IN THE MATTER OF

ROCHE HOLDING LTD.

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-3809. Complaint, May 22, 1998--Decision, May 22, 1998

This consent order requires, among other things, the Switzerland-based corporation to divest Corange Limited's U.S. and Canadian Retavase businesses to Centecor Inc., and divest, to a Commission-approved acquirer, Corange's worldwide drug abuse testing reagent business, which uses Cloned Enzyme Donor Immuno-Assay ("CEDIA") reagents, and grant a non-exclusive license to all other CEDIA reagents.

Appearances

For the Commission: *Christina Perez, Andrew Topps, Ann Malester* and *William Baer.*

For the respondent: *Ronan Harty, Davis, Polk & Wardwell,* New York, N.Y.

COMPLAINT

The Federal Trade Commission ("Commission"), having reason to believe that respondent, Roche Holding Ltd ("Roche"), a corporation subject to the jurisdiction of the Commission, has agreed to acquire 100% of the voting stock of Corange Limited ("Corange"), a corporation subject to the jurisdiction of the Commission, in violation of Section 7 of the Clayton Act, as amended, 15 U.S.C. 18, and Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45, and it appearing to the Commission that a proceeding in respect thereof would be in the public interest, hereby issues its complaint, stating its charges as follows:

I. DEFINITIONS

1. "*Cardiac Thrombolytic Agents*" means all thrombolytic agents used to dissolve blood clots.

2. "*DAT Reagents*" means all diagnostic reagents used to test for any drug of abuse.

II. RESPONDENT

3. Respondent Roche is a corporation organized, existing, and doing business under and by virtue of the laws of Switzerland, with its principal executive offices located at Grenzacherstrasse 124, Basel, Switzerland 4002.

4. Respondent is engaged in, among other things, the research, development, manufacture and sale of Cardiac Thrombolytic Agents and DAT Reagents.

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

III. THE ACQUIRED COMPANY

6. Corange is a corporation organized, existing, and doing business under and by virtue of the laws of Bermuda, with its headquarters located at 22 Church Street, P.O. Box HM 2026, Hamilton, HM HX Bermuda.

7. Corange is engaged in, among other things, the research, development, manufacture and sale of Cardiac Thrombolytic Agents and DAT Reagents.

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

IV. THE ACQUISITION

9. On May 24, 1997, Roche entered into a Stock Purchase Agreement with Corange to acquire 100% of Corange's voting stock for approximately $11 billion ("Acquisition").

V. THE RELEVANT MARKETS

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

(a) The research, development, manufacture and sale of Cardiac Thrombolytic Agents; and

(b) The research, development, manufacture and sale of DAT Reagents used in workplace testing.

11. For purposes of this complaint, the United States is the relevant geographic area in which to analyze the effects of the Acquisition in the relevant lines of commerce.

VI. STRUCTURE OF THE MARKETS

12. The market for the research, development, manufacture and sale of Cardiac Thrombolytic Agents is highly concentrated as measured by the Herfindahl-Hirschmann Index ("HHI"). The post merger HHI is 8,698 points, which is an increase of 3,220 points over the premerger HHI level. Roche and Corange are the two leading suppliers of Cardiac Thrombolytic Agents in the United States and produce the safest and most effective products on the market.

13. Roche and Corange are actual competitors in the relevant market for the research, development, manufacture and sale of Cardiac Thrombolytic Agents in the United States.

14. The market for the research, development, manufacture and sale of DAT Reagents used in workplace testing is highly concentrated as measured by the HHI. The post merger HHI is 4,878 points, which is an increase of 704 points over the premerger HHI level. Roche and Corange are two of only four suppliers of DAT Reagents used in workplace testing in the United States.

15. Roche and Corange are actual competitors in the relevant market for the research, development, manufacture and sale of DAT Reagents used in workplace testing in the United States.

VII. BARRIERS TO ENTRY

16. Entry into the market for the research, development, manufacture and sale of Cardiac Thrombolytic Agents is unlikely and would not occur in a timely manner to deter or counteract the adverse competitive effects described in paragraph eighteen because of, among other things, the time-consuming nature of research, development and U.S. Food and Drug Administration approval of these products.

17. Entry into the market for the research, development, manufacture and sale of DAT Reagents used in workplace testing is unlikely and would not occur in a timely manner to deter or counteract the adverse competitive effects described in paragraph eighteen because of, among other things, the difficulty of developing a full panel of DAT Reagents, as well as gaining brand name recognition and customer acceptance.

VIII. EFFECTS OF THE ACQUISITION

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

(a) By eliminating actual, direct, and substantial competition between Roche and Corange in the markets for the research, development, manufacture and sale of Cardiac Thrombolytic Agents and DAT Reagents used in workplace testing;

(b) By increasing the likelihood that Roche will unilaterally exercise market power in the market for the research, development, manufacture and sale of Cardiac Thrombolytic Agents;

(c) By increasing the likelihood that consumers in the United States will be charged higher prices for Cardiac Thrombolytic Agents and DAT Reagents used in workplace testing;

(d) By reducing the likelihood of innovation in the market for the research, development, manufacture and sale of Cardiac Thrombolytic Agents; and

(e) By enhancing the likelihood of collusion or coordinated interaction between or among the firms in the market for the research, development, manufacture and sale of DAT Reagents used in workplace testing.

IX. VIOLATIONS CHARGED

19. The Acquisition agreement described in paragraph nine constitutes a violation of Section 5 of the FTC Act, as amended, 15 U.S.C. 45.

20. 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 FTC 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 100% of the voting stock of Corange Limited ("Corange"), 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 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 agreement containing consent order and placed such agreement on the public record for a period of sixty (60) days, now in further conformity with the procedure described in Section 2.34 of its Rules, the Commission hereby issues its complaint, makes the following jurisdictional findings and enters the following order:

1. Respondent Roche Holding Ltd ("Roche") is a corporation organized, existing, and doing business under and by virtue of the laws of Switzerland, with its principal executive offices located at Grenzacherstrasse 124, Basel, Switzerland 4002. Hoffmann-La Roche Inc., an indirect wholly-owned subsidiary of Roche Holding Ltd, is located at 340 Kingsland Street, Nutley, New Jersey.

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. "*Roche*" or "*respondent*" means Roche Holding Ltd, its predecessors, subsidiaries, divisions, groups and affiliates controlled by Roche, and their respective directors, officers, employees, agents and representatives, and their respective successors and assigns.

B. "*Corange*" means Corange Limited, a corporation organized, existing and doing business under the laws of Bermuda with its headquarters located at 22 Church Street, P.O. Box HM 2026,

Hamilton, HM HX Bermuda, including its predecessors, subsidiaries, divisions, groups and affiliates controlled by Corange, and their respective directors, officers, employees, agents and representatives, and their respective successors and assigns.

C. "*Acquirer*" means Centocor, Inc., a corporation organized, existing and doing business under the laws of Pennsylvania with its principal place of business located at 200 Great Valley Parkway, Malvern, Pennsylvania, or the entity to whom Roche shall divest the Reteplase Assets pursuant to paragraph II of this order, as applicable.

D. "*Acquisition*" means the acquisition by Roche, through a subsidiary, of 100% of the voting stock of Corange pursuant to a Stock Purchase Agreement dated May 24, 1997.

E. "*CEDIA Assets*" means all of Corange's assets, business, goodwill and rights that are not part of Corange's physical facilities at the Penzberg Plant, as of the date of the Divestiture Agreement described in paragraph V.B of this order, relating to the research, development, manufacture or sale of products that utilize the CEDIA Patents. "CEDIA Assets" also include, but are not limited to, all machinery, fixtures, equipment and other tangible real and personal property, trade names, trademarks, brand names, formulations, inventory, contractual rights, patents, trade secrets, technology, know-how, specifications, designs, drawings, processes, production information, manufacturing information, testing and quality control data, research materials, technical information, marketing and distribution information, customer lists, software, information stored on management information systems (and specifications sufficient for the New Reagent Acquirer to use such information) and all data, contractual rights, materials and information relating to FDA and other government or regulatory approvals relating to CEDIA Reagents.

F. "*CEDIA Method*" means a general detection principle used in diagnostic applications based on the bacterial enzyme B-galactosidase, where the enzyme has been genetically engineered into two fragments: the enzyme donor and the enzyme acceptor.

G. "*CEDIA Patents*" means all of the Patents and know-how world-wide, which cover the CEDIA Method, whether granted or applied for that are not divested pursuant to paragraph V.A.(i).

H. "*CEDIA Reagents*" means all of Corange's diagnostic reagents researched, developed, manufactured or sold that are based on the CEDIA Method, including, but not limited to, drugs of abuse testing, therapeutic drug monitoring, thyroid analysis, testing for anemia, and hormone testing.

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

J. "*Contract Manufacture*" means the manufacture of Reteplase or any CEDIA Reagents supplied pursuant to a Divestiture Agreement, as applicable, by Roche for sale to the Acquirer, New Acquirer, Reagent Acquirer, or New Reagent Acquirer, as applicable.

K. "*Cost*" means average direct per unit cost or, if the Acquirer is Centocor, the cost as stated in the Asset Purchase Agreement between Roche and Centocor, dated February 11, 1998.

L. "*DAT Applications*" means all diagnostic applications based on the CEDIA Patents for use in drugs of abuse testing.

M. "*DAT Reagent Assets*" means all of Corange's assets, business, goodwill and rights that are not part of Corange's physical facilities at the Penzberg Plant, as of the date this agreement containing consent order becomes final, relating to the research, development, manufacture and sale of DAT Reagents throughout the world. "DAT Reagent Assets" also include, but are not limited to, all machinery, fixtures, equipment and other tangible real and personal property, trade names, trademarks, brand names, formulations, inventory, U.S. Patent 5,573,955 and any other Patent that is related soley to the manufacture or sale of DAT Reagents, trade secrets, technology, know-how, specifications, designs, drawings, processes, production information, manufacturing information, testing and quality control data, research materials, technical information, marketing and distribution information, customer lists, software, information stored on management information systems (and specifications sufficient for the Reagent Acquirer or New Reagent Acquirer to use such information) and all data, contractual rights, materials and information relating to FDA and other government or regulatory approvals relating to DAT Reagents.

N. "*DAT Reagents*" means all Corange diagnostic reagents researched, developed, manufactured or sold for DAT Applications.

O. "*Designee*" means any entity that will manufacture Reteplase or any CEDIA Reagent for the Acquirer, New Acquirer, Reagent Acquirer, or New Reagent Acquirer, as applicable.

P. "*Divestiture Trustee*" means the trustee(s) appointed pursuant to paragraphs IV or VII of this order, as applicable.

Q. "*FDA*" means the United States Food and Drug Administration.

R. "*Governance Agreement*" means the Amended and Restated Governance Agreement dated October 25, 1995, between Roche Holdings, Inc. and Genentech, Inc. and any and all amendments thereof.

S. "*Interim Trustee*" means the trustee(s) appointed pursuant to paragraphs III or VI of this order, as applicable.

T. "*New Acquirer*" means the entity to whom the Divestiture Trustee shall divest the world-wide Reteplase Assets pursuant to paragraph IV of this order.

U. "*New Reagent Acquirer*" means the entity to whom the Divestiture Trustee shall divest the CEDIA Assets pursuant to paragraph VII of this order.

V. "*Non-DAT Applications*" means all diagnostic applications based on the CEDIA Patents other than DAT Applications.

W. "*Non-Reteplase Applications*" means any human pharmaceutical application that is not a Reteplase Application.

X. "*Patent*" means the patent and patent right, and patent applications, patents of addition, re-examinations, reissues, extensions, granted supplementary protection certificates, substitutions, confirmations, registrations, revalidations, revisions, additions and the like, of or to said patent and patent right and any and all continuations and continuations-in-part.

Y. "*Penzberg Plant*" means the current Corange facility located in Penzberg, Germany, or any Roche facility, that is used to manufacture Reteplase.

Z. "*Reagent Acquirer*" means the entity to whom respondent shall divest the DAT Reagent Assets and grant (i) an exclusive license to the CEDIA Patents for DAT Applications, and (ii) a non-exclusive license to the CEDIA Patents for Non-DAT Applications in the United States pursuant to paragraph V of this order.

AA."*Reteplase*" means recombinant reteplase ("rPA"), a recombinant, nonglycosylated plasminogen activator, containing amino acids 1-3 and 176-527 of the amino acid sequence of the tissue-type plasminogen activator or any future presentation, formulation, application or therapeutic use of the active ingredient.

BB."*Reteplase Applications*" means all applications based on the Reteplase Patents, that contain the Reteplase active ingredient or any future presentation, formulation, application or therapeutic use of the active ingredient.

CC."*Reteplase Assets*" means all of Corange's assets, business, goodwill and rights that are not part of Corange's physical facilities, as of the date this agreement containing consent order becomes final, relating to the research, development, manufacture and sale of Reteplase for sale in the United States and Canada. "Reteplase Assets" also include, but are not limited to, all trade names, trademarks, brand names, formulations, inventory, U.S. Patent 5,223,256, U.S. Patent 5,510,330, U.S. Patent 5,500,411 and any other U.S. or Canadian Patent related solely to the manufacture or sale of Reteplase, trade secrets, technology, know-how, specifica-

tions, designs, drawings, processes, production information, manufacturing information, testing and quality control data, research materials, technical information, marketing and distribution information, customer lists, software, information stored on management information systems (and specifications sufficient for the Acquirer or New Acquirer to use such information), and all data, contractual rights, materials and information relating to FDA and other government or regulatory approvals for the United States and Canada relating to Reteplase.

DD."*Reteplase Patents*" means: (1) all of the Patents and know-how, as of the date the agreement containing consent order becomes final, that are related to the manufacture or sale of Reteplase and are not divested pursuant to paragraph II.A.(i); and (2) any new Patent or know-how that respondent uses to manufacture Reteplase during the term of the Contract Manufacturing of Reteplase unless the changes are being made solely to obtain regulatory approval outside the United States or Canada.

EE."*World-wide Reteplase Assets*" means all of Corange's assets, business, goodwill and rights that are not part of Corange's physical facilities, as of the date this agreement containing consent order becomes final, relating to the research, development, manufacture and sale of Reteplase throughout the world. "world-wide Reteplase Assets" also include, but are not limited to, all trade names, trademarks, brand names, formulations, inventory, all world-wide Patents related solely to the manufacture or sale of Reteplase, trade secrets, technology, know-how, specifications, designs, drawings, processes, production information, manufacturing information, testing and quality control data, research materials, technical information, marketing and distribution information, customer lists, software, information stored on management information systems (and specifications sufficient for the Acquirer or New Acquirer to use such information), and all data, contractual rights, materials and information relating to FDA and other government or regulatory approvals for the United States and Canada relating to Reteplase.

II.

It is further ordered, That:

A. Respondent shall: (i) divest, absolutely and in good faith, the Reteplase Assets as a competitively viable, on-going product line; (ii) grant an exclusive, royalty-free license, in perpetuity, to the Reteplase Patents for Reteplase Applications in the United States and Canada, and (iii) grant a royalty-bearing, non-exclusive license, in perpetuity, to the Reteplase Patents for Non-Reteplase Applications in the United

States and Canada to: (1) Centocor, in accordance with the Asset Purchase Agreement dated February 11, 1998; or (2) at no minimum price, to an Acquirer that receives the prior approval of the Commission and only in a manner that receives the prior approval of the Commission within ninety (90) days of the date on which this order becomes final. The purpose of the divestiture of the Reteplase Assets is to ensure their continued use in the research, development, manufacture, and sale for the treatment of acute myocardial infarction and other applications that may be further developed or found in the future and to remedy the lessening of competition resulting from the proposed Acquisition as alleged in the Commission's complaint.

B. Respondent's agreement with the Acquirer or the New Acquirer (hereinafter "Divestiture Agreement") shall include the following provisions, and respondent shall commit to satisfy the following:

1. Respondent shall Contract Manufacture and deliver to the Acquirer or the New Acquirer in a timely manner and under reasonable terms and conditions, a supply of Reteplase, specified in the Divestiture Agreement at cost for a period not to exceed four (4) years from the date the Divestiture Agreement is approved, or three (3) months after the date the Acquirer or the New Acquirer obtains all necessary FDA approvals to manufacture and sell Reteplase in the United States, whichever is earlier; provided, however, that the four (4) year period may be extended by the Commission in twelve (12) month increments for a period not to exceed two (2) years.

2. After respondent commences delivery of Reteplase to the Acquirer or the New Acquirer pursuant to the Divestiture Agreement and for the term of the Contract Manufacturing arrangement for Reteplase, referred to in paragraph II.B of this order, respondent will make inventory of Reteplase available for sale or resale (i) in the United States or Canada only to the Acquirer or (ii) world-wide only to the New Acquirer.

3. Respondent shall make representations and warranties that the Reteplase supplied pursuant to the Divestiture Agreement meets the FDA approved specifications. Respondent shall agree to indemnify, defend and hold the Acquirer or the New Acquirer harmless from any and all suits, claims, actions, demands, liabilities, expenses or losses alleged to result from the failure of the Reteplase supplied to the Acquirer or New Acquirer pursuant to the Divestiture Agreement by respondent to meet FDA specifications. This obligation shall be contingent upon the Acquirer or the New Acquirer giving respondent prompt, adequate notice of such claim, cooperating fully in the

defense of such claim, and permitting respondent to assume the sole control of all phases of the defense and/or settlement of such claim, including the selection of counsel; provided, however, any such defense and/or settlement shall be consistent with the obligations assumed by respondent under this order. This obligation shall not require respondent to be liable for any negligent act or omission of the Acquirer or the New Acquirer or for any representations and warranties, express or implied, made by the Acquirer or the New Acquirer that exceed the representations and warranties made by respondent to the Acquirer or the New Acquirer.

4. Respondent shall make representations and warranties that respondent will hold harmless and indemnify the Acquirer or New Acquirer for any liabilities or loss of profits resulting from the failure by respondent to deliver Reteplase in a timely manner as required by the Divestiture Agreement unless respondent can demonstrate that its failure was entirely beyond the control of respondent and in no part the result of negligence or willful misconduct on respondent's part.

5. During the term of the Contract Manufacturing between respondent and the Acquirer or the New Acquirer, upon request by the Acquirer, New Acquirer or the Interim Trustee, respondent shall make available to the Interim Trustee all records that relate to the manufacture of Reteplase.

6. Upon reasonable notice and request from the Acquirer or the New Acquirer to respondent, respondent shall provide in a timely manner: (a) assistance and advice to enable the Acquirer or the New Acquirer (or the Designees of the Acquirer or New Acquirer) to obtain all necessary FDA approvals to manufacture and sell Reteplase; (b) assistance to the Acquirer or New Acquirer (or the Designee thereof) as is necessary to enable the Acquirer or New Acquirer (or the Designee thereof) to manufacture Reteplase in substantially the same manner and quality employed or achieved by Corange; and (c) consultation with knowledgeable employees of respondent and training, at the request of and at the facility of the Acquirer's or the New Acquirer's choosing, until the Acquirer or New Acquirer (or the Designee thereof) receives certification from the FDA or abandons its efforts for certification from the FDA, sufficient to satisfy the management of the Acquirer or New Acquirer that its personnel (or the Designee's personnel) are adequately trained in the manufacture of Reteplase. Such assistance shall include on-site inspections of the Penzberg Plant, at the Acquirer's or New Acquirer's request, which is the specified source of supply of the Contract Manufacturing. Respondent may require reimbursement from the Acquirer or New Acquirer for all its direct out-of-pocket

expenses incurred in providing the services required by this paragraph II.B.6.

7. The Divestiture Agreement shall require the Acquirer or the New Acquirer to submit to the Commission within 10 days of signing the Divestiture Agreement a certification attesting to the good faith intention of the Acquirer or the New Acquirer, including a plan by the Acquirer or the New Acquirer, to obtain in an expeditious manner all necessary FDA approvals to manufacture and sell Reteplase.

8. The Divestiture Agreement shall require the Acquirer or the New Acquirer to submit to the Commission and Interim Trustee periodic verified written reports, setting forth in detail the efforts of the Acquirer or the New Acquirer to sell Reteplase obtained pursuant to the Divestiture Agreement and to obtain all FDA approvals necessary to manufacture and sell Reteplase. The Divestiture Agreement shall require the first such report to be submitted 60 days from the date the Divestiture Agreement is approved by the Commission and every 90 days thereafter until all necessary FDA approvals are obtained by the Acquirer or the New Acquirer to manufacture and sell Reteplase in the United States. The Divestiture Agreement shall also require the Acquirer or the New Acquirer to report to the Commission and the Interim Trustee within ten (10) days of its ceasing the sale in the United States of Reteplase obtained pursuant to the Divestiture Agreement for any time period exceeding sixty (60) days or abandoning its efforts to obtain all necessary FDA approvals to manufacture and sell Reteplase in the United States. The Acquirer or New Acquirer shall provide the Interim Trustee access to all records and all facilities that relate to its efforts, pursuant to the Divestiture Agreement, to sell or manufacture Reteplase or obtain FDA approvals.

9. The Divestiture Agreement shall provide that the Commission may terminate the Divestiture Agreement if the Acquirer or the New Acquirer: (a) voluntarily ceases for sixty (60) days or more the sale of, or otherwise fails to pursue good faith efforts to sell, Reteplase in the United States prior to obtaining all necessary FDA approvals to manufacture and sell Reteplase in the United States; (b) fails to pursue good faith efforts to obtain all necessary FDA approvals to manufacture and sell Reteplase in the United States; or (c) fails to obtain all necessary FDA approvals of its own to manufacture and sell Reteplase in the United States within four (4) years from the date the Commission approves the Divestiture Agreement between respondent and the Acquirer or the New Acquirer; provided, however, that the four (4) year period may be extended by the Commission in twelve (12) month increments for a period not to

exceed an additional two (2) years if it appears that such FDA approvals are likely to be obtained within such extended time period.

10. The Divestiture Agreement shall provide that if it is terminated, the Reteplase Assets shall revert back to Roche and the world-wide Reteplase Assets shall be divested by the Divestiture Trustee to a New Acquirer pursuant to the provisions of paragraph IV of this order.

C. During the pendency of any Patent dispute that: (1) challenges or seeks to render invalid any of the Patents divested or licensed pursuant to paragraph II.A; (2) could affect the manufacture or sale of Reteplase; and (3) is brought by Genentech, Inc., Boehringer Ingelheim, or Roche, including, but not limited to, the *Genentech Inc. v. Boehringer Mannheim* patent litigation, Civil Action 96-11090, respondent shall commit to satisfying the following:

1. Respondent shall provide, at its own expense, cooperation and assistance in connection with the pursuit or defense of such dispute as requested by the Acquirer or New Acquirer, including but not limited to:

(a) Full access to and cooperation from any employee or agent of Corange for the purposes of this paragraph II.C, including ensuring that the availability of such individuals shall not be interfered with by reason of their employment with respondent;

(b) Continued cooperation and assistance, to the extent of respondent's best efforts, of any Corange employee who has left the employ of Corange or Roche, including, but not limited to, expenses related to obtaining cooperation of any former Corange employee no longer employed by respondent and agreeing to reimburse the former employee's new employer for all reasonable direct out-of-pocket expenses associated with cooperating with and assisting the Acquirer or New Acquirer pursuant to this paragraph II.C;

(c) Copies of all documents, as requested by the Acquirer or New Acquirer, in the possession, custody or control of Corange relevant to, or likely to lead to information relevant to, the pursuit or defense of such dispute, along with information in respondent's possession or control sufficient to legally authenticate such documents; and

(d) Reimbursement for half of all expenses relating to the dispute submitted in the manner specified in paragraph II.C.5 of this order, including, but not limited to, fees paid to attorneys (who are not employees of the Acquirer or the New Acquirer) and fees paid to agents, experts, and courts.

2. Respondent shall not enter into any new agreement, or enforce any existing agreement, with any employee or former employee regarding confidential information that would otherwise prevent or hinder an employee or former employee from providing cooperation and assistance in connection with any dispute referred to in this paragraph II.C.

3. Respondent shall be financially responsible for any payments determined to be owed as a result of any sales of Reteplase prior to divestiture of the Reteplase Assets pursuant to this order, and for any sales of Reteplase outside of the United States or Canada.

4. Respondent shall ensure that no employee of respondent is penalized in any manner as a result of his or her full cooperation with the Acquirer or New Acquirer in connection with the obligations imposed pursuant to this order.

5. All requests for payments due from respondent pursuant to this paragraph II.C shall be submitted to the Interim Trustee or an agent of the Interim Trustee for verification. The Interim Trustee shall submit verified costs to respondent on a periodic basis. Such submissions shall contain only aggregate information about expenses incurred that reveals no privileged or confidential information. Respondent shall make payments to the Acquirer or New Acquirer pursuant to the Interim Trustee's submissions in a timely manner as specified by the Interim Trustee.

6. Respondent shall not, absent the prior written consent of the Acquirer or New Acquirer, provide, disclose or otherwise make available to Genentech, Inc. any information relating to any Patent dispute involving the Reteplase Assets.

7. In the event that the Governance Agreement allows respondent to control Genentech, Inc. or respondent obtains 100% of the stock of Genentech, Inc., respondent shall cause to be dismissed, with prejudice, any pending litigation by Genentech, Inc. against the Acquirer or New Acquirer regarding Patent rights for the research, development, manufacture or sale of Reteplase and shall refrain from instituting any new litigation against the Acquirer or New Acquirer challenging or seeking to render invalid any of the Patents divested or licensed pursuant to paragraph II.A.

D. By the time the Divestiture Agreement between respondent and the Acquirer or New Acquirer of the Reteplase Assets is signed, respondent shall provide the Acquirer or New Acquirer with a complete list of all employees who were engaged in the sale or marketing of Reteplase on the date of the Acquisition, as well as all employees engaged in the sale or marketing of Reteplase on the date

of the Divestiture Agreement. Such list(s) shall state each such individual's name, position, address, business telephone number, or if no business telephone number exists, a home telephone number, if available and with the consent of the employee, and a description of the duties and work performed by the individual in connection with the Reteplase Assets. Respondent shall provide the Acquirer or New Acquirer the opportunity to enter into employment contracts with such individuals provided that such contracts are contingent upon the Commission's approval of the Divestiture Agreement.

E. Following the signing of the Divestiture Agreement and subject to the consent of the employees, respondent shall provide the Acquirer or New Acquirer with an opportunity to inspect the personnel files and other documentation relating to the individuals identified in paragraph II.D of this order to the extent possible under applicable laws. For a period of two (2) months following the divestiture, respondent shall provide the Acquirer or New Acquirer with a further opportunity to interview such individuals and negotiate employment contracts with them.

F. Respondent shall provide all employees identified in paragraph II.D of this order with reasonable financial incentives to continue in their employment positions pending divestiture of the Reteplase Assets in order that such employees may be in a position to accept employment with the Acquirer or New Acquirer at the time of the divestiture. Such incentives shall include continuation of all employee benefits offered by respondent until the date of the divestiture, and vesting of all pension benefits (as permitted by law). In addition, respondent shall not enforce any confidentiality or non-compete restrictions relating to the Reteplase Assets that apply to any employee identified in paragraph II.D who accepts employment with any Acquirer or New Acquirer.

G. For a period of one (1) year commencing on the date of the individual's employment by the Acquirer or New Acquirer, respondent shall not re-hire any of the individuals identified in paragraph II.D of this order who accept employment with the Acquirer or New Acquirer, unless such individual has been separated from employment by the Acquirer or New Acquirer against that individual's wishes.

H. Prior to divestiture, respondent shall not transfer, without consent of the Acquirer or New Acquirer, any of the individuals identified in paragraph II.D of this order to any other position.

I. While the obligations imposed by paragraphs II, III or IV of this order are in effect, respondent shall take such actions as are necessary: (1) to maintain all necessary FDA approvals to

manufacture and sell Reteplase; (2) to maintain the viability and marketability of the world-wide Reteplase Assets consistent with general practices in the pharmaceutical industry, as well as all tangible assets, including respondent's facilities, used to manufacture and sell Reteplase; and (3) to prevent the destruction, removal, wasting, deterioration or impairment of the world-wide Reteplase Assets and the Penzberg Plant, except for ordinary wear and tear.

III.

It is further ordered, That:

A. At any time after respondent signs the agreement containing consent order in this matter, the Commission may appoint an Interim Trustee to ensure that respondent and the Acquirer or New Acquirer expeditiously perform their respective responsibilities as required by this order and the Divestiture Agreement approved by the Commission. Respondent shall consent to the following terms and conditions regarding the powers, duties, authorities, and responsibilities of the Interim Trustee appointed pursuant to this paragraph III:

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

2. The Interim Trustee shall have the power and authority to monitor respondent's compliance with the terms of this order and with the terms of the Divestiture Agreement with the Acquirer or New Acquirer.

3. Within ten (10) days after appointment of the Interim Trustee, respondent shall execute a trust agreement that, subject to the prior approval of the Commission, confers on the Interim Trustee all the rights and powers necessary to permit the Interim Trustee to monitor respondent's compliance with the terms of this order and with the Divestiture Agreement with the Acquirer or New Acquirer, and to monitor the compliance of the Acquirer or New Acquirer under the Divestiture Agreement.

4. The Interim Trustee shall serve until such time as the Acquirer or New Acquirer has received all necessary FDA approvals to manufacture and sell Reteplase.

5. The Interim Trustee shall have full and complete access to respondent's personnel, books, records, documents, facilities and technical information relating to the research, development, manufacture, importation, distribution and sale of Reteplase, or to any other relevant information, as the Interim Trustee may reasonably request, including, but not limited to, all documents and records kept in the normal course of business that relate to the manufacture of Reteplase. Respondent shall cooperate with any reasonable request of the Interim Trustee. Respondent shall take no action to interfere with or impede the Interim Trustee's ability to monitor respondent's compliance with paragraphs II, III and IV of this order and the Divestiture Agreement between respondent and the Acquirer or New Acquirer.

6. The Interim Trustee shall serve, without bond or other security, at the expense of respondent, on such reasonable and customary terms and conditions as the Commission may set. The Interim Trustee shall have authority to employ, at the expense of respondent, such consultants, accountants, attorneys and other representatives and assistants as are reasonably necessary to carry out the Interim Trustee's duties and responsibilities. The Interim Trustee shall account for all expenses incurred, including fees for his or her services, subject to the approval of the Commission.

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

8. If the Commission determines that the Interim Trustee has ceased to act or failed to act diligently, the Commission may appoint a substitute trustee in the same manner as provided in paragraph III.A.1 of this order.

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

10. The Interim Trustee shall evaluate reports submitted to it by the Acquirer or the New Acquirer with respect to the efforts of the

Acquirer or the New Acquirer to obtain all necessary FDA approvals to manufacture and sell Reteplase. The Interim Trustee shall report in writing, concerning compliance by respondent and the Acquirer or New Acquirer with the provisions of paragraphs II and III to the Commission every two (2) months from the date the Divestiture Agreement is signed until the Acquirer or New Acquirer obtains, or abandons efforts to obtain, all necessary FDA approvals to manufacture and sell Reteplase in the United States. Such reports shall include at least the following:

a. Whether respondent has supplied Reteplase in conformity with the requirements of paragraph II.B of this order;

b. Whether respondent has given the Interim Trustee access to records pursuant to paragraph II.B.5 of this order;

c. Whether the Acquirer or New Acquirer has given the Interim Trustee reports and access pursuant to paragraph II.B.8 of this order;

d. Whether the Acquirer or New Acquirer is making good faith efforts to sell Reteplase and obtain all necessary FDA approvals to manufacture and sell Reteplase and whether these actions meet the projections of the business plan of the Acquirer or New Acquirer as required by paragraphs II.B.7 and II.B.8 of this order;

e. If three (3) years and six (6) months have elapsed from the date of approval of the Divestiture Agreement and the Acquirer or New Acquirer has not obtained all necessary FDA approvals to manufacture and sell Reteplase in the United States, whether such approvals are likely to be obtained if the Commission extends the four (4) year period specified in paragraph II.B.9 of this order; and

f. Whether respondent has maintained the world-wide Reteplase Assets as required in paragraph II.I of this order.

B. If the Commission terminates the Divestiture Agreement pursuant to paragraph II.B.9 of this order, the Commission may direct the Divestiture Trustee to seek a New Acquirer, as provided for in paragraph IV of this order.

IV.

It is further ordered, That:

A. If respondent fails to divest absolutely and in good faith, and with the Commission's prior approval, the Reteplase Assets and to comply with the requirements of paragraph II of this order, or if the Acquirer abandons its efforts or fails to obtain all necessary regulatory approvals in the manner set out in paragraph II.B.9, then any executed Divestiture Agreement between respondent and the

Acquirer shall be terminated and the Commission may appoint a Divestiture Trustee to divest the world-wide Reteplase Assets and execute a new Divestiture Agreement that satisfies the requirements of paragraph II of this order. The Divestiture Trustee may be the same person as the Interim Trustee and will have the authority and responsibility to divest the world-wide Reteplase Assets absolutely and in good faith, and with the Commission's prior approval. Neither the decision of the Commission to appoint the Divestiture Trustee, nor the decision of the Commission not to appoint the Divestiture Trustee, to divest any of the assets under this paragraph IV.A shall preclude the Commission or the Attorney General from seeking civil penalties or any other relief available to it, including a court-appointed trustee, pursuant to Section 5(*l*) of the Federal Trade Commission Act, or any other statute enforced by the Commission, for any failure by the respondent to comply with this order.

B. If a Divestiture Trustee is appointed by the Commission or a court pursuant to paragraph IV.A to divest the world-wide Reteplase Assets to a New Acquirer, respondent shall consent to the following terms and conditions regarding the Divestiture Trustee's powers, duties, authority, and responsibilities:

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

2. Subject to the prior approval of the Commission, the Divestiture Trustee shall have the exclusive power and authority to divest the world-wide Reteplase Assets to a New Acquirer pursuant to the terms of this order and to enter into a Divestiture Agreement with the New Acquirer pursuant to the terms of this order, which Divestiture Agreement shall be subject to the prior approval of the Commission.

3. Within ten (10) days after appointment of the Divestiture Trustee, respondent shall execute a (or amend the existing) trust agreement that, subject to the prior approval of the Commission and, in the case of a court-appointed trustee, of the court, transfers to the Divestiture Trustee all rights and powers necessary to permit the Divestiture Trustee to divest the world-wide Reteplase Assets to a

New Acquirer and to enter into a Divestiture Agreement with the New Acquirer.

4. The Divestiture Trustee shall have twelve (12) months from the date the Commission approves the trust agreement described in paragraph IV.B.3 of this order to divest the world-wide Reteplase Assets and to enter into a Divestiture Agreement with the New Acquirer that satisfies the requirements of paragraph II of this order. If, however, at the end of the applicable twelve (12) month period, the Divestiture Trustee has submitted to the Commission a plan of divestiture or believes that divestiture can be achieved within a reasonable time, such divestiture period may be extended by the Commission, or, in the case of a court-appointed trustee, by the court; provided, however, the Commission may extend such divestiture period only two (2) times.

5. The Divestiture Trustee shall have full and complete access to the personnel, books, records and facilities of respondent related to the manufacture, distribution, or sale of the world-wide Reteplase Assets or to any other relevant information, as the Divestiture Trustee may request. Respondent shall develop such financial or other information as the Divestiture Trustee may request and shall cooperate with the Divestiture Trustee. Respondent shall take no action to interfere with or impede the Divestiture Trustee's accomplishment of his or her responsibilities.

6. The Divestiture Trustee shall use reasonable efforts to negotiate the most favorable price and terms available in each contract that is submitted to the Commission, subject to respondent's absolute and unconditional obligation to divest at no minimum price and the Divestiture Trustee's obligation to expeditiously accomplish the remedial purpose of the order; to assure that respondent enters into a Divestiture Agreement that complies with the provisions of paragraph II.B; to assure that respondent complies with the remaining provisions of paragraph IV of this order; and to assure that the New Acquirer obtains all necessary FDA approvals to manufacture and sell Reteplase. The divestiture shall be made to, and the Divestiture Agreement executed with, the New Acquirer in the manner set forth in paragraph II of this order; provided, however, if the Divestiture Trustee receives bona fide offers from more than one acquiring entity, and if the Commission determines to approve more than one (1) such acquiring entity, the Divestiture Trustee shall divest to the acquiring entity selected by respondent from among those approved by the Commission.

7. The Divestiture Trustee shall serve, without bond or other security, at the expense of respondent, on such reasonable and

customary terms and conditions as the Commission or a court may set. The Divestiture Trustee shall have the authority to employ, at the expense of respondent, such consultants, accountants, attorneys, investment bankers, business brokers, appraisers, and other representatives and assistants as are necessary to carry out the Divestiture Trustee's duties and responsibilities. The Divestiture Trustee shall account for all monies derived from the divestiture and all expenses incurred. After approval by the Commission and, in the case of a court-appointed trustee, by the court, of the account of the trustee, including fees for his or her services, all remaining monies shall be paid at the direction of respondent. The Divestiture Trustee's compensation shall be based at least in significant part on a commission arrangement contingent on the Divestiture Trustee's locating a New Acquirer and assuring compliance with this order.

8. Respondent shall indemnify the Divestiture Trustee and hold the Divestiture Trustee harmless against any losses, claims, damages, liabilities, or expenses arising out of, or in connection with, the performance of the Divestiture Trustee's duties, including all reasonable fees of counsel and other expenses incurred in connection with the preparation for, or defense of, any claim, whether or not resulting in any liability, except to the extent that such liabilities, losses, damages, claims, or expenses result from misfeasance, gross negligence, willful or wanton acts, or bad faith by the Divestiture Trustee.

9. If the Commission determines that the Divestiture Trustee has ceased to act or failed to act diligently, the Commission may appoint a substitute trustee in the same manner as provided in paragraph IV of this order.

10. The Commission or, in the case of a court-appointed trustee, the court, may on its own initiative or at the request of the Divestiture Trustee issue such additional orders or directions as may be necessary or appropriate to comply with the terms of this order.

11. The Divestiture Trustee shall have no obligation or authority to operate or maintain the world-wide Reteplase Assets.

12. The Divestiture Trustee shall report in writing to respondent and the Commission every two months concerning his or her efforts to divest the relevant assets, respondent's compliance with the terms of this order, and the New Acquirer's efforts to obtain all necessary FDA approvals to manufacture and sell Reteplase.

V.

It is further ordered, That:

A. Within two (2) months of the date on which this order becomes final respondent shall: (i) divest, absolutely and in good faith, at no minimum price, the world-wide DAT Reagent Assets as a competitively viable, on-going product line; (ii) grant an exclusive, world-wide royalty-free license, in perpetuity, to the CEDIA Patents for DAT Applications, and (iii) grant a non-exclusive, royalty-free license, in perpetuity, to the CEDIA Patents for Non-DAT Applications in the United States, to a Reagent Acquirer that receives the prior approval of the Commission and only in a manner that receives the prior approval of the Commission. The purpose of the divestiture of the DAT Reagent Assets is to ensure the continued research, development, manufacture, and sale of the DAT Reagents as a viable competitive alternative for screening for the use of drugs of abuse, to establish a viable competitor and to remedy the lessening of competition resulting from the proposed Acquisition as alleged in the Commission's complaint. In the event that the Reagent Acquirer does not choose to acquire all of the physical assets included in the DAT Reagent Assets because the Reagent Acquirer does not require such assets in order to engage in the manufacture and sale of DAT reagents, respondent shall not be required to divest such assets.

B. Respondent's agreement with the Reagent Acquirer or New Reagent Acquirer (hereinafter "Divestiture Agreement") shall include the following provisions, and respondent shall commit to satisfy the following:

1. Respondent shall Contract Manufacture and deliver to the Reagent Acquirer or New Reagent Acquirer in a timely manner, a supply of all of the CEDIA Reagents specified in the Divestiture Agreement at cost for a period not to exceed one (1) year from the date the Divestiture Agreement is approved, or three (3) months after the date the Reagent Acquirer or the New Reagent Acquirer obtains all necessary FDA approvals to manufacture and sell all of the CEDIA Reagents in the United States, whichever is earlier; provided, however, that the one (1) year period may be extended by the Commission in three (3) month increments for a period not to exceed one (1) year. In the event that the Reagent Acquirer does not choose to have all of the CEDIA Reagents Contract Manufactured because the Reagent Acquirer does not require such reagents in order to manufacture or sell DAT Reagents in a competitive manner, respondent shall not be required to Contract Manufacture those reagents the Reagent Acquirer does not require.

2. After respondent commences delivery of all of the CEDIA Reagents to the Reagent Acquirer or the New Reagent Acquirer pursuant to the Divestiture Agreement required by paragraph V.B of this order, all inventory of the DAT Reagents acquired by respondent through the Acquisition may be made available by respondent only to the Reagent Acquirer or the New Reagent Acquirer.

3. Respondent shall make representations and warranties to the Reagent Acquirer or the New Reagent Acquirer that all of the CEDIA Reagents supplied pursuant to the Divestiture Agreement by respondent to the Reagent Acquirer or the New Reagent Acquirer meet the FDA approved specifications. Respondent shall agree to indemnify, defend and hold the Reagent Acquirer or the New Reagent Acquirer harmless from any and all suits, claims, actions, demands, liabilities, expenses or losses alleged to result from the failure of any of the CEDIA Reagents supplied to the Reagent Acquirer or New Reagent Acquirer pursuant to the Divestiture Agreement by respondent to meet FDA specifications. This obligation shall be contingent upon the Reagent Acquirer or the New Reagent Acquirer giving respondent prompt, adequate notice of such claim, cooperating fully in the defense of such claim, and permitting respondent to assume the sole control of all phases of the defense and/or settlement of such claim, including the selection of counsel; provided, however, any such defense and/or settlement shall be consistent with the obligations assumed by respondent under this order. This obligation shall not require respondent to be liable for any negligent act or omission of the Reagent Acquirer or the New Reagent Acquirer or for any representations and warranties, express or implied, made by the Reagent Acquirer or the New Reagent Acquirer that exceed the representations and warranties made by respondent to the Reagent Acquirer or the New Reagent Acquirer.

4. Respondent shall make representations and warranties that respondent will hold harmless and indemnify the Reagent Acquirer or New Reagent Acquirer for any liabilities or loss of profits resulting from the failure by respondent to deliver in a timely manner any of the CEDIA Reagents as required by the Divestiture Agreement unless respondent can demonstrate that its failure was entirely beyond the control of respondent and in no part the result of negligence or willful misconduct on respondent's part.

5. During the term of the Contract Manufacturing between respondent and the Reagent Acquirer or the New Reagent Acquirer, upon request by the Reagent Acquirer, New Reagent Acquirer or the Interim Trustee, respondent shall make available to the Interim

Trustee all records that relate to the manufacture of any of the CEDIA Reagents supplied pursuant to the Divestiture Agreement.

6. Upon reasonable notice and request from the Reagent Acquirer or the New Reagent Acquirer to respondent, respondent shall provide in a timely manner: (a) assistance and advice to enable the Reagent Acquirer or the New Reagent Acquirer (or the Designee of the Reagent Acquirer or New Reagent Acquirer) to obtain all necessary FDA approvals to manufacture and sell all of the CEDIA Reagents supplied pursuant to the Divestiture Agreement; (b) assistance to the Reagent Acquirer or New Reagent Acquirer (or the Designee thereof) as is necessary to enable the Reagent Acquirer or New Reagent Acquirer (or the Designee thereof) to manufacture all of the CEDIA Reagents supplied pursuant to the Divestiture Agreement in substantially the same manner and quality employed or achieved by Corange at the time this agreement containing consent order is signed; and (c) consultation with knowledgeable employees of respondent and training, at the request of and at the facility of the Reagent Acquirer's or the New Reagent Acquirer's choosing until the Reagent Acquirer or New Reagent Acquirer (or the Designee thereof) receives certification from the FDA or abandons its efforts for certification from the FDA, sufficient to satisfy the management of the Reagent Acquirer or New Reagent Acquirer that its personnel (or the Designee's personnel) are adequately trained in the manufacture of all of the CEDIA Reagents supplied pursuant to the Divestiture Agreement. Such assistance shall include on-site inspections of the Roche facility, at the Reagent Acquirer's or New Reagent Acquirer's request, that is the specified source of supply of the Contract Manufacturing. Respondent may require reimbursement from the Reagent Acquirer or New Reagent Acquirer for all its direct out-of-pocket expenses incurred in providing the services required by this paragraph V.B.6.

7. The Divestiture Agreement shall require the Reagent Acquirer or the New Reagent Acquirer to submit to the Commission, at the same time that respondent submits its application for approval of divestiture, a certification attesting to the good faith intention of the Reagent Acquirer or the New Reagent Acquirer, including a plan by the Reagent Acquirer or the New Reagent Acquirer, to obtain in an expeditious manner all necessary FDA approvals to manufacture and sell DAT Reagents.

8. The Divestiture Agreement shall require the Reagent Acquirer or the New Reagent Acquirer to submit to the Commission and the Interim Trustee periodic verified written reports, setting forth in detail the efforts of the Reagent Acquirer or the New Reagent

Acquirer to sell DAT Reagents obtained pursuant to the Divestiture Agreement and to obtain all FDA approvals necessary to manufacture and sell DAT Reagents. The Divestiture Agreement shall require the first such report to be submitted sixty (60) days from the date the Divestiture Agreement is approved by the Commission and every ninety (90) days thereafter until all necessary FDA approvals are obtained by the Reagent Acquirer or the New Reagent Acquirer to manufacture and sell DAT Reagents. The Divestiture Agreement shall also require the Reagent Acquirer or the New Reagent Acquirer to report to the Commission and the Interim Trustee within ten (10) days of its ceasing the sale of all or substantially all of the DAT Reagents obtained pursuant to the Divestiture Agreement for any time period exceeding sixty (60) days or abandoning its efforts to obtain all necessary FDA approvals to manufacture and sell DAT Reagents. The Reagent Acquirer or New Reagent Acquirer shall provide the Interim Trustee access to all records and facilities that relate to its efforts, pursuant to the Divestiture Agreement, to sell or manufacture any of the CEDIA Reagents or obtain FDA approvals.

9. The Divestiture Agreement shall provide that the Commission may terminate the Divestiture Agreement if the Reagent Acquirer or the New Reagent Acquirer: (a) voluntarily ceases for sixty (60) days or more the sale of, or otherwise fails to pursue good faith efforts to sell, all or substantially all of the DAT Reagents prior to obtaining all necessary FDA approvals to manufacture and sell DAT Reagents; (b) fails to pursue good faith efforts to obtain all necessary FDA approvals to manufacture and sell the DAT Reagents; or (c) fails to obtain all necessary FDA approvals to manufacture and sell DAT Reagents in the United States within one (1) year from the date the Commission approves the Divestiture Agreement between respondent and the Reagent Acquirer or the New Reagent Acquirer; provided, however, that the one (1) year period may be extended by the Commission in three (3) month increments for a period not to exceed an additional one (1) year if it appears that such FDA approvals are likely to be obtained within such extended time period.

10. The Divestiture Agreement shall provide that if it is terminated, the DAT Reagent Assets shall revert back to respondent, all licences to the CEDIA Patents shall be rescinded, and the CEDIA Assets shall be divested by the Divestiture Trustee to a New Reagent Acquirer pursuant to the provisions of paragraph VII of this order.

C. By the time the Divestiture Agreement between respondent and the Reagent Acquirer or New Reagent Acquirer is signed, respondent shall provide the Reagent Acquirer or New Reagent

Acquirer with a complete list of all employees of respondent who were engaged in the sale, marketing, or production of CEDIA Reagents on the date of the Acquisition, as well as all employees engaged in the sale, marketing or production of CEDIA Reagents on the date of the Divestiture Agreement. Such list(s) shall state each such individual's name, position, address, business telephone number, or if no business telephone number exists, a home telephone number, if available and with the consent of the employee, and a description of the duties and work performed by the individual in connection with the CEDIA Reagents. Respondent shall provide the Reagent Acquirer or New Reagent Acquirer the opportunity to enter into employment contracts with such individuals provided that such contracts are contingent upon the Commission's approval of the Divestiture Agreement.

D. Following the signing of the Divestiture Agreement and subject to the consent of the employees, respondent shall provide the Reagent Acquirer or New Reagent Acquirer with an opportunity to inspect the personnel files and other documentation relating to the individuals identified in paragraph V.C of this order to the extent possible under applicable laws. For a period of two (2) months following the divestiture, respondent shall provide the Reagent Acquirer or New Reagent Acquirer with a further opportunity to interview such individuals and negotiate employment contracts with them.

E. Respondent shall provide all employees identified in paragraph V.C of this order with reasonable financial incentives, if necessary, to continue in their employment positions pending compliance with paragraph V.A of this order, in order that such employees may be in a position to accept employment with the Reagent Acquirer or New Reagent Acquirer at the time of the divestiture. Such incentives shall include continuation of all employee benefits offered by respondent until the date of the divestiture, and vesting of all pension benefits (as permitted by law). In addition, respondent shall not enforce any confidentiality or non-compete restrictions relating to the CEDIA Assets that apply to any employee identified in paragraph V.C who accepts employment with the Reagent Acquirer or New Reagent Acquirer.

F. For a period of one (1) year commencing on the date of the individual's employment by the Reagent Acquirer or New Reagent Acquirer, respondent shall not re-hire any of the individuals identified in paragraph V.C of this order who accept employment with the Reagent Acquirer or New Reagent Acquirer, unless such

individual has been separated from employment by the Reagent Acquirer or New Reagent Acquirer against that individual's wishes.

G. Prior to divestiture, respondent shall not transfer, without consent of the Reagent Acquirer or New Reagent Acquirer, any of the individuals identified in paragraph V.C of this order to any other position.

H. Respondent shall not enforce against the Reagent Acquirer or New Reagent Acquirer any exclusivity provision of the Agreement on the Distribution of Instruments (hereinafter "Distribution Agreement") with Hitachi Ltd. dated November 20, 1987. Within ten (10) days after respondent signs the Divestiture Agreement, respondent shall inform Hitachi Ltd. that, as to the Reagent Acquirer or New Reagent Acquirer, it waives all exclusivity provisions of the Distribution Agreement.

I. While the obligations imposed by paragraphs V, VI or VII of this order are in effect, respondent shall take such actions as are necessary: (1) to maintain all necessary FDA approvals to manufacture and sell all of the CEDIA Reagents; (2) to maintain the viability and marketability of the CEDIA Assets, as well as all tangible assets, including the Roche facilities used to manufacture and sell all of the CEDIA Reagents; and (3) to prevent the destruction, removal, wasting, deterioration or impairment of the CEDIA Assets and the Roche facilities, used to manufacture and sell CEDIA Reagents, except for ordinary wear and tear.

VI.

It is further ordered, That:

A. At any time after respondent signs the agreement containing consent order in this matter, the Commission may appoint an Interim Trustee to monitor that respondent and the Reagent Acquirer or New Reagent Acquirer expeditiously perform their respective responsibilities as required by this order and the Divestiture Agreement approved by the Commission. Respondent shall consent to the following terms and conditions regarding the powers, duties, authorities, and responsibilities of the Interim Trustee appointed pursuant to this paragraph:

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

to have consented to the selection of the proposed trustee. This trustee may be the same trustee appointed pursuant to paragraphs III or IV of this order.

2. The Interim Trustee shall have the power and authority to monitor respondent's compliance with the terms of this order and with the terms of the Divestiture Agreement with the Reagent Acquirer or New Reagent Acquirer.

3. Within ten (10) days after appointment of the Interim Trustee, respondent shall execute a trust agreement that, subject to the prior approval of the Commission, confers on the Interim Trustee all the rights and powers necessary to permit the Interim Trustee to monitor respondent's compliance with the terms of this order and with the Divestiture Agreement with the Reagent Acquirer or New Reagent Acquirer, and to monitor the compliance of the Reagent Acquirer or New Reagent Acquirer under the Divestiture Agreement.

4. The Interim Trustee shall serve until such time as the Reagent Acquirer or New Reagent Acquirer has received all necessary FDA approvals to manufacture and sell all of the DAT Reagents.

5. The Interim Trustee shall have full and complete access to respondent's personnel, books, records, documents, facilities and technical information relating to the research, development, manufacture, importation, distribution and sale of any CEDIA Reagent supplied pursuant to the Divestiture Agreement, or to any other relevant information, as the Interim Trustee may reasonably request, including, but not limited to, all documents and records kept in the normal course of business that relate to the manufacture of any of the CEDIA Reagents. Respondent shall cooperate with any reasonable request of the Interim Trustee. Respondent shall take no action to interfere with or impede the Interim Trustee's ability to monitor respondent's compliance with paragraphs V and VI of this order and the Divestiture Agreement between respondent and the Reagent Acquirer or the New Reagent Acquirer.

6. The Interim Trustee shall serve, without bond or other security, at the expense of respondent, on such reasonable and customary terms and conditions as the Commission may set. The Interim Trustee shall have authority to employ, at the expense of respondent, such consultants, accountants, attorneys and other representatives and assistants as are reasonably necessary to carry out the Interim Trustee's duties and responsibilities. The Interim Trustee shall account for all expenses incurred, including fees for his or her services, subject to the approval of the Commission.

7. Respondent shall indemnify the Interim Trustee and hold the Interim Trustee harmless against any losses, claims, damages,

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

8. If the Commission determines that the Interim Trustee has ceased to act or failed to act diligently, the Commission may appoint a substitute trustee in the same manner as provided in paragraph VI.A.1 of this order.

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

10. The Interim Trustee shall evaluate reports submitted to it by the Reagent Acquirer or the New Reagent Acquirer with respect to the efforts of the Reagent Acquirer or the New Reagent Acquirer to obtain all necessary FDA approvals to manufacture and sell DAT Reagents. The Interim Trustee shall report in writing, concerning compliance by respondent and the Reagent Acquirer or New Reagent Acquirer with the provisions of paragraphs V and VI, to the Commission every two (2) months from the date the Divestiture Agreement becomes final until the Reagent Acquirer or New Reagent Acquirer obtains or abandons efforts to obtain all necessary FDA approvals to manufacture and sell DAT Reagents. Such reports shall include at least the following:

a. Whether respondent has supplied all of the CEDIA Reagents in conformity with the requirements of the Divestiture Agreement entered into pursuant to paragraph V.B of this order;

b. Whether respondent has given the Interim Trustee access to records as required by paragraph V.B.5 of this order;

c. Whether the Reagent Acquirer or New Reagent Acquirer has given the Interim Trustee reports and access pursuant to paragraph V.B.8 of this order;

d. Whether the Reagent Acquirer or New Reagent Acquirer is making good faith efforts to sell DAT Reagents and obtain all necessary FDA approvals to manufacture and sell DAT Reagents and whether these actions meet the projections of the business plan of the Reagent Acquirer or New Reagent Acquirer as required by paragraphs V.B.7 and V.B.8 of this order;

e. If six (6) months have elapsed from the date of approval of the Divestiture Agreement and the Reagent Acquirer or New Reagent Acquirer has not obtained all necessary FDA approvals to manufacture and sell DAT Reagents, whether such approvals are likely to be obtained if the Commission extends the one (1) year period specified in paragraph V.B.9 of this order; and

f. Whether respondent has maintained the CEDIA Assets as required in paragraph V.I of this order.

B. If the Commission terminates the Divestiture Agreement pursuant to paragraph V.B.9 of this order, the Commission may direct the Divestiture Trustee to seek a New Reagent Acquirer, as provided for in paragraph VII of this order.

VII.

It is further ordered, That:

A. If respondent fails to divest absolutely and in good faith, and with the Commission's prior approval, the DAT Reagent Assets and to grant the licenses required by paragraph V of this order, or if the Reagent Acquirer abandons its efforts or fails to obtain all necessary regulatory approvals in the manner set out in paragraph V.B.9, then any executed Divestiture Agreement between respondent and the Reagent Acquirer shall be terminated and the Commission may appoint a Divestiture Trustee to divest all of the CEDIA Assets and execute a new Divestiture Agreement that satisfies the requirements of paragraph V of this order. The Divestiture Trustee may be the same person as the Interim Trustee and will have the authority and responsibility to divest the CEDIA Assets absolutely and in good faith, and with the Commission's prior approval. Neither the decision of the Commission to appoint the Divestiture Trustee, nor the decision of the Commission not to appoint the Divestiture Trustee, to divest any of the assets under this paragraph VII.A shall preclude the Commission or the Attorney General from seeking civil penalties or any other relief available to it, including a court-appointed trustee, pursuant to Section 5(*l*) of the Federal Trade Commission Act, or any other statute enforced by the Commission, for any failure by the respondent to comply with this order.

B. If a Divestiture Trustee is appointed by the Commission or a court pursuant to paragraph VII.A to divest the CEDIA Assets to a New Reagent Acquirer, respondent shall consent to the following terms and conditions regarding the Divestiture Trustee's powers, duties, authority, and responsibilities:

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

2. Subject to the prior approval of the Commission, the Divestiture Trustee shall have the exclusive power and authority to divest the CEDIA Assets to a New Reagent Acquirer pursuant to the terms of this order and to enter into a Divestiture Agreement with the New Reagent Acquirer pursuant to the terms of this order, which Divestiture Agreement shall be subject to the prior approval of the Commission.

3. Within ten (10) days after appointment of the Divestiture Trustee, respondent shall execute a (or amend the existing) trust agreement that, subject to the prior approval of the Commission and, in the case of a court-appointed trustee, of the court, transfers to the Divestiture Trustee all rights and powers necessary to permit the Divestiture Trustee to divest the CEDIA Assets to a New Reagent Acquirer and to enter into a Divestiture Agreement with the New Reagent Acquirer.

4. The Divestiture Trustee shall have twelve (12) months from the date the Commission approves the trust agreement described in paragraph VII.B.3 of this order to divest the CEDIA Assets and to enter into a Divestiture Agreement with the New Reagent Acquirer that satisfies the requirements of paragraph V of this order. If, however, at the end of the applicable twelve (12) month period, the Divestiture Trustee has submitted to the Commission a plan of divestiture or believes that divestiture can be achieved within a reasonable time, such divestiture period may be extended by the Commission, or, in the case of a court-appointed trustee, by the court; provided, however, the Commission may extend such divestiture period only two (2) times.

5. The Divestiture Trustee shall have full and complete access to the personnel, books, records and facilities of respondent related to the manufacture, distribution, or sale of the CEDIA Reagents or to any other relevant information, as the Divestiture Trustee may request. Respondent shall develop such financial or other information as the Divestiture Trustee may request and shall cooperate with the Divestiture Trustee. Respondent shall take no action to interfere with

or impede the Divestiture Trustee's accomplishment of his or her responsibilities.

6. The Divestiture Trustee shall use reasonable efforts to negotiate the most favorable price and terms available in each contract that is submitted to the Commission, subject to respondent's absolute and unconditional obligation to divest at no minimum price and the Divestiture Trustee's obligation to expeditiously accomplish the remedial purpose of the order; to assure that respondent enters into a Divestiture Agreement that complies with the provisions of paragraph V.B; to assure that respondent complies with the remaining provisions of paragraph VII of this order; and to assure that the New Reagent Acquirer obtains all necessary FDA approvals to manufacture and sell CEDIA Reagents. The divestiture shall be made to, and the Divestiture Agreement executed with, the New Reagent Acquirer in the manner set forth in paragraph V of this order; provided, however, if the Divestiture Trustee receives bona fide offers from more than one acquiring entity, and if the Commission determines to approve more than one such acquiring entity, the Divestiture Trustee shall divest to the acquiring entity selected by respondent from among those approved by the Commission.

7. The Divestiture Trustee shall serve, without bond or other security, at the expense of respondent, on such reasonable and customary terms and conditions as the Commission or a court may set. The Divestiture Trustee shall have the authority to employ, at the expense of respondent, such consultants, accountants, attorneys, investment bankers, business brokers, appraisers, and other representatives and assistants as are necessary to carry out the Divestiture Trustee's duties and responsibilities. The Divestiture Trustee shall account for all monies derived from the divestiture and all expenses incurred. After approval by the Commission and, in the case of a court-appointed trustee, by the court, of the account of the trustee, including fees for his or her services, all remaining monies shall be paid at the direction of respondent. The Divestiture Trustee's compensation shall be based at least in significant part on a commission arrangement contingent on the Divestiture Trustee's locating a New Reagent Acquirer and assuring compliance with this order.

8. Respondent shall indemnify the Divestiture Trustee and hold the Divestiture Trustee harmless against any losses, claims, damages, liabilities, or expenses arising out of, or in connection with, the performance of the Divestiture Trustee's duties, including all reasonable fees of counsel and other expenses incurred in connection with the preparation for, or defense of, any claim, whether or not

resulting in any liability, except to the extent that such liabilities, losses, damages, claims, or expenses result from misfeasance, gross negligence, willful or wanton acts, or bad faith by the Divestiture Trustee.

9. If the Commission determines that the Divestiture Trustee has ceased to act or failed to act diligently, the Commission may appoint a substitute trustee in the same manner as provided in paragraph VII.B.1 of this order.

10. The Commission or, in the case of a court-appointed trustee, the court, may on its own initiative or at the request of the Divestiture Trustee issue such additional orders or directions as may be necessary or appropriate to comply with the terms of this order.

11. The Divestiture Trustee shall have no obligation or authority to operate or maintain the CEDIA Assets.

12. The Divestiture Trustee shall report in writing to respondent and the Commission every two (2) months concerning his or her efforts to divest the relevant assets, respondent's compliance with the terms of this order, and the New Reagent Acquirer's efforts to obtain all necessary FDA approvals to manufacture and sell the CEDIA Assets.

VIII.

It is further ordered, That:

A. Within sixty (60) days of the date this order becomes final and every ninety (90) days thereafter until respondent has fully complied with the provisions of paragraphs II through VII of this order, respondent shall submit to the Commission a verified written report setting forth in detail the manner and form of which it intends to comply, is complying, and has complied with these paragraphs 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 these paragraphs of this order, including a description of all substantive contacts or negotiations for accomplishing the divestitures and entering into the Divestiture Agreements required by this order, including the identity of all parties contacted. Respondent shall include in its compliance reports copies of all written communications to and from such parties, all internal memoranda, and all reports and recommendations concerning the Divestiture Agreements required by paragraphs II and V of this order.

B. One (1) year from the date this order becomes final and annually thereafter until respondent has complied with all of the terms of this order or until the Acquirer or New Acquirer has

obtained all necessary FDA approvals to manufacture and sell Reteplase in the United States, 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.

C. One (1) year from the date this order becomes final and annually thereafter until respondent has complied with all of the terms of this order or until the Reagent Acquirer or New Reagent Acquirer has obtained all necessary FDA approvals to manufacture and sell DAT Reagents, 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.

IX.

It is further ordered, That, for the purpose of determining or securing compliance with this order, and subject to any legally recognized privilege, upon written request and on reasonable notice to respondent, respondent shall permit any duly authorized representatives of the Commission:

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

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 such matters.

X.

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

IN THE MATTER OF

SCHNUCK MARKETS, INC.

MODIFYING 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-3585. Consent Order, June 8, 1995–Modifying Order, June 2, 1998

This order reopens a 1995 consent order -- that required the respondent to divest 24 stores to Commission-approved purchasers -- and this order modifies the consent order by permitting Schnuck to donate used equipment from its store in Granite City, Illinois, for use in the St. Louis Community College Culinary Studies Program, and this order also substitutes the prior approval requirement with prior notification and waiting period requirements.

ORDER REOPENING AND MODIFYING ORDER

On March 6, 1998, Schnuck Markets, Inc. ("Schnuck"), the respondent named in the consent order issued by the Commission on June 8, 1995, in Docket No. C-3585, filed its "Petition to Reopen and Modify Consent Order" ("Petition"), seeking to modify the order to divest and to cease and desist from certain acts and practices. For the reasons stated below, the Commission has determined to grant the Petition.

The order requires respondent to divest 24 supermarkets located in the St. Louis MSA. Schnuck has completed the divestitures required by the order. In addition to the divestiture requirements, the order requires Schnuck to refrain from certain conduct. Paragraph IV of the order requires Schnuck for ten years to obtain the Commission's approval before acquiring any supermarkets, or any stock in any firm owning or operating a supermarket, in the St. Louis MSA. Paragraph V.B of the order prohibits Schnuck from removing any equipment from a supermarket owned by Schnuck prior to a sale, sublease, assignment or change in occupancy, except for replacement or relocation of such equipment in or to another supermarket owned by Schnuck.

Schnuck made its request to modify the order under the public interest standard. It did not assert any change of fact or law. Schnuck has received a request from the St. Louis Community College ("College") for a donation of used equipment for use in its Culinary Studies Program. Schnuck has equipment that would meet the needs of the College at its Granite City store, located in Granite City,

Illinois, which has been closed since the June, 1995 acquisition of assets of National Holdings, Inc. Exhibit 2 to the Petition contains the request. Exhibit 3 contains a list of the equipment to be donated. Schnuck requested that the order be modified to allow it to donate the requested equipment.

Schnuck also requested that the prior approval requirements of paragraph IV of the order be converted to prior notice, pursuant to the Commission's June 21, 1995, Statement of Federal Trade Commission Policy Concerning Prior Approval and Prior Notice Provisions ("Prior Approval Policy Statement").[1] Schnuck states that there is nothing to rebut the Prior Approval Policy Statement's presumption that the prior approval provision should be modified.

The Commission, in its Prior Approval Policy Statement, "concluded that a general policy of requiring prior approval is no longer needed," citing the availability of the premerger notification and waiting period requirements of Section 7A of the Clayton Act, commonly referred to as the Hart-Scott-Rodino ("HSR") Act, 15 U.S.C. 18a, to protect the public interest in effective merger law enforcement.[2] The Commission announced that it will "henceforth rely on the HSR process as its principal means of learning about and reviewing mergers by companies as to which the Commission had previously found a reason to believe that the companies had engaged or attempted to engage in an illegal merger." As a general matter, "Commission orders in such cases will not include prior approval or prior notification requirements."[3]

The Commission stated that it will continue to fashion remedies as needed in the public interest, including ordering narrow prior approval or prior notification requirements in certain limited circumstances. The Commission said in its Prior Approval Policy Statement that "a narrow prior approval provision may be used where there is a credible risk that a company that engaged or attempted to engage in an anticompetitive merger would, but for the provision, attempt the same or approximately the same merger." The Commission also said that "a narrow prior notification provision may be used where there is a credible risk that a company that engaged or attempted to engage in an anticompetitive merger would, but for an order, engage in an otherwise unreportable anticompetitive merger."[4]

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[1] 60 Fed. Reg. 39745-47 (Aug. 3, 1995); 4 Trade Reg. Rep. (CCH) ¶ 13,241.

[2] Prior Approval Policy Statement at 2.

[3] *Id.*

[4] *Id. at 3.*

As explained in the Prior Approval Policy Statement, the need for a prior notification requirement will depend on circumstances such as the structural characteristics of the relevant markets, the size and other characteristics of the market participants, and other relevant factors.

The Commission also announced, in its Prior Approval Policy Statement, its intention "to initiate a process for reviewing the retention or modification of these existing requirements" and invited respondents subject to such requirements "to submit a request to reopen the order."[5] The Commission determined that, "when a petition is filed to reopen and modify an order pursuant to . . . [the Prior Approval Policy Statement], the Commission will apply a rebuttable presumption that the public interest requires reopening of the order and modification of the prior approval requirement consistent with the policy announced" in the Statement.[6]

The Commission has determined that it is in the public interest to reopen and modify the order as requested by Schnuck. There does not appear to be any reason to retain paragraph V.B as written to preclude the donation proposed by Schnuck.[7] Paragraph V.B was designed to make it more likely that any supermarket closed by Schnuck would be reopened as a supermarket by someone else. However, nothing in the order requires Schnuck to sell or lease any stores that it closes, and the Granite City store has been closed for almost three years. The possible detrimental impact on Schnuck's positive public image, and the public benefits to the College, outweigh the seemingly slight possibility that someone would want to acquire the Granite City store as a supermarket only if the to-be-donated equipment were still in the store. Further, the State of Illinois, with which Schnuck has agreed to make the Granite City store available to supermarket operators, does not object to the donation. Therefore the reasons to modify the order outweigh the reasons to retain it as written.

Additionally, paragraph IV of the order is modified to replace the prior approval requirement with prior notice. Nothing has been shown to rebut the presumption that the order should be modified.

Accordingly, *It is ordered*, That this matter be, and it hereby is, reopened; and

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[5] *Id.* at 4.

[6] *Id.*

[7] Schnuck has not requested that the order be modified to allow all donations to charity, but only this particular donation.

It is further ordered, That paragraph IV of the order be, and it hereby is, modified, as of the effective date of this order, to read as follows:

It is further ordered, That, for a period commencing on the date this order becomes final and continuing for ten (10) years thereafter, Schnuck shall cease and desist from acquiring, without Prior Notification to the Commission (as defined below), directly or indirectly, through subsidiaries or otherwise, any supermarket, including any facility that has been operated as a supermarket within six (6) months of the date of the offer by Schnuck to purchase the facility, or any interest in a supermarket, or any interest in any individual, firm, partnership, corporation or other legal or business entity that directly or indirectly owns or operates a supermarket in the St. Louis MSA.

Provided, however, that this paragraph IV shall not be deemed to require Prior Notification to the Commission for the construction of new facilities by Schnuck or the purchase or lease by Schnuck of a facility that has not been operated as a supermarket at any time during the six (6) month period immediately prior to the purchase or lease by Schnuck in those locations.

"Prior Notification to the Commission" required by paragraph IV shall be given on the Notification and Report Form set forth in the Appendix to Part 803 of Title 16 of the Code of Federal Regulations, as amended (hereinafter referred to as "the Notification Form"), and shall be prepared and transmitted in accordance with the requirements of that part, except that no filing fee will be required for any such notification, notification shall be filed with the Secretary of the Commission, notification need not be made to the United States Department of Justice, and notification is required only of Schnuck and not of any other party to the transaction. Schnuck shall provide the Notification Form to the Commission at least thirty (30) days prior to consummating any such transaction (hereinafter referred to as the "first waiting period"). If, within the first waiting period, representatives of the Commission make a written request for additional information, Schnuck shall not consummate the transaction until twenty (20) days after substantially complying with such request for additional information. Early termination of the waiting periods in this paragraph may be requested and, where appropriate, granted by letter from the Bureau of Competition. Schnuck shall not be required to provide Prior Notification to the Commission pursuant to this order for a transaction for which notification is required to be made, and has been made, pursuant to Section 7A of the Clayton Act, 15 U.S.C. 18a; and

It is further ordered, That paragraph V.B of the order be, and it hereby is, modified, as of the effective date of this order, to read as follows:

Respondent shall not remove any equipment from a supermarket owned or operated by respondent in the St. Louis MSA prior to a sale, sublease, assignment, or change in occupancy, except for replacement or relocation of such equipment in or to any other supermarket owned or operated by respondent in the ordinary course of business, or as part of any negotiation for a sale, sublease, assignment, or change in occupancy of such supermarket. Provided, however, that nothing in this provision shall prevent respondent from transferring equipment in response to the October 7, 1996, request from St. Louis Community College, including equipment from its store at 34707 Nameoki Street, Granite City, Illinois.

Commissioner Azcuenaga not participating.

IN THE MATTER OF

CIVIC DEVELOPMENT GROUP, INC., ET AL.

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

Docket C-3810. Complaint, June 5, 1998--Decision, June 5, 1998

This consent order prohibits, among other things, the two organizations and the officers of each organization from engaging in deceptive charitable solicitations on behalf of local law enforcement agencies. In addition, the consent order requires both organizations to set up an education and monitoring program for employees.

Appearances

For the Commission: *Mona Spivack* and *Eileen Harrington.*

For the respondents: *Errol Copelivitz, Copelivitz & Canter*, Kansas City, MO.

COMPLAINT

The Federal Trade Commission, having reason to believe that Civic Development Group, Inc. and Community Network, Inc., corporations, and Scott Pasch and David Keezer, individually and as officers of Civic Development Group, Inc., and Richard McDonnell, individually and as an officer of Community Network, Inc. ("respondents"), have violated the provisions of the Federal Trade Commission Act, and it appearing to the Commission that this proceeding is in the public interest, alleges:

1. Respondent Civic Development Group, Inc. ("CDG") is a New Jersey corporation with its principal office or place of business at 655 Florida Grove Road, Hopelawn, New Jersey. By itself or in concert with others, CDG controls the acts or practices of Community Network, Inc., including the acts or practices alleged in this complaint.

2. Respondent Community Network, Inc. ("CNI") is a Delaware corporation with its principal office or place of business at 655 Florida Grove Road, Hopelawn, New Jersey.

3. Respondent Scott Pasch is an officer of CDG. Individually or in concert with others, he formulates, directs, or controls the policies, acts, or practices of CDG and CNI, including the acts or practices alleged in this complaint. His principal office or place of business is 655 Florida Grove Road, Hopelawn, New Jersey.

4. Respondent David Keezer is an officer of CDG. Individually or in concert with others, he formulates, directs, or controls the policies, acts, or practices of CDG and CNI, including the acts or practices alleged in this complaint. His principal office or place of business is 655 Florida Grove Road, Hopelawn, New Jersey.

5. Respondent Richard McDonnell is an officer of CNI. Individually or in concert with others, he formulates, directs, or controls the policies, acts, or practices of CNI, including the acts or practices alleged in this complaint. His principal office or place of business is 655 Florida Grove Road, Hopelawn, New Jersey.

6. Respondents have solicited consumers by telephone and direct mail to contribute to a non-profit organization, the American Deputy Sheriffs' Association ("ADSA").

7. 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 FTC Act.

8. Respondents have solicited consumers by telephone and direct mail to contribute to the ADSA. During these solicitations, respondents have represented, expressly or by implication, that:

A. Money contributed to the ADSA by consumers in the past had benefitted law enforcement offices in the town, city, county, or state in which the consumers reside;

B. Money contributed to the ADSA by consumers had been used in the past to purchase bullet-proof vests for law enforcement offices in the town, city, county, or state in which the consumers reside; and

C. Money contributed to the ADSA by consumers had been used in the past to pay death benefits to the survivors of deceased law enforcement officers who resided or worked in the town, city, county, or state in which the consumers reside.

9. In truth and in fact, in numerous instances:

A. Money contributed to the ADSA by consumers in the past had not benefitted law enforcement offices in the town, city, county, or state in which the consumers reside;

B. Money contributed to the ADSA by consumers had not been used in the past to purchase bullet-proof vests for law enforcement offices in the town, city, county, or state in which the consumers reside; and

C. Money contributed to the ADSA by consumers had not been used in the past to pay death benefits to the survivors of deceased law enforcement officers who resided or worked in the town, city, county, or state in which the consumers reside.

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

10. During the solicitations described above, the respondents have also represented, expressly or by implication, that:

A. Money contributed to the ADSA by consumers would be used to benefit law enforcement offices in the town, city, county or state in which the consumers reside;

B. Money contributed to the ADSA by consumers would be used to purchase bullet-proof vests for law enforcement offices in the town, city, county or state in which the consumers reside; and

C. Money contributed to the ADSA by consumers would be used to pay death benefits to the survivors of deceased law enforcement officers who resided or worked in the town, city, county, or state in which the consumers reside.

11. In truth and in fact, in numerous instances:

A. Money contributed to the ADSA by consumers is not used to benefit law enforcement offices in the town, city, county, or state in which the consumers reside;

B. Money contributed to the ADSA by consumers is not used to purchase bullet-proof vests for law enforcement offices in the town, city, county, or state in which the consumers reside; and

C. Money contributed to the ADSA by consumers is not used to pay death benefits to the survivors of deceased law enforcement officers who resided or worked in the town, city, county, or state in which the consumers reside.

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

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

Commissioner Swindle not participating.

DECISION AND ORDER

The Federal Trade Commission having initiated an investigation of certain acts and practices of the respondents named in the caption hereof, and the respondents having been furnished thereafter with a copy of a draft of complaint which the Bureau of Consumer

Protection proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge respondents with violations of the Federal Trade Commission Act; and

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

The Commission having thereafter considered the matter and having determined that it had reason to believe that the respondents have violated the said Act, and that complaint should issue stating its charges in that respect, and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of 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 Community Network, Inc. ("CNI") is a Delaware corporation with its principal place of business at 655 Florida Grove Road, Hopelawn, New Jersey.

2. Respondent Richard McDonnell is an officer of CNI. Individually or in concert with others, he formulates, directs, or controls the policies, acts, or practices of CNI. His principal place of business is 655 Florida Grove Road, Hopelawn, New Jersey.

3. Respondent Civic Development Group, Inc. ("CDG") is a New Jersey corporation with its principal place of business at 655 Florida Grove Road, Hopelawn, New Jersey. By itself or in concert with others, CDG formulates, directs, or controls the policies, acts, or practices of CNI, including the acts or practices alleged in this complaint.

4. Respondent Scott Pasch is an officer of CDG. Individually or in concert with others, he formulates, directs, or controls the policies, acts, or practices of CDG and CNI, including the acts or practices alleged in this complaint. His principal place of business is 655 Florida Grove Road, Hopelawn, New Jersey.

5. Respondent David Keezer is an officer of CDG. Individually or in concert with others, he formulates, directs, or controls the policies, acts, or practices of CDG and CNI, including the acts or

practices alleged in this complaint. His principal place of business is 655 Florida Grove Road, Hopelawn, New Jersey.

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

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

ORDER

DEFINITIONS

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

1. "*Material*" means likely to affect a person's choice of, or conduct regarding, their decision to contribute to a charity.

2. Unless otherwise specified, "*respondents*" means Civic Development Group, Inc., a corporation, its successors and assigns and its officers; Community Network, Inc., a corporation, its successors and assigns and its officers; Richard McDonnell, individually and as an officer of Community Network, Inc., and Scott Pasch and David Keezer, individually and as officers of Civic Development Group, Inc., and each of the above's agents, representatives, and employees.

3. "*Person*" means a natural person, organization, or other legal entity, including a corporation, partnership, proprietorship, association, cooperative, government agency, or any other group or combination acting as an entity.

4. "*Charity*" means any person which is, or is represented to be, a non-profit entity or which has, or is represented to have, a charitable purpose.

5. "*Charitable contribution*" means money or any item of value that any person gives or transfers to a respondent, charity, or other person following a representation by a respondent that the money or item of value would be given, in whole or in part, to a charity or would benefit, either in whole or in part, a law enforcement organization, law enforcement personnel or a law enforcement program.

6. "*Telephone solicitation*" means soliciting charitable contributions by telephone.

7. "*Telephone solicitor*" means any person who, in connection with telephone solicitation, initiates or receives telephone calls to or from a customer.

8. "*Affiliated company*" means any corporation, partnership, sole proprietorship, unincorporated entity or other organization of any kind owned or controlled, directly or indirectly, by any of the respondents in this matter.

I.

It is ordered, That respondents, directly or through any corporation, subsidiary, division, or other device, in connection with telephone solicitation, shall not misrepresent, in any manner, expressly or by implication, the purpose for which charitable contributions have been or will be used.

II.

It is further ordered, That respondents, directly or through any corporation, subsidiary, division, or other device, in connection with telephone solicitation, shall not misrepresent, in any manner, expressly or by implication, the geographic location of the charity, organization or program that has benefitted or will benefit from charitable contributions.

III.

It is further ordered, That respondents, directly or through any corporation, subsidiary, division, or other device, in connection with telephone solicitation, shall not misrepresent, in any manner, expressly or by implication, any fact material to the decision of any person to make any charitable contribution.

IV.

It is further ordered, That respondents, in connection with telephone solicitation directly or through any corporation, subsidiary, division or other device, shall adopt an education and monitoring program designed to ensure compliance with paragraphs I, II and III of this order. Such program shall include, but is not limited to:

A. Providing the brochure attached hereto as Exhibit 1 to all current and future employees, agents and representatives of respondents and any affiliated companies, and securing from each such person a signed and dated statement acknowledging receipt of the brochure. Respondents shall deliver this brochure to such current personnel within thirty (30) days after the date of service of this order, and to such future personnel within thirty (30) days after the person assumes such position or responsibilities;

B. Obtaining, from each charity for which the respondents directly or through any corporation, subsidiary, division, or other device, solicit charitable contributions prior to any charitable solicitation on behalf of any such charity and again every six months until respondents terminate all charitable solicitation on behalf of that charity:

1. Written notices that all sales, verification, rebuttal and any other telephone solicitation scripts used in connection with any such charitable solicitation on behalf of such charity do not misrepresent:

a. The identity or occupation of the telephone solicitor;
b. The program or programs aided by the solicited contributions; and
c. The geographic area or areas of the program's focus.

2. Written reports detailing the goods or services provided by the charity in support of each affirmative representation contained in each telephone solicitation sales script used in connection with soliciting charitable contributions on behalf of such charity.

Such notices and written reports shall not be effective for purposes of paragraph V of this order in the event the respondents know or reasonably should know that any representation in any telephone solicitation sales scripts used in connection with soliciting charitable contributions is false or misleading.

C. Monitoring, in each location from which the respondents solicit charitable contributions, a random and representative sample of all employees and agents of the respondents involved in charitable solicitation, at all times during which such employees and agents engage in charitable solicitation, to ensure that they comply with paragraphs I, II and III of this order;

D. So long as this order is in effect, taping a random and representative sample of all telephone solicitation calls in all locations from which such calls are placed and reviewing a random sample of no fewer than one thousand such calls every thirty days to determine whether the employees or agents of respondents or their affiliated companies have made representations in violation of paragraphs I, II or III or this order;

E. Providing written notice to each employee or agent of the respondents who makes any representation in violation of paragraphs I, II or III of this order, and terminating any employee or agent of the respondents who makes more than one material representation in

violation of paragraphs I, II or III of this order in any consecutive twelve month period.

V.

It is further ordered, That in any action brought by the Commission to enforce this order, unless respondents either know or reasonably should know of violations of this order other than those addressed pursuant to paragraph IV(E) of this order, there shall be a rebuttable presumption that the respondents have exercised good faith in complying with paragraphs I, II and III of this order, if the respondents show, by a preponderance of the evidence, that they have established and maintained the education and compliance program mandated in paragraph IV; provided, however, that the presumption shall only apply to all telephone solicitation calls emanating from those locations where respondents have conducted taping pursuant to paragraph IV(D) of this order.

VI.

It is further ordered, That respondents shall, for a period of five (5) years from the date of entry of this order, maintain and permit representatives of the Federal Trade Commission access to their business premises to inspect and copy all documents relating in any way to any conduct subject to this order, including but not limited to:

A. All scripts used by respondents in connection with the solicitation of charitable contributions directly or through any subsidiary, division or other device and all other promotional material used in the solicitation and collection of any charitable contribution;

B. All complaints and other communications with consumers and governmental or consumer protection organizations; provided, however, that respondents shall keep all complaints, inquiries or other notations accompanying consumers' contributions for one year;

C. All notices and reports pursuant to paragraph IV(B) of this order;

D. All tape recordings required to be reviewed by respondents pursuant to paragraph IV(D) of this order, together with all documents detailing the locations at which the respondents conduct such taping, and all other tape recordings made by respondents pursuant to paragraph IV (D) to be kept by respondents for a period of one year,

E. All records of violations of paragraphs I, II or III of this order respondents discovered as a result of its monitoring, taping, other compliance program pursuant to paragraph V of this order, or for any

other reason, including the date, the name of the employee or agent, the subject of the telephone solicitation call, the misrepresentation, the number of times the employee or agent has violated paragraphs I, II or III of this order in the preceding twelve months, and a copy of the written warning or termination notice resulting from such violation; and

F. All statements required to be obtained pursuant to paragraph VII, below.

The Commission may otherwise monitor any respondents' compliance with this order by all lawful means available, including the use of investigators posing as consumers or clients.

VII.

It is further ordered, That respondents shall, for a period of five (5) years from the date of entry of this order, permit representatives of the Commission to interview and depose, under oath, at the respondents' business premises, the officers, directors, or employees of any such business with regard to compliance with the terms of this order. Such officers, directors, or employees may have counsel present. The respondents shall refrain from interfering with duly authorized representatives of the Commission who wish to interview the respondents' officers, directors, or employees relating in any way to any conduct subject to this order.

VIII.

It is further ordered, That respondents, directly or through any corporation, subsidiary, division, or other device, shall not provide means and instrumentalities to, or otherwise assist or facilitate, any person who respondents know or should know makes false or misleading representations about the purpose for which charitable contributions have been or will be used, the geographic location of the charity, organization or program that has benefitted or will benefit from charitable contributions, or any other fact material to the decision of any person to make any charitable contribution.

For purposes of this paragraph, "assist or facilitate" includes but is not limited to:

Providing or arranging for the provision of telephone service or equipment;

Providing or arranging for the provision of computer hardware or software;

Providing or assisting in the development of telephone scripts or other marketing material;
Mailing or arranging for the mailing of any solicitation or marketing material; or
Providing or arranging for the provision of names of prospective contributors.

IX.

It is further ordered, That respondents shall, for a period of five (5) years from the date of entry of this order, deliver a copy of this order to all current and future principals, officers, directors, and managers of respondents or of any affiliated companies having responsibilities with respect to the subject matter of this order, and shall secure from each such person a signed and dated statement acknowledging receipt of the order. Respondents shall deliver this order to such current personnel within thirty (30) days after the date of service of this order, and to such future personnel within thirty (30) days after the person assumes such position or responsibilities.

X.

It is further ordered, That respondents Civic Development Group, Inc. and Community Network, Inc. shall notify the Commission at least thirty (30) days prior to any change in the corporation(s) that may affect compliance obligations arising under this order, including but not limited to a dissolution, assignment, sale, merger, or other action that would result in the emergence of a successor corporation; the creation or dissolution of a subsidiary, parent, or affiliate that engages in any acts or practices subject to this order; the proposed filing of a bankruptcy petition; or a change in the corporate name or address. Provided, however, that, with respect to any proposed change in the corporation about which respondents learn less than thirty (30) days prior to the date such action is to take place, respondents shall notify the Commission as soon as is practicable after obtaining such knowledge. All notices required by this paragraph shall be sent by certified mail to the Associate Director, Division of Enforcement, Bureau of Consumer Protection, Federal Trade Commission, Washington, D.C.

XI.

It is further ordered, That respondents Community Network, Inc., Civic Development Group, Inc., and their successors and assigns and respondents Scott Pasch, David Keezer, and Richard McDonnell, within sixty (60) days after the date of service of this order, and again

180 days following entry of this order, and again 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. The reports required by this paragraph shall be sent by certified mail to the Associate Director, Division of Enforcement, Bureau of Consumer Protection, Federal Trade Commission, Washington, D.C.

XII.

It is further ordered, That respondents Scott Pasch, David Keezer, and Richard McDonnell, for a period of ten (10) years after the date of issuance of this order, shall notify the Commission of the discontinuance of their current business or employment, or of their affiliation with any new business or employment. The notice shall include respondents' new business address and telephone number and a description of the nature of the business or employment and their duties and responsibilities. All notices required by this paragraph shall be sent by certified mail to the Associate Director, Division of Enforcement, Bureau of Consumer Protection, Federal Trade Commission, Washington, D.C.

XIII.

This order will terminate on June 5, 2018, or twenty (20) years from the most recent date that the United States or the Federal Trade Commission files a complaint (with or without an accompanying consent decree) in federal court alleging any violation of the order, whichever comes later; provided, however, that the filing of such a complaint will not affect the duration of:

A. Any paragraph in this order that terminates in less than twenty (20) years;
B. This order's application to any respondent that is not named as a defendant in such complaint; and
C. This order if such complaint is filed after the order has terminated pursuant to this paragraph.

Provided, further, that if such complaint is dismissed or a federal court rules that the respondent did not violate any provision of the order, and the dismissal or ruling is either not appealed or upheld on appeal, then the order will terminate according to this paragraph as though the complaint had never been filed, except that the order will not terminate between the date such complaint is filed and the later

of the deadline for appealing such dismissal or ruling and the date such dismissal or ruling is upheld on appeal.

Commissioner Swindle not participating.

EXHIBIT 1

WHAT ARE MY OBLIGATIONS AS A PROFESSIONAL FUNDRAISER?

As a professional telemarketer raising funds for nonprofit or charitable entities, you have a legal obligation and a moral responsibility to tell the truth. In fact, your obligation to tell the truth is especially important because your company has entered into an order with the Federal Trade Commission prohibiting misrepresentations when soliciting donations. Violations of this order may result in the termination of your employment and a law enforcement action.

When you lie to consumers, you not only expose yourself and your company to legal liability, but you harm the credibility of all charitable or nonprofit organizations that rely on donations, including the ones we represent.

Simply put, you **may not** misrepresent any fact a person would rely on in deciding to give money. For example:

1. You may not falsely claim that money has gone or will go to purchase a specific item, such as bullet proof vests.
2. You may not falsely claim that money has gone or will go for a specific purpose, such as to pay for death benefits for families of fallen police officers.
3. You may not falsely claim that money has gone or will go to an organization in a particular location.
4. You may not lie about your occupation or employer, such as by saying you are a police officer, state trooper or deputy sheriff, if you do not hold such a position, or by claiming that you are a member of an organization if you are not.

WHAT DO I DO IF I KNOW THE SCRIPT IS FALSE OR MISLEADING?

You may be liable for violations of law if you knowingly make false statements to consumers. In addition, the Federal Trade Commission order with your company requires the company to terminate your employment if you lie to consumers.

HOW DO I RESPOND TO QUESTIONS?

Do not make up answers under any circumstances. Stop the presentation and ask your employer for the correct answer. A false rebuttal is every bit as serious as a false initial presentation, and may subject you to legal action and the termination of your employment.

STATEMENT OF CHAIRMAN ROBERT PITOFSKY AND
COMMISSIONER SHEILA F. ANTHONY

Today, we finalize the attached administrative settlement following public comment. The agreement resolves serious allegations about misrepresentations made by respondents in connection with their telephone fundraising efforts on behalf of a non-profit organization. We present our views on one particular provision in the order to ensure that it is not misconstrued to suggest to some that the Commission is steering in a new direction.

Part V of the order provides respondents with a limited rebuttable presumption that they have exercised good faith in complying with key injunctive provisions of the order, if respondents show, by a preponderance of the evidence, that they have established and maintained the education and compliance program mandated in Part IV. In this case, including this provision is acceptable.

Part IV of the order establishes numerous and significant monitoring and education requirements designed to ensure that respondents make no deceptive representations in connection with any charitable solicitations by telephone. These requirements include, but are not limited to: disseminating a brochure that discusses the obligations of a professional fundraiser to current and future employees and agents (Part IV.A); monitoring a random and representative sample of employees and agents in each location from which solicitations are made to ensure compliance with the injunctive provisions (Part IV.C); and taping a random and representative sample of telephone solicitations in each location in which solicitations are made and reviewing a random sample of at least 1000 such calls every 30 days to ensure compliance with the injunctive provisions (Part IV.D). Part IV.E further requires that respondents terminate any employee or agent who makes more than one material representation that violates the injunctive provisions in any consecutive twelve-month period.

Given the circumstances of this case as well as the strength and scope of the monitoring and education requirements in Part IV, we are of the view that the limited rebuttable presumption delineated in Part V is acceptable. (Under current law, good faith is among those

factors relevant to determining an appropriate civil penalty amount where an order has been violated. *See United States v. Danube Carpet Mills, Inc.*, 737 F.2d 998, 993-94 (11th Cir. 1984); *United States v. Reader's Digest Ass'n*, 662 F.2d 955, 967-68 (3d Cir. 1981), *cert. denied*, 455 U.S. 908 (1982)). This provision does not establish a defense to any subsequent enforcement actions. Similarly, it in no way precludes the Commission from taking action should it determine that respondents are not in full compliance with any final order. Furthermore, the Commission continues to adhere to its Policy Statement Concerning Errors and Omissions Clauses in Consent Decrees, 59 Fed. Reg. 34440 (July 5, 1994). We consider it highly unlikely that other facts would present themselves -- in the administrative or federal court context -- that would warrant application of the same or a similar rebuttable presumption.

STATEMENT OF COMMISSIONER MOZELLE W. THOMPSON

I am writing to concur with the Statement of Chairman Robert Pitofsky and Commissioner Sheila F. Anthony on the final administrative settlement in Civic Development Group, Inc. I have voted to support this agreement in recognition of the allegation of serious harm caused by respondents through their fraudulent telemarketing fundraising and the need to place such respondents under order. However, one provision of the order raises issues addressed by my two aforementioned colleagues and that I wish also to address through this Statement.

Part V of the order in Civic Development Group states that in any Commission action to enforce the order, "there shall be a rebuttable presumption that the respondents have exercised good faith in complying with [substantive provisions of the order] if the respondents show, by a preponderance of the evidence, that they have established and maintained the education and compliance program mandated in paragraph IV of the order. . . ."

I question the propriety of accepting a consent agreement that results in shifting the burden of proof to benefit a party that the Commission is claiming engaged in unlawful conduct. There are serious risks in permitting any party or adjudicative body to interfere with the Commission's well-supported prosecutorial discretion, and it could be argued that the limited rebuttable presumption in Part V allows respondent's compliance with the procedural requirements to detract from the Commission's ability to pursue substantive violations.

For purposes of this case only, I accept the order's burden-shifting provision and concur with the Chairman, Commissioner Anthony, and staff that this order is acceptable based on the unique and specialized aspects of this case. Accordingly, in my view, the order presented here should not be regarded as having precedential value.

I trust that staff will continue to work closely with the company to monitor its compliance with the stringent requirements of Part IV as well as all other requirements of the order.

IN THE MATTER OF

MEGA SYSTEMS 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-3811. Complaint, June 8, 1998--Decision, June 8, 1998

This consent order requires, among other things, the Illinois-based corporation and its officer to pay $500,000 in consumer redress and to disclose that their television and radio programs are paid advertisements. In addition, the consent order requires the respondents to substantiate claims regarding the benefits, performance or efficacy of any product or program they advertise, promote, sell or distribute in the future.

Appearances

For the Commission: *Russell Damtoft, Mary Tortorice, Charluta Pagar, Theresa McGrew* and *C. Steven Baker.*

For the respondents: *Barry Cutler, Baker & Hostetler*, Washington, D.C.

COMPLAINT

The Federal Trade Commission, having reason to believe that Mega Systems International, Inc., a corporation, and Jeffrey Salberg, individually and as an officer of the corporation ("respondents"), have violated the provisions of the Federal Trade Commission Act, and it appearing to the Commission that this proceeding is in the public interest, alleges:

1. Respondent Mega Systems International, Inc. is an Indiana corporation with its principal office or place of business at 2025 East 175th Street, Lansing, Illinois.

2. Respondent Jeffrey Salberg is an officer of the corporate respondent. Individually or in concert with others, he formulates, directs, or controls the policies, acts, or practices of the corporation, including the acts or practices alleged in this complaint. His principal office or place of business is the same as that of Mega Systems International, Inc.

3. Respondents have advertised, offered for sale, sold, and distributed products to the public, including but not limited to, Eden's Secret Nature's Purifying Product, Sable Hair Farming System, Kevin Trudeau's Mega Memory System, Dr. Callahan's Addiction Breaking System, and Jeanie Eller's Action Reading.

4. Eden's Secret Nature's Purifying Product and Sable Hair Farming System are "drugs," within the meaning of Sections 12 and 15 of the Federal Trade Commission Act.

5. Respondents' advertisements include, but are not limited to, program-length radio and television commercials which run for 30 minutes or less and fit within normal radio and television broadcasting time slots. Respondents' television commercials were and are broadcast on network, independent and cable television stations throughout the United States. Several of the television commercials are identified as "The Danny Bonaduce Show" and "A Closer Look.." The Danny Bonaduce Show purports to be a television talk show similar to "Late Night with David Letterman." The set consists of a band playing off to the side, a live audience, and a back drop of city skyline silhouette. Danny Bonaduce performs a monologue before interviewing a guest who is actually a promoter of a Mega Systems, Inc. product. A Closer Look purports to be a television talk show similar to "Larry King Live." The set consists of a desk similar to the desk used in "Larry King Live." Respondents' radio commercials were and are broadcast on network and independent radio stations throughout the United States. Kevin Trudeau acts as the host or guest in most, but not all, of respondents' radio and television commercials.

6. 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.

EDEN'S SECRET NATURE'S PURIFYING PRODUCT

7. Respondents have disseminated or have caused to be disseminated advertisements for Eden's Secret Nature's Purifying Product, including but not necessarily limited to the attached Exhibits A and B. These advertisements contain the following statements:

A. Trudeau: "That cleansing my body has had a dramatic impact on my body and life. I feel brighter and more alert for longer periods of time than I have in years, and there's no question that my immune system has dramatically improved."

*****

Wright: "...a body that is cleansed and purified of toxic wast matters, colon waste, fatty arterial deposits, the ph balance of the blood's better, the microflouron of the colon's better, you're simply enhancing the overall integrity of your body."

*****

Trudeau: "... I honestly believe that people try, they can't lose weight. And it is really amazing because I have friends that I see what they eat, and they try to exercise. They try to, and they still can't lose the weight."

Wright: "That's right."

Trudeau: "What's the problem here?"

Wright: "Well, step number one is if you don't cleanse the system out, your body is constantly hungry. Why? It is not getting nutrients. It's not getting fed. The colon wall gets lined with some sort of a type of, it's old fecal matter, it's old gluey plaque like substance. The wall of the colon gets compromised in such manner that a lot of the nutrients that you're eating, the foods that you're eating don't transfer."

*****

Wright: "So what we're doing is cleaning out the digestive tract, the colon and aiming at cleaning and purifying the blood all at the same time. So between the two of these, what we're initiating, Kevin, is a complete biological interwashing. When you assist the body's own eliminative channels, help open them up -- "

Trudeau: "Right."

Wright: "The body has an ability to restore itself. The integrity of the cells themselves on a cellular level becomes higher because there's not a lot of junk in there. There's not a lot of plaque in the way. They're opening up the transfer of nutrients and oxygen so your cells can live again."

*****

Trudeau: "And one of the things that everybody said, I asked them, I said what is your weight situation, and everyone said they have lost weight."

Wright: "Right."

Trudeau: "They're losing pounds."

Wright: "Right."

Trudeau: "Now this is obviously, we are not claiming to lose weight with the product, but this is cleansing, something is happening here."

*****

Wright: "Your blood stream's impure, the PH balance is off, and it's exactly like a girl who has PMS. The blood stream gets impure before her cycle, it's reabsorbed back into the blood stream, she's experiencing, she goes AHHH!!! She goes crazy, just like my wife used to until we founded this formula. This is the same kind of experience. Your stress level gets nuts."

Trudeau: "So are you telling me that people that have -- women that have a bad PMS syndrome, if they started cleansing their system, that could perhaps be relieved in some -- to some degree?" (Exhibit A; Radio Infomercial Script.)

B. This 100% natural, herbal purifying program is designed to cleanse your body quickly and easily of accumulated, harmful toxins. **I guarantee you'll feel energized and revitalized!** And many experts now believe that detoxification may even help you avoid premature aging and ill health.

*****

Worse yet, these man-made toxins eventually overwhelm our bodies' natural cleansing abilities and accumulate in our cells and tissues. As recent medical research indicates, the waste that remains is linked to declining appearance, premature aging and ill health.

Your body's cry for help

Although this news may come as a surprise to you, **your body has probably been trying to tell you for years that it's "toxic"!** Just a few symptoms you may experience include fatigue, indigestion, headaches, being bloated or overweight, irritability, irregularity, depression, arthritis, insomnia and immune suppression. If you suffer from any or all of these conditions, it's time to listen to your body **now**. . . before your health suffers further.

The Nature's Pure Body Program helps your body purify itself, quickly and easily

My exclusive purifying program gives your body the added help it needs to clear out the toxins that rob you of your energy and good health.
(Exhibit B; Promotional Brochure.)

8. Through the means described in paragraph seven, respondents have represented, expressly or by implication, that:

A. Eden's Secret Nature's Purifying Product causes significant weight loss.

B. Eden's Secret Nature's Purifying Product will prevent or cure illnesses, including but not limited to fatigue, headaches, depression, arthritis, insomnia, immune suppression, and premenstrual syndrome.

C. Eden's Secret Nature's Purifying Product will cleanse the body of harmful toxins.

D. Eden's Secret Nature's Purifying Product will purify the body's blood supply.

9. In truth and in fact:

A. Eden's Secret Nature's Purifying Product will not cause significant weight loss.

B. Eden's Secret Nature's Purifying Product will not prevent or cure illnesses, including but not limited to fatigue, headaches, depression, arthritis, insomnia, immune suppression, and premenstrual syndrome.

C. Eden's Secret Nature's Purifying Product will not cleanse the body of harmful toxins.

D. Eden's Secret Nature's Purifying Product will not purify the body's blood supply.

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

10. Through the means described in paragraph seven, respondents have represented, expressly or by implication, that they possessed and relied upon a reasonable basis that substantiated the representations set forth in paragraph eight, at the time the representations were made.

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

SABLE HAIR FARMING SYSTEM

12. Respondents have disseminated or have caused to be disseminated advertisements for Sable Hair Farming System, including but not necessarily limited to the attached Exhibit C. This advertisement contains the following statements:

Sabal: "So I found a combination of herbs that, when mixed with cleansers like witch hazels and alcohols, can deep clean underneath the surface of the scalp, and clean out all the debris that prevents the hair or blocks the hair from reaching the surface."

*****

"And the amazing thing that was happening is that after we cleaned, as we looked at the scalp, hair sprouted out."

*****

"[T]he hair that sprouts out measures five years, for instance, that it's been growing under the scalp, from the blood, from the protein in the blood."

*****

"[W]e had live subjects tested in a laboratory here in south Florida, and they counted the hairs as they came in on every test subject every day that they used the product."

*****

"So we have a wonderful product that cleans the scalp. And if you learn to do that, first of all, you'll never lose your hair."

*****

"I should be in most of the major medical journals in the world in the next few months, which will finally end baldness in the human race. And I'm very proud of that. A hundred percent on my testing. And that will be announced, I would say, before the end of the June."

*****

"And everyone should have all their hair back in six months to a year, permanently, painlessly, and never have to purchase anything again."

*****

Trudeau: "And you're saying that if the follicles were cleaned properly –"

Sabal: "They would never lose their hair."

*****

Sabal: "[W]e could actually end hair loss in the human race. No one would become bald any more."

*****

"Well, the doctors that have tested with us, that amazed them. That was the very first thing that amazed them. They said they saw more in five minutes with our product than they did with any other product they've ever tested. And that includes the Rogaine and Minoxidil products."

"You don't ever have to be bald any more. You don't ever have to go bald, if you're a young person who's just starting to lose their hair. And there's a lot of help that we can give you. So I hope you do give us a call." (Exhibit C; Radio Infomercial Script.)

13. Through the means described in paragraph twelve, respondents have represented, expressly or by implication, that:

A. Sable Hair Farming System will stop, prevent, cure, relieve, reverse or reduce hair loss.

B. Sable Hair Farming System will promote the growth of hair where hair has already been lost.

C. Sable Hair Farming System is superior to Rogaine and Minoxidil in stopping, preventing, curing, relieving, reversing or reducing hair loss.

14. In truth and in fact:

A. Sable Hair Farming System will not stop, prevent, cure, relieve, reverse or reduce hair loss.

B. Sable Hair Farming System will not promote the growth of hair where hair has already been lost.

C. Sable Hair Farming System is not superior to Rogaine and Minoxidil in stopping, preventing, curing, relieving, reversing or reducing hair loss.

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

15. Through the means described in paragraph twelve, respondents have represented, expressly or by implication, that they possessed and relied upon a reasonable basis that substantiated the representations set forth in paragraph thirteen, at the time the representations were made.

16. In truth and in fact, respondents did not possess and rely upon a reasonable basis that substantiated the representations set forth in paragraph thirteen, at the time the representations were made. Therefore, the representation set forth in paragraph fifteen was, and is, false or misleading.

17. Through the means described in paragraph twelve, respondents have represented, expressly or by implication, that scientific studies demonstrate that Sable Hair Farming System is effective in stopping hair loss and promoting hair growth.

18. In truth and in fact, scientific studies do not demonstrate that Sable Hair Farming System is effective in stopping hair loss and promoting hair growth. Therefore, the representation set forth in paragraph seventeen was, and is, false or misleading.

KEVIN TRUDEAU'S MEGA MEMORY SYSTEM

19. Respondents have disseminated or have caused to be disseminated advertisements for Kevin Trudeau's Mega Memory

System, including but not necessarily limited to the attached Exhibits D through F. These advertisements contain the following statements:

A. Trudeau: "[W]e teach people all around the world how to release the photographic memory that people have right now, or instant recall memory."

*****

"All these little absent minded things we help people when we develop and release the photographic memory that they have."

*****

"Every single person has a photographic memory right now lying dormant. It's an ability that everyone has. You, see, you remember everything that you see, hear and think about. If it comes through the senses it is remembered. The problem though is recalling information."

*****

"Yeah, that's one of the things about Mega Memory that's very unique is that fact that it only takes only a few hours to learn the technology and when you release that photographic memory ...."

*****

"We took an entire seventh grade class in the beginning of last school year. They went through the Mega Memory system, just took a few days, a couple of hours, very easy and at the end of the school year they had a big problem on their hands. Eight months ahead of their school curriculum, lowest grade point average A minus, and they test the vocabulary levels of the seventh graders and they found to be those of sophomores in college because they could remember all the words and definitions. I can't wait until they take their SAT's. They were three years ahead in Spanish, because foreign languages, if you ever wanna learn foreign languages, it has a lot to do with memory, you know."

*****

"I then met a fellow who did a research report in 1975 at the Oklahoma School for the Blind in Muskogee, Oklahoma, V. R. Carter was the Superintendent back then, and he took thirty-five blind children and he improved their memory. These kids were blind from birth, by the way, and he improved, in just five days, fifteen percent recall ability to ninety percent in just one week. .... They were so impressed that they tested the kids six and eight months later to see if it stuck and most of the kids improved to ninety-five and ninety-eight percent recall. So, it stuck. We duplicated the results with retarded kids with IQ's of only fifty and sixty and the results were almost identical, lower memory in the beginning, dramatic improvement in the nineties just a week later and a year later in testing almost a hundred percent recall ability with slow, retarded kids. Obviously we know at this point if we can teach blind and retarded kids it had to be an ability, a powerful memory, that everyone had. So I took that raw data and put together, invented, if you will, over the next year the entire Mega Memory system that we have today, founded the institute and just in the last couple of years over two million people now, uh, Danny, have gone through the Mega Memory home study course to improve their own memory."

*****

"...ADD and we're getting letters and calls more on this subject than anything else and there are millions of people, children and adults who are afflicted with this problem, and when I started looking at that because it has a lot to do with memory, attention span, ... So I started doing the research and we tested five thousand kids with ADD. .... there's a lot of controversy 'bout this, by the way because the drug

Ritalin is the drug of choice to give. And we don't agree with that as an option, but uh we think through dietary change and we discuss this in Mega Memory, some of the things and options that people can take to dramatically improve."
(Exhibit D; Television Infomercial Script.)

B. Help Sheet - Overcoming Common Objections

4.) Can this work for people with learning disabilities, ADD, dyslexia, or head injuries?
These techniques were perfected with blind and retarded children back in the early 70's. Through research, we've found that everyone can improve their memory with this program (except Alzheimer's patients). (Exhibit E; Telephone Sales Script.)

C. Kevin Trudeau's breakthrough techniques were developed while working with blind and mentally handicapped students. Their recall ability increased from 15% to 90% in just 5 days! Because these methods have been proven under the most difficult circumstances, they're guaranteed to work for you! Kevin's breakthrough techniques that you'll learn in this course allow you to release your own perfect photographic memory ... effortlessly. (Exhibit F; Promotional Brochure.)

20. Through the means described in paragraph nineteen, respondents have represented, expressly or by implication, that Kevin Trudeau's Mega Memory System will enable users to achieve a photographic memory.

21. In truth and in fact, Kevin Trudeau's Mega Memory System will not enable users to achieve a photographic memory. In fact, Kevin Trudeau's Mega Memory System simply consists of standard memory techniques. Therefore, the representation set forth in paragraph twenty was, and is, false or misleading.

22. Through the means described in paragraph nineteen, respondents have represented, expressly or by implication, that Kevin Trudeau's Mega Memory System is effective in causing adults or children with learning disabilities or attention deficit disorder to substantially improve their memory.

23. Through the means described in paragraph nineteen, respondents have represented, expressly or by implication, that they possessed and relied upon a reasonable basis that substantiated the representations set forth in paragraphs twenty and twenty-two, at the time the representations were made.

24. In truth and in fact, respondents did not possess and rely upon a reasonable basis that substantiated the representations set forth in paragraphs twenty and twenty-two, at the time the representations were made. Therefore, the representation set forth in paragraph twenty-three was, and is, false or misleading.

25. Through the means described in paragraph nineteen, respondents have represented, expressly or by implication, that:

A. Scientific studies of Kevin Trudeau's Mega Memory System on seventh-grade students demonstrate that Kevin Trudeau's Mega Memory System will substantially improve their academic performance and grades.

B. Scientific studies of Kevin Trudeau's Mega Memory System on blind children demonstrate that Kevin Trudeau's Mega Memory System will improve their recall ability to a level of 95% to 98%.

C. Scientific studies of Kevin Trudeau's Mega Memory System on children with IQ's of fifty to sixty demonstrate that Kevin Trudeau's Mega Memory System will improve their recall ability to a level of almost 100%.

D. Scientific studies of Kevin Trudeau's Mega Memory System on children with attention deficit disorder demonstrate that Kevin Trudeau's Mega Memory System will substantially improve their memory.

26. In truth and in fact:

A. Scientific studies of Kevin Trudeau's Mega Memory System on seventh-grade students do not demonstrate that Kevin Trudeau's Mega Memory System will substantially improve their academic performance and grades.

B. Scientific studies of Kevin Trudeau's Mega Memory System on blind children do not demonstrate that Kevin Trudeau's Mega Memory System will improve their recall ability by 95% to 98%.

C. Scientific studies of Kevin Trudeau's Mega Memory System on children with IQ's of fifty to sixty do not demonstrate that Kevin Trudeau's Mega Memory System will improve their recall ability by almost 100%.

D. Scientific studies of Kevin Trudeau's Mega Memory System on children with Attention Deficit Disorder do not demonstrate that Kevin Trudeau's Mega Memory System will substantially improve their memory.

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

DR. CALLAHAN'S ADDICTION BREAKING SYSTEM

27. Respondents have disseminated or have caused to be disseminated advertisements for Dr. Callahan's Addiction Breaking System, including but not necessarily limited to the attached Exhibits G through I. These advertisements contain the following statements:

A. Trudeau: "He [Dr. Callahan] has been a best-selling author whose revolutionary treatment for losing weight and quitting smoking takes less than three minutes with 95 percent success. If you smoke and want to quit, or if you want to lose weight once and for all, today's show could be an answer to your prayers."

*****

"[T]he treatments that you discovered, that you invented get rid of addictions like food addictions so people can lose weight easily without trying to diet. They can just lose the weight because they reduce the urge to overeat. You can reduce smoking, alcoholism, any type of compulsion, depression, jealousy."

*****

Callahan: "It's revolutionary because it works with a high success rate that's never before been possible."

*****

Trudeau: "[I]f you have any addiction, whether it be for food, if you're overweight, if you have a smoking addiction, if your children are addicted to drugs -- any compulsion, anything whatsoever, we recommend you call the 800 number..."

*****

Callahan: "What we mean is that their addictive urge, that uncontrollable urge is gone, completely gone, and they feel fine."

*****

"And when we eliminate the anxiety, they don't need the heroin; they don't need the alcohol. The withdrawal is gone." (Exhibit G; Television Infomercial Script.)

B. Trudeau: "We're going to be sharing Dr. Callahan's revolutionary breakthrough that he had discovered while studying quantum physics. Dr. Callahan came up with a breakthrough that in 60 seconds can eliminate your addictive urge to overeat, to smoke cigarettes, to do any compulsion, any type of addicted behavior, whether it be alcohol, drugs, cigarettes, food, maybe picking your thumb, any type of compulsive behavior, and eliminate all the stress and anxiety in your body. Now this technique will take 60 seconds to apply and works in virtually 100 percent of the time."

*****

"Dr. Callahan, while studying quantum physics, figured out that he has this technique that in 60 seconds you can break up the stress and anxiety in your body and eliminate totally the addictive urge. Now what will that mean to you? That means you can lose weight easily, effortlessly, because you don't have any urge to overeat when you're not hungry. The urge is gone."

*****

"While I was on another time, a gal called up on the phone. She said, "Kevin, I saw you about a month ago and I bought your program." This is right on tape. We have this on film. Right on national TV. She said, "I want you to know, I got it a month ago and here's what happened. I was addicted because of food. I would overeat when I wasn't hungry. So late at night when I wanted to eat food, I used the technique. It took only 60 seconds. I just used it one time. I relaxed, I felt fantastic. I slept better than I have in years because all the stress was gone." She goes, "I was just feeling great and the urge was gone. I didn't eat the food. I didn't want it." She goes, "Since then, I've lost over 10 pounds, but I'm not trying to lose weight." She said, "I eat ice cream, I eat cookies, I eat cake, I eat everything I want. But I'm just losing weight." And I said, "Are you trying to lose weight." And she says, 'No.'"

*****

"The best thing about this technique if you're overweight, you can eat everything you want. You can eat pizza, you can eat ice cream, you can eat anything and everything you want. You're just not going to want it. The urge is going to be gone. The uncontrollable urge is gone."

*****

"When I was on Value Vision, the home shopping club, a gal called up and said she does work in an alcohol and drug treatment center with alcoholics, heroin addicts, cocaine addicts. That's how Dr. Callahan actually started this work. He worked with some of these major additions. Here's the interesting thing. Whether your addiction is cocaine, heroin, alcohol or pizza or chocolate or cigarettes, it's all caused by the exact same thing. The stress and anxiety energy field. She told me that she's getting this program and for the first time in her life she can actually help people, because in 60 seconds she knocks out the urge, the uncontrollable urge."

*****

"Another gal called up on the same day on Value Vision and said this. She brought the program 30 days ago. She had lost weight -- and after she used it once, she lost weight. But her husband was an alcoholic. He used the program. He hasn't had a drink in 30 days. Why? Because it knocked out the addictive urge. Dr. Callahan was in a grocery store in California where he lives. A guy ran up to him and said, "Dr. Callahan?" He said, "Yes." He said, "I saw you on TV three years ago when you were talking about this technique, and I got your book where it describes it." He said, 'I was an alcoholic my whole life, over 28 years. I used your technique and I haven't had a drink, Doctor, in three years, and I feel so wonderful.'" (Exhibit H; Television Infomercial Script.)

C. ... by placing your order today you're taking the most important step to eliminate your addiction(s) for the rest of your life.

*****

Dr. Callahan's addiction breaking system is a video taped program that will instantly teach you how to break any addictive urge you want to eliminate by using a simple and easy to use 15 minute technique.

*****

BENEFITS TO YOUR CUSTOMER:

QUIT SMOKING BREAK ADDICTIVE URGES LOSE WEIGHT

(Exhibit I; Telephone Sales Script.)

28. Through the means described in paragraph twenty-seven, respondents have represented, expressly or by implication, that for all or virtually all users:

A. Dr. Callahan's Addiction Breaking System reduces an individual's compulsive desire to eat, leading to significant weight loss.

B. Dr. Callahan's Addiction Breaking System reduces an individual's compulsive desire to eat, leading to significant weight loss without the need to diet or exercise.

C. Dr. Callahan's Addiction Breaking System cures addictions and compulsions, including but not limited to, smoking, eating, and using alcohol or heroin.

29. In truth and in fact:

A. Dr. Callahan's Addiction Breaking System does not reduce an individual's compulsive desire to eat, and as such, Dr. Callahan's Addiction Breaking System does not lead to significant weight loss.

B. Dr. Callahan's Addiction Breaking System does not reduce an individual's compulsive desire to eat, and as such, Dr. Callahan's Addiction Breaking System does not lead to significant weight loss without the need to diet or exercise.

C. Dr. Callahan's Addiction Breaking System does not cure addictions and compulsions, including but not limited to, smoking, eating and using alcohol or heroin. Indeed, Dr. Callahan's Addiction Breaking System simply consists of a video tape in which Dr. Callahan demonstrates a series of tapping one's face, chest, and hand, rolling one's eyes, and humming.

Therefore, the representations set forth in paragraph twenty-eight were, and are, false or misleading.

30. Through the means described in paragraph twenty-seven, respondents have represented, expressly or by implication, that they possessed and relied upon a reasonable basis that substantiated the representations set forth in paragraph twenty-eight, at the time the representations were made.

31. In truth and in fact, respondents did not possess and rely upon a reasonable basis that substantiated the representations set forth in paragraph twenty-eight, at the time the representations were made. Therefore, the representation set forth in paragraph thirty was, and is, false or misleading.

32. Through the means described in paragraph twenty-seven, respondents have represented, expressly or by implication, that testimonials with regard to consumers' use of Dr. Callahan's Addiction Breaking System reflect the typical or ordinary experience of members of the public who use the product.

33. In truth and in fact, testimonials with regard to consumers' use of Dr. Callahan's Addiction Breaking System do not reflect the typical or ordinary experience of members of the public who use the product. Therefore, the representation set forth in paragraph thirty-two was, and is, false or misleading.

JEANIE ELLER'S ACTION READING

34. Respondents have disseminated or have caused to be disseminated advertisements for Jeanie Eller's Action Reading, including but not necessarily limited to the attached Exhibits J and K. These advertisements contain the following statements:

A. Trudeau: "According to my guest, Jennie Eller, every single person -- if they can see, hear and talk -- can learn to read, guaranteed. She also claims that her revolutionary approach to teaching reading is easy, quick and works 100 percent of the time."

*****

Eller: "That is the program I took back. We started using it in the Anchorage School District. Every child that went through it learned to read."

*****

"And when you go through this program, you start at the beginning and you take every logical step right through it. And when you come out, you are a fluent, independent reader. And I've put my 30 years of teaching credibility on the line. It absolutely is guaranteed to work."

*****

"[B]ut any child that you show them how that code works, you can't stop them from reading. They crack that code. And that code is the key."

*****

Trudeau: "But you're talking about this secret code. The government says -- you were mentioning to me -- that teaches (sic) certain kids just can't read, and you're saying that's hogwash."

Eller: "It is. It's absolute hogwash. I've been teaching for 30 years and I've never had anyone not learn to read."

Trudeau: "Because I just (sic) watching a show the other day on -- on -- on TV and they were saying, this guy's trying to read. He's tried -- he tried a phonics program himself. He -- he still can't read. He's frustrated. He thinks he's dumb. And they said -- they made the statement, the only way he can read is by hard, hard work, and he still may never learn how to read."

Eller: "No, that is absolutely not true, and I hope he's watching this show, because if he'll get this program, I guarantee you he'll learn to read."

*****

"[I]f you tell them what the words are, they know those words. They speak those words. The people that I taught to read on the Oprah Show, as soon as they could decode, decipher the newspaper, they knew those words. They were articulate people. They spoke the language. They understood the language. They just could not decipher the language."

*****

"Absolutely, because it not only teaches the decoding, the phonics part, it teaches comprehension." (Exhibit J; Television Infomercial Script.)

B. **For Adults**

Easier and quicker for adults to learn, because most already know the vocabulary - they just need to learn how to "decode" written words and sentences.

*****

1. How can it improve comprehension?

Even though we've heard a lot of words before in conversation, a person who can't read wouldn't recognize them. Action Reading teaches you how to read words for

their meaning. (It's like putting a persons (sic) face to their name, when you have only spoken to them on the telephone.)

*****

6. Does Jeanie guarantee that she can teach anyone to read?
Action Reading can teach anyone who can see, hear, think and talk to read... (Exhibit K; Telephone Sales Script.)

35. Through the means described in paragraph thirty-four, respondents have represented, expressly or by implication, that Jeanie Eller's Action Reading is successful in teaching reading 100% of the time.

36. Through the means described in paragraph thirty-four, respondents have represented, expressly or by implication, that they possessed and relied upon a reasonable basis that substantiated the representation set forth in paragraph thirty-five, at the time the representation was made.

37. In truth and in fact, respondents did not possess and rely upon a reasonable basis that substantiated the representation set forth in paragraph thirty-five, at the time the representation was made. Therefore, the representation set forth in paragraph thirty-six was, and is, false or misleading.

DECEPTIVE FORMAT

38. Through the advertisement and dissemination of respondents' television infomercials including, but not limited to, "The Danny Bonaduce Show" (Exhibit D) and "A Closer Look" (Exhibits G, H, and J), and radio infomercials (Exhibits A and C), respondents have represented, directly or by implication, that these commercials are independent television and radio programs and not paid commercial advertising.

39. In truth and in fact, respondents' television and radio infomercials are not independent television and radio programs and are paid commercial advertising. Therefore, the representation set forth in paragraph thirty-eight was, and is, false or misleading.

40. 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.

By the Commission.[1]

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[1] Prior to leaving the Commission, former Commissioner Azcuenaga registered a vote in the affirmative for this complaint.

EXHIBIT A

FEDERAL TRADE COMMISSION

FTC MATTER NO.: 942-3278

TITLE: EDEN'S SECRET NATURE'S PURIFYING PRODUCT RADIO INFOMERCIAL

PAGES: 1 THROUGH 27

MSI/SALBERG COMPLAINT EXHIBIT A
TRUDEAU COMPLAINT EXHIBIT A
WRIGHT COMPLAINT EXHIBIT A

EXHIBIT A

P R O C E E D I N G S

And it's Kevin Trudeau. Let's Talk America.

Today's topic, I've been talking about it all week long and I'm really looking forward to this show. If you're listening in, you're going to get excited about this program.

We're talking about energy. We're talking about health. We're talking about cleansing the body and feeling good. Boy, it sounds like an interesting program, doesn't it.

My guest, live in the studio, is the founder of Eden Secret, a company that he started out in California, and he invented a program called the Purifying Program. Ken Wright is my guest. Welcome, Ken. Thanks for being on the show.

MR. WRIGHT: Hey! Thanks for having me.

MR. TRUDEAU: Listen, you know we're talking about health, we're talking about cleaning the body, and I've got to read this because, you know, so many people, my producers say let's put this person on as a guest, let's put this person on -- and we're very particular about who we put on.

But I got this stuff you sent me and I couldn't believe it. I'm reading this and it said, "I've noticed I have more energy upon awakening and no longer need a pot of coffee to get going in the morning."

MR. WRIGHT: (Laughter)

MR. TRUDEAU: And this one here said, "The most dramatic differences since I started is appeared in my skin. I

EXHIBIT A

have a problematic dry skin problem. My face and eyes and hair have become radiant, my nails become stronger, and my energy level is better than ever."

This one here is by. This is a PhD who wrote this letter who said, "For the last 15 years or so, I have been experiencing increasingly painful body aches and pains, which I believe to be rheumatism, increasingly stronger, more frequent sinus headaches, and a growing sense of fatigue and weakness."

And after they started going and cleansing out the body as you discuss and we'll show people how to do, it said, "my energy level is up 50 to 70 percent" --

MR. WRIGHT: Isn't that incredible.

MR. TRUDEAU: "And at 43, I feel healthier than I have since my early 20's." And this is by a PhD. And this one here was hysterical. It says, "I can unequivocally say --

MR. WRIGHT: (Laughter)

MR. TRUDEAU: That cleansing my body has had a dramatic impact on my body and life. I feel brighter and more alert for longer periods of time than I have in years, and there's no question that my immune system as dramatically improved. Recently the flow of -- with the cold and flu epidemic going around, I was able to shake a cold in three days."

MR. WRIGHT: Alright.

MR. TRUDEAU: "I've never in my life been able to shake a cold that simply." Now these people, when I looked at this, I

EXHIBIT A

said, wait a minute. This guy must know something about cleansing the body --

MR. WRIGHT: (Laughter)

MR. TRUDEAU: And about giving people, you know, some techniques so they can use to feel good and have energy and so forth.

Now my question to you is, tell me about how you got involved with this. I know you have an herbal formula that you invented, the Purifying Program, but how did you get involved in this whole business?

MR. WRIGHT: Well, I really got into this sort of backwards. I had a typical kind of American diet. I was eating too much fast food, fried food, like you know, the typical listener out there listening has a poor diet, is pretty sedentary. I was traveling a lot, under a lot of stress. And personally, I had really bad digestion and got constipated, you know, too frequently.

Consequently, my hair got really, really brittle and bad --

MR. TRUDEAU: Un-huh.

MR. WRIGHT: My skin got really crumby.

MR. TRUDEAU: Like gray?

MR. WRIGHT: As people get older, your skin just doesn't look healthy. You don't have that glow of health. And I just lost all my energy.

EXHIBIT A

MR. TRUDEAU: Un-huh.

MR. WRIGHT: And in high school, I was a really energetic, vibrant guy. I had a lot of energy, a lot of fun. I played and, you know, enjoyed myself, and I just started feeling all this fatigue. It just wasn't acceptable to me.

And like a lot of people, I travel around. I'm flying on business here and there. And I was -- actually, I was in the Philippines and I just was talking to some people about it and complaining about this. I was saying I just feel like crumb.

MR. TRUDEAU: Right.

MR. WRIGHT: And (laughter) somebody said you should go see this herbalist. What are herbs? I didn't know anything about herbs.

MR. TRUDEAU: Right. Right.

MR. WRIGHT: So I go to an herbalist. They give me this, basically it's a potent, a recipe, a formula kind of a thing. And I was there for three weeks and started taking this formula. And, I mean, I felt better. I mean, I had had horrible digestion. I had had horrible constipation, and my skin would be so crumby. I mean I just lacked energy.

MR. TRUDEAU: Yeah.

MR. WRIGHT: And I started cleansing all this toxic stuff out of my body. So I came back to America and I went to every health food store I could find. I went to this health food store, that health food store, trying to find something that was

EXHIBIT A

similar. I couldn't find anything.

Another trip, fast forward, I'm in Africa. There's someone on an airplane. I'm not sleeping. I'm eating all this hotel food, airplane food, that kind of thing. I'm in Africa again. I go to an herbalist now. Now I'm thinking, I've got to find out more about herbs. Same exact thing, I find another kind of formula that works.

I come back to America. I go to the library and do all the massive research. I go to health food stores and try to find out how can I actually put something together to actually cleanse the body.

The long story short, I know I'm getting long winded here, a body that is cleansed and purified of toxic waste matters, colon waste, fatty arterial deposits, the Ph balance of the blood's better, the microflouron of the colon's better, you're simply enhancing the overall integrity of the body.

What does that give you? What are the benefits? The benefits of that are: allow more energy, better circulation, better skin, hair and nails, much more overall increased sense of vitality. That kind of a thing.

MR. TRUDEAU: So what you're saying is when the body -- people out there, because when you were talking about fatigue and things, I'm thinking, yeah you know, people are probably sitting home going he's talking about me.

MR. WRIGHT: Oh, yeah.

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MR. TRUDEAU: I have a hard time getting up in the morning.

MR. WRIGHT: Oh, yeah.

MR. TRUDEAU: I need like this woman said, I need a pot of coffee to get going, and I'm not a morning person. I just don't have any energy.

MR. WRIGHT: Oh yeah, same like me. You're all foggy in the morning. You get up first thing in the morning, the alarm clock goes off, what do you do? You lay there and want to throw a shoe at it. Well, if you clean all that stuff out, you may just jump out of bed.

MR. TRUDEAU: You have energy?

MR. WRIGHT: You just have a lot of energy. Just jump out of bed, go to work and focus better. You can attack what you're doing with more zest.

We get cards and letters from around the country. We sell this product around the United States to chiropractors, detox centers, holistic healers, and natural paths, colon therapists, you name it. And uniformly, we get the kind of results and benefits that is just really unbelievable.

It's dramatic just by -- when a system is cleansed of waste matter, a person looks and feels terrific. Their vitality is restored. It's amazing.

MR. TRUDEAU: Unbelievable. Now I know that you've been on hundreds of radio talk shows all across the country.

EXHIBIT A

MR. WRIGHT: Yeah.

MR. TRUDEAU: Because I've talk to several of the producers and managers and say, you've had this guy on --

MR. WRIGHT: Right.

MR. TRUDEAU: He seems to know what he's talking about, and he invented this program that helps the body cleanse itself, is that right?

MR. WRIGHT: Right. It's just when a body is cleansed, it completely will help rejuvenate itself. However, what you first have to do is get all the old stuff out. It's that simple.

MR. TRUDEAU: So getting the stuff out is the key?

MR. WRIGHT: Getting the stuff out of your system is the key. I mean, people have heard of colonics. You've heard of enemas. You've heard of three day fasts. You've heard of juice fasts. You've heard of fasting. Jesus, so to speak. Jesus went and He fasted for forty days before he had to make his big decisions. It's talked about in the Bible. Cleanse and purify yourself and I will exalt ye to the throne of power. What are they talking about? They're talking about a restoration of your personal power, of personal energies.

MR. TRUDEAU: Now let me ask you this. You say cleanse the stuff out. What specifically -- I mean a person is -- like me. A person, you know, is going through life --

MR. WRIGHT: Right.

MR. TRUDEAU: And why today do people, I mean,

EXHIBIT A

generally have less energy? I mean, you know, my parents say you know, you people you're not feeling good, you know you don't wake up bright, you're not feeling good, you just don't have the energy.

MR. WRIGHT: Right.

MR. TRUDEAU: Why today is this different that it was year's ago? What are people doing to themselves today that's different that they need to be in some type of cleansing program?

MR. WRIGHT: Twentieth century man, right there. There are new and stronger chemicals in the environment. Walk down a health food -- I mean walk down a store. Walk down the aisles and look what's on the food. Ninety percent of the food that you're eating has impurities in it. It has been treated with toxic -- it has been treated with pesticides, herbicides. The meat that you're getting has been shot full of antibiotics.

MR. TRUDEAU: Un-huh.

MR. WRIGHT: The environment is polluted. Now there are newer and stronger chemicals in your dry-cleaning. The air is polluted, the water is polluted. So what happens? I mean it simply has an affect on the microbiology of your system.

MR. TRUDEAU: So now where a person is today, they're eating fried food, it an advent to the fast food industry --

MR. WRIGHT: Right, right.

MR. TRUDEAU: The food chemicals and the additives, the stuff in the water. I know I've been reading all these articles

EXHIBIT A

about how bad the water is.

MR. WRIGHT: Right:

MR. TRUDEAU: It's clogging up the system and that's making them feel kind of miserable and crumby and as you mentioned the symptoms that people can see readily are the lack of energy, the skin, and the hair?

MR. WRIGHT: Right.

MR. TRUDEAU: And maybe the --

MR. WRIGHT: Weight.

MR. TRUDEAU: Oh, they gain weight.

MR. WRIGHT: Oh, my God. I mean people -- why do you hold on to weight? Why do people hold on to weight?

MR. TRUDEAU: Now wait a minute. Stop here.

MR. WRIGHT: Why are you craving foods all the time?

MR. TRUDEAU: Now this is very important. Today I was reading USA Today. They said that there are more people overweight today than ever in history in our country. And people are telling me, I meet them all over the country, they go no matter what I do, and I honestly believe that people try, they can't lose weight.

And it's really amazing because I have friends that I see what they eat, and they try to exercise, they try to eat right and they still can't lose the weight.

MR. WRIGHT: That's right.

MR. TRUDEAU: What's the problem here?

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MR. WRIGHT: Well step number one is if you don't cleanse the system out, your body is constantly hungry. Why? It's not getting nutrients. It's not getting fed. The colon wall gets lined with some sort of a type of a, it's old fecal matter. It's a old gluey plaque-like substance.

The wall of the colon gets compromised in such a matter that a lot of the nutrients that you're eating, the foods that you eat, don't transfer. It actually doesn't get into the blood stream so you're not getting properly fed. So you're body's hungry all the time.

Not only that, obviously you're eating -- people are just eating way too much and the food they're eating is crumby. But number one is if you don't clean the system out first off, none of the food that you're eating gets into the system so you're always hungry. You're always tired because you're not getting fed. It's a vicious circle.

MR. TRUDEAU: Alright, now you're talking about this colon problem with this fecal matter or something --

MR. WRIGHT: Right, right.

MR. TRUDEAU: That's clogging it up and people can't absorb the food --

MR. WRIGHT: Right.

MR. TRUDEAU: And nutrients that they're taking?

MR. WRIGHT: Right.

MR. TRUDEAU: So people taking vitamins are really

EXHIBIT A

wasting their money?

MR. WRIGHT: Well you've heard -- you know that doctors used to say that vitamins are expensive urine. They were right. A lot of this stuff that we eat, the good food that you're trying to eat, actually don't get into the body.

MR. TRUDEAU: Uh-huh.

MR. WRIGHT: It simply is passed out of you.

MR. TRUDEAU: Now are there -- your program consists of herbs.

MR. WRIGHT: Right.

MR. TRUDEAU: And I have it here right in front of me. How many herbs are in this stuff?

MR. WRIGHT: There's 28 herbs.

MR. TRUDEAU: There's 28 herbs --

MR. WRIGHT: Twenty-eight different herbs, yeah.

MR. TRUDEAU: This is a combination that you put together? Invented?

MR. WRIGHT: Well, yeah. I did a lot of research. I hired a biochemist. I hired a formulator. We went back and forth with powders and mixes and tried this and tired that. And then, in the health food store, I mean you can get a product that has maybe five or six herbs in it, right.

MR. TRUDEAU: Right.

MR. WRIGHT: But it doesn't have the type of synergistic affect, meaning that when you have a blend, like this

EXHIBIT A

is a very powerful blend, you can't get a blend like this. This is -- we're the only company in America that makes this. The affect of this broad, wide variety of herbs has a synergistic affect on the body so that it cleanses deep and easy.

MR. TRUDEAU: Now, I've heard of cleansing before. Before I had you on as a guest, I called a lot of the health food stores in the area and I said, hey, is cleansing -- what's this cleansing stuff? You know, cleaning out --

MR. WRIGHT: (Laughter)

MR. TRUDEAU: And they go, oh, yes, yes. You want a colon cleanser, you want a colon cleanser. And I said, what do you have? And they said, well we have this powder and this powder and this powder. And every place I called, they gave me -- they're showing me these powder stuff that you mix up and supposedly cleans out the colon.

MR. WRIGHT: Right.

MR. TRUDEAU: Now this, I notice, is just a tablet.

MR. WRIGHT: Right.

MR. TRUDEAU: And it says -- one of them says, whole body formula, and the other one says colon formula. So what is the difference between like this type of program and what I was being exposed to in a health food store?

MR. WRIGHT: Right. It's real simple. I mean if you go to a health food store, they're going to give you some sort of formula that's just aimed at the colon. But if the colon is

EXHIBIT A

compromised, if your colon is sluggish --

MR. TRUDEAU: Un-huh.

MR. WRIGHT: It is intestinal constipation leads to cellular constipation. It means the whole body is slows down and get sluggish because your intestines are slow.

So what we did is we coupled a we coupled a colon cleanser and what comes under the category so to speak of blood purifiers. I mean the large jar the you see there, the 300 tablets of the purifying formula, those come under the category of blood purifiers.

So what we're doing is cleaning out the digestive tract, the colon and aiming at cleaning and purifying the blood all at the same time. So between the two of these, what we're initiating, Kevin, is a complete biological interwashing. When you assist the body's own eliminative channels, help open them up --

MR. TRUDEAU: Right.

MR. WRIGHT: The body has an ability to restore itself. The integrity of the cells themselves on a cellular level becomes higher because there's not a bunch of junk in there. There's not a lot of plaque in the way. They're opening up the transfer of nutrients and oxygen so your cells can live again.

MR. TRUDEAU: Now I know that since you started being a guest on radio shows that your office has been flooded with phone calls.

EXHIBIT A

MR. WRIGHT: Incredible, absolutely unbelievable.

MR. TRUDEAU: I was talking to my dear friend, Fred Van Liew. You were on his show a few weeks ago.

MR. WRIGHT: Right.

MR. TRUDEAU: And you got a couple hundred phone calls or something

MR. WRIGHT: in about a half a hour or forty minutes.

MR. TRUDEAU: Right. People just responded. So I took the liberty myself -- I know you sent me these people's letters -- and I started calling people. I said, hey, I know you've been using this stuff, what do you see? Everybody I talked to, unless you just gave me the right people to call --

MR. WRIGHT: (Laughter)

MR. TRUDEAU: But everybody I talked to said the same thing. They said let me tell you something, Kevin, I feel better, I think clearer, my mind's more alert, I wake up in the morning I don't need coffee. There's a lot of people who said they don't even use alarm clocks anymore.

MR. WRIGHT: Right.

MR. TRUDEAU: And one of the things that everybody said, I said what's you weight situation? And everyone said they've lost weight.

MR. WRIGHT: Right.

MR. TRUDEAU: They're losing pounds.

MR. WRIGHT: Right.

EXHIBIT A

MR. TRUDEAU: Now this is obviously, we're not claiming to lost weight with the product, but this is cleaning. Something's happening here.

MR. WRIGHT: Right.

MR. TRUDEAU: Are you having any -- is there anyone that takes this that doesn't like it?

MR. WRIGHT: We sell thousands -- I mean I've been on radio shows, talk shows, interviewed in a variety of different types of newspapers, guest appearances. I've been lecturing on cleansing now, going to conventions and talking to people. We just put it out there. And if you want to try it, try it. If you don't like it, we'll give you your money back. Period. You know what we have, Kevin?

MR. TRUDEAU: Tell me.

MR. WRIGHT: We haven't had anybody send anything back ever.

MR. TRUDEAU: They just don't send it back.

MR. WRIGHT: They don't send it back. How can you send it back when it works. They simply -- if you clean the junk out of your system -- In a nutshell, I'm tying to keep this real simple. Conceptually, if you just get all the old stuff out.--

MR. TRUDEAU: Right.

MR. WRIGHT: The old waste matter that's built up in the body. How many times a day do you brush your teeth? Once in the morning, once in the evening. Why? You get plaque built up

EXHIBIT A

on your teeth. You get a sludge on your teeth. You take a shower everyday. What do you doing? Your washing off the biggest, eliminative channel you have, your skin. How do feel when you take a shower? You feel great, right?

MR. TRUDEAU: That's it.

MR. WRIGHT: You feel a lot better. You've got a lot more energy.

MR. TRUDEAU: Right.

MR. WRIGHT: It's the same concept but you're doing it internally.

MR. TRUDEAU: My engineer is screaming. People are calling the station --

MR. WRIGHT: (Laughter)

MR. TRUDEAU: And they want to know how to get a hold of you. If they can get your program. So let's take a short break 'cause we can give our a toll free number where people do want information on the purifying program they can call your office directly and get information on how to order it.

So let's take a quick break so we can get that number.

MR. WRIGHT: Okay.

(BREAK TAKEN)

MR. TRUDEAU: And we're back. Kevin Trudeau. Let's Talk America.

This is a fascinating show. Again, my guest is Mr. Ken Wright, the founder of Eden's Secret and the inventor of

EXHIBIT A

formulator, if you will, of the Purifying Program, which is an herbal concoction that a person takes --

MR. WRIGHT: (Laughter)

MR. TRUDEAU: To help the body purify themselves, the blood and the colon. During the break, the engineer come running in saying, this is unbelievable, this is great.

MR. WRIGHT: Yeah.

MR. TRUDEAU: And he said, wait a minute, wait a minute.

MR. WRIGHT: He wants some of it. Do you see him go "I want some of this." Let me have some.

MR. TRUDEAU: The question he asked Ken, he said how come I just can't go out and like eat fresh fruits and vegetables and drink a lot of water and cleanse my body that way?

MR. WRIGHT: Well let me tell you, there was just a, in the January/February issue of Natural Health Magazine, which there's a copy of here or anybody if you wanted to call Natural Health and get a copy of it, they did an analysis of all of the top cleansing products. They put a person on broccoli, brown rice and water for a month. They had people on a variety of different detox programs.

MR. TRUDEAU: Like the -- similar to the ones I'd seen at the health food stores?

MR. WRIGHT: Oh yeah, right. You know they tested all the top brands and through their analysis they did stool

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analysis and urine analysis before and after, and according to their lab tests, the lab data from Great Smokies and Doctors Data, these are the two big clinics that test people's stools and things for doctors, this product gave the best results.

And listen to this, the girl who was on our product, on this formula --

MR. TRUDEAU: Right.

MR. WRIGHT: Didn't even change her diet. And it took her level -- it took the levels of pathogens in her colon from the level of microflouron in her colon from pathogenic, which means to disease causing --

MR. TRUDEAU: Uh-huh.

MR. WRIGHT: To normal in 30 days.

MR. TRUDEAU: Without changing her diet?

MR. WRIGHT: Without changing her diet at all. The best results compared to somebody who ate broccoli, brown rice and water for a month. Somebody else was on a two week water, lemon juice, cajun pepper and --

MR. TRUDEAU: Maple syrup.

MR. WRIGHT: Maple syrup, right. I told you about that on the phone.

MR. TRUDEAU: Yeah, I remember reading the article you sent me.

MR. WRIGHT: Right. Right.

MR. TRUDEAU: Now this is interesting because this is a

EXHIBIT A

claim you made. You didn't even know that they were doing this test.

MR. WRIGHT: No, no, no.

MR. TRUDEAU: They just happened to buy the Purifying Program from you.

MR. WRIGHT: Right, right.

MR. TRUDEAU: And they tested it on their own basis.

MR. WRIGHT: Oh, yeah. I mean I called up, when I found out who they were and what they were doing, I called and said hey, what's going on? How are you placing it? They would not tell me anything.

MR. TRUDEAU: Yeah.

MR. WRIGHT: I mean it wasn't until -- I had to actually call them and about a week before they released the article, they finally faxed it to me. And I was going, well how did we do.

MR. TRUDEAU: Yeah, you were probably sitting there going, hey are we doing alright.

MR. WRIGHT: Did we do good? But I tell you, since that article, our business has quadrupled. We can't keep -- we have orders from all around the country. We have -- our booklet that you see here has been translated into Spanish and Italian. We're exporting -- we have a guy here, a guy in Beverly Hills now who's here from South Africa who wants to import it into South Africa.

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It's just great. When somebody cleanses their body and purifies their system of waste matters, what happens? It's only logic. There's no mystic -- there's nothing mystical about it. It's very practical. It's very down to earth. You simply look and feel better. You have a lot more energy and you revitalize your system because it's not working so darn hard. It's simple.

MR. TRUDEAU: This is interesting here. I have something here from the Citizens Commission on Human Rights --

MR. WRIGHT: Right.

MR. TRUDEAU: And this is a nice lady, she's the legal director over there, and she writes and she says, "I work a lot of hours, usually 60 to 80 hours a week. Sometimes I only get five --

MR. WRIGHT: (Laughter)

MR. TRUDEAU: or less hours of sleep for a couple of days at a time. Before I started on the Purifying Program, I started cleansing my body, I needed eight hours of sleep or I would become a real witch.

MR. WRIGHT: (Laughter)

MR. TRUDEAU: Irritable and unpredictable, with no tolerance for stress.

MR. WRIGHT: (Laughter)

MR. TRUDEAU: I bet I know a lot of people that this category fits.

MR. WRIGHT: Yeah. (Laughter) Including my wife

EXHIBIT A

MR. TRUDEAU: Since starting on the program and detoxifying my system, I have much more -- I am much more stable emotionally, regardless of the sleep irregularities or stress that impinges upon me.

Now I want to mention about -- ask you a question about his. There are people out there that, you know, are snappy and irritable and have this emotional stress all the time. I have a very dear friend that flies a lot and she's always like complaining and she always has this stress problem.

MR. WRIGHT: Oh, yeah.

MR. TRUDEAU: I just need to relax. Is that also due because of the buildup of the toxins in the body?

MR. WRIGHT: Well, how do you feel after you've had four cups of coffee? How do you feel the next day after you've gone out and had too many drinks? Or a drug addict who's recovering from drugs and alcohol? They feel crumby.

Why? It's very simple. There's nothing dramatic about it. Your blood stream is a wreck. Your blood stream's impure, the PH balance is off, and it's exactly like a girl who has PMS. The blood stream gets impure before her cycle, it's reabsorbed back into the blood stream, she's experiencing she goes AHHH!!! She goes crazy, just like my wife used to until we founded this formula. This is the same kind of experience. Your stress level gets nuts.

MR. TRUDEAU: So are you telling me that people that

EXHIBIT A

have -- women that have a bad PMS syndrome, if they started cleansing their system, that could perhaps be relieved in some -- to some degree?

MR. WRIGHT: Let me tell you even a more dramatic story.

MR. TRUDEAU: Okay.

MR. WRIGHT: Let me tell you a story.

MR. TRUDEAU: I can see you're about to -- I see you're smiling like --

MR. WRIGHT: (Laughter)

MR. TRUDEAU: I've got something good here.

MR. WRIGHT: This is from a woman in Burger, Texas. Now I'm not going to talk about PMS 'cause that's sort of a pedestrian type thing that seems to be handled when the body cleanses itself daily.

MR. TRUDEAU: Okay.

MR. WRIGHT: This is a woman who had been -- who is a nurse, who was not attending work regularly. She was at home and in bed more frequently. She was missing her paychecks.

She wrote us a letter, I won't read you the whole thing. It's pretty long but she says, basically she's passed out a lot of old, toxic stuff out of her body and she says here, "Though I know my healing is not complete, I feel more energetic and emotionally, emotionally well than I felt in almost a year. I'm an RN, etc., etc., etc."

EXHIBIT A

So she called me up and told that now what's happening. Now, she's back to work, she's regularly back to work. Her patients are saying, my God, look at how great you look. What have you been doing? What did you do, fall in love?

MR. TRUDEAU: (Laughter)

MR. WRIGHT: Were you on vacation? How come you look so great?

MR. TRUDEAU: (Laughter)

MR. WRIGHT: What is it? So what am I trying to communicate to you? I'm trying to tell the people out there, I'm tying to tell the listeners, that by getting this old, old -- this is nothing new. This is getting this old waste matter out of your system. You can look and feel better. You can have more energy. You can be brighter. Your skin can look better. Your hair -- you know what, look at my hair. You see that the haircut that I got?

MR. TRUDEAU: Yeah.

MR. WRIGHT: Why do I get a haircut? I get a haircut -- I get short, short haircuts because my grows so fast it is ridiculous. My hairdresser, she was a real skeptic. Then she saw my hair and said, what are you doing? Why is your hair like this all the time? You come in here more frequently that anybody I know. She now sells our product.

MR. TRUDEAU: Unbelievable.

MR. WRIGHT: (Laughter)

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MR. TRUDEAU: We've got to take another break, Ken, because again our engineer is saying let's give out that toll free number again if people do want information on the Purifying Program. So let's take a quick break so we can get that number out.

(BREAK TAKEN)

MR. TRUDEAU: And we're back. Kevin Tradeau. Let's Talk America. My guest, Mr. Ken Wright, founder of the Eden Secret and the inventor of the Purifying Program, which is an herbal cleanser, detoxifier.

Now, I have to ask you a question. I'm look at all of these herbs that are in here.

MR. WRIGHT: Right.

MR. TRUDEAU: And you mentioned earlier that it's never been done before where they put this combination together in one tablet.

MR. WRIGHT: Right, very unique.

MR. TRUDEAU: And I know that its simple a tablet form that a person takes. So it's very easy.

MR. WRIGHT: Real simple.

MR. TRUDEAU: You just take it two times a day, is that right?

MR. WRIGHT: That's right, take a twice a day. Half of it for breakfast, half of it for dinner with a big glass of water. They're tablets. They're not big horse pills. They're

EXHIBIT A

small so everyone can take them.

MR. TRUDEAU: It's easy.

MR. WRIGHT: Very, very easy.

MR. TRUDEAU: What's -- now I've got to say this.

MR. WRIGHT: No muck, no mess.

MR. TRUDEAU: When a person takes it, does this do anything specific?

MR. WRIGHT: You know, Kevin, I've got to say this flat out. These herbs are not going to do anything. I mean they are not designed -- they're not going to heal anything, they're not going to change anything in the body. What will happen is --

MR. TRUDEAU: So no medical claims?

MR. WRIGHT: There's no -- (laughter)

MR. TRUDEAU: There's no making the blind walk or anything?

MR. WRIGHT: No, I mean the FDA would come down and shut us down in a heartbeat. This simply, by cleansing your system, when the body is cleansed of its waste matters, your body can heal itself. It just makes common sense.

MR. TRUDEAU: So it simply helps the body cleanse and detoxify?

MR. WRIGHT: Right. And when the body is cleansed and detoxified, what happens? You have more oxygen circulating through the body, you have more nutrient distribution, there's less waste matter in the body. Obviously it gets out of the

EXHIBIT A

system faster. What happens? Your cells are alive. You're living in a human organism and it has to be vibrant.

MR. TRUDEAU: Now some of these things I'm looking at here, Echia. Is that my pronunciation?

MR. WRIGHT: Ecanatia.

MR. TRUDEAU: Ecanatia?

MR. WRIGHT: (Laughter)

MR. TRUDEAU: Is that what -- I can read, Ecanatia.

MR. WRIGHT: Ecanatia.

MR. TRUDEAU: What do some of these herbs do specifically? I know some of them have a lot of historical background that they historically do certain things or help the body do certain things.

MR. WRIGHT: Right. I mean they call it folk medicine historically they have been used for. But in our formula we've got barberry buck thorn, capsicum, chickweed, dandelion root. Dandelion root has been know to help, you know, it contains natural salts which purify the blood. Ecanatia has been written up as an infection fighter. You've heard a lot about ecanatia and golden seal on the news a lot lately and CNN and the cover of the Times, the LA Times Newspapers, a variety of different talk shows.

They're finding that golden seal and ecanatia, when people have colds they drink these as teas. Why? It seems to help as a natural bionic. That's what the -- as a natural

EXHIBIT A

antibiotic that's what people are using these for.

MR. TRUDEAU: Well Ken, the time has flew and I'm looking at the clock. We're about to end the show. But I just want to thank you for coming on and sharing this with us. I know that I'm going to jump on this thing and I will be the first person to let you know how we do. Of course my engineer is going yes, yes, yes.

MR. WRIGHT: (Laughter)

MR. TRUDEAU: He's shaking he head, give me some of this stuff right now.

MR. WRIGHT: (Laughter)

MR. TRUDEAU: But folks, thanks for listening. Ken, thanks again for being on the show.

MR. WRIGHT: Thanks, Kevin.

MR. TRUDEAU: Have a great day and folks, Let's Talk America again soon.

(End of Tape)

EXHIBIT B

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