

IN THE MATTER OF

ARKLA, INC.

MODIFYING ORDER IN REGARD TO ALLEGED VIOLATION OF
SEC. 7 OF THE CLAYTON ACT AND SEC. 5 OF THE
FEDERAL TRADE COMMISSION ACT

Docket C-3265. Consent Order, Oct. 10, 1989--Modifying Order, April 5, 1995

This order reopens a 1989 consent order that settled allegations that Arkla's acquisition of natural gas pipeline assets from TransArk Transmission Co. could reduce competition in the transportation of natural gas out of the Arkoma basin and the transmission of gas to consumers in the Russellville, Arkansas, area. This order modifies the consent order by deleting the divestiture requirement, because changed market conditions, such as regulatory changes and new entry in the market, make it no longer necessary.

ORDER MODIFYING ORDER

On December 6, 1994, NorAm Energy Corporation, successor to Arkla, Inc. ("Arkla"), filed a Petition To Reopen and Vacate or Modify Consent Order ("Petition") in Docket C-3265, pursuant to Section 5(b) of the Federal Trade Commission Act, 15 U.S.C. 45(b), and Section 2.51 of the Commission's Rules of Practice, 16 CFR 2.51. Arkla requests that the Commission reopen the consent order issued on October 10, 1989 ("order"), and set it aside or modify the order by eliminating the requirement to divest. For the reasons discussed below, the Commission has determined to reopen the order and to set aside the divestiture requirement.

I. BACKGROUND

The order, which became final on October 23, 1989, was issued by the Commission to remedy the alleged anticompetitive effects of Arkla's 1986 acquisition of a pipeline and right of way of TransArk Transmission Company ("TransArk Assets"). The Commission's complaint alleged that the acquisition eliminated the TransArk Assets as an actual and a potential competitor in the transportation of gas to consumers in the Russellville-Morrilton-Conway, Arkansas, area and in the transportation of gas out of the Affected portion of the Arkoma

Basin ("APAB"), as defined in the order. The complaint also alleged that entry into the relevant markets "is very difficult or unlikely."

The order requires Arkla, among other things, to divest by April 23, 1991, the TransArk Assets or, in the alternative, at the sole discretion of the Commission, the Arkla Pipeline Assets, as defined in the order.¹ The purpose of divestiture under the order is to remedy the lessening of competition alleged in the complaint. *See Arkla, Inc.*, 112 FTC 509 (1989), modified (March 28, 1994).

II. STANDARD FOR REOPENING A FINAL ORDER OF THE COMMISSION

Section 5(b) of the Federal Trade Commission Act, 15 U.S.C. 45(b), provides that the Commission shall reopen an order to consider whether it should be modified if the respondent "makes a satisfactory showing that changed conditions of law or fact" so require. A satisfactory showing sufficient to require reopening is made when a request to reopen identifies significant changes in circumstances and shows that the changes eliminate the need for the order or make continued application of it inequitable or harmful to competition. S. Rep. No. 96-500, 96th Cong., 2d Sess. 9 (1979) (significant changes or changes causing unfair disadvantage); *Louisiana-Pacific Corp.*, Docket No. C-2956, Letter to John C. Hart (June 5, 1986), at 4 (unpublished) ("Hart Letter").²

Section 5(b) also provides that the Commission may modify an order when, although changed circumstances would not require reopening, the Commission determines that the public interest so requires. Respondents are therefore invited in petitions to reopen to show how the public interest warrants the requested modification. Hart Letter at 5; 16 CFR 2.51. In such a case, the respondent must demonstrate as a threshold matter some affirmative need to modify the order. *Damon Corp.*, Docket No. C-2916, Letter to Joel E. Hoffman, Esq. (March 29, 1983), at 2 ("Damon Letter").³ For example, it may be in the public interest to modify an order "to relieve any impediment to effective competition that may result from

¹ The Commission in June 1991 and March 1994 granted requests by Arkla for approval of proposed divestitures of the Arkla Pipeline Assets. Neither of the proposed divestitures was approved by the Federal Energy Regulatory Commission, however, and neither was completed. *See* Petition at 8-12.

² *See also United States v. Louisiana-Pacific Corp.*, 967 F.2d 1372, 1376-77 (9th Cir. 1992) ("A decision to reopen does not necessarily entail a decision to modify the order. Reopening may occur even where the petition itself does not plead facts requiring modification.").

³ Reprinted in [1979-1983 Transfer Binder] Trade Reg. Rep. (CCH) ¶ 22,207.

the order." *Damon Corp.*, 101 FTC 689, 692 (1983). Once such a showing of need is made, the Commission will balance the reasons favoring the requested modification against any reasons not to make the modification. Damon Letter at 2. The Commission also will consider whether the particular modification sought is appropriate to remedy the identified harm. Damon Letter at 4.

The language of Section 5(b) plainly anticipates that the burden is on the petitioner to make a "satisfactory showing" of changed conditions to obtain reopening of the order. The legislative history also makes clear that the petitioner has the burden of showing, other than by conclusory statements, why an order should be modified. The Commission "may properly decline to reopen an order if a request is merely conclusory or otherwise fails to set forth specific facts demonstrating in detail the nature of the changed conditions and the reasons why these changed conditions require the requested modification of the order." S. Rep. No. 96-500, 96th Cong., 1st Sess. 9-10 (1979); *see also* Rule 2.51(b) (requiring affidavits in support of petitions to reopen and modify). If the Commission determines that the petitioner has made the necessary showing, the Commission must reopen the order to consider whether modification is required and, if so, the nature and extent of the modification. The Commission is not required to reopen the order, however, if the petitioner fails to meet its burden of making the satisfactory showing required by the statute. The petitioner's burden is not a light one in view of the public interest in repose and the finality of Commission orders. *See Federated Department Stores, Inc. v. Moitie*, 425 U.S. 394 (1981) (strong public interest considerations support repose and finality).

III. ARKLA'S PETITION

Arkla asserts in its Petition that reopening is required by changed conditions of fact. The changed conditions identified by Arkla are order 636 of the Federal Energy Regulatory Commission ("FERC"),⁴ substantial new entry in the relevant markets and excess capacity in the relevant markets.⁵ Arkla states that FERC order 636 has resulted

⁴ Pipeline Service Obligations and Revisions to Regulations Governing Self-Implementing Transportation; and Regulation of Natural Gas Pipelines After Partial Wellhead Decontrol, 57 Fed. Reg. 13,267, 3 FERC Stats. & Regs. (CCH) ¶ 30,939 (1992); order on rehearing, order No. 636-A, 57 Fed. Reg. 36,128, 3 FERC Stats. & Regs. (CCH) ¶ 30,950 (Aug. 3, 1992); order on rehearing, order No. 636-B, 57 Fed. Reg. 57,911, 61 FERC ¶ 61,272 (Nov. 27, 1992) (collectively "FERC order 636").

⁵ Petition at 13-26.

in sweeping changes in the pipeline industry, by requiring pipelines to unbundle their services into separate components and to become open access pipelines and by enabling shippers to sell unneeded pipeline capacity through a capacity release program. According to Arkla, these changes have fostered new entry. Arkla also claims that entry has occurred since the order was issued, that other pipeline companies are potential entrants in the markets, and that an incumbent firm has proposed increasing its capacity. Arkla's Petition was placed on the public record for thirty days; no comments were received.

IV. ARKLA HAS SHOWN CHANGED CONDITIONS OF FACT THAT REQUIRE REOPENING

Arkla has shown changed conditions of fact that require reopening to consider whether the order should be modified as requested. FERC order 636, issued in 1992, altered the nature of competition in the natural gas industry. Among other things, FERC order 636 requires interstate pipeline companies to "unbundle" the charges for the services that they provide. Before FERC order 636, a pipeline acted as a merchant of gas, buying gas at the wellhead, gathering and storing it, transporting it through the pipeline, and charging customers a single price for this integrated service. FERC order 636 requires pipeline companies to separate out the charges for each service, and customers may deal with different suppliers for each service. The unbundling required by FERC order 636 enables pipeline companies to compete in providing one or more services without being fully integrated. According to Arkla, FERC order 636 has converted pipelines "from merchants of gas into transporters of gas offering transportation-only service for hire for third parties." Petition at 19. FERC order 636 enables firms to engage in pipeline transportation without incurring the costs of building or acquiring gathering and storage facilities, thus easing conditions of entry. Petition at 35-36. The Commission previously reopened and modified the order to set aside the requirement that Arkla divest gathering facilities associated with pipeline assets, because a pipeline company no longer needs to own gathering facilities to compete.⁶

FERC order 636 requires virtually all pipelines to be open access carriers, that is, to provide transportation service to and from any

⁶ Arkla, Inc., Docket C-3265, order (March 28, 1994).

point on the pipeline system, and eases the regulatory requirements to build new pipelines. FERC order 636 also altered competition in the pipeline transportation of natural gas by enabling customers that are contractually obligated to take a certain amount of gas on a daily basis (firm commitment customers) to resell unneeded capacity under so-called capacity release programs. In addition, under the flexible receipt and delivery points required by FERC order 636, a buyer of firm commitment capacity need not deliver gas to or receive gas from the same points as its seller but may use any receipt and delivery points along the pipeline system. As a result, firm commitment customers can compete with pipeline companies in offering pipeline transportation services to some customers. According to Arkla, capacity release by shippers is rapidly increasing. Petition at 32.

Significant entry and capacity expansion have occurred in the Affected Area of the Arkoma Basin ("APAB"), as defined in the order.⁷ Ozark Gas Transmission Systems in 1991 converted its pipeline to open access.⁸ Ozark also obtained FERC approval for a capacity expansion (although the project has not been completed). Petition at 15. NOARK Pipeline System in 1992 completed construction of and began operating a pipeline in the APAB.⁹ The Ozark and NOARK pipelines have added capacity to the APAB that is six times the capacity of TransArk; if Ozark completes its planned expansion, the combined capacity will be ten times the capacity of TransArk.

The entry and expansion that have occurred since the order was issued have substantially reduced concentration in the APAB. In 1989, Arkla was the only open access pipeline in the market, and TransArk was a potential competitor.¹⁰ The entry and expansion in the market reduce concentration, as does the availability of capacity

⁷ Cf. Louisiana Pacific Corp., Docket C-2956, letter to John C. Hart, June 5, 1986, at 8 (unpublished) (denying reopening and modification when respondent failed to show changes in structural conditions, such as ease of entry, that might obviate need for divestiture requirement).

⁸ The Ozark pipeline is within 10 miles of the TransArk line through the APAB. Petition at 15.

⁹ NOARK began construction of its pipeline in October 1991 and opened it for service in September 1992. The NOARK pipeline crosses the TransArk pipeline and is within 18 miles of it through the APAB.

¹⁰ Independent entry by TransArk would have reduced the Herfindahl-Hirschmann Index ("HHI") by approximately 1404 points from 10,000 to 8596. The HHI is used by the enforcement agencies "[a]s an aid to the interpretation of market data." See 1992 Horizontal Merger Guidelines ¶ 1.5

under capacity release programs.¹¹ Although the volume of gas shipped by released capacity still is relatively small (8% nationally in 1994),¹² the proportion of capacity that is allocated to firm transportation contracts and, therefore, subject to release is increasing, which increases the potential for capacity release in the future. Petition at 32.

In addition to entry and expansion in the APAB, there has been substantial entry in other parts of the Arkoma Basin. Transok in 1989 began operating a pipeline in the Arkoma Basin and in 1990 built a second pipeline serving the Arkoma Basin. Natural Gas Pipeline of America ("NGPL") in 1991 completed a pipeline in the Arkoma Basin. The NGPL pipeline was completed in about six months after construction began. Petition at 14. Although the Transok and NGPL pipelines are not in the markets alleged in the complaint, their experience shows that entry conditions have eased. In addition, to the extent that Transok and NGPL may be potential entrants in the APAB, their presence in areas adjacent to the APAB helps alleviate the competitive concerns alleged in the complaint.

Entry and expansion coupled with flat production in the area have resulted in excess pipeline capacity. Petition at 25 & 39. In 1992, according to Arkla, most major pipelines in the Arkoma Basin were operating at less than 50% of capacity. Petition at 25. The existence of excess capacity may decrease the possibility of successful collusion, because participants will have incentives to undercut the collusive price. According to Arkla, excess pipeline capacity has increased competition in the Arkoma Basin. The Federal Energy Regulatory Commission, in setting rates for Ozark, said that "[t]he record reflects substantial excess capacity and thus considerable competition in the Arkoma Basin." Petition at 26, citing Ozark Gas Transmission System, 68 FERC ¶ 61,032, at 61,108 (1994). Under

¹¹ Pipeline entry and expansion in the APAB reduces the HHI to 5140. Assigning capacity available for capacity release to the shippers that hold the capacity under contract reduces the HHI to 3346. See Petition at 33 n.22; letter from Tom D. Smith, Esq., to Kenneth A. Libby, Esq., Feb. 8, 1995, at 3.

¹² According to Arkla, "[a]s much as 90% of Ozark's total capacity was released through capacity release," driving pipeline rates down. Petition at 33. Rates for firm pipeline capacity consist of two parts: a demand or reservation charge, which must be paid whether or not the capacity is used; and a usage charge. According to Arkla, a firm shipper has incentives to sell its unused capacity rights to defray the demand or reservation charge. Petition at 22. According to the Energy Information Administration of the Department of Energy, although firm commitment customers theoretically could make a profit on released capacity, "[i]n practice so far . . . released capacity has sold at a discount." Energy Information Administration, *Natural Gas 1994: Issues and Trends* 49 (July 1994), Petition Exhibit Q.

conditions of excess capacity, Arkla is selling its services in the Arkoma Basin "at a considerable discount under the rates authorized by the FERC." Petition at 40.

Pipeline entry and expansion also have affected the Russellville-Morrilton-Conway ("RMC") corridor. Both the Ozark and NOARK pipelines are near the TransArk pipeline in the RMC corridor and could provide cost-effective hook ups for customers in the corridor. *See* Petition at 38 n.27. Therefore, Arkla has shown changed conditions that require reopening to consider whether the order should be modified as requested.

V. THE ORDER SHOULD BE MODIFIED

Arkla has shown significant changes in circumstances such that there is no further need for the order's requirement to divest. The changes in competitive conditions in the relevant markets resulting from FERC order 636 and the entry and expansion that have occurred since the order was issued eliminate the need for divestiture that was required by the order.

Arkla has not shown that the prior approval requirement of the order should be set aside. Paragraph V of the order, in relevant part, requires Arkla, for ten years, to obtain the approval of the Commission before acquiring certain pipeline interests in the relevant markets. Arkla claims that the prior approval requirement rested on the presumption that any pipeline acquisition by Arkla "would impermissibly augment [Arkla's] perceived ability to exercise market power in the relevant markets."¹³ Arkla fails to show that there is no longer a continuing need for prior approval of acquisitions by Arkla in the relevant markets.

The relevant markets identified in the complaint still are highly concentrated, and Arkla still is a substantial competitor in the relevant markets. The conclusion that the requirement to divest the TransArk assets should be set aside in light of changed conditions does not imply that any subsequent acquisition by Arkla would not raise competitive concerns. For example, an acquisition by Arkla of either NOARK or Ozark, the two pipelines that compete directly with Arkla in both the APAB and the RMC corridor, would eliminate a significant, direct competitor, increase concentration substantially and likely raise antitrust concerns that would warrant further

¹³ Letter from Tom D. Smith, Esq., to Kenneth A. Libby, Esq., Feb. 8, 1995, at 4.

examination. Under the circumstances, the prior approval clause should not be set aside. See *Damon Corporation*, Docket C-2916 (March 29, 1983) (denying request to set aside prior approval clause when respondent had not shown that acquisitions "would no longer pose any antitrust concern");¹⁴ see also *Canada Cement Lafarge, Ltd.*, 111 FTC 590 (1989) (prior approval clause not set aside when respondent failed to show that no acquisition that it might make would raise competitive concerns).

VI. CONCLUSION

Accordingly, *It is ordered*, That this matter be, and it hereby is, reopened and that the order in Docket C-3265 be, and it hereby is, modified to set aside paragraphs II, III and IV, as of the effective date of this order.

Commissioner Starek concurring only in the result.

¹⁴ Letter to Joel Hoffman, reprinted in [1979-1983 Transfer Binder] Trade Reg. Rep. (CCH) ¶ 22,207, at 22,585.

IN THE MATTER OF

NINZU, INC., ET AL.

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF
SECS. 5 AND 12 OF THE FEDERAL TRADE COMMISSION ACT*Docket C-3566. Complaint, April 7, 1995--Decision, April 7, 1995*

This consent order requires, among other things, the Maryland-based marketers to possess and rely upon competent and reliable scientific substantiating evidence to support any performance, benefits, efficacy, or safety claims they make for any weight loss or weight control product or program or any acupuncture device they market in the future.

*Appearances*For the Commission: *Richard L. Cleland.*For the respondents: *Michael B. Metzger*, President, Baltimore, MD.

COMPLAINT

The Federal Trade Commission, having reason to believe that Ninzu, Inc. d/b/a Davish Enterprises and Davish Health Products, Davish Merchandising, Inc., Order By Phone, Inc., and Auricle Clip, Inc., corporations; and Michael Metzger, individually and as an officer and director of said corporations ("respondents"), have 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:

PARAGRAPH 1. Respondent Ninzu, Inc. is a Maryland corporation doing business under its own name and under the names Davish Enterprises and Davish Health Products. Its principal place of business is located at 1 East Chase Street, Suite 200, Baltimore, Maryland.

Respondent Davish Merchandising, Inc. is a Maryland corporation with its principal place of business located at 1 East Chase Street, Suite 200, Baltimore, Maryland.

Respondent Order By Phone, Inc. is a Maryland corporation and the parent corporation of Auricle Clip, Inc. Its principal place of business is located at 1 East Chase Street, Suite 200, Baltimore, Maryland.

Respondent Auricle Clip, Inc. is a Maryland corporation with its principal place of business located at 1 East Chase Street, Suite 200, Baltimore, Maryland.

Respondent Michael Metzger is or was at relevant times herein an officer and director of Ninzu, Inc., Davish Merchandising, Inc., Order By Phone, Inc., and Auricle Clip, Inc. Individually or in concert with others, he participated in and/or formulated, directed and controlled the acts and practices of the respondent corporations. His address is 12135 Henson Garth, Owings Mills, Maryland.

PAR 2. Respondents have advertised, offered for sale, sold, and distributed the Ninzu, Auricle Clip, and B-Trim, acupressure weight-loss devices that clip onto the ear. The Ninzu, Auricle Clip, and B-Trim are devices within the meaning of Sections 12 and 15 of the Federal Trade Commission Act, 15 U.S.C. 52 and 55.

PAR. 3. The acts and practices of respondents alleged in this complaint have been in or affecting commerce, as "commerce" is defined in section 4 of the Federal Trade Commission Act, 15 U.S.C. 44.

NINZU

PAR. 4. Respondents have disseminated or have caused to be disseminated advertisements and promotional materials for the Ninzu, including but not necessarily limited to the attached Exhibits A and B. The aforesaid advertisements contain the following statements:

A. NO DIET! NO EXERCISE! LOSE 30 POUNDS IN 30 DAYS!

No conventional diet is better than any other. Don't kid yourself, they just do not work (Read the June issue of *Consumer Reports*).

NINZU™ is the first effortless weight loss product that really works. Now available in the U.S. You must be satisfied with your results in just 30 days or we will completely refund your money... no questions asked!

NINZU™ is a tiny acupressure device that fits snugly on your ear. This product utilizes the ancient science of acupressure to make you lose weight. It's safe and it works...we guarantee it.

NINZU™ does not involve the use of drugs. There are no needles, no shakes, no special diet foods to buy again and again. Wearing NINZU™ for less than 3 hours a day will produce dramatic results.

JOIN OUR LIST OF SATISFIED CUSTOMERS

I have tried every diet known to man. This is the first time I actually lost weight and I'm keeping it off. Mr. C.D. of Texas.

I lost 32 pounds last month by using NINZU. My husband says that I've never looked better. Mrs. J.R. of Ohio.

At first I thought it was a joke but after dropping 47 pounds in 2 months, I'm a true believer. Mr. T.U. of Maryland. (Exhibit A).

B. Would you put a needle in your ear to help you lose weight? Medical doctors in China use acupuncture every day to successfully help millions of patients.

Now for the first time in America you can actually lose weight using the proven principles of acupuncture without needles.

Introducing Ninzu, an amazing device guaranteed to help you lose weight by controlling your hunger. Just attach the small device to the triangular portion of your outer ear for one hour before eating, during the meal, and one hour after eating. It's completely painless, and totally effective. In just seconds your hunger pains disappear. You eat less, you lose weight quickly and safely.

Here's how it works. In Chinese medicine the hunger point is the tragus. The tragus is connected to the major nerve ending that controls your stomach and upper intestine. When you apply pressure to the nerve ending it actually inhibits your stomach's contractions. Your brain receives the signal that your stomach is full, reducing your craving. Imagine, no calorie counting, no diet shakes, no special fads, no pills or drugs. Just a safe, effective method that really works.

* * * *

"I dropped two dress sizes, so simple, yet so incredibly effective."

* * * *

"You can't notice it but I'm wearing it right now and I literally cut my food intake in half." (Exhibit B).

PAR. 5. Through the use of the statements contained in the advertisements referred to in paragraph four, including but not necessarily limited to the advertisements attached as Exhibits A and B, respondents have represented, directly or by implication, that:

- A. Ninzu causes significant weight loss;
- B. Ninzu causes significant weight loss without the need to diet or exercise;
- C. Ninzu controls appetite or eliminates a person's craving for food; and
- D. Ninzu is scientifically proven to cause significant weight loss and control appetite.

PAR. 6. In truth and in fact:

- A. Ninzu does not cause significant weight loss;
- B. Ninzu does not cause significant weight loss without the need to diet or exercise;
- C. Ninzu does not control appetite or eliminate a person's craving for food; and
- D. Ninzu is not scientifically proven to cause significant weight loss and control appetite.

Therefore, the representations set forth in paragraph five were, and are, false and misleading.

PAR. 7. Through the use of statements contained in the advertisements referred to in paragraph four, including but not necessarily limited to the advertisements attached as Exhibits A and B, respondents have represented, directly or by implication, that at the time they made the representations set forth in paragraph five. (A), (B), and (C), they possessed and relied upon a reasonable basis that substantiated such representations.

PAR. 8. In truth and in fact, at the time they made the representations set forth in paragraph five (A), (B), and (C), respondents did not possess and rely upon a reasonable basis that substantiated such representations. Therefore, the representation set forth in paragraph seven was, and is, false and misleading.

PAR. 9. Through the use of statements contained in the advertisements referred to in paragraph four, including but not necessarily limited to the advertisements attached as Exhibits A and B, respondents have represented, directly or by implication, that testimonials from consumers appearing in advertisements for the Ninzu reflect the typical or ordinary experience of members of the public who have used the product.

PAR. 10. In truth and in fact, testimonials from consumers appearing in advertisements for the Ninzu do not reflect the typical or ordinary experience of members of the public who have used the product. Therefore, the representation set forth in paragraph nine was, and is, false and misleading.

AURICLE CLIP

PAR. 11. Respondents have disseminated or have caused to be disseminated advertisements and promotional materials for the Auricle Clip, including but not necessarily limited to the attached Exhibit C. The aforesaid advertisement contains the following statements:

AURICLE CLIP™

The Effortless Weight Loss Product

A Board Certified internist born in China has uncovered the secret of using acupressure for quick and effortless weight loss. The introduction of the Auricle Clip makes available to the public the work of Dr. Daniel S.J. Choy, a qualified medical professional. The Auricle Clip is the product that will make dieting obsolete.

Through the science of acupressure, the Auricle Clip allows the user to lose weight without having to think about calories or grams of fat. Now, people who have failed as dieters because they could not stand to deprive themselves of the foods they love, will be able to take control of their lives and become happier, thinner people.

The Auricle Clip attaches to a pressure point on the tragus, the triangular portion of the outer ear, where it slows the wave-like muscular movement of food from the stomach into the intestines (peristalsis). This simply means that the stomach thinks that it is half-full before the user even begins eating. After a few bites the user feels full. In effect, the stomach seems smaller so the user eats less.

The Auricle Clip does not involve the use of drugs. There are no needles, no shakes, no special diet foods to buy again and again. By wearing the Auricle Clip on the tragus of each ear a half hour before eating and one hour after eating the user will change his/her eating habits, which is the real key to losing weight and keeping it off. (Exhibit C).

PAR. 12. Through the use of the statements contained in the advertisements referred to in paragraph eleven, including but not necessarily limited to the advertisement attached as Exhibit C, respondents have represented, directly or by implication, that:

- A. Auricle Clip causes significant weight loss;
- B. Auricle Clip causes significant weight loss without the need to diet;
- C. Auricle Clip controls appetite; and
- D. Auricle Clip is scientifically proven to cause significant weight loss and control appetite.

PAR. 13. In truth and in fact:

- A. Auricle Clip does not cause significant weight loss;
- B. Auricle Clip does not cause significant weight loss without the need to diet;
- C. Auricle Clip does not control appetite; and
- D. Auricle Clip is not scientifically proven to cause significant weight loss and control appetite.

Therefore, the representations set forth in paragraph twelve were, and are, false and misleading.

PAR. 14. Through the use of statements contained in the advertisements referred to in paragraph eleven, including but not necessarily limited to the advertisement attached as Exhibit C, respondents have represented, directly or by implication, that at the time they made the representations set forth in paragraph twelve (A), (B), and (C), they possessed and relied upon a reasonable basis that substantiated such representations.

PAR. 15. In truth and in fact, at the time they made the representations set forth in paragraph twelve (A), (B), and (C), respondents did not possess and rely upon a reasonable basis that substantiated such representations. Therefore, the representation set forth in paragraph fourteen was, and is, false and misleading.

B-TRIM

PAR. 16. Respondents have disseminated or have caused to be disseminated advertisements and promotional materials for the B-Trim, including but not necessarily limited to the advertisement attached as Exhibit D. The aforesaid advertisement contains the following statements:

SUCCESSFUL DIETING

(NAPS)--If you're ready to lose your share of the millions of pounds Americans are overweight, experts suggest you follow this sensible advice:

1. If you're thinking of a major weight loss, see a doctor before you start.

[DRAWING OF A WOMAN STANDING ON A BATHROOM SCALE
OVER THE FOLLOWING CAPTION: A modern invention based on the
ancient science of acupressure can reduce your craving for food.]

2. Make sure the diet you choose contains the proper amount of protein, fats, carbohydrates, water and vitamins. The U.S. Dept. of Health recommends that no more than 30 percent of your calories should come from fat.

3. Be aware of new techniques for dieters. One new product is reported to be able to help you lose weight without feeling hungry. Called B-Trim, this inexpensive acupuncture product was developed by a Chinese born, board certified internist on the staff of two New York hospitals. When you attach a small, specially designed clip to the triangular portion of your outer ear, a message is sent to your brain via the vagus nerve that tells your stomach it is partially full. This effect makes dieting practically effortless. The device is worn for a half hour before and an hour after meals. (Exhibit D).

PAR. 17. Through the use of the statements contained in the advertisements referred to in paragraph seventeen, including but not necessarily limited to the advertisement attached as Exhibit D, respondents have represented, directly or by implication, that:

- A. B-Trim causes significant weight loss; and
- B. B-Trim reduces the user's craving for food and causes weight loss without the user feeling hungry.

PAR. 18. In truth and in fact:

- A. B-Trim does not cause significant weight loss; and
- B. B-Trim does not reduce the user's craving for food or cause weight loss without the user feeling hungry.

Therefore, the representations set forth in paragraph seventeen were, and are, false and misleading.

PAR. 19. Through the use of statements contained in the advertisements referred to in paragraph sixteen, including but not necessarily limited to the advertisement attached as Exhibit D, respondents have represented, directly or by implication, that at the time they made the representations set forth in paragraph seventeen, they possessed and relied upon a reasonable basis that substantiated such representations.

PAR. 20. In truth and in fact, at the time they made the representations set forth in paragraph seventeen, respondents did not possess and rely upon a reasonable basis that substantiated such representations. Therefore, the representation set forth in paragraph nineteen was, and is, false and misleading.

PAR. 21. The acts and practices of respondents as alleged in this complaint constitute unfair or deceptive acts or practices and the making of false advertisements in or affecting commerce in violation of Sections 5(a) and 12 of the Federal Trade Commission Act.

EXHIBIT A

EXHIBIT A

NO DIET! NO EXERCISE!

No conventional diet is better than any other. Don't kid yourself, they just do not work (Read the June issue of Consumer Reports).

LOSE 30 POUNDS IN 30 DAYS!

I lost 32 pounds last month by using NINZU. My husband says that I've never looked better.
Mrs. J.R. of Ohio.

At first I thought it was a joke but after dropping 47 pounds in 2 months, I'm a true believer.
Mr. T.U. of Maryland.

For the first time in 10 years I can't wait to wear my swim suit. Your product is terrific and I'll never have to diet again.
Ms. S.N. of New York.

NINZU™ is the first effortless weight loss product that really works. Now available in the U.S. You must be satisfied with your results in just 30 days or we will completely refund your money... no questions asked!

NINZU™ is a tiny acupressure device that fits snugly on your ear. This product utilizes the ancient science of acupressure to make you lose weight. It's safe and it works... we guarantee it.

NINZU™ does not involve the use of drugs. There are no needles, no shakes, no special diet foods to buy again and again. Wearing NINZU™ for less than 3 hours a day will produce dramatic results.

JOIN OUR LIST OF SATISFIED CUSTOMERS

I have tried every diet known to man. This is the first time I actually lost weight and I'm keeping it off.
Mr. C.D. of Texas.

NINZU™ is marketed world-wide by D.M.I., One East Chase Street, Suite 200, Baltimore, MD 21202, (410) 962-8221. The cost is only \$19.95 per pair of NINZU™ plus \$2.99 shipping.

Lose the weight and save your money, because there is nothing more for you to buy... Remember, you have nothing to lose but weight. We guarantee it!

BONUS - A free gift for the first 1000 orders that are received from this ad.

YOU'LL BE AMAZED AT THE RESULTS!!!

AS SEEN ON TV

ONLY \$19.95

MONEY BACK GUARANTEE

ALL 1-800-289-1700

NINZU, INC. • One East Chase Street, Suite 200, Baltimore, MD 21202

YES! I do want to lose weight fast! Please rush NINZU™ today. If I am not fully satisfied, I may return them within 90 days for a full refund.

Check/Money Order VISA M.C. Discover

Quantity of NINZU™ @ \$19.95 pr
 Shipping & Handling @ \$2.99 pr
(Shipping and handling not for return)
TOTAL

Signature _____

Exp. Date _____ Card # _____

Name _____

Address _____

City _____ State _____ Zip _____

Phone _____

Washington Times Aug 29, 1993, p. A11

Complaint

119 F.T.C.

EXHIBIT B

DAVISH ENTERPRISES

"NINZU" 2 MIN.

VER. A \$19.95

1-800-STAY TRIM

7/1/93

Would you put a needle in your ear to help you lose weight? Medical doctors in China use acupuncture every day to successfully help millions of patients.

Now for the first time in America you can actually lose weight using the proven principles of acupuncture without needles.

[ON SCREEN: 1-800-STAY TRIM (1-800-782-9874)]

Introducing Ninzu, an amazing device guaranteed to help you lose weight by controlling your hunger. Just attach the small device to the triangular portion of your outer ear for one hour before eating, during the meal, and one hour after eating. It's completely painless, and totally effective. [ON SCREEN: 1-800-STAY TRIM (1-800-782-9874)]. In just seconds your hunger pains disappear. You eat less, you lose weight quickly and safely.

Here's how it works. In Chinese medicine the hunger point is the tragus. The tragus is connected to the major nerve ending that controls your stomach and upper intestine. When you apply pressure to the nerve ending it actually inhibits your stomach's contractions. Your brain receives the signal that your stomach is full, reducing your craving. Imagine, no calorie counting, no diet shakes, no special fads, no pills or drugs. Just a safe, effective method that really works.

"Ninzu really change my life. It is so satisfying to feel good about myself again."

"I dropped two dress sizes, so simple, yet so incredibly effective."

"Since wearing the Ninzu I really can't wait to get dressed in the morning."

"You can't notice it but I'm wearing it right now and I literally cut my food intake in half."

The Chinese clip is based on 4000 years of ancient oriental medicine. It's totally safe and guaranteed to work. [ON SCREEN: Ted D. Annenberg, R.Ac., P.A., Registered Acupuncturist - Nutritional Medicine, Weight Loss, Food Allergist]

[ON SCREEN: 1-800-STAY TRIM (1-800-782-9874)]

Now Ninzu can be yours for only \$19.95. Best of all there's no additional purchases or refills. It's safe, painless, and it lasts forever.

"I can't believe how much money this little product has saved me, but best of all it works."

421

Complaint

Ninzu comes with an iron-clad money-back guarantee. Try it for 90 days [ON SCREEN: 1-800-STAY TRIM (1-800-782-9874)] if you're not completely satisfied return them for a complete refund, no questions asked.

Ninzu for only \$19.95, order today. Call now 1-800-STAY TRIM, that's 1-800-782-9874 for credit card orders, or send check or money order for \$19.95 plus shipping to NINZU, Box 32088, Baltimore, Maryland 21208.

Ninzu comes with a 90 day money back guarantee. Order Ninzu now.

[ON SCREEN:

Visa, Master Card, American Express, Discover

Call Now 1-800-STAY TRIM

(1-800-782-9874)

or send check or money order for \$19.95 plus \$2.99 S+H to
NINZU, P.O. Box 32088, Baltimore, MD. 21208.

Free Gift Included

90 Day Money Back Guarantee

D.M.I. 1 E Chase Street, Suite 200, Baltimore, MD. 21202.]

EXHIBIT C

EXHIBIT C

AURICLE CLIP[®]
The Effortless Weight Loss Product

A Board Certified internist born in China has uncovered the secret of using acupuncture for quick and effortless weight loss. The introduction of the Auricle Clip makes available to the public the work of Dr. Daniel S. J. Choy, a qualified medical professional. The Auricle Clip is the product that will make dieting obsolete.

Through the science of acupuncture, the Auricle Clip allows the user to lose weight without having to think about calories or grams of fat. Now, people who have failed as dieters because they could not stand to deprive themselves of the foods they love, will be able to take control of their lives and become happier, thinner people.

The Auricle Clip attaches to a pressure point on the tragus, the triangular portion of the outer ear, where it slows the reversible muscular movement of food from the stomach into the



intestines (peristalsis). The simple means that the stomach thinks that it is happy before the user even begins eating. After a few days the user feels that, in effect, the stomach seems smaller so the user eats less.

The Auricle Clip does not involve the use of drugs. There are no needles, no shakes, no special diet foods to buy again and again. By wearing the Auricle Clip on the tragus of each ear a half hour before eating and one hour after eating the user will change her/his eating habits, which is the real key to losing weight and keeping it off.

The Auricle Clip is marketed world-wide by Davien Enterprises, One East Chase Street, Suite 200, Eastmore, MD 21222, (800) 288-1700. The cost is \$39.95 per pair of Auricle Clips plus \$3.95 s/h.



N.D. SPECIAL MEDICATION



N.D. SPECIAL MEALS



N.D. SPECIAL DRINKS

100% Satisfaction Guaranteed

AURICLE CLIP, INC. Division of Order By Phone
 One East Chase Street, Suite 200, Eastmore, MD 21222
 *We'll take your order by phone. Please allow 48 hours for delivery. *We'll take your order by phone. Please allow 48 hours for delivery. *We'll take your order by phone. Please allow 48 hours for delivery.

Check American Express VISA
 MasterCard Discover Other

Name _____
 Address _____
 City _____ State _____ Zip _____
 Phone _____
 Card # _____
 Exp. Date _____
 Signature _____

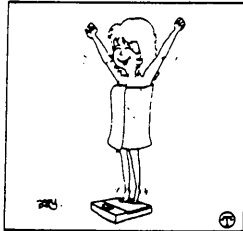
EXHIBIT D

EXHIBIT D

SUCCESSFUL DIETING

NAPS—If you're ready to lose your share of the millions of pounds Americans are overweight, experts suggest you follow this sensible advice:

1. If you're thinking of a major weight loss, see a doctor before you start.



A modern invention based on the ancient science of acupressure can reduce your craving for food.

2. Make sure the diet you choose contains the proper amount of protein, fats, carbohydrates, water and vitamins. The U.S. Dept. of Health recommends that no more than 30 percent of your calories should come from fat.

3. Be aware of new techniques for dieters. One new product is reported to be able to help you lose weight without feeling hungry. Called B-Trim, this inexpensive acupressure product was developed by a Chinese born, board certified internist on the staff of two New York hospitals. When you attach a small, specially designed clip to the triangular portion of your outer ear, a message is sent to your brain via the vagus nerve that tells your stomach it is partially full. This effect makes dieting practically effortless. The device is worn for a half hour before and an hour after meals.

B-Trim is available by sending a check for \$39.95, plus \$3.95 S&H to: Davish Health Products, One East Chase Street, Suite 200, Baltimore, MD 21202; or by calling (800) 289-1700.

DECISION AND ORDER

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

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

The Commission having thereafter considered the matter and having determined that it had reason to believe that the respondents have violated the 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 sixty (60) days, now in further conformity with the procedure prescribed in Section 2.34 of its Rules, the Commission hereby issues its complaint, makes the following jurisdictional findings and enters the following order:

1. Respondent Ninzu, Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the State of Maryland, with its office and principal place of business located at 1 East Chase Street, Suite 200, in the City of Baltimore, State of Maryland.

Respondent Davish Merchandising, Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the State of Maryland, with its office and principal place of business located at 1 East Chase Street, Suite 200, in the City of Baltimore, State of Maryland.

Respondent Order By Phone, Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the

State of Maryland, with its office and principal place of business located at 1 East Chase Street, Suite 200, in the City of Baltimore, State of Maryland.

Respondent Michael B. Metzger is an officer and director of said corporations. He formulates, directs and controls the policies, acts and practices of said corporations, and his principal office and place of business is located at the above- stated address.

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

ORDER

For the purposes of this order:

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. "*Acupressure device*" shall mean any product, program, or service that is intended to function by means of the principles of acupressure.

I.

It is ordered, That respondents, Ninzu, Inc., Davish Merchandising, Inc. d/b/a Davish Enterprises and Davish Health Products, and Order By Phone, Inc. d/b/a Auricle Clip, Inc., corporations, their successors and assigns, and their officers; Michael B. Metzger, individually and as an officer and director of said corporations; and respondents' agents, representatives and employees, directly or through any partnership, corporation, subsidiary, division or other device, in connection with the advertising, packaging, labeling, promotion, offering for sale, sale or distribution of the Ninzu, Auricle Clip, B-Trim or any other acupressure device in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from representing, in any manner, directly or by implication, that:

- A. Such product causes significant weight loss;
- B. Such product causes significant weight loss without the need to diet or exercise;
- C. Such product controls appetite, eliminates a person's craving for food, or causes weight loss without the user feeling hungry; or
- D. Such product is scientifically proven to cause significant weight loss and control appetite.

II.

It is further ordered, That respondents, Ninzu, Inc., Davish Merchandising, Inc. d/b/a Davish Enterprises and Davish Health Products, and Order By Phone, Inc. d/b/a Auricle Clip, Inc., corporations, their successors and assigns, and their officers; Michael B. Metzger, individually and as an officer and director of said corporations; and respondents' agents, representatives and employees, directly or through any partnership, corporation, subsidiary, division or other device, in connection with the advertising, packaging, labeling, promotion, offering for sale, sale or distribution of any weight-loss or weight-control product or program or any acupuncture device in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from making any representation, directly or by implication, regarding the performance, benefits, efficacy, or safety of such product, program, or device unless such representation is true and unless, at the time of making such representation, respondents possess and rely upon competent and reliable scientific evidence that substantiates the representation.

III.

It is further ordered, That respondents, Ninzu, Inc., Davish Merchandising, Inc. d/b/a Davish Enterprises and Davish Health Products, and Order By Phone, Inc. d/b/a Auricle Clip, Inc., corporations, their successors and assigns, and their officers; Michael B. Metzger, individually and as an officer and director of said corporations; and respondents' agents, representatives and employees, directly or through any partnership, corporation, subsidiary, division or other device, in connection with the advertising, packaging, labeling, promotion, offering for sale, sale or distribution of any

weight-loss or weight-control product or program or any acupuncture device in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from representing, directly or by implication, that any endorsement (as "endorsement" is defined in 16 CFR 255.0(b)) of the product, program, or device represents the typical or ordinary experience of members of the public who use the product, program, or device unless this is the case.

IV.

It is further ordered, That respondents, Ninzu, Inc., Davish Merchandising, Inc. d/b/a Davish Enterprises and Davish Health Products, and Order By Phone, Inc. d/b/a Auricle Clip, Inc., corporations, their successors and assigns, and their officers; Michael B. Metzger, individually and as an officer and director of said corporations; and respondents' agents, representatives and employees, directly or through any partnership, corporation, subsidiary, division or other device, in connection with the advertising, packaging, labeling, promotion, offering for sale, sale or distribution of any weight-loss or weight-control product or program or any acupuncture device in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from misrepresenting, in any manner, directly or by implication, the contents, validity, results, conclusions, or interpretations of any test or study.

V.

It is further ordered, That for five (5) years after the last date of dissemination of any representation covered by this order, respondents, or their successors and assigns, shall maintain and upon request make available to the Federal Trade Commission or its staff for inspection and copying:

A. All materials that were relied upon in disseminating such representation; and

B. All tests, reports, studies, surveys, demonstrations or other evidence in their possession or control that contradict, qualify, or call

into question such representation, or the basis relied upon for such representation, including complaints from consumers.

VI.

It is further ordered, That respondents, Ninzu, Inc., Davish Merchandising, Inc. d/b/a Davish Enterprises and Davish Health Products, and Order By Phone, Inc. d/b/a Auricle Clip, Inc. shall:

A. Within thirty (30) days after service of this order, provide a copy of this order to each of respondents' current principals, officers, directors and managers, and to all personnel, agents, and representatives having sales, advertising, or policy responsibility with respect to the subject matter of this order; and

B. For a period of five (5) years from the date of issuance of this order, provide a copy of this order to each of respondents' future principals, officers, directors, and managers, and to all personnel, agents, and representatives having sales, advertising, or policy responsibility with respect to the subject matter of this order who are associated with respondents or any subsidiary, successor, or assign, within three (3) days after the person assumes his or her position.

VII.

It is further ordered, That respondents, Ninzu, Inc., Davish Merchandising, Inc. d/b/a Davish Enterprises and Davish Health Products, and Order By Phone, Inc. d/b/a Auricle Clip, Inc., shall notify the Federal Trade Commission at least thirty (30) days prior to any proposed change in their corporate structures, including but not limited to dissolution, assignment, or sale resulting in the emergence of a successor corporation, the creation or dissolution of subsidiaries or affiliates, the planned filing of a bankruptcy petition, or any other corporate change that may affect compliance obligations arising out of this order.

VIII.

It is further ordered, That respondent, Michael B. Metzger, shall, for a period of five (5) years from the date of issuance of this order, notify the Commission within thirty (30) days of the discontinuance

of his present business or employment and of his affiliation with any new business or employment. Each notice of affiliation with any new business or employment shall include respondent's new business address and telephone number, current home address, and a statement describing the nature of the business or employment and his duties and responsibilities.

IX.

It is further ordered, That respondents, Ninzu, Inc., Davish Merchandising, Inc. d/b/a Davish Enterprises and Davish Health Products, and Order By Phone, Inc. d/b/a Auricle Clip, Inc., corporations, and Michael B. Metzger, individually and as an officer and director of said corporations, 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.

IN THE MATTER OF

ALLIANT TECHSYSTEMS INC.

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

Docket C-3567. Complaint, April 7, 1995--Decision, April 7, 1995

This consent order permits, among other things, Alliant Techsystems Inc. ("Alliant"), a Minnesota-based defense contractor, to acquire Hercules Inc.'s propellant division, Hercules Aerospace Company, under certain conditions, and requires Alliant to prevent its newly acquired propellant division from sharing non-public information with Alliant's ammunition and munitions division. Alliant also has to notify its propellant customers of the Commission order before obtaining any non-public information from them.

Appearances

For the Commission: *Laura A. Wilkinson and Ann Malester.*

For the respondent: *Ronald A. Bloch and Timothy J. Waters, McDermott, Will & Emery, Washington, D.C.*

COMPLAINT

The Federal Trade Commission ("Commission"), having reason to believe that respondent, Alliant Techsystems Inc. ("Alliant"), a corporation subject to the jurisdiction of the Federal Trade Commission, has agreed to acquire certain stock and assets of Hercules Incorporated, a corporation subject to the jurisdiction of the Federal Trade Commission, in violation of Section 7 of the Clayton Act, as amended, 15 U.S.C. 18, and Section 5 of the Federal Trade Commission Act ("FTC Act"), 15 U.S.C. 45; and it appearing to the Commission that a proceeding in respect thereof would be in the public interest, hereby issues its complaint, stating its charges as follows:

I. DEFINITIONS

For the purposes of this complaint the following definitions apply:

1. "*Propellant*" and "*Explosives*" mean substances used to propel or activate Weapons.
2. "*Weapons*" means ammunition or munitions.

II. RESPONDENT

3. Respondent Alliant is a corporation organized, existing, and doing business under and by virtue of the laws of the state of Delaware, with its principal place of business located at 600 Second Street, N.E., Hopkins, Minnesota.

4. Respondent, through its Defense Systems Business Group, is engaged in the research, development, manufacture and sale of Weapons and weapon systems.

5. Respondent, through the proposed acquisition of substantially all of the stock and assets relating to Hercules Aerospace Company, would be engaged in the research, development, manufacture and sale of Propellant and Explosives, which are used to propel or activate Weapons.

III. THE ACQUIRED COMPANY

6. Hercules Incorporated is a corporation organized, existing, and doing business under and by virtue of the laws of the state of Delaware, with its principal place of business at Hercules Plaza, Wilmington, Delaware.

7. Hercules Incorporated, through its unincorporated division, Hercules Aerospace Company, is engaged in the research, development, manufacture and sale of Propellant and Explosives, which are used to propel or activate Weapons.

IV. JURISDICTION

8. For purposes of this proceeding, respondent Alliant 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 in or affecting commerce as "commerce" is defined in Section 4 of the Federal Trade Commission Act, as amended, 15 U.S.C. 44.

V. THE ACQUISITION

9. On July 11, 1994, Alliant agreed to acquire substantially all of the stock and assets relating to Hercules Aerospace Company, an unincorporated division of Hercules Incorporated, for consideration totalling approximately \$466 million.

VI. TRADE AND COMMERCE

10. The relevant lines of commerce are the research, development, manufacture and sale of Propellant or Explosives and the research, development, manufacture and sale of Weapons.

11. The relevant section of the country in which to evaluate the effects of the acquisition is the United States.

12. The relevant line of commerce consisting of the research, development, manufacture and sale of Propellant or Explosives is highly concentrated, whether measured by Herfindahl-Hirschmann Indices ("HHI") or two-firm and four-firm concentration ratios.

13. Entry into the research, development, manufacture and sale of Propellant or Explosives is difficult and unlikely.

VII. EFFECTS OF THE ACQUISITION

14. The effect of the acquisition may be substantially to lessen competition or to tend to create a monopoly in the market for the research, development, manufacture and sale of Weapons in violation of Section 7 of the Clayton Act, 15 U.S.C. 18, and Section 5 of the Federal Trade Commission Act, 15 U.S.C. 45. The acquisition may increase and enhance the position and ability of Alliant to gain access to competitively significant and non-public information concerning other Weapons manufacturers.

15. The effect identified in paragraph fourteen may increase the likelihood that, in the market for the research, development, manufacture and sale of Weapons:

- a. Direct actual competition between Alliant and other Weapons manufacturers will be reduced; and
- b. Advancements in Weapons research, innovation, and quality will be reduced.

VIII. VIOLATIONS CHARGED

16. The acquisition agreement described in paragraph nine constitutes a violation of Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45.

17. The acquisition described in paragraph nine, if consummated, would constitute a violation of Section 7 of the Clayton Act, as amended, 15 U.S.C. 18, and Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45.

DECISION AND ORDER

The Federal Trade Commission having initiated an investigation of the proposed acquisition by respondent of certain assets and businesses of the Hercules Aerospace Company of Hercules Incorporated ("Hercules"), and the respondent having been furnished thereafter with a copy of a draft of complaint that the Bureau of Competition presented to the Commission for its consideration and which, if issued by the Commission, would charge respondent with violations of Section 7 of the Clayton Act, as amended, 15 U.S.C. 18, and Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45; and

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

The Commission having thereafter considered the matter and having determined that it had reason to believe that the respondent has violated the said Acts, and that a complaint should issue stating its charges in that respect, and having thereupon accepted the

executed consent agreement and placed such agreement on the public record for a period of sixty (60) days, and having duly considered the comment filed thereafter by an interested person pursuant to Section 2.34 of its Rules, the Commission hereby issues its complaint, makes the following jurisdictional findings and enters the following order:

1. Respondent Alliant Techsystems Inc. ("Alliant") is a corporation, organized, existing, and doing business under and by virtue of the laws of the State of Delaware, with its office and principal place of business located at 600 Second Street, N.E., Hopkins, Minnesota.

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

ORDER

I.

It is ordered, That, as used in this order, the following definitions shall apply:

A. "*Alliant*" or "*Respondent*" means Alliant Techsystems Inc., its predecessors, subsidiaries, divisions, groups and affiliates controlled by Alliant, and their respective directors, officers, employees, agents and representatives, and their respective successors and assigns.

B. "*Defense Systems*" means (1) Alliant's Defense Systems Business Group, an unincorporated division of Alliant with its principal place of business at 600 Second Street, N.E., Hopkins, Minnesota, as well as its officers, employees, agents, divisions, subsidiaries, successors, and assigns, and the officers, employees or agents of the Defense Systems Business Group's divisions, subsidiaries, successors and assigns, and (2) Hercules Defense Electronics Systems, Inc., a corporation with its principal place of business at 13133 34th Street North, Clearwater, Florida, as well as its officers, employees, agents, divisions, subsidiaries, successors, and assigns, and the officers, employees or agents of Hercules Defense Electronics Systems, Inc.'s divisions, subsidiaries, successors and assigns. Defense Systems is principally engaged in the research, development, manufacture and sale of Weapons and weapon systems.

C. "*Hercules*" means Hercules Incorporated, a corporation organized, existing and doing business under the laws of Delaware with its principal place of business at Hercules Plaza, Wilmington, Delaware.

D. "*Person*" means any natural person, corporate entity, partnership, association, joint venture, government entity, trust or other business or legal entity.

E. "*Commission*" means the Federal Trade Commission.

F. "*Propellant or Explosives*" means substances used to propel or activate Weapons.

G. "*Weapons*" means ammunition and munitions.

H. "*Acquisition*" means the acquisition by Alliant of substantially all of the assets and stock relating to Hercules Aerospace Company, an unincorporated division of Hercules.

I. "*Non-Public Information*" means any information not in the public domain furnished by a Weapons developer, manufacturer or systems contractor to Alliant in Alliant's capacity as a provider of Propellant or Explosives; provided (a) if written information is furnished, it is designated in writing by the Weapons developer, manufacturer or systems contractor as proprietary information by an appropriate legend, marking, stamp, or positive written identification on the face thereof, or (b) if oral, visual or other information is furnished, it is identified as proprietary information in writing by the Weapons developer, manufacturer or systems contractor prior to the disclosure to Alliant or within thirty (30) days after such disclosure. Non-Public Information shall not include (i) information already known to Alliant, (ii) information which subsequently falls within the public domain through no violation of this order by Alliant, (iii) information which subsequently becomes known to Alliant from a third party not in breach of a confidential disclosure agreement with a Weapons developer, manufacturer or systems contractor, or (iv) information after six (6) years from the date of disclosure to Alliant or such other period as agreed to in writing by Alliant and the Weapons developer, manufacturer or systems contractor.

II.

It is further ordered, That:

A. Alliant shall not, absent the prior written consent of the proprietor of Non-Public Information, provide, disclose, or otherwise make available to Defense Systems any Non-Public Information; and

B. Alliant shall use any Non-Public Information it obtains only in its capacity as a provider of Propellant or Explosives, absent the prior written consent of the proprietor of Non-Public Information.

III.

It is further ordered, That, Alliant shall deliver a copy of this order to any United States Weapons developer, manufacturer or systems contractor prior to first obtaining any Non-Public Information relating to the developer's, manufacturer's or systems contractor's Weapons either from the Weapons developer, manufacturer, or systems contractor or through the Acquisition; provided that for Non-Public Information described in paragraph I. Section I.(b) of this order, Alliant shall deliver a copy of this order within ten (10) days of the written identification by the Weapons developer, manufacturer or systems contractor.

IV.

It is further ordered, That:

A. Within sixty (60) days after the date this order becomes final, respondent shall submit to the Commission a verified written report setting forth in detail the manner and form in which it intends to comply, is complying, and has complied with paragraphs II and III of this order; 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, respondent shall file a verified written report with the Commission setting forth in detail the manner and form in which it has complied and is complying with this order. To the extent not prohibited by United States Government national security requirements, respondent shall include in its reports information sufficient to identify all United States Weapons developers, manufacturers or systems contractors with whom respondent has

entered an agreement for the research, development, manufacture or sale of Propellant or Explosives.

V.

It is further ordered, That respondent shall notify the Commission at least thirty days prior to any proposed change in respondent, such as dissolution, assignment or sale resulting in the emergence of a successor corporation, the creation or dissolution of subsidiaries or any other change in respondent, that may affect compliance obligations arising out 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 applicable United States Government security requirements, upon written request, and on reasonable notice, respondent shall permit any duly authorized representative of the Commission:

A. Access, during office hours and in the presence of counsel, to inspect and copy all books, ledgers, accounts, correspondence, memoranda and other records and documents in the possession or under the control of respondent relating to any matters contained in this order; and

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

VII.

It is further ordered, That this order shall terminate twenty (20) years from the date this order becomes final.

CONCURRING STATEMENT OF COMMISSIONER MARY L. AZCUENAGA

Today, the Commission accepts a consent agreement that resolves allegations that the acquisition of the stock and assets of Hercules

Aerospace Company, an unincorporated division of Hercules Incorporated, by Alliant Techsystems Inc. may substantially lessen competition in research, development, manufacture and sale of propellant, explosives or weapons. I concur in the finding of reason to believe the law has been violated, but write separately to add two observations about the remedy.

First, the consent order omits the ten-year prior approval provision that the Commission usually imposes in cases brought under Section 7 of the Clayton Act. My vote in favor of accepting the consent order despite this omission is based on the highly unusual facts of this case. I continue to believe that prior approval requirements should be standard in Section 7 cases.

Second, the order prohibits Alliant from misusing or appropriating nonpublic information obtained from a competitor in the development of weapons. Although we have had few similar cases, recently the Commission imposed a similar remedy in Martin Marietta Corp., Dkt. No. 3500 (June 22, 1994). I joined in that decision and again do so here. Nonetheless, I question the extent to which this provision of the order adds to the protection afforded by private contracts to respect confidentiality and the extent to which the Commission can effectively monitor compliance with this requirement. Enforcement experience and further analysis may well suggest a need for different, more effective remedies.

IN THE MATTER OF

FORMU-3 INTERNATIONAL, INC., ET AL.

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

Docket C-3568. Complaint, April 11, 1995--Decision, April 11, 1995

This consent order prohibits, among other things, the Ohio weight-loss centers from misrepresenting the performance, efficacy or safety of any weight-loss program they offer, or the competence or training of their personnel, in the future. The consent order requires the respondents to possess scientific evidence to substantiate future claims, and, in addition, to make certain disclosures in conjunction with weight-loss and safety maintenance claims in the future.

Appearances

For the Commission: *Brenda Doubrava, Phillip Broyles and Christian White.*

For the respondents: *Robert J. Newbold, Canton, OH.*

COMPLAINT

The Federal Trade Commission, having reason to believe that Formu-3 International, Inc., a corporation, Formu-3 of Northern Ohio, Inc., a corporation, and Formu-3 of Southern Ohio, Inc., a corporation (referred to collectively herein as respondents or Formu-3) have 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:

PARAGRAPH 1. Respondent Formu-3 International, Inc., is an Ohio corporation with its office and principal place of business located at 4790 Douglas Circle N.W., Canton, Ohio.

Respondent Formu-3 of Northern Ohio, Inc., is an Ohio corporation with its office and principal place of business located at 4790 Douglas Circle N.W., Canton, Ohio.

Respondent Formu-3 of Southern Ohio, Inc., is an Ohio corporation with its office and principal place of business located at 4790 Douglas Circle N.W., Canton, Ohio.

PAR. 2. Respondents advertise, offer for sale, sell, and otherwise promote throughout much of the United States weight loss and weight maintenance services and products, which respondents make available to consumers at respondents' numerous "Form-You-3 Weight Loss Centers" (centers) in many states. These products also include "food" within the meaning of Sections 12 and 15 of the Federal Trade Commission Act. Through franchised and company-owned centers, respondents are engaged in the sale and offering for sale of low-calorie diet programs providing 800 calories or more per day.

PAR. 3. The acts and practices of respondents alleged in this complaint have been in or affecting commerce, as "commerce" is defined in Section 4 of the Federal Trade Commission Act.

PAR. 4. Respondents have disseminated, or have caused to be disseminated, advertisements for Form-You-3 Weight Loss Centers (also referred to herein as "Formu-3 Weight Loss Centers") services and products, including but not necessarily limited to the attached Exhibits A through M.

PAR. 5. The advertisements referred to in paragraph four, including but not necessarily limited to the attached Exhibits A-K, contain the following statements:

A. LORA JOHNSON LOST 15 ½ POUNDS IN 20 DAYS! (Total Weight Loss 119 Pounds) (Exhibit A)

B. At Formu-3 Weight Loss Centers you can lose 1 SIZE before summer ever gets here - and another 3 SIZES before summer ends!

A nutritiously balanced 5-step program that's EASY-TO-FOLLOW and guaranteed to work if followed as directed.

DEBRA: BEFORE SHE LOST 50 POUNDS WITH FORMU-3 (Exhibit B)

C. Five Months Ago People Said I Was A Heavyweight. Now They Say I'm a Knockout!

LOSE UP TO 30-40 POUNDS BY SPRING!

ROSANNE BERNDT LOST 30 POUNDS IN 60 DAYS!!!

BEFORE: 170 POUNDS (Exhibit C)

D. MARY GRIFFIN LOST 85 POUNDS AND 85 INCHES ON THE FORMU-3 PROGRAM.

Call Formu-3 TODAY and lose 20lb-35lb by THE FIRST OF SUMMER! That's at least 3 SIZES SMALLER than you are now!

SAFE, EFFECTIVE AND NUTRITIONALLY BALANCED! (Exhibit D)

E. LOSE UP TO 25-50 POUNDS IN 10 WEEKS!

SHARON SPEIGLE LOST 66 1/2 Pounds

Safe, effective and nutritionally balanced! (Exhibit E)

F. LOSE UP TO 15-30 POUNDS IN 30 DAYS!

KATHY KLAY LOST 22 POUNDS IN 30 DAYS! TOTAL WEIGHT LOST: 42 Pounds! (Exhibit F)

G. JULIE NARANCIC LOST 21 POUNDS IN 6 WEEKS!

You Can Lose Up To 30 Pounds By Summer! (Exhibit G)

H. JENELLE LOST 15 POUNDS IN 30 DAYS! FROM SIZE 16 TO 12 IN 30 DAYS!

BEFORE FORMU-3 180 POUNDS NOW! 125 POUNDS

Extensive Life Modification program to help KEEP your weight off! (Exhibit H)

I. "I went from size 36 to a size 7 in five months! And I've kept it off for a year and a half because of the Formu-3 program. . .

I was taught how to eat right - and I didn't have to depend on pre-packaged foods like a girl friend of mine did on another program. She had to spend \$50 a week on THEIR pre-packaged food. The Formu-3 program works using real grocery store food." Barbara Schenkel

GUARANTEED if program is followed as directed. (Exhibit I)

J. We'll show you how to keep your weight and extra inches off permanently.

. . . In fact, we've helped many long-time, unsuccessful dieters achieve their goal and stay trim for years. (Exhibit J)

K. YOU'RE JUST ONE CALL AWAY FROM ONE OF AMERICA'S MOST AFFORDABLE WEIGHT LOSS PROGRAMS.... A PROGRAM THAT WORKS! IT'S EASY AT FORMU-3 BECAUSE OF OUR COMMITMENT (sic) TO YOU! WE'LL BE THERE TO MAKE SURE YOU LOSE THAT EXTRA WEIGHT.... AND TO MAKE SURE YOU KEEP IT OFF! (Exhibit K)

PAR. 6. Through the use of the statements contained in the advertisements referred to in paragraph five, including but not necessarily limited to the statements in the advertisements attached as Exhibits A-K, respondents have represented, directly or by implication, that:

A. Form-You-3 Weight Loss Centers customers typically are successful in reaching their weight loss goals;

B. Form-You-3 Weight Loss Centers customers typically are successful in maintaining their weight loss achieved under the Form-You-3 Weight Loss Centers diet program; and

C. Form-You-3 Weight Loss Centers customers typically are successful in reaching their weight loss goals and maintaining their weight loss either long-term or permanently.

PAR. 7. Through the use of the statements contained in the advertisements referred to in paragraph five, including but not necessarily limited to the statements in the advertisements attached

as Exhibits A-K, respondents have represented, directly or by implication, that at the time they made the representations set forth in paragraph six, respondents possessed and relied upon a reasonable basis that substantiated such representations.

PAR. 8. In truth and in fact, at the time respondents made the representations set forth in paragraph six, they did not possess and rely upon a reasonable basis that substantiated such representations. Therefore, respondents' representation as set forth in paragraph seven was, and is, false and misleading.

PAR. 9. The advertisements referred to in paragraph four, including but not necessarily limited to the attached Exhibits E, F, and I contain the following statements:

- A. LOSE UP To 25-50 POUNDS IN 10 WEEKS! (Exhibit E)
- B. LOSE UP TO 15-30 POUNDS IN 30 DAYS! (Exhibit F)
- C. Lose up to 15-30 pounds in 30 days! GUARANTEED if program is followed as directed. (Exhibit I)

PAR. 10. Through the use of the statements contained in the advertisements referred to in paragraph nine, including but not necessarily limited to the statements in the advertisements attached as Exhibits E, F, and I, respondents have represented, directly or by implication, that:

- A. An appreciable number of consumers on the Form-You-3 Weight Loss Centers program lose weight at an average rate of fifty pounds in ten weeks; and
- B. An appreciable number of consumers on the Form-You-3 Weight Loss Centers program lose weight at an average rate of thirty pounds in thirty days.

PAR. 11. In truth and in fact:

- A. An appreciable number of consumers on the Form-You-3 Weight Loss Centers program do not lose weight at an average rate of fifty pounds in ten weeks; and
- B. An appreciable number of consumers on the Form-You-3 Weight Loss Centers program do not lose weight at an average rate of thirty pounds in thirty days.

Therefore, the representations set forth in paragraph ten were, and are, false and misleading.

PAR. 12. Through the use of the statements contained in the advertisements referred to in paragraph nine, including but not necessarily limited to the statements in the advertisements attached as Exhibits E, F, and I, respondents have represented, directly or by implication, that at the time they made the representations set forth in paragraph ten, respondents possessed and relied upon a reasonable basis that substantiated such representations.

PAR. 13. In truth and in fact, at the time respondents made the representations set forth in paragraph ten, they did not possess and rely upon a reasonable basis that substantiated such representations. Therefore, respondents' representation as set forth in paragraph twelve was, and is, false and misleading.

PAR. 14. The advertisements referred to in paragraph four, including but not necessarily limited to the attached Exhibit J, contain the following statement:

A. What other weight loss program helps you lose 3 to 5 lbs. a week without expensive pre-packaged foods, required supplements, strenuous exercise, shots, pills or drugs? (Exhibit J)

PAR. 15. Through the use of the statements contained in the advertisements referred to in paragraph fourteen, including but not necessarily limited to the statement in the advertisement attached as Exhibit J, respondents have represented, directly or by implication, that consumers on the Form-You-3 Weight Loss Centers Program typically lose weight at an average rate of three to five pounds per week.

PAR. 16. In truth and in fact, consumers on the Form-You-3 Weight Loss Centers Program do not typically lose weight at an average rate of three to five pounds per week. Therefore, the representation set forth in paragraph fifteen was, and is, false and misleading.

PAR. 17. Through the use of the statements contained in the advertisements referred to in paragraph fourteen, including but not necessarily limited to the statement in the advertisement attached as Exhibit J, respondents have represented, directly or by implication, that at the time they made the representation set forth in paragraph

fifteen, respondents possessed and relied upon a reasonable basis that substantiated such representation.

PAR. 18. In truth and in fact, at the time respondents made the representation set forth in paragraph fifteen, they did not possess and rely upon a reasonable basis that substantiated such representation. Therefore, respondents' representation as set forth in paragraph seventeen was, and is, false and misleading.

PAR. 19. In the routine course and conduct of their business, respondents have represented during initial sales presentations that consumers will typically reach their desired weight loss goal within the time frame computed for their weight loss program by Form-You-3 Weight Loss Centers personnel.

PAR. 20. Through the use of the statements described in paragraph nineteen, and others not specifically set forth herein, respondents have represented, directly or by implication, that at the time they made the representation set forth in paragraph nineteen, respondents possessed and relied upon a reasonable basis that substantiated such representation.

PAR. 21. In truth and in fact, at the time respondents made the representation set forth in paragraph nineteen they did not possess and rely upon a reasonable basis that substantiated such representation. Therefore, respondents' representation as set forth in paragraph twenty was, and is, false and misleading.

PAR. 22. The advertisements referred to in paragraph four, including but not necessarily limited to the attached Exhibits D-H and L, contain the following statements:

- A. Safe, effective and nutritionally balanced! (Exhibits D and E)
- B. Safe, effective & nutritionally balanced! (Exhibit F)
- C. SAFE and nutritionally balanced (Exhibits G and H)
- D. FORMU-3 IS ONE OF THE NATIONS (sic) MOST AFFORDABLE WEIGHT LOSS PROGRAMS, AND IS DESIGNED TO GET YOUR WEIGHT OFF AS QUICKLY AS IS SAFELY POSSIBLE FOR AN AVERAGE WEEKLY COST OF ONLY \$7.65! (Exhibit L)

PAR. 23. In the routine course and conduct of their business, respondents provide their customers with diet instructions that require said customers, *inter alia*, to come in to a Form-You-3 Weight Loss Center several times per week for monitoring of their progress, including weighing in.

PAR. 24. Through the use of the statements contained in the advertisements referred to in paragraph twenty-two, including but not necessarily limited to the statements in the advertisements attached as Exhibits D-H and L, and through the conduct of the monitoring described in paragraph twenty-three, respondents have represented, directly or by implication, on an ongoing basis to each customer that customers on respondents' weight loss program lose weight safely and do not experience an increased risk of developing health complications.

PAR. 25. In the course of regularly monitoring their customers' weight loss progress, respondents, in some instances, are presented with weight loss results indicating that a customer is losing weight significantly in excess of his or her expected rate of weight loss, which is an indication that the customer may not be consuming all of the calories prescribed by his or her diet instructions. Such conduct could, if not corrected promptly, result in health complications.

PAR. 26. When presented with the weight loss results described in paragraph twenty-five, respondents on many occasions have not disclosed to the customers that failing to follow the diet instructions and consume all of the calories prescribed could result in health complications. This fact would be material to consumers in their purchase and use decisions regarding the diet program. In light of the representation set forth in paragraph twenty-four, said failure to disclose was, and is, a deceptive practice.

PAR. 27. The advertisements referred to in paragraph four, including but not necessarily limited to the attached Exhibits B, G, and L, contain the following statements:

A. \$50 OFF!

OUR REGULAR PROGRAM PRICE!

At Formu-3 Weight Loss Centers you can lose 1 SIZE before summer ever gets here-and another 3 SIZES before summer ends!

Average cost is \$7.65 (includes everything) per week. During this special, average weekly cost is lower. (Exhibit B)

B. You Can Lose Up to 30 Pounds By Summer!

AVG. COST OF: \$7.65 PER WEEK.

INCLUDES EVERYTHING! (Exhibit G)

C. DON'T PANIC..... YOU STILL HAVE A FEW MONTHS! CALL A FORMU-3 WEIGHT LOSS CENTER TODAY AND USE THAT TIME TO TAKE OFF UP TO 25 TO 30 POUNDS UP TO 35 INCHES AND UP TO FOUR DRESS SIZES BEFORE YOU HANG YOUR FIRST HOLIDAY ORNAMENT! FORM-3 IS ONE OF THE NATIONS (sic) MOST

AFFORDABLE WEIGHT LOSS PROGRAMS, AND IS DESIGNED TO GET YOUR WEIGHT OFF AS QUICKLY AS IS SAFELY POSSIBLE FOR AN AVERAGE WEEKLY COST OF ONLY \$7.65! (Exhibit L)

PAR. 28. Through the use of the statements contained in the advertisements referred to in paragraph twenty-seven, including but not necessarily limited to the statements in the advertisements attached as Exhibits B, G, and L, respondents have represented, directly or by implication, that the total cost of losing weight on the Form-You-3 Weight Loss Centers program is the advertised average weekly price multiplied by the number of weeks required for a program participant to achieve his or her weight loss goal.

PAR. 29. In truth and in fact, the total cost of losing weight on the Form-You-3 Weight Loss Centers program is an amount equal to the advertised average weekly price for one full year, or the advertised average weekly price multiplied by fifty-two. Therefore, respondents' representation set forth in paragraph twenty-eight was, and is, false and misleading.

PAR. 30. In advertising the Form-You-3 Weight Loss Centers program, respondents have represented that the total cost of losing weight on the Form-You-3 Weight Loss Centers program is the advertised average weekly price multiplied by the number of weeks required for participants to achieve their weight loss goals. respondents have failed to disclose to consumers that the total cost of losing weight on the Form-You-3 Weight Loss Centers program is the advertised average weekly price for one full year, or the advertised average weekly price multiplied by fifty-two. This fact would be material to consumers in their purchase decisions regarding the program. The failure to disclose this fact, in light of the representation made, was, and is, a deceptive practice.

PAR. 31. In the routine course and conduct of their business, respondents provide participants in their weight loss program with diet instructions that contain, *inter alia*, diet menus. Said diet menus for respondents' program include two food products sold by respondents to be consumed by participants each day. Respondents have given additional diet instructions to participants who choose not to purchase and consume respondents' food products, directing them to substitute certain foods for the two food products listed in the diet menus. Said additional diet instructions, attached as Exhibit M, contain the following statements:

A. WHY SHOULD I USE FORMU-FAST FOOD PRODUCTS?

Because they . . .

- Decrease calories by at least 33% daily.
- Decrease fat by at least 7% daily. (Exhibit M)

PAR. 32. Through the use of the statements referred to in paragraph thirty-one, respondents have represented, directly or by implication, that participants who consume two Formu-Fast food products instead of substituting the foods specified in the additional instructions will decrease daily caloric intake by at least 33% and daily fat intake by at least 70%.

PAR. 33. In truth and fact, participants who consume two Formu-Fast food products instead of substituting the foods specified in the additional instructions will not decrease daily caloric intake by at least 33% and daily fat intake by at least 70%. Therefore, the representations set forth in paragraph thirty-two were, and are, false and misleading.

PAR. 34. Through the use of the statements described in paragraph thirty-one, respondents have represented, directly or by implication, that at the time they made the representations set forth in paragraph thirty-two, respondents possessed and relied upon a reasonable basis that substantiated such representations.

PAR. 35. In truth and in fact, at the time respondents made the representations set forth in paragraph thirty-two they did not possess and rely upon a reasonable basis that substantiated such representations. Therefore, respondents' representation as set forth in paragraph thirty-four was, and is, false and misleading.

PAR. 36. The advertisements referred to in paragraph four, including, but not limited to the attached Exhibit J, contain the following statement:

A. At Formu-3 a certified counselor monitors your progress, offers helpful suggestions and provides ongoing motivation and moral support to keep you on track. (Exhibit J)

PAR. 37. Through the use of the statements contained in the advertisements referred to in paragraph thirty-six, including but not necessarily limited to the statement in the advertisement attached as Exhibit J, respondents have represented, directly or by implication, that counselors employed by Form-You-3 Weight Loss Centers are

certified, through an objective evaluation process, in the treatment of obesity.

PAR. 38. In truth and fact, few, if any, counselors employed by Form-You-3 Weight Loss Centers are certified, through an objective evaluation process, in the treatment of obesity. Therefore, the representation set forth in paragraph thirty-seven was, and is, false and misleading.

PAR. 39. In providing advertisements and promotional materials such as those referred to in paragraph four to its individual franchised centers for the purpose of inducing consumers to purchase their weight loss services and products, respondent Formu-3 International, Inc., has furnished the means and instrumentalities to those centers to engage in the acts and practices alleged in paragraphs five through thirty-eight.

PAR. 40. The acts and practices of respondents as alleged in this complaint constitute deceptive acts or practices in or affecting commerce in violation of Sections 5(a) and 12 of the Federal Trade Commission Act.

EXHIBIT A

**THERE'S STILL
TIME TO LOSE
1 SIZE (10 lbs.)
BY THE
HOLIDAYS!**

LORA JOHNSON LOST 15½
POUNDS IN 20 DAYS!
Total Weight Loss
110 Pounds

There's still time to lose up to 10 or
more pounds by the holidays -
and 10 pounds can make a big
difference in the way you look
and feel this holiday season!

**FIRST
50
CALLERS**

**LOSE
1 DRESS
SIZE
FREE!**

**CALL
TODAY!**

Formu-3
WEIGHT LOSS CENTERS®
OVER 200 LOCATIONS TO BETTER SERVE YOU
See Your Web Any Other Offer.
©1991 Formu-3 International, Inc.

Exhibit A

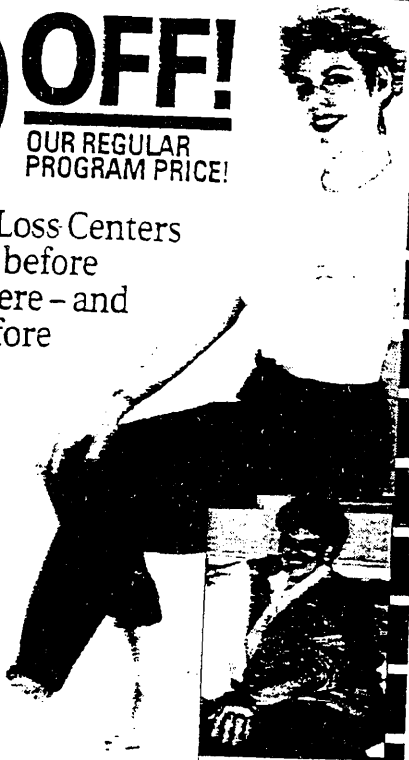
005027

EXHIBIT B

\$50 OFF!
OUR REGULAR PROGRAM PRICE!

At Formu-3 Weight Loss Centers you can lose **1 SIZE** before summer ever gets here - and another **3 SIZES** before summer ends!

- Enjoy regular grocery store food!
- A nutritiously balanced 5-step program that's EASY-TO-FOLLOW and guaranteed to work if followed as directed.
- Average cost is **\$7.65** (includes everything) per week. During this special, average weekly cost is lower.



DEBRA: BEFORE SHE LOST 50 POUNDS WITH FORMU-3

FORMU-3
WEIGHT LOSS CENTERS

©1992 Formu-3 International, Inc. Not valid with any other offer.

Exhibit B

Five Months Ago People Said I Was A Heavyweight.
 Now They Say I'm A Knockout!

**ROSANNE BERNDT
 LOST 30 POUNDS
 IN 60 DAYS!!!**

Lose UP TO 30-40 Pounds By Spring!

- Eat Regular Grocery Store Food!
- SAFE and Nutritionally Balanced!
- Includes a Comprehensive LIFE MODIFICATION PROGRAM designed to make you feel good about YOU!

FOR 3 WEEKS ONLY: \$50 OFF
OUR REGULAR PROGRAM PRICE

SAVE UP TO 73%
over other nationally advertised weight loss programs (based on 40 pounds).

FORMU-3
 WEIGHT LOSS CENTERS™

OVER 300 LOCATIONS TO BETTER SERVE YOU!

Not Valid With Any Other Offer. © 1991 Formu-3 International.

Exhibit C

LOSE UP TO 3 DRESS SIZES OR 20"-35" BY THE FIRST OF SUMMER!



MARY GRIFFIN LOST 85 POUNDS AND 85 INCHES ON THE FORMU-3 PROGRAM.

FOR AN AVERAGE COST OF \$6.70 PER WEEK!

INCLUDES EVERYTHING: WEIGHT LOSS, STABILIZATION AND MAINTENANCE FOR BALANCE OF THE YEAR.

PRE-SUMMER SPECIAL!



Call Formu-3® TODAY and lose 20"-35" by THE FIRST OF SUMMER! That's at least 3 SIZES SMALLER than you are right now!

- LOSE UP TO 15-30 POUNDS YOUR FIRST 30 DAYS!
- EAT REGULAR GROCERY STORE FOOD!
- NO HIDDEN EXTRAS OR REQUIRED PURCHASES!
- SAFE, EFFECTIVE AND NUTRITIONALLY BALANCED!
- UP TO 65% LESS THAN OTHER NATIONALLY ADVERTISED WEIGHT LOSS PROGRAMS! (Based on 50 pound Program.)

CALL TODAY!!!

FORMU-3®
WEIGHT LOSS CENTERS™

OVER 300 LOCATIONS TO BETTER SERVE YOU!

Exhibit D

Not Valid With Any Other Offer.
© 1991 Formu-3 International, Inc.

LOSE UP TO 25-50 POUNDS IN 10 WEEKS!

SHARON SPEIGLE
LOST 66½ Pounds



UP TO 65% LESS THAN OTHER NATIONALLY
ADVERTISED WEIGHT LOSS PROGRAMS.
(Based on 52-Week Program)

AVG. COST **\$7.65** PER WEEK!

INCLUDES EVERYTHING

Weight Loss, Stabilization and Maintenance for Balance of One Year.

- Lose up to 15-30 pounds your first 30 days!
- Safe, effective and nutritionally balanced!
- Eat regular grocery store food!
- No hidden extras or required purchases!

FORMU-3
WEIGHT LOSS CENTERS™

Exhibit E

OVER 300 LOCATIONS TO
BETTER SERVE YOU!

Not Valid With Any Other Offer.
© 1994 Formu-3 International, Inc.


EXHIBIT F

LOSE WEIGHT

BEFORE THE END OF SUMMER!!!

30-DAY WEIGHT AWAY!!!

3 WEEKS ONLY!



LOSE UP TO 15-30 POUNDS IN 30 DAYS!

\$69

INCLUDES EVERYTHING

- NO hidden costs!
- Eat regular grocery store food!
- Safe, effective & nutritionally balanced!
- NO required purchases!

Formu-3

WEIGHT LOSS CENTERS[®]



KATHY KLAY
LOST 22 POUNDS
IN 30 DAYS!
TOTAL WEIGHT LOST:
42 Pounds!

OVER 300 LOCATIONS TO
BETTER SERVE YOU!

Price May Vary According To Location.
Not Valid With Any Other Offer.
©1991 Formu-3 International, Inc.

Exhibit F

EXHIBIT G

AT FORMU-3 WEIGHT LOSS CENTERS

You Can Lose Up To 30 Pounds By Summer!

JULIE NARANCIC
LOST 21 POUNDS
IN 6 WEEKS!

AVG. COST OF:
\$7.65 PER WEEK

INCLUDES EVERYTHING!

- Eat regular grocery store food!
- SAFE and nutritionally balanced
- Affordable for everyone!

CALL TODAY!

OR CALL 1-800-333-NEWU
OVER 300 LOCATIONS
TO BETTER SERVE YOU

FORMU-3
WEIGHT LOSS CENTERS®

©1992 Formu-3 International, Inc.
Not to be used with any other offer.



Exhibit G

EXHIBIT H

AT FORMU-3 WEIGHT LOSS CENTERS

30 DAYS CAN MAKE A BIG DIFFERENCE!

GENELLE LOST 15 POUNDS IN 30 DAYS!



BEFORE FORMU-3
180 POUNDS



FROM SIZE 14 TO 12 IN 30 DAYS!



NOW!
125 POUNDS

30 DAYS FOR 30 DOLLARS!

3 WEEKS ONLY!

- Eat regular grocery store food! ■ SAFE and nutritionally balanced!
- SAVE up to 73% over other nationally advertised weight loss programs based on 40 pounds!
- Extensive Life Modification program to help KEEP your weight off!

NO HIDDEN COSTS!!!

OVER 300 LOCATIONS
TO BETTER SERVE YOU!



WEIGHT LOSS CENTERS

Not Valid With Any Other Offer.
© 1991 Formu-3 International, Inc.

2 WEEKS

FINAL

Exhibit H

FORMU-3® WEIGHT LOSS CENTERS

"I went from size 36 to a size 7 in five months! And I've kept it off

for a year and a half because of the Formu-3 program. . .

... I was taught how to eat right - and I didn't have to depend on pre-packaged foods like a girl friend of mine did on another program. She had to spend \$50 a week on THEIR pre-packaged food. The Formu-3 program works using real grocery store food."

Barbara Schenkel



- The Formu-3 program costs up to 60% less than other weight loss programs!
- No hidden costs!
- No required food supplements!
- Lose up to 15-30 pounds in 30 days!
- **GUARANTEED** if program is followed as directed.

FOR AN AVERAGE WEEKLY COST OF ONLY **\$7.65** **INCLUDES EVERYTHING**
WEIGHT LOSS, STABILIZATION AND MAINTENANCE FOR BALANCE OF ONE YEAR.
BASED ON A 52 WEEK PROGRAM.

NO REQUIRED FOOD SUPPLEMENTS.

Another reason why Formu-3 Weight Loss Centers are America's 1st choice in weight loss.



With Over 300 Locations To Better Serve You.

Please refer every prospecting to nearest Center for information only.

Exhibit I

449

Complaint

EXHIBIT K

FINE ADVERTISING AND MEDIA SERVICES

2 SUMMIT PARK DR., INDEPENDENCE, OHIO 44131
(216) 642-3830 FAX 642-1179

COPY

CLIENT: FORMU-3 WEIGHT LOSS CENTERS
SPOT#: FWL-22
RADIO : :52 (WITH :08 LIVE TAG)
TITLE : COMMITMENT
DATE : DECEMBER 4, 1991

ANCR:
ARE YOU READY TO MAKE A COMMITMENT TO LOSE WEIGHT THIS
YEAR? WELL IF YOU ARE.....ALL YOU HAVE TO DO IS MAKE ONE
SIMPLE CALL!

MUSIC BED:
CALL A FORMU-3 WEIGHT LOSS CENTER TODAY AND TAKE THE
FIRST STEP TO BECOMING THE REAL YOU! THAT'S RIGHT.....YOU'RE
JUST ONE CALL AWAY FROM ONE OF AMERICA'S MOST AFFORDABLE
WEIGHT LOSS PROGRAMS.....A PROGRAM THAT WORKS! IT'S
EASY AT FORMU-3 BECAUSE OF OUR COMMITMENT TO YOU!
WE'LL BE THERE TO MAKE SURE YOU LOSE THAT EXTRA WEIGHT.....
AND TO MAKE SURE YOU KEEP IT OFF!
YOU'LL EAT REGULAR GROCERY STORE FOOD WHILE
ON THE FORMU-3 PROGRAM.....NOT PRE-PACKAGED ENTREES
THAT CAN COST UP TO SEVENTY FIVE DOLLARS EXTRA EVERY
WEEK! SO CALL FORMU-3 TODAY,
AND FOR THE NEXT FEW WEEKS WE'LL EVEN TAKE FIFTY DOLLARS
OFF THE REGULAR PROGRAM PRICE. THAT'S LIKE LOSING TEN
POUNDS FREE! IF YOU'RE READY TO MAKE THE COMMITMENT TO
LOSE WEIGHT.....WE'LL MAKE SURE YOU DO.....AND YOU WILL!
CALL FORMU-3 TODAY.....C'MON.....CALL US!
(:07 LIVE TAG)

Exhibit K

003125

Complaint

119 F.T.C.

EXHIBIT L

FINE ADVERTISING AND MEDIA SERVICES

2 SUMMIT PARK DR., INDEPENDENCE, OHIO 44122
(216) 642-3830 FAX 642-1179

COPY

CLIENT: FORMU-3 WEIGHT LOSS CENTERS
SPOT#: FWL-14
RADIO : :53 (WITH :07 LIVE TAG)
TITLE : LOSE WEIGHT BY THE HOLIDAYS
DATE : AUGUST 16, 1991

ANCR:

DID YOU KNOW THAT FALL IS WHEN MORE PEOPLE DECIDE TO
LOSE WEIGHT THAN AT ANY OTHER TIME? THAT'S PROBABLY
BECAUSE THE HOLIDAYS ARE JUST AROUND THE CORNER.....

MUSIC BED:

DON'T PANIC.....YOU STILL HAVE A FEW MONTHS! CALL A FORMU-3
WEIGHT LOSS CENTER TODAY AND USE THAT TIME TO TAKE OFF
UP TO 25 TO 30 POUNDS.....UP TO 35 INCHES.....AND UP TO FOUR
DRESS SIZES BEFORE YOU HANG YOUR FIRST HOLIDAY ORNAMENT!
FORMU-3 IS ONE OF THE NATIONS MOST AFFORDABLE WEIGHT
LOSS PROGRAMS, AND IS DESIGNED TO GET YOUR WEIGHT OFF
AS QUICKLY AS IS SAFELY POSSIBLE FOR AN AVERAGE WEEKLY
COST OF ONLY \$7.65! NOW.....PICTURE YOURSELF THIS DECEMBER;
IF YOU'RE A SIZE 18, SEE YOURSELF IN A SIZE 12. IF YOU'RE A SIZE
16, PICTURE YOURSELF UNDER THE MISTLETOE IN A SIZE 10! IT CAN
BE YOU.....IT WILL BE YOU! FALL IS THE PERFECT TIME TO START
LOSING WEIGHT. CALL FORMU-3 TODAY AND GET YOUR HEAD
START ON THE HOLIDAYS! C'MON.....CALL US!

(:07 LIVE TAG)

Exhibit L

003120

Complaint

EXHIBIT M



WEIGHT LOSS CENTERS®

SUBSTITUTION OF FORMU-FAST® FOOD PRODUCTS

As a substitution for the Breakfast and Lunch Formu-Fast® Food Products on Levels 1, 2, and 3, add the following:

LUNCH

4 oz. Poultry/Seafood
AND
1 Slice High-Fiber
Low-Calorie Wheat Bread

PLEASE NOTE: When substituting the poultry/ seafood and bread for the Formu-Fast® Food Products, a slower weight loss may occur. When substituting the above, you may have two Formu-Fast® Food Products per day. If the substitution is not used, you may have up to four Formu-Fast® Food Products per day.

WHY SHOULD I USE FORMU-FAST® FOOD PRODUCTS?

Because they...

- Decrease calories by at least 33% daily.
- Decrease fat by at least 70% daily.
- Taste great!
- Appease temptation by providing dessert items.
- Help you develop more control to achieve quicker results.
- Create a feeling of fullness by providing the body with healthful nutrients.
- Provide a rapid, smooth transition from old eating habits to new eating habits.
- Help you to resist the temptation to eat more fattening foods when dining out.
- Can be easily prepared anytime, anywhere!
- Provide the best results possible on your program.

Exhibit M

DECISION AND ORDER

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

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

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

1. Proposed respondent Formu-3 International, Inc., is 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 4790 Douglas Circle N.W., Canton, Ohio.

2. Proposed respondent Formu-3 of Northern Ohio, Inc., is 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 4790 Douglas Circle N.W., Canton, Ohio.

3. Proposed respondent Formu-3 of Northern Ohio, Inc., is 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 4790 Douglas Circle N.W., Canton, Ohio.

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.

O R D E R

DEFINITIONS

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

A. "*Competent and reliable scientific evidence*" shall mean tests, analyses, research, studies, or other evidence, based on the expertise of professionals in the relevant area that has been conducted and evaluated in an objective manner by persons qualified to do so, using procedures generally accepted in the relevant profession or science to yield accurate and reliable results;

B. "*Weight loss program*" shall mean any program designed to aid consumers in weight loss or weight maintenance;

C. A "*broadcast medium*" shall mean any radio or television broadcast, cablecast, home video or theatrical release;

D. For any order-required disclosure in a print medium to be made "clearly and prominently" or in a "clear and prominent" manner, it must be given both in the same type style and in: (1) twelve point type where the representation that triggers the disclosure is given in twelve point or larger type; or (2) the same type size as the representation that triggers the disclosure where that representation is given in a type size that is smaller than twelve point type. For any order-required disclosure given orally in a broadcast medium to be made "clearly and prominently" or in a "clear and prominent manner", the disclosure must be given at the same volume and in the same cadence as the representation that triggers the disclosure.

E. A "*short broadcast advertisement*" shall mean any advertisement of thirty seconds or less duration made in a broadcast medium.

I.

It is ordered, That respondents, Formu-3 International, Inc., a corporation, Formu-3 of Northern Ohio, Inc., a corporation, and

Formu-3 of Southern Ohio, Inc., a corporation, their successors and assigns, and their officers, and respondents' agents, representatives and employees, directly or through any corporation, subsidiary, division or other device, including franchisees or licensees, in connection with the advertising, promotion, offering for sale, or sale of any weight loss program in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

A. Making any representation, directly or by implication, about the success of participants on any weight loss program in achieving or maintaining weight loss or weight control unless, at the time of making any such representation, respondents possess and rely upon competent and reliable scientific evidence substantiating the representation, provided, further, that for any representation that:

1. Any weight loss achieved or maintained through the weight loss program is typical or representative of all or any subset of participants using the program, said evidence shall, at a minimum, be based on a representative sample of:

a. All participants who have entered the program, where the representation relates to such persons; provided, however, that the required sample may exclude those participants who dropped out of the program within two weeks of their entrance, or who were unable to complete the program due to illness, pregnancy, or change of residence; or

b. All participants who have completed a particular phase of the program or the entire program, where the representation only relates to such persons;

2. Any weight loss is maintained long-term, said evidence shall, at a minimum, be based upon the experience of participants who were followed for a period of at least two years from their completion of the active maintenance phase of respondents' program or earlier termination, as applicable; and

3. Any weight loss is maintained permanently, said evidence shall, at a minimum, be based upon the experience of participants who were followed for a period of time after completing the program that is either:

- a. Generally recognized by experts in the field of treating obesity as being of sufficient length for predicting that weight loss will be permanent, or
- b. Demonstrated by competent and reliable survey evidence as being of sufficient duration to permit such a prediction.

B. Representing, directly or by implication, except through endorsements or testimonials referred to in paragraph I.E. herein, that participants of any weight loss program have successfully maintained weight loss, unless respondents disclose, clearly and prominently, and in close proximity to such representation, the statement: "For many dieters, weight loss is temporary."; provided, further, that respondents shall not represent, directly or by implication, that the above-quoted statement does not apply to dieters in respondents' weight loss program; provided, however, that a mere statement about the existence, design, or content of a maintenance program shall not, without more, be considered a representation that participants of any weight loss program have successfully maintained weight loss.

C. Representing, directly or by implication, except through short broadcast advertisements referred to in paragraph I.D. herein, and except through endorsements or testimonials referred to in paragraph I.E. herein, that participants of any weight loss program have successfully maintained weight loss, unless respondents disclose, clearly and prominently, and in close proximity to such representation, the following information:

1. The average percentage of weight loss maintained by those participants;
2. The duration over which the weight loss was maintained, measured from the date that participants ended the active weight loss phase of the program, provided, further, that if any portion of the time period covered includes participation in a maintenance program(s) that follows active weight loss, such fact must also be disclosed; and
3. If the participant population referred to is not representative of the general participant population for respondents' programs:
 - a. The proportion of the total participant population in respondents' programs that those participants represent, expressed in terms of a percentage or actual numbers of participants, or

b. The statement: "Form-You-3 Weight Loss Centers makes no claim that this [these] result[s] is [are] representative of all participants in the Form-You-3 Weight Loss Centers program.";

Provided, further, that compliance with the obligations of this paragraph I.C. in no way relieves respondents of the requirement under paragraph I.A. of this order to substantiate any representation about the success of participants on any weight loss program in maintaining weight loss.

D. Representing, directly or by implication, in short broadcast advertisements, that participants of any weight loss program have successfully maintained weight loss, unless respondents:

1. Include, clearly and prominently, and in immediate conjunction with such representation, the statement: "Check at our centers for details about our maintenance record.";

2. For a period of time beginning with the date of the first broadcast of any such advertisement and ending no sooner than thirty days after the last broadcast of such advertisement, comply with the following procedures upon the first presentation of any form asking for information from a potential client, but in any event before such person has entered into any agreement with respondents:

a. Give to each potential client a separate document entitled "Maintenance Information," which shall include all the information required by paragraph I.B. and subparagraphs I.C.1-3 of this order and shall be formatted in the exact type size and style as the example form below, and shall include the heading (Helvetica 14 pt. bold), lead-in (Times Roman 12 pt.), disclosures (Helvetica 14 pt. bold), acknowledgment language (Times Roman 12 pt.) and signature block therein; provided, further, that no information in addition to that required to be included in the document required by this subparagraph I.D.2 shall be included therein:

programs if the weight loss success or weight loss maintenance success depicted in the advertisement is not representative of what participants in respondents' weight loss programs generally achieve, unless respondents disclose, clearly and prominently, and in close proximity to the endorser's statement of his or her weight loss success or weight loss maintenance success:

1. What the generally expected success would be for Form-You-3 Weight Loss Centers customers in losing weight or maintaining achieved weight loss; provided, however, that in determining the generally expected success for Form-You-3 Weight Loss Centers customers, respondents may exclude those customers who dropped out of the program within two weeks of their entrance or who were unable to complete the program due to illness, pregnancy, or change of residence; or

2. One of the following statements:

- a. "You should not expect to experience these results."
- b. "This result is not typical. You may not do as well."
- c. "This result is not typical. You may be less successful."
- d. "_____s success is not typical. You may not do as well."
- e. "_____s experience is not typical. You may achieve less."
- f. "Results not typical."
- g. "Results not typical of program participants.";

Provided, further, that if the endorsements or testimonials covered by this paragraph are made in, a broadcast medium, any disclosure required by this paragraph must be communicated in a clear and prominent manner and in immediate conjunction with the representation that triggers the disclosure; and

Provided, however, that:

- (i) For endorsements or testimonials about weight loss success, respondents can satisfy the requirements of subparagraph I.E.1. by accurately disclosing the generally expected success in the following phrase: "Form-You-3 Weight Loss Centers clients lose an average of ____ pounds over an average ____ week treatment period"; and
- (ii) If the weight loss success or weight loss maintenance success depicted in the advertisement is representative of what participants of a group or subset clearly defined in the advertisement generally

achieve, then, in lieu of the disclosures required in either subparagraph I.E.1. or 2. herein, respondents may substitute a clear and prominent disclosure of the percentage of all of respondents' customers that the group or subset defined in the advertisement represents.

F. Representing, directly or by implication, the average or typical rate or speed at which participants or prospective participants in any weight loss program have lost or will lose weight, unless at the time of making such representation, respondents possess and rely upon competent and reliable scientific evidence substantiating the representation.

G. Representing, directly or by implication, that participants or prospective participants in respondents, weight loss programs have reached or will reach a specified weight within a specified time period, unless at the time of making such representation, respondents possess and rely upon competent and reliable scientific evidence substantiating the representation.

H. Failing to disclose, clearly and prominently, either (1) to each participant who, after the first two weeks on the program, is experiencing average weekly weight loss that exceeds two percent (2%) of said participant's initial body weight, or three pounds, whichever is less, for at least two consecutive weeks, or (2) in writing to all participants, when they enter the program, that failure to follow the diet instructions and consume the total caloric intake recommended may involve the risk of developing serious health complications.

I. Representing, directly or by implication, the daily, weekly, or monthly price at which any weight loss program can be purchased, unless respondents disclose, clearly and prominently, and in close proximity to such representation, either: (1) the number of days, weeks, or months participants will be obligated to pay the weekly price represented; or (2) the total cost of the weight loss program;

Provided, further, that in broadcast media, if the representation that triggers any disclosure required by this paragraph is oral, the required disclosure must also be made orally.

J. Misrepresenting, directly or by implication, the competence, skill, training, credentials or expertise of any of respondents' employees or any of the employees of respondents' franchisees.

K. Misrepresenting, directly or by implication, through numerical or descriptive terms or any other means, the existence or amount of calories, fat, or any other nutrient or ingredient in any food product, or otherwise misrepresenting the performance, efficacy, safety, nutritional composition, or benefits of any food or drug, as those terms are defined in Section 15 of the Federal Trade Commission Act.

L. Misrepresenting, directly or by implication, the performance, efficacy, price, or safety of any weight loss program.

II.

Nothing in this order shall prohibit respondents from making any representation that is specifically permitted in labeling for any such product by regulations promulgated by the Food and Drug Administration pursuant to the Nutrition Labeling and Education Act of 1990, or by nutrition labeling regulations promulgated by the Department of Agriculture pursuant to the Federal Meat Inspection Act or the Poultry Products Inspection Act.

III.

Nothing in this order shall prohibit respondents from making any representation for any drug that is permitted in labeling for any 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.

IV.

It is further ordered, That respondents shall notify the Commission at least thirty (30) days prior to the effective date of any proposed change in the respondents such as dissolution, assignment, or sale resulting in the emergence of a successor corporation(s), the creation or dissolution of subsidiaries, or any other change in the corporation that may affect compliance obligations arising out of this order.

V.

It is further ordered, That for three (3) years after the last date of dissemination of any representation covered by this order, respondents, or their successors and assigns, shall maintain and upon request make available to the Federal Trade Commission for inspection and copying:

A. All materials that were relied upon in disseminating such representation; and

B. All tests, reports, studies, surveys, demonstrations or other evidence in their possession or control that contradict, qualify, or call into question such representation, or the basis relied upon for such representation, including complaints from consumers.

VI.

It is further ordered, That respondents shall distribute a copy of this order to each of their officers, agents, representatives, independent contractors and employees, who are involved in the preparation and placement of advertisements or promotional materials or in communication with customers or prospective customers or who have any responsibilities with respect to the subject matter of this order; and, for a period of five (5) years from the date of entry of this order, distribute same to all future such officers, agents, representatives, independent contractors and employees.

VII.

It is further ordered, That:

A. Respondent Formu-3 International, Inc., shall distribute a copy of this order to each of its franchisees and licensees and shall contractually bind them to comply with the prohibitions and affirmative requirements of this order; respondent may satisfy this contractual requirement by incorporating such order requirements into its current Operations Manual; and

B. Respondent Formu-3 International, Inc., shall further make reasonable efforts to monitor its franchisees' and licensees' compliance with the order provisions; respondent may satisfy this

requirement by: (1) taking reasonable steps to notify promptly any franchisee or licensee that respondent determines is failing materially or repeatedly to comply with any order provision; (2) providing the Federal Trade Commission with the name and address of the franchisee or licensee and the nature of the noncompliance if the franchisee or licensee fails to comply promptly with the relevant order provision after being so notified; and (3) in cases where that franchisee's or licensee's conduct constitutes a material or repeated violation of the order, diligently pursuing reasonable and appropriate remedies available under its franchise or license agreement and applicable state law to bring about a cessation of that conduct by the franchisee or licensee.

Provided, however, that respondent Formu-3 International, Inc.'s compliance with this Part shall constitute an affirmative defense to any civil penalty action arising from an act or practice of one of respondent's franchisees or licensees that violates this order where respondent: a) has not authorized, approved or ratified that conduct; b) has reported that conduct promptly to the Federal Trade Commission under this Part; and c) in cases where that franchisee's or licensee's conduct constitutes a material or repeated violation of the order, has diligently pursued reasonable and appropriate remedies available under the franchise or license agreement and applicable state law to bring about cessation of that conduct by the franchisee or licensee.

VIII.

It is further ordered, That respondents 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 it has complied with this order.

IN THE MATTER OF

DEL MONTE FOODS COMPANY, ET AL.

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

Docket C-3569. Complaint, April 11, 1995--Decision, April 11, 1995

This consent order requires, among other things, Del Monte Corporation and Pacific Coast Producers to terminate the purchase option agreement and the provisions of the supply agreement that relate to planning for the 1995 canning season within three days after this order becomes final, and to terminate the remaining provisions of the supply agreement by June 30, 1995. In addition, the order requires the California-based respondents to obtain, for ten years, Commission approval before acquiring any stock or assets of a United States canned fruit manufacturer and before entering into a variety of marketing, packing, or other agreements with competitors.

Appearances

For the Commission: *Ronald B. Rowe* and *Marimichael O. Skubel*.

For the respondents: *Terry Calvani* and *Terrence A. Callan*, Pillsbury, Madison & Sutro, San Francisco, CA.

COMPLAINT

The Federal Trade Commission ("Commission"), having reason to believe that Del Monte Foods Company, through its wholly-owned subsidiary Del Monte Corporation, and Pacific Coast Producers have entered into an agreement in violation of Section 7 of the Clayton Act, as amended, 15 U.S.C. 18, and Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45; and it appearing to the Commission that a proceeding in respect thereof would be in the public interest, hereby issues its complaint, pursuant to Section 11(b) of the Clayton Act, 15 U.S.C. 21(b), and Section 5(b) of the Federal Trade Commission Act, 15 U.S.C. 45(b), stating its charges as follows:

THE RESPONDENTS

1. Respondent Del Monte Foods Company is a Maryland corporation, with its office and principal place of business at One Market Plaza, San Francisco, California.

2. Respondent Del Monte Corporation, a wholly-owned subsidiary of Del Monte Foods Company, is a New York corporation, with its office and principal place of business at One Market Plaza, San Francisco, California.

3. Respondent Pacific Coast Producers ("PCP") is a California corporation, with its office and principal place of business at 631 N. Cluff Avenue, Lodi, California.

4. Del Monte Corporation is a leading producer of canned fruit (peaches, pears, fruit cocktail, and fruit mix, which consists primarily of peaches and pears, that are processed and canned) in the United States.

5. PCP is a leading producer of canned fruit in the United States.

6. At all times relevant herein, Del Monte Foods Company and Del Monte Corporation (hereinafter collectively referred to as "Del Monte") and PCP have been and are now engaged in commerce, as "commerce" is defined in Section 1 of the Clayton Act, as amended, 15 U.S.C. 12; and each 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.

DEL MONTE/PCP AGREEMENTS

7. On May 4, 1992, Del Monte Foods Company, through its wholly-owned subsidiary Del Monte Corporation, entered into an agreement with PCP, whereby PCP provides to Del Monte virtually all of PCP's output of canned fruit, canned tomatoes, and canned apricots ("Supply Agreement"). The Supply Agreement between Del Monte and PCP provides that PCP prepares, manufactures, processes, packages and loads for shipping canned fruit. Under the Supply Agreement, Del Monte markets the canned fruit output of PCP. Del Monte makes all the pricing decisions; arranges the "bookings," or orders with the customers; and directs PCP as to what products Del Monte will need manufactured for the coming pack year. Del Monte runs the combined canned fruit businesses of the respondents. The Supply Agreement went into effect on July 1, 1992, continues for six

years, and runs for successive five-year periods unless the Supply Agreement is terminated by either party, upon two years' written notice and a \$10 million penalty.

8. On May 4, 1992, Del Monte Foods Company, through its wholly-owned subsidiary Del Monte Corporation, entered into an agreement with PCP pursuant to which Del Monte acquired and PCP conveyed an exclusive and irrevocable option to purchase certain rights in, and title to, certain assets of PCP, including long term contracts with growers ("Option Agreement").

TRADE AND COMMERCE

9. The relevant line of commerce in which to analyze the effects of the Supply Agreement and Option Agreement is the manufacture and sale of canned fruit.

10. The relevant section of the country in which to analyze the effects of the Supply Agreement and the Option Agreement is the United States.

MARKET STRUCTURE

11. The manufacture and sale of canned fruit in the United States is highly concentrated, whether measured by the Herfindahl-Hirschmann Index or by two-firm and four-firm concentration ratios.

ENTRY CONDITIONS

12. Entry into the manufacture and sale of canned fruit in the United States is difficult and would be neither timely, likely, nor sufficient to prevent anticompetitive effects in the relevant line of commerce in the relevant section of the country.

ACTUAL COMPETITION

13. Prior to entering into the Supply Agreement and the Option Agreement, Del Monte and PCP were actual competitors in the relevant line of commerce in the relevant section of the country. As a result of the Supply Agreement and Option Agreement, PCP has been removed from the market as an independent entity, and Del Monte has acquired the business of PCP.

EFFECTS

14. The effect of the Supply Agreement and the Option Agreement may be substantially to lessen competition in the relevant line of commerce in the relevant section of the country in any of the following ways, among others:

- a. By eliminating direct competition between Del Monte and PCP;
- b. By increasing the likelihood that Del Monte will unilaterally exercise market power; or
- c. By increasing the likelihood of, or facilitating, collusion or coordinated action among firms that manufacture and sell canned fruit.

VIOLATIONS CHARGED

15. The agreements entered into by Del Monte and PCP violate Section 7 of the Clayton Act, 15 U.S.C. 18, and Section 5 of the Federal Trade Commission Act, 15 U.S.C. 45.

DECISION AND ORDER

The Federal Trade Commission having initiated an investigation of the supply agreement entered into between Del Monte Foods Company through its wholly-owned subsidiary, Del Monte Corporation, and Pacific Coast Producers (hereinafter collectively "respondents") and respondents, having been furnished with a copy of a draft complaint that the Bureau of Competition proposed to present to the Commission for its consideration, and which, if issued by the Commission, would charge respondents with violations of the Clayton Act and Federal Trade Commission Act; and

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

The Commission having thereafter considered the matter and having determined that it had reason to believe that the respondents have violated the said Acts, and that complaint should issue stating its charges in that respect, and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of sixty (60) days, 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 Del Monte Foods Company is a Maryland corporation, with its office and principal place of business at One Market Plaza, San Francisco, California.

2. Respondent Del Monte Corporation, a wholly-owned subsidiary of Del Monte Foods Company, is a New York corporation, with its office and principal place of business at One Market Plaza, San Francisco, California.

3. Respondent Pacific Coast Producers is a California corporation, with its office and principal place of business at 631 N. Cluff Avenue, Lodi, California.

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

ORDER

I.

It is ordered, That, as used in this order, the following definitions shall apply:

A. "*Del Monte Corporation*" means Del Monte Corporation, its predecessors, subsidiaries, divisions, groups and affiliates controlled by Del Monte Corporation, and their respective directors, officers, employees, agents, and their respective successors and assigns.

B. "*Del Monte*" means Del Monte Foods Company, its predecessors, subsidiaries (including Del Monte Corporation), divisions, groups and affiliates controlled by Del Monte Foods Company, and their respective directors, officers, employees, agents, and their respective successors and assigns.

C. "*PCP*" means Pacific Coast Producers, its predecessors, subsidiaries, divisions, groups and affiliates controlled by Pacific Coast Producers, and their respective directors, officers, employees, members, agents, and their respective successors and assigns.

D. "*Respondents*" means PCP and Del Monte (including Del Monte Corporation).

E. "*Commission*" means the Federal Trade Commission.

F. "*Canned Fruit*" means peaches, pears, fruit cocktail, and fruit mix, which consists primarily of diced peaches and diced pears, that are processed and canned.

G. "*Option Agreement*" means the Option Agreement between Del Monte Corporation and Pacific Coast Producers entered into on May 4, 1992, pursuant to which Del Monte acquired and PCP conveyed an exclusive and irrevocable option to purchase certain rights in, and title to, certain assets of PCP, including long term contracts with growers.

H. "*Supply Agreement*" means the Supply Agreement between Del Monte Corporation and Pacific Coast Producers entered into on May 4, 1992, pursuant to which Del Monte agreed to purchase virtually all of PCP's output of Canned Fruit, canned tomatoes, and canned apricots.

I. "*Spot Market*" means ad hoc inter-canner transactions for Canned Fruit placed on an irregular basis where all Canned Fruit ordered under such an arrangement is delivered within nine weeks of placing the order.

J. "*Tri Valley Growers*" means Tri Valley Growers, its predecessors, subsidiaries, divisions, groups and affiliates controlled by Tri Valley Growers, and their respective directors, officers, employees, members, agents, and their respective successors and assigns.

II.

It is further ordered, That:

A. Within three (3) days after the date this order becomes final, respondents shall terminate the Option Agreement;

B. Within three (3) days after the date this order becomes final, respondents shall declare null and void the following paragraphs of the Supply Agreement: paragraph two, subparagraphs (b), (c), (e),

and (f), paragraph twenty-three, paragraph twenty-four, and paragraph twenty-five as it relates to the budget for canning after June 30, 1995; and

C. On or before June 30, 1995, respondents shall absolutely and in good faith terminate the Supply Agreement.

III.

It is further ordered, That, for a period of ten (10) years from the date this order becomes final, Del Monte shall not, without the prior approval of the Commission, directly or indirectly, through subsidiaries, partnerships, or otherwise:

A. Acquire any stock, share capital, equity, or other interest in any concern, corporate or non-corporate, engaged, at the time of such acquisition or within the two years preceding such acquisition, in the manufacture of any type of Canned Fruit in the United States; provided, however, that an acquisition shall be exempt from the requirements of this paragraph if it is solely for the purpose of investment and Del Monte will not hold more than one percent of the shares of any publicly traded class of security; or

B. Acquire any assets, other than in the ordinary course of business, used for or used anytime within the two years preceding such acquisition (and still suitable for use for) the manufacture of any type of Canned Fruit in the United States; provided, however, that an acquisition of assets will be exempt from the requirements of this paragraph if the purchase price of the assets-to-be-acquired is less than \$1,500,000.00, and the purchase price of all assets used for, or previously used for (and still suitable for use for) the manufacture of any type of Canned Fruit in the United States that Del Monte has acquired from the same person (as that term is defined in the premerger notification rules, 16 CFR 801.1(a)(1)) in the twelve-month period preceding the proposed acquisition, when aggregated with the purchase price of the to-be-acquired assets, does not exceed \$1,500,000.

IV.

It is further ordered, That, for a period of ten (10) years from the date this order becomes final, unless Del Monte is required to seek

prior approval from the Commission pursuant to paragraph III, and unless Del Monte has obtained such prior approval, Del Monte shall not, without providing advance written notification to the Commission, directly or indirectly, through subsidiaries, partnerships, or otherwise, acquire any assets, other than in the ordinary course of business, used for or used anytime within the two years preceding such acquisition for (and still suitable for use for) the manufacture of any type of Canned Fruit in the United States.

The notification required by this paragraph shall be provided to the Commission at least thirty (30) days prior to the acquisition. Such notification shall include a description of the assets to be acquired, the purchase price, the name of the person from whom the assets are to be acquired, including the name of the individual employed by such person that is most knowledgeable about the proposed acquisition, Del Monte's purpose in acquiring the assets from such person, and the use to which Del Monte intends to put such assets. Del Monte shall comply with reasonable requests from Commission staff for additional information within ten (10) days of service of such requests.

V.

It is further ordered, That, for a period of ten (10) years from the date this order becomes final, Del Monte shall not, without the prior approval of the Commission, directly or indirectly, through subsidiaries, partnerships, or otherwise:

A. Except with respect to agreements covered by paragraphs VII and VIII, enter into any agreement or other arrangement to purchase or market any type of Canned Fruit with any corporate or non-corporate entity, engaged, at the time of entering into such agreement or other arrangement or within two years preceding entering into such agreement or other arrangement, in the manufacture of any type of Canned Fruit in the United States; provided, however, that entering into such an agreement or other arrangement will be exempt from the requirements of this paragraph if the agreement or other arrangement is for the purchase of Canned Fruit on the Spot Market; or

B. Enter into any agreement or other arrangement with Tri Valley Growers to have any type of Canned Fruit manufactured on Del Monte's behalf.

VI.

It is further ordered, That

A. For a period of five (5) years from the date this order becomes final, Del Monte shall not, without the prior approval of the Commission, directly or indirectly, through subsidiaries, partnerships, or otherwise, except with respect to agreements covered by paragraphs V, VII, and VIII, enter into any agreement or other arrangement to have Canned Fruit manufactured on Del Monte's behalf ("co-pack agreement") with any corporate or non-corporate entity, engaged, at the time of entering into such co-pack agreement or within the two years preceding entering into such co-pack agreement, in the manufacture of any type of Canned Fruit in the United States;

B. For a period beginning on the fifth anniversary of the date this order becomes final until ten years from the date this order becomes final, Del Monte shall not, without providing advance written notification to the Commission, directly or indirectly, through subsidiaries, partnerships, or otherwise, except with respect to agreements covered by paragraphs V, VII, and VIII, enter into any agreement or other arrangement to have Canned Fruit manufactured on Del Monte's behalf ("co-pack agreement") with any corporate or non-corporate entity, engaged, at the time of entering into such co-pack agreement or within the two years preceding entering into such co-pack agreement, in the manufacture of any type of Canned Fruit in the United States. Said notification shall be provided to the Commission by Del Monte thirty (30) days before the entity begins manufacturing the Canned Fruit pursuant to such co-pack agreement. Said notification shall include a copy of the proposed co-pack agreement and all schedules and attachments. Del Monte shall comply with reasonable requests from Commission staff for additional information concerning such co-pack agreements within ten (10) days of service of such requests.

VII.

It is further ordered, That, for a period of ten (10) years from the date this order becomes final, respondents shall not, without the prior approval of the Commission, directly or indirectly, through

subsidiaries, partnerships, or otherwise, enter into an agreement requiring PCP to manufacture any type of Canned Fruit on behalf of Del Monte ("co-pack agreement"); provided, however, that such a co-pack agreement between Del Monte and PCP will be exempt from the requirements of this paragraph if the aggregate of all co-pack agreements entered into in any calendar year meet all of the following criteria: 1) the amount of retail sizes (net weight under two pounds) does not exceed ten percent of PCP's output of Canned Fruit, measured in basic cases (24 2 ½ can sizes), manufactured in the same year as the Canned Fruit manufactured pursuant to the co-pack agreements; 2) the amount of peaches grown by PCP used for the co-pack agreements does not exceed 8,000 tons in any year and none of PCP's peaches is used for retail sizes manufactured pursuant to the co-pack agreements; and 3) the total amount of the Canned Fruit manufactured pursuant to the co-pack agreements a) in each of the years 1995 and 1996 constitutes forty percent or less of PCP's output of Canned Fruit manufactured in each of those years, measured in basic cases; and b) in each year thereafter constitutes thirty percent or less of PCP's output of Canned Fruit manufactured in that year, measured in basic cases.

VIII.

It is further ordered, That, for a period of ten (10) years from the date this order becomes final, unless respondents are required to seek prior approval from the Commission pursuant to paragraph VI, and unless respondents have obtained such prior approval, respondents shall not, without providing advance written notification to the Commission, directly or indirectly, through subsidiaries, partnerships, or otherwise, enter into a co-pack agreement with each other. Said notification shall be provided to the Commission by PCP on or before March 1 of each year in which Del Monte and PCP plan to enter into a co-pack agreement. Said notification shall include a copy of the proposed co-pack agreement, all schedules and attachments, the amount of the planned co-pack stated in basic cases (24 2 ½ can sizes) and the amount, stated in basic cases, for PCP's planned production of Canned Fruit for the same year.

IX.

It is further ordered, That:

A. Within thirty (30) days after the date this order becomes final and every sixty (60) days thereafter until the Supply Agreement is terminated, respondents shall submit to the Commission a verified written report setting forth in detail the steps taken to comply with paragraph II of the order; and

B. One year (1) from the date this order becomes final, annually for the next nine (9) years on the anniversary of the date this order becomes final, and at 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 each has complied and is complying with the provisions of this order.

X.

It is further ordered, That each of the respondents shall notify the Commission at least thirty (30) days prior to any proposed change in such respondent such as dissolution, assignment, or sale resulting in the emergence of a successor corporation, or the creation or dissolution of subsidiaries or any other change in such respondent that may affect compliance obligations arising out of the order.

XI.

It is further ordered, That, for the purposes of determining or securing compliance with this order, and subject to any legally recognized privilege, upon written request and on reasonable notice to respondents, each of the 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 and other records and documents in the possession or under the control of such respondent relating to any matters contained in this order; and

B. Upon five days' notice to such respondent and without restraint or interference from it, to interview officers, directors, or employees

of such respondent, who may have counsel present, regarding such matters.

CONCURRING STATEMENT OF COMMISSIONER ROSCOE B. STAREK, III

Some provisions of the present order -- paragraph VII is the extreme example -- seem to prescribe the behavior of Del Monte and Pacific Coast Producers ("PCP") with an unfortunate degree of detail. As a general proposition, I prefer clear, simple, easily enforceable cease-and-desist language over orders that establish complex metes and bounds for permissible conduct.

In this case, however, the order is unlikely to place undue constraints on the parties' operations. In particular, the "regulatory"-looking proviso to paragraph VII clearly constitutes a substantial accommodation -- *i.e.*, an exception to what would otherwise be a moratorium on co-pack arrangements between Del Monte and PCP -- designed to allow the parties to realize efficiencies. To the extent that the parties need even more latitude than that proviso affords, paragraph VII allows them to seek the Commission's approval for a more extensive co-pack arrangement. Thus, if the parties wish to expand their co-pack agreement beyond what the proviso to paragraph VII contemplates, the paragraph operates as it should: it puts on the parties the burden of establishing that a more extensive arrangement will yield net efficiencies.

IN THE MATTER OF

HEALTHSOUTH REHABILITATION CORPORATION

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

Docket C-3570. Complaint, April 12, 1995--Decision, April 12, 1995

This consent order requires, among other things, HEALTHSOUTH, an Alabama-based corporation, to divest Nashville Rehabilitation Hospital and related assets in Nashville, TN. within twelve months to a Commission approved entity. If the divestiture is not completed on time, the Commission is permitted to appoint a trustee to complete the transaction. In addition, the consent order requires HEALTHSOUTH to terminate management contracts to operate rehabilitation units at Medical Center East in Birmingham, AL. and Roper Hospital in Charleston, S.C. Also, the consent order requires HEALTHSOUTH, for ten years, to obtain Commission approval before merging, by acquisition, lease, management contract or otherwise, any of its rehabilitation hospital facilities in any of the three areas with any competing facilities in those areas.

Appearances

For the Commission: *Oscar Voss* and *Mark Horoschak*.

For the respondent: *Jeffrey Schmidt* and *Todd Miller*, Pillsbury, Madison & Sutro, Washington, D.C.

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, having reason to believe that HEALTHSOUTH Rehabilitation Corporation (hereinafter sometimes referred to as "respondent" or "HEALTHSOUTH") has entered into an agreement whereby HEALTHSOUTH will merge with ReLife, Inc. ("ReLife"); that the merger agreement violates Section 5 of the Federal Trade Commission Act, 15 U.S.C. 45, as amended; 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; and it appearing to the Commission that a proceeding by it in respect thereof would be in the

public interest, the Commission hereby issues its complaint, pursuant to Section 11(b) of the Clayton Act, 15 U.S.C. 21(b), and Section 5(b) of the Federal Trade Commission Act, 15 U.S.C. 45(b), stating its charges as follows:

I. DEFINITIONS

PARAGRAPH 1. For purposes of this complaint, the following definitions shall apply:

A. "*Rehabilitation hospital facility*" means a hospital, or distinct part thereof or unit therein with beds licensed as hospital beds, which specializes in the provision of comprehensive, acute inpatient medical rehabilitation care to patients requiring intensive, multidisciplinary rehabilitation treatment programs, such as patients suffering from conditions such as stroke, head injury, spinal cord injury, amputation, severe fractures, or neuromuscular diseases.

B. To "*operate*" a rehabilitation hospital facility means to own, lease, manage, or otherwise control or direct the operations of a rehabilitation hospital facility, directly or indirectly.

II. THE PARTIES

PAR. 2. Respondent HEALTHSOUTH Rehabilitation Corporation is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Delaware, with its office and principal place of business at Two Perimeter Park South, Birmingham, Alabama. HEALTHSOUTH operates more than 300 rehabilitation health care facilities, including more than 40 rehabilitation hospital facilities, in 34 states. Among the rehabilitation hospital facilities HEALTHSOUTH operates are:

A. A rehabilitation hospital facility within Medical Center East, a general acute care hospital in Birmingham, Alabama;

B. Trident Neurosciences Center, a rehabilitation hospital in Charleston, South Carolina; and

C. Vanderbilt Stallworth Rehabilitation Hospital, a rehabilitation hospital in Nashville, Tennessee.

PAR. 3. ReLife, Inc. is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Delaware, with its office and principal place of business at 813 Shades Creek Parkway, Suite 300, Birmingham, Alabama. ReLife operates more than 45 rehabilitation health care facilities, including more than 15 rehabilitation hospital facilities, in 12 states. Among the rehabilitation hospital facilities ReLife operates are:

A. Lakeshore Hospital, a rehabilitation hospital in Birmingham, Alabama, as well as rehabilitation hospital facilities within Bessemer Carraway Medical Center, Brookwood Medical Center, and Carraway Methodist Medical Center, all general acute care hospitals in Birmingham, Alabama or adjacent communities in Jefferson County, Alabama;

B. A rehabilitation hospital facility within Roper Hospital, a general acute care hospital in Charleston, South Carolina; and

C. Nashville Rehabilitation Hospital in Nashville, Tennessee, a general acute care hospital in Nashville, Tennessee which contains a rehabilitation hospital facility, as well as a rehabilitation hospital facility within Sumner Memorial Hospital, a general acute care hospital in Gallatin, Tennessee, northeast of Nashville.

III. JURISDICTION

PAR. 4. HEALTHSOUTH and ReLife are, and at all times relevant herein have been, engaged in or affecting commerce, as "commerce" is defined in Section 1 of the Clayton Act, as amended, 15 U.S.C. 12. The businesses of HEALTHSOUTH, ReLife, and the HEALTHSOUTH- or ReLife-operated rehabilitation hospital facilities identified in paragraphs two and three above, at all times relevant herein, have been and are now in or affecting commerce, as "commerce" is defined in Section 4 of the Federal Trade Commission Act, as amended, 15 U.S.C. 44.

IV. THE PROPOSED ACQUISITION

PAR. 5. On or about September 18, 1994, HEALTHSOUTH entered into an agreement with ReLife, under which ReLife would become a wholly-owned subsidiary of HEALTHSOUTH, through the merger of a HEALTHSOUTH subsidiary into ReLife. The value of

the consideration to be given by HEALTHSOUTH to ReLife's shareholders is approximately \$180 million.

V. NATURE OF TRADE AND COMMERCE

PAR. 6. For purposes of this complaint, the relevant line of commerce in which to analyze the proposed acquisition is the production and sale by rehabilitation hospital facilities of comprehensive, acute inpatient medical rehabilitation services, and/or any narrower group of services contained therein.

PAR. 7. For purposes of this complaint, the relevant sections of the country are:

A. The "Birmingham metropolitan area," consisting of Blount, Jefferson, St. Clair, and Shelby counties in Alabama;

B. The "Charleston metropolitan area," consisting of Berkeley, Charleston, and Dorchester counties in South Carolina; and

C. The "Nashville metropolitan area," consisting of Cheatham, Davidson, Dickson, Robertson, Rutherford, Sumner, Williamson, and Wilson counties in Tennessee.

VI. MARKET STRUCTURE

PAR. 8. The relevant markets -- *i.e.*, the relevant line of commerce in the relevant sections of the country -- are highly concentrated, whether measured by the Herfindahl-Hirschmann Index ("HHI") or by four-firm concentration ratios.

VII. ENTRY CONDITIONS

PAR. 9. Entry into the relevant markets is difficult. Entry is difficult due to, among other things, certificate-of-need regulation of the establishment of new rehabilitation hospital facilities in the States of Alabama, South Carolina, and Tennessee.

VIII. COMPETITION

PAR. 10. In each relevant market, the rehabilitation hospital facilities operated by HEALTHSOUTH and ReLife are actual and potential competitors.

IX. EFFECTS

PAR. 11. The effects of the aforesaid acquisition, if consummated, may be substantially to lessen competition in the relevant markets in the following ways, among others:

A. By eliminating actual and potential competition between the rehabilitation hospital facilities operated by HEALTHSOUTH and ReLife;

B. By significantly increasing the already high levels of concentration in the relevant markets;

C. By eliminating the rehabilitation hospital facilities operated by ReLife from the relevant markets as substantial, independent competitive forces;

D. By increasing the possibility of collusion or interdependent coordination by the remaining firms in the relevant markets; and

E. By denying patients, physicians, third-party payers, and other consumers of the benefits of free and open competition based on price, quality, and service.

X. VIOLATIONS CHARGED

PAR. 12. The merger agreement described in paragraph five above violates Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45.

PAR. 13. The merger described in paragraph five above, if consummated, would violate Section 7 of the Clayton Act, as amended, 15 U.S.C. 18, and Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45.

DECISION AND ORDER

The Federal Trade Commission ("Commission"), having initiated an investigation of the proposed merger of ReLife, Inc. with HEALTHSOUTH Rehabilitation Corporation ("HEALTHSOUTH"), and the respondent having been furnished thereafter with a copy of a draft of complaint which the Bureau of Competition proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge respondent with a violation of Section 7 of the Clayton Act, as amended, 15 U.S.C. 18, and Section

5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45; 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 of complaint, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondent that the law has been violated as alleged in such complaint, and waivers and other provisions as required by the Commission's Rules; and

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

1. Respondent HEALTHSOUTH 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 Two Perimeter Park South, Birmingham, Alabama.

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

ORDER

I.

It is ordered, That as used in this order, the following definitions shall apply:

A. "*Respondent*" or "*HEALTHSOUTH*" means HEALTHSOUTH Rehabilitation Corporation, its predecessors, subsidiaries, divisions, and partnerships, joint ventures, groups, and affiliates controlled by HEALTHSOUTH; their respective directors, officers, employees,

agents, and representatives; and their respective successors and assigns.

B. The "*Acquisition*" means the merger of ReLife, Inc. with HEALTHSOUTH, pursuant to their merger agreement dated September 18, 1994.

C. "*Rehabilitation hospital facility*" means a hospital, or distinct part thereof or unit therein with beds licensed as hospital beds, that specializes in the provision of comprehensive, acute inpatient medical rehabilitation care to patients requiring intensive, multidisciplinary rehabilitation treatment programs, such as patients suffering from stroke, head injury, spinal cord injury, amputation, severe fractures, or neuromuscular diseases.

D. To "*acquire*" a rehabilitation hospital facility means to directly or indirectly, through subsidiaries, partnerships, or otherwise, acquire the whole or any part of the stock, share capital, equity, or other interest in a person who operates the rehabilitation hospital facility; acquire any assets of the rehabilitation hospital facility; enter into any agreement or other arrangement to obtain direct or indirect ownership, management, or control of the rehabilitation hospital facility or any part thereof, including but not limited to, a lease of or management contract for any such rehabilitation hospital facility, or an agreement to replace the rehabilitation hospital facility with a new rehabilitation hospital facility to be operated by respondent; or acquire or otherwise obtain the right to designate, directly or indirectly, directors or trustees of any rehabilitation hospital facility.

E. To "*operate*" a rehabilitation hospital facility means to own, lease, manage, or otherwise control or direct the operations of a rehabilitation hospital facility, directly or indirectly.

F. "*Affiliate*" means any entity whose management and policies are controlled in any way, directly or indirectly, by the person with whom it is affiliated.

G. "*Relevant market area*" means each of the following areas:

1. The "Birmingham metropolitan area," consisting of Blount, Jefferson, St. Clair, and Shelby counties in Alabama;
2. The "Charleston metropolitan area," consisting of Berkeley, Charleston, and Dorchester counties in South Carolina; and
3. The "Nashville metropolitan area," consisting of Cheatham, Davidson, Dickson, Robertson, Rutherford, Sumner, Williamson, and Wilson counties in Tennessee.

H. "*Person*" means any natural person, partnership, corporation, company, association, trust, joint venture, or other business or legal entity, including any governmental agency.

I. "*Commission*" means the Federal Trade Commission.

J. "*Material confidential information*" means competitively sensitive or proprietary information not independently known to respondent from sources other than the rehabilitation hospital facility to which that information pertains, including but not limited to customer lists, price lists, marketing methods, patents, technologies, processes, or other trade secrets.

II.

It is further ordered, That:

A. Respondent shall divest, absolutely and in good faith, within twelve (12) months of the date this order becomes final, all of its rights, title, and interests in and to all tangible and intangible assets, businesses, goodwill, properties, lands, licenses, and leases relating to Nashville Rehabilitation Hospital, a general acute care hospital in Nashville, Tennessee which contains a rehabilitation hospital facility ("assets to be divested"). Respondent shall divest the assets only to an acquirer or acquirers that receive the prior approval of the Commission, and only in a manner that receives the prior approval of the Commission. Respondent may, but is not required to, divest to said acquirer(s) the management contract under which ReLife, Inc. operates the rehabilitation hospital facility at Sumner Memorial Hospital in Gallatin, Tennessee, or otherwise transfer operation of that facility to said acquirer(s), if Sumner Memorial consents to the transfer. The purpose of the divestiture is to ensure the continuation of the rehabilitation hospital facility of Nashville Rehabilitation Hospital as an ongoing, viable rehabilitation hospital facility, and to remedy the lessening of competition resulting from the Acquisition as alleged in the Commission's complaint.

B. Respondent shall unconditionally terminate, absolutely and in good faith, the following management contracts, and cease operating the rehabilitation hospital facilities to which those contracts pertain:

1. By no later than October 1, 1995, the Rehabilitation Unit Management Agreement between ReLife, Inc. and Roper Hospital,

dated December 6, 1991, under which ReLife operates the rehabilitation hospital facility at Roper Hospital in Charleston, South Carolina; and

2. Within ninety (90) days of the date this order becomes final, the Consulting Services Contract between HEALTHSOUTH Rehabilitation Corp. and Medical Center East, Inc. dated January 1, 1990, as amended, under which HEALTHSOUTH operates the rehabilitation hospital facility at Medical Center East in Birmingham, Alabama.

Provided, however, that respondent may contract with Medical Center East to provide to that hospital's rehabilitation hospital facility the services of licensed physical, occupational, or speech therapists, so long as the therapists provided by respondent do not perform managerial functions at the facility, or supervise personnel except other therapists provided by respondent.

C. By no later than the termination of each contract identified in paragraph II.B. above, respondent shall enter into an agreement with the hospital whose rehabilitation hospital facility was operated under such contract (the "managed hospital"), that:

1. Prohibits respondent from using, in connection with respondent's operation of any rehabilitation hospital or other health care facility in the relevant market area where the managed hospital is located, any material confidential information of the managed hospital's rehabilitation hospital facility; and

2. Confers upon the managed hospital a legal right to enforce the prohibition set forth above in paragraph II.C.1.

D. Respondent shall comply with all terms of the Agreement to Hold Separate, attached hereto and made a part hereof as Appendix I. Said Agreement to Hold Separate shall continue in effect until such time as respondent has fulfilled the divestiture requirements of this order or until such other time as the Agreement to Hold Separate provides.

E. Pending the divestiture required by paragraph II.A. above, and the contract terminations required by paragraph II.B. above, respondent shall take such actions as are necessary to maintain the viability, competitiveness, and marketability of the assets to be divested and of the rehabilitation hospital facilities operated under the

contracts to be terminated, and to prevent the destruction, removal, wasting, deterioration, or impairment of any of those assets, except for ordinary wear and tear.

F. A condition of approval by the Commission of the divestiture required by paragraph II.A. shall be a written agreement by the acquirer that it will not, for a period of ten (10) years from the date of divestiture, directly or indirectly, through subsidiaries, partnerships, or otherwise, without the prior approval of the Commission, sell or otherwise transfer all or substantially all of the rehabilitation hospital facility of Nashville Rehabilitation Hospital to any person who operates, or will operate immediately following such sale or transfer, any other rehabilitation hospital facility in the Nashville metropolitan area as defined in paragraph I.G.3. above.

III.

It is further ordered, That:

A. If the respondent has not divested, absolutely and in good faith and with the Commission's prior approval, the assets to be divested identified in paragraph II.A. above, in accordance with this order, within twelve (12) months of the date this order becomes final, the Commission may appoint a trustee to divest such assets. In the event that the Commission or the Attorney General brings an action for any failure to comply with this order or in any way relating to the Acquisition, pursuant to Section 5(l) of the Federal Trade Commission Act, 15 U.S.C. 45(l), or any other statute enforced by the Commission, the respondent shall consent to the appointment of a trustee in such action. 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 appointment of a trustee pursuant to Section 5(l) of the Federal Trade Commission Act, 15 U.S.C. 45(l), or any other statute enforced by the Commission, for any failure by the respondent to comply with this order.

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

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

2. Subject to the prior approval of the Commission, the trustee shall have the exclusive power and authority to divest the assets identified in paragraph II.A. above.

3. Within ten (10) days after appointment of the trustee, respondent shall execute a trust agreement that, subject to the prior approval of the Commission and, in the case of a court-appointed trustee, of the court, transfers to the trustee all rights and powers necessary to permit the trustee to effect the 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.B.3. to accomplish the divestiture, which shall be subject to the prior approval of the Commission. If, however, at the end of the twelve-month period, the trustee has submitted a plan of divestiture or believes that divestiture can be achieved within a reasonable time, the divestiture period may be extended by the Commission, or in the case of a court-appointed trustee, by the court; provided however, the Commission may extend this period only two (2) times.

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

6. The trustee shall use his or her best efforts to negotiate the most favorable price and terms available in each contract that is

submitted to the Commission, subject to the respondent's absolute and unconditional obligation to divest at no minimum price. The divestiture shall be made in the manner and to acquirer[s] as set out in paragraph II of this order; provided, however, if the trustee receives *bona fide* offers from more than one acquiring entity, and if the Commission determines to approve more than one such acquiring entity, the trustee shall divest to the acquiring entity selected by respondent from among those approved by the Commission.

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

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

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

IV.

It is further ordered, That, for a period of ten (10) years from the date this order becomes final, respondent shall not, without the prior approval of the Commission, directly or indirectly, through subsidiaries, partnerships, or otherwise:

A. Acquire any stock, share capital, equity, or other interest in any person who operates any rehabilitation hospital facility in any relevant market area;

B. Acquire any assets of any rehabilitation hospital facility in any relevant market area;

C. Enter into any agreement or other arrangement to obtain direct or indirect ownership, management, or control of any rehabilitation hospital facility or any part thereof in any relevant market area, including but not limited to, a lease of or management contract for any such rehabilitation hospital facility, or an agreement to replace a rehabilitation hospital facility operated by another person with a rehabilitation hospital facility to be operated by respondent;

D. Acquire or otherwise obtain the right to designate, directly or indirectly, directors or trustees of any rehabilitation hospital facility in any relevant market area; or

E. Permit any rehabilitation hospital facility it operates in any relevant market area to be acquired (in whole or in part, by stock acquisition, asset acquisition, lease, management contract, establishment of a replacement facility, right to designate directors or trustees, or otherwise) by any person who operates, or will operate immediately following such acquisition, any other rehabilitation hospital facility in that relevant market area.

Provided, however, that prior approval shall not be required by this paragraph IV for:

1. The establishment of a new rehabilitation hospital facility (other than as a replacement for a rehabilitation hospital facility, not

operated by respondent, in any relevant area, pursuant to an agreement or understanding between respondent and the person operating the replaced facility);

2. Any transaction otherwise subject to this paragraph IV of this order if the fair market value of (or, in case of a purchase acquisition, the consideration to be paid for) the rehabilitation hospital facility or part thereof to be acquired does not exceed five hundred thousand dollars (\$500,000);

3. Any transaction otherwise subject to this paragraph IV of this order if the rehabilitation hospital facility in question is already operated by respondent (unless respondent is required by paragraph II of this order to cease operating the facility); or

4. The acquisition of products or services in the ordinary course of business.

V.

It is further ordered, That, for a period of ten (10) years from the date this order becomes final, respondent shall not, directly or indirectly, through subsidiaries, partnerships or otherwise, without providing advance written notification to the Commission, consummate any joint venture or other arrangement with any rehabilitation hospital facility in any relevant market area not operated by respondent, for the joint establishment or operation of any new rehabilitation hospital service, facility, or part thereof in that relevant market area. Such advance notification shall be filed immediately upon respondent's issuance of a letter of intent for, or execution of an agreement to enter into, such a transaction, whichever is earlier.

Said notification required by this paragraph V of this order shall be given on the Notification and Report Form set forth in the Appendix to Part 803 of Title 16 of the Code of Federal Regulations (as amended), 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 need not be made to the United States Department of Justice, and notification is required only of respondent and not of any other party to the transaction. Respondent is not required to observe any waiting period after making said notification required by this paragraph V.

Respondent shall comply with reasonable requests by the Commission staff for additional information concerning any transaction subject to this paragraph V of this order, within fifteen (15) days of receipt of such requests.

Provided, however, that no transaction shall be subject to this paragraph V of this order if:

A. The fair market value of the assets to be contributed to the joint venture or other arrangement, by rehabilitation hospital facilities not operated by respondent, does not exceed five hundred thousand dollars (\$500,000);

B. The fair market value of the assets to be contributed to the joint venture or other arrangement by respondent does not exceed five hundred thousand dollars (\$500,000);

C. The service, facility, or part thereof to be established or operated in a transaction subject to this order is to engage in no activities other than the provision of the following services: laundry; data processing; purchasing; materials management; billing and collection; dietary; industrial engineering; maintenance; printing; security; records management; laboratory testing; personnel education, testing, or training; or health care financing (such as through a health maintenance organization or preferred provider organization); or

D. Notification is required to be made, and has been made, pursuant to Section 7A of the Clayton Act, 15 U.S.C. 18a, or prior approval by the Commission is required, and has been requested, pursuant to paragraph IV of this order.

VI.

It is further ordered, That, for a period of ten (10) years from the date this order becomes final, respondent shall not sell or otherwise transfer to any other person all or substantially all of any rehabilitation hospital facility it operates in any relevant market area (except pursuant to a divestiture required by paragraph II of this order), unless the acquiring person files with the Commission, prior to the closing of such acquisition, a written agreement to be bound by the provisions of this order as applicable to the facility and the relevant market area in which the acquired facility is located, which

agreement respondent shall require as a condition precedent to the acquisition.

VII.

It is further ordered, That:

A. Within sixty (60) days after the date this order becomes final and every sixty (60) days thereafter until the respondent has fully complied with paragraphs II and III of this order, the respondent shall submit to the Commission a verified written report setting forth in detail the manner and form in which it intends to comply, is complying, and has complied with paragraphs II and III of this order. Respondent shall include in its compliance reports, among other things that are required from time to time, a full description of the efforts being made to comply with paragraphs II and III of the order, including a description of all substantive contacts or negotiations for the divestiture of the assets identified in paragraph II.A. above, the steps taken to terminate the contracts identified in paragraph II.B. above, and the identity of all parties contacted. Respondent shall also include in its compliance reports, subject to any legally recognized privilege, copies of all written communications to and from such parties, all internal memoranda, and all reports and recommendations concerning divestiture.

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

VIII.

It is further ordered, That respondent shall notify the Commission at least thirty (30) days prior to any proposed change in the corporate respondent 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, and subject to any legally recognized privilege, the respondent shall permit any duly authorized representative of the Commission:

A. Access, during office hours and in the presence of counsel, to inspect and copy all books, ledgers, accounts, correspondence, memoranda, and other records and documents in the possession or under the control of the respondent relating to any matters contained in this order; and

B. Upon five days' notice to respondent and without restraint or interference from it, to interview officers, directors, or employees of respondent.

APPENDIX I

AGREEMENT TO HOLD SEPARATE

This Agreement to Hold Separate ("Agreement") is by and between HEALTHSOUTH Rehabilitation Corporation ("respondent" or "HEALTHSOUTH"), a corporation organized, existing, and doing business under and by virtue of the laws of the State of Delaware, with its principal place of business at Two Perimeter Park South, Birmingham, Alabama; and the Federal Trade Commission ("Commission"), an independent agency of the United States Government, established under the Federal Trade Commission Act of 1914, 15 U.S.C. 41, *et seq.*

Whereas, on or about September 18, 1994, HEALTHSOUTH agreed to merge with ReLife, Inc. ("ReLife"), and thereby acquire, *inter alia*, a majority partnership interest in Nashville Rehabilitation Hospital in Nashville, Tennessee (the "Acquisition"); and,

Whereas, the Commission is now investigating the Acquisition to determine if it would violate any of the statutes enforced by the Commission; and

Whereas, if the Commission accepts the Agreement Containing Consent Order in this matter ("consent order"), which would require the divestiture of ReLife's majority partnership interest in, and certain

other assets listed in paragraph II.A. of the consent order relating to, Nashville Rehabilitation Hospital (which assets, together with the Hospital, hereinafter are referred to as the "NRH Assets"), the Commission must place the consent order on the public record for a period of at least sixty (60) days and may subsequently withdraw such acceptance pursuant to the provisions of Section 2.34 of the Commission's Rules; and

Whereas, the Commission is concerned that if an understanding is not reached, preserving the *status quo ante* of the NRH Assets during the period prior to the final acceptance and issuance of the consent order by the Commission (after the 60-day public comment period), divestiture resulting from any proceeding challenging the legality of the Acquisition might not be possible, or might be less than an effective remedy; and

Whereas, the Commission is concerned that if the Acquisition is consummated, it will be necessary to preserve the Commission's ability to compel the divestiture required by paragraphs II.A. and III of the consent order and the Commission's right to have the NRH Assets continue as a viable independent rehabilitation hospital facility; and

Whereas, the purpose of this agreement and the consent order is to:

- (i) Preserve the NRH Assets as a viable independent inpatient rehabilitation hospital facility pending the divestiture required by paragraphs II.A. and III of the consent order, and
- (ii) Remedy any anticompetitive effects of the Acquisition;

Whereas, respondent's entering into this agreement shall in no way be construed as an admission by respondent that the Acquisition is illegal; and

Whereas, respondent understands that no act or transaction contemplated by this agreement shall be deemed immune or exempt from the provisions of the antitrust laws or the Federal Trade Commission Act by reason of anything contained in this agreement.

Now, therefore, the parties agree as follows, upon understanding that the Commission has not yet determined whether the Acquisition will be challenged, and in consideration of the Commission's agreement that, unless the Commission determines to reject the consent order, it will not seek further relief from respondent with

respect to the Acquisition, except that the Commission may exercise any and all rights to enforce this agreement and the consent order to which it is annexed and made a part thereof, and in the event the required divestiture is not accomplished, to appoint a trustee to seek divestiture of the NRH Assets pursuant to the consent order:

1. Respondent agrees to execute the agreement containing consent order and be bound by the attached consent order.

2. Respondent agrees that from the date this agreement is accepted until the earliest of the times listed in subparagraphs 2.a or 2.b, it will comply with the provisions of paragraph 3 of this agreement:

a. Three (3) business days after the Commission withdraws its acceptance of the consent order pursuant to the provisions of Section 2.34 of the Commission's Rules; or

b. The time that the divestiture required by the consent order has been completed.

3. Respondent will hold the NRH Assets as they are presently constituted separate and apart, on the following terms and conditions:

a. The NRH Assets, as they are presently constituted, shall be held separate and apart and shall be operated independently of respondent (meaning here and hereinafter, HEALTHSOUTH excluding the NRH Assets), except to the extent that respondent must exercise direction and control over the NRH Assets to assure compliance with this agreement or the consent order, and except as otherwise provided in this agreement.

b. HEALTHSOUTH shall appoint a Management Committee to manage and maintain the NRH Assets on a day-to-day basis while this agreement remains in effect. The Management Committee shall have exclusive management and control of the NRH Assets, and shall manage the NRH Assets independently of HEALTHSOUTH's other businesses.

c. The Management Committee, which shall be appointed by HEALTHSOUTH, shall consist of three or five members, including a chairman who is independent of respondent and is competent to assure the continued viability and competitiveness of the NRH Assets; a person with experience in operating rehabilitation hospital

facilities; and a HEALTHSOUTH controller or other financial officer, whose responsibilities do not include any participation in HEALTHSOUTH's operations in the Nashville metropolitan area as defined in paragraph I.G. of the consent order. No more than a minority of Management Committee members shall be directors, officers, employees, or agents of respondent ("respondent's Management Committee members"). Meetings of the Management Committee during the term of this agreement shall be audio recorded, and recordings shall be retained for two (2) years after the termination of this agreement.

d. Respondent shall not exercise direction or control over, or influence directly or indirectly, the NRH Assets, any associated operations or businesses, the Management Committee, or the independent chairman of the Management Committee; provided, however, that respondent may exercise only such direction and control over the Management Committee as is necessary to assure compliance with this agreement or the consent order.

e. Respondent shall maintain the viability, competitiveness, and marketability of the NRH Assets, and shall not sell, transfer, encumber (other than in the normal course of business, or to effect the divestitures contemplated by the consent order), or otherwise impair their viability, competitiveness, or marketability.

f. The NRH Assets shall be staffed with employees sufficient in numbers and skills to maintain the viability, competitiveness, and marketability of the Hospital and the NRH Assets, which employees shall be selected from the existing employee base of the NRH Assets, and may also be hired from other sources. To this end, respondent shall maintain at least the same ratios of full-time equivalent employees to inpatient days, for professional employee staff (such as nurses and therapists), and for other staff employees, as exist at the date of this agreement, and shall offer salaries and employee benefits sufficient to maintain such staffing levels and maintain quality of patient care at least substantially equivalent to that now provided by the employees of the NRH Assets.

g. With the exception of respondent's Management Committee members, respondent shall not change the composition of the Management Committee unless the independent chairman consents to such change. The independent chairman shall have power to remove members of the Management Committee for cause. Respondent shall not change the composition of the management of

the NRH Assets, except that the Management Committee shall have the power to remove management employees for cause.

h. If the independent chairman ceases to act or fails to act diligently, a substitute chairman shall be appointed in the same manner as provided in paragraph 3.c. of this agreement.

i. Except as required by law, and except to the extent that necessary information is exchanged in the course of evaluating the Acquisition, defending investigations, defending or prosecuting litigation, negotiating agreements to divest assets, or complying with this agreement or the consent order, respondent shall not receive, have access to, use, or continue to use, any material confidential information (as that term is defined in the consent order) not in the public domain about the NRH Assets, or the activities of the Management Committee. Nor shall the NRH Assets or the Management Committee receive or have access to, or use or continue to use, any material confidential information not in the public domain about respondent that relates to rehabilitation hospital facilities operated by respondent in the Nashville metropolitan area as defined in paragraph I.G. of the consent order. Respondent may receive on a regular basis aggregate financial information relating to the NRH Assets necessary and essential to allow respondent to prepare United States consolidated financial reports, tax returns, 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.

j. Except as permitted by this agreement, respondent's Management Committee members shall not, in their capacity as Management Committee members, receive material confidential information of the NRH Assets, and shall not disclose any such information received under this agreement to respondent, or use it to obtain any advantage for respondent. Each of respondent's Management Committee members shall enter a confidentiality agreement prohibiting disclosure of material confidential information. Respondent's Management Committee members shall participate in matters that come before the Management Committee only for the limited purposes of considering a capital investment or other transaction exceeding \$100,000, approving any proposed budget and operating plans, and carrying out respondent's responsibilities under this agreement, the consent agreement, and the consent order. Except as permitted by this agreement, respondent's Management Committee

members shall not participate in any matter, or attempt to influence the votes of the other members of the Management Committee with respect to matters, that would involve a conflict of interest if respondent and the NRH Assets were separate and independent entities.

k. Any material transaction relating to the NRH Assets that is out of the ordinary course of business must be approved by a majority vote of the Management Committee; provided that the Management Committee shall approve no transaction, material or otherwise, that is precluded by this agreement.

l. All earnings and profits of the NRH Assets shall be retained separately. If necessary, respondent shall provide the NRH Assets with sufficient working capital to maintain the current rate of operation of the NRH Assets, and to carry out any capital improvement plans which have already been approved.

m. HEALTHSOUTH shall continue to provide the same support services to the NRH Assets, which are not provided by that hospital's employees, as are being provided by ReLife to the hospital as of the date this agreement is signed. HEALTHSOUTH may charge the NRH Assets the same fees, if any, charged by ReLife for such support services as of the date of this agreement. HEALTHSOUTH personnel providing such support services must retain and maintain all material confidential information of the NRH Assets on a confidential basis, and, except as is permitted by this 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 respondent's businesses, including without limitation businesses in the Nashville metropolitan area. Such personnel shall also execute a confidentiality agreement prohibiting the disclosure of any material confidential information of the NRH Assets.

n. HEALTHSOUTH shall cause the NRH Assets to continue to expend funds for marketing and advertising at a level not lower than that expended in fiscal year 1994 or budgeted in fiscal year 1995, and shall increase such spending as deemed reasonably necessary by the Management Committee in light of competitive conditions.

4. Should the Federal Trade Commission seek in any proceeding to compel respondent to divest any of the NRH Assets as provided in the consent order, or to seek any other injunctive or equitable relief

for any failure to comply with the consent order or this agreement, or in any way relating to the Acquisition, respondent shall not raise any objection based upon the expiration of the applicable Hart-Scott-Rodino Antitrust Improvements Act waiting period or the fact that the Commission has permitted the Acquisition. Respondent also waives all rights to contest the validity of this agreement.

5. To the extent that this agreement requires respondent to take, or prohibits respondent from taking, certain actions that otherwise may be required or prohibited by contract, respondent shall abide by the terms of this agreement or the consent order and shall not assert as a defense such contract requirements in a civil penalty action brought by the Commission to enforce the terms of this agreement or consent order.

6. For the purpose of determining or securing compliance with this agreement, subject to any legally recognized privilege, and upon written request with reasonable notice to respondent made to its principal office, respondent shall permit any duly authorized representative or representatives of the Commission:

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

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

7. This agreement shall not be binding until approved by the Commission.