a patented process that this Korean gentleman invented?

JOHN ZIGLAR: No, it wasn't, Kevin. At the time, what he had was a combination of oils that he had in a little formula that he sprayed in the back of his throat and then Paul went to his laboratories and he developed a liposome formulation of the all-natural oils. He put some vitamins, minerals in it and put a whole lot better taste. He put a spearmint taste into the product so that it would taste good and then still solve the problem.

KEVIN TRUDEAU: So, now this is a patented formula?

JOHN ZIGLAR: Yes, it is.

KEVIN TRUDEAU: Okay. Patented process.

L. KEVIN TRUDEAU: So, this -- this -- this is an all-natural product; this is clinically tested; no after effects; natural ingredients; vitamin enhanced; fresh breath -- 97 percent effective. . . .

M. KEVIN TRUDEAU: Tell me how this eliminates the snoise of noring (sic). What exactly happens when I spray this in my mouth before I go to sleep?

JOHN ZIGLAR: Because of the technology -- what we have been able to do with the oils in this product, is we have been able through a liposome technology, put it so that when it lands on the back of your throat it will actually stay there. It will stay topical for up to eight hours.

N. KEVIN TRUDEAU: It's a patented product. It's not available in any stores. It's only available directly from the company. Call the number on your screen to get more information on SNORenz. It's very inexpensive, it tastes great, it's all-natural, it's clinically proven to eliminate the noise of snoring in 97 percent of the cases, and in our personal experience is virtually 100 percent.

O. KEVIN TRUDEAU: The person who snores, Dr. Leonard, if they are snoring and it "doesn't bother them."

DR. LEONARD: Um-hmm.

KEVIN TRUDEAU: They don't get woken up. Is it, in fact, having an adverse effect on the person's sleep patterns, thus making them more potentially irritable and fatigued during the day?

DR. LEONARD: Certainly. Potential irritability and fatigue throughout the day has got to be commonplace.

KEVIN TRUDEAU: Now, why is that? I mean, if I snore and I don't wake up during the night and I don't -- I don't even know I snore –

DR. LEONARD: Um-hmm.

KEVIN TRUDEAU: -- how is it having that effect on me?

DR. LEONARD: If you're sleeping and snoring, obviously, like you're talking about exchanging air and still breathing and your air passage is restricted, once things are restricted to a point, you automatically or for the most part most people will wake up, catch a deep breath, roll over, what-have-you. So, yeah, your sleep pattern is disturbed by that.

KEVIN TRUDEAU: So, a person may not even realize that he's constantly waking up and going back to bed during the night?

DR. LEONARD: That's right.

P. KEVIN TRUDEAU: Folks, if you're watching right now and you are a snorer or if you know someone that is, get on the telephone and call to get SNORenz. It's a very simple, all natural product, it's just natural oils with some vitamins

and minerals. You simply just spray it in your mouth three times before you go to bed. It tastes great, it's a patented product, it has been proven to be 97 percent effective in eliminating the snoise -- the noise of snoring. . . . It's all natural, it's patented, and it's not available in any store. So, pick up the phone right now for more information on SNORenz. And it's pennies, it's very cheap and it'll eliminate your snoring.

. . .

(Music playing.)
ON SCREEN: For more information or to order Snorenz call:

Tru-Vantage International, 7300 N. Lehigh Ave, Niles, IL 60714 (847)647-0300.

If snoring is accompanied by any signs of Sleep Apnea, you should consult a physician before using any product.

The preceding has been a paid commercial for SNORENZ brought to you by Kevin Trudeau's Tru-Vantage International, America's premier direct response marketing company.

INFOMERCIAL: VP SNORENZ 4 - JD [Exhibit D]

Q. JON DENNY: If you have a snoring problem, if you have problems sleeping next to a snorer, then SNORenz may be the answer you've been waiting for. Snoring can seriously reduce your energy levels, your concentration, and can seriously affect your work habits, as well. And you can be sure your snoring is seriously bothering someone other than you. SNORenz is the first all-natural spray that has been proven to give you a healthy, natural, good night's sleep. It has no side effects, it's as easy as a few sprays before bed, and it lasts all night.

R. JON DENNY: If you're sleeping and snoring, obviously, like you're talking about exchanging air and still breathing and your air passage is restricted, once things are restricted to a point, you automatically or for the most part most people will wake up, catch a deep breath, roll over, what-have-you. So, yeah, your sleep pattern is disturbed by that.. Do it for him, do it for yourself, do it for your family. It is worth the phone call, and it is pennies per day to end the snoring problem. This is a product, as I mentioned, that has been proven effective in studies. And you actually conducted the studies out of your offices in Michigan. Tell us about how SNORenz worked.

DR. BOB CURRIER: Interestingly enough, it's not only the results of the studies we got, but the comments we received. Many people, again, they're aware of snoring, but they aren't aware of the problems that come with it. And actually it's like until it's resolved, the snoring itself, oh, my word, what a problem it was. And you can see the changes it's made. That was probably the most interesting part of doing that whole study –

JON DENNY: Um-hmm.

DR. BOB CURRIER: -- was the comments that we got back, the little stories that people had through the week –

JON DENNY: Yes.

DR. BOB CURRIER: -- you know, of using this product. And that was the beauty of this. I loved doing the study, it was highly effective.

INFOMERCIAL: VP SNORenz 8 JD/JPK [Exhibit E]

S. JON DENNY: For millions of Americans, this is the most annoying and unwelcome sound in the world. That's right, more than 90 million Americans have a snoring problem,

and it could cause sleeplessness, headaches and a lack of energy, and that goes for the snorer as well as the person trying to sleep next to the snorer. What can be done about it? On Vantage Point today, hear about a new discovery that could eliminate the sound of snoring.

ON SCREEN: Vantage Point with Jon Denny

T. JON DENNY: Hi, I'm Jon Denny, and welcome to Vantage Point. We are going to talk about snoring today and we're going to do it with Paul Kravitz, who has brought to the market an exciting break-through product called SNORenz, which has been proven from snorers around the country to reduce or eliminate their snoring problem. Paul, welcome to the show.

PAUL Kravitz: Thank you, Jon.

JON DENNY: Tell me, is this a break-through medical discovery; is this a revolutionary new direction to help people stop this snoring problem?

ON SCREEN: Paul Kravitz/SNORenz/TVI

PAUL Kravitz: Well, Jon, I don't know if you'd call it a medical breakthrough or a new discovery. To me it was a major breakthrough. In fact, it saved my marriage. I had been a heavy snorer for years and at one point in my life my -- my ribs hurt so much in the morning from my wife poking me to wake up to stop snoring, it was just a terrible thing. And over the course of many years I was thinking about surgery -- there were a lot of potential cures that I -- that I thought I would find to help the situation out. And I met somebody about six or seven years ago, a Korean gentleman who lived in Brazil, actually, and who was working with an EMT specialist who lived next door, and they came up with a -- with a product and I had met him, they were looking for somebody to invest in a company, and

things just went -- went the way of the world -- and finally I asked him if I could try the product, and I did. And it worked. It was – at the it was in its infancy, it was terrible tasting, and – but it worked, and I used it for five days straight and I made a small investment, which became a larger investment, and even a larger investment. Until, finally, I bought the formula from the Korean and we went to work on it. It took a year and a half to develop, and, Jon, we've tested it, we've proven it, it works. And it works and it's a very simple way it does work.

U. JON DENNY: How does SNORenz work to correct or address the problem you're talking about?

PAUL Kravitz: Well, very simply put, it oils the vibrating parts of your -- of your throat. And when you put oil on a -- on a rusty part, it silences it. And that's exactly how it does work. The secret of the product, and what we've spent millions of dollars to find out, is how to get it to attach itself -- the product itself -- the spray -- to stay in the back of the throat so that the noise stays -- I mean, that the noise stays away for six to eight hours.

V. JON DENNY: Now, why is snoring a problem? On one hand we know it's a problem for the person sleeping next to us, the snorer, they're not getting enough sleep because of that sound coming right next to them, but in what other ways is snoring a real problem for both the snorer as well as the person trying to sleep next to them?

PAUL KRAVITZ: Well, from the snorer's point of view, Jon, it's a major problem. First of all, you don't know it, but if you were a snorer, you wake up maybe a thousand times a night, because the snoring does wake you up. You go right back to sleep again, and then you wake up again. Even if your wife doesn't wake you up or your girlfriend doesn't wake you up, you are really not sleeping soundly.

W. JON DENNY: Interestingly. We have Dr. Mike Leonard on the line from Kalamazoo, Michigan. Dr. Leonard, are you with us?

DR. LEONARD: Yes, I am.

JON DENNY: Dr. Leonard, I believe, conducted some tests on the efficacy of this product out of his offices in Michigan. Dr. Leonard, let me ask a question. As a dentist, is this something that you have recommended to your patients who have sleep problems, most particularly snoring problems?

ON SCREEN: caller: Dr. Michael Leonard/Kalamazoo, MI/TVI

DR. LEONARD: Yes. Initially, as a dentist, we -- in the -- historically we fabricate occlusal appliances or guards that go in your mouth that, oh, essentially keep your mouth open wider or really position your lower jaw forward so you can keep the airway open like you were talking about earlier and don't have those tissues vibrating and rolling around. The problem is a lot of people can't tolerate those appliances. They are large, they are cumbersome and throughout the night if you've got it in your mouth you may end up with it on your pillow in the morning because you just subconsciously take it out.

JON DENNY: These are clamps that dentists have in the past put into people's mouths to create more air space?

DR. LEONARD: Exactly. Very -- of varying different sizes and shapes, et cetera, but they're custom-made appliances and for some people that can't tolerate them, it's -- it's an expense to go through if you're not going to be able to utilize it.
So, I had -- through the grapevine -- heard about a spray to use and got the name of the company, called them up and

ordered a case of SNORenz and had it sent to my office to start dispensing to patients and having them try it out and see what they thought, because, quite simply, it's easily reversible. If you are not tolerating it, if it was not working, you just stop using it. You're not really out anything. And that -- the feedback that I got was very, very positive. People were getting good results and the people that were coming in with the problems were not the snorers themselves, it was the mate -- the partner -- that was sleeping next to them that was kept up all night or irritated all night that they're having to roll their spouse over to get them to quiet down a little bit so they could get a more restful sleep.

X. JON DENNY: Now, there have been not only clamps but also pills that have been tried and also strips across one's nose, and very expensive and painful surgeries as well.

DR. LEONARD: That's right.

JON DENNY: So, Doctor, would you consider SNORenz to be a logical common-sense approach to a typical snoring problem?

DR. LEONARD: It's an extremely logical, common-sense, first-line approach to dealing with it. Use it and if you use it properly and if you use it consistently, I find that it works. It works for me and it works for a number of the patients that I'm having use it in the practice.

Y. JON DENNY: If you want more information about SNORenz, the patented process, all-natural spray that could help reduce or eliminate the sound of snoring, if you are a snorer or you sleep next to a snorer, this may be the product for you. Money-back guarantee, it costs pennies to address this very serious problem, and hopefully you shall all get a full, restful, silent night's sleep. I'm Jon Denny on Vantage Point. I think I'm going to knock off a few sprays, because

I've been told I'm a snorer. We'll see you next time on Vantage Point. Take care.

ON SCREEN: For more information or to order Snorenz call:

Tru-Vantage International
7300 N. Lehigh Ave.
Niles, IL 60714
(847)647-0300

If snoring is accompanied by any signs of Sleep Apnea, you should consult a physician before using any product.

The preceding has been a paid commercial program for SNORENZ.

6. Through the means described in Paragraph 5, respondent has represented, expressly or by implication, that:

A. SNORenz significantly reduces or eliminates snoring or the sound of snoring in users of the product.

B. A single application of SNORenz significantly reduces or eliminates snoring or the sound of snoring for six to eight hours.

C. SNORenz can eliminate, reduce or mitigate the symptoms of sleep apnea including daytime tiredness and frequent interruptions of deep restorative sleep.

D. Testimonials from consumers appearing in the advertisements for SNORenz reflect the typical or ordinary experience of members of the public who use the product.

7. Through the means described in Paragraph 5, respondent has represented, expressly or by implication, that it possessed and relied upon a reasonable basis that substantiated the representations set forth in Paragraph 6, at the time the representations were made.

8. In truth and in fact, respondent did not possess and rely upon a reasonable basis that substantiated the representations set forth in Paragraph 6, at the time the representations were made. Among other reasons, the single study that respondent relied upon that purported to use a double blind, controlled design contained basic flaws in design (such as failure to apply an appropriate measurement to assess sound reduction, failure to include a statistical analysis of the results, insufficient duration of the testing period, and failure to develop a baseline against which any improvement could be measured). Therefore, the representation set forth in Paragraph 7 was, and is, false or misleading.

9. Through the means described in Paragraph 5, respondent has represented, expressly or by implication, that clinical research proves that SNORenz significantly reduces or eliminates snoring or the sound of snoring.

10. In truth and in fact, clinical research does not prove that SNORenz significantly reduces or eliminates snoring or the sound of snoring. Therefore, the representations set forth in Paragraph 9 were, and are, false or misleading.

11. In its advertising and sale of SNORenz, respondent has represented, expressly or by implication, that the product reduces or eliminates snoring or the sound of snoring. Respondent has failed to disclose or to disclose adequately that SNORenz is not intended to treat sleep apnea for which snoring is a primary symptom, that sleep apnea is a potential life-threatening condition, and that persons who have symptoms of sleep apnea should consult a physician. These facts would be material to consumers in their purchase or use of the product. The failure to disclose

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

12. In its advertising and sale of SNORenz, respondent has represented, expressly or by implication, that a physician, Robert (or "Bob") Currier (or "Courier"), M.D., endorses SNORenz. Respondent should have known but failed to inquire as to whether Dr. Currier had a material connection with SNORenz's marketer and manufacturer, Med-Gen, Inc. Therefore, respondent failed to disclose that Dr. Currier has a material connection with Med Gen, Inc., in that he is an investor in the company and may have a financial interest in promoting the sale of SNORenz. This fact would be material to consumers in their purchase decision regarding SNORenz. The failure to disclose this fact, in light of the representations made, was and is a deceptive practice.

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

THEREFORE, the Federal Trade Commission, this fifth day of February, 2002, has issued this complaint against respondent.

By the Commission.

OFFICIAL TRANSCRIPT PROCEEDING

FEDERAL TRADE COMMISSION

MATTER NO. 0023211

TITLE MED GEN INC.

DATE RECORDED: OCTOBER 13, 1999
TRANSCRIBED: MAY 12, 2000

PAGES 1 THROUGH 34

TRU SNORENZ 1 - KT $49.95 TRS1 - HARD
VIDEOTAPE

FEDERAL TRADE COMMISSION

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FEDERAL TRADE COMMISSION

In the Matter of:)
Med Gen, Inc.,) Matter No. 0023211

October 13, 1999

The following transcript was produced from a videotape provided to For The Record, Inc. on May 8, 2000.

PROCEEDINGS

ON SCREEN:

Client: Trudeau Marketing/TVI
Project: VP SNORENZ 1
Price Point: $49.95
Edit Date: 9/29/98
Editor: SR
Audio: Mixed
Notes: 800-385-6663
The following is a paid commercial for SNORENZ brought to you by Kevin Trudeau's Tru-Vantage International, America's premier direct response marketing company.

TRU-VISION

UNIDENTIFIED MALE: The following is a paid commercial brought to you by Kevin Trudeau's Tru-Vantage International.

(Music playing.)

ON SCREEN:

John Ziglar Kevin Trudeau
KEVIN TRUDEAU: Hi, I'm Kevin Trudeau, you're watching Tru-Vision. If you're a snorer or know someone that is, stay with us for this half-hour. I have my good friend, John Ziglar, with me. We're going to be talking

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about a — almost a medical breakthrough. It's not quite a medical breakthrough, but it's certainly a revolutionary breakthrough —

JOHN ZIGLAR: Yes, it is.

KEVIN TRUDEAU: — for getting rid of the noise of snoring. And if you are a snorer or you know somebody that is a snorer, we have a product being introduced on Tru-Vision for the very first time. It's called Snorenz. It's an all-natural product that you simply just spray into your mouth and it gets rid of the noise of snoring in 97 percent of the cases.

John, tell us a little bit about the problems people have with snoring, what people have tried in the past and why this works.

JOHN ZIGLAR: Kevin, I was introduced to the product a couple of months ago by a friend named Paul Kravitz down in Florida.

KEVIN TRUDEAU: Um-hmm.

JOHN ZIGLAR: And he was a snorer and he had a Korean man that came into his office one day and introduced him to this product. It was a similar product, it wasn't this one exactly.

And Paul was a snorer and, so, he took the product home, he used it, he quit snoring immediately.

KEVIN TRUDEAU: Hmmm.

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JOHN ZIGLAR: The problem was it didn't taste very good, so Paul took it to his own laboratories, put spearmint flavor into the product so that it didn't have a bad after-taste, came up with this product, Snorenz, with a lysosome, patented product — process — and it's been phenomenal

KEVIN TRUDEAU: Now, this is a patented, all-natural product and, basically, what's in it is just natural oils, correct?

JOHN ZIGLAR: That's correct.

KEVIN TRUDEAU: And this is a patented product. It has been clinically tested in double-blind studies —

JOHN ZIGLAR: Yes.

KEVIN TRUDEAU: Tell us about that.

JOHN ZIGLAR: What we did is we had two double-blind studies done in two separate locations. Basically, we had where the doctors did not know which was the placebo product or did the patient know. And in each of the cases, the people that took the product that had the Snorenz product in it in 97 percent of the cases they quit snoring immediately.

KEVIN TRUDEAU: Now, let's talk about how this actually works. And by the way, if you're watching right now, and you would like to get Snorenz — it's not available in any stores, it's made available right now

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exclusively through Tru-Vision, you can buy it at an incredible price, look on your screen.

ON SCREEN: Limited Time Only!
Exciting New Product
SNORENZ
End Your Snoring Problem, Now!
All-Natural
3 Month's Supply!
Compare $99.95
Now Only
$49.99 +S&H
Results
Guaranteed or
Your Money Back!
1-800-385-6663

This is a three-month's supply of Snorenz. It's all natural, it's patented, it's available exclusively through Tru-Vision. You can call right now. This is a limited-time offer. This is a three-month's supply and the suggested retail price for a three-month's supply is $99 — that's the suggested retail price. That's only $33 per month.

But you can buy it right now, $49.95 — just $49.95, plus shipping and handling, gets you a three-month's supply. That's about $15 a month, a little bit

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more than that, that's it, and you can eliminate the sound of snoring virtually instantly.

Now, John, let's talk about how it works and what a person actually does. It's all natural, it's just natural oils in a patented process —

JOHN ZIGLAR: Right.

KEVIN TRUDEAU: — it has a great spearmint taste and before I go to bed, what do I do?

JOHN ZIGLAR: What you do is you simply lean your head back, you spray three squirts into the back of your throat —

KEVIN TRUDEAU: Um-hmm.

JOHN ZIGLAR: — and then you virtually go to sleep. It's that easy. It's really that easy.

KEVIN TRUDEAU: Now, the first thing I've got to let everybody know is how good this tastes. Because you said the first product —

JOHN ZIGLAR: Yes.

KEVIN TRUDEAU: — that came over from Korea was a horrible taste —

JOHN ZIGLAR: Yes.

KEVIN TRUDEAU: — and this tastes like spearmint gum. If you were here, you could smell how wonderful the spearmint flavor is.

Now, when I spray this in, what's actually

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happening in the mouth to get rid of the snoring, just like that, instantly?

JOHN ZIGLAR: What happens, when you go to sleep, Kevin, is all of your muscles and your tissues begin to relax. The same thing occurs inside of your throat. And, so, what happens is the — the hole, the air passageway, inside your throat will actually become smaller. And as it becomes smaller than the air that passes through passes through faster because it's going through a smaller hole.

And when it does, it rubs against — it causes the uvula and the soft tissues inside your throat to flutter. And what they do is they hit against each other, they begin to stick and that is the noise that we call snoring.

What this product does is lubricates the parts.

KEVIN TRUDEAU: Un-huh.

JOHN ZIGLAR: And what the patented process does is we have found a way to keep this product inside your throat for eight hours, and that's why you don't have the noise of snoring.

KEVIN TRUDEAU: So, you just spray it in your mouth, just like that, it tastes great. I mean —

JOHN ZIGLAR: Yeah.

KEVIN TRUDEAU: — it really tastes incredible.

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I was concerned about it was going to give me a crummy feeling or anything, but it just tastes wonderful. It smells great, and you just go to sleep and it basically eliminates that noise.

JOHN ZIGLAR: That's exactly right. That was my biggest concern too. I thought, you know, if it doesn't taste good, people won't take it on a consistent basis.

KEVIN TRUDEAU: Right.

JOHN ZIGLAR: This one is easy.

KEVIN TRUDEAU: Now, what other techniques or methods or drugs is available out there right now for somebody who's watching that's a snorer?

JOHN ZIGLAR: You've seen a lot of different things that people have introduced as snoring fixes. You've seen the little strips that go across the bridge of your noise.

In the dental industry what you have is you have a mechanical piece that goes inside your mouth and it will actually pull your jaw forward and it's very uncomfortable and they have a very hard time getting people to wear it because it's hard to sleep with this in your mouth.

KEVIN TRUDEAU: Right.

JOHN ZIGLAR: There have been pills that people

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have suggested will help you to stop snoring. At this point in time, there has not been anything that has lasted long-term.

They even have surgical procedures where a surgeon will come in and they will take the uvula, which is the little hangy-down part of your throat, they'll take that, Kevin, and they will surgical remove all or part of that, and then the back part of your tongue and parts of your throat.

It's a very painful process; it's expensive and the recovery time is about six months.

KEVIN TRUDEAU: Folks, if you've watching right now, get on the telephone, this is a three-month's supply, unconditionally guaranteed, you will know whether it works the very first night you use it, and if it doesn't work for you, send it back for a full refund, no questions asked.

This is a revolutionary — it should be called a medical breakthrough — what can you call it?

JOHN ZIGLAR: I call it miracle in a bottle. I'll just tell you.

(Laughter.)

KEVIN TRUDEAU: And if you're a snorer, you know how powerful this can be. Now, we're going to talk about some of the health benefits of getting a full-

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night's sleep in a just a moment.

But get on the telephone right now. This is a limited-time offer. This is normally going to sell — manufacturer's suggested retail price — $99 for a three-month's supply. That's $33 a month. But if you call right now, get on the telephone, call right now, while the supply lasts, this is the only place you can buy this product today, on sale, a three-month's supply, $49.95. That's an incredible value — this is a limited-time offer — it is an all-natural product, it's patented, it's guaranteed to work or your money back, unconditionally guarantee.

There's been a double-blind study, clinical testing, 97+ percent effective, will guarantee to wipe out all the noise of snoring, all night long, just three squirts, this is really — as John said — a miracle in a bottle.

I want to go to the phone lines. We have Tina from Phoenix on the line. Tina, are you there?

TINA: I'm here.

KEVIN TRUDEAU: How you doing?

TINA: I have a little cold, so bear with me.

KEVIN TRUDEAU: Oh, that's fine. That's fine. Now, tell us about your experience with your husband's snoring, what — what you've done — and how this product

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has worked.
TINA: Well, everything you've spoken about, actually, my husband's had done. He's had two surgeries, he's a fire fighter/paramedic, so I'm not the only one who was affected by his snoring.
I mean, we do not sleep in the same room — well, we do not, thank God, because of Snorenz, but at the station where he works the guys even built a partition around his bunk bed because they couldn't stand the snoring any longer.
He went in for one surgery, they removed all the polyps in his nose, they thought it was his sinuses
KEVIN TRUDEAU: Un-huh.
TINA: — that didn't work. Then, they put him in the Sleep Center for sleep apnea, then they okayed — because you have to get an okay because it's a very expensive operation, as — you know — you said, they removed part of his uvula, part of the roof of his mouth — his tonsils, his adenoids — and this poor man, this was a very, very, very painful operation.
And it did work for a while. We were thinking, thank, God, we can go on vacation, we can sleep in the same room together, and then the one night when he started snoring again, I woke him up, he thought I was

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nuts, he was telling me there is no way, he's had two surgeries, that it's in my imagination, he's just breathing hard.
Well, that wasn't the case. So, back to the couch again and arguing about the snoring and I saw a commercial out here in Phoenix on my news station and this couple was talking about this Snorenz. So, I figured what have I got to lose?
I called up and I ordered it. And my husband thinks, okay, you're a real nut. If two surgeries didn't work, some spray stuff is not going to work.
Well, I've got to tell you, it's now been — it has to be at least six months that we're using this product. I belong to the Snorenz Bottle of the Month Club, my husband brought it up to the station because there was fire fighter up there that was driving him crazy now snoring —
KEVIN TRUDEAU: (Laughter.)
TINA: — wives are calling me for the number. My daughter was here last Sunday and she says why didn't I tell her about this product. So, I gave her my last bottle, so I have to go call another order in, because I will not be without it. I keep it on my nightstand and I'm telling you, my husband, the minute he starts snoring, he turns around, sprays his throat, and it

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stops.
KEVIN TRUDEAU: Now, when you said — when they start snoring — when your husband starts, you have to spray his throat. Is that because he forgot to spray before he went to sleep?
TINA: He doesn't — he doesn't even think about it. He'll wake up maybe — it doesn't happen even all the time. If he had a hard night, if he was working all night on a shift or whatever, and I start hearing that it's coming on — I'm a light sleeper — I just say, John, he turns over, reaches for the bottle, sprays his throat, and that's it.
KEVIN TRUDEAU: And it's — and for the whole night —
TINA: The whole night.
KEVIN TRUDEAU: — there's no more sound?
TINA: That's it. We're good to go.
KEVIN TRUDEAU: That's —
TINA: It's amazing, it really is. And to think he went through all of these surgeries and what he — I'll tell you, he was out of work for at least, I would say six weeks with this. He was black and blue, he couldn't eat, he had food coming out of his nose when he'd try to eat —
KEVIN TRUDEAU: Hmmm.

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TINA: — because they removed part of the upper part of his — the roof of his mouth —
KEVIN TRUDEAU: Ummmm.
TINA: I mean, he went through hell and high water and now here's something that is great and — it's terrible being with a snorer because you cannot go on vacations, you can't get a good night's sleep yourself — neither one of you do — so I — I have to say try this product, I'm a believer.
KEVIN TRUDEAU: Now, Tina, the people that you've given the product to —
TINA: Un-huh.
KEVIN TRUDEAU: — you said some friends and so forth —
TINA: Correct.
KEVIN TRUDEAU: Is it working for them too?
TINA: Absolutely.
KEVIN TRUDEAU: Is there anyone that you've given it to that it hasn't worked for?
TINA: No.
KEVIN TRUDEAU: It works for everybody?
TINA: Everybody — nobody's called me up and said any otherwise and my husband's a happy camper at work because his partner doesn't snore anymore.
KEVIN TRUDEAU: (Laughter.)

TINA: So, everybody's happy.
KEVIN TRUDEAU: That's terrific. Tina, thanks very much for calling. I hope you get better with that cold.
TINA: Thank you.
KEVIN TRUDEAU: All right, have a great day.
TINA: Okay. Bye-bye.
KEVIN TRUDEAU: Now, John, we hear stories like that all the time —
JOHN ZIGLAR: I know.
KEVIN TRUDEAU: — about this product. Really, I wish we could call it a medical breakthrough. I mean, it's really a revolutionary breakthrough, certainly for snorers, a miracle in a bottle.
Well, let's talk about what really is the problem with not only the snorer but the person that they're snoring, you know, with.
Why is it bad for a person to snore? What's the problem with snoring? I mean, if I snore and don't know I snore —
JOHN ZIGLAR: Right.
KEVIN TRUDEAU: — why would I want to get this?
JOHN ZIGLAR: Right.
KEVIN TRUDEAU: Hey, I'm not affecting

everybody. Nobody's complaining —
JOHN ZIGLAR: Exactly.
KEVIN TRUDEAU: — what's the problem?
JOHN ZIGLAR: Kevin, when I was introduced to the product, and I started using the product myself in my own home, I didn't realize I was a snorer. Now, I'm been married for 25 years and Linda had never really complained.
But when I told her that we had this new product, she suggested that I bring it home. And I obviously suggested that I didn't think she snored that bad.
KEVIN TRUDEAU: (Laughter.)
JOHN ZIGLAR: She told me it wasn't — it wasn't her that had the problem.
KEVIN TRUDEAU: (Laughter.)
JOHN ZIGLAR: So — but here's the point: The point is is when you do snore what happens to you is you wake yourself up multiple times in a nighttime. And, so, what I did is I found myself waking up 10, 15, 20 times a night and turning over. And what I did is I never got deep sleep.
KEVIN TRUDEAU: Hmmmm.
JOHN ZIGLAR: I got a letter from a lady a couple of weeks ago and she had said that for the first

time in his life she is now beginning to remember dreams.
KEVIN TRUDEAU: Hmmmm.
JOHN ZIGLAR: She got to deep sleep, where she was able now to recognize dreams patterns that she had had. And she wasn't getting that before when she was in the bed with a husband that snored.
KEVIN TRUDEAU: If you're watching right now, we are offering a three-month's supply of Snorenz — this is the refill bottle, this is the pump spray — you just spray three squirts in your mouth before you go to sleep, guaranteed to instantly stop the snoring noise all night long.
And what John's saying is, if you are a snorer and maybe you think, oh, it doesn't affect me, it doesn't wake me up, it doesn't affect my partner. It is.
JOHN ZIGLAR: Yeah.
KEVIN TRUDEAU: If you use this product one time, for the first time in years, you will get the best night's sleep you've ever had. You'll actually go and get deep sleep for the very first time. And you'll wake up the next morning probably with more energy than you've ever imagined having. Because, folks, if you snore, I can tell you right now you are not getting deep sleep and you are not full of the energy of that you can be by just getting a full night's rest.

You'll also be more pleasant, you won't be as irritable, your body could even function better, your immune system and all of your systems can work better when you've had a full-night's rest.
Get on the phone right now. This normally sells — manufacturer's suggested retail price for a three-month's supply is $99 — that's only $33 a month — this is a patented process, it's exclusive, you cannot buy this in any stores, but for a first time, as our introductory special on Tru-Vision, you can get this product, while the supplies last, just $49.95.
Call the number on your screen for Snorenz, unconditionally guaranteed.
Now, let's talk about — in addition to the sleep patterns — how about kids or younger people that may actually snore and does it affect their school work or job performance.
JOHN ZIGLAR: There's actually a study, Kevin, that's been done over in West Germany with medical students. And what they did is they divided the class into snorers and nonsnorers. And what they did is they took and they did a profile on these students and they measured their performance over the entire process of their medical career —
KEVIN TRUDEAU: Um-hmm.

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JOHN ZIGLAR: — and they found that snorers actually tested six percent lower than the nonsnorers did.

KEVIN TRUDEAU: Hmmmm.

JOHN ZIGLAR: And in our own office, we have people who have children who snore. I know myself with four children that when they don't get enough sleep, then the next day their performance is hampered. They simply are not as pleasant —

KEVIN TRUDEAU: Um-hmm.

JOHN ZIGLAR: — with themselves, with each other, with the work that they do — whatever it is.

Sleep depravation is a big problem in our country.

KEVIN TRUDEAU: Now, of all the medical discoveries out there, there's nothing that we know of right now that gets rid of snoring. I mean, you've got surgery, there's no drugs, there's these little things you put on your nose — they don't work. There's — there's really not a lot of things out there. A person doesn't have a lot of choices or options —

JOHN ZIGLAR: No, they don't.

KEVIN TRUDEAU: — it's just basically roll over, turn around — you're basically stuck with the problem.

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JOHN ZIGLAR: Or go to the next room.

KEVIN TRUDEAU: Or go to the next room.

JOHN ZIGLAR: Yeah.

KEVIN TRUDEAU: This product, folks, guaranteed — get on the telephone right now — guaranteed —

JOHN ZIGLAR: Um-hmm.

KEVIN TRUDEAU: — the first time you open this bottle, you open up your mouth, go to sleep — three squirts — and it tastes good.

JOHN ZIGLAR: I know it does.

KEVIN TRUDEAU: I mean, it tastes good. It's got that smearmint — spearmint — taste, tastes great — all night long, no snoring.

Now, let's talk about why it wouldn't work.

JOHN ZIGLAR: Yes.

KEVIN TRUDEAU: Because there are a couple situations where you just need to know about this. There's just kind of — kind of a couple directions to make sure that you — that it does work for you.

JOHN ZIGLAR: Absolutely. What you have is — you have to use the product correctly, okay? We had a dentist that did a research project for us to find out exactly where this product lands when you squirt it in your throat. You've got to get it on the back of your throat —

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KEVIN TRUDEAU: Um-hmm.

JOHN ZIGLAR: — or else it will not work.

KEVIN TRUDEAU: Right.

JOHN ZIGLAR: Next thing is, we — you cannot — you've got to have a clean palate. In other words, what I'm saying, before you go to bed, drink a glass of water or else don't drink anything or eat anything at least 30 minutes before you go to bed.

And particularly alcohol. If you drink any alcohol, then what it will do is it will naturally cut the oils in the product, it'll flow down your throat and it simply will not be there. So, it cannot work.

KEVIN TRUDEAU: So, that's really the only thing —

JOHN ZIGLAR: That's the only thing.

KEVIN TRUDEAU: — just make sure you spray it at the back of your throat, we'll show you exactly how to do that, and make sure 30 minutes before you use the product, don't drink or eat anything, primarily alcohol, that way it will stay on the throat, then go to sleep and guaranteed to work or your money back; double-blind studies — two of them proved, clinical research, that 97 percent of the times this was effective in eliminating the snoring noise all night long. It's all natural, it's patented, and you can't beat the value.

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You can't beat this value, folks. If this thing works, and it does, guaranteed, how much would you pay? As a matter of fact, you don't even know how much it's worth, because you haven't gotten a good night's rest in years. You have no idea of how much energy you can have the next day when you get a good night's rest.

We're going to go to the phone lines again. I believe we have Kevin and Cindy from Sandwich, Illinois, on the phone.

Kevin and Cindy, are you there?

CINDY: Yes, we are.

KEVIN: Yeah.

KEVIN TRUDEAU: How you doing?

CINDY: Good.

KEVIN: Terrific, how about yourself?

KEVIN TRUDEAU: I'm well. It's a little rainy out here today, but okay. Wish I was on the golf course.

KEVIN: I heard that.

CINDY: (Laughter.)

KEVIN TRUDEAU: So, tell me about your experience. I sent you a bottle of this stuff and tell me what happened.

KEVIN: Well, actually, first of all, I was king of skeptical about it. I'm like, yeah, what — I didn't know who sent it at first —

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KEVIN TRUDEAU: (Laughter.)
KEVIN: And I thought, yeah, what am I going to do with this? I thought it was a joke. But then Cindy kind of conned me into trying it, and I tried it and it's really weird because we've only been married like three years, and so we — some say you're still in the honeymoon stage, but I used to wake up in bed by myself because I didn't realize that I was snoring so bad my wife would get up and go sleep on the couch.
KEVIN TRUDEAU: Wow.
KEVIN: I couldn't understand why. But I started taking it and I started waking up with my wife every morning and things have been a whole lot better since.
CINDY: His snoring was so bad that he would be in the room and I would be in the living room and the door would be closed and I still could hear him.
KEVIN TRUDEAU: Now, Cindy, you knew that his snoring was bad and, obviously, it affected your sleep so you had to leave the room, correct?
CINDY: Oh, it was awful, yes.
KEVIN TRUDEAU: Kevin, did you — you never realized how bad your snoring was, right?
KEVIN: I didn't realize I snored that bad, other than in the mornings I waked up — woke up and, you

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know, had that nasty taste in my mouth and just couldn't get enough water down — like dry mouth almost every morning.
KEVIN TRUDEAU: Right.
KEVIN: That's the only way I knew, you know, I wasn't breathing well.
KEVIN TRUDEAU: Have you noticed when you — because this product really tastes good —
KEVIN: Right.
KEVIN TRUDEAU: Now, I just tried it for the first time today, so I know how good it tastes. Have you noticed any difference in that dry mouth or that morning breath in the mornings since you've been using the product or when you use it?
KEVIN: Oh, absolutely. I mean, it's — it's night and day difference. I wake up in the morning, I don't have that taste, I don't need to get a drink first thing in the morning. Plus, I honestly, myself, feel that I'm getting a better night's sleep, absolutely. I mean, wake up in the morning with more energy and ready to face the day instead of dragging my butt out of bed and whining and pissing and moaning about going to work.
KEVIN TRUDEAU: Yeah. Does — does it — so you feel that a good night's rest is maybe even affecting your personality or pleasantness?

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KEVIN: Absolutely, I feel.
CINDY: Yes, he's much better.
(Laughter.)
KEVIN TRUDEAU: Well, wait a minute. Wait a minute, Cindy. If you're getting a good night's rest now, too —
CINDY: Oh, exactly.
KEVIN TRUDEAU: — it's probably affecting your — your maybe personality or happiness level or emotional level also, right?
CINDY: Exactly. Yeah, because, I mean, I would never get a good night's sleep because I kept thinking, oh, he'll stop, I'll turn him over this way or I'll turn him over the other way, and it — it doesn't work.
KEVIN: Hey, another added benefit is I'm getting a lot less bruises in my sleep.
(Laughter.)
KEVIN TRUDEAU: Hey, would you recommend this — and, obviously, you've seen the results — and would you recommend this to other people that snore, do you think they can get the same benefits?
KEVIN: Absolutely.
CINDY: Highly recommend it.
KEVIN TRUDEAU: It's easy to use, right, Kevin?

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KEVIN: Oh, it's simple. I mean, at first I — you know — I was real apprehensive. I thought it was going to taste nasty, like you said earlier. I mean, the taste is just — it's very pleasant. I thought it was going to be like a medicine. I'm almost ready to pinch my nose, but the taste is like, Wow!
But it's simple. You just need a couple of squirts in your mouth and you're done.
KEVIN TRUDEAU: That's great. And did it seem to work all night long?
KEVIN: Yeah, absolutely, for me. I mean, I — I don't know, I didn't realize I was waking up, but it's very evident with my wife.
KEVIN TRUDEAU: Right. Well, that's great. Well, listen, thanks very much for calling in. I appreciate it.
CINDY: Okay.
KEVIN TRUDEAU: You guys have a great day.
KEVIN: You, too, take care.
CINDY: Thank you.
KEVIN TRUDEAU: Bye-bye.
CINDY: Bye.
KEVIN TRUDEAU: You know, it's funny, because he said he's — oh, I feel better, I'm not, you know, pissing —

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JOHN ZIGLAR: Yes.
KEVIN TRUDEAU: — and moaning when I wake up. And so forth and so on. And this is interesting because people who snore really don't realize that they are waking up throughout the night. I mean, every little while they're waking up and then going back to sleep; and then waking up and then going back to sleep; waking up — and they don't realize that that's never allowing them to get into that deep sleep.
JOHN ZIGLAR: That's right.
KEVIN TRUDEAU: But when they wake up they don't realize that they haven't gotten a good night's rest.
JOHN ZIGLAR: Right. I didn't personally realize it until I came up to the apartment in Chicago and I was sleeping in the bed by myself and I realized that I was not having to make the bed up all the time where I had pulled the covers out of the foot of the bed because I didn't turn over so many times —
KEVIN TRUDEAU: Oh, that's interesting.
JOHN ZIGLAR: — as a result of using the Snorenz. It's the only single other difference.
KEVIN TRUDEAU: Folks, if you're watching right now. Get on the phone and get Snorenz. This is exclusive, it's a breakthrough, we're announcing it for

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the very first time, this is a revolutionary product that's patented, guaranteed to work, you get a three-month's supply — this is your refill — and this is the little squirter. You just put this by the bed stand and then all you do — you can see how it sprays out here — you just put three squirts in your mouth, on the back of your throat, just squirt it in right before you go to sleep, it tastes great, it's all natural, it's a patented product. In double-blind studies, clinical testing, guaranteed to work 97 percent of the time.
And, you know, we have never seen it fail. And I think the reason it says 97 percent, if they put 100 percent people would think, oh, it sounds too good to be true.
And it does sound too good to be true, but the double-blind studies, the people that use it, and you can find out for yourself —
JOHN ZIGLAR: Yes.
KEVIN TRUDEAU: — it's guaranteed to work or your money back. You'll know the very first time you try it.
It normally sells for the three-month's supply, $99. You can buy it here today on Tru-Vision — look at the price on your screen — just $49.95. That's less than $15 a month for a great night's sleep. That's $.50

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a day for a restful, peaceful, wonderful sleep. You're not going to wake up your partner.
If you are a snorer or you know somebody that is a snorer, get on the phone right now. This will be the best gift you could ever give yourself or you could ever give anyone else.
They will get a good night's sleep, and I'll tell you something, when — and you found this out —
JOHN ZIGLAR: Yeah.
KEVIN TRUDEAU: — when people are getting a good night's sleep for the very first time, they wake up — and from people who order this — they don't realize for maybe five, 10, 20, 30 years, they haven't gotten a good night's rest.
JOHN ZIGLAR: Right.
KEVIN TRUDEAU: And I can guarantee you something. When a person gets a good night's rest and wakes up the next morning, they're going to have — probably have more energy than they've had in years. They're going to feel better about themselves, they're going to have a better relationship with their spouse and family and friends —
JOHN ZIGLAR: Exactly.
KEVIN TRUDEAU: — they're going to do better on the job, better in school, they're going to

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potentially think clearer, they're going to be less irritable, they're going to be happier.
You know, we hear all these people are depressed today —
JOHN ZIGLAR: I know.
KEVIN TRUDEAU: — taking Prozac and everything else, and a lot of it may have to do with just getting a good night's rest.
JOHN ZIGLAR: Sleep is a — sleep depravation is huge. It's a huge, huge problem.
KEVIN TRUDEAU: You know, when a person gets a good night's rest — you mentioned this too —
JOHN ZIGLAR: Um-hmm.
KEVIN TRUDEAU: — people can actually start dreaming better —
JOHN ZIGLAR: Yes.
KEVIN TRUDEAU: — thinking clearer. And, again, that relationship with your spouse can get much, much better.
It's a big problem, folks, snoring. If you know a snorer, if you are one, get on the phone right now and get Snorenz. This is a limited-time offer, this is the first time we've made it available on Tru-Vision. We don't know how long this will be made available at this price, it is a limited inventory. We're not sure how

long we'll be making it available at this price.
You get a three-month's supply, it's all natural, it's easy to use. If you are a snorer or know somebody that is, it will eliminate the snoring just like that, guaranteed or your money back. It's a patented process, double-blind studies, clinical research. If it doesn't work, send it back for a full refund, no questions asked.
But the statistics show, 97 percent effective in eliminating the noise of snoring the very first application. Folks, your life can be changed when you get a good night's rest.
Get on the telephone right now and get Snorenz. This is Kevin Trudeau with John Ziglar. You're watching Tru-Vision. It's a limited supply, one-time only price, get on the phone and get a good night's rest for the first time in years.
Kevin Trudeau, Tru-Vision, with John Ziglar. John, thanks very much for being here.
JOHN ZIGLAR: Thank you, Kevin.
KEVIN TRUDEAU: We'll see you next time — order now.
JOHN ZIGLAR: Bye-bye.
(Music playing.)
ON SCREEN: The preceding has been a paid

commercial for SNORENZ brought to you by Kevin Trudeau's Tru-Vantage International, America's premier direct response marketing company.
(End of video.)

CERTIFICATION O F TYPIST

MATTER NUMBER: 0023211
CASE TITLE: MED GEN INC.
TAPING DATE: OCTOBER 13, 1999
TRANSCRIPTION DATE: MAY 12, 2000

I HEREBY CERTIFY that the transcript contained herein is a full and accurate transcript of the tapes transcribed by me on the above cause before the FEDERAL TRADE COMMISSION to the best of my knowledge and belief.

DATED: MAY 12, 2000

DIANE QUADE

CERTIFICATIONOFPROOFREADER

I HEREBY CERTIFY that I proofread the transcript for accuracy in spelling, hyphenation, punctuation and format.

ELIZABETH M. FARRELL

Lawyer's Notes

FEDERAL TRADE COMMISSION

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VPS2 Soft 3

FEDERAL TRADE COMMISSION

In the Matter of:)
Med Gen, Inc.)Matter No. 0023211

October 13, 1999

The following transcript was produced from a live tape provided to For The Record, Inc. On May 8, 2000.

PROCEEDINGS

ON SCREEN: Client:Trudeau Marketing/TVI Project:VP Snorenz 2 (JD)
Price Point: Soft Offer
Edit Date: 10-6-98
Editor: SR
Audio: Mixed
Notes: 800-392-4006
MALE ANNOUNCER:The following is a paid commercial brought to you by Kevin Trudeau's Tru Vantage International.
ON SCREEN: The following is a paid commercial for Snorenz brought to you by Kevin Trudeau's Tru-Vantage International,America's premier direct response marketing company.
JON DENNY: For millions of Americans, this is the most annoying and unwelcome signed imaginable. That's right, more than 90 million Americans have a snoring problem, and it can cause sleeplessness, headaches, a lack of energy throughout the day, and that goes for the snorer as well as the person trying to sleep nearby.
Join us and find out how to instantly solve your snoring problem in this special edition of Vantage

Point.
ON SCREEN: Vantage Point with Kevin Trudeau Jon Denny
JON DENNY: I'm Jon Denny, and this is a special edition of Vantage Point. We're going to talk about snoring today, and if you're a snorer or just happen to sleep next to one, then you know snoring is no laughing matter. Snoring can and does seriously diminish the quality of your sleep, your life and it could drive two people apart, meaning the snorer and the person next to the snorer.
My guests today are Dr. Bob Courier, physician, surgeon and associate clinical professor at Michigan State University, and John Ziglar, who represents a company that manufactures a product called Snorenz, which is designed to end your snoring problem.
Gentlemen, thank you for joining me.
Guys, got to ask you this first question, because for some people it's a light matter, and for others it seriously impacts their life, certainly impacts their sleep. What causes snoring? What is the reason behind that all-too-familiar rumbling sound that keeps half of America, it seems, up every night?
ON SCREEN: DR. BOB COURIER, Physician Surgeon
DR. BOB COURIER: Well, what snoring really is,

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Jon, is simply a relaxation of the tissues in the back of your throat. It's when we fall asleep, much of our muscles in our body as well as our throat relax. That's the time we sleep. We're supposed to get our rest.

What happens with that, though, unfortunately is as the tissues relax, they occlude or actually narrow, and they cause a funnel effect for the air as it goes through, flapping the tissue. This is in the back of the throat, hence creating the noise. It's very positional, it's very — also very dependent on habits that we have, such as smoking, our dietary habits, and then also it affects really how much we sleep and how much rest we actually get throughout a night.

JON DENNY: Now, you were both snorers presumably.

DR. BOB COURIER: Absolutely.

JOHN ZIGLAR: Sure.

JON DENNY: Tell me, how did you get involved in Snorenz? How did this all come about?

JOHN ZIGLAR: This all came about, Jon, I met a friend down in Fort Lauderdale, Florida named Paul Cravitz. Paul Cravitz was in the banking industry, and he had a Korean man that came into his office with a

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product in a little bottle and it didn't have any labels on it or anything, but he says, This will make you quit snoring. And Paul looked at it, and he put it over on the side of his desk and didn't think too much about it, but he did make the mistake of telling his wife that somebody had come in with this product, and she asked him would he go ahead and bring it home and try it.

ON SCREEN: John Ziglar, Master Strategies Researcher

JOHN ZIGLAR: The bottom line is, he did use the product, it did make him quit snoring, but it tasted terrible, and so Paul says, Whoa, you know, what a price to pay. So, he took that product, he developed it, he took it to the laboratories, and they did some liposome technology with the product, and they put a flavor to the product to make it so that it tasted good, and we now call the product Snorenz, and it's just phenomenal.

JON DENNY: And in your first exposure to it, you were a rumbler. We heard Harley Davidson sounds coming from you at night is the word on the street. Tell me your first experience with the product.

JOHN ZIGLAR: My first experience really, when I — I had been married for 25 years, my wife, Linda, I

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came home after talking with Paul, and I told my wife about this new product that we were looking at, and she said — and she says, Well, when are you going to bring it home? And I said, Well, honey, I said really, you know, you don't snore that bad. And she said it really wasn't for her. And up until that point, I really didn't realize that I snored.

JON DENNY: Um-hum.

JOHN ZIGLAR: But I did turn over in the bed an awful lot at night, and I knew that, and so I used the product, and John, what I found is for me personally, I quit turning over so many times at night, and I began to get a more peaceful, restful sleep. So, that's what personally happened in my life.

JON DENNY: Well, that raises an interesting point, because for some people snoring — in a litany of problems that we face on an everyday basis, snoring is not at the top of the list. But in fact, if you speak to people who sleep next to a snorer, as well as the snorer themselves, there are some real health issues, there are some real serious concerns that a snorer has or should have. How does and why does a snorer — why should a snorer worry about this? Why is it a problem?

DR. BOB COURIER: Well, it is a problem, but

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the real problem is an awareness. A lot of people aren't aware, as you were, that you didn't snore. You don't snore. It's — and people don't want to offend someone else that they may sleep with or someone in their family by telling them they snore, and they have put up with it for years.

The problem with that is all the things that go with it, even on a personal level. Me personally, I snore and have snored, and I've used the product, as well, and it's worked great for me. Why do I know this? Because of my energy level, I feel better, I get better sleep. The problems that happen, I think people go to sleep, they assume they're automatically going to wake up rested. They don't. And then they wake up with a headache, less energy, they hurt, they're sore, they're irritable.

The health problems are really insidious. We can go into hypertension, problems with your heart, your cardiovascular system that can go into this, but let's no even go that deep. Let's just talk about the things that happen to us on an everyday basis, the energy level that we have. We're not rested. That's the problem.

JON DENNY: So, you're saying snorers get less rest — get a less restful sleep?

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DR. BOB COURIER: Absolutely, they do not sleep.

JOHN ZIGLAR: See, what happened to me — what was going on in my night is I would literally turn over 20 or 30 times a night, and the reason I would is because I would go to sleep, my tissues would relax, I would snore — I would literally wake myself up, and then I would turn over, and I would turn — I didn't wake up and get up out of the bed to turn over.

I would just wake up and turn over, and what that does is it keeps me, John, from getting the deep, restful sleep.

We get letters, we've got a letter from a lady out in Phoenix, also, who told us that for the first time in her life she started taking this product, and she can remember her dreams. Well, you see, dreaming is an important thing, and we all dream if we get peaceful, restful sleep.

JON DENNY: But isn't — isn't dreaming or the dream state indicative of a deep, restful, REM sleep I think they call it?

JOHN ZIGLAR: Yes, it is.

JON DENNY: So, if you're a snorer, you won't dream as much, meaning you're not getting as deep a sleep. Is that the point?

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DR. BOB COURIER: That is correct. You almost, because of the snoring, and sometimes we're not aware of it, we keep waking ourselves up. We snore, then we wake up, then we try to reposition ourselves. We're just not comfortable. We can't get our air, we can't get the oxygen we need, hence the headache, the irritability when we wake up. We're not rested, that's the problem.

ON SCREEN: Dr. Bob Courier, Physician Surgeon

DR. BOB COURIER: Another side effect, a cute story, my brother's also a snorer, I think this is just something that runs in families, as well. Anyway, he has since tried the product, as I have, and I use it, and I think it's fantastic, because it does stop the snoring. My brother has also — he doesn't have the aches and pains he used to wake up with.

You were also talking about the tossing and turning. We're also forgetting his wife used to jab him in the middle of the night. So, he does not wake up bruised. So, this also helps, a little sidelight there.

JON DENNY: How does Snorenz work? Is there have been other products available over the course of the last, you know, 10 to 20 years that have been in pill form, surgeries, people have gone through painful, expensive surgeries. In fact, we're going to — I think we're going to talk to a caller later who has a story to share with us about this product and the journey she went through with her husband to essentially reduce this problem or eliminate this problem. How does this product work?

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JOHN ZIGLAR: John, what we've done is we have taken all natural oils, and we have taken and put them together in a liposome formulation, and we have taken it so that you can actually spray this product into the back of your throat, and the process is really quite simple. Have you ever seen a car go down the road that didn't have enough oil in it, and you hear the clatter and the clanking?

ON SCREEN: John Ziglar, Master Strategies Researcher

JOHN ZIGLAR: Well, what happens is we took that same philosophy, that same technology, and we said, Hey, if we can oil the parts and we can take and make a topical solution that will stay in a place for an extended period of time, we can eliminate the noise of snoring. You're still going to have the same amount of air that's going to pass through the passage, but all we're going to do is we're going to lubricate the parts so that there is no noise associated so that you don't then wake up or wake up your neighbor.

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JON DENNY: So, it's essentially lubricating what part of the throat and which part of the throat is causing that sound?

DR. BOB COURIER: Well, to take this just a little bit further, a dentist has studied this and has actually sprayed this in models, and he actually used a dye at the time so he could see where it was applied. In the soft tissues, in the back of the throat, the ones that we see that flap and flutter and that need the lubrication, what — it is applied there, but where the technology goes even further and better through this liposome technology is to apply it evenly, and the very neat thing about this is it stays. It stays there all night. That's where others have failed. And that's also where a lot of the appliances, that's where also a lot of the applications of surgeries, pills, other things that have been attempted and tried have failed. This product here stays there. It's easy application.

As a physician, one of the problems that I have with patients is compliance, trying to get them to use and continually use something. If we're going to get restful sleep, we need it on an every-night basis. This is accrued, we have a clock and a bank and it's

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for sleeping purposes.
So, this isn't something just one night good sleep will help. This is something that's accrued over time. When you get good sleep, that helps a lot. We need compliance. With the ease of application, what he is talking about, where the effectiveness of it staying there, it's a winner, and that's how it works.
JON DENNY: So, it's basically, correct me if I'm wrong, it's two or three sprays in the back of your mouth. I have a friend who underwent a session with a dentist who fitted him with a clamp of some sort, which pushed his jaw out and tried to create more breathing space essentially, and that lasted for about three or four months. This works, and it stays working for people?
DR. BOB COURIER: Yes, and what you're trying to do with the appliance is just simply trying to open up the airway more so you don't get the fluttering of the tissues, and that's what we do when we snore. When we snore, we essentially wake ourselves up in a snore and then reposition ourselves, trying to, again, open up our airway to get more air so we get more oxygen.
What happens with this product, this lubricates, stays there, again through the technology, and then you don't have the snore; hence, you don't

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wake up; hence, you get a more restful sleep.
JOHN ZIGLAR: And the problem, John, with the appliance is it's very uncomfortable, and there have been a lot of people — and dentists will tell you that they have got patients who have paid for the procedure, paid to get the appliance, could not sleep with it hooked up, and so it did not work for them, because they were so uncomfortable.
JON DENNY: Right.
JOHN ZIGLAR: Okay? So, when I saw this first — this product the first time, I looked at this thing and I thought, Oh, my goodness, you know, I'm going to spray oil in the back of my throat, I'm thinking WD-40 or something like that and an oil slick, and I'm going, Oh, but it's the consistency of water, and the nice thing about it is that it doesn't — there's no feeling associated with the spray in the back of your throat. All you get is a nice, clean, peppermint taste, which made it wonderful, so compliance — people will do it.
JON DENNY: Well, the after taste —
JOHN ZIGLAR: Yes.
JON DENNY: — in the morning when you wake up is much better.
JOHN ZIGLAR: Exactly.
JON DENNY: You don't feel like you have an oil

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sludge at all. It's a minty taste.
ON SCREEN: 800-392-4006
MR. DENNY: If you have a snoring problem, if you have problems sleeping next to a snorer, then Snorenz may be the answer you've been waiting for. Remember, snoring is a medical condition. Studies have shown that shoring can seriously reduce your energy levels, your concentration and can seriously affect your work habits, as well, and you can be sure your snoring is seriously bothering someone other than you.
Snorenz is the first all-natural spray that has been proven to give you a healthy, natural, good night's sleep. It has no side effects. It's as easy as a few sprays before bed, and it lasts all night, and if you want more information on Snorenz, if you want to stop the snoring, if it's a snorer next to you or if you be the snorer, you may want to call the 800 number on your screen.
We have I believe a caller on the line from Arizona, and I believe it's Tina Hines (phonetic). Tina, are you on the air with us?
TINA HINES: I'm here.
JON DENNY: Great. How are you feeling today?
TINA HINES: I've got a sore throat, but other than that, good. I'm listening to your show, and I

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have to tell you that snoring, you know, is a lot more dangerous that people think. My husband was a chronic snorer, he's a firefighter/paramedic, so I wasn't the only one affected by this. I mean, we didn't sleep together for years.
JON DENNY: Now, you've been married for how long, Tina?
TINA HINES: Sixteen years.
JON DENNY: Sixteen years, and this was a problem that occurred right from the start of your marriage?
TINA HINES: Oh, yeah.
JON DENNY: You found you were married to a snorer?
TINA HINES: Oh, absolutely, and the poor guy, it would be all night, John, turn over, turn over. It did not matter, he could be sleeping on his head, and he would still snore.
Well, it got so bad that even at the fire department, he was being hassled at the fire department, because these guys sleep at different shifts, they don't all sleep at the same time, and when John was sleeping, he would be waking everybody else up, so they would be pounding on the walls and he'd come home all aggravated, he'd come home and want to

sleep.

They even built a partition around my husband's bunk bed to try to keep out the noise. Well, it got so bad he finally went to the doctor, and in order for the insurance company to pay for this surgery, they put him in the hospital, in the sleep center, and found out that he also had sleep apnea, which is very dangerous, because when you're snoring, you stop breathing, then you forget to sleep.

So, they did the surgery, and needless to say, it lasted for a while, and then after that he started up again, and he would not even believe when I would tell him, John, you're snoring again. You don't want to go through surgery and find out that you're snoring again.

JON DENNY: So, this was after a surgery, he had — the problem re-emerged.

TINA HINES: Right, they did surgery on all his sinuses, they went through his nose and removed all his polyps, thinking that was the problem. So, now he's in for the second surgery, and they decided they are going to remove part of his uvula, and the roof of his mouth, his tonsils and his adenoids, and this way it will give his tongue more room, I guess is what they said, so he wouldn't snore.

Well, he went through this, and it was a horrible surgery. I really felt very, very bad for him. He was out of work for six weeks, and he had high hopes that this was going to work and our life was going to change, we could sleep in the same room together, go on vacation, the guys wouldn't be hassling him.

Well, that did work for quite a while, and then it started up again, and I'll tell you what, I was even afraid to tell him, because I couldn't believe it myself. It's aggravating, it's annoying, I don't get a good night's sleep, he doesn't get a good night's sleep. I hated to say it, but I was happier when he was at the fire department because I got a good night's sleep.

JON DENNY: Tina, I want to interrupt you for a second, because this is a — you know, a real relatable story to some. Perhaps not all have gone through surgeries and so forth, but for the millions of people who sleep next to a snorer, their lives are affected, as well. How did you find your life or your sleep quality affected by sleeping next to a snorer?

TINA HINES: Well, I didn't, I chased him out. Actually, I had insomnia and I don't get a good — I mean, I could hear the dog turn over. So, he would

have to go out in the other room, but I could still hear him through the vents, but I'd get up in the morning, and I would be a grouch at work, because I was — I was tired.

JON DENNY: Yes.

TINA HINES: And I was aggravated. You're talking two surgeries, what's it going to take? He tried those stupid nose strip things, they didn't work.

So, one day I'm sitting here watching TV and I see a commercial out here in Phoenix and a couple is talking about the same thing, and I'm thinking, Well, what have I got to lose?

Well, my husband tells me I'm nuts, because if two surgeries didn't work, the spray was not going to work. I figure, Well, I'm going to try it. So, I sent for it, put it on the nightstand, the first night he was home, I woke him up, I said, John, spray your throat. He said, Yeah, yeah, yeah, yeah. I said, John, please, spray your throat. So, we sprayed his throat, and I'm like waiting — I'm laying there, I'm laying there, I'm like, Oh, wow, he was sleeping, there was no noise coming out of him. And I was — I was pretty well hooked. And he still was not a believer. He said it was just a fluke. So, it took a few times of using the Snorenz.

Now, I'll tell you what, he's taken it up to the fire department. I have the wives calling from the fire department asking me the 800 number. I've given away more bottles, I can't tell you, because I belong to the Snorenz Bottle of the Month Club, and I just gave one to my daughter last week, she came over, and she was like, Mom, I'm going crazy, Kenny's snoring. I said, Here, take my last bottle, take it home.

JON DENNY: And how long now has your family or your husband in particular been using Snorenz?

TINA HINES: Oh, for — oh, months.

JON DENNY: For months.

TINA HINES: Months, absolutely.

JON DENNY: And it works for him pretty much every night.

TINA HINES: Well, he takes it in his little duffle bag when he goes to the fire department, because being a medic, also, he might be called to another station, he doesn't want to go to another station with, you know, guys he doesn't know and start snoring. So, he carries it in his little bag, and everyplace he goes, the Snorenz goes with him.

JON DENNY: Right. Well, Tina, thank you for calling from Arizona.

TINA HINES: Hey, thanks for the Snorenz, I'll

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tell you.
JON DENNY: Well, we appreciate you calling and continue to get a full silent night's sleep.
TINA HINES: Absolutely.
JON DENNY: Okay, Tina, thank you.
TINA HINES: Thank you.
JON DENNY: Bob, tell us about some of your patients who have been turned on to Snorenz.
DR. BOB COURIER: Well, I'll give you a good example. I have Mike. Now, we always think of a snorer as someone that's older, okay, that's a little bit more passed middle age, always a male, and it's always grandpa, the chainsaw, somebody like that. Interestingly enough, I had a 25-year-old patient of mine named Mike who is an optician. Now, Mike was trying to qualify, okay, for the certifying exam to become a certified optician. He was losing energy.
He just couldn't — he couldn't understand it. He couldn't understand why he didn't have the get-up and go to do his job, plus go home to study. He's single. He lives by himself.
So, he's wondering why. I said, Well, you know, maybe you're not sleeping well. And he said, Well, you know, I just can't sleep. So, what happens to him is I give him some Snorenz. I said, Well just

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try this, it's just an outside shot, I said you have got to try this, let me know how it works.
He comes back, now, I don't see him in a week or two on another appointment basis, he comes back, and my word, he just — he's just aglow. He passed the certifying exam, he feels like he is more awake, more energetic, he feels like he can do anything, he can conquer the world. He's 25 years old.
What has happened is he relayed this story: What happened to him is he would fall asleep, he couldn't get to sleep at night, okay, so he'd sit up and watch late night TV and he becomes an insomniac.
What he would do is fall asleep, but he would awake with a snore. This way, with using Snorenz, he could get his clock back in order, he could go to sleep, and he could go to sleep snoring free, wake up refreshed in the morning. He figured it all out real simply, and it took us years to figure all this out, and he did it in a very short time.
Now, he doesn't have a bed partner, and so what happens is he did this for himself, for his own energy level, and so, you know, it has worked successfully for him. It isn't always a bedmate telling someone that they have it. He did it for himself.
JON DENNY: You think of snorers as older

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people, your grandfather, your father. I remember growing up my father — listening to my father across the hallway snoring, it sounded like the start of the Indianapolis 500 every night. But, in fact, younger people snore, too, do they not? In fact, there's a study out about students who were snorers who were proven to have lower test scores. Tell me about that.
JOHN ZIGLAR: I was reading the newspaper here in Chicago one day and the Sun Times has an article, and the top of the article says, "Test scores affected by snoring." So, I'm looking at it, I'm thinking, Wow, you know, there's actually been a study done, and what had happened is a research program was done over in West Germany with medical students, and what they did is they tracked an entire medical school class from the day they started until the day they finished, and they put them in two categories.
One category was the snorers and over here was the category of the nonsnorers, and after everything was said and done, are from start to finish, the nonsnorers scored six percent higher on their test than the snorers did, all other things being equal.
JON DENNY: And you just happened to run across this. So, it's now becoming an awareness. People are becoming aware now, and it's — see, it's all too

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obvious now when you read something like this why that would happen, because we're all aware, and my patients are aware of this.
Interestingly enough, I store this on the — well, on shelves and such in the office. When we do our inventory at the end of the day, I find that some has been taken. I don't want to say stolen, because these are my patients, and we have created a relationship, but actually, it's missing.
ON SCREEN: This is a paid commercial for Snorenz
DR. BOB COURIER: So, what happens is it just plain gets taken. People want this. People are now aware, and I think this is what's happening here, and we know why people don't score well. They don't sleep well. They snore.
ON SCREEN: 800-392-4006
JON DENNY: Ninety million Americans snore. That doesn't include the countless millions who sleep next to a snorer, and if you want more information about this revolutionary, breakthrough product, which has been proven effective in 97 percent of cases to eliminate or reduce the sound of snoring, call the toll-free 800 number on your screen, get more information about Snorenz, do it for him, do it for

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yourself, do it for your family. It is worth the phone call, and it is pennies per day to end the snoring problem forever.

This is a product, as I mentioned, that has been proven effective in double-blind studies, and you actually conducted the studies out of your auspices in Michigan. Tell us about a double-blind study, what it is and how Snorenz worked.

DR. BOB COURIER: Really, just to define what a double-blind study is in general is nobody knows what product anybody is getting. The doctor isn't aware of it, okay, and nor are the patients. For example, we're giving a block or a bunch of bottles, for example, in this case, Snorenz, and we are to distribute this out to our patients in a test pattern, they are going to use it for a week, but I am blind to the fact of what product am I giving them, the placebo or dummy product versus the actual product itself. I'm not aware, so I cannot influence the study results.

I accumulate the study results, I gather the patients and have them get compliant with it for use over a week's time, but I don't — I can't affect it. The patients can't affect it. So, I am blind to it, and so are the patients.

Interestingly enough, it's not only the results

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of the studies we got but the comments we received. Many people, again, they're aware of snoring, but they aren't aware of the problems that come with it, and actually it's like — until it's resolved, the snoring itself, oh, my word, what a problem it was, and you can see the changes it's made. That was probably the most interesting part of doing that whole study, was the comments that we got back, the little stories that people have through the week, you know, of using this product, and that was the beauty of this.

I loved doing this study. It was highly effective.

JON DENNY: And John, this is an all-natural product?

JOHN ZIGLAR: It's all-natural oils, and we also have some vitamins that we have also put into the product.

JON DENNY: Tell us about snorer's breath. I'm going to test this here. I hope I don't get it in my eye. It would eliminate my — some problem in my eye, perhaps, but I — it's minty, actually it tastes a lot like mouthwash, I mean, it's — in a good way. Three sprays of this before bed, and how long will this last, through the night?

JOHN ZIGLAR: It will last through the night.

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It will last from six to eight hours.

JON DENNY: And in what cases doesn't this work?

JOHN ZIGLAR: You know, when I first got this product, we did test — and I have given it to everybody that I know that snores so that I could find out, you know, because I always wanted to know exactly how did it work on everybody else. So, we had one friend we gave it to, and quite honestly, they had been married for three years, they're already sleeping in different bedrooms because he snores so loudly, and he would go to bed — they would go to bed together, wake up in different rooms.

And so Kevin was taking the product, and the first night it worked perfectly, the second night it worked perfectly, third night it worked perfectly, fourth night, didn't work, fifth night, didn't work. He called me up and he says, Look, you know, it works temporarily, but after that, it doesn't — it doesn't work. And I said, Wait a minute, you know, there's got to be a reason. There's something wrong here, the only guy it doesn't work on in the world.

And he says, Well — so, I started to ask him some questions, and here's the point. What I found out was the night that it did not work, he had a beer just

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before he went to bed, and what we had here was a situation where the alcohol in the beer literally cut through the oils in our product, and it went down his throat, so it was not there. Since it was not there, it could not work, and it proved that he still was a snorer, he just needed the product to stay where it was so that he would live without the noise.

JON DENNY: So, you suggested that he sort of cut down his drinking right before going to bed.

JOHN ZIGLAR: Exactly, don't eat or drink anything 30 minutes before you go to bed, or if you do, then take a couple of swallows of water just to clear your pallet so that your throat is clean so that when you put the product in on the back of your tongue, then it will stay there.

JON DENNY: Right. Your wives are happy, gentlemen, that you —

DR. BOB COURIER: Happier, happier.

JON DENNY: We won't get into that, but they're happy that your snoring problems have been reduced or eliminated.

DR. BOB COURIER: Yes, very much so.

JOHN ZIGLAR: And now, you know, I roll over and Linda gives me a kiss before we go to bed, and I think that's just real sweet. She's checking to see if

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I've taken the Snorenz, okay?
JON DENNY: If you want more information about this revolutionary, all-natural, vitamin-based spray, no pills, no surgery, no clamps, no strips across your nose, Snorenz will end your snoring problem and do it naturally. It is pennies in comparison to the value and the almost priceless value of a full, restful, silent night's sleep for all, and that goes for the snorer as well as the person sleeping next to the snorerailroad.
For more information, call the 800 number on the screen.
Dr. Bob Courier, thank you for joining us on Vantage Point.
DR. BOB COURIER: Thank you for having me.
JON DENNY: And, John Ziglar, thank you.
JOHN ZIGLAR: Enjoyed it.
JON DENNY: I may knock off a few sprays tonight and try to get my snoring down. This is Jon Denny saying good-bye from Vantage Point, and we will see you next time.
ON SCREEN: For more information on Snorenz call: 800-392-4006
Tru-Vantage International
7300 Lehigh Ave.

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Niles, IL 60714
(847)647-0300
ON SCREEN: The preceding has been a paid commercial for SNORENZ brought to you by Kevin Trudeau's Tru-Vantage International, America's premier direct response marketing company.
(The videotape was concluded.)

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CERTIFICATION OF TRANSCRIBER

DOCKET/FILE NUMBER: 0023211
CASE TITLE: MED GEN, INC.
RECORDING DATE: OCTOBER 13, 1999
TRANSCRIPTION DATE: MAY 15, 2000
I HEREBY CERTIFY that the transcript contained herein is a full and accurate transcript of the videotapes transcribed by me on the above cause before the FEDERAL TRADE COMMISSION to the best of my knowledge and belief.

DATED:

SUSANNE Q. TATE

CERTIFICATION OF PROOFREADER

I HEREBY CERTIFY that I proofread the transcript for accuracy in spelling, hyphenation, punctuation and format.

DIANE QUADE

OFFICIAL TRANSCRIPT PROCEEDING

FEDERAL TRADE COMMISSION

MATTER NO. 0023211

TITLE MED GEN INC.

DATE RECORDED: OCTOBER 13, 1999
TRANSCRIBED: MAY 8, 2000

PAGES 1 THROUGH 34

VP SNORENZ 3 - KT W/DISCLAIMERS SNR3 SOFT
VIDEOTAPE

FEDERAL TRADE COMMISSION

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FEDERAL TRADE COMMISSION

In the Matter of:)
Med Gen, Inc.,) Matter No. 0023211

October 13, 1999

The following transcript was produced from a videotape provided to For The Record, Inc. on May 8, 2000.

PROCEEDINGS

ON SCREEN:

Client: Trudeau Marketing/TVI
Project: VP SNORENZ 3
Price Point: Soft Offer
Edit Date: 11/13/98
Editor: WPS
Audio: Mixed
Notes: Generic - Keys, No Phone
The following is a paid commercial for SNORENZ brought to you by Kevin Trudeau's Tru-Vantage International, America's premier direct response marketing company.
Lower test scores linked to snoring
There's More to Snoring Than Meets the Ears
Can you win the snore war?
Something to lose sleep over
MALE ANNOUNCER: The following is a paid commercial brought to you by Kevin Trudeau's Tru Vantage International.
(Music playing.)
KEVIN TRUDEAU: For years over 150 million people have suffered from the effects of snoring. It can cause headaches, sleeplessness, irritability, poor job

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performance, a lack of energy and even big relationship problems. Well, what can be done about it? Until now, nothing.

On Vantage Point today, hear about a new breakthrough discovery that could possibly eliminate the sound of snoring.

VANTAGE POINT with Kevin Trudeau

KEVIN TRUDEAU: I am Kevin Trudeau, you're watching Vantage Point, and joining me is John Ziglar. John, how are you doing? Good to have you here.

JOHN ZIGLAR: Magnificent. Good to be here, Kevin.

KEVIN TRUDEAU: You have discovered a product, a new patented — I don't know if this is a medical discovery — that can solve the effects or the sound of snoring. Tell me about this product and what it does.

JOHN ZIGLAR: Kevin, a friend of mine introduced me to the product from down in Ft. Lauderdale, Florida. The guy's name is Paul Cravatz. And Paul was an investment banker and a Korean man came into his office one day and had a product called Snorenz that he wanted to have Paul look at to see if he could help him to market it.

Well, Paul put it over to the side of his desk, didn't think too much about it because he never really

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thought about snoring too much.

KEVIN TRUDEAU: Um-hmm.

JOHN ZIGLAR: But he made the mistake of saying something about it to his wife when he went home. Paul's been married for 37 years and his wife suggested that he might bring that product home. (Laughter.)

KEVIN TRUDEAU: (Laughter.)

JOHN ZIGLAR: And, so, when he brought the product home, then, he tasted the product; the product tasted terrible; but he quit snoring.

So, he found a product that actually worked and helped him to eliminate the noise of snoring.

KEVIN TRUDEAU: Now, when he found that product, was this a patented process that this Korean gentleman invented?

JOHN ZIGLAR: No, it wasn't, Kevin. At the time, what he had was a combination of oils that he had in a little formula that he sprayed in the back of his throat and then Paul went to his laboratories and he developed a lysosome formulation of the all-natural oils. He put some vitamins, minerals in it and put a whole lot better taste. He put a spearmint taste into the product so that it would taste good and then still solve the problem.

KEVIN TRUDEAU: So, now this is a patented

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formula?

JOHN ZIGLAR: Yes, it is.

KEVIN TRUDEAU: Okay. Patented process. Now, explain to me why somebody snores.

JOHN ZIGLAR: The reason people snore, Kevin, when somebody lays down at night and they go to sleep, what happens is your muscles on your skeletal structure begin to relax, and the muscles and the tissues inside of your throat also relax at the same time.

KEVIN TRUDEAU: Um-hmm.

JOHN ZIGLAR: And when that occurs, what happens is the air passageway inside of your throat actually diminishes in size. When that happens, then you've got the same amount of air flow and so the velocity is greater and it causes the air to run across your uvula and the soft tissue from the back of your throat and your tongue and they hit against each other and that clatter is the noise that we call snoring.

KEVIN TRUDEAU: Now, up until this point, John, what has been done to solve the problem? Are there any drugs, any surgery, any other herbal or natural supplements that people have tried?

JOHN ZIGLAR: There've been — people have been trying to solve the problem for years. In the dental profession, they have a mechanical device that you put

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inside of your mouth that will actually bring your jaw forward to make the air passageway larger.

KEVIN TRUDEAU: Um-hmm.

JOHN ZIGLAR: It's very uncomfortable; very few people are able to live with that on a consistent basis. There have been — there's surgery that people have gone through where they go in and they actually take part of the uvula — the little hangy-down part in your throat —

KEVIN TRUDEAU: Un-huh.

JOHN ZIGLAR: — where they take and they cut that out. They take some of the soft tissues off of the back of the throat and it's an expensive surgery, it's very painful and the results up to date have been that a year, two years, down the road you've got wives poking their husbands in the chin — in their ribs again because they've begun to snore again.

KEVIN TRUDEAU: Any drugs available?

JOHN ZIGLAR: I'm not aware of any drugs that have been used. I know from time to time you see a thing where there have been pills that people can take to try to eliminate snoring, but I do not know exactly what the technology has been.

KEVIN TRUDEAU: So, this — this — this is an all-natural product; this is clinically tested; no after effects; natural ingredients; vitamin enhanced; fresh

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breath — 97 percent effective — now, let's explain exactly — all that's in here are natural oils and it just says the natural oils and is a taste like a peppermint — type of wintergreen taste. And all you do — I just want to show people what it looks like.

This is the spray and you just spray this in your mouth three times before you go to sleep.

JOHN ZIGLAR: Right.

KEVIN TRUDEAU: I just want to spray it now. I'll just spray it once. Now, the first thing is before I did this I assume — you mentioned it tasted terrible

JOHN ZIGLAR: Yes.

KEVIN TRUDEAU: — but, until Paul Cravatz fixed the taste.

JOHN ZIGLAR: Correct.

KEVIN TRUDEAU: It tastes either like either a chewing gum or a — a mint.

JOHN ZIGLAR: It tastes like spearmint gum.

KEVIN TRUDEAU: Okay, it tastes just like spearmint gum.

JOHN ZIGLAR: Yes, it does.

KEVIN TRUDEAU: It's actually a very refreshing taste.

JOHN ZIGLAR: Yes.

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KEVIN TRUDEAU: Tell me how this eliminates the snoise of noring (sic)? What exactly happens when I spray this in my mouth before I go to sleep?

JOHN ZIGLAR: Because of the technology — what we have been able to do with the oils in this product, is we have been able through a lysosome technology, put it so that when it lands on the back of your throat it will actually stay there. It will stay topical for up to eight hours.

And, so, it's just like — Kevin, have you ever seen a car going down the road that didn't have enough oil in it and you could hear the pinging and the knocking of the engine?

KEVIN TRUDEAU: Right.

JOHN ZIGLAR: What we're doing right here is we're going to oil the parts inside your throat so that we eliminate the clatter and that's all this product will do.

KEVIN TRUDEAU: So, you just spray this on your throat and it just basically lubricates, if you will, the inside of your throat.

JOHN ZIGLAR: Exactly.

KEVIN TRUDEAU: And it's designed, because of the proprietary formula, where it lasts all night long.

JOHN ZIGLAR: That's right.

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KEVIN TRUDEAU: And there's nothing else — you can't buy this at a store or something — they can only get it directly from the company.

JOHN ZIGLAR: That's correct.

KEVIN TRUDEAU: And then all night long the person sleeps without any noise?

JOHN ZIGLAR: That's right.

KEVIN TRUDEAU: We have on the phone, Dr. Michael Leonard. Dr. Michael Leonard is a doctor I believe in Detroit —

JOHN ZIGLAR: Um-hmm.

DR. LEONARD: Kalamazoo.

KEVIN TRUDEAU: Kalamazoo. How you doing, Dr. Leonard?

DR. LEONARD: Good, how are you.

KEVIN TRUDEAU: I'm doing great. Explain to me what type of reaction or results or experience you've had with this product?

ON SCREEN: Called from Kalamazoo, MI — DR. MICHAEL LEONARD — TVI.

DR. LEONARD: Uh — originally I was introduced to it by a friend of mine. Again, I'm a dentist, and dealing with patients that have problems with snoring and making appliances, et cetera, that are difficult for people to comply with. We can look for, you know, making

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these appliances, advancing the jaw and getting the tissues up off the — (inaudible) — aspect of the mouth, but a lot of those people won't wear the appliance but for many a couple of nights because they are fairly uncomfortable.

I was told about this product and went ahead and ordered a case hoping to start dispensing to a few patients and let them try it out and see if it worked, and got positive feedback from these people.

So, I was telling my wife about it and she said, Yeah, before you give all that stuff away you better bring some home for yourself, because you also have a problem with snoring. And to tell you the truth I'm using it for a year and it doesn't bother me that I snore but certainly my wife, who gets my attention at night as I'm falling asleep and, you know, she knows I haven't sprayed down just yet, she'll give me a little nudge and say, you know, be sure and use that before you go to bed, because it does eliminate to a point where she's quite comfortable also.

KEVIN TRUDEAU: Now, in your profession, you said you've used other things to help patients of yours with the snoring problem, like appliances?

DR. LEONARD: Correct.

KEVIN TRUDEAU: And what — what's the success

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rate of one of those appliances? I know they're very uncomfortable —

ON SCREEN: Called from Kalamazoo, MI — DR. MICHAEL LEONARD — TVI.

DR. LEONARD: Yeah, it really — it really is dictated on patient compliance, and when things are uncomfortable, the compliance drops to very, very low numbers.

KEVIN TRUDEAU: Un-huh.

DR. LEONARD: And I don't have a percentage of number of people that are — 100 percent comply with it and, on the other hand, with something like this that you can keep with you, throw it in your dog kit, have one at home — it's there, it's available and it's easy to use and it works.

KEVIN TRUDEAU: Yeah, I mean, it tastes really good. So, I mean, obviously, right before you go to sleep to have this by your nightstand to just spray a couple of squirts, it shouldn't be a problem.

As a matter of fact, John was telling me that if somebody forgets to spray it in your mouth, it's not a problem at all because your wife will remind you about an hour and a half after you've gone to sleep —

DR. LEONARD: That's right.

KEVIN TRUDEAU: — with a little nudge —

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DR. LEONARD: Yeah.

KEVIN TRUDEAU: — and you just spray it there and then sleep the whole night.

DR. LEONARD: Yeah. Well, just like Pablo's dog, eventually you remember to do it before you go to sleep.

(All laughing.)

KEVIN TRUDEAU: Now, you've given this to many of your patients?

DR. LEONARD: Correct.

KEVIN TRUDEAU: And do you find it working for everyone? It says 97 percent effective, so there's some people, allegedly, that it does not work for. What's your personal experience?

DR. LEONARD: My experience has been people that use it and use it properly — and by properly, I'll get to that in just a second — people that are using it on a regular basis, they are getting relief.

And, again, when you talk to somebody who comes into the office and says, I'm having — my wife tells me or my husband tells me — I've having difficulty with snoring and it's bothering her, the next time they come in and you don't get that complaint or the wife comes in shortly thereafter and is not complaining at that point, it works well.

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KEVIN TRUDEAU: Say —

DR. LEONARD: The — the trick with using it properly is just getting it to these tissues in the back of your mouth. Now, if you open your mouth wide and spray the surface of your tongue only, it's not going to be effective.

So, I ended up doing a study here in the office and taking some photographs of distribution of the product, staining it and spraying it in people's mouths with different head positions so we're assured that it gets to where it needs to go.

KEVIN TRUDEAU: Um-hmm.

DR. LEONARD: With the proper positioning of the head and spraying it to the back of your throat, letting it sit there for maybe five seconds before you swallow, I think the effectiveness is tremendously increased.

KEVIN TRUDEAU: Hold with us just for a few moments, but I do want people to know right now if you're watching and you do want information on Snorenz, if you are a snorer or if you know someone that is, this really could be a Godsend. It's a patented product, it's not available in any stores, it's only available directly from the company. Call the number on your screen to get more information on Snorenz. It's very inexpensive, it

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tastes great, it's all-natural, it's clinically proven to eliminate the noise of snoring in 97 percent of the cases, and in my personal experience is virtually 100 percent.

Call right now, it's unconditionally guaranteed. The very first time you use it, it will eliminate your snoring.

Michael, just stay with us for just a moment. John, I want to go back to the people that it's worked for and those it hasn't worked for.

I have a friend of mine that I sent this to when you first came to me and said, I got this product, it gets rid of snoring. I said, well —

JOHN ZIGLAR: Right.

KEVIN TRUDEAU: — you know, I know snoring can be an issue because I've known people that snore like freight trains.

JOHN ZIGLAR: Right.

KEVIN TRUDEAU: I was fishing with a fellow who was in a log cabin, we were up north — as a matter of fact, you were with us last year —

JOHN ZIGLAR: Right.

KEVIN TRUDEAU: — but this was like the year before — and there were nine guys in this cabin. They threw this fellow out. Now, we're there for a week, they

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threw — this poor guy had to sleep in the shower cabin — the shower stall because he was so loud and still — you could still hear him in the cabin across camp.

JOHN ZIGLAR: I know.

KEVIN TRUDEAU: This guy was — crazy. But I had sent this to a friend of mine who snored so bad his wife was not sleeping in the bedroom anymore. They — they'd go to sleep together and then an hour later she would leave and go and sleep on the couch because she just could not get a good night's rest.

JOHN ZIGLAR: That's common.

KEVIN TRUDEAU: Now, he used this and the first night he called me up and said, Gosh, darn it, I sprayed this — I woke up, my wife was lying next to me for the first time in like three years. This actually worked. I mean, it knocked out my snoring. He says and better than that, Kevin, I had the best night's sleep I ever had.

Now, we'll talk about what happens when you keep waking up in the middle of the night.

JOHN ZIGLAR: Right.

KEVIN TRUDEAU: But here's the thing: three days he called me and he said, It doesn't work any more.

JOHN ZIGLAR: No.

KEVIN TRUDEAU: And I said, What do you mean? So, I got back to you and let's talk about why it

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wouldn't work in a particular case. We had a situation last night with Doug McCleary and with this fellow. Explain some of the reasons why it wouldn't work.

JOHN ZIGLAR: Okay. Here's — there's a couple of things. What happened in this particular guy's case is before he went to bed, he had a beer.

KEVIN TRUDEAU: Um-hmm.

JOHN ZIGLAR: And when he had the beer, he didn't clean his palate off. In order words, there was still alcohol. Well, alcohol is an agent that will cut through oils. And, so, since this is an oil-based, a natural oil-based product, when he had the alcohol still on his palate and he sprayed it, it cut through and the Snorenz actually went right straight down his throat, was not on the tissues where it would create the lubrication.

KEVIN TRUDEAU: So, you can't eat or drink for a half an hour before you use the product?

JOHN ZIGLAR: Exactly.

KEVIN TRUDEAU: Which is a good healthy practice anyway. You shouldn't be drinking or eating right before you go to sleep.

JOHN ZIGLAR: Of course. Or you could even brush your teeth before you go to bed. It would be a good practice.

KEVIN TRUDEAU: You know, a fellow last night

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said it worked up until he went to bed at 11:00 at night, 10:00 at night —

JOHN ZIGLAR: Yes.

KEVIN TRUDEAU: — and at 5:30 in the morning got woken up because of the snoring.

JOHN ZIGLAR: Exactly.

KEVIN TRUDEAU: So, it worked up until 5:30 a.m. What happened there?

ON SCREEN: JOHN ZIGLAR, Master Strategies Researcher, TVI.

JOHN ZIGLAR: What happened is when he sprayed the product in his mouth, he did it correctly, but he only put one spray.

KEVIN TRUDEAU: Um-hmm.

JOHN ZIGLAR: He only did one pump. And what we recommend is three. All right? So, if you do three, it will last the full eight hours.

KEVIN TRUDEAU: Dr. Leonard — let's go back to you. I have a question about — you're a dentist —

DR. LEONARD: Yes.

KEVIN TRUDEAU: — obviously. Bad breath —

DR. LEONARD: Yes.

KEVIN TRUDEAU: Do you — have you found that people who snore have a worse bad breath problem when they wake up as opposed to nonsnorers?

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DR. LEONARD: I don't know of a direct correlation with that —

KEVIN TRUDEAU: Does this —

ON SCREEN: Caller from Kalamazoo, MI — DR. MICHAEL LEONARD — TVI.

DR. LEONARD: — certainly having your mouth open and all the tissues drying out and — you could see where — and it depends on the diet, also — but it's interesting. I don't know that offhand. It has to be something to look into a bit.

KEVIN TRUDEAU: Does this product help with breath in the morning? I mean, a lot of us have morning breath.

DR. LEONARD: Oh, yes. Just by nature of the way it tastes. You know, you're going to bed with something that tastes and has a pleasant smell to it to begin with —

KEVIN TRUDEAU: Um-hmm.

DR. LEONARD: — as opposed to like the guy who went to bed slugging down a beer.

KEVIN TRUDEAU: Right, right.

DR. LEONARD: I don't know about you, but I'd rather have somebody have a mint candy before they went to bed and slept for eight hours instead of a Miller Lite or whatever.

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KEVIN TRUDEAU: Right.
DR. LEONARD: So, in that case, yeah, I think it could be — could be said that that would certainly help out a bit with morning breath.
KEVIN TRUDEAU: Yeah, because that's one of the things that I'm finding from people that I have actually given this to in my testing —
DR. LEONARD: Um-hmm.
KEVIN TRUDEAU: — and I say, you know, what's your reaction? And primarily from the wives, they say, Wow, I can give him a kiss in the morning and it's not that yucky morning breath.
DR. LEONARD: They're not blown away, huh?
KEVIN TRUDEAU: Yeah, which is kind of interesting. And then, of course, the fellows are saying the same thing. I wake up and I feel more refreshed because my mouth is clean and it has this great taste to it.
So, in addition to having a soundful sleep without any snoring whatsoever, but they wake up — they have this clean feeling in their mouth. You know, with addition to the extra energy they'll get —
DR. LEONARD: Sure.
KEVIN TRUDEAU: — and —
DR. LEONARD: Plus they've had a good night's

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sleep.
KEVIN TRUDEAU: Correct. But, let's talk about that. The person who snores, Dr. Leonard, if they are snoring and it "doesn't bother them."
DR. LEONARD: Um-hmm.
KEVIN TRUDEAU: They don't get woken up. Is it, in fact, having an adverse effect on the person's sleep patterns, thus making them more potentially irritable and fatigued during the day?
DR. LEONARD: Certainly. Potential irritability and fatigue throughout the day has got to be commonplace.
KEVIN TRUDEAU: Now, why use that? I mean, if I snore and I don't wake up during the night and I don't — I don't even know I snore —
DR. LEONARD: Um-hmm.
KEVIN TRUDEAU: — how is it having that effect on me?
DR. LEONARD: If you're sleeping and snoring, obviously, like you're talking about exchanging air and still breathing and your air passage is restricted, once things are restricted to a point, you automatically or for the most part most people will wake up, catch a deep breath, roll over, what-have-you. So, yeah, your sleep pattern is disturbed by that.

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KEVIN TRUDEAU: So, a person may not even realize that he's constantly waking up and going back to bed during the night?
DR. LEONARD: That's right.
KEVIN TRUDEAU: And, therefore, their sleep pattern's getting —
Dr. Leonard, I know you have to get back to your practice, thanks very much for calling in.
DR. LEONARD: Thank you.
KEVIN TRUDEAU: Have a great day.
DR. LEONARD: Thanks.
KEVIN TRUDEAU: Let's talk about that, John, because —
JOHN ZIGLAR: Yeah, Kevin, because that's what my experience has been.
KEVIN TRUDEAU: Okay.
JOHN ZIGLAR: When I started to take the product myself —
KEVIN TRUDEAU: Um-hmm.
JOHN ZIGLAR: — I noticed — first of all, that I don't turn over in my sleep as many times. And, so, I noticed it because I don't pull the covers out of the bottom of the bed every night.
KEVIN TRUDEAU: Right.
JOHN ZIGLAR: And, you see, it's not a

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conscious thing when you wake yourself up snoring and then you immediately go back to sleep. We've got testimonial letters from all over the country.
One of the ladies said that for the first time in her life she can remember dreams.
KEVIN TRUDEAU: Hmmm.
JOHN ZIGLAR: And what that means is that she, for the first time in a long time, has gotten some deep sleep where she now has recollection of dreams. We all dream —
KEVIN TRUDEAU: Um-hmm.
JOHN ZIGLAR: — if we get deep sleep.
KEVIN TRUDEAU: Now, 90 million people snore —
JOHN ZIGLAR: Yeah.
KEVIN TRUDEAU: — that means about 150 million people are affected because of the sleeping partners.
JOHN ZIGLAR: Correct.
KEVIN TRUDEAU: How young does somebody snore, they start snoring? I mean, can they start as child?
JOHN ZIGLAR: They can absolutely. We've got someone in our office who has a child who started snoring and the child is eight years old.
KEVIN TRUDEAU: I want to talk about that, about how snoring can affect even grades in school, because there was an article I know in the Chicago

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Tribune about that.
JOHN ZIGLAR: Yes.
KEVIN TRUDEAU: But if you're watching right now and you do want more information on Snorenz, it's an all-natural product, it's not available at any stores, call the number on your screen. If you are a snorer or know someone that is, call that number and get this very inexpensive, it's all natural, tastes great, it's guaranteed to work the very first time you try it. You just put three squirts in your mouth before you go to sleep, no snoring all night long.
If you're not thrilled, send it back for a refund. Clinically proven in studies to eliminate the sound of snoring in 97 percent of the cases. And in my personal experience, virtually everybody that we've given it to. It's all natural and it can work for you.
Call the number on your screen for Snorenz if you are a snorer or know anyone that is, they need this product for their own health and the people around them.
Let's talk about the kids. As young as eight years old —
JOHN ZIGLAR: Yeah.
KEVIN TRUDEAU: — that can start snoring. And how does that adversely affect their grade performance in school?

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JOHN ZIGLAR: Kevin, as you know, I have four children myself —
KEVIN TRUDEAU: Um-hmm.
JOHN ZIGLAR: — and I know that with my own children if I let them stay up too late at night or they do not get enough sleep, I notice the next day whether or not they're as pleasant to their brothers and sisters. I notice, for instance, if they go for a period of time where they don't get good sleep, that it does impact their grades, their performance on the athletic field or wherever they are, and, quite honestly, it's no different for them than it is for us. Sleep depravation affects us all.
KEVIN TRUDEAU: So, it can affect us in our job performance?
JOHN ZIGLAR: Certainly.
KEVIN TRUDEAU: Irritability during the day?
JOHN ZIGLAR: Yes.
KEVIN TRUDEAU: Relationship with your spouse?
JOHN ZIGLAR: Of course.
KEVIN TRUDEAU: And not just because you're not maybe sleeping in the same room or same bed, but the next day because you're tired, because your sleep pattern has been interrupted all night long, that you're just probably not as pleasant and you can be a little snippy and snappy and that's going to have an adverse affect on the relationship.

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JOHN ZIGLAR: Exactly.
KEVIN TRUDEAU: Now, let's talk about this — there was this article we were talking about right before the start of the show —
JOHN ZIGLAR: Yeah.
KEVIN TRUDEAU: — in the Chicago Tribune, I think it was.
JOHN ZIGLAR: Right.
KEVIN TRUDEAU: What was that about?
JOHN ZIGLAR: There was a study that was done with medical students over in West Germany.
KEVIN TRUDEAU: Um-hmm.
JOHN ZIGLAR: And what they did is they found — they did a test and they found which of the students snored and which of the students did not snore, and then what they did is they just simply took and put them in two distinct categories and then they took and they took the average of the grades of the snorers and the nonsnorers, and in this particular case, the snorers ended up with six points less than the nonsnorers did.
KEVIN TRUDEAU: That seems like a major difference in grades.
JOHN ZIGLAR: I would have to think so,

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especially where the amount of sleep that a med student would have an opportunity to get.
KEVIN TRUDEAU: Right.
JOHN ZIGLAR: You — another — let me just share a story with you. This — we talked with a lady who — whose husband was a fireman —
KEVIN TRUDEAU: Um-hmm.
JOHN ZIGLAR: — and he was out in Phoenix, and he snored so loud and since he was a fireman he was required to sleep at the fire station —
KEVIN TRUDEAU: Um-hmm.
JOHN ZIGLAR: — with the other guys who were on duty at the same time. Well, they only have a certain amount of hours that they can sleep and, so, they would all rush — when it got time to go to bed — they would all rush to get to bed before John got up there because when he got to sleep — if you weren't to sleep before he got to sleep, his snoring was so loud that you couldn't get to sleep.
KEVIN TRUDEAU: Um-hmm.
JOHN ZIGLAR: And it was such a problem for him that he went to the expense of having the surgery and everybody in the fire station was thrilled to death that he had done that. It was an expensive process and the healing process from the surgery is six months —

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KEVIN TRUDEAU: Hmmmm.
JOHN ZIGLAR: — so, it affected diet, it affect a lot of different things in his life, but he wasn't snoring.
A year after the surgery, he gets the old elbow in the ribs from his wife and she says, Roll over, John, you've started to snore.
And, so, even with the surgery —
KEVIN TRUDEAU: Hmmmm.
JOHN ZIGLAR: — he had started to snore again. And when he started back up —
KEVIN TRUDEAU: Is that normal — is that common, by the way? I mean, you had this expensive surgery, you go through six months of healing, all this pain, it eliminates the snoring for a year and then it picks up. Is that — is that common?
JOHN ZIGLAR: I have heard lots of cases where that has occurred.
KEVIN TRUDEAU: It's amazing.
JOHN ZIGLAR: Yes, it is. So, all of a sudden appears at the fire station, now, the guys in his dormitory where he sleeps, had taken and gotten some sheet rock —
KEVIN TRUDEAU: Um-hmm.
JOHN ZIGLAR: — and built a cage around John's

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bed because he had started to snore again.
KEVIN TRUDEAU: Hmmmm.
JOHN ZIGLAR: And we had put a small ad on a radio station out there, his wife had heard about Snorenz, she said, My goodness, we've got nothing to lose. She bought the product, she squirted it in his mouth before he went to bed that night, and from that day to this John does not snore.
KEVIN TRUDEAU: That's incredible. I mean, it seems incredible — you could call this a medical breakthrough, but it's not a medical device and it's not a drug.
JOHN ZIGLAR: No, no.
KEVIN TRUDEAU: What do you call it?
JOHN ZIGLAR: I don't know — you call it a miracle.
KEVIN TRUDEAU: (Laughter.)
JOHN ZIGLAR: I don't know what you call it. Let me tell you, when I — when I first got the product myself, I, you know, I told Linda, my wife, about the product and she says, Well, you know, you need to bring some home. And I told her, Well, Honey, I said, you really don't snore that bad. (Laughter.)
She suggested it wasn't for her.
KEVIN TRUDEAU: (Laughter.)

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JOHN ZIGLAR: And in my own relationship I can tell you for a fact I am getting better sleep.
KEVIN TRUDEAU: So, you're having more energy during the day?
JOHN ZIGLAR: I am.
KEVIN TRUDEAU: Thinking clearer?
JOHN ZIGLAR: Uh — I don't know — I don't think I was thinking unclear.
(Laughter.)
KEVIN TRUDEAU: But you definitely — well, let me ask you this: You definitely feel better during the day?
JOHN ZIGLAR: Yes, I do. I do not get tired.
KEVIN TRUDEAU: Because now you are actually really getting a full night's sleep.
JOHN ZIGLAR: Exactly.
KEVIN TRUDEAU: As — and you didn't notice — you, like most snorers —
JOHN ZIGLAR: Right.
KEVIN TRUDEAU: — did not notice that you were actually waking up all night?
JOHN ZIGLAR: No.
KEVIN TRUDEAU: So, your rapid eye movements, your dreams, all those things are being adversely affected by this interruption of the breathing pattern

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waking you up and then going back to sleep; and waking you up and going back to sleep?
JOHN ZIGLAR: Exactly. I really didn't notice that much, Kevin, except for when I'm up here in Chicago in my apartment by myself.
KEVIN TRUDEAU: Um-hmm.
JOHN ZIGLAR: Where I have to make the bed myself.
KEVIN TRUDEAU: (Laughter.)
JOHN ZIGLAR: And I noticed that I don't turn over and get the sheets out of the foot of the bed. That's when I really noticed it.
KEVIN TRUDEAU: Folks, if you're watching right now and you are a snorer or if you know someone that is, get on the telephone and call to get Snorenz. It's a very simple, all natural product, it's just natural oils with some vitamins and minerals. You simply just spray it in your mouth three times before you go to bed.
It tastes great, it's a patented product, it has been proven to be 97 percent effective in eliminating the snoise — the noise of snoring. You'll wake up with a great, fresh, clean mouth.
You'll have more energy during the day, you'll have less irritability, you'll be more pleasant, kids get better grades in school, as evidenced by the study in the

Chicago Tribune, you'll think clearer, potentially, throughout the day, perhaps better job performance, definitely a better relationship with your spouse or significant other. So, call the number right now for Snorenz.

The reason I have John here is we tested it with the people that I know in my life and it works beyond a shadow of a doubt.

It's all natural, it's patented, and it's not available in any store. So, pick up the phone right now for more information on Snorenz. And it's pennies, it's very cheap and it'll eliminate your snoring.

This is Kevin Trudeau with my guest John Ziglar. We've been talking about snoring and you've been watching Vantage Point. We'll see you next time. Bye-bye.

(Music playing.)

ON SCREEN: For more information or to order Snorenz call:

If snoring is accompanied by any signs of Sleep Apnea, you should consult a physician before using any product.

Tru-Vantage International, 7300 N. Lehigh Ave, Niles, IL 60714 (847)647-0300.

The preceding has been a paid commercial for

SNORENZ brought to you by Kevin Trudeau's Tru-Vantage International, America's premier direct response marketing company.

(End of videotape.)

CERTIFICATION O F TYPIST

MATTER NUMBER: 0023211
CASE TITLE: MED GEN INC.
TAPING DATE: OCTOBER 13, 1999
TRANSCRIPTION DATE: MAY 9, 2000

I HEREBY CERTIFY that the transcript contained herein is a full and accurate transcript of the tapes transcribed by me on the above cause before the FEDERAL TRADE COMMISSION to the best of my knowledge and belief.

DATED: MAY 9, 2000

DIANE QUADE

CERTIFICATIONOFPROOFREADER

I HEREBY CERTIFY that I proofread the transcript for accuracy in spelling, hyphenation, punctuation and format.

ELIZABETH M. FARRELL

Lawyer's Notes

OFFICIAL TRANSCRIPT PROCEEDING

FEDERAL TRADE COMMISSION

MATTER NO. 0023211

TITLE MED GEN INC.

DATE RECORDED: OCTOBER 13, 1999
TRANSCRIBED: MAY 10, 2000

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VP SNORENZE 4 - JD W/ DISCLAIMER SNR4
VIDEOTAPE

FEDERAL TRADE COMMISSION

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FEDERAL TRADE COMMISSION

In the Matter of:)
Med Gen, Inc.,) Matter No. 0023211

October 13, 1999

The following transcript was produced from a videotape provided to For The Record, Inc. on May 8, 2000.

PROCEEDINGS

ON SCREEN:

Tru-Vantage & Mercury Media
Present
VP SNORENZ 4
JD WITH DISCLAIMERS // SNR4
28:30 MINUTES
1-800-835-8941
TUESDAY, NOVEMBER 17, 1998
NCMG MASTER #293 Randy Pfeiffer
CUSTOMIZATION BY NORTH COUNTRY MEDIA GROUP
www.ncmg.com

ON SCREEN:

The following is a paid commercial for SNORENZ brought to you by Kevin Trudeau's Tru-Vantage International, America's premier direct response marketing company.

ANNOUNCER: The following is a paid commercial brought to you by Kevin Trudeau's Tru Vantage International.

(Music playing.)

UNIDENTIFIED MALE: For millions of Americans,

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this is the most annoying and unwelcome sound in the world.

ON SCREEN: News clippings.

ANNOUNCER: That's right, more than 90 million Americans have a snoring problem and it can cause sleeplessness, headaches and a lack of energy, and that goes for the snorer, as well as the person trying to sleep next to the snorer.

What can be done about it? On Vantage Point today, hear about a new discovery that could eliminate the sound of snoring.

ON SCREEN: VANTAGE POINT with Kevin Trudeau.

ON SCREEN: John Denny.

JOHN DENNY: Hi, I'm John Denny, and this is a special edition of Vantage Point. We're going to talk about snoring today, and if you're a snorer, or just happen to sleep next to one, then you know snoring is no laughing matter. Snoring can and does seriously diminish the quality of your sleep, your life, and it could drive two people apart, meaning the snorer and the person next to the snorer.

My guests today are Dr. Bob Currier, physician, surgeon and associate clinical professor at Michigan State University, and John Ziglar, who represents a company that manufactures a product called Snorenz, which

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is designed to end your snoring problem.

Gentlemen, thank you for joining me. Guys, got to ask you this first question, because for some people it's a light matter and for others it seriously impacts their life, certainly impacts their sleep. What causes snoring? What is the reason behind that all too familiar rumbling sound that keeps half of America, it seems, up every night?

ON SCREEN: Dr. Bob Currier, Physician/Surgeon.

DR. BOB CURRIER: Well, what snoring really is, John, is just simply a relaxation of the tissues in the back of your throat. It's when we fall asleep, much of our muscles in our body, as well as our throat relax. That's the time we sleep. We're supposed to get our rest.

JOHN DENNY: Um-hmm.

DR. BOB CURRIER: What happens with that, though, unfortunately, is as the tissues relax, they occlude or actually narrow, and they cause a funnel effect for the air as it goes through, flapping the tissue.

JOHN DENNY: Um-hmm.

DR. BOB CURRIER: This is in the back of the throat, hence creating the noise. It's very positional. It's very — also very dependant on habits that we have,

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such as smoking or dietary habits. And then also it affects really how much we sleep and how much rest we actually get throughout a night.

JOHN DENNY: Now, you were both snorers, presumably?

DR. BOB CURRIER: Um-hmm.

JOHN ZIGLAR: Sure.

DR. BOB CURRIER: Absolutely.

JOHN DENNY: Tell me, how did you get involved in Snorenz? How did this all come about?

ON SCREEN: John Ziglar, SNORENZ.

JOHN ZIGLAR: This all came about, John, I met a friend down in Fort Lauderdale, Florida, named Paul Kravitz.

JOHN DENNY: Um-hmm.

JOHN ZIGLAR: Paul Kravitz was in the banking industry. And he had a Korean man that came into his office with a product. He had a little bottle of it, it didn't have any labels on it or anything, but he says this will make you quit snoring. And Paul looked at it and he put it over on the side of his desk, he didn't think too much about it. But he did make the mistake of telling his wife that somebody had come in with this product. And she asked him would he go ahead and bring it home and try it. Bottom line is he did use the

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product, it did make him quit snoring, but it tasted terrible.

And, so, Paul says Whoa, you know, what a price to pay, so he took that product, he developed it, he took it to the laboratories and they did some liposome technology with the product and they put a flavor to the product to make it so that it tasted good and we now call the product Snorenz, and it's just phenomenal.

JOHN DENNY: And in your first exposure to it -

JOHN ZIGLAR: Correct.

JOHN DENNY: — you were a rumbler. You — we heard Harley-Davidson sounds coming from you at night —

JOHN ZIGLAR: (Laughter).

JOHN DENNY: — is the word on the street.

JOHN ZIGLAR: (Laughter).

JOHN DENNY: Tell me your first experience with the product.

JOHN ZIGLAR: My first experience really, when I — I had been married for 25 years, my wife, Linda. I came home after talking with Paul and I told my wife about this new product that we were looking at. And she said — and she says well, when are you going to bring it home. And I said Well, honey, I said, really, you know, you don't snore that bad. And she said it really wasn't

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for her.
JOHN DENNY: (Laughter).
DR. BOB CURRIER: (Laughter).
JOHN ZIGLAR: And up until that point I really didn't realize that I snored.
JOHN DENNY: Um-hmm.
JOHN ZIGLAR: But I did turn over in the bed an awful lot at night, and I knew that. And, so, I used the product and, John, what I found is for me personally, I quit turning over so many times at night. And I began to get a more peaceful, restful sleep.
JOHN DENNY: Um-hmm.
JOHN ZIGLAR: So, that's what personally happened in my life.
JOHN DENNY: Well, that raises an interesting point, because for some people snoring in a litany of problems, you know, that we face on an everyday basis, snoring is not at the top of the list. But, in fact, if you speak to people who sleep next to a snorer, as well as the snorer themselves, there are some real health issues, there are some real serious concerns that a snorer has, or should have. How does, and why does, a snorer — why should a snorer worry about this? Why is it a problem?
DR. BOB CURRIER: Well, it is a problem, but

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the real problem is an awareness. A lot of people aren't aware, as you were, that you didn't snore, you don't snore. It's — and people don't want to offend someone else that they may sleep with or someone in their family by telling them they snore.
JOHN DENNY: Um-hmm.
DR. BOB CURRIER: And they've put up with it for years.
JOHN DENNY: Um-hmm.
DR. BOB CURRIER: The problem with that is all the things that go with it, even on a personal level. Me personally, I snore and have snored, and I've used the product, as well, and it's worked great for me.
ON SCREEN: These statements have not been evaluated by the Food and Drug Administration. This product is not intended to diagnose, treat, cure or prevent any disease.
DR. BOB CURRIER: Why do I know this? Because of my energy level, I feel better, I get better sleep.
The problems that happen, I think people go to sleep, they assume they're automatically going to wake up rested. They don't. And then they wake up with a headache, less energy, they hurt, they're sore, they're irritable. The health problems are really insidious. But let's not even go that deep. Let's just talk about

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the things that happen to us on an everyday basis: the energy level that we have. We're not rested.
JOHN DENNY: So, you're saying snorers —
DR. BOB CURRIER: That's the battle.
JOHN DENNY: — snorers get less rest, get a less restful —
DR. BOB CURRIER: Absolutely. They do not sleep.
JOHN ZIGLAR: See, what happened to me, what was going on in my night, is I would literally turn over 20 or 30 times a night. And the reason I would is because I would go to sleep, my tissues would relax, I would snore — I would literally wake myself up, and then I would turn over. And I would turn. Well, now, I didn't wake up and get up out of the bed to turn over.
JOHN DENNY: Um-hmm.
JOHN ZIGLAR: I would just wake up and turn over. And what that does is it keeps me, John, from getting the deep, restful sleep.
JOHN DENNY: Hmm.
JOHN ZIGLAR: We get letters. We got a letter from a lady out in Phoenix also who told us that for the first time in her life she started taking this product and she can remember her dreams. Well, you see, dreaming is an important thing, and we all dream, if we get

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peaceful, restful sleep.
JOHN DENNY: But isn't dreaming or the dream state indicative of a deep, restful, REM sleep, I think they call it?
DR. BOB CURRIER: Yes. Yes, it is.
JOHN DENNY: So if you're a snorer, you won't dream as much, meaning you're not getting as deep a sleep. Is that what —
DR. BOB CURRIER: That is correct. You almost, because of the snoring, and sometimes we're not aware of it, keep waking ourselves up. We snore, and we huh (indicating), and then we wake up, then we try to reposition ourselves. We're just not comfortable. We can't get our air; we can't get the oxygen we need, hence the headache, the irritability when we wake up. We're not rested. That's the problem.
ON SCREEN:
Dr. Bob Currier
Physician/Surgeon.
DR. BOB CURRIER: Another side effect, a cute story, my brother is also a snorer. I think this is just something that runs in families, as well. Anyway, he has since tried the product, as I have, and I use it and I think it's fantastic because it does stop the snoring. My brother has also — he doesn't have the aches and

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pains he used to wake up with.
You were also talking about the tossing and turning, we're also forgetting his wife used to jab him in the middle of the night, so he does not wake up bruised, so this also helps, a little sidelight there.
DR. BOB CURRIER: Yes.
JOHN DENNY: How does Snorenz work? There have been other products available, over the course of the last, you know, 10 and 20 years that are — have been in pill form, surgeries. People have gone through painful, expensive surgeries.
In fact, we're going to — I think we're going to talk to a caller later who has a story to share with us about this product and the journey she went through with her husband to essentially reduce this problem or eliminate this problem. How does this product work?
JOHN ZIGLAR: John, what we've done is we have taken all-natural oils, and we have taken and put them together in a liposome formulation. And we have taken it and so that you can actually spray this product into the back of your throat. And the process is really quite simple. Have you ever seen a car go down the road that didn't have enough oil in it?
JOHN DENNY: Um-hmm.
JOHN ZIGLAR: And you hear the clatter and the

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clanking.

ON SCREEN:
JOHN ZIGLAR
SNORENZ

JOHN DENNY: Yes.
JOHN ZIGLAR: Well, what happens is we took that same philosophy, that same technology, and we said hey, if we can oil the parts and we can take and make a topical solution that will stay in a place for an extended period of time, we can eliminate the noise —
JOHN DENNY: Um-hmm.
JOHN ZIGLAR: — of snoring. You're still going to have the same amount of air that's going to pass through the passage, but all we're going to do is we're going to lubricate the parts so that there is no noise associated so that you don't then wake up or wake up your neighbor.
JOHN DENNY: So, it's essentially lubricating what part of the throat, and which part of the throat is causing that sound?
DR. BOB CURRIER: Well, to take this just a little bit further, a dentist has studied this and has actually sprayed this in models, and he actually used a dye at the time so he could see where it was applied. In the soft tissues, in the back of the throat, the ones

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that we say that flap and flutter and then need the lubrication —
JOHN DENNY: Yeah.
DR. BOB CURRIER: — when it is applied there, but when the technology goes even further and better through this liposome technology, is to apply it evenly. And the very neat thing about this is it stays. It stays there all night.
JOHN DENNY: Hmm.
DR. BOB CURRIER: That's where others have failed, and that's also where a lot of the appliances, that's where also a lot of the applications of surgeries, pills, other things that have been attempted and tried have failed.
JOHN DENNY: Um-hmm.
DR. BOB CURRIER: This product here stays there. It's easy application. As a physician, one of the problems that I have with patients is compliance, trying to get them to use and continually use something.
JOHN DENNY: Um-hmm.
DR. BOB CURRIER: If we're going to get a restful sleep, we need it on an every-night basis. This is accrued, we have a clock and we have a bank and it's for sleeping purposes. So, it isn't something that just one night good sleep will help. This is something that's

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accrued over time. When you get good sleep, that helps a lot. We need compliance. With the ease of application, as what he is talking about, okay?
JOHN DENNY: Um-hmm.
DR. BOB CURRIER: With the effectiveness of its staying there, it's a winner. And that's how it works.
JOHN DENNY: So, it's basically — correct me if I'm wrong — it's two or three sprays in the back of your mouth. I have a friend who underwent a session with a dentist who fitted him with a clamp of some sort, which pushed his jaw out and tried to create more breathing space essentially, and that lasted for about three to four months. This works, and it stays working for people?
DR. BOB CURRIER: Yes, what you're trying to do with the appliance is just simply try to open up the airway more so you don't get the fluttering of the tissues.
JOHN DENNY: Um-hmm.
DR. BOB CURRIER: What — and that's what we do when we snore. When we snore, we essentially wake ourselves up in a snore, and then reposition ourselves, trying to again open up our airway to get more air so we get more oxygen. What happens with this product, this lubricates, stays there, again through the technology,

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and then you don't have the snore; hence, you don't wake up; hence, you get a more restful sleep.

JOHN ZIGLAR: And the problem, John, with the appliance is it's very uncomfortable.

JOHN DENNY: Um-hmm.

JOHN ZIGLAR: And there have been a lot of people, and dentists will tell you that they have got patients who have paid for the procedure, paid to get the appliance, could not sleep with it hooked up.

JOHN DENNY: Um-hmm.

JOHN ZIGLAR: And, so, it did not work for them because they were so uncomfortable.

JOHN DENNY: Um-hmm.

JOHN ZIGLAR: Okay? And, so, when I saw this first — this product the first time, I looked at this thing and I thought oh, my goodness, you know, I'm going to spray oil in the back of my throat. I'm thinking WD-40 or something like that, you know —

JOHN DENNY: Right.

JOHN ZIGLAR: — and an oil slick, and I'm going oh, but it's the consistency of water. And the nice thing about it is is that it does — there's no feeling associated with the spray in the back of your throat. All you get is a nice, clean, peppermint taste -

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JOHN DENNY: Hmm.

JOHN ZIGLAR: — which made it wonderful, so compliant, people will do it.

ON SCREEN: This is a paid commercial for Snorenz.

DR. BOB CURRIER: Well, the aftertaste.

JOHN ZIGLAR: Yes.

DR. BOB CURRIER: In the morning, when you wake up, it's better.

JOHN ZIGLAR: Exactly.

DR. BOB CURRIER: You don't feel like you have an oil sludge at all. It's a minty taste.

ON SCREEN: 1-800-835-8941

JOHN DENNY: If you have a snoring problem, if you have problems sleeping next to a snorer, then Snorenz may be the answer you've been waiting for. Snoring can seriously reduce your energy levels, your concentration, and can seriously affect your work habits, as well. And you can be sure your snoring is seriously bothering someone other than you.

Snorenz is the first all-natural spray that has been proven to give you a healthy, natural, good night's sleep. It has no side effects, it's as easy as a few sprays before bed, and it lasts all night. If you want more information on Snorenz, if you want to stop the

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snoring, if it's a snorer next to you or if you be the snorer, you may want to call the 800 number on your screen.

We have, I believe, a caller on the line from Arizona, and I believe it's Tina Heinz. Tina, are you on the air with us?

TINA HEINZ: I'm here.

JOHN DENNY: Great. How you feeling today?

TINA HEINZ: Good. I'm listening to your show, and I have to tell you that snoring, you know, is a lot more dangerous than people think.

JOHN DENNY: Hmm.

TINA HEINZ: My husband was a chronic snorer. He's a firefighter/paramedic, so I wasn't the only one affected by this.

JOHN DENNY: Hmm. Um-hmm.

TINA HEINZ: I mean, we didn't sleep together for years.

JOHN DENNY: Now, you've been married for how long, Tina?

TINA HEINZ: Sixteen years.

JOHN DENNY: Sixteen years. And this was a problem that occurred right from the start of your marriage?

TINA HEINZ: Oh, yeah.

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JOHN DENNY: I mean, you found you were married to a snorer?

TINA HEINZ: Oh, absolutely. And the poor guy, it would be all night, John, turn over, turn over. It did not matter, he could be sleeping on his head and he would still snore. Well, it got so bad that even at the fire department he was being, you know, hassled at the fire department because these guys sleep at different shifts, they don't all sleep at the same time.

JOHN DENNY: Um-hmm.

TINA HEINZ: And when John was sleeping, he would be waking everybody else up, and they'd be pounding on the walls, and he'd come home all aggravated, he'd come home and want to sleep. They built a partition around my husband's bunk bed to try to keep out the noise.

(Laughter).

TINA HEINZ: Well, it got so bad he finally went to the doctor and, in order for the insurance company to pay for this surgery, they put him in the hospital in the sleep center and found out that he also had sleep apnea, which is very dangerous because when you're snoring you stop breathing and you forget to sleep.

JOHN ZIGLAR: Um-hmm.

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TINA HEINZ: So, they did this surgery, and needless to say, it lasted for a while and after that he started up again, and he would not even believe when I would tell him John, you're snoring again.

JOHN DENNY: Hmm.

TINA HEINZ: You don't want to go through surgery and find out that you're snoring again.

JOHN DENNY: So, this was after a surgery, he had — the problem re-emerged?

TINA HEINZ: Right, they did surgery on all his sinuses. They went through his nose, and they removed all his polyps, thinking that was the problem. So, now, he's in for a second surgery, and they decided that they're going to remove part of his uvula and the roof of his mouth, his tonsils and his adenoids.

JOHN DENNY: Hmm.

TINA HEINZ: And this will give his tongue more room, I guess is what they said, so he wouldn't snore.

DR. BOB CURRIER: Um-hmm.

TINA HEINZ: Well, he went through this and it was a horrible surgery. I really felt very, very bad for him. He was out of work for six weeks, and he had high hopes that this was going to work and our life was going to change, we could sleep in the same room together, go on vacation, the guys wouldn't be hassling him. Well,

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that did work for quite a while and then it started up again.

ON SCREEN:

Caller from Phoenix, AZ

Tina Heinz

TINA HEINZ: And I tell you, I was even afraid to tell him, because I couldn't believe it myself. It's aggravating; it's annoying. I don't get a good night's sleep; he doesn't get a good night's sleep. I hated to say, but I was happy when he was at the fire department because I got a good night's sleep.

(Laughter).

JOHN DENNY: Tina, I want to interrupt you for a second, because this is, you know, a real relatable story to some, perhaps not all have gone through surgeries and so forth, but for the millions of people who sleep next to a snorer, their lives are affected as well. How did you find your life or your sleep quality affected by sleeping next to a snorer?

TINA HEINZ: Well, I didn't, I chased him out.

JOHN DENNY: Right.

TINA HEINZ: Actually, I have insomnia, and I don't get — I mean, I could hear the dog turn over, so he'd have to go into the other room, and I would still hear him through the vents, but I would get up in the

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morning and I would be a grouch at work because I was — I was tired.

JOHN DENNY: Yes.

JOHN ZIGLAR: Um-hmm.

TINA HEINZ: And I was aggravated. You're talking two surgeries, what is it going to take? He tried those stupid nose-strip things, they didn't work.

JOHN DENNY: Hmm.

TINA HEINZ: So, one day I'm sitting here watching TV and I see a commercial out here in Phoenix, and a couple's talking about the same things. And I'm thinking, well, what have I got to lose. My husband tells me I'm nuts because his two surgeries didn't work, a spray was not going to work.

I figure well, I'm going to try it. So, I sent for it; put it on the nightstand. First night he was home, I woke him up, I said John, spray your throat; he's like yeah, yeah, yeah, yeah. I said John, please, spray your throat. So, we sprayed his throat, and I'm like wait, I'm laying there, I'm laying there, I'm like oh, wow, he was sleeping, there was no noise coming out of him.

And I was — I was pretty well hooked. And he still was not a believer; he said it was just a fluke. So, it took a few times of using the Snorenz. Now, I

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tell you what, he's taking it up to the fire department. I had the wives calling up from the fire department asking me the 800 number. I've given away more bottles, I can't tell you —

JOHN DENNY: (Laughter).

TINA HEINZ: — because I bought the Snorenz bottle-of-the month club.

JOHN DENNY: Um-hmm.

TINA HEINZ: And I just gave one to my daughter last week. She came over and she was like Mom, I'm going crazy, Timmy's snoring. I said here, take my last bottle, take it home.

JOHN DENNY: And how long now has your family or your husband in particular been using Snorenz?

TINA HEINZ: Oh, for months.

JOHN DENNY: For months?

TINA HEINZ: Months, absolutely.

JOHN DENNY: And it works for him pretty much every night?

TINA HEINZ: Well, he takes it in his little duffle bag when he goes to the fire department, because being a medic also he might be called to another station. He doesn't want to go to another station with, you know, guys he doesn't know and start snoring.

JOHN DENNY: Hmm.

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TINA HEINZ: So, he carries it in his little bag and every place he goes the Snorenz goes with him.
JOHN DENNY: Right. Well, Tina, thank you for calling from Arizona.
TINA HEINZ: Hey, thanks for the Snorenz, I'll tell you.
JOHN DENNY: Well, we appreciate your calling and continue to get a full, silent night's sleep.
TINA HEINZ: Absolutely.
JOHN DENNY: Okay, Tina, thank you.
TINA HEINZ: Thank you.
JOHN DENNY: Bob, tell us about some of your patients who have been turned on to Snorenz.
DR. BOB CURRIER: Well, I'll give you a good example. I have Mike. Now, we always think of a snorer as someone that's older, okay, and that's a little bit more past middle age, always a male, and it's always Grandpa, the chain saw —
JOHN DENNY: Um-hmm.
DR. BOB CURRIER: — somebody like that. Interestingly enough, I had a 25-year-old patient of mine named Mike who is an optician. Now, Mike was trying to qualify, okay, for the certifying exam to become a certified optician. He was losing energy. He just couldn't — he couldn't understand it, he couldn't

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understand why he didn't have the get-up-and-go to do his job plus go home to study.
He's single. He lives by himself. So, he's wondering why. I said, well, you know, maybe you're not sleeping well. And he said well, you know, I just — I just can't sleep. And so what happens to him is I give him some Snorenz. I said well, just try this, it's just an outside shot, and I said you've got to try this, let me know how it works.
He comes back, now I don't see him in a week or two, on another appointment basis. He comes back and my word, he says — he's just aglow. He passed the certifying exam; he feels like he is more awake, more energetic. He feels like he can do anything. He can conquer the world, he's 25 years old.
ON SCREEN: These statements have not been evaluated by the Food and Drug Administration. This product is not intended to diagnose, treat, cure or prevent any disease.
DR. BOB CURRIER: And what has happened is he relayed the story. What happened to him is he would fall asleep; he couldn't get to sleep at night, okay, so he'd sit up and watch late-night TV, he becomes and insomniac. What he would do is fall asleep, but he'd wake with a snore.

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This way, with using Snorenz, he could get his clock back in order, he could go to sleep, and he could go to sleep snoring free, wake up refreshed in the morning. He figured it all out real simple, and it took us years to figure all this out and he did it in a very short time.
JOHN DENNY: Um-hmm.
DR. BOB CURRIER: Now, he doesn't have a bed partner, and so what happens is he did this for himself, for his own energy level.
JOHN DENNY: Um-hmm.
DR. BOB CURRIER: And, so, you know, there it has worked successfully for him. It isn't always a bed mate telling someone that they have it.
JOHN DENNY: Um-hmm.
JOHN ZIGLAR: That's right.
DR. BOB CURRIER: He did it for himself.
JOHN ZIGLAR: Right.
JOHN DENNY: You think of snorers as older people, your grandfather, your father. I remember growing up, my father — listening to my father across the hallway snoring. It sounded like the start of the Indianapolis 500 every night. But, in fact, younger people snore, too, do they not? In fact, there's a study out about students who were snorers who were proven to

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have lower test scores. Tell me about that.
JOHN ZIGLAR: I was reading the newspaper here in Chicago one day, and the Sun-Times has an article and the top of the article says Test Scores Affected by Snoring. And, so, I'm looking at it and I'm thinking wow, you know, there's actually been a study done. And what had happened is a research program was done over in West Germany with medical students.
JOHN DENNY: Um-hmm.
JOHN ZIGLAR: And what they did is they tracked an entire medical school class from the day they started to the day they finished, and they put them in two categories. One category was the snorers, and over here was the category of the non-snorers. And after everything was said and done from start to finished, the non-snorers scored 6 percent higher on their tests —
JOHN DENNY: Hmm.
JOHN ZIGLAR: — than the snorers did, all other things being equal.
DR. BOB CURRIER: Hmm. And you just happened to run across this, so it's now becoming an awareness.
JOHN ZIGLAR: Exactly.
DR. BOB CURRIER: Right. People are becoming aware now. And it's — see, it's all too obvious now when you read something like this why that would happen,

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because we're all aware, and my patients are aware. Interestingly enough, I store this on — well on shelves and such in the office. When we do our inventory at the end of the day, I find that some has been taken. I don't want to say stolen, because these are my patients and we've created a relationship, but actually it's missing.

JOHN DENNY: Right.

DR. BOB CURRIER: So, what happens is it just plain gets taken, people want this.

JOHN DENNY: Hmm.

DR. BOB CURRIER: People are now aware. And I think this is what's happening here, and we know why people don't score well, they don't sleep well, they snore.

ON SCREEN: This is a paid commercial for Snorenz.

JOHN DENNY: Ninety million Americans snore. That doesn't include the countless millions who sleep next to a snorer.

ON SCREEN: 1-800-835-8941.

JOHN DENNY: And if you wanted more information about this revolutionary, breakthrough product which has been proven effective in 97 percent of cases to eliminate or reduce the sound of snoring, call the toll-free 800 number on your screen, get more information about

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Snorenz.

Do it for him, do it for yourself, do it for your family. It is worth the phone call, and it is pennies per day to end the snoring problem. This is a product, as I mentioned, that has been proven effective in studies. And you actually conducted the studies out of your auspices in Michigan. Tell us about how Snorenz worked.

DR. BOB CURRIER: Interestingly enough, it's not only the results of the studies we got, but the comments we received. Many people, again, they're aware of snoring, but they aren't aware of the problems that come with it. And actually it's like until it's resolved, the snoring itself, oh, my word, what a problem it was. And you can see the changes it's made. That was probably the most interesting part of doing that whole study —

JOHN DENNY: Um-hmm.

DR. BOB CURRIER: — was the comments that we got back, the little stories that people had through the week —

JOHN DENNY: Yes.

DR. BOB CURRIER: — you know, of using this product. And that was the beauty of this. I loved doing the study, it was highly effective.

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JOHN DENNY: And, John, this is an all-natural product?

JOHN ZIGLAR: It's all-natural oils. And we also have some vitamins —

JOHN DENNY: Um-hmm.

JOHN ZIGLAR: — that we have also put into the product.

JOHN DENNY: And tell us about snorer's breath. I'm going to test this here.

JOHN ZIGLAR: Yes.

JOHN DENNY: I hope I don't get it in my eye.

(Laughter).

JOHN DENNY: In my — in my — some problem in my eye perhaps, but it's minty.

JOHN ZIGLAR: Yes.

JOHN DENNY: Actually, it tastes a lot like mouthwash, I mean, in a good way. Three sprays of this before bed.

JOHN ZIGLAR: Right.

JOHN DENNY: And how long will this last, through the night?

JOHN ZIGLAR: It'll last through the night. It'll last from six to eight hours.

JOHN DENNY: Um-hmm. In what cases doesn't this work?

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JOHN ZIGLAR: You know, when I first got this product, we did test, and I've given it to everybody that I know that snores —

JOHN DENNY: Um-hmm.

JOHN ZIGLAR: — so that I could find out, you know, because I always wanted to know exactly how did it work on everybody else. And, so, we had one friend we gave it to and, quite honestly, they've been married for three years, they're already sleeping in different bedrooms because he snores so loudly —

JOHN DENNY: Hmm.

JOHN ZIGLAR: — and he would go to bed, they would go to bed together, wake up in different rooms. And, so, Kevin was taking the product and the first night it worked perfectly; second night it worked perfectly; third night it worked perfectly; fourth night, didn't work; fifth night, didn't work.

He called me up and he says look, you know, it works temporarily but after that it doesn't work. And I said wait a minute, you know, there's got to be a reason, there's something wrong here that only guy it doesn't work for all in the world. (Laughter). And he says well — and so I started to ask him some questions, and here's the point, what I found out was the night that it did not work, he had a beer just before he went to bed.

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JOHN DENNY: Hmm.
JOHN ZIGLAR: And what we have here was a situation where the alcohol in the beer literally cut through the oils in our product and it went down his throat, so it was not there.
JOHN DENNY: Um-hmm.
JOHN ZIGLAR: Since it was not there, it could not work, and it proved that he still was a snorer, he just needed the product to stay where it was —
JOHN DENNY: Um-hmm.
JOHN ZIGLAR: — so that he would live without the noise.
JOHN DENNY: So, you suggested that he sort of cut down his drinking right before going to bed?
JOHN ZIGLAR: Exactly. Don't eat or drink anything 30 minutes before you go to bed —
JOHN DENNY: Um-hmm.
JOHN ZIGLAR: — or if you do, then take a couple of swallows of water just to clear your palate so that your throat is clean —
JOHN DENNY: Um-hmm.
JOHN ZIGLAR: — so that when you put the product in, on the back of your tongue, that it'll stay there.
JOHN DENNY: Your wives are happy, gentlemen,

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that you are —
DR. BOB CURRIER: Happier.
JOHN DENNY: Happier. We won't get into that, but they're happy that your snoring problems have been reduced or eliminated?
DR. BOB CURRIER: Yes, very much so.
JOHN ZIGLAR: And now, you know, I roll over and Linda gives me a kiss before we go to bed, and I think that's just real sweet. She's checking to see if I've taken the Snorenz, okay?
(Laughter).
JOHN DENNY: If you want more information about this revolutionary, all-natural, vitamin-based spray, no pills, no surgery, no clamps, no strips across your nose, Snorenz will end your snoring problem and do it naturally. It is pennies in comparison to the value and the almost priceless value of a full, restful, silent night's sleep for all, and that goes for the snorer as well as the person sleeping next to the snorer.
For more information, call the 800 number on the screen. Dr. Bob Currier, thank you for joining us on Vantage Point.
DR. BOB CURRIER: Thank you for having me.
JOHN DENNY: And, John Ziglar, thank you.
JOHN ZIGLAR: You're welcome.

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JOHN DENNY: I may knock off a few sprays tonight and try to get my snoring down. This is John Denny saying goodbye from Vantage Point, and we will see you next time.
(Music playing.)
ON SCREEN:
For more information or to order Snorenz call:
1-800-835-8941
If snoring is accompanied by any signs of Sleep Apnea, you should consult a physician before using any product.
ON SCREEN:
Tru-Vantage International
7300 N. Lehigh Ave. Niles, IL 60714 (847)647-0300
ANNOUNCER: The preceding has been a paid commercial brought to you by Kevin Trudeau's Tru Vantage International.
ON SCREEN:
The preceding has been a paid commercial for SNORENZ brought to you by Kevin Trudeau's Tru-Vantage International, America's premier direct response marketing company.
(End of videotape.)

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CERTIFICATION O F TYPIST

MATTER NUMBER: 0023211
CASE TITLE: MED GEN INC.
TAPING DATE: OCTOBER 13, 1999
TRANSCRIPTION DATE: MAY 13, 2000

I HEREBY CERTIFY that the transcript contained herein is a full and accurate transcript of the tapes transcribed by me on the above cause before the FEDERAL TRADE COMMISSION to the best of my knowledge and belief.

DATED: MAY 15, 2000

SARA J. VANCE

CERTIFICATIONOFPROOFREADER

I HEREBY CERTIFY that I proofread the transcript for accuracy in spelling, hyphenation, punctuation and format.

ELIZABETH M. FARRELL

Lawyer's Notes

FEDERAL TRADE COMMISSION

INDEX

VIDEOTAPE: Page
VP Snorenz 8 JD/JPK
(Replace SNZ6)
Rollout SNZ8 Soft 3

FEDERAL TRADE COMMISSION

In the Matter of:)
) Matter No. 0023211
Med Gen, Inc.)

October 13, 1999

The following transcript was produced from a live tape provided to For The Record, Inc. On May 8, 2000.

PROCEEDINGS

ON SCREEN: Client:TVI
Project:VP Snorenz 8 Generic
Price Point: Soft Offer
Edit Date: 3/29/99
Editor:WPS
Audio: Mixed
Notes: Generic
ON SCREEN:The following is a paid commercial program for SNORENZ.

MALE ANNOUNCER: The following is a paid program.

JON DENNY: For millions of Americans, this is the most annoying and unwelcome sound in the world.That's right, more than 90 million Americans have a snoring problem, and it could cause sleeplessness, headaches and a lack of energy, and that goes for the snorer as well as the person trying to sleep next to the snorer.

What can be done about it? On Vantage Point today, hear about a new discovery that could eliminate the sound of snoring.

ON SCREEN: Vantage Point with Jon Denny
Jon Denny

JON DENNY: Hi, I'm Jon Denny, and welcome to Vantage Point.We are going to talk about snoring today, and we are going to do it with Paul Kravitz, who has brought to the market an exciting breakthrough product called Snorenz, which has been proven from snorers around the country to reduce or eliminate their snoring problem.

Paul, welcome to the show.

PAUL KRAVITZ: Thank you, Jon.

JON DENNY: Tell me, is this a breakthrough medical discovery, is this a revolutionary new direction to help people stop their snoring problem?

ON SCREEN: Paul Kravitz, Snorenz

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PAUL KRAVITZ: Well, John, I don't know if you would call it a medical breakthrough or a new discovery. To me it was a major breakthrough. In fact, it saved my marriage.

I had been a heavy snorer for years, and at one point in my life, my — my ribs hurt so much in the morning from my wife poking me to wake up to stop snoring, it was just a terrible thing, and over the course of many years, I was thinking about surgery, a lot of potential cures that I — that I thought I would find to help the situation out, and I met somebody about six or seven years ago, a Korean gentleman who was — lived in Brazil, actually, and who was working with an EMT specialist who lived next door, and they came up with a product, and I had met him, they were looking for somebody to invest in the company, and things just went — went the way of the world, and finally, I asked him if I could try the product, and I did, and it worked.

It was — at that time it was in its infancy, it was terrible tasting, and — but it worked, and I used it for five days straight, and I made a small investment, which became a larger investment and even a larger investment, until

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finally I bought the formula from the Korean, and we went to work on it. It took a year and a half to develop, and Jon, we've tested it, we've proven it, it works. And it works, and it's a very simple way it does work.

JON DENNY: Now, before we get into how Snorenz works, what is snoring? What causes that terrible Harley Davidson rumbling sound that seems to emanate from almost every bedroom across America? I mean, I grew up with a father, and it sounded like the start of the Indianapolis 500 every night, the house would literally rattle. What is snoring?

PAUL KRAVITZ: Well, snoring is caused by a vibration of three parts of your mouth — in your throat. It's a vibration of the back of your tongue against the uvula, which is the small part of the skin that hangs down from your throat, and your soft pallet, which vibrates. Now, you can either vibrate the two pieces together, either the back of the tongue and the uvula, or you can vibrate all three, and the deeper the resonance, the more vibrations you're going to hear.

Our product really addresses the vibrations. You can't stop the vibration, but you

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can stop the snoring noise.

JON DENNY: Well, how does Snorenz work? It is a spray, an all-natural spray?

PAUL KRAVITZ: It's an all-natural spray, yes:

JON DENNY: Vitamin-based?

PAUL KRAVITZ: It's vitamin based, it's all natural, and it's manufactured in a very special technique called liposome.

JON DENNY: And is this a patented process?

PAUL KRAVITZ: Yes, it is, it's patented.

JON DENNY: And how does it work exactly? So, we have a snorer — we are going to go to some video feeds of some couples who have experienced what snoring has done in their lives and really impacted their marriages. We may consider this a laughing matter, but for many people, it isn't a laughing matter at all.

PAUL KRAVITZ: No, it's a very serious problem, John.

JON DENNY: How does Snorenz work to correct or address the problem you're talking about?

PAUL KRAVITZ: Well, very simply put, it

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oils the vibrating parts of your — of your throat, and when you put oil on a rusty part, it silences it, and that's exactly how it does work. The secret of the product and what we've spent millions of dollars to find out is how to get it to attach itself, the product itself, the spray, to staying in the back of the throat so that the noise stays for — I mean, the noise stays away for six to eight hours.

JON DENNY: Um-hum.

PAUL KRAVITZ: And we were able to find a trace product that we use in all of our products that let's it stick to the back of the throat, thereby quieting the noise. So, in its simplest form, what you're doing is greasing the noisy parts.

JON DENNY: Right, like someone would if a car's axis or car parts were rumbling or rattling together, oil would essentially grease those areas?

PAUL KRAVITZ: That's it, right, that's it.

JON DENNY: Now, when I hear oil and I hear grease, my word, not yours, I'm thinking terrible tasting, I'm thinking that — I'm not sure that I want to spray oil in my mouth. Tell me

about the taste of this.
PAUL KRAVITZ: Well, we've added peppermint flavor to it, so — as a matter of fact, the taste is delicious. It almost tastes like bubble gum, and I used to love bubblegum as a kid, and I love it. I take it in every day — every night, I go to bed at night, I spray my throat, I wake up in the morning, my throat is fresh, I have had a good, restful night's sleep, and so has my wife, as a matter of fact. We both think this product is wonderful, and we've turned a lot of people on to this product.
JON DENNY: Now, why is snoring a problem? On one hand we know it's a problem for the person sleeping next to us, the snorer, they're not getting enough sleep because of that sound coming right next to them, but in what other ways is snoring a real problem for both the snorer as well as the person trying to sleep next to them?
PAUL KRAVITZ: Well, from the snorer's point of view, Jon, it's a major problem. First of all, you don't know it, but if you were a snorer, you wake up maybe a thousand times a night, because the snoring does wake you up. You go right back to sleep again, and then you wake up again. Even if

your wife doesn't wake you up or your girlfriend doesn't wake you up, you are really not sleeping soundly.
As a matter of fact, there was a Times article, the Los Angeles Times, if you don't mind me reading it, it says basically that the snoring decreased — as snoring decreased, you were able to function better in the daytime, and they've actually been able to prove that people function better with a better night's sleep, obviously if you don't snore, you do get a better night's sleep.
As far as your wife is concerned or your girlfriend is concerned or anybody nearby you, obviously they're going to sleep better, as well. So, it's a dual effect.
JON DENNY: Interestingly. We have Dr. Mike Leonard on the line from Kalamazoo, Michigan. Dr. Leonard, are you with us?
DR. MIKE LEONARD: Yes, I am.
ON SCREEN: Caller: Dr. Michael Leonard Kalamazoo, MI
JON DENNY: Dr. Leonard, I believe conducted some tests on the efficacy of this product out of his auspices in Michigan. Dr. Leonard, let me ask you a question. As a dentist,

is this something that you have recommended to your patients who have sleep problems, most particularly snoring problems?
DR. MIKE LEONARD: Yes. Initially, as a dentist, we — historically we fabricate occlusal appliances or guards that go in your mouth that, oh, essentially keep your mouth open wider or really position your lower jaw forward so you can keep the airway open like you were talking about earlier and don't have those tissues vibrating and rolling around.
The problem is a lot of people can't tolerate those appliances. They are large, they are cumbersome, and throughout the night, if you've got it in your mouth, you may end up with it on your pillow in the morning, because you're just subconsciously take it out.
JON DENNY: These are clamps that dentists are in the past put into people's mouth to create more airspace?
DR. MIKE LEONARD: Exactly, of varying different sizes and shapes, et cetera, but they're custommade appliances, and for some people that can't tolerate them, it's an expense to go through if you're not going to be able to utilize it.

So, I had, through the grapevine, heard about a spray to use and got the name of the company, called them up and ordered a case of Snorenz and had it sent to my office to start dispensing to patients and having them try it out and see what they thought, because quite simply, it's easily reversible.
If you are not tolerating it, if it was not working, you just stop using it. You're not really out anything. And that — the feedback that I got was very, very positive. People were getting good results, and the people that were coming in with the problems were not the snorers themselves; it was the mate, the partner that was sleeping next to them that was kept up all night or irritated all night that they were having to roll their spouse over to get them to quiet down a little bit so they could get a more restful sleep.
JON DENNY: Now, the rumor out of Michigan was that not only did you dispense Snorenz to some of your patients, but you may have tried it or been urged to try it yourself. Tell me about your personal experience with the product.
DR. MIKE LEONARD: Yes, exactly, I was at home one night talking — just talking to my wife

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about the daily goings-on, et cetera, and I was telling her I gave a patient of a sample of the Snorenz, and it kind of caught her ear, and she perked up a little bit and said, Well, what — tell me about this stuff. And I told her, got a case of it, been giving it out, and she said, Well, don't give all of it out, she said, you better bring some of it home yourself, because you snore like a lumberjack, which was prior to that unbeknownst to me, I had no idea.

So, since then, I've been bringing it home. I've got a bottle of it on my bedside table that I use every night, and if I forget, as I'm dozing off to sleep at night, if I forget to use it, she will give me a little nudge at this point and make sure that I've used my spray, and I get a restful sleep, she gets a restful sleep, and we're both happy.

JON DENNY: Now, Paul, if people want more information about Snorenz, this patented product process that is apparently helping people get a full, restful, silent night's sleep across the country, where do they get more information about it?

PAUL KRAVITZ: Well, actually, for this

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show and this show only, Jon, we're giving a special bonus offer, and if they — people call in and they see this 800 number on the bottom of the screen, all they have to do is call in and they can get a special offer of Snorenz.

JON DENNY: Great, great.

PAUL KRAVITZ: And Dr. Leonard, you know, what was interesting about what you said is that I actually went to a dentist to get this appliance, and I have a terrible problem with gagging, and the appliance — I could not wear that appliance at night, and I just — I must tell you something, your wife turning you onto the product was really tremendous. I have seen your orders come through the office, so now I have gotten to speak to you, Doctor.

DR. MIKE LEONARD: Very good.

PAUL KRAVITZ: And it's a pleasure.

JON DENNY: Now, there have been not only clamps but also pills that have been tried and also strips across one's nose, very expensive and painful surgeries, as well.

DR. MIKE LEONARD: That's right.

JON DENNY: So, Doctor, would you consider Snorenz to be a logical, common sense approach to a

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typical snoring problem?

DR. MIKE LEONARD: It's an extremely logical, common sense, first line approach to dealing with it. Use it, and if you use it properly and if you use it consistently, I find that it works. It works for me and it works for a number of the patients that I'm having use it in the practice.

PAUL KRAVITZ: I am really so excited about listening to the successes of people that use the product, Jon. Every time I get a letter — I must have a stack of testimonials from different people, some of Dr. Leonard's clients — patients, as well, and I just — I get chilled all over, because I think it's just so wonderful, because to me, this was an affliction. I really think this is a major breakthrough, and for something that is really hurting people, not allowing them to sleep. Direct application of this oil or solution that we have that actually quiets the noise down, that's what happens.

JON DENNY: We want to talk — we have from Chicago a couple, Ralph and Julie Dynek (phonetic), who are being beamed in to us as we speak. Welcome to the show, guys.

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JULIE DYNEK: Hi.

RALPH DYNEK: Thank you.

JON DENNY: You experienced your own story with both a snoring problem and success with this product. Tell me a little bit about what happened and why snoring was a problem in your life.

JULIE DYNEK: Well, it — for as long as I've known Ralph, as long as we've been married, the snoring has been terrible, absolutely terrible. Sometimes I'd get up, go sleep in another bedroom. Many times I'd be like punching him, telling him please stop snoring, you're snoring, I can't sleep. He's like, I don't snore, I don't snore, but it's been a real — it was a terrible, terrible problem, and I thought of millions of things, I didn't know what to do, because it was always waking me up, every single night, and I was getting no — barely any sleep.

So, I thought of — I heard that you could like sew a tennis ball in their T-shirt, and when they roll over on their back, it's uncomfortable, but I didn't know what to do. I just said — you know, I'd just punch him overnight.

JON DENNY: I would think you would want to put the tennis ball in his mouth to stop the

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snoring problem. But you actually, Ralph, you didn't believe that you had a snoring problem until Julie did something. Is that correct?

RALPH DYNEK: Yeah, that's true. She got up in the evening while we were sleeping and went and got the tape recorder, and it was — it was a widening of the eyes. It was just — I couldn't believe it. I mean, I was loud, and I felt really bad.

I mean, I love Julie, and we have a very, very energetic life, and if you fall behind in your sleep, who knows how the next day is going to be, and sometimes, you know, we were running out of energy, and I know I was waking up, too, and the more information I got, we didn't know where to turn.

We were concerned, she was concerned, and there was also threatening — you see ads in the paper or you hear ads on TV about people could be even having life-threatening situations. So, we wanted to address it. We were definitely concerned, and thank God we ran into this product. It's been just fabulous.

JON DENNY: And Julie and Ralph from Chicago, how did the problem, before you addressed

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it with Snorenz, how did the problem affect your relationship? I mean, was it difficult for, Julie, for you to get a good night's sleep next to Ralph?

JULIE DYNEK: Oh, it was terrible, especially when I was pregnant, I mean, you don't get very much sleep anyways, I would be — like I said, I would punch him, I would kick the bed, I would like be, "shh, shh," all night long, and nothing — it would stop for a little while, I would fall asleep, and then it would start roaring again.

I can remember one time when my sister-in-law slept over, and she was actually sleeping in a spare bedroom in the basement and through the ceiling of the basement she actually thought that there was either a tornado or an earthquake or something. She came running up the stairs, and she said, What is that? What is that? I'm like, What? She's like, Oh, my God, it's Ralph's snoring. I'm like, Oh, yeah — that — I'm so used to it, you know, it's like, you know, you get used to it, but somebody new coming into the house, it was just horrible for her.

JON DENNY: And tell me about the experience and the success that you've had with

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Snorenz.

JULIE DYNEK: Well, it's kind of a funny story. My same sister-in-law told me, I have this product that I heard about, I think you guys should try it, and so we tried it for a whole week, and that week, it didn't really even dawn on me, I said to her one day, I said, I feel like I have so much energy, and I have — I don't know what's going on, I feel so rested, and she said, Oh, hello, don't you think it's that product I gave you? Don't you think it's the Snorenz? And then it dawned on me that definitely it was. At that point I was very happy.

JON DENNY: And, Ralph, do you find yourself, now that the product has helped cut down or eliminate your sound of snoring, do you feel more rested? Are you getting a better night's sleep?

RALPH DYNEK: Clearly I am, and I'll tell you what, I didn't really believe it, but I was waking up, and when you — when you go back and you think about the times or actually when it happens, if I fall asleep sometimes in the afternoon, if I'm having a nap after a rough day at work, then all of a sudden I'll be woken up, you know, you can do

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these short, ten-minute naps, and I can actually hear the tail end of the snore — of course, I'm not using the product at that time, and then I just turn and go, Oh, my gosh, I can't believe it. It's a little bit embarrassing. It's a lot embarrassing. So —

JON DENNY: And it's worked throughout the night for you every night?

RALPH DYNEK: Yeah, it's been a very solid performance out of it, and it's amazing, and you know what, the — I can't really tell, but — but Julie tells me, and then I can tell in the morning, because I can just take one look at her and know if she had a good night's rest, if she says 48th although to me nicely, because sometimes she was a little bitter at me in the morning.

JON DENNY: Um-hum, oh, I bet. Ralph and Julie, thank you for joining us from Chicago. Continue to get a full and restful, silent night's sleep.

JULIE DYNEK: Thank you.

ON SCREEN: Paul Kravitz, Snorenz

PAUL KRAVITZ: You know, Jon, they say snorers are broken into three categories, those who know they snore, those who are in denial and those

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who sleep alone. I'm happy to hear that these people bought some of our product and it works.

JON DENNY: Now, Paul, tell us how snoring can affect other aspects of people's lives. There have been — there's a study, I believe, in a Chicago newspaper about how — a study was conducted that students who snored actually were proven to get worse grades, that as the snoring decreased or was eliminated, energy levels were up, restlessness, and better grades. Have you heard that story?

PAUL KRAVITZ: Yeah, I've heard it. I have heard so many stories, Jon, talking to doctors, and I'm not a doctor, I'm a businessman, but I'm happy to have introduced this product into the world.

I have heard so many stories about students who are now getting better grades because they found a way to sleep well at night and get rest. I have heard stories of mothers — you know, actually, speaking, 60 percent — in studies that have been conducted, 60 percent of the men — of the people in the world are male are snorers and 40 percent are female, which is kind of wild when you think about it, that there are more men snorers

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than women, and I have no answer for that.

The truth of the matter is that the stories that I have — that are bound today, and the medical profession is really getting into this big time. In fact, I read an article about a month ago in the New England Medical Journal that addressed the problem of snoring. They had tried almost everything, surgery and everything else, and here's a very simple product which costs very little money, easy to use, tastes good. As a matter of fact, it's a breath freshener.

JON DENNY: I wanted to ask you about this. Essentially tree sprays, and I know Dr. Leonard is still on the line from Kalamazoo — and compliance, patient compliance is a very important issue, to actually do it right. So, it's actually three easy sprays of this.

PAUL KRAVITZ: Three sprays in the back of your throat.

JON DENNY: Right.

PAUL KRAVITZ: And you will have a good night's sleep.

JON DENNY: And tell me about morning breath, because snorers are notorious —

PAUL KRAVITZ: Well, John, I haven't slept

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with you lately, but morning breath is a problem.

JON DENNY: And we are going to keep it that way.

PAUL KRAVITZ: Right.

JON DENNY: But tell me about morning breath.

PAUL KRAVITZ: Morning breath is — actually, this takes away morning breath. I mean, everybody has a stale mouth when they wake up in the morning. This — this gives you a lasting, sweetness, pepperminty flavor in your mouth, and it lasts all day long almost. It never — it lingers, and it's just a wonderful product. It really takes away that stale breath — mouth feeling when you wake up in the morning.

JON DENNY: Now, Dr. Leonard, how has it worked for you personally back in Kalamazoo?

ON SCREEN: Caller: Dr. Michael Leonard Kalamazoo, MI

DR. MIKE LEONARD: I guess I would have to sum it up by saying my wife every night nudges me to make sure I use it, so the snoring never bothered me to begin with, and the only one that it really noticeably bothered was her. She consistently has me use it, so it works.

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JON DENNY: Right, and you would recommend this to other people out there who are experiencing the problems that snoring can bring?

DR. MIKE LEONARD: Right, I do recommend it.

JON DENNY: Dr. Leonard, thank you for joining us from Kalamazoo.

DR. MIKE LEONARD: Thank you.

ON SCREEN: This is a paid commercial for Snorenz

JON DENNY: Paul, if people want more information about Snorenz, this revolutionary product that is reducing or eliminating the sound of snoring in cases all across the world, because this product now, through your company only, is being distributed throughout the world and being — is being made — a special offer is being made here through this show, it's — do they call an 800 number that's on the screen now?

PAUL KRAVITZ: There's an 800 number that should appear on the screen, and if the — if your listeners call in, they will receive a special price for this show.

JON DENNY: Right.

PAUL KRAVITZ: And they will enjoy the

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product.
JON DENNY: And you had a little story flying here, did you not?
PAUL KRAVITZ: As a matter of fact, it was a great story. I brought — I was asked to bring a box of 24 of our Snorenz product to the show, and the box on the side had a label, it said, Snorenz," and it says, "Stops snoring," and so forth, and I was putting it up on the top of the seat on the plane, and the plane was full as all planes are today, and I get it up there.
And finally a gentleman — nice guy, got up, and he said, Let me fix it for you, and he put it up on the top, and that was — we take off, and about halfway into the flight here from — to Chicago from Florida, I hear this terrible noise, somebody snoring across the way from me. I mean, he had the plane in an uproar. It was the funniest thing you ever heard. I mean, the noise was just tremendous.
So, the guy next to me, the passenger next to me said, Well, why don't we just open up the box, I saw what you — I said, Well, I'm the manufacturer of the product. He says, Why don't we break out a bottle and spray it in his throat.

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But, you know, that's a remarkable thing. Sleeping — falling asleep on a plane, you're not only annoying other people, but you're just not getting a good restful sleep when you do that.
JON DENNY: Right. We have Cindy Brown with us from a studio, and Cindy, you have a story about snoring and how it actually affected your marriage. Tell us about that.
CINDY BROWN: Well, my husband, Kevin, and I have been married for four years now, and for the last two, he's been snoring really badly, and I always ended up on the couch because of him snoring.
JON DENNY: You ended up on the couch?
CINDY BROWN: Yes, I did.
JON DENNY: Now, how did that happen? You couldn't like hit him a couple times and send him out to Siberia?
CINDY BROWN: Yeah, I would try hitting and punching and rolling — trying to get him to roll over, and nothing worked. So, I just got frustrated and ended up on the couch.
JON DENNY: Now, what — how did it affect you? I mean, was the snoring that loud that you really couldn't sleep at night? Were you awakened

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in the middle of the night by his snoring?
CINDY BROWN: It was awful, because he would always fall asleep before me, and I would always end up not being able to go to sleep, and if I did go to sleep, I would wake right back up because of his snoring, even with the door closed in the other room, I still could hear him.
JON DENNY: You could hear him even with the door closed?
CINDY BROWN: Yes.
JON DENNY: So, your husband, Kevin, is snoring in the other room. You're out on the couch in the living room with the door closed still hearing the snoring. It's affecting your sleep, obviously.
CINDY BROWN: Right.
JON DENNY: How is it affecting your relationship?
CINDY BROWN: Well, it wasn't so good. We were never sleeping together, and I would wake up the next day being very angry at him for him snoring. I knew it wasn't his fault, but it was — it sure seemed like it should be.
JON DENNY: And how was it affecting you during the course of the day, you know, you're not

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getting obviously the full restful, silent night's sleep that you probably deserve.
CINDY BROWN: Right. Well, I was always tired, constant tired, never felt energetic. Then once he quit snoring, you realize how much you need sleep.
JON DENNY: It's a good thing, sleep.
CINDY BROWN: Oh, definitely.
JON DENNY: How did you get turned on to or at least become aware of this product called Snorenz?
CINDY BROWN: Well, it was given to us to try, and I thought, Yeah, right, this isn't going to work, but we tried it, and it ended up working.
JON DENNY: Hmm. And did it work for you right away and did it work for you through the night?
CINDY BROWN: Yeah, it did. Actually, it was funny, because the first week it worked, and then it quit working, and so then we found out that he shouldn't eat anything or drink anything about a half an hour to an hour before.
JON DENNY: Hmm. And does it now work for you? Is it something that Kevin is using at your behest and insistence, probably, every night?

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CINDY BROWN: Yes. Yes, it does. Yep, I make sure that if he doesn't take it, I'm waking him back up to make sure he takes it.

JON DENNY: And I presume that you've moved book into the bedroom?

CINDY BROWN: Yes, I have.

JON DENNY: And I feel like I'm prying here.

CINDY BROWN: No, no. I have — we're sleeping together again, and so everything is great.

JON DENNY: That's terrific. Cindy, thank you for your story, and continue to get a full restful silent night's sleep with Snorenz.

CINDY BROWN: Thank you.

PAUL KRAVITZ: Isn't that a wonderful story?

JON DENNY: Yeah, it really is.

Now, tell me about how as a former snorer before you tried Snorenz, how has it improved your life and your marriage?

PAUL KRAVITZ: Well, it really has. Obviously my — I'm bigger than my wife, so I — she left the bedroom, I didn't, but actually, my wife — my rest, my days are a lot more vigorous,

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my wife is very much happier, and even my daughter, who sleeps in a room four bedrooms down, doesn't hear me anymore. So, it really has improved my life.

JON DENNY: Right. And if people want more information about Snorenz, the all-natural spray that people are using all around the country now to great effect, where do they get more information, Paul?

PAUL KRAVITZ: Well, John, I'm delighted that we have a special offer today on your show, and if the listeners would call the 800 number on the bottom of the screen and call in their order today, they will receive a special price and a money-back guarantee if it doesn't work.

JON DENNY: All right. So, it must be gratifying for you to get all these letters and phone calls and people who come up to you on the street telling you thank you, you not only helped them get better sleep, you have saved some marriages, I assume, in the process.

PAUL KRAVITZ: It sounds like I have, John.

JON DENNY: That's great.

PAUL KRAVITZ: It truly does.

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JON DENNY: That's great. Paul, thank you for being here.

PAUL KRAVITZ: Thank you for having me.

JON DENNY: If you want more information about Snorenz, the patented process, all-natural spray that could help reduce or eliminate the sound of snoring, if you are a snorer or you sleep next to a snorer, this may be the product for you. Money-back guarantee, it costs pennies to address this very serious problem, and hopefully you shall all get a full, restful, silent night's sleep.

I'm Jon Denny on Vantage Point. I think I'm going to knock off a few sprays, because I've been told I'm a snorer. We'll see you next time on Vantage Point. Take care.

ON SCREEN: For more information or to order Snorenz call: NO NUMBER
Tru-Vantage International
7300 N. Lehigh Ave.
Niles, IL 60714
(847)647-0300
If snoring is accompanied by any signs of Sleep Apnea, you should consult a physician before using any product.

The preceding has been a paid commercial

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program for SNORENZ.

(The videotape was concluded.)

CERTIFICATE OF TRANSCRIBER

DOCKET/FILE NUMBER: 0023211
CASE TITLE: Med Gen, Incorporated
RECORDING DATE: October 13, 1999
TRANSCRIPTION DATE: May 15, 2000
I HEREBY CERTIFY that the transcript contained herein is a full and accurate transcript of the videotapes transcribed by me on the above cause before the FEDERAL TRADE COMMISSION to the best of my knowledge and belief.

DATED:

SUSANNE Q. TATE

CERTIFICATE OF PROOFREADER

I HEREBY CERTIFY that I proofread the transcript for accuracy in spelling, hyphenation, punctuation and format.

DIANE QUADE

Lawyer's Notes

DECISION AND ORDER

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

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

The Commission having thereafter considered the matter and having determined that it had reason to believe that the respondents have violated the said Act, and that a complaint should issue stating its charges in that respect, and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of (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, and having determined to modify the Decision and Order in certain respects, 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, Tru-Vantage International, L.L.C., is a limited liability company with its office and principal place of business located at 7300 North Lehigh Avenue, Niles, Illinois 60714.

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

ORDER

DEFINITIONS

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

1. "Competent and reliable scientific evidence" shall mean tests, analyses, research, studies, or other evidence based on the expertise of professionals in the relevant area, that has been conducted and evaluated in an objective manner by persons qualified to do so, using procedures generally accepted in the profession to yield accurate and reliable results.

2. "Clearly and prominently" shall mean as follows:

   A. In an advertisement communicated through an electronic medium (such as television, video, radio, and interactive media such as the Internet and online services), the disclosure shall be presented simultaneously in both the audio and video portions of the advertisement. Provided, however, that in any advertisement presented solely through video or audio means, the disclosure may be made through the same means in which the ad is presented. The audio disclosure shall be delivered in a volume and cadence sufficient for an ordinary consumer to hear and comprehend it. The video disclosure shall be of a size and shade, and shall appear on the screen for a duration sufficient for an ordinary consumer to read and comprehend it. In addition to the foregoing, in interactive media, the disclosure shall also be unavoidable and shall be presented prior to the consumer incurring any financial obligation.

B. In a print advertisement, promotional material, or instructional manual, the disclosure shall be in a type size and location sufficiently noticeable for an ordinary consumer to read and comprehend it, in print that contrasts with the background against which it appears. In multipage documents, the disclosure shall appear on the cover or first page.

C. On a product label, the disclosure shall be in a type size and location on the principal display panel sufficiently noticeable for an ordinary consumer to read and 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.

3. Unless otherwise specified, "respondent" shall mean Tru-Vantage International, L.L.C., and its successors and assigns and its officers, agents, representatives, and employees.

4. "Drug" shall mean as defined in Section 15 of the Federal Trade Commission Act, 15 U.S.C. § 55.

5. "Food" shall mean as defined in Section 15 of the Federal Trade Commission Act, 15 U.S.C. § 55.

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 respondent, directly or through any corporation, subsidiary, division, or other device, in connection with the advertising, promotion, offering for sale, sale, or distribution of SNORenz or any other food, drug, or dietary

supplement, as "food" and "drug" are defined in Section 15 of the Federal Trade Commission Act, in or affecting commerce, shall not make any representation, in any manner, expressly or by implication that:

A. Such product reduces or eliminates snoring or the sound of snoring in users of the product,

B. A single application of such product reduces or eliminates snoring or the sound of snoring for any specified period of time, or

C. Such product can eliminate, reduce or mitigate the symptoms of sleep apnea including daytime tiredness and frequent interruptions of deep restorative sleep;

unless at the time the representation is made, respondent possesses and relies upon competent and reliable scientific evidence that substantiates the representation.

II.

IT IS FURTHER ORDERED that respondent, directly or through any corporation, subsidiary, division, or other device, in connection with the manufacturing, labeling, advertising, promotion, offering for sale, sale, or distribution of any product that has not been shown by competent and reliable scientific evidence to be effective in the treatment of sleep apnea**,** in or affecting commerce, shall not represent, in any manner, expressly or by implication, that the product is effective in reducing or eliminating snoring or the sounds of snoring, unless it discloses, clearly and prominently, and in close proximity to the representation, that such product is not intended to treat sleep apnea, that the symptoms of sleep apnea include loud snoring, frequent episodes of totally obstructed breathing during sleep, and excessive daytime sleepiness, that sleep apnea is a potentially life-threatening condition, and that persons who have symptoms of sleep apnea should consult their physician or a specialist in sleep medicine. Provided, however, that for any television commercial

or other video advertisement fifteen (15) minutes in length or longer or intended to fill a broadcasting or cablecasting time slot fifteen (15) minutes in length or longer, the disclosure shall be made within the first thirty (30) seconds of the advertisement and immediately before each presentation of ordering instructions for the product. Provided further, that, for the purposes of this provision, the presentation of a telephone number, e-mail address, or mailing address for listeners to contact for further information or to place an order for the product shall be deemed a presentation of ordering instructions so as to require the announcement of the disclosure provided herein.

III.

IT IS FURTHER ORDERED that respondent, directly or through any corporation, subsidiary, division, or other device, in connection with the manufacturing, labeling, advertising, promotion, offering for sale, sale, or distribution of SNORenz or any other product, service, or program in or affecting commerce, shall not make any representation, in any manner, expressly or by implication, about the benefits, performance, efficacy or safety of any such product, service, or program, unless, at the time the representation is made, respondent possesses and relies upon competent and reliable evidence, which, when appropriate, must be competent and reliable scientific evidence, that substantiates the representation.

IV.

IT IS FURTHER ORDERED that respondent, directly or through any corporation, subsidiary, division, or other device, in connection with the manufacturing, labeling, advertising, promotion, offering for sale, sale, or distribution of any product, service, or program in or affecting commerce, shall not misrepresent, in any manner, expressly or by implication, the existence, contents, validity, results, conclusions, or interpretations of any test, study, or research.

V.

IT IS FURTHER ORDERED that respondent, directly or through any corporation, subsidiary, division, or other device, in connection with the manufacturing, labeling, advertising, promotion, offering for sale, sale, or distribution of any product, service, or program in or affecting commerce, shall not represent, in any manner, expressly or by implication, that the experience represented by any user testimonial or endorsement of the product, service, or program represents, the typical or ordinary experience of members of the public who use the product, service, or program unless:

A. At the time it is made, respondent possesses and relies upon competent and reliable scientific evidence that substantiates the representation; or

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

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

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

For purposes of this Part, "endorsement" shall mean as defined in 16 C.F.R. § 255.0(b).

VI.

IT IS FURTHER ORDERED that respondent, directly or through any corporation, subsidiary, division, or other device, in connection with the manufacturing, labeling, advertising, promotion, offering for sale, sale, or distribution of any product, service, or program in or affecting commerce, shall disclose, clearly and prominently, and in close proximity to the

endorsement, a material connection, where one exists, between a person or entity providing an endorsement of any product, service, or program, as "endorsement" is defined 16 C.F.R. 255.0 (b) and respondent, or any other individual or entity manufacturing, labeling, advertising, promoting, offering for sale, selling, or distributing such product, service, or program. For purposes of this order, "material connection" shall mean any relationship that might materially affect the weight or credibility of the endorsement and would not be reasonably expected by endorsers.

VII.

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

VIII.

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

IX.

IT IS FURTHER ORDERED that respondent and its successors and assigns shall, for five (5) years after the last date of dissemination of any representation covered by this order, maintain and upon request make available to the Federal Trade Commission for inspection and copying:

A. All advertisements and promotional materials containing the representation;

B. All materials that were relied upon in disseminating the representation; and

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

X.

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

XI.

IT IS FURTHER ORDERED that respondent and its successors and assigns shall notify the Commission at least thirty (30) days prior to any change in the corporation that may affect compliance obligations arising under this order, including but not limited to a dissolution, assignment, sale, merger, or other action that would result in the emergence of a successor corporation; the creation or dissolution of a subsidiary, parent, or affiliate that engages in any acts or practices subject to this order; the proposed filing of a bankruptcy petition; or a change in the corporate name or address. Provided, however, that, with respect to any proposed change in the corporation about which respondent learns less than thirty (30) days prior to the date such action is to take place, respondent shall notify the Commission as soon as is practicable

after obtaining such knowledge. All notices required by this Part shall be sent by certified mail to the Associate Director, Division of Enforcement, Bureau of Consumer Protection, Federal Trade Commission, 601 Pennsylvania Ave., N.W., S-4302, Washington, D.C. 20580.

XII.

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

XIII.

This order will terminate on February 5, 2022, 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 an agreement, subject to final approval, to a proposed consent order from Tru-Vantage International, L.L.C. ("TVI" or the "proposed respondent"). TVI is an infomercial producer. It also purchases media time, disseminates its infomercials, and fulfills the orders for products featured in the infomercials.

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 advertising and promotional practices related to the sale of Snorenz, a purported anti-snoring product. Snorenz is a dietary supplement consisting of oils and vitamins that is sprayed on the back of the throat of persons who snore. The Commission's complaint charges that TVI failed to have a reasonable basis for claims, which were contained in infomercials it produced to promote Snorenz, about the product's efficacy in (1) reducing or eliminating snoring or the sounds of snoring, (2) reducing or eliminating snoring or the sounds of snoring for six to eight hours, and (3) treating the symptoms of sleep apnea. The complaint also alleges that TVI lacked a reasonable basis to substantiate representations that testimonials from consumers who used Snorenz represented the typical and ordinary experience of users of the product. TVI is also charged with making false claims that clinical proof establishes the efficacy of Snorenz. Further the complaint alleges that that the proposed respondent failed to disclose that the product is not intended to treat sleep apnea; that sleep apnea is a potentially life-threatening disorder characterized by loud snoring, frequent interruptions of sleep, and daytime tiredness; and that persons experiencing those symptoms should seek medical attention. Finally, the complaint alleges that

TVI failed to disclose adequately that a material connection existed between a physician who appeared in the infomercials to endorse the product and the product's manufacturer and marketer, Med Gen, Inc. A separate consent settlement with Med Gen, Inc. (File No. 002-3211) is also being placed on the public record for comment.

Part I of the consent order requires that TVI possess competent and reliable scientific evidence to substantiate representations that Snorenz or any other food, drug, or dietary supplement reduces or eliminates snoring or the sound of snoring; reduces or eliminates snoring or the sound of snoring for any specified period of time through a single application; or eliminates, reduces or mitigates the symptoms of sleep apnea. Part II of the order requires that, for any product that has not been shown to be effective in the treatment of sleep apnea, TVI must affirmatively disclose, whenever it represents that a product is effective in reducing or eliminating snoring or the sounds of snoring, a warning statement about sleep apnea and the need for physician consultation. Part III of the order requires proposed respondent to substantiate any representation about the benefits, performance, efficacy, or safety of Snorenz or any other product, service or program. Part IV prohibits false claims about scientific support for any product, service, or program. Part V requires that, for any consumer endorsement or testimonial respondent uses to promote a product, service or program, it must either possess competent and reliable scientific evidence that the testimonial represents the typical or ordinary experience of users or make an affirmative disclosure that the testimonial is not typical. Part VI requires an affirmative disclosure of any material connection between TVI and any endorser or between an endorser and the marketer. Parts VII and VIII of the proposed order permit proposed respondent to make certain claims for drugs or dietary supplements, respectively, that are permitted in labeling under laws and/or regulations administered by the U.S. Food and Drug Administration.

The remainder of the proposed order contains standard requirements that respondent maintain advertising and any materials relied upon as substantiation for any representation

covered by substantiation requirements under the order; 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 its compliance with the order. Part XIII of the proposed order is a provision whereby the order, absent certain circumstances, terminates twenty years from the date of issuance.

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.

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.

Complaint

IN THE MATTER OF

INA-HOLDING SCHAEFFLER KG, 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-4071; File No. 0210002
Complaint, December 20, 2001--Decision, February 5, 2002

This consent order addresses the acquisition by Respondent INA-Holding Schaeffler KG ("INA") of Respondent FAG Kugelfischer Georg Schäfer AG ("FAG"); the two firms are the only two suppliers in the world of cartridge ball screw support bearings, which are used in machine tools such as grinding machines, milling machines, and laser drilling and cutting systems to reduce the friction associated with the rotation of a rolling screw, which is used in turn to control linear motion for accurate positioning. The consent order, among other things, requires the respondents to divest FAG's cartridge ball screw support bearings business – including specialized tooling equipment, technical drawings, advertising and training materials, customer lists, and other assets used in the research, development, manufacturing, quality assurance, marketing, customer support and sale of the bearings – to Aktiebolaget SKF. The order also requires the respondents, for six months, to provide SKF with personnel, assistance, and training, and transitional manufacturing services. In addition, the order requires the respondents to provide the Commission with prior notice before entering into any joint venture activities with NTN Corporation of Japan affecting North America.

Participants

For the Commission: *Nicholas R. Koberstein, Sean G. Dillon, Jeffrey H. Perry, Ann Malester, Rendell A. Davis, Jr., Daniel P. Ducore, Roy Levy, Leslie Farber* and *Mary T. Coleman.*

For the Respondents: *Wayne D. Collins, Shearman & Sterling, Christopher Smith* and *Eugene J. Meigher, Arent, Fox, Kintner, Plotkin & Kahn PLLC,* and *Michael L. Weiner* and *Jill A. Ross, Skadden, Arps, Slate, Meagher and Flom 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 Respondents INA-Holding Schaeffler KG ("INA"), a corporation, and FAG Kugelfischer Georg Schäfer AG ("FAG"), a corporation, both subject to the jurisdiction of the Commission, have entered into an agreement whereby INA would acquire all of the issued and outstanding securities and convertible debentures of FAG in violation of Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18, and Section 5 of the Federal Trade Commission Act ("FTC Act"), as amended, 15 U.S.C. § 45, and it appearing to the Commission that a proceeding in respect thereof would be in the public interest, hereby issues its Complaint, stating its charges as follows:

I. RESPONDENTS

1. Respondent INA is a corporation organized, existing and doing business under and by virtue of the laws of Germany, with its office and principal place of business located at Industriestrasse 1-3, D-91072 Herzogenaurach, Germany. INA's principal subsidiary in the United States is located at 308 Springhill Farm Road, Fort Mill, South Carolina 29715.

2. Respondent FAG is a corporation organized, existing and doing business under and by virtue of the laws of Germany, with its office and principal place of business located at Georg-Schäfer-Straße 30, 97421 Schweinfurt, Germany. FAG's principal subsidiary in the United States, Barden Corporation, is located at 200 Park Avenue, P.O. Box 2449, Danbury, Connecticut 06813.

3. Respondents INA and FAG are engaged in, among other things, the research, development, manufacture and sale of ball and roller bearings, including, but not limited to, cartridge ball screw support bearings ("CBSSBs").

4. 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 Federal Trade Commission Act, as amended, 15 U.S.C. § 44.

II. THE PROPOSED ACQUISITION

5. On or about September 13, 2001, INA announced a cash tender offer to acquire all of the issued and outstanding shares of FAG ("Acquisition"). On or about October 15, 2001, FAG announced that it had reached a legally binding agreement with INA regarding the pricing of the Acquisition and the management of the combined firm ("Agreement"). Under the terms of the Agreement, the Acquisition is valued at approximately $650 million.

III. THE RELEVANT MARKET

6. 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 CBSSBs. CBSSBs are a type of bearing used in the manufacturing of machine tool equipment. CBSSBs are sold both to original equipment manufacturers as well as after-market customers for replacement purposes.

7. For the purposes of this Complaint, the world is the relevant geographic area in which to analyze the effects of the Acquisition in the relevant line of commerce.

IV. THE STRUCTURE OF THE MARKET

8. INA and FAG are the only two suppliers of CBSSBs in the world. Thus, the market for the research, development, manufacture and sale of CBSSBs is extremely highly concentrated, as measured by the Herfindahl-Hirschman Index.

The proposed acquisition, if consummated, would result in a monopoly in the relevant market.

V. ENTRY CONDITIONS

9. Entry into the research, development, manufacture and sale of CBSSBs is a difficult process because of, among other things, the time and cost associated with researching and developing a line of CBSSB products, acquiring the necessary production assets, and developing the expertise needed to successfully design, produce, and market these products.

10. New entry into the relevant market for CBSSBs is not likely to occur to deter or counteract the adverse competitive effects described in Paragraph 12 because the costs of entering the market and producing CBSSBs are high relative to the potential sales opportunities available to an entrant.

11. New entry into the relevant market for CBSSBs would not occur in a timely manner to deter or counteract the adverse competitive effects described in Paragraph 12 because it would take over two years for an entrant to accomplish the steps required for entry and achieve a significant market impact.

VI. EFFECTS OF THE ACQUISITION

12. 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 INA and FAG in the relevant market;

b. by creating a monopoly in the relevant market, thereby substantially increasing the likelihood that INA will unilaterally exercise market power in the relevant market;

c. by reducing current incentives to improve service or product quality, or pursue further innovation in the relevant market; and

d. by increasing the likelihood that customers of CBSSBs would be forced to pay higher prices.

VII. VIOLATIONS CHARGED

13. The Agreement constitutes a violation of Section 5 of the FTC Act, as amended, 15 U.S.C. § 45.

14. The 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 FTC Act, as amended, 15 U.S.C. § 45.

WHEREFORE, THE PREMISES CONSIDERED, the Federal Trade Commission on this twentieth day of December, 2001, issues its Complaint against said Respondents.

By the Commission, Chairman Muris not participating.

DECISION AND ORDER

The Federal Trade Commission ("Commission") having initiated an investigation of the proposed acquisition of Respondent FAG Kugelfischer Georg Schäfer AG ("FAG") by Respondent INA-Holding Schaeffler KG ("INA"), 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. Proposed Respondent INA is a corporation organized, existing and doing business under and by virtue of the laws of Germany, with its office and principal place of business located at Industriestrasse 1-3, D-91072 Herzogenaurach, Germany.

2. Proposed Respondent FAG is a corporation organized, existing and doing business under and by virtue of the laws of Germany, with its office and principal place of business located at Georg-Schäfer-Straße 30, 97421 Schweinfurt, Germany.

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. "INA" means INA-Holding Schaeffler KG, its directors, officers, employees, agents, representatives, predecessors, successors, and assigns; and joint ventures, subsidiaries, divisions, groups, and affiliates controlled by INA-Holding Schaeffler KG, and the respective directors, officers, employees, agents, representatives, successors, and assigns of each.

B. "FAG" means FAG Kugelfischer Georg Schäfer AG, its directors, officers, employees, agents, representatives, predecessors, successors, and assigns; and joint ventures, subsidiaries, divisions, groups, and affiliates controlled by FAG Kugelfischer Georg Schäfer AG, and the respective directors, officers, employees, agents, representatives, successors, and assigns of each.

C. "Respondents" means INA and FAG.

D. "Acquirer" means SKF or any other Person that acquires the Assets To Be Divested, and any Additional Assets To Be Divested, pursuant to this Order.

E. "Acquisition Date" means the date, if any, on which INA acquires any voting securities or assets of FAG in addition to those held as of December 1, 2001.

F. "Additional Assets To Be Divested" means any FAG Machinery that the trustee elects to divest pursuant to Paragraph III.A. of this Order.

G. "Assets To Be Divested" means all of the following:

1. The name, address, and telephone number of each Contact Person for each Customer of INA and each Customer of FAG;

2. All of FAG's rights, title, and interests in all Tools and Technical Drawings relating in any way to the research, development, manufacture, or quality assurance of Cartridge Ball Screw Support Bearings by FAG, regardless of whether such assets relate exclusively to such activities;

3. All of FAG's rights, title, and interests in all documents relating to the research, development, manufacture, quality assurance, marketing, customer support, or sale of Cartridge Ball Screw Support Bearings, regardless of whether such documents relate exclusively to such activities (but subject to Paragraph II.C.5. of this Order), including, but not limited to, books, records, files, marketing materials, advertising materials, training materials, product data, price lists, sales materials, marketing information, customer files, and promotional materials; and

4. All of FAG's rights, title, and interests in any assets, tangible and intangible, that are reasonably necessary for

the Acquirer to engage in the research, development, manufacture, quality assurance, marketing, customer support, or sale of Cartridge Ball Screw Support Bearings in the same manner, and achieving the same quality and customer acceptance, as did FAG prior to the Divestiture Date, including, but not limited to, all rights, title and interests in inventions, technology, contractual rights, patents, patent applications, trade secrets, know-how, technical information, software, designs, and processes.

H. "Cartridge Ball Screw Support Bearings" means self-retained, ready to mount, double-row axial angular contact ball screw support bearing units with integral seals and incorporating an outer ring, two inner rings, and ball cage assemblies, that are designed for use as an alternative to two single-row angular contact ball bearings, including but not limited to, all INA products with part numbers identified with a ZKLN or ZKLF prefix and all FAG products with part numbers identified with a DBSB or DBSBS prefix and a 2RS.T suffix.

I. "Commission" means the Federal Trade Commission.

J. "Contact Person" means the Person or Persons at the Customer who has or have been, in the normal course of business, the Person or Persons to whom Respondents send information to or contact regarding Respondents' Cartridge Ball Screw Support Bearings.

K. "Customer" means any Person that has acquired a Cartridge Ball Screw Support Bearing manufactured by INA or FAG since January 1, 1999, including, but not limited to, distributors, original equipment manufacturers, and end-use customers.

L. "Divestiture Agreement" means the SKF Divestiture Agreement or any other agreement or agreements pursuant to which Respondents, or a trustee, divest the Assets To Be

Divested, and any Additional Assets To Be Divested, pursuant to this Order.

M. "Divestiture Date" means the date on which the Respondents have fully completed the divestiture, pursuant to this Order, of the Assets To Be Divested and any Additional Assets To Be Divested, to the Acquirer.

N. "FAG Machinery" means all tangible assets, other than real estate, used by FAG at any time prior to the Divestiture Date in the manufacture of Cartridge Ball Screw Support Bearings, regardless of whether such assets relate exclusively to such manufacture.

O. "NTN" means NTN Corporation, a Japanese corporation with its principal place of business located at 3-17, 1 Chome, Kyomachibori, Nishi-ku, Osaka 550-0003, Japan; and joint ventures, subsidiaries, divisions, groups, and affiliates controlled by NTN Corporation.

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

Q. "SKF" means SKF Österreich AG, an Austrian corporation which has its principal place of business at Seitenstettner Strasse 15, AT - 4400 Stey, Austria, and which is a wholly-owned subsidiary of Aktiebolaget SKF, a Swedish corporation with its principal place of business located at Hornsgatan 1, Goteborg, Sweden.

R. "SKF Divestiture Agreement" means the Sales and Transfer Agreement dated December 13, 2001, that is attached as Confidential Appendix A to this Order.

S. "Technical Drawings" means any precise drawing.

T. "Tools" means fixtures that are fastened to a machine tool, and that make contact with the part being produced in order to achieve the desired geometry of such part.

II.

IT IS FURTHER ORDERED that:

A. No later than twenty (20) business days after the Acquisition Date, Respondents shall divest to SKF, absolutely, and in good faith, at no minimum price, the Assets To Be Divested as an on-going business. The SKF Divestiture Agreement shall be incorporated into this Order and made a part hereof, and shall not be construed to vary from or contradict the terms of this Order. Any failure to comply with the terms of the SKF Divestiture Agreement shall constitute a violation of this Order. PROVIDED, HOWEVER, if, at the time the Commission makes the Order final, the Commission determines that SKF is not an acceptable acquirer or that the SKF Divestiture Agreement is not an acceptable manner of divestiture, Respondents shall, within three (3) months of the date Respondents receive notice of such determination from the Commission, divest the Assets To Be Divested absolutely and in good faith, at no minimum price, as an on-going business, to an acquirer that receives the prior approval of the Commission and only in a manner that receives the prior approval of the Commission.

B. If Respondents have divested the Assets To Be Divested to SKF prior to the date this Order becomes final, and if, at the time the Commission makes the Order final, the Commission determines that SKF is not an acceptable acquirer or that the SKF Divestiture Agreement is not an acceptable manner of divestiture, and so notifies Respondents, then Respondents shall, within three (3) business days of receiving such notification, rescind the transaction with SKF, and shall divest the Assets To Be Divested in accordance with the proviso to Paragraph II.A. of this Order.

C. Respondents shall divest the Assets To Be Divested and any Additional Assets To Be Divested on the following terms, in addition to others that may be required by this Order and by the Divestiture Agreement, and shall agree with the Acquirer to do the following:

1. Respondents shall place no restrictions on the use by the Acquirer of the Assets To Be Divested and of any Additional Assets To Be Divested.

2. Respondents shall waive any claim that any tangible or intangible asset of FAG relating to the research, development, manufacture, or quality assurance of Cartridge Ball Screw Support Bearings infringes in any way on any right of INA, and shall not make any such claim against the Acquirer.

3. For a period of at least ten (10) years following the Divestiture Date, Respondents shall maintain the confidentiality of all proprietary business information conveyed to the Acquirer pursuant to this Order.

4. Respondents shall provide to the Acquirer, at no additional cost, for a period of up to six (6) months after the Divestiture Date, such personnel, assistance, and training as the Acquirer might reasonably request in order for the Acquirer to engage in the research, development, manufacture, quality assurance, marketing, customer support, or sale of Cartridge Ball Screw Support Bearings in the same manner, and achieving the same quality and customer acceptance, as did FAG prior to the Divestiture Date.

5. Notwithstanding any other provision of Paragraphs II. and III., Respondents may redact from assets identified in Paragraph I.G.3. of this Order, and conveyed to the Acquirer, any information that does not relate to the research, development, manufacture, quality assurance,

marketing, customer support, or sale of Cartridge Ball Screw Support Bearings.

6. Upon the request of the Acquirer, for a period of up to six (6) months after the Divestiture Date, Respondents shall manufacture, and deliver to the Acquirer, Cartridge Ball Screw Support Bearings in sufficient quantities to satisfy the reasonable requirements of customers of the Assets To Be Divested; provided that the Acquirer makes available to Respondents any Tools acquired from Respondents that are necessary for such manufacture. Such manufacture and sale of Cartridge Ball Screw Support Bearings shall be on the following terms and conditions:

   a. The price to the Acquirer of such Cartridge Ball Screw Support Bearings shall not exceed Respondents' variable cost.

   b. Respondents shall make representations and warranties that the Cartridge Ball Screw Support Bearings supplied (i) meet all applicable product specifications and (ii) are merchantable so as to pass without objection in the trade under the product description. Respondents shall agree to indemnify, defend and hold the Acquirer harmless from any and all suits, claims, actions, demands, liabilities, expenses or losses resulting from the failure of the products supplied by Respondents to the Acquirer to comply with such representations and warranties. This obligation shall not require Respondents to be liable for any negligent act or omission of the Acquirer or for any representations and warranties, express or implied, made by the Acquirer that exceed the representations and warranties made by Respondents to the Acquirer. Respondents shall make representations and warranties that Respondents will hold harmless and indemnify the Acquirer for any liabilities or loss of profits resulting

from the failure by Respondents to deliver Cartridge Ball Screw Support Bearings in a timely manner unless Respondents can demonstrate that such failure was entirely beyond the control of Respondents and was in no part the result of negligence or willful misconduct on Respondents' part.

D. After the Divestiture Date, Respondents shall not use, in the sale of Cartridge Ball Screw Support Bearings, any catalog numbers used at any time prior to the Divestiture Date by FAG to identify Cartridge Ball Screw Support Bearings manufactured by FAG.

E. The purpose of Paragraphs II. and III. of this Order is to ensure the continuation of the Assets To Be Divested and any Additional Assets To Be Divested as, or as part of, an on-going viable enterprise engaged in the same business in which such assets were engaged at the time of the announcement of the Acquisition by Respondents and to remedy the lessening of competition alleged in the Commission's Complaint.

III.

IT IS FURTHER ORDERED that:

A. If Respondents have not divested, absolutely and in good faith and with the Commission's prior approval, the Assets To Be Divested within the time and in the manner required by Paragraph II. of this Order, the Commission may appoint a trustee to divest those assets; provided, however, that the trustee may also divest, in addition to the Assets To Be Divested, any FAG Machinery that the trustee may elect to divest, subject to the approval of the Commission. In the event that the Commission or the Attorney General brings an action pursuant to Section 5(*l*) of the Federal Trade Commission Act, 15 U.S.C. § 45(*l*), or any other statute enforced by the Commission, Respondents shall consent to the appointment of a trustee in such action. Neither the

appointment of a trustee nor a decision not to appoint a trustee under this Paragraph shall preclude the Commission or the Attorney General from seeking civil penalties or any other relief available to it, including a court-appointed trustee, pursuant to Section 5(*l*) of the Federal Trade Commission Act, or any other statute enforced by the Commission, for any failure by Respondents to comply with this Order.

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

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

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

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

4. The trustee shall have twelve (12) months from the date the Commission or court approves the trust agreement described in Paragraph III.B.3. to accomplish the divestiture. If, however, at the end of the twelve-month period, the trustee has submitted a plan of divestiture or believes that divestiture can be achieved within a reasonable time, the divestiture period may be extended by the Commission, or, in the case of a court-appointed trustee, by the court; provided, however, the Commission may extend the period for no more than two (2) additional periods of twelve (12) months each.

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

6. The 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 only in a manner that receives the prior approval of the Commission, and only to an acquirer that receives the prior approval of the Commission. Provided, however, if the trustee receives bona fide offers for the Assets To Be Divested, and any Additional Assets To Be Divested, from more than one acquiring entity, and if the Commission determines to approve more than one such acquiring entity, the trustee

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

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

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

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

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

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.

14. Any trustee appointed pursuant to Paragraph III.A. of this Order may be the same Person appointed as Monitor pursuant to Paragraph III.A. of the Order to Maintain Assets.

IV.

IT IS FURTHER ORDERED, that for a period commencing on the date this Order becomes final and continuing for ten (10) years, Respondents shall not, without providing advance written notification to the Commission:

A. acquire, directly or indirectly, through subsidiaries or otherwise, any ownership, leasehold, or other interest, in whole or in part, in any of the assets divested pursuant to Paragraph II. or III. of this Order; or

B. enter into any collaboration, joint venture or other such arrangement with NTN related to any product sold or service provided by INA or FAG in North America at any time within two years prior to entering the collaboration, joint venture of other such arrangement with NTN.

Said notification shall be given on the Notification and Report Form set forth in the Appendix to Part 803 of Title 16 of the Code of Federal Regulations as amended (hereinafter referred to as "the Notification"), and shall be prepared and transmitted in accordance with the requirements of that part, except that no filing fee will be required for any such notification, notification shall be filed with the Secretary of the Commission, notification need not be made to the United States Department of Justice, and notification is required only of Respondents and not of any other party to the transaction. Respondents shall provide the Notification to the Secretary of 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 submitting such additional information or documentary material. Early termination of the waiting periods in this Paragraph may be requested and, where appropriate, granted by letter from the Commission's 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 within sixty (60) days after the date this Order becomes final and every sixty (60) days thereafter until they have fully complied with their obligations under Paragraphs II.A., II.B. and III. of this Order, each Respondent shall submit to the Commission, and to any Monitor

appointed pursuant to Paragraph III.A. of the Order to Maintain Assets, a verified written report setting forth in detail the manner and form in which it intends to comply, is complying, and has complied with Paragraphs II. and III. of this Order and with the Order to Maintain Assets. Respondents shall include in such compliance reports, among other things that are required from time to time, a full description of the efforts being made to comply with Paragraphs II. and III. of the Order, including a description of all substantive contacts or negotiations for the divestiture and the identity of all parties contacted. Respondents shall include in their compliance reports copies of all written communications to and from such parties, all internal memoranda, and all reports and recommendations concerning divestiture.

VI.

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.

VII.

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

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

B. Upon five (5) days' notice to Respondents and without restraint or interference from them, to interview officers, directors, employees, agents or independent contractors of Respondents, who may have counsel present, relating to any matters contained in this Order.

VIII.

IT IS FURTHER ORDERED that this Order will terminate on February 5, 2022.

By the Commission, Chairman Muris not participating.

CONFIDENTIAL

APPENDIX A

[Redacted From Public Record Version]

ORDER TO MAINTAIN ASSETS

The Federal Trade Commission ("Commission") having initiated an investigation of the proposed acquisition of Respondent FAG Kugelfischer Georg Schäfer AG ("FAG") by Respondent INA-Holding Schaeffler KG ("INA"), 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 the proposed Decision and Order and Order to Maintain Assets, 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 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. Proposed Respondent INA is a corporation organized, existing and doing business under and by virtue of the laws of Germany, with its office and principal place of business

located at Industriestrasse 1-3, D-91072 Herzogenaurach, Germany.

2. Proposed Respondent FAG is a corporation organized, existing and doing business under and by virtue of the laws of Germany, with its office and principal place of business located at Georg-Schäfer-Straße 30, 97421 Schweinfurt, Germany.

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. "INA" means INA-Holding Schaeffler KG, its directors, officers, employees, agents, representatives, predecessors, successors, and assigns; and joint ventures, subsidiaries, divisions, groups, and affiliates controlled by INA-Holding Schaeffler KG, and the respective directors, officers, employees, agents, representatives, successors, and assigns of each.

B. "FAG" means FAG Kugelfischer Georg Schäfer AG, its directors, officers, employees, agents, representatives, predecessors, successors, and assigns; and joint ventures, subsidiaries, divisions, groups, and affiliates controlled by FAG Kugelfischer Georg Schäfer AG, and the respective directors, officers, employees, agents, representatives, successors, and assigns of each.

C. "Respondents" means INA and FAG.

D. "Acquirer" means SKF or any other Person that acquires the Assets To Be Divested, and any Additional Assets To Be Divested, pursuant to the Decision & Order.

E. "Additional Assets To Be Divested" means any FAG Machinery that the trustee elects to divest pursuant to Paragraph III.A. of the Decision & Order.

F. "Assets To Be Divested" means all of the following:

1. The name, address, and telephone number of each Contact Person for each Customer of INA and each Customer of FAG;

2. All of FAG's rights, title, and interests in all Tools and Technical Drawings relating in any way to the research, development, manufacture, or quality assurance of Cartridge Ball Screw Support Bearings by FAG, regardless of whether such assets relate exclusively to such activities;

3. All of FAG's rights, title, and interests in all documents relating to the research, development, manufacture, quality assurance, marketing, customer support, or sale of Cartridge Ball Screw Support Bearings, regardless of whether such documents relate exclusively to such activities (but subject to Paragraph II.C.5. of the Decision & Order), including, but not limited to, books, records, files, marketing materials, advertising materials, training materials, product data, price lists, sales materials, marketing information, customer files, and promotional materials; and

4. All of FAG's rights, title, and interests in any assets, tangible and intangible, that are reasonably necessary for the Acquirer to engage in the research, development, manufacture, quality assurance, marketing, customer support, or sale of Cartridge Ball Screw Support Bearings in the same manner, and achieving the same quality and

customer acceptance, as did FAG prior to the Divestiture Date, including, but not limited to, all rights, title and interests in inventions, technology, contractual rights, patents, patent applications, trade secrets, know-how, technical information, software, designs, and processes.

G. "Cartridge Ball Screw Support Bearings" means self-retained, ready to mount, double-row axial angular contact ball screw support bearing units with integral seals and incorporating an outer ring, two inner rings, and ball cage assemblies, that are designed for use as an alternative to two single-row angular contact ball bearings, including but not limited to, all INA products with part numbers identified with a ZKLN or ZKLF prefix and all FAG products with part numbers identified with a DBSB or DBSBS prefix and a 2RS.T suffix.

H. "Commission" means the Federal Trade Commission.

I. "Consent Agreement" means the Agreement Containing Consent Orders in this matter.

J. "Contact Person" means the Person or Persons at the Customer who has or have been, in the normal course of business, the person or persons to whom Respondents send information to or contact regarding Respondents' Cartridge Ball Screw Support Bearings.

K. "Customer" means any Person that has acquired a Cartridge Ball Screw Support Bearing manufactured by INA or FAG since January 1, 1999, including, but not limited to, distributors, original equipment manufacturers, and end-use customers.

L. "Decision & Order" means the Decision and Order attached to the Consent Agreement.

M. "Divestiture Agreement" means the SKF Divestiture Agreement or any other agreement or agreements pursuant to

which Respondents, or a trustee, divest the Assets To Be Divested pursuant to the Decision & Order.

N. "Divestiture Date" means the date on which the Respondents have fully completed the divestiture, pursuant to the Decision & Order, of the Assets To Be Divested, and any Additional Assets To Be Divested, to the Acquirer.

O. "FAG Machinery" means all tangible assets, other than real estate, used by FAG at any time prior to the Divestiture Date in the manufacture of Cartridge Ball Screw Support Bearings, regardless of whether such assets relate exclusively to such manufacture.

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

Q. "Relevant Orders and Agreements" means this Order to Maintain Assets, the Consent Agreement, the Decision & Order, the SKF Divestiture Agreement, and any other Divestiture Agreement.

R. "Technical Drawings" means any precise drawing.

S. "Tools" means fixtures that are fastened to a machine tool, and that make contact with the part being produced in order to achieve the desired geometry of such part.

II.

IT IS FURTHER ORDERED that, until the Divestiture Date, Respondents shall:

A. Maintain the Assets To Be Divested and the FAG Machinery in substantially the same condition (except for normal wear and tear) existing at the time Respondents sign the Consent Agreement, and take such action that is consistent with the past practices of Respondents in connection with the Assets

To Be Divested and FAG Machinery and is taken in the ordinary course of the normal day-to-day operations of Respondents;

B. Maintain the relations and good will with suppliers, customers, landlords, creditors, employees, agents, and others having relationships with the business of the Assets To Be Divested and the FAG Machinery;

C. Provide all employees of FAG who have responsibilities relating to the Assets To Be Divested or the FAG Machinery 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 as of December 1, 2001; and

D. Preserve the Assets To Be Divested and the FAG Machinery intact as an on-going business and not take any affirmative action, or fail to take any action within their control, as a result of which the viability, competitiveness, or marketability of the Assets To Be Divested or the FAG Machinery would be diminished.

III.

IT IS FURTHER ORDERED that:

A. At any time after the Commission issues this Order to Maintain Assets, the Commission may appoint one or more Monitors to assure that Respondents expeditiously comply with their obligations under the Relevant Orders and Agreements.

B. Respondents shall consent to the following terms and conditions regarding the powers, duties, authorities and responsibilities of any Monitor appointed pursuant to Paragraph III.A.:

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 ten (10) days after receipt of written 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 the Relevant Orders and Agreements.

3. 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 the terms of the Relevant Orders and Agreements.

4. The Monitor shall serve for such time as is necessary to monitor Respondents' compliance with the provisions of the Relevant Orders and Agreements.

5. 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 of the Assets To Be Divested or FAG Machinery, or to any other 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 Assets To Be Divested or FAG Machinery. 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 the Relevant Orders and Agreements.

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.

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 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.

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

9. 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 the Relevant Orders and Agreements.

10. The Monitor shall report in writing to the Commission concerning compliance by Respondents with the provisions of the Relevant Orders and Agreements within twenty (20) days from the date of appointment and every thirty (30) days thereafter until the end of his term.

11. 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.

12. Any Monitor appointed pursuant to Paragraph III.A. of this Order to Maintain Assets may be the same Person appointed as trustee pursuant to Paragraph III.A. of the Decision & Order.

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 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 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 the Relevant Orders and Agreements; 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. Thirty (30) days after Respondents have fully:

1. completed the divestiture, pursuant to the Decision & Order, of the Assets To Be Divested, and any Additional Assets To Be Divested, to the Acquirer; and

2. complied with Paragraphs II.C.4. and II.C.6. of the Decision & Order.

By the Commission, Chairman Muris not participating.

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 Orders ("Consent Agreement") from INA-Holding Schaeffler KG ("INA") and FAG Kugelfischer Georg Schäfer AG ("FAG"), which is designed to remedy the anticompetitive effects resulting from INA's acquisition of FAG. Under the terms of the Consent Agreement, INA and FAG will be required to divest FAG's cartridge ball screw support bearing ("CBSSB") business. FAG's CBSSB business will be divested to Aktiebolaget SKF ("SKF"), and will take place no later than twenty (20) business days from the date on which INA begins its acquisition of FAG.

The proposed 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 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.

Pursuant to a cash tender offer announced on September 13, 2001, INA proposes to acquire all of the outstanding shares of FAG. The total value of the transaction is approximately $650 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 worldwide market for the research, development, manufacture and sale of CBSSBs.

FAG and INA are the only two suppliers of CBSSBs in the world. CBSSBs are critical components in many industrial machine tools, and are utilized by machine tool original equipment manufacturers ("OEMs") around the world. Machine tools are machines that are used in the production of other

equipment, and include grinding machines, milling machines, and laser drilling and cutting systems. Machine tool OEMs utilize CBSSBs to reduce the friction associated with the rotation of a rolling screw. This rotation is used to control linear motion for accurate positioning, and is vital to the proper functioning of certain machine tools. Although other types of bearings can be used to accomplish this purpose, CBSSBs are easier, less expensive, and less time intensive to use than the potential alternatives. CBSSBs also allow end users of machine tools to replace the bearings easily, quickly and without incurring substantial cost. Moreover, once a machine tool is designed with CBSSBs, the process of switching to an alternative type of bearing would require a costly and time consuming redesign of the tool. For these reasons, it is highly unlikely that OEMs, or end users, would switch from CBSSBs to alternative technologies even if CBSSB prices increased significantly.

The global market for CBSSBs is highly concentrated. If the proposed acquisition is consummated, the combined firm would monopolize the worldwide market for CBSSBs. Prior to the acquisition, INA and FAG frequently competed against each other for CBSSB business, and this competition benefitted CBSSB customers. By eliminating competition between the two competitors in this highly concentrated market, the proposed acquisition would allow the combined firm to exercise market power unilaterally, thereby increasing the likelihood that purchasers of CBSSBs would be forced to pay higher prices and that innovation, service levels, and product quality in this market would decrease.

There are significant impediments to new entry into the CBSSB market. A new entrant into the CBSSB market would need to undertake the difficult, expensive and time-consuming process of researching and developing a line of CBSSB products, acquiring the necessary production assets, and developing the expertise needed to successfully design, manufacture, and market these products. It would take a new entrant over two years to accomplish these steps and achieve a significant market impact. Additionally, new entry into the CBSSB market is unlikely to

occur because the costs of entering the market and producing CBSSBs are high relative to the limited sales opportunities available to new entrants.

The Consent Agreement effectively remedies the acquisition's anticompetitive effects in the worldwide market for CBSSBs by requiring INA and FAG to divest FAG's CBSSB business. This business consists of, among other things, FAG's specialized tooling equipment, technical drawings, advertising and training materials, customer lists, and other assets used in the research, development, manufacturing, quality assurance, marketing, customer support and sale of CBSSBs (collectively "CBSSB Assets"). Pursuant to the Consent Agreement, INA and FAG are required to divest the CBSSB Assets to SKF within twenty (20) business days from the date on which INA begins its acquisition of FAG. If the Commission determines that SKF is not an acceptable buyer or that the manner of the divestiture is not acceptable, INA and FAG must rescind the sale to SKF within three (3) business days, and divest the CBSSB Assets to a Commission-approved buyer within three (3) months. If INA and FAG have not divested the CBSSB Assets within the time and in the manner required by the Consent Agreement, the Commission may appoint a trustee to divest these assets and any additional FAG machinery that the trustee deems appropriate, subject to Commission approval.

The Commission's goal in evaluating possible purchasers of divested assets is to maintain the competitive environment that existed prior to the acquisition. A proposed buyer of divested assets must not itself present competitive problems. The Commission is satisfied that SKF is a well-qualified acquirer of the divested assets. SKF is a publicly-traded Swedish corporation and the largest supplier of ball and roller bearings worldwide. SKF has been active in the bearings industry since 1907, and currently has production sites in 22 countries around the world and sales activities in almost every country in the world. SKF is also a current producer of ball screw support bearings, the product from which CBSSBs were originally derived. Thus, SKF has the necessary industry expertise to manufacture and sell CBSSBs, and

its entry into the CBSSB market will effectively replace the competition being eliminated by INA's acquisition of FAG. Furthermore, SKF does not pose separate competitive issues as the acquirer of the divested assets.

The Consent Agreement includes a number of provisions that are designed to ensure that the divestiture of the CBSSB Assets is successful. The Consent Agreement requires that, for a period of six (6) months, INA and FAG provide SKF with personnel, assistance, and training at no cost to SKF. This provision will ensure that SKF is able to effectively manufacture and market CBSSBs of the same quality as those currently produced by FAG. Additionally, if requested by SKF, INA and FAG are required to provide transitional manufacturing services at variable cost to SKF for up to six (6) months. This will ensure that SKF is able to serve customers in the CBSSB market without delay. In order to further facilitate SKF's entry into the CBSSB market, the Consent Agreement also prohibits INA and FAG from using any catalog numbers currently used by FAG to identify its CBSSBs.

To preserve the competitive viability and independence of the CBSSB Assets pending divestiture, the Consent Agreement includes an Order to Maintain Assets. This Order contains a number of provisions designed to ensure that the viability, competitiveness, and marketability of the CBSSB Assets and other FAG machinery are not diminished. The Order to Maintain Assets also provides that the Commission may appoint one or more monitors to ensure that INA and FAG expeditiously comply with their obligations under the Consent Agreement.

In order to ensure that the Commission remains informed about the status of the pending divestiture, and about efforts being made to accomplish the divestiture, the Consent Agreement requires INA and FAG to file an initial status report with the Commission within ten (10) days of the date the Consent Agreement is executed, and additional reports every thirty (30) days thereafter until the Commission's Decision and Order becomes final. Once the Commission's Order becomes final, INA and FAG have sixty (60) days within which to submit a verified written report

detailing the manner in which they have complied, or intend to comply, with the Commission's Order. This reporting requirement continues until INA and FAG have fully complied with the Commission's Order.

In addition to the divestiture outlined above, the Commission's Order also addresses potential competitive issues raised by a possible future joint venture between FAG and NTN Corporation of Japan ("NTN"), another large producer of bearings worldwide. Although no joint activities have taken place to date, a preliminary agreement between FAG and NTN indicates that a wide range of possible joint marketing, joint production and joint sales activities are contemplated by the joint venture between the two companies. INA has publicly asserted that it welcomes the alliance with NTN and is prepared to continue this cooperation with NTN after INA's acquisition of FAG. Given that this scenario creates the possibility of a future global three-firm alliance, and given that such joint venture activities may not otherwise trigger Hart-Scott-Rodino reporting requirements, the Commission's Order requires INA and FAG to provide prior notice to the Commission before entering into any such joint venture activities with NTN affecting North America. This requirement will give the Commission an opportunity to review such activities for potential competitive harm before they take place.

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

Complaint

IN THE MATTER OF

VALERO ENERGY CORPORATION, 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-4031; File No. 0110141
Complaint, December 18, 2001--Decision, February 19, 2002

This consent order addresses the merger of Respondent Valero Energy Corporation – a company engaged in national refining, transportation, and marketing of petroleum products and related petrochemical products, headquartered in San Antonio, Texas – with Respondent Ultramar Diamond Shamrock Corporation, a company engaged in the refining, marketing and transportation of petroleum products and petrochemicals and also headquartered in San Antonio. The order, among other things, requires the respondents to divest the Ultramar Golden Eagle refinery located in Avon, California – which can refine California Air Resources Board gasoline – bulk gasoline supply contracts, and 70 Ultramar-owned and operated Northern California retail service stations to an acquirer approved by the Commission. An accompanying Order to Hold Separate requires the respondents to hold separate and maintain certain assets pending their divestiture.

Participants

For the Commission: *Peter Richman, Frank Lipson, Art Nolan, Marc W. Schneider, Connie Salemi, Shai Littlejohn, Matthew Stratton, Jordan Coyle, Robert Walters, Valicia Spriggs, Catharine M. Moscatelli, Naomi Licker, Elizabeth A. Piotrowski, Phillip L. Broyles, Daniel P. Ducore, Susan Creighton, David W. Meyer, Louis Silvia* and *Mary T. Coleman.*

For the Respondents: *David Neill, Wachtell, Lipton, Rosen & Katz,* and *Phillip Proger* and *Peter J. Love, Jones, Day, Reavis & Pogue.*

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 ("FTC" or "Commission"), having reason to believe that Respondent Valero Energy Corporation ("Valero") and Respondent Ultramar Diamond Shamrock Corporation ("Ultramar") have entered into an agreement and plan of merger whereby Valero proposes to acquire all of the outstanding common stock of Ultramar, that such agreement and plan of merger violates 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 it appearing to the Commission that a proceeding in respect thereof would be in the public interest, hereby issues its complaint, stating its charges as follows:

I. RESPONDENTS

Valero Energy Corporation

1. Respondent Valero 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 Valero Place, San Antonio, TX 78212.

2. Respondent Valero is, and at all times relevant herein has been, a diversified energy company engaged, either directly or through affiliates, in the refining of crude oil into refined petroleum products, including gasoline, aviation fuel, and other light petroleum products; the transportation, terminaling, and marketing of gasoline, diesel fuel, and aviation fuel; and other related businesses.

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

"commerce" is defined in Section 4 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 44.

Ultramar Diamond Shamrock Corporation

4. Respondent Ultramar 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 6000 N. Loop 1604 West, San Antonio, TX 78249.

5. Respondent Ultramar is, and at all times relevant herein has been, a diversified energy company engaged, either directly or through affiliates, in the refining of crude oil into refined petroleum products, including gasoline, aviation fuel, and other light petroleum products; the transportation, terminaling, and marketing of gasoline, diesel fuel, and aviation fuel; and other related businesses.

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

II. THE PROPOSED MERGER

7. Pursuant to an agreement and plan of merger dated May 6, 2001, Valero intends to acquire all of the outstanding voting securities of Ultramar in exchange for cash, stock of Valero, or a combination of cash and stock of Valero. The value of the transaction at the time of the agreement was approximately $6 billion. The surviving entity is to be called Valero Energy Corporation.

III. TRADE AND COMMERCE

A. Relevant Product Markets

8. Relevant lines of commerce in which to analyze the effects of the proposed merger are:

   a. the refining and bulk supply of gasoline that meets the current specifications of the California Air Resources Board ("CARB 2" gasoline); and

   b. the refining and bulk supply of gasoline that meets the proposed specifications of the California Air Resources Board to become effective January 1, 2003 ("CARB 3" gasoline).

9. Motor gasoline is a fuel used in automobiles and other vehicles. It is produced from crude oil at refineries in the United States and throughout the world. Gasoline is produced in various grades and types, including conventional unleaded gasoline, reformulated gasoline, CARB 2 and CARB 3 gasoline, and others. There is no substitute for gasoline as a fuel for automobiles and other vehicles that are designed to use gasoline.

10. CARB 2 gasoline is a motor fuel used in automobiles that meets the current Phase 2 specifications of the California Air Resources Board. CARB 2 gasoline is cleaner burning and causes less air pollution than conventional unleaded gasoline. Since 1996, the use of any gasoline other than CARB 2 gasoline has been prohibited in California. CARB 2 gasoline is manufactured primarily at refineries on the West Coast of the United States. There are no substitutes for CARB 2 gasoline as fuel for automobiles and other vehicles that use gasoline in California.

11. CARB 3 gasoline is a motor fuel to be used in automobiles that meets the proposed Phase 3 specifications of the

California Air Resources Board. CARB 3 gasoline is cleaner burning and causes less air pollution than CARB 2 gasoline. After December 31, 2002, the use of any gasoline other than CARB 3 gasoline will be prohibited in California. CARB 3 gasoline will be manufactured primarily at refineries on the West Coast of the United States. There will be no substitutes for CARB 3 gasoline as fuel for automobiles and other vehicles that use gasoline in California.

B. Relevant Geographic Markets

12. Relevant sections of the country in which to analyze the proposed merger are the following:

a. Northern California, consisting of California counties north of, but not including, San Luis Obispo, Kern and San Bernardino counties, where the merger would reduce competition in the refining and bulk supply of CARB 2 and CARB 3 gasoline, as alleged below; and

b. the State of California, where the merger would reduce competition in the refining and bulk supply of CARB 2 and CARB 3 gasoline, as alleged below.

Market Structure

13. The market for the refining and bulk supply of CARB 2 gasoline for Northern California would be highly concentrated following the proposed merger. Refineries supplying Northern California are primarily located in the Bakersfield and San Francisco Bay Area, California, and Anacortes, Washington. The proposed merger would increase concentration in this market by more than 750 points to an HHI level above 2,700.

14. The market for the refining and bulk supply of CARB 2 gasoline for the State of California would be at the upper

end of the moderately concentrated range following the proposed merger. Refineries supplying California are primarily located in California and Anacortes, Washington. The proposed merger would increase concentration in this market by more than 325 points to an HHI level above 1,750.

15. The market for the refining and bulk supply of CARB 3 gasoline for Northern California would be highly concentrated following the proposed merger. Refineries supplying Northern California are primarily located in the Bakersfield and San Francisco Bay Area, California, and Anacortes, Washington. The proposed merger would increase concentration in this market by more than 1,050 points to an HHI level above 3,050.

16. The market for the refining and bulk supply of CARB 3 gasoline for the State of California would be highly concentrated following the proposed merger. Refineries supplying California are primarily located in California and Anacortes, Washington. The proposed merger would increase concentration in this market by more than 390 points to an HHI level above 1,850.

Entry Conditions

17. Entry into the relevant lines of commerce in the relevant sections of the country is difficult and would not be timely, likely or sufficient to prevent anticompetitive effects resulting from the proposed merger.

IV. VIOLATIONS CHARGED

First Violation Charged

18. Valero and Ultramar are or will be competitors in the refining and bulk supply of CARB 2 and CARB 3 gasoline for sale in Northern California.

19. The effect of the proposed merger, if consummated, may be substantially to lessen competition in the refining and bulk supply of CARB 2 and CARB 3 gasoline for sale in Northern California, 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 Valero and Ultramar in the refining and bulk supply of CARB 2 and CARB 3 gasoline;

b. by increasing the likelihood that the combination of Valero and Ultramar will unilaterally exercise market power; and

c. by increasing the likelihood of, or facilitating, collusion or coordinated interaction between the combination of Valero and Ultramar and their competitors in Northern California;

each of which increases the likelihood that the price of CARB 2 and CARB 3 gasoline will increase in the relevant section of the country.

Second Violation Charged

20. Valero and Ultramar are or will be competitors in the refining and bulk supply of CARB 2 and CARB 3 gasoline for sale in the State of California.

21. The effect of the proposed merger, if consummated, may be substantially to lessen competition in the refining and bulk supply of CARB 2 and CARB 3 gasoline for sale in the State of California, 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 Valero and Ultramar in the refining and bulk supply of CARB 2 and CARB 3 gasoline; and

b. by increasing the likelihood of, or facilitating, collusion or coordinated interaction between the combination of Valero and Ultramar and their competitors in California;

each of which increases the likelihood that the price of CARB 2 and CARB 3 gasoline will increase in the relevant section of the country.

Statutes Violated

22. The proposed merger between Valero and Ultramar violates Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45, and would, if consummated, violate Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18, and Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45.

WHEREFORE, THE PREMISES CONSIDERED, the Federal Trade Commission on this eighteenth day of December, 2001, issues its complaint against said Respondents.

By the Commission, Chairman Muris not participating.

DECISION AND ORDER

The Federal Trade Commission having initiated an investigation of the proposed merger involving Respondents Valero Energy Corporation ("Valero") and Ultramar Diamond Shamrock Corporation ("Ultramar"), 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 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 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 person 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 Order:

1. Respondent Valero Energy Corporation is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware, with its office and principal place of business located at One Valero Place, San Antonio, Texas 78212.

2. Respondent Ultramar Diamond Shamrock 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 6000 N. Loop 1604 West, San Antonio, Texas 78249.

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

B. "Ultramar" or "UDS" means Ultramar Diamond Shamrock Corporation, its directors, officers, employees, agents and representatives, predecessors, successors, and assigns; its

joint ventures, subsidiaries, divisions, groups and affiliates controlled by Ultramar, and the respective directors, officers, employees, agents, representatives, successors, and assigns of each.

C. "California CARB Refining and Marketing Assets" means the following assets: (1) Ultramar's Golden Eagle refinery located at Avon, California and all of Ultramar's interest in all tangible assets used in the operation of the refinery, including but not limited to docks, associated tanks, and pipelines; all licenses, agreements, contracts, and permits used in the operation of the refinery; the non-exclusive right to use all patents, know-how, and other intellectual property used by Ultramar in the operation of the refinery; all agreements, contracts, and understandings listed in Schedule A, attached as a confidential attachment; at the acquirer's option, all contracts, agreements or understandings (other than those listed in Schedule A) relating to the transportation, terminaling, storage or sale of the refinery's petroleum product output; at the acquirer's option, all agreements (other than those listed in Schedule A) under which Ultramar receives crude oil or other inputs at or for the refinery; and, at the acquirer's option, all exchange agreements involving the refinery; 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, and improvements, modifications, or upgrades to, the Golden Eagle refinery; (2) Ultramar's refinery located at Wilmington, California, and all of Ultramar's interest in all tangible assets used in the operation of the refinery; all licenses, agreements, contracts, and permits used in the operation of the refinery, including but not limited to docks, associated tanks, and pipelines; the non-exclusive right to use all patents, know-how, and other

intellectual property used by Ultramar in the operation of the refinery; at the acquirer's option, all contracts, agreements or understandings relating to the transportation, terminaling, storage or sale of the refinery's petroleum product output; at the acquirer's option, all agreements under which Ultramar receives crude oil or other inputs at or for the refinery; and, at the acquirer's option, all exchange agreements involving the refinery; 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, and improvements, modifications, or upgrades to, the Wilmington refinery; and (3) Ultramar's California Retail Assets.

D. "CARB Gasoline" means motor fuel used in automobiles that meets the specifications of the California Air Resources Board.

E. "Commission" means the Federal Trade Commission.

F. "Effective Date of Divestiture" means the date on which the applicable divestiture is consummated.

G. "Golden Eagle CARB Refining and Marketing Assets" means: (1) Ultramar's Golden Eagle refinery located at Avon, California and all of Ultramar's interest in all tangible assets used in the operation of the refinery, including but not limited to docks, associated tanks, and pipelines; all licenses, agreements, contracts, and permits used in the operation of the refinery; the non-exclusive right to use all patents, know-how, and other intellectual property used by Ultramar in the operation of the refinery; all agreements, contracts and understandings listed in Schedule A; at the acquirer's option, all contracts, agreements or

understandings (other than those listed in Schedule A) relating to the transportation, terminaling, storage or sale of the refinery's petroleum product output to the extent they relate to the refinery's petroleum product output; at the acquirer's option, all agreements (other than those listed in Schedule A) under which Ultramar receives crude oil or other inputs at or for the refinery; and all exchange agreements involving the refinery (but only to the extent the exchange agreements involve output of the refinery); 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, and improvements, modifications, or upgrades to, the Golden Eagle refinery; and (2) Ultramar's Divestiture Retail Assets.

H. "Merger" means the proposed merger involving Valero and Ultramar.

I. "New Valero" means Valero Energy Corporation, or any other entity resulting from the merger involving Valero and Ultramar, its directors, officers, employees, agents and representatives, predecessors, successors, and assigns; its joint ventures, subsidiaries, divisions, groups and affiliates controlled by New Valero.

J. "Respondents" means Valero and Ultramar, individually and collectively, and New Valero.

K. "Retail Assets" means, for each Retail Site, all fee or leasehold interests of Respondents in the Retail Site, and all of Respondents' interest in all assets, tangible or intangible, that are used at that Retail Site, including, but not limited to, all permits, licenses, consents, contracts, and agreements used in the operation of the Retail Site, and the non-

exclusive right to use all patents, know-how, and other intellectual property used by Respondents in the operation of the Retail Sites. "Retail Assets" also includes 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) located at each Retail Site, including all permits, licenses, consents, contracts, and agreements used in the operation of the ancillary businesses, and the non-exclusive right to use all know-how, patents, and other intellectual property used in the operation of the ancillary businesses. "Retail Assets" does not include Respondents' proprietary trademarks, trade names, logos, trade dress, and system-wide software and databases.

L. "Retail Site" means a business establishment from which gasoline is sold to the general public.

M. "Ultramar's California Retail Assets" means all of Ultramar's Retail Assets relating to all Retail Sites in California that Ultramar operates.

N. "Ultramar's Divestiture Retail Assets" means all of Ultramar's Retail Assets relating to the Retail Sites that are listed in Schedule B.

II.

IT IS FURTHER ORDERED that:

A. Respondents shall divest the Golden Eagle CARB Refining and Marketing 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 execute the Consent Agreement.

B. Respondents shall offer the acquirer of the Golden Eagle CARB Refining and Marketing Assets an indemnity, subject to the prior approval of the Commission and to be effective upon the Effective Date of Divestiture of the Golden Eagle CARB Refining and Marketing 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 Golden Eagle refinery and the Retail Sites that are divested or assigned pursuant to this Paragraph.

C. 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), substitute equivalent assets, subject to Commission approval. A substituted asset will not be deemed to be equivalent unless it enables the refinery to perform the same function at the same or lower cost.

D. 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 only 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.

E. The purpose of the divestiture of the Golden Eagle CARB Refining and Marketing Assets, and of the other provisions of this Paragraph, is to ensure the continued use of the Golden Eagle CARB Refining and Marketing Assets as viable, on-going businesses, in the same businesses in which they were engaged at the time of the announcement of the Merger, including the refining and bulk supply of CARB Gasoline and other petroleum products, by a firm that has a sufficient ability and an equivalent incentive to invest and compete in the assets and businesses as Ultramar had before the Merger, and to remedy the lessening of competition in the refining and bulk supply of CARB Gasoline and other petroleum products resulting from the proposed Merger as alleged in the Commission's Complaint.

III.

IT IS FURTHER ORDERED that**:**

A. If Respondents have not, within the time periods required, complied with the requirements of Paragraph II, absolutely and in good faith, the Commission may appoint a trustee to effectuate the divestiture required by Paragraph II; provided, however, that the trustee may, subject to the approval of the Commission, substitute the California CARB Refining and Marketing Assets for the Golden Eagle CARB Refining and Marketing Assets.

B. In the event that the Commission or the United States Attorney General brings an action pursuant to § 5(*l*) of the Federal Trade Commission Act, 15 U.S.C. § 45(*l*), or any other statute enforced by the Commission, Respondents shall consent to the appointment of a trustee in such action. Neither the appointment of a trustee nor a decision not to appoint a trustee under this Paragraph shall preclude the

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

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

1. The Commission shall select the trustee 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, assign the agreements required to be assigned, and enter into the required agreements, thereby binding Respondents, all on such terms and conditions as are necessary to comply with the requirements of the applicable paragraph, to comply with all applicable laws, and to effectuate the remedial purposes of this Order. Subject to the prior approval of the Commission, the trustee shall have the sole authority to divest the assets described in Paragraph

III.A in smaller packages as the trustee deems necessary to effectuate divestiture of the assets and to effectuate the remedial purposes of this Order.

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 III.C.3. to accomplish the divestiture to an acquirer that receives the prior approval of the Commission and in a manner that receives 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.

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

determined by the Commission or, for a court-appointed trustee, by the court.

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

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

Respondents, and the trustee's power shall be terminated. The trustee's compensation shall be based at least in significant part on a commission arrangement contingent on the trustee's divesting the assets to be divested.

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

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

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

IV.

IT IS FURTHER ORDERED that within sixty (60) days after the date this Order becomes final and every sixty (60) days thereafter until Respondents have fully complied with the provisions of Paragraphs II and III of this Order, Respondents shall submit to the Commission a verified written report setting forth in detail the manner and form in which they intend to comply, are complying, and have complied with these Paragraphs. 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.

V.

IT IS FURTHER ORDERED that:

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

B. Upon consummation of the Merger, Respondents shall cause New Valero to be bound by the terms of this Order.

VI.

IT IS FURTHER ORDERED that, for the purpose of determining or securing compliance with this Order, and subject to any legally recognized privilege, 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 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.

VII.

IT IS FURTHER ORDERED that if (1) within the time period required for divestiture pursuant to Paragraph II 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 such paragraphs; 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 best efforts to resolve the concerns of the particular State.

By the Commission, Chairman Muris not participating.

SCHEDULE A

Confidential

[Redacted From Public Record Version]

SCHEDULE B

StoreAddressCityStateZipZone Number

3674851 N. Highway 49JacksonCA95642351

36091021 South StOrlandCA95963-1640351

362118475 N Highway 1Fort BraggCA95437-8774351

36221250 S Main StWillitsCA95490-4306351

36231105 S State StUkiahCA95482-6410351

3628812 Main StreetWeavervilleCA96093351

3678585 E Perkins StUkiahCA95482-4508351

3679440 S Main StRed BluffCA96080-4316351

3680506 6th StOrlandCA95963-1229351

3692975 S Main StLakeportCA95453-5512351

369315010 Lakeshore DrClearlakeCA95422351

35447920 Brentwood BlvdBrentwoodCA94513-1004351

355842245 Fremont BlvdFremontCA94538-4143351

359440500 Fremont BlvdFremontCA94538-4304351

36041619 1st StLivermoreCA94550-4303351

37124321 Clayton RdConcordCA94521-2842351

37132501 Pacheco BlvdMartinezCA94553-2043351

37143767 Alhambra AveMartinezCA94553-3803351

37151616 Oak Park BlvdPleasant HillCA94523-4410351

37161990 San Ramon Valley BlvdSan RamonCA94583-1204351

37172098 Mt Diablo BlvdWalnut CreekCA94596-4302351

37201088 Marina BlvdSan LeandroCA94577-3437351

372144 Lewelling BlvdSan LorenzoCA94580-1628351

35202998 Churn Creek RdReddingCA96002-1130351

35212071 North StAndersonCA96007-3456351

35493212 S Market StReddingCA96001-3530351

35722700 Gateway DrAndersonCA96007-3531351

363037303 State Highway 299 EBurneyCA96013-4371351

3088I-5 & Road 8DunniganCA95937351

34285040 El Camino AveCarmichaelCA95608-4650351

34473 Main StWoodlandCA95695-3123351

3527601 Sunrise AveRosevilleCA95661-4109351

35424250 Madison AveNorth HighlandsCA95660-5403351

36018070 N. Lake BlvdKings BeachCA95719351

360310299 Folsom BlvdRancho CordovaCA95670-3516351

36426990 Douglas BlvdGranite BayCA95746-6214351

36838651 Folsom BlvdSacramentoCA95826-3708351

36841312 BroadwayPlacervilleCA95667-5902351

36859301 Greenback LnOrangevaleCA95662-4901351

36863430 Taylor RdLoomisCA95650-9583351

36871110 High StAuburnCA95603-5110351

36882304 Lake Tahoe BlvdS. Lake TahoeCA96150-7107351

36941001 Sacramento AveBroderickCA95605-1902351

37837550 Watt AveNorth HighlandsCA95660-2609351

34201370 Camden AveCampbellCA95008-6702351

3586929 Fremont AveLos Altos HillsCA94024-6013351

36021885 N Milpitas BlvdMilpitasCA95035-2505351

37232790 Story RdSan JoseCA95127-3922351

37241365 Kooser RdSan JoseCA95118-3814351

37251598 Alum Rock AveSan JoseCA95116-2425351

3786921 W Hamilton AveCampbellCA95008-0405351

3489921 Sebastopol RdSanta RosaCA95407-6830351

3645300 College AveSanta RosaCA95401-5118351

37007898 Old Redwood HwyCotatiCA94931-5107351

3701219 Healdsburg AveHealdsburgCA95448-4103351

37028850 Sonoma HwyKenwoodCA95452-9024351

37032601 Lakeville HwyPetalumaCA94954-5654351

37041080 GravensteinSebastopolCA95472351

350235 N Cherokee LnLodiCA95240-2411351

3513401 W Kettleman LnLodiCA95240-5741351

36962448 W Kettleman LnLodiCA95242-4123351

375613975 E Highway 88LockefordCA95237-9549351

33781800 W Imola AveNapaCA94559-4619351

34161300 Trancas StNapaCA94558-2912351

3522800 Merchant StVacavilleCA95688-6912351

36821105 N 1st StDixonCA95620-2404351

3706385 Silverado TrlNapaCA94559-4013351

3707800 St. Helena HwySaint HelenaCA94574351

37103438 Broadway StAmer. CanyonCA94589-1254351

37111295 Marine World PkwyVallejoCA94589-3104351

ORDER TO HOLD SEPARATE AND MAINTAIN ASSETS

The Federal Trade Commission having initiated an investigation of the proposed merger involving Respondents Valero Energy Corporation ("Valero") and Ultramar Diamond Shamrock Corporation ("Ultramar"), 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 Agreement Containing Consent Orders 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"):

1. Respondent Valero 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 Valero Place, San Antonio, TX 78212.

2. Respondent Ultramar 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 6000 N. Loop 1604 West, San Antonio, TX 78249.

3. 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 Hold Separate, the following definitions and provisions shall apply:

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

B. "Ultramar" or "UDS" means Ultramar Diamond Shamrock Corporation, its directors, officers, employees, agents and representatives, predecessors, successors, and assigns; its joint ventures, subsidiaries, divisions, groups and affiliates controlled by Ultramar, and the respective directors, officers, employees, agents, representatives, successors, and assigns of each.

C. "Commission" means the Federal Trade Commission.

D. “Decision and Order” means the Decision and Order contained in the Agreement Containing Consent Orders, executed by Respondents in this matter.

E. “Effective Date of Divestiture” means the date on which the divestiture required by Paragraph II or III of the Decision and Order is consummated.

F. “Held Separate Business” means (1) Ultramar’s Golden Eagle refinery located at Avon, California and all of Ultramar’s interest in all tangible assets used in the operation of the refinery, including but not limited to docks, associated tanks, and pipelines; all licenses, agreements, contracts, and permits used in the operation of the refinery; the non-exclusive right to use all patents, know-how, and other intellectual property used by Ultramar in the operation of the refinery; all contracts, agreements or understandings relating to the transportation, terminaling, storage or sale of the refinery’s petroleum product output to the extent they relate to the refinery’s petroleum product output; all agreements under which Ultramar receives crude oil or other inputs at or for the refinery; and all exchange agreements involving the refinery (but only to the extent the exchange agreements involve output of the refinery); 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, and improvements, modifications, or upgrades to, the Golden Eagle refinery; (2) Ultramar’s Divestiture Retail Assets; and (3) all Ultramar employees employed at the Golden Eagle refinery and the Ultramar’s Divestiture Retail Assets and all other of Respondents’ employees listed in Schedule A attached as a confidential attachment.

G. "Hold Separate Period" means the time period during which the Hold Separate is in effect, which shall begin no later than five (5) days after the date the Hold Separate becomes final and terminate pursuant to Paragraph V. hereof.

H. "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.

I. "Merger" means the proposed merger involving Valero and Ultramar.

J. "Respondents" means Valero and Ultramar, individually and collectively, and the successor corporation.

K. "Retail Assets" means, for each Retail Site, all fee or leasehold interests of Respondents in the Retail Site, and all of Respondents' interest in all assets, tangible or intangible, that are used at that Retail Site, including, but not limited to, all permits, licenses, consents, contracts, and agreements used in the operation of the Retail Site, and the non-exclusive right to use all patents, know-how, and other intellectual property used by Respondents in the operation of the Retail Sites. "Retail Assets" also includes 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) located at each Retail Site, including all permits, licenses, consents, contracts, and agreements used in the operation of the ancillary businesses, and the non-exclusive right to use all know-how, patents, and other intellectual property used in the operation of the ancillary businesses. For purposes of this Hold Separate, "Retail Assets" includes Respondents' proprietary trademarks, trade names, logos, trade dress, and system-wide software and databases.

L. "Retail Site" means a business establishment from which gasoline is sold to the general public.

M. "Ultramar's California Retail Assets" means all of Ultramar's Retail Assets relating to each and every Retail Site in California that Ultramar operates.

N. "Ultramar's Divestiture Retail Assets" means all of Ultramar's Retail Assets relating to the Retail Sites that are listed in Schedule B.

O. "Ultramar's Non-divestiture Retail Assets" means all of Ultramar's California Retail Assets other than Ultramar's Divestiture Retail Assets.

P. "Ultramar's Wilmington Refinery" means Ultramar's refinery located at Wilmington, California, and all of Ultramar's interest in all tangible assets used in the operation of the refinery; all licenses, agreements, contracts, and permits used in the operation of the refinery, including but not limited to docks, associated tanks, and pipelines; the non-exclusive right to use all patents, know-how, and other intellectual property used by Ultramar in the operation of the refinery; all contracts, agreements or understandings relating to the transportation, terminaling, storage or sale of the refinery's petroleum product output; all agreements under which Ultramar receives crude oil or other inputs at or for the refinery; and all exchange agreements involving the refinery; 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, and improvements, modifications, or upgrades to, the Wilmington refinery.

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 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, 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 Held Separate Business, Ultramar's Wilmington Refinery Assets, and Ultramar's Non-divestiture Retail Assets 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 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 no Material Confidential Information is exchanged between Respondents and the Held Separate Business, except in accordance with the provisions of this Hold Separate; (3) prevent interim harm to competition pending the relevant divestitures and other relief; and (4) help remedy any anticompetitive effects of the proposed Merger.

D. Respondent shall hold the Held Separate Business separate, apart, and independent on the following terms and conditions:

1. Richard Shermer of R. Shermer & Company, Inc., shall serve as Hold Separate Trustee, pursuant to the agreement executed by the Hold Separate Trustee and Respondents and attached as Confidential Appendix A ("trustee agreement").

   a. The trustee agreement shall require that, no later than five (5) days after this Hold Separate 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 and consistent with the purposes of the Decision and Order.

   b. No later than five (5) days after this Order to Hold Separate and Maintain Assets becomes final, Respondents shall, pursuant to the 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 Order to Hold Separate and Maintain Assets and consistent with the

purposes of the Decision and Order contained in the Consent Agreement.

c. The Hold Separate Trustee shall have the responsibility, consistent with the terms of this Hold Separate and the Decision and Order contained in the Consent Agreement, 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 and the Decision and Order contained in the Consent Agreement.

d. The Hold Separate Trustee shall have full and complete access 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 and the Consent Agreement or otherwise to perform his/her duties and responsibilities consistent with the terms of this Hold Separate.

e. The Hold Separate Trustee shall have the authority to employ, at the 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 becomes final, and every thirty (30) days thereafter until the Hold Separate terminates, the Hold Separate Trustee shall report in writing to the Commission concerning the efforts to accomplish the purposes of this Hold Separate. 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, 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 trustee agreement, subject to the approval of the Commission, consistent with this paragraph.

2. No later than one (1) day after this Hold Separate 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 Bill Haywood.

   a. In the event that Bill Haywood 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.

   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.

   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.

   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, 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.

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

(i) all personnel performing responsibilities in connection with the Held Separate Business as of the date Respondents executed the Consent Agreement, and (ii) any persons 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 Ultramar 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 Agreement, such persons shall be prohibited from providing, discussing, exchanging, circulating, or otherwise furnishing any such information to or with any person whose employment involves any of Respondents' businesses, other than the Held Separate Business. Such personnel shall also execute confidentiality agreements prohibiting the disclosure of any Material Confidential Information of 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;
(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, 2001. 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 product trading and acquisition;
(2)Wholesale engineering services, including engineering, design, and maintenance of terminals;
(3)Convenience store category management;
(4)Credit card processing;
(5)Information systems, which constructs, maintains, and supports all SAP and other computer systems;
(6)Public affairs, which provides media and community

relations services;
(7)Processing of accounts payable;
(8)Security services;
(9)Technical support;
(10) Financial accounting services;
(11) Procurement of refinery supplies (*e.g.* catalysts, chemicals, repair services, maintenance);
(12) Procurement of goods and services utilized in the ordinary course of business by the Held Separate Business;
(13) Legal services;
(14) Service station design, maintenance, and construction; and
(15) Real estate services, including the identification and development of new sites.

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. 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, 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, sales, marketing, and financial operations of the competing products of Respondents.

6. No later than ten (10) days after the date this Order to Hold Separate and Maintain Assets 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.

7. No later than five (5) days after the date this Order to Hold Separate and Maintain Assets 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 United States, a notice of this Hold Separate and Consent Agreement, in the form attached as Attachment A.

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 rates of refinery production and product sales) and at no less than the rates of operation projected in the 2002 Golden Eagle Profit and Loss Budget, dated November 2001 (including, but not limited to, the rates of refinery production and product sales projected in such Profit and Loss Budget); provided that failure to achieve production or sales goals projected in Respondents' Profit and Loss Budget shall not be deemed to be a violation of this Hold Separate;

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 the 2002 Golden Eagle Capital Expenditure Plan, dated November 2001, 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 contained in the Consent Agreement, 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 employees of the Held Separate Business 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. Provided, however, that Respondents may, if they determine to do so, make offers of employment to the employees listed in Schedule C, attached as a confidential attachment, during the Hold Separate Period; provided further that, if the acquirer approved by the Commission also determines to make an offer to any of the employees listed in Schedule C, Respondents may not convey the terms of Respondents' offer to such employee until such time as the Commission-approved acquirer makes its offer.

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 that 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 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 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, not in the public domain, of the Held Separate Business. 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.

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 Hold Separate.

IV.

IT IS FURTHER ORDERED that for the purposes of determining or securing compliance with this Hold Separate, 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; 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 Hold Separate 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 divestiture required by the Consent Agreement is completed.

By the Commission, Chairman Muris not participating.

SCHEDULE A

Confidential

[redacted]

Order

SCHEDULE B

Store	Address	City	State	Zip	Zone Number
3674	851 N. Highway 49	Jackson	CA	95642	351
3609	1021 South St	Orland	CA	95963-1640	351
3621	18475 N Highway 1	Fort Bragg	CA	95437-8774	351
3622	1250 S Main St	Willits	CA	95490-4306	351
3623	1105 S State St	Ukiah	CA	95482-6410	351
3628	812 Main Street	Weaverville	CA	96093	351
3678	585 E Perkins St	Ukiah	CA	95482-4508	351
3679	440 S Main St	Red Bluff	CA	96080-4316	351
3680	506 6th St	Orland	CA	95963-1229	351
3692	975 S Main St	Lakeport	CA	95453-5512	351
3693	15010 Lakeshore Dr	Clearlake	CA	95422	351
3544	7920 Brentwood Blvd	Brentwood	CA	94513-1004	351
3558	42245 Fremont Blvd	Fremont	CA	94538-4143	351
3594	40500 Fremont Blvd	Fremont	CA	94538-4304	351
3604	1619 1st St	Livermore	CA	94550-4303	351
3712	4321 Clayton Rd	Concord	CA	94521-2842	351
3713	2501 Pacheco Blvd	Martinez	CA	94553-2043	351
3714	3767 Alhambra Ave	Martinez	CA	94553-3803	351
3715	1616 Oak Park Blvd	Pleasant Hill	CA	94523-4410	351
3716	1990 San Ramon Valley Blvd	San Ramon	CA	94583-1204	351

3717	2098 Mt Diablo Blvd	Walnut Creek	CA
94596-4302		351	
3720	1088 Marina Blvd	San Leandro	CA
94577-3437		351	
3721	44 Lewelling Blvd	San Lorenzo	CA
94580-1628		351	
3520	2998 Churn Creek Rd	Redding	CA
96002-1130		351	
3521	2071 North St	Anderson	CA
96007-3456		351	
3549	3212 S Market St	Redding	CA
96001-3530		351	
3572	2700 Gateway Dr	Anderson	CA
96007-3531		351	
3630	37303 State Highway 299 E	Burney	CA
96013-4371		351	
3088	I-5 & Road 8	Dunnigan	CA
95937	351		
3428	5040 El Camino Ave	Carmichael	CA
95608-4650		351	
3447	3 Main St	Woodland	CA
95695-3123		351	
3527	601 Sunrise Ave	Roseville	CA
95661-4109		351	
3542	4250 Madison Ave	North Highlands	CA
95660-5403		351	
3601	8070 N. Lake Blvd	Kings Beach	CA
95719	351		
3603	10299 Folsom Blvd	Rancho Cordova	CA
95670-3516		351	
3642	6990 Douglas Blvd	Granite Bay	CA
95746-6214		351	
3683	8651 Folsom Blvd	Sacramento	CA
95826-3708		351	
3684	1312 Broadway	Placerville	CA
95667-5902		351	
3685	9301 Greenback Ln	Orangevale	CA
95662-4901		351	
3686	3430 Taylor Rd	Loomis	CA
95650-9583		351	
3687	1110 High St	Auburn	CA
95603-5110		351	
3688	2304 Lake Tahoe Blvd	S. Lake Tahoe	CA
96150-7107		351	
3694	1001 Sacramento Ave	Broderick	CA

95605-1902 351
3783 7550 Watt Ave North Highlands CA
95660-2609 351
3420 1370 Camden Ave Campbell CA
95008-6702 351
3586 929 Fremont Ave Los Altos Hills CA
94024-6013 351
3602 1885 N Milpitas Blvd Milpitas CA
95035-2505 351
3723 2790 Story Rd San Jose CA
95127-3922 351
3724 1365 Kooser Rd San Jose CA
95118-3814 351
3725 1598 Alum Rock Ave San Jose CA
95116-2425 351
3786 921 W Hamilton Ave Campbell CA
95008-0405 351
3489 921 Sebastopol Rd Santa Rosa CA
95407-6830 351
3645 300 College Ave Santa Rosa CA
95401-5118 351
3700 7898 Old Redwood Hwy Cotati CA
94931-5107 351
3701 219 Healdsburg Ave Healdsburg CA
95448-4103 351
3702 8850 Sonoma Hwy Kenwood CA
95452-9024 351
3703 2601 Lakeville Hwy Petaluma CA
94954-5654 351
3704 1080 Gravenstein Sebastopol CA
95472 351
3502 35 N Cherokee Ln Lodi CA
95240-2411 351
3513 401 W Kettleman Ln Lodi CA
95240-5741 351
3696 2448 W Kettleman Ln Lodi CA
95242-4123 351
3756 13975 E Highway 88 Lockeford CA
95237-9549 351
3378 1800 W Imola Ave Napa CA
94559-4619 351
3416 1300 Trancas St Napa CA
94558-2912 351
3522 800 Merchant St Vacaville CA
95688-6912 351

Order

3682	1105 N 1st St	Dixon	CA
95620-2404		351	
3706	385 Silverado Trl	Napa	CA
94559-4013		351	
3707	800 St. Helena Hwy	Saint Helena	CA
94574	351		
3710	3438 Broadway St	Amer. Canyon	CA
94589-1254		351	
3711	1295 Marine World Pkwy	Vallejo	CA
94589-3104		351	

SCHEDULE C

Confidential

[redacted]

ATTACHMENT A

NOTICE OF DIVESTITURE AND REQUIREMENT FOR CONFIDENTIALITY

Valero Energy Corporation and Ultramar Diamond Shamrock Corporation, hereinafter referred to as Respondents (which includes the entity resulting from the proposed merger of Valero and Ultramar), have entered into an Agreement Containing Consent Orders ("Consent Agreement") with the Federal Trade Commission relating to the divestiture of certain assets and other relief.

As used herein, the term "Held Separate Business" means the businesses and personnel as defined in Paragraph I.F. of the Order to Hold Separate and Maintain Assets (the "Hold Separate Order") contained in the Consent Agreement. Under the terms of the Decision and Order contained in the Consent Agreement, Respondents must divest certain assets, which are included within the Held Separate Business, within 12 months of the date Respondents executed the Consent Agreement.

During the Hold Separate Period (which begins after the Hold Separate Order becomes final and ends after Respondents have completed the required divestiture), the Held Separate Business shall be held separate, apart, and independent of Respondents' businesses. The Held Separate Business must be managed and maintained as a separate, ongoing business, independent of all other businesses of Respondents until Respondents have completed the required divestiture. All competitive information relating to the Held Separate Business must be retained and maintained by the persons involved in the operation of the Held Separate Business 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 of Respondents' businesses, except as otherwise provided in the Hold Separate Order. These persons involved in the operation of the Held Separate Business shall not be involved in any way in the

management, production, distribution, sales, marketing, or financial operations of Respondents relating to competing products. Similarly, persons involved in similar activities in Respondents' businesses shall be prohibited from providing, discussing, exchanging, circulating, or otherwise furnishing any similar information to or with any other person whose employment involves the Held Separate Business, except as otherwise provided in the Hold Separate Order.

Any violation of the Consent Agreement may subject Respondents to civil penalties and other relief as provided by law.

Confidential Appendix A

[redacted]

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 Valero Energy Corporation ("Valero") and Ultramar Diamond Shamrock Corporation ("Ultramar") (collectively "Respondents") 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 has 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 ("Proposed Consent 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 anticompetitive effects arising from Respondents' proposed merger, as alleged in the Complaint. The Hold Separate Order preserves competition pending divestiture.

II. Description of the Parties and the Transaction

Valero, headquartered in San Antonio, Texas, is an independent domestic refining company. Valero is engaged in national refining, transportation, and marketing of petroleum products and related petrochemical products. Valero reported 2000 net income of $611 million on revenues of nearly $15 billion. Valero's revenues are generated almost exclusively in the United States from seven fuel refineries.

Ultramar is an independent North American refining and marketing company also headquartered in San Antonio, Texas. It is primarily engaged in the refining, marketing and transportation of petroleum products and petrochemicals. Ultramar reported 2000 net earnings of $444 million on operating revenues of $17.1 billion. Ultramar operates seven refineries in the United States

and Canada with a total throughput of 850,000 barrels per day, marketed through a network of over 5,000 branded retail stations.

Pursuant to an agreement and plan of merger dated May 6, 2001, Valero proposes to merge with Ultramar in a transaction valued at approximately $6 billion. Valero intends to acquire 100% of the voting stock of Ultramar. As a result of the merger, Valero will be one of the largest refiners in the United States.

III. The Investigation and the Complaint

The Complaint alleges that the merger of Valero and Ultramar 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, by substantially lessening competition in each of the following markets: (1) the refining and bulk supply of CARB 2 and CARB 3 gasoline for sale in Northern California; and (2) the refining and bulk supply of CARB 2 and CARB 3 gasoline in the State of California.

To remedy the alleged anticompetitive effects of the merger, the Proposed Order requires Respondents to divest the Ultramar Golden Eagle refinery located in Avon, California. Along with the refinery assets, Respondents will divest bulk gasoline supply contracts and 70 Ultramar Northern California retail service stations. This will assure the new entrant a consistent CARB gasoline demand to assure that the entrant possesses the same incentives to produce CARB gasoline that Ultramar had pre-merger.

The Commission's decision to issue the Complaint and enter into the Agreement Containing Consent Orders was made after an extensive investigation in which the Commission examined competition and the likely effects of the merger in the markets alleged in the Complaint and in several other markets, including markets for asphalt refining and pipeline transportation, and terminaling or marketing of gasoline or other fuels in sections of the country other than those alleged in the Complaint. The Commission has concluded that the merger is unlikely to reduce

competition significantly in markets other than those alleged in the Complaint.

The Commission conducted the investigation leading to the Complaint in collaboration with the Attorneys General of the States of California and Oregon. As part of this joint effort, Respondents have entered into State Decrees with these States settling charges that the merger would violate both state and federal antitrust laws.

The Complaint alleges that the merger would violate the antitrust laws in four product and geographic markets, each of which is discussed below. The analysis applied in each market generally follows the analysis set forth in the FTC and U.S. Dep't of Justice *Horizontal Merger Guidelines* (1997) ("*Merger Guidelines*").

Count I - Refining and Bulk Supply of CARB 2 and CARB 3 Gasoline for Sale in Northern California

Valero and Ultramar compete in the refining and bulk supply of CARB gasoline for sale in Northern California.[1] Refining and bulk supply of CARB 2 and CARB 3 gasoline are relevant product markets. CARB gasoline meets the specifications of the California Air Resources Board ("CARB"). CARB 2 automotive gasoline meets the current Phase 2 specifications in effect since 1996 and is the only gasoline that can be sold to California gasoline consumers. CARB 3 automotive gasoline meets the proposed Phase 3 specifications that are scheduled to go into effect on January 1, 2003. After that date, CARB 3 will be the only gasoline that can be sold to California gasoline consumers. Thus, there are no substitutes for CARB 2 gasoline today and there will be no substitutes for CARB 3 gasoline. In the current investigation and in past decisions, the Commission concluded

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[1] A bulk supply market consists of firms that have the ability to deliver large quantities of gasoline on a regular and continuing basis, such as pipelines or local refineries.

that the refining and bulk supply of CARB 2 gasoline is a relevant market.[2]

The North Coast (Northern California and Northwest refineries) constitutes a relevant geographic market for the refining and bulk supply of CARB 2 and CARB 3 gasoline for sale in Northern California. The North Coast refiners can profitably raise prices in Northern California by a small but significant and nontransitory amount without losing significant sales to other bulk suppliers. Five California refiners (ChevronTexaco (Chevron), Equilon (Shell/Texaco), Phillips (Tosco), Ultramar, and Valero) supply more than 94% of the CARB gasoline consumed in Northern California; Kern Oil (Bakersfield, California) and Tesoro (Anacortes, Washington) supply virtually all the remainder during normal market operations. The next closest refineries, located in the Los Angeles area, are unlikely to supply CARB gasoline to Northern California in response to a small but significant and nontransitory increase in price because of the transportation costs to ship from Southern California.

The North Coast market would be highly concentrated following the proposed merger.[3] Based on current CARB refining capacity, the proposed merger would increase concentration for the refining of CARB 2 gasoline by Northern California and Northwest refineries by more than 750 points to an HHI level

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[2] Shell Oil Co., C-3803 (1998); Exxon, C-3907 (2000); Chevron, C-4023 (Proposed Order 2001).

[3] The Commission measures market concentration using the Herfindahl-Hirschman Index ("HHI"), which is calculated as the sum of the squares of the shares of all firms in the market. *FTC and Department of Justice Horizontal Merger Guidelines ("Merger Guidelines")* § 1.5. Markets with HHIs between 1000 and 1800 are deemed "moderately concentrated," and markets with HHIs exceeding 1800 are deemed "highly concentrated." *Merger Guidelines* § 1.51.

above 2,700. Based on forecasted CARB 3 refining capacity, the proposed merger would increase concentration for the refining and bulk supply of CARB 3 gasoline by Northern California and Northwest refineries by more than 1,050 points to an HHI level above 3,050.

Entry is difficult and would not be timely, likely, or sufficient to prevent anticompetitive effects arising from the proposed merger. Building a new refinery is extremely unlikely due to the severe environmental constraints and substantial sunk costs. Imports of CARB gasoline from outside California are unlikely because of substantial import barriers, including (1) geographic isolation from potential outside sources; (2) cost and difficulty of producing CARB gasoline; (3) lack of potential customers because of the extensive integration of refining and marketing that has eliminated most independent gasoline marketers and retailers; and (4) price risk stemming from spot market volatility in Northern California.

The efficiency claims of the Respondents, to the extent they relate to these markets, are not cognizable under the *Merger Guidelines*, are small compared to the magnitude of the potential harm, and would not restore the competition lost by the merger even if the efficiencies were achieved.

The Complaint charges that the proposed merger would likely substantially reduce competition in refining and bulk supply of CARB gasoline for sale in Northern California, thereby increasing wholesale prices of CARB gasoline by (1) eliminating direct competition between Valero and Ultramar; (2) increasing the likelihood that the combined company will unilaterally raise prices; and (3) increasing the ability and likelihood of coordinated interaction between the combined company and its competitors in Northern California. The proposed merger would create a highly concentrated market in Northern California. The combined company would control between 40 and 45% of CARB gasoline refining capacity in Northern California. Under the *Merger Guidelines*, these figures trigger a presumption that "the merger will create or enhance market power or facilitate its exercise . . . "

Merger Guidelines § 1.51(c). These anticompetitive effects could result either from unilateral action by the combined firm or from coordinated interaction among the remaining refiners. Valero's post-merger market share supports a presumption under the *Merger Guidelines* that it would have the ability and incentive to unilaterally reduce supply in Northern California and raise prices. It could do this in a variety of ways, including reducing or eliminating capacity expansions at the Bay Area refineries, running the refineries at below capacity, or exporting gasoline out of the market.

The merger increases the likelihood of coordinated interaction in Northern California by reducing the number of significant refiners in the market from five to four. The market exhibits characteristics that are conducive to coordinated interaction, including (1) homogenous product; (2) small number of market participants; (3) high concentration; (4) recognition by participants that individual output decisions impact the market; (5) difficult entry conditions that insulate the market from outside supply; (6) vertical integration that eliminates potential low-cost competitors and creates a finite and identifiable collusive group; and (7) industry practices and conditions that allow the collusive group to easily detect and punish cheating on the tacit agreement.

The merger could raise the costs of CARB gasoline to Northern California consumers substantially; even a one cent per gallon price increase would cost Northern California consumers more than $60 million annually. To remedy the harm, the Proposed Order requires the Respondents to divest Ultramar's Golden Eagle refinery, which refines CARB gasoline, and 70 Ultramar retail service stations supplied from the Golden Eagle refinery, as described more fully below. This divestiture will eliminate the refining and bulk supply overlap in the North Coast market otherwise presented by this merger.

Count II - Refining and Bulk Supply of CARB Phase 2 and CARB Phase 3 Gasoline for Sale in California

Valero and Ultramar compete in refining and bulk supply of CARB gasoline for sale in California. As explained in Count I, only CARB gasoline can be sold legally in California. Refining and bulk supply of CARB 2 and CARB 3 gasoline are relevant product markets.

The West Coast constitutes a relevant antitrust geographic market for refining and bulk supply of CARB 2 and CARB 3 gasoline for sale in California. The West Coast refiners can profitably raise prices by a small but significant and nontransitory amount without losing significant sales to other refiners. Seven California refiners (BP (Arco), ChevronTexaco (Chevron), Equilon (Shell/Texaco), ExxonMobil, Phillips (Tosco), Ultramar, and Valero) supply more than 97% of the CARB gasoline consumed in California; Kern Oil (Bakersfield, California) and Tesoro (Anacortes, Washington) supply virtually all the remainder during normal market operations.

The seven refiner-marketers also account for more than 95% of retail gasoline sales in California through their branded retail stations. One effect of the close integration between refining and marketing in California is that refiners outside the West Coast cannot easily find outlets for imported cargoes of CARB gasoline, since nearly all the outlets are controlled by incumbent refiner-marketers. Likewise, the extensive integration of refining, marketing and bulk storage makes it more difficult for the few non-integrated marketers to turn to imports as a source of supply, since the few remaining independent marketers lack the scale to import cargoes economically and thus must rely on California refiners for their usual supply.

Other than the California refineries and one Washington refinery, no other refineries regularly produce CARB gasoline in significant quantities. The next closest refineries, located in the U.S. Virgin Islands, Texas and Louisiana, do not supply CARB gasoline to California except during significant price spikes

caused by supply disruptions at California refineries. These refineries are unlikely to supply CARB gasoline to California in response to a small but significant and nontransitory increase in price due to (1) transportation costs from other refineries; (2) limited access to marine and bulk storage facilities; (3) lack of potential customers because of the extensive integration of refining and marketing that has eliminated most independent gasoline marketers and retailers; and (4) price risk stemming from spot market volatility in California.

The West Coast market for the refining and bulk supply of CARB 2 gasoline would be at the upper end of the moderately concentrated range following the proposed merger. Based on current refining capacity, the proposed merger would increase concentration for the refining of CARB 2 gasoline by California and Washington refineries by more than 325 points to an HHI level above 1,750. Based on forecasted CARB 3 refining capacity, the proposed merger would result in a highly concentrated market, increasing concentration for the refining and bulk supply of CARB 3 gasoline by California and Washington refineries by more than 390 points to an HHI level above 1,850.

Entry is difficult and would not be timely, likely, or sufficient to prevent anticompetitive effects arising from the proposed merger. Building a new refinery is unlikely due to the severe environmental constraints and substantial sunk costs. Imports of CARB gasoline from outside California are unlikely because of the substantial import barriers listed above.

The efficiency claims of the Respondents, to the extent they relate to these markets, are not cognizable under the *Merger Guidelines*, are small compared to the magnitude of the potential harm, and would not restore the competition lost by the merger even if the efficiencies were achieved.

The Complaint charges that the proposed merger would likely reduce competition in refining and bulk supply of CARB gasoline for sale in California, thereby increasing wholesale prices of CARB gasoline by (1) eliminating direct competition between

Valero and Ultramar; and (2) increasing the ability and likelihood of coordinated interaction between the combined company and its competitors in California. This market exhibits the same characteristics conducive to coordinated interaction identified in Count I. The proposed merger reduces the number of CARB gasoline refiners in California and increases concentration, thereby increasing the likelihood of coordination.

The merger could raise the costs of CARB gasoline to all California consumers substantially; even a one cent per gallon price increase would cost California consumers more than $150 million annually. To remedy the harm, the Proposed Order requires the Respondents to divest the refining and marketing assets identified above in Count I. This divestiture will eliminate the refining and bulk supply overlap in the West Coast market otherwise presented by this merger.

IV. Resolution of the Competitive Concerns

A. CARB Gasoline Refining and Bulk Supply

The Commission has provisionally entered into the Agreement Containing Consent Orders with Valero and Ultramar in settlement of the Complaint. The Agreement Containing Consent Orders contemplates that the Commission would issue the Complaint and enter the Proposed Order and the Hold Separate Order for the divestiture of certain assets described below. The Commission will appoint R. Shermer & Company, Inc. as the hold separate trustee.

To remedy the lessening of competition in refining and bulk supply of CARB 2 and CARB 3 gasoline alleged in Counts I and II of the Complaint, Paragraph II of the Proposed Order requires Respondents to divest Ultramar's Golden Eagle refinery and 70 Ultramar-owned and operated gas stations supplied from the Golden Eagle refinery to an acquirer approved by the Commission. (¶ II.A.) The retail divestiture is ordered to maintain the likelihood that the owner of the Golden Eagle refinery will have incentives to produce CARB gasoline and other

petroleum products equivalent to Ultramar's pre-merger incentives. The divestiture of Ultramar's Golden Eagle refinery, with associated Ultramar retail assets, will not significantly reduce the amount of gasoline available to non-integrated marketers, since the refinery will likely continue to produce CARB gasoline and other products and will need outlets for its sale.

Divestiture of the Golden Eagle refinery will effectively restore the competitive status quo *ante* in both markets. Valero and Ultramar are the only major refiners in California with excess capacity above their direct marketing needs. This excess (or "swing") capacity helps to dampen price spikes during shortages resulting from refinery shutdowns. Elimination of this swing production would lead to greater and longer price spikes during refinery outages. The divestiture will eliminate the combined company's ability and incentive to unilaterally reduce production and raise prices. In addition, Valero and Ultramar are the primary suppliers of unbranded wholesale gasoline to independent marketers and, in Northern California, they compete directly for this business. These unbranded marketers provide lower-cost competition to the branded refiner-marketers. The divestiture will insure that the remaining independent marketers have two vigorous competitors for their business, thus helping them to survive and continue to provide a lower-cost alternative for consumers. This competition, in turn, will increase the incentive for Valero and the acquirer to supply more CARB gasoline, thus, increasing swing capacity. The divestiture will complicate the ability of the Northern California refiners to coordinate their production because there will be more refiners than there would be without the divestiture. Valero and the acquirer will likely have different incentives than the integrated refiner-marketers and may be less willing to coordinate output decisions with the refiner-marketers. Although the divestiture will have the most direct effect in Northern California, it will also help competition in California as a whole; since supplies are longer in Northern California, CARB gasoline typically flows north to south. Maintaining production in Northern California will therefore result in more product availability throughout the state.

In considering an application to divest the Ultramar Golden Eagle refinery and associated marketing assets to an acquirer, the Commission will consider the acquirer's ability and incentive to invest and compete in the businesses in which Ultramar was engaged in California. The Commission will consider, *inter alia*, whether the acquirer has the business experience, technical judgment and available capital to continue to invest in the refinery in order to maintain CARB gasoline production even in the event of changing environmental regulation.

B. Other Terms

Paragraphs III - VII of the Proposed Order detail certain general provisions. Pursuant to Paragraph III, if Respondents fail to comply with the divestiture ordered in Paragraph II, the Commission may appoint a trustee to effectuate the divestiture of the Golden Eagle Refinery and the 70 retail stations, or substitute a package containing Ultramar's two California refineries and all of Ultramar's company-operated retail stations. Paragraph IV 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 V provides for notification to the Commission in the event of any changes in the corporate Respondents. Paragraph VI requires that Respondents provide the Commission with access to their facilities and employees for the purposes of determining or securing compliance with the Proposed Order. Finally, to avoid conflicts between the Proposed Order and the State consent decrees, Paragraph VII provides that if a State fails to approve any of the divestitures contemplated by the Proposed Order, then the period of time required under the Proposed Order for such divestiture shall be extended for sixty days.

V. Opportunity for Public Comment

The Proposed Order has been placed on the public record for thirty (30) days for receipt of comments by interested persons. The Commission, pursuant to a change in its Rules of Practice,

has also issued its Complaint in this matter, as well as a Hold Separate Order. Comments received during this thirty day comment period will become part of the public record. After thirty (30) days, the Commission will again review the Proposed Order and the comments received and will decide whether it should withdraw from the Proposed Order or make final the Proposed Order.

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, and to aid the Commission in its determination of whether it should make final the Proposed Order contained in the agreement. 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

LEINER HEALTH PRODUCTS, INC.

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

Docket C-4035; File No. 0123039
Complaint, February 19, 2002--Decision, February 19, 2002

This consent order addresses claims on certain packaging and labeling for acetaminophen tablets produced by Respondent Leiner Health Products, Inc. that such products are all or virtually all made in the United States. The order, among other things, prohibits the respondent from misrepresenting the extent to which any non-prescription drug product containing an analgesic is made in the United States, while permitting the respondent to represent that such products are made in the United States as long as all, or virtually all, of the ingredients or component parts of such products are made in the United States and all, or virtually all, of the labor in manufacturing such products is performed in the United States. The order also permits the respondent to represent that a product containing imported active ingredient(s) is "Processed in the United States with Foreign Ingredients" when describing a product that has been "significantly processed" in the United States.

Participants

For the Commission: *Laura D. Koss, Walter C. Gross, Joni Lupovitz, Elaine D. Kolish* and *Keith Anderson.*

For the Respondent: *Harvey Applebaum, Covington & Burling.*

COMPLAINT

The Federal Trade Commission, having reason to believe that Leiner Health Products, Inc. ("respondent") has violated the provisions of the Federal Trade Commission Act, and it appearing to the Commission that this proceeding is in the public interest, alleges:

1. Respondent is a Delaware corporation with its principal office or place of business at 901 233rd Street, Carson, California 90745.

2. Respondent has manufactured, labeled, offered for sale, sold, and distributed acetaminophen tablets to the public, including but not limited to private label acetaminophen brands.

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

4. Respondent has disseminated or has caused to be disseminated packaging and labeling for certain of its acetaminophen products, including but not necessarily limited to the attached Exhibits A through E. The packaging and labeling contain the following statements or depictions:

A. **Equate Extra Strength PM Nighttime Sleep Aid/Pain Reliever, Exhibit A**

"Manufactured by Leiner Health Products Inc. . . .
[image of American flag] Made in the USA"

B. **Kirkland Non-Drowsy Day-time Cold/Flu Medicine Soft Gels, Exhibit B**

"Distributed by: Leiner Health Products Inc. . . . **Made in the U.S.A.**"

C. **Target Non-Aspirin Extra Strength, Exhibit C**

"Distributed by Dayton Hudson Corporation . . . Made in U.S.A."

D. **Member's Mark Pain Reliever • Fever Reducer Acetaminophen 500 mg**, **Exhibit D**

"Distributed by: SWC . . . Made in the U.S.A."

E. **Safeway Extra Strength Pain Relief Tablets, Exhibit E**

"DISTRIBUTED BY SAFEWAY INC. . . . PRODUCT OF U.S.A."

5. Through the means described in Paragraph 4, respondent has represented, expressly or by implication, that certain of its acetaminophen products are made in the United States, *i.e.*, that all, or virtually all, of the ingredients of such products are made in the United States, and that all, or virtually all, of the labor in manufacturing such products is performed in the United States.

6. In truth and in fact, a significant portion of the ingredients of certain of respondent's acetaminophen products is, or has been, of foreign origin. The active ingredient, bulk acetaminophen compound, that respondent processed into acetaminophen tablets is or was made outside the United States. Therefore, the representation set forth in Paragraph 5 was, and is, false or misleading.

7. The acts and practices of respondent as alleged in this complaint constitute unfair or deceptive acts or practices, and the making of false advertisements, in or affecting commerce in violation of Sections 5(a) and 12 of the Federal Trade Commission Act, 15 U.S.C. §§ 45(a) and 52.

THEREFORE, the Federal Trade Commission this nineteenth day of February 2002, has issued this complaint against respondent.

By the Commission.

Leiner Health Products

Exhibits

012 3039

NDC 59606-060-24

equate®

extra strength pm

NIGHTTIME SLEEP AID/PAIN RELIEVER

150 CAPLETS

*Compare to Extra Strength Tylenol® PM Caplets active ingredients**

Drug Facts

Active Ingredients (in each caplet):	*Purposes:*
Acetaminophen 500 mg	Pain Reliever/Fever Reducer
Diphenhydramine Hydrochloride 25 mg	Sleep Aid

Uses • for the temporary relief of occasional headaches and minor aches and pains with accompanying sleeplessness.

Warnings

Alcohol Warning: If you consume 3 or more alcoholic drinks every day, ask your doctor whether you should take acetaminophen or other pain relievers/fever reducers. Acetaminophen may cause liver damage.

Do not use • with other products containing acetaminophen
• if you have a breathing problem such as emphysema or chronic bronchitis
• if you have glaucoma or difficulty in urination due to enlargement of the prostate gland.

Ask a doctor or pharmacist before use if you are taking sedatives or tranquilizers

When using this product • do not exceed recommended dosage
• drowsiness will occur
• Do not drive a motor vehicle or operate machinery
• Do not use for more than 10 days • Avoid alcoholic beverages

Drug Facts (continued)

Stop use and ask a doctor • if this product is used for pain for more than 10 days
• if fever persists for more than 3 days or gets worse
• if redness or swelling is present, these could be signs of a serious condition
• if symptoms persist or new ones occur
• if sleeplessness persists continuously for more than 2 weeks. Insomnia may be a symptom of serious underlying medical illness.

If pregnant or breast-feeding, ask a health professional before use.

Keep out of the reach of children. In case of overdose, get medical help or contact a Poison Control Center right away. Prompt medical attention is critical for adults as well as children even if you do not notice any signs or symptoms.

Directions **Adults and children 12 years of age and over:** 2 caplets at bedtime. **Do not give to children under 12 years of age.**

Inactive Ingredients: FD&C Blue No. 1, FD&C Blue No. 2, Hydroxypropyl Methylcellulose, Microcrystalline Cellulose, Polyethylene Glycol, Titanium Dioxide, and may also contain: Croscarmellose Sodium, Magnesium Stearate, Maltodextrin, Polydextrose, Polysorbate 80, Povidone, Pregelatinized Starch, Silicon Dioxide, Sodium Starch Glycolate, Stearic Acid, Triacetin.

NDC 59606-060-24

equate®

extra strength pm

NIGHTTIME SLEEP AID/PAIN RELIEVER

150 CAPLETS

*Compare to Extra Strength Tylenol® PM Caplets active ingredients**

USE ONLY IF INNER FOIL SEAL PRINTED "SEALED FOR YOUR PROTECTION" IS NOT BROKEN OR MISSING.

Keep tightly closed. Store at room temperature between 15° and 30°C (59° and 86°F). Use by expiration date printed on package.

*This product is not manufactured or distributed by McNeil Consumer Products Company, distributor of Extra Strength TYLENOL® PM. TYLENOL® is a registered trademark of Ortho-Clinical Diagnostics, Inc.

MANUFACTURED BY
LEINER HEALTH PRODUCTS INC.
CARSON, CA 90745 U.S.A.
EQ81129A008

Made in the USA

SATISFACTION GUARANTEED BY REFUND OR EXCHANGE

EQ81129AQ08
LHP016

LHP016

3 30419 34709 1

Exhibit A

KIRKLAND

Non-Drowsy

DAY-TIME

Cold/Flu Medicine Softgels

Pseudoephedrine / Acetaminophen / Dextromethorphan

- Nasal Decongestant
- Pain Reliever - Fever Reducer
- Cough Suppressant

Compare To The Active Ingredients Of DayQuil® LiquiCaps®

96 SOFTGELS

ITEM #314005

IFC236

CF81744AQ00b

Lot No.
Exp. Date

SAFETY SEALED: THIS PRODUCT PROTECTED WITH SEALED BLISTER UNITS. DO NOT USE IF ANY ARE TORN OR BROKEN

Drug Facts

Active Ingredients (in each softgel) — **Purpose**

Pseudoephedrine HCl 30 mg	Nasal Decongestant
Acetaminophen 250 mg	Pain Reliever/Fever Reducer
Dextromethorphan HBr 10 mg	Cough Suppressant

Uses temporarily relieves symptoms due to the common cold/flu:
- minor aches and pains
- fever
- headache
- muscular aches
- sore throat pain
- nasal congestion
- cough

Warnings

Alcohol Warning: If you consume 3 or more alcoholic drinks every day, ask your doctor whether you should take acetaminophen or other pain relievers/fever reducers. Acetaminophen may cause liver damage.

Do not use if you are now taking a prescription monoamine oxidase inhibitor (MAOI) (certain drugs for depression, psychiatric, or emotional conditions, or Parkinson's disease), or for 2 weeks after stopping the MAOI drug. If you do not know if your prescription drug contains an MAOI, ask a health professional before taking this product. • with other products containing acetaminophen

Ask a doctor before use if you have
- asthma
- excessive phlegm (mucus)
- chronic bronchitis
- heart disease
- persistent or chronic cough
- emphysema
- cough associated with smoking
- high blood pressure
- thyroid disease
- diabetes
- difficulty in urination due to enlargement of the prostate gland

Stop use and ask a doctor
- If nervousness, dizziness, or sleeplessness occur
- If sore throat is severe, persists for more than 2 days, is accompanied or followed by fever, headache, rash, nausea or vomiting
- If symptoms do not improve or are accompanied by fever that lasts more than 3 days, or if new symptoms occur.
- If cough persists for more than 7 days (adults) or 5 days (children), recurs, or is accompanied by rash or persistent headache. A persistent cough may be a sign of a serious condition

If pregnant or breast-feeding, ask a health professional before use.

Keep out of the reach of children. In case of overdose, get medical help or contact a Poison Control Center right away. Prompt medical attention is critical for adults as well as children even if you do not notice any signs or symptoms.

Directions

Age Group	Frequency	Maximum Dosage
Adults and children 12 years of age and over:	2 softgels with water every 4 hours	Not to exceed 8 softgels in 24 hours
Children 8 to under 12 years of age:	1 softgel with water every 4 hours	Not to exceed 4 softgels in 24 hours
Children under 6 years of age:	Consult a doctor	

Inactive Ingredients: D&C Yellow No.10, Edible Ink, FD&C Red No. 40, FD&C Yellow No. 6, Gelatin, Glycerin, Polyethylene Glycol, Povidone, Propylene Glycol, Propyl Paraben, Purified Water, Sorbitol

Store at room temperature between 15° and 30°C (59° and 86°F). Use by expiration date printed on package. Keep tablets in carton for better identification until used.

*This product is not manufactured or distributed by Procter & Gamble, distributor of DayQuil® LiquiCaps® DayQuil® and LiquiCaps® are registered trademarks of The Procter & Gamble Company.

CF81744AQ00

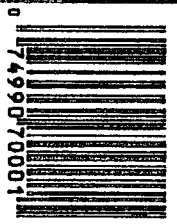
Distributed by:
Lever Hasbin Products Inc
Carson, CA 90745 1-800-774-2678
Made in the U.S.A.

4 00003 14005 3

Exhibit B

CAUTION:
It is the vendors responsibility to print a reasonable UPC code from either our artwork or your alternative UPC method.

Economy Size • Save • Economy Size • Save • Economy Size • Save • Economy Size



094 01 0001

941
001

See New Warning

TARGET

NON ASPIRIN

EXTRA STRENGTH

*COMPARE TO THE ACTIVE INGREDIENT OF TYLENOL® EXTRA STRENGTH CAPLETS

Giving back to our community every day on every purchase since 1962.

Unconditional Guarantee
If you are not completely satisfied with this product for any reason, simply return the unused portion for a complete refund.

PAIN RELIEVER/FEVER REDUCER
ACETAMINOPHEN
ASPIRIN FREE
EASY TO SWALLOW

500 CAPLETS 500 MG EACH

USE ONLY IF INNER FOIL SEAL PRINTED "SEALED FOR YOUR PROTECTION" IS NOT BROKEN OR MISSING.

INDICATIONS: For the temporary relief of minor aches and pains associated with a cold or flu, headache, toothache, muscular aches, backache, the premenstrual and menstrual periods (dysmenorrhea), for the minor pain from arthritis, and to reduce fever.

DIRECTIONS: Adults and children 12 years of age and over: 2 caplets every 6 hours, while symptoms persist, not to exceed 8 caplets in 24 hours, or as directed by a doctor. **Children under 12 years of age:** Consult a doctor.

WARNINGS: Do not take this product for pain for more than 10 days or for fever for more than 3 days unless directed by a doctor. If pain or fever persists or gets worse, if new symptoms occur, or if redness or swelling is present, consult a doctor because these could be signs of a serious condition. As with any drug, if you are pregnant or nursing a baby, seek the advice of a health professional before using this product. **Keep this and all drugs out of the reach of children.** In case of accidental overdose, seek professional assistance or contact a poison control center immediately. Prompt medical attention is critical for adults as well as for children even if you do not notice any signs or symptoms. Do not use with other products containing acetaminophen.

ALCOHOL WARNING: If you consume 3 or more alcoholic drinks every day, ask your doctor whether you should take acetaminophen or other pain relievers/fever reducers. Acetaminophen may cause liver damage.

ACTIVE INGREDIENT: Each caplet contains: Acetaminophen 500 mg.

ALSO CONTAINS: Hydroxypropyl Methylcellulose, Povidone, Starch, Stearic Acid. **May also contain:** Croscarmellose Sodium, Hydroxypropyl Cellulose, Polyethylene Glycol, Polysorbate 80, Powdered Cellulose, Propylene Glycol, Sodium Starch Glycolate.

Keep tightly closed. Store at room temperature between 15° and 30°C (59° and 86°F). Use by expiration date printed on package.

*This product is not manufactured or distributed by McNeil Consumer Products Company, distributor of TYLENOL®. TYLENOL® is a registered trademark of Johnson & Johnson.

Distributed by Dayton Hudson Corporation,
Minneapolis, MN 55402 ©1999 DHC
All Rights Reserved. Made in U.S.A.

TG9800K06

Lot No.
Exp. Date:

Leiner Health Products **In-house Graphics Department**	810 E. 233 STREET · CARSON, CA 90745 VOICE (310) 835-8400 · FAX (310) 522-9180	**Software(s):** *Illustrator 7.0* ☒ IBM ☐ MAC	**Disk:** ☒ YES ☐ NO

COLORS

Pantone Black	PMS 100	PMS 109	PMS 186	Pantone Reflex Blue	PMS 000	PMS 000

FONTS

Face Panel: *Univers (Family)* *Helvetica (Family)* *Utopia (Family)*

Ingredient Panels: *Univers (Family)*

Die Number: *0-107*

Prepared by: *Tom Nelson* *January 15, 1999*

Path File Name: Q:\PRODUCTION\OTC\TARGET\CLIPART\TG9800.EPS | **Ctrl. No.** 11215 | **Proofreader:** JOEF 1/20/99

*COLOR BREAK AND DIE LINES ARE FOR REFERENCE ONLY AND MAY NOT ACCURATELY REFLECT ACTUAL PRINT PRODUCTION.

Exhibit C

Item #4

Exhibit D

Drug Facts

Active Ingredients (in each caplet) — **Purposes**

Acetaminophen 500 mg — Pain Reliever/Fever Reducer

Uses • temporarily relieves minor aches and pains associated with: cold, flu, headache, toothache, muscular aches, backache, the premenstrual and menstrual periods (dysmenorrhea), fever, arthritis, rheumatism • and to reduce fever.

Warnings

Alcohol Warning: If you consume 3 or more alcoholic drinks every day, ask your doctor whether you should take acetaminophen or other pain relievers/fever reducers. Acetaminophen may cause liver damage.

Do not use • with other products containing acetaminophen.

Member's Mark℠

Pain Reliever • Fever Reducer

ACETAMINOPHEN

500 mg

Compare to Extra Strength Tylenol® active ingredient*

QUALITY GUARANTEED

Non Aspirin

EXTRA STRENGTH

500 Caplets

Drug Facts (continued)

Stop use and ask a doctor if this product is used for pain for more than 10 days or for fever for more than 3 days

• if pain or fever persists or gets worse • if new symptoms occur • or if redness or swelling is present, these could be signs of a serious condition.

If pregnant or breast-feeding, ask a health professional before use.

Keep out of the reach of children. In case of overdose, get medical help or contact a Poison Control Center right away. Prompt medical attention is critical for adults as well as children even if you do not notice any signs or symptoms.

Directions

Age Group	Frequency	Maximum Dosage
Adults and children 12 years of age and over.	2 caplets every 6 hours	Not to exceed 8 caplets in 24 hours
Children under 12 years of age:	Consult a doctor	

Inactive Ingredients: Hydroxypropyl Methylcellulose, Povidone, Corn Starch, and Stearic Acid. May also contain: Carnauba Wax, Croscarmellose Sodium, Hydroxypropyl Cellulose, Polyethylene Glycol, Polysorbate 80, Powdered Cellulose, Propylene Glycol, Sodium Starch Glycolate, Talc, and Titanium Dioxide.

6 05388 60444 6

USE ONLY IF INNER FOIL SEAL PRINTED "SEALED FOR YOUR PROTECTION" IS NOT BROKEN OR MISSING.

Keep tightly closed. Store at room temperature between 15° and 30°C (59° and 86°F). Use by expiration date printed on package.

Distributed by: SWC
608 S.W. 8th Street, Bentonville, AR 72712
Made in the U.S.A.
MM98000BOM06

Lot No.
Exp. Date:

CAUTION:
It is the vendors responsibility to print a scannable UPC code from either our artwork or your alternative UPC method.

Leiner Health Products 810 E. 233 STREET • CARSON, CA 90745
In-house Graphics Department VOICE (310) 835-8400 • FAX (310) 522-9180

Software(s): Illustrator 8 ☐ IBM ■ MAC
Disk: ☐ YES ■ NO

COLORS

Process Black	Process Cyan	PMS 186	Process Yellow	PMS 872	PMS 000	PMS 000

FONTS

Face Panel: Universe, Lucida Sans, ITC Stone Serif
Ingredient Panels: Helvetica Black, Helvetica Condensed
Smallest Point Size: 5 pt

Die Number: 3 X 8
Prepared by: nance 01 17 01

Path: PRODUCTION\OTC\MEMBERSMARK\ARTWORK\LABELS\MM98000b.EPS | **Job No.** MM-1000248 | **Proofreader:**

**COLOR BREAK AND DIE LINES ARE FOR REFERENCE ONLY AND MAY NOT ACCURATELY REFLECT ACTUAL PRINT PRODUCTION.*

PMS 186 REPLACES MAGENTA

Leiner Health Products
In-house Graphics Department

810 E. 233 STREET • CARSON, CA 90745
VOICE (310) 835-8400 • FAX (310) 522-9180

Software(s): Illustrator 8.0 ☒ IBM ☐ MAC
WamNet: ☒ YES ☐ NO

COLORS

Pantone Black	Pantone Pro Yellow	PMS 485	PMS 343	PMS 000	PMS 000	PMS 000

FONTS

Face Panel: *Times, Helvetica Condensed*
Ingredient Panels: *Helvetica, Helvetica Black*
Smallest Type: 5.5 pnt

Die Number: *LHP010*
Prepared by: *Lois 11-30-00*

Path File Name: Q:\PRODUCTION\OTC\SAFEWAY\ARTWI
SW-1000334
Proofreader:

Exhibit E

*COLOR BREAK AND DIE LINES ARE FOR REF
ATELY REFLECT ACTUAL PRINT PRODUCTION.

...ibility ...ssurable UPC code ...either our artwork or ...alternative UPC method.

DECISION AND ORDER

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

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

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

1. Respondent Leiner Health Products, Inc. is a Delaware corporation with its principal office or place of business at 901 233rd Street, Carson, California 90745.

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

ORDER

I.

IT IS ORDERED that respondent, Leiner Health Products, Inc., its successors and assigns, and its officers, agents, representatives, and employees, directly or through any corporation, subsidiary, division, or other device, in connection with the manufacturing, labeling, advertising, promotion, offering for sale, sale, or distribution of any non prescription drug product containing an analgesic in or affecting commerce, as "commerce" is defined in Section 4 of the Federal Trade Commission Act, 15 U.S.C. § 44, shall not misrepresent, in any manner, directly or by implication, the extent to which any such product is made in the United States. For purposes of this Order, “drug” shall mean as defined in Section 15 of the Federal Trade Commission Act, 15 U.S.C. § 55, and “analgesic” shall mean an agent used to alleviate pain.

PROVIDED, however, that a representation that any such product is made in the United States will not be in violation of this order so long as all, or virtually all, of the ingredients or component parts of such product are made in the United States and all, or virtually all, of the labor in manufacturing such product is performed in the United States.

PROVIDED FURTHER, that a representation that any such product containing imported active ingredient is “Processed in the United States with Foreign Ingredients” will not be in violation of this Order when such representation is true and is used to describe a product that has been significantly processed in the United States.

PROVIDED FURTHER, that nothing in the order shall prohibit respondent from depleting the inventory of packaging and

labeling for such products bearing a marking or labeling otherwise prohibited by this order and existing on the date this order is signed, in the normal course of business, provided that no such existing inventory is shipped from respondent later than December 31, 2001.

II.

IT IS FURTHER ORDERED that respondent, and its successors and assigns, shall, for five (5) years after the last date of dissemination of any representation covered by this order, maintain and upon request make available to the Federal Trade Commission for inspection and copying:

A. All labeling, packaging, advertisements and promotional materials containing the representation;

B. All materials that were relied upon in disseminating the representation; and

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

III.

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

IV.

IT IS FURTHER ORDERED that respondent, 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.

V.

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

VI.

This order will terminate on February 19, 2022, 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 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 respondent Leiner Health Products, Inc. ("Leiner").

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 "Made in U.S.A." claims on packaging and labeling for Leiner's acetaminophen tablets sold at retail bearing private brand names. The Commission's complaint alleges that respondent misrepresented on packaging and labeling that certain of these products, manufactured for customers such as Wal-Mart, Costco, Target, and Safeway, are all or virtually all made in the United States. According to the complaint, these products are actually made with significant foreign content. The products' active ingredient, bulk acetaminophen compound, that respondent processed into acetaminophen tablets, is or was made outside the United States. The imported bulk acetaminophen comprises a substantial percentage of total manufacturing costs and imparts the crucial analgesic quality to the OTC products at issue. The Commission's complaint does not allege that all of Leiner's private label acetaminophen brands or products are mislabeled, but only that certain products for certain customers have been improperly labeled.

The proposed consent order contains a provision that is designed to remedy the charges and to prevent the respondent from engaging in similar acts and practices in the future. Part I of the proposed order prohibits Leiner from misrepresenting the extent to which any non-prescription drug product containing an analgesic is made in the United States. The order defines

"analgesic" as an agent used to alleviate pain. The proposed order would allow Leiner to represent that such products are made in the United States as long as all, or virtually all, of the ingredients or component parts of such products are made in the United States and all, or virtually all, of the labor in manufacturing such products is performed in the United States. The proposed order also would allow Leiner to represent that a product containing imported active ingredient(s) is "Processed in the United States with Foreign Ingredients" when describing a product that has been "significantly processed" in the United States.

The draft order also includes a provision that would allow Leiner to use its current packaging inventory until December 31, 2001.

Part II of the proposed order requires the respondent to maintain materials relied upon in disseminating any representation covered by the order. Part III of the proposed order requires the respondent to distribute copies of the order to certain company officials and employees. Part IV of the proposed order requires the respondent to notify the Commission of any change in the corporation that may affect compliance obligations under the order. Part V of the proposed order requires the respondent to file one or more compliance reports. Part VI of the proposed order is a provision whereby the order, absent certain circumstances, terminates twenty years from the date of issuance.

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

Complaint

IN THE MATTER OF

A & S PHARMACEUTICAL CORP.

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

Docket C-4036; File No. 0123051
Complaint, February 19, 2002--Decision, February 19, 2002

This consent order addresses claims on certain packaging and labeling for aspirin tablets produced by Respondent A&S Pharmaceutical Corporation that such products are all or virtually all made in the United States. The order, among other things, prohibits the respondent from misrepresenting the extent to which any over-the-counter drug product is made in the United States, while permitting the respondent to represent that such products are made in the United States as long as all, or virtually all, of the ingredients or component parts of such products are made in the United States and all, or virtually all, of the labor in manufacturing such products is performed in the United States.

Participants

For the Commission: *Laura D. Koss, Walter C. Gross, Joni Lupovitz, Elaine D. Kolish* and *Keith Anderson.*

For the Respondent: *Dr. Arnold Lewis, pro se.*

COMPLAINT

The Federal Trade Commission, having reason to believe that A & S Pharmaceutical Corporation ("respondent") has violated the provisions of the Federal Trade Commission Act, and it appearing to the Commission that this proceeding is in the public interest, alleges:

1. Respondent is a Connecticut corporation with its principal office or place of business at 480 Barnum Avenue, Bridgeport, Connecticut 06608.

2. Respondent has manufactured, labeled, offered for sale, sold, and distributed aspirin tablets to the public, including but not limited to private label aspirin brands.

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

4. Respondent has disseminated or has caused to be disseminated packaging and labeling for certain of its aspirin products, including but not necessarily limited to the attached Exhibits A through G. The packaging and labeling contain the following statements or depictions:

A. **Food Lion Aspirin Tablets, Exhibit A**

"DISTRIBUTED BY FOOD LION, INC. . . .
Made in U.S.A."

B. **Price Chopper Coated Aspirin Tablets, Exhibit B**

"**Made in U.S.A.** . . .
DISTRIBUTED BY THE
PRICE CHOPPER, INC. . . ."

C. **Berkley & Jensen Aspirin, Exhibit C**

"**DISTRIBUTED BY**
BJWC . . .
Made in U.S.A."

D. **FormuCare Aspirin Tablets**, **Exhibit D**

"**Made in U.S.A.**
Mfd. for Amway Corp."

E. **AAFES Aspirin, Exhibit E**

"Manufactured in the **U.S.A.** for:
Army & Air Force Exchange Service"

F. **Western Family Aspirin, Exhibit F**

"Proudly Distributed By: **WESTERN FAMILY FOODS, INC.** . . .

MADE IN
U.S.A.

."

G. **Fred's Aspirin, Exhibit G**

"DISTRIBUTED BY: FRED'S, INC. . . .
Made in U.S.A."

5. Through the means described in Paragraph 4, respondent has represented, expressly or by implication, that certain of its aspirin products are made in the United States, *i.e.*, that all, or virtually all, of the ingredients of such products are made in the United States, and that all, or virtually all, of the labor in manufacturing such products is performed in the United States.

6. In truth and in fact, a significant portion of the ingredients of certain of respondent's aspirin products is, or has been, of foreign origin. The active ingredient, bulk aspirin compound, that respondent processed into aspirin tablets is or was made outside the United States. Therefore, the representation set forth in Paragraph 5 was, and is, false or misleading.

7. The acts and practices of respondent as alleged in this complaint constitute unfair or deceptive acts or practices, and the making of false advertisements, in or affecting commerce in violation of Sections 5(a) and 12 of the Federal Trade Commission Act, 15 U.S.C. §§ 45(a) and 52.

THEREFORE, the Federal Trade Commission this nineteenth day of February 2002, has issued this complaint against respondent.

By the Commission.

A & S Pharmaceutical

Exhibits

012 3051

Compare to the active ingredient in Bayer™

BERKLEY JENSEN

Aspirin

Pain Reliever
Fever Reducer

Ultra thin coating for easy swallowing [illegible]

PHARMACIST APPROVED

500 Tablets

DO NOT USE IF THE PRINTED SEAL AROUND THE CAP IS BROKEN OR MISSING.

INDICATIONS. For the temporary relief of headache, pain and fever of colds, [illegible] and pain of arthritis.
DIRECTIONS. Adults: 2 tablets every 4 hours as needed. Do not exceed 12 tablets in 24 hours unless directed by a doctor. Children under 12 years: Consult a doctor.
ALCOHOL WARNING. If you consume 3 or more alcoholic drinks every day, ask your doctor whether you should take aspirin or other pain relievers/fever reducers. Aspirin may cause stomach bleeding.
WARNINGS. Children and teenagers should not use this medicine for chicken pox or flu symptoms before a doctor is consulted about Reye's syndrome, a rare but serious illness reported to be associated with aspirin. Do not take this product for pain for more than 10 days or for fever for more than 3 days unless directed by a doctor. [illegible] IT IS ESPECIALLY IMPORTANT NOT TO USE ASPIRIN DURING THE LAST 3 MONTHS OF PREGNANCY UNLESS SPECIFICALLY DIRECTED TO DO SO BY A DOCTOR BECAUSE IT MAY CAUSE PROBLEMS IN THE UNBORN CHILD OR COMPLICATIONS DURING DELIVERY.
Keep this and all drugs out of the reach of children. In case of accidental overdose, contact a doctor immediately.
EACH TABLET CONTAINS: Aspirin 325 mg
Also contains: [illegible], [illegible], starch.
Keep tightly closed in a dry place.
Do not expose to excessive heat.
*This product is not manufactured or distributed by Bayer Corp. Consumer Care Division, owner of the registered trademark Bayer®.

DISTRIBUTED BY
[illegible]
1 [illegible] Road
[illegible], MA 01[illegible]
1-800-[illegible]

[illegible] 225081-0500 Made in U.S.A.

FORMU CARE

Aspirin

TABLETS, 325 mg each

PAIN RELIEVER / FEVER REDUCER

Ultra thin coating for easy swallowing

DO NOT USE IF THE PRINTED SEAL AROUND THE CAP IS BROKEN OR MISSING.

[illegible]

T-5570

*Compare to the active ingredient in Bayer®***

BERKLEY JENSEN

Aspirin

Pain Reliever/Fever Reducer

Ultra thin coating for easy swallowing

500 Tablets

DO NOT USE IF THE PRINTED SEAL AROUND THE CAP IS BROKEN OR MISSING.

INDICATIONS: For the temporary relief of headache, pain and fever of colds, muscle aches and pains, menstrual pain, toothache pain, and minor aches and pains of arthritis.
DIRECTIONS: Adults: 2 tablets every 4 hours as needed. Do not exceed 12 tablets in 24 hours or as directed by a doctor. Children under 12 years: Consult a doctor.
ALCOHOL WARNING: If you consume 3 or more alcoholic drinks every day, ask your doctor whether you should take aspirin or other pain relievers/fever reducers. Aspirin may cause stomach bleeding.
WARNINGS: Children and teenagers should not use this medicine for chicken pox or flu symptoms before a doctor is consulted about Reye syndrome, a rare but serious illness reported to be associated with aspirin. Do not take this product for pain for more than 10 days or for fever for more than 3 days unless directed by a doctor. If pain or fever persists or gets worse, if new symptoms occur, or if redness or swelling is present, consult a doctor because these could be signs of a serious condition. As with any drug, if you are pregnant or nursing a baby, seek the advice of a health professional before using this product. **IT IS ESPECIALLY IMPORTANT NOT TO USE ASPIRIN DURING THE LAST 3 MONTHS OF PREGNANCY UNLESS SPECIFICALLY DIRECTED TO DO SO BY A DOCTOR BECAUSE IT MAY CAUSE PROBLEMS IN THE UNBORN CHILD OR COMPLICATIONS DURING DELIVERY.**
Keep this and all drugs out of the reach of children. In case of accidental overdose, contact a doctor immediately.
EACH TABLET CONTAINS: Aspirin, 325 mg
Also contains: [illegible]
Keep tightly closed in a dry place.
Do not use if [illegible]
**This product is not manufactured or distributed by Bayer Corp., Consumer Care Division, owner of the registered trademark Bayer®.

DISTRIBUTED BY
BJWC
1 Mercer Road
Natick, MA 01760
1-800-[illegible]

LA[illegible] AW 22236F-0500 Made in U.S.A.

INDICATIONS: For the temporary relief of headache, backache, fever, symptoms of colds, muscle aches and pains, menstrual pain, toothache, sore throat, and minor aches and pains of arthritis.

DIRECTIONS: Adults: 2 tablets every 4 hours as needed. Do not exceed 12 tablets in 24 hours unless directed by a doctor. Children under 12 years: Consult a doctor.

ALCOHOL WARNING: If you consume 3 or more alcoholic drinks every day, ask your doctor whether you should take aspirin or other pain reliever/fever reducer. Aspirin may cause stomach bleeding.

WARNINGS: Children and teenagers should not use this medicine for chicken pox or flu-like symptoms before a doctor is consulted about Reye's syndrome, a rare but serious illness associated with aspirin. Do not take this product for more than 10 days unless directed by a doctor. If pain persists for more than 5 days or fever lasts for more than 3 days, stop use and consult a doctor or dentist. Do not use this product if you have ever had an allergic reaction to this product or any pain reliever/fever reducer. Ask a doctor before use if you have stomach problems (such as heartburn), asthma, or are taking a diuretic. Consult a doctor before use if you are under a doctor's care for any serious condition. As with any drug, if you are pregnant or nursing a baby, seek the advice of a health professional before using this product. IT IS ESPECIALLY IMPORTANT NOT TO USE ASPIRIN DURING THE LAST 3 MONTHS OF PREGNANCY UNLESS SPECIFICALLY DIRECTED TO DO SO BY A DOCTOR BECAUSE IT MAY CAUSE PROBLEMS IN THE UNBORN CHILD OR CAUSE COMPLICATIONS DURING DELIVERY.

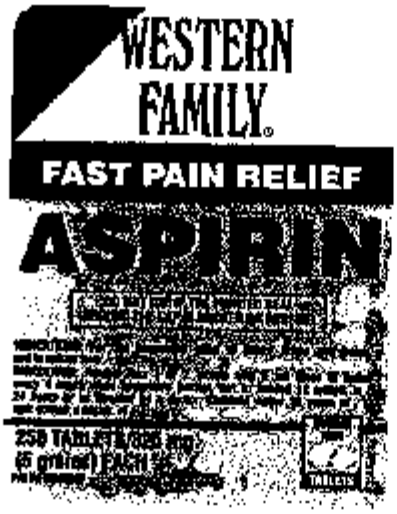
Keep this and all drugs out of the reach of children. In case of accidental overdose, contact a doctor or poison control center.

EACH TABLET CONTAINS: Aspirin, 325 mg. Also contains Hydroxypropyl Methylcellulose, Corn Starch.

Read label for proper storage and use.
Do not use if printed seal around cap is broken or missing.
Store in a dry place.
Made in U.S.A.

22248-0100 (4/97)C-AN

T-5570


WESTERN FAMILY®
FAST PAIN RELIEF
ASPIRIN


WESTERN FAMILY.
FAST PAIN RELIEF
ASPIRIN
250 TABLETS
TABLETS


0 15400 02250 7

DECISION AND ORDER

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

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

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

1. Respondent A&S Pharmaceutical Corporation is a Connecticut corporation with its principal office or place of business at 480 Barnum Avenue, Bridgeport, Connecticut 06608.

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

ORDER

I.

IT IS ORDERED that respondent, A & S Pharmaceutical Corporation, its successors and assigns, and its officers, agents, representatives, and employees, directly or through any corporation, subsidiary, division, or other device, in connection with the manufacturing, labeling, advertising, promotion, offering for sale, sale, or distribution of any over-the-counter drug in or affecting commerce, as "commerce" is defined in Section 4 of the Federal Trade Commission Act, 15 U.S.C. § 44, shall not misrepresent, in any manner, directly or by implication, the extent to which any such product is made in the United States. For purposes of this Order, "drug" shall mean drug as defined in Section 15 of the Federal Trade Commission Act, 15 U.S.C. § 55, and "over-the-counter" shall mean available without a prescription.

PROVIDED, however, that a representation that any such product is made in the United States will not be in violation of this order so long as all, or virtually all, of the ingredients or component parts of such product are made in the United States and all, or virtually all, of the labor in manufacturing such product is performed in the United States.

II.

IT IS FURTHER ORDERED that respondent, and its successors and assigns, shall, for five (5) years after the last date of dissemination of any representation covered by this order, maintain and upon request make available to the Federal Trade Commission for inspection and copying:

A. All labeling, packaging, advertisements and promotional materials containing the representation;

B. All materials that were relied upon in disseminating the representation; and

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

III.

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

IV.

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

VI.

This order will terminate on February 19, 2022, 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 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 an agreement, subject to final approval, to a proposed consent order from respondent A&S Pharmaceutical Corporation ("A&S").

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 "Made in U.S.A." claims on packaging and labeling for A&S's aspirin tablets sold at retail bearing private brand names. The Commission's complaint alleges that respondent misrepresented on packaging and labeling that certain of these products, manufactured for customers such as Food Lion, Price Chopper, and BJ's Wholesale Club, are all or virtually all made in the United States. According to the complaint, these products are actually made with significant foreign content. The products' active ingredient, bulk aspirin compound, that respondent processed into aspirin tablets is or was made outside the United States. The imported bulk aspirin compound comprises a substantial percentage of total manufacturing costs and imparts the crucial analgesic quality to the OTC products at issue. The Commission's complaint does not allege that all of A&S's private label aspirin brands or products are mislabeled, but only that certain products for certain customers have been improperly labeled.

The proposed consent order contains a provision that is designed to remedy the charges and to prevent the respondent from engaging in similar acts and practices in the future. Part I of the proposed order prohibits A&S from misrepresenting the extent to which any over-the-counter drug product is made in the United States. The proposed order would allow A&S to represent that

such products are made in the United States as long as all, or virtually all, of the ingredients or component parts of such products are made in the United States and all, or virtually all, of the labor in manufacturing such products is performed in the United States.

Part II of the proposed order requires the respondent to maintain materials relied upon in disseminating any representation covered by the order. Part III of the proposed order requires the respondent to distribute copies of the order to certain company officials and employees. Part IV of the proposed order requires the respondent to notify the Commission of any change in the corporation that may affect compliance obligations under the order. Part V of the proposed order requires the respondent to file one or more compliance reports. Part VI of the proposed order is a provision whereby the order, absent certain circumstances, terminates twenty years from the date of issuance.

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

Complaint

IN THE MATTER OF

LNK INTERNATIONAL, INC.

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

Docket C-4037; File No. 0123058
Complaint, February 19, 2002--Decision, February 19, 2002

This consent order addresses claims on certain packaging and labeling for aspirin and acetaminophen tablets produced by Respondent LNK International, Inc. that such products are all or virtually all made in the United States. The order, among other things, prohibits the respondent from misrepresenting the extent to which any non-prescription drug product containing an analgesic is made in the United States, while permitting the respondent to represent that such products are made in the United States as long as all, or virtually all, of the ingredients or component parts of such products are made in the United States and all, or virtually all, of the labor in manufacturing such products is performed in the United States. The order also permits the respondent to represent that a product containing imported active ingredient(s) is "Processed in the United States with Foreign Ingredients" when describing a product that has been "significantly processed" in the United States.

Participants

For the Commission: *Laura D. Koss, Walter C. Gross, Joni Lupovitz, Elaine D. Kolish* and *Keith Anderson.*

For the Respondent: *Fred Sonnenfeld, Sonnenfeld & Richman.*

COMPLAINT

The Federal Trade Commission, having reason to believe that LNK International, Inc. ("respondent") has violated the provisions of the Federal Trade Commission Act, and it appearing to the Commission that this proceeding is in the public interest, alleges:

1. Respondent is a New York corporation with its principal office or place of business at 60 Arkay Drive, Hauppauge, New York 11788.

2. Respondent has manufactured, labeled, offered for sale, sold, and distributed aspirin and acetaminophen tablets to the public, including but not limited to private label aspirin and acetaminophen brands.

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

4. Respondent has disseminated or has caused to be disseminated packaging and labeling for certain of its aspirin and acetaminophen products, including but not necessarily limited to the attached Exhibits A through G. The packaging and labeling contain the following statements or depictions:

A. **Health Pride Tri-Buffered Aspirin Analgesic, Exhibit A**

"Made in U.S.A. . . . Distributed by **Compass Foods** . . . ."

B. **Eckerd Aspirin Plus, Exhibit B**

"Made in U.S.A. . . .
DISTRIBUTED BY ECKERD DRUG COMPANY . . ."

C. **Quality Choice Enteric Coated Lo-Dose Aspirin, Exhibit C**

"**DISTRIBUTED BY QUALITY CHOICE** . . .
MADE IN U.S.A."

D. **Stop & Shop Enteric Coated Aspirin**, **Exhibit D**

"DIST. BY THE
STOP & SHOP

SUPERMARKET COMPANY . . .
MADE IN U.S.A."

E. **The Medicine Shoppe Extra Strength Enteric Coated Aspirin for Arthritis, Exhibit E**

"Made in USA
Distributed by
Medicine Shoppe International, Inc. . . ."

F. **CVP Extra Strength Pain Reliever Non-Aspirin Analgesic, Exhibit F**

"Made in U.S.A.
Distributed by
Consumer Value Products, Inc. . . ."

G. **Goldline Genapap Acetaminophen (APAP) Tablets, Exhibit G**

"Made in USA
Dist by:
GOLDLINE LABORATORIES, INC."

5. Through the means described in Paragraph 4, respondent has represented, expressly or by implication, that certain of its aspirin and acetaminophen products are made in the United States, *i.e.*, that all, or virtually all, of the ingredients of such products are made in the United States, and that all, or virtually all, of the labor in manufacturing such products is performed in the United States.

6. In truth and in fact, a significant portion of the ingredients of certain of respondent's aspirin and acetaminophen products is, or has been, of foreign origin. The active ingredients, bulk aspirin and acetaminophen compounds, that respondent processed into aspirin or acetaminophen tablets are or were made outside the United States. Therefore, the representation set forth in Paragraph 5 was, and is, false or misleading.

7. The acts and practices of respondent as alleged in this complaint constitute unfair or deceptive acts or practices, and the making of false advertisements, in or affecting commerce in violation of Sections 5(a) and 12 of the Federal Trade Commission Act, 15 U.S.C. §§ 45(a) and 52.

THEREFORE, the Federal Trade Commission this nineteenth day of February 2002, has issued this complaint against respondent.

By the Commission.

LNK International

Exhibits

012 3058

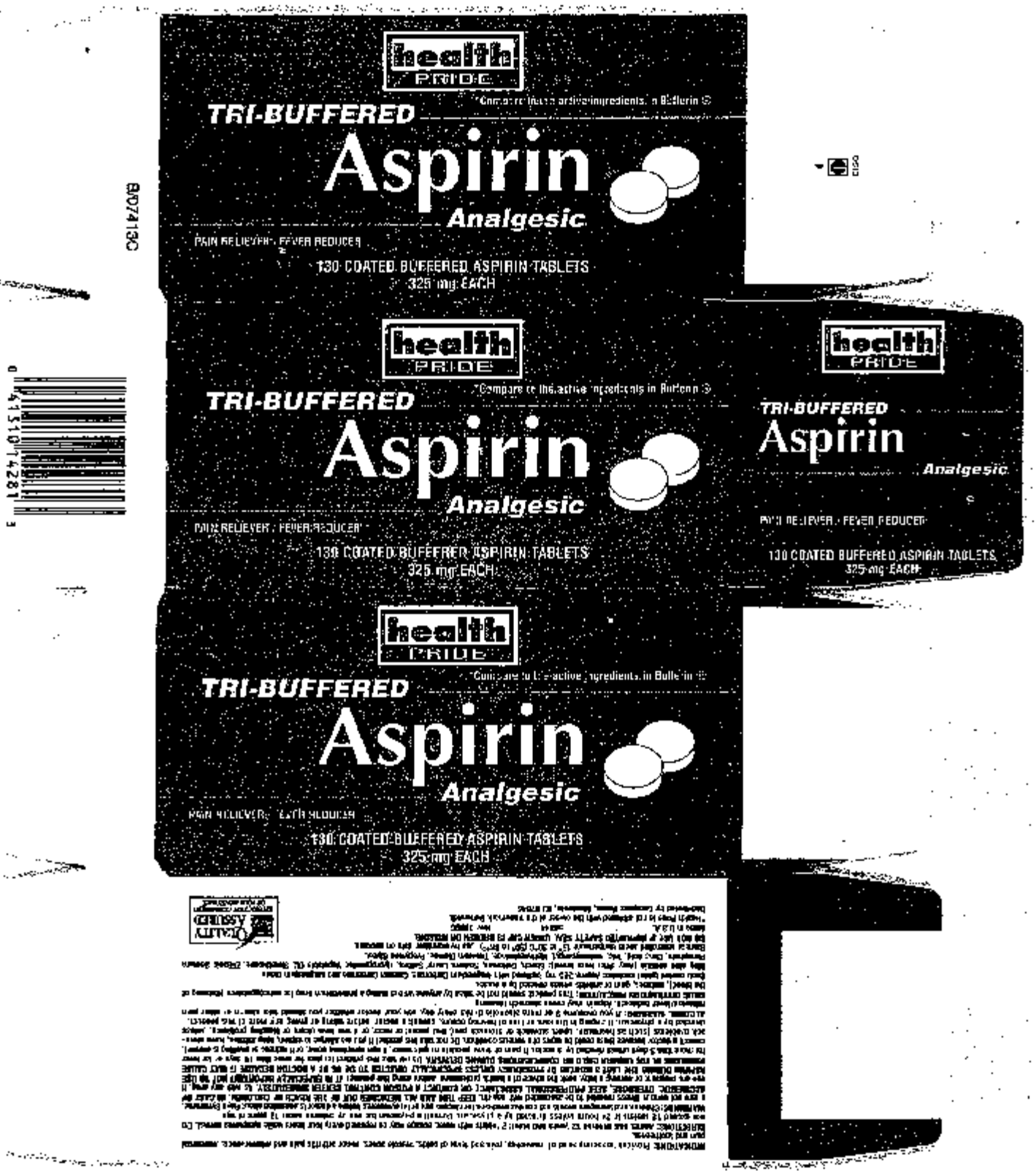

health
PRIDE
TRI-BUFFERED
Aspirin
Analgesic
PAIN RELIEVER / FEVER REDUCER
130 COATED BUFFERED ASPIRIN TABLETS
325 mg EACH
*Compare to the active ingredients in Bufferin ®
B074130

Exhibit A

ECKERD

Aspirin Plus

ASPIRIN, ALUMINA AND MAGNESIA TABLETS
•ANALGESIC

PAIN RELIEF --WITHOUT STOMACH DISCOMFORT

100 TABLETS

ECKERD

Aspirin Plus

ASPIRIN, ALUMINA AND MAGNESIA TABLETS
•ANALGESIC

PAIN RELIEF --WITHOUT STOMACH DISCOMFORT

100 TABLETS

TAMPER EVIDENT: DO NOT USE IF IMPRINTED SAFETY SEAL UNDER CAP IS BROKEN OR MISSING

ECKERD

Aspirin Plus

PEEL CARTON FOR COMPLETE PRODUCT INFORMATION

Drug Facts

Active ingredients (in each tablet) Purpose

Uses

Warnings

Directions

Other information

Inactive ingredients

Questions or comments?

Drug Facts

Active ingredients (in each tablet) Purpose

Uses

Warnings

Directions

Other information

Inactive ingredients

Questions or comments?

ECKERD ITEM 509570
NDC 19458-5095-1

34575-50957 7

ENTERIC COATED

LO-DOSE

ASPIRIN

ANALGESIC • PAIN RELIEVER • EASY TO SWALLOW

120 TABLETS 81 mg EACH

Low Strength Enteric Coated aspirin contains one-quarter the strength of regular strength aspirin tablets. Helps you to work comfortably. Use this dosage as directed by your doctor. These tablets are safely coated and contain this. Because of its delayed action it will not irritate the stomach as regular aspirin may.

Directions: See the instruction sheet of warnings before use. Adults and children 12 years and over: Unless otherwise directed by your doctor, take 1 to 2 tablets every 4 hours, not to exceed 48 tablets in 24 hours, or as recommended by your doctor. Do not give to children under 12 unless directed by a doctor.

Warnings: Children and teenagers should not use this medicine for children pox or flu symptoms before a doctor is consulted about Reye Syndrome, a rare but serious disease reported to be associated with aspirin. Do not take for pain for more than 10 days or for fever for more than 3 days unless directed by a doctor. If pain or fever worsens or persists for more than 10 days or redness is present, consult a doctor because these could be signs of a serious condition. Do not take if you are allergic to aspirin, have asthma, have stomach problems (such as heartburn, nausea, vomiting or stomach pain) and unless directed by a doctor. If you have heart disease or history of stroke, consult a doctor before using this product. If you are taking a prescription drug for anticoagulation (thinning of blood), diabetes, gout or arthritis, consult a doctor.

ALCOHOL WARNINGS: If you consume 3 or more alcoholic drinks every day, ask your doctor whether you should take aspirin or other pain reliever/fever reducer. Aspirin may cause stomach bleeding.

DRUG INTERACTION PRECAUTIONS: Do not take this product if you are taking a prescription drug for anticoagulation (thinning of blood), diabetes, gout or arthritis unless directed by a doctor.

Safe Uses: Adults 21 and over take this product 1 tablet every day, with water. Swallow whole. Enteric coating (may stain stool). Store in a dry place at room temperature 59° to 30°C (59° to 86°F).

Inactive Ingredients: Carnauba Wax, Dimethicone, Hydroxypropyl Cellulose, Magnesium Stearate, Methacrylic Acid Copolymer, Polyethylene Glycol, Polysorbate 80, Sodium Alginate, Sodium Bicarbonate, Sodium Starch Glycolate, Talc, Titanium Dioxide, Triacetin, Triethyl Citrate, Extra of peppermint may be present.

Use by expiration date on package. See end panel for expiration date.

If pain or fever continues or gets worse, if redness or swelling is present, consult a doctor because these could be signs of a serious condition. Do not take if you are allergic to aspirin, have asthma, have stomach problems (such as heartburn, nausea, vomiting or stomach pain) and unless directed by a doctor. If you have heart disease or history of stroke, consult a doctor before using this product. If you are taking a prescription drug for anticoagulation (thinning of blood), diabetes, gout or arthritis, consult a doctor. If you are taking a diuretic, it might be necessary to increase your daily fluid intake to help prevent kidney problems, consult a doctor before using this product in this situation. In case of accidental overdose, seek professional assistance or contact a Poison Control Center immediately. As with any drug, if you are pregnant or nursing a doctor, may be harmful. This product contains enteric coating which may delay the action of this product by about 1 hour. Do not take this product if you have ever had an allergic reaction to this product or any of its ingredients listed above.

DO NOT USE IF PRINTED SEAL UNDER CAP IS BROKEN OR MISSING.

IMPORTANT: Do not use if you have ever had an allergic reaction to this product or any of its ingredients listed above.

Distributed by
Quality Choice Laboratories, Inc.
Nova, Alcohol-Free 32976-0995
Made in U.S.A.
DC 92546

"Quality Choice" is not affiliated with the owners of the trademarks listed. Satisfaction Guaranteed or Your Money Back

ENTERIC COATED

LO-DOSE

ASPIRIN

ANALGESIC • PAIN RELIEVER • EASY TO SWALLOW

120 TABLETS 81 mg EACH

QC QUALITY CHOICE

ENTERIC COATED

LO-DOSE

ASPIRIN

ANALGESIC • PAIN RELIEVER • EASY TO SWALLOW

120 TABLETS 81 mg EACH

NDC 62770-227-12

STOP & SHOP

FOR ARTHRITIS PAIN

ENTERIC COATED ASPIRIN

GUARANTEED THE ACTIVE INGREDIENT OF ASPIRIN

SAFETY COATED

SAFER FOR YOUR STOMACH THAN PLAIN OR BUFFERED ASPIRIN ANALGESIC

100 TABLETS-325 mg each

NDC 62770-227-12

STOP & SHOP

FOR ARTHRITIS PAIN

ENTERIC COATED ASPIRIN

GUARANTEED THE ACTIVE INGREDIENT OF ASPIRIN

SAFETY COATED

SAFER FOR YOUR STOMACH THAN PLAIN OR BUFFERED ASPIRIN ANALGESIC

100 TABLETS-325 mg each

0 21120-94404 3

STOP & SHOP

FOR ARTHRITIS PAIN

ENTERIC COATED ASPIRIN

Safer for your stomach than plain or buffered aspirin.

INDICATIONS: For the temporary relief of minor aches and pains of arthritis and rheumatism. Enteric coated aspirin tablets are easier to swallow and are specially coated to help prevent the gastric upset often caused by plain uncoated aspirin.

DIRECTIONS: Adults and children over 12 years of age: 2 h: 2 tablets every 4 hours, while symptoms persist, not to exceed 12 tablets in 24 hours, unless directed by a physician. Drink a full glass of water with each dose. Children under 12 years of age: Consult a physician.

WARNINGS: Children and teenagers should not use this medicine for chicken pox or flu symptoms before a doctor is consulted about Reye Syndrome, a rare but serious illness reported to be associated with aspirin. Do not take this product for pain for more than 10 days or for fever for more than 3 days unless directed by a doctor. If pain or fever persists or gets worse, if new symptoms occur, or if redness or swelling is present, consult a doctor because these could be signs of a serious condition. Do not take this product if you are allergic to aspirin, have asthma, or if you have stomach problems that persist or recur, or if you have ulcers or bleeding problems unless directed by a doctor. If ringing in the ears or a loss of hearing occurs, consult a doctor before taking any more of this product. Keep this and all drugs out of the reach of children. In case of accidental overdose, seek professional assistance or contact a poison control center immediately. As with any medicine, if you are pregnant or nursing a baby, seek the advice of a health professional before using this product. IT IS ESPECIALLY IMPORTANT NOT TO USE ASPIRIN DURING THE LAST 3 MONTHS OF PREGNANCY UNLESS SPECIFICALLY DIRECTED TO DO SO BY A DOCTOR BECAUSE IT MAY CAUSE PROBLEMS IN THE UNBORN CHILD OR COMPLICATIONS DURING DELIVERY.

ALCOHOL WARNING: If you consume 3 or more alcoholic drinks every day, ask your doctor whether you should take aspirin or other pain reliever/fever reducers. Aspirin may cause stomach bleeding.

DRUG INTERACTION PRECAUTION: Do not take this product if you are taking a prescription drug for anticoagulation (thinning of the blood), diabetes, gout or arthritis unless directed by a physician.

Each enteric coated tablet contains: Aspirin 325 mg, USP (5 gr.) **May also contain** (may differ from brand): Black Iron Oxide, Cellulose, Colloidal Silicon Dioxide, D&C Yellow #10 Aluminum Lake, FD&C Yellow #6 Aluminum Lake, Hydroxypropyl Methylcellulose, Polydextrose, Polyethylene Glycol, Polyvinyl Acetate Phthalate, Propylene Glycol, Shellac Wax, Sodium Aglinate, Sodium Bicarbonate, Starch, Stearic Acid, Talc, Titanium Dioxide, Triacetin, Triethyl Citrate.

Store in a cool, dry place at controlled room temperature 15°-30°C (59°-86°F). Use by expiration date on package. See end flap for expiration date and lot no.

TAMPER EVIDENT: DO NOT USE IF IMPRINTED SAFETY SEAL UNDER CAP IS BROKEN OR MISSING

* This product is not manufactured or distributed by Smithkline Beecham Consumer Brands, owner of the registered trademark Sucrets® Tablets.

60844 Rev. 9/98

DIST. BY THE
STOP & SHOP
SUPERMARKET COMPANY
P.O. BOX 1942,
BOSTON, MA 02106
MADE IN U.S.A.

B/12212

0 81899-113- 8

Same as your other aspirin does plain or buffered aspirin.

INDICATIONS: For the temporary relief of minor aches and pains of arthritis and rheumatism. Enteric coated aspirin tablets are easier to swallow and are specially coated to help prevent the gastric upset often caused by plain uncoated aspirin.

DIRECTIONS: ADULTS: 2 tablets every 8 hours, as necessary, with water or fruit juice. Do not exceed 6 tablets in 24 hours unless directed by a physician. **Children under 12 years of age:** As recommended by a physician.

WARNINGS: Children and teenagers should not use this medicine for chicken pox or flu symptoms before a doctor is consulted about Reye Syndrome, a rare but serious illness reported to be associated with aspirin. Do not take this product for pain for more than 10 days or for fever for more than 3 days unless directed by a doctor. If pain or fever persists or gets worse, if new symptoms occur, or if redness or swelling is present, consult a doctor because these could be signs of a serious condition. Do not take this product if you are allergic to aspirin, have asthma, or if you have stomach problems that persist or recur, or if you have ulcers or bleeding problems unless directed by a doctor. If taking in the elderly or a loss of hearing previously caused a doctor before taking any more of this product. **Keep this and all drugs out of the reach of children.** In case of accidental overdose, seek professional assistance or contact a poison control center immediately. As with any medicines, if you are pregnant or nursing a baby, seek the advice of a health professional before using this product. **IT IS ESPECIALLY IMPORTANT NOT TO USE ASPIRIN DURING THE LAST 3 MONTHS OF PREGNANCY UNLESS SPECIFICALLY DIRECTED TO DO SO BY A DOCTOR**

BECAUSE IT MAY CAUSE PROBLEMS IN THE UNBORN CHILD OR COMPLICATIONS DURING DELIVERY.

ALCOHOL WARNING: If you consume 3 or more alcoholic drinks every day, ask your doctor whether you should take aspirin or other pain relievers/fever reducers. Aspirin may cause stomach bleeding.

DRUG INTERACTION PRECAUTION: Do not take this product if you are taking a prescription drug for anticoagulation (thinning of blood), diabetes, gout or arthritis unless directed by a physician.

Each caplet sealed tablet contains: Aspirin 500 mg. May also contain (may differ from brand): Cellulose, Croscarmellose Sodium, Ethelic Wax, Polyvinyl Acetate Phthalate, Talc, Polyethylene Glycol, Titanium Dioxide, Sodium Bicarbonate, Triethyl Citrate, Stearic Acid, Epoxen Alginate, Colloidal Silicon Dioxide, Black Iron Oxide, Propylene Glycol, Hydroxypropyl Methylcellulose, Polysorbate, FD&C Yellow #6 Aluminum Lake, D&C Yellow #10 Aluminum Lake, Shellac.

Store in a cool, dry place at controlled room temperature 15° to 30°C (59° to 86°F). Use by expiration date on package. See last flap for expiration date and lot no.

TAMPER EVIDENT: DO NOT USE IF IMPRINTED SAFETY SEAL UNDER CAP IS BROKEN OR MISSING

"This product is manufactured or distributed by SmithKline Beecham Consumer Brands, owner of the registered trademark Ecotrin® Maximum Strength Tablets.

Made in USA 50804 PRG 1295

Distributed by
Medicine Shoppe International, Inc.
St. Louis, MO 63139

CVP

EXTRA STRENGTH

PAIN RELIEVER

NON-ASPIRIN ANALGESIC

acetaminophen

COMPARE TO THE ACTIVE INGREDIENT IN EXTRA STRENGTH TYLENOL® TABLETS*

CVP

EXTRA STRENGTH

PAIN RELIEVER

NON-ASPIRIN ANALGESIC

acetaminophen

COMPARE TO THE ACTIVE INGREDIENT IN EXTRA STRENGTH TYLENOL® TABLETS*

CVP

EXTRA STRENGTH

PAIN RELIEVER

NON-ASPIRIN ANALGESIC

acetaminophen

DO NOT USE IF IMPRINTED SAFETY SEAL UNDER CAP IS BROKEN OR MISSING

7 61706-16004 6

RETAIN CARTON FOR COMPLETE PRODUCT INFORMATION

Acetaminophen Extra Strength tablets contain no aspirin and are unlikely to cause gastric irritation or a reaction in those allergic to aspirin.

Drug Facts

Active ingredient (in each tablet)	Purpose
Acetaminophen 500 mg	Pain Reliever/Fever Reducer

Uses for the temporary relief of minor aches and pains associated with: ■ headache ■ muscular aches ■ backache ■ minor arthritis pain ■ common cold ■ toothache ■ menstrual cramps ■ for the reduction of fever

Warnings Do not exceed recommended dose.

Do not use: ■ with any other product containing acetaminophen ■ for more than 10 days for pain unless directed by a doctor ■ for more than 3 days for fever unless directed by a doctor

Stop use and ask a doctor if: ■ symptoms do not improve ■ new symptoms occur ■ pain or fever persists or gets worse ■ redness or swelling is present

If pregnant or breast-feeding, ask a health professional before use.

Keep out of the reach of children. In case of accidental overdose, get medical help or contact a Poison Control Center right away.

Drug Facts (continued)

Alcohol Warning: If you consume 3 or more alcoholic drinks every day, ask your doctor whether you should take acetaminophen or other pain relievers/fever reducers. Acetaminophen may cause liver damage.

Directions

adults and children 12 years and over	take two tablets every 4 to 6 hours as needed. Do not take more than 8 tablets in 24 hours, or as directed by a doctor
children under 12 years	consult a doctor. Do not use this adult extra strength product in children under 12 years of age. This will provide more than the recommended dose (overdose) of acetaminophen and could cause serious health problems.

Other information ■ TAMPER EVIDENT: DO NOT USE IF IMPRINTED SAFETY SEAL UNDER CAP IS BROKEN OR MISSING ■ store at controlled room temperature 15°-30°C (59°-86°F) ■ use by expiration date on package ■ see end flap for expiration date and lot no.

Inactive ingredients povidone, starch, stearic acid

*This product is not manufactured or distributed by McNeil Consumer Products Co., owner of the registered trademark Extra Strength Tylenol® Tablets.

Made in U.S.A. 60844 Rev. 5/99

Distributed by:
Consumer Value Products, Inc., Temple, Texas 76503

Next

5

Goldline

NDC 0182-1410-01 TAMPER-EVIDENT

GENAPAP™

acetaminophen (APAP) tablets.....ASPIRIN-free

PAIN RELIEVER/FEVER REDUCER

100 TABLETS
-325 mg EACH

Compare to the active ingredient in Regular Strength TYLENOL® Tablets*

Goldline

NDC 0182-1410-01 TAMPER-EVIDENT

GENAPAP™

acetaminophen (APAP) tablets.....ASPIRIN-free

PAIN RELIEVER/FEVER REDUCER

100 TABLETS
-325 mg EACH

Compare to the active ingredient in Regular Strength TYLENOL® Tablets*

TAMPER-EVIDENT

Goldline

GENAPAP™

acetaminophen (APAP) tablets.....
ASPIRIN-free

PAIN RELIEVER/FEVER REDUCER

100 TABLETS - 325 mg EACH

Tamper-Evident package
See warning

0182-1410-01

Drug Facts (continued)

Directions

adults and children 12 years and over	take 2 tablets every 4 to 6 hours as needed. Do not take more than 10 tablets in 24 hours, or as directed by a doctor
children 6 to under 12 years	take 1 tablet every 4 to 6 hours as needed. Do not take more than 5 tablets in 24 hours
children under 6 years	consult a doctor. Do not use this adult regular strength product in children under 6 years of age. This product contains acetaminophen (the FDA-approved active ingredient found in many prescription medicines)

Other information ■ "TAMPER-EVIDENT: DO NOT USE THIS PRODUCT IF IMPRINTED FOIL SEAL OVER THE MOUTH OF THE BOTTLE IS CUT, TORN, BROKEN OR MISSING. ■ store at room temperature 15-30°C (59-86°F) ■ see bottle for expiration date ■ each package contains silica gel to protect from moisture. Do not eat.

Inactive ingredients povidone, starch, stearic acid

*This product is not manufactured or distributed by McNEIL-PPC, Inc., owner of the registered trademark TYLENOL®.

DIST. BY: GOLDLINE LABORATORIES, INC.
Miami, FL 33167

RETAIN CARTON FOR COMPLETE PRODUCT INFORMATION

Drug Facts

Active ingredient (in each tablet) — **Purpose**

Acetaminophen 325 mg ..... Pain Reliever/Fever Reducer

Uses ■ for the temporary relief of minor aches and pains associated with ■ headache ■ muscular aches ■ backache ■ arthritis ■ minor pain of arthritis ■ toothache ■ menstrual cramps ■ common cold ■ headache ■ sore throat ■ fever ■ For the reduction of fever

Warnings Do not exceed recommended dose.

Alcohol warning: If you consume 3 or more alcoholic drinks every day, ask your doctor whether you should take acetaminophen or other pain reliever/fever reducer. Acetaminophen may cause liver damage.

Do not take ■ with any other product containing acetaminophen ■ for more than 10 days, unless directed by a doctor (children): for pain, unless directed by a doctor ■ for more than 5 days for fever, unless directed by a doctor

Stop use and ask a doctor if ■ symptoms do not improve ■ new symptoms occur ■ pain or fever persists or gets worse ■ redness or swelling is present

If pregnant or breast-feeding, ask a health professional before use.

Keep out of the reach of children. In case of accidental overdose, get medical help or contact a Poison Control Center right away.

A

DECISION AND ORDER

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

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

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

1. Respondent LNK International, Inc. is a New York corporation with its principal office or place of business at 60 Arkay Drive, Hauppauge, New York 11788.

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

ORDER

I.

IT IS ORDERED that respondent, LNK International, Inc., its successors and assigns, and its officers, agents, representatives, and employees, directly or through any corporation, subsidiary, division, or other device, in connection with the manufacturing, labeling, advertising, promotion, offering for sale, sale, or distribution of any non prescription drug product containing an analgesic in or affecting commerce, as "commerce" is defined in Section 4 of the Federal Trade Commission Act, 15 U.S.C. § 44, shall not misrepresent, in any manner, directly or by implication, the extent to which any such product is made in the United States. For purposes of this Order, "drug" shall mean as defined in Section 15 of the Federal Trade Commission Act, 15 U.S.C. § 55, and "analgesic" shall mean an agent used to alleviate pain.

PROVIDED, however, that a representation that any such product is made in the United States will not be in violation of this order so long as all, or virtually all, of the ingredients or component parts of such product are made in the United States and all, or virtually all, of the labor in manufacturing such product is performed in the United States.

PROVIDED FURTHER, that a representation that any such product containing imported active ingredient is "Processed in the United States with Foreign Ingredients" will not be in violation of this Order when such representation is true and is used to describe a product that has been significantly processed in the United States.

PROVIDED FURTHER, that nothing in the order shall prohibit respondent from depleting the inventory of packaging and labeling for such products bearing a marking or labeling otherwise

prohibited by this order and existing on the date this order is signed, in the normal course of business, provided that no such existing inventory is shipped from respondent later than December 31, 2001.

II.

IT IS FURTHER ORDERED that respondent, and its successors and assigns, shall, for five (5) years after the last date of dissemination of any representation covered by this order, maintain and upon request make available to the Federal Trade Commission for inspection and copying:

A. All labeling, packaging, advertisements and promotional materials containing the representation;

B. All materials that were relied upon in disseminating the representation; and

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

III.

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

IV.

IT IS FURTHER ORDERED that respondent, 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.

V.

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

VI.

This order will terminate on February 19, 2022, 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 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 respondent LNK International, Inc. ("LNK").

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 "Made in U.S.A." claims on packaging and labeling for LNK's aspirin and acetaminophen tablets sold at retail bearing private brand names. The Commission's complaint alleges that respondent misrepresented on packaging and labeling that certain of these products, manufactured for customers such as Compass Foods (A&P), Eckerd Company, and Stop & Shop Supermarket Company, are all or virtually all made in the United States. According to the complaint, these products are actually made with significant foreign content. The products' active ingredients, bulk aspirin and acetaminophen compounds, that respondent processed into aspirin and acetaminophen tablets, are or were made outside the United States. The imported bulk aspirin and acetaminophen comprise a substantial percentage of total manufacturing costs and impart the crucial analgesic quality to the OTC products at issue. The Commission's complaint does not allege that all of LNK's private label aspirin and acetaminophen brands or products are mislabeled, but only that certain products for certain customers have been improperly labeled.

The proposed consent order contains a provision that is designed to remedy the charges and to prevent the respondent from engaging in similar acts and practices in the future. Part I of the proposed order prohibits LNK from misrepresenting the extent

to which any non-prescription drug product containing an analgesic is made in the United States. The order defines "analgesic" as an agent used to alleviate pain. The proposed order would allow LNK to represent that such products are made in the United States as long as all, or virtually all, of the ingredients or component parts of such products are made in the United States and all, or virtually all, of the labor in manufacturing such products is performed in the United States. The proposed order also would allow LNK to represent that a product containing imported active ingredient(s) is "Processed in the United States with Foreign Ingredients" when describing a product that has been "significantly processed" in the United States.

The draft order also includes a provision that would allow LNK to use its current packaging inventory until December 31, 2001.

Part II of the proposed order requires the respondent to maintain materials relied upon in disseminating any representation covered by the order. Part III of the proposed order requires the respondent to distribute copies of the order to certain company officials and employees. Part IV of the proposed order requires the respondent to notify the Commission of any change in the corporation that may affect compliance obligations under the order. Part V of the proposed order requires the respondent to file one or more compliance reports. Part VI of the proposed order is a provision whereby the order, absent certain circumstances, terminates twenty years from the date of issuance.

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

Complaint

IN THE MATTER OF

PHARMACEUTICAL FORMULATIONS, INC.

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

Docket C-4038; File No. 0123059
Complaint, February 19, 2002--Decision, February 19, 2002

This consent order addresses claims on certain packaging and labeling for aspirin and acetaminophen tablets produced by Respondent Pharmaceutical Formulations, Inc. that such products are all or virtually all made in the United States. The order, among other things, prohibits the respondent from misrepresenting the extent to which any non-prescription drug product containing an analgesic is made in the United States, while permitting the respondent to represent that such products are made in the United States as long as all, or virtually all, of the ingredients or component parts of such products are made in the United States and all, or virtually all, of the labor in manufacturing such products is performed in the United States. The order also permits the respondent to represent that a product containing imported active ingredient(s) is "Processed in the United States with Foreign Ingredients" when describing a product that has been "significantly processed" in the United States.

Participants

For the Commission: *Laura D. Koss, Walter C. Gross, Joni Lupovitz, Elaine D. Kolish* and *Keith Anderson.*

For the Respondent: *James Ingram, pro se.*

COMPLAINT

The Federal Trade Commission, having reason to believe that Pharmaceutical Formulations, Inc. ("respondent") has violated the provisions of the Federal Trade Commission Act, and it appearing to the Commission that this proceeding is in the public interest, alleges:

1. Respondent is a Delaware corporation with its principal office or place of business at 460 Plainfield Avenue, Edison, New Jersey 08818.

2. Respondent has manufactured, labeled, offered for sale, sold, and distributed aspirin and acetaminophen tablets to the public, including but not limited to private label aspirin and acetaminophen brands.

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

4. Respondent has disseminated or has caused to be disseminated packaging and labeling for certain of its aspirin and acetaminophen products, including but not necessarily limited to the attached Exhibits A through J. The packaging and labeling contain the following statements or depictions:

A. **American Fare Allergy/Sinus Headache Caplets, Exhibit A**

"Made in the **USA** for
Kmart Corporation"

B. **DG Maximum Strength Non-Aspirin Flu Medicine, Exhibit B**

"**MADE IN**
USA"

C. **DR Duane Reade Enteric Coated Aspirin, Exhibit C**

"**Made in U.S.A.** . . .
Distributed By: DUANE READE . . . "

D. **Eckerd Maximum Strength Non-Aspirin Allergy**

Sinus, **Exhibit D**

"ECKERD BRAND Promise . . .
Made in U.S.A."

E. **Harris Teeter Non-Aspirin Maximum Strength Pain Reliever Sinus/Allergy, Exhibit E**

"**Made in U.S.A.**
PROUDLY DISTRIBUTED BY
HARRIS TEETER® MATTHEWS . . ."

F. **Osco Maximum Strength Allergy Sinus Gelatin Caplets, Exhibit F**

"**Made in U.S.A.**
DISTRIBUTED BY: AMERICAN PROCUREMENT
AND LOGISTICS CO."

G. **Our Family No Drowsiness Sinus Tabs, Exhibit G**

"**Made in U.S.A.**
DISTRIBUTED BY
NASH FINCH COMPANY."

H. **Sav-on Enteric Coated Aspirin, Exhibit H**

"**Made in U.S.A.** . . .
DISTRIBUTED BY AMERICAN PROCUREMENT
AND
LOGISTICS CO."

I. **Select Brand® Multi-Symptom Cold Medicine Tablets, Exhibit I**

"Dist. by: **SELECT BRAND DISTRIBUTORS** . . .
Made in U.S.A."

J. **Walgreens Maximum Strength No-Aspirin Sinus Formula, Exhibit J**

"**Distributed by: Walgreen Co. . . . Made in U.S.A.**"

5. Through the means described in Paragraph 4, respondent has represented, expressly or by implication, that certain of its aspirin and acetaminophen products are made in the United States, *i.e.*, that all, or virtually all, of the ingredients of such products are made in the United States, and that all, or virtually all, of the labor in manufacturing such products is performed in the United States.

6. In truth and in fact, a significant portion of the ingredients of certain of respondent's aspirin and acetaminophen products is, or has been, of foreign origin. The active ingredients, bulk aspirin or acetaminophen compounds, that respondent processed into aspirin or acetaminophen tablets are or were made outside the United States. Therefore, the representation set forth in Paragraph 5 was, and is, false or misleading.

7. The acts and practices of respondent as alleged in this complaint constitute unfair or deceptive acts or practices, and the making of false advertisements, in or affecting commerce in violation of Sections 5(a) and 12 of the Federal Trade Commission Act, 15 U.S.C. §§ 45(a) and 52.

THEREFORE, the Federal Trade Commission this nineteenth day of February, 2002, has issued this complaint against respondent.

By the Commission.

Pharmaceutical Formulations

012 3059

Allergy/Sinus Headache Caplets

Antihistamine
Nasal Decongestant
Pain Reliever

NDC # 10796-281-24

Allergy/Sinus Headache Caplets

For the Temporary Relief of Nasal Congestion

100% Guarantee

Compare to active ingredients of Benadryl® Allergy Sinus Headache

24 CAPLETS

EACH DOSE IS INDIVIDUALLY SEALED IN PLASTIC OVER A FOIL BACKING. DO NOT USE IF THESE ARE TORN OR BROKEN.

Allergy/Sinus Headache Caplets

0 72000 17560 6

D1560361248

Each Caplet Contains: Then Active Ingredient(s):

Acetaminophen (Non-Narcotic Analgesic) NSI 125 mg)	Pain Reliever/Fever Reducer
Chlorpheniramine Maleate (Antihistamine) NSI 2 mg)	Relieves sneezing, itchy, watery eyes, runny nose
Phenylephrine HCl (Nasal Decongestant) NSI 10 mg)	Temporarily relieves nasal congestion due to hay fever or other upper respiratory allergies

Also Contains: Carnauba Wax, Colloidal Silicon Dioxide, Croscarmellose Sodium, D&C Yellow #10 Al. Lake, FD&C Blue #1 Al Lake, FD&C Yellow #6 Al Lake, Hydroxypropyl Methylcellulose, Magnesium Stearate, Microcrystalline Cellulose, Pregelatinized Starch, Stearic Acid, Titanium Dioxide, Triacetin.

DIRECTIONS: Follow dosage recommendations below, or as recommended by your doctor.

Adults and children 12 years of age and over	Two (2) caplets every 4 hours while symptoms persist. Not to exceed 8 caplets in 24 hours.
Children under 12 years of age	Consult a doctor.

ALCOHOL WARNINGS: If you consume 3 or more alcoholic drinks every day, ask your doctor whether you should take acetaminophen or other pain reliever/fever reducer. Acetaminophen may cause liver damage.

WARNINGS: Do not take this product for more than 10 days. If symptoms do not improve or are accompanied by fever, rash, lasts for more than 3 days, or if new symptoms occur, consult a doctor. Do not exceed recommended dosage. If nervousness, dizziness, or sleeplessness occur, discontinue use and consult a doctor. Do not take this product if you have a bleeding problem such as hypothyroidism or chronic overactivity, heart disease, high blood pressure, thyroid disease, diabetes, or if you have glaucoma or difficulty in urination due to enlargement of the prostate gland. May cause drowsiness, especially when alcohol, sedatives, and tranquilizers may increase the drowsiness effect. Avoid alcoholic beverages while using this product. Do not take this product if you are taking sedatives or tranquilizers without first consulting your doctor. Use caution when driving a motor vehicle or operating machinery. Do not take with any other product containing diphenhydramine, including one applied topically. As with any drug, if you are pregnant or nursing a baby, seek the advice of a health professional before use.

STORAGE INSTRUCTIONS: Do not use this product if the inner seal around the bottle opening is broken or missing. Store between 15°-30°C (59°-86°F). Avoid excessive heat above 40°C (104°F). Keep container tightly closed. Protect from moisture.

INACTIVE INGREDIENTS: Carnauba Wax, Colloidal Silicon Dioxide, Croscarmellose Sodium, D&C Yellow #10 Al. Lake, FD&C Yellow #6 Al Lake, Hydroxypropyl Methylcellulose, Magnesium Stearate, Microcrystalline Cellulose, Pregelatinized Starch, Stearic Acid, Titanium Dioxide, Triacetin.

Questions or comments? Call 1-800-842-7869, Monday - Friday 8:30 AM - 5:00 PM EST.

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MAXIMUM STRENGTH NON-ASPIRIN

FLU MEDICINE

DG 100% SATISFACTION GUARANTEED

Guarantee

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MAXIMUM STRENGTH
NON-ASPIRIN

FLU MEDICINE

*Compare to the active ingredients of Tylenol® Flu

FOR THE NON-DROWSY TEMPORARY RELIEF OF

- Fever
- Headaches / Body Aches
- Coughing
- Nasal Congestion
- Sore Throat

10 GELATIN CAPLETS

LOT:

EXP:

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MAXIMUM STRENGTH NON-ASPIRIN

FLU MEDICINE

MAXIMUM STRENGTH NON-ASPIRIN

FLU MEDICINE

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DR duane reade

ENTERIC COATED

Aspirin

100 TABLETS 325 mg EACH

Prevents stomach upset caused by aspirin

DR duane reade

ENTERIC COATED

Aspirin

100 TABLETS 325 mg EACH

Prevents stomach upset caused by aspirin

DR duane reade

ENTERIC COATE

Aspirin

100 TABLETS 325 mg EACH

DO NOT USE IF THE IMPRINTED FOIL SEAL UNDER THE CAP IS BROKEN OR MISSING.
DISTRIBUTED BY: DUANE READE, 440 NINTH AVE., NEW YORK, NY 10001

Made in U.S.A.

KEEP TIGHTLY CLOSED IN A DRY PLACE. DO NOT EXPOSE TO EXCESSIVE HEAT.

Do not take this product if you are allergic to aspirin, have asthma, have stomach problems (such as heartburn, upset stomach, or stomach pain) that persist or occur, or if you have ulcers or bleeding problems, unless directed by a doctor. If ringing in the ears or a loss of hearing occurs, consult a doctor before taking any more of this product. As with any drug, if you are pregnant or nursing a baby, seek the advice of a health professional before using this product. IT IS ESPECIALLY IMPORTANT NOT TO USE ASPIRIN DURING THE LAST 3 MONTHS OF PREGNANCY UNLESS SPECIFICALLY DIRECTED TO DO SO BY A DOCTOR BECAUSE IT MAY CAUSE PROBLEMS IN THE UNBORN CHILD OR COMPLICATIONS DURING DELIVERY.

DRUG INTERACTION PRECAUTION: Do not take this product if you are taking a prescription drug for anticoagulation (thinning of the blood), diabetes, gout or arthritis unless directed by a doctor. Keep this and all drugs out of the reach of children. In case of accidental overdose, seek professional assistance or contact a Poison Control Center immediately.

KEEP TIGHTLY CLOSED IN A DRY PLACE. DO NOT EXPOSE TO EXCESSIVE HEAT.

Made in U.S.A.

DO NOT USE IF THE IMPRINTED FOIL SEAL UNDER THE CAP IS BROKEN OR MISSING.

DISTRIBUTED BY: DUANE READE, 440 NINTH AVE., NEW YORK, NY 10001

DOSAGE AND ADMINISTRATION: For the temporary relief of the minor aches, pains, and inflammation of arthritis and rheumatism.

EACH TABLET CONTAINS: Aspirin 325 mg. Each tablet is enteric coated to help prevent the stomach upset caused by aspirin.

INACTIVE INGREDIENTS: Carnauba Wax, D&C Yellow #10 Al Lake, FD&C Yellow #6 Al. Lake, Methacrylic Polymer Dispersion, Polyethylene Glycol, Propylene Glycol, Sodium Lauryl Sulfate, Talc, Titanium Dioxide, Triacetin.

DIRECTIONS: Adults and children 12 years of age and over: 2 tablets every 4 hours as needed, or as directed by a doctor. Do not exceed 12 tablets in 24 hours. Drink a full glass of water with each dose.

Children under 12 years of age: consult a doctor.

ALCOHOL WARNING: If you consume 3 or more alcoholic drinks every day, ask your doctor whether you should take aspirin or other pain/fever/inflammatory products. Aspirin may cause stomach bleeding.

WARNINGS: Children and teenagers should not use this medicine for chicken pox or flu symptoms before a doctor is consulted about Reye syndrome, a rare but serious illness reported to be associated with aspirin. Do not take this product for pain for more than 10 days unless directed by a doctor. If pain persists or gets worse, if new symptoms occur, or if redness or swelling is present, or in stomach conditions affecting children under 12 years of age, consult a physician immediately.

Do not take this product if you are allergic to aspirin, have asthma, have stomach problems (such as heartburn, upset stomach, or stomach pain) that persist or occur, or if you have ulcers or bleeding problems, unless directed by a doctor. If ringing in the ears or a loss of hearing occurs, consult a doctor before taking any more of this product. As with any drug, if you are pregnant or nursing a baby, seek the advice of a health professional before using this product. IT IS ESPECIALLY IMPORTANT NOT TO USE ASPIRIN DURING THE LAST 3 MONTHS OF PREGNANCY UNLESS SPECIFICALLY DIRECTED TO DO SO BY A DOCTOR BECAUSE IT MAY CAUSE PROBLEMS IN THE UNBORN CHILD OR COMPLICATIONS DURING DELIVERY.

DRUG INTERACTION PRECAUTION: Do not take this product if you are taking a prescription drug for anticoagulation (thinning of the blood), diabetes, gout or arthritis unless directed by a doctor. Keep this and all drugs out of the reach of children. In case of accidental overdose, seek professional assistance or contact a Poison Control Center immediately.

KEEP TIGHTLY CLOSED IN A DRY PLACE. DO NOT EXPOSE TO EXCESSIVE HEAT.

Made in U.S.A.

DR duane reade

ENTERIC COATED

Aspirin

Prevents stomach upset caused by aspirin

100 TABLETS 325 mg EACH

DO NOT USE IF THE IMPRINTED FOIL SEAL UNDER THE CAP IS BROKEN OR MISSING.

LOT

Exp.

ECKERD
Maximum Strength
NON ASPIRIN
Allergy Sinus
Pain Reliever, Antihistamine, Nasal Decongestant
Night Time Relief
24 CAPLETS
Compare to the Active Ingredients of Tylenol® Allergy Sinus Night Time®
EACH DOSE IS INDIVIDUALLY SEALED IN FOIL. DO NOT USE IF THESE ARE TORN OR BROKEN.
DISTRIBUTED BY ECKERD CORPORATION, CLEARWATER, FL 33765
Drug Facts
Active ingredients (in each caplet) — Purpose
Acetaminophen 500 mg — Pain reliever/fever reducer
Diphenhydramine HCl 25 mg — Antihistamine
Pseudoephedrine HCl 30 mg — Nasal decongestant
Drug Facts (continued)
Uses temporarily relieves the following symptoms associated with hay fever and other upper respiratory allergies: runny nose, sneezing, itchy, watery eyes, itchy throat, nasal and sinus congestion, sinus pain, sinus pressure, headache
Warnings
Alcohol warning: If you consume 3 or more alcoholic drinks every day, ask a doctor whether you should take acetaminophen or other pain relievers/fevers reducers. Acetaminophen may cause liver damage.
Do not use
with any other product containing diphenhydramine, including one applied topically
if you are now taking a prescription monoamine oxidase inhibitor (MAOI) (certain drugs for depression, psychiatric or emotional conditions, or Parkinson's disease), or for 2 weeks after stopping the MAOI drug. If you do not know if your prescription drug contains an MAOI, ask a doctor or pharmacist before taking this product.
Ask a doctor before use if you have
liver disease — heart disease — high blood pressure — thyroid disease
diabetes — glaucoma — trouble urinating due to an enlarged prostate gland
a breathing problem such as emphysema or chronic bronchitis
Ask a doctor or pharmacist before use if you are taking sedatives or tranquilizers
When using this product
do not use more than directed — excitability may occur, especially in children
marked drowsiness may occur — avoid alcoholic drinks
alcohol, sedatives, and tranquilizers may increase the drowsiness
use caution when driving a motor vehicle or operating machinery
Stop use and ask a doctor if
you get nervous, dizzy, or sleepless — redness or swelling is present
nausea or vomiting is present — symptoms do not improve
you need to use more than 7 days — fever gets worse or lasts more than 3 days
If pregnant or breast-feeding, ask a health professional before use.
Keep out of reach of children. In case of overdose, get medical help or contact a Poison Control Center right away. Prompt medical attention is critical for adults as well as children even if you do not notice any signs or symptoms.

Directions	
■ take at bedtime ■ may repeat every 6 hours; do not exceed 4 doses in a 24-hour period	Adults and children 12 years and over — 2 caplets
	Children under 12 years — consult a doctor

Other information
■ keep tightly closed ■ store at room temperature

Inactive ingredients
carnauba wax, colloidal silicon dioxide, croscarmellose sodium, D&C yellow # 10 Al. lake, FD&C blue # 1 Al. lake, hydroxypropyl cellulose, hypromellose, magnesium stearate, microcrystalline cellulose, polyethylene glycol, povidone, red #6 Al. lake, titanium dioxide, starch, and trimyristin

Questions or comments?
1-800-955-4464

Harris Teeter

Non-Aspirin Maximum Strength

Pain Reliever
Sinus/Allergy

Harris Teeter

Non-Aspirin
Maximum Strength

Pain Reliever
Sinus/Allergy

Antihistamine • Nasal Decongestant • Pain Reliever

For the Temporary Relief of Runny Nose, Sneezing, Itchy, Watery Eyes, Nasal Congestion, Sinus Pressure and Pain

Compare To The Active Ingredients In Tylenol® Allergy Sinus*

24 Caplets

EACH DOSE IS INDIVIDUALLY SEALED IN PLASTIC. DO NOT USE IF THESE ARE TORN OR BROKEN.

LOT:

EXP:

0 72036 73047 3

0850307248

Distributed by
Harris Teeter, Inc.
Matthews, NC 28106

Questions or comments?
1-800-432-6111

*This statement is not established or distributed by the manufacturer of the product mentioned. Consumer opinions may or may not be typical of those of other consumers.

Manufactured in the U.S.A.

NDC 72036-730-47

Harris Teeter

maximum strength

Osco

allergy sinus

gelatin caplets

QUALITY GUARANTEED

NDC 12810-300-24

NON-ASPIRIN

maximum strength

allergy sinus

gelatin caplets

Nasal Decongestant, Analgesic, Antihistamine

Relieves runny nose, sneezing, itchy, watery eyes, nasal and sinus congestion, sinus pain & pressure

24 GELATIN CAPLETS

SAFETY SEALED SINGLE GELATIN CAPLETS.
EACH DOSE IS INDIVIDUALLY SEALED IN PLASTIC OVER A FOIL BACKING. DO NOT USE IF THESE ARE TORN OR BROKEN.

maximum strength
allergy sinus
gelatin caplets
Osco

maximum strength
Osco
allergy sinus
gelatin caplets

ACTIVE INGREDIENTS (EACH CAPLET) Chlorpheniramine Maleate 2 mg, Phenylephrine HCl 10 mg, Acetaminophen 325 mg

PURPOSES Chlorpheniramine Maleate, D&C Yellow #10, FD&C Blue #1, Fruit Juice #2, Talc, and Titanium Dioxide, Hypromellose, Polyethylene Glycol, Polysorbate 80, Sodium Starch Glycolate, Sodium Lauryl Sulfate, and Yellow #6

INDICATIONS: Adults and children 12 years of age and older: Two gelatin caplets every 6 hours as directed by a doctor. Do not exceed eight gelatin caplets in any 24-hour period, or as directed by a doctor. Children under 12 years of age: Do not use this product in children under this age except under the advice and supervision of a doctor.

WARNINGS: Do not take this product for more than 7 days. If symptoms do not improve or if new symptoms occur, consult a doctor or pharmacist promptly. If nervousness, dizziness, or sleeplessness occur, discontinue use and consult a doctor. Do not take this product if you are taking other drugs containing acetaminophen (prescription or nonprescription). Ask a doctor before use if you have liver disease. Ask a doctor or pharmacist before use if you are taking tranquilizers or sedatives. Do not take this product if you have ever had an allergic reaction to this product or any of its ingredients. Do not take this product if you have glaucoma, thyroid disease, diabetes, or if you have difficulty in urination due to enlargement of the prostate gland. May cause drowsiness. Alcohol, sedatives and tranquilizers may increase the drowsiness effect. Avoid alcoholic beverages while taking this product. Do not take this product if you are taking other prescription or nonprescription medications containing acetaminophen. As with any drug, if you are pregnant or nursing a baby, seek the advice of a health professional before using this product.

DRUG INTERACTION PRECAUTIONS: Do not use this product if you are now taking a prescription monoamine oxidase inhibitor (MAOI) (certain drugs for depression, psychiatric or emotional conditions, or Parkinson's disease), or for 2 weeks after stopping the MAOI drug. If you are unsure whether your prescription drug contains an MAOI, consult a doctor or pharmacist before taking this product.

Keep this and all drugs out of the reach of children. In case of overdose, get medical help or contact a Poison Control Center immediately. Overdose symptoms may include: excitability, drowsiness, dizziness, disturbed coordination, seizures, loss of consciousness, rapid heartbeat, nausea and vomiting. Taking more than the recommended dose (overdose) may cause liver damage.

DIRECTIONS: Do not take more than directed (see Warnings). Adults and children 12 years of age and over: Two caplets every 6 hours. Do not take this product for more than 7 days or if new symptoms occur, unless directed by a doctor. If you have a condition (diabetes, glaucoma, difficulty in urination due to enlargement of the prostate gland, thyroid disease, asthma, or if you are under a doctor's treatment for depression or psychiatric or emotional conditions), ask a doctor before using this product. Ask a doctor or pharmacist before use if you are taking tranquilizers or sedatives. Do not exceed eight gelatin caplets in any 24-hour period, or as directed by a doctor. Children under 12 years of age: Do not use this product in children under this age except under the advice and supervision of a doctor.

OTHER INFORMATION: Each caplet contains: Calcium 10 mg, Magnesium 10 mg, Potassium 5 mg, Sodium 10 mg. Store at room temperature. Avoid excessive heat. Tamper resistant: Do not use if blister unit is torn or broken. Each caplet is imprinted with "Osco".

INACTIVE INGREDIENTS: Chlorpheniramine Maleate, D&C Yellow #10, FD&C Blue #1, Fruit Juice #2, Talc, and Titanium Dioxide, Hypromellose, Polyethylene Glycol, Polysorbate 80, Sodium Starch Glycolate, Sodium Lauryl Sulfate, and Yellow #6

QUESTIONS? Adults and children 12 years of age and over: Two gelatin caplets every 6 hours as directed by a doctor. Do not exceed eight gelatin caplets in any 24-hour period, or as directed by a doctor. Children under 12 years of age: Do not use this product in children under this age except under the advice and supervision of a doctor.

NO DROWSINESS

Sinus Tabs

MAXIMUM STRENGTH

24 CAPLETS

Acetaminophen/Pseudoephedrine Hydrochloride
Pain Reliever • Nasal Decongestant

SAFETY SEALED

NDC 70253-162-24

Compare to the Active Ingredients of Sinutab® Sinus+

Our Family®

NO DROWSINESS

Sinus Tabs

Acetaminophen/Pseudoephedrine Hydrochloride
Pain Reliever • Nasal Decongestant

For Temporary Relief of:
Headache • Nasal Congestion • Sinus Pain

MAXIMUM STRENGTH

24 CAPLETS

EACH DOSE IS INDIVIDUALLY SEALED IN PLASTIC UNDER A FOIL BACKING.
DO NOT USE IF THESE ARE TORN OR BROKEN.

NO DROWSINESS
Sinus Tabs
MAXIMUM STRENGTH
24 CAPLETS
Acetaminophen/Pseudoephedrine Hydrochloride
Pain Reliever • Nasal Decongestant

Our Family®

NO DROWSINESS
Sinus Tabs
MAXIMUM STRENGTH
24 CAPLETS
Acetaminophen/Pseudoephedrine Hydrochloride
Pain Reliever • Nasal Decongestant

12182A
5024
BRZ47DD ST AW

EACH CAPLET CONTAINS: Acetaminophen 500 mg; Pseudoephedrine HCl 30 mg.

INACTIVE INGREDIENTS: Croscarmellose Sodium, D&C Yellow #10 Lake, FD&C Yellow #6 Lake, Magnesium Stearate, Microcrystalline Cellulose, Povidone, Pregelatinized Starch, Stearic Acid.

DIRECTIONS: For the temporary relief of minor aches, pains, headache, and nasal congestion associated with sinusitis.

DIRECTIONS: Adults and children 12 years of age and over: 2 caplets every 6 hours, not to exceed 8 caplets in 24 hours, or as directed by a doctor. Children under 12 years of age: Consult a doctor.

ALCOHOL WARNING: If you consume 3 or more alcoholic drinks every day, ask your doctor whether you should take acetaminophen or other pain reliever/fever reducers. Acetaminophen may cause liver damage.

WARNINGS: Do not exceed recommended dosage. If nausea, dizziness, or sleeplessness occur, discontinue use and consult a doctor. Do not take this product for more than 10 days. If symptoms do not improve or are accompanied by fever that lasts for more than 3 days, or if new symptoms occur, consult a doctor. Do not take drug product if you have heart disease, high blood pressure, thyroid disease, diabetes, or difficulty in urination due to enlargement of the prostate gland unless directed by a doctor. As with any drug, if you are pregnant or nursing a baby, seek the advice of a health professional before using this product.

DRUG INTERACTION PRECAUTION: Do not use this product if you are now taking a prescription monoamine oxidase inhibitor (MAOI) (certain drugs for depression, psychiatric or emotional conditions, or Parkinson's disease), or for 2 weeks after stopping the MAOI drug. If you are uncertain whether your prescription drug contains an MAOI, consult a health professional before using this product.

Keep this and all drugs out of the reach of children. In case of accidental overdose, seek professional assistance or contact a Poison Control Center immediately. Prompt medical attention is critical for adults as well as for children even if you do not notice any signs or symptoms.

Keep in a dry place.

Do not expose to excessive heat.

*This product is not manufactured or distributed by Warner-Lambert Consumer Healthcare, owner of the registered trademark Sinutab®.

Made in U.S.A.

DISTRIBUTED BY
NASH FINCH COMPANY,
©1996 MINNEAPOLIS, MINNESOTA 55436

CONSTRUCTION WITH TIP TAB(S)™ TO OPEN/REMOVE FOIL: PEEL AWAY FOIL BEHIND TIP TAB(S). DO NOT REMOVE FOIL WITHOUT TIP TAB(S). NASH-FINCH COMPANY.

0 70253 96562 0

8948 10/96

Exhibit G

LOT

EXP

ACTIVE INGREDIENT (EACH TABLET CONTAINS):
Aspirin 500 mg.

Each tablet is enteric coated to help prevent the stomach upset caused by aspirin.

INACTIVE INGREDIENTS: Carnauba Wax, D&C Yellow #10 Al. Lake, FD&C Yellow #6 Al. Lake, Hydroxypropyl Methylcellulose, Isophthalic Acid Copolymer, Microcrystalline Cellulose, Polyethylene Glycol, Polysorbate 80, Pregelatinized Starch, Sodium Lauryl Sulfate, Talc, Titanium Dioxide, Triacetin.

INDICATIONS: For the temporary relief of the minor aches, pains, and inflammation of arthritis and rheumatism.

DIRECTIONS: Adults and children 12 years of age and over: 2 tablets every 8 hours as needed, or as directed by a doctor. Do not exceed 8 tablets in 24 hours. Children under 12 years of age: consult a doctor.

ALCOHOL WARNING: If you consume 3 or more alcoholic drinks every day, ask your doctor whether you should take aspirin or other pain reliever/fever reducers. Aspirin may cause stomach bleeding.

WARNINGS: Children and teenagers should not use this medicine for chicken pox or flu symptoms before a doctor is consulted about Reye syndrome, a rare but serious illness reported to be associated with aspirin. Do not take this product for pain for more than 10 days unless directed by a doctor. If pain persists or gets worse, if new symptoms occur, or if redness or swelling is present, or if stomach conditions (such as ulcer, diabetes, gout or arthritis) worsen, consult a physician before use. Do not use this product if you are allergic to aspirin, have asthma, have stomach problems (such as heartburn, upset stomach or pain) that persist or recur, or if you have or will be having surgery. Ask a doctor before use if you have liver disease, heart disease, anemia or bleeding problems. Do not use if you are taking a blood thinning (anticoagulant) or steroid drug. Do not use if you are taking more than one drug containing aspirin (including prescription drugs), unless directed by a doctor. Keep this and all drugs out of the reach of children. In case of accidental overdose, seek professional assistance or contact a Poison Control Center immediately.

KEEP TIGHTLY CLOSED IN A DRY PLACE. DO NOT EXPOSE TO EXCESSIVE HEAT.

"The package is not manufactured or distributed by Smithkline Beecham Consumer Healthcare, owner of the registered trademark Sensodyne, Blistex or L.B.S."

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LOT

EXP

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EXP

MULTI-SYMPTOM

COLD MEDICINE

24 TABLETS

select brand®

the lower price name brand

MULTI-SYMPTOM

COLD MEDICINE TABLETS

Compare to the active ingredients of Tylenol® Cold*

Each dose is sealed in plastic over a foil backing.
Do not use if these are torn or broken.

MULTI-SYMPTOM
COLD
MEDICINE
24 TABLETS

UPC FROM TOP OF PUNCH-CASE

Made in U.S.A.

MAXIMUM STRENGTH

no-aspirin Sinus Formula

- Sinus Headache Pain
- Sinus Pressure
- Nasal Congestion

EASY TO SWALLOW

24 GELATIN CAPLETS

Compare to active ingredients of Tylenol® Sinus*

100% SATISFACTION GUARANTEED

Walgreens
The Brand America Trusts®

$3.99 USD

SAFETY SEALED BANDED GELATIN CAPLETS.
EACH DOSE IS INDIVIDUALLY SEALED IN PLASTIC OVER A FOIL BLISTER. DO NOT USE IF THESE ARE TORN OR BROKEN.

Distributed by Walgreen Co. Deerfield, IL 60015-4681 Made in U.S.A.

EXP

LOT

Drug Facts

Active ingredients (in each gelatin caplet) — **Purpose**

Acetaminophen 500 mg ..... Pain Reliever/Fever Reducer

Pseudoephedrine HCl 30 mg ..... Nasal decongestant

Uses

- temporarily relieves the following symptoms associated with sinusitis:
- minor aches and pains
- sinus pain and pressure
- headache
- nasal and sinus congestion

Warnings

Alcohol warning: If you consume 3 or more alcoholic drinks every day, ask your doctor whether you should take acetaminophen or other pain reliever/fever reducers. Acetaminophen may cause liver damage.

Do not use if you are now taking a prescription nonnarcotic analgesic (pain reliever) or antidepressant drugs for depression, psychiatric or emotional conditions, or Parkinson's disease), or for 2 weeks after stopping the MAOI drug. If you do not know if your prescription drug contains an MAOI, ask a doctor or pharmacist before taking this product.

Ask a doctor before use if you have

- heart disease
- high blood pressure
- thyroid disease
- diabetes
- trouble urinating due to an enlarged prostate gland

When using this product do not use more than directed

Stop use and ask a doctor if

- you get nervous, dizzy, or shaky
- redness or swelling is present
- new symptoms occur
- symptoms do not improve
- fever gets worse or does not go away within 7 days

If pregnant or breast-feeding, ask a health professional before use.

Keep out of reach of children. In case of overdose, get medical help or contact a Poison Control Center right away. Prompt medical attention is critical for adults as well as children even if you do not notice any signs or symptoms.

Directions

- take dosage below or use as directed by a doctor
- take every 6 hours, do not exceed 4 doses in a 24 hour period

adults and children 12 years and over	2 caplets
children under 12 years	do not use

Other information

- keep blister closed
- store at room temperature

Drug Facts (continued)

Inactive ingredients croscarmellose sodium, D&C yellow #10, FD&C blue #1, FD&C green #3, imprint, hydroxypropyl cellulose, magnesium stearate, polyethylene glycol, silicon dioxide, sodium lauryl sulfate, titanium dioxide

This product is not manufactured or distributed by Merck-Medco Managed Care, LLC owner of the registered trademark Tylenol®.

ITEM 625223

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9600301247

Drug Facts

Active ingredients (in each gelatin caplet) — Purpose

Acetaminophen 500 mg ..... Pain Reliever/Fever reducer

Pseudoephedrine HCl 30 mg ..... Nasal decongestant

Uses

- temporarily relieves the following symptoms associated with sinusitis:
- minor aches and pains
- sinus pain and pressure
- headache
- nasal and sinus congestion

DECISION AND ORDER

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

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

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

1. Respondent Pharmaceutical Formulations, Inc. is a Delaware corporation with its principal office or place of business at 460 Plainfield Avenue, Edison, New Jersey 08818.

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

ORDER

I.

IT IS ORDERED that respondent, Pharmaceutical Formulations, Inc., its successors and assigns, and its officers, agents, representatives, and employees, directly or through any corporation, subsidiary, division, or other device, in connection with the manufacturing, labeling, advertising, promotion, offering for sale, sale, or distribution of any non prescription drug product containing an analgesic in or affecting commerce, as "commerce" is defined in Section 4 of the Federal Trade Commission Act, 15 U.S.C. § 44, shall not misrepresent, in any manner, directly or by implication, the extent to which any such product is made in the United States. For purposes of this Order, "drug" shall mean as defined in Section 15 of the Federal Trade Commission Act, 15 U.S.C. § 55, and "analgesic" shall mean an agent used to alleviate pain.

PROVIDED, however, that a representation that any such product is made in the United States will not be in violation of this order so long as all, or virtually all, of the ingredients or component parts of such product are made in the United States and all, or virtually all, of the labor in manufacturing such product is performed in the United States.

PROVIDED FURTHER, that a representation that any such product containing imported active ingredient is "Processed in the United States with Foreign Ingredients" will not be in violation of this Order when such representation is true and is used to describe a product that has been significantly processed in the United States.

PROVIDED FURTHER, that nothing in the order shall prohibit respondent from depleting the inventory of packaging and

labeling for such products bearing a marking or labeling otherwise prohibited by this order and existing on the date this order is signed, in the normal course of business, provided that no such existing inventory is shipped from respondent later than December 31, 2001.

II.

IT IS FURTHER ORDERED that respondent, and its successors and assigns, shall, for five (5) years after the last date of dissemination of any representation covered by this order, maintain and upon request make available to the Federal Trade Commission for inspection and copying:

A. All labeling, packaging, advertisements and promotional materials containing the representation;

B. All materials that were relied upon in disseminating the representation; and

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

III.

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

IV.

IT IS FURTHER ORDERED that respondent, 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.

V.

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

VI.

This order will terminate on February 19, 2022, 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 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 respondent Pharmaceutical Formulations, Inc. ("PFI").

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 "Made in U.S.A." claims on packaging and labeling for PFI's aspirin and acetaminophen tablets sold at retail bearing private brand names. The Commission's complaint alleges that respondent misrepresented on packaging and labeling that certain of these products, manufactured for customers such as Kmart, Duane Reade, Eckerd, and Harris Teeter, are all or virtually all made in the United States. According to the complaint, these products are actually made with significant foreign content. The products' active ingredients, bulk aspirin and acetaminophen compounds, that respondent processed into aspirin and acetaminophen tablets, are or were made outside the United States. The imported bulk aspirin and acetaminophen comprise a substantial percentage of total manufacturing costs and impart the crucial analgesic quality to the OTC products at issue. The Commission's complaint does not allege that all of PFI's private label aspirin and acetaminophen brands or products are mislabeled, but only that certain products for certain customers have been improperly labeled.

The proposed consent order contains a provision that is designed to remedy the charges and to prevent the respondent from engaging in similar acts and practices in the future. Part I of the proposed order prohibits PFI from misrepresenting the extent to which any non-prescription drug product containing an

analgesic is made in the United States. The order defines "analgesic" as an agent used to alleviate pain. The proposed order would allow PFI to represent that such products are made in the United States as long as all, or virtually all, of the ingredients or component parts of such products are made in the United States and all, or virtually all, of the labor in manufacturing such products is performed in the United States. The proposed order also would allow PFI to represent that a product containing imported active ingredient(s) is "Processed in the United States with Foreign Ingredients" when describing a product that has been "significantly processed" in the United States.

The draft order also includes a provision that would allow PFI to use its current packaging inventory until December 31, 2001.

Part II of the proposed order requires the respondent to maintain materials relied upon in disseminating any representation covered by the order. Part III of the proposed order requires the respondent to distribute copies of the order to certain company officials and employees. Part IV of the proposed order requires the respondent to notify the Commission of any change in the corporation that may affect compliance obligations under the order. Part V of the proposed order requires the respondent to file one or more compliance reports. Part VI of the proposed order is a provision whereby the order, absent certain circumstances, terminates twenty years from the date of issuance.

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

Complaint

IN THE MATTER OF

PERRIGO COMPANY

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

Docket C-4039; File No. 0123121
Complaint, February 19, 2002--Decision, February 19, 2002

This consent order addresses claims on certain packaging and labeling for aspirin, acetaminophen, and ibuprofen tablets produced by Respondent Perrigo Company that such products are all or virtually all made in the United States. The order, among other things, prohibits the respondent from misrepresenting the extent to which any non-prescription drug product containing an analgesic is made in the United States, while permitting the respondent to represent that such products are made in the United States as long as all, or virtually all, of the ingredients or component parts of such products are made in the United States and all, or virtually all, of the labor in manufacturing such products is performed in the United States. The order also permits the respondent to represent that a product containing imported active ingredient(s) is "Processed in the United States with Foreign Ingredients" when describing a product that has been "significantly processed" in the United States.

Participants

For the Commission: *Laura D. Koss, Walter C. Gross, Joni Lupovitz, Elaine D. Kolish* and *Keith Anderson.*

For the Respondent: *George N. Grammas* and *George C. McKann, Gardner, Carton & Douglas.*

COMPLAINT

The Federal Trade Commission, having reason to believe that Perrigo Company ("respondent") has violated the provisions of the Federal Trade Commission Act, and it appearing to the Commission that this proceeding is in the public interest, alleges:

1. Respondent is a Michigan corporation with its principal office or place of business at 515 Eastern Avenue, Allegan, Michigan 49010.

2. Respondent has manufactured, labeled, offered for sale, sold, and distributed aspirin, acetaminophen, and ibuprofen tablets to the public, including but not limited to private label aspirin, acetaminophen, and ibuprofen brands.

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

4. Respondent has disseminated or has caused to be disseminated packaging and labeling for certain of its aspirin, acetaminophen, and ibuprofen products, including but not necessarily limited to the attached Exhibits A through D. The packaging and labeling contain the following statements or depictions:

A. **Equate Adult Low Strength 81 mg Enteric Coated Aspirin**
[Exhibit A]

"MANUFACTURED BY PERRIGO CO. . . . [image of American flag] Made in the USA"

B. **American Fare Ibuprofen Tablets [Exhibit B]**

"Made in U.S.A. for Kmart Corporation."

C. **Target Brand Junior Strength Soft Chewable Tablets Acetaminophen [Exhibit C]**

"Distributed By Target Corporation . . . Made in USA"

D. **Safeway Junior Strength Non-Aspirin Acetaminophen Chewable Tablets [Exhibit D]**

"DISTRIBUTED BY SAFEWAY, INC. . . . PRODUCT OF U.S.A."

5. Through the means described in Paragraph 4, respondent has represented, expressly or by implication, that certain of its aspirin, acetaminophen, and ibuprofen products are made in the United States, *i.e.*, that all, or virtually all, of the ingredients of such products are made in the United States, and that all, or virtually all, of the labor in manufacturing such products is performed in the United States.

6. In truth and in fact, a significant portion of the ingredients of certain of respondent's aspirin, acetaminophen, and ibuprofen products is, or has been, of foreign origin. The active ingredients, bulk aspirin, acetaminophen, and ibuprofen compounds, that respondent processed into aspirin, acetaminophen, or ibuprofen tablets are or were made outside the United States. Therefore, the representation set forth in Paragraph 5 was, and is, false or misleading.

7. The acts and practices of respondent as alleged in this complaint constitute unfair or deceptive acts or practices, and the making of false advertisements, in or affecting commerce in violation of Sections 5(a) and 12 of the Federal Trade Commission Act, 15 U.S.C. §§ 45(a) and 52.

THEREFORE, the Federal Trade Commission this nineteenth day of February 2002, has issued this complaint against respondent.

By the Commission.

Perrigo Company

Exhibits

07/23/21

SEALED WITH PRINTED FOIL UNDER CAP FOR YOUR PROTECTION

ALCOHOL WARNING: IF YOU CONSUME 3 OR MORE ALCOHOLIC DRINKS EVERY DAY, ASK YOUR DOCTOR WHETHER YOU SHOULD TAKE ASPIRIN OR OTHER PAIN RELIEVER/FEVER REDUCERS. ASPIRIN MAY CAUSE STOMACH BLEEDING.

DRUG INTERACTION PRECAUTION: DO NOT TAKE THIS PRODUCT IF YOU ARE TAKING A PRESCRIPTION DRUG FOR [illegible] UNLESS DIRECTED BY A DOCTOR.

THE ENTERIC COATING ON THIS PRODUCT IS DESIGNED TO ALLOW THE TABLET TO PASS THROUGH THE STOMACH TO THE INTESTINE WHERE IT DISSOLVES. PROVIDES PROTECTION AGAINST STOMACH UPSET.

BECAUSE OF ITS DELAYED ACTION, THIS PRODUCT WILL NOT PROVIDE FAST RELIEF OF HEADACHES, FEVER OR OTHER SYMPTOMS. BLEEDING MAY OCCUR WITHOUT WARNING.

ACTIVE INGREDIENT: 81 MG ASPIRIN PER TABLET

INACTIVE INGREDIENTS: ACETYLATED MONOGLYCERIDES, COLLOIDAL SILICON DIOXIDE, CROSCARMELLOSE SODIUM, D&C YELLOW #10, HYDROXYPROPYL METHYLCELLULOSE PHTHALATE, IRON OXIDE, LACTOSE, MICROCELLULOSE, MODIFIED STARCH, MINERAL OIL, OCHRE, POLYETHYLENE GLYCOL, POLYSORBATE 80, TITANIUM DIOXIDE

STORE AT ROOM TEMPERATURE [illegible]

**EQUATE ENTERIC COATED ASPIRIN IS NOT MANUFACTURED OR DISTRIBUTED BY BAYER CORPORATION DISTRIBUTOR OF BAYER® ADULT LOW STRENGTH ASPIRIN

MANUFACTURED BY PERRIGO CO.
ALLEGAN, MI [illegible] U.S.A.

Made in the USA

SEE INSPECTION MARK ON BOTTLE OR REMOVE OR EXPOSE

first discussing it with your doctor. IF YOU EXPERIENCE ANY SYMPTOMS WHICH ARE UNUSUAL OR SEEM UNRELATED TO THE CONDITION FOR WHICH YOU TOOK IBUPROFEN, CONSULT A DOCTOR BEFORE TAKING ANY MORE OF IT. Although ibuprofen is indicated for the same conditions as aspirin and acetaminophen, it should not be taken with these except under a doctor's direction. Do not consume this product with any other ibuprofen containing product. As with any drug, if you are pregnant or nursing a baby, seek the advice of a health professional before using this product. IT IS ESPECIALLY IMPORTANT NOT TO USE IBUPROFEN DURING THE LAST 3 MONTHS OF PREGNANCY UNLESS SPECIFICALLY DIRECTED TO DO SO BY A DOCTOR BECAUSE IT MAY CAUSE PROBLEMS IN THE UNBORN CHILD OR COMPLICATIONS DURING DELIVERY. Keep this and all drugs out of the reach of children. In case of accidental overdose, seek professional assistance or contact a poison control center immediately.

ACTIVE INGREDIENT: Each tablet contains Ibuprofen USP, 200 mg.

INACTIVE INGREDIENTS: Colloidal Silicon Dioxide, Corn Starch, D&C Yellow #10 Aluminum Lake, FD&C Blue #2 Aluminum Lake, FD&C Red #40 Aluminum Lake, Hydroxypropyl Cellulose, Hydroxypropyl Methylcellulose, Lactose Anhydrous, Magnesium Stearate, Microcrystalline Cellulose, Polyethylene Glycol, Povidone, Sodium Lauryl Sulfate, Sodium Starch Glycolate, Titanium Dioxide. Store at room temperature. Avoid excessive heat 40°C (104°F).

Made in USA for
Kmart Corporation
Troy, Michigan 48084

If you are not satisfied with this or any American Family product, please call 1-800-642-7866.

IBUPROFEN TABLETS, contain ibuprofen, a safe and effective pain reliever which has been prescribed by doctors for millions and is now available in non-prescription strength.

AMERICAN FAMILY

Modern Pain Medicine

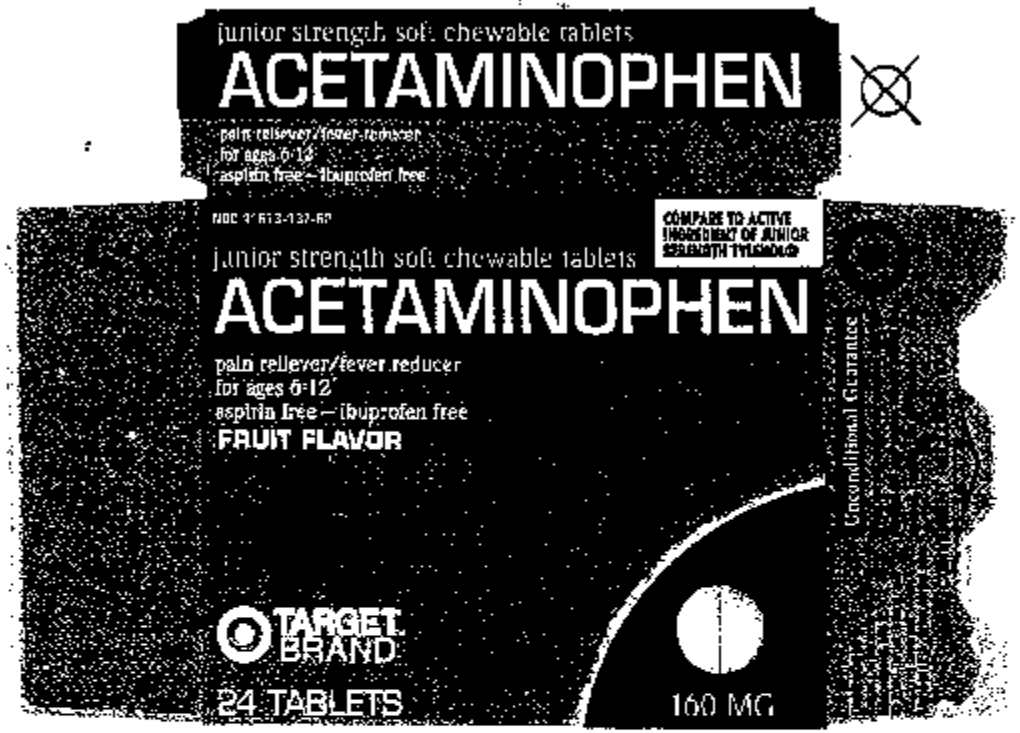
NDC 69730-xxx-xx
SEE WARNING CHANGE

Ibuprofen
Tablets

Pain Reliever/Fever Reducer

Compare to active ingredient of Advil®

100 COATED TABLETS, 200 mg EACH


junior strength soft chewable tablets
ACETAMINOPHEN
pain reliever/fever reducer
for ages 6-12
aspirin free—ibuprofen free
NDC 4[illegible]
COMPARE TO ACTIVE INGREDIENT OF JUNIOR STRENGTH TYLENOL®
junior strength soft chewable tablets
ACETAMINOPHEN
pain reliever/fever reducer
for ages 6-12
aspirin free—ibuprofen free
FRUIT FLAVOR
Unconditional Guarantee
TARGET BRAND
24 TABLETS
160 MG


3 21130 77700 7
SAFEWAY
NON-ASPIRIN
OPEN OTHER END
COMPARE TO ACTIVE INGREDIENT IN JUNIOR STRENGTH TYLENOL®
FOR AGES 6-12*
Junior Strength
Non-Aspirin
acetaminophen chewable tablets
• pain reliever • fever reducer
• for ages 6-12
Soft Chewable Tablets
Fruit Flavor
• aspirin free
• ibuprofen free
Junior Strength
Non-Aspirin

DECISION AND ORDER

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

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

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

1. Proposed respondent is a Michigan corporation with its principal office or place of business at 515 Eastern Avenue, Allegan, Michigan 49010.

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

ORDER

I.

IT IS ORDERED that respondent, Perrigo Company, its successors and assigns, and its officers, agents, representatives, and employees, directly or through any corporation, subsidiary, division, or other device, in connection with the manufacturing, labeling, advertising, promotion, offering for sale, sale, or distribution of any non-prescription drug product containing an analgesic in or affecting commerce, as "commerce" is defined in Section 4 of the Federal Trade Commission Act, 15 U.S.C. § 44, shall not misrepresent, in any manner, directly or by implication, the extent to which any such product is made in the United States. For purposes of this Order, "drug" shall mean as defined in Section 15 of the Federal Trade Commission Act, 15 U.S.C. § 55, and "analgesic" shall mean an agent used to alleviate pain.

PROVIDED, however, that a representation that any such product is made in the United States will not be in violation of this order so long as all, or virtually all, of the ingredients or component parts of such product are made in the United States and all, or virtually all, of the labor in manufacturing such product is performed in the United States.

PROVIDED FURTHER, that a representation that any such product containing imported active ingredient is "Processed in the United States with Foreign Ingredients" will not be in violation of this Order when such representation is true and is used to describe a product that has been significantly processed in the United States.

PROVIDED FURTHER, that this Part shall take effect for non-prescription drug products containing an imported analgesic on December 31, 2001, and shall take effect for all other non-prescription drug products containing an analgesic on March 31, 2002.

II.

IT IS FURTHER ORDERED that respondent, and its successors and assigns, shall, for five (5) years after the last date of dissemination of any representation covered by this order, maintain and upon request make available to the Federal Trade Commission for inspection and copying:

A. All labeling, packaging, advertisements and promotional materials containing the representation;

B. All materials that were relied upon in disseminating the representation; and

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

III.

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

IV.

IT IS FURTHER ORDERED that respondent, 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.

V.

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

VI.

This order will terminate on February 19, 2022, 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 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 respondent Perrigo Company. ("Perrigo").

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 "Made in U.S.A." claims on packaging and labeling for Perrigo's aspirin, acetaminophen, and ibuprofen tablets sold at retail bearing private brand names. The Commission's complaint alleges that respondent misrepresented on packaging and labeling that certain of these products, manufactured for customers such as Kmart, Wal-Mart, Target, and Safeway, are all or virtually all made in the United States. According to the complaint, these products are actually made with significant foreign content. The products' active ingredients, bulk aspirin, acetaminophen, or ibuprofen compounds, that respondent processed into aspirin, acetaminophen, or ibuprofen tablets, are or were made outside the United States. The imported bulk compounds comprise a substantial percentage of total manufacturing costs and impart the crucial analgesic quality to the OTC products at issue. The Commission's complaint does not allege that all of Perrigo's private label aspirin, acetaminophen, and ibuprofen brands or products are mislabeled, but only that certain products have been improperly labeled.

The proposed consent order contains a provision that is designed to remedy the charges and to prevent the respondent from engaging in similar acts and practices in the future. Part I of the proposed order prohibits Perrigo from misrepresenting the extent to which any non-prescription drug product containing an

analgesic is made in the United States. The order defines "analgesic" as an agent used to alleviate pain. The proposed order would allow Perrigo to represent that such products are made in the United States as long as all, or virtually all, of the ingredients or component parts of such products are made in the United States and all, or virtually all, of the labor in manufacturing such products is performed in the United States. The proposed order also would allow Perrigo to represent that a product containing imported active ingredient(s) is "Processed in the United States with Foreign Ingredients" when describing a product that has been "significantly processed" in the United States.

The draft order is effective on December 31, 2001, for OTC products containing an imported analgesic and on March 31, 2001, for all other OTC products containing an analgesic. These dates take into consideration the number of different products Perrigo produces and the time it will take to convert its stock without disrupting its supply of store brand goods to its retailer customers. Thus, the order is designed to end the mislabeling quickly while minimizing unnecessary burdens on Perrigo, its customers, and consumers of these products.

Part II of the proposed order requires the respondent to maintain materials relied upon in disseminating any representation covered by the order. Part III of the proposed order requires the respondent to distribute copies of the order to certain company officials and employees. Part IV of the proposed order requires the respondent to notify the Commission of any change in the corporation that may affect compliance obligations under the order. Part V of the proposed order requires the respondent to file one or more compliance reports. Part VI of the proposed order is a provision whereby the order, absent certain circumstances, terminates twenty years from the date of issuance.

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

Complaint

IN THE MATTER OF

KRIS A. PLETSCHKE, INDIVIDUALLY AND DOING BUSINESS AS RAW HEALTH

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

Docket C-4040; File No. 0223070
Complaint, February 22, 2002--Decision, February 22, 2002

This consent order addresses practices used by Respondent Kris A. Pletschke, individually and doing business as Raw Health, in marketing Colloidal Silver" – a dietary supplement allegedly containing submicroscopic particles of silver – intended to be taken for the cure and treatment of more than 650 diseases. The order, among other things, prohibits the respondent from misrepresenting any claims that Colloidal Silver – or any food, dietary supplement, drug, device, or health-related service or program – has been medically proven to kill disease-causing organisms or any number of infections in the body. The order also requires the respondent to possess and rely upon competent and reliable scientific evidence to substantiate representations that Colloidal Silver or any covered product (1) is effective in treating 650 diseases and health-related conditions; (2) kills the HIV virus and can be used as an antibiotic for all acquired diseases of active AIDS; (3) is superior to antibiotics in killing disease-causing organisms and the treatment of burns; (4) protects and strengthens the immune system; (5) can safely be used on open wounds, sprayed into the eye, injected, used orally, vaginally, anally, atomized or inhaled into the nose or lungs and dropped into the eyes; (6) has no side effects, even at double or triple the normal dose of 260 parts per million, and is safe for children and pregnant and nursing women; or (7) has any health, performance, safety, or efficacy benefits. In addition, the order prohibits the respondent from misrepresenting, including by means of metatags, the existence, contents or interpretation of any test, study, or research. The order also requires the respondent to offer refunds to all of his past consumers and wholesale purchasers of Colloidal Silver, and to file a sworn affidavit with the Commission concerning his compliance with the refund provisions.

Participants

For the Commission: *James T. Rohrer, Cindy A. Liebes,* and *Andrea L. Foster.*

For the Respondent: *Kris A. Pletschke, pro se.*

COMPLAINT

The Federal Trade Commission, having reason to believe that Kris A. Pletschke ("respondent"), individually, and doing business as Raw Health, has violated the provisions of the Federal Trade Commission Act, and it appearing to the Commission that this proceeding is in the public interest, alleges:

1. Respondent Kris A. Pletschke is a resident of Oregon. His principal office or place of business is 11355 SW 14th St., Beaverton, OR 97005. Individually, or in concert with others, he formulates, directs, or controls the policies, acts, or practices of the business operating under the trade name "Raw Health," including the acts and practices alleged in this complaint.

2.a. Respondent has promoted, advertised, labeled, offered for sale, sold and distributed directly to the public a colloidal silver liquid product called *Colloidal Silver*, various vitamin, mineral, and herbal products, and other health products, including by means of an Internet Web site, <www.rawhealth.net>, that provides product and purchase information and advertising and promotional claims.

2.b. Respondent's *Colloidal Silver* is purportedly a liquid containing 260 ppm silver, enhanced with gold, quartz, and emerald essence in a water solution, that can be used for various therapeutic purposes through oral ingestion, intravenous administration, nasal spray, anal and vaginal administration, or topical application. *Colloidal Silver* is either a "food" or "drug" within the meaning of Sections 12 and 15 of the Federal Trade Commission Act.

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

4. Respondent has disseminated or has caused to be disseminated advertisements or promotional materials for *Colloidal Silver*,

through, among other media, websites on the Internet, including but not necessarily limited to the attached Exhibits A and B. These advertisements contain the following statements, among others:

A.

Add item: Colloidal Silver 1-(8oz 260ppm) . . ..$18.00 ea.
Add item: Colloidal Silver 4-(8oz 260ppm) . . ..$17.50 ea.
Add item: Colloidal Silver 8-(8oz 260ppm) . . ..$17.00 ea.
Enhanced with gold, quartz, and emerald essences. Clear and ordorless. You won't find your local natural foods store carrying this enhanced combination or nearly this concentration (ppm). Colloidal Silver Water is the only naturally occurring and most effective anti-viral and anti-bacterial substance known; it is beyond pharmaceutical antibiotics. Great for traveling to purify the drinking water. Helps to accelerate wound healing, eye infections, cold-flu, douching, candida, & more.

www.rawhealth.net/cleanse.htm

Exhibit A

B.

COLLOIDAL SILVER FABULOUS FACTS -
& Frequently Asked Questions

* * *

Colloidal Silver is a pure all-natural substance consisting of sub-microscopic clusters of silver held in a suspension of pure

ionized water by a tiny electric charge placed on each particle. Colloidal Silver is a tasteless, odorless, nontoxic, pure, natural substance consisting of submicroscopic clusters of silver particles, suspended by a tiny electric charge placed on each particle within a suitable liquid. The molecules size is .00001 microns or 1.26 angstroms in diameter which is very small. The particles do not settle but remain suspended since the electric charge exerts more force than gravity on each particle. Colloidal is the form of choice for silver delivery since the body must convert a crystalline solution to a colloid before it can be assimilated. Taken daily, it is a powerful adjunct to our immune system. It kills harmful disease causing organisms and aids healing.

* **

WHAT ARE THE KEY CHARACTERISTICS?

Colloidal Silver is non-toxic, non-addictive and has no side-effects. The body develops no tolerance and one cannot overdose. Colloidal Silver cannot cause harm to the liver, kidneys or any other organ in the body. It is safe for pregnant and nursing women and even aids the developing fetus in growth and health as well as easing the mother's delivery and recovery. Colloidal Silver is odorless, tasteless, non-stinging, harmless to eyes, contains no free radicals, is harmless to human enzymes and has no reaction with other medications. It improves digestion, aids in the regeneration of damaged cells and tissues, helps prevent colds, flu and organism caused diseases [*sic*]. It has been reported to rapidly subdue inflammation and promote faster healing. The body needs Colloidal Silver to fight disease causing organisms and to aid healing. Taken daily, Colloidal Silver provides a second immune system resulting in more energy, vitality, vigor, relaxation, faster healing and reduced bodily toxins.

HOW DOES COLLOIDAL silver WORK?

According to medical journals from around the world, it disables the particular enzyme that all one celled bacteria, fungi and viruses use for their oxygen metabolism. The presence of Colloidal Silver near a virus, fungus, bacterium or any other single celled pathogen disables its oxygen metabolism enzyme, its chemical lung, so to say. It suffocates them in six minutes or less after initial contact; the pathogen suffocates and dies and is cleared out of the body by the immune, lymphatic and elimination systems. Colloidal Silver co-mingles with the blood and enters the cells to seek out and destroy harmful organisms. This phenomenon was recently demonstrated in tests at UCLA Medical Lab. Trace amounts protect and strengthen the immune system. . . .

Thus **Colloidal Silver is absolutely safe** for humans, reptiles, plants and all multi-celled living matter. Unlike with antibiotics, resistant strains have never been known to develop. In fact, antibiotics are only effective against perhaps a dozen forms of bacteria and fungi, but never viruses. Because no known disease causing organism can live in the presence of even minute traces of the chemical element of metallic silver, colloidal silver is effective against more than 650 different disease causing pathogens. . . .

Medical journal reports and documented studies spanning the past 100 years indicate no known side-effects from oral or IV administration of colloidal silver in animal or human testing. Colloidal silver has been used with good results under the most demanding health care circumstances. Without overstating the case, it may be time to recognize colloidal silver as not only the safest medicine on Earth but also the most powerful. . . .

Colloidal Silver is truly a safe, natural remedy for many of mankind's ills. Since viruses like Ebola and Hunta, or even the

dreaded "flesh-eating bacteria" are in the end merely hapless viruses and bacteria. . . .

USES OF COLLOIDAL SILVER

For several decades the clinical use of Silver have been proven in the treatment of burns as well as eye, ear, nose, throat, vaginal, rectal and urinary tract infections. Silver has been prescribed in medicine as an aid to the brain, reproductive disorders in women and the circulatory system. It has been used as a remedy for mental imbalances, sleepwalking and anorexia nervosa. Additional uses include the treatment of AIDS, allergies, anthrax, arthritis, blood poisoning, boils, wounds of the cornea, chronic fatigue, cerebral spinal meningitis, candida, cholera, colitis, cystitis, diabetes, diphtheria, dysentery, enlarged prostate, gonorrhea, herpes, hepatitis, infantile diseases, lesions, leukemia, lupus, Lyme disease, parasites, dental plaque remover, rheumatism, ringworm shingles, skin cancer, staph and strep infections, stomach flu, thyroid conditions, tonsillitis, toxemia, stomach ulcers and whooping cough to name a few. It is even used as a natural under arm deodorant and handy for virtually every medical circumstance for humans, plants and animals around the home and farm.

INGESTING COLLOIDAL SILVER

Taken orally, the silver solution is absorbed from the mouth into the bloodstream then transported quickly to the body cells. Swishing the solution under the tongue briefly before swallowing ensures fast absorption[.] In three to four days the silver will have accumulated in the tissues sufficiently for benefits to begin. Since Colloidal Silver is eliminated by the kidneys, lymph system and bowel after three weeks, a regular daily intake is recommended as a protection against dangerous pathogens. In cases of minor burns, an accumulation of Colloidal Silver can hasten healing, reducing scar tissue and

infection. The lives of millions of people susceptible to chronic low-grade inflections can be enhanced by this powerful preventative health measure[.]

TOPICAL APPLICATION OF COLLOIDAL SILVER
(concentration/ parts-per-million determines your actual dosage. consult your bottle.)

Colloidal Silver is painless on burns, cuts, abrasions, in open wounds, in the nostrils for a stuffy nose, arid [*sic*] even in a persons eyes because unlike antiseptics, it does not destroy tissue cells. It is perfect with cosmetics, creams and lotions. Spray on then add your favorite beauty product. A few drops on a Q-tip or band-aid may be used to disinfect any wound or sore. Liquid silver is administered orally and can also be injected. It can be used vaginally, anally, atomized or inhaled into the nose or lungs and dropped into the eyes. To start, take one teaspoon per day, for seven days, then reduce to half a teaspoon per day. Children should use proportionally smaller doses. For cold and flu symptoms up to a tablespoon three times daily is recommended. Overdosing should not be of concern even if more than the recommended dose is administered. After a few days of use, one might experience a detoxification effect in the form of feeling sluggish or mild aches. Consumption of water will cause these symptoms to disappear.

It is safe for pregnant and nursing women and is known to aid the developing fetus in growth. It will not generate free radicals or interfere with enzyme activity. . . .

A 65-year-old diabetic cut himself on the leg. He washed and bandaged it but, as often happens with diabetes, the pain persisted. The cut grew into a sore. Soon it became bigger than the bandage and he had to apply a dressing. Still, it

grew bigger and ugly. In desperation he went to a clinic. His sore was diagnosed as a stasis ulcer. For a year, one treatment after another was tried. Nothing including penicillin and sulfonamide, could heal the ulcer. If his condition had continued unchecked [his] leg probably would have been amputated. But finally he was referred to a burn clinic that treated skin ulcers with a silver compound. This promptly stopped the growth of all bacteria. In less than two months, the ulcer was completely healed. Science Digest-March 1978.

FOR CHRONIC OR SERIOUS CONDITIONS

Take double or triple the recommended amount for 10 to 45 days, then drop to the maintenance dose. If your body is extremely ill or toxic do not be in a hurry to clear up everything at once. If pathogens are killed off too quickly, the body's five eliminatory channels, i.e., the liver, kidneys, skin, lungs and bowel, may be temporarily overloaded, causing flu-like conditions, headache, extreme fatigue, dizziness, nausea or aching muscles. Ease off on the Colloidal Silver to the maintenance amount and increase your distilled water intake, Regular bowel movements are a must in order to relieve the discomforts of detoxification. Resolve to reduce sugar and saturated fats from the diet, and exercise more. Given the opportunity, the body's natural ability to heal will amaze you.

WHAT ABOUT COLLOIDAL SILVER FOR AIDS?

Since in active AIDS, the suppressed immune system of the body is open to all kinds of disease. Colloidal Silver is the perfect nontoxic substance used for its wide spectrum antibiotic effect. A researcher at Brigham Young University sent Colloidal Silver to two different labs including UCLA Medical Center, and reported "It not only killed the HIV virus but every virus that was tested in the labs. According

to FDA rules, Colloidal Silver cannot be used for treating the HIV virus, but it could be used as an antibiotic for all acquired diseases of active AIDS.

HAS IT BEEN CLINICALLY TESTED?

YES! Colloidal Silver has been successfully tested at the UCLA Medical Labs
where it killed every virus on which it was tested.

WHAT DOES THE FDA SAY?

According to the United States Government Food and Drug Administration Colloidal Silver may continue to be marketed and used as it was originally intended. Colloidal Silver exceeds FDA recognized standards for safety. In a September 13, 1991 letter written by Harold Davies, U.S. Food and Drug Administration Consumer Safety Officer stated that FDA has no jurisdiction regarding a pure, mineral element. No one should worry about the FDA (Food and Drug Administration) being put in charge of this home remedy. Colloidal Silver is grand fathered as a pre 1938 healing modality. This makes it exempt from FDA jurisdiction.

COLLOIDAL SILVER VERSUS PHARMACEUTICAL ANTIBIOTICS

Interest in Colloidal Silver has increased recently because illness causing organisms do not build up a resistance to Colloidal Silver the way they do to pharmaceutical antibiotics. Antibiotics are becoming less effective as resistance to them grows. Artificial antibiotics kill, on average 6 different disease organisms but Colloidal Silver is known to kill over 650 diseases without any harmful side effects or toxicity. The Los Angeles Times states "In the last decade, a broad resistance to antibiotics has begun to emerge. Because bacteria can transfer genes among themselves, experts only expect the resistance to

grow, The potential nightmare is an Andromeda strain, which is immune to all antibiotics and could wreak havoc *Arsenal of Antibiotics Failing as Resistant Bacteria Develop* October 23, 1994.

* * *

Jim Powell reported in the Science Digest article quoted above, that an antibiotic kills perhaps 7 different disease organisms, but silver kills some 650. Resistant strains fail to develop. Moreover, silver is nontoxic! The comeback of silver in medicine began in the 1970's. The late Dr. Carl Moyer, chairman of Washington University's Department of Surgery received a grant to develop a better treatment for burn victims. Dr. Harry Margraf of St. Louis, as the chief biochemist, worked with Dr. Moyer and other surgeons to find an antiseptic strong enough yet safe enough to use over larger areas of the body. Dr. Margraf reviewed 22 antiseptic compounds and found drawbacks in all of them. He noted that many of these antibiotics were ineffective against a number of harmful bacteria, including the biggest killer in burn cases a greenish blue bacterium called Pseudomonas acruginose. In extensive trials silver proved to be the most effective treatment and is currently used in all major bum [*sic*] centers in the United States. The safest proven germ fighter! SILVER IS USED IN ALL MAJOR BURN CENTERS IN THE UNITED STATES. UCLA MEDICAL LABS FOUND IT EFFECTIVE ON EVERY VIRUS THEY TESTED IT ON.

WHAT DO HEALTH PROFESSIONALS SAY ABOUT COLLOIDAL SILVER?

According to Dr. Evan of Illinois, . . . colloidal silver has provided excellent removal of abnormal intestinal bacteria also it has proved to be a great adjunct to our Candida albicans, Epstein Barr Virus and Chronic Fatigue Syndrome protocols.

* * *

Dr. Henry Crooks in Use of Colloids in Health-Disease found that silver in the colloidal state is highly germicidal, quite harmless to humans and absolutely nontoxic. From his bacteriological experiments with silver he concluded "I know of no microbe that is not killed in laboratory experiments in six minutes."

Dr. Bjorn Nordenstrorn of the Larolinska Institute, Sweden has successfully used silver as a component in his cancer treatments for many years. Dr. Leonard Keene Hirschberg, M. D. at John Hopkins states, "Speaking generally, the colloidal metals are especially remarkable for their beneficial action in infective states."

Dr, Richard L. Davies, executive director of the Silver Institute, which monitors silver technology in 37 countries, reports: "In four years we've described 87 important new medical uses for silver. We're just beginning to see to what extent silver can relieve suffering."

The March 1978 issue of *Science Digest*, in an article, "Our Mightiest Germ Fighter, "reported:" Thanks to eye-opening research, silver is emerging as a wonder of modem medicine. An antibiotic kills perhaps a half-dozen different disease organisms, but silver kills some 650. Resistant strains fail to develop. Moreover, silver is virtually non-toxic. "The article ended with a quote by Dr. Harry Margraf, a biochemist and pioneering silver researcher who worked with the late Carl Moyer, M.D., chairman of Washington University's Department of Surgery in the 1970s:
"Silver is the best all-around germ fighter we have."

* * *

Since the body is known to have a vital need for silver to maintain both the immune system and the production of new healthy cells, and due to the harmonious nature of colloids entering the body, it stands within reason that colloidal silver may be harmless. Just to prove the point make a sixteen-ounce solution of well over 250 ppm and drink it. It's plenty safe. This makes sense according to Capitol Drugs pharmacist Ron Barnes, PhD. "Many strains of pathogenic microbes, viruses, fungi, bacteria or any other single celled pathogen resistant to other antibiotics are killed on contact by colloidal silver, and are unable to mutate. However, it does not harm tissue-cell enzymes and friendly bacteria.

www.rawhealth.net/silver.htm

Exhibit B

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5. Through the means described in Paragraph 4, respondent has represented, expressly or by implication, that:

A. *Colloidal Silver* is effective in treating or curing 650 diseases.

B. *Colloidal Silver* eliminates all pathogens in the human body in six minutes or less.

C. *Colloidal Silver* has been medically proven to kill every destructive bacterial, viral and fungal organism in the body, including anthrax, Ebola, Hunta, and "flesh-eating bacteria."

6. In truth and in fact, *Colloidal Silver* is not effective in treating or curing 650 diseases; *Colloidal Silver* does not eliminate all pathogens in the human body in six minutes or less; and *Colloidal Silver* has not been medically proven to kill destructive bacterial, viral, or fungal organisms in the body. In addition, the FDA issued a final rule, effective September 16, 1999, finding and establishing that all OTC drug products containing colloidal silver ingredients or silver salts for internal or external use are not generally recognized as safe and effective. Therefore, the representations set forth in Paragraph 5 were, and are, false and misleading.

7. Through the means described in Paragraphs 4, respondent has represented, expressly or by implication, that:

A. *Colloidal Silver* is effective in treating 650 diseases and health-related conditions, including AIDS, allergies, anthrax, arthritis, blood poisoning, boils, wounds of the cornea, chronic fatigue, cerebral spinal meningitis, candida, cholera, colitis, cystitis, dental plaque, diabetes, diphtheria, dysentery, enlarged prostate, gonorrhea, herpes, hepatitis, infantile diseases, lesions, leukemia, lupus, Lyme disease, parasites, rheumatism, ringworm shingles, skin cancer, staph and strep infections, stomach flu, thyroid conditions, tonsillitis, toxemia, stomach ulcers and whooping cough.

B. *Colloidal Silver* kills the HIV virus and can be used as an antibiotic for all acquired diseases of active AIDS.

C. *Colloidal Silver* is superior to antibiotics in killing disease-causing organisms and the treatment of burns.

D. *Colloidal Silver* protects and strengthens the immune system.

E. *Colloidal Silver* can safely be used on open wounds, sprayed into the eye, injected, used orally, vaginally, anally, atomized or inhaled into the nose or lungs and dropped into the eyes.

F. *Colloidal Silver* has no side effects, even at double or triple the normal dose of 260 ppm, and it is safe for children and pregnant and nursing women.

G. *Colloidal Silver* aids the growth and health of the developing fetus and eases delivery and recovery.

8. Through the means described in Paragraph 4, respondent has represented, expressly or by implication, that he possessed and relied upon a reasonable basis that substantiated the representations set forth in Paragraph 7, at the time the representations were made.

9. In truth and in fact, respondent did not possess and rely upon a reasonable basis that substantiated the representations set forth in Paragraph 7 at the time the representations were made. For example, there is no competent and reliable scientific evidence that *Colloidal Silver* is effective in treating or curing any disease, including AIDS, anthrax, or arthritis; that *Colloidal Silver* kills the HIV virus and can be used as an antibiotic for all acquired diseases of active AIDS, or that it is superior to antibiotics in killing disease-causing organisms. In addition, there is no competent and reliable scientific evidence that *Colloidal Silver* is safe for oral ingestion, topical application, and IV administration or that *Colloidal Silver* has no side effects. Therefore, the representation set forth in Paragraph 8 was, and is, false or misleading.

10. The acts and practices of respondent as alleged in this complaint constitute unfair or deceptive acts or practices, and the

making of false advertisements, in or affecting commerce in violation of Sections 5(a) and 12 of the Federal Trade Commission Act.

THEREFORE, the Federal Trade Commission this twenty-second day of February, 2002, has issued this complaint against respondent.

By the Commission.

DECISION AND ORDER

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

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

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

1. Respondent Kris A. Pletschke is an individual doing business and residing at 11355 SW 14th St., Beaverton, OR 97005 under the trade name "Raw Health."

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

ORDER

DEFINITIONS

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

1. "Competent and reliable scientific evidence" shall mean tests, analyses, research, studies, or other evidence based on the expertise of professionals in the relevant area, that has been conducted and evaluated in an objective manner by persons qualified to do so, using procedures generally accepted in the profession to yield accurate and reliable results.

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

3. A requirement that respondent "notify the Commission," "file with the Commission," or "deliver to the Commission" shall mean that the respondent shall send the necessary information via first-class mail, costs prepaid, to the Associate Director for Division of Enforcement, Federal Trade Commission, 600 Pennsylvania Avenue, N.W., Washington, D.C. 20580. Attention: In the Matter Kris A. Pletschke.

4. "Person" shall mean a natural person, organization or other legal entity, including a partnership, corporation, proprietorship, association, cooperative, or any other group acting together as an entity.

5. Unless otherwise specified, "respondent" shall mean Kris A. Pletschke, individually, and d/b/a Raw Health, his agents, representatives, and employees.

6. "Colloidal Silver product" shall mean any product containing or purporting to contain colloidal silver or silver salts, including but not limited to Raw Health's *Colloidal Silver*.

7. "Distributor" shall mean any purchaser or other transferee of any product, service, or program covered by this order who acquires product or service from respondent, with or without valuable consideration, and who sells, or who has sold, such product or service to other sellers or to consumers, including but not limited to individuals, retail stores, or catalogs.

8. "Food," "drug," and "device" shall mean as "food," "drug," and "device" are defined in Section 15 of the Federal Trade Commission Act, 15 U.S.C. § 55.

9. "Covered product or service" shall mean any food, dietary supplement, drug, device, or health-related service or program.

10. "Endorsement" shall mean as "endorsement" is defined in 16 C.F.R.§ 255.0(b).

I.

IT IS HEREBY ORDERED that respondent, directly or through any partnership, corporation, subsidiary, division, trade name, or other device, including franchisees, licensees, or distributors, in connection with the labeling, advertising, promotion, offering for sale, sale, or distribution of any *Colloidal Silver* product or any covered product or service in or affecting commerce, shall not misrepresent, in any manner, expressly or by implication, that such product or service is effective in treating or curing 650 diseases; eliminates all pathogens in the human body in six minutes or less; or has been medically proven to kill any destructive bacterial, viral and fungal organism in the body, including anthrax, Ebola and Hunta, or "flesh-eating bacteria."

II.

IT IS HEREBY FURTHER ORDERED that respondent, directly or through any partnership, corporation, subsidiary, division, trade name, or other device, including franchisees, licensees, or distributors, in connection with the labeling, advertising, promotion, offering for sale, sale, or distribution of

any *Colloidal Silver* product, or any covered product or service in or affecting commerce, shall not make any representation, in any manner, including by means of endorsements, expressly or by implication:

A. That any such product or service is effective in treating any disease or health-related condition, including, but not limited to, AIDS, allergies, anthrax, arthritis, blood poisoning, boils, wounds of the cornea, chronic fatigue, cerebral spinal meningitis, candida, cholera, colitis, cystitis, dental plaque, diabetes, diphtheria, dysentery, enlarged prostate, gonorrhea, herpes, hepatitis, infantile diseases, lesions, leukemia, lupus, Lyme disease, parasites, rheumatism, ringworm shingles, skin cancer, staph and strep infections, stomach flu, thyroid conditions, tonsillitis, toxemia, stomach ulcers and whooping cough;

B. That any such product or service kills the HIV virus or can be used as an antibiotic for any acquired diseases of active AIDS;

C. That any such product or service is superior to antibiotics in killing disease-causing organisms or the treatment of burns;

D. That any such product or service protects or strengthens the immune system;

E. That any such product or service can be used safely on open wounds, sprayed into the eye, injected, used orally, vaginally, anally, atomized or inhaled into the nose or lungs, or dropped into the eyes;

F. That any such product or service has no side effects or that it is safe for children, or pregnant or nursing women;

G. That any such product or service aids the growth or health of the developing fetus or eases delivery or recovery;

H. That any such product or service is effective in the mitigation, treatment, prevention, or cure of any disease, illness or health conditions; or

I. About the health benefits, performance, safety, or efficacy of any such product or service;

unless, at the time the representation is made, respondent possesses and relies upon competent and reliable scientific evidence that substantiates the representation.

III.

IT IS FURTHER ORDERED that respondent, directly or through any partnership, corporation, subsidiary, division, trade name, or other device, including franchisees, licensees or distributors, in connection with the labeling, advertising, promotion, offering for sale, sale, or distribution of any covered product or service in or affecting commerce, shall not misrepresent, in any manner, including by means of metatags, expressly or by implication, the existence, contents, validity, results, conclusions, or interpretations of any test, study, or research.

IV.

Nothing in this order shall prohibit respondent from making any representation for any drug that is permitted in labeling for such product under any tentative final or final standard promulgated by the Food and Drug Administration. Nor shall it prohibit respondent from making any representation for any product that is specifically permitted in labeling for such product by regulations promulgated by the Food and Drug Administration pursuant to the Nutrition Labeling and Education Act of 1990.

V.

IT IS FURTHER ORDERED that respondent shall:

A. Within seven (7) days after service of this order upon respondent, deliver to the Commission a list, in the form of a sworn affidavit, of all distributors who purchased *Colloidal Silver* on or after January 1, 1999, directly from respondent or indirectly through one of respondent's other distributors. Such list shall include each distributor's name and address, and, if available, the telephone number and email address of each distributor.

B. Within seven (7) days after service of this order upon respondent, deliver to the Commission a list, in the form of a sworn affidavit, of all consumers who purchased *Colloidal Silver* on or after January 1, 1999, directly from respondent or indirectly through one of respondent's distributors. Such list shall include each consumer's name and address, and, if available, the telephone number and email address of each consumer and the full purchase price paid, including shipping, handling, and taxes, for *Colloidal Silver* purchased from respondent.

C. Within thirty (30) days after service of this order upon respondent, send by first class mail, with postage prepaid, an exact copy of the notice attached hereto as Attachment A, showing the date of mailing, to each distributor who purchased *Colloidal Silver* from respondent between January 1, 1999 and the date of service of this order. This mailing shall not include any other document.

D. Within thirty (30) days after service of this order upon respondent, send by first class mail, with postage prepaid, an exact copy of the notice attached hereto as Attachment B, showing the date of mailing, to each consumer who purchased *Colloidal Silver* between January 1, 1999 and the date of service of this order. This mailing shall not include any other document.

VI.

IT IS FURTHER ORDERED that respondent shall refund the full purchase price paid of the *Colloidal Silver,* including shipping and handling and applicable taxes, to each consumer whose initial request for a refund is received by respondent within ninety (90) days after the date of mailing as indicated on Attachment B pursuant to subpart V.D. of this order. Respondent shall refund the full purchase price under the following terms and conditions:

A. If respondent's diligent inquiry and examination of respondent's books and records reasonably substantiates the consumer's claim of purchase or the consumer provides proof of purchase, including but not limited to any of the following: return of goods or packaging, canceled check[s], credit card invoice[s], or receipt[s], the refund shall be paid within fifteen (15) business days of respondent's receipt of the refund request.

B. If the consumer makes a timely request for a refund but neither of the conditions of subpart A is satisfied, respondent shall provide the consumer within fifteen(15) days of receipt of the request for refund, a declaration of purchase together with a stamped and addressed return envelope, and advise the consumer that respondent will provide a prompt refund if the consumer completes and return the signed declaration to the respondent within fifteen (15) days of consumer's receipt of the notice. The declaration shall be substantially in the form of the declaration attached hereto as Attachment C. The refund shall be paid within fifteen (15) business days of respondent's receipt of the consumer's completed declaration.

Refund requests shall be sent to Kris A Pletschke at 11355 SW 14th Street, Beaverton, OR 97005.

VII.

IT IS FURTHER ORDERED that respondent shall, no later than one hundred and eighty (180) days after the date of service of this order, deliver to the Commission a monitoring report, in the form of a sworn affidavit executed on behalf of respondent. This report shall specify the steps respondent has taken to comply with the terms of Parts V. and VI. of this order and shall state, without limitation:

A. The name and address of each consumer to whom respondent sent the notice attached hereto as Attachment B as required under subpart V.D;

B. The name and address of each consumer from whom respondent received a refund request;

C. The date on which each request was received and the amount of the refund requested;

D. The amount of the refund provided by respondent to each such consumer;

E. The status of any disputed refund request and the identification of each consumer whose refund request is disputed, by name, address, and amount of the claim; and

F. The total amount of refunds paid by respondent.

VIII.

IT IS FURTHER ORDERED that respondent, for ten (10) years after the last date of dissemination of any representation covered by this order, maintain and upon request make available to the Federal Trade Commission for inspection and copying:

A. All advertisements and promotional materials containing the representation;

B. All materials that were relied upon in disseminating the representation; and

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

IX.

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

X.

IT IS FURTHER ORDERED that respondent, directly or through any partnership, corporation, subsidiary, division, trade name, or other device, including franchisees, licensees, or distributors shall:

A. For a period of five (5) years following the entry of this order, send a copy of the notice attached hereto (Attachment A) by first class certified mail, return receipt requested, to any distributor of *Colloidal Silver* or any other covered product or service, ***provided***, ***however,*** that the requirement

of this subpart shall not apply to any distributor who received a copy of the notice attached hereto (Attachment A) pursuant to the requirements of subpart V.C of this order.

B. Institute a reasonable program of surveillance adequate to reveal whether any of respondent's distributors are disseminating advertisements or promotional materials that contain any representation about *Colloidal Silver* or any other covered product or service manufactured by or purchased from respondent, that is prohibited by Parts I through III of this order.

C. Terminate all sales of *Colloidal Silver* or any other covered product or service to any distributor who is engaged in disseminating advertisements or promotional materials that contain any representation about *Colloidal Silver* or any other covered product or service manufactured by or purchased from respondent, that is prohibited by Parts I through III of this order, once respondent knows or should know that the distributor is or has been engaged in such conduct.

XI.

IT IS FURTHER ORDERED that respondent shall notify the Commission at least thirty (30) days prior to any change with regard to Raw Health that may affect compliance obligations arising under this order, including but not limited to its incorporation; and if incorporated, its creation, 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 business or corporate name or address. ***Provided***, ***however***, that, with respect to any proposed change about which respondent learns less than thirty (30) days prior to

the date such action is to take place, respondent shall notify the Commission as soon as is practicable after obtaining such knowledge.

XII.

IT IS FURTHER ORDERED that respondent, within five (5) days of entry of this order, shall notify the Commission of (1) his residence address and mailing address; (2) his telephone number(s); (3) if applicable, the names of his employer and supervisor(s); and (4) his duties and responsibilities.

XIII.

IT IS FURTHER ORDERED that respondent, for a period of ten (10) years after the date of entry of this order, shall notify the Commission of (1) any changes in his residence address, mailing address, or business address; (2) the discontinuance of his current business or employment; and (3) his affiliation with any new business or employment. Notice of changes in employment status shall include: (1) the new employer's name, address and telephone number; (2) the full names of the employer's principals; (3) if applicable, the names of respondent's supervisors; and (4) a description of the employer's activities, and respondent's duties and responsibilities.

XIV.

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

XV.

This order will terminate on February 22, 2022, 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

ATTACHMENT A

LETTER SENT TO DISTRIBUTORS WITH WHOM
RESPONDENT HAS DONE BUSINESS BETWEEN
JANUARY 1, 1999
AND THE DATE OF SERVICE OF THIS ORDER

[To Be Printed on Kris Pletschke's or Raw Health's letterhead]

[NAME AND ADDRESS OF RECIPIENT]

[DATE]

Dear [DISTRIBUTOR'S NAME]:

This letter is to inform you that Raw Health recently settled a civil dispute with the Federal Trade Commission regarding its advertising for *Colloidal Silver*. Among other things, the settlement requires us to notify distributors of the settlement. **Importantly, the settlement requires us to monitor our distributors and terminate all distributors making prohibited claims for *Colloidal Silver* or any other dietary supplement, food or drug purchased from us for resale.**

According to the FTC complaint, our advertising materials falsely claimed that *Colloidal silver* (1) is effective in treating or curing 650 diseases; (2) eliminates all pathogens in the human body in six minutes or less; (3) has been medically proven to kill every destructive bacterial, viral and fungal organism in the body, including anthrax, Ebola, Hunta, and "flesh-eating bacteria." In addition, the FTC complaint alleged that we did not have a reasonable basis to claim that *Colloidal Silver* (1) is effective in treating AIDS, allergies, anthrax, arthritis, blood poisoning, boils, wounds of the cornea, chronic fatigue, cerebral spinal meningitis,

candida, cholera, colitis, cystitis, diabetes, diphtheria, dysentery, enlarged prostate, gonorrhea, herpes, hepatitis, infantile diseases, lesions, leukemia, lupus, Lyme disease, parasites, dental plaque, rheumatism, ringworm shingles, skin cancer, staph and strep infections, stomach flu, thyroid conditions, tonsillitis, toxemia, stomach ulcers and whooping cough; (2) kills the HIV virus and can be used as an antibiotic for all acquired diseases of active AIDS; (3) is superior to antibiotics in killing disease-causing organisms and the treatment of burns; (4) protects and strengthens the immune system; (5) can safely be used on open wounds, sprayed into the eye, injected, used orally, vaginally, anally, atomized or inhaled into the nose or lungs and dropped into the eyes; (6) has no side effects, even at double or triple the normal dose of 250 ppm, and is safe for children and pregnant and nursing women; and (7) aids the growth and health of the developing fetus and eases delivery and recovery.

Please sign, date, and return this letter to Kris Pletschke at 11355 SW 14th Street, Beaverton, OR 97005. A copy of this letter has been provided for your files. If you have any questions or you want a copy of the FTC order, please contact [Insert name and telephone number of respondent's contact]. Thank you for your anticipated cooperation and assistance.

_____
Kris Pletschke

ACKNOWLEDGMENT AND AGREEMENT

The undersigned acknowledges receipt of this letter.

Date:

Print Full Name:

Signature:

ATTACHMENT B

LETTER SENT TO CONSUMERS WITH WHOM RESPONDENT HAS DONE BUSINESS BETWEEN JANUARY 1, 1999 AND THE DATE OF SERVICE OF THIS ORDER

[To Be Printed on Kris Pletschke's or Raw Health's letterhead]

[NAME AND ADDRESS OF RECIPIENT]

[DATE]

Dear [CUSTOMER'S NAME]:

This letter is to inform you that Raw Health recently settled a civil dispute with the Federal Trade Commission regarding its advertising for *Colloidal Silver*. Among other things, the settlement requires us to notify consumers of the settlement and offer refunds to persons who purchased *Colloidal Silver*.

According to the FTC complaint, our advertising materials falsely claimed that *Colloidal silver* (1) is effective in treating or curing 650 diseases; (2) eliminates all pathogens in the human body in six minutes or less; (3) has been medically proven to kill every destructive bacterial, viral and fungal organism in the body, including anthrax, Ebola, Hunta, and "flesh-eating bacteria." In addition, the FTC complaint alleged that we did not have a reasonable basis to claim that *Colloidal Silver* (1) is effective in treating AIDS, allergies, anthrax, arthritis, blood poisoning, boils, wounds of the cornea, chronic fatigue, cerebral spinal meningitis, candida, cholera, colitis, cystitis, diabetes, diphtheria, dysentery, enlarged prostate, gonorrhea, herpes, hepatitis, infantile diseases, lesions, leukemia, lupus, Lyme disease, parasites, dental plaque,

rheumatism, ringworm shingles, skin cancer, staph and strep infections, stomach flu, thyroid conditions, tonsillitis, toxemia, stomach ulcers and whooping cough; (2) kills the HIV virus and can be used as an antibiotic for all acquired diseases of active AIDS; (3) is superior to antibiotics in killing disease-causing organisms and the treatment of burns; (4) protects and strengthens the immune system; (5) can safely be used on open wounds, sprayed into the eye, injected, used orally, vaginally, anally, atomized or inhaled into the nose or lungs and dropped into the eyes; (6) has no side effects, even at double or triple the normal dose of 250 ppm, and is safe for children and pregnant and nursing women; and (7) aids the growth and health of the developing fetus and eases delivery and recovery.

Although we deny the FTC's allegations, we have agreed to send this letter and offer you a refund. In order to receive a refund, please complete the enclosed form and return it to Kris Pletschke at 11355 SW 14th Street, Beaverton, OR 97005.

_____
Kris Pletschke

REFUND REQUEST

The undersigned hereby requests a refund for the purchase of *Colloidal Silver*.

Full Name (Please Print):
_____

Address: _____
_____
_____
_____

Purchase Price, including shipping, handling and taxes:

_____

It is not necessary to include proof of purchase, such as credit card statements, canceled checks, or receipts, but doing so may expedite your refund request in the event of a dispute concerning the amount of your refund.

Date: _____

Signature of Consumer:

_____

ATTACHMENT C

[ADDRESS AND TELEPHONE NUMBER OF THE DECLARANT]

[DATE]

Kris Pletschke
11355 SW 14th Street
Beaverton, OR 97005

Dear Mr. Pletschke

I make the following Declaration of Purchase.

On or about **[DATE]**, I purchased **[NUMBER OF PACKAGES]** of **[PRODUCT(S)]** at **[PRICE PER UNIT]**. Moreover, I incurred **[DOLLAR AMOUNT]** in shipping and handling charges and taxes as a result of this purchase(s). I request a refund for **[TOTAL DOLLAR AMOUNT FOR PRODUCT(S), SHIPPING AND HANDLING, AND TAXES]**.

I declare under penalty of perjury that the foregoing is true and correct.

_____
[DECLARANT'S FULL NAME]

_____
[DECLARANT'S SIGNATURE]

_____
[DATE]

Analysis of Consent Order to Aid Public Comment

The Federal Trade Commission has accepted an agreement to a consent order from Kris A Pletschke, d/b/a/ Raw Health (" respondent"), and has issued a Complaint and the Decision and Order ("Order") contained in the Consent Agreement. Respondent marketed "Colloidal Silver," a dietary supplement allegedly containing submicroscopic particles of silver that was intended to be taken orally and in other manners for the cure and treatment of more than 650 diseases.

The Commission's complaint charges that respondent made false claims that his Colloidal Silver product (1) is effective in treating or curing 650 diseases; (2) eliminates all pathogens in the human body in six minutes or less; and (3) has been medically proven to kill every destructive bacterial, viral and fungal organism in the body, including anthrax, Ebola, Hunta, and "flesh-eating bacteria." The Commission's complaint also charges that respondent failed to have a reasonable basis for claims he made that his Colloidal Silver product (1) is effective in treating 650 diseases and health-related conditions, including AIDS, allergies, anthrax, arthritis, blood poisoning, boils, wounds of the cornea, chronic fatigue, cerebral spinal meningitis, candida, cholera, colitis, cystitis, dental plaque, diabetes, diphtheria, dysentery, enlarged prostate, gonorrhea, herpes, hepatitis, infantile diseases, lesions, leukemia, lupus, Lyme disease, parasites, rheumatism, ringworm shingles, skin cancer, staph and strep infections, stomach flu, thyroid conditions, tonsillitis, toxemia, stomach ulcers and whooping cough; (2) kills the HIV virus and can be used as an antibiotic for all acquired diseases of active AIDS; (3) is superior to antibiotics in killing disease-causing organisms and the treatment of burns; (4) protects and strengthens the immune system; (5) can safely be used on open wounds, sprayed into the eye, injected, used orally, vaginally, anally, atomized or inhaled into the nose or lungs and dropped into the eyes; (6) has no side effects, even at double or triple the normal dose of 260 ppm, and is safe for children and pregnant and nursing women; and (7) aids the growth and health of the developing fetus and eases delivery and recovery.

Analysis

Part I of the consent order prohibits respondent from misrepresenting any claims that Colloidal Silver or any food, dietary supplement, drug, device, or health-related service or program has been medically proven to kill disease-causing organisms or any number of infections in the body. Part II of the order requires competent and reliable scientific evidence to substantiate representations that Colloidal Silver or any covered product (1) is effective in treating 650 diseases and health-related conditions, including AIDS, allergies, anthrax, arthritis, blood poisoning, boils, wounds of the cornea, chronic fatigue, cerebral spinal meningitis, candida, cholera, colitis, cystitis, dental plaque, diabetes, diphtheria, dysentery, enlarged prostate, gonorrhea, herpes, hepatitis, infantile diseases, lesions, leukemia, lupus, Lyme disease, parasites, rheumatism, ringworm shingles, skin cancer, staph and strep infections, stomach flu, thyroid conditions, tonsillitis, toxemia, stomach ulcers and whooping cough; (2) kills the HIV virus and can be used as an antibiotic for all acquired diseases of active AIDS; (3) is superior to antibiotics in killing disease-causing organisms and the treatment of burns; (4) protects and strengthens the immune system; (5) can safely be used on open wounds, sprayed into the eye, injected, used orally, vaginally, anally, atomized or inhaled into the nose or lungs and dropped into the eyes; (6) has no side effects, even at double or triple the normal dose of 260 ppm, and is safe for children and pregnant and nursing women; (7) aids the growth or health of the developing fetus or eases delivery or recovery; (8) is effective in the mitigation, treatment, prevention, or cure of any disease, illness or health conditions; or (9) has any health, performance, safety, or efficacy benefits.

Part III of the order prohibits respondent from misrepresenting, including by means of metatags, the existence, contents or interpretation of any test, study, or research. Part IV of the order permits respondent to make certain claims for drugs or dietary supplements, respectively, that are permitted in labeling under laws and/or regulations administered by the U.S. Food and Drug Administration.

Parts V and VI of the order require respondent to offer refunds to all of his past consumers and wholesale purchasers of Colloidal Silver. Part VII requires respondent to file a sworn affidavit with the Commission concerning his compliance with the refund provisions.

The remainder of the order contains standard requirements that respondent maintain advertising and any materials relied upon as substantiation for any representation covered by substantiation requirements under the order; distribute copies of the order to certain company officials and employees; notify the Commission of any change in the business entity that may affect compliance obligations under the order; and file one or more reports detailing his compliance with the order. Part XV of the order is a provision whereby the order, absent certain circumstances, terminates twenty years from the date of issuance.

This order 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 decision and order will release any claims against any unnamed persons or entities associated with the conduct described in the complaint.

Effective Date of Order and Opportunity for Public Comment

The Commission issued the Complaint and the Decision and Order, and served them upon the Respondent, at the same time it accepted the Consent Agreement for public comment. As a result of this action, the Order has already become effective. In August 1999, the Commission adopted procedures to allow for immediate effectiveness of an Order prior to a public comment period. The Commission announced that it "contemplates doing so only in exceptional cases where, for example, it believes that the allegedly unlawful conduct to be prohibited threatens substantial and imminent public harm." 64 Fed. Reg. 46267 (1999).

This case is an appropriate one in which to issue a final order before receiving public comment because the complaint alleges

that the respondent made false and unsubstantiated health and safety claims of a serious nature, and the respondent continued to make the challenged claims after signing the consent agreement. Accordingly, the Commission believes it is important to prohibit the respondent from making these claims as quickly as possible.

The Order has also been placed on the public record for 30 days for receipt of comments by interested persons, and comments received during this period will become part of the public record. Thereafter, the Commission will review the Order, and may determine, on the basis of the comments or otherwise, that the Order should be modified.[1]

The Commission anticipates that the Order, as issued, will satisfactorily address the deceptive practices alleged in the Complaint. The purpose of this analysis is to invite public comment on the Order to aid the Commission in determining whether to modify the Order in any respect, and is not intended to constitute an official interpretation of the agreement and order, or to modify in any way their terms.

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[1] If the Respondent does not agree to such modifications, the Commission may (1) initiate a proceeding to reopen and modify the Order in accordance with Rule 3.72(b), 16 CFR § 3.72(b), or (2) commence a new administrative proceeding by issuing an administrative complaint in accordance with Rule 3.11, 16 CFR § 3.11. *See* 16 CFR § 2.34(e)(2).

Complaint

IN THE MATTER OF

AMERICAN HOME PRODUCTS

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

Docket 9297; File No. 9910256
Complaint, March 30, 2002--Decision, April 2, 2002

This consent order addresses allegations in the administrative complaint issued earlier that Respondent American Home Products Corporation, which develops and markets brand name and generic drugs, as well as over-the-counter medications, unlawfully agreed with Schering-Plough Corporation to delay selling its generic version of Schering's K-Dur 20 – an extended-release micro-encapsulated potassium chloride product, marketed as a brand name drug and used to treat patients who suffer from insufficient levels of potassium, which can lead to serious cardiac problems – in exchange for payments from Schering. The order, among other things, prohibits the respondent from entering into agreements to resolve patent infringement disputes wherein a New Drug Application holder makes payments or otherwise transfers something of value to an Abbreviated New Drug Application filer and (2) the ANDA filer agrees not to market its product for some period of time, except under certain limited circumstances. The order also prohibits the respondent from entering into 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. In addition, the order prohibits the respondent from entering into agreements that involve payment to an ANDA filer, in which the ANDA filer agrees not to enter the market for a period of time, but the patent infringement litigation at issue continues.

Participants

For the Commission: *Karen G. Bokat, Phillip M. Eisenstat, David R. Pender, Susan Creighton,* and *Andrea L. Foster.*

For the Respondent: *Michael N. Sohn* and *Cathy Hoffman, Arnold & Porter.*

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, and by virtue of the authority vested in the agency by said

Act, the Federal Trade Commission ("Commission"), having reason to believe that respondents Schering-Plough Corporation ("Schering"), Upsher-Smith Laboratories ("Upsher-Smith"), and American Home Products Corporation ("AHP") have engaged in conduct, as described herein, that violates Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45, and it appearing to the Commission that a proceeding in respect thereof would be in the public interest, hereby issues its complaint, stating its charges as follows:

Nature of the Case

1. This action challenges unlawful agreements by Schering, Upsher-Smith, and AHP to delay the entry of low-cost generic competition to Schering's highly profitable prescription drug K-Dur 20, a product used to treat patients who suffer from insufficient levels of potassium, a condition that can lead to serious cardiac problems.

2. When confronted with the prospect of competition to K-Dur 20 through generic entry by Upsher-Smith and ESI Lederle, Incorporated ("ESI"), a division of AHP, Schering structured and entered into agreements with Upsher-Smith, AHP, and ESI that are keeping Upsher-Smith, ESI, and all other potential generic competitors out of the market. These agreements have cost consumers in excess of $100 million.

The Respondents

3. Respondent Schering is a New Jersey corporation with its principal place of business at 2000 Galloping Hill Road, Kenilworth, New Jersey. Schering is engaged in the discovery, development, and marketing of brand-name and generic drugs, as well as over-the-counter healthcare and animal care products. Schering's net sales for 1999 were approximately $9.2 billion.

4. Respondent Upsher-Smith is a Minnesota corporation with its principal place of business at 14905 23rd Avenue North, Plymouth, Minnesota. Upsher-Smith is engaged in the discovery, development, and marketing of drugs. Upsher-Smith markets twelve brand-name products, all of which are sold in the United States.

5. Respondent AHP is a Delaware corporation with its principal place of business at 5 Giralda Farms, Madison, New Jersey. AHP engages in the discovery, development, and marketing of brand-name and generic drugs, as well as over-the-counter medications. AHP had net sales of $13.5 billion in 1999.

6. ESI Lederle, Incorporated, a division of AHP, engages in the research, manufacture, and sale primarily of generic drugs.

7. Schering, Upsher-Smith, and AHP, at all relevant times herein, have been, and are now, corporations as "corporation" is defined in Section 4 of the Federal Trade Commission Act, 15 U.S.C. § 44.

8. Respondents' acts and practices, including the acts and practices alleged herein, are in or affect commerce as "commerce" is defined in Section 4 of the Federal Trade Commission Act, 15 U.S.C. § 44.

Federal Regulation of Prescription Drugs

9. Under the Federal Food, Drug and Cosmetic Act, 21 U.S.C. § 301 et seq., approval by the Food and Drug Administration ("FDA") is required before a company may market or sell a prescription drug in the United States.

10. Newly developed prescription drugs are often protected by patents and marketed under proprietary brand names. Such new drugs are referred to as "brand name drugs" or "branded drugs." FDA approval for a branded drug is

generally sought by filing a New Drug Application ("NDA") with the FDA.

11. Congress enacted the Drug Price Competition and Patent Term Restoration Act of 1984, 98 Stat. 1585, 21 U.S.C. § 355 (the "Hatch-Waxman Act"), to facilitate entry of generic drugs while maintaining incentives for new drug development.

12. FDA approval for a generic drug is generally sought by filing an Abbreviated New Drug Application ("ANDA") with the FDA. The ANDA applicant has to demonstrate that the generic drug is bioequivalent to the brand name drug that it references.

13. When a brand name drug is protected by one or more patents, an ANDA applicant that intends to market its generic product prior to expiration of any patents may proceed to seek FDA approval, but must certify in the ANDA either that (1) the generic version does not infringe the patents on the brand name drug or (2) the patents are invalid. This is called a "Paragraph IV Certification."

14. The ANDA applicant must then notify the NDA holder and the patent holder of the filing of its ANDA. If, within 45 days of receiving such notification, a patent infringement suit is initiated against the ANDA applicant, the FDA must stay its final approval of the ANDA for the generic drug until the earliest of (1) the patent expiration, (2) a judicial determination of the patent litigation, or (3) the expiration of a 30-month waiting period.

15. The Hatch-Waxman Act gives the first firm filing an ANDA for a generic version of a brand name drug with a Paragraph IV Certification a period of protection from competition from other generic versions of the drug. The FDA may not approve other generic versions of the same drug until 180 days after the earlier of the date on which (1) the first firm

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. This is referred to as "the 180-day Exclusivity Period."

16. If the first firm filing an ANDA loses its patent litigation with the patent holder, no firm is given a 180-day Exclusivity Period.

The Impact of Generic Competition

17. Generic entry generally leads to a significant erosion of the branded drug's market share and unit and dollar sales within the first year. As additional generic drugs enter, the price of the generic drugs typically decreases even further and the branded drug's market share erodes further.

18. Pharmacists generally are permitted, and in some instances required, to substitute generic drugs for their branded counterparts, unless the prescribing physician has directed that the branded product be dispensed.

19. Certain third-party payers of prescription drugs (e.g., managed care plans, Medicaid programs) encourage or insist on the use of generic drugs in lieu of their branded counterparts wherever possible.

Relevant Product and Geographic Market

20. The relevant geographic market in which to evaluate the conduct of Schering, Upsher-Smith, and AHP is the United States.

21. The relevant product markets are the manufacture and sale of all potassium chloride supplements approved by the FDA, and narrower markets contained therein, including the manufacture and sale of 20 milliequivalent extended-release potassium chloride tablets and capsules.

22. Potassium chloride supplements are used to treat patients with depleted potassium levels, a condition that typically occurs when people take certain anti-hypertensive medications to lower blood pressure. Depleted potassium levels can cause dangerous cardiac problems.

23. Patients who suffer from depleted potassium levels have no practical substitute for potassium chloride supplements.

24. For clinical reasons, among others, physicians and patients prefer 20 milliequivalent extended-release potassium chloride tablets over other forms and dosages of potassium chloride.

25. The existence of other potassium chloride products has not significantly constrained Schering's pricing of K-Dur 20.

Market Power

26. Schering has approximately 69% of the sales of potassium chloride supplements.

27. Schering's K-Dur 20 has 100% of the sales of 20 milliequivalent extended-release potassium chloride tablets and capsules.

28. At all times relevant herein, entry into the relevant markets was restricted and unlikely to diminish Schering's market share. Before entry could occur, potential entrants were required to, *inter alia*, file an NDA or an ANDA with the FDA, and obtain FDA final approval. At all relevant times, only one NDA for a new potassium chloride supplement was pending before the FDA. That NDA, for a powder form, has not been approved; and, even if it were approved, because of the disadvantages of potassium chloride powders compared to tablets, a new potassium chloride powder would be unlikely to diminish Schering's market share. If a

new NDA were to be filed with the FDA, final approval would likely take a minimum of 12-18 months.

29. At all times relevant herein, FDA final approval of an ANDA for a generic version of K-Dur 20 for anyone other than Upsher-Smith was blocked. Pursuant to the Hatch-Waxman Act, Upsher-Smith was eligible for the right to a 180-day Exclusivity Period for the sale of a generic version of K-Dur 20. As a result, no company could obtain final FDA approval of an ANDA to market or sell a generic version of K-Dur 20 until180 days after Upsher-Smith first sold its product, or until Upsher-Smith's exclusivity right is relinquished, forfeited or otherwise expired.

30. At all times relevant herein, the existence of generic versions of branded potassium chloride supplements other than K-Dur 20 has not constrained Schering's market power in the potassium chloride supplement market.

Background

31. Schering manufactures and markets two extended-release microencapsulated potassium chloride products: K-Dur 20 milliequivalent ("K-Dur 20") and K-Dur 10 milliequivalent ("K-Dur 10"). Both products are marketed as brand name drugs.

32. In 1998, sales of Schering's two K-Dur products were over $220 million.

33. Potassium chloride, the active ingredient in potassium chloride supplements, is not patentable.

34. Schering's K-Dur 20 and K-Dur 10 are covered by a formulation patent owned by Schering, patent number 4,863,743 (the "'743 patent"), which claims a controlled release potassium chloride tablet. The '743 patent expires on September 5, 2006.

35. The allegedly novel aspect of the'743 patent is the composition of the coating material applied to previously known potassium chloride crystals.

36. Schering anticipated generic entry prior to expiration of its '743 patent.

37. Prior to 1997, Schering projected that the first year of low-priced generic competition would reduce branded K-Dur 20's sales by over $30 million.

Schering/Upsher-Smith Agreement Not To Compete

38. On August 6, 1995, Upsher-Smith filed an ANDA with the FDA to market Klor Con M20, a generic version of Schering's K-Dur 20. Upsher-Smith's ANDA was the first for a generic version of K-Dur 20. Upsher-Smith submitted a Paragraph IV Certification with this ANDA and, on November 3, 1995, Upsher-Smith notified Schering of its Paragraph IV Certification and ANDA filing.

39. Schering sued Upsher-Smith for patent infringement in the United States District Court for the District of New Jersey on December 15, 1995, alleging that Upsher-Smith's Klor-Con M20 infringed Schering's '743 patent. This lawsuit triggered the statutory waiting period of up to 30 months for final FDA approval of the Upsher-Smith product.

40. This lawsuit was strongly contested by Upsher-Smith.

41. As the first ANDA filer with a Paragraph IV Certification for a generic version of Schering's K-Dur 20, Upsher-Smith is eligible for the 180-day Exclusivity Period.

42. Because Upsher-Smith is eligible for the 180-day Exclusivity Period, no other generic manufacturer can obtain final FDA approval to market a generic version of K-

Dur 20 until after the exclusivity period has expired, whether or not the other marketer has a product that infringes the Schering patent.

43. During the first half of 1997, Upsher-Smith prepared to launch commercially Klor Con M20 no later than May 1998, the month in which the 30-month stay of FDA approval was to expire.

44. On June 17, 1997, on the eve of their patent trial, Schering and Upsher-Smith agreed to settle their litigation. Under the settlement, Schering agreed to make unconditional payments of $60 million to Upsher-Smith; Upsher-Smith agreed not to enter the market, either with the allegedly infringing generic version of K-Dur 20 or with any other generic version of K-Dur 20, regardless of whether such product would infringe Schering's patents, until September 2001; both parties agreed to stipulate to the dismissal of the litigation without prejudice; and Schering received licenses to market five Upsher-Smith products.

45. The $60 million payment from Schering to Upsher-Smith was unrelated to the value of the products Upsher-Smith licensed to Schering.

46. The licensed products were of little value to Schering. Schering never sold four of the five licensed products, made minimal sales of the fifth, and has no expectation of making additional sales of any of the five products.

47. A court decision in the Schering patent infringement suit against Upsher-Smith would have removed barriers to generic competition, regardless of which party prevailed in the suit. If Upsher-Smith had prevailed, the FDA would have been permitted to grant final approval to Upsher-Smith's generic version of K-Dur 20, allowing Upsher-Smith to offer generic competition to Schering. After Upsher-Smith's 180-day Exclusivity Period had run, other

potential generic competitors would have been eligible for final FDA approval. If Schering had prevailed, Upsher-Smith would not have been eligible for the 180-day Exclusivity Period. Since no other firm would have been eligible for the 180-day Exclusivity Period, there would have been no 180-day Exclusivity Period blocking final FDA approval of other generic competitors. Thus, the settlement agreement between Schering and Upsher-Smith preserved a barrier to generic competition to K-Dur 20.

48. In November 1998, Upsher-Smith received final FDA approval to market its Klor Con M20 generic version of Schering's K-Dur 20.

49. Pursuant to its agreement with Schering, Upsher-Smith has not marketed Klor Con M20, nor has it attempted to develop another generic version of Schering's K-Dur 20.

50. Under the Hatch-Waxman Act, the FDA is not permitted to grant final approval to a generic version of K-Dur 20, other than Upsher-Smith's Klor Con M20, until the 180-day Exclusivity Period has run.

Schering/AHP/ESI Agreement Not To Compete

51. On December 29, 1995, ESI submitted an ANDA to the FDA to market a generic version of Schering's K-Dur 20. ESI submitted a Paragraph IV Certification with this filing and notified Schering of its Paragraph IV Certification and ANDA filing.

52. ESI planned to launch its generic version of K-Dur 20 after Upsher-Smith's 180-day Exclusivity Period expired.

53. Schering sued ESI for patent infringement in the United States District Court for the Eastern District of Pennsylvania on February 16, 1996, alleging that ESI's generic version of Schering's K-Dur 20 infringed Schering's '743 patent.

Schering's lawsuit triggered the statutory waiting period of up to 30 months for FDA approval of the ESI product.

54. By the end of January 1998, Schering, AHP, and ESI had reached an agreement in principle to settle their patent litigation.

55. Pursuant to their agreement in principle, Schering agreed to pay ESI up to $30 million; AHP and ESI agreed to refrain from marketing the allegedly infringing generic version of K-Dur 20 or with any other generic version of K-Dur 20, regardless of whether such product would infringe Schering's patents, until January 2004; AHP and ESI agreed to refrain from marketing more than one generic version of K-Dur 20 between January 2004 and September 2006; and AHP and ESI agreed not to conduct, sponsor, file or support a study of the bioequivalence of any product to K-Dur 20 prior to September 2006, when the K-Dur 20 patent will expire. Schering agreed to pay ESI $5 million up front; an additional $10 million if ESI could demonstrate that its generic version of K-Dur 20 was able to be approved by the FDA under an ANDA on or before June 30, 1999; and another $15 million for licenses of two generic products that ESI was developing. The payments for the licenses included $5 million to be paid within ten days of execution of the agreement, plus $10 million to be paid in annual installments over seven years.

56. Schering has made no sales to date of the two products it licensed from ESI.

57. Instead of being based on the value of the licensed products, the $15 million license payment is based on the amount that ESI wanted in order to settle its patent litigation with Schering.

58. On June 19, 1998, Schering and ESI executed their final settlement agreement. Their patent litigation had previously been dismissed with prejudice.

59. Schering has paid ESI over $20 million and continues to make annual payments to ESI under the terms of their agreement.

60. ESI received tentative approval of its ANDA from the FDA on May 11, 1999, but is not eligible for final approval until Upsher-Smith's 180-day Exclusivity Period expires.

Other Potential Generic Competition

61. Andrx Corporation ("Andrx") filed an ANDA for a generic version of Schering's K-Dur 20 on June 2, 1999. Schering has not sued Andrx for infringement of the '743 patent.

62. Andrx cannot market its product until Upsher-Smith's 180-day Exclusivity Period has run.

Effects Of Respondents' Conduct

63. The acts and practices of the respondents as herein alleged have had the purpose and effect to restrain competition unreasonably and to injure competition by preventing or discouraging the entry of generic K-Dur 20 products into the relevant markets.

64. By making cash payments to Upsher-Smith and ESI, Schering induced them to agree to delay launching generic versions of K-Dur 20. Absent those payments, neither Upsher-Smith nor ESI would have agreed to delay its entry for so long.

65. By making cash payments to Upsher-Smith and ESI, Schering protected itself from competition in the relevant

markets from Upsher-Smith and ESI until 2001 and 2004, respectively.

66. Upsher-Smith's agreement with Schering not to compete with a generic version of K-Dur 20 until September 2001 has the effect of delaying entry into the relevant market by any other potential generic competitor. As the first ANDA filer for a generic version of K-Dur 20, Upsher-Smith is entitled to 180 days of market exclusivity before any other generic competitor may enter with its own generic version of K-Dur 20. By avoiding a court decision that would have either (a) triggered this 180-day Exclusivity Period (in the event Upsher-Smith prevailed) or (b) resulted in its forfeiture (in the event Schering prevailed), the challenged agreement delays the start of Upsher-Smith's 180-day Exclusivity Period until September 2001 and, as a result, the entry of competition from other generic manufacturers until March 2002.

67. As a result of respondents' conduct as herein alleged, consumers are being deprived of the benefits of competition from Upsher-Smith, ESI, or other generic competitors. Without this lower-priced generic competition, consumers, pharmacies, hospitals, insurers, wholesalers, government agencies, managed care organizations, and others are forced to purchase Schering's more expensive K-Dur 20 product.

First Violation Alleged

68. The agreement between Schering and Upsher-Smith that Upsher-Smith will not compete by marketing any generic version of Schering's K-Dur 20 until September 2001 unreasonably restrains commerce, and is therefore an unfair method of competition, in violation of Section 5 of the FTC Act.

Second Violation Alleged

69. The agreement between Schering, AHP, and ESI that ESI will not compete by marketing any generic version of Schering's K-Dur 20 until January 2004, market more than one generic version of Schering's K-Dur 20 between January 2004 and September 2006, or support any study of the bioequivalence or therapeutic equivalence of a product to K-Dur 20 until September 5, 2006, unreasonably restrains commerce, and is therefore an unfair method of competition, in violation of Section 5 of the FTC Act.

Third Violation Alleged

70. Schering has monopoly power in the manufacture and sale of potassium chloride supplements approved by the FDA and narrower markets contained therein, and engaged in conduct intended to unlawfully preserve such monopoly power in violation of Section 5 of the FTC Act.

Fourth Violation Alleged

71. Schering conspired separately with Upsher-Smith and AHP that Schering monopolize the manufacture and sale of potassium chloride supplements approved by the FDA and narrower markets contained therein, and all three respondents acted with specific intent and engaged in overt acts in furtherance of these conspiracies to monopolize the relevant markets, in violation of Section 5 of the FTC 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 7 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 July 2, 2001, 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.

NOTICE OF CONTEMPLATED RELIEF

Should the Commission conclude from the record developed in an adjudicative proceeding in this matter that the respondents are in violation of Section 5 of the Federal Trade Commission Act, as alleged in the complaint, the Commission may order such relief as is supported by the record and is necessary and appropriate including, but not limited to, an order that requires the following:

1. Each respondent shall cease and desist from being a party to any settlement of patent infringement litigation which involves collateral restraints, such as a restraint on the research, development, manufacture, marketing, or sale of a "non-infringing" drug product – i.e., a drug product not at issue in the patent infringement litigation.

2. Each respondent shall cease and desist from being a party to any agreement in which one party agrees to refrain from conducting or assisting a study of the bioequivalence or therapeutic equivalence of a product to the NDA holder's drug product.

3. Each respondent shall cease and desist from being a party to any agreement in which the NDA holder provides anything of value to the alleged infringer and the alleged infringer agrees to refrain from selling a drug product for any period of time.

4. Schering shall immediately license for no compensation its '743 patent to Upsher-Smith and to ESI so as to allow the latter two companies to make, produce, and market commercially generic versions of Schering's K-Dur 20 and K-Dur 10. Said license must eliminate any and all legal claims that Schering

would have for patent infringement by Upsher-Smith and ESI for selling the generic potassium chloride products for which each has already applied to the FDA for an ANDA.

5. Upsher-Smith shall immediately and without delay notify the FDA, in writing, that Upsher-Smith relinquishes its right to a 180-day Exclusivity Period for Klor Con M20 (its generic version of K-Dur 20).

6. Each respondent shall mail a copy of the Commission's complaint and order in this matter, along with a letter from such respondent's chief executive officer stating that it will abide by the terms of this order, to each of its employees who has the authority to enter into agreements concerning the research, development, manufacture, marketing, or sale of a drug product.

7. Each respondent shall take such other measures as are appropriate to correct or remedy, or prevent the recurrence of, the anticompetitive practices engaged in by respondents.

WHEREFORE, THE PREMISES CONSIDERED, the Federal Trade Commission on this thirtieth day of March, 2001, issues its complaint against said respondents.

By the Commission.

DECISION AND ORDER

The Federal Trade Commission ("Commission") having heretofore issued its complaint charging that it had reason to believe that certain acts and practices of Schering-Plough Corporation ("Respondent Schering"), Upsher-Smith Laboratories, Inc. ("Respondent Upsher"), and American Home Products Corporation ("Respondent AHP") may have violated Section 5 of the Federal Trade Commission Act, and Respondents having been served with a copy of that complaint, together with a notice of contemplated relief, and Respondents having filed answers denying said charges.

Respondent AHP and counsel for the Commission having thereafter executed an Agreement Containing Consent Order; an admission by Respondent AHP of the jurisdictional facts relating to Respondent AHP set forth in the aforesaid complaint; a denial of all other allegations; a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by Respondent AHP that the law has been violated as alleged in such complaint or that any allegation of the complaint is true, other than the jurisdictional facts relating to Respondent AHP; 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 thereafter 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. American Home Products 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 Five Giralda Farms, Madison, New Jersey.

2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of Respondent American Home Products Corporation, and the Commission has determined that this 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 AHP" means American Home Products Corporation, its directors, officers, employees, agents and representatives, predecessors, successors, and assigns; its subsidiaries (including ESI Lederle), divisions, groups, and affiliates controlled by American Home Products Corporation, and the respective directors, officers, employees, agents and representatives, successors, and assigns of each.

B. "Commission" means the Federal Trade Commission.

C. "180-day Exclusivity Period" means the period of time established by Section 505(j)(5)(B)(iv) of the Federal Food, Drug, and Cosmetic Act (21 U.S.C. § 355(j) *et seq.*).

D. "Agreement" means anything that would constitute an agreement under Section 1 of the Sherman Act or Section 5 of the Federal Trade Commission Act. "Agreement" includes all agreements related to resolving a Patent Infringement Claim.

E. "ANDA" means an Abbreviated New Drug Application, as defined under 21 U.S.C. § 355(j) *et seq*.

F. "ANDA Filer" means a party who has filed an ANDA.

G. "ANDA First Filer" means the party who the FDA determines is and remains entitled to, or eligible for, a 180-day Exclusivity Period that has not yet commenced running or expired, so long as that status is known, or would be known through the exercise of reasonable due diligence, to Respondent AHP at the time of the Agreement.

H. "ANDA Product" means the product to be manufactured under the ANDA that is the subject of the Patent Infringement Claim.

I."Drug Product" means a finished dosage form (*e.g.,* tablet, capsule, or solution) that contains a drug substance, generally, but not necessarily, in association with one or more other ingredients, as defined in 21 C.F.R. § 314.3(b).

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

K. "NDA" means a New Drug Application, as defined under 21 U.S.C. § 355(b) *et seq*.

L. "NDA Holder" means: (1) the party that received FDA approval to market a Drug Product pursuant to an NDA, (2) a party owning or controlling enforcement of the patent(s) listed in the Approved Drug Products With Therapeutic Equivalence Evaluations (commonly known as the "FDA Orange Book") in connection with the NDA, or (3) the predecessors, subsidiaries, divisions, groups and affiliates controlled by, 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.

M. "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, patents of addition and extensions thereof.

N. "Patent Infringement Claim" means any allegation, whether or not included in a complaint filed with a court of law, that an ANDA or ANDA Product may infringe any patent held by, or exclusively licensed to, the NDA Holder of the Reference Drug Product.

O. "Person" means both natural persons and artificial persons, including, but not limited to, corporations, unincorporated entities, and governments.

P. "Reference Drug Product" means the Drug Product identified by the ANDA Filer as the Drug Product upon which the ANDA Filer bases its ANDA.

II.

IT IS FURTHER ORDERED that, in any instance where Respondent AHP makes or is subject to a Patent Infringement Claim in which Respondent AHP is either the NDA Holder or the ANDA Filer, Respondent AHP shall cease and desist, either directly or indirectly, in connection with the sale of Drug Products in or affecting commerce, as "commerce" is defined in Section 4 of the Federal Trade Commission Act, 15 U.S.C. § 44, from being a party to any Agreement in which (a) the parties resolve the Patent Infringement Claim, (b) the NDA Holder provides (i) anything of value to the ANDA First Filer or (ii) anything of value (other than a license to manufacture the ANDA Product) to any ANDA Filer other than the ANDA First Filer, and (c) the ANDA Filer agrees to refrain from selling the Drug Product at issue, or any Drug Product containing the same active chemical ingredient as the Drug Product at issue, for any period of time.

Notwithstanding the above, however, such an Agreement is permissible when entered into in conjunction with a joint stipulation between the parties that the court may enter a permanent injunction, if:

(1) together with the stipulation for a permanent injunction, Respondent AHP provides the court the proposed Agreement, as well as a copy of the Commission's complaint, order, and Analysis to Aid Public Comment in this matter (which provision may be made to the court in camera or pursuant to any confidentiality order in place in the case);

(2) Respondent AHP has provided Notification, as described in Paragraph V below, to the Commission at least thirty (30) days prior to submitting the stipulation to the court for a permanent injunction;

(3) Respondent AHP does not oppose any effort by the Commission to participate, in any capacity permitted by the court, in the court's consideration of any stipulation for permanent injunction (with the Commission giving consideration to participating in such proceeding in the event the Commission determines that such participation will expedite the court's consideration of said stipulated permanent injunction); and

(4) the court issues an order and the parties' Agreement conforms to said order or the Commission determines, at the request of Respondent AHP, that entering into the stipulation and Agreement would not raise issues under Section 5 of the Federal Trade Commission Act. Nothing in Paragraph II shall be interpreted to prohibit or restrict the right of Respondent AHP to seek relief from the court, without notice to the Commission, including, but not limited to, applying for permanent injunctive relief or seeking to extend, or reduce, the 30-month stay pursuant to 21 U.S.C. § 355(j)(5)(B)(iii).

III.

IT IS FURTHER ORDERED that, in any instance where Respondent AHP makes or is subject to a Patent Infringement Claim in which Respondent AHP is either the NDA Holder or the ANDA Filer, Respondent AHP shall cease and desist, either directly or indirectly, in connection with the sale of Drug Products in or affecting commerce, as "commerce" is defined in Section 4 of the Federal Trade Commission Act, 15 U.S.C. § 44, from being a party to any Agreement in which the ANDA Filer agrees to refrain from researching, developing, manufacturing, marketing, or selling any Drug Product that

(1) could be approved for sale by the FDA pursuant to an ANDA and

(2) is neither the subject of any written claim of Patent Infringement nor supported by a good faith opinion of counsel (the privileged nature of which shall be respected and remain protected) that the Drug Product would be the subject of such a claim if disclosed to the NDA Holder.

IV.

IT IS FURTHER ORDERED that, in any instance where Respondent AHP is a party to an action involving a Patent Infringement Claim in which it is either the NDA Holder or the ANDA Filer, it shall cease and desist, either directly or indirectly, in connection with the sale of Drug Products in or affecting commerce, as "commerce" is defined in Section 4 of the Federal Trade Commission Act, 15 U.S.C. § 44, from being a party to any Agreement in which (a) the parties do not agree to dismiss the Patent Infringement Claim, (b) the NDA Holder provides anything of value to the ANDA Filer, and (c) the ANDA Filer agrees to refrain during part or all of the course of the litigation from selling the Drug Product at issue, or any Drug Product containing the same active chemical ingredient as the Drug Product at issue.

Notwithstanding the above, however, such an Agreement is permissible when entered into in conjunction with a joint stipulation between the parties that the court may enter a preliminary injunction pursuant to Rule 65 of the Federal Rules of Civil Procedure, if:

(1) together with the stipulation for a preliminary injunction, Respondent AHP provides the court the proposed Agreement, as well as a copy of the Commission's complaint, order, and Analysis to Aid Public Comment in this matter (which provision may be made to the court in camera or pursuant to any confidentiality order in place in the case);

(2) Respondent AHP has provided Notification, as described in Paragraph V below, to the Commission at least thirty (30) days prior to submitting to the court the stipulation for a preliminary injunction;

(3) Respondent AHP 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 (with the Commission giving consideration to participating in such proceeding in the event the Commission determines that such participation will expedite the court's consideration of said preliminary injunction motion); and

(4) the court issues an order and the parties' agreement conforms to said order or the Commission determines, at the request of Respondent AHP, that entering into the stipulation during the pendency of the Patent Infringement action would not raise issues under Section 5 of the Federal Trade Commission Act. Nothing in Paragraph IV shall be interpreted to prohibit or restrict the right of Respondent AHP to seek relief from the court, without notice to the Commission, including, but not limited to, applying for preliminary injunctive relief or seeking to

extend, or reduce, the 30-month stay pursuant to 21 U.S.C. § 355(j)(5)(B)(iii).

V.

The Notification required by Paragraphs II and IV shall be filed with the Secretary of the Commission and shall include the following information, to the extent known and not subject to any legally recognized privilege or immunity: (1) identification of the parties involved in the Agreement; (2) identification of all Drug Products involved in the Agreement; (3) identification of all persons known by Respondent AHP to have filed an ANDA with the FDA (including the status of such application) for any Drug Product containing the same chemical entity(ies) as the Drug Product(s) involved in the Agreement; (4) a copy of the proposed Agreement; (5) identification of the court, and a copy of the docket sheet, for any legal action, excluding product liability actions, that involves either party to the Agreement and relates to any Drug Product(s) containing the same chemical entity(ies) involved in the Agreement; and (6) all documents that were prepared by or for any officer(s) or director(s) of Respondent AHP for the purpose of evaluating or analyzing the Agreement.

VI.

IT IS FURTHER ORDERED that Respondent AHP shall file a verified written report within sixty (60) days after the date this order is issued, annually thereafter for five (5) years on the anniversary of the date this order is issued, and at such other times as the Commission may by written notice require, setting forth in detail the manner and form in which Respondent AHP intends to comply, is complying, and has complied with this order. Respondent AHP shall include in its compliance reports, among other things that are required from time to time, a full description of the efforts being made to comply with this order.

VII.

IT IS FURTHER ORDERED that Respondent AHP shall notify the Commission at least thirty (30) days prior to any proposed change in Respondent AHP 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 AHP 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 or immunity, and upon written request with reasonable notice to Respondent AHP, Respondent AHP 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 AHP, who may have counsel present, regarding such compliance issues.

IX.

IT IS FURTHER ORDERED that this order shall terminate on April 2, 2012.

By the Commission, Chairman Muris not participating.

Analysis to Aid Public Comment

The Federal Trade Commission has accepted for public comment an agreement and proposed consent order with American Home Products Corporation. The proposed consent order would settle charges that AHP unlawfully agreed with Schering-Plough Corporation to delay selling its generic version of Schering's K-Dur 20, in exchange for payments from Schering. 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 AHP that it violated the law or that the facts alleged in the complaint, other than the jurisdictional facts, are true. In July 2001, AHP advised its customers that it intends to phase out its oral generic drug product line.

Background

Schering develops and markets brand name and generic drugs, as well as over-the-counter health care and animal care products. Schering manufactures and markets an extended-release micro-encapsulated potassium chloride product, K-Dur 20. K-Dur 20, marketed as a brand name drug, has sales over $200 million per year. K-Dur 20 is used to treat patients who suffer from insufficient levels of potassium, a condition that can lead to serious cardiac problems.

AHP develops and markets brand name and generic drugs, as well as over-the-counter medications. ESI Lederle, Incorporated, a division of AHP, received tentative approval from the Food and Drug Administration in May 1999 for a generic version of Schering's K-Dur 20.

Upsher-Smith Laboratories, Inc. develops and markets brand name and generic drugs. Upsher-Smith received final approval from the Food and Drug Administration in November 1998 for a generic version of Schering's K-Dur 20.

Analysis

Generic drugs are chemically identical to their branded counterparts, but typically are sold at substantial discounts from the branded price. A Congressional Budget Office Report estimates that purchasers saved an estimated $8-10 billion on prescriptions at retail pharmacies in 1994 by purchasing generic drugs instead of the brand name product.[1]

The Drug Price Competition and Patent Term Restoration Act of 1984, commonly referred to as "the Hatch-Waxman Act," establishes certain rights and procedures in situations where a company, such as AHP or Upsher, seeks FDA approval to market a generic product prior to the expiration of a patent or patents relating to a brand name drug upon which the generic is based. In such cases, the applicant must: (1) certify to the FDA that the patent in question is invalid or is not infringed by the generic product (known as a "paragraph IV certification"); and (2) notify the patent holder of the filing of the certification. If the holder of patent rights files a patent infringement suit within 45 days of the notification, FDA approval to market the generic drug is automatically stayed for 30 months, unless before that time the patent expires or is judicially determined to be invalid or not infringed. This automatic 30-month stay allows the patent holder time to seek judicial protection of its patent rights before a generic competitor is permitted to market its product.

In addition, the Hatch-Waxman Act provides an incentive for generic drug companies to bear the cost of patent litigation that may arise when they challenge invalid patents or design around valid ones. The Act, as currently interpreted, grants the first company to file an ANDA in such cases a 180-day period during which it has the exclusive right to market a generic version of the brand name drug. No other generic manufacturer may obtain

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[1] Congressional Budget Office, *How Increased Competition from Generic Drugs Has Affected Prices and Returns in the Pharmaceutical Industry* at xiii, 13 (July 1998).

FDA approval to market its product until the first filer's 180-day exclusivity period has expired.

Upsher-Smith was the first company to file an ANDA for a generic version of Schering's K-Dur 20. Upsher-Smith filed a paragraph IV certification with the FDA, stating that its product did not infringe any valid patent held by Schering covering K-Dur 20. In 1995, Schering sued Upsher-Smith for patent infringement. The complaint alleges that at all times relevant herein, FDA final approval of an ANDA for a generic version of K-Dur 20 for anyone other than Upsher-Smith was blocked. Pursuant to the Hatch-Waxman Act, Upsher-Smith was eligible for the right to a 180-day Exclusivity Period for the sale of a generic version of K-Dur 20. The complaint further alleges that as a result, no company could obtain final FDA approval of an ANDA to market or sell a generic version of K-Dur 20 until 180 days after Upsher-Smith first sold its product, or until Upsher-Smith's exclusivity right is relinquished, forfeited or otherwise expired.

ESI was the second company to file an ANDA for K-Dur 20. ESI also filed a paragraph IV certification with the FDA stating that its product did not infringe any valid patent held by Schering covering K-Dur 20. In 1996, Schering sued ESI for patent infringement.

The Challenged Agreements

The complaint challenges unlawful agreements between Schering and Upsher-Smith and among Schering, AHP and ESI to delay the entry of low-cost generic competition to Schering's highly profitable prescription drug K-Dur 20. According to the complaint, when confronted with the prospect of competition to K-Dur 20 through generic entry by Upsher-Smith and ESI, Schering entered into these agreements that kept Upsher, ESI and all other potential generic competitors out of the market. The complaint alleges that the Upsher-Smith/Schering agreement delayed the start of Upsher-Smith's 180-day Exclusivity Period

until September 2001 and, as a result, the entry of competition from other generic manufacturers until March 2002.

With respect to AHP and ESI, the complaint alleges that in January 1998, Schering, AHP, and ESI reached an agreement to settle their patent litigation. Pursuant to that agreement: Schering agreed to pay ESI up to $30 million; AHP and ESI agreed to refrain from marketing the allegedly infringing generic version of K-Dur 20 or any other generic version of K-Dur 20, regardless of whether such product would infringe Schering's patents, until January 2004; AHP and ESI agreed to refrain from marketing more than one generic version of K-Dur 20 between January 2004 and September 2006, when the K-Dur 20 patent will expire; and AHP and ESI agreed not to conduct, sponsor, file or support a study of the bio-equivalence of any product to K-Dur 20 prior to September 2006. Schering agreed to pay ESI $5 million up front; an additional $10 million if ESI could demonstrate that its generic version of K-Dur 20 was able to be approved by the FDA under an ANDA on or before June 30, 1999; and another $15 million for licenses to two generic products that ESI was developing.

The complaint further alleges that the patent litigation between Schering and ESI was dismissed. Schering has paid ESI over $20 million and continues to make payments under the terms of their agreement. Schering has made no sales to date of the two products it licensed from ESI.

Competitive Analysis

Generic drugs can have a swift marketplace impact, because pharmacists generally are permitted, and in some instances are required, to substitute lower-priced generic drugs for their branded counterparts, unless the prescribing physician directs otherwise. In addition, there is a ready market for generic products because certain third-party payers of prescription drugs (*e.g.*, state Medicaid programs and many private health plans) encourage or insist on the use of generic drugs wherever possible.

The complaint charges that the challenged agreement among Schering, AHP and ESI injured competition by preventing or discouraging the entry of generic K-Dur 20. The complaint also alleges that by making cash payments to ESI, Schering induced it to agree to delay launching its generic version of K-Dur 20. According to the complaint, absent those payments, ESI would not have agreed to delay its entry for so long. The complaint charges that by making cash payments to ESI, Schering protected itself from competition from ESI until 2004. The complaint also alleges that without lower-priced generic competition from Upsher-Smith and ESI, consumers, pharmacies, hospitals, insurers, wholesalers, government agencies, managed care organizations, and others are forced to purchase Schering's more expensive K-Dur 20 product.

The Proposed Order

The proposed order is designed to remedy the unlawful conduct charged against AHP in the complaint and prevent recurrence of such conduct. As described more fully below, the proposed order would essentially prohibit two categories of conduct:

- agreements in which the NDA holder makes payments to an ANDA filer and the ANDA filer agrees not to market its product for some period of time (except in certain limited circumstances) (Paragraph II deals with agreements that resolve a patent infringement dispute and Paragraph IV covers "interim" agreements that apply during the pendency of ongoing patent litigation); 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 (Paragraph III).

The proposed order would apply to AHP whether it is acting as potential generic competitor (an ANDA filer) or as a branded drug seller (an NDA holder). As noted above, AHP has advised its customers that it intends to phase out its oral generic

pharmaceutical product line. It will continue to develop, manufacture, and market brand name drugs and injectable generic drugs. Notwithstanding AHP's plans to phase out its oral generic products – the line of business that includes its generic version of K-Dur 20 – an order is appropriate here to prevent a recurrent violation.

Paragraph II of the 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, except under certain limited circumstances described below. The ban in Paragraph II includes not only settlements of ongoing patent infringement litigation, but also agreements resolving claims of patent infringement that have not resulted in a lawsuit (see Paragraph I.O.). In addition, by virtue of the definition of "Agreement" in Paragraph I.D., the 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, where one agreement resolves the patent infringement dispute and another provides for the payment for delayed entry).

The 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 all of 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 order is not limited to cash payments.

The proposed order distinguishes between the first ANDA filer (the party eligible for the 180-day market exclusivity period under the Hatch-Waxman Act) and later filers. It bars giving "anything of value" to the first ANDA filer, but would permit NDA holders

to grant other ANDA filers a delayed license to manufacture the ANDA product. The proposed order makes this distinction because an agreement by a later filer to refrain from entering does not block entry by other potential competitors. Where the only value granted by the NDA holder is the license to sell the ANDA product, there is no payment to distort the generic's incentive to seek the earliest possible entry date. In the case of the first ANDA filer, however, any agreement with an NDA holder that involves a promise by the generic firm not to enter the market risks blocking entry by other potential generic competitors, and therefore such agreements are subject to the general prohibition of Paragraph II of the proposed order.

As noted above, the proposed order would create a limited exception to Paragraph II's ban on giving value for delayed entry. This exception addresses the possibility that there might be some agreements that fall within the terms of the prohibition in Paragraph II that the Commission would not wish to prohibit. For example, as was previously discussed, the proposed order would ban not only agreements involving cash payments of the type that the Commission has challenged to date, but also the giving of other things of value. It is possible, however, that the giving of some non-cash items in a settlement that did not provide for immediate entry by the ANDA filer could promote competition. Thus, the order includes a mechanism that would permit consideration of such arrangements.

The exception that has been crafted in this matter could arise only in situations where Respondent AHP presents the agreement to a court in connection with a joint stipulation for a permanent injunction. In that circumstance, Paragraph II will not bar an otherwise prohibited agreement, if the following conditions are met:

- First, Respondent must follow certain procedures designed to provide notice and information both to the Commission and the court: (1) along with the joint stipulation for permanent injunction and the proposed agreement, Respondent must

provide the court with a copy of the Commission's complaint, order, and the Analysis to Aid Public Comment in this matter; (2) at least 30 days before submitting the stipulation to the court, Respondent must provide written notice (as set forth in Paragraph V of the order) to the Commission; and (3) Respondent may not oppose Commission participation in the court's consideration of the request for permanent injunction; and

- Second, either: (1) the court issues a permanent injunction and the parties' agreement conforms to the court's permanent injunction order; or (2) the Commission determines that the agreement does not raise issues under Section 5 of the FTC Act.

The proviso to Paragraph II also makes it clear that the order would not prevent Respondent AHP from unilaterally seeking relief from the court. The proviso sets forth conditions under which AHP could seek to avoid, though court action, the bar on agreements that is set forth in the core prohibition of Paragraph II of the proposed order. These conditions would not affect AHP's ability to take action that did not involve an agreement otherwise prohibited in Paragraph II.

The Commission recognizes that, outside of the class action context, final settlements between private litigants ordinarily are not scrutinized by courts. Unlike the case of a court-ordered preliminary injunction based on a stipulation of the parties (the situation addressed in Paragraph IV, discussed below), the court in the final settlement context has no express legal mandate to consider the public interest. Thus, there remains some degree of risk that an anticompetitive agreement could escape the prohibition of Paragraph II if the parties were able to persuade a court to issue their agreement as a permanent injunction. On the other hand, it is also relatively rare for courts in ordinary private litigation to issue settlement agreements as permanent injunction orders. This is likely to reduce the risk that an anticompetitive agreement would evade the order, because, as noted above, the

exception to the prohibitions of Paragraph II does not arise unless the court issues a permanent injunction order. On balance, in light of all the circumstances of this proposed consent order (including that it is the first involving a challenge to a final settlement with a second ANDA filer), the Commission believes that the exception contained in Paragraph II is appropriate here.

Paragraph III 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 Commission has previously considered this type of restraint in the context of an agreement between an NDA holder and an ANDA first filer (that is, the party possessing an unexpired right to Hatch-Waxman 180-day exclusivity), and had limited the bans in previous orders to that context. Having now considered a similar restraint in an agreement involving a later ANDA filer, the Commission believes it is appropriate to extend this prohibition to agreements between an NDA holder and any ANDA filer.

Paragraph IV addresses what are sometimes referred to as interim settlement agreements. It covers 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. AHP would be barred from entering into such interim agreements. As in Paragraph II, it extends beyond cash payments to cover the NDA holder's providing "anything of value" to the ANDA filer, and provides an exception in limited circumstances, similar to those described in connection with Paragraph II of the proposed order. Although the challenged conduct here was an agreement in connection with a final settlement of litigation, rather than an interim agreement, this provision is appropriate in light of the serious antitrust concerns raised by interim agreements and the need to impose an order to prevent recurrence of violations similar to that with which AHP is charged.

The form of notice that Respondent AHP must provide to the Commission under Paragraphs II and IV of the order is set forth in Paragraph V. In addition to supplying a copy of the proposed agreement, AHP is required to provide certain other information to assist the Commission in assessing the potential competitive impact of the agreement. Accordingly, the order requires Respondent to identify, among other things, all others known by AHP 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 Respondent. In addition, Respondent AHP must provide the Commission with certain documents that evaluate the proposed agreement.

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

TECHNOBRANDS, INC., ET AL.

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

Docket C-4041; File No. 9923034
Complaint, April 15, 2002--Decision, April 15, 2002

This consent order addresses practices used by Respondent TechnoBrands, Inc., and its president, Respondent Charles J. Anton, related to the advertising, offering for sale, sale, and distribution of products such as the Hollywood 48-Hour Miracle Diet; the Enforma System; the BMI Magnetic Kit; the Nisim New Hair Biofactors System; and the Clarion Ionic Filter Ceiling Fan and the Sila Ionic Air Purifier. The order, among other things, prohibits the respondents from representing – unless they possess competent and reliable evidence that substantiates the representations – (1) that consumers who use the Hollywood Diet, or any substantially similar product, can lose 10 lbs. in 48 hours; or (2) that by using Enforma, or any substantially similar product, consumers can achieve substantial weight loss, or avoid weight gain, without a restricted calorie diet or exercise. The order also prohibits the respondents from representing that celebrities have lost substantial weight by using the Hollywood Diet, unless they possess competent and reliable evidence that substantiates the representations. In addition, the order prohibits the respondents from making unsubstantiated representations about the comparative or absolute benefits, performance, or efficacy of any product or service, and from misrepresenting the existence, contents, validity, results, conclusions, or interpretations of any test, study, or research. The order also requires the respondents to pay the Commission the sum of $200,000.

Participants

For the Commission: *Carol Jennings, Pablo M. Zylberglait, Louise R. Jung, Heather Hippsley, James Reilly Dolan, Elaine D. Kolish* and *Charles Pidano.*

For the Respondent: *W. Jeffery Edwards* and *Kelly Faglioni, Hunton & Williams.*

COMPLAINT

The Federal Trade Commission, having reason to believe that TechnoBrands, Inc. ("TBI"), and Charles J. Anton ("Anton"), individually and as an officer of TBI ("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 TBI is a Virginia corporation with its principal place of business at 1998 Ruffin Mill Road, Colonial Heights, Virginia 23834. TBI was incorporated on May 5, 1987 under the name of Comtrad Industries, Inc. On May 24, 2000, the company changed its corporate name to TechnoBrands, Inc. TBI advertises and does business as The Lifestyle Resource, TechnoScout, Ennoventions, Tech Update, and International Collectors' Society.

2. Respondent Anton is an officer of TBI. Individually or in concert with others, he formulates, directs, or controls the policies, acts, or practices of TBI, including the acts or practices alleged in this complaint. His principal office or place of business is the same as that of TBI.

3. Respondents have advertised, offered for sale, sold, and distributed products to the public, including the Hollywood 48-Hour Miracle Diet ("Hollywood Diet"), a liquid diet; the Enforma System ("Enforma"), a diet product combination consisting primarily of chitosan and pyruvate; the BMI Magnetic Kit, a set of magnets with purported analgesic properties; the Nisim New Hair Biofactors System ("Nisim"), a purported hair-growth product; the Clarion Ionic Filter Ceiling Fan ("Clarion"), an air-cleaning device; and the Sila Ionic Air Purifier ("Sila"), another air-cleaning device. The Hollywood Diet and Enforma are "foods" and/or "drugs" within the meaning of Sections 12 and 15 of the Federal Trade Commission Act. Nisim is a "drug" within the meaning of Sections 12 and 15 of the Federal Trade Commission Act. The BMK is a "device" within the meaning of Sections 12 and 15 of the Federal Trade Commission Act.

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

Hollywood Diet

5. Respondents have disseminated or have caused to be disseminated advertisements for the Hollywood Diet, including but not necessarily limited to the attached Exhibit 1. These advertisements contain the following statements:

> **Lose up to 10 lbs this weekend!** . . .
> *by Pete Johnson*
> How often have you wasted precious time and money trying to lose weight? Let's see . . . I've tried every quick-fix, fad diet known to man . . . even tried the ones where you buy the pre-packaged food. They all seem to take months to show any results . . . and by that time my motivation is gone! Even straight fasting didn't work for me. Then I read about the Hollywood 48-Hour Miracle Diet and decided to try it – I had nothing to lose but weight – and I did! . . .
> The Hollywood 48-Hour Miracle Diet is a special formulation of all-natural juices and botanical extracts so it looks like an ordinary bottle of juice – and works like a miracle! For two days you give up all bad food habits. . . .
> **Hollywood's best-kept diet secret.** This amazing diet has been rushed to the sets of E.R., Friends, plus many of today's biggest celebrities. It's what actors, actresses and models use to fit into those sleek suits and sexy dresses – fast! . . .
> **And it's clinically proven.** Tested by an independent lab, this remarkable diet produced impressive results. A clinical trial involving 10 volunteers found that subjects lost an average of 4% of their initial body weight and noted 'obvious results' at the end of two days. . . .
> **There are no failures on this diet – you will lose weight – guaranteed!** . . .

Don't take our word for it
[Consumer endorser:] 'I lost 10 pounds in 48 hours. I broke my plateau weight of 135 to 125 pounds. It was so easy – I'm telling all my friends about it!' Elizabeth K., New York City.

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

A. Scientific evidence proves that consumers who use the Hollywood Diet can lose an average of 4% of their initial body weight in two days.

B. An endorser named Pete Johnson lost weight by using the Hollywood Diet.

7. In truth and in fact:

A. Scientific evidence does not prove that consumers who use the Hollywood Diet can lose an average of 4% of their initial body weight in two days.

B. The endorser referenced in Exhibit 1 as Pete Johnson does not exist, and the events related in his endorsement are fictional.

Therefore, the representations set forth in Paragraph 6 were, and are, false or misleading.

8. Through the means described in Paragraph 5, respondents have represented, expressly or by implication, that:

A. Consumers who use the Hollywood Diet can lose 10 lbs. in 48 hours.

B. Many celebrities, actors, actresses, and models – including some that star in the shows E.R. and Friends – have lost substantial weight by using the Hollywood Diet.

C. Testimonials for the Hollywood Diet reflect the typical or ordinary experience of members of the public who use the product.

9. Through the means described in Paragraph 5, respondents have represented, expressly or by implication, that they possessed and relied upon a reasonable basis that substantiated the representations set forth in Paragraph 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 Paragraph 8, at the time the representations were made. Therefore, the representation set forth in Paragraph 9 was, and is, false or misleading.

Enforma

11. Respondents have disseminated or have caused to be disseminated advertisements for Enforma, including but not necessarily limited to the attached Exhibit 2. These advertisements contain the following statements:

Dieters' dream . . . 'Exercise In A Bottle!'
Enforma is the natural system for eliminating fat without crazy diets or strenuous exercise.
By Donna White

Like millions of Americans, you've probably tried many different diets, special food programs and other plans that have just not worked. If they did work, it was probably for a short period of time, and they failed you when your willpower gave in and you ate the foods you really love. That doesn't have to happen, not with the Enforma System. This remarkable program can help you shed those unwanted pounds, keep them off and give you power to eat what you want and enjoy yourself.

What's ideal . . . what's real. Most people know that certain things must occur for us to lose weight and keep it off, and this amazing system automatically provides them. . . . The desired result can be achieved by reducing our intake of calories as well as burning surplus calories with exercise. Unfortunately, both ways of ridding ourselves of unwanted fat are usually difficult to sustain. None of us wants to cut out delicious foods from our diets, and we can't always exercise when we want. In fact, many of us don't exercise at all. The Enforma System allows us to accomplish the goals of shedding pounds and keeping them off with its two breakthrough products, Fat Trapper and Exercise In A Bottle.

A one-two punch. We all know how hard it is to change eating habits, and when it comes to fatty foods, the habit may seem impossible to break. That's where Fat Trapper comes in. It literally binds up and traps fat as it enters your digestive system, before it can become absorbed into your body and stored on your hips, thighs, stomach and other parts of your body.

12. Through the means described in Paragraph 11, respondents have represented, expressly or by implication, that:

A. Consumers who use Enforma can lose substantial weight without the need for a restricted calorie diet or exercise.

B. Consumers who use Enforma can avoid weight gain without the need for a restricted calorie diet or exercise.

13. Through the means described in Paragraph 11, respondents have represented, expressly or by implication, that they possessed and relied upon a reasonable basis that substantiated the representations set forth in Paragraph 12, at the time the representations were made.

14. In truth and in fact, respondents did not possess and rely upon a reasonable basis that substantiated the representations set forth in Paragraph 12, at the time the representations were made. Therefore, the representation set forth in Paragraph 13 was, and is, false or misleading.

BMI Magnetic Kit

15. Respondents have disseminated or have caused to be disseminated advertisements for the BMI Magnetic Kit, including but not necessarily limited to the attached Exhibit 3. These advertisements contain the following statements:

'Bio Magnets are superior to anything I've used before'

– Ronnie Lott, 10-time All-Pro

Amazing magnets from BMI reduce pain from muscle strain and injury without drugs, needles or physical therapy.
by C. Eddie Vernon

I have a spot in my lower back that can just kill me. . . . if I lift something heavy the wrong way, it throws my back out, and the pain is excruciating.

Frantic for pain relief. . . . I've tried the 'traditional medicine' route, with anti-inflammatory drugs that made me dopey. I've been massaged, had my back 'cracked' by 3 chiropractors, and even tried acupuncture. I'm so frustrated, I've been on the verge of demanding an expensive and dangerous operation on my spine!

Sports medicine breakthrough. Nothing provided satisfactory relief, and that's why I tried 'magnetic field therapy' using BMI Magnets. The results have been

excellent: my 'bad back' feels better than it has in YEARS! I get relief because of two football guys – George Anderson, an ex-trainer from the Oakland Raiders, and Ronnie Lott, an ex-defensive back. With decades of experience in a bone-crushing sport, including 7 Super Bowl wins, they know injuries . . . and how to handle them.

They tried magnetic field therapy, and saw for themselves it works. It is believed that the magnets work on the human body by actually enlarging the diameter of veins, arteries, and capillaries. This 'vaso-ventilation' increases blood flow, aids circulation, reduces inflammation, and suppresses the body's production of pain-causing chemicals. . . . [It] has been used by thousands of former pain sufferers. . . . My advice to anyone with chronic or occasional pain is to give these a try. . . .

BMI MAGNETIC THERAPY [anatomical chart]
Lower Back Pain
Tennis Elbow
Carpal Tunnel Syndrome
Hand Pain
Ankle Strains
Neck Pain
Shoulder Pain
Hip Pain
Muscle Strains
Knee Pain

[Consumer endorser]: . . . 'I've used hundreds of pain relieving products from all over the world and BMI's bio magnetic therapy products have given me the best results.' – Kurt Angle 1996 U.S. Olympic Gold Medalist.

16. Through the means described in Paragraph 15, respondents have represented, expressly or by implication, that an endorser named C. Eddie Vernon experienced significant pain relief by using the BMI Magnetic Kit.

17. In truth and in fact, the endorser referenced in Exhibit 3 as C. Eddie Vernon does not exist, and the events related in his

endorsement are fictional. Therefore, the representation set forth in Paragraph 16 was, and is, false or misleading.

18. Through the means described in Paragraph 15, respondents have represented, expressly or by implication, that:

A. The BMI Magnetic Kit relieves severe pain, whether chronic or occasional, anywhere in the body, including lower back pain, tennis elbow, carpal tunnel syndrome, hand pain, ankle strains, neck pain, shoulder pain, hip pain, muscle strains, and knee pain.

B. The BMI Magnetic Kit can relieve pain more effectively than traditional medicine, anti-inflammatory drugs, massage, acupuncture, or chiropractic treatment.

C. The BMI Magnetic Kit relieves pain through magnetic field therapy, which enlarges the diameter of veins, arteries and capillaries, increases blood flow, aids circulation, reduces inflammation, and suppresses the body's production of pain-causing chemicals.

D. Testimonials for the BMI Magnetic Kit reflect the typical or ordinary experience of members of the public who use the product.

19. Through the means described in Paragraph 15, respondents have represented, expressly or by implication, that they possessed and relied upon a reasonable basis that substantiated the representations set forth in Paragraph 18, at the time the representations were made.

20. In truth and in fact, respondents did not possess and rely upon a reasonable basis that substantiated the representations set forth in Paragraph 18, at the time the representations were made. Therefore, the representation set forth in Paragraph 19 was, and is, false or misleading.

Nisim New Hair Biofactors System

21. Respondents have disseminated or have caused to be disseminated advertisements for Nisim, including but not necessarily limited to the attached Exhibit 4. These advertisements contain the following statements:

> **Finally . . . a drug-free way to combat hair loss!**
> *Nisim International has combined the wisdom of ancient phytotherapy with modern science to create a dramatic hair-loss therapy.*
> *by Justin Ellett*
> 'Thanks for the haircut, Margot, but what's that big, bare spot on the top of my head?' That was me, a year ago, joking with my hairdresser. Some joke! I was balding fast. I hounded barbers and hairdressers, thinking that among all their bottles, vials, and potions they must have a solution to what was becoming a major embarrassment for me. . . .
> **Personal advice from a pro**. Well, Margot came through for me when she recommended Nisim New Hair Biofactors® Stimulating System. She confided she used it herself and she has the thickest head of hair you'd ever want to see. (That's why she does!) She told me there were several hair restorers out there, but she warned, 'Those prescription ones actually get into your blood stream.' I had enough trouble with hair loss. I didn't want to risk who-knows-what with hair growth drugs floating through my system.
>
> Concentrated Nisim is about a fraction of the cost of heavily-advertised restorers, is simple to use (just 2 steps), and is formulated for both men and women. Herbal-based solution may stop excessive hair loss in a matter of days.

22. Through the means described in Paragraph 21, respondents have represented, expressly or by implication, that an endorser named Justin Ellett obtained positive hair-growth results by using Nisim.

23. In truth and in fact, the endorser referenced in Exhibit 4 as Justin Ellett does not exist, and the events related in his endorsement are fictional. 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:

A. Consumers who use Nisim can stop excessive hair loss in a matter of days.

B. Nisim is as effective at stimulating hair growth as prescription products, or other heavily advertised restorers (such as Rogaine or Propecia).

C. Testimonials for Nisim reflect the typical or ordinary experience of members of the public who use the product.

25. 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 Paragraph 24, at the time the representations were made.

26. In truth and in fact, respondents did not possess and rely upon a reasonable basis that substantiated the representations set forth in Paragraph 24, at the time the representations were made. Therefore, the representation set forth in Paragraph 25 was, and is, false or misleading.

Clarion Ionic Filter Ceiling Fan

27. Respondents have disseminated or have caused to be disseminated advertisements for Clarion, including but not necessarily limited to the attached Exhibit 5. These advertisements contain the following statements:

The world's most effective air purification . . . and it takes up no floor space!
The Clarion air filter fan removes dust, smoke particles, pollen, molds and other airborne contaminants as small as 0.1 micron.
by Michael Terry
. . . Every silent stroke of the 5 fan blades cleans away stale smoke and cooking odors. Dangerous dust mites and pet dander are swept from the air.
All day, all night, relief from allergies. Many notes from allergy sufferers tell us what an amazing difference the Clarion fan has made. Why is it more effective than traditional air cleaners? First, because its use is almost automatic: You flip on the fan and it goes to work, silently efficiently, circulating air throughout your room – filtering pollen, mold, airborne contaminants, with every turn of the blade. . . .
[Consumer endorser:] 'I have asthma and allergies . . . I use my Clarion fan in my bedroom and I absolutely love it! I just can't say enough about it . . . don't ever discontinue it! S.B. Easton, MA'

28. Through the means described in Paragraph 27, respondents have represented, expressly or by implication, that:

A. Consumers who use the Clarion fan will experience relief from allergies and other respiratory problems.

B. The Clarion fan eliminates dust mites and pet dander from a user's environment.

C. Testimonials for the Clarion fan reflect the typical or ordinary experience of members of the public who use the product.

29. Through the means described in Paragraph 27, respondents have represented, expressly or by implication, that they possessed

and relied upon a reasonable basis that substantiated the representations set forth in Paragraph 28, at the time the representations were made.

30. In truth and in fact, respondents did not possess and rely upon a reasonable basis that substantiated the representations set forth in Paragraph 28, at the time the representations were made. Therefore, the representation set forth in Paragraph 29 was, and is, false or misleading.

Sila Ionic Air Purifier

31. Respondents have disseminated or have caused to be disseminated advertisements for the Sila Ionic Air Purifier, including but not necessarily limited to the attached Exhibit 6. These advertisements contain the following statements:

> **Three ionic solutions for everyday pollution problems** . . .
> *by Rob Gilmore*
> If you think air pollution is strictly an outdoor problem, you're in for a surprise. According to the Environmental Protection Agency, indoor air pollution represents our nation's biggest pollution problem. . . . people are more likely to get sick from the air they breathe indoors than outdoors. That's because we are trapped inside with everything from mold and mildew to bacteria and chemicals. Pet odors, organic odors and chemical odors are simply an indication of what we are breathing. Now an innovative company has developed breakthrough technology that can actually recreate the natural process that combats air pollution. . . .
> **The indoor pollution solution.** The Sila Air Purifiers and Deodorizers from Lentek use new Zyonic technology to neutralize nasty odors and create cleaner, fresher air. They help solve the problem of indoor air pollution the same way that nature tries to solve pollution outdoors. They rid air of

pollutants and odors by creating super oxygenated molecules, which convert the odors to pure oxygen. This process also introduces negative ions to pollutants like dust, smoke, soot and pollen. The combined molecules drop to the ground, significantly reducing the number of airborne pollutants.

32. Through the means described in Paragraph 31, respondents have represented, expressly or by implication, that the Sila air purifier eliminates mold, mildew, bacteria, chemicals, and pollutants from a user's environment.

33. Through the means described in Paragraph 31, respondents have represented, expressly or by implication, that they possessed and relied upon a reasonable basis that substantiated the representation set forth in Paragraph 32, at the time the representation was made.

34. In truth and in fact, respondents did not possess and rely upon a reasonable basis that substantiated the representation set forth in Paragraph 32, at the time the representation was made. Therefore, the representation set forth in Paragraph 33 was, and is, false or misleading.

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

THEREFORE, the Federal Trade Commission this fifteenth day of April, 2002, has issued this complaint against respondents.

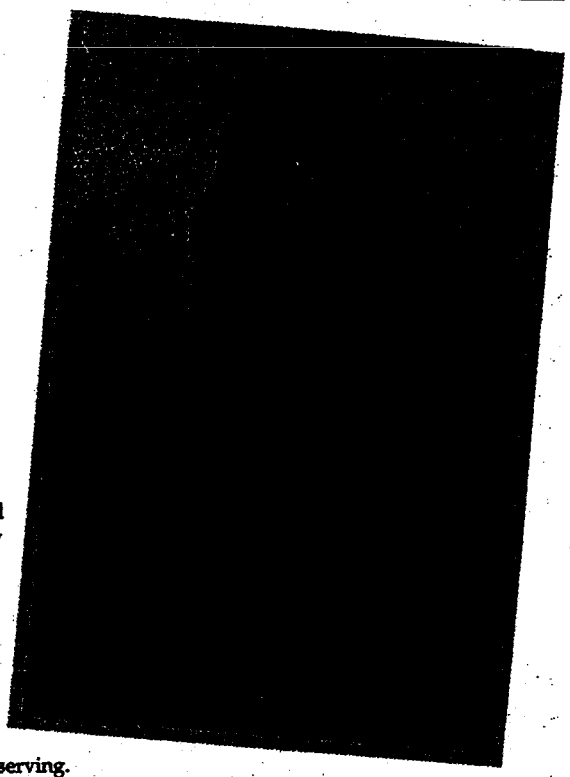
By the Commission.

Hollywood's new diet phenomenon

Lose up to 10 lbs this weekend!

The Hollywood "Miracle" diet features delicious, all-natural juices that help you lose weight while you cleanse, detoxify and rejuvenate your body.

by Pete Johnson



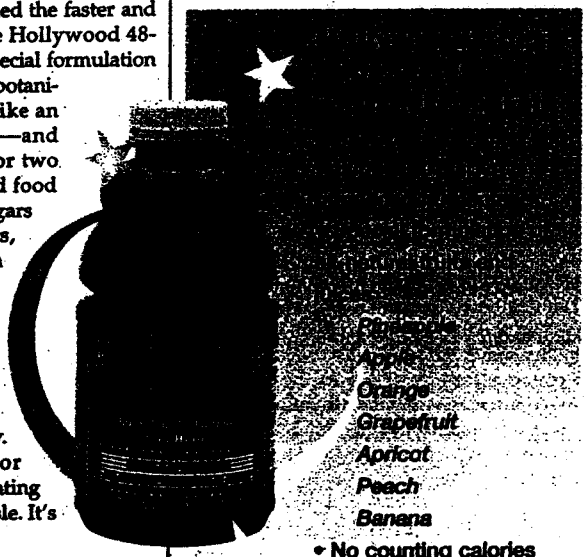
How often have you wasted precious time and money trying to lose weight? Let's see...I've tried every quick-fix, fad diet known to man...even tried the ones where you buy the pre-packaged food. They all seem to take months to show any results...and by that time my motivation is gone! Even straight fasting didn't work for me. Then I read about the Hollywood 48-Hour Miracle Diet and decided to try it—I had nothing to lose but weight—and I did!

The skinny. James Kabler, world famous for his phenomenally successful Six Day Bio Diet, has now launched the faster and easier Miracle Diet. The Hollywood 48-Hour Miracle Diet is a special formulation of all-natural juices and botanical extracts so it looks like an ordinary bottle of juice—and works like a miracle! For two days you give up all bad food habits. In place of fats, sugars and artificial ingredients, you flood your body with the vitamins, minerals and essential oils found in this amazing juice. Just mix half of it with an equal amount of cold water and sip it throughout the day. It's so easy. There's no measuring or combining foods, no counting calories or points, no hassle. It's that easy.

Hollywood's best-kept diet secret. This amazing diet has been rushed to the sets of E.R., Friends, plus many of today's biggest celebrities. It's what actors, actresses and models use to fit into those sleek suits and sexy dresses—fast! And it's so delicious, refreshing and satisfying that it's featured on the menu of the famous Hollywood Hills Cafe. This phenomenal weight-loss program is great for anyone because you only have to stay on it for 2 DAYS TO SEE RESULTS! Ideal for people who have a special occasion coming up and want to look and feel their best—fast. High-school reunions, weddings, even that trip to Hawaii are all great reasons to lose a quick ten!

Detoxify your system. Based on the time-tested and popular European method of periodic cleansing of the body, the all-natural, citrus-flavored juice supplies your body with vitamins, minerals, antioxidants, essential oils and other cleansing ingredients that detoxify and rejuvenate your body, while you shed pounds. And it supplies more than 100% of the U.S.R.D.A. of 12 essential vitamins in every serving.

And it's clinically proven. Tested by an independent lab, this remarkable diet produced impressive results. A clinical trial involving 10 volunteers found that subjects lost an average of 4% of their initial body weight and noted "obvious results" at the end of two days. The diet supplied all of the needed nutrients required over the two-day period with no adverse side effects, and no problems with hunger or fatigue. All subjects were pleased and wanted to use the diet again!



- No counting calories or diet points

There are no failures on this diet—you will lose weight—guaranteed! Lose up to 10 pounds in just 48 hours with NO risk. If you're not 100% satisfied, return the unused portion within 30 days for a full refund, "No Questions Asked" refund. Dieting is easier when you do it with a friend or spouse, so order enough for two!

Don't take our word for it

"I lost 10 pounds in 48 hours. I broke my plateau weight of 135 to 125 pounds. It was so easy—I'm telling all my friends about it!"
Elizabeth K., New York City

"I use Hollywood's 48-Hour Miracle Diet once a month to detoxify my body and lose those extra pounds I put on."
Michael J., Chicago Illinois

"My boyfriend called and invited me to go sailing. I quickly did the Hollywood's 48-Hour Miracle Diet, lost 8 pounds and got into my bathing suit."
Jennifer T., San Diego, CA

–Results may vary–

Hollywood 48-Hour Miracle Diet
One 32 fl. oz. bottle..... **$24.95** $5.95 S&H
Buy 2 or more..... **$19.95** $each
Please mention promotional code **7371-Z119.**

For fastest service, call toll-free 24 hours a day

800-704-1211

To order by mail, send check or money order for the total amount including S&H. To charge it to your credit card, enclose your account number and expiration date.

Virginia residents only—please include 4.5% sales tax.

comtrad industries
2820 Waterford Lake Dr., Suite 102
Midlothian, Virginia 23112

EXHIBIT 1

TECHNOLOGY UPDATE

Dieters' dream... "Exercise In A Bottle!"

Enforma is the natural system for eliminating fat without crazy diets or strenuous exercise.

by Donna White

Like millions of Americans, you've probably tried many different diets, special food programs and other plans that have just not worked. If they did work, it was probably for a short period of time, and they failed you when your willpower gave in and you ate the foods you really love. That doesn't have to happen, not with the Enforma System. This remarkable program can help you shed those unwanted pounds, keep them off and give you the power to eat what you want and enjoy yourself.

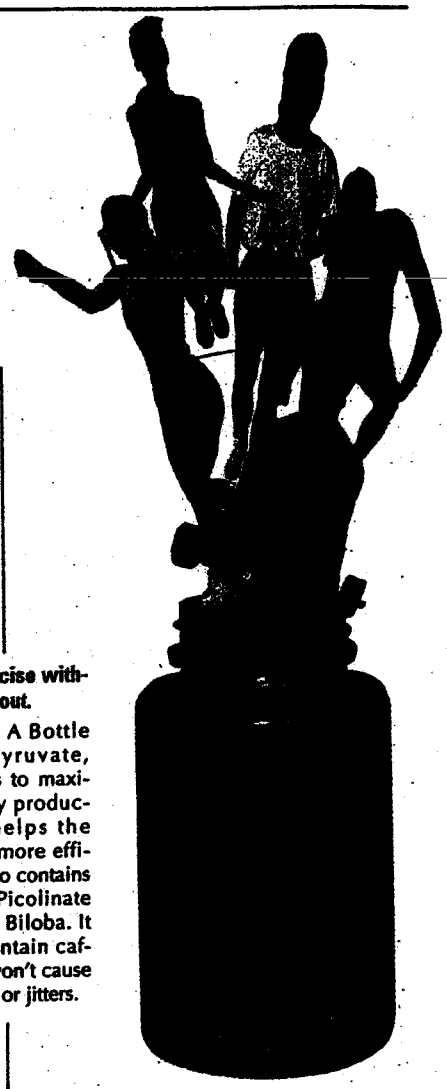
What's ideal...what's real. Most people know that certain things must occur for us to lose weight and keep it off, and this amazing system automatically provides them. We must reduce our net calories—those calories still available in our bodies after we have used the total available calories as fuel for the activities of our daily lives. The desired result can be achieved by reducing our intake of calories as well as burning surplus calories with exercise. Unfortunately, both ways of ridding ourselves of unwanted fat are usually difficult to sustain. None of us wants to cut out delicious foods from our diets, and we can't always exercise when we want. In fact, many of us don't exercise at all. The Enforma System allows us to accomplish the goals of shedding pounds and keeping them off with its two breakthrough products, Fat Trapper and Exercise In A Bottle.

Fat Trapper binds fat as it enters your digestive system and allows it to pass through without absorbing

- With Chitozyme™
- Controls fat absorption*
- Supports healthy cholesterol and triglyceride levels*
- Helps reduce calorie absorption from fat*

A one-two punch. We all know how hard it is to change eating habits, and when it comes to fatty foods, the habit may seem impossible to break. That's where Fat Trapper comes in. It literally binds up and traps fat as it enters your digestive system, before it can become absorbed into your body and stored on your hips, thighs, stomach and other parts of your body*. Unlike some other products on the market, the process is natural and caffeine-free. Fat Trapper is a proprietary blend of insoluble plant fibers and soluble shellfish fiber. This blend, called Chitozyme™, has the characteristic of attracting and bundling fat molecules, causing them to pass through the body without being absorbed*. The second component is Exercise In A Bottle, which contains Pyruvate. Test results have shown that people who take Pyruvate in conjunction with mild exercise experience greater weight loss and fat reduction than those who simply exercise. While no one knows exactly how the process works, it is suggested that it can help your body work more efficiently*. Exercise In A Bottle does this without caffeine, so there are no jitters or sleeplessness...often associated with other products that seek to raise the body's metabolic rate. Pyruvate is naturally present in small quantities in the human body and in many of the foods we eat, so it's safe and natural. Exercise In A Bottle also includes Chromium Picolinate and Ginkgo Biloba*. The combined effects of these all-natural ingredients is an ideal part of any fat-reduction program.

A complete weight loss system. In addition to the two powerful supplements, the Enforma System includes a booklet containing valuable information on the dynamics of calorie reduction and increasing activity levels. This information, combined with the supplements, will assist you in achieving your goals. With the consultation of a registered dietitian, the makers of Enforma have developed a special low-calorie eating plan that not only indicates what and how much you should eat, but will begin to train you to make better food choices. Plus with our special discount for a 60-day supply, you can lose weight for less.



Natural exercise without working out.

Exercise In A Bottle contains Pyruvate, which helps to maximize energy production and helps the body work more efficiently. It also contains Chromium Picolinate and Ginkgo Biloba. It does not contain caffeine, so it won't cause nervousness or jitters.

Why take our word for it...it's risk-free. Now you can try the Enforma System for yourself with Comtrad's exclusive risk-free home trial. If you are not completely satisfied simply return the unused portion within 30 days for a full "No Questions Asked" refund.

Note: Fat Trapper and Exercise In A Bottle may be effective in overall weight control, especially when used in conjunction with a physician-approved exercise program and an appropriate reduced-calorie diet.

**These statements have not been evaluated by the FDA. This product is not intended to diagnose, treat, cure or prevent any disease.*

Enforma System . . . . . $69.95 $4.95 S&H

Please mention promotional code **6722-Z119.**

For fastest service, call toll-free 24 hours a day

800-704-1211

To order by mail, send check or money order for the total amount including S&H. To charge it to your credit card, enclose your account number and expiration date.

Virginia residents only—please include 4.5% sales tax.

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2820 Waterford Lake Drive, Suite 102 Midlothian, VA 23112

The one-two punch in fighting fat.

Most of us gain weight as we age, as muscle tone decreases and our body tries to build up fat. The Enforma System can change this process. By causing fat to pass through the body unabsorbed, this remarkable program enables us to avoid this cycle of weight gain.

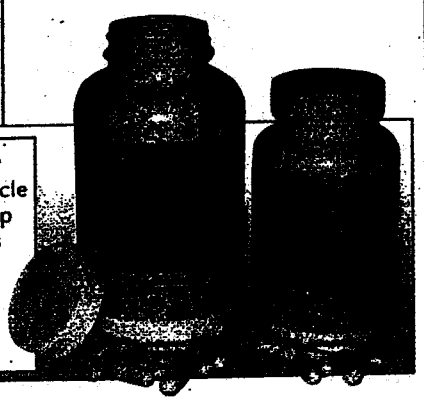
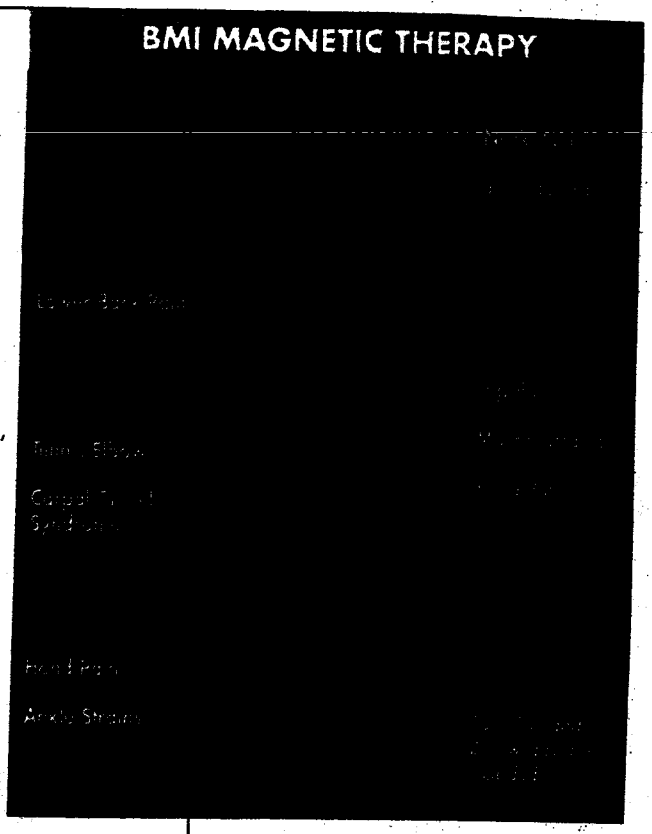


EXHIBIT 2

"Bio Magnets are superior to anything I've used before"

—Ronnie Lott, 10-time All-Pro

Amazing magnets from BMI reduce pain from muscle strain and injury without drugs, needles or physical therapy.



by C. Eddie Vernon

I have a spot in my lower back that can just kill me. My chiropractor says I'm out of alignment, but I say, "Oh my aching back!" It doesn't hurt all the time, but when I'm tired, or if I lift something heavy the wrong way, it throws my back out, and the pain is excruciating.

Frantic for pain relief. I've been frantic for relief. I've had x-rays, tried deep-heat, I've used ice and heat (and I've tried alternating them). I've tried the "traditional medicine" route, with anti-inflammatory drugs that made me dopey. I've been massaged, had my back "cracked" by 3 chiropractors, and even tried acupuncture. I'm so frustrated, I've been on the verge of demanding an expensive and dangerous operation on my spine!

It is believed that the magnets work on the human body by actually enlarging the diameter of veins, arteries, and capillaries. This "vaso-ventilation" increases blood flow, aids circulation, reduces inflammation, and suppresses the body's production of pain-causing chemicals.

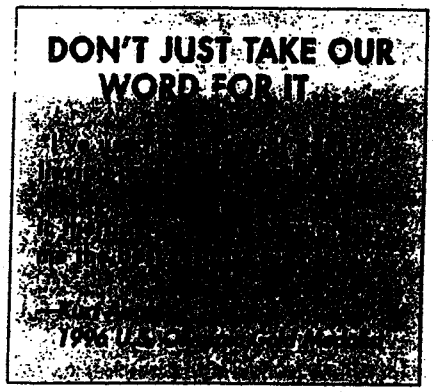
Sports medicine breakthrough. Nothing provided satisfactory relief, and that's why I tried "magnetic field therapy" using BMI Magnets. The results have been excellent: my "bad back" feels better than it has in YEARS! I get relief because of two football guys—George Anderson, an ex-trainer from the Oakland Raiders, and Ronnie Lott, an ex-defensive back. With decades of experience in a bone-crushing sport, including 7 Super Bowl wins, they know injuries...and how to handle them.

They tried magnetic field therapy, and saw for themselves it works. It is believed that the magnets work on the human body by actually enlarging the diameter of veins, arteries, and capillaries. This "vaso-ventilation" increases blood flow, aids circulation, reduces inflammation, and suppresses the body's production of pain-causing chemicals.

Do-it-yourself pain treatment. George and Ronnie's breakthrough was to create a company that makes bio magnetic therapy available and affordable for the ordinary "weekend warrior" like me. The magnets are simply put over the problem area and held there for minutes...hours...all day long...or all night while sleeping, as desired. The inventors recommend a PREVENTATIVE strategy: strapping them on prior to exercise. They also recommend a TREATMENT strategy: as soothing treatment for muscles following an injury. It's 100% natural, non-intrusive, safe, and has been used by thousands of former pain-sufferers.

Permanent magnets and comfortable belts. When you buy BMI Magnets, you get four permanent magnetic disks—two 1.5" and two 4". You also get four belts made of soft, durable, washable medical foam and neoprene into which the disks slip. The Back Belt takes care of bad backs like mine, and the other belts let you apply the magnets to just about any place on your aching body.

Try it...you have nothing to lose but pain! Exasperation with pain motivated me to try just about anything for relief, and that got me my solution: BMI Magnets. My advice to anyone with chronic or occasional pain is to give these a try. At only $69.95, they're equivalent to a couple of trips to physical therapy. They come with a 30-day manufacturer's warranty and Comtrad's exclusive risk-free home trial. If you are not completely satisfied, return them within 90 days for a full "No Questions Asked" refund. Magnetic therapy system is not a medical device.



BMI Magnetic Kit. . . . . $69.95 $7.95 S&H

Kit includes one lower back belt, two small disks, two large disks, and three body wraps (10", 15" and 20").

Magnetic therapy products should not be worn during pregnancy and should not be used by individuals with a cardiac pacemaker or defibrillator.

Please mention promotional code **4133-Z118.**

For fastest service, call toll-free 24 hours a day

800-704-1211

To order by mail, send check or money order for the total amount including S&H. To charge it to your credit card, enclose your account number and expiration date.

Virginia residents only—please include 4.5% sales tax.

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EXHIBIT 3

TECHNOLOGY UPDATE

Finally...a drug-free way to combat hair loss!

Nisim International has combined the wisdom of ancient phytotherapy with modern science to create a dramatic hair-loss therapy.

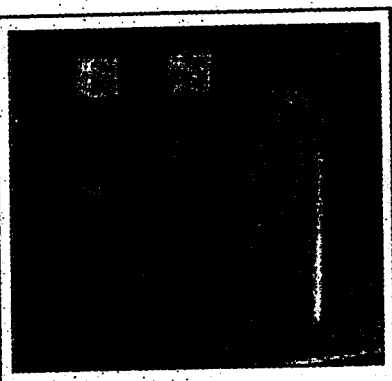
by Justin Ellett

"Thanks for the haircut, Margot, but what's that big, bare spot on the top of my head?" That was me, a year ago, joking with my hairdresser. Some joke! I was balding fast. I hounded barbers and hairdressers, thinking that among all their bottles, vials, and potions they must have a solution to what was becoming a major embarrassment for me.

Falling hair, falling self esteem. I'd wake up and count the hairs on my pillow. So many! I'd gently tug on what was once a dense forelock and out would pop four, six, ten more hairs. I started looking older... much older than I actually was. I'm no movie star, but turning into a "chrome dome" was putting a serious dent in my self esteem, and I actually started avoiding people at the office and at parties.

Personal advice from a pro. Well, Margot came through for me when she recommended Nisim NewHair Biofactors® Stimulating System. She confided she used it herself and she has the thickest head of hair you'd ever want to see. (That's why she does!) She told me there were several hair restorers out there, but she warned, "Those prescription ones actually get into your blood stream." I had enough trouble with hair loss. I didn't want to risk who-knows-what with hair growth drugs floating through my system.

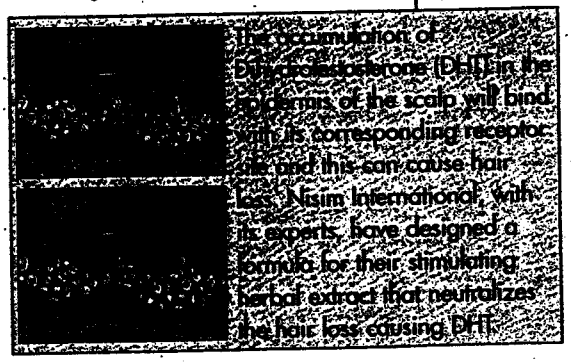
Concentrated Nisim is about a fraction of the cost of heavily-advertised restorers, is simple to use (just 2 steps), and is formulated for both men and women. Herbal-based solution may stop excessive hair loss in a matter of days. Nisim is a two-part system extracted from natural herbs. Lather up daily with Nisim Scalp Cleansing Shampoo, a specially prepared, deep-cleansing formula. It effectively removes perspiration and surface oils which are harmful to your hair follicles. Far more significant, it also neutralizes Dihydrotestosterone (DHT)—a hormone-based chemical both men and women produce that actually causes your hair to weaken and not re-grow. Then, apply just a few drops of Nisim Hair Stimulating Extract to your thinning areas and massage it into your scalp. Later in the day, apply the extract again. That's it!

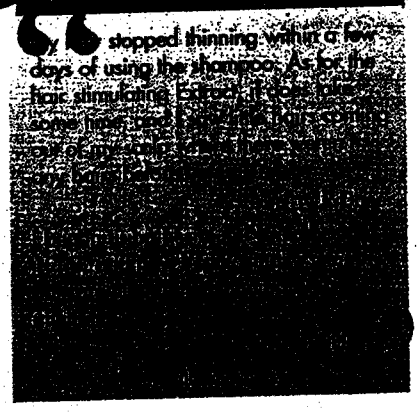


Nisim Advantages

- **Shampoo alone combats excessive hair loss in a matter of days.**
- **Neutralizes and controls the causes of premature or excessive hair loss.**
- **Not a drug—safe to use with no ill side effects.**

Rich and nourishing. Micro-encapsulated, micro-emulsified Nisim Extract slips between the cells of your scalp to penetrate deep into the hair follicles themselves, where it nourishes, nurses, and revives failing hair replacement cells. Its double-extracted fatty acids feed and stimulate your hair. Its palmetto extract contains cyclic ringed carbons that protect your scalp. Its sulfur-containing amino acids are building blocks for protein...and hair is made of protein! More ingredients strengthen and support each hair, supply growth energy, and optimize growing conditions. Finally, naturally-occurring vasodilators maximize your body's use of all this natural goodness.





"I stopped thinning within a few days of using the shampoo. As for the hair stimulating Extract, I [illegible] some hair [illegible] for [illegible] of only [illegible]"

Time to stop losing! If you're losing your hair like I was, you've already lost enough. Try Nisim NewHair Biofactors® Stimulating System RISK-FREE. The system comes with Comtrad's 90-day risk-free home trial. If you're not completely satisfied, simply return it for a full "No Questions Asked" refund.

New Hair Biofactors® System
. . . . . **$49.95** $12 S&H

Kit includes 8oz. Normal to Dry Shampoo, 8oz. Finishing Rinse, 8oz. Gel Formula Stimulating Extract or 8oz. Normal to Oily Shampoo, 8oz.Oil Free Conditioner., 8oz, Original Formulation Extract

Please mention promotional code **6182-Z119.**

For fastest service, call toll-free 24 hours a day

800-704-1211

To order by mail, send check or money order for the total amount including S&H. To charge it to your credit card, enclose your account number and expiration date.

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EXHIBIT 4

TECHNOLOGY UPDATE

The world's most effective air purification... and it takes up no floor space!

The Clarion air filter fan removes dust, smoke particles, pollen, molds and other airborne contaminants as small as 0.1 micron.

by Michael Terry

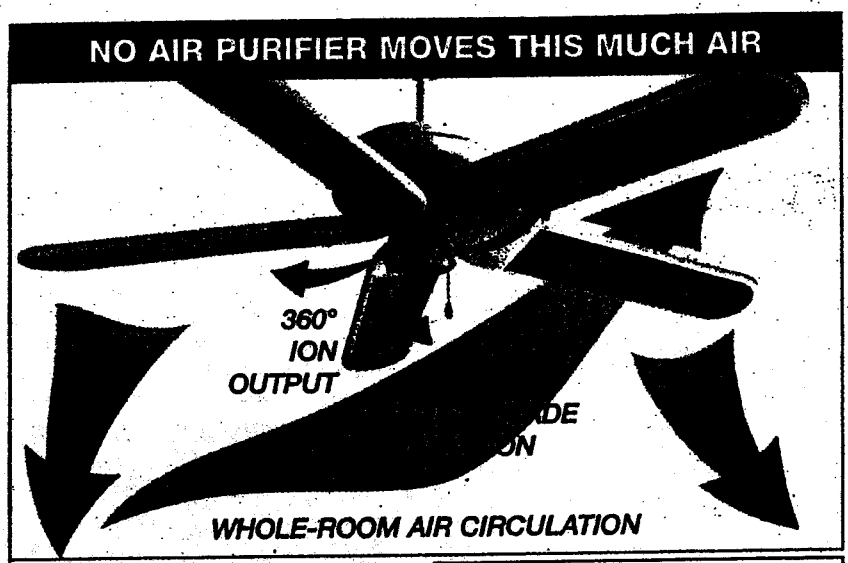
In our travels we noticed that the finest hotels and restaurants, no matter how well air-conditioned, depended upon ceiling fans for customer comfort. They are out of the way, have no tangling cords yet provide silent, draft-free circulation for an entire room. We were so impressed we decided to put them in the new home we were building. So we went shopping and—made a marvelous discovery!

It's a brand new kind of ceiling fan—nothing else like it on the market—the Clarion "Air-Cleaning" fan: It's silent, powerful, draft-free, has all the Euro-style charm of traditional fans but, get this, it also cleans your air every second it's on!

Sweeps away odors, smoke, dust, with every stroke. There is no "gadgety" look, none of the whir and blow of conventional air cleaners. A clever carbon filtration system is built unobtrusively into each fan blade. An ionizer hidden in the fan's center pre-charges contaminant particles for easy retrieval; doubling the fan's filtration efficiency.

Every silent stroke of the 5 fan blades cleans away stale smoke and cooking odors. Dangerous dust mites and pet dander are swept from the air.

All day, all night, relief from allergies. Many notes from allergy sufferers tell us what an amazing difference the Clarion fan has made. Why is it more effective than traditional air cleaners? First, because its use is almost automatic: You flip on the fan and it goes to work, silently efficiently, circulating air throughout your room—filtering pollen, mold, airborne contaminants, with every turn of the blade. It doesn't occupy the table or floor space or make the motor noises of a conventional room air cleaner, yet it purifies a 12'x 16' room with ease. It consumes no more power than a 65-watt bulb so many people leave it on all day.

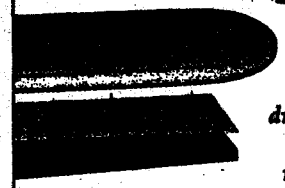


Better cooling and heating efficiency than ever before. You've experienced it in your own home—part of the room is cool, part too warm. There's no air movement to blend temperatures. Or, even if your heating and air-conditioning systems are working perfectly, rooms become stuffy. The problem: no circulation. Stagnant air, with its odors and fine dirt particles, just hangs there.

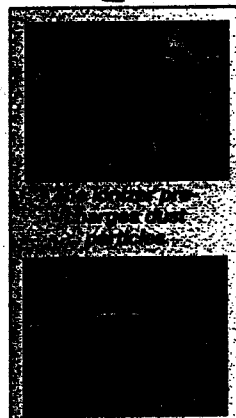
The best test of this fan is your first party! As your rooms fill and conversations become active, it's surprising how quickly temperatures seem to rise. Quietly turn on the Clarion Air Cleaning Fan and, in a few minutes, watch how your guests brighten up. Fresh air circulates freely, the stuffiness is whisked away. You'll be amazed how quickly it takes effect!

A major life style improvement for a modest price. For less than the price of most small TVs this revolutionary new air cleaning fan will bring you and your guests years and years of comfort. During allergy or high-fog periods it can be a godsend for sensitive people. It will certainly pay for itself in more efficient heating and cooling costs. It comes with a two-year manufacturer's limited warranty and Comtrad's exclusive risk-free home trial. If you are not satisfied for any reason, simply return it within 30 days for a complete "No Questions Asked" refund.

Dual Filtration Technology



As the fan blades rotate, dust, smoke, pollen and unpleasant cooking or pet odors are literally swept right out of the air.



The coolest way to clean your air

- Removes dust, smoke particles, pollen, molds and other airborne contaminants as small as 0.1 micron.
- Carbon filter helps to reduce unpleasant cooking and pet/nursery odors.
- Energy efficient—evenly distributes warm or cool air for maximum comfort in winter or summer.
- Occupies no valuable table or floor space
- 12' x 16' recommended room size based on ANSI/AHAM AC-1 testing

"I have asthma and allergies...I use my Clarion fan in my bedroom and I absolutely love it! I just can't say enough about it...don't ever discontinue it!
S.B.
Easton, MA
—results may vary"

Ionic Filter Ceiling Fan
. . . . . $199.95 $19.95 S&H

Please mention promotional code 7171-Z109.

For fastest service, call toll-free 24 hours a day

800-704-1211

To order by mail, send check or money order for the total amount including S&H. Or charge it to your credit card by enclosing your account number and expiration date.

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EXHIBIT 5

Why put up with unpleasant odors?

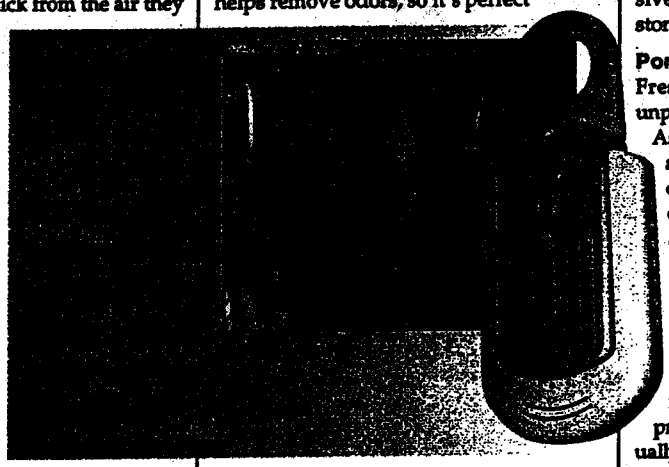
Three ionic solutions for everyday pollution problems

Three revolutionary products help you purify your air, neutralize unpleasant odors and freshen your garments using the latest ionic technology.

by Rob Gilmore

If you think air pollution is strictly an outdoor problem, you're in for a surprise. According to the Environmental Protection Agency, indoor air pollution represents our nation's biggest pollution problem. This is largely due to the fact that buildings and structures tend to block out nature's cleaning agents, trapping the pollutants inside with us. What's more people are more likely to get sick from the air they breathe indoors than outdoors. That's because we are trapped inside with everything from mold and mildew to bacteria and chemicals. Pet odors, organic odors and chemical odors are simply an indication of what we are breathing. Now, an innovative company has developed breakthrough technology that can actually recreate the natural process that combats air pollution. They have incorporated this revolutionary concept into three products that can help improve the air we breathe.

The indoor pollution solution. The Sila Air Purifiers and Deodorizers from Lentek use new Zyonic technology to neutralize nasty odors and create cleaner, fresher air. They help solve the problem of indoor air pollution the same way that nature tries to solve pollution outdoors. They rid air of pollutants and odors by creating super oxygenated molecules, which convert the odors to pure oxygen. This process also introduces negative ions to pollutants like dust, smoke, soot and pollen. The combined molecules drop to the ground, significantly reducing the number of airborne pollutants.



Portable purification. The Sila Air Purifier/Deodorizer puts the latest Zyonic technology into a plug-in unit with two selectable settings. The Super O3 setting helps remove odors, so it's perfect for kitchens, laundry rooms, bathrooms, basements and pet areas. The Super Ionic Release setting helps remove airborne particles, so it's great for bedrooms, living rooms, hallways and dens. This is the first product that includes these two technologies in a single compact unit. Just plug it into any outlet, and it operates silently. Since it operates on just pennies a day, you can put one in each room of your house. By providing a flow of 125 trillion ions per second, this portable purifier covers up to a 12-foot by 12-foot area. The unit includes a handy night light, and there are no expensive filter to replace...all you have to do is plug it in.

Sweep away unpleasant

You can take it with you. We not only breathe indoor pollution, we carry it around on our clothes. Even though that dress jacket may not be dirty, it no longer has that fresh from the cleaner smell. After a night out, it may even smell of stale smoke. In today's society, whether you're on business or leisure travel, you might not have the luxury of bringing several garments with you. You still want to have fresh, clean clothing, and dry cleaning may not be an option. It can be expensive, inconvenient and can shorten the life of your clothes. Now, the Sila Closet, Garment and Travel Air Purifier and Deodorizer lets you take Zyonic technology on the road. This handy device hangs directly in your closet or garment bag, making it ideal for business travelers. It also has an exclusive "Cedar Bead Chambers" that protect stored clothing from mold and insects.

Portable dry cleaner. The Sila Clothes Freshener and Lint Brush sweeps away unpleasant odors using Zyonic technology. As it removes the odors, it removes lint and pet hair at the same time. It silently circulates air to help rid the clothes of odor. It operates on one 9-volt battery and can easily fit into a pocket or purse. It has a flashing green light to indicate that it's working and an automatic shutoff that is activated after 5 minutes.

Try them for yourself...risk-free. Now you can protect yourself from indoor air pollution...for a reduced price. You can get these purifiers individually, or get a special discount for ordering all three. They come with a two-year manufacturer's limited warranty and Comtrad's exclusive risk-free home trial. If you are not completely satisfied for any reason, simply return your purchase within 90 days for a full "No Questions Asked" refund.

Ionic Air Purifier ..... **$49.95** $4.95 S&H
Ionic Garment Purifier ..... **$49.95** $4.95 S&H
Ionic Clothes Freshener/Lint Brush ..... **$49.95** $4.95 S&H
2 or more ..... **$39.95 each** $4.95 S&H

Please mention promotional code **7291-Z109.**

For fastest service, call toll-free 24 hours a day

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To order by mail, send check or money order for the total amount including S&H. Or charge it to your credit card by enclosing your account number and expiration date.
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EXHIBIT 6

DECISION AND ORDER

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

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

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

1. Respondent TechnoBrands, Inc. ("TBI") is a Virginia corporation with its principal office or place of business at 1998 Ruffin Mill Road, Colonial Heights, Virginia 23834.

2. Respondent Charles J. Anton ("Anton") is a shareholder and President of TBI. His principal office or place of business is the same as that of TBI.

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

ORDER

DEFINITIONS

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

1. "Competent and reliable scientific evidence" shall mean tests, analyses, research, studies, or other evidence based on the expertise of professionals in the relevant area, that has been conducted and evaluated in an objective manner by persons qualified to do so, using procedures generally accepted in the profession to yield accurate and reliable results.

2. Unless otherwise specified, "respondents" shall mean TBI, its successors and assigns and its officers; Anton, individually and as an officer of TBI; and each of the above's agents, representatives, and employees.

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

I.

IT IS ORDERED that respondents, directly or through any corporation, subsidiary, division, or other device, in connection with the labeling, advertising, promotion, offering for sale, sale, or distribution of the Hollywood 48-Hour Miracle Diet or any substantially similar product in or affecting commerce, shall not make any representation, in any manner, expressly or by implication, that:

A. Consumers who use such product can lose 10 lbs. in 48 hours; or

B. Many celebrities, actors, actresses, and models – including some that star in the television shows E.R. and Friends – have lost substantial weight by using such product;

unless at the time the representation is made, respondents possess and rely upon competent and reliable evidence that substantiates the representation. In the case of the representation set forth in subparagraph A (regarding weight loss) the substantiation must consist of competent and reliable scientific evidence.

II.

IT IS FURTHER ORDERED that respondents, directly or through any corporation, subsidiary, division, or other device, in connection with the labeling, advertising, promotion, offering for sale, sale, or distribution of the Enforma System or any substantially similar product in or affecting commerce, shall not make any representation, in any manner, expressly or by implication, that:

A. Consumers who use such product can lose substantial weight without the need for a restricted calorie diet or exercise; or

B. Consumers who use such product can avoid weight gain without the need for a restricted calorie diet or exercise;

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

III.

IT IS FURTHER ORDERED that respondents, directly or through any corporation, subsidiary, division, or other device, in connection with the labeling, advertising, promotion, offering for sale, sale, or distribution of the BMI Magnetic Kit 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 relieves severe pain, whether chronic or occasional, anywhere in the body, including lower back pain, tennis elbow, carpal tunnel syndrome, hand pain, ankle strains, neck pain, shoulder pain, hip pain, muscle strains, and knee pain;

B. Such product can relieve pain more effectively than traditional medicine, anti-inflammatory drugs, massage, acupuncture, or chiropractic treatment; or

C. Such product relieves pain through magnetic field therapy, which enlarges the diameter of veins, arteries and capillaries, increases blood flow, aids circulation, reduces inflammation, and suppresses the body's production of pain-causing chemicals;

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

IV.

IT IS FURTHER ORDERED that respondents, directly or through any corporation, subsidiary, division, or other device, in connection with the labeling, advertising, promotion, offering for sale, sale, or distribution of the Nisim New Hair Biofactors System or any substantially similar product in or affecting commerce, shall not make any representation, in any manner, expressly or by implication, that:

A. Consumers who use such product can stop excessive hair loss in a matter of days; or

B. Such product is as effective at stimulating hair growth as prescription products, or other heavily advertised restorers (such as Rogaine or Propecia);

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

V.

IT IS FURTHER ORDERED that respondents, directly or through any corporation, subsidiary, division, or other device, in connection with the labeling, advertising, promotion, offering for sale, sale, or distribution of the Clarion Ionic Filter Ceiling Fan or any substantially similar product in or affecting commerce, shall not make any representation, in any manner, expressly or by implication, that:

A. Consumers who use such product will experience relief from allergies and other respiratory problems; or

B. Such product eliminates dust mites and pet dander from a user's environment;

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

VI.

IT IS FURTHER ORDERED that respondents, directly or through any corporation, subsidiary, division, or other device, in connection with the labeling, advertising, promotion, offering for sale, sale, or distribution of the Sila Ionic Air Purifier or any substantially similar product in or affecting commerce, shall not make any representation, in any manner,
expressly or by implication, that the Sila air purifier eliminates mold, mildew, bacteria, chemicals, and pollutants from a user's environment, unless at the time the representation is made, respondents possess and rely upon competent and reliable scientific evidence that substantiates the representation.

VII.

IT IS FURTHER ORDERED that respondents, directly or through any corporation, subsidiary, division, or other device, in connection with the labeling, advertising, promotion, offering for sale, sale, or distribution of any product or service in or affecting commerce, shall not make any representation, in any manner, expressly or by implication, about the comparative or absolute benefits, performance, or efficacy of such product or service, 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.

VIII.

IT IS FURTHER ORDERED that respondents, directly or through any corporation, subsidiary, division, or other device, in connection with the labeling, advertising, promotion, offering for sale, sale, or distribution of any product or service in or affecting commerce, shall not misrepresent, in any manner, expressly or by implication, the existence, contents, validity, results, conclusions, or interpretations of any test, study, or research.

IX.

IT IS FURTHER ORDERED that respondents, directly or through any corporation, subsidiary, division, or other device, in connection with the labeling, advertising, promotion, offering for sale, sale, or distribution of any product or service in or affecting commerce, shall not represent, in any manner, expressly or by implication, that: (A) Any user testimonial or endorsement of the product reflects the actual and current opinions, findings, beliefs, or experiences of the user or (B) the experience represented by any user testimonial or endorsement of the product represents the typical or ordinary experience of members of the public who use the product, unless:

1. 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; or

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

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

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

For purposes of this Part, "endorsement" shall mean as defined in 16 C.F.R. § 255.0(b).

X.

IT IS FURTHER ORDERED that, no later than the date this order becomes final, respondents shall pay to the Federal Trade Commission the sum of two hundred thousand dollars ($200,000), under the following terms and conditions:

A. The payment shall be made by wire transfer or certified or cashier’s check made payable to the Federal Trade Commission. In the event of any default in payment, which default continues for ten (10) days beyond the due date of payment, the amount due, together with interest, as computed pursuant to 28 U.S.C. § 1961 from the date of default to the date of payment, shall immediately become due and payable.

B. The funds paid by respondents, together with any accrued interest, shall, in the discretion of the Commission, be used by the Commission to provide direct redress to purchasers of the products outlined in the complaint issued

in this proceeding, and to pay any attendant costs of administration. If the Commission determines, in its sole discretion, that redress to purchasers of this product is wholly or partially impracticable or is otherwise unwarranted, any funds not so used shall be paid to the United States Treasury. Respondents shall be notified as to how the funds are distributed, but shall have no right to contest the manner of distribution chosen by the Commission. No portion of the payment as herein provided shall be deemed a payment of any fine, penalty or punitive assessment.

C. Respondents relinquish all dominion, control and title to the funds paid, and all legal and equitable title to the funds vests in the Treasurer of the United States and in the designated consumers. Respondents shall make no claim to or demand for return of the funds, directly or indirectly, through counsel or otherwise; and in the event of bankruptcy of respondent, respondent acknowledges that the funds are not part of the debtor's estate, nor does the estate have any claim or interest therein.

XI.

IT IS FURTHER ORDERED that respondent TBI, and its successors and assigns, and respondent Anton shall, for three (3) years after the last date of dissemination of any representation covered by this order, maintain and upon request make available to the Federal Trade Commission for inspection and copying:

A. All advertisements and promotional materials containing the representation;

B. All materials that were relied upon in disseminating the representation; and

C. All tests, reports, studies, surveys, demonstrations, or other evidence in 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.

XII.

IT IS FURTHER ORDERED that respondent TBI, and its successors and assigns, and respondent Anton (when Anton is the majority shareholder or officer of a business involved in the advertising and sale of products to the public) shall deliver a copy of this order to all current and future principals, officers, directors, and managers, and shall secure from each such person a signed and dated statement acknowledging receipt of the order. Respondents shall deliver this order to current above referenced personnel within thirty (30) days after the date of service of this order, and to future above referenced personnel within thirty (30) days after the person assumes such position or responsibilities. Respondents shall maintain for a period of three (3) years after creation, and upon reasonable notice, make available to representatives of the Commission, the original signed and dated acknowledgments of the receipt of copies of this order.

XIII.

IT IS FURTHER ORDERED that respondent TBI, and its successors and assigns, and respondent Anton (when Anton is the majority shareholder or officer of a business involved in the advertising and sale of products to the public) shall deliver a copy of Attachment A to this order to all current and future employees, agents, and representatives having responsibilities with respect to the advertising and sale of products to the public, and shall secure from each such person a signed and dated statement acknowledging receipt of Attachment A. Respondents shall deliver Attachment A 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 for a period of three (3) years after creation, and upon reasonable notice, make available to representatives of the Commission, the original

signed and dated acknowledgments of the receipt of copies of Attachment A.

XIV.

IT IS FURTHER ORDERED that respondent TBI 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 respondents learn less than thirty (30) days prior to the date such action is to take place, respondents shall notify the Commission as soon as is practicable after obtaining such knowledge. All notices required by this Part shall be sent by certified mail to the Associate Director, Division of Enforcement, Bureau of Consumer Protection, Federal Trade Commission, 600 Pennsylvania Avenue, N.W., Washington, D.C. 20580.

XV.

IT IS FURTHER ORDERED that respondent Anton, for a period of three (3) years after the date of issuance of this order, shall notify the Commission of the discontinuance of his current business or employment, or of his affiliation with any new business or employment involving the sale of consumer products and/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, 600 Pennsylvania Avenue, N.W., Washington, D.C. 20580.

XVI.

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

XVII.

This order will terminate on April 15, 2022, 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.

ATTACHMENT A

LEGAL NOTICE

As a result of an agreement among TBI and Charles Anton (collectively the "business") and the Federal Trade Commission, you are to be informed of the following:

- In connection with the labeling, advertising, promotion, offering for sale, sale, or distribution of the Hollywood 48-Hour Miracle Diet, or any substantially similar product in or affecting commerce, there shall be no representation made in any manner, expressly or by implication, that:

(1) Consumers who use such product can lose 10 lbs. in 48 hours; or

(2) Many celebrities, actors, actresses, and models – including some that star in the television shows E.R. and Friends – have lost substantial weight using such product; unless at the time the representation is made, the business possesses and relies upon competent and reliable evidence that substantiates the representation. In the case of the representation set forth in subparagraph (1) (regarding weight loss), the substantiation must consist of competent and reliable scientific evidence.

- In connection with the labeling, advertising, promotion, offering for sale, sale, or distribution of the Enforma System, or any substantially similar product in or affecting commerce, there shall be no representation made in any manner, expressly or by implication, that:

  (1) Consumers who use such product can lose substantial weight without the need for a restricted calorie diet or exercise; or

  (2) Consumers who use such product can avoid weight gain without the need for a restricted calorie diet or exercise;

  unless at the time the representation is made, the business possesses and relies upon competent and reliable scientific evidence that substantiates the representation.

- In connection with the labeling, advertising, promotion, offering for sale, sale, or distribution of the BMI Magnetic Kit, or any substantially similar product in or affecting commerce, there shall be no representation made in any manner, expressly or by implication, that:

  (1) Such product relieves severe pain, whether chronic or occasional, anywhere in the body, including lower back pain, tennis elbow, carpal tunnel syndrome, hand pain, ankle strains, neck pain, shoulder pain, hip pain, muscle strains, and knee pain;

  (2) Such product can relieve pain more effectively than traditional medicine, anti-inflammatory drugs, massage, acupuncture, or chiropractic treatment; or

  (3) Such product relieves pain through magnetic field therapy, which enlarges the diameter of veins, arteries and capillaries, increases blood flow, aids circulation, reduces inflammation, and suppresses the body's production of pain-causing chemicals;

  unless at the time the representation is made, the business possesses and relies upon competent and reliable scientific evidence that substantiates the representation.

- In connection with the labeling, advertising, promotion, offering for sale, sale, or distribution of the Nisim New Hair Biofactors System, or any substantially similar product in or affecting commerce, there shall be no representation made in any manner, expressly or by implication, that:

  (1) Consumers who use such products can stop excessive hair loss in a matter of days; or

  (2) Such product is as effective at stimulating hair growth as prescription products, or other heavily advertised restorers (such as Rogaine or Propecia);

  unless at the time the representation is made, the business possesses and relies upon competent and reliable scientific evidence that substantiates the representation.

- In connection with the labeling, advertising, promotion, offering for sale, sale, or distribution of the Clarion Ionic Filter Ceiling Fan or any substantially similar product in or affecting commerce, there shall be no representation made in any manner, expressly or by implication, that:

  (1) Consumers who use such product will experience relief from allergies and other respiratory problems; or

  (2) Such product eliminates dust mites and pet dander from a user's environment;

  unless at the time the representation is made, the business possesses and relies upon competent and reliable scientific evidence that substantiates the representation.

- In connection with the labeling, advertising, promotion, offering for sale, sale, or distribution of the Sila Ionic Air Purifier, or any substantially similar product in or affecting commerce, there shall be no representation made in any manner, expressly or by implication, that the Sila Ionic Air Purifier eliminates mold, mildew, bacteria, chemicals, and pollutants from a user's environment, unless at the time the representation is made, the business possesses and relies upon competent and reliable scientific evidence that substantiates the representation.

- In connection with the labeling, advertising, promotion, offering for sale, sale, or distribution of any product or service in or affecting commerce, there shall be no representation made in any manner, expressly or by implication, about the comparative or absolute benefits, performance, or efficacy of such product or service unless, at the time the representation is made, the business possesses and relies upon competent and reliable evidence, which when appropriate must be competent and reliable scientific evidence, that substantiates the representation.

- In connection with the labeling, advertising, promotion, offering for sale, sale, or distribution or any product or service in or affecting commerce, there shall be no misrepresentation made in any manner, expressly or by implication, regarding the existence,

contents, validity, results, conclusions, or interpretations of any test, study, or research.

- In connection with the labeling, advertising, promotion, offering for sale, sale, or distribution of any product or service in or affecting commerce, there shall be no representation in any manner, expressly or by implication, that:

    (1) Any user testimonial or endorsement of the product reflects the actual and current opinions, findings, beliefs, or experiences of the user; or

    (2) The experience represented by any user testimonial or endorsement of the product represents the typical or ordinary experience of members of the public who use the product, unless:

        (a) The representation is true and, at the time it is made, the business possesses and relies upon competent and reliable scientific evidence that substantiates the representation; or

        (b) The business discloses clearly and prominently, and in close proximity to the endorsement or testimonial, either:

            (i) what the generally expected results would be for users of the product;or

            (ii) the limited applicability of the endorser's experience to what consumers may generally expect to achieve, that is, that consumers should not expect to experience similar results.

ANY VIOLATION OF THIS AGREEMENT COULD RESULT IN SUBSTANTIAL MONETARY OR OTHER PENALTIES FOR TBI OR MR. ANTON. ANY QUESTION YOU MAY HAVE REGARDING YOUR CONDUCT AND THIS AGREEMENT SHOULD BE DIRECTED TO AN OFFICER OF TBI OR OUR

OUTSIDE LEGAL COUNSEL, W. JEFFERY EDWARDS (804-788-8721), AS SOON AS POSSIBLE.

I acknowledge that I have received this LEGAL NOTICE

_____
Print Name

_____
Signature

_____
Date

Analysis of Proposed Consent Order to Aid Public Comment

The Federal Trade Commission has accepted, subject to final approval, an agreement to a proposed consent order from respondents TechnoBrands, Inc., and Charles J. Anton, individually and as president of the corporate respondent.

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 products to the public, including the Hollywood 48-Hour Miracle Diet, a liquid diet; the Enforma System, a diet product combination consisting primarily of chitosan and pyruvate; the BMI Magnetic Kit, a set of magnets with purported analgesic properties; the Nisim New Hair Biofactors System, a purported hair-growth product; the Clarion Ionic Filter Ceiling Fan, an air-cleaning device; and the Sila Ionic Air Purifier, another air-cleaning device. The Commission's complaint charges that respondents violated the Federal Trade Commission Act, 15 U.S.C. § 41 *et seq.*, by making numerous representations that were false and/or for which they lacked a reasonable basis of substantiation. These representations concerned: the weight loss that consumers can achieve with the Hollywood Diet and Enforma; the pain relief that can be achieved with the BMI Magnetic Kit; the effectiveness of Nisim in stopping hair loss and stimulating hair growth; the ability of the air cleaners to eliminate various pollutants from indoor space; the health benefits of using the Clarion Fan; the scientific evidence for the efficacy of some of these products; the comparative efficacy of some of these products; and the experiences of consumers and celebrities who purportedly have used some of these products.

Analysis

Part I of the proposed order prohibits a representation that consumers who use the Hollywood Diet, or any substantially similar product, can lose 10 lbs. in 48 hours, unless respondents possess competent and reliable scientific evidence that substantiates the representation. In addition, Part I prohibits representations that celebrities, such as actors and actresses in popular television programs, have lost substantial weight by using the product, unless the respondents possess competent and reliable evidence that substantiates the representations.

Part II of the proposed order prohibits representations that by using Enforma, or any substantially similar product, consumers can achieve substantial weight loss, or avoid weight gain, without a restricted calorie diet or exercise, unless respondents possess competent and reliable scientific evidence that substantiates the representations.

Part III of the proposed order prohibits representations that use of the BMI Magnetic Kit, or any substantially similar product, relieves severe pain; relieves pain more effectively than other kinds of treatment; and relieves pain by enlarging blood vessels, increasing blood flow, reducing inflammation, or suppressing the body's production of pain-causing chemicals, unless respondents possess competent and reliable scientific evidence that substantiates the representations.

Part IV of the proposed order prohibits representations that Nisim, or any substantially similar product, stops hair loss in a matter of days or stimulates hair growth as effectively as prescription products, unless respondents possess competent and reliable scientific evidence that substantiates the representations.

Part V of the proposed order prohibits representations that the Clarion Ceiling Fan, or any substantially similar product, eliminates dust mites and pet dander from the user's environment, or that consumers who use the product will experience relief from allergies and other respiratory problems, unless respondents possess competent and reliable scientific evidence that substantiates the representations.

Analysis

Part VI of the proposed order prohibits representations that the Sila Air Purifier, or any substantially similar product, eliminates mold, mildew, bacteria, chemicals, and other pollutants from a user's environment, unless respondents possess competent and reliable scientific evidence that substantiates the representations.

Part VII of the proposed order prohibits unsubstantiated representations about the comparative or absolute benefits, performance, or efficacy of any product or service.

Part VIII of the proposed order prohibits misrepresentations about the existence, contents, validity, results, conclusions, or interpretations of any test, study, or research.

Part IX of the proposed order prohibits representations that any user testimonial or endorsement of a product reflects the actual experience of the user or that the user's experience is the typical experience of members of the public using the product, unless: (1) the representation is true and substantiated by competent and reliable scientific evidence; or (2) there is a disclosure of either the generally expected results for users of the product, or that consumers should not expect to experience similar results.

Part X of the proposed order requires that respondents pay to the Federal Trade Commission the sum of $200,000.

Part XI of the proposed order is a record keeping provision that requires the respondents to maintain certain records for three (3) 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 XII of the proposed order requires distribution of the order to current and future principals, officers, directors, and managers of the corporation.

Analysis

Part XIII of the proposed order requires distribution of Attachment A to the order to current and future employees, agents, and representatives having responsibilities with respect to the advertising and sale of products to the public. Attachment A is entitled "Legal Notice" and is a summary of the injunction provisions of the proposed order.

Part XIV 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 XV of the proposed order requires that for a period of three (3) years, the 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 and/or services.

Part XVI of the proposed order requires the respondents to file a compliance report with the Commission.

Part XVII 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

INTERSTATE BAKERIES CORPORATION

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

Docket C-4042; File No. 0123182
Complaint, April 16, 2002--Decision, April 16, 2002

This consent order addresses allegedly unsubstantiated representations made by Respondent Interstate Bakeries Corporation – on television and in Internet advertising – about the effects of the calcium in Wonder Bread on children's memory and brain function. The order, among other things, prohibits the respondent from representing that – as a good source of calcium – Wonder Bread helps children's minds work better, or helps children remember things, without possessing competent and reliable scientific evidence that substantiates the claim. The order also requires the respondent to possess competent and reliable scientific evidence for any claim that any of its breads, bread products, rolls or muffins – or any of their ingredients – helps brain function or memory, or can treat, cure or prevent any disease or related health condition. In addition, the order provides that a mere statement that a product contains a particular vitamin or mineral will not, without more, be considered for purposes of this order a representation that the product can treat, cure or prevent any disease or related health condition.

Participants

For the Commission: *Richard F. Kelly, Kial S. Young, Mary K. Engle,* and *Joseph P. Mulholland.*

For the Respondent: *Michael L. Sibarium, Winston & Strawn.*

COMPLAINT

The Federal Trade Commission, having reason to believe that Interstate Bakeries Corporation, a corporation ("respondent"), has violated the provisions of the Federal Trade Commission Act, and it appearing to the Commission that this proceeding is in the public interest, alleges:

1. Respondent Interstate Bakeries Corporation ("IBC") is a Delaware corporation with its principal office or place of business at 12 East Armour Boulevard, Kansas City, Missouri, 64111. IBC operates bakeries throughout the United States, distributing baked goods marketed under national and regional brands, including Wonder, Home Pride, Beefsteak, and Sunbeam. IBC produces and disseminates advertising in the form of television programming that is disseminated through cable channels, broadcast stations, and via the Internet.

2. Respondent has manufactured, advertised, labeled, offered for sale, sold, and distributed products to the public, including Wonder Bread. Wonder Bread is a "food," within the meaning of Sections 12 and 15 of the Federal Trade Commission Act.

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

4. Respondent has disseminated or has caused to be disseminated advertisements and other promotional material for Wonder Bread, including but not limited to the attached Exhibits A and B. According to the product labels, Wonder Bread contains, among other ingredients, calcium. The attached advertisements and promotional material for Wonder Bread contain the following statements:

A. "PROFESSOR WONDER: Moms know calcium helps build strong bones. But did you know it helps build strong minds, too? * Neurons in your brain need calcium to transmit signals. Without it, they can be, well, a little slow. [Inside Missy's brain, Professor Wonder sees tired neurons that have obviously not gotten enough calcium] Let's see what happens when you give them soft, delicious Wonder Bread. [Professor Wonder, with the help of Mom, constructs a demonstration that will allow Missy to get her calcium.] A good source of calcium with vitamins and minerals.

WOMAN: [After Missy takes a bite of her sandwich, Mom directs Missy to do her homework in order to show how well the calcium worked. Professor Wonder looks into her brain again.] Missy, go do your homework. [Inside Missy's brain we see lively, active neurons.]
NEURON: Let's go, guys, time to do homework.
PROFESSOR WONDER: Wow! I've never seen anything like it! Calcium helps you remember things, too. So remember, Wonder helps build strong bodies and minds."

* The following superscript appears in small, white type, on varying backgrounds, at the bottom of the screen, for approximately three (3) seconds: "With regular exercise and a balanced diet."

(Exhibit A) (Exhibit A is a storyboard of a thirty-second television advertisement) (*See also* Exhibit C, a videotape version of the advertisement)

B. "Parents know calcium helps build strong bones, but did you know that with regular exercise and a balanced diet, calcium helps build strong minds too? Calcium can help you to remember things, which is good to know when you ... ah, er, um, oh yeah, ... lost your train of thought.

* * *

The neurons in the brain need calcium to help transmit their signals. Without calcium, neurons can become a little slow.

* * *

So, help your kids (and keep the whole family thinking sharply) by making sure they get enough calcium with a balanced diet and help from Wonder Bread.

* * *

[D]id you know that Wonder Bread is calcium fortified and now has 200% more calcium than regular white bread? So, when you're looking for a good source of calcium, go for the dough."

(Exhibit B) (Exhibit B is a printout from the Internet web site for Wonder Bread, www.wonderbread.com/calcium.html)(printed 2/21/01)

5. Through the means described in Paragraph 4, including but not necessarily limited to the advertisements attached as Exhibits A and B, respondent has represented, expressly or by implication, that:

A. As a good source of calcium, Wonder Bread helps children's minds work better, and

B. As a good source of calcium, Wonder Bread helps children remember things.

6. Through the means described in Paragraph 4, respondent has represented, expressly or by implication, that it possessed and relied upon a reasonable basis that substantiated the representations set forth in Paragraph 5, at the time the representations were made.

7. In truth and in fact, respondent did not possess and rely upon a reasonable basis that substantiated the representations set forth in Paragraph 5, at the time the representations were made. Therefore, the representation set forth in Paragraph 6 was, and is, false or misleading.

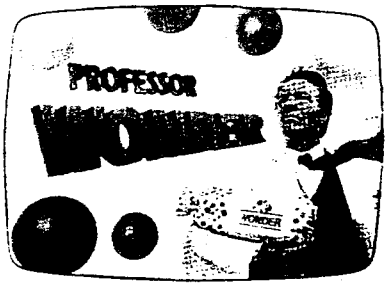
8. The acts and practices of respondent as alleged in this complaint constitute unfair or deceptive acts or practices, and the making of false advertisements, in or affecting commerce in violation of Sections 5(a) and 12 of the Federal Trade Commission Act.

THEREFORE, the Federal Trade Commission this sixteenth day of April, 2002, has issued this complaint against respondent.

By the Commission, Commissioner Anthony recused.

WONDER

New :30 Wonder Television Commercial
"Neurons"



1. *(Open on an frame of a heroic Professor Wonder holding a package of Wonder Bread.)*
   SUPER: PROFESSOR WONDER

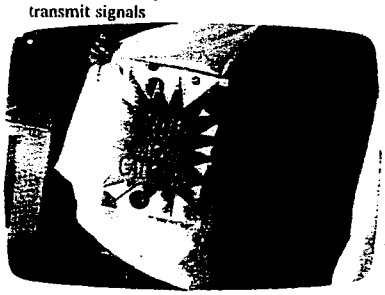
2. *(Professor Wonder confirms what moms know, that calcium, most frequently identified with milk, helps build strong bones.)*
   PW: Mom's know calcium helps build strong bones.

3. *(With the help of a brain prop, Professor Wonder shares new news with mom: that calcium helps build strong minds.)*
   PW: But did you know it helps build strong minds too.
   SUPER: WITH REGULAR EXERCISE AND A BALANCED DIET.

4. *(In an attempt to further explain this new news, Professor Wonder uses a souped-up magnifying glass to look into Missy's brain.)*
   PW: Neurons in your brain need calcium to transmit signals

5. *(Inside Missy's brain, Professor Wonder sees tired neurons that have obviously not gotten enough calcium.)*
   PW: With out it they can be, well, a little slow.

6. *(Professor Wonder, with the help of mom, constructs a demonstration that will allow Missy to get her calcium.)*
   PW: Let's see what happens when you give them soft delicious Wonder Bread.



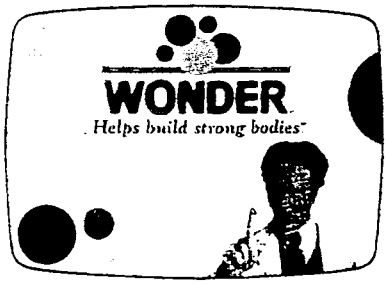
7. *(A visual demonstration of the 200% more calcium enrichment in Wonder Bread.)*
   PW: A good source of calcium with vitamins and minerals.

8. *(After Missy takes a bite of her sandwich, mom directs Missy to do her homework in order to show how well the calcium worked. Professor Wonder looks into her brain again.)*
   MOM: Missy, go do your homework.

9. *(Inside Missy's brain we see lively, active neurons.)*
   NEURON: Let's go guys, time to do homework.

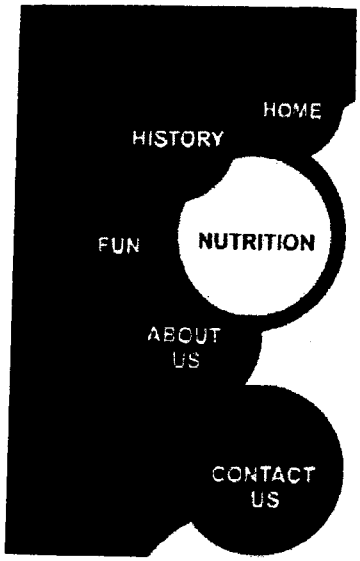
10. *(Professor Wonder is amazed by what he just saw.)*
    PW: Wow! I've never seen anything like it!

11. *(As we see the active neurons, Professor Wonder restates the new news we've just learned about calcium.)*
    PW: Calcium helps you remember things too.



12. *(Closing scene, again with Professor Wonder and the Wonder Bread logo.)*
    PW: So remember, Wonder helps build strong bodies, and minds!

Exhibit A



WONDER

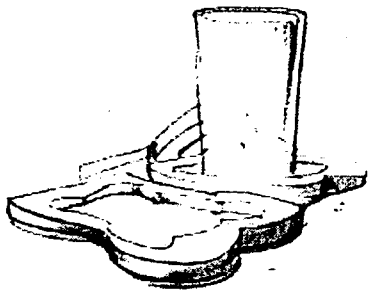
Calcium

Did you know that bones and teeth make up 99% of the body's calcium content? As the glue that holds the body's entire framework together, calcium is an important nutrient for building strong bodies and minds.

Brain Food

Parents know calcium helps build strong bones, but did you know that with regular exercise and a balanced diet, calcium helps build strong minds too? Calcium can help you to remember things, which is good to know when you . . . ah, er, um, oh yeah, . . . lose your train of thought.

Speaking of thinking. Everyone knows that your brain helps you think. But have you ever thought about your brain? As the main control center, the brain instructs the body on what to do, how to react as well as other basic functions. To communicate the different commands with your muscles, organs and nerves, the brain uses a vast network called the nervous system. In addition to the brain and spinal cord, the nervous system includes more than 100 billion nerves.



Although nerves are very small, they perform some very big, complex functions. When you need energy, your brain sends a message to your stomach to let you know that you're hungry and need nutrients to sustain your body. This messenger is known as a neuron. Also known as nerve cells, neurons electronically transmit these messages between the brain, spinal column and other nerves. The neurons in the brain require calcium to help transmit their signals. Without calcium, neurons can become a little slow.

So, help your kids (and keep the whole family thinking sharply) by making sure they get enough calcium with a balanced diet and help from Wonder Bread.

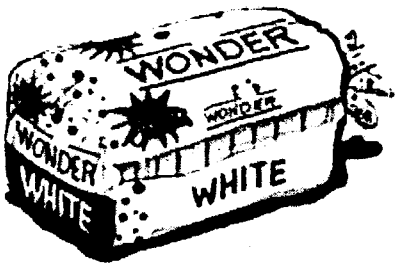
Osteoporosis

Osteoporosis, which means "porous bones," is a disease in which bones become fragile. If not prevented, osteoporosis can lead to bone breaks, usually in the hip, spine, and wrist. Although there is no cure for osteoporosis, you can help prevent the disease by incorporating a balanced diet rich in calcium, which helps to build strong bones, during childhood and adolescence. According to government studies, more than 70% of American women don't get enough calcium in their diet. That's why it's so important to eat foods containing calcium like Wonder Bread.

Starting Young

Calcium also is needed for the heart, muscles and nerves to function properly and for blood to clot. Nutrition experts stress the importance of consuming enough calcium early in life, but unfortunately, national nutrition surveys show that many young girls consume less than half the amount of calcium recommended to grow and maintain healthy bones. In fact, 7 out of 10 kids do not get enough calcium. That's a problem. When the calcium intake doesn't meet the daily requirement, your body pulls what it needs from your bones, weakening them in the process. So getting the recommended daily amount of calcium is critical to helping your kids build strong bodies.

Exhibit B



Your Skeletal Account

To visualize the importance of calcium, think of your body as a savings account. We deposit most of our bone and build bone mass during the first 30 years of our life. In fact, 75 to 85% of the skeleton's 206 bones are formed during adolescence. By about age 20, the average woman has acquired 98% of her skeletal mass. At age 30, bone mass starts to break down faster than it forms. If adequate amounts of calcium have not been stored, she is at risk for a number of diseases. In fact, deficiency of calcium has been linked to:

- high blood pressure
- stroke
- kidney stones
- and colon cancer

Parents already know that milk is a good source of calcium. But did you know that Wonder Bread is calcium fortified and now has 200% more calcium than regular white bread? So, when you're looking for a good source of calcium, go for the dough.

folic acid ▶

Home History Nutrition Fun About Us Contact Us
Corporate Info Planet Twinkie

DECISION AND ORDER

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

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

The Commission having thereafter considered the matter and having determined that it had reason to believe that the respondent has violated the Act, and that complaint should issue stating its charges in that respect, and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of 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 Interstate Bakeries Corporation is a Delaware corporation with its principal office or place of business at 12 East Armour Boulevard, Kansas City, Missouri, 64111.

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

ORDER

DEFINITIONS

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

1. "Competent and reliable scientific evidence" shall mean tests, analyses, research, studies, or other evidence based on the expertise of professionals in the relevant area, that has been conducted and evaluated in an objective manner by persons qualified to do so, using procedures generally accepted in the profession to yield accurate and reliable results.

2. Unless otherwise specified, "respondent" shall mean Interstate Bakeries Corporation, its successors and assigns, and its officers, agents, representatives, and employees.

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

I.

IT IS ORDERED that respondent, directly or through any corporation, subsidiary, division, or other device, in connection with the labeling, advertising, promotion, offering for sale, sale, or distribution of Wonder Bread, in or affecting commerce, shall not make any representation, in any manner, expressly or by implication that:

A. As a good source of calcium, Wonder Bread helps children's minds work better, or

B. As a good source of calcium, Wonder Bread helps children remember things,

unless, at the time the representation is made, respondent possesses and relies upon competent and reliable scientific evidence that substantiates the representation.

II.

IT IS FURTHER ORDERED that respondent, directly or through any corporation, subsidiary, division, or other device, in connection with the labeling, advertising, promotion, offering for sale, sale, or distribution of any bread, bread product, rolls, or muffins, in or affecting commerce, shall not make any representation, in any manner, expressly or by implication, that such product or any of its ingredients, helps brain function or memory, or can treat, cure or prevent any disease or related health condition, unless, at the time the representation is made, respondent possesses and relies upon competent and reliable scientific evidence that substantiates the representation;

provided, however, that a mere statement that the product contains a particular vitamin or mineral shall not, without more, be considered for purposes of this order a representation that the product can treat, cure or prevent any disease or related health condition.

III.

Nothing in this order shall prohibit respondent from making any representation for any product that is specifically permitted in labeling for such product by regulations promulgated by the Food and Drug Administration pursuant to the Nutrition Labeling and Education Act of 1990, and any such representation shall not be covered by this order.

IV.

IT IS FURTHER ORDERED that the provisions of this order shall not apply to any label or labeling printed prior to the date of service of this order and shipped by respondent's bakeries to distributors or retailers prior to January 16, 2003 .

V.

IT IS FURTHER ORDERED that respondent Interstate Bakeries Corporation, and its successors and assigns, shall, for five (5) years after the last date of dissemination of any representation covered by this order, maintain and upon request make available to the Federal Trade Commission for inspection and copying:

A. All advertisements and promotional materials containing the representation including videotape recordings of all such broadcast advertisements;

B. All materials that were relied upon in disseminating the representation; and

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

VI.

IT IS FURTHER ORDERED that respondent Interstate Bakeries Corporation, and its successors and assigns, shall, within thirty (30) days after service upon it of this order, deliver a copy of this order to all executive officers, managing employees, agents, and representatives having responsibilities with respect to the subject matter of this order. Respondent shall secure from each such person a signed and dated statement acknowledging receipt of the order pursuant to this paragraph. Respondent shall deliver this order to current personnel within thirty (30) days after the date of service of this order, and, for a period of three (3) years, to future personnel within thirty (30) days after the person assumes such position or responsibilities.

VII.

IT IS FURTHER ORDERED that respondent Interstate Bakeries Corporation, and its successors and assigns, shall notify the Commission at least thirty (30) days prior to any proposed change in the corporation that may affect compliance obligations arising under this order, such as dissolution, assignment, or sale resulting in the emergence of a successor corporation, the creation or dissolution of a subsidiary or parent, or any other corporate change that may affect compliance obligations. 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, NW, Washington, D.C. 20580.

VIII.

IT IS FURTHER ORDERED that respondent Interstate Bakeries Corporation, and its successors and assigns shall, within sixty (60) days after the date of service of this order, 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 April 16, 2022, or twenty (20) years from the most recent date that the United States or the Federal Trade Commission files a complaint (with or without an accompanying consent decree) in federal court alleging any violation of the order, whichever comes later; provided, however, that the filing of such a complaint will not affect the duration of:

A. Any Part in this order that terminates in less than twenty (20) years;

B. This order's application to any respondent that is not named as a defendant in such complaint; and

C. This order if such complaint is filed after the order has terminated pursuant to this Part.

Provided, further, that if such complaint is dismissed or a federal court rules that the respondent did not violate any provision of the order, and the dismissal or ruling is either not appealed or upheld on appeal, then the order will terminate according to this Part as though the complaint had never been filed, except that the order will not terminate between the date such complaint is filed and the later of the deadline for appealing such dismissal or ruling and the date such dismissal or ruling is upheld on appeal.

By the Commission, Commissioner Anthony recused.

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 Interstate Bakeries Corporation (IBC).

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

This matter involves allegedly unsubstantiated representations made on television and in Internet advertising about the effects of the calcium in Wonder Bread on children's memory and brain function. According to the FTC complaint, IBC made unsubstantiated claims that as a good source of calcium, Wonder Bread helps children's minds work better and helps children remember things.

The proposed consent order contains provisions designed to prevent IBC from engaging in similar acts and practices in the future. Part I of the proposed order prohibits IBC from making any unsubstantiated claim (a claim lacking competent and reliable scientific evidence) that as a good source of calcium, Wonder Bread helps children's minds work better, or as a good source of calcium, Wonder Bread helps children remember things.

Part II of the order requires IBC to have competent and reliable scientific evidence for any claim that any of its breads, bread products, rolls or muffins or any of their ingredients, helps brain function or memory, or can treat, cure or prevent any disease or related health condition. Part II also provides that a mere statement that a product contains a particular vitamin or mineral will not, without more, be considered for purposes of this order a representation that the product can treat, cure or prevent any disease or related health condition.

Analysis

Part IV of the order states that the order does not apply to any label or labeling printed before the order is served on IBC and shipped by IBC's bakeries to distributors or retailers within nine months after the order is issued.

Part III of the order notes that this order does not prohibit IBC from making any claim that is specifically permitted in labeling pursuant to the Nutrition Labeling and Education Act of 1990. Parts V through VIII of the order require IBC to keep copies of relevant advertisements and materials substantiating claims made in the advertisements, to provide copies of the order to certain of its personnel, to notify the Commission of changes in corporate structure, and to file a compliance report with the Commission. Part IX provides that the order will terminate after twenty (20) years under certain circumstances.

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

Complaint

IN THE MATTER OF

CAMPBELL MITHUN LLC

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

Docket C-4043; File No. 0123204
Complaint, April 16, 2002--Decision, April 16, 2002

This consent order addresses allegedly unsubstantiated representations in television commercials created by Respondent Campbell Mithun LLC, an advertising agency, about the effects of the calcium in Wonder Bread on children's memory and brain function. The order, among other things, prohibits the respondent from representing that – as a good source of calcium – Wonder Bread helps children's minds work better, or helps children remember things, without possessing competent and reliable scientific evidence that substantiates the claim. The order also requires the respondent to possess competent and reliable scientific evidence for any claim that any bread, bread product, rolls or muffins or any of their ingredients, helps brain function or memory, or can treat, cure or prevent any disease or related health condition. In addition, the order provides that a mere statement that a product contains a particular vitamin or mineral will not, without more, be considered for purposes of this order a representation that the product can treat, cure or prevent any disease or related health condition.

Participants

For the Commission: *Richard F. Kelly, Kial S. Young, Mary K. Engle,* and *Joseph P. Mulholland.*

For the Respondent: *Jeffrey S. Edelstein* and *Elky Stone, Hall Dickler Kent Goldstein & Wood.*

COMPLAINT

The Federal Trade Commission, having reason to believe that Campbell Mithun LLC, a corporation ("respondent"), has violated the provisions of the Federal Trade Commission Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, alleges:

1. Respondent Campbell Mithun LLC is a Delaware corporation with its principal office or place of business at 222 South Ninth Street, Minneapolis, Minnesota, 55402.

2. Respondent, at all times relevant to this complaint, was an advertising agency of Interstate Bakeries Corporation and prepared and disseminated advertisements to promote the sale of Wonder Bread. Wonder Bread is a "food" within the meaning of Sections 12 and 15 of the Federal Trade Commission Act.

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

4. Respondent has prepared and disseminated or caused to be disseminated advertisements for Wonder Bread, including, but not necessarily limited to, the attached Exhibit A. These advertisements contain the following statements and depictions:

A. "PROFESSOR WONDER: Moms know calcium helps build strong bones. But did you know it helps build strong minds, too? * Neurons in your brain need calcium to transmit signals. Without it, they can be, well, a little slow. [Inside Missy's brain, Professor Wonder sees tired neurons that have obviously not gotten enough calcium] Let's see what happens when you give them soft, delicious Wonder Bread. [Professor Wonder, with the help of Mom, constructs a demonstration that will allow Missy to get her calcium.] A good source of calcium with vitamins and minerals.
WOMAN: [After Missy takes a bite of her sandwich, Mom directs Missy to do her homework in order to show how well the calcium worked. Professor Wonder looks into her brain again.] Missy, go do your homework. [Inside Missy's brain we see lively, active neurons.]
NEURON: Let's go, guys, time to do homework.

PROFESSOR WONDER: Wow! I've never seen anything like it! Calcium helps you remember things, too. So remember, Wonder helps build strong bodies and minds."

* The following superscript appears in small, white type, on varying backgrounds, at the bottom of the screen, for approximately three (3) seconds: "With regular exercise and a balanced diet."

(Exhibit A) (Exhibit A is a storyboard of a thirty-second television advertisement) (*See also* Exhibit B, a videotape version of the advertisement)

5. Through the use of the statements and depictions contained in the advertisements referred to in paragraph 4, including but not necessarily limited to the advertisements attached as Exhibit A, respondent has represented, expressly or by implication, that:

A. As a good source of calcium, Wonder Bread helps children's minds work better, and

B. As a good source of calcium, Wonder Bread helps children remember things.

6. Through the means described in Paragraph 4, respondent has represented, expressly or by implication, that it possessed and relied upon a reasonable basis that substantiated the representations set forth in Paragraph 5, at the time the representations were made.

7. In truth and in fact, respondent did not possess and rely upon a reasonable basis that substantiated the representations set forth in Paragraph 5, at the time the representations were made. Therefore, the representation set forth in Paragraph 6 was, and is, false or misleading.

8. Respondent knew or should have known that the representation set forth in paragraph 6 was and is false or misleading.

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

THEREFORE, the Federal Trade Commission on this sixteenth day of April, 2002, has issued this complaint against respondent.

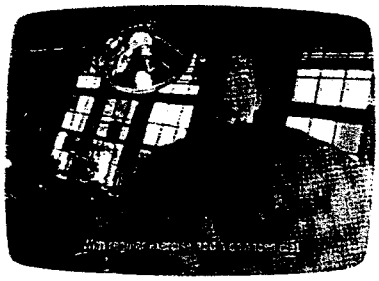
By the Commission, Commissioner Anthony recused.

WONDER

New :30 Wonder Television Commercial "Neurons"

1. *(Open on an frame of a heroic Professor Wonder holding a package of Wonder Bread.)*
   SUPER: PROFESSOR WONDER

2. *(Professor Wonder confirms what moms know, that calcium, most frequently identified with milk, helps build strong bones.)*
   PW: Mom's know calcium helps build strong bones.

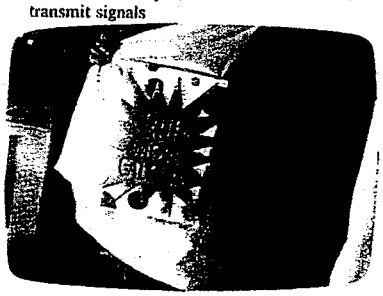


3. *(With the help of a brain prop, Professor Wonder shares new news with mom: that calcium helps build strong minds.)*
   PW: But did you know it helps build strong minds too.
   SUPER: WITH REGULAR EXERCISE AND A BALANCED DIET.

4. *(In an attempt to further explain this new news, Professor Wonder uses a souped-up magnifying glass to look into Missy's brain.)*
   PW: Neurons in your brain need calcium to transmit signals

5. *(Inside Missy's brain, Professor Wonder sees tired neurons that have obviously not gotten enough calcium.)*
   PW: With out it they can be, well, a little slow.

6. *(Professor Wonder, with the help of mom, constructs a demonstration that will allow Missy to get her calcium.)*
   PW: Let's see what happens when you give them soft delicious Wonder Bread.



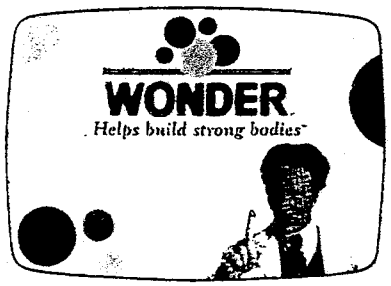
7. *(A visual demonstration of the 200% more calcium enrichment in Wonder Bread.)*
   PW: A good source of calcium with vitamins and minerals.

8. *(After Missy takes a bite of her sandwich, mom directs Missy to do her homework in order to show how well the calcium worked. Professor Wonder looks into her brain again.)*
   MOM: Missy, go do your homework.

9. *(Inside Missy's brain we see lively, active neurons.)*
   NEURON: Let's go guys, time to do homework.

10. *(Professor Wonder is amazed by what he just saw.)*
    PW: Wow! I've never seen anything like it!

11. *(As we see the active neurons, Professor Wonder restates the new news we've just learned about calcium.)*
    PW: Calcium helps you remember things too.



12. *(Closing scene, again with Professor Wonder and the Wonder Bread logo.)*
    PW: So remember, Wonder helps build strong bodies, and minds!

Exhibit A

DECISION AND ORDER

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

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

The Commission having thereafter considered the matter and having determined that it had reason to believe that the respondent has violated the Act, and that complaint should issue stating its charges in that respect, and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of 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 Campbell Mithun LLC is a Delaware corporation with its principal office or place of business at 222 South Ninth Street, Minneapolis, Minnesota, 55402.

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

ORDER

DEFINITIONS

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

1. "Competent and reliable scientific evidence" shall mean tests, analyses, research, studies, or other evidence based on the expertise of professionals in the relevant area, that has been conducted and evaluated in an objective manner by persons qualified to do so, using procedures generally accepted in the profession to yield accurate and reliable results.

2. Unless otherwise specified, "respondent" shall mean Campbell Mithun LLC, its successors and assigns, and its officers, agents, representatives, and employees.

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

I.

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

A. As a good source of calcium, Wonder Bread helps children's minds work better, or,

B. As a good source of calcium, Wonder Bread helps children remember things,

unless, at the time the representation is made, respondent possesses and relies upon competent and reliable scientific evidence that substantiates the representation.

II.

IT IS FURTHER ORDERED that respondent, directly or through any corporation, subsidiary, division, or other device, in connection with the advertising, promotion, offering for sale, sale, or distribution of any bread, bread product, rolls, or muffins, in or affecting commerce, shall not make any representation, in any manner, expressly or by implication, that such product or any of its ingredients, helps brain function or memory, or can treat, cure or prevent any disease or related health condition, unless, at the time the representation is made, respondent possesses and relies upon competent and reliable scientific evidence that substantiates the representation;

provided, however, that a mere statement that the product contains a particular vitamin or mineral shall not, without more, be considered for purposes of this order a representation that the product can treat, cure or prevent any disease or related health condition.

III.

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

IV.

IT IS FURTHER ORDERED that respondent Campbell Mithun LLC, and its successors and assigns, shall, for five (5) years after the last date of dissemination of any representation covered by this order, maintain and upon request make available to the Federal Trade Commission for inspection and copying:

A. All advertisements and promotional materials containing the representation including videotape recordings of all such broadcast advertisements;

B. All materials that were relied upon in disseminating the representation; and

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

V.

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

VI.

IT IS FURTHER ORDERED that respondent Campbell Mithun LLC, and its successors and assigns, shall notify the Commission at least thirty (30) days prior to any proposed change in its corporate structure 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, NW, Washington, D.C. 20580.

VII.

IT IS FURTHER ORDERED that respondent Campbell Mithun LLC, and its successors and assigns, shall, within sixty (60) days from the date of service of this order, and at such other times as the Federal Trade Commission may require, file with the Commission a report, in writing, setting forth in detail the manner and form in which it has complied with this order.

VIII.

This order will terminate on April 16, 2022, or twenty (20) years from the most recent date that the United States or the Federal Trade Commission files a complaint (with or without an accompanying consent decree) in federal court alleging any violation of the order, whichever comes later; provided, however, that the filing of such a complaint will not affect the duration of:

A. Any Part in this order that terminates in less than twenty (20) years;

B. This order's application to any respondent that is not named as a defendant in such complaint; and

C. This order if such complaint is filed after the order has terminated pursuant to this Part.

Provided further, that if such complaint is dismissed or a federal court rules that the respondent did not violate any provision of the order, and the dismissal or ruling is either not appealed or upheld on appeal, then the order will terminate according to this Part as though the complaint had never been filed, except that the order will not terminate between the date such complaint is filed and the later of the deadline for appealing such dismissal or ruling and the date such dismissal or ruling is upheld on appeal.

By the Commission, Commissioner Anthony recused.

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 Campbell Mithun LLC (Campbell), an advertising agency.

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

This matter involves allegedly unsubstantiated representations made on television advertising about the effects of the calcium in Wonder Bread on children's memory and brain function. Campbell was the advertising agency that created these commercials. According to the FTC complaint, Campbell made unsubstantiated claims that as a good source of calcium, Wonder Bread helps children's minds work better and helps children remember things. The complaint further alleges that the ad agency knew or should have known that the claims were unsubstantiated.

The proposed consent order contains provisions designed to prevent Campbell from engaging in similar acts and practices in the future. Part I of the proposed order prohibits Campbell from making any unsubstantiated claim (a claim lacking competent and reliable scientific evidence) that as a good source of calcium, Wonder Bread helps children's minds work better, or as a good source of calcium, Wonder Bread helps children remember things.

Part II of the order requires Campbell to have competent and reliable scientific evidence for any claim that any bread, bread product, rolls or muffins or any of their ingredients, helps brain function or memory, or can treat, cure or prevent any disease or related health condition. Part II also provides that a mere statement that a product contains a particular vitamin or mineral

will not, without more, be considered for purposes of this order a representation that the product can treat, cure or prevent any disease or related health condition.

Part III of the order notes that this order does not prohibit Campbell from making any claim that is specifically permitted in labeling pursuant to the Nutrition Labeling and Education Act of 1990. Parts IV through VII of the order require Campbell to keep copies of relevant advertisements and materials substantiating claims made in the advertisements, to provide copies of the order to certain of its personnel, to notify the Commission of changes in corporate structure, and to file a compliance report 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, 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

PALM, INC.

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

Docket C-4041; File No. 0023332
Complaint, April 17, 2002--Decision, April 17, 2002

This consent order addresses representations that Respondent Palm, Inc. made in advertisements regarding the ability of Palm handheld computers and personal digital assistants ("PDAs") to wirelessly access the Internet and email accounts and to perform other functions. The order, among other things, prohibits the respondent from misrepresenting that any PDA or handheld Internet or email access device can perform any common business function that it cannot perform without additional products or services that consumers must purchase. The order also prohibits the respondent from misrepresenting that wireless Internet or email service coverage for such products is available everywhere or almost everywhere in the United States. In addition, the order prohibits the respondent from misrepresenting performance characteristics relating to Internet or email account access of any non-wireless PDA or handheld Internet or email access device. The order also requires the respondent – whenever it makes any claims about the ability of any PDA or handheld Internet or email access device to perform any function that requires the purchase of additional products or services – to clearly and conspicuously disclose the contours of that requirement.

Participants

For the Commission: *Jock Chung, Keith Fentonmiller, Michael Ostheimer, Mary K. Engle,* and *Louis Silversin.*

For the Respondent: *Kevin J. Arquit, Craig A. Waldman,* and *Jeffrey H. Drichta, Clifford Chance Rogers & Wells.*

COMPLAINT

The Federal Trade Commission, having reason to believe that Palm, Inc., a corporation ("respondent"), has violated the provisions of the Federal Trade Commission Act, and it appearing to the Commission that this proceeding is in the public interest, alleges:

1. Respondent Palm, Inc. is a Delaware corporation with its principal office or place of business at 5470 Great America Parkway, Santa Clara, California 95054.

2. Respondent has manufactured, advertised, offered for sale, sold, and distributed products to the public, including Palm handheld computers. These Palm devices, including the Palm m100, Palm III, Palm V, and Palm VII model lines, function as personal digital assistants ("PDAs"). They provide ready access to addresses, tasks, calendars, and memos. With Palm.Net wireless service, the Palm VII model line can, as sold, wirelessly access portions of the Internet and some email accounts from a number of metropolitan areas.

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

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

   A. (Exhibit A: magazine advertisement)

"PERFECT FOR READING E-MAIL WHEN YOU'RE
"OUT SICK" AT THE BALL GAME.

Every now and then the chains come off and you find yourself away from your desk. (Reluctantly, of course.) No problem. The Palm™ platform lets you bring the office with you. Read e-mail. Draft memos. And check appointments. It's also perfect for reading news, entertainment and travel information. Wherever you want. Without blowing your cover. Efficiently. Elegantly. Simply."

Database Manager
Intranet Access
Custom Form Creation
Expense Reports
Maps
Send & Receive Faxes
Digital Camera
Sales Force Automation
Infrared Beaming
View Word & Excel
Internet Access
E-Mail
Flight Schedules
Shareware
Inventory Management
Stock Quotes & Trading
Customer Relationship Mgt.
Link to Outlook
Paging
Syncing with a PC
Business Card Scanner

Simply Palm™
www.palm.com

[Depiction of a Palm V PDA. The screen of the Palm displays an email message.]

[An extremely fine print disclosure, in approximately 4-point type at the bottom of the ad states in part:

"Application software and hardware add-ons may be optional and sold separately. Applications may not be available on all Palm handhelds."*]*

B. (Exhibit B: magazine advertisement)

""THE MARKET'S DOWN BUY!"

Online trading has revolutionized personal investing. Now the Palm™ handheld takes that revolution wireless. With access to the internet, the Palm platform lets you check market news and make trades along with its scores of other business and personal applications. It's all about going where life takes you - and bringing your portfolio along. Efficiently. Elegantly. Simply."

Database Manager
Intranet Access
Custom Form Creation
Expense Reports
GPS
Send & Receive Faxes
Digital Camera
Sales Force Automation
Infrared Beaming
View Word & Excel
Wireless Access
Flight Schedules
Shareware
Inventory Management
Stock Quotes & Trading
Customer Relationship Mgt.
Link to Outlook
Paging
Syncing with a PC
Business Card Scanner

Simply Palm™
www.palm.com

[Depiction of a Palm VII PDA. The screen of the Palm displays a form for trading stocks.]

[An extremely fine print disclosure, in approximately 4-point type at the bottom of the ad states in part:

"Application software and hardware add-ons may be optional and sold separately."*]*

C. (Exhibit C: newspaper advertisement)

[Depiction of two golfers on a golf green]

"**Palm Powered handhelds** give you real-time access to information where it really matters -- in the field. View and edit applications like MS Excel and Outlook. Check inventory, send an email, place an order, and close the deal. Update account information and send it back to the office, along with your new updated handicap. Simply amazing.

Simply Palm™"

[An extremely fine print disclosure, in approximately 4-point type, running along the side of the ad in poorly-contrasting, black text against a very dark background, states in part:

"Application software and hardware add-ons may be optional and sold separately. Applications may not be available on all Palm handhelds."*]*

D. (Exhibit D: magazine advertisement)

[Depiction of mountains with a person in the distance hanging upside down from a fully-extended bungee cord. A screen-shot of a Palm device, oriented upside down like the hanging person, is superimposed on the horizon. The words "eMail" and "Sent" appear at the top of the Palm screen. Below these words a message reads "Scott, Remember that bet we made when we both turned 30? Looks like someone owes me $100. -J."]

"Palm Powered™ handhelds can do just about anything, anytime. Drop an email, fax a lunch order, check inventory. That's taking the Internet with you. Simply amazing.

Simply Palm"

[An extremely fine print disclosure, in approximately 4-point type, running along the side of the ad in poorly-contrasting, white text against a light-colored background, states in part:

"Application software and hardware add-ons may be optional and sold separately. Apofications [sic] may not be available on all Palm handhelds."*]*

E. (Exhibit E: Palm IIIxe product packaging)

[Front panel of the package]

" **Access the Web***
Includes AvantGo
Internet Messaging & E-mail*
Fortified with Yahoo!
AOL Ready!"

[Depiction of a Palm IIIxe]

[Back panel of the package]

"Features & Benefits

Internet & E-mail Access
Where and when you want it.."

[Top panel of the package]

"**Internet & E-mail Access**"

[Right side panel of the package]

"**Compatible Software**

E-mail & Internet Connectivity*
• AOL Mail[sm]
• AvantGo
• Earthlink
• Eudora Pro
• Lotus Notes
• Microsoft Outlook & Outlook Express
• MultiMail Pro
• Netscape Communicator
• Yahoo! Messenger & Yahoo! Mail
• And other Internet e-mail services
. . .

*See other side panel for more information."

[Left side panel of the package]

"Technical Information
. . .

*Remote E-mail & Internet Access Requirements
Mail application requires modem or handset (sold separately) in addition to an e-mail account. Some e-mail applications may require optional linking software (sold separately)."

5. Through the means described in Paragraph 4, respondent has represented, expressly or by implication, that

   A. Palm PDAs, as sold, contain everything that consumers need to access the Internet and their email accounts, wirelessly.

   B. Palm PDAs, as sold, can perform common business functions such as data base management, custom form creation, and viewing Microsoft Word and Excel documents.

6. In truth and in fact,

A. Palm PDAs, as sold, other than the Palm VII model line, do not contain everything that consumers need to access the Internet and their email accounts, wirelessly. In order to wirelessly access the Internet and their email accounts using the Palm m100, Palm III, or Palm V model lines, consumers must purchase and carry a separate wireless modem or a device to connect the Palm to certain mobile telephones. Many mobile telephones currently in use in the United States are not compatible with Palm PDAs.

B. Palm PDAs, as sold, cannot perform common business functions such as data base management, custom form creation, and viewing Microsoft Word and Excel documents. To perform these functions using Palm PDAs, consumers must purchase and install additional software.

Therefore, the representations set forth in Paragraph 5 were, and are, false or misleading.

7. In its advertisements and packaging, respondent has represented that consumers can use Palm PDAs, as sold, to access the Internet and their email accounts wirelessly. In these advertisements and packaging, respondent has failed to disclose or failed to disclose adequately that in order to wirelessly access the Internet and their email accounts using the Palm m100, Palm III, or Palm V model lines, consumers must purchase and carry a separate wireless modem or a device to connect the Palm to certain mobile telephones. This fact would be material to consumers in their purchase or use of the products. The failure to disclose this fact, in light of the representation made, was, and is, a deceptive practice.

8. In its advertisements, respondent has represented that consumers can use Palm PDAs, as sold, to perform common business functions such as data base management, custom form creation, and viewing Microsoft Word and Excel documents.

In these advertisements, respondent has failed to disclose adequately that in order to perform these functions using Palm PDAs, consumers must purchase and install additional software. This fact would be material to consumers in their purchase or use of the products. The failure to disclose this fact, in light of the representations made, was, and is, a deceptive practice.

9. In its advertisements, respondent has represented that consumers can use the Palm VII model line to access the Internet and their email accounts wirelessly. Respondent has failed to disclose or failed to disclose adequately that to access the Internet and email accounts wirelessly using the Palm VII model line, consumers must subscribe to Palm.Net, a proprietary for-fee service. This fact would be material to consumers in their purchase or use of the product. The failure to disclose this fact, in light of the representation made, was, and is, a deceptive practice.

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

THEREFORE, the Federal Trade Commission this seventeenth day of April, 2002, has issued this complaint against respondent.

By the Commission.

PERFECT FOR READING E-MAIL WHEN YOU'RE "OUT SICK" AT THE BALL GAME.

Database Manager

Intranet Access

Custom Form Creation

Expense Reports

Maps

Send & Receive Faxes

Digital Camera

Sales Force Automation

Infrared Beaming

View Word & Excel

Internet Access

E-Mail

Flight Schedules

Shareware

Inventory Management

Stock Quotes & Trading

Customer Relationship Mgt.

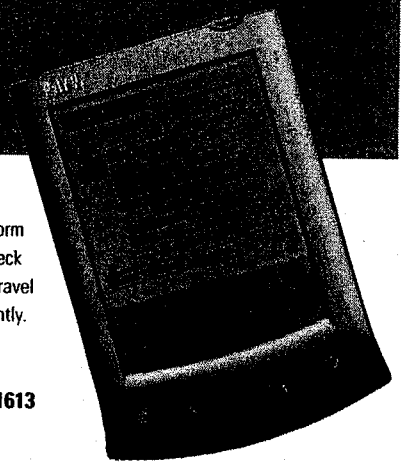
Link to Outlook

Paging

Syncing with a PC

Business Card Scanner

Simply Palm™
www.palm.com



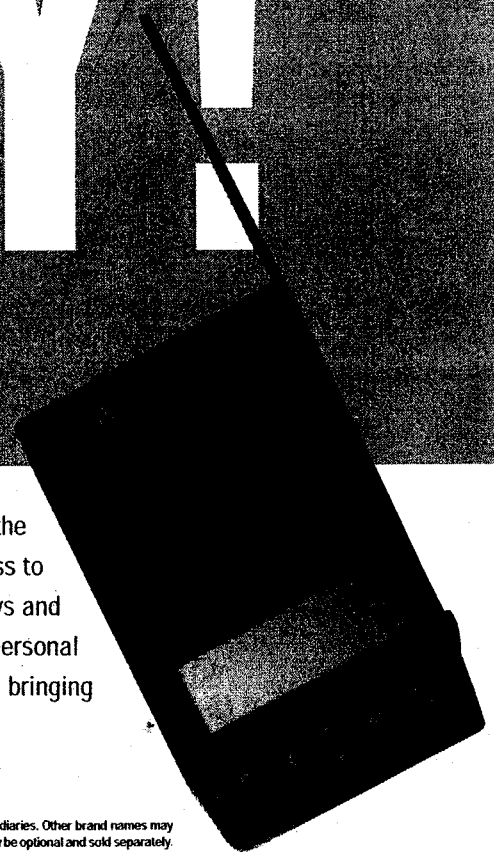
Every now and then the chains come off and you find yourself away from your desk. (Reluctantly, of course.) No problem. The Palm™ platform lets you bring the office with you. Read e-mail. Draft memos. And check appointments. It's also perfect for reading news, entertainment and travel information. Wherever you want. Without blowing your cover. Efficiently. Elegantly. Simply.

Visit us at the Macworld Expo in the Datavision Booth #1613 or the J&R Computer World Booth #941.

EXHIBIT A

palm

"THE MARKET'S DOWN. BUY!"



- Database Manager
- Intranet Access
- Custom Form Creation
- Expense Reports
- GPS
- Send & Receive Faxes
- Digital Camera
- Sales Force Automation
- Infrared Beaming
- View Word & Excel
- Wireless Access
- Flight Schedules
- Shareware
- Inventory Management
- **Stock Quotes & Trading**
- Customer Relationship Mgt.
- Link to Outlook
- Paging
- Syncing with a PC
- Business Card Scanner

Simply Palm
www.palm.com

Online trading has revolutionized personal investing. Now the Palm™ handheld takes that revolution wireless. With access to the internet, the Palm platform lets you check market news and make trades along with its scores of other business and personal applications. It's all about going where life takes you - and bringing your portfolio along. Efficiently. Elegantly. Simply.
For more information visit www.palm.com.

palm™

EXHIBIT B

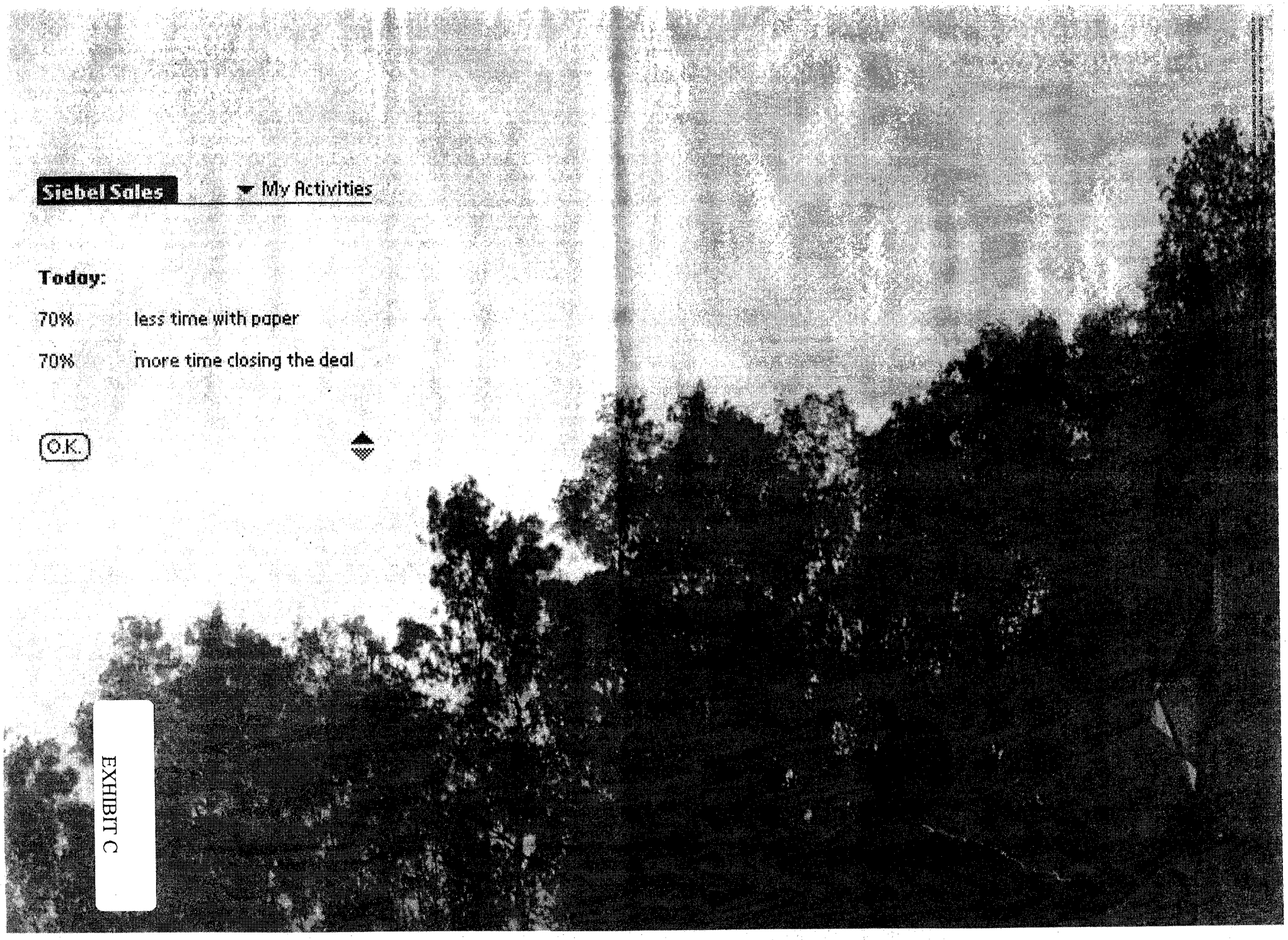

Siebel Sales
My Activities
Today:
70% less time with paper
70% more time closing the deal
O.K.

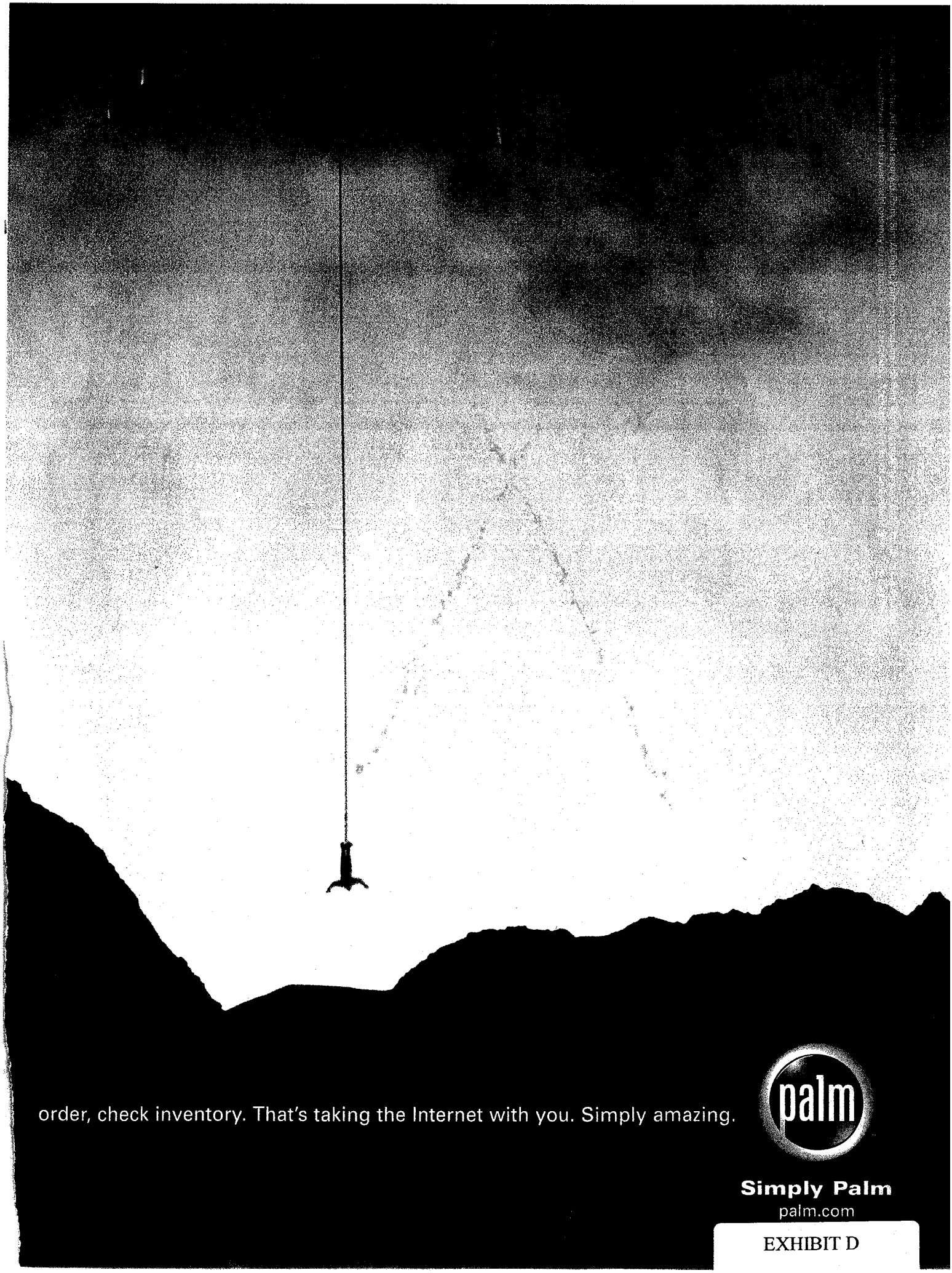
EXHIBIT C


Palm Powered™ handhelds give you real-time access to information where it really matters – in the field. View and edit applications like MS Excel and Outlook. Check inventory, send an email, place an order, and close the deal. Update account information and send it back to the office, along with your new updated handicap. Simply amazing.
palm
Simply Palm
palm.com

EXHIBIT C

Palm Powered™ handhelds can do just about anything, anytime. Drop an email, fax a lunch

EXHIBIT D


order, check inventory. That's taking the Internet with you. Simply amazing.
palm
Simply Palm
palm.com
EXHIBIT D


palm
Includes
Link to Microsoft Outlook*
Chapura PocketMirror
Access the Web*
AvantGo
Internet Messaging & E-mail*
Fortified with Yahoo!
AOL Ready!
To Do List
Memo Pad
Prefs
HotSync
Welcome
IIIxe
Handheld
Value & Function
Add even more applications.

EXHIBIT E

palm

III xe
Handheld

Features & Benefits

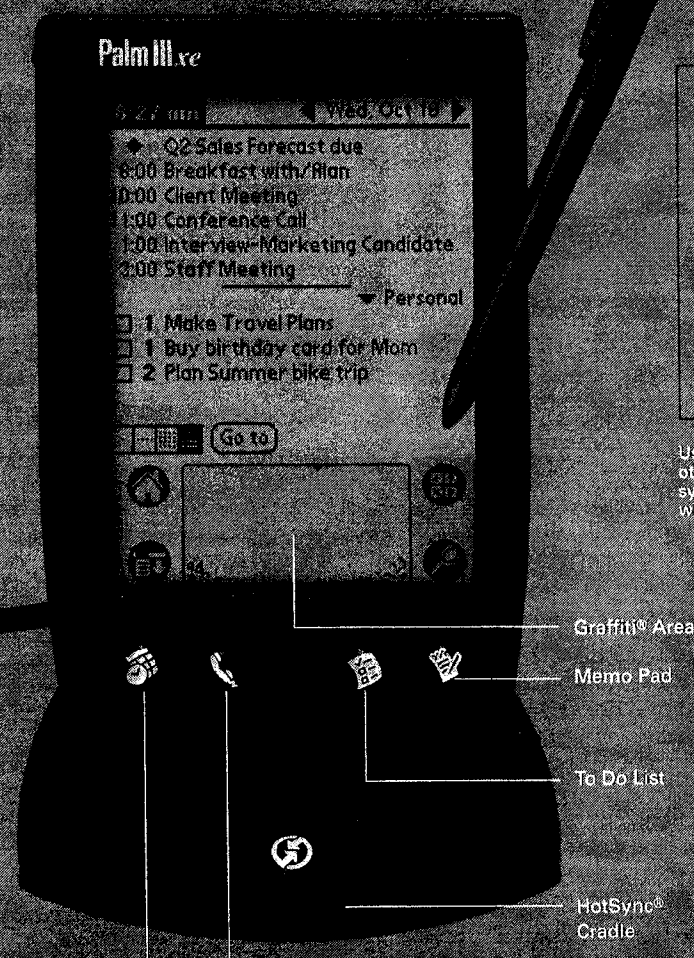
Internet & E-mail Access
Where and when you want it.

Powerful Yet Simple
You know instinctively how to get the most from your handheld computer right out of the box.

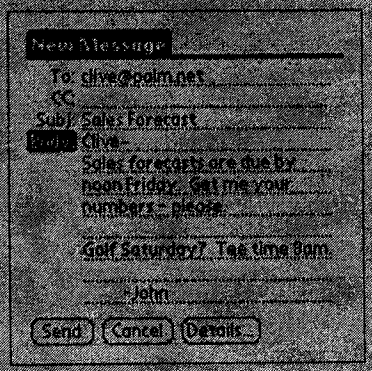
Safeguard Your Data
Back up, update, and exchange information between your handheld and PC with the touch of a button—then access your data from your PC or while on the go.

Easily Upgradeable
Included flash memory allows you to keep up to date with new features and software updates.

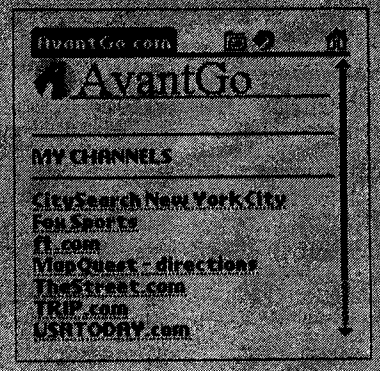
Do More with Less
Optimized system software for handheld computing lets you carry even more data and applications.



Handheld shown at actual size with HotSync Cradle.



Using the included Palm™ Mail client or other available e-mail add-ons, you can synchronize your messages and take them with you on the go.*



From the weather to maps, access any information on the Web with software such as AvantGo (included).

Thousands of Solutions
From games, to personal productivity and enterprise-class software, choose from a variety of software and hardware add-ons to extend the capabilities of your handheld.

Enter Data Your Way
Enter it from your PC, use the on-screen keyboard, write with Graffiti software, "beam" data and applications, or enter it with a compatible portable keyboard.

palm powered

EXHIBIT E

palm
IIIxe
Handheld
Powerful Yet Simple
Internet & E-mail Access
Thousands of Solutions
Easily Upgradeable
Safeguard Your Data

EXHIBIT E

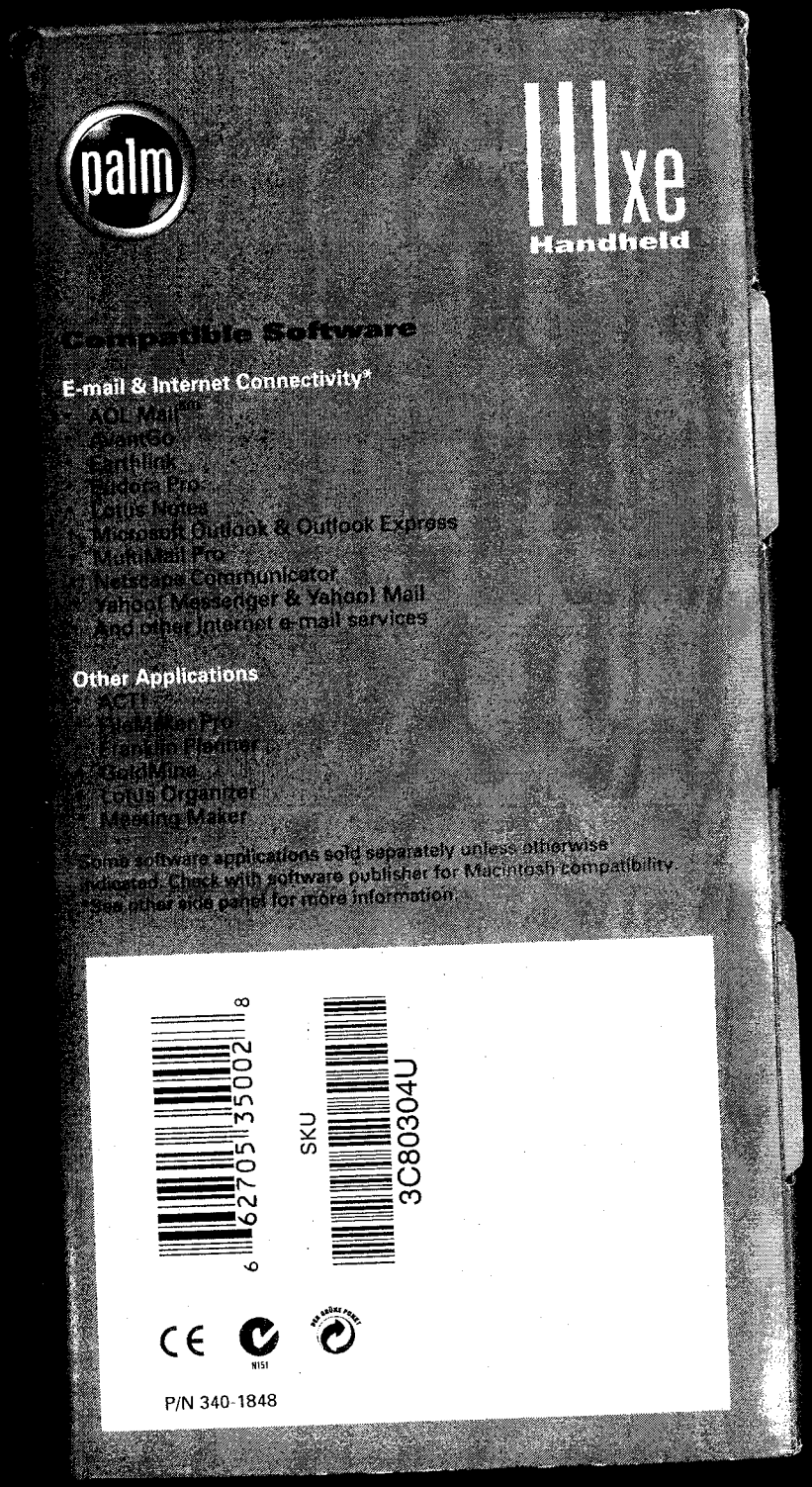

palm
IIIxe
Handheld
Compatible Software
E-mail & Internet Connectivity*
AOL Mail
Earthlink
Eudora Pro
Lotus Notes
Microsoft Outlook & Outlook Express
MultiMail Pro
Netscape Communicator
Yahoo! Messenger & Yahoo! Mail
And other Internet e-mail services
Other Applications
ACT!
DateBook Pro
Franklin Planner
QuickMute
Lotus Organizer
Meeting Maker
*Some software applications sold separately unless otherwise indicated. Check with software publisher for Macintosh compatibility.
*See other side panel for more information.
6 62705 35002 8
SKU
3C80304U
P/N 340-1848

EXHIBIT E

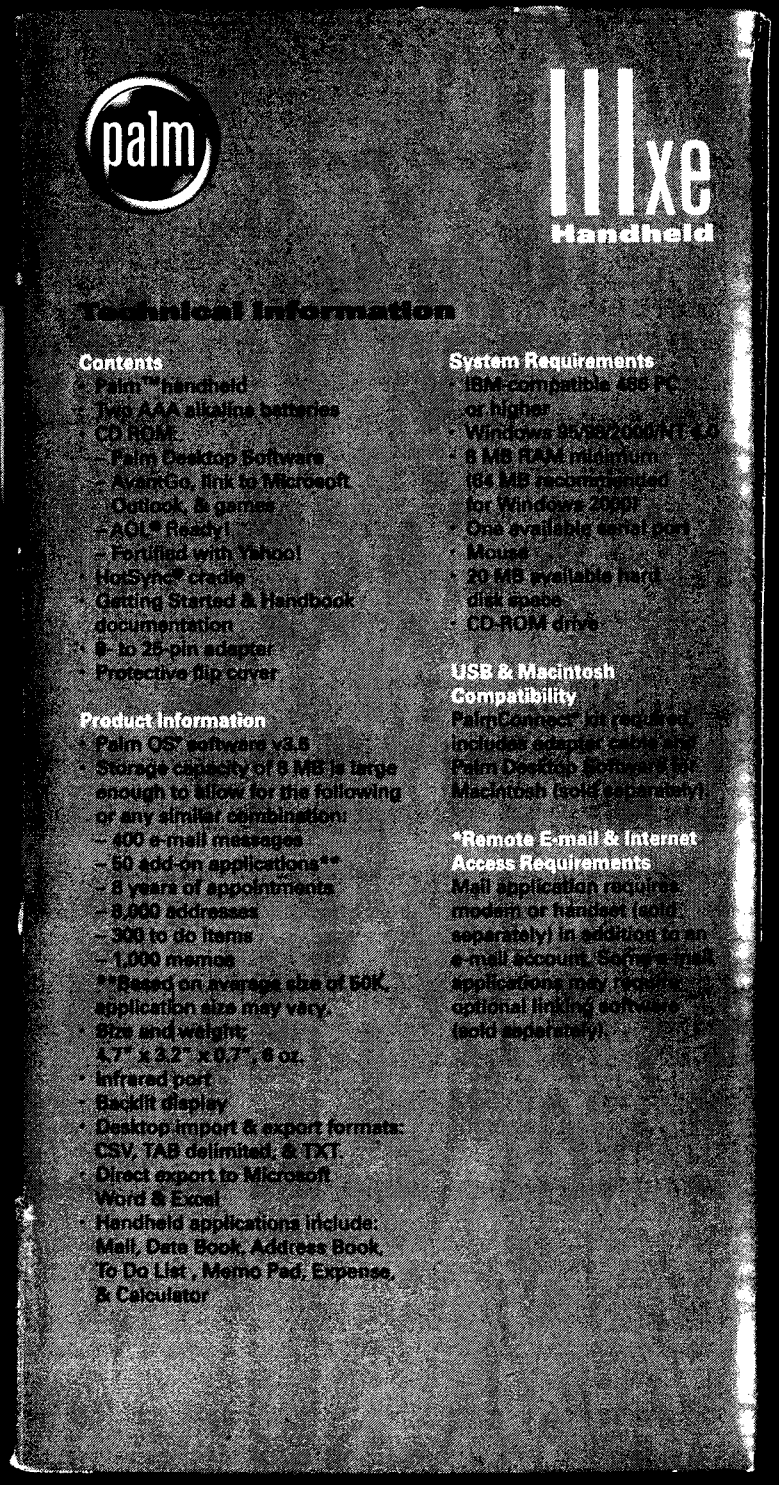

palm
IIIxe
Handheld
Technical Information
Contents
• Palm™ handheld
• Two AAA alkaline batteries
• CD ROM:
– Palm Desktop Software
– AvantGo, link to Microsoft Outlook, & games
– AOL® Ready!
– Fortified with Yahoo!
• HotSync® cradle
• Getting Started & Handbook documentation
• 9- to 25-pin adapter
• Protective flip cover
Product Information
• Palm OS® software v3.5
• Storage capacity of 8 MB is large enough to allow for the following or any similar combination:
– 400 e-mail messages
– 50 add-on applications**
– 8 years of appointments
– 8,000 addresses
– 300 to do items
– 1,000 memos
**Based on average size of 50K, application size may vary.
• Size and weight: 4.7" x 3.2" x 0.7", 6 oz.
• Infrared port
• Backlit display
• Desktop import & export formats: CSV, TAB delimited, & TXT.
• Direct export to Microsoft Word & Excel
• Handheld applications include: Mail, Date Book, Address Book, To Do List , Memo Pad, Expense, & Calculator
System Requirements
• IBM-compatible 486 PC or higher
• Windows 95/98/2000/NT 4.0
• 8 MB RAM minimum (64 MB recommended for Windows 2000)
• One available serial port
• Mouse
• 20 MB available hard disk space
• CD-ROM drive
USB & Macintosh Compatibility
PalmConnect* kit required, includes adapter cable and Palm Desktop Software for Macintosh (sold separately)
*Remote E-mail & Internet Access Requirements
Mail application requires modem or handset (sold separately) in addition to an e-mail account. Some e-mail applications may require optional linking software (sold separately).

EXHIBIT E

DECISION AND ORDER

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

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

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

1. Respondent Palm, Inc. is a Delaware corporation with its principal office or place of business at 5470 Great America Parkway, Santa Clara, California 95054.

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

ORDER

DEFINITIONS

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

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

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

A. In an advertisement communicated through an electronic medium (such as television, video, radio, and interactive media such as the Internet, online services and software), the disclosure shall be presented simultaneously in both the audio and visual portions of the advertisement if the claim triggering the disclosure is presented by both audio and visual means. In any claim presented solely through visual or audio means, the disclosure may be made through the same means in which the claim is presented. Any audio disclosure shall be delivered in a volume and cadence sufficient for an ordinary consumer to hear and comprehend it. Any visual disclosure shall be of a size and shade, 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.

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

C. On a product label, the disclosure shall be in a type size and location sufficiently noticeable for an ordinary consumer to

read and comprehend it, in print that contrasts with the background against which it appears.

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.

3. In the case of advertisements disseminated by means of an interactive electronic medium such as software, the Internet or online services, a disclosure made through the use of a hyperlink shall not be deemed "clear and conspicuous" unless the hyperlink itself is clear and conspicuous, is clearly identified as a hyperlink, is labeled to convey the nature and relevance of the information it leads to, is on the same webpage, online service page, or other electronic page and proximate to the triggering representation, and takes the consumer directly to the disclosure on the click-through electronic page or other display window or panel.

4. "General-purpose ISP service" shall mean the category of services that allow consumers to access the Internet from personal computers or that is generally understood by consumers to be necessary for wireless access to the Internet. It shall not include a specific Internet access service, if respondent's product requires use of that specific service to access the Internet.

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

I.

IT IS ORDERED that respondent, directly or through any corporation, subsidiary, division, or other device, in connection with the manufacturing, labeling, advertising, promotion, offering for sale, sale, or distribution of any personal digital assistant or handheld Internet or email access device, in or affecting commerce, shall not misrepresent, in any manner, expressly or by implication:

A. that the product is able to perform any common business function that it cannot perform without additional products or services that consumers must purchase; or

B. that wireless Internet or email service coverage for such product is available everywhere or almost everywhere in the United States.

II.

IT IS FURTHER ORDERED that respondent, directly or through any corporation, subsidiary, division, or other device, in connection with the manufacturing, labeling, advertising, promotion, offering for sale, sale, or distribution of any personal digital assistant or handheld Internet or email access device that requires the use of an additional device in order to wirelessly access the Internet or email accounts, in or affecting commerce, shall not misrepresent, in any manner, expressly or by implication any performance characteristic of such product relating to accessing the Internet or email accounts.

III.

IT IS FURTHER ORDERED that respondent, directly or through any corporation, subsidiary, division, or other device, in connection with the manufacturing, labeling, advertising, promotion, offering for sale, sale, or distribution of any personal digital assistant or handheld Internet or email access device, in or affecting commerce, shall not make any representation, in any manner, expressly or by implication, about the ability of any such product to perform any function that requires the purchase of additional products or services unless respondent discloses, clearly and conspicuously:

A. when such function involves accessing the Internet or email accounts, any other products (such as a modem, mobile telephone, or adapter) or Internet or email access services, other than general-purpose ISP service, that consumers must

purchase in order to access the Internet or email accounts using such product; or

B. when such function does not involve accessing the Internet or email accounts, that additional products must be purchased in order to perform such function using such product.

IV.

IT IS FURTHER ORDERED that the provisions of this Order shall not apply to any label or labeling printed prior to 30 days after the date respondent executed the consent agreement and shipped by respondent to distributors or retailers prior to 120 days after the date of service of this Order.

V.

IT IS FURTHER ORDERED that respondent Palm, Inc., and its successors and assigns shall, for five (5) years after the last date of dissemination of any representation covered by this order, maintain and upon request make available to the Federal Trade Commission for inspection and copying:

A. All advertisements and promotional materials containing the representation;

B. All materials that were relied upon in disseminating the representation; and

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

VI.

IT IS FURTHER ORDERED that respondent Palm, Inc., and its successors and assigns shall, for a period of five (5) years, deliver a copy of this order to all principals, officers, directors, and managers, and to all employees, agents, and representatives having responsibilities with respect to the subject matter of this order, and shall secure from each such person a signed and dated statement acknowledging receipt of the order. Respondent shall deliver this order to current personnel within thirty (30) days after the date of service of this order, and to future personnel within thirty (30) days after the person assumes such position or responsibilities.

VII.

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

VIII.

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

IX.

This order will terminate on April 17, 2022, 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 containing a consent order from Palm, Inc. ("Palm").

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

This matter involves alleged misleading representations about Palm handheld computers or personal digital assistants ("PDAs"). This matter concerns allegedly false and deceptive advertising claims made in advertisements regarding the ability of Palm devices to wirelessly access the Internet and email accounts and to perform other functions.

According to the FTC complaint, Palm misrepresented that Palm PDAs, as sold, contain everything that consumers need to wirelessly access the Internet and their email accounts. In fact, in order to wirelessly access the Internet and email accounts using Palm PDAs, other than the Palm VII model line, consumers must purchase and carry a separate wireless modem or a device to connect the Palm to certain mobile telephones; and, moreover, many mobile telephones currently in use in the U.S. are not compatible with Palm PDAs. The complaint also alleges that in representing that consumers can use Palm PDAs, as sold, to access the Internet and their email accounts wirelessly, Palm failed to disclose or failed to disclose adequately that in order to wirelessly access the Internet and their email accounts, consumers must purchase and carry a separate wireless modem or a device to connect the Palm to certain mobile telephones. The complaint alleges that the failure to disclose this material fact is a deceptive practice.

Analysis

The proposed complaint also challenges as false the claim that Palm PDAs, as sold, can perform common business functions such as data base management, custom form creation, and viewing Microsoft Word and Excel documents. To perform these functions using Palm PDAs, consumers must purchase and install additional software. The complaint also alleges that in representing that consumers can use Palm PDAs, as sold, to perform these functions, respondent failed to disclose or failed to disclose adequately that in order to perform these functions using Palm PDAs, consumers must purchase and install additional software. The complaint alleges that the failure to disclose this material fact is a deceptive practice.

Finally, the complaint alleges that in representing that consumers can use the Palm VII model line to access the Internet and their email accounts wirelessly, Palm failed to disclose or failed to disclose adequately that consumers must subscribe to Palm.Net, a proprietary for-fee service. The complaint alleges that the failure to disclose this material fact is a deceptive practice.

The proposed consent order contains provisions designed to prevent Palm from engaging in similar acts and practices in the future.

Part I of the proposed order prohibits respondent from making misrepresentations that any PDA or handheld Internet or email access device can perform any common business function that it cannot perform without additional products or services that consumers must purchase. Part I also prohibits misrepresentations that wireless Internet or email service coverage for the product is available everywhere or almost everywhere in the U.S.

Part II of the proposed order prohibits misrepresentations about performance characteristics relating to Internet or email account access of any non-wireless PDA or handheld Internet or email access device (i.e., one that requires the use of an additional device in order to access the Internet or email accounts wirelessly).

Analysis

Part III requires that when respondent makes any claims about the ability of any PDA or handheld Internet or email access device to perform any function that requires the purchase of additional products or services, it must make a clear and conspicuous disclosure, depending upon the function being discussed. When the function involves accessing the Internet or email accounts, respondent must disclose any other products (such as a modem, mobile telephone, or adapter) or Internet or email access services (other than general-purpose ISP service, as defined in the order), that consumers must purchase in order to access the Internet or email accounts. When the function does not involve accessing the Internet or email accounts, respondent must disclose that additional products must be purchased in order to perform such function(s).

Part IV of the proposed order provides that, for up to 120 days after service of the order, respondent may continue to ship products from existing stock in packaging with nonconforming labeling, as long as the packaging was printed less than 30 days after the date respondent signed the consent agreement.

Parts VI through IX require Palm to keep copies of relevant advertisements and materials substantiating claims made in the advertisements, to provide copies of the order to certain of its personnel, to notify the Commission of changes in corporate structure, and to file compliance reports with the Commission. Part X provides that the order will terminate after twenty (20) years under certain circumstances.

The purpose of this analysis is to facilitate public comment on the proposed order, 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

DEUTSCHE GELATINE-FABRIKEN STOESS AG, 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-4045; File No. 0110117
Complaint, April 17, 2002--Decision, April 17, 2002

This consent order addresses the acquisition by Respondent Deutsche Gelatine-Fabriken Stoess AG ("DGF Stoess"), the largest world and United States producer of pigskin and beef hide gelatin – used particularly by the food industry (in products such as gelatin desserts, marshmallows, gummy candies and other confections) and the pharmaceutical industry (in products such as soft and hard capsules and tablet coatings) – of the gelatin business of Respondent Goodman Fielder Limited. The order, among other things, prohibits DGF Stoess from acquiring Goodman Fielder's entire gelatin business, as initially proposed; rather, Goodman Fielder will retain its United States and Argentine gelatin assets, collectively representing approximately 40 percent of the original proposed acquisition. The order also prohibits DGF Stoess from buying any of the retained gelatin assets without prior Commission approval. In addition, the order prohibits Goodman Fielder from selling any of the retained gelatin assets to DGF Stoess – or to SKW , the third leading supplier worldwide of pigskin and beef hide gelatin – or from selling less than the complete package of retained assets to anyone without prior Commission approval. The order also requires Goodman Fielder to provide prior notice to the Commission of any other sale of the retained assets.

Participants

For the Commission: *James H. Holden, Jr., Jonathan S. Klarfeld, Jay C. Campbell, Ann Malester, Eric D. Rohlck, Elizabeth A. Piotrowski, Geary Gessler* and *Elizabeth Callison*..

For the Respondents: *Steven C. Sunshine, Shearman & Sterling,* and *Robert S. Schlossberg, Morgan, Lewis & Bockius.*

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 Goodman Fielder Limited ("Goodman Fielder") and Respondent Deutsche Gelatine-Fabriken Stoess AG ("DGF Stoess"), both corporations subject to the jurisdiction of the Commission, have entered into an agreement whereby Respondent DGF Stoess would acquire the gelatin business of Respondent Goodman Fielder 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. DGF STOESS

1. Respondent DGF Stoess is a corporation organized, existing and doing business under and by virtue of the laws of Germany, with its office and principal place of business located at Gammelsbacher Strasse 2, 69412 Eberbach, Germany. DGF Stoess's principal subsidiaries in the United States, Kind & Knox Gelatine, Inc. and Dynagel, Inc., are located, respectively, in Sioux City, Iowa and Calumet City, Illinois.

2. Respondent DGF Stoess is engaged in, among other things, the manufacture and sale of gelatin.

3. Respondent DGF Stoess 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.

II. GOODMAN FIELDER

4. Respondent Goodman Fielder is a corporation organized, existing and doing business under and by virtue of the laws of New South Wales, Australia, with its office and principal place of business located at 75 Talavera Road, Macquarie Park NSW 2113, Australia. Goodman Fielder's principal subsidiary in the United States, Goodman Fielder (USA) Inc., has a manufacturing facility located in Davenport, Iowa.

5. Respondent Goodman Fielder is engaged in, among other things, the manufacture and sale of gelatin.

6. Respondent Goodman Fielder 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 PROPOSED ACQUISITION

7. In a purchase agreement dated February 14, 2001 ("Purchase Agreement"), DGF Stoess agreed to acquire the gelatin business of Goodman Fielder in a transaction valued at approximately $170 million (the "Proposed Acquisition").

8. The Commission investigated the Proposed Acquisition and on January 15, 2002, authorized staff to seek a preliminary injunction in federal district court preventing Goodman Fielder and DGF Stoess from consummating the Proposed Acquisition.

IV. THE RELEVANT MARKET

9. For the purposes of this Complaint, the relevant line of commerce in which to analyze the effects of the Proposed Acquisition is the manufacture and sale of pigskin and beef hide gelatin.

10. For the purposes of this Complaint, the relevant geographic market within which to assess the competitive effects of the Proposed Acquisition is the United States.

V. THE STRUCTURE OF THE MARKET

11. DGF Stoess and Goodman Fielder are the two largest manufacturers and sellers of pigskin and beef hide gelatin in the United States and the world. If the Proposed Acquisition were to be consummated, DGF Stoess would have a market share in the United States of more than 50 percent, in a highly concentrated market.

VI. ENTRY CONDITIONS

12. Substantial and effective expansion by smaller competitors in the relevant market sufficient to deter or counteract the anticompetitive effects of the Proposed Acquisition is unlikely to occur.

13. New entry into the relevant market would not occur in a timely manner to deter or counteract the adverse competitive effects of the Proposed 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 Proposed 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 Goodman Fielder and DGF Stoess in the relevant market;

b. by further consolidating an already concentrated market, thereby substantially increasing the likelihood that DGF Stoess will unilaterally exercise market power in the relevant market;

c. by increasing the likelihood of collusion and coordinated interaction in the relevant market; and

d. by increasing the likelihood that customers of pigskin and beef hide gelatin would be forced to pay higher prices.

VIII. VIOLATIONS CHARGED

15. The Purchase Agreement constitutes a violation of Section 5 of the FTC Act, as amended, 15 U.S.C. § 45.

16. 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 FTC Act, as amended, 15 U.S.C. § 45.

WHEREFORE, THE PREMISES CONSIDERED, the Federal Trade Commission on this seventeenth day of April , 2002, issues its Complaint against Respondents DGF Stoess and Goodman Fielder.

By the Commission, Chairman Muris not participating.

DECISION AND ORDER

The Federal Trade Commission ("Commission") having initiated an investigation of the proposed acquisition of the gelatin business of Goodman Fielder Limited ("Goodman Fielder") by Deutsche Gelatine-Fabriken Stoess AG ("DGF Stoess"), and DGF Stoess and Goodman Fielder (collectively, "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 Order ("Consent Agreement"), containing an admission by Respondents of all the jurisdictional facts set forth in the aforesaid draft of Complaint, a statement that the signing of said Consent Agreement is for settlement purposes only and does not constitute an admission by Respondents that the law has been violated as alleged in such Complaint, or that the facts as alleged in such Complaint, other than jurisdictional facts, are true, and waivers and other provisions as required by the Commission's Rules; and

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

1. Respondent DGF Stoess is a corporation organized, existing and doing business under and by virtue of the laws of

Germany, with its office and principal place of business located at Gammelsbacher Strasse 2, 69412 Eberbach, Germany.

2. Respondent Goodman Fielder is a corporation organized, existing and doing business under and by virtue of the laws of New South Wales, Australia, with its office and principal place of business located at 75 Talavera Road, Macquarie Park NSW 2113, Australia.

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. "Goodman Fielder" means Goodman Fielder Limited, its directors, employees, agents, representatives, predecessors, successors, and assigns; its joint ventures, subsidiaries, divisions, groups, and affiliates controlled by Goodman Fielder Limited (including but not limited to Goodman Fielder (USA) Inc., Leiner Davis (USA) Inc., Leiner Davis Gelatin Corporation, Leiner Davis Gelatin Argentina SA, Maramba SRL and Leiner Davis Uruguaya de Gelatinas SA), and the respective directors, employees, agents, representatives, successors, and assigns of each.

B. "DGF Stoess" means Deutsche Gelatine-Fabriken Stoess AG, its directors, employees, agents, representatives, predecessors, successors, and assigns; its joint ventures, subsidiaries, divisions, groups, and affiliates controlled by Deutsche Gelatine-Fabriken Stoess AG (including but not limited to Kind and Knox Gelatine, Inc. and Dynagel, Inc.), and the respective directors, employees, agents, representatives, successors, and assigns of each.

C. "SKW" means the gelatin business of Degussa AG (commonly referred to as "SKW"); its directors, employees, agents, representatives, predecessors, successors, and assigns; its parents, joint ventures, subsidiaries, divisions, groups, and affiliates controlled by the gelatin business of Degussa AG ("commonly referred to as "SKW"), and the respective directors, employees, agents, representatives, successors, and assigns of each. Degussa AG is a corporation organized, existing and doing business under and by virtue of the laws of Germany, with its office and principal place of business located in Dusseldorf, Germany.

D. "Respondents" means DGF Stoess and Goodman Fielder.

E. The "Acquisition" means the proposed acquisition by DGF Stoess of the gelatin business of Goodman Fielder as set forth in Goodman Fielder's and DGF Stoess's Purchase Agreement dated February 14, 2001, and as subsequently amended.

F. "Commission" means the Federal Trade Commission.

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

H. "American Gelatin Assets" means Leiner Davis (USA) Inc. (formerly known as Goodman Fielder (USA) Inc.), and all of its successors and assigns, joint ventures, subsidiaries, divisions, groups and affiliates, including but not limited to Leiner Davis Gelatin Corporation, and all of their respective businesses, assets, properties, rights and liabilities.

I. "Argentinian Gelatin Assets" means Leiner Davis Gelatin Argentina SA and all of its successors and assigns, joint ventures, subsidiaries, divisions, groups and affiliates, including but not limited to Maramba SRL and Leiner Davis Uruguaya de Gelatinas SA, and all of their respective businesses, assets, properties, rights and liabilities.

J. "U.S. Gelatin Business" means the American Gelatin Assets and the Argentinian Gelatin Assets.

II.

IT IS FURTHER ORDERED that:

A. Goodman Fielder shall not sell, transfer, or otherwise convey, directly or indirectly, any ownership, leasehold, or other interest, in whole or in part, in the U.S. Gelatin Business (excluding transactions in the ordinary course of business such as sales of manufactured product) to DGF Stoess in connection with the Acquisition.

B. DGF Stoess shall not acquire, directly or indirectly, any ownership, leasehold, or other interest, in whole or in part, in the U.S. Gelatin Business (excluding transactions in the ordinary course of business such as purchases of manufactured product) in connection with the Acquisition.

III.

IT IS FURTHER ORDERED that, for a period commencing on the date this Order becomes final and continuing for ten (10) years, DGF Stoess shall not, without the prior approval of the Commission, acquire, directly or indirectly, any ownership, leasehold, or other interest, in whole or in part, in the U.S. Gelatin Business (excluding transactions in the ordinary course of business such as purchases of manufactured product).

IV.

IT IS FURTHER ORDERED that, for a period commencing on the date this Order becomes final and continuing for ten (10) years, Goodman Fielder shall not, without the prior approval of the Commission, sell, transfer, or otherwise convey, directly or indirectly, any ownership, leasehold, or other interest, in whole or in part, in the U.S. Gelatin Business (excluding transactions in the

ordinary course of business such as sales of manufactured product) to DGF Stoess.

V.

IT IS FURTHER ORDERED that, for a period commencing on the date this Order becomes final and continuing for five (5) years, Goodman Fielder shall not, without the prior approval of the Commission, sell, transfer, or otherwise convey, directly or indirectly:

A. any ownership, leasehold, or other interest, in whole or in part, in the U.S. Gelatin Business (excluding transactions in the ordinary course of business such as sales of manufactured product) to SKW; or

B. parts of, or the whole of, either (1) the American Gelatin Assets, or (2) the Argentinian Gelatin Assets (excluding transactions in the ordinary course of business such as sales of manufactured product) to a Person other than DGF Stoess or SKW.

VI.

IT IS FURTHER ORDERED that, for a period commencing on the date this Order becomes final and continuing for five (5) years, Goodman Fielder shall not, without prior written notification to the Commission, sell, transfer, or otherwise convey, directly or indirectly, the U.S. Gelatin Business as a whole to a Person other than DGF Stoess or SKW.

The prior notification required by this Paragraph shall be given on the Notification and Report Form set forth in the Appendix to Part 803 of Title 16 of the Code of Federal Regulations as amended (hereinafter referred to as the "Notification"), and shall be prepared and transmitted in accordance with the requirements of that part, except that no filing fee will be required for any such Notification, Notification shall be filed with the Secretary of the Commission, Notification need not be made to the United States

Department of Justice, and Notification is required only of Respondent Goodman Fielder and not of any other party to the transaction. Respondent Goodman Fielder shall provide the Notification to the Secretary of 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), Respondent Goodman Fielder shall not consummate the transaction until thirty (30) days after submitting such additional information or documentary material. Early termination of the waiting periods in this Paragraph may be requested and, where appropriate, granted by letter from the Commission's Bureau of Competition. PROVIDED, HOWEVER, that prior notification shall not be required by this Paragraph for a transaction for which notification is required to be made, and has been made, pursuant to Section 7A of the Clayton Act, 15 U.S.C. § 18a.

VII.

IT IS FURTHER ORDERED that:

A. Within sixty (60) days after the date this Order becomes final, Respondents shall submit to the Commission a verified written report setting forth in detail the manner and form in which they have complied and are complying with this Order; 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 such 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 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.

IX.

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, 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 books, ledgers, accounts, correspondence, memoranda and other records and documents in the possession or under the control of Respondents relating to any matters contained in this Order; and

B. Upon five (5) days' notice to Respondents and without restraint or interference from them, to interview officers, directors, employees, agents or independent contractors of Respondents, who may have counsel present, relating to any matters contained in this Order.

By the Commission, Chairman Muris not participating.

Analysis

Analysis of Agreement Containing Consent Order to Aid Public Comment

I. Introduction

The Federal Trade Commission ("Commission") has accepted, subject to final approval, an Agreement Containing Consent Order ("Consent Agreement") from Deutsche Gelatine-Fabriken Stoess AG ("DGF Stoess") and Goodman Fielder Limited ("Goodman Fielder") which is designed to remedy the anticompetitive effects resulting from Goodman Fielder's sale of its gelatin business to DGF Stoess. Under the terms of the Consent Agreement, DGF Stoess will not be allowed to acquire Goodman Fielder's entire gelatin business as initially proposed; rather, Goodman Fielder will retain its United States and Argentine gelatin assets, which, collectively, represent approximately 40 percent of the original proposed acquisition. Moreover, Goodman Fielder will face limitations on any subsequent divestiture of those retained assets, including requirements that Goodman Fielder seek prior approval from the Commission or provide prior notice to the Commission, depending on certain relevant considerations.

The proposed 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 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.

Pursuant to a purchase agreement dated February 14, 2001, DGF Stoess proposed to acquire Goodman Fielder's entire worldwide gelatin business (the "Proposed Acquisition"). The total value of the Proposed Acquisition is approximately $170 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 United States market for the manufacture and sale of pigskin and beef hide gelatin.

II. The Parties

Headquartered in Eberbach, Germany, DGF Stoess is the largest supplier of pigskin and beef hide gelatin in the United States and the world. DGF Stoess produces pigskin and beef hide gelatin at seven manufacturing plants worldwide. Two of the plants are located in the United States (Kind & Knox, in Sioux City, Iowa, and Dynagel, in Calumet City, Illinois), one plant is in Brazil, one plant is in Sweden, and three plants are in Germany.

Goodman Fielder is a diversified food products company based in Sydney, Australia. Through its Leiner Davis Gelatin subsidiary, and other related subsidiaries, Goodman Fielder is the second largest supplier of pigskin and beef hide gelatin in the United States and the world. Goodman Fielder owns and operates eight gelatin manufacturing plants of varying sizes worldwide – one each in the United States (Davenport, Iowa), Mexico, South Africa, Australia, New Zealand and Argentina, and two in Brazil. Of Goodman Fielder's gelatin manufacturing facilities, only the plants in the United States and South America compete for gelatin sales in the U.S. market.

III. The Pigskin and Beef Hide Gelatin Market

Pigskin and beef hide gelatins are versatile products obtained from the partial hydrolysis of collagen, a protein that is the principal constituent of pigskins and beef hides. Pigskin and beef hide gelatins have many functions and are a critical component of a wide variety of products, particularly in the food industry (in products such as gelatin desserts, marshmallows, gummy candies and other confections) and the pharmaceutical industry (in products such as soft and hard capsules and tablet coatings). Although other types of products (e.g., starch, carrageenan, pectin, etc.) can provide some of the qualities of gelatin, no other product provides the full range of performance of gelatin, or is sufficiently

cost-effective to replace gelatin in edible and pharmaceutical applications.

If the Proposed Acquisition were to be consummated, DGF Stoess would have a U.S. market share of over 50 percent of pigskin and beef hide gelatin sales and would be more than two and one-half times the size of its nearest competitor. Prior to the acquisition, DGF Stoess and Goodman Fielder (through its Leiner Davis Gelatin subsidiary) competed vigorously against each other for gelatin business, and this competition benefitted gelatin customers. By eliminating competition between the two largest gelatin suppliers, and creating a firm with a market share of over 50 percent, the Proposed Acquisition would allow the combined firm to exercise market power unilaterally, as well as increasing the likelihood of coordinated interaction among gelatin manufacturers. As a result, the Proposed Acquisition would increase the likelihood that purchasers of pigskin and beef hide gelatin would be forced to pay higher prices and that innovation, service levels, and product quality in this market would decrease.

There are significant impediments to both expansion by existing manufacturers, as well as new entry, in the pigskin and beef hide gelatin market. First, the gelatin industry is operating at or very near full capacity, as is required for the efficient operation of gelatin manufacturing facilities. Second, even under normal conditions, the raw materials for pigskin and beef hide gelatin production are a finite resource often in short supply. Third, recent outbreaks of foot and mouth disease and "mad cow" disease around the world have further limited the normally tight supply of raw materials for the gelatin industry, thus diminishing the likelihood of significant and timely expansion. Finally, even if raw materials were available, significant capacity expansions (beyond the limited available excess capacity) can take years to complete, and more modest expansions are generally viewed as economically inefficient.

New entry is an even more remote possibility because a new entrant, beyond facing the same limited raw material supply, would need to build a plant – a difficult, expensive and time-

consuming process. It would take a new entrant over two years to accomplish the necessary steps for entry and achieve a significant market impact. Indeed, because many gelatin customers impose stringent supplier qualification requirements that (even if all goes well) can take years to complete, a new entrant is highly unlikely to achieve a significant market impact within two years. New entry also is unlikely because the costs of building a new plant and entering the market are high relative to the limited sales opportunities available to new entrants.

IV. The Consent Agreement

The Commission initiated its investigation of the Proposed Acquisition shortly after being notified of the transaction in March 2001. In response to competitive concerns raised by the Commission which came to light during the course of the Commission's investigation, DGF Stoess and Goodman Fielder proposed to divest one of Goodman Fielder's gelatin plants – a large pigskin gelatin plant located in Davenport, Iowa. After careful consideration, that proposal was ultimately deemed insufficient to remedy the anticompetitive effects of the Proposed Acquisition. On January 15, 2002, the Commission authorized its staff to seek a preliminary injunction in federal district court preventing DGF Stoess and Goodman Fielder from consummating the Proposed Acquisition. The Consent Agreement arose out of subsequent discussions between the Commission, DGF Stoess and Goodman Fielder. In those discussions, the parties proposed to amend the Purchase Agreement such that Goodman Fielder would not sell its entire gelatin business to DGF Stoess, but rather would retain two of its plants – a pigskin gelatin manufacturing plant in Davenport, Iowa, and a beef hide gelatin plant located in Santa Fe, Argentina – along with all of the ancillary assets and infrastructure (e.g., production personnel, sales operations, etc.) required to operate those plants together as an ongoing business.

The parties' proposal, as reflected in the Consent Agreement, effectively remedies the Proposed Acquisition's anticompetitive effects in the United States market for pigskin and beef hide gelatin. By retaining two substantial gelatin plants in Davenport

and Santa Fe, Goodman Fielder will have virtually the same U.S. presence as did DGF Stoess before the acquisition, and the concentration level of the U.S. market for pigskin and beef hide gelatin will remain nearly unchanged by the transaction. In addition, the package of assets retained by Goodman Fielder, a pigskin gelatin plant in the United States and a beef hide gelatin plant in Argentina, provides geographic scope and product diversity characteristic of the most competitive market participants.

Although Goodman Fielder's retention of the U.S. and Argentine plants largely remedies the anticompetitive effects of the Proposed Acquisition, some competitive questions remain because Goodman Fielder has expressed a desire to exit the gelatin business. Accordingly, the Commission has required additional provisions in the Consent Agreement in case Goodman Fielder chooses to dispose of the retained assets, to address three specific concerns. First, and most obviously, a subsequent sale of the retained assets to DGF Stoess would be problematic because such a sale would simply effectuate a two-step version of the Proposed Acquisition – a transaction that the Commission already believes to be anticompetitive. Second, a subsequent sale of the retained assets to SKW, the third leading supplier worldwide of pigskin and beef hide gelatin, would raise many of the same competitive issues raised by a sale of those assets to DGF Stoess. Third, any sale by Goodman Fielder that would split up the retained assets would raise a competitive concern, because it would eliminate the product and geographic diversity of the gelatin business retained by Goodman Fielder and likely would diminish the competitive significance of those assets in the U.S. market.

To address these problems, the proposed Consent Agreement provides that: (1) DGF Stoess may not buy any of the gelatin assets retained by Goodman Fielder without prior approval from the Commission; (2) Goodman Fielder may not sell any of the retained gelatin assets to DGF or SKW, or sell less than the complete package of retained assets to anyone, without prior approval from the Commission; and (3) Goodman Fielder must

provide the Commission with prior notice of any other sale of the retained assets. The prior approval requirements ensure that the Commission will be able to address the three specific issues raised above. The prior notice requirement guarantees the Commission the benefits of the Hart-Scott-Rodino framework in evaluating all other possible sales of the retained assets, including those that might otherwise be unreportable. In short, the Consent Agreement preserves the current competitive situation, allows DGF Stoess and Goodman Fielder to complete a modified version of their transaction that does not harm competition, and provides Goodman Fielder with ongoing flexibility with respect to a disposition of the retained assets, even if market conditions change in the near future.

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

Complaint

IN THE MATTER OF

ELI LILLY and COMPANY

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

Docket C-4047; File No. 0123214
Complaint, May 8, 2002--Decision, May 8, 2002

This consent order addresses representations made by Respondent Eli Lilly and Company – a pharmaceutical company that manufactures, markets, and sells drugs such as the anti-depressant medication Prozac, and operates the Prozac.com Web site – through Lilly's privacy policies, and during the sign-up process for Medi-Messenger, a service that enabled its subscribers to receive individualized email reminders from Lilly concerning their Prozac medication or other matters. The order, among other things, prohibits the respondent from misrepresenting the extent to which it maintains and protects the privacy or confidentiality of any personally identifiable information collected from or about consumers. The order also requires the respondent to implement a four-stage information security program designed to establish and maintain reasonable and appropriate administrative, technical, and physical safeguards to protect consumers' personal information against any reasonably anticipated threats or hazards to its security, confidentiality, or integrity, and to protect such information against unauthorized access, use, or disclosure.

Participants

For the Commission: *Mamie Kresses, Dean C. Forbes, Heather Hippsley, Mary K. Engle, Louis Silversin,* and *Gerard R. Butters.*

For the Respondent: *Karen Silverman* and *J. Thomas Rosch, Latham & Watkins,* and *Rebecca O. Kendall* and *Stanley W. Crosley, Eli Lilly.*

COMPLAINT

The Federal Trade Commission, having reason to believe that Eli Lilly and Company, a corporation ("respondent") has violated the provisions of the Federal Trade Commission Act, and it

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

1. Respondent Eli Lilly and Company is an Indiana corporation with its principal office or place of business at Lilly Corporate Center, Indianapolis, Indiana 46285. Respondent, a pharmaceutical company, has advertised and promoted its anti-depressant medication, Prozac, through the company's Web sites www.prozac.com and www.lilly.com.

2. The acts and practices of respondent as 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 promotes its Prozac.com Web site as "Your Guide to Evaluating and Recovering from Depression." From March 15, 2000 until June 22, 2001, respondent advertised, promoted, and marketed via www.Prozac.com and www.Lilly.com an email reminder service known as "Medi-messenger." Consumers who utilized the Medi-messenger service could design and receive personal email reminder messages from respondent concerning their medication or other matters. Once a visitor registered for Medi-messenger, the reminder messages were automatically emailed from Prozac.com to the subscriber at the email address s/he provided, and according to the schedule established by the subscriber.

4. Subscribers to the Medi-messenger service registered by providing an email address, a password, the text of the reminder message they wanted to receive, and the schedule for sending the reminder messages. (Complaint Exhibit A, pp.1-4). After providing information to register for Medi-messenger, the subscriber was invited to view the Prozac.com "Privacy Statement" via a hyperlink, which was positioned just above the "Submit" and "Reset" buttons. (Complaint Exhibit A, p.4)

5. Respondent has disseminated or has caused to be disseminated privacy policies on Prozac.com and Lilly.com, including but not

necessarily limited to the attached Exhibits B and C. These privacy policies contain the following statements regarding the privacy and confidentiality of personal information collected through respondent's Web sites:

A. "**Your Privacy**

This Web site has been created to provide our visitors with information on certain medical conditions. Eli Lilly and Company respects the privacy of visitors to its Web sites, and we feel it is important to maintain our guests' privacy as they take advantage of this resource. As a result, we have developed this privacy code.

* * *

We will use Your Information to respond to requests you may make of us, and from time to time, we may refer to Your Information to better understand your needs and how we can improve our Web sites, products and services. Any and all uses would comply with all applicable laws. We may also use Your Information to contact you. However, the provision of Your Information will only be necessary if you choose to use or receive certain tools or services, such as a newsletter or our medical reminder service.

* * *

Our Web sites have security measures in place, including the use of industry standard secure socket layer encryption (SSL), to protect the confidentiality of any of Your Information that you volunteer; however, to take advantage of this your browser must support encryption protection (found in Internet Explorer release 3.0 and above). These security measures also help us to honor your choices for the use of Your Information."

Exhibit B: "Prozac.com | Privacy Statement," http://www.prozac.com/your_privacy.jsp; and https://secure.prozac.com/your_privacy.jsp.

B. "**privacy**

Eli Lilly and Company respects the privacy of visitors to its websites, and we feel it is important to maintain our guests' privacy as they take advantage of this resource. As a result, we have developed this privacy code.

* * *

We will use Your Information to respond to requests you may make of us, and from time to time, we may refer to Your Information to better understand your needs and how we can improve our Web sites, products and services. Any and all uses would comply with all applicable laws. We may also use Your Information to contact you in connection with your requests.

* * *

Our Web sites have security measures in place, including the use of industry standard secure socket layer encryption (SSL), to protect the confidentiality of any of Your Information that you volunteer; however, to take advantage of this your browser must support encryption protection (found in Internet Explorer release 3.0 and above)."

Exhibit C: "Lilly: Privacy," http://www.lilly.com/privacy.html.

6. On June 27, 2001, at respondent's direction, an Eli Lilly employee sent an email message to Medi-messenger subscribers announcing the termination of the Medi-messenger service. To do this, the employee created a new computer program to access subscribers' email addresses and send them the email. The June

27th email disclosed the email addresses of all 669 Medi-messenger subscribers to each individual subscriber by including all of the recipients' email addresses within the "To:" line of the message. (Complaint Exhibit D, *email addresses redacted from original*). By including the email addresses of all Medi-messenger subscribers within the June 27th email message, respondent unintentionally disclosed personal information provided to it by consumers in connection with their use of the Prozac.com Web site.

7. The June 27th disclosure of personal information resulted from respondent's failure to maintain or implement internal measures appropriate under the circumstances to protect sensitive consumer information. For example, respondent failed to provide appropriate training for its employees regarding consumer privacy and information security; failed to provide appropriate oversight and assistance for the employee who sent out the email, who had no prior experience in creating, testing, or implementing the computer program used; and failed to implement appropriate checks and controls on the process, such as reviewing the computer program with experienced personnel and pretesting the program internally before sending out the email. Respondent's failure to implement appropriate measures also violated certain of its own written policies.

8. Through the means described in Paragraph 5, respondent has represented, expressly or by implication, that it employs measures and takes steps appropriate under the circumstances to maintain and protect the privacy and confidentiality of personal information obtained from or about consumers through its Prozac.com and Lilly.com Web sites.

9. In truth and in fact, as described in Paragraphs 6 and 7, respondent has not employed measures and has not taken steps appropriate under the circumstances to maintain and protect the privacy and confidentiality of personal information obtained from or about consumers through its Prozac.com and Lilly.com Web

sites. Therefore, the representation set forth in Paragraph 8 was, and is, false or misleading.

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

THEREFORE, the Federal Trade Commission this eighth day of May, 2002, has issued this complaint against respondent.

By the Commission.

Prozac® | Recovery Tools | MediMessenger - Microsoft Internet Explorer provided by Eli Lilly and Company(20010711.01)

File Edit View Favorites Tools Help

Back Forward Stop Refresh Home Search Favorites History Mail Print Edit Messenger

Address D:\My Documents\prozacSourceCode\webroot\4_rec\4rec200.htm

PROZAC®
fluoxetine hydrochloride

Disease Information | About Prozac | Taking Control | Recovery Tools | Caring for Others | Community

Home | Prozac in the News | Contact Us | Survey | Visitor Poll | Safety | Product Label | Search | Site Map

Recovery Tools

- Self-Assessment & Tracking
- MediMessenger
- Patient Associations & Resources
- Newsletter

MediMessenger

This useful and free reminder service can keep your life on schedule. Use this tool to remind yourself to take/refill your medication, take a walk, schedule appointments or even remind yourself to have a great day!

Click here to sign-up, or if you have already signed-up, insert your information below to update your account.

Username or Alias:

Password:

Please note: Username and Password are case-sensitive for your security e.g. Jane Doe

Login

Start Inbox Prozac

12:30 PM

PENGAD-Bayonne, EXHIBIT NO. A

Prozac® | Recovery Tools | MediMessenger - Microsoft Internet Explorer provided by Eli Lilly and Company(20010711.01)

File Edit View Favorites Tools Help

Back Forward Stop Refresh Home Search Favorites History Mail Print Edit Messenger

Address D:\My Documents\prozacSourceCode\webroot\4_rec\4rec201.htm

PROZAC
fluoxetine hydrochloride

Disease Information | About Prozac | Taking Control | Recovery Tools | Caring for Others | Community

Home | Prozac in the News | Contact Us | Survey | Visitor Poll | Safety | Product Label | Search | Site Map

Recovery Tools

- Self-Assessment & Tracking
- MediMessenger
- Patient Associations & Resources
- Newsletter

MediMessenger

Let us remind you!

Sign up below to receive daily, weekly and monthly reminders for **any task** using our e-mail reminder service.

Username or Alias :

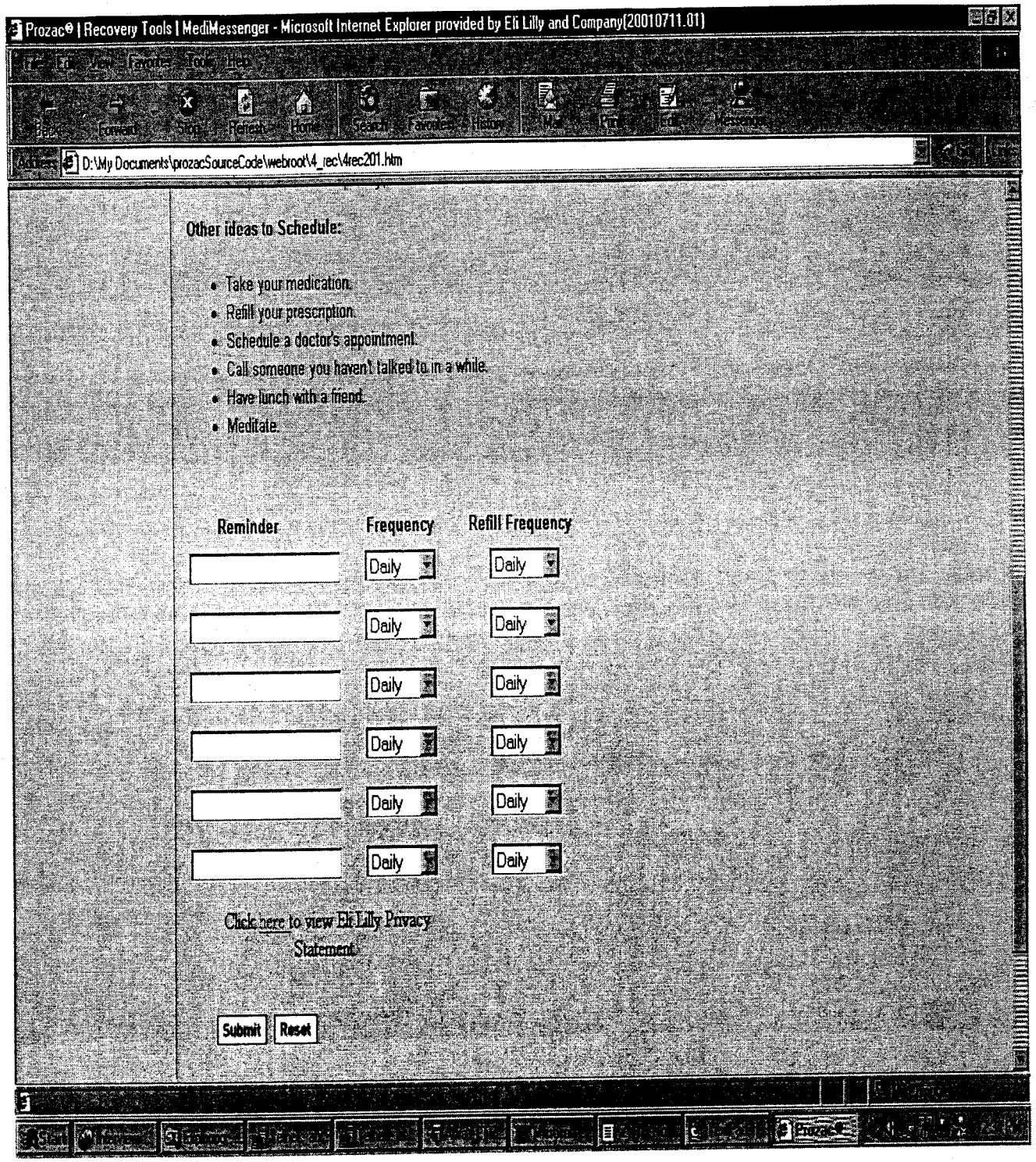
Password :

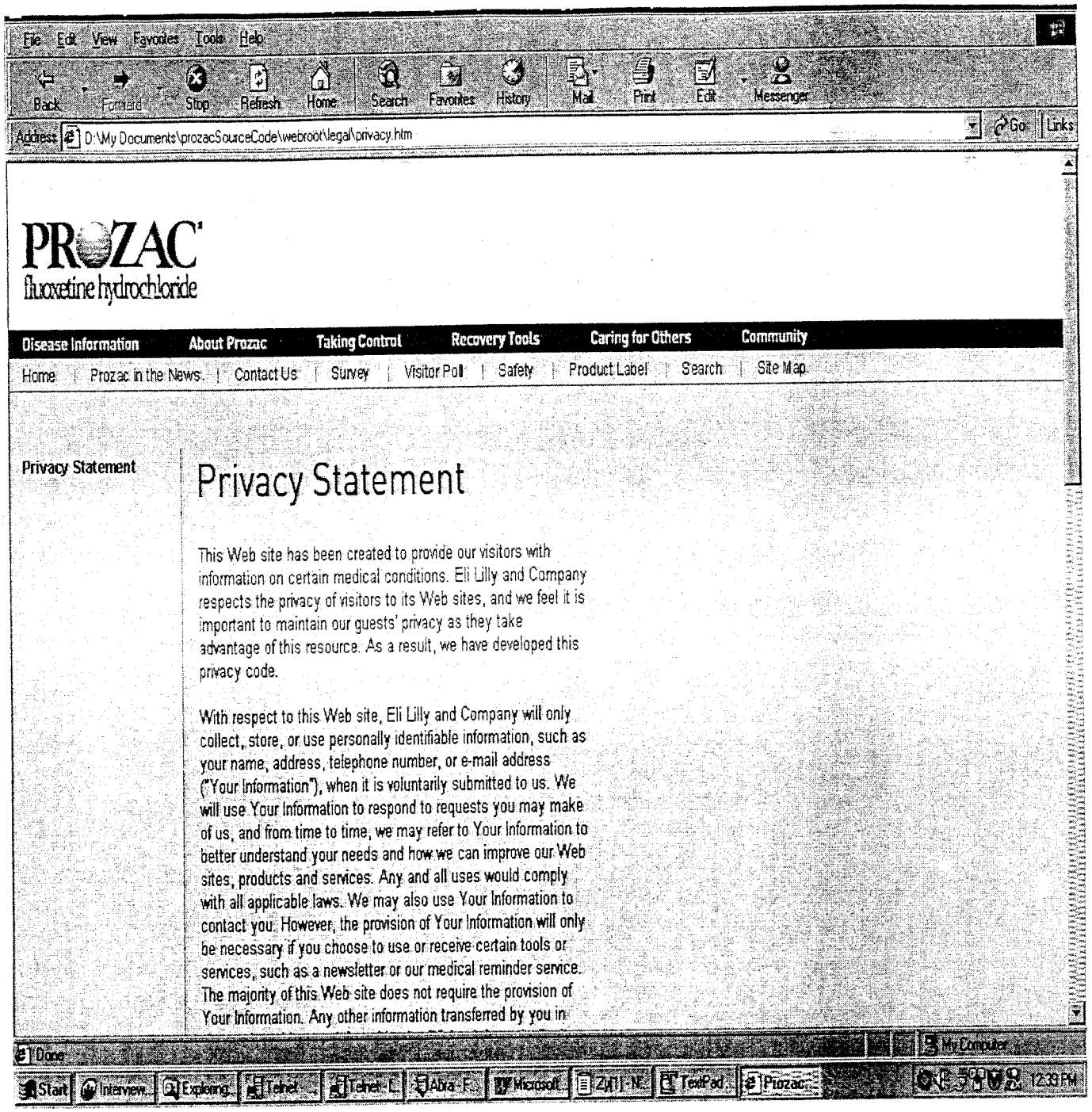
Confirm Password :

E-mail Address :

Please note that Username and password are case sensitive for your security, e.g. Jane Doe.
Be sure to memorize your information or write it down and keep it in a safe place to make any changes. You can use the same username and password to sign up for the Zung Tracking Tool.
Enter the task and the frequency of the task. If you enter a medication, set the refill frequency, otherwise select **None.**

Start | Interview | Exploring | Telnet ab | Telnet b | Abra FTP | Microsoft | Zyl | Nox | TextPad | Prozac® | My Computer | 12:30 PM


Prozac® | Recovery Tools | MediMessenger - Microsoft Internet Explorer provided by Eli Lilly and Company(20010711.01)
Address
D:\My Documents\prozacSourceCode\webroot\4_rec\4rec201.htm
Other ideas to Schedule:
Take your medication.
Refill your prescription.
Schedule a doctor's appointment.
Call someone you haven't talked to in a while.
Have lunch with a friend.
Meditate.
Reminder
Frequency
Refill Frequency
Daily
Click here to view Eli Lilly Privacy Statement.
Submit
Reset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Address D:\My Documents\prozacSourceCode\webroot\legal\privacy.htm
Go Links
PROZAC
fluoxetine hydrochloride
Disease Information About Prozac Taking Control Recovery Tools Caring for Others Community
Home | Prozac in the News | Contact Us | Survey | Visitor Poll | Safety | Product Label | Search | Site Map
Privacy Statement
Privacy Statement
This Web site has been created to provide our visitors with information on certain medical conditions. Eli Lilly and Company respects the privacy of visitors to its Web sites, and we feel it is important to maintain our guests' privacy as they take advantage of this resource. As a result, we have developed this privacy code.
With respect to this Web site, Eli Lilly and Company will only collect, store, or use personally identifiable information, such as your name, address, telephone number, or e-mail address ("Your Information"), when it is voluntarily submitted to us. We will use Your Information to respond to requests you may make of us, and from time to time, we may refer to Your Information to better understand your needs and how we can improve our Web sites, products and services. Any and all uses would comply with all applicable laws. We may also use Your Information to contact you. However, the provision of Your Information will only be necessary if you choose to use or receive certain tools or services, such as a newsletter or our medical reminder service. The majority of this Web site does not require the provision of Your Information. Any other information transferred by you in
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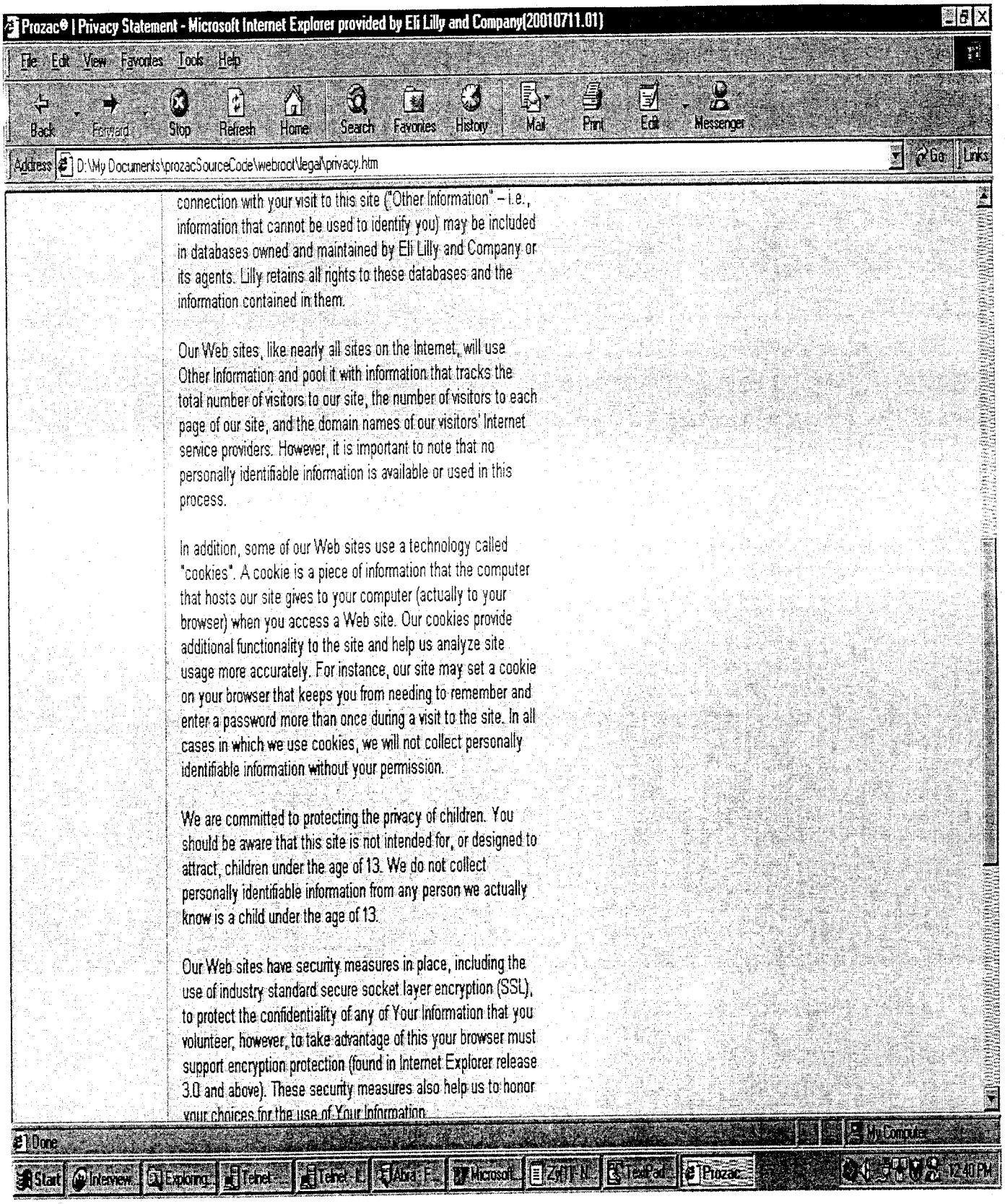
Prozac® | Privacy Statement - Microsoft Internet Explorer provided by Eli Lilly and Company(20010711.01)
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Go Links
connection with your visit to this site ("Other Information" – i.e., information that cannot be used to identify you) may be included in databases owned and maintained by Eli Lilly and Company or its agents. Lilly retains all rights to these databases and the information contained in them.
Our Web sites, like nearly all sites on the Internet, will use Other Information and pool it with information that tracks the total number of visitors to our site, the number of visitors to each page of our site, and the domain names of our visitors' Internet service providers. However, it is important to note that no personally identifiable information is available or used in this process.
In addition, some of our Web sites use a technology called "cookies". A cookie is a piece of information that the computer that hosts our site gives to your computer (actually to your browser) when you access a Web site. Our cookies provide additional functionality to the site and help us analyze site usage more accurately. For instance, our site may set a cookie on your browser that keeps you from needing to remember and enter a password more than once during a visit to the site. In all cases in which we use cookies, we will not collect personally identifiable information without your permission.
We are committed to protecting the privacy of children. You should be aware that this site is not intended for, or designed to attract, children under the age of 13. We do not collect personally identifiable information from any person we actually know is a child under the age of 13.
Our Web sites have security measures in place, including the use of industry standard secure socket layer encryption (SSL), to protect the confidentiality of any of Your Information that you volunteer, however, to take advantage of this your browser must support encryption protection (found in Internet Explorer release 3.0 and above). These security measures also help us to honor your choices for the use of Your Information.
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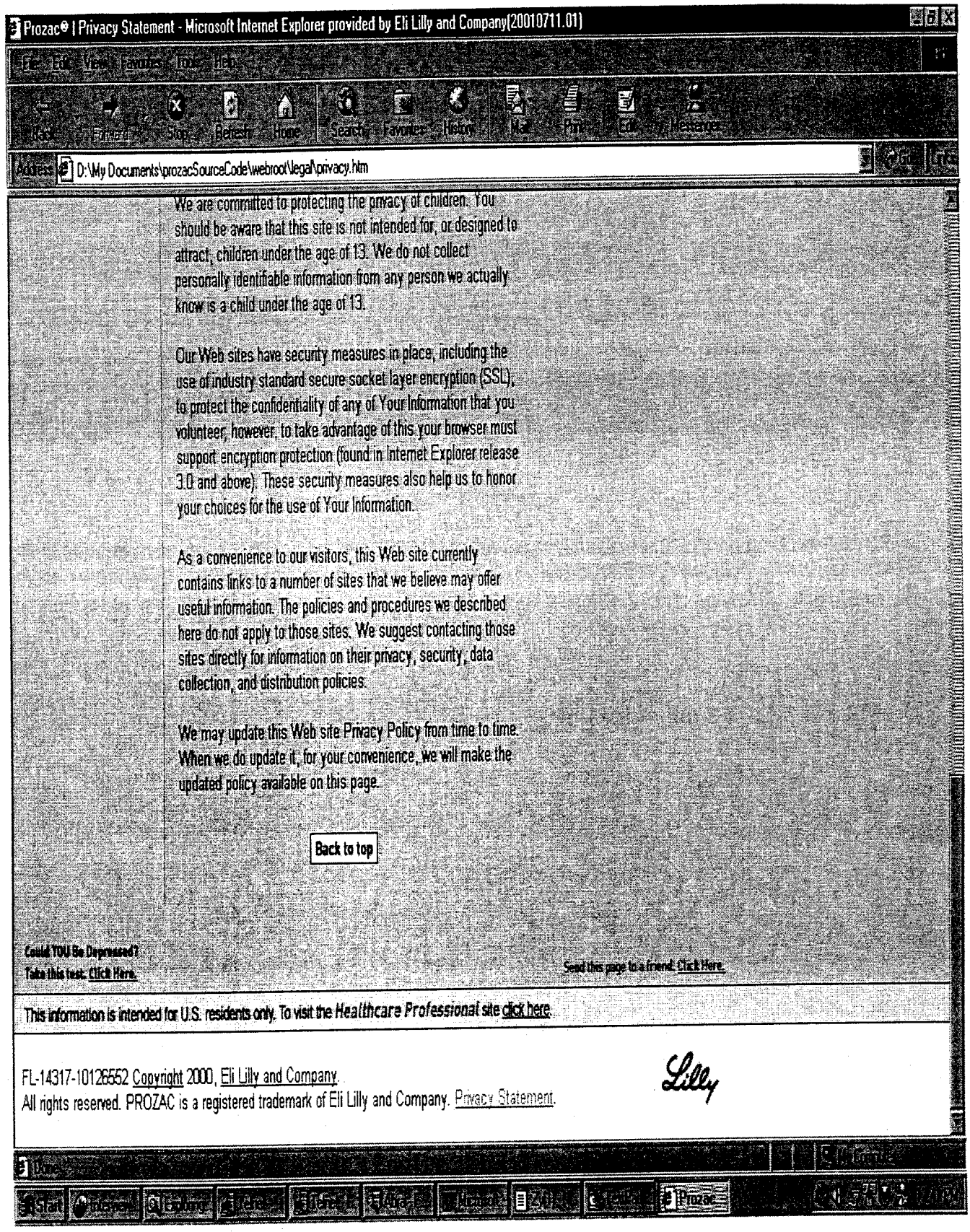
Prozac® | Privacy Statement - Microsoft Internet Explorer provided by Eli Lilly and Company(20010711.01)
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Address D:\My Documents\prozacSourceCode\webroot\legal\privacy.htm
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We may update this Web site Privacy Policy from time to time. When we do update it, for your convenience, we will make the updated policy available on this page.
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Could YOU Be Depressed? Take this test. Click Here.
Send this page to a friend. Click Here.
This information is intended for U.S. residents only. To visit the Healthcare Professional site click here.
FL-14317-10126552 Copyright 2000, Eli Lilly and Company.
All rights reserved. PROZAC is a registered trademark of Eli Lilly and Company. Privacy Statement.
Lilly
Done
Start
Prozac

Your Privacy

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With respect to this Web site, Eli Lilly and Company will only collect, store, or use personally identifiable information, such as your name, address, telephone number, or e-mail address ("Your Information"), when it is voluntarily submitted to us. We will use Your Information to respond to requests you may make of us, and from time to time, we may refer to Your Information to better understand your needs and how we can improve our Web sites, products and services. Any and all uses would comply with all applicable laws. We may also use Your Information to contact you. However, the provision of Your Information will only be necessary if you choose to use or receive certain tools or services, such as a newsletter or our medical reminder service. The majority of this Web site does not require the provision of Your Information. Any other information transferred by you in connection with your visit to this site ("Other Information" – i.e., information that cannot be used to identify you) may be included in databases owned and maintained by Eli Lilly and Company or its agents. Lilly retains all rights to these databases and the information contained in them.

Our Web sites, like nearly all sites on the Internet, will use Other Information and pool it with information that tracks the total number of visitors to our site, the number of visitors to each page of our site, and the domain names of our visitors' Internet service providers. However, it is important to note that no personally identifiable information is available or used in this process.

In addition, some of our Web sites use a technology called "cookies". A cookie is a piece of information that the computer that hosts our site gives to your computer (actually to your browser) when you access a Web site. Our cookies provide additional functionality to the site and help us analyze site usage more accurately. For instance, our site may set a cookie on your browser that keeps you from needing to remember and enter a password more than once during a visit to the site. In all cases in which we use cookies, we will not collect personally identifiable information without your permission.

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privacy

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With respect to this website, Eli Lilly and Company and its agents will only collect, store or use personally identifiable information, such as your name, address, social security number, stockholder account number, or e-mail address ("Your Information"), when it is voluntarily submitted to us. We will use Your Information to respond to requests you may make of us, and from time to time, we may refer to Your Information to better understand your needs and how we can improve our websites, products and services. Any and all uses would comply with all applicable laws. We may also use Your Information to contact you in connection with your requests. Any other information transferred by you in connection with your visit to this site ("Other Information" -- i.e., information that cannot be used to identify you) may be included in databases owned and maintained by Eli Lilly and Company or its agents. Lilly retains all rights to these databases and the information contained in them.

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PENGAD-Bayonne, [illegible]

EXHIBIT

NO. C

[redacted]

From: mail_usmail-welcome@lilly.com
Sent: Wednesday, June 27, 2001 8:37 PM
To: [redacted]

EXHIBIT
PENGAD-Bayonne
NO. D

To:

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[redacted]@hotmail.com;

Subject: Medi-Messenger

Dear Medi-Messenger User:

We're listening! This week Eli Lilly and Company relaunched Prozac.com with a new navigation and feel. Based upon feedback from consumers like you, we have discontinued our Medi-Messenger e-mail reminder service. We are appreciative of your comments, and hope this does not cause any inconvenience to those of you who were using this feature.

DECISION AND ORDER

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

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

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

1. Respondent Eli Lilly and Company is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Indiana, with its principal office or place of business at Lilly Corporate Center, Indianapolis, Indiana 46285.

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

ORDER

DEFINITIONS

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

1. "Personally identifiable information" or "personal information" shall mean individually identifiable information from or about an individual consumer 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 consumer; (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 consumer; or (h) or any information that is combined with (a) through (g) above. Provided that, this definition shall not include personally identifiable information about physicians, nurses, or other health care professionals, or their staff, that is collected in connection with such persons' professional duties.

2. Unless otherwise specified, "respondent" shall mean Eli Lilly and Company, its successors and assigns and its officers, agents, representatives, and employees acting within the scope of their authority on behalf of, or in active concert or participation with, Eli Lilly and Company.

3. "Lilly USA division" shall mean Lilly USA, a division of Eli Lilly and Company, and Lilly USA's successors, assigns, officers, representatives, agents, employees, and other entities responsible for the development, control, support, or oversight of U.S. product or service sales, advertising, or marketing, information management,

or information technology. Provided that, the Lilly USA division shall be treated as a corporation under the control of Eli Lilly and Company for the purpose of determining whether any other entity is Lilly USA division's successor or assign.

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

I.

IT IS ORDERED that respondent shall not misrepresent in any manner, expressly or by implication, the extent to which it maintains and protects the privacy or confidentiality of any personally identifiable information collected from or about consumers, in connection with the advertising, marketing, offering for sale or sale, in or affecting commerce, of any pharmaceutical, medical or other health-related product or service by respondent's Lilly USA division, directly or through any corporation, subsidiary, division, or other entity.

II.

IT IS FURTHER ORDERED that respondent shall establish and maintain an information security program for the protection of personally identifiable information collected from or about consumers in connection with the advertising, marketing, offering for sale, or sale of any pharmaceutical, medical, or other health-related product or service, in or affecting commerce, by respondent's Lilly USA division, directly or through any corporation, subsidiary, division, or other entity. Such program shall consist of:

A. designating appropriate personnel to coordinate and oversee the program;

B. identifying reasonably foreseeable internal and external risks to the security, confidentiality, and integrity of personal information, including any such risks posed by lack of training, and addressing these risks in each relevant area of its operations, whether performed by employees or

agents, including: (i) management and training of personnel; (ii) information systems for the processing, storage, transmission, or disposal of personal information; and (iii) prevention and response to attacks, intrusions, unauthorized access, or other information systems failures;

C. conducting an annual written review by qualified persons, within ninety (90) days after the date of service of this order and yearly thereafter, which review shall monitor and document compliance with the program, evaluate the program's effectiveness, and recommend changes to it; and

D. adjusting the program in light of any findings and recommendations resulting from reviews or ongoing monitoring, and in light of any material changes to its operations that affect the program.

III.

IT IS FURTHER ORDERED that respondent shall for a period of five (5) years
after the date of service of this order maintain and upon request make available to the Federal Trade Commission for inspection and copying a print or electronic copy of the following documents relating to compliance with Parts I and II of this order by respondent's Lilly USA division, directly or through any corporation, subsidiary, division, or other entity:

A. a sample copy of each different consumer-targeted print, broadcast, cable, or Internet advertisement, promotion, information collection form, Web page, screen, email message, or other document containing any representation regarding the Lilly USA division's collection, use, and security of personal information from or about consumers. 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. Provided, however, that after

creation of any Web page or screen in compliance with this order, the Lilly USA division shall not be required to retain a print or electronic copy of any amended Web page or screen to the extent that the amendment does not affect its compliance obligations under this order;

B. all reports, studies, reviews, audits, audit trails, policies, training materials, and plans, whether prepared by or on behalf of respondent, relating to the Lilly USA division's compliance with the information security program required by Part II of this order; and

C. any documents, whether prepared by or on behalf of the Lilly USA division, that contradict, qualify, or call into question its compliance with the information security program required by Part II of this order, maintained through reasonable efforts in accordance with a document retention program.

IV.

IT IS FURTHER ORDERED that respondent Eli Lilly and Company, 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 relating 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.

V.

IT IS FURTHER ORDERED that respondent Eli Lilly and Company, 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.

VI.

IT IS FURTHER ORDERED that respondent Eli Lilly and Company, and its successors and assigns, shall within one hundred and twenty (120) 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. This report shall include a copy of the initial annual review required by Part II.C of this order.

VII.

This order will terminate on May 8, 2022, or twenty (20) years from the most recent date that the United States or the Federal Trade Commission files a complaint (with or without an accompanying consent decree) in federal court alleging any violation of the order, whichever comes later; provided, however, that the filing of such a complaint will not affect the duration of:

A. Any Part in this order that terminates in less than twenty (20) years;

B. This order's application to any respondent that is not named as a defendant in such complaint; and

C. This order if such complaint is filed after the order has terminated pursuant to this Part.

Provided, further, that if such complaint is dismissed or a federal court rules that the respondent did not violate any provision of the order, and the dismissal or ruling is either not appealed or upheld on appeal, then the order will terminate according to this Part as though the complaint had
never been filed, except that the order will not terminate between the date such complaint is filed
and the later of the deadline for appealing such dismissal or ruling and the date such dismissal or ruling is upheld on appeal.

By the Commission.

Analysis of Proposed Consent Order to Aid Public Comment

The Federal Trade Commission has accepted, subject to final approval, an agreement containing a consent order from Eli Lilly and Company ("Lilly").

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 appropriate action or make final the agreement's proposed order.

Lilly is a pharmaceutical company that manufactures, markets, and sells drugs, including the anti-depressant medication Prozac. To market Prozac, among other things Lilly operates the Prozac.com Web site, which the company promotes as "Your Guide to Evaluating and Recovering from Depression." The Prozac.com site, like Lilly.com and several of Lilly's other product Web sites, collects personal information from visitors.

From March 2000 through June 2001, Lilly offered through Prozac.com a service called "Medi-Messenger," which enabled its subscribers to receive individualized email reminders from Lilly concerning their Prozac medication or other matters. On June 27, 2001, Lilly sent a form email to subscribers to the service, which disclosed all of the subscribers' email addresses to each individual subscriber by including all of their addresses within the "To:" entry of the message.

This matter concerns allegedly false or misleading representations, made through Lilly's privacy policies and during the sign-up process for Medi-Messenger. The Commission's proposed complaint alleges that Lilly claimed that it employs measures and takes steps appropriate under the circumstances to maintain and protect the privacy and confidentiality of personal information obtained from or about consumers through its

Prozac.com and Lilly.com Web sites, when in fact Lilly had not employed such measures and had not taken such steps.

As set forth in the complaint, Lilly's unintentional June 27th disclosure of Medi-Messenger subscribers' personal information (i.e., email addresses) resulted from its failure to maintain or implement internal measures appropriate under the circumstances to protect sensitive consumer information. For example, Lilly failed to provide appropriate training for its employees regarding consumer privacy and information security; failed to provide appropriate oversight and assistance for the employee who sent out the email, who had no prior experience in creating, testing, or implementing the computer program used; and failed to implement appropriate checks and controls on the process, such as reviewing the computer program with experienced personnel and pretesting the program internally before sending out the email. Lilly's failure to implement appropriate measures also violated certain of its own written policies.

The proposed consent order contains provisions designed to prevent Lilly from engaging in similar acts and practices in the future.

The proposed order applies to the collection of personal information from or about consumers in connection with the advertising, marketing, offering for sale, or sale of any pharmaceutical, medical, or other health-related product or service by Lilly's USA division.

Part I of the proposed order prohibits misrepresentations regarding the extent to which Lilly maintains and protects the privacy or confidentiality of any personally identifiable information collected from or about consumers.

Part II of the proposed order requires Lilly to implement a four-stage information security program designed to establish and maintain reasonable and appropriate administrative, technical, and physical safeguards to protect consumers' personal information against any reasonably anticipated threats or hazards to its

security, confidentiality, or integrity, and to protect such information against unauthorized access, use, or disclosure. Specifically, Part II requires Lilly to:

- designate appropriate personnel to coordinate and oversee the program;

- identify reasonably foreseeable internal and external risks to the security, confidentiality, and integrity of personal information, including any such risks posed by lack of training, and to address these risks in each relevant area of its operations, whether performed by employees or agents, including: (i) management and training of personnel; (ii) information systems for the processing, storage, transmission, or disposal of personal information; and (iii) prevention and response to attacks, intrusions, unauthorized access, or other information systems failures;

- conduct an annual written review by qualified persons, within ninety (90) days after the date of service of the order and yearly thereafter, which review shall monitor and document compliance with the program, evaluate the program's effectiveness, and recommend changes to it; and

- adjust the program in light of any findings and recommendations resulting from reviews or ongoing monitoring, and in light of any material changes to Lilly's operations that affect the program.

Parts III through VI of the proposed order are reporting and compliance provisions. Part III requires Lilly's retention of materials relating to its privacy and security representations and to its compliance with the order's information security program. Part IV requires dissemination of the order now and in the future to persons with responsibilities relating to the subject matter of the order. Part V ensures notification to the FTC of changes in corporate status. Part VI mandates compliance reports, including a copy of the initial annual review required by Part II.C within one hundred and twenty (120) days after service of the order. Part

VII 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. It is not intended to constitute an official interpretation of the agreement and proposed order or to modify their terms in any way.

Statement

Concurring Statement of Commissioner Orson Swindle

I am pleased with the consent agreement that the Commission has reached with Eli Lilly and Company. Lilly's unfortunate and unintended disclosure of prescription drug users' personal information has given us all the opportunity to evaluate how to improve upon security practices for confidential information. Lilly should be respected for its long-standing efforts in development of its privacy practices, its acceptance of responsibility for the internal failures that resulted in the alleged violation of its privacy policy, and its willingness to take appropriate steps to correct those mistakes. I appreciate the company's leadership in cooperating with us to improve its security measures, and I believe the firm will fully carry out its commitments under the proposed order. Lilly's responsiveness and its efforts to improve corporate privacy practices can be a model for others to follow.

Complaint

IN THE MATTER OF

OBSTETRICS AND GYNECOLOGY MEDICAL CORPORATION OF NAPA VALLEY, ET AL.

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

Docket C-4048; File No. 0110153
Complaint, May 14, 2002--Decision, May 14, 2002

This consent order addresses agreements among Respondent Obstetrics & Gynecology Medical Corp. of Napa Valley ("OGMC") – a for-profit corporation and a single-specialty independent practice association ("IPA") composed of virtually all of the OB/GYNs with active medical staff privileges at the two general acute care hospitals in Napa County, California – and its Respondent shareholders concerning prices and other terms of dealing with payors. The order, among other things, prohibits the respondents from entering into, participating, or facilitating: (1) any agreement to negotiate on behalf of any physicians with any payor or provider; (2) any agreement to deal or refuse to deal with any payor or provider; or (3) any agreement regarding any term on which any physicians deal, or are willing to deal, with any payor or provider. The order also prohibits the respondents from attempting to engage in – or from encouraging, suggesting, advising, pressuring, inducing, or attempting to induce any person to engage in – any action that would violate the order. In addition, the order requires Respondent OGMC to dissolve itself.

Participants

For the Commission: *Sylvia Kundig, Lisa Rosenthal, Thomas Dahdouh, John P. Wiegand, Erika Wodinsky, Jeffrey Klurfeld, Rendell A. Davis, Jr., Daniel P. Ducore, Louis Silvia, Jr., Thomas R. Iosso* and *Mary T. Coleman.*

For the Respondent: *Frank E. Gamma, Glenn Stover,* and *Joel S. Goldman, Hanson, Bridgett, Marcus, Vlahos & Rudy.*

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, and by virtue of the authority vested in it by said Act, the Federal Trade Commission ("Commission"), having reason to

believe that Obstetrics and Gynecology Medical Corporation of Napa Valley, a California corporation ("OGMC"), Bryan Henry, M.D., R. Bruce Scarborough, M.D., Anthony King, M.D., Dario Gambetta, M.D., Jerome Solomon, M.D., and Cheryl Henry, M.D. (collectively the "physician respondents") have violated the provisions of said Act, 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 in that respect as follows:

RESPONDENTS

PARAGRAPH 1: OGMC is a professional corporation organized, existing, and doing business under and by virtue of the laws of the State of California, with its office and principal place of business located at 1100 Trancas Street, Suite #209, Napa, CA, 94558.

PARAGRAPH 2: The physician respondents are individuals who are or have been engaged in the private practice of obstetrics and gynecology for a fee in Napa County, CA. Except to the extent that competition has been restrained as alleged herein, some or all of the physician respondents have been, and are now, in competition with each other for the provision of physician services. The physician respondents are, or were, the shareholders of OGMC. Their respective business addresses are as follows:

a. Bryan Henry, M.D., 1530 Railroad Avenue, St. Helena, CA 94574;

b. R. Bruce Scarborough, M.D., 1100 Trancas Street, #209, Napa, CA 94558;

c. Anthony King, M.D., 980 Trancas Street, #11, Napa, CA 94558;

d. Dario Gambetta, M.D., 1530 Railroad Avenue, St. Helena, CA 94574;

e. Jerome Solomon, M.D.,1100 Trancas Street, #351, Napa, CA 94558;

f. Cheryl Henry, M.D., 975 Sereno Dr., Vallejo, CA 94589.

PARAGRAPH 3: The physician respondents are, or have been, members of the medical staffs of the two general acute care hospitals in Napa County, CA. They constitute virtually all of the obstetricians and gynecologists with active medical staff privileges at both hospitals.

JURISDICTION

PARAGRAPH 4: The general business practices of OGMC and the physician respondents, including the acts and practices alleged herein, are in commerce or affect commerce as defined in Section 4 of the Federal Trade Commission Act, 15 U.S.C. § 44.

PARAGRAPH 5: Respondent OGMC is a for-profit corporation that also engages in substantial activities for the pecuniary benefit of its physician members. At all times relevant to the complaint, OGMC is and has been organized in substantial part for the profit of its members, and therefore is a corporation within the meaning of Section 4 of the FTC Act, 15 U.S.C. § 44.

BUSINESS ACTIVITIES

PARAGRAPH 6: Physicians often contract with health plans that reimburse, purchase, or pay for health care services provided to other persons. Such health plans include, but are not limited to, health maintenance organizations ("HMOs") and preferred provider organizations. Contracts between physicians and health plans typically establish the terms and conditions, including price terms, under which the physicians will render services to the enrollees of the health plans. Physicians entering into such contracts often agree to reductions in their compensation to obtain access to additional patients. These contracts may permit health

plans to lower their costs and thus reduce the cost of medical care for their enrollees.

PARAGRAPH 7: Physicians organize their practices under several models, including, but not limited to, sole proprietorships, partnerships, and professional corporations (collectively "physician entities"). Absent agreements among competing physician entities on the terms on which they will provide services to the enrollees of health plans, competing physician entities decide unilaterally whether to enter into contracts with health plans to provide services to the health plan enrollees and what prices and other terms and conditions they will accept under such contracts.

PARAGRAPH 8: Physician entities often are paid for the services they provide to health plan enrollees either by contracting directly with a health plan or by participating in independent practice associations ("IPAs"). Some physician entities that participate in IPAs share the risk of financial loss with other participants if the total costs of services provided to health plan enrollees exceed the anticipated volume of service. In addition, when the physician entities share financial risk, they typically agree to follow guidelines relating to quality assurance, utilization review, and administrative efficiency.

PARAGRAPH 9: Napa Valley Physicians' Plan, A Medical Group Inc. ("Napa Valley Physicians") was a risk-sharing IPA, as described in Paragraph 8. Among other things, Napa Valley Physicians contracted with HMOs to provide services to HMO enrollees, most of whom lived or worked in Napa County, CA. Many physicians in Napa County participated in, or had contracts with, Napa Valley Physicians to provide services to the HMO enrollees under Napa Valley Physicians' contracts with HMOs. The physician respondents shared risk under their agreements with Napa Valley Physicians and provided services to HMO enrollees under contracts negotiated by Napa Valley Physicians with health plans.

PARAGRAPH 10: Beginning in 1998, the physician respondents became dissatisfied with their level and timeliness of reimbursement from Napa Valley Physicians and expressed that dissatisfaction to Napa Valley Physicians. In early 1999, each physician respondent concurrently terminated his or her relationship with Napa Valley Physicians. After their terminations, the physician respondents continued to provide services to HMO enrollees through Napa Valley Physicians on a fee-for-service basis. Once the physician respondents began providing services on a fee-for-service basis, they no longer shared financial risk. Although the physician respondents consulted legal counsel in late 1999 about forming an entity in which the physician respondents would share financial risk regarding agreements with Napa Valley Physicians, no such agreement was executed.

PARAGRAPH 11: In February 2000, the physician respondents formed OGMC to, among other things, promote the collective economic interests of the physician respondents by increasing their negotiating power with Napa Valley Physicians. The physician respondents knew that health plans needed to have the services of the physician respondents, whether through Napa Valley Physicians, through another IPA, or through direct contract, in order to be able to offer a viable health plan in Napa County.

ACTS AND PRACTICES

PARAGRAPH 12: Prior to the formation of OGMC, and continuing into 2001, the physician respondents agreed with some or all of the other physician respondents to refuse to contract individually with Napa Valley Physicians or any health plan.

PARAGRAPH 13: Prior to the formation of OGMC, and continuing into 2001, while attempting to negotiate a contract with Napa Valley Physicians under which the physician respondents would share financial risk, the physician respondents agreed on the fees they would charge to Napa Valley Physicians or

health plans for obstetrical and gynecological services provided under agreements between Napa Valley Physicians and health plans. After the formation of OGMC, the physician respondents agreed on the fees they would charge, as members of OGMC, to Napa Valley Physicians and/or health plans for obstetrical and gynecological services provided under agreements between OGMC and Napa Valley Physicians and between OGMC and health plans. On numerous occasions, the physician respondents met to discuss collectively and to vote on short-term and long-term fee-for-service and risk contract proposals. In many instances, the physician respondents agreed on such contract proposals, which included fee-for-service price terms.

PARAGRAPH 14: Prior to the formation of OGMC, and continuing into 2001, the physician respondents agreed to boycott and did boycott Napa Valley Physicians in order to coerce Napa Valley Physicians to meet the physician respondents' demands for higher fees for services rendered to enrollees of HMOs that contracted with Napa Valley Physicians.

PARAGRAPH 15: Respondent OGMC, acting as a combination of its members, and in conspiracy with its members, has acted to restrain competition by, among other things, facilitating, entering into, and implementing agreements among its members, express or implied, to fix price and other competitively significant terms of dealing with Napa Valley Physicians and/or health plans, and refusing to deal with Napa Valley Physicians and/or health plans except on collectively agreed-upon terms.

PARAGRAPH 16: The physician respondents, acting as a combination, and in conspiracy with one another, have acted to restrain competition by, among other things, facilitating, entering into, and implementing agreements among themselves, express or implied, to fix price and other competitively significant terms of dealing with health plans, and to refuse to deal with Napa Valley Physicians and/or health plans except on collectively agreed-upon terms.

PARAGRAPH 17: The physician respondents have not clinically or financially integrated their practices to create efficiencies sufficient to justify the acts and practices described in Paragraphs 12 through 16.

EFFECTS OF RESPONDENTS' ACTS AND PRACTICES

PARAGRAPH 18: As a consequence of the respondents' conduct, described in Paragraphs 12 through 16, Napa Valley Physicians did not have sufficient providers of obstetrical and gynecological services to serve adequately the HMO enrollees of the health plans with which it had contracted. Because Napa Valley Physicians was unable to ensure adequate obstetrical and gynecological services to HMO enrollees, certain health plans discontinued providing HMO coverage in Napa County. Consequently, HMO enrollees had to find alternative health plan coverage.

PARAGRAPH 19: The conduct described in Paragraphs 12 through 16 has had, or has the tendency to have, the effect of restraining trade unreasonably and hindering competition in the provision of physician services in Napa County in the following ways, among others:

A. Price and other forms of competition among the physician respondents has been unreasonably restrained;

B. Prices for physician services have increased;

C. Health plans, employers, and consumers have been deprived of the benefits of competition in the purchase of physician services; and

D. Employers and individual consumers were deprived of the benefits of competition among health plans.

VIOLATION OF THE FTC ACT

PARAGRAPH 20: The combination, conspiracy, acts, and practices described above constitute unfair methods of competition in or affecting commerce in violation of Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45. Such acts and practices, or the effects thereof, will continue or recur in the absence of appropriate relief.

WHEREFORE, THE PREMISES CONSIDERED, the Federal Trade Commission on this fourteenth day of May, 2002, issues its complaint against OGMC and the physician respondents.

By the Commission, Commissioner Anthony not participating.

DECISION AND ORDER

The Federal Trade Commission ("Commission") having initiated an investigation of certain acts and practices of respondents named in the caption hereof ("Respondents"), and Respondents having been furnished thereafter with a copy of the draft of Complaint that the Commission staff 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, now in further conformity with the procedure described in Commission Rule 2.34, 16 C.F.R. § 2.34, the Commission hereby issues its Complaint, makes the following jurisdictional findings and issues the following Order:

1. Respondent Obstetrics and Gynecology Medical Corporation of Napa Valley is a professional corporation organized, existing, and doing business under and by virtue of the laws of the State of California, with its office and principal place

of business located at 1100 Trancas Street, Suite # 209, Napa, CA 94558.

2. The other Respondents are, or have been, members of Obstetrics and Gynecology Medical Corporation of Napa Valley, are physicians licensed to practice medicine in the State of California, and are engaged in the private practice of obstetrics and gynecology for a fee in Napa Valley, California. Their respective business addresses are as follows:

   a. Bryan Henry, M.D., 1530 Railroad Avenue, St. Helena, CA 94574;

   b. R. Bruce Scarborough, M.D.,1100 Trancas Street, #209, Napa, CA 94558;

   c. Anthony King, M.D., 980 Trancas Street, #11, Napa, CA 94558;

   d. Dario Gambetta, M.D., 1530 Railroad Avenue, St. Helena, CA 94574;

   e. Jerome Solomon, M.D., 1100 Trancas Street, #351, Napa, CA 94558;

   f. Cheryl Henry, M.D., 975 Sereno Dr., Vallejo, CA 94589.

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.

I.

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

A. "OGMC" means Obstetrics and Gynecology Medical Corporation of Napa Valley, its officers, directors, employees, agents, representatives, successors, and assigns; and the subsidiaries, divisions, groups, and affiliates controlled by OGMC, and the respective officers, directors, employees, agents, representatives, successors, and assigns of each.

B. "Physician Respondents" means Bryan Henry, M.D., R. Bruce Scarborough, M.D., Anthony King, M.D., Dario Gambetta, M.D., Jerome Solomon, M.D., and Cheryl Henry, M.D.

C. "Respondents" means OGMC and the Physician Respondents.

D. "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.

E. "Person" means both natural persons and artificial persons, including, but not limited to, corporations, unincorporated entities, and governments.

F. "Physician" means a doctor of allopathic medicine ("M.D.") or a doctor of osteopathic medicine ("D.O.").

G. "Participate" in an entity means (1) to be a shareholder, owner, or member 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.")

H. "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.

I. "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 such participation and thereby create incentives for these physicians to jointly control costs and improve quality by managing the provision of physician services, such as risk-sharing involving:

   a. the provision of physician services to 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 payment, where the costs of that course of treatment for any individual patient can vary greatly due to the individual patient's condition, the choice, complexity, or length of treatment, or other factors; and

2. any agreement concerning reimbursement or other terms or conditions of dealing entered into by or within the

arrangement is reasonably necessary to obtain significant efficiencies through the joint arrangement.

J. "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 to evaluate and modify the practice patterns of, and create a high degree of interdependence and cooperation among, these physicians, in order to control costs and ensure the quality of services provided through the arrangement; and

2. any agreement concerning reimbursement or other terms or conditions of dealing entered into by or within the arrangement is reasonably necessary to obtain significant efficiencies through the joint arrangement.

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, or

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;

B. Attempting to engage in any action prohibited by Paragraph II.A. above; and

C. Encouraging, suggesting, advising, pressuring, inducing, or attempting to induce any person to engage in any action that would be prohibited if the person were subject to this Order.

PROVIDED HOWEVER that nothing in this Paragraph shall prohibit any agreement involving, or conduct by, Respondents that is reasonably necessary to form, participate in, or take any other action in furtherance of a qualified risk-sharing joint arrangement or a qualified clinically-integrated joint arrangement.

III.

IT IS FURTHER ORDERED that OGMC shall:

A. Within ten (10) 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 up of OGMC's affairs and its dissolution;

B. Within sixty (60) days after the date on which this Order becomes final, and prior to the dissolution provided for in Paragraph III.C. below, distribute by first-class mail a copy of this Order and the accompanying Complaint to:

1. each physician who participates, or has participated, in OGMC;

2. each officer, director, manager, and employee of OGMC;

3. each payor who, at any time since January 1, 1999, has communicated to OGMC or to any Physician Respondent, or to whom OGMC or any Physician Respondent has communicated, with regard to any desire,

willingness, or interest of such payor in contracting for physician services; and

4. Queen of the Valley Hospital, Napa, California, and St. Helena Hospital, Deer Park, California; and

C. Dissolve itself within one hundred twenty (120) days after the date on which this Order becomes final.

IV.

IT IS FURTHER ORDERED that, if OGMC 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 Physician Respondent Bryan Henry, M.D. 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 OGMC did not comply.

V.

IT IS FURTHER ORDERED that each Physician Respondent shall:

A. Within thirty (30) days after the date this Order becomes final, deliver to OGMC a list of the names, addresses, and telephone numbers of each payor who, at any time since January 1, 1999, has communicated to the Physician Respondent, or to whom the Physician Respondent has communicated, with regard to any desire, willingness, or interest of such payor in contracting for physician services; and

B. Take all actions necessary to effect dissolution of OGMC as required by this Order.

VI.

IT IS FURTHER ORDERED that OGMC 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.C. above, file with the Commission a verified written report demonstrating how it has complied and is complying with this Order; and

B. Notify the Commission at least thirty (30) days prior to any proposed change in OGMC, such as change of address, assignment, sale resulting in the emergence of a successor, or any other change in OGMC that may affect compliance obligations arising out of this Order.

VII.

IT IS FURTHER ORDERED that each Physician Respondent shall:

A. Within sixty (60) days after the date this Order becomes final, every sixty (60) days thereafter in which OGMC is not dissolved, and within the thirty (30) days following dissolution of OGMC, file with the Commission a verified written report setting forth in detail the manner and form in which the Physician Respondent intends to comply, is complying, and has complied with this Order, including, but not limited to, a full description of his or her efforts to comply with Paragraph V. above; and

B. File verified written reports one (1) year after the date this Order becomes final, and annually thereafter for three (3) additional 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:

   1. in detail, the manner and form in which the Physician Respondent has complied with this Order, including, but

not limited to, any information necessary to demonstrate such compliance, and

2. the name, address, and telephone number of each physician group in which the Physician Respondent has participated.

C. Notify the Commission of any change in the Principal Address of the Physician Respondent within twenty (20) days of such change in address.

VIII.

IT IS FURTHER ORDERED that, for the purpose of determining or securing compliance with this Order, Respondents 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 their possession, or under their control, relating to any matter contained in this Order;

B. Upon five (5) days' notice to OGMC and without restraint or interference from it, to interview officers, directors, or employees of OGMC; and

C. Upon five (5) days' notice to any Physician Respondent, and without restraint or interference from such Physician Respondent, to interview the Physician Respondent or the employees of the Physician Respondent.

IX.

IT IS FURTHER ORDERED that this Order shall terminate on May 14, 2022.

By the Commission.

Analysis of Agreement Containing Consent Order to Aid Public Comment

The Federal Trade Commission has accepted, subject to final approval, an agreement with Obstetrics & Gynecology Medical Corp. of Napa Valley and its shareholders (collectively "OGMC" or "proposed respondents") containing a proposed consent order. The proposed order settles charges that OGMC violated Section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45, by facilitating or implementing agreements among its members to fix prices and other terms of dealing with payors, and to refuse to deal with payors 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 the proposed respondents that they violated the law or that the facts alleged in the complaint (other than jurisdictional facts) are true.

The Complaint

The allegations in the Commission's proposed complaint are summarized below.

Respondent OGMC is a for-profit corporation and a single-specialty independent practice association ("IPA") composed of virtually all of the OB/GYNs with active medical staff privileges at the two general acute care hospitals in Napa County, California. OGMC's physicians had been members of Napa Valley Physicians ("NVP"), a multispecialty IPA in Napa County. An

IPA is a vehicle through which physicians can contract with health plans to provide services to health plan enrollees. At times, physicians who participate in IPAs share the risk of financial loss with other participants if the total costs of services provided to patients exceed the anticipated volume of service. NVP was such a risk-sharing IPA. As is typical of such IPAs, NVP also provided quality assurance and utilization review.

Beginning in 1998, NVP's OB/GYNs became dissatisfied with the level and timeliness of reimbursement from NVP. The OB/GYNs resigned from NVP, and then in February 2000, formed OGMC to promote, among other things, their collective economic interests by increasing their negotiating power with NVP. Prior to the formation of OGMC, and continuing into 2001, these OB/GYNs agreed among themselves to refuse to contract individually with NVP or any health plan. During this time, the OB/GYNs also agreed on the fees they would charge, and to boycott NVP to coerce it to meet their fee demands. As a consequence of the proposed respondents' conduct, NVP did not have sufficient OB/GYNs to serve adequately the HMO enrollees under NVP's HMO contracts. NVP ceased doing business in early 2001, and some health plans discontinued providing HMO coverage in Napa County.

OGMC did not engage in any activity that might justify collective agreements on the prices its members would accept for their services. For example, the OB/GYNs have not clinically or financially integrated their practices to create efficiencies sufficient to justify their acts and practices. The proposed respondents' actions have restrained price and other forms of competition among OB/GYNs in Napa County, California, and thereby harmed consumers (including health plans, employers, and individual consumers) by increasing the prices for physician services.

The Proposed Consent Order

The proposed order is designed to prevent recurrence of the illegal concerted actions alleged in the complaint, while allowing

the OB/GYNs to engage in legitimate joint conduct. The core prohibitions of the proposed order are contained in Paragraph II. Paragraph II.A prohibits the proposed respondents from entering into, participating, or facilitating: (1) any agreement to negotiate on behalf of any physicians with any payor or provider; (2) any agreement to deal or refuse to deal with any payor or provider; or (3) any agreement regarding any term on which any physicians deal, or are willing to deal, with any payor or provider.

Paragraph II.B prohibits the proposed respondents from attempting to engage in a violation of Paragraph II.A. Paragraph II.C prohibits them from encouraging, suggesting, advising, pressuring, inducing, or attempting to induce any person to engage in any action that would be prohibited if the person were subject to the order.

A proviso to Paragraph II allows the proposed respondents to engage in conduct (including collectively determining reimbursement and other terms of contracts) that is reasonably necessary to operate any "qualified risk-sharing joint arrangement" or "qualified clinically-integrated joint arrangement." As defined in the proposed order, a "qualified risk-sharing joint arrangement" must satisfy two conditions. First, all physician participants must share substantial financial risk through the arrangement. (The definition of financial risk-sharing tracks the discussion of that term contained in the 1996 FTC/DOJ Statements of Antitrust Enforcement Policy in Health Care.) Second, any agreement on prices or terms of reimbursement must be reasonably necessary to obtain significant efficiencies through the joint arrangement.

A "qualified clinically-integrated joint arrangement" is defined as one in which the physicians undertake cooperative activities to achieve efficiencies in the delivery of clinical services, without necessarily sharing substantial financial risk. (This definition also reflects the analysis contained in the 1996 FTC/DOJ Statements of Antitrust Enforcement Policy in Health Care.) Under this analysis, participating physicians must establish a high degree of interdependence and cooperation through their use of programs to

evaluate and modify their clinical practice patterns, in order to control costs and assure the quality of physician services provided. In addition, any agreement on prices or terms of reimbursement must be reasonably necessary to obtain significant efficiencies through the joint arrangement.

Paragraph III of the proposed order requires OGMC to dissolve. The remaining provisions of the proposed order impose obligations on the proposed respondents with respect to facilitating OGMC's dissolution; distributing the order and complaint to specified persons; and reporting information to the Commission. The order terminates 20 years after it issues.

Complaint

IN THE MATTER OF

FMC CORPORATION

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

Docket C-4050; File No. 9810237
Complaint, June 12, 2002--Decision, June 12, 2002

This consent order addresses conduct engaged in by Respondent FMC Corporation, the largest manufacturer and seller in the world of microcrystalline cellulose ("MCC") – derived from purified wood cellulose and used primarily as a binder in the manufacture of pharmaceutical tablets – and Asahi Chemical Industry Co. Ltd., the second largest seller of MCC worldwide, and the largest supplier in Japan. The order, among other things, prohibits Respondent FMC from agreeing with competitors (1) to divide or allocate markets, customers, contracts, or geographic territories in connection with the sale of MCC, or (2) to refrain in whole or in part from producing, selling, or marketing MCC. The order also prohibits the respondent from inviting or soliciting such agreements not to compete. In addition, the order prohibits the respondent (1) for ten years, from serving as the United States distributor for any competing manufacturer of MCC, including Asahi Chemical, and (2) for five years, from distributing in the United States any other inactive ingredient used in the manufacture of pharmaceutical products that is manufactured by Asahi Chemical.

Participants

For the Commission: *Geoffrey M. Green, L. Barry Costilo, Veronica G. Kayne, Christopher T. Taylor, Louis Silvia, Jr.* and *Daniel O'Brien.*

For the Respondent: *Joseph A. Tate, Stephen A. Stack, Jr.* and *Michael L. Kichline, Dechert Price & Rhoads.*

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, and by virtue of the authority vested in it by said Act, the Federal Trade Commission ("Commission"), having reason to believe that FMC Corporation and Asahi Chemical Industry Co., Ltd., corporations, hereinafter sometimes collectively referred to

as "respondents," have engaged in conduct, as described herein, that violates Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45, and it appearing to the Commission that a proceeding in respect thereof would be in the public interest, hereby issues its complaint, stating its charges in that respect as follows:

1. Respondent FMC Corporation ("FMC") is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware, with its office and principal place of business located at 200 East Randolph Drive, Chicago, Illinois 60601.

2. Respondent Asahi Chemical Industry Co., Ltd. ("Asahi Chemical") is a corporation organized and existing under and by virtue of the laws of Japan, with its office and principal place of business located at 1-2 Yurakucho 1-chome, Chiyoda-ku, Tokyo, Japan. Asahi Chemical does business in the United States both directly and through Asahi Chemical Industry America, Inc. ("Asahi America"). Asahi America is a wholly-owned subsidiary of Asahi Chemical, with its office and principal place of business located at 535 Madison Avenue, 33rd Floor, New York, New York 10022.

3. The acts and practices of FMC and Asahi Chemical, including the acts and practices alleged herein, are in commerce or affect commerce, as "commerce" is defined in Section 4 of the Federal Trade Commission Act, 15 U.S.C. § 44.

4. For the purpose of this complaint, "MCC" means microcrystalline cellulose. For the purpose of this complaint, "Asia Pacific" refers to the following countries: South Korea, Taiwan, Hong Kong, the Philippines, Indonesia, New Zealand, China, North Korea, Vietnam, and Australia.

5. The line of commerce relevant to assessing respondents' anticompetitive conduct is the manufacture and sale of pharmaceutical MCC worldwide. Pharmaceutical MCC is derived

from purified wood cellulose, and is used primarily as a binder in the manufacture of pharmaceutical tablets (prescription and OTC drugs). Pharmaceutical MCC is a component of nearly all pharmaceutical tablets sold in the United States today. Other binders are not acceptable substitutes for pharmaceutical MCC for several reasons, including differences in quality, consistency, performance, efficacy, and stability. Entry into the relevant market is difficult and time-consuming.

6. FMC was the first, and for several years the only manufacturer of MCC in the world. To this day, FMC remains the largest manufacturer and seller of MCC in the world. During the period from 1984 to 1995, FMC's share of the relevant market has exceeded 70 percent.

7. FMC operates facilities for the production of MCC in Newark, Delaware and Cork, Ireland. FMC utilizes several trademarks in connection with its marketing of MCC. The most commonly used grades of MCC are sold by FMC in the United States and elsewhere under the trade name "Avicel."

8. Asahi Chemical operates a facility for the production of MCC in Nobeoka, Japan. During the period from 1984 to 1995, Asahi Chemical has been the dominant supplier of MCC in Japan and the second largest seller of MCC in the world.

9. FMC engaged in a course of conduct designed to neutralize or eliminate competing sellers of MCC and to secure monopoly power. FMC entered into a conspiracy with Asahi Chemical to divide territories. In addition, FMC invited three smaller producers of MCC to join with FMC in collusive and anticompetitive conduct. The three firms solicited by FMC were Ming Tai Chemical Co., Ltd. ("Ming Tai"), Wei Ming Pharmaceutical Mfg. Co., Ltd. ("Wei Ming"), and the Mendell division of Penwest, Ltd. ("Mendell").

10. In or about 1984, FMC and Asahi Chemical entered into both a written agreement governing the shared use of the trademark

Avicel and a covert non-written agreement or understanding governing the sale and marketing of MCC.

11. The parties' written agreement, termed a Letter of Understanding, continued a trademark license first entered into by FMC and Asahi Chemical in 1968. In the 1984 Letter of Understanding, FMC granted Asahi Chemical, for an additional term of years, the exclusive right to use the trademark Avicel in Japan and Asia Pacific in connection with the sale of MCC products. FMC continued to reserve to itself the exclusive right to use the Avicel mark in North America and Europe.

12. In the parties' non-written agreement, FMC and Asahi Chemical agreed to a territorial division of markets for MCC products. FMC agreed that it would not sell MCC to customers located in Japan or Asia Pacific without the consent of Asahi Chemical. In return, Asahi Chemical agreed that it would not sell MCC to customers located in North America or Europe without the consent of FMC.

13. The market division agreement was in effect from 1984 until 1995. During this period, Asahi Chemical refrained from selling MCC to potential customers located in North America or Europe. During this period, FMC refrained from selling MCC to potential customers located in Japan or Asia Pacific. For example, several of the largest multinational pharmaceutical manufacturers requested that FMC enter into "global agreements" to supply MCC to all of their manufacturing facilities worldwide. Pursuant to its non-written agreement with Asahi Chemical, FMC declined to supply MCC to manufacturing facilities located in Japan and Asia Pacific.

14. In or about 1994, two Taiwan-based manufacturers of MCC, Ming Tai and Wei Ming, emerged as significant suppliers of MCC to portions of the Asian MCC market. FMC was concerned that these Taiwanese manufacturers would next compete for FMC's MCC accounts in North America and Europe. In or about January 1995, FMC proposed to Ming Tai that it grant FMC the exclusive

right to distribute all MCC exported from Taiwan by Ming Tai. Ming Tai did not accept FMC's invitation. Also in or about January 1995, FMC proposed to Wei Ming that it sell MCC to FMC on an exclusive basis. Wei Ming did not accept FMC's invitation.

15. Later in 1995, FMC joined with Wei Ming to market an MCC product that, as compared to FMC's Avicel-brand MCC, had a lower quality and a lower price. The venture targeted certain customers of Ming Tai. FMC's purposes were to discipline Ming Tai for its aggressive pricing and to pressure Ming Tai to ally itself with FMC. This arrangement was terminated by the parties in 1996.

16. In 1995, Mendell posed a competitive threat to FMC's position as the dominant seller of MCC to pharmaceutical manufacturers in North America and Europe. Mendell had recently opened an MCC manufacturing facility in the United States, and was actively seeking to expand its sales. In April 1995, FMC proposed to Mendell that the two firms enter into a market division agreement. Mendell did not accept FMC's invitation.

17. At all relevant times herein, FMC had either monopoly power or a dangerous probability of achieving monopoly power in the world pharmaceutical MCC market.

18. The acts and practices of respondents, as alleged herein, were engaged in by respondents with the specific intent to exclude competition and to achieve or maintain monopoly power.

19. The acts and practices of respondents, as alleged herein, have had the purpose and effect, or the tendency and capacity, to restrain competition in the manufacture and sale of pharmaceutical MCC and to injure consumers in the United States and worldwide.

Violations Alleged

20. As set forth in Paragraphs 12, 13, and 19 above, FMC and Asahi Chemical conspired to divide markets and unreasonably restrained trade, in violation of Section 5 of the Federal Trade Commission Act, as amended.

21. As set forth in Paragraphs 6, 8, 12, 13, 18 and 19 above, FMC and Asahi Chemical conspired to monopolize the relevant market, in violation of Section 5 of the Federal Trade Commission Act, as amended.

22. As set forth in Paragraphs 6 through 19 above, FMC attempted to monopolize the relevant market in violation of Section 5 of the Federal Trade Commission Act, as amended.

23. As set forth in Paragraph 16 above, FMC invited its competitor Mendell to agree not to compete with FMC in violation of Section 5 of the Federal Trade Commission Act, as amended.

24. The conspiracy, acts and practices of respondents, as alleged herein constitute unfair methods of competition in or affecting commerce in violation of Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45. Such conspiracy, acts and practices, or the effects thereof, will continue or recur in the absence of appropriate relief.

WHEREFORE, THE PREMISES CONSIDERED, the Federal Trade Commission on this twelfth day of June, 2002, issues its complaint against respondents.

DECISION AND ORDER

The Federal Trade Commission having initiated an investigation of certain acts and practices of Respondent, FMC Corporation, and Respondent having been furnished thereafter with a copy of the draft of Complaint that the Bureau of Competition presented to the Commission for its consideration and which, if issued, would charge Respondent with violations of Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45; and

Respondent, its attorneys, and counsel for the Commission having thereafter executed an Agreement Containing Consent Order ("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

described in Commission Rule 2.34, 16 C.F.R. § 2.34, the Commission hereby issues its complaint, makes the following jurisdictional findings and issues the following Order:

1. Respondent FMC Corporation is a corporation organized and existing under the laws of the State of Delaware, with its office and principal place of business located at 200 East Randolph Drive, Chicago, Illinois 60601.

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

ORDER

I.

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

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

B. "Commission" means the Federal Trade Commission.

C. "MCC" means microcrystalline cellulose, and includes any product consisting in whole or in part of microcrystalline cellulose.

D. "Producer of MCC" means any person, firm, company, corporation, partnership, joint venture, or other entity that produces or manufactures microcrystalline cellulose. The term Producer of MCC shall include Asahi Chemical. The term Producer of MCC shall not include an entity that only purchases MCC for resale, or for use as an input in the production of another product (*e.g.*, an aspirin tablet), provided that such entity does not also produce or manufacture microcrystalline cellulose.

E. "Excipient" means an inert or inactive substance used in the production of pharmaceutical products or other tablets, including without limitation any product used as a binder,

disintegrant, or super disintegrant. The term Excipient shall include MCC.

F. "Asahi Chemical" means Asahi Chemical Industry Co., Ltd., its directors, officers, employees, agents, representatives, predecessors, successors, and assigns; its subsidiaries, divisions, groups, and affiliates controlled by Asahi Chemical Industry Co., Ltd.; and the respective directors, officers, employees, agents, representatives, successors, and assigns of each.

G. "FMC Employee" means any employee of FMC with direct or indirect responsibility for the pricing, marketing, or sale of MCC. The term FMC Employee shall include all officers of FMC Corporation.

H. "License" means a written agreement between Respondent and a Producer of MCC other than Asahi Chemical that provides for the license, cross-license, or other transfer of intellectual property that is protected by patent, copyright, and/or trade secret law and that is related to MCC.

I. "Joint Venture Agreement" means a written agreement between Respondent and a Producer of MCC other than Asahi Chemical that provides that the parties to the agreement shall collaborate in the production or distribution of MCC, or shall collaborate in the performance of research and development relating to MCC.

J. "Avicel Asia Pacific" means Avicel Asia Pacific, Ltd., a corporation organized and existing under the laws of Hong Kong with its office and principal place of business located at Suite 2401-02 Central Plaza, 18 Harbour Road, Wanchai, Hong Kong.

K. "Written Communication" means any non-oral statement, information, comment, question, or answer, and includes any letter, memorandum, fax, or electronic mail.

L. "United States" means the fifty states, the District of Columbia, the Commonwealth of Puerto Rico, and all territories, dependencies, and possessions of the United States of America.

II.

IT IS FURTHER ORDERED that Respondent shall cease and desist from, directly, indirectly, or through any corporate or other device, in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, inviting, entering into or attempting to enter into,
organizing or attempting to organize, implementing or attempting to implement, continuing or attempting to continue, soliciting, or otherwise facilitating any combination, agreement, or understanding, either express or implied, with any Producer of MCC to allocate or divide markets, customers, contracts, lines of commerce, or geographic territories in connection with the sale of MCC.

III.

IT IS FURTHER ORDERED that Respondent shall cease and desist from, directly, indirectly, or through any corporate or other device, in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, inviting, entering into or attempting to enter into, implementing or attempting to implement, continuing or attempting to continue, soliciting, or otherwise facilitating any combination, agreement, or understanding, either express or implied, with any Producer of MCC that such Producer of MCC shall refrain in whole or in part from producing, selling, or marketing MCC.

IV.

IT IS FURTHER ORDERED that:

A. For a period of ten (10) years after the date on which this Decision and Order becomes final, Respondent shall cease and

desist from, directly, indirectly, or through any corporate or other device, in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, inviting, entering into or attempting to enter into, implementing or attempting to implement, continuing or attempting to continue, soliciting, or otherwise facilitating any combination, agreement, or understanding, either express or implied, that Respondent shall distribute, sell, merchandise or otherwise market in the United States MCC produced by any Producer of MCC other than Respondent.

B. For a period of five (5) years after the date on which this Decision and Order becomes final, Respondent shall cease and desist from, directly, indirectly, or through any corporate or other device, in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, inviting, entering into or attempting to enter into, implementing or attempting to implement, continuing or attempting to continue, soliciting, or otherwise facilitating any combination, agreement, or understanding, either express or implied, that Respondent shall distribute, sell, merchandise or otherwise market in the United States any Excipient produced by Asahi Chemical.

V.

IT IS FURTHER ORDERED that:

A. It shall not, of itself, constitute a violation of Paragraph II. or Paragraph III. of this Decision and Order for Respondent to enter into, attempt to enter into, or comply with a written agreement that is reasonably related to a lawful License or lawful Joint Venture Agreement and that is reasonably necessary to achieve its procompetitive benefits.

B. It shall not, of itself, constitute a violation of Paragraph II. or Paragraph III. of this Decision and Order for Respondent to enter into, attempt to enter into, or comply with a written agreement that: (1) licenses a Producer of MCC to use, on an exclusive or non-exclusive basis and in any geographic area, any

trademark owned by Respondent and to prohibit such licensee concurrently from utilizing any trademark that is confusingly similar to the licensed trademark owned by Respondent, and/or (2) authorizes a Producer of MCC to distribute outside of the United States, on an exclusive or non-exclusive basis, MCC produced by Respondent and to prohibit such distributor from reselling such MCC produced by Respondent into the United States.

C. It shall not, of itself, constitute a violation of Paragraph II. or Paragraph III. of this Decision and Order for Respondent to threaten, initiate, or settle litigation to protect its intellectual property that is protected by patent, copyright, trademark, and/or trade secret law, provided that there is a reasonable basis in law and in fact for the claims alleged by Respondent in such litigation.

D. It shall not, of itself, constitute a violation of Paragraph IV. of this Decision and Order for Respondent to enter into, attempt to enter into, or comply with an agreement to purchase and re-sell, on a temporary basis, any grade of MCC produced by both Respondent and an entity other than Respondent, provided that Respondent's production of such grade of MCC is insufficient to meet actual or forecast demand due to plant closure, governmental action, health or safety hazards, a mechanical failure or a failure in the chemical reaction process in Respondent's production facility, Act of God, or Force Majeure.

E. It shall not, of itself, constitute a violation of Paragraph IV. of this Decision and Order for Respondent to enter into, attempt to enter into, or comply with an agreement to distribute, sell, merchandise or otherwise market, for use by customers in food products only, MCC produced by an entity other than Respondent (hereinafter referred to as a "Distribution Agreement"). Provided, however, that for a period of ten (10) years after the date on which this Decision and Order becomes final, this exclusion shall not apply to any agreement that authorizes Respondent to distribute, sell, merchandise or otherwise market MCC for use in pharmaceutical products or other tablets.

F. It shall not, of itself, constitute a violation of Paragraph IV. of this Decision and Order for Respondent to purchase from Asahi Chemical MCC meeting the current specifications of Ceolus, Grade KG-801, as set forth in confidential Exhibit A, attached to this Decision and Order, and to re-sell such product to the single customer identified in confidential Exhibit B, attached to this Decision and Order.

G. It shall not, of itself, constitute a violation of Paragraph II. or Paragraph III. of this Decision and Order for Respondent to enter into, attempt to enter into, or comply with a written Distribution Agreement providing FMC with the right to be an MCC producer's sole or exclusive re-seller of MCC for use by customers in food products only. Provided, however, that for a period of ten (10) years after the date on which this Decision and Order becomes final, this exclusion shall not apply to any agreement that authorizes Respondent to distribute, sell, merchandise or otherwise market MCC for use in pharmaceutical products or other tablets.

H. Where, pursuant to a lawful Joint Venture Agreement, FMC and a Producer of MCC other than Asahi Chemical collaborate in the creation of new MCC manufacturing capacity, it shall not, of itself, constitute a violation of Paragraph II., Paragraph III., or Paragraph IV. of this Decision and Order for Respondent to enter into, attempt to enter into, or comply with a written agreement to distribute, sell, merchandise or otherwise market, on an exclusive or non-exclusive basis, the MCC that is the output of such new manufacturing capacity.

I. In any action by the Commission alleging violations of this Decision and Order, Respondent shall bear the burden of proof in demonstrating that its conduct satisfies the conditions of Paragraph(s) V.A., V.B., V.C., V.D., V.E., V.F., V.G. and/or V.H. of this Decision and Order.

VI.

IT IS FURTHER ORDERED that for a period of six (6) years after the date on which this Decision and Order becomes final:

A. Respondent shall require that when an FMC Employee engages in any Written Communication with an employee of any other Producer of MCC relating to the pricing, marketing, or sale of MCC, a copy of such Written Communication shall be sent to an attorney from the Office of the General Counsel of FMC for review. A copy of such Written Communication shall be retained by Respondent for a period of three (3) years, and shall upon request be made available to the Commission's representative pursuant to Paragraph IX of this Decision and Order.

B. The requirements of Paragraph VI.A. shall not apply to any Written Communication between an FMC Employee and an employee of Asahi Chemical relating exclusively to the operations of Avicel Asia Pacific.

VII.

IT IS FURTHER ORDERED that:

A. Within sixty (60) days after the date this Decision and Order becomes final, Respondent shall submit to the Commission a verified written report setting forth in detail the manner and form in which that Respondent has complied and is complying with this order.

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

C. Respondent shall file with the Commission, within thirty (30) days after its effective date: (1) a copy of each written agreement entered into by Respondent and Asahi Chemical that relates to Excipients, (2) a copy of each License or Joint Venture Agreement that relates to MCC, and (3) a copy of each written agreement between Respondent and a Producer of MCC that is ancillary or related to a License or Joint Venture Agreement.

VIII.

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

IX.

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

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

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

X.

IT IS FURTHER ORDERED that Respondent shall:

A. Within thirty (30) days after the date on which this Decision and Order becomes final, send by first class mail a copy of this Decision and Order to all directors, officers, and management employees with responsibility for the pricing, marketing or sale of MCC (hereinafter referred to as "Management Employees");

B. Mail by first class mail a copy of this Decision and Order to each person who becomes a director, officer, or Management Employee, within thirty (30) days of the commencement of such person's employment or affiliation with Respondent; and

C. Require each of their directors, officers, and Management Employees to sign and submit to Respondent within thirty (30) days of the receipt thereof a statement that: (1) acknowledges receipt of the Decision and Order; (2) represents that the undersigned has read and understands the Decision and Order; and (3) acknowledges that the undersigned has been advised and understands that non-compliance with the order may subject FMC Corporation to penalties for violation of the order.

XI.

IT IS FURTHER ORDERED that this Decision and Order shall terminate on June 12, 2022, except as otherwise provided in this Decision and Order.

By the Commission, Chairman Muris not participating.

Confidential Exhibits A and B

[Redacted From Public Record Version]

Analysis of Proposed Consent Orders to Aid Public Comment

The Federal Trade Commission has accepted agreements to proposed consent orders from FMC Corporation ("FMC") and from Asahi Chemical Industry Co. Ltd. ("Asahi Chemical"). FMC has its principal place of business in Chicago, Illinois. Asahi Chemical has its principal place of business in Tokyo, Japan.

The proposed consent orders have 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 agreements and the comments received, and decide whether it should withdraw from the agreements or make final the agreements' proposed orders.

The Commission's multi-count complaint charges that FMC and Asahi Chemical (collectively referred to as "respondents") have violated Section 5 of the Federal Trade Commission Act by conspiring to monopolize the world market for microcrystalline cellulose, and by agreeing to divide territories for the sale of microcrystalline cellulose. In addition, FMC is charged with attempting to monopolize the relevant market and with inviting a competitor to collude.

According to the complaint, microcrystalline cellulose ("MCC") is derived from purified wood cellulose and is used primarily as a binder in the manufacture of pharmaceutical tablets. MCC is a component of nearly all pharmaceutical tablets sold in the United States today. During the term of the conspiracy, FMC was the largest manufacturer and seller of MCC in the world. Asahi Chemical was the second largest seller of MCC in the world, and the dominant supplier of MCC in Japan.

The complaint alleges that, for over a decade, FMC engaged in a course of conduct designed to neutralize or eliminate competing sellers of MCC and to secure monopoly power. In or about 1984,

FMC entered into a conspiracy with Asahi Chemical to divide territories. FMC agreed that it would not sell any MCC product to customers located in Japan or East Asia without the consent of Asahi Chemical. In return, Asahi Chemical agreed that it would not sell any MCC product to customers located in North America or Europe without the consent of FMC.

In addition, the complaint alleges that FMC invited three smaller producers of MCC to join with FMC in collusive and anticompetitive conduct. The three firms solicited by FMC were Ming Tai Chemical Co., Ltd. ("Ming Tai"), Wei Ming Pharmaceutical Mfg. Co., Ltd. ("Wei Ming"), and the Mendell division of Penwest, Ltd. ("Mendell").

According to the complaint, in 1994 Ming Tai and Wei Ming emerged as significant suppliers of MCC to portions of the Asian MCC market. FMC was concerned that these Taiwan-based manufacturers would next compete for FMC's MCC accounts in North America and Europe. In or about January 1995, FMC proposed to Ming Tai that it grant FMC the exclusive right to distribute all MCC exported from Taiwan by Ming Tai. Also in or about January 1995, FMC proposed to Wei Ming that it sell MCC to FMC on an exclusive basis. In seeking these arrangements, FMC's intent was to exclude competition from the Taiwanese manufacturers and thereby secure monopoly power. Neither Ming Tai nor Wei Ming accepted FMC's invitation.

The complaint further alleges that, in 1995, Mendell posed a competitive threat to FMC's position as the dominant seller of MCC to pharmaceutical manufacturers in North America and Europe. Mendell had recently opened an MCC manufacturing facility in the United States, and was actively seeking to expand its sales. In April 1995, FMC proposed to Mendell that the two

firms enter into a market division agreement. Mendell did not accept FMC's invitation.[1]

Finally, the complaint alleges that the conduct engaged in by FMC and Asahi Chemical had the purpose and effect, or the tendency and capacity, to restrain competition in the manufacture and sale of MCC and to injure consumers in the United States and worldwide.

FMC and Asahi Chemical have signed consent agreements containing the proposed consent orders. The proposed consent orders would prohibit FMC and Asahi Chemical from: (i) agreeing with competitors to divide or allocate markets, customers, contracts, or geographic territories in connection with the sale of MCC, or (ii) agreeing with competitors to refrain in whole or in part from producing, selling, or marketing MCC. The respondents would also be barred from inviting or soliciting such agreements not to compete.

Further, in order to eradicate the anticompetitive effects of the alleged conspiracy, FMC is barred from serving as the U.S. distributor for any competing manufacturer of MCC (including Asahi Chemical) for a period of ten years. Further, for a period of five years, FMC may not distribute in the United States any other excipient manufactured by Asahi Chemical.[2]

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[1] FMC's efforts to recruit Ming Tai, Wei Ming, and Mendell to enter into anticompetitive arrangements, as alleged in the complaint, support the attempted monopolization claim. *See* Complaint ¶ 22. FMC's invitation to Mendell was the most patently anticompetitive of the three, and is the basis for an independent cause of action. *See* Complaint ¶ 23.

[2] An excipient is an inactive ingredient used in the manufacture of pharmaceutical products.

Analysis

The proposed consent orders contain several limited exemptions to the above-described provisions intended to permit FMC and Asahi Chemical to engage in certain lawful and pro-competitive conduct. For example, notwithstanding the broad prohibition on agreeing to divide markets, each respondent would be permitted to enter into exclusive trademark license agreements, to enforce its intellectual property rights, and to abide by reasonable restraints ancillary to lawful joint venture agreements. In any action by the Commission alleging violations of the consent order, each respondent would bear the burden of proof in demonstrating that its conduct satisfied the conditions of the exemption.

The proposed consent orders contain provisions to assist the Commission in monitoring the respondents' compliance with the orders. FMC would be required to retain copies of written communications with competing MCC manufacturers, and upon request, to make such documents available to the Commission. Asahi Chemical would be required to produce to the Commission all documents reasonably necessary for the purpose of determining or securing compliance with the consent order, without regard to whether the documents are located in the United States or in another jurisdiction.

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

Complaint

IN THE MATTER OF

ASAHI CHEMICAL INDUSTRY CO., LTD.

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

Docket C-4051; File No. 9810237
Complaint, June 12, 2002–Decision, June 12, 2002

This consent order addresses conduct engaged in by Respondent Asahi Chemical Industry Co. Ltd., the second largest seller in the world, and the largest supplier in Japan, of microcrystalline cellulose ("MCC") – derived from purified wood cellulose and used primarily as a binder in the manufacture of pharmaceutical tablets – and FMC Corporation, the largest manufacturer and seller of MCC in the world. The order, among other things, prohibits Respondent Asahi Chemical from agreeing with competitors (1) to divide or allocate markets, customers, contracts, or geographic territories in connection with the sale of MCC, or (2) to refrain in whole or in part from producing, selling, or marketing MCC. The order also prohibits the respondent from inviting or soliciting such agreements not to compete.

Participants

For the Commission: *Geoffrey M. Green, L. Barry Costilo, Veronica G. Kayne, Christopher T. Taylor, Louis Silvia, Jr.* and *Daniel O'Brien.*

For the Respondent: *Mark Leddy, David Gelfand,* and *David Snyder, Cleary, Gottlieb, Steen & Hamilton.*

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, and by virtue of the authority vested in it by said Act, the Federal Trade Commission ("Commission"), having reason to believe that FMC Corporation and Asahi Chemical Industry Co., Ltd., corporations, hereinafter sometimes collectively referred to as "respondents," have engaged in conduct, as described herein, that violates Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45, and it appearing to the Commission that a proceeding in respect thereof would be in the public interest,

hereby issues its complaint, stating its charges in that respect as follows:

1. Respondent FMC Corporation ("FMC") is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware, with its office and principal place of business located at 200 East Randolph Drive, Chicago, Illinois 60601.

2. Respondent Asahi Chemical Industry Co., Ltd. ("Asahi Chemical") is a corporation organized and existing under and by virtue of the laws of Japan, with its office and principal place of business located at 1-2 Yurakucho 1-chome, Chiyoda-ku, Tokyo, Japan. Asahi Chemical does business in the United States both directly and through Asahi Chemical Industry America, Inc. ("Asahi America"). Asahi America is a wholly-owned subsidiary of Asahi Chemical, with its office and principal place of business located at 535 Madison Avenue, 33rd Floor, New York, New York 10022.

3. The acts and practices of FMC and Asahi Chemical, including the acts and practices alleged herein, are in commerce or affect commerce, as "commerce" is defined in Section 4 of the Federal Trade Commission Act, 15 U.S.C. § 44.

4. For the purpose of this complaint, "MCC" means microcrystalline cellulose. For the purpose of this complaint, "Asia Pacific" refers to the following countries: South Korea, Taiwan, Hong Kong, the Philippines, Indonesia, New Zealand, China, North Korea, Vietnam, and Australia.

5. The line of commerce relevant to assessing respondents' anticompetitive conduct is the manufacture and sale of pharmaceutical MCC worldwide. Pharmaceutical MCC is derived from purified wood cellulose, and is used primarily as a binder in the manufacture of pharmaceutical tablets (prescription and OTC drugs). Pharmaceutical MCC is a component of nearly all pharmaceutical tablets sold in the United States today. Other

binders are not acceptable substitutes for pharmaceutical MCC for several reasons, including differences in quality, consistency, performance, efficacy, and stability. Entry into the relevant market is difficult and time-consuming.

6. FMC was the first, and for several years the only manufacturer of MCC in the world. To this day, FMC remains the largest manufacturer and seller of MCC in the world. During the period from 1984 to 1995, FMC's share of the relevant market has exceeded 70 percent.

7. FMC operates facilities for the production of MCC in Newark, Delaware and Cork, Ireland. FMC utilizes several trademarks in connection with its marketing of MCC. The most commonly used grades of MCC are sold by FMC in the United States and elsewhere under the trade name "Avicel."

8. Asahi Chemical operates a facility for the production of MCC in Nobeoka, Japan. During the period from 1984 to 1995, Asahi Chemical has been the dominant supplier of MCC in Japan and the second largest seller of MCC in the world.

9. FMC engaged in a course of conduct designed to neutralize or eliminate competing sellers of MCC and to secure monopoly power. FMC entered into a conspiracy with Asahi Chemical to divide territories. In addition, FMC invited three smaller producers of MCC to join with FMC in collusive and anticompetitive conduct. The three firms solicited by FMC were Ming Tai Chemical Co., Ltd. ("Ming Tai"), Wei Ming Pharmaceutical Mfg. Co., Ltd. ("Wei Ming"), and the Mendell division of Penwest, Ltd. ("Mendell").

10. In or about 1984, FMC and Asahi Chemical entered into both a written agreement governing the shared use of the trademark Avicel and a covert non-written agreement or understanding governing the sale and marketing of MCC.

11. The parties' written agreement, termed a Letter of

Understanding, continued a trademark license first entered into by FMC and Asahi Chemical in 1968. In the 1984 Letter of Understanding, FMC granted Asahi Chemical, for an additional term of years, the exclusive right to use the trademark Avicel in Japan and Asia Pacific in connection with the sale of MCC products. FMC continued to reserve to itself the exclusive right to use the Avicel mark in North America and Europe.

12. In the parties' non-written agreement, FMC and Asahi Chemical agreed to a territorial division of markets for MCC products. FMC agreed that it would not sell MCC to customers located in Japan or Asia Pacific without the consent of Asahi Chemical. In return, Asahi Chemical agreed that it would not sell MCC to customers located in North America or Europe without the consent of FMC.

13. The market division agreement was in effect from 1984 until 1995. During this period, Asahi Chemical refrained from selling MCC to potential customers located in North America or Europe. During this period, FMC refrained from selling MCC to potential customers located in Japan or Asia Pacific. For example, several of the largest multinational pharmaceutical manufacturers requested that FMC enter into "global agreements" to supply MCC to all of their manufacturing facilities worldwide. Pursuant to its non-written agreement with Asahi Chemical, FMC declined to supply MCC to manufacturing facilities located in Japan and Asia Pacific.

14. In or about 1994, two Taiwan-based manufacturers of MCC, Ming Tai and Wei Ming, emerged as significant suppliers of MCC to portions of the Asian MCC market. FMC was concerned that these Taiwanese manufacturers would next compete for FMC's MCC accounts in North America and Europe. In or about January 1995, FMC proposed to Ming Tai that it grant FMC the exclusive right to distribute all MCC exported from Taiwan by Ming Tai. Ming Tai did not accept FMC's invitation. Also in or about January 1995, FMC proposed to Wei Ming that it sell MCC to FMC on an exclusive basis. Wei Ming did not accept FMC's

invitation.

15. Later in 1995, FMC joined with Wei Ming to market an MCC product that, as compared to FMC's Avicel-brand MCC, had a lower quality and a lower price. The venture targeted certain customers of Ming Tai. FMC's purposes were to discipline Ming Tai for its aggressive pricing and to pressure Ming Tai to ally itself with FMC. This arrangement was terminated by the parties in 1996.

16. In 1995, Mendell posed a competitive threat to FMC's position as the dominant seller of MCC to pharmaceutical manufacturers in North America and Europe. Mendell had recently opened an MCC manufacturing facility in the United States, and was actively seeking to expand its sales. In April 1995, FMC proposed to Mendell that the two firms enter into a market division agreement. Mendell did not accept FMC's invitation.

17. At all relevant times herein, FMC had either monopoly power or a dangerous probability of achieving monopoly power in the world pharmaceutical MCC market.

18. The acts and practices of respondents, as alleged herein, were engaged in by respondents with the specific intent to exclude competition and to achieve or maintain monopoly power.

19. The acts and practices of respondents, as alleged herein, have had the purpose and effect, or the tendency and capacity, to restrain competition in the manufacture and sale of pharmaceutical MCC and to injure consumers in the United States and worldwide.

Violations Alleged

20. As set forth in Paragraphs 12, 13, and 19 above, FMC and Asahi Chemical conspired to divide markets and unreasonably restrained trade, in violation of Section 5 of the Federal Trade

Commission Act, as amended.

21. As set forth in Paragraphs 6, 8, 12, 13, 18 and 19 above, FMC and Asahi Chemical conspired to monopolize the relevant market, in violation of Section 5 of the Federal Trade Commission Act, as amended.

22. As set forth in Paragraphs 6 through 19 above, FMC attempted to monopolize the relevant market in violation of Section 5 of the Federal Trade Commission Act, as amended.

23. As set forth in Paragraph 16 above, FMC invited its competitor Mendell to agree not to compete with FMC in violation of Section 5 of the Federal Trade Commission Act, as amended.

24. The conspiracy, acts and practices of respondents, as alleged herein constitute unfair methods of competition in or affecting commerce in violation of Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45. Such conspiracy, acts and practices, or the effects thereof, will continue or recur in the absence of appropriate relief.

WHEREFORE, THE PREMISES CONSIDERED, the Federal Trade Commission on this twelfth day of June, 2002, issues its complaint against respondents.

DECISION AND ORDER

The Federal Trade Commission having initiated an investigation of certain acts and practices of Respondent, Asahi Chemical Industry Co., Ltd., and Respondent having been furnished thereafter with a copy of the draft of Complaint that the Bureau of Competition presented to the Commission for its consideration and which, if issued, would charge Respondent with violations of Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45; and

Respondent, its attorneys, and counsel for the Commission having thereafter executed an Agreement Containing Consent Order ("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 described in Commission Rule 2.34, 16 C.F.R. § 2.34, the Commission hereby issues its complaint, makes the following jurisdictional findings and issues the following Order:

1. Respondent Asahi Chemical Industry Co., Ltd. is a corporation organized and existing under the laws of Japan, with its office and principal place of business located at 1-2 Yurakucho 1-chome, Chiyoda-ku, Tokyo, Japan.

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

ORDER

I.

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

A. "Asahi Chemical" or "Respondent" means Asahi Chemical Industry Co., Ltd., its directors, officers, employees, agents, representatives, predecessors, successors, and assigns; its subsidiaries, divisions, groups, and affiliates controlled by Asahi Chemical Industry Co., Ltd.; and the respective directors, officers, employees, agents, representatives, successors, and assigns of each.

B. "Commission" means the Federal Trade Commission.

C. "MCC" means microcrystalline cellulose, and includes any product consisting in whole or in part of microcrystalline cellulose. The term MCC shall not include a Drug Product. The term MCC shall not include a food product in its finished form that is intended for direct human consumption and not as an ingredient or input into another product.

D. "Drug Product" means a finished dosage form (for example, tablet, capsule, or solution) that contains an active drug ingredient in association with inactive ingredients.

E. "Producer of MCC" means any person, firm, company, corporation, partnership, joint venture, or other entity that produces or manufactures MCC. The term Producer of MCC shall include FMC.

F. "Excipient" means an inert or inactive substance used in the production of pharmaceutical products, including without

limitation any product used as a binder, disintegrant, or super disintegrant. The term Excipient shall include MCC.

G. "FMC" means FMC Corporation, its directors, officers, employees, agents, representatives, predecessors, successors, and assigns; its subsidiaries, divisions, groups, and affiliates controlled by FMC Corporation; and the respective directors, officers, employees, agents, representatives, successors, and assigns of each.

H. "License" means a written agreement between Respondent and a Producer of MCC other than FMC that provides for the license, cross-license, or other transfer of intellectual property that is protected by patent, copyright, and/or trade secret law and that is related to MCC.

I. "Joint Venture Agreement" means a written agreement between Respondent and a Producer of MCC other than FMC that provides that the parties to the agreement shall collaborate in the production or distribution of MCC.

J. "Written Communication" means any non-oral statement, information, comment, question, or answer, and includes any letter, memorandum, fax, or electronic mail.

K. "United States" means the fifty states, the District of Columbia, the Commonwealth of Puerto Rico, and all territories, dependencies, and possessions of the United States of America.

L. "Officers" means the President and all Executive Vice Presidents of Asahi Chemical Industry Co., Ltd.

II.

IT IS FURTHER ORDERED that Respondent shall cease and desist from, directly, indirectly, or through any corporate or other device, in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, inviting, entering into or

attempting to enter into, organizing or attempting to organize, implementing or attempting to implement, continuing or attempting to continue, soliciting, or otherwise facilitating any combination, agreement, or understanding, either express or implied, with any Producer of MCC to allocate or divide markets, customers, contracts, lines of commerce, or geographic territories in connection with the sale of MCC.

III.

IT IS FURTHER ORDERED that Respondent shall cease and desist from, directly, indirectly, or through any corporate or other device, in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, inviting, entering into or attempting to enter into, implementing or attempting to implement, continuing or attempting to continue, soliciting, or otherwise facilitating any combination, agreement, or understanding, either express or implied, with any Producer of MCC that Respondent and/or such Producer of MCC shall refrain in whole or in part from producing, selling, or marketing MCC.

IV.

IT IS FURTHER ORDERED that:

A. For a period of ten (10) years after the date on which this Decision and Order becomes final, Respondent shall cease and desist from, directly, indirectly, or through any corporate or other device, in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, inviting, entering into or attempting to enter into, implementing or attempting to implement, continuing or attempting to continue, soliciting, or otherwise facilitating any combination, agreement, or understanding, either express or implied, that FMC shall distribute, sell, merchandise, or otherwise market in the United States MCC produced by Respondent.

B. For a period of five (5) years after the date on which this Decision and Order becomes final, Respondent shall cease and

desist from, directly, indirectly, or through any corporate or other device, in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, inviting, entering into or attempting to enter into, implementing or attempting to implement, continuing or attempting to continue, soliciting, or otherwise facilitating any combination, agreement, or understanding, either express or implied, that FMC shall distribute, sell, merchandise, or otherwise market in the United States any Excipient produced by Respondent.

V.

IT IS FURTHER ORDERED that:

A. It shall not, of itself, constitute a violation of Paragraph II. or Paragraph III. of this Decision and Order for Respondent to enter into, attempt to enter into, or comply with a written agreement that is reasonably related to a lawful License or lawful Joint Venture Agreement and that is reasonably necessary to achieve its procompetitive benefits.

B. It shall not, of itself, constitute a violation of Paragraph II. or Paragraph III. of this Decision and Order for Respondent to enter into, attempt to enter into, or comply with a written agreement that: (1) licenses a Producer of MCC to use, on an exclusive basis and in any geographic area, any trademark owned by Respondent, or (2) licenses Respondent to use, on an exclusive basis and in any geographic area, a trademark owned by a Producer of MCC.

C. It shall not, of itself, constitute a violation of Paragraph II. or Paragraph III. of this Decision and Order for Respondent to threaten, initiate, or settle litigation to protect its intellectual property that is protected by patent, copyright, and/or trade secret law, provided that there is a reasonable basis in law and in fact for the claims alleged by Respondent in such litigation.

D. It shall not, of itself, constitute a violation of Paragraph IV. of this Decision and Order for Respondent to enter into, attempt to

enter into, or comply with an agreement to sell to FMC, on a temporary basis, any grade of MCC produced by both Respondent and FMC, provided that FMC's production of such grade of MCC is insufficient to meet FMC's actual or forecast demand due to plant closure, governmental action, health or safety hazards, a mechanical failure or a failure in the chemical reaction process in FMC's production facility, Act of God or Force Majeure.

E. It shall not, of itself, constitute a violation of Paragraph IV. of this Decision and Order for Respondent to enter into, attempt to enter into, or comply with an agreement to sell MCC to FMC for use by customers in food products only (hereinafter referred to as a "Distribution Agreement"). Provided, however, that for a period of ten (10) years after the date on which this Decision and Order becomes final, this exclusion shall not apply to any agreement that authorizes FMC to distribute, sell, merchandise or otherwise market MCC for use in pharmaceutical products or other tablets.

F. It shall not, of itself, constitute a violation of Paragraph IV. of this Decision and Order for Respondent to sell to FMC MCC meeting the current specifications of Ceolus, Grade KG-801, as set forth in confidential Exhibit A, attached to this Decision and Order, provided that such product is re-sold by FMC to the single customer identified in confidential Exhibit B, attached to this Decision and Order.

G. It shall not, of itself, constitute a violation of Paragraph II. or Paragraph III. of this Decision and Order for Respondent to enter into, attempt to enter into, or comply with a written Distribution Agreement providing FMC with the right to be Respondent's sole or exclusive re-seller of MCC for use by customers in food products only. Provided, however, that for a period of ten (10) years after the date on which this Decision and Order becomes final, this exclusion

shall not apply to any agreement that authorizes FMC to distribute, sell, merchandise or otherwise market MCC for use in pharmaceutical products or other tablets.

H. Where, pursuant to a lawful Joint Venture Agreement, Respondent and a Producer of MCC other than FMC collaborate in the creation of new MCC manufacturing capacity, it shall not, of itself, constitute a violation of Paragraph II. or Paragraph III. of this Decision and Order for Respondent to enter into, attempt to enter into, or comply with a written agreement to distribute, sell, merchandise or otherwise market, on an exclusive or non-exclusive basis, the MCC that is the output of such new manufacturing capacity.

I. In any action by the Commission alleging violations of this Decision and Order, Respondent shall bear the burden of proof in demonstrating that its conduct satisfies the conditions of Paragraph(s) V.A., V.B., V.C., V.D., V.E., V.F., V.G., and/or V.H. of this Decision and Order.

VI.

IT IS FURTHER ORDERED that for a period of six (6) years after the date on which this Decision and Order becomes final:

A. Respondent shall retain, for a period of three (3) years from the date of delivery or receipt thereof, a copy of each Written Communication between Respondent and FMC relating to the pricing, marketing, or sale of MCC in or into the United States.

B. Upon written request from any duly authorized representative of the Commission, Respondent shall produce to the Commission, at its offices in Washington D.C. and within a reasonable period of time: (1) a copy of each Written Communication between Respondent and FMC, and (2) copies of all other documents reasonably necessary for the purpose of determining or securing compliance with this Decision and Order. The requirements of this Paragraph VI.B. shall apply to all documents in the possession or under the control of Respondent without regard to whether the documents are physically located in the United States or in another jurisdiction.

VII.

IT IS FURTHER ORDERED that:

A. Within sixty (60) days after the date this Decision and Order becomes final, Respondent shall submit to the Commission a verified written report setting forth in detail the manner and form in which that Respondent has complied and is complying with this order.

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

C. Respondent shall file with the Commission, within thirty (30) days after its effective date: (1) a copy of each written agreement entered into by Respondent and FMC that relates to MCC or any Excipient, (2) a copy of each License or Joint Venture Agreement affecting commerce as "commerce" is defined in the Federal Trade Commission Act, and (3) a copy of each written agreement between Respondent and a Producer of MCC that is ancillary or related to a License or Joint Venture Agreement affecting commerce as "commerce" is defined in the Federal Trade Commission Act.

VIII.

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

IX.

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

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

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

X.

IT IS FURTHER ORDERED that Respondent shall:

A. Within thirty (30) days after the date on which this Decision and Order becomes final, send by first class mail a copy of this Decision and Order and a Japanese translation thereof to all directors, Officers, and management employees with responsibility for the pricing, marketing or sale of MCC (hereinafter referred to as "Management Employees");

B. Mail by first class mail a copy of this Decision and Order and a Japanese translation thereof to each person who becomes a director, Officer, or Management Employee, within thirty (30) days of the commencement of such person’s employment or affiliation with Respondent; and

C. Require each of its directors, Officers, and Management Employees to sign and submit to Respondent within thirty (30) days of the receipt thereof a statement that: (1) acknowledges receipt of the Decision and Order; (2) represents that the undersigned has read and understands the Decision and Order; and

(3) acknowledges that the undersigned has been advised and understands that non-compliance with the order may subject Asahi Chemical Industry Co., Ltd. to penalties for violation of the order.

XI.

IT IS FURTHER ORDERED that this Decision and Order shall terminate on June 12, 2022, except as otherwise provided in this Decision and Order.

By the Commission, Chairman Muris not participating.

Confidential Exhibits A and B

[Redacted From Public Record Version]

Analysis of Proposed Consent Orders to Aid Public Comment

The Federal Trade Commission has accepted agreements to proposed consent orders from FMC Corporation ("FMC") and from Asahi Chemical Industry Co. Ltd. ("Asahi Chemical"). FMC has its principal place of business in Chicago, Illinois. Asahi Chemical has its principal place of business in Tokyo, Japan.

The proposed consent orders have 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 agreements and the comments received, and decide whether it should withdraw from the agreements or make final the agreements' proposed orders.

The Commission's multi-count complaint charges that FMC and Asahi Chemical (collectively referred to as "respondents") have violated Section 5 of the Federal Trade Commission Act by conspiring to monopolize the world market for microcrystalline cellulose, and by agreeing to divide territories for the sale of microcrystalline cellulose. In addition, FMC is charged with attempting to monopolize the relevant market and with inviting a competitor to collude.

According to the complaint, microcrystalline cellulose ("MCC") is derived from purified wood cellulose and is used primarily as a binder in the manufacture of pharmaceutical tablets. MCC is a component of nearly all pharmaceutical tablets sold in the United States today. During the term of the conspiracy, FMC was the largest manufacturer and seller of MCC in the world. Asahi Chemical was the second largest seller of MCC in the world, and the dominant supplier of MCC in Japan.

The complaint alleges that, for over a decade, FMC engaged in a course of conduct designed to neutralize or eliminate competing sellers of MCC and to secure monopoly power. In or about 1984,

FMC entered into a conspiracy with Asahi Chemical to divide territories. FMC agreed that it would not sell any MCC product to customers located in Japan or East Asia without the consent of Asahi Chemical. In return, Asahi Chemical agreed that it would not sell any MCC product to customers located in North America or Europe without the consent of FMC.

In addition, the complaint alleges that FMC invited three smaller producers of MCC to join with FMC in collusive and anticompetitive conduct. The three firms solicited by FMC were Ming Tai Chemical Co., Ltd. ("Ming Tai"), Wei Ming Pharmaceutical Mfg. Co., Ltd. ("Wei Ming"), and the Mendell division of Penwest, Ltd. ("Mendell").

According to the complaint, in 1994 Ming Tai and Wei Ming emerged as significant suppliers of MCC to portions of the Asian MCC market. FMC was concerned that these Taiwan-based manufacturers would next compete for FMC's MCC accounts in North America and Europe. In or about January 1995, FMC proposed to Ming Tai that it grant FMC the exclusive right to distribute all MCC exported from Taiwan by Ming Tai. Also in or about January 1995, FMC proposed to Wei Ming that it sell MCC to FMC on an exclusive basis. In seeking these arrangements, FMC's intent was to exclude competition from the Taiwanese manufacturers and thereby secure monopoly power. Neither Ming Tai nor Wei Ming accepted FMC's invitation.

The complaint further alleges that, in 1995, Mendell posed a competitive threat to FMC's position as the dominant seller of MCC to pharmaceutical manufacturers in North America and Europe. Mendell had recently opened an MCC manufacturing facility in the United States, and was actively seeking to expand its sales. In April 1995, FMC proposed to Mendell that the two

firms enter into a market division agreement. Mendell did not accept FMC's invitation.[1]

Finally, the complaint alleges that the conduct engaged in by FMC and Asahi Chemical had the purpose and effect, or the tendency and capacity, to restrain competition in the manufacture and sale of MCC and to injure consumers in the United States and worldwide.

FMC and Asahi Chemical have signed consent agreements containing the proposed consent orders. The proposed consent orders would prohibit FMC and Asahi Chemical from: (i) agreeing with competitors to divide or allocate markets, customers, contracts, or geographic territories in connection with the sale of MCC, or (ii) agreeing with competitors to refrain in whole or in part from producing, selling, or marketing MCC. The respondents would also be barred from inviting or soliciting such agreements not to compete.

Further, in order to eradicate the anticompetitive effects of the alleged conspiracy, FMC is barred from serving as the U.S. distributor for any competing manufacturer of MCC (including Asahi Chemical) for a period of ten years. Further, for a period of five years, FMC may not distribute in the United States any other excipient manufactured by Asahi Chemical.[2]

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[1] FMC's efforts to recruit Ming Tai, Wei Ming, and Mendell to enter into anticompetitive arrangements, as alleged in the complaint, support the attempted monopolization claim. *See* Complaint ¶ 22. FMC's invitation to Mendell was the most patently anticompetitive of the three, and is the basis for an independent cause of action. *See* Complaint ¶ 23.

[2] An excipient is an inactive ingredient used in the manufacture of pharmaceutical products.

Analysis

The proposed consent orders contain several limited exemptions to the above-described provisions intended to permit FMC and Asahi Chemical to engage in certain lawful and pro-competitive conduct. For example, notwithstanding the broad prohibition on agreeing to divide markets, each respondent would be permitted to enter into exclusive trademark license agreements, to enforce its intellectual property rights, and to abide by reasonable restraints ancillary to lawful joint venture agreements. In any action by the Commission alleging violations of the consent order, each respondent would bear the burden of proof in demonstrating that its conduct satisfied the conditions of the exemption.

The proposed consent orders contain provisions to assist the Commission in monitoring the respondents' compliance with the orders. FMC would be required to retain copies of written communications with competing MCC manufacturers, and upon request, to make such documents available to the Commission. Asahi Chemical would be required to produce to the Commission all documents reasonably necessary for the purpose of determining or securing compliance with the consent order, without regard to whether the documents are located in the United States or in another jurisdiction.

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

Complaint

IN THE MATTER OF

KRYTON COATINGS INTERNATIONAL, INC.

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

Docket C-4052; File No. 0123060
Complaint, June 14, 2002--Decision, June 14, 2002

This consent order addresses advertising representations made about "Multi-Gard" – a residential coating product also known as Liquid Siding, Liquid Vinyl, or Multi-Gard R-20 – by Respondents Kryton Coatings International, Inc. and Procraft, Inc. The order, among other things, prohibits the respondents from making any representation about the benefits, performance or efficacy of any liquid siding or coating product – including (1) that such product reduces energy loss, energy costs, energy consumption, or utility bills; (2) any R-value associated with such product; or (3) such product's insulation qualities as compared to any other materials, including insulation materials – unless, at the time of making such representation, respondents possess and rely upon competent and reliable scientific evidence that substantiates the representation. The order also requires the respondents to notify Multi-Gard distributors and wholesalers about this action, and to send them a copy of the order.

Participants

For the Commission: *Hampton Newsome, Robert M. Frisby, Joni Lupovitz, Elaine D. Kolish* and *Janis K. Pappalardo.*

For the Respondent: *Edward A. Geltman, Squire, Sanders & Dempsey, L.L.P.*

COMPLAINT

The Federal Trade Commission, having reason to believe that Procraft, Inc. and Kryton Coatings International, Inc., corporations, ("respondents") have violated the provisions of the Federal Trade Commission Act, and it appearing to the Commission that this proceeding is in the public interest, alleges:

1a.Respondent Kryton Coatings International, Inc. is a Tennessee corporation with its principal office or place of business at 1701 Louisville Drive, Suite C, Knoxville, Tennessee 37921.

1b. Respondent Procraft, Inc. is a Tennessee corporation with its principal office or place of business at 1701 Louisville Drive, Suite C, Knoxville, Tennessee 37921.

2. Respondents cooperated and acted together in carrying out acts and practices hereinafter set forth.

3. Respondents have advertised, offered for sale, sold, and distributed a residential coating product known as Multi-Gard to the public under the trade names Liquid Siding, Liquid Vinyl, and Multi-Gard R-20 ("Multi-Gard").

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

5. Respondents have disseminated or have caused to be disseminated advertisements for Multi-Gard, including but not necessarily limited to the attached Exhibits A through E. These advertisements contain the following statements:

a. This specialized, permanent coating employs a thin layer of super insulating ceramic microspheres, which dry to the thickness of a credit card and provide insulation equal to seven inches of fiberglass batting (R-20).
[Exhibit A (Procraft and Kryton print ad)]

b. Liquid Siding is guaranteed to cut utility bills up to 40 percent.
[Exhibit A]

c. The space shuttle uses this same ultra-thin ceramic technology in protecting its vulnerable under-belly from the 200-degrees-below-zero cold of outer space to the more

than 2,000-degree heat of re-entry into the Earth's atmosphere.
[Exhibit A]

d. It Cuts Energy Loss by up to 40%
Using space-age NASA technology, Multi-Gard R-20® employs a thin layer of super insulating "Ceramic Microspheres" which dry to the thickness of a credit card, providing insulation equal to 7 inches of fiber glass batting.
[Exhibit B (Kryton Internet ad)]

e. The space shuttle uses similiar [sic] ultra-thin ceramic technology in protecting it's [sic] vulnerable under belly from the 200 degrees below zero COLD of outer space to the more than 2000 degrees HEAT of re-entry into Earth's atmosphere. MultiGard R-20® is as effective a solution on Earth as it is in space.
[Exhibit B]

f. It adds R-20 to the exterior wall reducing energy costs up to 40%!
[Exhibit C (Procraft brochure)]

g. NASA Technology at work for you Today!!
[Exhibit C]

h. Microscopic in size, Ceramic Microspheres [graphic of tightly packed layers of spheres] .. allign [sic] to form an impenetrable Thermal-barrier.
[Exhibit C]

i. Customer 2: I want to reduce my utilities up to 40% with liquid siding.. Where do I find it?
PB: You gotta call Pro craft!
* * *
Intercom: Yes, you can save up to 40% on your utilities ....
[Exhibit D (Procraft television ad script)]

j. It cuts utility bills up to 40% ....
[Exhibit E (Procraft radio ad script)]

6. Through the means described in Paragraph 5, respondents have represented, expressly or by implication, that Multi-Gard:

a. provides insulation equivalent to seven inches of fiberglass batting;

b. provides an insulation value of R-20;

c. reduces energy loss, energy costs or utility bills by up to 40%; and

d. performs the same insulation function as the ultra-thin ceramic technology on the space shuttle.

7. Through the means described in Paragraph 5, respondents have represented, expressly or by implication, that they possessed and relied upon a reasonable basis that substantiated the representations set forth in Paragraph 6, at the time the representations were made.

8. In truth and in fact, although the use of Multi-Gard and caulking may seal air leaks and cracks in buildings and, as a result, may reduce energy costs in some cases, respondents did not possess and rely upon a reasonable basis that substantiated the representations set forth in Paragraph 6, at the time the representations were made. Therefore, the representation set forth in Paragraph 7 was, and is, false or misleading.

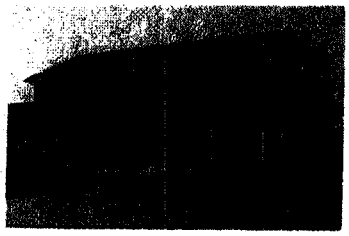
9. The acts and practices of respondents as alleged in this complaint constitute unfair or deceptive acts or practices, in or affecting commerce, in violation of Section 5(a) of the Federal Trade Commission Act.

THEREFORE, the Federal Trade Commission this fourteenth day of June, 2002, has issued this complaint against respondents.

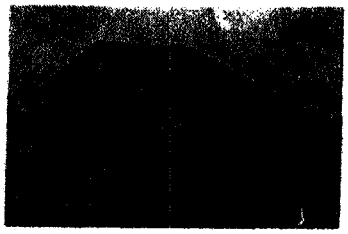
EXHIBIT A

Liquid Siding®

An Evolution In Home Improvement



Liquid Siding® is perfect for wood, clapboard, asbestos, stucco, masonry, brick, block and aluminum siding. And is the permanent solution to a maintenance free cedar home



People have come to our booths at Home Shows Nationwide and said, "We've been looking all over for your product!" The product to which they refer is Liquid Siding, an energy-efficient exterior coating manufactured by Kryton Coatings International. Liquid Siding is an evolutionary alternative to painting or vinyl siding. This specialized, permanent coating employs a thin layer of super insulating ceramic microspheres, which dry to the thickness of a credit card and provide insulation equal to seven inches of fiberglass batting (R-20). Today, more than 2000 homes have been improved with this product. Liquid Siding is guaranteed to cut utility bills up to 40 percent. Liquid Siding is designed for people who have to paint their home or for those considering vinyl siding, it adheres to all surfaces except vinyl and glass. Unlike paint, Liquid Siding won't mold or mildew, fade, split, crack, peel, blister or chip. The product was invented in Canada approximately 35 years ago, using space-age NASA technology. The space shuttle uses this same ultra-thin ceramic technology in protecting its vulnerable under-belly from the 200-degrees-below - zero cold of outer space to the more than 2,000-degree heat of re-entry into the Earth's atmosphere. Liquid Siding was originally developed as an exterior coating for coastal lighthouses. A test site at Point Atkinson in West Vancouver, Canada, is used to measure the product's performance. As a result of the products superior durability on the test site, the warranty has been increased from it's original guarantee of 10 years. The product now carries a non-prorated, 25-year warranty. Liquid Siding performed particularly well for Mobile Army Surgical Hospitals in Algeria. That MASH unit reported the need for six generators to maintain a temperature of 65 degrees prior to installation of the product and only two generators afterward. Kryton is currently investing $1.5 million into a new manufacturing plant in Knoxville Tennessee, which projects it will employ approximately 50 people. The product is installed by local contractors, with a 100-percent customer satisfaction guarantee. Liquid Siding comes in hundreds of colors, and it's more affordable than premium siding. Liquid Siding looks like paint and works like magic. For more information, call the number below. Those who mention this article will receive a 15% discount.

LIQUID SIDING
Permanent Exterior Coating®

Call Toll Free

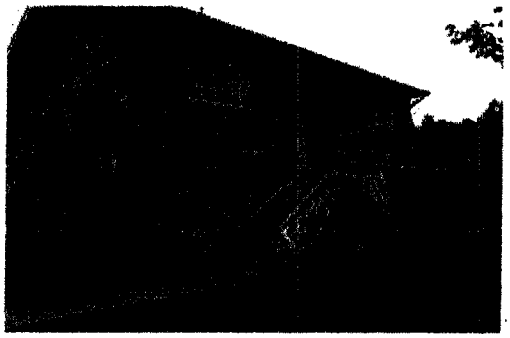
For more information about Liquid Siding visit the manufacturer's web site at www.kryton.net

PRO 0000022

EXHIBIT B

Liquid Vinyl--Multi-Gard R-20®

What is Multi-Gard R-20®?

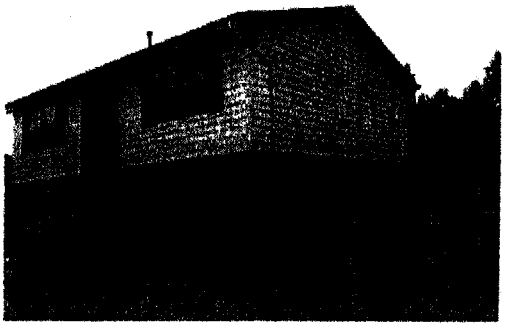


Before

This is a highly unique, specialized permanent exterior coating designed to beautify, insulate and protect your home. Multi-Gard R-20® was originally developed as an exterior coating for coastal lighthouses. For over 25 years, single applications of Multi-Gard R-20® have been withstanding the harshest elements; crashing ocean waves, driving rains, hurricane force winds, dry desert heat, arctic cold, pounding hail and tropic humidity; all without chipping, cracking, blistering, or peeling. Yes, Multi-Gard R-20® is the most durable, energy saving and maintenance free protection available for any home or commercial building.

It Cuts Energy Loss by up to 40%

Using space-age NASA technology, Multi-Gard R-20® employs a thin layer of super insulating "Ceramic Microspheres" which dry to the thickness of a credit card, providing insulation equal to 7 inches of fiber glass batting.



After

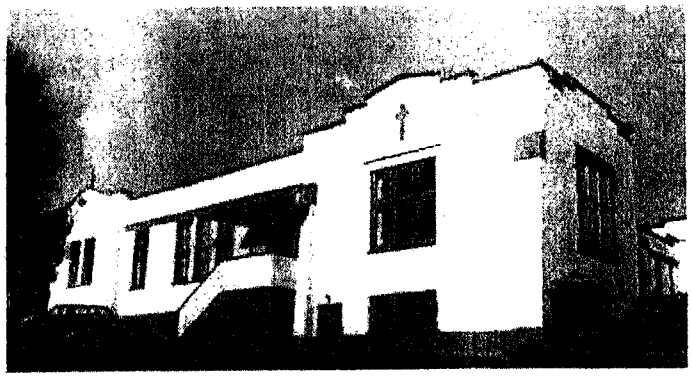
Before

The space shuttle uses similiar ultra-thin ceramic technology in protecting it's vulnerable under belly from the 200 degrees below zero COLD of outer space to the more than 2000 degrees HEAT of re-entry into Earth's atmosphere. Multi-Gard R-20® is as effective a solution on Earth as it is in space.

Proven to Protect, Beautifully

Warranted for 25 years, not to chip, crack, blister or peel, Multi-Gard R-20® has been tested to stretch up to 645% bridging new settlement cracks as they occur.

Multi-Gard R-20's ® anti-static formula is proven to resist clinging dirt, giving your home or building the superior custom look of always having been painted, day after day, season after season.



After

Click here to view our online presentation for Multi-Gard R-20®

WHEN YOU ONLY WANT TO DO IT ONCE!

For more information please contact us at:
1-888-8Kryton

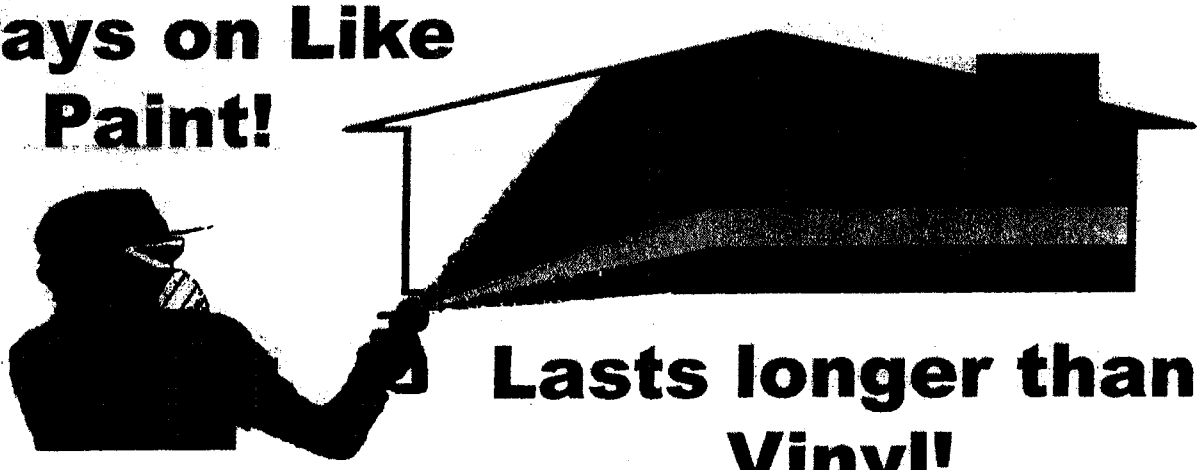
NASA Technology at work for you Today!!

EXHIBIT C

MULTI-GARD R-20

Permanent Exterior Coating

Sprays on Like Paint!



Lasts longer than Vinyl!

Has More Benefits than Both with None of the Problems.

Tomorrow's siding solution is here Today...Liquid Siding

Transferable 25 year Warranty!

It adds R-20 to the exterior wall reducing energy costs up to 40%!

LIQUID SIDING

The look, color and feel of fresh paint!

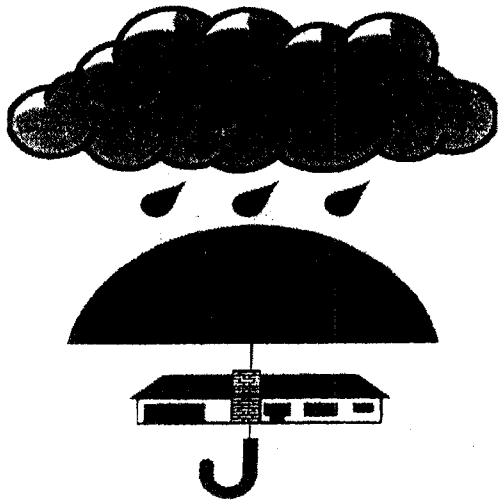
Used in over 40 countries world wide!

PRO 0000013

VISIT OUR WEBSITE @ WWW.KRYTON.NET

Vapor Permeable • Non-Toxic • Environmentally Friendly

ck tone masonry, block, stucco, & metal! It's your Permanent Solution!



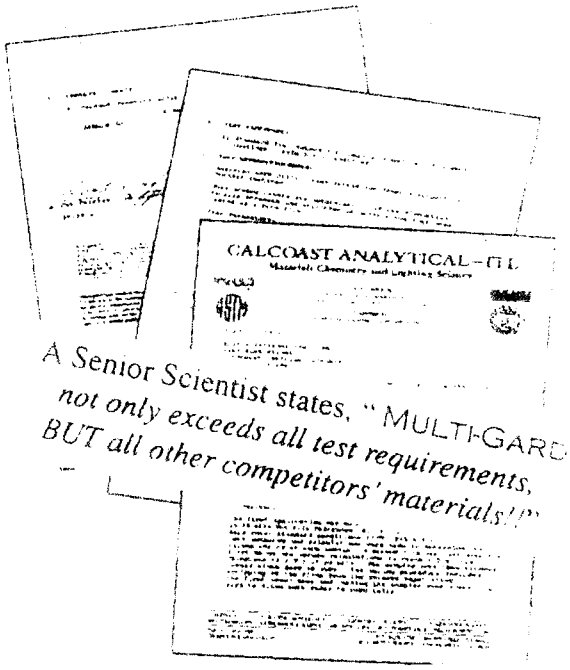
Moisture Attacks!

All construction materials are porous and retain water. Swelling produces cracks, dry rot causes your homes frame to weaken, moisture breeds hazardous bacteria. Rather than masking exterior problems with paint or vinyl siding, MULTI-GARD R-20 is the only solution allowing your home breath. Our exclusive Dura-Plas resin, combined with Titanium Dioxide, repels water, yet allows trapped moisture to escape. MULTI-GARD R-20's high level or waterproof protection and vapor permeability will add years of life and safety to your home. All this with added bonus of always giving your home the instant curb appeal of having just been painted.

VISIT OUR WEBSITE @ WWW.KRYTON.NET

Proven to Protect, Beautifully

The World's leading test laboratories have proven MULTI-GARD R-20's ability to withstand all climates. Warranted for 25 years, not to chip, crack, blister or peel, MULTI-GARD R-20 has been tested to stretch up to 645% bridging new settlement cracks as they occur. MULTI-GARD R-20's anti-static formula is proven to resist clinging dirt, giving your home the superior custom look of always having just been painted, day after day, season after season. As the ultimate bonus in beauty and protection, MULTI-GARD R-20 comes in 100's of UV radiation resistant colors to match any décor. Unlike "covering" your home with paint or vinyl siding, MULTI-GARD R-20 becomes a Beautiful and Durable "skin" for your home. with MULTI-GARD R-20, beauty and durability truly is "skin-deep".



A Senior Scientist states, "MULTI-GARD not only exceeds all test requirements, BUT all other competitors' materials!"

PRO 0000015

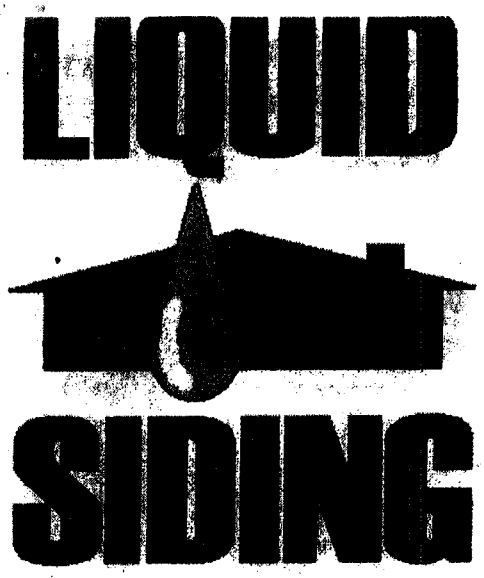
Kryton's Choice Contractor

Toll Free

(877) 776-2723

- ✓ *Call NOW for a special discount*
- ✓ *Professionally applied*
- ✓ *Licensed, bonded and insured*
- ✓ *Fully transferable warranty*
- ✓ *100% financing available*

tant • Fade Resistant • Energy Efficient • Warranted for a Full 25 Years



REAL ESTA

JAMES DULLEY

SenSible Home

Cost-effective coats

Insulating paints do more than make home look pretty

Q: My house is hot in the summer, and my heating bills are too high in the winter. Will painting the walls with residential-type, insulating, ceramic-filled paint help? Is it durable and washable?

H. O.

A: Insulating ceramic-filled interior and exterior paint and flat platelets. The platelets create a heat reflecting (not visually reflective) and dissipating surface. The micro-spheres create the insulation barrier.

This paint rolls on many times thicker, up to 15 mils (thousandths of an inch), than ordinary wall paint.

If you have a problem with (fiber than a hum water-based acryli cleanup. As the paint spheres get tightly form an insulating ba

Several new paint bination of hollow m

Enclosed is the info you requested !

Making A Difference...
Through Quality Programs

ALPHA MEDIA
CONCEPTS

Client: Pro Craft

Date: 10/8/97

Title: Paint Boy Stock

Audio	Video
	Paint Boy Stocking Shelf Customer approaches.
Customer: Where do I find Liquid Siding?	
	Paint Boy calls stock room on walkie talkie.
PB: Bert..Where's the Liquid Siding?	
	Voice off Camera 800 Number appears
Voice: It's not available in stores. Call Pro Craft to have it professionally installed.	
	Paint Boy stocking shelf
Customer 2: I want to reduce my utilities up to 40% with Liquid Siding.. Where Do I find it?	
PB: You gotta call Pro Craft!	
Customer 3: I want that Liquid Siding..you know it lasts for 20 years. I'll never have to paint my house again.	Paint Boy and Customer look up and listen to intercom like the voice of God is speaking.
Intercom: Attention Shoppers, you can't get liquid siding in stores! Yes, you can save up to 40% on your utilities and yes it lasts for 20 years...Call Pro Craft now!!	Pro Craft Logo with 800 number

2589 Hobbs Road • Louisville, Tennessee • 37777 • 423-982-1590

If you've thought about putting vinyl siding on your home, stop and listen to me. Hi folks, this is Ed Brantley for Liquid Siding. That's right, Liquid Siding. Now you can get the same look & results as vinyl siding by painting on Liquid Siding distributed by ProCraft. You get the look, the color and the feel of fresh paint. But it's stronger than vinyl. It lasts longer than vinyl. It has more benefits than both do and none of the problems. This is the absolute best product that you could put on your house. I've seen it. It's remarkable. It cuts utility bills up to 40% and it saves time cause you don't have to paint anymore. And during this special offer we'll offer Liquid Siding for your home at a cost too low to mention on the air. It's fire resistant, mildew resistant, fade resistant and energy efficient. It's got a 25-year warranty. It's used worldwide & we'll give you a free in home estimate. Call toll free 1-877ProCraft. That's 1-877ProCraft. Call right now for Liquid Siding.

DECISION AND ORDER

The Federal Trade Commission having initiated an investigation of certain acts and practices of the respondents named in the caption hereof, and the respondents having been furnished thereafter with a copy of a draft of 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 violation of the Federal Trade Commission Act; and

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

The Commission having thereafter considered the matter and having determined that it had reason to believe that the respondents have violated the said Act, and that a complaint should issue stating its charges in that respect, and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of thirty (30) days for the receipt and consideration of public comments, and having duly considered the comment filed thereafter by interested parties pursuant to Section 2.34 of the Rules, the Commission hereby issues its complaint, makes the following jurisdictional findings, and enters the following order:

1a. Respondent Kryton Coatings International, Inc. is a Tennessee corporation with its principal office or place of business at 1701 Louisville Drive, Suite C, Knoxville, Tennessee 37921.

1b. Respondent Procraft, Inc. is a Tennessee corporation with its principal office or place of business at 1701 Louisville Drive, Suite C, Knoxville, Tennessee 37921.

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

ORDER

DEFINITIONS

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

1. "Competent and reliable scientific evidence" shall mean tests, analyses, research, studies, or other evidence based on the expertise of professionals in the relevant area, that have been conducted and evaluated in an objective manner by persons qualified to do so, using procedures generally accepted in the profession to yield accurate and reliable results.

2. Unless otherwise specified, "respondents" shall mean Procraft, Inc. and Kryton Coatings International, Inc., corporations, and their successors and assigns.

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

I.

IT IS ORDERED that respondents, and their officers, agents, representatives, and employees, directly or through any corporation, subsidiary, division, or other device, in connection with the manufacturing, labeling, advertising, promotion, offering for sale, sale, or distribution of Liquid Siding, Multi-Gard, Multi-Gard R-20, Liquid Vinyl, or any other liquid siding or coating product, in or affecting commerce, shall not make any representation, in any manner, expressly or by implication:

A. that such product reduces energy loss, energy costs, energy consumption, or utility bills;

B. about any R-value associated with such product;

C. about such product's insulation qualities as compared to any other materials, including insulation materials; or

D. about the benefits, performance, or efficacy of such product,

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 shall, for five (5) years after the last date of dissemination of any representation covered by this Order, maintain and upon request make available to the Federal Trade Commission for inspection and copying:

A. All advertisements and promotional materials containing the representation;

B. All materials that were relied upon in disseminating the representation; and

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

III.

IT IS FURTHER ORDERED that respondents shall deliver a copy of this order to all current and future principals, officers, directors, managers, and to all current and future employees, and

outside advertising agencies or consultants 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.

IV.

IT IS FURTHER ORDERED that respondents shall, within thirty (30) days after the date of service of this order, send by first class certified mail, return receipt requested, to each purchaser for resale of Liquid Siding, Multi-Gard, Multi-Gard R-20, Liquid Vinyl, or any other liquid siding or coating product with which respondents have done business since January 1, 1999, the form attached as Attachment A and a copy of this order. The mailing shall not include any other documents.

V.

IT IS FURTHER ORDERED that respondents shall notify the Commission at least thirty (30) days prior to any change in the corporations that may affect compliance obligations arising under this order, including but not limited to a dissolution, assignment, sale, merger, or other action that would result in the emergence of a successor corporation; the creation or dissolution of a subsidiary, parent, or affiliate that engages in any acts or practices subject to this order; the proposed filing of a bankruptcy petition; or a change in the corporate name or address. Provided, however, that, with respect to any proposed change in the corporation about which respondents learn less than thirty (30) days prior to the date such action is to take place, respondents shall notify the Commission as soon as is practicable after obtaining such knowledge. All notices required by this Part shall be sent by

certified mail to the Associate Director, Division of Enforcement, Bureau of Consumer Protection, Federal Trade Commission, Washington, D.C. 20580.

VI.

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

VII.

This order will terminate on June 14, 2022, or twenty (20) years from the most recent date that the United States or the Federal Trade Commission files a complaint (with or without an accompanying consent decree) in federal court alleging any violation of the order, whichever comes later; provided, however, that the filing of such a complaint will not affect the duration of:

A. Any Part in this order that terminates in less than twenty (20) years;

B. This order's application to any respondent that is not named as a defendant in such complaint; and

C. This order if such complaint is filed after the order has terminated pursuant to this Part.

Provided, further, that if such complaint is dismissed or a federal court rules that the respondents did not violate any provision of the order, and the dismissal or ruling is either not appealed or upheld on appeal, then the order will terminate according to this

Part as though the complaint had never been filed, except that the order will not terminate between the date such complaint is filed and the later of the deadline for appealing such dismissal or ruling and the date such dismissal or ruling is upheld on appeal.

By the Commission.

ATTACHMENT A

[To be printed on respondents' letterhead]

BY CERTIFIED MAIL,
RETURN RECEIPT REQUESTED

[date]

Dear [purchaser for resale]:

This letter is to inform you that Kryton Coatings International, Inc., and Procraft, Inc. have settled a civil dispute with the Federal Trade Commission ("FTC") regarding advertising claims for the Multi-Gard residential coating product, also known as Liquid Siding, Liquid Vinyl, and Multi-Gard R-20 (collectively referred to hereinafter as "Multi-Gard").

As part of that settlement, the FTC issued a consent order to cease and desist, which prohibits certain claims for Multi-Gard unless, at the time such claims are made, we possess and rely upon competent reliable scientific evidence. A copy of the order is attached. We consented to the issuance of the order for settlement purposes only and without admitting any of the FTC's allegations. The order requires us to request that our distributors and wholesalers stop using or distributing advertisements or promotional materials containing claims challenged by the FTC, unless we have competent reliable scientific evidence to support these claims. As one of our distributors or wholesalers, we are required to send you this letter as part of this settlement.

Specifically, the FTC order prohibits us from making any claims about Multi-Gard related to:

1. its ability to reduce energy loss, energy costs, energy consumption, or utility bills;
2. any R-value associated with the product;

3. its insulation qualities as compared to any other materials, including insulation materials; or
4. the benefits, performance, or efficacy of Multi-Gard

unless we have competent and reliable scientific evidence.

We request your assistance by asking you to discontinue using, distributing, or relying on any advertising or promotional material for Multi-Gard previously received from us. Please also notify any of your customers who resell these products and who may have such materials to discontinue using those promotional materials.

We shall be modifying our advertising and promotional material to comply with this order. New suggested advertising and promotional materials will be sent under separate cover.

Thank you very much for your assistance.

Sincerely,

Nat Campbell, Jr.
President
Kryton Coatings International, Inc.

Christopher Scheevel
President
Procraft, Inc.

Enclosure as stated

Analysis of Proposed Consent Order to Aid Public Comment

The Federal Trade Commission has accepted, subject to final approval, an agreement for entry of a proposed consent order from Kryton Coatings International, Inc. and Procraft, Inc. ("respondents"). The agreement would settle a proposed complaint by the Federal Trade Commission that respondents engaged in unfair or deceptive acts or practices in violation of Section 5(a) of the Federal Trade Commission Act.

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

This matter concerns advertising representations made about "Multi-Gard" (also known as Liquid Siding, Liquid Vinyl, or Multi-Gard R-20), a residential coating product. The proposed administrative complaint alleges that respondents violated the FTC Act by disseminating ads that made unsubstantiated performance claims about Multi-Gard. The proposed complaint further alleges that respondents represented that Multi-Gard: 1) provides insulation equivalent to seven inches of fiberglass batting; 2) provides an insulation value of R-20; 3) reduces energy loss, energy costs or utility bills by up to 40%; and 4) performs the same insulation function as the ultra-thin ceramic technology on the space shuttle. The proposed complaint alleges that respondents represented that they had a reasonable basis for these claims. The proposed complaint further alleges that, although the use of Multi-Gard and caulking (which is provided as part of the application service for Multi-Gard) may seal air leaks and cracks in buildings and, as a result, may reduce energy costs in some cases, respondents did not possess and rely upon a reasonable basis that substantiated their claims.

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 order prohibits respondents from making any representation about the benefits, performance or efficacy of any Liquid Siding, Multi-Gard, Multi-Gard R-20, Liquid Vinyl, or any other liquid siding or coating product, including: that such product reduces energy loss, energy costs, energy consumption, or utility bills; any R-value associated with such product; or such product's insulation qualities as compared to any other materials, including insulation materials, unless, at the time of making such representation, respondents possess and rely upon competent and reliable scientific evidence that substantiates the representation.

Part IV requires respondents to notify Multi-Gard distributors and wholesalers about this action and send them a copy of the consent order. The form of the notice is provided in Attachment A to the order. The remainder of the proposed order contains provisions regarding record-keeping, distribution of the order, notification of changes in corporate status, the filing of a compliance report, and termination of the order.

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

Complaint

IN THE MATTER OF

SOLVAY S.A.

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

Docket C-4046; File No. 0210067
Complaint, April 29, 2002--Decision, June 21, 2002

This consent order addresses the acquisition by Respondent Solvay S.A. -- whose United States operations produce, among other things, polyvinylidene fluoride ("PVDF"), a fluoropolymer used in applications such as highly durable architectural coatings, wire and cable jacketing, fiber optic raceways, chemical processing equipment, and semiconductor manufacturing equipment -- of Ausimont S.p.A. from Italenergia S.p.A. The order, among other things, requires the respondent to divest the Solvay Fluoropolymers Business -- including its Decatur, Alabama plant and its interest in a joint venture that manufactures the main raw material for PVDF -- to an acquirer approved by the Commission. The order also requires the respondent to provide the acquirer with a royalty-free license to Solvay intellectual property -- including detailed information about the respondent's production of PVDF at its two plants in Alabama and France -- and the scope of the license allows the acquirer to manufacture or sell PVDF anywhere in the world. An accompanying Order to Hold Separate and Maintain Assets requires the respondent to preserve the Solvay Fluoropolymers Business as a viable, competitive, and ongoing operation until the divestiture is achieved.

Participants

For the Commission: *Robert S. Tovsky, Eric Sprague, Oded Pincas, Barbara Shapiro, Jacqueline Tapp, Jessica Rosen, Richard Liebeskind, Daniel P. Ducore, John Howell, Charissa P. Wellford* and *Mary T. Coleman.*

For the Respondent: *D. Stuart Meiklejohn, Sullivan & Cromwell.*

COMPLAINT

The Federal Trade Commission ("Commission"), having reason to believe that Solvay S.A. ("Solvay") has entered into an agreement to acquire certain voting securities of Ausimont S.p.A. ("Ausimont"), a subsidiary of Italenergia S.p.A. and that the acquisition, if consummated, would result in a violation of Section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45, and Section 7 of the Clayton Act, 15 U.S.C. § 18, and it appearing to the Commission that a proceeding in respect thereof would be in the public interest, hereby issues its complaint, stating its charges as follows:

A. THE RESPONDENT

1. Respondent Solvay S.A. is a corporation organized, existing, and doing business under and by virtue of the laws of Belgium, with its principal office and principal place of business located at Rue du Prince Albert, 33, B-1050, Brussels, Belgium. Solvay, among other things, engages in the worldwide development, manufacture and sale of chemicals, plastics, and pharmaceuticals.

2. At all times relevant herein, Respondent Solvay S.A. has been and is now engaged in commerce, as "commerce" is defined in Section 1 of the Clayton Act, 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, 15 U.S.C. § 44.

B. THE PROPOSED ACQUISITION

3. On December 21, 2001, Solvay S.A. entered into a share purchase agreement with Montedison S.p.A. and Longside International S.A. to acquire Ausimont. Montedison S.p.A., which owned eighty percent of Ausimont, is a wholly-owned subsidiary of Italenergia S.p.A.

C. RELEVANT MARKET

4. One relevant line of commerce in which to analyze the effects of Solvay's proposed acquisition of Ausimont is the manufacture and sale of polyvinylidene fluoride ("PVDF"), which includes coatings grades of PVDF and melt-processible grades. Coatings grade PVDF is used in highly durable exterior coatings. Melt-processible PVDF is used in a range of applications, including wire and cable jacketing, fiber optic raceways, chemical processing equipment, and semiconductor manufacturing equipment. There are no economic substitutes for PVDF in the applications in which it is used. That is, a small but significant and non-transitory price increase would not significantly affect the current level of consumption of any of the grades of PVDF in any of the significant end-use applications.

5. A second line of commerce in which to analyze the effects of the acquisition is the manufacture and sale of melt-processible grades of PVDF. These grades have different physical properties than coatings grades of PVDF. There are no economic substitutes for melt-processible PVDF in the applications in which it is used. However, some firms can produce both coatings grades and melt-processible grades in some or all of their equipment, without incurring significant sunk costs.

6. The relevant geographic market in which to analyze the effects of Solvay's proposed acquisition of Ausimont is the world.

D. MARKET STRUCTURE

7. The markets for PVDF and melt-processible PVDF are highly concentrated. Three manufacturers, Solvay, Ausimont, and AtoFina, currently account for approximately ninety percent of world PVDF capacity. All three manufacturers produce melt-processible grades of PVDF, but Solvay does not produce coatings grades.

8. Solvay produces PVDF in the U.S. at a plant in Decatur, Alabama. It also produces PVDF at its plant in Tavaux, France. Ausimont produces PVDF at a plant in Thorofare, New Jersey.

9. The proposed acquisition would increase concentration significantly for all grades of PVDF, as measured by the Herfindahl-Hirschman Index ("HHI"), by more than 1000 points, to over 4300. It would increase the HHI for melt-processible PVDF by several hundred points, to over 5100. In each case the market is already highly concentrated and would be significantly more concentrated as a result of the proposed acquisition.

E. CONDITIONS OF ENTRY

10. *De novo* entry or fringe expansion into the relevant market would require a substantial sunk investment and a significant period of time, such that new entry would be neither timely, likely, nor sufficient to deter or counteract the effects of the acquisition. Further, effective entry would require vertical integration into VF_2, which is a necessary raw material to produce PVDF, and which is not widely traded. Entry into VF_2 would also take a long time, and would likely require adding capacity beyond that which is required to support efficient PVDF production.

F. MARKET CHARACTERISTICS FACILITATE COORDINATED INTERACTION

11. The characteristics of the market for PVDF facilitate coordinated interaction among producers. Among such characteristics are:

a. The market for PVDF is already highly concentrated, and after the acquisition there would only be two significant competitors;

b. Reliable pricing information is readily available from customers;

c. PVDF is generally sold in small quantities to numerous customers; and

d. Pricing does not respond significantly to changing demand and supply conditions.

H. EFFECTS OF THE PROPOSED ACQUISITION

12. The effect of the acquisition may be substantially to lessen competition and to tend to create a monopoly in the relevant market in violation of Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18, and Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45, in the following ways, among others:

a. It will substantially increase concentration in the market for PVDF;

b. It will significantly enhance the likelihood of coordinated interaction in the relevant market among the competitors in the manufacture and sale of PVDF;

c. It will eliminate Ausimont as a growing competitor in melt-processible grades of PVDF, and;

d. It will lead to higher prices and a reduced level of innovation in PVDF.

I. VIOLATIONS CHARGED

13. The acquisition agreement between Solvay and Montedison S.p.A. and Longside International S.A., as described in paragraph 4, violates Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C.§ 45.

14. The acquisition of Ausimont by Solvay, if consummated, would violate Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45, and Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18.

WHEREFORE, THE PREMISES CONSIDERED, the Federal Trade Commission on this twenty-ninth day of April, 2002, issues its complaint against said Respondent.

By the Commission.

DECISION AND ORDER

The Federal Trade Commission ("Commission") having initiated an investigation of the proposed acquisition by Respondent Solvay S.A. ("Solvay") of certain voting securities of Ausimont S.p.A. ("Ausimont"), 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 that, 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, an admission by Respondents of all the jurisdictional facts set forth in the aforesaid draft of Complaint, a statement that the signing of the Agreement Containing Consent Orders 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 its Order to Hold Separate and Maintain Assets and having accepted the executed Agreement Containing Consent Orders and placed such Agreement Containing Consent Orders on the public record for a period of thirty (30) days for the receipt and consideration of public comments, and having duly considered the comments filed thereafter by interested persons pursuant to Commission Rule 2.34, 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 Solvay S.A. is a corporation organized, existing and doing business under and by virtue of the laws of Belgium, with its office and principal place of business located at Rue du Prince Albert, 33, B-1050 Brussels, Belgium. Respondent's wholly-owned subsidiary, Solvay America, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of Delaware, with its principal office and place of business at 3333 Richmond Avenue, Houston, Texas 77098.

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.

A. "Solvay" means Solvay S.A., a Belgian Corporation, its directors, officers, employees, agents, representatives, successors, and assigns; its subsidiaries, divisions, groups, and affiliates controlled by Solvay S.A., including Solvay America, Inc., and the respective directors, officers, employees, agents, representatives, successors, and assigns of each.

B. "Ausimont" means Ausimont S.p.A., an Italian Corporation, and its parents, subsidiaries, divisions, groups, and affiliates controlled by Ausimont.

C. "Alventia" means Alventia LLC, a limited liability company organized, existing and doing business under the laws of Delaware, and its subsidiaries and divisions, as well as groups and affiliates controlled by Alventia. Alventia does not include Dyneon LLC or Solvay.

D. "Commission" means the Federal Trade Commission.

E. "Respondent" means Solvay S.A.

F. "Acquirer" means each Person approved by the Commission to acquire the Solvay Fluoropolymers Business, the Solvay VF_2 Joint Venture Business, or the Ausimont - New Jersey Fluoropolymers Business.

G. "Acquisition" means the proposed acquisition of Ausimont by Solvay, as described in the December 21, 2001, Share Purchase Agreement between Montedison S.p.A., Longside International S.A. and Solvay S.A.

H. "Actual Cost" means Respondent's direct out-of-pocket expenses incurred in providing a service.

I. "Asset Purchase Agreement" means all agreements submitted to and approved by the Commission between Solvay and the Acquirer that sell, assign, or otherwise convey the Solvay Fluoropolymers Business and the Solvay VF_2 Joint Venture Business or the Ausimont - New Jersey Fluoropolymers Business to one or two Acquirers.

J. "Ausimont - New Jersey Fluoropolymers Business" means all of Solvay's right, title, and interest acquired in the Acquisition in all assets and businesses in the world relating to the research, development, manufacture, marketing, sale, and distribution of PVDF at, from, and by the Ausimont Thorofare Plant, including, but not limited to:

1. the Ausimont Thorofare Plant;

2. the Ausimont Thorofare VF_2 Plant (subject to the proviso below)

3. all real property (together with appurtenances, licenses and permits) used for any purpose related to the research, development, manufacture, marketing, sale, and distribution of PVDF;

4. all personal property;

5. all intellectual property, including but not limited to Ausimont PVDF Production Information, trademarks, patents, mask works, copyrights, trade secrets, research materials, technical information, management information systems, software, inventions, test data, technological know-how, licenses, registrations, submissions, approvals, technology, specifications, designs, drawings, processes, recipes, protocols, and formulas;

6. all contracts entered into with customers (together with associated bid and performance bonds), suppliers, sales representatives, distributors, agents, employees, personal property lessors, personal property lessees, licensors, licensees, consignors and consignees, and joint venture partners;

7. all governmental approvals, consents, licenses, permits, waivers, or other authorizations;

8. all warranties and guaranties, express or implied;

9. all customer lists, vendor lists, catalogs, sales promotion literature, advertising materials, research materials, technical information, dedicated management information systems, information contained in management information systems, rights to software, technology, know-how, ongoing research and development, specifications, designs, drawings, processes and quality control data;

10. all customer purchase orders, customer product specifications and requirements, records of historical customer purchases, customer correspondence, customer information, invoices, payment records, customer records, and customer files;

11. all books, records, and files;

12. all plant facilities, machinery, equipment, furniture, fixtures, tools, vehicles, transportation and storage facilities, and supplies;

13. all rights in and to inventories of products, raw materials, supplies and parts, including work-in-process and finished goods; and,

14. all items of prepaid expense.

Provided, however, that the Ausimont - New Jersey Fluoropolymers Business does not include: (a) the HCFC 142b manufacturing equipment located at the Ausimont Thorofare Plant; (b) any assets used exclusively in the research, development, manufacture or sale of fluoroelastomers or any other product unrelated to PVDF; and (3) those assets described in Confidential Exhibit 1.

K. "Ausimont - New Jersey Fluoropolymers Employees" means all full-time, part-time, or contract employees of Solvay:

1. whose duties on the Effective Date of Divestiture of the Ausimont - New Jersey Fluoropolymers Business directly or indirectly, wholly or in part, relate to the Ausimont - New Jersey Fluoropolymers Business;

2. whose duties related primarily to the Ausimont - New Jersey Fluoropolymers Business at any time during the period commencing twelve-months prior to the Effective Date of Divestiture of the Ausimont - New Jersey Fluoropolymers Business and ending on the Effective Date of Divestiture of the Ausimont - New Jersey Fluoropolymers Business; or,

3. who performed duties that related directly or indirectly, wholly or in part, to the Ausimont - New Jersey Fluoropolymers Business for all or any part of a day for a cumulative one hundred (100) work days (whether consecutive days or not) during the period commencing twelve-months prior to the Effective Date of Divestiture of the Ausimont - New Jersey Fluoropolymers Business and ending on the Effective Date of Divestiture of the Ausimont - New Jersey Fluoropolymers Business.

Provided, however, that Ausimont - New Jersey Fluoropolymers Employees do not include the Persons listed on Confidential Exhibit 2 ("Ausimont Retained Employees").

L. "Ausimont - New Jersey Fluoropolymers Key Employees" means any Ausimont - New Jersey Fluoropolymers Employees identified as such in the Asset Purchase Agreement, or who at the time of the Acquisition were identified as managers within the Ausimont - New Jersey Fluoropolymers Business.

M. "Ausimont PVDF Production Information" means all information relating to the past, present, planned, developed or researched production of each grade of PVDF, whether at the Ausimont Thorofare Plant, or at any other PVDF plant in which Solvay holds a legal or equitable ownership or management interest pursuant to the Acquisition, and includes all proprietary and public information relating to the specifications for each grade of PVDF, all specifications for all products sold to all customers, the raw material formulations, the operating conditions, the finishing process, the equipment cleaning procedures, plant maintenance information, the specifications for the manufacturing equipment, and any other information which relates to past, present, planned, developed or researched production by Ausimont of any grades of PVDF in the ordinary course of business.

N. "Ausimont Thorofare Plant" means buildings, structures, fixtures, equipment, machinery, and other tangible property owned or operated by or on behalf of Ausimont and located in Thorofare, New Jersey and the immediate vicinity used for any purpose related to the research, development, manufacture, marketing, sale, and distribution of PVDF.

O. "Ausimont Thorofare VF_2 Plant" means buildings, structures, fixtures, equipment, machinery, and other tangible property owned or operated by or on behalf of Ausimont and located in Thorofare, New Jersey and the immediate vicinity used for any purpose related to the research, development, manufacture, marketing, sale, and distribution of VF_2.

P. "Decatur PVDF Plant" means all buildings, structures, fixtures, equipment, machinery, and other tangible property owned or operated by or on behalf of Solvay and located in Decatur, Alabama, and the immediate vicinity, used for any purpose directly or indirectly related to the research, development, manufacture, marketing, sale, and distribution of PVDF.

Q. "Decatur VF_2 Plant" means all buildings, structures, fixtures, equipment, machinery, and other tangible property owned or operated by or on behalf of Alventia and located in Decatur, Alabama, and the immediate vicinity, used for any purpose directly or indirectly related to the research, development, manufacture, marketing, sale, and distribution of VF_2.

R. "Divestiture Agreements" means:

1. the Asset Purchase Agreement;

2. the Non-Exclusive PVDF Technology License;

3. the Non-Exclusive VF_2 Technology License;

4. the Non-Exclusive Ausimont Technology License;

5. the Trademark License;

6. the Supplemental Rights Agreement; and,

7. any other agreements between Solvay and each Acquirer related to the divestiture.

S. "Divestiture Trustee" means the divestiture trustee(s) appointed pursuant to Paragraph V. of this Order.

T. "Effective Date of Divestiture" means the date on which the divestiture of the Solvay Fluoropolymers Business and the Solvay VF_2 Joint Venture Business, or the Ausimont - New Jersey Fluoropolymers Business, to the Acquirer is consummated.

U. "HCFC-142b" means hydrocholorofluorocarbon 142b which, among other uses, is used as a raw material in the manufacture of VF_2.

V. "Hold Separate" means the Order to Hold Separate and Maintain Assets incorporated into and made a part of the Agreement Containing Consent Orders.

W. "Monitor Trustee" means the trustee appointed pursuant to Paragraph IV. of this Order.

X. "Non-Exclusive VF_2 Technology License" means a non-exclusive, royalty free, fully assignable license, to the Acquirer, with the right to sub-license, to make, use, and sell VF_2 anywhere in the world using all of the intellectual property controlled by Solvay which relates to the research, development, manufacture or sale of VF_2; *provided, however,* the Non-Exclusive VF_2 Technology License shall not require Solvay or the Acquirer to provide or license to the other party to the Non-Exclusive VF_2 Technology

License any improvements to any patents or other intellectual property granted, invented, researched, or developed after the Effective Date of Divestiture.

Y. "Non-Public Ausimont - New Jersey Fluoropolymers Information" means any information relating to the Ausimont - New Jersey Fluoropolymers Business not in the public domain. Non-Public Information shall not include: (i) information that subsequently falls within the public domain through no violation of this Order by Respondent or breach of a confidentiality or non-disclosure agreement with respect to such information; (ii) information independently developed by Respondent without reference to or use of Non-Public Information; and (iii) information that is required to be disclosed by law.

Z. "Non-Public Solvay Fluoropolymers Information" means any information relating to the Solvay Fluoropolymers Business or the Solvay VF_2 Joint Venture Business not in the public domain. Non-Public Information shall not include: (i) information that subsequently falls within the public domain through no violation of this Order by Respondent or breach of a confidentiality or non-disclosure agreement with respect to such information; (ii) information independently developed by Respondent without reference to or use of Non-Public Information; and (iii) information that is required to be disclosed by law.

AA. "Person" means any individual, partnership, joint venture, firm, corporation, association, trust, unincorporated organization or other entity.

BB. "PVDF" means polyvinylidene fluoride, including homopolymers and copolymers.

CC. "SFI" means Solvay Fluoropolymers, Inc., a wholly-owned subsidiary of Solvay.

DD. "Solvay/Alventia HCFC-142b Agreement" means the agreement between Solvay and Alventia dated January 19, 1998 pursuant to which Solvay has agreed to provide HCFC-142b to Alventia.

EE. "Solvay Fluoropolymers Business" means:

1. all of Solvay's right, title, and interest in SFI, including, but not limited to:

   a. the Decatur PVDF Plant;

   b. all real property (together with appurtenances, licenses and permits) used for any purpose related to the research, development, manufacture, marketing, sale, and distribution of PVDF;

   c. all patents owned by Solvay or SFI that are used exclusively for the purpose of manufacturing, selling, or using PVDF in the United States ("Decatur Patents");

   d. all know-how relating to the manufacture, sale, and use of PVDF which is reflected in written or electronic records at the Decatur PVDF Plant or in the knowledge of Solvay Fluoropolymers Employees, including, but not limited to trade secrets, ongoing research and development, research materials, technical information, management information systems, information contained in management information systems, software, inventions, quality control data, test data, technological know-how, licenses, assignments, registrations, submissions, approvals, technology, specifications, designs, drawings, processes, recipes, protocols, and formulas;

   e. all contracts entered into with customers (together with associated bid and performance bonds),

suppliers, sales representatives, distributors, agents, employees, personal property lessors, personal property lessees, licensors, licensees, consignors and consignees, and joint venture partners;

f. all governmental approvals, consents, licenses, permits, waivers, or other authorizations relating to the Decatur PVDF Plant;

g. all warranties and guarantees, express or implied, relating to the Decatur PVDF Plant;

h. all customer lists, vendor lists, catalogs, sales promotion literature, and advertising materials;

i. all customer purchase orders, customer product specifications and requirements, records of historical customer purchases, customer correspondence, customer information, invoices, payment records, customer records, and customer files relating to the Decatur PVDF Plant (whether in the actual possession of Solvay, SFI, or Solvay America, Inc.);

j. all books, records, and files relating to SFI or the Decatur PVDF Plant (whether in the actual possession of Solvay, SFI, or Solvay America, Inc.);

k. all plant facilities, machinery, equipment, furniture, fixtures, tools, vehicles, transportation and storage facilities, and supplies relating to the Decatur PVDF Plant;

l. all rights in and to inventories of products, raw materials, supplies and parts, including work-in-process and finished goods relating to the Decatur PVDF Plant;

m. all items of prepaid expense relating to the Decatur PVDF Plant; and

n. any other tangible or intangible right, asset, or property relating to the Decatur PVDF Plant;

2. a non-exclusive, royalty free, fully assignable license, to the Acquirer ("Non-Exclusive PVDF Technology License"), with the right to sub-license, to make, use, and sell PVDF anywhere in the world using all Solvay PVDF Production Information and all other intellectual property (other than the SOLEF® trademark) used at any time by SFI or at the Decatur PVDF Plant, or at other Solvay plants and facilities, or relating to the research, development, manufacture or sale of PVDF, including, but not limited to, intellectual property and other intangible property related to PVDF grades sold by SFI manufactured at locations other than the Decatur PVDF Plant; *provided, however,* the Non-Exclusive PVDF Technology License shall not require Solvay or the Acquirer to provide or license to the other party to the Non-Exclusive PVDF Technology License any improvements to any patents or other intellectual property granted, invented, researched, or developed after the Effective Date of Divestiture.

3. a non-exclusive, royalty free, fully assignable, one-year license to the Acquirer to use the SOLEF® trademark in its marketing, sale, and distribution of PVDF ("Trademark License");

4. a list of customers outside the United States who have purchased PVDF from Solvay within the three years preceding the Effective Date of Divestiture;

5. a copy of all vendor lists, catalogs, sales promotion literature, and advertising materials used by Solvay in connection with sales of PVDF to any Person outside of

the United States within the three years preceding the Effective Date of Divestiture;

6. a copy of any computer software located anywhere in the world that relates to the research, development, manufacture, marketing, sale, or distribution of any substance, compound, or product manufactured at the Decatur PVDF Plant;

7. all machinery, equipment, testing equipment, and tools that: (a) are physically located at the Decatur PVDF Plant as of the Effective Date of Divestiture that relate to the research, development, manufacture, marketing, sale or distribution of PVDF at or by the Decatur PVDF Plant or SFI; or (b) at any time within one year of the Effective Date of Divestiture have been physically located at the Decatur PVDF Plant; and,

8. tangible or intangible assets located anywhere in the world that are used exclusively to, or have been used exclusively to, manufacture, market, sell, or distribute PVDF at or by the Decatur PVDF Plant or SFI.

Provided, however, that

(a) Respondent may retain a list of the twenty (20) largest PVDF customers in the United States, as measured by volumes delivered in the United States, for each of the last three years;

(b) Respondent may retain all contract rights and copies of files to the extent they are related solely to Solvay PVDF sales in the United States that have not been supplied by production from the Decatur PVDF Plant within twelve (12) months before the date this Order is accepted for public comment; and,

(c) Solvay Fluoropolymers Business does not include any assets used exclusively in the research, development,

manufacture or sale of fluoroelastomers or any other product unrelated to PVDF.

FF. "Solvay Fluoropolymers Employees" means:

1. all full-time, part-time, or contract employees of SFI at any time within one year of the Effective Date of Divestiture of the Solvay Fluoropolymers Business; and,

2. all full-time, part-time, or contract employees of Solvay (but excluding employees of SFI) the services of which, wholly or in part, were billed, paid, charged, or invoiced (to the extent such charges can be specifically identified) by or to SFI or Alventia at any time within one year of the Effective Date of Divestiture, but excluding those employees who provided legal, accounting or other purely administrative support to SFI.

Provided, however, that Solvay Fluoropolymers Employees do not include the Persons listed on Confidential Exhibit 3 ("Solvay Retained Employees").

GG. "Solvay Fluoropolymers Key Employees" means any Solvay Fluoropolymers Employees identified as such in the Asset Purchase Agreement, or who at the time of the Acquisition were identified as managers within SFI.

HH. "Solvay PVDF Production Information" means all information relating to the past, present, planned, developed, or researched production of each grade of PVDF, whether at the Decatur PVDF Plant, or at any other PVDF plant in which Solvay holds a legal or equitable ownership or management interest, other than through the Acquisition, and includes all proprietary and public information relating to the specifications for each grade of PVDF, the raw material formulations, the operating conditions, the finishing process, the equipment cleaning procedures, plant maintenance

information, the specifications for the manufacturing equipment, and any other information which relates to past, present, planned, developed, or researched production by Solvay of any grades of PVDF in the ordinary course of business. Solvay PVDF Production Information does not include the supercritical carbon dioxide technology that Solvay has licensed from the University of North Carolina and the know-how defined in Definition I.V.(1).(d).

II. "Solvay VF_2 Joint Venture Business" means Respondent's ownership interest in Alventia, including any other interests or rights of Solvay associated with Solvay's ownership in Alventia.

JJ. "VF_2" means vinylidene fluoride monomer.

II.

IT IS FURTHER ORDERED that:

A. Solvay shall divest the Solvay Fluoropolymers Business, absolutely and in good faith and 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 one hundred and eighty (180) days from the date upon which this Order becomes final.

B. Solvay shall divest the Solvay VF_2 Joint Venture Business, absolutely and in good faith and 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 one hundred and eighty days (180) days from the date upon which this Order becomes final.

C. Respondent shall divest both the Solvay Fluoropolymers Business and the Solvay VF_2 Joint Venture Business together to a single Acquirer that receives the prior approval of the Commission, and in a manner that receives the prior approval of the Commission. *Provided, however,* that Respondent may divest the Solvay Fluoropolymers Business to an Acquirer who is not the Acquirer of the Solvay VF_2 Joint Venture Business, but only: (1) if Respondent, despite having made good faith efforts, is unable to divest the Solvay Fluoropolymers Business and the Solvay VF_2 Joint Venture Business to the same Acquirer; (2) if the Acquirer of the Solvay Fluoropolymers Business, by a contract, agreement, legally enforceable interest or another method acceptable to the Commission, has an assured supply of VF_2 from one or more Persons other than Respondent in a manner that will allow the Acquirer of the Solvay Fluoropolymers Business to operate the Solvay Fluoropolymers Business on a viable and competitive basis and accomplish the purposes of the Order; and (3) if the Commission, in its sole discretion, approves such divestiture.

D. Respondent shall, and the Divestiture Agreements shall require Respondent to, do the following:

1. provide to the Acquirer of the Solvay Fluoropolymers Business on or before the Effective Date of Divestiture the Non-Exclusive PVDF Technology License and, if the Acquirer of the Solvay Fluoropolymers Business is not the Acquirer of the Solvay VF_2 Joint Venture Business, Respondent shall also provide to the Acquirer of the Solvay Fluoropolymers Business the Non-Exclusive VF_2 Technology License;

2. at the option of the Acquirer of the Solvay VF_2 Joint Venture Business, and subject to the prior approval of the Commission, provide to the Acquirer of the Solvay VF_2 Joint Venture Business on or before the Effective Date of

Divestiture the Non-Exclusive VF_2 Technology License for use in the research, development, manufacture, or sale of VF_2 at: (a) locations other than the Decatur VF_2 Plant; and (b) the Decatur VF2 Plant;

provided, however, that Respondent shall only be required to license for use at the Decatur VF_2 Plant: (i) intellectual property which is contained in the Non-Exclusive VF2 Technology License and which has not already been conveyed to Alventia; and, (ii) intellectual property which is contained in the Non-Exclusive VF_2 License (if any) which is reasonably necessary to allow the continued manufacture of VF_2 at the Decatur VF_2 Plant in a manner that achieves the purposes of the Order; and,

provided further, that nothing in this Paragraph II.D.2. shall amend or modify any existing VF_2 licensing agreement between Respondent and Alventia;

3. assign to the Acquirer of the Solvay Fluoropolymers Business on or before the Effective Date of Divestiture the Decatur Patents, *provided that*, Respondent will be permitted, at the time it makes such assignment, and with the approval of the Commission, to retain a non-exclusive, royalty free assignable license, with the right to sub-license, to practice all claims of the Decatur Patents;

4. at the option of the Acquirer of the Solvay Fluoropolymers Business and the Acquirer of the Solvay VF_2 Joint Venture Business and subject to the prior approval of the Commission, enter into contracts, licenses, or other agreements with the Acquirer ("Supplemental Rights Agreement") sufficient to permit the Acquirer to use, for a period of up to two years after the Effective Date of Divestiture, assets, located anywhere in the world, that are not included in the

definition of Solvay Fluoropolymers Business or the Solvay VF_2 Joint Venture Business but that have been used in some way in the twelve (12) months preceding the date this Order is accepted for public comment, in the research, development, manufacture, marketing, sale, or distribution of PVDF or VF_2 at or by the Decatur PVDF Plant or SFI;

5. at the request of the Acquirer of the Solvay Fluoropolymers Business, the Solvay VF_2 Joint Venture Business, or Ausimont - New Jersey Fluoropolymers Business (if the Divestiture Trustee divests the Ausimont - New Jersey Fluoropolymers Business), at Solvay's Actual Cost, and at any time up to two years following the Effective Date of Divestiture:

   a. provide all technical assistance relating to obtaining and complying with all governmental approvals relating to the operation of the Solvay Fluoropolymers Business, the Solvay VF_2 Joint Venture Business (if Respondent or the Divestiture Trustee divests the Solvay Fluoropolymers Business and the Solvay VF_2 Joint Venture Business) or Ausimont - New Jersey Fluoropolymers Business (if the Divestiture Trustee divests the Ausimont - New Jersey Fluoropolymers Business);

   b. provide all technical assistance relating to the research, development, marketing, sale, and distribution of PVDF or VF_2 in the world, or relating to the operation of the Solvay Fluoropolymers Business or the Solvay VF_2 Joint Venture Business (if Respondent or the Divestiture Trustee divests the Solvay Fluoropolymers Business and the Solvay VF_2 Joint Venture Business) or Ausimont - New Jersey Fluoropolymers Business (if the Divestiture Trustee divests the Ausimont - New Jersey Fluoropolymers Business);

c. provide all technical assistance relating to the process of obtaining customer or other product approvals related to PVDF or VF_2;

d. provide such technical assistance as is necessary to enable the Acquirer to use the technology contained in the Non-Exclusive PVDF Technology License and the Non-Exclusive VF_2 Technology License (if Respondent or the Divestiture Trustee divests the Solvay Fluoropolymers Business and the Solvay VF_2 Joint Venture Business) or Ausimont - New Jersey Production Information (if the Divestiture Trustee divests the Ausimont - New Jersey Fluoropolymers Business);

6. at the request of the Acquirer of the Solvay Fluoropolymers Business or the Solvay VF_2 Joint Venture Business:

a. if Solvay or the Divestiture Trustee divests the Solvay Fluoropolymers Business:

(1) not later than forty five days before the Effective Date of Divestiture, Solvay shall: (i) provide to the Acquirer a list of all Solvay Fluoropolymers Employees; (ii) allow the Acquirer an opportunity to interview any Solvay Fluoropolymers Employees; (iii) allow the Acquirer to inspect the personnel files and other documentation relating to such Solvay Fluoropolymers Employees;

(2) not later than thirty days before the Effective Date, Solvay shall provide an opportunity for the Acquirer: (i) to meet personally, and outside the presence or hearing of any employee or agent of Solvay, with any one or more of the Solvay Fluoropolymers Employees; and, (ii) to make

offers of employment to any one or more of the Solvay Fluoropolymers Employees;

(3) Solvay shall: (i) not directly or indirectly interfere with the Acquirer's offer of employment to any one or more of the Solvay Fluoropolymers Employees, directly or indirectly attempt to persuade any one or more of the Solvay Fluoropolymers Employees to decline any offer of employment from the Acquirer, or offer any incentive to any Solvay Fluoropolymers Employee to decline employment with the Acquirer; (ii) irrevocably waive any legal or equitable right to deter any Solvay Fluoropolymers Employee from accepting employment with the Acquirer, including, but not limited to, any non-compete or confidentiality provisions of employment or other contracts with Solvay that directly or indirectly relate to PVDF or the employment of any one or more of the Solvay Fluoropolymers Employees by the Acquirer (iii) not interfere with the employment by the Acquirer of any Solvay Fluoropolymers Employee; and, (iv) continue employee benefits offered by Solvay until the Effective Date of Divestiture, including regularly scheduled or merit raises and bonuses, and regularly scheduled vesting of all pension benefits; and,

(4) pay a bonus equal to ten (10) percent of the employee's annual salary to any and all Solvay Fluoropolymers Key Employees who accept an offer of employment from the Acquirer no later than fourteen (14) days from the Effective Date of Divestiture; or

b. if the Divestiture Trustee divests the Ausimont - New Jersey Fluoropolymers Business:

(1) not later than forty five days before the Effective Date of Divestiture, Solvay shall: (i) provide to the Acquirer a list of all Ausimont - New Jersey Fluoropolymers Employees; (ii) allow the Acquirer an opportunity to interview any Ausimont - New Jersey Fluoropolymers Employees; (iii) allow the Acquirer to inspect the personnel files and other documentation relating to such Ausimont - New Jersey Fluoropolymers Employees;

(2) not later than thirty days before the Effective Date of Divestiture, Solvay shall provide an opportunity for the Acquirer: (i) to meet personally, and outside the presence or hearing of any employee or agent of Solvay, with any one or more of the Ausimont - New Jersey Fluoropolymers Employees; and, (ii) to make offers of employment to any one or more of the Ausimont - New Jersey Fluoropolymers Employees;

(3) Solvay shall: (i) not directly or indirectly interfere with the Acquirer's offer of employment to any one or more of the Ausimont - New Jersey Fluoropolymers Employees, directly or indirectly attempt to persuade any one or more of the Ausimont - New Jersey Fluoropolymers Employees to decline any offer of employment from the Acquirer, or offer any incentive to any Ausimont - New Jersey Fluoropolymers Employee to decline employment with the Acquirer; (ii) irrevocably waive any legal or equitable right to deter any Ausimont - New Jersey Fluoropolymers Employee from accepting employment with the Acquirer, including, but not limited to, any non-compete or confidentiality provisions of employment or other contracts with Solvay or Ausimont that directly or indirectly relate to PVDF or the employment of any one or more of the Ausimont - New Jersey

Fluoropolymers Employees by the Acquirer (iii) not interfere with the employment by the Acquirer of any Ausimont - New Jersey Fluoropolymers Employee; and, (iv) continue employee benefits offered by Solvay or Ausimont until the Effective Date of Divestiture, including regularly scheduled or merit raises and bonuses, and regularly scheduled vesting of all pension benefits; and,

(4) pay a bonus equal to ten (10) percent of the employee's annual salary to any and all Ausimont - New Jersey Fluoropolymers Key Employees who accept an offer of employment from the Acquirer no later than fourteen (14) days from the Effective Date of Divestiture;

7. if the Divestiture Trustee divests the Ausimont - New Jersey Fluoropolymers Business, provide, at the request of the Acquirer and subject to the prior approval of the Commission, an ongoing supply of HCFC-142b, and access to all assets and services located at the Ausimont Thorofare Plant, related to the research, development, manufacture and sale of PVDF, on the same basis on which Ausimont had relied on such assets and services in connection with the operation of the Ausimont - New Jersey Fluoropolymers Business, and in a manner sufficient to allow the Acquirer to operate the Ausimont - New Jersey Fluoropolymers Business on a viable and competitive basis and accomplish the purposes of this Order.

E. If the Divestiture Trustee divests the Ausimont-New Jersey Fluoropolymers Business, upon the request of the Respondent, and subject to the prior approval of the Commission, Respondent may retain a non-exclusive, royalty free, fully assignable license ("Non-Exclusive Ausimont Technology License"), with the right to sub-license only to Respondent's affiliates in which Respondent

maintains a 20% or greater ownership interest, to use all intellectual property described in Paragraph I.J.5. of this Order;

provided, however, the Non-Exclusive Ausimont Technology License shall only permit Respondent to use the intellectual property licensed by the Ausimont Technology License for the manufacture, use, or sale of products other than PVDF and VF2.

F. For a period of one year from the Effective Date of Divestiture:

1. if Solvay or the Divestiture Trustee has divested the Solvay Fluoropolymers Business and the Solvay VF_2 Joint Venture Business, Solvay shall not, directly or indirectly, solicit, negotiate, hire or enter into any arrangement for the services of all or any of the Solvay Fluoropolymers Employees or the Solvay Fluoropolymers Key Employees employed by the Acquirer, unless such employee's employment has been terminated by the Acquirer; or,

2. if the Divestiture Trustee has divested the Ausimont - New Jersey Fluoropolymers Business, Solvay shall not, directly or indirectly, solicit, negotiate, hire or enter into any arrangement for the services of all or any of the Ausimont - New Jersey Fluoropolymers Employees or the Ausimont - New Jersey Fluoropolymers Key Employees employed by the Acquirer, unless such employee's employment has been terminated by the Acquirer.

G. Respondent shall comply with all terms of the Divestiture Agreements, and any breach by Respondent of any term of the Divestiture Agreement shall constitute a violation of this Order. If any term of the Divestiture Agreements varies from the terms of this Order ("Order Term"), then to the

extent that Respondent cannot fully comply with both terms, the Order Term shall determine Respondent's obligations under this Order. Notwithstanding any paragraph, section, or other provision of the Divestiture Agreements, any failure to meet any condition precedent to closing (whether waived or not) or any modification of the Divestiture Agreements, without the prior approval of the Commission, shall constitute a failure to comply with this Order.

H. No part of this Order precludes any Solvay employee, including any Solvay Retained Employee, after the Effective Date of Divestiture, from performing his or her responsibilities as they relate to PVDF, VF_2 or any other product researched, manufactured or sold by Solvay; *provided that* Respondent shall comply fully with all terms and provisions of the Hold Separate, including, but not limited to, provisions restricting Respondent's employment of Persons participating in the management of assets held separate.

I. If the Respondent or the Divestiture Trustee divests the Solvay Fluoropolymers Business and the Solvay VF_2 Joint Venture Business, Respondent shall comply with all terms of the Solvay/Alventia HCFC-142b Agreement, which agreement is incorporated into and made a part of this Order. At the request of the Acquirer of the Solvay Fluoropolymers Business, and subject to the prior approval of the Commission, the term of such agreement may be extended for a term of up to fifteen (15) years following the Effective Date of Divestiture or otherwise modified upon commercially reasonable terms in order to achieve the purposes of the Order. Any breach by Respondent of any term of the Solvay/Alventia HCFC-142b Agreement shall constitute a violation of this Order. Notwithstanding any paragraph, section, or other provision of the Solvay/Alventia HCFC-142b Agreement, any modification of the Solvay/Alventia HCFC-142b Agreement, without the prior

approval of the Commission, shall constitute a failure to comply with this Order.

J. The purpose of the divestiture of the Solvay Fluoropolymers Business and the Solvay VF_2 Joint Venture Business, or the Ausimont - New Jersey Fluoropolymers Business is to ensure the continuing, viable and competitive operation of the Solvay Fluoropolymers Business and the Solvay VF_2 Joint Venture Business, or the Ausimont - New Jersey Fluoropolymers Business in the same business (including, but not limited to, the research and development of PVDF) and in the same manner in which the Solvay Fluoropolymers Business and the Solvay VF_2 Joint Venture Business, or the Ausimont - New Jersey Fluoropolymers Business were engaged at the time of the announcement of the proposed Acquisition and to remedy the lessening of competition alleged in the Commission's complaint.

III.

IT IS FURTHER ORDERED that:

A. Respondent shall:

1. not provide, disclose or otherwise make available any Non-Public Solvay Fluoropolymers Information (if Respondent or the Divestiture Trustee divests the Solvay Fluoropolymers Business and the Solvay VF_2 Joint Venture Business) or Non-Public Ausimont - New Jersey Fluoropolymers Information (if the Divestiture Trustee divests the Ausimont - New Jersey Fluoropolymers Business) to any Person; and,

2. not use any Non-Public Solvay Fluoropolymers Information (if Respondent or the Divestiture Trustee divests the Solvay Fluoropolymers Business and Solvay VF_2 Joint Venture Business) or Non-Public Ausimont - New Jersey Fluoropolymers Information (if the

Divestiture Trustee divests the Ausimont - New Jersey Fluoropolymers Business) for any reason or purpose other than as otherwise required or permitted by this Order.

B. Notwithstanding Paragraph III of this Order and subject to the Hold Separate, Respondent shall use Non-Public Solvay Fluoropolymers Information (if Respondent or the Divestiture Trustee divests the Solvay Fluoropolymers Business and the Solvay VF_2 Joint Venture Business) and the Non-Public Ausimont - New Jersey Fluoropolymers Information (if the Divestiture Trustee divests the Ausimont - New Jersey Fluoropolymers Business) only (i) for the purpose of performing Respondent's obligations under this Order, the Hold Separate, or the Divestiture Agreements; or, (ii) for the purpose of complying with Respondent's financial, tax reporting, health, safety, and environmental obligations.

IV.

IT IS FURTHER ORDERED that:

A. At any time after Respondent signs the Consent Agreement, the Commission may appoint a Person to serve as Monitor Trustee to monitor Respondent's compliance with the terms of this Order and the Divestiture Agreements made a part of this Order. The Monitor Trustee may be the same person as the Divestiture Trustee, or as the Hold Separate Trustee.

B. If the Commission appoints a Person to serve as Monitor Trustee pursuant to this Paragraph IV. of this Order, Respondent shall consent to the following terms and conditions regarding the powers, duties, authorities, and responsibilities of the Monitor Trustee:

1. The Commission shall select the Monitor Trustee, subject to the consent of Respondent, which consent

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

2. The Monitor Trustee shall have the power and authority to monitor Respondent's compliance with the terms of this Order and the Divestiture Agreements and shall exercise such power and authority and carry out the duties and responsibilities of the Monitor Trustee in a manner consistent with the purposes of this Order and in consultation with the Commission.

3. Within ten (10) days after appointment of the Monitor Trustee, Respondent shall execute an agreement ("Monitor Trustee Agreement") that, subject to the approval of the Commission, confers on the Monitor Trustee all the rights and powers necessary to permit the Monitor Trustee to monitor Respondent's compliance with the terms of this Order and the Divestiture Agreements in a manner consistent with the purposes of this Order. Respondent may require the Monitor Trustee to sign a confidentiality agreement prohibiting the use, or disclosure to anyone other than the Commission, of any competitively sensitive or proprietary information gained as a result of his or her role as Monitor Trustee.

4. The Monitor Trustee shall serve until the earlier of: (i) the expiration of this Order pursuant to Paragraph IX.; or (ii) the expiration of all the terms that comprise the Divestiture Agreements.

5. The Monitor Trustee shall have full and complete access to Respondent's books, records, documents, personnel, facilities and technical information relating to

compliance with this Order and the Divestiture Agreements, or to any other relevant information, as the Monitor Trustee may reasonably request. Respondent shall cooperate with any reasonable request of the Monitor Trustee. Respondent shall take no action to interfere with or impede the Monitor Trustee's ability to monitor Respondent's compliance with this Order and the Divestiture Agreements.

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

7. Respondent shall indemnify the Monitor Trustee and hold the Monitor Trustee harmless against any losses, claims, damages, liabilities or expenses arising out of, or in connection with, the performance of the Monitor Trustee's duties (including the duties of the Monitor Trustee's employees), 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 gross negligence, willful or wanton acts, or bad faith by the Monitor Trustee.

8. If at any time the Commission determines that the Monitor Trustee has ceased to act or failed to act diligently, or is unwilling or unable to continue to serve, the Commission may appoint a substitute to serve as

Monitor Trustee in the same manner as provided in this Paragraph IV.

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

10. The Monitor Trustee shall report in writing to the Commission concerning Respondent's compliance with this Order and the Divestiture Agreements every ninety days for a period of two years from the date Respondent signs the Consent Agreement and annually thereafter on the anniversary of the date this Order becomes final during the remainder of the Monitor Trustee's period of appointment, and at such other times as representatives of the Commission may request.

C. Respondent shall comply with all terms of the Monitor Trustee Agreement, and any breach by Respondent of any term of the Trustee Agreement shall constitute a violation of this Order. Notwithstanding any paragraph, section, or other provision of the Monitor Trustee Agreement, any modification of the Monitor Trustee Agreement, without the prior approval of the Commission, shall constitute a failure to comply with this Order.

V.

IT IS FURTHER ORDERED that:

A. If Respondent fails to complete the divestitures required by Paragraph II. of this Order within the time periods specified therein, then the Commission may appoint a Divestiture Trustee to divest the Solvay Fluoropolymers Business and the Solvay VF_2 Joint Venture Business to an Acquirer or

Acquirers and to execute Divestiture Agreements that satisfy the requirements of Paragraph II of this Order; provided, however, that the Divestiture Trustee may, subject to the approval of the Commission, substitute the Ausimont - New Jersey Fluoropolymers Business for the Solvay Fluoropolymers Business and the Solvay VF_2 Joint Venture Business. The Divestiture Trustee may be the same person as the Monitor Trustee or the Hold Separate Trustee, and will have the authority and responsibility to divest the Solvay Fluoropolymers Business and the Solvay VF_2 Joint Venture Business or the Ausimont - New Jersey Fluoropolymers Business, absolutely and in good faith, and with the Commission's prior approval.

B. 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 V. shall preclude the Commission or the Attorney General from seeking civil penalties or any other relief available to it, including a court-appointed trustee, pursuant to § 5(*l*) of the Federal Trade Commission Act, 15 U.S.C. § 45(*l*), or any other statute enforced by the Commission, for any failure by the Respondent to comply with this Order.

C. If a Divestiture Trustee is appointed by the Commission or a court pursuant to this Paragraph V. of this Order to divest the Solvay Fluoropolymers Business and the Solvay VF_2 Joint Venture Business or the Ausimont - New Jersey Fluoropolymers Business, 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. 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 from 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 Solvay Fluoropolymers Business and the Solvay VF_2 Joint Venture Business or the Ausimont - New Jersey Fluoropolymers Business to an Acquirer that receives the prior approval of the Commission pursuant to the terms of this Order and to enter into Divestiture Agreements with the Acquirer pursuant to the terms of this Order, which Divestiture Agreements shall be subject to the prior approval of the Commission.

3. Within ten (10) days after appointment of the Divestiture Trustee, Respondent shall execute a (or amend the existing) trust agreement ("Divestiture Trustee Agreement") that, subject to the prior approval of the Commission and, in the case of a court-appointed trustee, of the court, transfers to the Divestiture Trustee all rights and powers necessary to permit the Divestiture Trustee to divest the Solvay Fluoropolymers Business and the Solvay VF_2 Joint Venture Business or the Ausimont - New Jersey Fluoropolymers Business to an Acquirer and to enter into Divestiture Agreements with the Acquirer.

4. The Divestiture Trustee shall have twelve (12) months from the date the Commission, or the court, in the case of a court-appointed trustee, approves the Divestiture Trustee Agreement described in this Paragraph V. of this Order to divest the Solvay Fluoropolymers Business and the Solvay VF_2 Joint Venture Business or the Ausimont - New Jersey Fluoropolymers Business and to enter into Divestiture Agreements with an Acquirer that satisfies

the requirements of Paragraph II. of this Order. If, however, at the end of the applicable twelve-month period, the Divestiture Trustee has submitted to the Commission or the court a plan of divestiture or believes that divestiture can be achieved within a reasonable time, such divestiture period may be extended by the Commission, or, in the case of a court-appointed trustee, by the court; provided, however, the Commission may extend such divestiture period only two (2) times.

5. The Divestiture Trustee shall have full and complete access to the personnel, books, records and facilities of Respondent related to the manufacture, distribution, or sale of PVDF and VF_2, or related 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 his or her responsibilities.

6. The Divestiture Trustee shall use reasonable efforts to negotiate the most favorable price and terms available in each contract that is submitted to the Commission, subject to Respondent's absolute and unconditional obligation to divest at no minimum price and the Divestiture Trustee's obligation to expeditiously accomplish the remedial purpose of this Order; to assure that Respondent enters into Divestiture Agreements that comply with the provisions of Paragraph II. of this Order; to assure that Respondent complies with the remaining provisions of this Order; and to assure that the Acquirer obtains the assets required to research, develop, manufacture, sell and distribute PVDF and VF_2. The divestiture shall be made to, and the Divestiture Agreements executed with, an Acquirer in the manner set forth in Paragraph II.. of this Order; *provided, however*, if

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

7. The Divestiture Trustee shall serve, without bond or other security, at the 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 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 trustee, by the court, of the account of the trustee, including fees for his or her services, all remaining monies shall be paid at the direction of Respondent. The Divestiture Trustee's compensation shall be based at least in significant part on a commission arrangement contingent on the Divestiture Trustee's locating an Acquirer and assuring compliance with 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 Commission determines that the Divestiture Trustee has ceased to act or failed to act diligently, the Commission may appoint a substitute trustee in the same manner as provided in this Paragraph V. 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 comply with the terms of this Order.

11. The Divestiture Trustee shall have no obligation or authority to operate or maintain the Divested Assets.

12. The Divestiture Trustee shall report in writing to Respondent and to the Commission every two (2) months concerning his or her efforts to divest the Solvay Fluoropolymers Business and the Solvay VF_2 Joint Venture Business or the Ausimont - New Jersey Fluoropolymers Business and Respondent's compliance with the terms of this Order.

D. If the Divestiture Trustee divests the Ausimont - New Jersey Fluoropolymers Business, Respondent may propose an agreement to allow the Acquirer of the Ausimont - New Jersey Fluoropolymers Business to supply to Respondent VF2 manufactured at the Ausimont Thorofare VF2 Plant for, among other things, Respondent's use in the production of fluoroelastomers, provided that such agreement must provide sufficient VF2 to Acquirer to operate the Ausimont Thorofare PVDF Plant at an annual rate of production no lower than highest annual rate of production at the Ausimont Thorofare PVDF Plant in any of the five (5)

calendar years preceding the Effective Date of Divestiture, and must provide sufficient VF2 to Acquirer to support the Acquirer's good-faith plans, decisions, or efforts to meet the production goals and targets in Acquirer's business plans currently in effect and to expand production of PVDF at the Ausimont Thorofare PVDF Plant, in a manner consistent with the purposes of this Order. Respondent may also propose an agreement to expand the capacity to manufacture VF2 at the Ausimont Thorofare VF2 Plant. If such agreements are proposed by Respondent, the Divestiture Trustee shall include such agreements among the terms offered to prospective Acquirers, and may submit a divestiture containing such agreement for the approval by the Commission. If the Divestiture Trustee is unable to enter such agreements, or if Commission does not approve such agreements, or does not approve a divestiture subject to such agreements, the Commission may approve, and the Divestiture Trustee may divest, a divestiture of the Ausimont - New Jersey Fluoropolymers Business without such agreements.

E. Respondent shall comply with all terms of the Divestiture Trustee Agreement, and any breach by Respondent of any term of the Trustee Agreement shall constitute a violation of this Order. Notwithstanding any paragraph, section, or other provision of the Divestiture Trustee Agreement, any modification of the Divestiture Trustee Agreement, without the prior approval of the Commission, shall constitute a failure to comply with this Order.

VI.

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

other change in the corporation that may affect compliance obligations arising out of this Order.

VII.

IT IS FURTHER ORDERED that:

A. Within thirty (30) days after the date this Order becomes final and every thirty (30) days thereafter until the Respondent has fully complied with the provisions of Paragraphs II. and V. of this Order, Respondent shall submit to the Commission (with simultaneous copies to the Divestiture Trustee(s), as appropriate) verified written reports setting forth in detail the manner and form in which it intends to comply, is complying, and has complied with Paragraphs II. and V. of this Order. Respondent shall include in the reports, among other things that are required from time to time, a full description of the efforts being made to comply with Paragraphs II.A., II.B. and II.C. of this Order, including a description of all substantive contacts or negotiations for the divestitures and the identity of all parties contacted. Respondent shall include in the 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, Respondent shall file verified written reports with the Commission setting forth in detail the manner and form in which it has complied and is complying with this Order.

VIII.

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

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

B. Upon five (5) days' notice to Respondent and without restraint or interference from it, to interview officers, directors, employees, agents or independent contractors of Respondent.

IX.

IT IS FURTHER ORDERED that this Order shall terminate on June 21, 2012.

By the Commission.

[Confidential Exhibits 1-3 Redacted From Public Record Version]

ORDER TO HOLD SEPARATE AND MAINTAIN ASSETS

The Federal Trade Commission ("Commission") having initiated an investigation of the proposed acquisition by Respondent Solvay S.A. ("Solvay") of certain voting securities of Ausimont S.p.A., 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 that, 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"), 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 have violated the said Acts and that a Complaint should issue stating its charges in that respect, and having determined to accept the executed Consent Agreement and to place such Consent Agreement containing the Decision and Order on the public record for a period of thirty (30) days 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 Solvay S.A. is a corporation organized, existing and doing business under and by virtue of the laws of Belgium, with its office and principal place of business located at Rue du Prince Albert, 33, B-1050 Brussels, Belgium. Respondent's wholly-owned subsidiary, Solvay America, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of Delaware, with its principal office and place of business at 3333 Richmond Avenue, Houston, Texas 77098.

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

ORDER
I.

IT IS HEREBY ORDERED that, as used in this Hold Separate, the following definitions shall apply:

A. "Solvay" means Solvay S.A., a Belgian Corporation, its directors, officers, employees, agents, representatives, successors, and assigns; its subsidiaries, divisions, groups, and affiliates controlled by Solvay S.A., including Solvay America, Inc., and the respective directors, officers, employees, agents, representatives, successors, and assigns of each.

B. "Ausimont" means Ausimont S.p.A., an Italian Corporation, and its parents, subsidiaries, divisions, groups, and affiliates controlled by Ausimont.

C. "Alventia" means Alventia LLC, a limited liability company organized, existing and doing business under the laws of Delaware, and its subsidiaries and divisions, as well as groups and affiliates controlled by Alventia. Alventia does not include Dyneon LLC or Solvay.

D. "Commission" means the Federal Trade Commission.

E. "Respondent" means Solvay S.A.

F. "Acquirer" means each Person approved by the Commission to acquire the Solvay Fluoropolymers Business, the Solvay VF_2 Joint Venture Business, or the Ausimont - New Jersey Fluoropolymers Business.

G. "Acquisition" means the proposed acquisition of Ausimont by Solvay, as described in the December 21, 2001, Share Purchase Agreement between Montedison S.p.A., Longside International S.A. and Solvay S.A.

H. "Actual Cost" means Respondent's direct out-of-pocket expenses incurred in providing a service.

I. "Asset Purchase Agreement" means all agreements submitted to and approved by the Commission between Solvay and the Acquirer that sell, assign, or otherwise convey the Solvay Fluoropolymers Business and the Solvay VF_2 Joint Venture Business or the Ausimont - New Jersey Fluoropolymers Business to one or two Acquirers.

J. "Ausimont - New Jersey Fluoropolymers Business" means all of Solvay's right, title, and interest acquired in the Acquisition in all assets and businesses in the world relating to the research, development, manufacture, marketing, sale, and distribution of PVDF at, from, and by the Ausimont Thorofare Plant, including, but not limited to:

1. the Ausimont Thorofare Plant;

2. the Ausimont Thorofare VF_2 Plant (subject to the proviso below)

3. all real property (together with appurtenances, licenses and permits) used for any purpose related to the research,

development, manufacture, marketing, sale, and distribution of PVDF;

4. all personal property;

5. all intellectual property, including but not limited to Ausimont PVDF Production Information, trademarks, patents, mask works, copyrights, trade secrets, research materials, technical information, management information systems, software, inventions, test data, technological know-how, licenses, registrations, submissions, approvals, technology, specifications, designs, drawings, processes, recipes, protocols, and formulas;

6. all contracts entered into with customers (together with associated bid and performance bonds), suppliers, sales representatives, distributors, agents, employees, personal property lessors, personal property lessees, licensors, licensees, consignors and consignees, and joint venture partners;

7. all governmental approvals, consents, licenses, permits, waivers, or other authorizations;

8. all warranties and guaranties, express or implied;

9. all customer lists, vendor lists, catalogs, sales promotion literature, advertising materials, research materials, technical information, dedicated management information systems, information contained in management information systems, rights to software, technology, know-how, ongoing research and development, specifications, designs, drawings, processes and quality control data;

10. all customer purchase orders, customer product specifications and requirements, records of historical

customer purchases, customer correspondence, customer information, invoices, payment records, customer records, and customer files;

11. all books, records, and files;

12. all plant facilities, machinery, equipment, furniture, fixtures, tools, vehicles, transportation and storage facilities, and supplies;

13. all rights in and to inventories of products, raw materials, supplies and parts, including work-in-process and finished goods; and,

14. all items of prepaid expense.

Provided, however, that the Ausimont - New Jersey Fluoropolymers Business does not include: (a) the HCFC 142b manufacturing equipment located at the Ausimont Thorofare Plant; (b) any assets used exclusively in the research, development, manufacture or sale of fluoroelastomers or any other product unrelated to PVDF; and (3) those assets described in Confidential Exhibit 1.

K. "Ausimont - New Jersey Fluoropolymers Employees" means all full-time, part-time, or contract employees of Solvay:

1. whose duties on the Effective Date of Divestiture of the Ausimont - New Jersey Fluoropolymers Business directly or indirectly, wholly or in part, relate to the Ausimont - New Jersey Fluoropolymers Business;

2. whose duties related primarily to the Ausimont - New Jersey Fluoropolymers Business at any time during the period commencing twelve-months prior to the Effective Date of Divestiture of the Ausimont - New Jersey Fluoropolymers Business and ending on the Effective

Date of Divestiture of the Ausimont - New Jersey Fluoropolymers Business; or,

3. who performed duties that related directly or indirectly, wholly or in part, to the Ausimont - New Jersey Fluoropolymers Business for all or any part of a day for a cumulative one hundred (100) work days (whether consecutive days or not) during the period commencing twelve-months prior to the Effective Date of Divestiture of the Ausimont - New Jersey Fluoropolymers Business and ending on the Effective Date of Divestiture of the Ausimont - New Jersey Fluoropolymers Business.

Provided, however, that Ausimont - New Jersey Fluoropolymers Employees do not include the Persons listed on Confidential Exhibit 2 ("Ausimont Retained Employees").

L. "Ausimont - New Jersey Fluoropolymers Key Employees" means any Ausimont - New Jersey Fluoropolymers Employees identified as such in the Asset Purchase Agreement, or who at the time of the Acquisition were identified as managers within the Ausimont - New Jersey Fluoropolymers Business.

M. "Ausimont PVDF Production Information" means all information relating to the past, present, planned, developed or researched production of each grade of PVDF, whether at the Ausimont Thorofare Plant, or at any other PVDF plant in which Solvay holds a legal or equitable ownership or management interest pursuant to the Acquisition, and includes all proprietary and public information relating to the specifications for each grade of PVDF, all specifications for all products sold to all customers, the raw material formulations, the operating conditions, the finishing process, the equipment cleaning procedures, plant maintenance information, the specifications for the manufacturing equipment, and any

other information which relates to past, present, planned, developed or researched production by Ausimont of any grades of PVDF in the ordinary course of business.

N. "Ausimont Thorofare Plant" means buildings, structures, fixtures, equipment, machinery, and other tangible property owned or operated by or on behalf of Ausimont and located in Thorofare, New Jersey and the immediate vicinity used for any purpose related to the research, development, manufacture, marketing, sale, and distribution of PVDF.

O. "Ausimont Thorofare VF_2 Plant" means buildings, structures, fixtures, equipment, machinery, and other tangible property owned or operated by or on behalf of Ausimont and located in Thorofare, New Jersey and the immediate vicinity used for any purpose related to the research, development, manufacture, marketing, sale, and distribution of VF_2.

P. "Decatur PVDF Plant" means all buildings, structures, fixtures, equipment, machinery, and other tangible property owned or operated by or on behalf of Solvay and located in Decatur, Alabama, and the immediate vicinity, used for any purpose directly or indirectly related to the research, development, manufacture, marketing, sale, and distribution of PVDF.

Q. "Decatur VF_2 Plant" means all buildings, structures, fixtures, equipment, machinery, and other tangible property owned or operated by or on behalf of Alventia and located in Decatur, Alabama, and the immediate vicinity, used for any purpose directly or indirectly related to the research, development, manufacture, marketing, sale, and distribution of VF_2.

R. "Decision and Order" means:

1. until the issuance of a final Decision and Order by the Commission, the proposed Decision and Order incorporated into and made a part of the Consent Agreement; or,

2. following the issuance of a final Decision and Order by the Commission, the Decision and Order issued by the Commission.

S. "Divestiture Agreements" means:

1. the Asset Purchase Agreement;

2. the Non-Exclusive PVDF Technology License;

3. the Non-Exclusive VF_2 Technology License;

4. Non-Exclusive Ausimont Technology License;

5. the Trademark License;

6. the Supplemental Rights Agreement; and,

7. any other agreements between Solvay and each Acquirer related to the divestiture.

T. "Divestiture Trustee" means the divestiture trustee(s) appointed pursuant to Paragraph V. of the Decision and Order.

U. "Effective Date of Divestiture" means the date on which the divestiture of the Solvay Fluoropolymers Business and the Solvay VF_2 Joint Venture Business, or the Ausimont - New Jersey Fluoropolymers Business, to the Acquirer is consummated.

V. "HCFC-142b" means hydrocholorofluorocarbon 142b which, among other uses, is used as a raw material in the manufacture of VF_2.

W. "Hold Separate" means the Order to Hold Separate and Maintain Assets incorporated into and made a part of the Agreement Containing Consent Orders.

X. "Hold Separate Period" means the time period during which the Hold Separate is in effect, which shall begin on the date that the Acquisition is consummated and terminated pursuant to Paragraph VII. hereof.

Y. "Monitor Trustee" means the trustee appointed pursuant to Paragraph IV. of this Order.

Z. "Non-Exclusive VF_2 Technology License" means a non-exclusive, royalty free, fully assignable license, to the Acquirer, with the right to sub-license, to make, use, and sell VF_2 anywhere in the world using all of the intellectual property controlled by Solvay which relates to the research, development, manufacture or sale of VF_2; *provided, however,* the Non-Exclusive VF_2 Technology License shall not require Solvay or the Acquirer to provide or license to the other party to the Non-Exclusive VF_2 Technology License any improvements to any patents or other intellectual property granted, invented, researched, or developed after the Effective Date of Divestiture.

AA. "Non-Public Ausimont - New Jersey Fluoropolymers Information" means any information relating to the Ausimont - New Jersey Fluoropolymers Business not in the public domain. Non-Public Information shall not include: (i) information that subsequently falls within the public domain through no violation of this Order by Respondent or breach of a confidentiality or non-disclosure agreement with respect to such information; (ii) information independently developed by Respondent

without reference to or use of Non-Public Information; and (iii) information that is required to be disclosed by law.

BB. "Non-Public Solvay Fluoropolymers Information" means any information relating to the Solvay Fluoropolymers Business or the Solvay VF_2 Joint Venture Business not in the public domain. Non-Public Information shall not include: (i) information that subsequently falls within the public domain through no violation of this Order by Respondent or breach of a confidentiality or non-disclosure agreement with respect to such information; (ii) information independently developed by Respondent without reference to or use of Non-Public Information; and (iii) information that is required to be disclosed by law.

CC. "Person" means any individual, partnership, joint venture, firm, corporation, association, trust, unincorporated organization or other entity.

DD. "PVDF" means polyvinylidene fluoride, including homopolymers and copolymers.

EE. "SFI" means Solvay Fluoropolymers, Inc., a wholly-owned subsidiary of Solvay.

FF. "Solvay/Alventia HCFC-142b Agreement" means the agreement between Solvay and Alventia dated January 19, 1998 pursuant to which Solvay has agreed to provide HCFC-142b to Alventia.

GG. "Solvay Fluoropolymers Business" means:

1. all of Solvay's right, title, and interest in SFI, including, but not limited to:

   a. the Decatur PVDF Plant;

b. all real property (together with appurtenances, licenses and permits) used for any purpose related to the research, development, manufacture, marketing, sale, and distribution of PVDF;

c. all patents owned by Solvay or SFI that are used exclusively for the purpose of manufacturing, selling, or using PVDF in the United States ("Decatur Patents");

d. all know-how relating to the manufacture, sale, and use of PVDF which is reflected in written or electronic records at the Decatur PVDF Plant or in the knowledge of Solvay Fluoropolymers Employees, including, but not limited to trade secrets, ongoing research and development, research materials, technical information, management information systems, information contained in management information systems, software, inventions, quality control data, test data, technological know-how, licenses, assignments, registrations, submissions, approvals, technology, specifications, designs, drawings, processes, recipes, protocols, and formulas;

e. all contracts entered into with customers (together with associated bid and performance bonds), suppliers, sales representatives, distributors, agents, employees, personal property lessors, personal property lessees, licensors, licensees, consignors and consignees, and joint venture partners;

f. all governmental approvals, consents, licenses, permits, waivers, or other authorizations relating to the Decatur PVDF Plant;

g. all warranties and guarantees, express or implied, relating to the Decatur PVDF Plant;

h. all customer lists, vendor lists, catalogs, sales promotion literature, and advertising materials;

i. all customer purchase orders, customer product specifications and requirements, records of historical customer purchases, customer correspondence, customer information, invoices, payment records, customer records, and customer files relating to the Decatur PVDF Plant (whether in the actual possession of Solvay, SFI, or Solvay America, Inc.);

j. all books, records, and files relating to SFI or the Decatur PVDF Plant (whether in the actual possession of Solvay, SFI, or Solvay America, Inc.);

k. all plant facilities, machinery, equipment, furniture, fixtures, tools, vehicles, transportation and storage facilities, and supplies relating to the Decatur PVDF Plant;

l. all rights in and to inventories of products, raw materials, supplies and parts, including work-in-process and finished goods relating to the Decatur PVDF Plant;

m. all items of prepaid expense relating to the Decatur PVDF Plant; and

n. any other tangible or intangible right, asset, or property relating to the Decatur PVDF Plant;

2. a non-exclusive, royalty free, fully assignable license, to the Acquirer ("Non-Exclusive PVDF Technology License"), with the right to sub-license, to make, use, and sell PVDF anywhere in the world using all Solvay PVDF Production Information and all other intellectual property (other than the SOLEF® trademark) used at any time by

SFI or at the Decatur PVDF Plant, or at other Solvay plants and facilities, or relating to the research, development, manufacture or sale of PVDF, including, but not limited to, intellectual property and other intangible property related to PVDF grades sold by SFI manufactured at locations other than the Decatur PVDF Plant; *provided, however,* the Non-Exclusive PVDF Technology License shall not require Solvay or the Acquirer to provide or license to the other party to the Non-Exclusive PVDF Technology License any improvements to any patents or other intellectual property granted, invented, researched, or developed after the Effective Date of Divestiture.

3. a non-exclusive, royalty free, fully assignable, one-year license to the Acquirer to use the SOLEF® trademark in its marketing, sale, and distribution of PVDF ("Trademark License");

4. a list of customers outside the United States who have purchased PVDF from Solvay within the three years preceding the Effective Date of Divestiture;

5. a copy of all vendor lists, catalogs, sales promotion literature, and advertising materials used by Solvay in connection with sales of PVDF to any Person outside of the United States within the three years preceding the Effective Date of Divestiture;

6. a copy of any computer software located anywhere in the world that relates to the research, development, manufacture, marketing, sale, or distribution of any substance, compound, or product manufactured at the Decatur PVDF Plant;

7. all machinery, equipment, testing equipment, and tools that: (a) are physically located at the Decatur PVDF Plant as of the Effective Date of Divestiture that relate to the

research, development, manufacture, marketing, sale or distribution of PVDF at or by the Decatur PVDF Plant or SFI; or (b) at any time within one year of the Effective Date of Divestiture have been physically located at the Decatur PVDF Plant; and,

8. tangible or intangible assets located anywhere in the world that are used exclusively to, or have been used exclusively to, manufacture, market, sell, or distribute PVDF at or by the Decatur PVDF Plant or SFI.

Provided, however, that
(a) Respondent may retain a list of the twenty (20) largest PVDF customers in the United States, as measured by volumes delivered in the United States, for each of the last three years;
(b) Respondent may retain all contract rights and copies of files to the extent they are related solely to Solvay PVDF sales in the United States that have not been supplied by production from the Decatur PVDF Plant within twelve (12) months before the date this Order is accepted for public comment; and,
(c) Solvay Fluoropolymers Business does not include any assets used exclusively in the research, development, manufacture or sale of fluoroelastomers or any other product unrelated to PVDF.

HH. "Solvay Fluoropolymers Employees" means:

1. all full-time, part-time, or contract employees of SFI at any time within one year of the Effective Date of Divestiture of the Solvay Fluoropolymers Business; and,

2. all full-time, part-time, or contract employees of Solvay (but excluding employees of SFI) the services of which, wholly or in part, were billed, paid, charged, or invoiced (to the extent such charges can be specifically identified) by or to SFI or Alventia at any time within one year of the Effective Date of Divestiture, but excluding those

employees who provided legal, accounting or other purely administrative support to SFI.

Provided, however, that Solvay Fluoropolymers Employees do not include the Persons listed on Confidential Exhibit 3 ("Solvay Retained Employees").

II. "Solvay Fluoropolymers Hold Separate Trustee" means the Solvay Fluoropolymers Hold Separate Trustee appointed pursuant to Paragraph III. of this Hold Separate.

JJ. "Solvay Fluoropolymers Key Employees" means any Solvay Fluoropolymers Employees identified as such in the Asset Purchase Agreement, or who at the time of the Acquisition were identified as managers within SFI.

KK. "Solvay Fluoropolymers Manager" means an individual with experience in the management, sales, marketing, and financial operations of the Solvay Fluoropolymers Business and the Solvay VF_2 Joint Venture Business, who is appointed by the Respondent and approved by the Solvay Fluoropolymers Hold Separate Trustee to manage the Solvay Fluoropolymers Business and the Solvay VF_2 Joint Venture Business during the Hold Separate Period.

LL. "Solvay PVDF Production Information" means all information relating to the past, present, planned, developed, or researched production of each grade of PVDF, whether at the Decatur PVDF Plant, or at any other PVDF plant in which Solvay holds a legal or equitable ownership or management interest, other than through the Acquisition, and includes all proprietary and public information relating to the specifications for each grade of PVDF, the raw material formulations, the operating conditions, the finishing process, the equipment cleaning procedures, plant maintenance information, the specifications for the manufacturing equipment, and any other information which relates to

past, present, planned, developed, or researched production by Solvay of any grades of PVDF in the ordinary course of business. Solvay PVDF Production Information does not include the supercritical carbon dioxide technology that Solvay has licensed from the University of North Carolina and the know-how defined in Definition I.V.(1).(d).

MM. "Solvay VF_2 Joint Venture Business" means Respondent's ownership interest in Alventia, including any other interests or rights of Solvay associated with Solvay's ownership in Alventia.

NN. "VF_2" means vinylidene fluoride monomer.

II.

IT IS FURTHER ORDERED THAT:

A. During the Hold Separate Period, Respondent shall (i) hold the Solvay Fluoropolymers Business and the Solvay VF_2 Joint Venture Business as a separate and independent business as required by this Hold Separate, except to the extent that Respondent must exercise direction and control over the Solvay Fluoropolymers Business and the Solvay VF_2 Joint Venture Business to assure compliance with this Hold Separate, or with the Decision and Order, and except as otherwise provided in this Hold Separate, and (ii) shall vest the Solvay Fluoropolymers Business and the Solvay VF_2 Joint Venture Business with all powers and authorities necessary to conduct its business.

B. Until the Effective Date of Divestiture, Respondent shall take such actions as are necessary to maintain the viability, marketability, and competitiveness of the Solvay Fluoropolymers Business, the Solvay VF_2 Joint Venture Business, and the Ausimont - New Jersey Fluoropolymers

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, and renewing or extending any leases or licenses that expire or terminate prior to the Effective Date of Divestiture.

C. The purpose of this Hold Separate is to: (i) preserve the Solvay Fluoropolymers Business and the Solvay VF_2 Joint Venture Business as viable, competitive, and ongoing businesses, independent of Respondent, until the Effective Date of Divestiture of the Solvay Fluoropolymers Business and the Solvay VF_2 Joint Venture Business, or the Ausimont - New Jersey Fluoropolymers Business Assets; (ii) preserve the Ausimont - New Jersey Fluoropolymers Business as a viable, competitive, and ongoing business until the Effective Date of Divestiture of the Solvay Fluoropolymers Business and the Solvay VF_2 Joint Venture Business, or the Ausimont - New Jersey Fluoropolymers Business; (iii) assure that no Material Confidential Information is exchanged between Respondent and the Solvay Fluoropolymers Business and the Solvay VF_2 Joint Venture Business, except as otherwise provided in this Hold Separate; and (iii) prevent interim harm to competition pending divestiture of the Solvay Fluoropolymers Business and the Solvay VF_2 Joint Venture Business, or the Ausimont - New Jersey Fluoropolymers Business.

III.

IT IS FURTHER ORDERED THAT:

A. Rajiv Gupta is hereby appointed to serve as the Solvay Fluoropolymers Hold Separate Trustee. The Solvay Fluoropolymers Hold Separate Trustee may be the same Person as the Divestiture Trustee or the Monitor Trustee.

B. The Solvay Fluoropolymers Hold Separate Trustee shall monitor Respondent's compliance with this Hold Separate, and shall have all powers and authority necessary to effectuate his or her responsibilities pursuant to this Hold Separate and shall have the rights, duties and responsibilities described below:

1. No later than ten (10) days after the execution of the Consent Agreement, Respondent shall execute a Solvay Fluoropolymers Hold Separate Trustee Agreement that, subject to the approval of the Commission, transfers to the Solvay Fluoropolymers Hold Separate Trustee all rights, powers and authorities contained in the Consent Agreement or necessary to permit the Solvay Fluoropolymers Hold Separate Trustee to perform his or her duties and obligations pursuant to this Hold Separate and the Decision and Order.

2. No later than one (1) day after the commencement of the Hold Separate Period, Respondent shall transfer to the Solvay Fluoropolymers Hold Separate Trustee all rights, powers, and authorities necessary to permit the Solvay Fluoropolymers Hold Separate Trustee to perform his or her duties and responsibilities, pursuant to this Hold Separate and consistent with the purposes of the Decision and Order contained in the Consent Agreement.

3. The Solvay Fluoropolymers Hold Separate Trustee shall have the responsibility, consistent with the terms of this Hold Separate and the Decision and Order, for monitoring the organization of the Solvay Fluoropolymers Business and the Solvay VF_2 Joint Venture Business; for managing the Solvay Fluoropolymers Business and the Solvay VF_2 Joint Venture Business through the Solvay Fluoropolymers Manager; for maintaining the independence of the Solvay Fluoropolymers Business and the Solvay VF_2 Joint Venture Business; and for assuring Respondent's

compliance with its obligations pursuant to this Hold Separate and the Decision and Order.

4. The Solvay Fluoropolymers Hold Separate Trustee shall have full and complete access to all personnel, books, records, documents and facilities of the Solvay Fluoropolymers Business and the Solvay VF_2 Joint Venture Business, and the Ausimont - New Jersey Fluoropolymers Business, or to any other relevant information of the Respondent relating to the Solvay Fluoropolymers Business and the Solvay VF_2 Joint Venture Business, and the Ausimont - New Jersey Fluoropolymers Business, or to any other relevant information relating to Respondents' obligations under the Decision and Order and/or under this Hold Separate, as the Solvay Fluoropolymers Hold Separate Trustee may reasonably request. Respondent shall develop such financial or other information as the Solvay Fluoropolymers Hold Separate Trustee may reasonably request and shall cooperate with the Solvay Fluoropolymers Hold Separate Trustee. Respondent shall take no action to interfere with or impede the Solvay Fluoropolymers Hold Separate Trustee's ability to perform his or her responsibilities consistent with the terms of this Hold Separate or to monitor Respondent's compliance with this Hold Separate or the Decision and Order.

5. The Solvay Fluoropolymers Hold Separate Trustee shall have the authority to employ, at the cost and expense of Respondent, such consultants, accountants, attorneys, and other representatives and assistants as are reasonable and necessary to carry out the Solvay Fluoropolymers Hold Separate Trustee's duties and responsibilities. The Solvay Fluoropolymers Hold Separate Trustee shall account for all expenses incurred, including fees for his or her services, subject to the approval of the Commission.

6. The Commission may require the Solvay Fluoropolymers Hold Separate Trustee to sign an appropriate confidentiality agreement relating to materials and information received from the Commission, and Material Confidential Information received from Respondent, in connection with the performance of the Solvay Fluoropolymers Hold Separate Trustee's duties.

7. The Respondent may require the Solvay Fluoropolymers Hold Separate Trustee to sign a confidentiality agreement prohibiting the disclosure of any Material Confidential Information relating to the Solvay Fluoropolymers Business, the Solvay VF_2 Joint Venture Business, and the Ausimont - New Jersey Fluoropolymers Business, to anyone other than the Commission. However, nothing herein shall be construed to inhibit the communication of any Material Confidential Information between the Solvay Fluoropolymers Hold Separate Trustee and the individuals contemplated for the employment relationships provided for in subparagraph B.5. of this Paragraph III.

8. If the Solvay Fluoropolymers Hold Separate Trustee ceases to act or fails to act diligently and consistently with the purposes of this Hold Separate, the Commission may appoint a substitute Solvay Fluoropolymers Hold Separate Trustee. If Respondent has not opposed, in writing, including the reasons for opposing, the selection of any proposed Solvay Fluoropolymers Hold Separate Trustee within ten (10) business days after receipt of written notice from the Commission's staff to Respondents of the identity of any proposed Solvay Fluoropolymers Hold Separate Trustee, Respondent shall be deemed to have consented to the selection of the proposed Solvay Fluoropolymers Hold Separate Trustee.

C. No later than ten (10) days after the execution of the Solvay Fluoropolymers Hold Separate Trustee Agreement, Respondent shall, subject to the approval of the Solvay Fluoropolymers Hold Separate Trustee, enter into a management agreement with, and transfer to the Solvay Fluoropolymers Manager all rights, powers, and authorities necessary to permit the Solvay Fluoropolymers Manager to perform his or her duties and responsibilities, pursuant to the Hold Separate and consistent with the purposes of the Decision and Order.

1. The Solvay Fluoropolymers Manager, in his or her capacity as such, shall report directly and exclusively to the Solvay Fluoropolymers Hold Separate Trustee, and shall manage the Solvay Fluoropolymers Business and the Solvay VF_2 Joint Venture Business independently of the management of Respondent. The Solvay Fluoropolymers Manager shall not be involved in any way in the operations of the Respondent's businesses (other than the Solvay Fluoropolymers Business and the Solvay VF_2 Joint Venture Business) during the Hold Separate Period.

2. The Solvay Fluoropolymers Manager shall sign a confidentiality agreement prohibiting the disclosure of any Material Confidential Information relating to the Solvay Fluoropolymers Business or the Solvay VF_2 Joint Venture Business to anyone other than the Solvay Fluoropolymers Hold Separate Trustee and the Commission.

3. In the event the Solvay Fluoropolymers Manager ceases to act in his or her capacity as such, then Respondent shall select a substitute Solvay Fluoropolymers Manager, subject to the approval of the Solvay Fluoropolymers Hold Separate Trustee, and transfer to the substitute Solvay Fluoropolymers Manager all rights, powers and authorities necessary to permit the substitute Solvay

Fluoropolymers Manager to perform his or her duties and responsibilities, pursuant to this Hold Separate.

4. Respondent shall not change the composition of the management of the Solvay Fluoropolymers Business or the Solvay VF_2 Joint Venture Business except that the Solvay Fluoropolymers Manager shall be permitted to remove management employees for cause subject to approval of the Solvay Fluoropolymers Hold Separate Trustee. The Solvay Fluoropolymers Hold Separate Trustee shall have the power to remove the Solvay Fluoropolymers Manager for cause. Within fifteen (15) days after such removal, Respondent shall appoint a replacement for the Solvay Fluoropolymers Manager, subject to the approval of the Solvay Fluoropolymers Hold Separate Trustee in the same manner as provided in Paragraph III. of this Hold Separate.

5. 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. 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.

6. The Solvay Fluoropolymers Manager shall make no material changes in the present operation of the Solvay Fluoropolymers Business or the Solvay VF_2 Joint Venture Business except with the approval of or at the instruction of the Solvay Fluoropolymers Hold Separate Trustee.

7. In addition to the Solvay Fluoropolymers Employees, the Solvay Fluoropolymers Manager shall employ such employees as are reasonably necessary to assist the Solvay Fluoropolymers Manager in managing the Solvay Fluoropolymers Business and the Solvay VF_2 Joint Venture 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 (balances scorecard, expense, volume, shared services reporting) customer relations personnel and marketing administration personnel. For a period of two (2) years beginning after the termination of this Hold Separate, Respondent shall not retain the services of any Persons employed by the Solvay Fluoropolymers Manager to assist in the management of the Solvay Fluoropolymers Business and the Solvay VF_2 Joint Venture Business under this Hold Separate.

D. Respondent shall assure that the Solvay Fluoropolymers Business and the Solvay VF_2 Joint Venture Business are staffed with employees sufficient to maintain the marketability, viability, and competitiveness of the Solvay Fluoropolymers Business and the Solvay VF_2 Joint Venture Business. Solvay Fluoropolymers Employees shall include (i) all Solvay Fluoropolymers Employees employed by Solvay as of the date the Commission accepts the Consent Agreement for public comment; and, (ii) those persons hired from other sources. The Solvay Fluoropolymers Manager, with the

approval of the Solvay Fluoropolymers Hold Separate Trustee, shall have the authority to replace employees who have otherwise left their positions with the Solvay Fluoropolymers Business or the Solvay VF_2 Joint Venture Business since March 1, 2001. To the extent that Solvay Fluoropolymers Employees leave the Solvay Fluoropolymers Business or the Solvay VF_2 Joint Venture Business prior to the Effective Date of Divestiture of the Solvay Fluoropolymers Business and the Solvay VF_2 Joint Venture Business, or the Ausimont - New Jersey Fluoropolymers Business, the Solvay Fluoropolymers Manager, with the approval of the Solvay Fluoropolymers Hold Separate Trustee, shall use reasonable efforts to replace the departing Solvay Fluoropolymers Employees with persons who have similar experience and expertise.

1. Respondent shall cause the Solvay Fluoropolymers Manager and each Solvay Fluoropolymers Employee with managerial responsibilities having access to Material Confidential Information relating to the Solvay Fluoropolymers Business or the Solvay VF_2 Joint Venture Business to sign an agreement to maintain the confidentiality required by the terms and conditions of this Hold Separate. These individuals must retain and maintain all Material Confidential Information relating to the Solvay Fluoropolymers Business or the Solvay VF_2 Joint Venture Business on a confidential basis and, except as is permitted by this Hold Separate, 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 Respondent's businesses other than the Solvay Fluoropolymers Business or the Solvay VF_2 Joint Venture Business. These persons shall not be involved in any way in the management, sales, marketing, and financial operations of products of Respondent that compete with the products of the Solvay

Fluoropolymers Business or the Solvay VF_2 Joint Venture Business.

2. No later than ten (10) days after the execution of the Solvay Fluoropolymers Hold Separate Trustee Agreement, Respondent shall establish written procedures, subject to the approval of the Solvay Fluoropolymers Hold Separate Trustee, covering the management, maintenance, and independence of the Solvay Fluoropolymers Business and the Solvay VF_2 Joint Venture Business consistent with the provisions of this Hold Separate.

3. No later than one (1) business day after the commencement of the Hold Separate Period, Respondent shall circulate to the Solvay Fluoropolymers Employees and to Respondent's employees who are responsible for the operation of the Solvay Fluoropolymers Business and the Solvay VF_2 Joint Venture Business, or the research, development, manufacture, distribution, marketing or sale of PVDF, a notice of this Hold Separate and Consent Agreement, in the form attached as Attachment A.

E. The Solvay Fluoropolymers Hold Separate Trustee and the Solvay Fluoropolymers Manager shall serve, without bond or other security, at the cost and expense of Respondent, on reasonable and customary terms and conditions commensurate with the person's experience and responsibilities.

F. Respondent shall indemnify the Solvay Fluoropolymers Hold Separate Trustee and the Solvay Fluoropolymers Manager, and hold the Solvay Fluoropolymers Hold Separate Trustee and the Solvay Fluoropolymers Manager harmless against any losses, claims, damages, liabilities, or expenses arising out of, or in connection with, the performance of the Solvay Fluoropolymers Hold Separate Trustee's or the Solvay Fluoropolymers 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 losses, claims, damages, liabilities, or expenses result from misfeasance, gross negligence, willful or wanton acts, or bad faith by the Solvay Fluoropolymers Hold Separate Trustee or the Solvay Fluoropolymers Manager.

G. Respondent shall provide the Solvay Fluoropolymers Business, the Solvay VF_2 Joint Venture Business, and the Ausimont - New Jersey Fluoropolymers Business with sufficient financial resources:

1. as are appropriate in the judgment of the Solvay Fluoropolymers Hold Separate Trustee to operate the Solvay Fluoropolymers Business and the Solvay VF_2 Joint Venture Business, and at no less than current rates of operation (including, but not limited to, current rates of the Solvay Fluoropolymers Business and the Solvay VF_2 Joint Venture Business, production and sales) and at no less than the rates of operation projected in the business plans of the Solvay Fluoropolymers Business and the Solvay VF_2 Joint Venture Business as of January 1, 2002 (including, but not limited to, the rates of operation projected in the business plans); provided that the failure to achieve production or sales goals projected in Respondent's business plans shall not be deemed to be a violation of this Hold Separate;

2. to continue, at least at their scheduled pace, any additional expenditures for the Solvay Fluoropolymers Business, the Solvay VF_2 Joint Venture Business, and the Ausimont - New Jersey Fluoropolymers Business authorized prior to the date the Consent Agreement is executed;

3. to perform all ordinary and necessary maintenance to, and replacements of, assets of the Solvay Fluoropolymers Business, the Solvay VF_2 Joint Venture Business, and the Ausimont - New Jersey Fluoropolymers Business;

4. to maintain the viability, competitiveness, and marketability of the Solvay Fluoropolymers Business, the Solvay VF_2 Joint Venture Business, and the Ausimont - New Jersey Fluoropolymers Business until the Effective Date of Divestiture, provided neither the Solvay Fluoropolymers Business, the Solvay VF_2 Joint Venture Business, nor the Ausimont - New Jersey Fluoropolymers Business may assume any new long-term debt, except as necessary to meet a competitive threat and, with respect to the Solvay Fluoropolymers Business and the Solvay VF_2 Joint Venture Business, as approved by the Solvay Fluoropolymers Hold Separate Trustee; and,

5. such financial resources to be provided to the Solvay Fluoropolymers Business, the Solvay VF_2 Joint Venture Business, and the Ausimont - New Jersey Fluoropolymers 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 Solvay Fluoropolymers Hold Separate Trustee may reduce the scale or pace of any capital or research and development project, or substitute any capital or research and development project for another of the same cost.

H. Respondent shall, at the option of the Solvay Fluoropolymers Manager, and with the approval of the Solvay Fluoropolymers Hold Separate Trustee, continue to provide the same support services to the Solvay Fluoropolymers Business and the Solvay VF_2 Joint Venture Business as are being provided to such assets

and business as of the date Respondent executes the Consent Agreement; provided:

1. Respondent may charge the Solvay Fluoropolymers Business and the Solvay VF_2 Joint Venture Business the same fees, if any, charged by Respondent for such support services as of the date Respondent executes the Consent Agreement; and,

2. Respondent shall ensure that all personnel providing such support services retain and maintain all Material Confidential Information relating to the Solvay Fluoropolymers Business and the Solvay VF_2 Joint Venture Business on a confidential basis, and, except as is permitted by this Hold Separate, such persons shall be prohibited from providing, discussing, exchanging, circulating, or otherwise furnishing any such information to or with any person whose employment involves any of Respondent's businesses (other than the Solvay Fluoropolymers Business or the Solvay VF_2 Joint Venture Business). Such personnel shall also be required to execute confidentiality agreements prohibiting the disclosure of any Material Confidential Information relating to the Solvay Fluoropolymers Business and the Solvay VF_2 Joint Venture Business.

Nothing herein shall require Respondent to hold separate the operations, assets or personnel used to provide the following support services to the Solvay Fluoropolymers Business or the Solvay VF_2 Joint Venture Business during the Hold Separate Period, provided that Respondents adhere to the confidentiality obligations contained herein:

(1) Public affairs/media relations services;
(2) Legal services;
(3) Preparation of tax returns and other audit services;
(4) Information systems services, including construction, maintenance and support of all SAP and other computer systems;

(5) Medical services, including drug testing;
(6) Processing of accounts payable;
(7) Security services;
(8) Technical support;
(9) Financial accounting services;
(10) Engineering services, including engineering, design and maintenance of plants and terminals;
(11) Real estate services, including the identification and development of new site;
(12) Procurement of goods and services utilized in the ordinary course of business by the Solvay Fluoropolymers Business or the Solvay VF_2 Joint Venture Business;
(13) Human resources and Employee Benefits; and
(14) Transportation and other logistics services.

3. Except as provided in this Hold Separate and the Decision and Order, Respondent shall not employ or make offers of employment to any Solvay Fluoropolymers Employee during the Hold Separate Period. The Acquirer of the Solvay Fluoropolymers Business and the Solvay VF_2 Joint Venture Business shall have the option of offering employment to the Solvay Fluoropolymers Employees pursuant to the terms of the Decision and Order. After the Hold Separate Period and subject to Respondent's obligations under the Order, Respondent may offer employment to the Solvay Fluoropolymers Employees who have not been offered employment or have been terminated by the Acquirer. Respondent shall not interfere with the employment of the Solvay Fluoropolymers Employees by the Acquirer; shall not offer any incentive to said employees to decline employment with the Acquirer or accept other employment with Respondent; and shall remove any impediments that may deter Solvay Fluoropolymers Employees from accepting employment with the Acquirer including, but not limited to, any non-compete or confidentiality provisions of employment or other

contracts with the Solvay Fluoropolymers Employees that would affect the ability of the Solvay Fluoropolymers Employees to be employed by the Acquirer of the Solvay Fluoropolymers Business and the Solvay VF_2 Joint Venture Business.

4. For a period of one (1) year commencing on the Effective Date of Divestiture of the Assets to Be Divested, Respondent shall not employ or make offers of employment to any Solvay Fluoropolymers Employees who have been offered employment with the Acquirer, unless such individuals have been terminated by the Acquirer.

5. Notwithstanding subparagraph III.H.3., Respondent shall offer a bonus or severance, equal to five (5) percent of the employee's annual salary, to those Solvay Fluoropolymers Employees who continue their employment with the Solvay Fluoropolymers Business and the Solvay VF_2 Joint Venture Business until the Effective Date of Divestiture of the Solvay Fluoropolymers Business and the Solvay VF_2 Joint Venture Business, in addition to any other bonus or severance to which the Solvay Fluoropolymers Employees would otherwise be entitled.

6. Respondent shall not exercise direction or control over, or influence directly or indirectly, the Solvay Fluoropolymers Business, the Solvay VF_2 Joint Venture Business, the Solvay Fluoropolymers Hold Separate Trustee, the Solvay Fluoropolymers Manager, or any of its operations; provided, however, that Respondent may exercise only such direction and control over the Solvay Fluoropolymers Business and the Solvay VF_2 Joint Venture Business as are necessary to assure compliance with this Hold Separate or the Consent Agreement, or with all applicable laws including, in consultation with the Solvay Fluoropolymers Hold Separate Trustee,

continued oversight of the Solvay Fluoropolymers Business' and the Solvay VF_2 Joint Venture Business' compliance with policies and standards concerning the safety, health, and environmental aspects of their operations and the integrity of their financial controls; and Respondent shall have the right to defend any legal claims, investigations or enforcement actions threatened or brought against the Solvay Fluoropolymers Business and the Solvay VF_2 Joint Venture Business.

7. Except for the Solvay Fluoropolymers Manager, the Solvay Fluoropolymers Hold Separate Trustee and except to the extent provided in this Paragraph III., Respondent shall not permit any Person who is not an employee, officer or director of the Solvay Fluoropolymers Business or the Solvay VF_2 Joint Venture Business to be involved in the operations of the Solvay Fluoropolymers Business or the Solvay VF_2 Joint Venture Business.

IV.

IT IS FURTHER ORDERED THAT:

A. Respondent shall maintain the viability, marketability, and competitiveness of the Solvay Fluoropolymers Business, the Solvay VF_2 Joint Venture Business, and the Ausimont - New Jersey Fluoropolymers Business, and shall not cause the wasting or deterioration of the Solvay Fluoropolymers Business, the Solvay VF_2 Joint Venture Business, or the Ausimont - New Jersey Fluoropolymers Business, nor shall they cause the Solvay Fluoropolymers Business, the Solvay VF_2 Joint Venture Business, or the Ausimont - New Jersey Fluoropolymers Business 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 Solvay Fluoropolymers Business, the Solvay VF_2

Joint Venture Business, or the Ausimont - New Jersey Fluoropolymers Business. Respondent shall comply with the terms of this subparagraph IV.A. until such time as Respondent or the Divestiture Trustee have divested the Solvay Fluoropolymers Business, the Solvay VF_2 Joint Venture Business, or the Ausimont - New Jersey Fluoropolymers Business pursuant to the terms of the Decision and Order. Respondent shall conduct the business of the Solvay Fluoropolymers Business, the Solvay VF_2 Joint Venture Business, and the Ausimont - New Jersey Fluoropolymers Business in the regular and ordinary course of business and in accordance with past practice (including regular repair and maintenance efforts) and shall use their best efforts to preserve the existing relationships with suppliers, customers, employees, and others having business relationships with the Solvay Fluoropolymers Business, the Solvay VF_2 Joint Venture Business, and the Ausimont - New Jersey Fluoropolymers Business, in the ordinary course of business and in accordance with past practice. Respondent shall use its best efforts to keep the organization and properties of the Solvay Fluoropolymers Business, the Solvay VF_2 Joint Venture Business, and the Ausimont - New Jersey Fluoropolymers Business intact, including current business operations, physical facilities and working conditions, and a work force of equivalent size, training, and expertise associated with the Solvay Fluoropolymers Business, the Solvay VF_2 Joint Venture Business, and the Ausimont - New Jersey Fluoropolymers Business.

B. Until the Effective Date of Divestiture of the Solvay Fluoropolymers Business and the Solvay VF_2 Joint Venture Business, or the Ausimont - New Jersey Fluoropolymers Business, Respondent shall ensure that the Solvay Fluoropolymers Employees and the Ausimont - New Jersey Fluoropolymers Employees continue to be paid their salaries, all current and accrued bonuses, pensions and other

current and accrued benefits to which such employees would otherwise have been entitled.

C. Except as required by law, and except to the extent that necessary information is exchanged in the course of consummating the Acquisition, defending investigations, defending or prosecuting litigation, obtaining legal advice, negotiating and meeting obligations under agreements to divest assets pursuant to the Decision and Order contained in the Consent Agreement and engaging in related due diligence, or complying with this Hold Separate or the Decision and Order contained in the Consent Agreement, Respondent shall not receive or have access to, or use or continue to use, any Non-Public Solvay Fluoropolymers Information. Nor shall the Solvay Fluoropolymers Manager or the Solvay Fluoropolymers Employees (excluding support services employees involved in providing support to the Solvay Fluoropolymers Business and the Solvay VF_2 Joint Venture Business pursuant to this Paragraph IV. receive or have access to, or use or continue to use, any Material Confidential Information not in the public domain about Respondent and relating to Respondent's businesses except such information as is necessary to maintain and operate the Solvay Fluoropolymers Business and the Solvay VF_2 Joint Venture Business. Respondent may receive, on a regular basis, aggregate financial information relating to the Solvay Fluoropolymers Business and the Solvay VF_2 Joint Venture Business necessary to allow Respondents to prepare United States consolidated financial reports and tax returns. Any such information that is obtained pursuant to this subparagraph shall be used only for the purposes set forth in this subparagraph.

D. Within thirty (30) days after commencement of the Hold Separate Period and every sixty (60) days thereafter until the Hold Separate terminates, the Solvay Fluoropolymers Hold Separate Trustee shall report in writing to the Commission concerning the efforts to accomplish the

purposes of this Hold Separate. Included within that report shall be the Solvay Fluoropolymers Hold Separate Trustee's assessment of the extent to which the Solvay Fluoropolymers Business and the Solvay VF_2 Joint Venture Business is meeting (or exceeding) projected goals as reflected in operating plans, budgets, projections or any other regularly prepared financial statements.

V.

IT IS FURTHER ORDERED that Respondent shall notify the Commission at least thirty (30) days prior to any proposed change in the corporate structure of 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 Hold Separate.

VI.

IT IS FURTHER ORDERED that for the purposes of determining or securing compliance with this Hold Separate, and subject to any legally recognized privilege, and upon written request with reasonable notice to Respondent made to their principal United States offices, Respondents 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 Hold Separate; 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.

VII.

IT IS FURTHER ORDERED that this Hold Separate 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 Effective Date of Divestiture of the Solvay Fluoropolymers Business and the Solvay VF_2 Joint Venture Business, or the Ausimont - New Jersey Fluoropolymers Business, as required by the Decision and Order contained in the Consent Agreement.

By the Commission.

ATTACHMENT A

NOTICE OF DIVESTITURE AND REQUIREMENT FOR CONFIDENTIALITY

Solvay S.A., hereinafter referred to as "Respondent," has entered into an Agreement Containing Consent Orders ("Consent Agreement") with the Federal Trade Commission relating to the divestiture of certain assets. As used herein, the term "Solvay PVDF and VF_2 Business" means all of Respondent's right, title, and interest in Solvay Fluoropolymers, Inc., including the PVDF production plant at Decatur, Alabama, and in Alventia LLC, and other rights related to the manufacture and sale of VF_2 anywhere in the world. In addition, as used herein the term "Ausimont PVDF and VF_2 Business" means all of Ausimont's assets and businesses in the world relating to PVDF and VF_2, including the Ausimont PVDF and VF_2 plants at Thorofare, New Jersey. Additional information about the Consent Agreement, as well as a copy of the Consent Agreement and proposed order, can be found on the web site of the Federal Trade Commission at www.FTC.gov.

Under the terms of the Consent Agreement, if the Respondent fails to divest the Solvay PVDF and VF_2 Business within 180 days from the date upon which Solvay and Ausimont consummate the Acquisition, a trustee will be appointed to divest either the Solvay PVDF and VF_2 Business or the Ausimont PVDF and VF_2 Business.

The Solvay PVDF and VF_2 Business must be managed and maintained as a separate, ongoing business, independent of all other businesses of the Respondent, including but not limited to Ausimont, until the Solvay PVDF and VF_2 Business is divested. All competitive information relating to the Solvay PVDF and VF_2 Business must be retained and maintained by the persons involved in the operation of the Solvay PVDF and VF_2 Business 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 Respondent, including but not limited to Ausimont. Similarly, persons involved in similar activities at Solvay or Ausimont shall be prohibited from providing, discussing, exchanging, circulating, or otherwise furnishing any similar information to or with any other person whose employment involves the Solvay PVDF and VF_2 Business.

Until either the Solvay PVDF and VF_2 Business or the Ausimont PVDF and VF_2 Business is divested, Solvay must take such actions as are necessary to maintain the viability and marketability of the Solvay PVDF and VF_2 Business and the Ausimont PVDF and VF_2 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, and renewing or extending any leases or licenses that expire or terminate prior to the Effective Date of Divestiture.

Any violation of the Consent Agreement may subject Respondent to civil penalties and other relief as provided by law.

Analysis to Aid Public Comment

The Federal Trade Commission ("Commission") has accepted, subject to final approval, an Agreement Containing Consent Orders ("Consent Agreement") from Solvay S.A. ("Solvay" or the "Respondent"). The Consent Agreement is intended to resolve anticompetitive effects stemming from Solvay's proposed acquisition of Ausimont S.p.A. ("Ausimont") from Italenergia S.p.A. The Consent Agreement includes a proposed Decision and Order (the "Order") which would require Respondent to divest Solvay's U.S. polyvinylidene fluoride ("PVDF") operations (the "Solvay Fluoropolymers Business"), including its Decatur, Alabama plant and its interest in the Alventia LLC joint venture, which manufactures the main raw material for PVDF. The Consent Agreement also includes an Order to Hold Separate and Maintain Assets which requires Respondent to preserve the Solvay Fluoropolymers Business as a viable, competitive, and ongoing operation until the divestiture is achieved.

The Consent Agreement, if finally accepted by the Commission, would settle charges that Solvay's proposed acquisition of Ausimont may have substantially lessened competition in two markets: PVDF, and melt-processible PVDF. The Commission has reason to believe that Solvay's proposed acquisition of Ausimont would have violated Section 7 of the Clayton Act and Section 5 of the Federal Trade Commission Act.

According to the Commission's proposed complaint, there are two relevant lines of commerce in which to analyze the effects of Solvay's proposed acquisition of Ausimont: the production and sale of all grades of PVDF; and the production and sale of melt-processible grades of PVDF. PVDF is a fluoropolymer used in a wide variety of applications, including highly durable architectural coatings, wire and cable jacketing, fiber optic raceways, chemical processing equipment, semiconductor manufacturing equipment, and other miscellaneous applications. The melt-processible grades include all PVDF grades except those used in coatings.

Analysis

The proposed complaint alleges that the markets for PVDF and melt-processible PVDF are highly concentrated, and that the proposed acquisition of Ausimont by Solvay would increase concentration in those markets. The proposed complaint also alleges that entry into the relevant markets would not be timely, likely, or sufficient to deter or offset the acquisition's adverse competitive effects. Producers employ proprietary technology to manufacture PVDF, and new entry would likely require entry into the production of VF_2, which is a necessary raw material to produce PVDF. Entry would likely take as long as three years.

The proposed complaint alleges that Solvay's acquisition of Ausimont would lessen competition by making coordinated interaction among the remaining producers more likely. The proposed complaint alleges that the acquisition would leave only two significant PVDF producers, that reliable pricing information is available from customers, and that the large number of customers in the industry would make cheating on any coordination easy to detect. The proposed complaint further alleges that Ausimont has been expanding its sales of melt-processible PVDF, and that the acquisition would limit the growing competition between Solvay and Ausimont in melt-processible grades of PVDF.

The proposed Order is designed to remedy the anticompetitive effects of the acquisition in the market for PVDF and melt-processible PVDF by requiring the divestiture of Solvay's fluoropolymers business in the U.S. That business includes Solvay's PVDF manufacturing plant in Decatur, Alabama, and its interest in Alventia LLC ("Alventia"), a VF_2 manufacturing joint venture. As part of the divestiture, the proposed Order would also require Solvay to provide to the Acquirer of the Solvay PVDF business a royalty-free license to Solvay's intellectual property, including detailed information about Solvay's production of PVDF at both of Solvay's two plants, in Alabama and France. The scope of the license would allow the acquirer to manufacture or sell PVDF anywhere in the world. The proposed Order would further require the Respondent to divest other assets related to the

Solvay PVDF business, including real property, customer lists, contracts, patents, inventories, and other intangible assets and goodwill used to operate the business.

The proposed Order requires that Respondent divest the Solvay Fluoropolymers Business to an acquirer approved by the Commission within one-hundred and eighty (180) days from the date upon which Solvay consummates its acquisition of Ausimont. The proposed Order also provides that if Solvay does not complete its divestiture within that period, the Commission may appoint a Divestiture Trustee to divest the Solvay Fluoropolymers Business in a manner acceptable to the Commission, or may require divestiture of Ausimont's PVDF business, including its VF_2 and PVDF manufacturing operations in Thorofare, New Jersey. The proposed Order also provides for the Commission to appoint a Monitor Trustee to oversee Solvay's compliance with the terms of the proposed Order and the divestiture agreements that Solvay enters pursuant to the proposed Order.

The proposed Order to Hold Separate and Maintain Assets that is also included in the Consent Agreement requires that Respondent hold separate and maintain the viability of Solvay's PVDF business as a viable and competitive operation, and to maintain the viability of Ausimont's PVDF business, until either business is transferred to the Commission-approved acquirer. Furthermore, it contains measures designed to ensure that no material confidential information is exchanged between Respondent and the Solvay PVDF business (except as otherwise provided in the Order to Hold Separate and Maintain Assets) and measures designed to prevent interim harm to competition in the PVDF market pending divestiture. The Order to Hold Separate and Maintain Assets provides for the Commission to appoint a Hold Separate Trustee who is charged with the duty of monitoring Respondent's compliance with the Order to Hold Separate and Maintain Assets.

Analysis

The proposed Order requires Respondent to provide the Commission, within thirty (30) days from the date the Order becomes final, a verified written report setting forth in detail the manner and form in which the Respondent intends to comply, is complying, and has complied with the provisions relating to the proposed Order and the Order to Hold Separate and Maintain Assets. The proposed Order further requires Respondent to provide the Commission with a report of compliance with the Order every thirty (30) after the date when the Order becomes final until the divestiture has been completed.

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

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

January 16, 2002

Thomas C. Willcox, Esquire
601 Indiana Avenue, N.W.
Suite 500
Washington, D.C. 20004

Re: Superior Court Trial Lawyers' Association
Docket No. 9171

Dear Mr. Willcox:

This is in response to the September 20, 2001 petition ("Petition") filed on behalf of respondent Superior Court Trial Lawyers' Association ("SCTLA") for reopening and modification, or interpretation, of the Federal Trade Commission's order in Docket No. 9171 (the "Order").[1] The Petition requests the Commission to reopen and modify, or interpret, the Order to allow a collective work-stoppage ("Proposed Boycott") directed at the timing of payments to its members. As explained below, SCTLA has not shown that the Order can or should be interpreted so narrowly. Further, SCTLA has not made a satisfactory showing that the public interest requires reopening the Order to modify it to permit SCTLA lawyers to plan and engage in such collective work-stoppage. Therefore, the Commission has denied SCTLA's Petition.[2]

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[1] *Superior Court Trial Lawyers' Association*, 107 F.T.C. 510, 603-05 (1986).

[2] The Petition does not assert that any changed condition of fact or law requires reopening, and the Commission has not considered that issue.

In the summer of 1983, SCTLA, its officers, members, and other lawyers (Criminal Justice Act, or "CJA," lawyers) agreed to stop providing legal services to the District of Columbia for indigent criminal defendants, until the District increased the fees it paid for such services. The Commission issued a complaint challenging that conduct and, following an administrative trial and appeal, issued its Order to Cease and Desist on June 23, 1986.[3] On appeal, the Supreme Court in 1990 held that SCTLA's collective boycott was illegal *per se*.[4] Following the Supreme Court's decision, the Commission's Order prohibiting collective action by SCTLA was affirmed and enforced by the D.C. Circuit.[5] SCTLA asserts that it has complied with the Order without incident for 10 years.

SCTLA alleges that it is now faced with a new situation again requiring collective action. The District of Columbia Superior Court ("D.C. Courts") has experienced two "compensation crises" during which D.C. Courts indefinitely suspended payments to CJA lawyers. SCTLA asserts that D.C. Courts' temporary suspension of payments on actually authorized CJA vouchers constitutes breach of contract or other unlawful activity. As a result, SCTLA wishes to consider the option of a collective work-stoppage of the CJA indigent appointments process to protest potential indefinite suspensions of payments.[6]

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[3] Order, 107 F.T.C. at 603-05.

[4] *Federal Trade Commission v. Superior Court Trial Lawyers' Association*, 493 U.S. 411, 436 (1990).

[5] *Superior Court Trial Lawyers' Association v. Federal Trade Commission*, 897 F.2d 1168 (D.C. Cir. 1990).

[6] Petition at 1.

Response to Petition

Section 5(b) of the Federal Trade Commission Act, 15 U.S.C. § 45(b), provides that the Commission may modify an Order when the Commission determines that the public interest so requires. In the case of "public interest" requests, FTC Rule of Practice 2.51(b)[7] requires the petitioner to make an initial "satisfactory showing" of how modification would serve the public interest before the Commission will determine whether to reopen an Order and consider all of the reasons for and against its modification.

A "satisfactory showing," with respect to public interest requests, is one that makes a *prima facie* showing of legitimate public interest reasons justifying relief. A request to reopen and modify will not make out 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.[8] To make this showing, the petitioner must 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

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[7] 16 C.F.R. §2.51(b)

[8] *Id.*

Commission were to grant the requested relief.[9] A public interest showing must be supported by evidence that is credible and reliable.[10]

If, after determining that the petitioner has made the required showing, the Commission determines to reopen the Order, the Commission will then consider and balance all of the reasons for and against modification.[11] In no instance does a decision to

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[9] Thus, a petitioner's mere assertion of competitive injury or disadvantage ordinarily will not constitute a "satisfactory showing" where the petitioner is unable to demonstrate how the proposed modification would promote effective competition or otherwise serve the broader public interest. *See, e.g., California & Hawaiian Sugar*, 119 F.T.C. 39, 44-45 (1995) (a petitioner 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).

[10] As explained in a prior amendment to Rule 2.51, "[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 petitioners 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 petitioners in presenting meritorious cases . . . . This [requirement] specifies the procedural method for substantiating factual assertions." 53 Fed. Reg. 40,867 (Oct. 19, 1988).

[11] All information and material that the petitioner wishes the Commission to consider shall be contained in the request at the time of filing. 16 C.F.R. § 2.51(b).

reopen an Order oblige the Commission to modify it,[12] and the burden remains on the petitioner 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 Commission Orders.[13]

The Commission has considered SCTLA's Petition and supporting materials, as well as the Commission's Opinion and Final Order,[14] and the Supreme Court's opinion in *Federal Trade Commission v. Superior Court Trial Lawyers' Association*.[15]

As an initial matter, SCTLA has not demonstrated that the Order should be narrowly interpreted as prohibiting its members from engaging in group boycotts only when the intent is to increase the hourly rate paid to CJA lawyers for their services. By its express terms, Paragraph I of the Commission's Order prohibits SCTLA and its members from "[r]efus[ing] to provide

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[12] *See United States v. Louisiana-Pacific Corp.*, 967 F.2d 1372, 1376-77 (9th Cir. 1992) (reopening and modification are independent determinations).

[13] *See Federated Department Stores, Inc. v. Moitie*, 452 U.S. 394 (1981) (strong public interest considerations support repose and finality).

[14] *Superior Court Trial Lawyers' Association*, 107 F.T.C. at 562-603 ("Opinion").

[15] 493 U.S. 411 (1990). *See also Superior Court Trial Lawyers' Association v. Federal Trade Commission*, *supra* note 5 (on remand from the Supreme Court, the Court of Appeals considered whether "the Commission's Order was overly broad and not reasonably related to the remedial purposes of the Federal Trade Commission Act," concluding that it was not and therefore enforcing the Commission's Order as originally drafted).

legal services to any government program for persons eligible for appointed counsel in connection with any effort to *fix, increase, stabilize, or otherwise affect the level of fees* for such legal services." 107 F.T.C. at 603 (emphasis added). As this language makes clear, the Commission's Order was not narrowly limited to cover only naked price-fixing agreements pertaining to the dollar amount of hourly fees. Rather, the Order prohibits all group boycotts by SCTLA attorneys having a connection with an effort to affect, in any manner, the level of such fees. *Id.*

The principal question raised by SCTLA's Petition, therefore, is whether the Proposed Boycott is sufficiently "connected" to an effort to "affect the level" of fees paid to CJA lawyers as to be prohibited by the Order. Upon analysis of this question, the Commission has concluded that the Proposed Boycott would squarely violate the terms of Paragraph I of the Order, inasmuch as an effect on the timing of payment of CJA fees is substantively no different from an effect on the dollar amount of the fees paid.

The Commission notes that the issue presented here is not a novel one. The federal courts previously have held that the timing and terms of payment for goods or services are functional elements of price and, for antitrust purposes, should be treated no differently from the dollar amount of the price itself. The seminal case for this proposition, a case not cited in SCTLA's Petition, is *Catalano, Inc. v. Target Sales, Inc.*, 446 U.S. 643 (1980) (cited with approval in *SCTLA*, 493 U.S. at 424). In *Catalano*, the Supreme Court considered whether a horizontal restraint relating to credit terms offered to customers, but not otherwise affecting prices, should constitute a *per se* violation of Section 1 of the Sherman Act. Specifically, the case dealt with a secret agreement among competing beer wholesalers whereby each agreed "they would sell to retailers *only* if payment were made in advance of or upon delivery." *Id.* at 644 (emphasis added). The participating wholesalers, in other words, agreed to refuse to deal with – that is,

to boycott – any retailers who would not agree to pay in advance or upon delivery.

Although the lower court had ruled that this type of agreement should not be characterized as a form of price fixing, the Supreme Court disagreed and ultimately reversed. As the Court stated:

> It is virtually self-evident that extending interest-free credit for a period of time is equivalent to giving a discount equal to the value of the use of the purchase price for that period of time. Thus, credit terms must be characterized as an inseparable part of the price. An agreement to terminate the practice of giving credit is thus tantamount to an agreement to eliminate discounts, and thus falls squarely within the traditional *per se* rule against price fixing.

Id. at 648.

Although the Proposed Boycott in this case is not identical to the restraint at issue in *Catalano*, the broader point made by the Court in *Catalano* seems very much apropos. Just as "credit terms must be characterized as an inseparable part of price" making an agreement to eliminate credit "tantamount" to price fixing, *id.*, the Commission believes that the timing of payment for legal services is, functionally speaking, an element of the rate paid for such services. Hence, in the Commission's view SCTLA's Proposed Boycott, even though it purportedly would not be designed to affect the set dollar amount paid to CJA lawyers for their hourly services, would nonetheless "affect the level of fees for such legal services," 107 F.T.C. at 603, thus violating the express terms of the Commission's Order.

Turning next to SCTLA's request to reopen the Order, SCTLA has not made a satisfactory showing sufficient to warrant reopening the Order to consider a modification that would permit a collective boycott. SCTLA asserts that its Proposed Boycott is

in the public interest because it would force D.C. Courts to make timely payments to SCTLA's members for their work representing indigent defendants. SCTLA argues that the public interest would be served because such an action would remedy alleged breaches of contract or other law violations by D.C. Courts and that the market for CJA lawyers will therefore be more competitive. SCTLA has not provided factual support for its assertions, however.

Significantly, SCTLA has not demonstrated any harm to competition from the Order's proscriptions. SCTLA has provided no credible or reliable evidence to support its contention that the 1998 and 1999 temporary suspensions of payment to CJA lawyers negatively impacted the market. The Petition fails to allege facts indicating that lawyers did not continue to compete for CJA appointments even through 1999, when another suspension occurred. Nor does the Petition indicate that there was any shortage of CJA lawyers from 1999 through the present. Lawyers seem to have taken CJA appointments in 1998 and through to the present, even in anticipation of indefinite suspensions of payment.

Similarly, SCTLA has not shown that there would be any competitive benefits from the Proposed Boycott. SCTLA submitted an economist's opinion stating that the Proposed Boycott is theoretically procompetitive.[16] Based on this opinion, SCTLA argues that the Proposed Boycott is procompetitive because, by making the time of payment more certain, it "would facilitate competition on both price and total-compensation

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[16] SCTLA Memorandum of Law in Support of Petition, Exhibit C. Dr. Ratliff's economic opinion does not in this case constitute "credible and reliable evidence" as necessary for a "satisfactory showing" to reopen a Commission order.

dimensions."[17] Other than this opinion, SCTLA did not submit additional evidence or affidavits to support its contention.

SCTLA asserts that the Proposed Boycott will benefit competition by making the time of payment more certain, because more lawyers will then be encouraged to accept CJA appointments. But the same might be said of a successful collective boycott to raise the specific level of fees, a position that was squarely rejected when the Supreme Court condemned such conduct as *per se* unlawful. In any event, and put more simply, to the extent the Petition is asserting that an increase in the value of the compensation would be procompetitive, it is making the same essential argument that was rejected when the Order was issued and affirmed on appeal.

Although SCTLA has not made a satisfactory showing that the public interest requires reopening the Order, the Commission has nevertheless considered all the facts and arguments raised by SCTLA to determine whether a modification of the Order would be warranted. In this case, the competitive costs that such a modification would impose would outweigh any benefits.

SCTLA urges that making the timing of payments earlier and more certain would encourage more lawyers to accept CJA appointments. The Commission has already explained the fundamental flaw in this argument. Even if the evidence submitted with SCTLA's Petition were deemed credible and reliable, the Commission would nevertheless be compelled to deny the request to modify the Order on the basis that the competitive costs of a modification would outweigh any purported benefits.

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[17] *Id.* at ¶ 22. This argument also further confirms that the Proposed Boycott would be in connection with an effort to "affect the level of fees," which is prohibited by the Order.

The costs that would be incurred by permitting SCTLA to engage in a concerted refusal to deal with the D.C. Courts have already been described in the Commission's Opinion.[18] When SCTLA's boycott succeeded in 1983, the District of Columbia's yearly CJA expenditures increased by $4 to $5 million, and the D.C. public defender attorneys were swamped by additional cases when they attempted to fill the market-void left by the boycott. If the Proposed Boycott were successful, it would similarly burden the District's criminal justice system and would thereby force the District to pay CJA lawyers when the lawyers wanted to be paid, rather than when payment would be made under normal competitive conditions in the CJA market.[19]

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[18] *See* Opinion, 107 F.T.C. at 567-69, 577-78.

[19] *See* Initial Decision, 107 F.T.C. at 543, where the ALJ found that

> [t]he expectation of the CJA lawyers was that their boycott would have a severe impact on the District's criminal justice system. This expectation was fully realized for essentially three reasons. First, the incidence of crime in the District does not subside because of the sudden unavailability of lawyers. Second, the criminal law requirements that a lawyer be assigned to each case almost immediately upon arrest of the accused and that the assigned lawyer's investigation and preparation proceed apace to meet certain early deadlines . . . are not changed either by the sudden nonavailability of enough lawyers or the imposition of massive caseloads on those who are available. Third, there was no one to replace the CJA regulars, and makeshift measures were totally inadequate.

The Commission appreciates the concern of SCTLA's members that they have not always been compensated as quickly as they might have desired. In that regard, however, SCTLA is not left without recourse. The Order explicitly allows SCTLA to exercise its First Amendment rights to petition the government concerning any procedures.[20] The Order also permits SCTLA to provide information or views in a noncoercive manner to persons engaged in or responsible for the administration of the CJA program.[21] Moreover, the D.C. Courts were made subject to the Prompt Payment Act in fiscal year 1999.[22] Under this Act, D.C. Courts are required to pay interest on any voucher payment made more than 30 days after submission of a proper invoice.[23] Further, the

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[20] Final Order, ¶ I.D.1., 107 F.T.C. at 604 ("*Provided*, That nothing in this order shall prevent respondents from: 1. Exercising rights under the First Amendment to the United States Constitution to petition any government body concerning legislation, rules or procedures") (emphasis in original).

[21] Final Order, ¶ I.D.2., 107 F.T.C. at 604 ("*Provided*, That nothing in this order shall prevent respondents from: . . . 2. Providing information or views in a noncoercive manner to persons engaged in or responsible for the administration of any program to obtain legal services for persons eligible for appointed counsel.") (emphasis in original).

[22] Pub. L. No. 105-277, § 162, 112 Stat. 2681-148 (1998), *see* 31 U.S.C. §§ 3901-07 (2001).

[23] *See D.C. Courts, Planning and Budgeting Difficulties During Fiscal year 1998*, United States General Accounting Office Report GAO/AIMD/OGC-99-226, at 3, 23 (Sept. 1999). The GAO's recommendations are on pages 19-20 of the Report, which can be found at: http://www.gao.gov/archive/1999/ag99226.pdf, or at http://www.gao.gov by following the link to GAO Reports and

D.C. Government has not ignored the issues raised by the D.C. Courts' temporary suspensions of payment. On June 2, 2000, the Council of the District of Columbia enacted the "Fiscal Year 2001 Budget Request Act," which requires the D.C. Courts to implement the recommendations in the Report from the General Accounting Office regarding payments to court-appointed attorneys.[24] The D.C. Council's enactments and the applicability of the Prompt Payment Act have remedied SCTLA's concerns to a great degree, without posing the competitive problems raised by SCTLA's proposed collective work-stoppage.

The Commission has duly considered SCTLA's Petition and the supporting submissions filed in connection therewith and other relevant information and has determined that SCTLA has failed to make a satisfactory showing that the public interest requires reopening the Order. Accordingly, SCTLA's Petition is denied.

By direction of the Commission.

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entering the Report number <<AIMD/OGC-99-226>>.

[24] *Fiscal Year 2001 Budget Request Act*, 47 D.C. Reg. 5049, 5051-52 (2000).

February 1, 2002

VIA FACSIMILE AND EXPRESS MAIL

Loree & Lord
Attention: Paige Loree Hensley, Owner
49 Cumberland Road
Fishkill, New York 12524-1438

Re: Petition of Loree & Lord to Quash Civil Investigative Demand
Matter No. 0223011

Dear Ms. Hensley:

This letter advises you of the Federal Trade Commission's ruling on the above-referenced Petition to Quash ("Petition").[1] The decision was made by Commissioner Sheila F. Anthony, acting as the Commission's delegate. See 16 C.F.R. § 2.7(d)(4).

The Petition is **denied** for the reasons stated below. As also set forth below, the new deadline for Loree & Lord ("Petitioner") to respond to, and otherwise comply with, the Civil Investigative Demand ("CID") is **Friday, February 15, 2002**.

Loree & Lord has the right to request review of this matter by the full Commission. Such a request must be filed with the Secretary of the Commission within three days after service of this

[1] Petitioner has filed two documents. One is titled "Petition to Quash," dated November 26, 2001, and the other is titled "Motion to Dismiss Civil Investigative Demand Number 9923259," dated January 8, 2002. The latter document shall be treated as a supplement to the first, and the two together shall be referred to throughout this letter ruling as "Petition."

letter. The filing of a request for review by the full Commission does not stay or otherwise affect the new return date -- February 15, 2002 -- unless the Commission rules otherwise. See 16 C.F.R. § 2.7(f).

I. BACKGROUND

Loree & Lord is (according to Petitioner "was") engaged in the marketing and sale of certain bulk e-mailing products. In its advertisements, Loree & Lord makes various representations, including, but not limited to, representations regarding the utility of the products and their likelihood to increase the user's earnings. The Commission is investigating whether any of these claims might violate the Federal Trade Commission Act.

The CID for documentary material was issued to Petitioner on November 13, 2001, pursuant to the Commission's omnibus resolution of September 7, 1999. The resolution authorizes the use of compulsory process in a non-public investigation to determine whether unnamed Internet advertisers, sellers, and promoters may be engaged in acts or practices in violation of Sections 5 and 12 of the Federal Trade Commission Act, 15 U.S.C. §§ 45, 52 as amended, including but not limited to the deceptive advertising, selling, and promoting of any good or service in commerce on or through the World Wide Web, e-mail, newsgroups, or other portions of the Internet. The resolution also authorizes investigation to determine whether action to obtain redress of injury to consumers or others would be in the public interest. The CID specified a return date of November 28, 2001.

Rather than produce the documents specified in the CID, on November 26, 2001, Petitioner filed a document styled a "Petition to Quash." The only argument set forth in that filing was a contention that the investigation was "moot" because the activity in question had ceased. Throughout December 2001, the FTC staff conducting the investigation attempted to persuade Petitioner to withdraw the Petition and comply with the CID. Staff, among other things, provided Petitioner with copies of advertisements

and other documents that prompted several of the specifications set forth in the CID. Petitioner continued to refuse to comply, and instead, on January 8, 2002, filed a document styled as a "Motion to Dismiss Civil Investigative Demand Number 9923259." This second filing, which the Commission shall treat as a supplement to the Petition to Quash, argued that the documents provided by staff "show no nexus to Loree & Lord and no injury."

Commissioner Anthony has reviewed the Petitioner's filings (referred to herein together as "Petition"). Nothing in those filings supports quashing or limiting the CID. While the Petition is in all likelihood procedurally deficient under Commission Rule 2.7, which sets forth the requirements for filing a petition to quash, it seems plain that these filings are not the work of an attorney. As an apparent *pro se* submission, the Commission will proceed directly to the substantive arguments and overlook the procedural issues at this time.

II. ANALYSIS

The Federal Trade Commission Act grants the Commission extensive investigatory powers. See 15 U.S.C. §§ 6, 9, 10, and 20. These powers are essential to allow the Commission to carry out its broad mandate. As the Supreme Court explained almost fifty years ago, an investigation by the Commission is "analogous to the Grand Jury, which does not depend on a case or controversy for power to get evidence but can investigate merely on suspicion that the law is being violated, or even just because it wants assurance that it is not." *United States v. Morton Salt Co.*, 338 U.S. 632, 642-43 (1950). Among the Commission's investigatory powers is the ability to use civil investigative demands to gather information and the concomitant right to enforce those demands in the federal district courts. See 15 U.S.C. § 20.

A. Mootness

Petitioner first argues that it ceased selling the bulk e-mail products at issue on November 11, 2001, and therefore the

investigation is moot. This argument is without merit. Even if Loree & Lord has now ceased making the claims or selling the product under investigation, as it contends, the fact remains that it apparently did make such claims and sell such product at one time. First, assuming those claims violated the law, the Commission may well desire an order ensuring that Loree & lord and its principals cannot make similar claims in the future. Second, consumers that may have been injured by false, misleading, or unsubstantiated claims made at one point in time are not made whole by the cessation of those claims going forward. In short, the existence of a past law violation and the responsibility to make amends for such violation are not negated merely because the violative conduct is not continuing.

B. Nexus and Injury

In its supplemental filing, Petitioner argues that the copies of e-mail advertisements and related promotional materials provided by staff demonstrate "no nexus to Loree & Lord and no injury . . . ." While Petitioner's filing is far from clear in its presentation, it appears that the company is arguing that the specific claims under investigation were not made by Loree & Lord and that staff has not demonstrated to Petitioner that any consumers were injured.

First, with respect to the injury issue, as explained above, the Commission does not need proof of injury in order to undertake an investigation. Rather, the Commission "can investigate merely on suspicion that the law is being violated, or even just because it wants assurance that it is not." *United States v. Morton Salt Co.*, 338 U.S. 632, 642-43 (1950). Uncovering *violations of the law*, whether or not those violations have caused injury, is the mission of the FTC. The remedies for those violations may take many forms; for example, if no injury has yet occurred, a mere injunction may suffice, but if injury is found, consumer redress payments may be in order. The point is that the existence of

injury is irrelevant to the Commission's authority to conduct an investigation.[2]

Second, with respect to the nexus issue, the documents provided by staff (attached as exhibits to Petitioner's supplemental filing) contain several references to Loree & Lord. Thus, on their face, they seem to show a "nexus." Petitioner's conclusory assertions to the effect that "unknown personnel" or a third party may have made the representations at issue or that the documents "contain products, services, or information that are distinctly not Loree & Lord's or Paige Loree Hensley's" do not provide a basis for quashing or limiting the CID, particularly where Petitioner appears to have endorsed or ratified the representations by referring potential purchasers to them. Petitioner's remedy is to respond to the CID and specify the basis for its belief that it did not make or ratify some or all of the representations about which the CID inquires.

III. CONCLUSION

For the foregoing reasons, the Petition is **denied**, and, pursuant to Rule 2.7(e), 16 C.F.R. § 2.7(e), **Petitioner is directed to**

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[2] Petitioner also seems to suggest that the matter is moot because refunds have been provided to those customers who asked for one -- a variation on no injury. First, the Commission has the right to investigate to determine for itself what injury exists and whether such injury has been adequately redressed. Second, as noted above, harm is not a requisite for pursuing an investigation. Third, redress of consumer harm is only one of the remedies the Commission might demand in an enforcement action; for example, injunctive relief is extremely common. Finally, if the Commission declined to pursue investigations where those asking for refunds had received them, the floodgates would be open to fraud and abuse because, for numerous reasons, many consumer victims will not have *asked*. A relevant question in this regard would be whether all consumers who are *entitled* to redress have received it, as opposed to merely those who have managed to ask by a certain point in time.

comply with the Civil Investigative Demand on or before Friday, February 15, 2002.

By direction of the Commission.

NONPUBLIC VERSION

June 18, 2002

S.S.T. Management, Inc. and Slim Down Solutions, LLC
through their counsel
Lewis Rose, Esquire
Elisa A. Nemiroff, Esquire
COLLIER SHANNON SCOTT, PLLC
3050 K Street, NW – Suite 400
Washington, D.C. 20007-5108

Re: Petition of S.S.T. Management, Inc. and Slim Down Solutions, LLC to
Partially Quash Civil Investigative Demands -- File No. 0223163

Dear Mr. Rose and Ms. Nemiroff:

This letter advises you of the Federal Trade Commission's ruling on the above-referenced Petition to Quash ("Petition"). The decision was made by Commissioner Sheila F. Anthony, acting as the Commission's delegate. See 16 C.F.R. § 2.7(d)(4).

The Petition is **denied** for the reasons stated below. The new deadline for S.S.T. Management, Inc. ("SST") and Slim Down Solutions, LLC ("SDS") (together "Petitioners") to respond to, and otherwise comply with, the Civil Investigative Demands ("CIDs") is **Friday, June 28, 2002.**

SDS has the right to request review of this matter by the full Commission. Such a request must be filed with the Secretary of the Commission within three days after service of this letter ruling. The filing of a request for review by the full Commission does not stay or otherwise affect the new return date – June 28, 2002 – unless the Commission rules otherwise. See 16 C.F.R. § 2.7(f).

I. BACKGROUND

The Commission is investigating whether Petitioners have violated Sections 5 and 12 of the FTC Act by engaging in unfair or deceptive acts or practices in the advertising or marketing of their products and services, including, but not limited to their Slim Down Solution weight loss product. The investigation is also to determine whether Commission action to obtain redress for injury to consumers or others would be in the public interest. See FTC "Resolution Directing Use of Compulsory Process in a Nonpublic Investigation of Unnamed Persons Engaged Directly or Indirectly in the Advertising or Marketing of Drugs, Devices, Dietary Supplements or Any Other Product or Service Intended to Provide a Health Benefit or to Affect the Structure or Function of the Body," issued May 3, 2000 ("Resolution").

Pursuant to the Resolution, on March 29, 2002, the Commission issued separate CIDs to SST and SDS. Each CID contained essentially identical document requests and interrogatories. Each CID also contained a copy of the above Resolution; as a consequence, Petitioners were fully apprised of "the purpose and scope of the investigation and of the nature of the conduct constituting the alleged violation . . . under investigation and the provisions of law applicable to such violation." 16 C.F.R. § 2.6. On May 20, 2002, Petitioners filed a Partial Petition to Quash the CIDs, objecting to those specifications seeking recent corporate tax filings, annual gross revenue figures, and a breakdown of the number of gross unit sales and revenue by individual product or service. Petitioners assert that this information is irrelevant and immaterial to the Commission's investigation and that the information is privileged and confidential. Notably, Petitioners' conclusory assertions are unsupported by any factual or legal argument whatsoever.

Commissioner Anthony reviewed the Petition, and determined that it should be denied for several reasons. First, it was untimely filed with respect to the two original CIDs. Second, Petitioners' legal arguments are meritless, unsupported, and directly

contradicted by longstanding federal appellate court precedent, including one leading case in which Petitioners' counsel, Lewis Rose, participated. See *Invention Submission Corp. v. FTC*, 965 F.2d 1086 (D.C. Cir. 1992), *cert. denied*, 507 U.S. 910 (1993) (holding that a corporation's financial information is relevant to an FTC investigation of alleged unfair or deceptive acts or practices and could be sought in an administrative subpoena; Lewis Rose on brief for appellant).

II. ANALYSIS

A. The Petition Was Untimely.

Subsection (d)(1) of Rule 2.7 provides that petitions to quash must be filed with the Secretary "within twenty days after service . . . or, if the return date is less than twenty days after service, prior to the return date." 16 C.F.R. § 2.7(d)(1).

The CIDs were served on Petitioners via the United States Postal Service by Certified Express Mail. SST and SDS have the same mailing address. According to Postal Service records, both CIDs were delivered on April 3, 2002 at 12:14 p.m., and both were signed for by "H. Jankowski." Thus, any petitions to limit or quash were due no later than April 23, 2002. The Petition was not filed until almost one month later, on May 20, 2002.

Petitioners admit receiving the SST CID on April 3, 2002; thus the Petition is plainly untimely with respect to SST. Although counsel for SDS claims that the SDS CID was never received, the records of the United States Postal Service show that the two CIDs were delivered simultaneously and signed for by the same person at the Petitioners' address.

Nevertheless, in an effort to keep matters moving forward, the Commission sent a second identical CID to SDS on May 17, 2002, with a return date of May 20, 2002. With respect to this second CID delivered to SDS, the Petition was timely filed by the return date.

B. The Requests for Financial Information are Relevant.

It is the respondent's burden to show that the information sought through administrative compulsory process is irrelevant. *Invention Submission Corp.,* 965 F.2d at 1090. Petitioners have failed to meet this difficult standard. Indeed, they have not even tried; their Petition asserts that the information is irrelevant, but offers neither explication nor legal authority to support this contention.

The Commission previously has ruled, and the courts have agreed, that an investigatory target's financial information is relevant to a law enforcement investigation. The leading case addressing this issue is *Invention Submission Corp. v. FTC*, 965 F.2d 1086 (D.C. Cir. 1992).[1] In the *Invention Submission* case, the target corporation argued that CIDs seeking its financial information, including income and annual sales, were irrelevant and unreasonable. The Commission ruled that the requested financial information was relevant, and the district court agreed. *FTC v. Invention Submission Corp.*, 1991-1 Trade Cas. (CCH) ¶ 69,338 at 65,353 (D.D.C. 1991), aff'd, 965 F.2d 1086 (D.C. Cir. 1992), cert. denied, 507 U.S. 910 (1993). The D.C. Court of Appeals affirmed, holding that the financial information sought was relevant to the investigation of alleged unfair or deceptive acts or practices under the FTC Act.[2] 965 F.2d at

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[1] See also, *FTC v. American Buyers' Network Inc.*, 1991-2 Trade Cas. 69,551 at 66,443 (D. Colo.) (Aug. 19, 1991) (ordering production of corporate target's financial information as relevant, in part to verify other financial information already provided by the target); *Universal Training Services, Inc.*, Docket No. 9106, 1978 FTC Lexis 277 (Commission order requiring production of individual target's personal financial information sought in order to determine whether restitution is an appropriate remedy).

[2] Petitioners' counsel here, Lewis Rose, was on the brief for appellant Invention Submission Corp., before the Court of Appeals for the D.C. Circuit in 1992, when the case was argued and decided.

1089-90. It noted that financial data could facilitate the investigation "in different ways, not all of which may yet be apparent." *Id.* at 1090. One example given by the court was that such information might help the Commission determine how to allocate its limited resources to protect the largest number of consumers possible. The court further stated that the Commission has no obligation to establish precisely the relevance of the material it seeks by tying that material to a particular theory of violation. *Id.*

C. Petitioners' Confidentiality Claim is Meritless.

Petitioners contend that the tax returns, revenue figures, and sales data sought in the CIDs "[are] privileged and confidential commercial and financial information that is competitively sensitive." This bald assertion provides absolutely no basis for quashing the specifications requesting the financial information.

As the district court in *FTC v. Invention Submission Corp.* succinctly explained:

> Congress, in authorizing the Commission's investigatory power, did not condition the right to subpoena information on the sensitivity of the

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Undoubtedly, therefore, Mr. Rose is aware of the D.C. Circuit's holding as well as the undeniable fact that Petitioners' assertions here are identical to those considered and rejected by the court there. The Petition's complete failure to address this leading precedent is both puzzling and damaging to the Petitioners' position. To the extent Petitioners might be seeking to change the established law, it was incumbent upon their counsel to produce a brief containing factual and legal arguments supporting such a change. See 16 C.F.R. § 2.7 (d); Fed. R. Civ. P. 11(b). Anything less wastes the Commission's limited resources and, of course, taxpayer dollars as well. Moreover, the absence of factual and legal arguments supporting a change in established law suggests that the Petition may have been filed merely to delay the production of important information.

> information sought. So long as the subpoena meets the requirements of the FTC Act, is properly authorized, and within the bounds of relevance and reasonableness, the confidential information is properly requested and [the subpoena] must be complied with.

1991-1 Trade Cas. (CCH) ¶ 69,338 at 65,353 (D.D.C. 1991), aff'd, 965 F.2d 1086 (D.C. Cir. 1992), cert. denied 507 U.S. 910 (1993).

More specifically, the Commission's conduct with regard to confidential information provided pursuant to compulsory process in a non-public investigation is controlled by a detailed set of statutes and rules, including Section 21 of the Federal Trade Commission Act, entitled "Confidentiality," 15 U.S.C. § 57b-2, and the Commission's "Nonpublic Material" regulation, 16 C.F.R. § 4.10. This set of laws and regulations, which are backed by criminal sanctions pursuant to 15 U.S.C. § 50; 16 C.F.R. 4.10(c), prescribes the rights and obligations of the Commission and of persons providing confidential information to the Commission, and consequently will comprehensively protect any confidential information that Petitioners might provide.

III. CONCLUSION

For all of the foregoing reasons, the Petition is **denied**, and, pursuant to Rule 2.7(e), 16 C.F.R. § 2.7(e), **Petitioners are directed to comply with the Civil Investigative Demand on or before Friday, June 28, 2002.**

By direction of the Commission.