IN THE MATTER OF

GENERAL MOTORS CORPORATION, ET AL.

SET ASIDE ORDER IN REGARD TO ALLEGED VIOLATION OF SEC. 3 OF THE CLAYTON ACT AND SEC. 5 OF THE FEDERAL TRADE COMMISSION ACT

Docket 3152. Modified Consent Order, June 25, 1942 -- Set Aside Order, April 18, 1995

This order reopens a 1942 modified consent order -- which prohibited the respondent from coercing or intimidating its automobile retail dealers into purchasing accessories supplied by General Motors or from its designated source -- and sets aside the modified consent order pursuant to the Commission's Sunset Policy Statement, under which the Commission presumes that the public interest requires terminating competition orders that are more than 20 years old.

ORDER REOPENING PROCEEDING AND SETTING ASIDE ORDER

On February 6, 1995, General Motors Corporation ("GM"), as respondent and successor to General Motors Sales Corporation,[1] filed its Petition to Reopen and Vacate Modified Order ("Petition") in this matter. GM requests that the Commission set aside the 1942 modified consent order in this matter pursuant to Section 5(b) of the Federal Trade Commission Act, 15 U.S.C. 45(b), Rule 2.51 of the Commission's Rules of Practice, 16 CFR 2.51, and the Statement of Policy With Respect to Duration of Competition Orders and Statement of Intention to Solicit Public Comment With Respect to Duration of Consumer Protection Orders, issued on July 22, 1994, and published at 59 Fed. Reg. 45,286-92 (Sept. 1, 1994) ("Sunset Policy Statement"). In the Petition, GM affirmatively states that it has not engaged in any conduct violating the terms of the order. The Petition was placed on the public record, and the thirty-day comment period expired on March 27, 1995. No comments were received.

The Commission in its Sunset Policy Statement said, in relevant part, that "effective immediately, the Commission will presume, in

[1] Since the Commission issued the order in this matter General Motors Sales Corporation, a named respondent in the order, was dissolved and its assets now reside within respondent General Motors Corporation.

the context of petitions to reopen and modify existing orders, that the public interest requires setting aside orders in effect for more than twenty years."[2] The Commission's modified consent order in Docket No. 3152 was issued on June 25, 1942, and has been in effect for more than fifty years. Consistent with the Commission's Sunset Policy Statement, the presumption is that the order should be terminated. Nothing to overcome the presumption having been presented, the Commission has determined to reopen the proceeding and set aside the order in Docket No. 3152.

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

It is further ordered, That the Commission's order in Docket No. 3152 be, and it hereby is, set aside, as of the effective date of this order.

[2] *See* Sunset Policy Statement, 59 Fed. Reg. at 45,289.

IN THE MATTER OF

SENSORMATIC ELECTRONICS CORPORATION

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

Docket C-3572. Complaint, April 18, 1995--Decision, April 18, 1995

This consent order prohibits, among other things, Sensormatic Electronics Corporation, a Florida-based manufacturer of electronic-article surveillance systems from acquiring patents and other exclusive rights for manufacturer installed disposable anti-shoplifting labels from Knogo Corporation, as they pertain to the United States and Canada. Also, the consent order requires Sensormatic, for ten years, to obtain Commission approval before acquiring certain rights in connection with Knogo's SuperStrip, or any significant acquisitions of entities engaged in, or assets used for, the research, development or manufacture of disposable labels, or acquisitions of patents or other intellectual property for such purposes.

Appearances

For the Commission: *Ann Malester, Arthur M. Strong* and *Melissa K. Heydenreich.*

For the respondent: *Wm. Randolph Smith, Crowell & Moring,* Washington, D.C. and *Steven A. Newborn, Rogers & Wells,* Washington, D.C.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, and by virtue of the authority vested in it by said Act, the Federal Trade Commission ("Commission"), having reason to believe that Sensormatic Electronics Corporation ("Sensormatic"), hereinafter sometimes referred to as respondent, has agreed to acquire through a merger certain assets of the Knogo Corporation in violation of Section 7 of the Clayton Act, as amended, 15 U.S.C. 18 and Section 5 of the Federal Trade Commission Act ("FTC Act"), 15 U.S.C. 45; and it appearing to the Commission that a proceeding in respect thereof would be in the public interest, hereby issues its complaint, stating its charges as follows:

I. DEFINITIONS

1. *"Hard goods EAS systems"* means electronic article surveillance systems and components designed to protect against shoplifting of hard goods merchandise by means of electronic hardware capable of detecting disposable labels attached to such merchandise.

2. *"Disposable labels"* means labels affixed to or embedded in retail merchandise and used in conjunction with hard goods EAS systems.

3. *"Source labelling"* means the process by which manufacturers, packagers, or independent wholesalers apply disposable labels to retail merchandise or its packaging.

4. *"SuperStrip"* means a proprietary material developed and patented by Knogo Corporation and used or intended for use in disposable labels.

5. *"United States"* means the fifty states, the District of Columbia, and Puerto Rico.

II. RESPONDENT

6. Respondent Sensormatic is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Delaware, with its office and principal place of business located at 500 N.W. 12th Avenue, Deerfield Beach, Florida.

7. Respondent is, and at all times relevant to this proceeding has been, engaged in commerce as "commerce" is defined in Section 1 of the Clayton Act, as amended, 15 U.S.C. 12, and is a corporation whose business is in or affecting commerce as "commerce" is defined in Section 4 of the FTC Act, as amended, 15 U.S.C. 44.

III. ACQUIRED COMPANY

8. Knogo Corporation is a corporation organized, existing, and doing business under and by virtue of the laws of the State of New York, with its office and principal place of business located at 350 Wireless Boulevard, Hauppauge, NY.

9. Knogo is, and at all times relevant to this proceeding has been, engaged in commerce as "commerce" is defined in Section 1 of the Clayton Act, as amended, 15 U.S.C. 12, and is a corporation whose

business is in or affecting commerce as "commerce" is defined in Section 4 of the FTC Act, as amended, 15 U.S.C. 44.

IV. ACQUISITION

10. On or about August 14, 1994, Sensormatic and Knogo entered into an agreement whereby Sensormatic agreed to acquire through a merger all of Knogo's assets outside of North America, along with patents related to SuperStrip ("Acquisition"). In addition, the agreement obligates Sensormatic and Knogo North America, Inc. ("Knogo/NA"), a successor corporation to Knogo's business and assets in the United States and Canada, to grant royalty-free cross licenses to one another for any improvements to patents or trade secrets related to SuperStrip.

V. TRADE AND COMMERCE

11. For purposes of this complaint, the relevant line of commerce in which to analyze the Acquisition is the research and development of disposable labels developed or used for source labelling and the research and development of processes to manufacture disposable labels.

12. For purposes of this complaint, the relevant geographic area is the United States and Canada.

13. The relevant market set forth in paragraphs eleven and twelve is highly concentrated.

14. Entry into the relevant market would not be timely, likely or sufficient to deter or counteract the adverse competitive effects described in paragraph sixteen of the complaint because of patent protection for important technology and the time required to develop the requisite technical skills to compete in the relevant line of commerce.

15. Sensormatic and Knogo are actual competitors in the relevant market.

VI. EFFECTS OF THE ACQUISITION

16. The effects of the Acquisition if consummated may be substantially to lessen competition in the relevant market in violation of Section 7 of the Clayton Act, 15 U.S.C. 18, and Section 5 of the

Federal Trade Commission Act, 15 U.S.C. 45, in the following ways, among others:

a. By reducing Knogo's incentives to research and develop disposable labels to be designed or used for source labelling;

b. By decreasing the number of research and development tracks for disposable labels to be designed or used for source labelling; and

c. By increasing Sensormatic's ability to unilaterally reduce research and development of disposable labels for source labelling.

17. All of the above increase the likelihood that firms in the relevant market will restrict output of research and development both in the near future and in the long term.

VII. VIOLATIONS CHARGED

18. The acquisition agreement described in paragraph ten constitutes a violation of Section 5 of the FTC Act, as amended, 15 U.S.C. 45.

19. The acquisition described in paragraph ten, 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 certain assets and businesses of the Knogo Corporation, and the respondent having been furnished thereafter with a copy of a draft of complaint that the Bureau of Competition presented to the Commission for its consideration and which, if issued by the Commission, would charge respondent with violations of Section 7 of the Clayton Act, as amended, 15 U.S.C. 18, and Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45; and

Respondent, its attorneys, and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by respondent of all the jurisdictional facts set forth in the aforesaid draft of complaint, a statement that the signing of said agreement is for settlement purposes only and does not constitute an

admission by respondent that the law has been violated as alleged in such complaint, or that the facts as alleged in such complaint, other than jurisdictional facts, are true and waivers and other provisions as required by the Commission's Rules; and

The Commission having thereafter considered the matter and having determined that it had reason to believe that the respondent has violated the said Acts, and that a complaint should issue stating its charges in that respect, and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of sixty (60) days, 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 Sensormatic Electronics Corporation ("Sensormatic") is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Delaware, with its office and principal place of business located at 500 N.W. 12th Avenue, Deerfield Beach, Florida.

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

ORDER

I.

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

A. *"Respondent"* or *"Sensormatic"* means Sensormatic Electronics Corporation, its predecessors, subsidiaries, divisions, and groups and affiliates controlled by Sensormatic Electronics Corporation, their directors, officers, employees, agents, and representatives, and their successors and assigns.

B. *"Knogo"* means Knogo Corporation, its predecessors, subsidiaries, divisions, and groups and affiliates controlled by Knogo, their directors, officers, employees, agents, and representatives, and their successors and assigns.

C. *"KNA"* means Knogo North America, Inc., the successor corporation to Knogo Corporation's business and assets in the United States and Canada to be formed pursuant to the Contribution and Divestiture Agreement between Knogo Corporation and Knogo North America, Inc., its subsidiaries, divisions, and groups and affiliates controlled by Knogo North America, Inc., their directors, officers, employees, agents, and representatives, and their successors and assigns.

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

E. *"Acquisition"* means the transaction described in the Agreement and Plan of Merger among Sensormatic, Knogo, and KNA, dated August 14, 1994.

F. *"Hard goods EAS systems"* means electronic article surveillance systems and components designed principally to protect against shoplifting of hard goods merchandise (*e.g.*, books, audio recordings, health and beauty aids, groceries, and home center merchandise), by means of electronic hardware capable of detecting disposable labels attached to such merchandise, whether the systems or components generate, detect, or employ radio frequency, electromagnetic, microwave, acoustic magnetic, or other electronic signals. Such systems and components may include electronic signal transmitters and receivers, signal processing equipment, computer software, label activation equipment, label deactivators, automatic and manual label applicators, and other related devices.

G. *"Disposable labels"* means labels that can be affixed to or embedded in retail merchandise and used in conjunction with hard goods EAS systems.

H. *"Source labelling"* means the process by which manufacturers, packagers, or independent wholesalers apply disposable labels to retail merchandise or its packaging.

I. *"SuperStrip"* means:

1. The material, described in Exhibit A attached hereto and made a part hereof, used or intended for use in disposable labels; and

2. Disposable labels incorporating such material.

J. *"SuperStrip Technology"* means all existing patents, inventions, trade secrets, know-how, concepts, designs, technical information, processes, and intellectual property relating to the design, manufacture, or use of SuperStrip.

K. *"SuperStrip Improvements"* means all improvements, modifications, developments, revisions, or enhancements of SuperStrip or SuperStrip Technology, whether or not covered by a patent or otherwise protected against disclosure or unauthorized use by law.

L. *"Supply Agreement"* means Exhibit B to the Contribution and Divestiture Agreement, attached as Exhibit C to the Agreement and Plan of Merger among Sensormatic, Knogo, and KNA, dated August 14, 1994, that requires Sensormatic to purchase products and materials for hard goods EAS systems from KNA upon the terms and conditions set forth therein.

M. *"United States"* means the fifty states, the District of Columbia, and Puerto Rico.

II.

It is further ordered, That:

A. As of the date this order becomes final, respondent shall not hold, possess, receive, or otherwise obtain, or have held, possessed, received, or otherwise obtained, the SuperStrip Technology from Knogo or KNA. Provided, however, that no provision of this order shall prohibit an acquisition by respondent from Knogo or KNA of: (1) a non-exclusive license of the SuperStrip Technology to practice and use SuperStrip and SuperStrip Technology in the United States and Canada; and (2) ownership of, or other exclusive or non-exclusive legal or equitable rights to practice and use, SuperStrip, SuperStrip Technology, and SuperStrip Improvements outside of the United States and Canada.

B. Respondent shall comply with the terms and conditions of the Supply Agreement.

III.

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

A. Acquire any legal or equitable rights to practice and use SuperStrip, SuperStrip Technology, or SuperStrip Improvements in the United States and Canada other than: (1) rights to manufacture in the United States for export only; or (2) a non-exclusive license that is also offered to other manufacturers of hard goods EAS systems or disposable labels in connection with adoption of a retail segment standard;

B. Acquire any stock, share capital, equity or other interest in any person or concern, corporate or non-corporate, engaged at the time of such acquisition in, or within the two (2) years preceding such acquisition engaged in, the research, development, or manufacture of disposable labels designed or used for source labelling; provided, however, that individual employees or directors of respondent and each pension, benefit, or welfare plan or trust controlled by respondent may acquire, for investment purposes only, an interest of not more than one (1) percent of the stock or share capital of such person or concern; or

C. Acquire any patents, intellectual property, or other tangible or intangible assets, other than a non-exclusive license, used in or previously used in (and still suitable for use in) the research, development, or manufacture of disposable labels designed or used for source labelling.

Provided, however, that an acquisition pursuant to paragraph III.B. or III.C. shall be exempt from the prior approval requirements of this paragraph III if: (1) the stock, share capital, equity, or assets are acquired from a person or concern that had less than $2 million in annual sales in the United States of disposable labels in either of the two (2) most recent calendar years preceding such acquisition; (2) the acquisition is of assets relating solely to the manufacture of, improvements of, or accessories to Sensormatic products that are in existence as of the time of the acquisition; (3) the acquisition is of assets from or an interest in a joint venture in which respondent is one participant and in which no other joint venture participant was at the time of the commencement of the venture engaged in the research, development, or manufacture of disposable labels in the United States; (4) the acquisition is of rights or other assets to be used solely in commercial or industrial (*i.e.*, non-retail) applications; or (5) the acquisition is of rights or other assets (other than United States or Canadian marketing rights to patents, trade secrets and other

intellectual property) to be used solely for products sold outside the United States and Canada.

IV.

It is further ordered, That within sixty (60) days after the date this order becomes final, one year (1) from the date this order becomes final, and annually for the next nine (9) years on the anniversary of the date this order becomes final, and at such other times as the Commission may require, respondent shall file a verified written report with the Commission setting forth in detail the manner and form in which it has complied and is complying with this order.

V.

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

VI.

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

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

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

EXHIBIT A

SUPERSTRIP MATERIAL

SuperStrip I: SuperStrip I is covered by Patent numbers 5,029,291 (docket number 85.151) and 5,304,987 (docket number 85.168) and one invention disclosure (as described in docket number 85.184). These patents and disclosure describe a new type of oxidized magnetic material with an asymmetrical hysteresis curve and the ability to become magnetically deactivated. SuperStrip I material is produced by a process, as described in Knogo's patent, that involves the cutting of amorphous magnetic material into short, tag-length segments and annealing these segments for several hours in the presence of a magnetic field.

SuperStrip II: SuperStrip II is a modified version of Knogo's standard magnetic tag. Short deactivation segments are electroplated onto the soft part of the magnetic strip in a continuous process instead of being mechanically cut and adhered to the strip. A U.S. patent application (docket number 85.180) filed by Knogo is pending with respect to this process.

SuperStrip III: SuperStrip III, which is the subject of a pending U.S. patent application (docket #85.191) filed by Knogo is a recent development involving the melt-spin casting of a specially formulated amorphous magnetic material in such a way as to produce a unique hysteresis curve in a manner similar to that of SuperStrip I, but without the use of any additional processing steps beyond casting the material.

STATEMENT OF MARY L. AZCUENAGA
CONCURRING IN PART AND DISSENTING IN PART

Today the Commission accepts a consent order that would settle allegations that Sensormatic Electronics Corporation's acquisition of Knogo Corporation's patents related to SuperStrip and the agreement to cross-license improvements to SuperStrip violate Section 7 of the Clayton Act and Section 5 of the Federal Trade Commission Act. I

find reason to believe the transaction violates the law and concur in accepting the order. I dissent, however, from the allegations in the complaint defining the relevant market and from paragraph II(B) of the order, which requires that Sensormatic adhere to a private supply contract.

Sensormatic and Knogo produce and sell electronic article surveillance ("EAS") systems and components, used by retailers to protect against shoplifting. EAS systems provide a warning when a special label attached to merchandise by the retailer triggers an electronic signal on hardware located at the store's exit, unless the label has been neutralized by store employees at the time of sale. Because Sensormatic proposes to acquire only those assets of Knogo located outside North America, the competitive analysis of the transaction does not focus on the production and sale of existing EAS systems and labels to retailers in the United States and Canada.

Sensormatic, Knogo, and other firms, however, are also engaged in research and development to perfect a new "source labelling" system. In such a system, manufacturers would apply the EAS label to the merchandise or its packaging, which would eliminate the need for retailers manually to affix a label to each protected item of merchandise. No source labelling system is currently in use, but Knogo has developed and patented SuperStrip technology for use in labels, potentially including source labels, and other firms are developing their own source labelling technologies.

I concur that the relevant market involves competition in research and development, but question the market definition in paragraph eleven of the complaint, which is narrowly limited to the research and development of "disposable labels developed or used for source labelling" and processes to make them. In a Section 7 case, the Commission has the burden of proving the relevant product market, and distinguishing research and development of source labelling from other improvements in EAS systems may be difficult or impossible. I would not limit the product market to research and development in source labelling but would define the market as research and development in EAS systems and components, including source labelling.

I also dissent from paragraph twelve of the complaint, which limits the geographic market to the United States and Canada. Successful research and development yields intellectual property that can move freely across international boundaries. A foreign firm can

license intellectual property without establishing a manufacturing or sales presence in the United States. Limiting the geographic market to the United States and Canada excludes from the market the potentially important research activity of at least one European firm. Even if domestic firms are familiar with particular technologies and have a sizable base of equipment already installed in retail stores, research and development may yield an improvement significant enough to overcome the advantages of current market leaders. The market should not be so narrowly defined as to presume that only North American firms could effect a significant breakthrough that might alter the current competitive balance.

Applying Section 7 analysis to the product and geographic markets as I would define them, I find reason to believe the transaction would violate the law. The proposed acquisition would significantly increase concentration in the already highly concentrated world market for EAS system research and development. The proposed transaction, the transfer or patents from Knogo to Sensormatic and the agreement to grant royalty-free cross licenses on any improvements to SuperStrip, likely would diminish competition in research and development of new EAS systems and components. Accordingly, I concur in paragraph II(A) of the order.

Finally, I dissent from paragraph II(B) of the order, which provides that Sensormatic "shall comply with the terms and conditions" of a supply agreement between Sensormatic and Knogo North America, Inc., the successor corporation to Knogo's North American business. The supply agreement is a long, highly detailed commercial contract that was negotiated as part of the acquisition in question. The complaint contains no allegations establishing a relationship between this contract and the state of competition in any antitrust market. Absent a demonstrable link between the contract and competition, the contract provides no basis for liability and compliance with the contract does not appear necessary to effect relief.

IN THE MATTER OF

B.A.T INDUSTRIES P.L.C., ET AL.

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

Docket 9271. Complaint, Nov. 28, 1994--Decision, April 19, 1995

This consent order permits, among other things, B.A.T Industries and Brown & Williamson Tobacco Corporation to consummate the acquisition of American Tobacco Company, but requires them to divest, within twelve months, six American Tobacco discount cigarette brands and to divest to the purchaser of these brands three American Tobacco full-revenue brands, as well as the American Tobacco manufacturing facility in Reidsville, N.C. If the required divestitures are not completed on time, the consent order permits the Commission to appoint a trustee to complete the transactions. In addition, the consent order requires the respondents, for ten years, to obtain Commission approval before acquiring any interest in a cigarette manufacturer or any assets used to manufacture or distribute cigarettes in the United States.

Appearances

For the Commission: *Joseph Krauss, Howard Morse* and *William Baer.*

For the respondents: *Ronald S. Rolfe, Cravath, Swaine & Moore*, New York, N.Y. *Daniel J. O'Neill, Chadbourne & Parker*, New York, N.Y. and *Mark Crane, Hopkins & Sutter*, Chicago, IL.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, and by virtue of the authority vested in it by said Act, the Federal Trade Commission ("Commission"), having reason to believe that respondent B.A.T Industries p.l.c., a corporation subject to the jurisdiction of the Federal Trade Commission, has agreed to acquire the American Tobacco Company, a corporation subject to the jurisdiction of the Federal Trade Commission, in violation of Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45, and Section 7 of the Clayton Act, as amended, 15 U.S.C. 18, and it appearing to the Commission that a proceeding in respect thereof

would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

I. RESPONDENTS

1. Respondent B.A.T Industries p.l.c. ("BAT") is a public limited company incorporated under the laws of England, with its headquarters and principal place of business located at Windsor House, 50 Victoria Street, London, England, SW1H 0NL. It is the second largest cigarette manufacturer in the world. BAT indirectly owns all of the common stock of Brown & Williamson Tobacco Corporation.

2. Respondent Brown & Williamson Tobacco Corporation ("B&W") is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware with its headquarters and principal place of business located at 1500 Brown & Williamson Tower, P.O. Box 35090, Louisville, Kentucky. B&W is the third largest cigarette manufacturer in the United States.

3. Respondent American Brands, Inc. ("American Brands") is a corporation organized, existing and doing business under and by virtue of the laws of the State of Connecticut with its headquarters and principal place of business located at 1700 East Putnam Avenue, P.O. Box 819, Old Greenwich, Connecticut.

4. Respondent American Tobacco Company ("ATC"), a wholly owned subsidiary of American Brands, is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware with its headquarters and principal place of business located at Six Stamford Forum, P.O. Box 1038, Stamford, Connecticut. ATC is the fifth largest cigarette manufacturer in the United States.

II. JURISDICTION

5. Employees and agents of BAT negotiated with employees and agents of American Brands, and entered into an agreement, in New York, New York, to acquire the stock of ATC. BAT, B&W, American Brands and ATC are, and at all times relevant herein have been, engaged in commerce as "commerce" is defined in Section 1 of the Clayton Act, as amended, 15 U.S.C. 12, and are corporations whose businesses are in or affect commerce as "commerce" is

defined in Section 4 of the Federal Trade Commission Act, as amended, 15 U.S.C. 44.

III. THE ACQUISITION

6. On or about April 26, 1994, BAT and American Brands entered into a stock purchase agreement whereby BAT agreed to purchase all of the outstanding common stock of ATC for $1 billion ("Acquisition"). BAT also agreed to assume all existing product liability claims against ATC.

IV. THE RELEVANT MARKETS

7. The relevant product market or line of commerce within which to assess the competitive effects of the proposed Acquisition is the manufacture and sale of cigarettes for U.S. consumption and any narrower market contained therein.

8. The relevant geographic market within which to assess the competitive effects of the proposed Acquisition is the United States.

V. MARKET STRUCTURE

9. The United States cigarette market is already highly concentrated, whether measured by the Herfindahl-Hirschmann Index or two-firm and four-firm concentration ratios. B&W and ATC are, respectively, the third and fifth largest manufacturers of cigarettes in a market that consists of only six meaningful firms.

10. The United States cigarette market will become substantially more concentrated if the proposed Acquisition is consummated.

VI. ENTRY CONDITIONS

11. Entry into the United States cigarette market is difficult and therefore unlikely to undermine an anticompetitive price increase.

VII. EFFECTS OF THE ACQUISITION

12. The effects of the Acquisition, if consummated, may be substantially to lessen competition in the manufacture and sale of cigarettes in the United States in violation of Section 7 of the Clayton Act, as amended (15 U.S.C. 18), and Section 5 of the Federal Trade

Commission Act, as amended (15 U.S.C. 45), in the following ways, among others:

(a) Eliminating ATC as a substantial independent, disruptive and competitive force in the market;

(b) Substantially increasing concentration, and further heightening barriers to entry, thereby increasing the likelihood of successful anticompetitive coordinated interaction, nonrivalrous behavior, and actual or tacit collusion among firms; and

(c) Eliminating substantial actual head-to-head competition between B&W and ATC in the manufacture and sale of cigarettes in the United States.

VIII. VIOLATIONS CHARGED

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

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

Commissioner Varney not participating.

DECISION AND ORDER

The Commission having heretofore issued its complaint charging the respondents named in the caption hereof with violation of Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45, and Section 7 of the Clayton Act, as amended, 15 U.S.C. 18, and the respondents having been served with a copy of that complaint, together with a notice of contemplated relief; and

The respondents, B.A.T Industries, p.l.c. and Brown & Williamson Tobacco Corporation, their attorneys, and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission, for the purposes only of that agreement and any proceedings arising out of, or to enforce that agreement, this order and the Preservation Agreement attached as Appendix I, by those respondents of all the jurisdictional facts set forth in the

complaint, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by those respondents that the law has been violated as alleged in such complaint, or that the facts as alleged in such complaint, other than jurisdictional facts, are true and waivers and other provisions as required by the Commission's Rules; and

The Secretary of the Commission having thereafter withdrawn this matter from adjudication in accordance with Section 3.25(c) of its Rules; and

The Commission having considered the matter and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of sixty (60) days, and having duly considered the comments filed thereafter by interested persons pursuant to Section 3.25(f) of its Rules, now in further conformity with the procedure prescribed in Section 3.25(f) of its Rules, the Commission hereby makes the following jurisdictional findings and enters the following order:

1. Respondent B.A.T Industries p.l.c. (BAT) is a public limited company incorporated under the laws of England, with its headquarters and principal place of business located at Windsor House, 50 Victoria Street, London, England, SW1H 0NL.

2. Respondent Brown & Williamson Tobacco Corporation (B&W) is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware with its headquarters and principal place of business located at 1500 Brown & Williamson Tower, P.O. Box 35090, Louisville, Kentucky.

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

ORDER

I.

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

A. *"BAT"* means B.A.T Industries p.l.c., its subsidiaries, divisions, and groups, including Brown & Williamson Tobacco

Corporation, its subsidiaries, divisions, and groups, and affiliates controlled by Brown & Williamson Tobacco Corporation ("B&W"), their successors and assigns, and their directors, officers, employees, agents, and representatives.

B. *"American Brands"* means American Brands, Inc., its subsidiaries, divisions and groups, including The American Tobacco Company ("ATC"), their successors and assigns, and their directors, officers, employees, agents, and representatives.

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

D. *"Acquisition"* means the acquisition of ATC from American Brands by BAT.

E. The *"Reidsville Assets"* means all real property, fixtures and equipment at ATC's location at North Scales Street, Reidsville, NC, including but not limited to, the following:

1. All machinery, fixtures, equipment, vehicles, transportation facilities, furniture, tools and other tangible personal property;

2. Inventory and storage capacity;

3. All rights, titles and interests in and to owned or leased real property, together with appurtenances, licenses and permits;

Provided however that the Reidsville Assets shall not include:

98.50/30 - (MISTY 100's) (3) Modules; Maker/Protos, Packer/Focke 350

120/32 - (MISTY 120's) (2) Modules; Maker/Protos, Packer/Focke 350

120/32 - (CARLTON 120's) (1) Module; Maker/Protos, Packer/Focke 350

Plus supporting equipment dedicated to the above identified brand styles including, but not limited to, plug makers, wrappers if separate, case packers, and routine maintenance parts and specific size parts.

F. *"ATC Value Brands"* means the following brands of cigarettes in the U.S.: Montclair, Riviera, Malibu, Bull Durham, Crowns, and Special Tens.

G. *"ATC Full Revenue Brands"* means the following brands of cigarettes in the U.S.: Tareyton, Silva Thins and Tall.

H. *"ATC Brands"* means the ATC Value Brands together with the ATC Full Revenue Brands.

I. *"B&W Brand"* means the following brand of cigarette in the U.S.: Belair.

J. The term *"Assets"* means the following tangible and intangible assets exclusively relating to the manufacture, distribution and sale of those of the ATC Value Brands, the ATC Full Revenue Brands (excluding any Reidsville Assets) or the B&W Brand actually being divested (collectively the "Brands") including, to the extent they exist, but not limited to:

1. The Brand profit and loss statements, Brand contribution statements, and Brand advertising, promotional and marketing spend records for each Brand since January 1, 1990;

2. All trademarks, trade dress, trade secrets, technical information, intellectual property, patents, technology, know-how, tobacco content formulae, designs, specifications, drawings, processes and quality control data exclusively related to any of the Brands;

3. A bill of materials for each of the Brands, consisting of full manufacturing standards and procedures, quality control specifications, specifications for raw materials and components, including lists of authorized sources for materials and components;

4. All dedicated molds and equipment currently in use for each of the Brands;

5. A list of all direct customers who have bought the Brands from ATC or B&W at any time from January 1, 1990, including names, addresses, and telephone numbers of the individual customer contacts, and the unit and dollar amounts of sales, by Brand, to each customer;

6. All current and projected advertising, promotional and marketing information, materials and programs specifically dedicated to the sale and distribution of each of the Brands;

7. All inventories of finished goods, packaging and raw materials uniquely relating to each of the Brands;

8. All names of manufacturers and suppliers under contract with ATC or B&W who produce for, or supply to, ATC or B&W in connection with the manufacture or sale of each of the Brands;

9. A copy of all product testing required by any regulatory authority specific to the Brands from January 1, 1990, including but not limited to tar and nicotine content testing as required by the FTC and all regulatory registrations and correspondence; and

10. All price lists for each of the Brands from January 1, 1990.

II.

It is further ordered, That:

A. BAT and B&W shall divest absolutely and in good faith, within 12 months of the date this order becomes final, the ATC Value Brands Assets. BAT and B&W shall also divest to the proposed acquirer of the ATC Value Brands Assets, the Reidsville Assets and the ATC Full Revenue Brands Assets. BAT and B&W shall also divest:

1. Such additional ancillary assets, formerly of ATC, and effect such arrangements in respect thereof, as are necessary to assure the marketability and the viability of the Reidsville Assets for the manufacture of cigarettes in the United States for sale and consumption in the United States; and

2. Such additional ancillary physical assets and legal rights, formerly of ATC, as are exclusive to those ATC Brands being divested and are necessary to assure the marketability and the viability of those ATC Brands;

Provided however, if the divestiture of only the ATC Value Brands Assets is approved by the Commission pursuant to paragraph II.B., and the divestiture does not include the Reidsville Assets and/or the ATC Full Revenue Brands Assets, the obligations of BAT and B&W to divest under this order shall be satisfied upon the divestiture of the ATC Value Brands Assets.

B. BAT and B&W shall divest hereunder only to an acquirer that receives the prior approval of the Commission and only in a manner that receives the prior approval of the Commission. The purpose of the divestiture provided herein is to remedy the lessening of competition resulting from the proposed acquisition as alleged in the Commission's complaint and, therefore, if the Reidsville Assets are divested, they shall be used only for the production of cigarettes in the U.S. principally for sale and consumption in the U.S.

C. Pending divestiture as provided in this paragraph II, BAT and B&W shall:

1. Take such actions as are necessary to maintain the viability and marketability of the Reidsville Assets by preventing the destruction, removal, wasting, deterioration, sale, transfer, encumbrance or impairment of any of the Reidsville Assets except for ordinary wear and tear, and

2. Take such actions as are necessary to maintain the viability and marketability of the ATC Brands Assets by preventing the destruction, sale, transfer, encumbrance or impairment of any of the ATC Brands Assets.

D. BAT and B&W shall comply with all terms of the Preservation Agreement, attached to this order and made a part hereof as Appendix I. The Preservation Agreement shall continue in effect until the date this order becomes final.

III.

It is further ordered, That:

A. If BAT and B&W have not divested, absolutely and in good faith and with the Commission's prior approval, as provided in paragraph II.A., the Commission may appoint a trustee to divest the ATC Value Brands Assets, the B&W Brand Assets and the Reidsville Assets. Upon divestiture under this paragraph III, the Reidsville Assets shall be used for the production of cigarettes in the U.S. principally for sale and consumption in the U.S. Provided, however, that if the Commission has not approved or disapproved a proposed divestiture within 120 days of the date the application for such divestiture has been placed on the public record, the running of the divestiture period shall be tolled until the Commission approves or disapproves the divestiture. In the event that the Commission or the Attorney General brings an action pursuant to Section 5(1) of the Federal Trade Commission Act, 15 U.S.C. 45(l), or any other statute enforced by the Commission, BAT and B&W shall consent to the appointment of a trustee in such action. Neither the appointment of a trustee nor a decision not to appoint a trustee under this paragraph shall preclude the Commission or the Attorney General from seeking civil penalties or any other relief available to it, including a court-appointed trustee, pursuant to Section 5(1) of the Federal Trade

Commission Act, or any other statute enforced by the Commission, for any failure by BAT and B&W to comply with this order.

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

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

2.Subject to the prior approval of the Commission, the trustee shall have the exclusive power and authority to divest the Reidsville Assets, the ATC Value Brands Assets and the B&W Brand Assets.

3. Within twenty (20) days after appointment of the trustee, BAT and B&W shall execute a trust agreement that, subject to the prior approval of the Commission and, in the case of a court-appointed trustee, of the court, transfers to the trustee all rights and powers necessary to permit the trustee to effect the divestiture required by this order.

4. The trustee shall have twelve (12) months from the date the Commission approves the trust agreement described in paragraph III B. 3. to accomplish the divestiture, which shall be subject to the prior approval of the Commission. If, however, at the end of the twelve-month period, the trustee has submitted a plan of divestiture or believes that divestiture can be achieved within a reasonable time, the divestiture period may be extended by the Commission, or, in the case of a court-appointed trustee, by the court; provided, however, the Commission may extend this period only two (2) times.

5. The trustee shall have full and complete access to the personnel, books, records and facilities related to the Reidsville Assets, the ATC Value Brands Assets and the B&W Brand Assets or to any other relevant information, as the trustee may request, and shall take all reasonable steps to ensure that the confidentiality is maintained of matters and documents so designated by either of the

respondents. BAT and B&W shall develop such financial or other information as such trustee may request and shall cooperate with the trustee. BAT and B&W shall take no action to interfere with or impede the trustee's accomplishment of the divestitures. Any delays in divestiture caused by BAT and B&W shall extend the time for divestiture under this paragraph in an amount equal to the delay, as determined by the Commission or, for a court-appointed trustee, by the court.

6. The trustee shall use his or her best efforts to negotiate the most favorable price and terms available in each contract (which may include provision for the contract manufacture of cigarettes) that is submitted to the Commission, subject to BAT's and B&W's absolute and unconditional obligation to divest at no minimum price. The divestiture shall be made in the manner and to the acquirer as set out in paragraph II.B. of this order; provided, however, if the trustee receives *bona fide* offers from more than one acquiring entity, and if the Commission determines to approve more than one such acquiring entity, the trustee shall divest to the acquiring entity selected by BAT and B&W from among those approved by the Commission.

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

8. BAT and B&W shall indemnify the trustee and hold the trustee harmless against any losses, claims, damages, liabilities, or expenses arising out of, or in connection with, the performance of the trustee's duties, including all reasonable fees of counsel and other expenses

incurred in connection with the preparation for, or defense of any claim, whether or not resulting in any liability, except to the extent that such liabilities, losses, damages, claims, or expenses result from misfeasance, gross negligence, willful or wanton acts, or bad faith by the trustee. BAT and B&W shall be responsible for the defense of any and all claims against the trustee under this subsection and the trustee shall do and omit nothing which may prejudice such defense.

9. If the trustee ceases to act or fails to act diligently a substitute trustee shall be appointed in the same manner as provided in paragraph III A. of this order.

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

11. The trustee shall have no obligation or authority to operate or maintain the Reidsville Assets, the ATC Value Brands Assets and the B&W Brand Assets.

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

13. The trustee shall note, in his or her recommendation to the Commission, whether the proposed acquirer, or any other entity controlling or commonly controlled by the proposed acquirer, has, directly or indirectly, in any jurisdiction in the world and at any time within the last five years, had goods that it manufactured or supplied seized, impounded or destroyed by any authority pursuant to a claim of infringement of any intellectual property or other right over or in respect to those goods.

IV.

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

A. Acquire any stock, share capital, equity, or other interest in any concern, corporate or non-corporate, engaged at the time of such acquisition, or within the two years preceding such acquisition, in the

manufacture in the United States of cigarettes for consumption in the United States, or

B. Acquire any assets used for or previously used for (and still suitable for use for) the manufacture, distribution, or sale in the United States of cigarettes.

Provided, however, that this paragraph IV shall not apply to transactions entered into in the ordinary course of business.

V.

It is further ordered, That:

A. Within sixty (60) days after the date this order becomes final and every sixty (60) days thereafter until BAT and B&W have fully complied with the provisions of paragraphs II and III of this order, BAT and B&W shall submit to the Commission a verified written report setting forth in detail the manner and form in which they intend to comply, are complying, and have complied with paragraphs II and III of this order. BAT and B&W shall include in their compliance reports, among other things that are required from time to time, a full description of the efforts being made to comply with paragraphs II and III of the order, including a description of all substantive contacts or negotiations for the divestiture and the identity of all parties contacted. BAT and B&W shall include in their compliance reports copies of all written communications to and from such parties, all internal memoranda, and all reports and recommendations concerning divestiture.

B. One year (1) from the date this order becomes final, annually for the next nine (9) years on the anniversary of the date this order becomes final, and at other times as the Commission may require, BAT and B&W shall file a verified written report with the Commission setting forth in detail the manner and form in which they have complied and are complying with paragraph IV of this order.

VI.

It is further ordered, That BAT and B&W shall notify the Commission at least thirty (30) days prior to any proposed change in the corporations, such as dissolution, assignment, sale resulting in the

emergence of a successor corporation, or the creation or dissolution of subsidiaries or any other change in the corporations, that in each case may affect compliance obligations arising out of the order.

VII.

It is further ordered, That, for the purpose of determining or securing compliance with this order, subject to any legally recognized privilege, BAT and B&W shall permit any duly authorized representative of the Commission:

A. Upon written notice to counsel, access, during office hours and in the presence of counsel, to inspect and copy all books, ledgers, accounts, correspondence, memoranda and other records and documents in the possession or under the control of BAT and B&W relating to any matters contained in this order; and

B. Upon five days' written notice to counsel and without restraint or interference from BAT and B&W, to interview officers, directors, or employees of BAT and B&W, who may have counsel present.

Commissioner Varney not participating.

APPENDIX I

PRESERVATION AGREEMENT

This Preservation Agreement is by and between B.A.T Industries p.l.c., a public limited company incorporated under the laws of England, with its headquarters and principal place of business located at Windsor House, 50 Victoria Street, London, England, SW1H 0NL ("BAT"), Brown & Williamson Tobacco Corporation, a corporation incorporated under the laws of the State of Delaware with its headquarters and principal place of business located at 1500 Brown & Williamson Tower, P.O. Box 35090, Louisville, Kentucky ("B&W"), and the Federal Trade Commission, an independent agency of the United States Government, established under the Federal Trade Commission Act of 1914, 15 U.S.C. 41, *et seq.*

PREMISES FOR AGREEMENT

Whereas, BAT, pursuant to an agreement dated April 26, 1994, agreed to purchase substantially all of the outstanding stock of the American Tobacco Company ("ATC"), a wholly owned subsidiary of American Brands, Inc.; and

Whereas, the Commission has reason to believe that the agreement would violate Section 5 of the Federal Trade Commission Act, and that, if consummated, would violate Section 7 of the Clayton Act and Section 5 of the Federal Trade Commission Act, statutes enforced by the Commission, and the Commission has issued its administrative complaint challenging the agreement; and

Whereas, if the parties accept the agreement containing consent order ("consent agreement"), the Commission is required to place it on the public record for a period of sixty (60) days for public comment and may subsequently withdraw such acceptance pursuant to the provisions of Section 3.25(f) of the Commission's Rules; and

Whereas, the Commission is concerned that if an agreement is not reached preserving the *status quo ante* of the Reidsville Assets and the ATC Brands Assets during the period prior to final acceptance of the order by the Commission (after the 60-day comment period), any divestiture resulting from any proceeding challenging the legality of the acquisition might not be possible, or might produce a less than effective remedy; and

Whereas, the Commission is concerned that if the acquisition is consummated, it will be necessary to preserve the continued viability and marketability of the Reidsville Assets and the ATC Brands Assets., as defined in the consent agreement; and

Whereas, the purpose of this Preservation Agreement and of the consent agreement is to preserve the Reidsville Assets and the ATC Brands Assets until the date this order becomes final, in order to remedy any anticompetitive effects of the acquisition; and

Whereas, BAT's and B&W's entering into this Preservation Agreement shall in no way be construed as an admission by BAT and B&W that the acquisition is anticompetitive or illegal; and

Whereas, BAT and B&W understand that no act or transaction contemplated by this Preservation Agreement shall be deemed immune or exempt from the provisions of the antitrust laws, or the Federal Trade Commission Act by reason of anything contained in this Preservation Agreement;

Now, therefore, in consideration of the Commission's agreement that, unless the Commission determines to reject the consent agreement, it will not seek further relief from the parties with respect to the acquisition, except that the Commission may exercise any and all rights to enforce this Preservation Agreement, and the consent agreement to which this Preservation Agreement, is annexed and made a part thereof, and the final order in this proceeding, and, in the event the required divestiture is not accomplished, to appoint a trustee to seek the divestiture of the Reidsville Assets, the ATC Value Brands Assets and the B&W Brand Assets as provided in the consent agreement, the parties agree as follows:

TERMS OF AGREEMENT

1. BAT and B&W agree to execute, and upon its issuance, to be bound by the consent agreement.

2. BAT will be free to close the acquisition with American Brands immediately after the Commission's approval of the consent agreement for placement on the public record for comment.

3. BAT and B&W agree that from the date this Preservation Agreement is signed by BAT and B&W until the earliest of the dates listed in subparagraphs 3.a and 3.b they will comply with the provisions of this Preservation Agreement:

a. Three business days after the Commission withdraws its acceptance of the consent agreement pursuant to the provisions of Section 3.25(f) of the Commission's Rules; or

b. The day the order becomes final.

4. From the time BAT and B&W sign this Preservation Agreement until the date the order becomes final, BAT and B&W shall:

a. Take such actions as are necessary to maintain the viability and marketability of the Reidsville Assets by preventing the destruction, removal, wasting, deterioration, sale, transfer, encumbrance or impairment of any of the Reidsville Assets except for ordinary wear and tear, and

b. Take such actions as are necessary to maintain the viability and marketability of the ATC Brands Assets by preventing the

destruction, sale, transfer, encumbrance or impairment of any of the ATC Brands Assets.

5. BAT and B&W also waive all rights to contest the validity of this agreement.

6. For the purpose of determining or securing compliance with this agreement, subject to any legally recognized privilege, and upon written request with reasonable notice to counsel for BAT or B&W, BAT or B&W shall permit any duly authorized representative or representatives of the Commission:

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

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

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

IN THE MATTER OF

BOSTON SCIENTIFIC CORPORATION

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

Docket C-3573. Complaint, April 28, 1995--Decision, April 28, 1995

This consent order permits, among other things, Boston Scientific Corporation, a Massachusetts-based manufacturer and marketer of catheters, to proceed with the proposed acquisitions of Cardiovascular Imaging Systems, Inc., and SCIMED Life Systems, Inc., but requires the respondent to grant a non-exclusive license to a specified package of patents and technology related to the manufacture, production and sale of intravascular ultrasound (IVUS) imaging catheters to the Hewlett-Packard Company or another Commission-approved licensee. In addition, the consent order requires the respondent to obtain Commission approval, for ten years, before acquiring an interest greater than one percent in a company engaged in researching, developing or manufacturing IVUS catheters for sale in the United States.

Appearances

For the Commission: *Howard Morse* and *Robert S. Tovsky*.

For the respondent: *Bruce Montgomery, Arnold & Porter*, Washington, D.C.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, and of the Clayton Act, and by virtue of the authority vested in it by said Acts, the Federal Trade Commission, having reason to believe that Boston Scientific Corporation (Boston Scientific) has entered into agreements with Cardiovascular Imaging Systems, Inc. (CVIS), and with SCIMED Life Systems, Inc. (SCIMED), whereby Boston Scientific will acquire all of the outstanding shares of both CVIS and SCIMED, in violation of Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45, and that such acquisitions, if consummated, would violate Section 7 of the Clayton Act, as amended, 15 U.S.C. 18, and Section 5 of the Federal Trade Commission Act, and having reason to believe that Boston Scientific has entered into such agreements in restraint of trade in violation of

Section 5 of the Federal Trade Commission Act, and it appearing to the Commission that a proceeding in respect thereof would be in the public interest, hereby issues its complaint stating its charges as follows:

I. THE RESPONDENT

1. Respondent Boston Scientific is a corporation organized and existing under the laws of Delaware, with its principal place of business at 1 Boston Scientific Place, Natick, Massachusetts.

2. At all times relevant herein, the respondent has been, and is now, engaged in commerce as "commerce" is defined in Section 4 of the FTC Act (15 U.S.C. 44) and Section 1 of the Clayton Act (15 U.S.C. 12), and is a corporation whose business is in or affecting commerce as defined in Section 4 of the Federal Trade Commission Act (15 U.S.C. 44).

II. THE PROPOSED ACQUISITIONS

3. On or about August 31, 1994, Boston Scientific and CVIS executed an Agreement and Plan of Merger and Reorganization ("CVIS Agreement") wherein Boston Scientific agreed to acquire all of the voting securities of CVIS. The transaction is valued at approximately $88 million.

4. On or about November 8, 1994, Boston Scientific and SCIMED executed an Agreement and Plan of Merger ("SCIMED Agreement") wherein Boston Scientific agreed to acquire all the outstanding shares of SCIMED through a stock swap valued at approximately $870 million.

III. THE RELEVANT MARKETS

5. One relevant line of commerce within which to analyze the effects of the CVIS and SCIMED acquisitions is the research and development, manufacture, and sale of intravascular ultrasound ("IVUS") catheters, including imaging catheters, imaging cores and imaging guidewires.

6. IVUS catheters are medical devices used as an adjunct to angiography in conjunction with therapeutic procedures such as balloon angioplasty, atherectomy, and stent implantation, to diagnose

and treat cardiovascular disease. IVUS catheters generate an ultrasound image from the inside of arteries, providing detailed information that is not obtainable using other imaging techniques. Use of IVUS catheters may result in more effective use of therapeutic treatments and overall lower health care costs.

7. One relevant geographic area within which to analyze the likely effects of the CVIS and SCIMED acquisitions is the United States. Foreign producers are constrained from selling in the United States, by, among other things, patents and requirements for regulatory approvals.

IV. MARKET STRUCTURE

8. Boston Scientific and CVIS are the two leading competitors in the research and development, manufacture, and sale of IVUS catheters in the United States.

9. The U.S. IVUS catheter market is extremely concentrated as measured by the Herfindahl-Hirschmann Index (HHI). In 1994, CVIS accounted for approximately 50% and Boston Scientific accounted for approximately 40% of sales of IVUS catheters in the United States. Boston Scientific's acquisition of CVIS would increase the HHI by approximately 3850 points, to over 7900.

10. Only one other company, Endosonics Corporation, currently sells IVUS catheters in the United States. Endosonics' IVUS catheters utilize a phased array technology, unlike Boston Scientific's and CVIS' IVUS catheters, which use a mechanical rotating technology. Endosonics' share of the U.S. IVUS catheter market has fallen over recent years.

11. Boston Scientific and CVIS are continuing to compete vigorously while engaged in patent litigation in which CVIS asserts Boston Scientific infringes certain of its patents, and Boston Scientific asserts that certain of CVIS' patents are invalid and that CVIS infringes certain of its patents.

12. The IVUS catheter market has grown rapidly in recent years and is projected to grow substantially over the next several years. Boston Scientific projects that the IVUS catheter market will remain highly concentrated for at least the next several years, and that both its own and CVIS' shares of the market will remain high.

13. SCIMED has conducted substantial research and development with respect to IVUS catheters, and after several years of work, has

developed a prototype imaging guidewire. But for its acquisition by Boston Scientific, SCIMED, which has the capacity, incentives and economic interest for entry, is likely to enter the U.S. IVUS catheter market within two to three years. No other firm has an entry advantage similar to SCIMED. SCIMED was perceived by Boston Scientific and others to be a potential competitor in the manufacture and sale of IVUS catheters in the United States.

V. ENTRY CONDITIONS

14. Entry into the IVUS catheter market would not be timely, likely or sufficient to deter or offset reductions in competition resulting from the proposed acquisitions. Designing and manufacturing IVUS catheters requires substantial technological expertise, and would require several years for research and development, product and process design, and establishment of manufacturing facilities. The time required for entry could be extended significantly by the need to obtain regulatory approvals. Entry would require significant sunk investment with uncertain ultimate success because of the technological difficulty. The broad patent positions of CVIS, Boston Scientific, and SCIMED increases the risk of entry, and the combination of the patent portfolios of these three companies would further increase the difficulty of entry.

VI. COMPETITIVE EFFECTS OF THE PROPOSED ACQUISITIONS

15. The acquisition of CVIS by Boston Scientific may substantially lessen competition and tend to create a monopoly in the IVUS catheter market in the United States because, among other things:

a. It will increase concentration substantially in a highly concentrated market;

b. It will eliminate substantial head-to-head competition between Boston Scientific and CVIS, who are each other's closest competitors in the research and development, manufacture, and sale of IVUS catheters;

c. It will allow Boston Scientific unilaterally to exercise market power;

d. It will make coordinated interaction between Boston Scientific and Endosonics, the only other remaining competitor, substantially more likely;

e. It will, by combining the patent portfolios of Boston Scientific and CVIS, make entry into the IVUS catheter market more difficult;

f. It will likely result in diminished product innovation in IVUS catheters; and

g. It will likely result in increased prices for IVUS catheters.

16. The acquisition of SCIMED by Boston Scientific may substantially lessen competition and tend to create a monopoly in the IVUS catheter market in the United States because, among other things:

a. It will eliminate competition between Boston Scientific and SCIMED in the research and development of IVUS catheters;

b. It will eliminate the most likely potential entrant, with a substantial entry advantage over other potential entrants, into the highly concentrated IVUS catheter market;

c. It will eliminate an actual potential competitor whose entry would likely have ultimately produced deconcentration of the IVUS catheter market;

d. It will eliminate a perceived potential competitor into the IVUS catheter market;

e. It will, by combining the patent portfolios of Boston Scientific and SCIMED, make entry into the IVUS catheter market more difficult;

f. It will likely result in diminished product innovation in IVUS catheters; and

g. It will likely result in increased prices for IVUS catheters.

VII. VIOLATIONS CHARGED

17. The acquisition agreement between Boston Scientific and CVIS described in paragraph three violates Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45.

18. The proposed acquisition of CVIS by Boston Scientific would, if consummated, violate Section 7 of the Clayton Act, as amended, 15 U.S.C. 18, and Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45.

19. The agreement between Boston Scientific and SCIMED described in paragraph four violates Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45.

20. The proposed acquisition of SCIMED by Boston Scientific would, if consummated, violate Section 7 of the Clayton Act, as amended, 15 U.S.C. 18, and Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45.

Chairman Pitofsky recused.

DECISION AND ORDER

The Federal Trade Commission ("the Commission"), having initiated an investigation of the proposed acquisitions by Boston Scientific Corporation ("Boston Scientific") of Cardiovascular Imaging Systems, Inc., and SCIMED Life Systems, Inc. ("SCIMED"), which acquisitions are more fully described at paragraphs I.(E) and I.(F) below, and Boston Scientific having been furnished with a copy of a draft complaint that the Bureau of Competition has presented to the Commission for its consideration and which, if issued by the Commission, would charge Boston Scientific with violations of the Clayton Act and Federal Trade Commission Act; and

The respondent, its attorneys, and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the respondent of all 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, and waivers and other provisions as required by the Commission's Rules; and

The Commission, having thereafter considered the matter and having determined that it had reason to believe that the respondent has violated the said Acts, and that complaint should issue stating its charges in that respect, and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of thirty (30) days, makes the following jurisdictional findings and enters the following order:

1. Respondent Boston Scientific Corporation is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware, with its principal office and place of business located at 1 Boston Scientific Place, Natick, Massachusetts.

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

ORDER

I.

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

A. *"Respondent"* or *"Boston Scientific"* means Boston Scientific Corporation, its predecessors, successors, assigns, subsidiaries, divisions, and groups and affiliates controlled by Boston Scientific, their successors and assigns, and the directors, officers, employees, agents, and representatives of each.

B. *"CVIS"* means Cardiovascular Imaging Systems, Inc.

C. *"SCIMED"* means SCIMED Life Systems, Inc.

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

E. *"CVIS Acquisition"* means the acquisition by respondent of CVIS voting securities that is the subject of an Agreement and Plan of Merger and Reorganization entered into on or about August 31, 1994.

F. *"SCIMED Acquisition"* means the acquisition of SCIMED voting securities that is the subject of an Agreement and Plan of Merger entered into on or about November 8, 1994.

G. *"IVUS Catheters"* means intravascular ultrasound catheters, intracardiac ultrasound catheters, removable imaging cores used in intravascular or intracardiac ultrasound imaging, and intravascular imaging guidewires.

H. *"IVUS Technology Portfolio"* means:

1. All rights of Boston Scientific, CVIS and SCIMED under United States and foreign patents and patent applications filed in any country relating to IVUS Catheters, including rights under patents issued in the future in any country based upon patent applications

filed, or inventor's certificates and invention disclosures made, on or before the License Date, and rights under all substitutions, continuations, continuations-in-part, divisions, renewals, reissues and extensions based on said patents and patent applications, including but not limited to the right to manufacture, use, sell, or offer for sale for any purpose or application any product suitable for use as an IVUS Catheter;

2. All trade secrets, technology and know-how of CVIS and SCIMED relating to IVUS Catheters, including but not limited to, books and records, the results of research and development efforts, filings with the United States Food and Drug Administration, scientific and clinical reports, designs, manuals, drawings, and design, material and equipment specifications and any know-how used by CVIS or SCIMED in conjunction with the research and development, manufacturing or marketing of IVUS Catheters;

3. A copy of the IVUS Catheter customer lists of Boston Scientific and CVIS.

I. *"SCIMED IVUS Technology"* means all assets of SCIMED relating to IVUS Catheters, including but not limited to:

1. United States and foreign patents and patent applications filed in any country relating to IVUS Catheters;

2. All trade secrets, technology, and know-how of SCIMED relating to IVUS Catheters, including but not limited to, books and records, the results of research and development efforts, filings with the United States Food and Drug Administration, scientific and clinical reports, designs, manuals, drawings, and design, material and equipment specifications and any know-how used by SCIMED in conjunction with the research and development, manufacturing or marketing of IVUS Catheters; and

3. All IVUS Catheter prototypes.

J. *"License Date"* means the date on which the IVUS Technology Portfolio is licensed following Commission approval pursuant to paragraph II or paragraph V of this order.

K. *"Licensee"* means the person to whom the IVUS Technology Portfolio is licensed pursuant to paragraph II or paragraph V of this order.

L. *"IVUS Consoles"* means instruments used to deploy IVUS Catheters and to convert into display images signals transmitted by IVUS Catheters.

II.

It is further ordered, That:

A. Within six (6) months of the date this order becomes final, respondent shall, absolutely and in good faith, grant pursuant to paragraph II.b of this order, at no minimum price and with no continuing royalties, a perpetual, non-exclusive license of the IVUS Technology Portfolio, together with the right to grant exclusive sub-licenses to any part of such IVUS Technology Portfolio, the right to grant exclusive sub-licenses to manufacture or sell any product pursuant to such IVUS Technology Portfolio, and the right to have IVUS Catheters manufactured and sold on its behalf by any person.

B. Respondent shall license the IVUS Technology Portfolio

1. To Hewlett-Packard Company, within ten days after the date this order becomes final, pursuant to, and in accordance with, the February 21, 1995, agreement between respondent and Hewlett-Packard Company, which agreement is appended to this order in Appendix II; or

2. To a person 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 license is to create an independent competitor in the development, production and sale of IVUS Catheters and to remedy the lessening of competition resulting from the CVIS Acquisition and the SCIMED Acquisition as alleged in the Commission's complaint.

C. For a period of three (3) years after the date this order becomes final, upon reasonable notice and reasonable request from the Licensee, Boston Scientific shall provide to the Licensee information, technical assistance and advice sufficient to effect the transfer to the Licensee of the IVUS Technology Portfolio, and to enable the Licensee to obtain all necessary United States Food and Drug Administration approvals or certifications obtained by CVIS or

Boston Scientific with respect to, and to enable the Licensee to manufacture, all IVUS Catheters manufactured by CVIS at any time during the period commencing twelve (12) months prior to the date this order becomes final and extending through the License Date. Upon reasonable notice and reasonable request from the Licensee, Boston Scientific shall also provide to the Licensee consultation with knowledgeable employees of Boston Scientific and training at the Licensee's facility for a period of time, not to exceed two (2) years, sufficient to satisfy the Licensee's management that its personnel are adequately trained in the design and manufacture of IVUS Catheters. Respondent may require reimbursement from the Licensee for all its direct out-of-pocket expenses incurred in providing the services required by this paragraph II.C of this order.

D. Respondent shall not restrict any person employed by CVIS or SCIMED prior to the date this order becomes final from accepting employment with the Licensee or, following employment of any such person by the Licensee, communicating to the Licensee any intellectual property included in the IVUS Technology Portfolio.

E. Pending the licensing of the IVUS Technology Portfolio, respondent shall take such actions as are necessary to maintain the viability and marketability of the IVUS Technology Portfolio and to prevent the destruction, removal, wasting, deterioration, or impairment of the IVUS Technology Portfolio.

F. Respondent shall comply with all terms of the Agreement to Hold Separate, attached to this order and made a part hereof as Appendix I. The Agreement to Hold Separate shall continue in effect until such time as specified in the Agreement to Hold Separate.

III.

It is further ordered, That respondent shall supply to the Licensee, for such period as the Licensee may request, up to three (3) years, on reasonable commercial terms and provisions, at Boston Scientific's cost or at such lower price as Boston Scientific and the Licensee may otherwise agree, for distribution and sale by the Licensee, such quantities and types of IVUS Catheters as may be requested by the Licensee, upon reasonable notice, from among the various types manufactured and sold by Boston Scientific during the period of such supply arrangement.

IV.

It is further ordered, That, for a period of five (5) years from the date this order becomes final, respondent shall not offer, renew, extend or enter into any exclusive contract or agreement, or enforce directly or indirectly any exclusivity provision thereof, with any manufacturer of IVUS Consoles, relating to the development, manufacture or distribution of such units or relating to compatibility between the IVUS Consoles produced by such manufacturer and IVUS Catheters produced by any person.

V.

It is further ordered, That:

A. If Boston Scientific has not licensed the IVUS Technology Portfolio as required by paragraph II of this order, the Commission may appoint a trustee to license the IVUS Technology Portfolio and to divest CVIS together with the SCIMED IVUS Technology. In the event that the Commission or the Attorney General brings an action pursuant to Section 5(l) of the Federal Trade Commission Act, 15 U.S.C. 45(l), or any other statute enforced by the Commission, Boston Scientific shall consent to the appointment of a trustee in such action. Neither the appointment of a trustee nor a decision not to appoint a trustee under this paragraph shall preclude the Commission or the Attorney General from seeking civil penalties or any other relief available to it, including a court-appointed trustee, pursuant to Section 5(l) of the Federal Trade Commission Act, or any other statute enforced by the Commission, for any failure by the respondent to comply with this order.

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

1. The Commission shall select the trustee, subject to the consent of respondent, which consent shall not be unreasonably withheld. The trustee shall be a person with experience and expertise in acquisitions, divestitures, and licensing. If respondent has not opposed, in writing, including the reasons for opposing, the selection

of any proposed trustee within ten (10) days after notice by the staff of the Commission to respondent of the identity of any proposed trustee, respondent shall be deemed to have consented to the selection of the proposed trustee.

2. Subject to the prior approval of the Commission, the trustee shall have the exclusive power and authority to license the IVUS Technology Portfolio and to divest CVIS together with the SCIMED IVUS Technology.

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

4. The trustee shall have:

a. Six (6) months from the date the Commission approves the trust agreement described in paragraph V.B.3. to accomplish the licensing of the IVUS Technology Portfolio, which license shall be subject to the prior approval of the Commission. If, however, at the end of this six (6)-month period, the trustee has submitted a licensing candidate or believes that licensing can be achieved within a reasonable time, the licensing period may be extended by the Commission, or, in the case of a court-appointed trustee, by the court; and

b. If the trustee has not licensed the IVUS Technology Portfolio within the six (6)-month period described in paragraph V.B.4.a., above, the trustee shall have an additional twelve (12) months to accomplish the divestiture of CVIS together with the SCIMED IVUS Technology, which divestiture shall be subject to the prior approval of the Commission. If, however, at the end of this twelve (12)-month period, the trustee has submitted a divestiture candidate or believes that divestiture can be achieved within a reasonable time, the divestiture period may be extended by the Commission, or, in the case of a court-appointed trustee, by the court; provided, however, the Commission may extend this period only two (2) times.

5. The trustee shall have full and complete access to the personnel, books, records and facilities related to the IVUS Technology Portfolio, CVIS and the SCIMED IVUS Technology and

to any other relevant information, as the trustee may request. Respondent shall develop such financial or other information as the trustee may request and shall cooperate with the trustee. Respondent shall take no action to interfere with or impede the trustee's accomplishment of the licensing or divestiture. Any delays in divestiture caused by respondent shall extend the time for divestiture under this paragraph in an amount equal to the delay, as determined by the Commission or, for a court-appointed trustee, by the court.

6. The trustee shall use his or her best efforts to negotiate the most favorable price and terms available in each contract that is submitted to the Commission, subject to respondent's absolute and unconditional obligation to license or divest at no minimum price. The licensing or divestiture shall be made in the manner and to a Licensee or acquirer approved by the Commission; provided, however, if the trustee receives *bona fide* offers from more than one entity, and if the Commission determines to approve more than one such entity, the trustee shall license or divest, as applicable, to the entity selected by respondent from among those approved by the Commission.

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

8. Respondent shall indemnify the trustee and hold the trustee harmless against any losses, claims, damages, liabilities, or expenses arising out of, or in connection with, the performance of the trustee's duties, including all reasonable fees of counsel and other expenses

incurred in connection with the preparation for, or defense of any claim, whether or not resulting in any liability, except to the extent that such liabilities, losses, damages, claims, or expenses result from misfeasance, gross negligence, willful or wanton acts, or bad faith by the trustee.

9. If the trustee ceases to act or fails to act diligently, a substitute trustee shall be appointed in the same manner as provided in paragraph V.A. of this order.

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

11. The trustee shall have no obligation or authority to operate or maintain the IVUS Technology Portfolio, CVIS or the SCIMED IVUS Technology.

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

VI.

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

A. Acquire more than one (1) percent of the stock, share capital, equity, or other interest in any concern, corporate or non-corporate, engaged in at the time of such acquisition, or within the two years preceding such acquisition engaged in the research, development, or manufacture of IVUS Catheters for sale in the United States;

B. Acquire any assets used for or previously used for (and still suitable for use for) the manufacture of IVUS Catheters for sale in the United States; or

C. Acquire exclusive rights to any patent or other technology relating to the manufacture or sale of IVUS Catheters in the United States.

Provided, however, that this paragraph VI shall not apply to the acquisition of products or services in the ordinary course of business.

VII.

It is further ordered, That:

A. Within sixty (60) days after the date this order becomes final and every sixty (60) days thereafter until respondent has fully complied with the provisions of paragraphs II and V of this order, respondent shall submit to the Commission a verified written report setting forth in detail the manner and form in which it intends to comply, is complying, and has complied with this order. Respondent shall 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 paragraph II of the order, including a description of all substantive contacts or negotiations for the licensing and 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 licensing.

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

VIII.

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

IX.

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

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

B. Without restraint or interference from respondent, to interview respondent's officers, directors, or employees, who may have counsel present, regarding such matters.

X.

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

Chairman Pitofsky recused, and Commissioner Azcuenaga concurring in part and dissenting in part.

APPENDIX I

AGREEMENT TO HOLD SEPARATE

This Agreement to Hold Separate (the "Hold Separate") is by and among the Boston Scientific Corporation ("Boston Scientific"), a corporation organized, existing, and doing business under and by virtue of the laws of Delaware, with its principal office and place of business at 1 Boston Scientific Place, Natick, Massachusetts, and the Federal Trade Commission (the "Commission"), an independent agency of the United States Government, established under the Federal Trade Commission Act of 1914, 15 U.S.C. 41, *et seq.* (collectively, the "Parties").

PREMISES

Whereas, on August 31, 1994, Boston Scientific entered into an agreement with Cardiovascular Imaging Systems, Inc. ("CVIS") providing for the acquisition (hereinafter the "CVIS Acquisition") of the voting securities of CVIS; and

Whereas, CVIS, with its principal office and place of business at 595 North Pastoria Avenue, Sunnyvale, California, manufactures and sells intravascular ultrasound catheters and high frequency imaging units for use with such catheters; and

Whereas, on November 8, 1994, Boston Scientific entered into an agreement with SCIMED Life Systems, Inc. ("SCIMED") providing for the acquisition (hereinafter the "SCIMED Acquisition") of the voting securities of SCIMED; and

Whereas, SCIMED, with its principal office and place of business at One SCIMED Place, Maple Grove, Minnesota, is conducting research and development with respect to IVUS Catheters; and

Whereas, if the Commission accepts the agreement containing consent order ("consent order"), the Commission will place it on the public record for a period of at least thirty (30) days and may subsequently withdraw such acceptance pursuant to the provisions of Section 2.34 of the Commission's Rules; and

Whereas, the Commission is concerned that if an understanding is not reached, preserving the *status quo ante* of CVIS, during the period prior to the final acceptance and issuance of the consent order by the Commission (after the thirty (30)-day public comment period), divestiture resulting from any proceeding challenging the legality of the CVIS Acquisition might not be possible, or might be less than an effective remedy; and

Whereas, the Commission is concerned that if the CVIS Acquisition is consummated, it will be necessary to preserve the Commission's ability to require the divestiture of CVIS and the Commission's right to seek a viable competitor to Boston Scientific; and

Whereas, the Commission has filed suit in the United States District Court for the District of Columbia (Civil Action No. 1:95 CV00198) seeking a preliminary injunction with respect to the CVIS Acquisition pending an administrative trial, and the Commission has authorized its staff to seek a preliminary injunction with respect to the SCIMED Acquisition pending an administrative trial; and

Whereas, the purpose of the Hold Separate is to:

(i) Preserve CVIS as a viable and competitive business, independent of Boston Scientific, and engaged in the research and development, manufacture and sale of IVUS Catheters and IVUS Consoles, pending final acceptance or withdrawal of acceptance of the consent order by the Commission pursuant to the provisions of Section 2.34 of the Commission's Rules;

(ii) Preserve CVIS as a viable and competitive business, independent of Boston Scientific, and engaged in the research and development, manufacture and sale of IVUS Catheters and IVUS Consoles, pending licensing of the IVUS Technology Portfolio pursuant to paragraph II of the consent order or pending licensing of the IVUS Technology Portfolio or divestiture of CVIS and the SCIMED IVUS Technology pursuant to paragraph V of the consent order; and

(iii) Remedy any anticompetitive effects of the CVIS Acquisition; and

Whereas, Boston Scientific's entering into this Hold Separate shall in no way be construed as an admission by Boston Scientific that the CVIS Acquisition or the SCIMED Acquisition is illegal or would have any anticompetitive effects; and

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

Now, therefore, the Parties agree, and in consideration of the Commission's agreement that, unless it determines to reject the consent order, it will not seek further relief from Boston Scientific with respect to the CVIS Acquisition or the SCIMED Acquisition, except that the Commission may exercise any and all rights to enforce this Hold Separate and the consent order, once it becomes final, and in the event that the required licensing is not accomplished, to appoint a trustee to seek divestiture of CVIS and the SCIMED IVUS Technology, pursuant to the consent order, as follows:

1. Boston Scientific agrees to execute and be bound by the attached consent order.

2. If the Commission accepts the consent order for public comment, Boston Scientific and the Commission will move to stay the action for preliminary injunction pending in United States District Court with respect to the CVIS Acquisition until such time as the Commission withdraws such acceptance pursuant to the provisions of Section 2.34 of the Commission's Rules or finally accepts and issues the consent order; and, in the event the Commission finally accepts the consent order, the Commission will move to dismiss the preliminary injunction action.

3. The terms "IVUS Catheters," "IVUS Consoles," "IVUS Technology Portfolio," and "SCIMED IVUS Technology" have the same definitions as in the consent order;

4. Boston Scientific agrees that from the date this Hold Separate is accepted until the earliest of the dates listed in subparagraph 4.a, 4.b, 4.c or 4.d, it will comply with the provisions of paragraph 5 of this Hold Separate:

a. May 26, 1995, if the Commission has not made the consent order final or withdrawn its acceptance of the consent order by that date;

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

c. The date the licensing required under paragraph II or V of the consent order is completed;

d. The date the divestiture required under paragraph V of the consent order is completed.

5. Boston Scientific shall hold CVIS as it is constituted on the date the CVIS Acquisition is consummated, separate and apart on the following terms and conditions:

a. CVIS, as defined in paragraph I.B. of the consent order, shall be held separate and apart and shall be operated independently of Boston Scientific (meaning here and hereinafter, Boston Scientific excluding CVIS and excluding all personnel connected with CVIS as of the date this Hold Separate is signed) except to the extent that Boston Scientific must exercise direction and control over CVIS to assure compliance with this Hold Separate or with the consent order.

b. Boston Scientific shall not exercise direction or control over, or influence directly or indirectly, CVIS, the New Board (as defined in subparagraph 5.d), or any of its operations or businesses; provided, however, that Boston Scientific may exercise only such direction and control over CVIS as is necessary to assure compliance with this Hold Separate or with the consent order and provided further that Boston Scientific may (a) direct CVIS to consent that patent litigation between Boston Scientific and CVIS be stayed; (b) direct CVIS to consent to acceptance of SCIMED's position in the arbitration proceeding pending between CVIS and SCIMED; and (c) direct that Boston Scientific and CVIS enter into a non-exclusive, royalty-free cross-license of all their IVUS Catheter patents, provided however no such cross-license shall limit rights conferred to CVIS except to the extent it imposes identical limits on rights conferred to Boston Scientific, and provided further that no such cross-license shall exclude any Boston Scientific patents relating to IVUS Catheters; and following execution of such cross-license, direct that the patent litigation between Boston Scientific and CVIS be dismissed.

c. Boston Scientific shall maintain the marketability, viability and competitiveness of CVIS, and shall not take such action that will cause or permit the destruction, removal, wasting, deterioration or impairment of CVIS, except in the ordinary course of business and except for ordinary wear and tear, and shall not sell, transfer, encumber (other than in the normal course of business), or otherwise impair the marketability, viability or competitiveness of CVIS.

d. Boston Scientific shall elect a three-person Board of Directors for CVIS (the "New Board"). The New Board shall consist of two persons knowledgeable about IVUS Catheters, one of whom shall be named Chairman of the New Board, and who shall remain independent of Boston Scientific and competent to assure the continued viability and competitiveness of CVIS, and one New Board Member who is also an officer, agent or employee of Boston Scientific (the "Boston Scientific New Board Member"). Except for the Boston Scientific New Board Member, Boston Scientific shall not permit any director, officer, employee or agent of Boston Scientific also to be a director, officer, employee or agent of CVIS. Each New Board member shall enter into a confidentiality agreement agreeing to be bound by the terms and conditions of this Hold Separate.

e. Except as required by law and except to the extent that necessary information is exchanged in the course of evaluating and

consummating the CVIS Acquisition, defending investigations or litigation, obtaining legal advice, or complying with this Hold Separate or the consent order, Boston Scientific shall not receive or have access to, or the use of, any material confidential information of CVIS or the activities of the New Board, not in the public domain. Boston Scientific may receive on a regular basis from CVIS aggregate financial information necessary and essential to allow Boston Scientific to file financial reports, tax returns and personnel reports. Boston Scientific and CVIS may also exchange confidential information, subject to appropriate confidentiality agreements, pursuant to agreements between CVIS and Boston Scientific for joint research or contract manufacture, on arms-length commercial terms, to the extent such agreements would be permissible between competitors under the antitrust laws. Any such information that is obtained pursuant to this subparagraph shall only be used for the purposes set out in this subparagraph. ("Material confidential information," as used in this Hold Separate, means competitively sensitive or proprietary information not independently known to Boston Scientific from sources other than CVIS or the New Board, as applicable, and includes but is not limited to customer lists, customers, price lists, prices, individual transactions, marketing methods, patents, technologies, processes, or other trade secrets).

f. Except as permitted by this Hold Separate, the New Board member appointed by Boston Scientific ("Boston Scientific New Board Member") who is also an officer, agent, or employee of Boston Scientific shall not receive any CVIS material confidential information and shall not disclose any such information obtained through his or her involvement with CVIS to Boston Scientific or use it to obtain any advantage for Boston Scientific. The Boston Scientific New Board Member shall participate in matters that come before the New Board only for the limited purpose of considering any capital investment of over one million dollars ($1,000,000), approving any proposed budget and operating plans, authorizing dividends and repayment of loans consistent with the provisions hereof, reviewing any material transactions described in paragraph 5.g, and carrying out Boston Scientific's responsibilities under the Hold Separate and the consent order. Except as permitted by the Hold Separate, the Boston Scientific New Board Member shall not participate in any other matter.

g. All material transactions, out of the ordinary course of business and not precluded by paragraph five hereof, shall be subject to a majority vote of the New Board (as defined in paragraph 5.d hereof).

h. Boston Scientific shall not change the composition of the New Board unless the Chairman of the New Board consents, or unless it is necessary to do so in order to assure compliance with this Hold Separate or with the consent order. The Chairman of the New Board shall have the power to remove members of the New Board for cause and to require Boston Scientific to appoint replacement members of the New Board. Boston Scientific shall not change the composition of the management of CVIS except that the New Board shall have the power to remove management employees for any legal reason. If the Chairman ceases to act or fails to act diligently, a substitute Chairman shall be appointed in the same manner as provided in paragraph 5.d. Boston Scientific shall circulate to the management employees of CVIS and appropriately display a notice of the Hold Separate and the Consent Agreement at a conspicuous place at all CVIS offices and facilities.

i. All earnings and profits of CVIS shall be retained separately by CVIS. If necessary, Boston Scientific shall provide CVIS with sufficient working capital to operate at current rates of operation, upon commercially reasonable terms.

j. Should the Federal Trade Commission seek in any proceeding to compel Boston Scientific to divest itself of CVIS or SCIMED or to compel Boston Scientific to divest any assets or businesses of CVIS and SCIMED that it may hold, or to seek any other injunctive or equitable relief, Boston Scientific shall not raise any objection based upon the expiration of the applicable Hart-Scott-Rodino Antitrust Improvements Act waiting period or the fact that the Commission has permitted the CVIS Acquisition or the SCIMED Acquisition. Boston Scientific also waives all rights to contest the validity of this Hold Separate.

6. For the purpose of determining or securing compliance with this Hold Separate, subject to any legally recognized privilege, and upon written request and five day's notice to Boston Scientific, Boston Scientific shall permit any duly authorized representative(s) of the Commission:

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

b. Without restraint or interference from Boston Scientific, to interview Boston Scientific's or CVIS' officers, directors or employees, who may have counsel present, regarding any such matters.

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

APPENDIX II

February 21, 1995 Agreement Between Boston Scientific Corporation and Hewlett-Packard Company

AGREEMENT

Agreement this 21st day of February, 1995 between Boston Scientific Corporation ("BSC") and Hewlett-Packard Company ("HP"). This Agreement supersedes and replaces the Agreement of February 17th, 1995 which is of no further effect. The terms "HP" and "BSC" include all their subsidiaries and successors throughout the term of this Agreement.

1. The Parties desire to enter into this Agreement to establish their respective rights in IVUS (intravascular ultrasound)-related patents and technology upon the acquisition by BSC of Cardiovascular Imaging Systems, Inc. ("CVIS") and SCIMED Life Sciences, Inc. ("SCIMED"). BSC will promptly submit this Agreement to the Federal Trade Commission ("FTC") in conjunction with and as a confidential exhibit to BSC's submission of a proposed consent order in contemplated settlement of FTC proceedings relating to the CVIS and SCIMED acquisitions. Both parties hereto will be bound by this Agreement as of the date of its execution; provided, however, that the licenses granted herein below will be effective upon their approval by the FTC (the "Effective Date"). In the event the FTC does not provisionally accept said consent order for public comment, this

Agreement shall be null and void and of no further effect. In the event the FTC provisionally accepts said consent order for public comment, BSC will not solicit, entertain or negotiate with any other party concerning any other such agreement or proposal relating to said contemplated settlement at any time during the public comment period or prior to final FTC action upon said consent order. In the event the FTC does not finally accept said consent order, and thereupon approve said licenses, BSC agrees that it will negotiate in good faith exclusively with HP during the first [ ] days following such FTC action in an effort to arrive at license terms satisfactory to HP and the FTC.

2. BSC hereby grants to HP, as of the Effective Date, a license to certain patents and technology (the "Licensed Technology") for use in the manufacture and sale of Licensed Products, as defined below. The Licensed Technology shall include all issued patents of BSC, SCIMED and CVIS used for the development, manufacture and sale of Licensed Products, including but not limited to, those listed on Exhibit A and all existing know-how of SCIMED and CVIS that is used or intended for use in the development, manufacture and sale of Licensed Products. BSC further agrees that it will not in perpetuity assert any of its rights (including but not limited to patents derived from CVIS and SCIMED) under issued patents and patents which subsequently issue on presently pending applications and continuations thereof, or patent rights arising from inventions disclosed to BSC, CVIS or SCIMED prior to the Effective Date, in a way that would prevent HP from practicing any of the Licensed Technology to manufacture, use or sell Licensed Products. "Licensed Products" are ultrasound imaging catheters, imaging cores and imaging guidewires which are designed for diagnostic or therapeutic use, or both, in the human coronary and peripheral vascular system. This definition includes and is no narrower than the collective claims of the patents (for coronary and peripheral vascular applications) listed on Exhibit A.

3. (a) BSC hereby grants to HP as of the Effective Date a co-exclusive, irrevocable, worldwide license to the Licensed Technology to make, use and sell the Licensed Products, under the terms set forth in paragraph six, below. HP shall have the right to have Licensed Products made on its behalf by a third party, so long as for a period of [ ] HP does not directly or indirectly sell such Licensed Product back to such third party or its affiliates or use sales support services

of such third party or its affiliates with respect to such Licensed Product. Commencing on the [ ], HP may not directly or indirectly contract with the same third party for both the manufacture and sale of all or substantially all of the Licensed Products.

(b) HP hereby grants to BSC as of the Effective Date a non-exclusive, irrevocable, worldwide, royalty-free license to make, use and sell in any field of use under the SIVUS patents listed on Exhibit B.

4. Within [ ] after the Effective Date, BSC will deliver to HP originals or copies of such tangible IVUS and IVUS-related property of CVIS and/or SCIMED as HP may at its option, with reasonable notice to BSC, designate, including, but not limited to, invention disclosures, product specifications, design drawings, works in process, inventory, process sheets and IVUS customer lists of BSC and CVIS. BSC will provide to HP assistance in acquiring the capability to manufacture such Licensed Products as HP may at its option, with reasonable notice to BSC, designate, including manufacturing planning and start up, which will include reasonable access to CVIS's, BSC's and SCIMED's IVUS production facilities and personnel, during the [ ] period commencing with the Effective Date.

5. The provisions of this paragraph five shall become effective on the Effective Date. If HP markets a product which BSC considers to infringe BSC's patent rights (a "Questioned Product") based on patents relating to inventions made during the period beginning on the Effective Date and ending on the [ ] of the Effective Date (the "Patent Rights"), and BSC gives notice to HP to that effect, then HP shall have the right to elect in writing within [ ] of such notice to invoke this paragraph for such Questioned Product. For each Questioned Product for which such election has been made, HP shall have [ ] from the date of such election (the "Amnesty Period") to design around such patent rights. BSC agrees not to bring suit during the Amnesty Period for such alleged infringement. If HP discontinues the marketing of such Questioned Product within the Amnesty Period, BSC agrees to waive any claim for damages based on infringement of [ ] Patent Rights by such Questioned Product. At any time during said Amnesty Period for a Questioned Product, HP shall have the right to elect to negotiate with BSC for a license to permit manufacture, use and sale of such Questioned Product under the respective [ ] Patent Rights, and the parties agree to negotiate

forthwith in good faith with respect thereto. Such license shall be [ ] All Questioned Products so licensed which are manufactured, used or sold by HP, including those sold during the respective Amnesty Period, shall be subject to such royalty.

6. As and for its total compensation to BSC for the licenses and technology set forth herein, HP agrees:

(a) To pay to BSC a one-time license fee of [ ] within [ ] of the Effective Date; and
(b) To pay to BSC the sum of [ ] on [ ]
(c) To pay to BSC the sum of [ ] on [ ]; and
(d) To pay to BSC [ ] before the end of the month following the dates on which [ ] exceeds the following amounts: [ ] provided that none of the payments provided for by this subparagraph shall be due if the sales threshold requiring such payment has not been reached on or before the [ ]

7. The provisions of this paragraph seven shall become effective on the Effective Date. The parties agree that during a period commencing with FDA regulatory approval or product introduction of each device released, whichever first occurs, and ending on the [] each party will provide on all of its IVUS consoles offered to its customers open interfaces to the IVUS products of the other party, whether currently owned or acquired in the future, provided the native console for such device is compatible with the Licensed Technology. For products already in existence, each party shall cooperate as requested by the other party in furthering this open interface objective. Each party has the option of upgrading its own consoles. Each party will take all reasonable and appropriate steps to assure that in interfacing such party's devices to the other party's consoles, the other party suffers no delay times or other disadvantage. These time-to-market safeguards will mean that, in interfacing such party's devices to the other party's consoles, no later than [ ] prior to such party's commercial introduction of any new device, all necessary technical specifications, regulatory information and the like shall be provided to the other party for the purpose of interface. Each party agrees to restrict use of confidential information identified as such and provided by the other party pursuant to this paragraph for the purpose of enabling interface design. Nothing herein shall restrict the receiving party from employing information already in its possession,

information subsequently developed independently by the receiving party, information provided by third parties without violating a confidentiality obligation, or, for interface information, more than [] from disclosure and, for other information, as set forth at the time of disclosure.

8. The provisions of this paragraph eight shall become effective on the Effective Date.

(a) BSC agrees that, at HP's option, BSC shall make available to HP all BSC IVUS Catheters (as defined below) at a price which does not exceed [ ]

(b) BSC will supply to HP as demonstration units at [ ] of all BSC IVUS Catheters purchased by HP, and shall mark such demonstration units as samples.

(c) BSC shall begin accepting regular orders from HP within [ ] of the Effective Date [ ] provided in paragraph one. The parties shall define and prepare to implement an orderly transition from the relationship of the parties pursuant to the agreement dated June 22, 1992 between them to the relationship defined by this Agreement.

(d) No later than [ ] after the Effective Date, and [ ] to the beginning of each [ ] calendar year thereafter, HP shall provide BSC with a forecast of its expected requirements of BSC IVUS Catheters. Such forecasts shall be updated by HP on a [ ] basis. HP shall be obligated to purchase the quantity of BSC IVUS Catheters forecast as its projected requirements for the [ ] immediately following each such forecast, provided that in each forecast HP may [ ] BSC shall make all best efforts to meet HP's requirements [ ], and HP shall make all best efforts to purchase the forecasted volumes in each such year.

(e) After the [ ] anniversary of the Effective Date, HP's purchases of BSC IVUS Catheters in [ ] ending on an anniversary of such effective date shall be restricted in the [ ] to no more than [ ], and in to no more than [ ], in order to accommodate residual customer demand for such catheters.

(f) *"BSC IVUS Catheters"* means all IVUS catheters listed by BSC on any price list, and, to the extent otherwise marketed by BSC to the public, any intravascular ultrasound catheter; provided, however, that BSC IVUS Catheters does not include removable imaging cores or removable imaging guidewires, and does not include products acquired or licensed by BSC from a third party

subsequent to the Effective Date. Current BSC and CVIS IVUS catheters are listed on Exhibit C.

(g) [ ]

9. HP may, without the consent of BSC, grant exclusive sublicenses, assignments, sales or other [ ] transfers effective any time beginning [ ] after the Effective Date to the Licensed Technology for use in the manufacture and sale of Licensed Products; provided that HP shall not grant such sublicenses to a single person the effect of which grant would be to cause HP, together with other current or future HP sublicensees, to retain less than substantial rights to the Licensed Technology, except as part of a sale of all or substantially all of HP's IVUS console and IVUS catheter business. BSC agrees that in the event of such a transfer of rights by HP, the benefit of BSC's obligation not to assert its intellectual property rights pursuant to paragraph two above shall be transferable therewith and in the event of such a transfer of rights by BSC, such rights shall be transferred subject to such obligation.

EXHIBIT A
[Non-public information]

EXHIBIT B
[Non-public information]

EXHIBIT C
[Non-public information]

STATEMENT OF COMMISSIONER MARY L. AZCUENAGA,
CONCURRING IN PART AND DISSENTING IN PART

I have reason to believe that the proposed acquisitions by Boston Scientific of CVIS and SciMed would be unlawful, and the consent agreement appears likely to provide an appropriate remedy for the violations. I disagree with the willingness of the Commission, at the behest of the respondent, to bargain away its standard processes. In particular, although Boston Scientific proffered no justification, the Commission agreed to curtail the public comment period from 60 days, as provided in the Commission's Rules of Practice, to 30 days. It should go without saying that the requirements of the Commission's Rules of Practice are not a proper subject for negotiation.[1] To the extent that the Commission agreed to reduce the length of the period for public comment and no good cause for that departure from the Commission's rules having been shown, I dissent.

In addition, the Commission acceded to a date certain for expiration of the hold separate agreement, the effect of which is to ensure completion of the Commission's review by that time.[2] It is appropriate that the Commission conduct its review of proposed mergers, indeed, all its business, expeditiously, consistent with a careful review of the merits and, on a proper showing, the Commission also should grant expedited treatment for particular matters.[3] The Commission's interest in completing its review of this case expeditiously is commendable, but its agreement to the date certain, in my view, is not. On occasion during the public comment period, the Commission receives information or identifies issues that warrant further investigation. Any such investigation should be conducted expeditiously, but it may not be possible to complete it by the date certain to which the Commission originally agreed. A

[1] The Commission's Rules of Practice have the force and effect of law and should not be taken lightly. Departing from the rules without justification leads to inequality of treatment and leaves the Commission open to charges of arbitrary and capricious decision making. *Cf.* the Tunney Act, 15 U.S.C. 16 (60-day public comment period for Department of Justice antitrust consent orders not to be shortened except by the court on a showing of extraordinary circumstances and that such "shortening is not adverse to the public interest." 15 U.S.C. 16(d).

[2] A hold separate agreement preserves a viable and competitive business, independent of the acquirer, in part to ensure the Commission's ability to require a divestiture. When the hold separate agreement expires, the parties are free to combine their assets and businesses, making it more difficult for the Commission to obtain effective relief different from that provided in the proposed consent agreement.

[3] Expedited treatment for one respondent means moving that matter to the front of the queue. The Commission ordinarily has required a showing that such treatment is warranted.

willingness to act expeditiously is quite different from acquiescing in advance to a "drop dead date" that potentially leaves the Commission unable fully to consider new issues, conditions or information that may arise between the time it commits to the date certain and the time that date arrives.

IN THE MATTER OF

ORCHID TECHNOLOGY

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

Docket C-3574. Complaint, May 1, 1995--Decision, May 1, 1995

This consent order prohibits, among other things, a California-based company from falsely representing that any of its computer peripheral products had been rated, reviewed or endorsed by any person or publication, and from misrepresenting the results of any test, study or evaluation in connection with marketing its computer peripheral equipment. The consent order also requires the respondent to possess competent and reliable evidence to substantiate performance claims.

Appearances

For the Commission: *Matthew D. Gold* and *Jeffrey A. Klurfeld.*

For the respondent: *Timothy Roake, Fenwick & West*, Palo Alto, CA.

COMPLAINT

The Federal Trade Commission, having reason to believe that Orchid Technology, a corporation ("respondent"), has violated the provisions of the Federal Trade Commission Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, alleges:

PARAGRAPH 1. Respondent Orchid Technology is a California corporation, with its principal office or place of business at 45365 Northport Loop West, Fremont, California.

PAR. 2. Respondent has manufactured, labelled, advertised, offered for sale, sold, and distributed peripheral products for personal computers. Among respondent's products is the "Celsius/VLB Windows accelerator" ("Celsius"), which is a graphics accelerator board. A graphics accelerator board increases the speed at which a personal computer displays complex graphical images and improves the quality of the graphics. The Celsius is powered by the AGX015 graphics accelerator chip, which respondent does not manufacture.

Several competitors of Orchid also use the AGX015 graphics accelerator chip to power graphics accelerator boards that they market.

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

PAR. 4. Respondent has disseminated or has caused to be disseminated advertisements and promotional materials for the Celsius, including but not necessarily limited to the attached Exhibits A-C. These advertisements and promotional materials contain the following statements:

(a) "THE FASTEST WINDOWS ACCELERATOR IN REAL WORLD APPLICATIONS."
Windows Magazine (U.K. Version), August 1993
(Exhibits A-C)
(b) "OUTPERFORMS MANY ACCELERATORS TWICE ITS PRICE."
Windows Magazine (U.K. Version), August 1993
(Exhibits A-C)

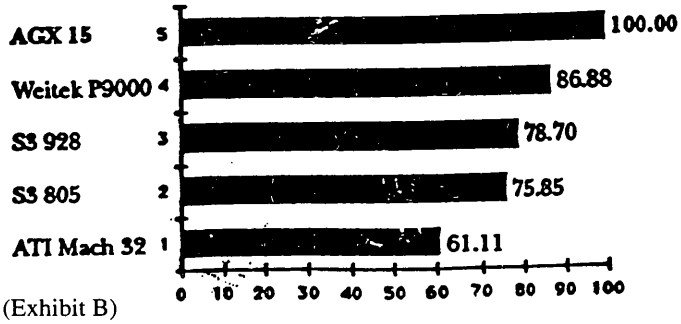
PAR. 5. Through the use of the statements contained in the advertisements referred to in paragraph four, including but not necessarily limited to the advertisements attached as Exhibits A-C, respondent has represented, directly or by implication, that the cited magazine described the Celsius in the manner represented.

PAR. 6. In truth and in fact, the cited magazine did not describe the Celsius in the manner represented. The statement set out in paragraph four (a) did not appear in the cited magazine or elsewhere in reference to the Celsius. The statement set out in paragraph four (b) appeared in the cited magazine but referred to a graphics accelerator board manufactured by one of Orchid's competitors. The Celsius was not even one of the products reviewed in the cited magazine. Therefore, the representation set forth in paragraph five was, and is, false and misleading.

PAR. 7. The advertisements and promotional materials referred to in paragraph four, including but not necessarily limited to the attached Exhibits B and C, contain the following statements and depictions:

(a) WINDOWS: Enjoy the speed of the Celsius (AGX 15) with it's 32-bit GUI accelerator chip and VRAM for peak acceleration.

PERFORMANCE: VidMark Scores (Higher number indicates better performance.) VidMark consists of five real world Windows applications including WordPerfect 5.2, Excel 4.0, CorelDraw 3.0, and Freelance 2.0.



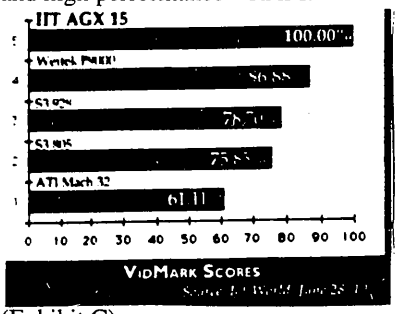
(Exhibit B)

(b) PERFORMANCE

In a recent VidMark performance test, Celsius' chip, the AGX 15, sped to victory in VidMark's latest comparison. VidMark is a benchmark that uses four real world Windows applications including WordPerfect 5.2, Excel 4.0, CorelDraw 3.0, and Freelance 2.0.

BOARD

The Celsius/VLB uses the IIT AGX015 graphics processor (see graph below) and high performance VRAM.



(Exhibit C)

PAR. 8. Through the use of the statements and depictions contained in the advertisements and promotional materials referred to in paragraph seven, including but not necessarily limited to the attached Exhibits B and C, respondent has represented, directly or by implication, that the Celsius achieved the top score of "100.00" in an objective test comparing several graphics accelerator boards.

PAR. 9. In truth and in fact, the Celsius did not achieve the top score of "100.00" in an objective test comparing several graphics accelerator boards. A competitor's product, which uses the same graphics accelerator chip that is in the Celsius, achieved that score.

Therefore, the representation set forth in paragraph eight was, and is, false and misleading.

PAR. 10. In providing the advertisements and promotional materials referred to in paragraph four to computer dealers, respondent has furnished the means and instrumentalities to those dealers to engage in the acts and practices alleged in paragraphs four through nine.

PAR. 11. The acts or practices of respondent as alleged in this complaint constitute unfair or deceptive acts or practices in or affecting commerce in violation of Section 5(a) of the Federal Trade Commission Act.

Chairman Pitofsky not participating.

EXHIBIT A

ORCHID

Celsius/VLB

GRAPHICS ACCELERATOR

WINDOWS
Enjoy the speed of the Celsius with its 32-bit GUI accelerator chip and VRAM for peak acceleration.

100Hz REFRESH
Create your work on a non-flickering screen in a Windows or AutoCAD environment—the Celsius' refresh rate exceeds VESA standards.

MasterCAD
Quick and powerful, MasterCAD drivers provide speed, bird's-eye view, 24-bit rendering and more.

16 MILLION COLORS
Enjoy the colors and speed of our 24-bit driver. It's so fast and realistic, it looks like a picture.

MULTIMEDIA
With Orchid's bi-directional feature connector, hardware and drivers, the Celsius provides top notch support for multimedia environments.

PERFORMANCE
In a recent VidMark performance test Celsius sped to victory. VidMark is a benchmark that uses four real world Windows applications which include WordPerfect 5.2, Excel 4.0, CorelDraw 3.0, and Freelance 2.0.

"FASTEST DRIVER TESTED TO DATE ... IN THE CADALYST GRAPHICS BENCHMARK"

"THE FASTEST WINDOWS ACCELERATOR IN REAL WORLD APPLICATIONS."

"OUTPERFORMS MANY ACCELERATORS TWICE ITS PRICE."

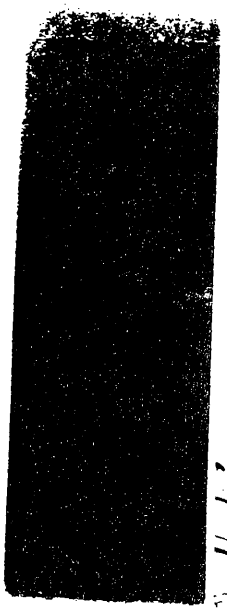


EXHIBIT 5A
ORCHID

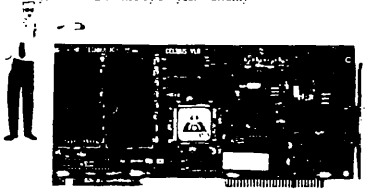
EXHIBIT A

Celsius/VLB

FASTEST WINDOWS ACCELERATOR FOR REAL WORLD APPLICATIONS

BOARD

Celsius/VLB uses the IIT AGX015 graphics processor (see graph below) and *high performance VRAM*. It ships standard with 1MB of memory and is upgradeable to 2MB. Celsius/VLB *requires* a 486 VL-Bus System and is backed by a 4-year warranty.



SPECIFICATIONS

Enhanced Windows Drivers
With a maximum of 1600 x 1200 resolution and a color depth of 800 x 600 x 16 million colors, the Celsius/VLB is the choice for the casual and professional user alike.

Multimedia Ready
Celsius/VLB's bi-directional feature connector, hardware and drivers gives you *top-of-the-line* support for *multimedia* environments like digital video.

Advanced Graphics Instructions
The Celsius/VLB implements hardware-based graphics instructions for the highest performance possible.

Our *Line Draw, BitBlt* and *Polygon Fill with reference pattern* features are the engines powering this card. At 4 operands per instruction the Celsius/VLB displays true color, photo-realistic quality images.

Full Driver Support
The Celsius/VLB is supported by hundreds of applications right out of the box using VESA, VGA and other high quality drivers, such as the following:

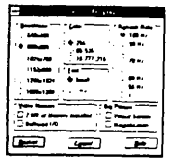
- ▲ AutoCAD
- ▲ AutoShade
- ▲ Windows 3.x
- ▲ OS/2 2.1
- ▲ WordPerfect
- ▲ 3D Studio
- ▲ MicroStation

AutoCAD Drivers
Orchid's MasterCAD Driver, a customized version of the "Aquila Plus," was recently rated by *CADalyst*, as the "fastest driver tested to date with the *CADalyst* Graphics Benchmark." Your benefit is increased speed as well as advanced features such as bird's-eye view, real-time panning and zooming, and 24-bit rendering.

Compatible Monitors
The Celsius/VLB is compatible with multi-frequency analog monitors, the IBM 8513, the IBM 8514 Display and compatibles.

FEATURES

Custom Orchid Display Setup
Orchid's custom display setup allows you to configure your video drivers on the fly. Simply click on the Orchid icon, choose the resolution, colors, font size or refresh rate and you're ready to go!

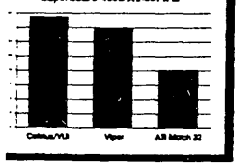


Technical Support
We offer free technical phone support Mon - Fri. from 7 a.m. - 5 p.m. PST at (510) 683-0327. Additional software drivers and upgrades can be obtained through the Orchid 24-hour Bulletin Board Service at (510) 683-0327 (1200/2400 BPS), or (510) 683-0555 (9600 BPS).

Extras

- ▲ Our Automatic Network Installer allows a *single installation to the server which* updates all Orchid card drivers *without affecting other cards.*
- ▲ VESA BIOS 1.2 compliant
- ▲ Requires 386/486 VL-Bus system or Pentium

Winstach 1.2—Overall RPM Test
Superboard 486DX2-66MHz*



Resolution, Colors and Vertical Refresh Rate Support

Resolution	Minimum Memory Configuration	Maximum Colors	Vertical Refresh
1280 x 1024	1 MB	16	45, 56, 70*
1152 x 900	1 MB	16	45, 56, 90*
1024 x 768	1 MB	256	45, 60, 70, 76
800 x 600	1 MB	256	56, 60, 70, 90, 100*
800 x 600	1 MB	65,536	56, 60, 65, 90*
640 x 480	1 MB	256	60, 70, 90, 100*
640 x 480	1 MB	65,536	60, 70, 90, 100*
640 x 480	1 MB	16.8 million	60, 70, 100*
1600 x 1200*	2 MB	16	45, 70
1280 x 1024	2 MB	256	45, 56
1024 x 768	2 MB	65,536	45
800 x 600*	2 MB	16.8 million	60, 70*

* Interl. Feature

MICROSOFT WINDOWS COMPATIBLE

ORCHID

HEADQUARTERS
Orchid Technology
45365 Northport Loop West
Fremont, CA 94538
Tel: (510) 683-0300
800-7-ORCHID

Orchid France S.A.R.L.
Colombes, France
Tel: (33-1-47 80 70 50

Orchid Technology GmbH
Meerbusch, Germany
Tel. 49 2132 80071

Orchid (Europe) Ltd.
Basingstoke, UK
Tel: (0256) 478898

A-2

EXHIBIT B

CELSIUS/ VLB

WINDOWS: Enjoy the speed of the Celsius (AGX 15) with it's 32-bit GUI accelerator chip and VRAM for peak acceleration.

90Hz REFRESH: View a non-flickering screen in Windows or AutoCAD, higher than VESA standards. It's incredible!

MASTERCAD: Quick and powerful, MasterCAD drivers will give you speed, bird's eye view, 24-bit regen and more.

16 MILLION COLORS: Enjoy the colors and the speed of our 24 bit driver. It's fast and so realistic, it looks like a picture.

MULTIMEDIA: Our bi-directional feature connector, hardware engine and drivers are compatible with Video for Windows and other multimedia products.

PERFORMANCE: VidMark Scores (Higher number indicates better performance.) VidMark consists of five real world Windows applications including WordPerfect 5.2, Excel 4.0, CorelDraw 3.0, and Freelance 2.0.

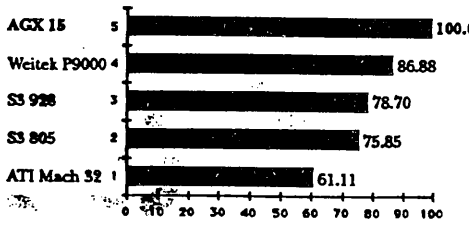


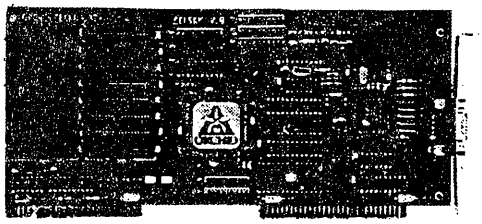
EXHIBIT B

EXHIBIT B

Celsius/VLB Technical Specifications

"The Best Price/Performance VRAM based board in the World."

The Celsius/VLB uses the IIT AGX015 graphics processor and high performance VRAM. It ships standard with 1MB of memory and is upgradeable to 2MB.



Enhanced Graphics Instructions

The Celsius/VLB implements hardware-based graphics instructions for the highest performance possible

▸ Line Draw, BitBlt and Polygon Fill with reference pattern is what makes this card so fast. Also, with an incredible 4 operands per instruction, our Celsius displays fast true color photo-realistic quality images.

Full Driver Support

The Celsius/VLB is supported by hundreds of applications right out of the box using VESA, VGA and other high quality drivers, such as the following:

- ▸ AutoCAD
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Enhanced Windows Drivers

▸ With a maximum of 1600x1200 resolution and a color depth of 800x600x16 million colors, the Celsius is the choice for the casual and professional alike.

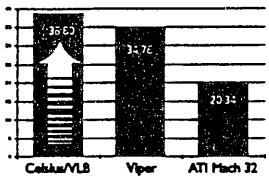
▸ Automatic Network Installation

Multimedia Ready

The Celsius has a bi-directional Feature Connector that is compatible with Video For Windows and many other popular multimedia products.

Wintach 1.2—Overall RPM Test

*Superboard 486DX2-66MHz**



AutoCAD Drivers

▸ Orchid's MasterCAD Driver delivers incredible speed plus advanced features such as bird's eye view, real-time zooming, 24-bit regen and more!

Additional Information

▸ Compatible with multi-frequency analog monitors, single-frequency analog (e.g. IBM 8513), IBM 8514 Display or compatibles.

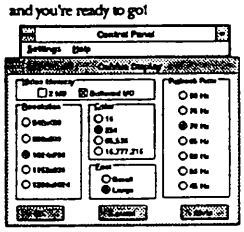
▸ Four year warranty

▸ VESA BIOS 1.2

▸ Requires 486 VL-Bus system

Custom Orchid Display Setup

▸ Orchid's custom display setup allows you to configure your video drivers "on the fly." Just click on the Orchid icon, choose the resolution, colors, font size or refresh rate and you're ready to go!



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1280 x 1024	2 MB	256	45, 56
1024 x 768	2 MB	65,536	45
800 x 600*	2 MB	16.8 million	60

* New Features

ORCHID

MICROSOFT WINDOWS COMPATIBLE

Headquarters
Orchid Technology
45365 Northport Loop West
Fremont, CA 94538
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Fax: (510) 490-8312

Orchid Technology GmbH
Meisterstücker Str. 26
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Germany
Tel: 49 2132 80071
Fax: 49 2132 80074

Orchid France S.A.R.L.
14 à 20 rue de Marnes
92700 Colombes
France
Tél: (33)-1-47 80 70 50
Fax: (33)-1-47 82 51 79

Orchid (Europe) Ltd.
Unit 5, Cartel Industrial Centre
Broadley Road, Basingstoke
Hants RG24 0UG, UK
Tel: (0256) 479888
Fax: (0256) 64222

EXHIBIT C

ORCHID

Celsius

WINDOWS ACCELERATOR

WINDOWS
Enjoy the speed of the Celsius (AGX 15) with its 32-bit GUI accelerator chip and VRAM for peak acceleration.

90Hz REFRESH
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"FASTEST DRIVER TESTED TO DATE WITH THE CADALYST GRAPHICS BENCHMARK"

"THE FASTEST WINDOWS ACCELERATOR IN REAL WORLD APPLICATIONS."

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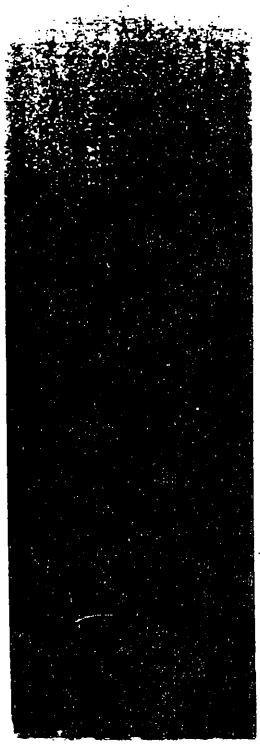


EXHIBIT C

EXHIBIT C

Celsius/VLB
WINDOWS ACCELERATOR

BOARD

The Celsius/VLB uses the IIT AGX015 graphics processor (see graph below) and high performance VRAM. It ships standard with 1MB of memory and is upgradeable to 2MB. Celsius requires a 486 VL-Bus System and is backed by a 4-year warranty

SPECIFICATIONS

Enhanced Windows Drivers
With a maximum of 1600 x 1200 resolution and a color depth of 800 x 600 x 16 million colors, the Celsius is the choice for the casual and professional user alike.

Multimedia Ready
Celsius' bi-directional feature connector, hardware and drivers gives you top-of-the-line support for multimedia environments like digital video.

Advanced Graphics Instructions
The Celsius/VLB implements hardware-based graphics instructions for the highest performance possible.

Our *Line Draw, BitBlt* and *Polygon Fill with reference pattern* features are the engines powering this card. At 4 operands per instruction the Celsius displays true color, photo-realistic quality images—*FAST*.

Full Driver Support
The Celsius/VLB is supported by hundreds of applications right out of the box using VESA, VGA and other high quality drivers, such as the following:

- ▲ AutoCAD
- ▲ AutoShade
- ▲ Windows 3.x
- ▲ WordPerfect
- ▲ 3D Studio
- ▲ MicroStation

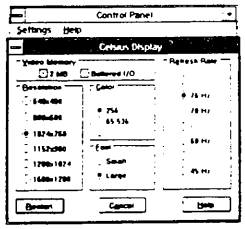
AutoCAD Drivers
Orchid's MasterCAD Driver, also known as the Aquila Extra, was recently rated by *CADalyst*, as the "fastest driver tested to date with the *CADalyst* Graphics Benchmark."

Your benefit is increased speed as well as advanced features such as bird's-eye view, real-time panning and zooming, and 24-bit rendering.

Compatible Monitors
The Celsius is compatible with multi-frequency analog monitors, the IBM 8513, the IBM 8514 Display and compatibles.

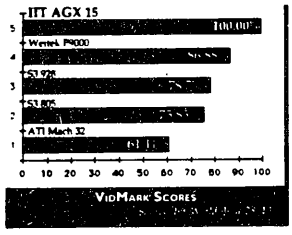
FEATURES

Custom Orchid Display Setup
Orchid's custom display setup allows you to configure your video drivers "on the fly." Simply click on the Orchid icon, choose the resolution, colors, font size or refresh rate and you're ready to go!



Technical Support
We offer free technical phone support Mon. - Fri. from 7 a.m. - 5 p.m. PST at (510) 683-0323. Additional software drivers and upgrades can be obtained through the Orchid 24-hour Bulletin Board Service at (510) 683-0327 (1200/2400 BPS), or (510) 683-0555 (9600 BPS).

Extras
- ▲ Our Automatic Network Installation puts you on the network in no time
- ▲ VESA BIOS 1.2
- ▲ Requires 486 VL-Bus system



Resolution, Colors and Vertical Refresh Rate Support

Resolution	Minimum Memory Configuration	Maximum Colors	Vertical Refresh
1280 x 1024	1 MB	16	45, 56
1152 x 900	1 MB	16	45, 56
1024 x 768	1 MB	256	45, 60, 70, 76
800 x 600	1 MB	256	56, 60, 70, 90*
800 x 600	1 MB	65,536	56, 60, 65
640 x 480	1 MB	65,536	60,70, 90*
640 x 480	1 MB	16.8 million	60, 70
1600 x 1200*	**2 MB**	**16**	**45**
1280 x 1024	2 MB	256	45, 56
1024 x 768	2 MB	65,536	45
800 x 600*	**2 MB**	**16.8 million**	**60**

* New Features

C-2

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Fax: (510) 490-9312

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Tél: (33)-1-47 80 70 50
Fax: (33)-1-47 82 51 79

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Germany
Tel: 49 2132 80071
Fax: 49 2132 80074

Orchid (Europe) Ltd.
Unit 5, Cartel Business Centre
Stroudley Road, Basingstoke
Hants RG24 0UG, UK
Tel: (0256) 479898
Fax: (0256) 64222

ORCHID

MICROSOFT WINDOWS COMPATIBLE

DECISION AND ORDER

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

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

The Commission having thereafter considered the matter and having determined that it had reason to believe that the respondent has violated the said Act, and that a complaint should issue stating its charges in that respect, and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of 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 Orchid Technology is a corporation organized, existing and doing business under and by virtue of the laws of the State of California, with its office and principal place of business located in the City of Fremont, State of California.

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

ORDER

DEFINITION

For purposes of this order, the term *"computer peripheral equipment"* shall mean graphics cards, sound cards, adaptor cards, memory expansion cards, or other hardware products that enhance the capability and performance of personal computers.

I.

It is ordered, That respondent Orchid Technology, a corporation, its successors and assigns, and its officers, agents, representatives and employees, directly or through any corporation, subsidiary, division or other device, in connection with the manufacturing, labelling, advertising, promotion, offering for sale, sale, or distribution of the Celsius Windows Accelerator, or other computer peripheral equipment, in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from representing, in any manner, directly or by implication, that such product has been rated, endorsed, recommended, reviewed or evaluated by any person or publication, unless such is the case.

II.

It is further ordered, That respondent Orchid Technology, a corporation, its successors and assigns, and its officers, agents, representatives and employees, directly or through any corporation, subsidiary, division or other device, in connection with the manufacturing, labelling, advertising, promotion, offering for sale, sale, or distribution of the Celsius Windows Accelerator, or other computer peripheral equipment, in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from misrepresenting, in any manner, directly or by implication, the existence, contents, validity, results, conclusions, interpretations or purpose of any test or study.

III.

It is further ordered, That respondent Orchid Technology, a corporation, its successors and assigns, and its officers, agents, representatives and employees, directly or through any corporation, subsidiary, division or other device, in connection with the manufacturing, labelling, advertising, promotion, offering for sale, sale, or distribution of the Celsius Windows Accelerator, or other computer peripheral equipment, in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from making any representation, in any manner, directly or by implication, about the performance or attributes of any such product, unless such representation is true and, at the time of making such representation, respondents possess and rely upon competent and reliable evidence, which when appropriate must be competent and reliable scientific evidence, that substantiates such representation. For purposes of this provision, "competent and reliable scientific evidence" shall mean tests, analyses, research, studies or other evidence based on the expertise of professionals in the relevant area, that has been conducted and evaluated in an objective manner by persons qualified to do so, using procedures generally accepted in the profession to yield accurate and reliable results.

IV.

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

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

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

V.

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

VI.

It is further ordered, That respondent shall, within ten (10) days from the date of service of this order upon it, distribute a copy of this order to each of its officers, agents, licensees, representatives, independent contractors, and employees involved in the preparation and placement of advertisements or promotional materials, or who is in communication with customers or prospective customers, or who has any responsibilities with respect to the subject matter of this order.

VII.

It is further ordered, That respondent shall, within sixty (60) days from the date of service of this order upon them, and at such other times as the Commission may require, file with the Commission a report, in writing, setting forth in detail the manner and form in which it has complied with this order.

Chairman Pitofsky not participating.

IN THE MATTER OF

TELE-COMMUNICATIONS, INC.

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

Docket C-3575. Complaint, May 3, 1995--Decision, May 3, 1995

This consent order permits, among other things, Tele-Communications, Inc. ("TCI") to complete its acquisition of TeleCable, on the condition that it divest either its own Columbus cable TV assets, or those of TeleCable, within twelve months. If the divestiture is not completed on time, the consent order permits the Commission to appoint a trustee to complete a sale of one of the systems. In addition, TCI, for ten years, is required to obtain Commission approval before acquiring any cable TV system in the Columbus, GA., area.

Appearances

For the Commission: *Ronald B. Rowe* and *Jill M. Frumin.*

For the respondent: *Joe Sims, Jones, Day, Reavis & Pogue*, Washington, D.C.

COMPLAINT

The Federal Trade Commission ("Commission"), having reason to believe that respondent Tele-Communications, Inc. ("TCI"), a corporation subject to the jurisdiction of the Commission, has agreed to acquire TeleCable Corporation ("TeleCable") in violation of Section 7 of the Clayton Act, as amended, 15 U.S.C. 18, and Section 5 of the Federal Trade Commission Act ("FTC Act"), as amended, 15 U.S.C. 45, and it appearing to the Commission that a proceeding in respect thereof would be in the public interest, hereby issues its complaint pursuant to Section 11 of the Clayton Act, as amended, 15 U.S.C. 21, and Section 5(b) of the FTC Act, as amended, 15 U.S.C. 45(b), stating its charges as follows:

I. TCI

PARAGRAPH 1. Respondent TCI is a corporation organized, existing, and doing business under and by virtue of the laws of the

State of Delaware, with its principal executive offices located at 5619 DTC Parkway, Englewood, Colorado.

PAR. 2. Respondent TCI 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 FTC Act, as amended, 15 U.S.C. 44.

II. TELECABLE

PAR.3. TeleCable is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Virginia, with its principal executive offices located at Dominion Tower, Suite 900, 999 Waterside Drive, Norfolk, Virginia.

PAR. 4. TeleCable 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 FTC Act, as amended, 15 U.S.C. 44.

III. THE PROPOSED MERGER

PAR. 5. Respondent TCI entered into a merger agreement with TeleCable in which TCI and TeleCable will exchange voting securities and TeleCable shareholders will receive TCI common and preferred stock worth approximately one billion dollars ("the merger").

IV. THE RELEVANT MARKETS

PAR. 6. The relevant line of commerce in which to analyze the effects of the merger is the distribution of multichannel video programming by cable television.

PAR. 7. The relevant geographic area in which to analyze the effects of the merger is the Columbus, Georgia, area.

PAR. 8. The relevant line of commerce is highly concentrated with only three cable television providers in the relevant geographic area. TCI and TeleCable are the two largest cable television providers in the relevant geographic area in terms of the number of subscribers and the number of homes passed.

PAR. 9. Respondent TCI is an actual and potential competitor of TeleCable in the relevant line of commerce in the relevant geographic area.

PAR. 10. Timely and effective entry in the relevant line of commerce in the relevant geographic area is unlikely.

V. EFFECTS OF THE MERGER

PAR. 11. The effects of the merger may be substantially to lessen competition or to tend to create a monopoly in the relevant markets in the following ways, among others:

a. Actual competition between TCI and TeleCable to serve existing residential neighborhoods, hotels, and apartment complexes will be eliminated;

b. Actual competition between TCI and TeleCable to serve new residential neighborhoods, hotels, and apartment developments will be eliminated; and

c. Actual and potential competition between TCI and TeleCable to extend their cable systems throughout the relevant geographic area will be eliminated.

VI. VIOLATIONS CHARGED

PAR. 12. The merger agreement described in paragraph five constitutes a violation of Section 5 of the FTC Act, as amended, 15 U.S.C. 45.

PAR. 13. The merger described in paragraph five, 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 ("Commission"), having initiated an investigation of the proposed acquisition of the common stock of TeleCable Corporation by Tele-Communications, Inc., and the proposed merger of TeleCable Corporation into TCI Communications, Inc., an entity within Tele-Communications, Inc., hereinafter sometimes referred to as "respondent," and respondent,

having been furnished with a copy of a draft complaint that the Bureau of Competition proposed to present to the Commission for its consideration, and which, if issued by the Commission, would charge respondent with violations of the Clayton Act and Federal Trade Commission Act;

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

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

1. Respondent Tele-Communications, Inc. is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Delaware, with its principal office and place of business at 5619 DTC Parkway, Englewood, Colorado.

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

ORDER

I.

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

A. *"Respondent"* or *"TCI"* means (1) Tele-Communications, Inc. and its predecessors, successors and assigns, subsidiaries, and

divisions, and their respective directors, officers, agents, and representatives; and (2) partnerships, joint ventures, groups and affiliates that Tele-Communications, Inc. controls, directly or indirectly, and their successors and assigns, and their respective directors, officers, agents, and representatives.

B. *"Control"* means (i) the ability or right, contractual or otherwise, to direct the management decisions of an entity, or (ii) an ownership interest of 50% or greater unless a person or entity other than respondent has the right to direct the management decisions of such entity.

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

D. *"Columbus Cable Television System Assets"* means either TCI's Cable Television System or TeleCable's Cable Television System now operating in Muscogee and Harris Counties, Georgia, including all properties, privileges, rights, interests and claims, real and personal, tangible and intangible, of every type and description that are owned, leased, held or used principally in the provision of Cable Television Service in Muscogee and Harris Counties, including the governmental permits, franchises, intangibles, equipment and real property.

E. *"Designated Columbus Cable Television System"* means the Cable Television System chosen by TCI pursuant to paragraph III B. 2. or if TCI fails to designate a Cable Television System pursuant to, and within the time limits of, paragraph III B. 2., the Columbus Cable Television System Assets.

F. *"Cable Television Service"* means the delivery of various video entertainment and informational programming via a cable television system.

G. *"Cable Television System"* means a facility, consisting of a set of closed transmission paths and associated signal generation, reception, and control equipment that is designed to provide cable television service, which includes video programming and which is provided to multiple subscribers within a community.

H. *"The Relevant Geographic Area"* means the counties of Muscogee and Harris in the State of Georgia.

I. *"Competitiveness, viability and marketability"* of the Columbus Cable Television System Assets means the respondent shall continue the operation of TCI's and TeleCable's Cable Television Systems in the ordinary course of business without material change or alteration that would adversely affect the value or goodwill of such Cable

Television Systems and the Columbus Cable Television System Assets.

II.

It is further ordered, That:

A. Respondent shall divest, absolutely and in good faith, within twelve months of the date this order becomes final, one of the Cable Television Systems constituting the Columbus Cable Television System Assets. Respondent shall also divest such additional ancillary assets and businesses and effect such arrangements as are necessary to assure the competitiveness, viability and marketability of the Columbus Cable Television System Assets. Respondent shall undertake its best efforts to facilitate any governmental approvals required to effect divestiture of the Columbus Cable Television System Assets and their continued use in Cable Television Service in the Relevant Geographic Area. To ensure the availability of programming to the divested Columbus Cable Television System Assets, respondent shall waive any exclusive rights to distribute programming by means of Cable Television Systems in the Relevant Geographic Area.

B. Respondent shall divest the Columbus Cable Television System Assets only to an acquirer or acquirers that receive the prior approval of the Commission and only in a manner that receives the prior approval of the Commission. The purpose of the divestiture of the Columbus Cable Television System Assets is to ensure the continued use of the Columbus Cable Television System Assets as an ongoing, viable deliverer of Cable Television Service in the Relevant Geographic Area, and to remedy the lessening of competition resulting from the proposed acquisition of TeleCable Corporation by TCI as alleged in the Commission's complaint.

C. Pending divestiture of the Columbus Cable Television System Assets, respondent shall take such actions as are necessary to maintain the competitiveness, viability and marketability of the Columbus Cable Television System Assets and to prevent the destruction, removal, wasting, deterioration, or impairment of any of the Columbus Cable Television System Assets except for ordinary wear and tear.

III.

It is further ordered, That:

A. If TCI has not divested, absolutely and in good faith and with the Commission's prior approval, the Columbus Cable Television System Assets within twelve months of the date this order becomes final, the Commission may appoint a trustee to divest the Columbus Cable Television System Assets, provided, however, that if the Commission has not approved a proposed divestiture within 120 days of the date the application for such divestiture has been put on the public record, the running of the divestiture period shall be tolled until the Commission approves or disapproves the divestiture. In the event that the Commission or the Attorney General brings an action pursuant to Section 5(l) of the Federal Trade Commission Act, 15 U.S.C. 45(l), or any other statute enforced by the Commission, TCI shall consent to the appointment of a trustee in such action. Neither the appointment of a trustee nor a decision not to appoint a trustee under this paragraph shall preclude the Commission or the Attorney General from seeking civil penalties or any other relief available to it, including a court-appointed trustee, pursuant to Section 5(l) of the Federal Trade Commission Act, or any other statute enforced by the Commission, for any failure by the respondent to comply with this order.

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

1. The Commission shall select the trustee, subject to the consent of respondent, which consent shall not be unreasonably withheld. The trustee shall be a person with experience and expertise in acquisitions and divestitures in the cable television industry. 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. Within ten (10) days after appointment of the trustee, respondent shall (1) execute a trust agreement that, subject to the

prior approval of the Commission and, in the case of a court-appointed trustee, of the court, transfers to the trustee all rights and powers necessary to permit the trustee to effect the divestiture required by this order; and (2) notify the trustee in writing whether TCI chooses to divest the TCI Columbus Cable Television System or the TeleCable Columbus Cable Television System; provided that if TCI fails to make this designation within the specified time period, the trustee is authorized to divest either the TCI or TeleCable Columbus Cable Television System.

3. Subject to the prior approval of the Commission, the trustee shall have the exclusive power and authority to divest the Designated Columbus Cable Television System Assets.

4. The trustee shall have twelve (12) months from the date the Commission approves the trust agreement described in paragraph III B. 2. to accomplish the divestiture, which shall be subject to the prior approval of the Commission. If, however, at the end of the twelve-month period, the trustee has submitted a plan of divestiture or believes that divestiture can be achieved within a reasonable time, the divestiture period may be extended by the Commission, or, in the case of a court-appointed trustee, by the court; provided, however, the Commission may extend this period only two (2) times.

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

6. The trustee shall use his or her best efforts to negotiate the most favorable price and terms available in each contract that is submitted to the Commission, subject to respondent's absolute and unconditional obligation to divest at no minimum price. The divestiture shall be made in the manner and to the acquirer or acquirers as set out in paragraph II of this order; provided, however, if the trustee receives *bona fide* offers from more than one acquiring entity, and if the Commission determines to approve more than one

such acquiring entity, the trustee shall divest to the acquiring entity or entities selected by respondent from among those approved by the Commission.

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

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

9. If the trustee ceases to act or fails to act diligently, a substitute trustee shall be appointed in the same manner as provided in paragraph III A. of this order.

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

11. The trustee shall have no obligation or authority to operate or maintain the Designated Columbus Cable Television System Assets.

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

IV.

It is further ordered, That respondent shall comply with all terms of the Hold Separate Agreement, attached to this order and made a part hereof as Appendix I. The Hold Separate Agreement shall continue in effect until such time as the Columbus Cable Television System Assets shall have been divested as required by this order.

V.

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

A. Acquire any stock, share capital, equity, or other interest in any concern, corporate or non-corporate, engaged in at the time of such acquisition, or within the two years preceding such acquisition engaged in Cable Television Service within the Relevant Geographic Area; or

B. Acquire any assets used for or previously used for (and still suitable for use for) Cable Television Service within the Relevant Geographic Area.

Provided, however, that this paragraph V shall not apply to the acquisition of products or services in the ordinary course of business; and provided further, that this paragraph V shall not apply to the acquisition of any interest in a concern that is not at the time of the acquisition engaged in Cable Television Service within the Relevant Geographic Area due to the sale within the preceding two years of all assets used for Cable Television Service within the Relevant Geographic Area to another party who intended to operate said assets for Cable Television Service within the Relevant Geographic Area.

VI.

It is further ordered, That:

A. Within sixty (60) days after the date this order becomes final and every sixty (60) days thereafter until respondent has fully complied with the provisions of paragraphs II and III of this order,

respondent shall submit to the Commission a verified written report setting forth in detail the manner and form in which it intends to comply, is complying, and has complied with paragraphs II and III of this order. Respondent shall include in its compliance reports, among other things that are required from time to time, a full description of the efforts being made to comply with paragraphs II and III of the order, including a description of all substantive contacts or negotiations for the divestiture and 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 divestiture.

B. One year (1) from the date this order becomes final, annually for the next nine (9) years on the anniversary of the date this order becomes final, and at 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.

VII.

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

VIII.

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

A. Access, during office hours and in the presence of counsel, to inspect and copy all books, ledgers, accounts, correspondence, memoranda and other records and documents in the possession or

under the control of respondent relating to any matters contained in this order; and

B. Upon five days' notice to respondent and without restraint or interference from it, to interview officers, directors, or employees of respondent, who may have counsel present, relating to any matters contained in this order.

APPENDIX I

AGREEMENT TO HOLD SEPARATE

This Agreement To Hold Separate ("Agreement") is by and between Tele-Communications, Inc. ("respondent" or "TCI"), a corporation organized, existing, and doing business under and by virtue of the laws of the State of Delaware, with its principal office and place of business at 5619 DTC Parkway, Englewood, Colorado; and the Federal Trade Commission ("Commission"), an independent agency of the United States Government, established under the Federal Trade Commission Act of 1914, 15 U.S.C. 41, *et seq.*

Whereas, respondent entered into an agreement with TeleCable Corporation ("TeleCable"), a Virginia corporation, whereby respondent will acquire the stock of TeleCable and merge TeleCable into TCI Communications, Inc., an entity within TCI (hereinafter the "Acquisition"); and

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

Whereas, if the Commission accepts the Agreement Containing Consent Order ("Consent Agreement"), which would require the divestiture of either the TCI or TeleCable Cable Television System Assets in Columbus, Georgia, the Commission must place the Consent Agreement on the public record for a period of at least sixty (60) days and may subsequently withdraw such acceptance pursuant to the provisions of Section 2.34 of the Commission's Rules; and

Whereas, the Commission is concerned that if an understanding is not reached, preserving the *status quo ante* of the TeleCable Columbus Cable Television System Assets during the period prior to the final acceptance and issuance of the Consent Agreement by the Commission (after the 60-day public comment period), divestiture resulting from any proceeding challenging the legality of the

Acquisition might not be possible, or might be less than an effective remedy; and

Whereas, the Commission is concerned that if the Acquisition is consummated, it will be necessary to preserve the Commission's ability to require the divestiture of the assets described in paragraph II of the Consent Agreement and the Commission's right to have the TeleCable Columbus Cable Television System Assets continue as a viable independent entity; and

Whereas, the purpose of this Agreement and the Consent Agreement is to:

(i) Preserve the TeleCable Columbus Cable Television System Assets as a viable independent cable television system pending possible divestiture, and

(ii) Remedy any anticompetitive effects of the acquisition; and

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

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

Now, therefore, the parties agree, upon understanding that the Commission has not yet determined whether the acquisition will be challenged, and in consideration of the Commission's agreement that, unless the Commission determines to reject the consent agreement, it will not seek further relief from respondent with respect to the acquisition, except that the Commission may exercise any and all rights to enforce this agreement and the Consent Agreement to which it is annexed and made a part thereof, and in the event the required divestiture is not accomplished, to appoint a trustee to seek divestiture pursuant to the Consent Agreement and to seek civil penalties or a court-appointed trustee or other equitable relief, as follows:

1. Respondent agrees to execute and be bound by the attached Consent Agreement.

2. Respondent agrees that from the date this Agreement is accepted until the earliest of the dates listed in subparagraphs 2.a -

2.b, it will comply with the provisions of paragraph three of this agreement:

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

b. The day after the divestiture required by the Consent Agreement has been completed.

3. To ensure the independence and viability of the TeleCable Columbus Cable Television System Assets and to assure that no competitive information is exchanged between the TeleCable Columbus Cable Television System and the TCI Columbus Cable Television System, TCI shall operate the TeleCable Columbus Cable Television System separate and apart on the following terms and conditions:

a. To the maximum extent possible, TCI will retain current TeleCable Columbus Cable Television System management and employees ("the management team") to manage and maintain the TeleCable Columbus Cable Television System. The individuals on the management team shall manage the TeleCable Columbus Cable Television System independently of the management of TCI's other businesses, including the TCI Columbus Cable Television System. The individuals on the management team shall not be involved in any way in the operation or management of any other TCI Cable Television System. If any member of the management team is unable or unwilling to continue to serve in his or her current position (or becomes unable to do so during the term of this Agreement) that position will be filled by an individual not involved in any way in the operation or management or any other TCI Cable Television System.

b. The management team, in its capacity as such, shall report directly and exclusively to an individual to be designated by TCI who has no direct responsibilities for Cable Television System operations and who is competent to assure the continued viability and competitiveness of the TeleCable Columbus Cable Television System ("TCI Contact").

c. TCI shall not exercise direction or control over, or influence directly or indirectly the management team or any of its activities relating to the operations of the TeleCable Columbus Cable

Television System; provided, however, that TCI may exercise such direction and control over the management team and the TeleCable Columbus Cable Television System Assets as is necessary to ensure compliance with this Agreement and with the Consent Agreement and with all applicable laws.

d. TCI shall maintain the marketability, viability, and competitiveness of the TeleCable Columbus Cable Television System assets and shall not sell, transfer, encumber (other than in the ordinary course of business), or otherwise impair their marketability, viability or competitiveness.

e. Except for the TCI Contact and the management team, TCI shall not permit any other TCI employee, officer, or director to be involved in the management of the TeleCable Columbus Cable Television System; provided, however, that TCI employees involved in engineering, construction, customer service, data processing, training, human resources, finance, legal services, tax, accounting, insurance, internal audit, payroll, programming, purchasing, real estate, risk management, telephony, compliance with FCC regulations, contract administration, and similar services ("support service employees") may provide such services to the TeleCable Columbus Cable Television System.

f. Except as required by law, and except to the extent that necessary information is exchanged in the course of evaluating the acquisition, defending investigations or litigation, or negotiating agreements to divest, TCI, other than the TCI Contact, the management team and support service employees involved in the TeleCable Columbus Cable Television System business, shall not receive or have access to, or the use of any material confidential information about the TeleCable Columbus Cable Television System. ("Material Confidential information," as used herein, means competitively sensitive or proprietary information not otherwise known to TCI from sources other than the TCI Contact, the management team involved in the TeleCable Columbus Cable Television System, or the support service employees.)

g. The management team shall serve at the cost and expense of TCI. TCI shall indemnify the management team against any losses or claims of any kind that might arise out of his or her involvement under this Agreement, except to the extent that such losses or claims result from misfeasance, gross negligence, willful or wanton acts, or bad faith by the management team.

h. If any member of the management team ceases to act or fails to act diligently, a substitute member shall be appointed.

4. Should the Federal Trade Commission seek in any proceeding to compel respondent to divest any of the Columbus Cable Television System Assets, as provided in the Consent Agreement, or to seek any other injunctive or equitable relief for any failure to comply with the Consent Agreement or this Agreement, or in any way relating to the Acquisition, as defined in the draft complaint, respondent shall not raise any objection based upon the expiration of the applicable Hart-Scott-Rodino Antitrust Improvements Act waiting period or the fact that the Commission has permitted the Acquisition. Respondent also waives all rights to contest the validity of this Agreement.

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

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

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

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

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

IN THE MATTER OF

THE AMERICAN ACADEMY OF ORTHOPAEDIC SURGEONS

SET ASIDE ORDER IN REGARD TO ALLEGED VIOLATION OF THE FEDERAL TRADE COMMISSION ACT

Docket C-2856. Consent Order, Dec. 14, 1976 -- Set Aside Order, May 4, 1995

This order reopens a 1976 consent order, that was modified in 1985, -- which prohibited the respondent from initiating, publishing or circulating relative value scales for medical or surgical procedures -- and sets aside the modified consent order based on changed conditions of facts, such as, the decision by Congress to base reimbursement for medical services provided under Medicare on resource based relative value scales.

ORDER SETTING ASIDE ORDER

On November 23, 1994, the American Academy of Orthopaedic Surgeons ("AAOS") filed a Petition To Reopen and Rescind or Modify Consent Order ("Petition") in Docket C-2856 ("order"), pursuant to Section 5(b) of the Federal Trade Commission Act, 15 U.S.C. 45(b), and Section 2.51 of the Commission's Rules of Practice, 16 CFR 2.51. In its Petition, AAOS requests that the Commission reopen the order and rescind it or, in the alternative, modify provisions of the order that restrict the ability of AAOS to develop and distribute a relative value scale ("RVS"), as defined in the order.

AAOS asserts in its Petition that changed conditions of law or fact and the public interest warrant reopening the order and rescinding or modifying it. A redacted version of the Petition was placed on the public record for thirty days; no comments were received. For the reasons described below, the Commission has determined that the order should be reopened and set aside.

I. BACKGROUND

The Commission's complaint alleged, among other things, that the preparation and circulation by AAOS of comparative numerical values for services performed by orthopaedic surgeons had the effect of establishing or maintaining fees charged by orthopaedic surgeons for their services, in violation of Section 5 of the FTC Act. The

complaint also alleged that the numerical values were convertible into a monetary fee by application of a dollar conversion factor. The order, in relevant part, requires AAOS to cease initiating, publishing or circulating, in whole or in part, any relative value scale, as defined.[1] *The American Academy of Orthopaedic Surgeons*, 88 FTC 968 (1976).

The order does not prevent AAOS from exercising rights under the First Amendment to the Constitution to petition state or federal government agencies and to participate in federal or state administrative or judicial proceedings or from providing information or views to third party payers concerning any issue, including reimbursement. *The American Academy of Orthopaedic Surgeons*, 105 FTC 248 (1985) (modifying order).

II. THE PETITION

AAOS requests that the Commission reopen the order and rescind or modify it to permit the AAOS to provide information concerning Medicare resource based relative value scales ("RBRVS") to third party payers, managed care organizations, other physician organizations and others in the private sector, including its members. AAOS states that the information will facilitate the development and adoption of RBRVS that accurately reflect the values of orthopaedic procedures, resulting in the efficient allocation of resources. AAOS already has provided information to government entities involved in medical reimbursement issues; it wants to provide the information to nongovernment entities and to its members.

In particular, AAOS wants to be able to circulate the Abt Restudy, a physician work value scale commissioned by AAOS.[2] AAOS also wants to be able to sponsor and disseminate future research projects that analyze other components of the Medicare RBRVS.

AAOS cites as changed conditions the adoption and implementation by the federal government of resource based relative value scales for purposes of physician reimbursement under

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[1] "Relative value scale" is defined in the order as any list or compilation of surgical or medical procedures that states comparative numerical values for those procedures or services. Order paragraph I.A.

[2] Noether & Sheehy, The Abt Restudy of Physician Work Values for Orthopaedic Surgery (Sept. 23, 1992), attached as Exhibit 8 to the AAOS Petition (hereafter "Abt Restudy").

Medicare. In 1986, Congress created the Physician Payment Review Commission ("PPRC") to make recommendations regarding physician reimbursement under Medicare. At that time, physician reimbursement was determined by the "customary, prevailing and reasonable" ("CPR") method, which relied on historical fees. The PPRC concluded that the CPR method increased costs under Medicare and recommended adopting instead a relative value scale based on resource costs.[3] In 1989, Congress enacted the Omnibus Budget Reconciliation Act of 1989, which, among other things, requires use of resource based relative value scales for purposes of physician reimbursement under Medicare.[4] The Act provides for consultations with "organizations representing physicians" to develop relative values for medical services.[5]

According to AAOS, the Abt Restudy was commissioned to respond to perceived shortcomings in Medicare RBRVS for orthopaedic services. *See* Petition at 13-15; Abt Restudy at 1. Providing the Abt Restudy to government entities is consistent with the proviso to the order,[6] which permits AAOS to petition government agencies and legislatures. AAOS would like to distribute the Abt Restudy to third party payers and other nongovernment entities, such as other medical societies, and to individual members of AAOS, at least for the limited purpose of preparing AAOS representatives to lobby state government bodies regarding physician reimbursement practices. AAOS also would like to sponsor future research projects analyzing other components of Medicare RBRVS. According to AAOS, to the extent that it is precluded by the order from providing information concerning reimbursement levels, the efficiency of RBRVS-based systems is lessened, "payers who would benefit from more efficient payment mechanisms are hindered in their ability to compete, and physicians and patients are given

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[3] *See* Physician Payment Review Commission, Annual Report to Congress (1988); Physician Payment Review Commission, Medicare Physician Payment: An Agenda for Reform (1987).

[4] Section 6102 of the Omnibus Budget Reconciliation Act of 1989, 42 U.S.C. 1395w-4. Medicare RBRVS bases physician reimbursement on (!) a relative value unit for the medical service, which is based on physician work, practice costs and professional liability costs; (2) a geographic adjustment factor; and (3) a conversion factor. Components of the RBRVS are to be updated periodically. Payment is based on the lesser of the RBRVS amount and the physician's actual fee. Petition at 12-13.

[5] 42 U.S.C. 1395w-4(c)(2)(B)(iii).

[6] 105 FTC at 249; *see* letter from Roberta S. Baruch, Deputy Assistant Director, Bureau of Competition, FTC, to Richard N. Peterson, General Counsel, American Academy of Orthopaedic Surgeons (May 12, 1993) ("staff advisory opinion"), Petition Exhibit 16.

distorted incentives and market signals for production and consumption of resources."[7]

III. STANDARD FOR REOPENING A FINAL ORDER OF THE COMMISSION

Section 5(b) of the Federal Trade Commission Act, 15 U.S.C. 45(b), provides that the Commission shall reopen an order to consider whether it should be modified if the respondent "makes a satisfactory showing that changed conditions of law or fact" so require. A satisfactory showing sufficient to require reopening is made when a request to reopen identifies significant changes in circumstances and shows that the changes eliminate the need for the order or make continued application of it inequitable or harmful to competition. S. Rep. No. 96-500, 96th Cong., 2d Sess. 9 (1979) (significant changes or changes causing unfair disadvantage); Louisiana-Pacific Corp., Docket No. C-2956, Letter to John C. Hart (June 5, 1986), at 4 (unpublished) ("Hart Letter").[8]

Section 5(b) also provides that the Commission may modify an order when, although changed circumstances would not require reopening, the Commission determines that the public interest so requires. Respondents are therefore invited in petitions to reopen to show how the public interest warrants the requested modification. Hart Letter at 5; 16 CFR 2.51. In such a case, the respondent must demonstrate as a threshold matter some affirmative need to modify the order. Damon Corp., Docket No. C-2916, Letter to Joel E. Hoffman, Esq. (March 29, 1983), at 2 [1979-1983 Transfer Binder] Trade Reg. Rep. (CCH) ¶ 22,207 ("Damon Letter"). For example, it may be in the public interest to modify an order "to relieve any impediment to effective competition that may result from the order." *Damon Corp.*, 101 FTC 689, 692 (1983). Once such a showing of need is made, the Commission will balance the reasons favoring the requested modification against any reasons not to make the modification. Damon Letter at 2. The Commission also will consider whether the particular modification sought is appropriate to remedy the identified harm. Damon Letter at 4.

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[7] Petition at 25-26.

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

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

IV. THE ORDER SHOULD BE REOPENED

AAOS has shown changed conditions of fact that require the order to be reopened to consider modification.[9] The decision by Congress to base reimbursement for medical services provided under Medicare on resource based relative value scales, with the participation of physicians and medical professional societies in identifying and modifying RBRVS for Medicare purposes, is a changed condition that makes application of the order inequitable.

The order bars AAOS from "directly or indirectly initiating, originating, developing, publishing, or circulating, the whole or any part of any proposed or existing relative value scales," while the Omnibus Budget Reconciliation Act of 1989, among other things, requires use of resource based relative value scales for purposes of physician reimbursement under Medicare and contemplates

[9] AAOS also cited changed conditions of law and the public interest. Because the order is set aside on the ground of changed conditions of fact, the Commission need not and does not consider the additional alleged grounds.

professional participation in the development of RBRVS. The Act requires the Department of Health and Human Services ("HHS") to consult with physician organizations in developing and modifying Medicare RBRVS. The order addressed conduct that allegedly contributed to the unlawful maintenance of fees by orthopaedic surgeons. It now appears that the order may inhibit participation by AAOS in the development and revision of RBRVS systems of reimbursement and thus may harm competition. Accordingly, the order should be reopened to consider modification.

V. THE ORDER SHOULD BE SET ASIDE

AAOS requests that the order be set aside or modified to permit AAOS to distribute the Abt Restudy and similar information to third party payers, other medical societies and its members.

The order, as modified in 1985, permits AAOS to "discuss[ ] relative value scales with governmental entities and third-party payers." 105 FTC at 248. The Commission, in modifying the order in 1985, concluded that the order's "restriction on [AAOS]'s ability to discuss relative value scales with third-party payers and governmental entities . . . caused injury to [AAOS] and the public that outweighed any benefit that might be derived from the restriction." *Id.* The Commission also observed that the modification was consistent with its opinion in *Michigan State Medical Society*, 105 FTC 191 (1983) ("MSMS"). Also consistent with MSMS, AAOS is not limited under the order to responding to requests from government and third party payers.[10] AAOS "may have a useful role to play in offering suggestions and advice to third payers on a wide variety of issues, including reimbursement. . . . [T]he potential value of this role is not limited to responsive communications but extends . . . to similar communications initiated by" AAOS. 105 FTC at 308.[11]

As the Commission recognized in MSMS, "there is some inherent danger in allowing any collective dialogue with third party payers on

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[10] The order, as modified in 1985, permits AAOS to discuss relative value guides with third party payers, but the staff of the Commission construed the order as barring AAOS from providing relative value guides to third party payers. *See* Staff advisory opinion at 3 ("[B]ased on the information we now have, we cannot conclude that it would be consistent with the order for AAOS to publish or circulate the Abt Restudy to the AAOS membership or to any non-governmental entity.").

[11] *See also* Advisory Opinion in American Society of Internal Medicine, 105 FTC 505, 510-11 (1985).

questions directly related to reimbursement amounts or policies."[12] Similarly, in modifying the order in AAOS, the Commission cautioned that "serious antitrust concerns would arise were AAOS to negotiate or attempt to negotiate an agreement with any such party or engage in any type of coercive activity to effect such an agreement."[13] Such actions concerning terms of reimbursement could be examined under Section 5 of the Federal Trade Commission Act.[14]

AAOS also would like to provide copies of the Abt Restudy to other medical professional societies. The process of establishing and refining Medicare RBRVS involves consideration of recommendations from the AMA/Specialty Society RVS Update Committee ("RUC"),[15] which is composed of representatives of major medical societies, including AAOS. The Abt Restudy could be useful to the RUC and ultimately to the Health Care Financing Administration ("HCFA"), which administers the Medicare program, in the review and refinement of Medicare RBRVS.[16] The inability of AAOS under the order to disseminate the Abt Restudy to members of the RUC appears likely to hinder participation in the process sponsored by HCFA for identifying information relevant to revising Medicare RBRVS and could increase the costs to HCFA in obtaining such information. Such inhibitions resulting from the order would be inconsistent with federal policy as expressed in the Omnibus Budget Reconciliation Act of 1989 and the implementing regulations. The order should be modified to permit AAOS to disseminate the Abt Restudy to other medical professional societies.

Finally, AAOS would like to provide copies of the Abt Restudy to its members, at least for the "limited purpose of furthering the Academy's efforts to persuade government bodies to modify their own physician payment practices." For example, according to AAOS, "in virtually all states, the Academy has no members who have ever seen the [Abt] Restudy, and therefore no one to meet with

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[12] The order in MSMS permitted the dialogue and addressed the risk by barring the medical society from entering into unlawful agreements with third party payers regarding reimbursement. 101 FTC at 308.

[13] 105 FTC at 249.

[14] *See, e.g.*, Department of Justice and FTC Statements of Enforcement Policy and Analytical Principles Relating to Health Care and Antitrust, Statements 5 & 6, reprinted in 4 Trade Reg. Rep. (CCH) ¶ 13,152, at 20,782-785 (1994) ("Health Care Policy Statements").

[15] Petition at 13, citing 59 Fed. Reg. 32,754 & 32,760 (1994).

[16] *See* Petition at 18-19.

interested state officials responsible for compensation issues in Medicaid, workers' compensation or other medical programs."[17]

The prohibition on distribution by AAOS of relative value scales to its members is at the core of the order, because of the alleged effect of maintaining the prices charged by its members.[18] Given the federal policy to rely on RBRVS for Medicare reimbursement and the increasing interest on the part of state governments and third party payers in relative value guides as a basis for physician reimbursement, however, the prohibition in the order on dissemination by AAOS may inhibit the contributions of its members to the development of RBRVS and increase the costs of disseminating the information.[19] Allowing AAOS to distribute the Abt Restudy to its members would allow them to participate in an informed manner in lobbying activities before state government agencies. Accordingly, AAOS should be permitted to distribute the Abt Restudy to its members.

The danger that AAOS members will use the Abt Restudy or other relative value guides as a basis for an unlawful agreement to fix the prices for their services has not been eliminated. Although the federal policy to use RBRVS for Medicare reimbursement counsels in favor of setting aside the restriction of the order on distribution of relative values to AAOS members, AAOS and its members remain subject to the laws against price fixing. Setting aside the restrictions of the order should not be construed as approval for use by AAOS or its members of a relative value guide as a basis for an unlawful agreement on price.

In some circumstances, preparation and circulation by a medical society of a relative value scale may have anticompetitive consequences. For example, in *American Society of Internal Medicine*, 105 FTC 505 (1985) (advisory opinion), the Commission declined to approve a proposal to circulate a relative guide because of the "substantial danger that ASIM's proposed conduct would involve an agreement in restraint of trade among ASIM and

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[17] Petition at 26.

[18] *See also Advisory Opinion in American Society of Internal Medicine*, 105 FTC 505, 510 (1985) ("[A]lthough the Commission cannot . . . predict that widespread concerted conformance to the RVG would necessarily result from its dissemination . . . the available information on this specific RVG proposal indicates that this type of agreement in restraint of trade is a substantial danger.").

[19] As a practical matter, material submitted to the Health Care Financing Administration on the public record presumably is available to members of AAOS on request.

physicians to concertedly adhere to the RVG."[20] The Joint Health Care Policy Statements also caution that "information exchanges among competing providers may facilitate collusion or otherwise reduce competition on prices."[21]

VI. CONCLUSION

Accordingly, *It is ordered*, That this matter be, and it hereby is, reopened, and that the modified order in Docket C-2856 be, and it hereby is, set aside, as of the effective date of this order.

Commissioner Starek concurring in the result only.

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[20] *Id.* at 511.

[21] Health Care Policy Statements at 20,784.