Findings, Opinions, and Orders

IN THE MATTER OF

FIRST DATA 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-3635. Complaint, Jan. 16, 1996--Decision, Jan. 16, 1996

This consent order requires, among other things, First Data, a New Jersey-based corporation, to divest, within 12 months to a Commission-approved acquirer, either its own MoneyGram business or First Financial's Western Union business. If the divestiture is not completed on time, the consent order allows the Commission to appoint a trustee.

Appearances

For the Commission: *Ann Malester, Craig Waldman,* and *William Baer.*

For the respondent: *David Bailis,* in-house counsel, Hackensack, N.J. and *William Fifield, Sidley & Austin*, Chicago, IL.

COMPLAINT

The Federal Trade Commission ("Commission"), having reason to believe that First Data Corporation, hereinafter sometimes referred to as respondent, a corporation subject to the jurisdiction of the Commission, has agreed to acquire all of the stock of First Financial Management Corporation, a corporation subject to the jurisdiction of the Commission, in violation of Section 7 of the Clayton Act, as amended, 15 U.S.C. 18, and Section 5 of the Federal Trade Commission Act ("FTC Act"), 15 U.S.C. 45; and it appearing to the Commission that a proceeding in respect thereof would be in the public interest, hereby issues its complaint, stating its charges as follows:

I. RESPONDENT

1. Respondent First Data Corporation ("First Data") is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Delaware, with its principal place of business located at 401 Hackensack Avenue, Hackensack, New Jersey.

2. Respondent, a corporation providing certain services including consumer money wire transfers marketed under the name "MoneyGram," is, and at all times relevant herein has been, engaged in commerce as "commerce" is defined in Section 1 of the Clayton Act, as amended, 15 U.S.C. 12, and is a corporation whose business is in or affecting commerce as "commerce" is defined in Section 4 of the FTC Act, as amended, 15 U.S.C. 44.

II. ACQUIRED COMPANY

3. First Financial Management Corporation ("First Financial") is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Georgia, with its principal place of business located at 3 Corporate Square, Suite 700, Atlanta, Georgia.

4. First Financial, a corporation providing certain services including consumer money wire transfers through Western Union Financial Services, Inc., is, and at all times relevant herein has been, engaged in commerce as "commerce" is defined in Section 1 of the Clayton Act, as amended, 15 U.S.C. 12, and is a corporation whose business is in or affecting commerce as "commerce" is defined in Section 4 of the FTC Act, as amended, 15 U.S.C. 44.

III. THE ACQUISITION

5. On June 13, 1995, First Data and First Financial agreed to merge in a stock swap valued at $6.7 billion. Under the proposed agreement, First Financial shareholders would receive 1.5859 shares of First Data stock for each share of First Financial ("the Acquisition").

IV. THE RELEVANT MARKET

6. For purposes of this complaint, the relevant line of commerce in which to analyze the effects of the Acquisition is the sale of consumer money wire transfer services.

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

8. The relevant market set forth in paragraphs six and seven is highly concentrated, whether measured by Herfindahl-Hirschmann Indices ("HHI") or two-firm and four-firm concentration ratios.

9. Entry into the relevant market, which requires significant sunk costs, would not be timely, likely and sufficient to deter or counteract the adverse competitive effects described in paragraph eleven because, among other things, of the difficulty of gaining brand name recognition and establishing a nationwide network of retail outlets to sell the relevant service.

10. First Data and First Financial are the only two actual competitors in the relevant market; thus, the Acquisition would result in a monopoly in the relevant market.

V. EFFECTS OF THE ACQUISITION

11. The effect of the Acquisition may be substantially to lessen competition and to tend to create a monopoly in the relevant market in violation of Section 7 of the Clayton Act, 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 eliminating direct actual competition between First Data and First Financial;

b. By increasing the likelihood that First Data would unilaterally exercise market power;

c. By increasing the likelihood that consumers would be forced to pay higher transfer fees;

d. By increasing the likelihood that consumer money wire transfer agents would be forced to accept lower commissions and guarantees for providing consumer money wire transfer services; and

e. By increasing the likelihood that consumer money wire transfer advertising, services and innovation would be reduced.

VI. VIOLATIONS CHARGED

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

13. The Acquisition 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 having initiated an investigation of the proposed merger of respondent and First Financial Management Corporation ("First Financial"), 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 attorney, 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 a complaint should issue stating its charges in that respect, and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of sixty (60) days, and having duly considered the comment received, 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 First Data Corporation ("First Data") is a corporation organized and existing under the laws of Delaware with its offices and principal place of business at 401 Hackensack Avenue, Hackensack, New Jersey.

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

ORDER

I.

It is ordered, That, as used in this order (including Appendix I), the following definitions shall apply:

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

B. *"First Financial"* means First Financial Management Corporation, a corporation providing certain services including consumer money wire transfers through Western Union Financial Services, Inc.

C. *"Western Union"* means Western Union Financial Services, Inc., a wholly-owned subsidiary of First Financial Management Corporation, with its principal office and place of business located at One Mack Center Drive, Paramus, New Jersey. Western Union provides and markets, among other things, consumer money wire transfer services.

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

E. *"Acquisition"* means the direct or indirect acquisition of control of First Financial by respondent First Data.

F. *"Consumer money wire transfer service"* means the business of transferring the right to money using computer or telephone lines from one person through the location of a selling agent to a different person physically present at the location of a selling agent available to the general public through selling agents at retail outlets as currently offered by First Data and Western Union. "Consumer money wire transfer service" does not include transactions involving

only one customer utilizing automatic teller machines and other point or sale devices, transactions involving debit cards, cash advances utilizing credit cards, home banking, prepaid telephone and cash cards, money orders, and utility bill payment services and further does not include the provision of data processing services to a consumer money wire transfer service business.

G. *"Selling agent"* means a person or business, such as a check cashing store, a drug store, a supermarket, a postal service, a bus station, or a travel agency, that contracts with consumer money wire transfer service providers to provide the consumer money wire transfer service to customers.

H. *"MoneyGram service"* means First Data's consumer money wire transfer service marketed under the name "MoneyGram."

I. *"MoneyGram Assets"* or *"MoneyGram Business"* include all assets, properties, business and goodwill, tangible and intangible, related to the sale and marketing of the MoneyGram Service, including, but not limited to:

1. The MoneyGram trade name, trade dress, trade marks, and service marks; and,

2. A group of contracts with selling agents to provide the MoneyGram Service that provides a network of selling agents at least comparable to the group of selling agents under contract to provide the MoneyGram service on May 1, 1995 other than the American Express Travel Related Services Company Travel Services Offices, based on characteristics of the selling agents such as the countries and cities served, number of selling agents, and type of outlet; provided, however, that the condition regarding the "number of selling agents" is satisfied if the number of selling agents is 10,000 or greater.

J. *"Western Union Service"* means Western Union's Consumer Wire Transfer Service.

K. *"Western Union Assets"* or *"Western Union Business"* include all assets, properties, business and goodwill, tangible and intangible, related to the sale and marketing of the Western Union Service, including, but not limited to:

1. The Western Union trade name, trade dress, trade marks, and service marks; and,

2. All contracts with selling agents to provide the Western Union Service.

L. *"Assets To Be Divested"* means either the MoneyGram Assets or the Western Union Assets. The definition of "Assets To Be Divested" as well as any other provision in this order, however, shall not be construed to prohibit First Data from divesting both the MoneyGram Assets and the Western Union Assets to different acquirers.

M. *"Marketability, viability, and competitiveness"* of the Assets To Be Divested means that such assets when used in conjunction with the assets of the acquirer or acquirers are capable of providing a consumer money wire transfer service substantially similar to the consumer money wire transfer service that the Assets To Be Divested are capable of providing at the time of the Acquisition.

N. *"Non-public information"* means any information not in the public domain furnished to First Data in its capacity as a provider of data processing services by a consumer money wire transfer service provider.

II.

It is further ordered, That:

A. Respondent shall divest, absolutely and in good faith, within twelve (12) months after the date this order becomes final, the Assets To Be Divested and shall also divest such additional ancillary assets and businesses other than money order or utility bill payments businesses and effect such arrangements as are necessary to assure the marketability, viability, and competitiveness of the Assets To Be Divested.

B. Respondent shall divest the Assets To Be Divested 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 Assets To Be Divested is to ensure the continued use of the Assets To Be Divested in the same businesses in which the Assets To Be Divested are presently engaged, and to remedy the lessening of competition resulting from the Acquisition as alleged in the Commission's complaint.

C. Respondent shall make available to the acquirer or acquirers such First Data personnel, assistance and training as the acquirer or acquirers reasonably need to transfer technology and know-how, and First Data shall continue providing such personnel, assistance and training at no additional cost for a period of time sufficient to satisfy the acquirer's or acquirers' management that its personnel are appropriately trained in the business. However, respondent shall not be required to continue providing such personnel, assistance and training for more than six (6) months after the Assets To Be Divested are divested pursuant to this order.

D. Pending divestiture of the Assets To Be Divested, respondent shall take such actions as are necessary to maintain the marketability, viability, and competitiveness of the Assets To Be Divested, and to prevent the destruction, removal, wasting, deterioration or impairment of any of the Assets To Be Divested except for ordinary wear and tear. Provided, however, that nothing in this paragraph shall be construed to prohibit First Data from competing in the ordinary course of business.

E. 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 respondent has divested all Assets To Be Divested as required by this order.

III.

It is further ordered, That:

A. If First Data has not divested, absolutely and in good faith, and with the Commission's prior approval, the Assets To Be Divested within the time period specified in paragraph II. A. of this order, the Commission may appoint a trustee to divest the Western Union Assets. 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(1), or any other statute enforced by the Commission, First Data 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 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. If respondent has not opposed, in writing, including the reasons for opposing, the selection of any proposed trustee within ten (10) days after notice by the staff of the Commission to respondent of the identity of any proposed trustee, respondent shall be deemed to have consented to the selection of the proposed trustee.

2. Subject to the prior approval of the Commission, the trustee shall have the exclusive power and authority to divest the Western Union Assets.

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 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 of the Western Union Assets, which shall be subject to the prior approval of the Commission. If, however, at the end of the twelve (12) 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 Western Union Assets or to any other relevant information, as the trustee may request. Respondent shall develop such financial or other

information as such 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 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 sale and all expenses incurred. After approval by the Commission and, in the case of a court-appointed trustee, by the court, of the account of the trustee, including fees for his or her services, all remaining monies shall be paid at the direction of the respondent, and the trustee's power shall be terminated. The trustee's compensation shall be based at least in significant part on a commission arrangement contingent on the trustee's divesting the Western Union 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 to the same manner as provided in this paragraph 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 Western Union Assets.

12. The trustee shall report in writing to respondent and the Commission every thirty (30) days concerning the trustee's efforts to accomplish divestiture.

IV.

It is further ordered, That if First Data divests the MoneyGram Assets pursuant to paragraph II. of this order, First Data shall not enter into any consumer money wire transfer service contract with any selling agent who is under contract to provide the MoneyGram Service at the time of the divestiture; provided, however, that First Data may enter into such a consumer money wire transfer service contract (i) after the time the selling agent's contract with First Data would have expired had the divestiture not occurred, determined without regard to any contract extension or renewal that could occur after the date of the divestiture, (ii) if the contract is terminated in accordance with its terms other than as may be permitted as a result of the divestiture of the MoneyGram Assets or (iii) if the First Data consumer money wire transfer service being provided is a transfer service utilizing automatic teller machines or any other point of sale device, and the MoneyGram Service contract upon its terms would not have barred the selling agent from entering into such a contract.

V.

It is further ordered, That nothing in this order shall be construed as prohibiting First Data from entering into agreements with any consumer money wire transfer service provider, including the acquirer or acquirers of the MoneyGram Business and the Western

Union Business, for the provision of data processing service provided that:

A. Any such agreement entered into within eighteen (18) months of the date of the divestiture does not run for a period of more than two years;

B. No First Data officer, employee or agent who is involved in providing First Data's consumer money wire transfer service receives non-public information of any other consumer money wire transfer service provider;

C. First Data uses any non-public information obtained by First Data only in First Data's capacity as a provider of data processing services; and

D. First Data delivers a copy of this order to each officer, employee or agent involved in marketing First Data's consumer money wire transfer service or in providing data processing to any other consumer money wire transfer service provider prior to First Data's obtaining any non-public information relating to the provider's business.

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 (1) year from the date this order becomes final, annually for the next nine (9) years on the anniversary of the date this order becomes final, and at such other times as the Commission may require, respondent shall file a verified written report with the Commission setting forth in detail the manner and form in which it has complied and is complying with paragraphs IV. and V. of 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 corporate respondent such as dissolution, assignment, or sale resulting in the emergence of a successor corporation, or the creation or dissolution of subsidiaries or any other change in the corporation that may affect compliance obligations arising out of this order.

VIII.

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

A. Access during office hours of First Data 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 regarding such matters.

APPENDIX I

AGREEMENT TO HOLD SEPARATE

This Agreement to Hold Separate (the "Agreement") is by and between First Data Corporation ("First Data"), a corporation

organized, existing, and doing business under and by virtue of the laws of the State of Delaware, with its office and principal place of business at 401 Hackensack Avenue, Hackensack, New Jersey; 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, First Data has proposed to acquire, directly or indirectly, all of the voting stock or substantially all of the assets of First Financial Management Corporation ("First Financial"), (hereinafter "Acquisition"); and

Whereas, First Data, with its principal office and place of business located at 401 Hackensack Avenue, Hackensack, New Jersey, provides and markets, among other things, consumer money wire transfer services; and

Whereas, First Financial, with its principal office and place of business located at 3 Corporate Square, Suite 700, Atlanta, Georgia, provides and markets, among other things, consumer money wire transfer services; and

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

Whereas, if the Commission accepts the attached Agreement Containing Consent Order ("consent order"), the Commission must place it 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 MoneyGram Business during the period prior to the final acceptance of the consent order by the Commission (after the 60-day public notice 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 To Be Divested as

described in paragraph I. of the consent order and the Commission's right to have the MoneyGram Business continued as a viable competitor; and

Whereas, the purpose of the Agreement and the consent order is:

1. To preserve the viability of the MoneyGram Business pending the divestiture of the Assets To Be Divested as a viable and ongoing enterprise,

2. To remedy any anticompetitive effects of the Acquisition, and

3. To preserve the MoneyGram Business as an ongoing and competitive consumer money wire transfer service until divestiture is achieved; and

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

Whereas, First Data 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 the understanding that the Commission has not yet determined whether the Acquisition will be challenged, and in consideration of the Commission's agreement that, at the time it accepts the consent order for public comment it will grant early termination of the Hart-Scott-Rodino waiting period, and unless the Commission determines to reject the consent order, it will not seek further relief from First Data with respect to the acquisition, except that the Commission may exercise any and all rights to enforce this Agreement to Hold Separate and the consent order to which it is annexed and made a part thereof, and in the event the required divestiture is not accomplished, to appoint a trustee to seek divestiture of the Western Union Assets pursuant to the consent order, as follows:

1. First Data agrees to execute and be bound by the attached consent order.

2. First Data 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 3. of this Agreement:

a. Three 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;

b. The day after the divestiture required by the consent order has been completed.

3. To ensure the complete independence and viability of the MoneyGram Business and to assure that no competitive information is exchanged between the MoneyGram Business and First Data, First Data shall hold the MoneyGram Business separate and apart on the following terms and conditions:

a. First Data will appoint three individuals to manage and maintain the MoneyGram Business. These individuals ("the management team") shall manage the MoneyGram Business independently of the management of First Data's other businesses. The individuals on the management team shall not be involved in any way in the marketing, selling or management of any other First Data business, including the Western Union Business.

b. The management team, in its capacity as such, shall report directly and exclusively to an independent auditor/manager, to be appointed by First Data. The independent auditor/manager shall have expertise in management and marketing. The independent auditor/manager shall have exclusive control over the operations of the MoneyGram Business, with responsibility for the management of the MoneyGram Business and for maintaining the independence of that business.

c. First Data shall not exercise direction or control over, or influence directly or indirectly the independent auditor/manager or the management team or any of its operations relating to the operations of the MoneyGram Business; provided, however, that First Data may exercise only such direction and control over the independent auditor/manager, management team and MoneyGram Business as is necessary to assure compliance with this Agreement and with all applicable laws.

d. First Data shall maintain the marketability, viability, and competitiveness of the MoneyGram Assets and shall not sell, transfer, encumber (other than in the normal course of business), or otherwise impair their marketability, viability or competitiveness.

e. Except for the management team, sales and marketing employees involved in the MoneyGram Business, and support service employees involved in the MoneyGram Business, such as human resource, legal, tax, accounting, insurance, and internal audit employees, First Data shall not permit any other First Data employee, officer, or director to be involved in the management of the MoneyGram Business. Sales and marketing employees involved in the MoneyGram Business, shall not be involved in any other First Data business, including the Western Union Business. Support service employees involved in the MoneyGram Business shall not be involved in the Western Union Business.

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 assets, First Data, other than sales and marketing employees involved in the MoneyGram Business, or support service employees involved in the MoneyGram Business, shall not receive or have access to, or the use of, any material confidential information about the MoneyGram Business, the activities of the management team, sales and marketing employees involved in the MoneyGram Business, or support service employees involved in the MoneyGram Business in managing that business not in public domain, nor shall the management team, sales and marketing employees involved in the MoneyGram Business, or support service employees involved in the MoneyGram Business receive or have access to, or the use of, any material confidential information about the Western Union Business or the activities of First Data in managing the Western Union Business not in the public domain. Any such information that is obtained pursuant to this subparagraph shall be used only for the purpose set forth in this subparagraph. ("Material confidential information," as used herein, means competitively sensitive or proprietary information not independently known to:

(a) First Data, with regard to the MoneyGram Business, from sources other than the management team, sales and marketing employees involved in the MoneyGram business, or support service employees involved in the MoneyGram Business; or

(b) The management team, sales and marketing employees involved in the MoneyGram Business, or support service employees

involved in the MoneyGram Business with regard to the Western Union Business

and includes but is not limited to customer lists, price lists, marketing methods, patents, technologies, processes, or other trade secrets.)

g. First Data shall not change the composition of the management team unless the independent auditor/manager consents. The independent auditor/manager shall have the power to remove members of the management team and to require First Data to appoint replacement member to the management team in the same manner as provided in paragraph 3.a. of this Agreement to Hold Separate.

h. First Data shall circulate to all its employees involved with the MoneyGram Business, Western Union Business, or the data processing services provided to either the MoneyGram or Western Union Businesses, and appropriately display, a notice of this Hold Separate Agreement and consent order in the form attached hereto as Attachment A.

i. First Data shall make available for use in the MoneyGram Business until divestiture of the Assets To Be Divested is accomplished an amount of money for advertising and trade promotion of the MoneyGram Service not lower than $24 million annually, with no less than $10 million for any two consecutive quarters. First Data shall pay all direct costs and indirect overheads for the MoneyGram Business. The MoneyGram Business shall not be charged with the compensation and expenses of the independent auditor/manager.

j. First Data shall make available for use in the MoneyGram Business until divestiture of the Assets To Be Divested an amount of money needed to provide an additional 20% sales commission to the MoneyGram Business sales force on all MoneyGram agent renewals and MoneyGram agent recruitments above and beyond the 1995 sales commission rate for MoneyGram agent renewals and MoneyGram agent recruitments.

k. The independent auditor/manager shall serve at the cost and expense of First Data. First Data shall indemnify the independent auditor/manager against any losses or claims of any kind that might arise out of his or her involvement under this Agreement to Hold Separate, except to the extent that such losses or claims result from

misfeasance, gross negligence, willful or wanton acts, or bad faith by the independent auditor/manager.

l. If the independent auditor/manager ceases to act or fails to act diligently, a substitute auditor/manager shall be appointed in the same manner as provided in paragraph 3.b. of this Agreement to Hold Separate.

m. The independent auditor/manager shall have access to and be informed about all companies who inquire about, seek or propose to buy the MoneyGram Assets. First Data may require the independent auditor/manager to sign a confidentiality agreement prohibiting the disclosure of any material confidential information gained as a result of his or her role as independent auditor/manager to anyone other than the Commission.

n. All material transactions, out of the ordinary course of business and not precluded by subparagraphs 3.a - 3.n. hereof, shall be subject to a majority vote of the management team. In case of a tie, the independent auditor/manager shall cast the deciding vote.

o. The independent auditor/manager shall report in writing to the Commission every thirty (30) days concerning the independent auditor/manager's efforts to accomplish the purposes of this Agreement to Hold Separate.

4. Should the Federal Trade Commission seek in any proceeding to compel First Data to divest itself of the MoneyGram Assets or the Western Union Assets, or to seek any other equitable relief, First Data shall not raise any objection based on the expiration of the applicable Hart-Scott-Rodino Antitrust Improvements Act waiting period or the fact that the Commission has permitted the Acquisition. First Data also waives all rights to contest the validity of this Agreement.

5. 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 First Data made to its General Counsel, First Data shall permit any duly authorized representative or representatives of the Commission:

a. Access during the office hours of First Data 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 First Data relating to compliance with this Agreement; and

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

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

ATTACHMENT A

NOTICE OF DIVESTITURE AND
REQUIREMENT FOR CONFIDENTIALITY

First Data Corporation ("First Data") has entered into a Consent Agreement and Agreement to Hold Separate with the Federal Trade Commission relating to the divestiture of the MoneyGram Business or the Western Union Business. Until after the Commission's order becomes final and First Data's interest in either the MoneyGram Business or the Western Union Business is divested, the MoneyGram Business must be managed and maintained as a separate, ongoing business, independent of all other First Data businesses and independent of the Western Union Business. All competitive information relating to the MoneyGram Business, except information received by First Data in connection with the provision of data processing services to the MoneyGram Business as described in and protected by the confidentiality provision of paragraph V. of the consent order, must be retained and maintained by the persons involved in the MoneyGram Business on a confidential basis and such persons shall be prohibited from providing, discussing, exchanging, circulating, or otherwise furnishing any such information to or with any other person whose employment involves any other First Data business, including the Western Union Business. Similarly, all such persons involved in the Western Union Business shall be prohibited from providing, discussing, exchanging, circulating or otherwise furnishing competitive information about such business to or with any person whose employment involves the MoneyGram Business.

Any violation of the Consent Agreement or the Agreement to Hold Separate, incorporated by reference as part of the consent order, may subject First Data to civil penalties and other relief as provided by law.

STATEMENT OF COMMISSIONER CHRISTINE A. VARNEY

The First Financial/First Data merger represents another milestone in the fast-paced development of electronic payment systems. While combinations such as this may have efficiency driven, pro-competitive effects, I remain concerned about increased concentration in the merchant acquirer services industry. This market is growing dramatically, and is increasingly central to back-end processing of credit card purchases. I expect that we will soon see additional acquisitions in the merchant acquirer services industry and, in that light, I have asked the staff of the Commission to continue to monitor the competitive situation in this evolving market.

IN THE MATTER OF

JOHNSON & JOHNSON CONSUMER PRODUCTS, INC.

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

Docket C-3636. Complaint, Jan. 18, 1996--Decision, Jan. 18, 1996

This consent order prohibits, among other things, a New Jersey-based personal health-care products company and its parent corporation from misrepresenting the results or conclusions of any test or study concerning any over-the-counter products with a use relating to human reproduction, reproductive organs or sexually transmitted diseases ("STDs"). It requires the respondent to have competent and reliable scientific evidence for any claims regarding the efficacy of over-the-counter contraceptives or products to protect against STDs. In addition, the respondent must have competent and reliable scientific evidence to substantiate the advertising claims of any personal lubricant and/or spermicide.

Appearances

For the Commission: *Linda K. Badger, Matthew D. Gold,* and *Jeffrey Klurfeld.*

For the respondent: *Clayton Patterson,* in-house counsel, New Brunswick, N.J.

COMPLAINT

The Federal Trade Commission, having reason to believe that Johnson & Johnson Consumer Products, Inc., ("respondent"), a corporation, 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 Johnson & Johnson Consumer Products, Inc., a wholly-owned subsidiary of Johnson & Johnson, is a New Jersey corporation with its offices and principal place of business at 1999 Grandview Road, Skillman, New Jersey.

PAR. 2. Respondent has manufactured, advertised, labeled, offered for sale, sold, and distributed K-Y Plus Nonoxynol-9

Spermicidal Lubricant ("K-Y Plus"), and other products to consumers. K-Y Plus is a "drug" within the meaning of Sections 12 and 15 of the Federal Trade Commission Act.

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 for K-Y Plus, including but not necessarily limited to the attached Exhibits A-C. These advertisements contain the following statements:

A. "K-Y Plus, because one out of every six condoms develops tiny holes during use. Holes invisible to the naked eye, but big enough for sperm, HIV and other viruses to pass through. K-Y Plus Brand Spermicidal Lubricant with Nonoxynol-9 provides double protection. First, the natural-feeling lubrication guards your condom against friction that can cause holes. Second, it contains a highly effective spermicide, doctor-recommended Nonoxynol-9, to give you peace of mind in case your condom fails. Ask your doctor about K-Y Plus. For your own protection.
Condom Insurance. The safer choice."
[Exhibit A (Print: "Condom Insurance")]

B. "New K-Y Plus, because one out of six condoms fails. Anyone can make a mistake, or a condom can develop tiny holes during use - invisible to the eye, but big enough for sperm, HIV and other viruses to pass through. So new K-Y Plus Brand with Nonoxynol-9 just makes good sense for personal lubrication. It provides double protection.
First, the clean-rinsing and natural-feeling lubrication of K-Y Plus guards your condom against friction that can cause invisible holes. Second, it contains a highly effective spermicide, doctor-recommended Nonoxynol-9, to give you peace of mind in case your condom fails.
Introducing condom insurance. The safer choice."
[Exhibit B (Print: "Introducing Condom Insurance.")]

C. "Studies show that up to 18.5% of condoms will fail - leaving patients vulnerable to pregnancy and STDs.
. . .
Like regular K-Y BRAND Jelly - available as always - new K-Y PLUS is crystal clear and provides safe water-soluble lubrication to guard against friction and condom breakage. New K-Y PLUS also contains proven nonoxynol-9 for extra protection against unplanned pregnancy.
NEW K-Y PLUS Spermicidal Lubricant An extra layer of protection."
[Exhibit C (Print: "Protect the Protector")]

PAR. 5. Through the use of the statements contained in the advertisements referred to in paragraph four, including but not necessarily limited to the advertisement attached as Exhibit C,

respondent has represented, directly or by implication, that scientific tests or studies show that up to eighteen and one half percent of condoms will fail; leaving users vulnerable to pregnancy and sexually transmitted diseases.

PAR. 6. In truth and in fact, scientific tests or studies do not show that eighteen and one half percent of condoms will fail, leaving users vulnerable to pregnancy and sexually transmitted diseases. Therefore, the representation set forth in paragraph five was, and is, false and misleading.

PAR. 7. 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:

A. One out of six condoms develops tiny holes during use which are big enough for sperm, HIV and other viruses to pass through.

B. One out of six condoms fails due to mistakes in using condoms or through the development of tiny holes during use.

C. K-Y Plus provides protection against the development of tiny holes in condoms during use.

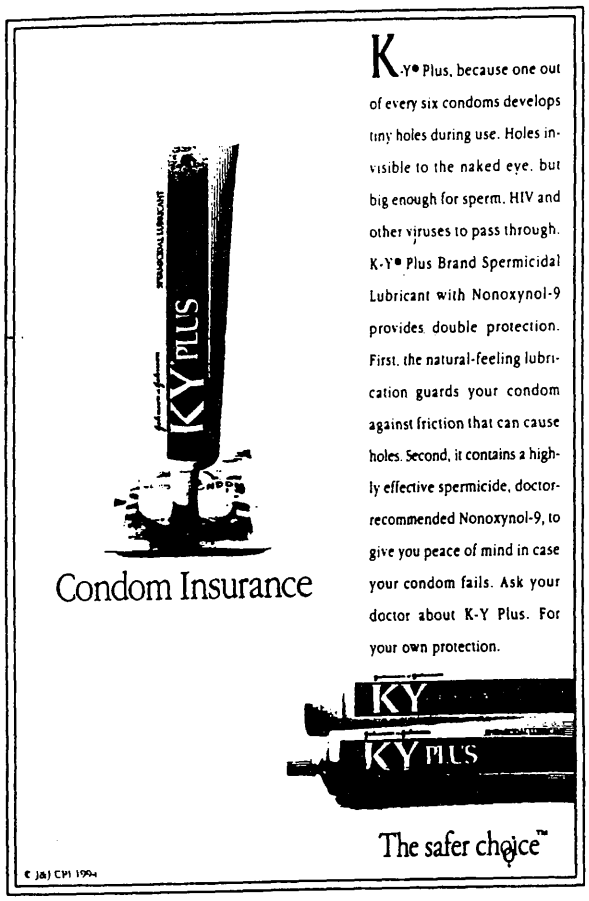
D. K-Y Plus provides protection against HIV and other viruses.

PAR. 8. 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 at the time it made the representations set forth in paragraphs five and seven, respondent possessed and relied upon a reasonable basis that substantiated such representations.

PAR. 9. In truth and in fact, at the time it made the representations set forth in paragraphs five and seven, respondent did not possess and rely upon a reasonable basis that substantiated such representations. Therefore, the representation set forth in paragraph eight was, and is, false and misleading.

PAR. 10. The acts and practices of respondent as alleged in this complaint constitute unfair or deceptive acts or practices and the making of false advertisements in or affecting commerce in violation of Sections 5(a) and 12 of the Federal Trade Commission Act.

EXHIBIT A



This advertisement created by:
LINTAS:NEW YORK
Ad No: P4-1129
Client: Johnson & Johnson
Title: Condom Insurance.

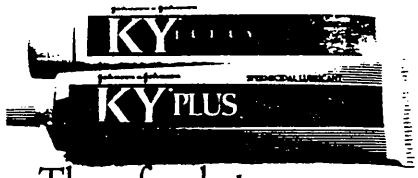
EXHIBIT A

EXHIBIT B

Introducing condom insurance.

New K-Y® Plus, because one out of six condoms fails. Anyone can make a mistake, or a condom can develop tiny holes during use — invisible to the eye, but big enough for sperm, HIV and other viruses to pass through. So new K-Y® Plus Brand with Nonoxynol-9 just makes good sense for personal lubrication. It provides double protection.

First, the clean-rinsing and natural-feeling lubrication of K-Y® Plus guards your condom against friction that can cause invisible holes. Second, it contains a highly effective spermicide, doctor-recommended Nonoxynol-9, to give you peace of mind in case your condom fails. And if you don't need a spermicide, regular K-Y® Brand Jelly is the water-based lubricant that won't erode latex condoms like petroleum jelly and other oil-based products can. Ask your doctor about regular K-Y® Jelly and new K-Y® Plus.



The safer choice

EXHIBIT B

000005
J&J

EXHIBIT C

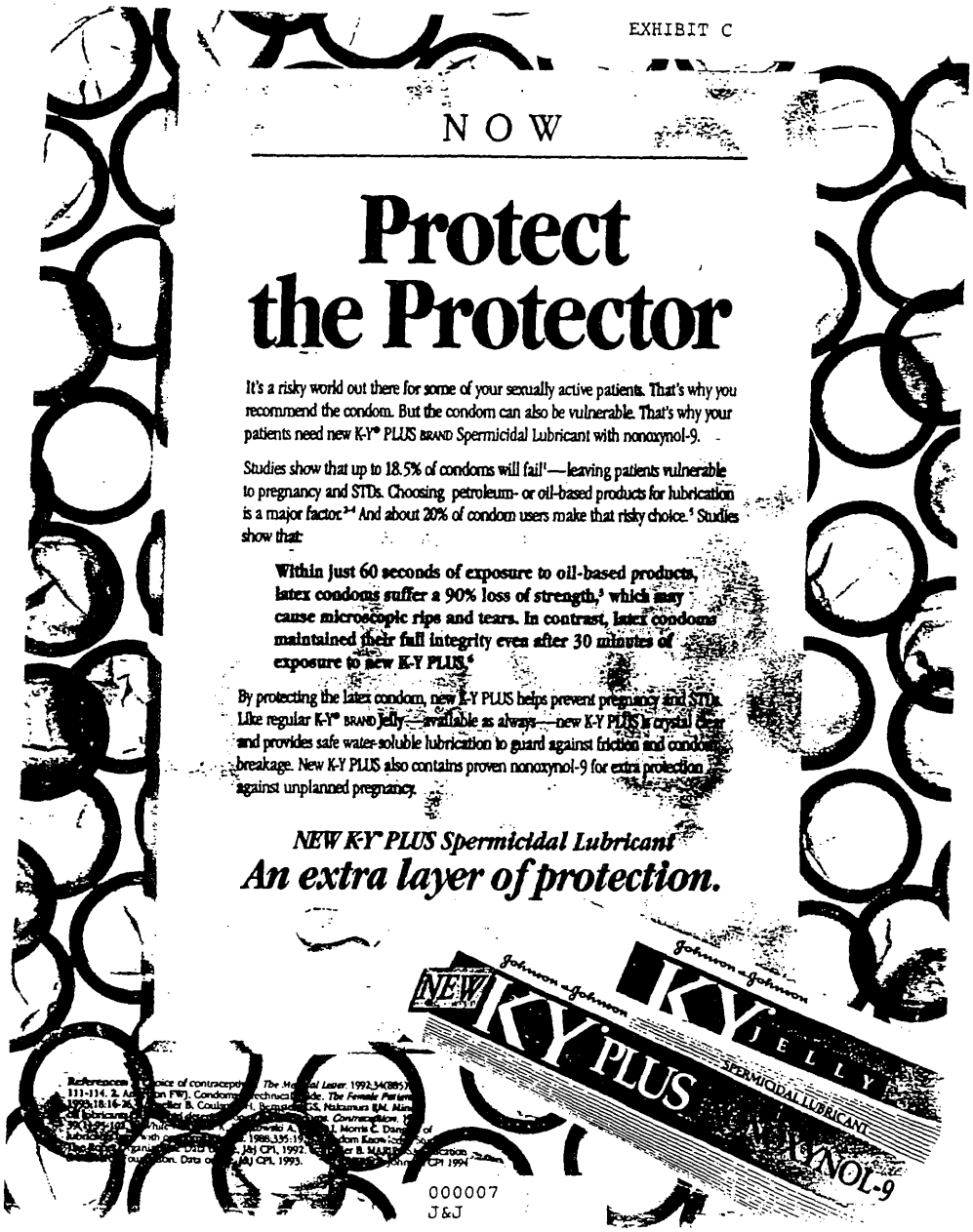


EXHIBIT C
NOW
Protect the Protector
It's a risky world out there for some of your sexually active patients. That's why you recommend the condom. But the condom can also be vulnerable. That's why your patients need new K-Y® PLUS BRAND Spermicidal Lubricant with nonoxynol-9.
Studies show that up to 18.5% of condoms will fail[1]—leaving patients vulnerable to pregnancy and STDs. Choosing petroleum- or oil-based products for lubrication is a major factor.[2-4] And about 20% of condom users make that risky choice.[5] Studies show that:
Within just 60 seconds of exposure to oil-based products, latex condoms suffer a 90% loss of strength,[3] which may cause microscopic rips and tears. In contrast, latex condoms maintained their full integrity even after 30 minutes of exposure to new K-Y PLUS.[6]
By protecting the latex condom, new K-Y PLUS helps prevent pregnancy and STDs. Like regular K-Y® BRAND Jelly—available as always—new K-Y PLUS is crystal clear and provides safe water-soluble lubrication to guard against friction and condom breakage. New K-Y PLUS also contains proven nonoxynol-9 for extra protection against unplanned pregnancy.
NEW K-Y PLUS Spermicidal Lubricant
An extra layer of protection.
Johnson & Johnson
NEW
K-Y PLUS
SPERMICIDAL LUBRICANT
NONOXYNOL-9
Johnson & Johnson
K-Y JELLY
References
000007
J&J

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 and its parent corporation, Johnson & Johnson, 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 parent corporation, and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the respondent and its parent corporation 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 or its parent corporation 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 Act, and that complaint should issue stating its charges in that respect, and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of sixty (60) days, pursuant to Section 2.34 of its Rules, now in further conformity with the procedure prescribed in Section 2.34 of its Rules, the Commission hereby issues its complaint, makes the following jurisdictional findings and enters the following order:

1. Respondent Johnson & Johnson Consumer Products, Inc., is a corporation organized, existing, and doing business under and by virtue of the laws of the State of New Jersey, with its office and principal place of business located at 1999 Grandview Road, in the City of Skillman, State of New Jersey;

Johnson & Johnson is a corporation organized, existing, and doing business under and by virtue of the laws of the State of New Jersey, with its office and principal place of business located at One Johnson & Johnson Plaza, in the City of New Brunswick, State of New Jersey.

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

ORDER

I.

It is ordered, That respondent, Johnson & Johnson Consumer Products, Inc., a corporation, its parent corporation, Johnson & Johnson, and all the other subsidiaries of Johnson & Johnson, their successors and assigns (hereinafter collectively "the companies"), and the companies' 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 K-Y Plus Nonoxynol-9 Spermicidal Lubricant, or any other personal lubricant and/or spermicide, in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from making any representation, directly or by implication, relating to:

A. The failure rate of any method of contraception due to defects, misuse, or any other cause;

B. Any such product's ability to provide protection against the development of tiny holes in condoms during use;

C. Any such product's ability to provide protection against HIV and other viruses; or

D. The health-related benefits of any such product;

unless, at the time of making any such representation, the companies possess and rely upon competent and reliable scientific evidence that substantiates such representation. For the purposes of this order, "competent and reliable scientific evidence" shall mean those tests, analyses, research, studies or other evidence based on the expertise of professionals in the relevant area, that have been conducted and evaluated in an objective manner by persons qualified to do so, using procedures generally accepted in the profession to yield accurate and reliable results.

II.

It is further ordered, That the companies and their 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 any "food," "drug" or "device," as those terms are defined in Section 15 of the Federal Trade Commission Act, 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, the efficacy of any over-the-counter product as a contraceptive or as a method of protection against the transmission of any sexually-transmitted disease, unless, at the time of making any such representation, the companies possess and rely upon competent and reliable scientific evidence that substantiates such representation.

III.

It is further ordered, That the companies and their 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 any over-the-counter product with a use relating to human reproduction, reproductive organs or sexually-transmitted diseases, 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, or interpretations of any test or study.

IV.

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

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

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

V.

It is further ordered, That the companies notify the Commission at least thirty (30) days prior to any proposed change in the companies 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 out of the order.

VI.

It is further ordered, (1) That respondent Johnson & Johnson Consumer Products, Inc., 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 operating divisions, to each of its managerial employees, and to each of its officers, agents, representatives or employees engaged in the preparation, review or placement of advertising or other materials covered by this order, and (2) that the parent corporation, Johnson & Johnson, 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 and of its subsidiaries' officers, agents, representatives or employees engaged in the preparation, review or placement of advertising of any over-the-counter product with a use relating to human reproduction, reproductive organs or sexually-transmitted diseases.

VII.

It is further ordered, That this order will terminate on January 18, 2016, or twenty years from the most recent date that the United States or the Federal Trade Commission files a complaint (with or without an accompanying consent decree) in federal court alleging any violation of the order, whichever comes later; provided, however, that the filing of such a complaint will not affect the duration of:

A. Any paragraph in this order that terminates in less than twenty years;

B. This order's application to any respondent that is not named as a defendant in such complaint; and

C. This order if such complaint is filed after the order has terminated pursuant to this paragraph.

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

VIII.

It is further ordered, That the companies 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 they have complied with this order.

IX.

It is further ordered, That nothing in this order shall prohibit the companies from making any representation for any drug that is permitted in labeling for any such drug under any tentative final or final standard promulgated by the Food and Drug Administration, or under any new drug application approved by the Food and Drug Administration.

CONCURRING STATEMENT OF COMMISSIONER MARY L. AZCUENAGA

I concur in the approval and issuance of the final decision and order in this matter except to the extent that the order imposes obligations on Johnson & Johnson (the parent company of the respondent Johnson & Johnson Consumer Products, Inc.), which is not named in the accompanying complaint.

IN THE MATTER OF

BBDO WORLDWIDE, INC.

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

Docket C-3637. Complaint, Jan. 24, 1996--Decision, Jan. 24, 1996

This consent order prohibits, among other things, a New York advertising firm from misrepresenting the amount of fat, calories, or cholesterol in any frozen yogurt, any frozen sorbet, and most ice cream products. This action stems from the firm's role in developing certain advertisements for Häagen-Dazs frozen yogurt products.

Appearances

For the Commission: *Anne V. Maher.*
For the respondent: *Pro se.*

COMPLAINT

The Federal Trade Commission, having reason to believe that BBDO Worldwide, Inc., 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 BBDO Worldwide, Inc. is a New York corporation, with its principal office or place of business at 1285 Avenue of the Americas, New York, NY.

PAR. 2. Respondent, at all times relevant to this complaint, was an advertising agency of Häagen-Dazs Company, Inc., and prepared and disseminated advertisements to promote the sale of Häagen-Dazs Frozen Yogurt, a "food" within the meaning of Sections 12 and 15 of the Federal Trade Commission Act.

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 for Häagen-Dazs Frozen Yogurt,

including but not necessarily limited to the attached Exhibits 1-3. These advertisements contain the following statements and depictions:

A. [In a 70-point type headline:]
WHY IS HÄAGEN-DAZS® FROZEN YOGURT BETTER THAN YOUR FIRST TRUE LOVE?
[Depiction of "Honeymooners"]
HÄAGEN-DAZS IS STILL 98% FAT FREE*.
[In 15-point text below the headline:]
Imagine pineapple sorbet tantalizingly wrapped around a coconut frozen yogurt bar. And now imagine that this bar has 100 calories. Or imagine a pint of vanilla frozen yogurt swirled with heavenly raspberry sorbet. And that these and all the rest of our irresistible frozen yogurt and sorbet combinations are 98% fat free. But they're still totally Häagen-Dazs.
What could be better?
[Depiction of frozen yogurt carton container and box of frozen yogurt bars]
[In 8-point type at the bottom right side of the page:]
*frozen yogurt and sorbet combinations
(Exhibit 1)

B. [In a 70-point type headline:]
WHY IS HÄAGEN-DAZS® FROZEN YOGURT BETTER THAN YOUR FIRST TRUE LOVE?
[Depiction of "Honeymooners"]
HÄAGEN-DAZS IS STILL 98% FAT FREE*.
[In 20-point text below the headline:]
Try new Raspberry Rendezvous™ and Orange Tango™ Frozen Yogurt.
Both are 98% fat free and still totally Häagen-Dazs.
[Depiction of frozen yogurt carton container]
[In 8-point type at the bottom right side of the page:]
*frozen yogurt and sorbet combinations
(Exhibit 2)

C. [In a 110-point type headline:]
NOW DISAPPEARING AT A STORE NEAR YOU.
[Depiction of frozen yogurt bar]
[In 15-point text below the headline:]
Take a good look. This is what a Häagen-Dazs Frozen Yogurt bar looks like. We thought we'd point that out, just in case you have some trouble finding them in your store. Because it seems that people are demanding them faster than we can supply them. Not that we're really surprised. After all, we're the ones who made them so irresistible in the first place -- with flavors like Raspberry & Vanilla, Peach, Strawberry Daiquiri and Piña Colada. And each with just 1 gram of fat and 100 calories. So now that you know what they look like -- go ahead and try one. And you'll find out for yourself just how quickly they can disappear.
(Exhibit 3)

PAR. 5. Through the use of the statements and depictions contained in the advertisements referred to in paragraph four, including but not necessarily limited to the advertisements attached as Exhibits 1 and 2, respondent has represented, directly or by implication, that Häagen-Dazs Frozen Yogurt is 98% fat free.

PAR. 6. In truth and if fact, in most cases Häagen-Dazs Frozen Yogurt is not 98% fat free. Seven of the nine Häagen-Dazs Frozen Yogurt flavors sold in cartons and three of the eight Häagen-Dazs Frozen Yogurt Bar flavors contained more than two percent fat content at the time of dissemination of the advertisements referred to in paragraph four. Therefore, the representation set forth in paragraph five was, and is, false and misleading.

PAR. 7. Through the use of the statements and depictions contained in the advertisements referred to in paragraph four, including but not necessarily limited to the advertisements attached as Exhibits 1 and 2, respondent has represented, directly or by implication, that Häagen-Dazs Frozen Yogurt is low fat.

PAR. 8. In truth and if fact, in most cases Häagen-Dazs Frozen Yogurt is not low fat. Three of the nine Häagen-Dazs Frozen Yogurt flavors sold in cartons and three of the eight Häagen-Dazs Frozen Yogurt Bar flavors contained from eight to twelve grams of fat per serving at the time of dissemination of the advertisements referred to in paragraph four. In addition, four of the nine Häagen-Dazs Frozen Yogurt flavors sold in cartons contained from four to six grams of fat per serving. Therefore, the representation set forth in paragraph seven was, and is, false and misleading.

PAR. 9. Through the use of the statements and depictions contained in the advertisements referred to in paragraph four, including but not necessarily limited to the advertisement attached as Exhibit 3, respondent has represented, directly or by implication, that Häagen-Dazs Frozen Yogurt Bars contain one gram of fat per serving.

PAR. 10. In truth and in fact, in many cases Häagen-Dazs Frozen Yogurt Bars contain more than one gram of fat per serving. Three of the eight Häagen-Dazs Frozen Yogurt Bar flavors contained from eleven to twelve grams of fat per serving at the time of dissemination of the advertisements referred to in paragraph four. Therefore, the representation set forth in paragraph nine was, and is, false and misleading.

PAR. 11. Through the use of the statements and depictions contained in the advertisements referred to in paragraph four, including but not necessarily limited to the advertisement attached as Exhibit 3, respondent has represented, directly or by implication, that Häagen-Dazs Frozen Yogurt Bars are low fat.

PAR. 12. In truth and in fact, in many cases Häagen-Dazs Frozen Yogurt Bars are not low fat. Three of the eight Häagen-Dazs Frozen Yogurt Bar flavors contained from eleven to twelve grams of fat per serving at the time of dissemination of the advertisements referred to in paragraph four. Therefore, the representation set forth in paragraph eleven was, and is, false and misleading.

PAR. 13. Through the use of the statements and depictions contained in the advertisements referred to in paragraph four, including but not necessarily limited to the advertisement attached as Exhibit 3, respondent has represented, directly or by implication, that Häagen-Dazs Frozen Yogurt Bars contain 100 calories per serving.

PAR. 14. In truth and in fact, in many cases Häagen-Dazs Frozen Yogurt Bars contain more than 100 calories per serving. Three of the eight Häagen-Dazs Frozen Yogurt Bar flavors contained from 210 to 230 calories per serving at the time of dissemination of the advertisements referred to in paragraph four. Therefore, the representation set forth in paragraph thirteen was, and is, false and misleading.

PAR. 15. Respondent knew or should have known that the representations set forth in paragraphs five, seven, nine, eleven and thirteen were, and are, false and misleading.

PAR. 16. The acts and practices of the respondent as alleged in this complaint constitute unfair or deceptive acts or practices and the making of false advertisements in or affecting commerce in violation of Sections 5(a) and 12 of the Federal Trade Commission Act.

EXHIBIT 1

EXHIBIT 1

WHY IS HÄAGEN-DAZS® FROZEN YOGURT BETTER THAN YOUR FIRST TRUE LOVE?

HÄAGEN-DAZS IS STILL 98% FAT FREE.*

Imagine pineapple sorbet tantalizingly wrapped around a coconut frozen yogurt bar. And now imagine that this bar has 100 calories. Or imagine a pint of vanilla frozen yogurt swirled with heavenly raspberry sorbet. And that these and all the rest of our irresistible frozen yogurt and sorbet combinations are 98% fat free. But they're still totally Häagen-Dazs.

What could be better?

HÄAGEN-DAZS. IT'S BETTER THAN ANYTHING.®

*frozen yogurt and sorbet combinations

EXHIBIT 2

EXHIBIT 2

WHY IS HÄAGEN-DAZS® FROZEN YOGURT BETTER THAN YOUR FIRST TRUE LOVE?

HÄAGEN-DAZS IS STILL 98% FAT FREE.*

COUPON EXPIRES 12/31/93

SAVE $1.00

ON ANY FLAVOR HÄAGEN-DAZS® FROZEN YOGURT PINTS

18023

VOID

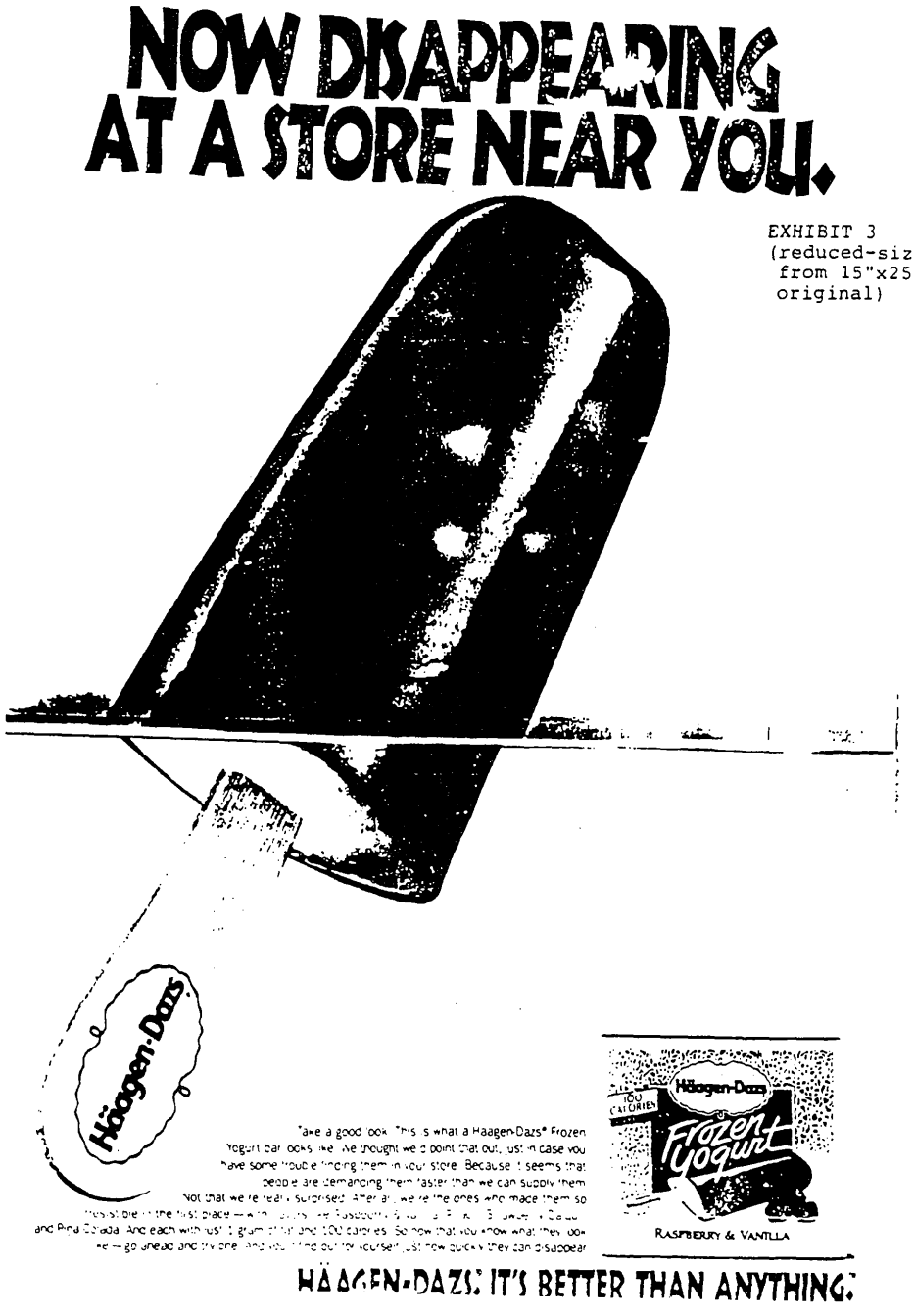
This certificate is redeemable at grocery convenience stores or at participating Haagen Dazs Ice Cream Shops

Try new Raspberry Rendezvous™ and Orange Tango™ Frozen Yogurt. Both are 98% fat free and still totally Häagen-Dazs.

HÄAGEN-DAZS. IT'S BETTER THAN ANYTHING.

*Frozen yogurt and sorbet combinations

EXHIBIT 3


NOW DISAPPEARING
AT A STORE NEAR YOU.
EXHIBIT 3
(reduced-size
from 15"x25"
original)
Häagen-Dazs
Take a good look. This is what a Haagen-Dazs® Frozen
Yogurt bar looks like. We thought we'd point that out, just in case you
have some trouble finding them in your store. Because it seems that
people are demanding them faster than we can supply them.
Not that we're really surprised. After all, we're the ones who made them so
and Pina Colada. And each with just 1 gram of fat and 100 calories. So now that you know what they do-
Häagen-Dazs
100 CALORIES
Frozen Yogurt
RASPBERRY & VANILLA
HÄAGEN-DAZS. IT'S BETTER THAN ANYTHING.

DECISION AND ORDER

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

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

The Commission having thereafter considered the matter and having determined that it had reason to believe that the respondent has violated the said Act, and that complaint should issue stating its charges in that respect, and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of a 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 BBDO Worldwide, Inc. 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 1285 Avenue of the Americas, in the City of New York, State of New York.

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

ORDER

I.

It is ordered, That respondent BBDO Worldwide, Inc., 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, labeling, advertising, promotion, offering for sale, sale, or distribution of any frozen yogurt, frozen sorbet or ice cream product (excluding all other food or confection products in which ice cream is an ingredient comprising less than fifty percent of the total weight of the involved product) 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, through numerical or descriptive terms or any other means, the existence or amount of fat, saturated fat, cholesterol or calories in any such product. If any representation covered by this Part either directly or by implication conveys any nutrient content claim defined (for purposes of labeling) by any regulation promulgated by the Food and Drug Administration, compliance with this Part shall be governed by the qualifying amount for such defined claim as set forth in that regulation.

II.

Nothing in this order shall prohibit respondent from making any representation that is specifically permitted in labeling for any frozen yogurt, frozen sorbet or ice cream by regulations promulgated by the Food and Drug Administration pursuant to the Nutrition Labeling and Education Act of 1990.

III.

It is further ordered, That for three (3) 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:

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

2. 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.

IV.

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 respondent which may affect compliance obligations arising out of this order.

V.

It is further ordered, That respondent shall, within thirty (30) days after service of this order, distribute a copy of this order to each of its operating divisions and to each of its officers, agents, representatives, or employees engaged in the preparation or placement of advertisements or other materials covered by this order.

VI.

This order will terminate on January 24, 2016, or twenty years from the most recent date that the United States or the Federal Trade Commission files a complaint (with or without an accompanying consent decree) in federal court alleging any violation of the order, whichever comes later; provided, however, that the filing of such a complaint will not affect the duration of:

A. Any paragraph in this order that terminates in less than twenty years;

B. This order's application to any respondent that is not named as a defendant in such complaint; and

C. This order if such complaint is filed after the order has terminated pursuant to this paragraph.

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

VII.

It is further ordered, That respondent shall, within sixty (60) days after service of this order, 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.

IN THE MATTER OF

THE UPJOHN COMPANY, ET AL.

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

Docket C-3638. Complaint, Feb. 8, 1996--Decision, Feb. 8, 1996

This consent order requires, among other things, the respondents to divest, within 12 months, Pharmacia Aktiebolag's 9-AC assets, an inhibitor drug for the treatment of colorectal cancer, to a Commission-approved acquirer. If the transaction is not completed in the prescribed time, the Commission will be allowed to appoint a trustee.

Appearances

For the Commission: *Ann Malester, Claudia Higgins* and *William Baer.*

For the respondents: *Stuart Meiklejohn, Sullivan & Cromwell,* New York, N.Y. and *Steven Sunshine, Shearman & Sterling,* Washington, D.C.

COMPLAINT

The Federal Trade Commission ("Commission"), having reason to believe that respondents The Upjohn Company ("Upjohn"), a Michigan corporation subject to the jurisdiction of the Commission, and Pharmacia Aktiebolag ("Pharmacia"), a Swedish corporation subject to the jurisdiction of the Commission, have agreed to merge 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, ("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. RESPONDENTS

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

Delaware, with its principal place of business located at 7000 Portage Road, Kalamazoo, Michigan.

2. Respondent Pharmacia is a corporation organized, existing, and doing business under and by virtue of the laws of Sweden, with its principal place of business located at Frösundaviks allé 15, S-171 97 Stockholm, Sweden.

II. JURISDICTION

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

III. THE MERGER

4. Respondents propose to combine their respective businesses in a transaction valued at approximately $13.9 billion, pursuant to the terms of a Combination Agreement dated August 20, 1995 ("the Merger").

IV. THE RELEVANT MARKET

5. The relevant line of commerce in which to analyze the effects of the Merger is the research, development, manufacture and sale of topoisomerase I inhibitors for the treatment of colorectal cancer. While no topoisomerase I inhibitor has yet been approved for sale in the United States, anticipated sales of all topoisomerase I inhibitors for the treatment of colorectal cancer will exceed $100 million by 2002.

6. An estimated 443,000 people in the United States are diagnosed with colorectal cancer each year. For most solid tumors, the first method of treatment is surgery, with radiation therapy and chemotherapy typically used as adjuncts to the surgery. Current protocols for colorectal cancer suggest that patients be treated with the chemotherapy agents 5-fluorouracil ("5FU") and either leucovorin or levamisole. For those patients whose cancer recurs, the survival rate is only fifteen percent. Topisomerase I inhibitors are expected to increase the rate of survival for colorectal cancer patients.

7. For purposes of this complaint, the United States is the relevant geographic area in which to analyze the effects of the Merger.

V. STRUCTURE OF THE MARKET

8. The relevant market set forth in paragraphs five and seven is highly concentrated. Upjohn and Pharmacia are two of only a very small number of firms currently in the advanced stages of developing topoisomerase I inhibitors for the treatment of colorectal cancer in the United States. Upjohn's product in development, CPT-11, is expected to be the first topoisomerase I inhibitor for the treatment of colorectal cancer on the market in the United States. Pharmacia plans to seek Food and Drug Administration ("FDA") approval for its topoisomerase I inhibitor, 9-Aminocamptothecin ("9-AC"), within the next few years.

VI. BARRIERS TO ENTRY

9. Entry into the relevant market is difficult and time consuming. Entry into the relevant market is governed by the requirements of the FDA which involve lengthy clinical trial periods, time consuming data collection and analysis from clinical trials, and expenditures of significant resources over a period of many years with no assurance that a viable commercial product will result. No company may reach advanced stages of development in the relevant market without engaging in scientific research that requires well over least two years time to complete.

VII. EFFECTS OF THE MERGER

10. The effects of the Merger may be substantially to lessen competition or tend to create a monopoly in the relevant market in violation of Section 7 of the Clayton Act, as amended, 15 U.S.C. 18, and Section 5 of the FTC Act, as amended, 15 U.S.C. 45, by, among other things:

a. Eliminating actual, direct and substantial competition in research and development between Upjohn and Pharmacia in the relevant market; and

b. Potentially decreasing the number of research and development tracks for topoisomerase I inhibitors for the treatment of colorectal cancer; and

c. Eliminating the potential for actual, direct and substantial price competition between Upjohn and Pharmacia in the relevant market.

VIII. VIOLATIONS CHARGED

11. The Combination Agreement described in paragraph four constitutes a violation of Section 5 of the FTC Act, as amended, 15 U.S.C. 45.

12. The Merger described in paragraph four, 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 merger by respondents The Upjohn Company ("Upjohn") and Pharmacia AB ("Pharmacia"), and the respondents 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 respondents with violations of Section 7 of the Clayton Act, as amended, 15 U.S.C. 18, and Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45; and

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

The Commission having thereafter considered the matter and having determined that it had reason to believe that the respondents have 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 Upjohn is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Delaware, with its principal place of business located at 7000 Portage Road, Kalamazoo, Michigan.

2. Respondent Pharmacia is a corporation organized, existing, and doing business under and by virtue of the laws of Sweden, with its principal place of business located at Frösundaviks allé 15, S-171 97 Stockholm, Sweden.

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. *"Upjohn"* means The Upjohn Company, its directors, officers, employees, agents and representatives, successors and assigns; its subsidiaries, divisions, groups and affiliates controlled by Upjohn; and the respective directors, officers, employees, agents and representatives, and the respective successors and assigns of each.

B. *"Pharmacia"* means Pharmacia Aktiebolag, its directors, officers, employees, agents and representatives, successors and assigns; its subsidiaries, divisions, groups and affiliates controlled by Pharmacia; and the respective directors, officers, employees, agents and representatives, and the respective successors and assigns of each.

C. *"Respondents"* means Upjohn and Pharmacia.

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

E. *"NCI"* means the National Cancer Institute.

F. *"Merger"* means the combination of Upjohn and Pharmacia pursuant to a Combination Agreement dated August 20, 1995.

G. *"9-AC"* or *"9-amino-20(S)-camptothecin"* means the semisynthetic compound which refers to the compound 1-pyrano [3', 4' : 6, 7] indolizino [1, 2-b] quinoline-3, 14 (4H, 12H) -dione, 10-amino-4-ethyl-4-hydroxy-(S) in respect of its therapeutic indication for the treatment of cancer.

H. *"CPT-11"* or *"irinotecan hydrochloride trihydrate"* means the chemical compound which refers to the compound (+) - (4S) -4, 11 - diethyl - 4 - hydroxy - 9 - [(4 - piperidinopiperidino) carbonyl - oxy] - 1H - pyrano [3', 4' : 6, 7] indolizino [1, 2 - b] quinoline - 3, 14 (4H, 12H) - dione hydrochloride trihydrate.

I. *"Pharmacia's 9-AC Assets"* means an exclusive license to all Pharmacia's assets relating to the research and development of 9-AC for sale in the United States that are not part of Pharmacia's physical facilities or other tangible assets. "Pharmacia's 9-AC Assets" includes, but is not limited to, all formulations, patents, trade secrets, technology, know-how, specifications, designs, drawings, processes, testing and quality control data, research data, technical information, information stored on management information systems (and specifications sufficient for the Acquirer to use such information), proprietary software used in connection with Pharmacia's 9-AC, and all data, contractual rights, materials and information relating to obtaining FDA approvals and other government or regulatory approvals for the United States for Pharmacia's 9-AC. "Pharmacia's 9-AC Assets" also includes the assignment of all rights of Pharmacia to NCI patents, trade secrets, technology, know-how, specifications, designs, drawings, processes, testing and quality control data, research materials, technical information, information stored on management information systems (and specifications sufficient for the Acquirer to use such information), proprietary software used in connection with Pharmacia's 9-AC and all data, contractual rights, materials and information relating to obtaining FDA approvals and other government or regulatory approvals for the United States for Pharmacia's 9-AC.

J. *"Acquirer"* means the entity to whom the respondents shall divest Pharmacia's 9-AC Assets pursuant to this order.

K. *"Cost"* means Pharmacia's actual per unit cost of manufacturing Pharmacia's 9-AC, which may be adjusted once annually to reflect any increases in Pharmacia's actual cost, provided,

however, that for any year, the total rate of such adjustment with respect to all components of cost other than material and labor shall not exceed the rate of increase in the Consumer Price Index for such year.

II.

It is further ordered, That:

A. Respondents shall divest, absolutely and in good faith, within twelve (12) months of the date this order becomes final, Pharmacia's 9-AC Assets.

B. Respondents shall divest Pharmacia's 9-AC Assets only to an Acquirer that receives the prior approval of the Commission and only in a manner that receives the prior approval of the Commission. Respondents shall obtain all necessary approvals and releases for such divestiture from NCI as a condition of the Commission's prior approval. The purpose of the divestiture of Pharmacia's 9-AC Assets is to ensure continued research and development of Pharmacia's 9-AC, in the same manner in which Pharmacia's 9-AC would be researched and developed absent the proposed Merger, and to remedy the lessening of competition resulting from the proposed Merger as alleged in the Commission's complaint.

C. At the Acquirer's option, respondents shall enter into a supply agreement with the Acquirer. Such agreement, if entered into, shall be provided to the Commission as part of respondents' application to the Commission for approval of the divestiture. This supply agreement shall include the following and respondents shall commit to satisfy the following:

1. Respondents shall manufacture and deliver to the Acquirer in a timely manner the Acquirer's requirements for 9-AC at respondents' cost for a period not to exceed three (3) years from the date the divestiture is approved. This supply agreement can be cancelled at the request of the Acquirer.

2. Respondents shall make representations and warranties to the Acquirer that the 9-AC manufactured by respondents for the Acquirer meets the United States Food and Drug Administration approved specifications therefor and are not adulterated or misbranded within the meaning of the Food, Drug and Cosmetic Act, 21 U.S.C. 321, *et*

seq. Respondents shall agree to indemnify, defend and hold the Acquirer harmless from any and all suits, claims, actions, demands, liabilities, expenses or losses alleged to result from the failure of the 9-AC manufactured for the Acquirer by respondents to meet FDA specifications. This obligation shall be contingent upon the Acquirer giving respondents prompt, adequate notice of such claim, cooperating fully in the defense of such claim, and permitting respondents to assume the sole control of all phases of the defense and/or settlement of such claim, including the selection of counsel. This obligation shall not require respondents to be liable for any negligent act or omission of the Acquirer or for any representations and warranties, express or implied, made by the Acquirer that exceed the representations and warranties made by respondents to the Acquirer.

3. During the term of the supply agreement, upon reasonable request by the Acquirer, respondents shall make available to the Acquirer all records kept in the normal course of business that relate to the cost of manufacturing 9-AC.

D. The time period for divestiture pursuant to paragraph II of this order shall be tolled if and when respondents:

1. Provide to the Commission objective evidence, including, but not limited to, results of clinical trials indicating that, based on 9-AC's or CPT-11's medical profile, and through no fault of respondents, either Pharmacia's 9-AC or Upjohn's CPT-11 is not medically safe or efficacious for use in the treatment of colorectal cancer; and

2. Petition the Commission to modify this order, pursuant to Section 5(b) of the FTC Act and Section 2.51 of the Commission's Rules of Practice, based on the circumstances described in subparagraph II.D.1 of this order.

This tolling of the time period for divestiture shall end when the Commission rules on respondents' petition to modify this order.

III.

It is further ordered, That:

A. If Upjohn and Pharmacia have not divested, absolutely and in good faith and with the Commission's prior approval, Pharmacia's 9-AC Assets within the time required by paragraph II.A. of this order, the Commission may appoint a trustee to divest, at Pharmacia's option, either (1) an exclusive United States license and a non-exclusive worldwide (excluding the United States) license in perpetuity, and in good faith, to all Pharmacia's assets relating to the research and development of 9-AC for sale throughout the world or (2) an exclusive worldwide license, in perpetuity, and in good faith, to all Pharmacia's assets relating to the research and development of 9-AC for sale throughout the world. The trustee shall obtain all necessary approvals and releases for the applicable license from NCI. Neither the decision of the Commission to direct the trustee nor the decision of the Commission not to direct the trustee to divest a license 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 respondents to comply with this order.

B. If the trustee is directed under subparagraph A. of this paragraph to divest, at Pharmacia's option, either (1) an exclusive United States license and a non-exclusive worldwide (excluding the United States) license or (2) an exclusive worldwide license, respondents shall consent to the following terms and conditions regarding the trustee's powers, duties, authority, and responsibilities:

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

2. Subject to the prior approval of the Commission, the trustee shall have the exclusive power and authority to divest, at Pharmacia's option, either (1) an exclusive United States license and a nonexclusive worldwide (excluding the United States) license or (2) an exclusive worldwide license.

3. Within ten (10) days after the appointment of the trustee, respondents shall execute a trust agreement that, subject to the prior

approval of the Commission, and in the case of a court-appointed trustee, of the court, transfers to the trustee all the rights and powers necessary to permit the trustee to assure respondents' compliance with the terms of this order. As part of the trustee agreement, the trustee shall execute confidentiality agreement(s) with respondents.

4. The trustee shall have twelve (12) months from the date the Commission approves the appointment of the trustee 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, facilities and technical information related to Pharmacia's 9-AC, or to any other relevant information, as the trustee may reasonably request, including but not limited to all records kept in the normal course of business that relate to research and development of, and the cost of manufacturing, Pharmacia's 9-AC. Respondents shall develop such financial or other information as the trustee may request and shall cooperate with the trustee. Respondents shall take no action to interfere with or impede the trustee's accomplishment of the divestiture. Any delays in divestiture caused by respondents shall extend the time for divestiture under this paragraph in an amount equal to the delay, as determined by the Commission or, for a court-appointed trustee, by the court.

6. The trustee shall use his or her best efforts to negotiate the most favorable price and terms available in each contract that is submitted to the Commission, subject to respondents' absolute and unconditional obligation to divest at no minimum price. The divestiture shall be made in the manner and to the Acquirer as set out in paragraphs II and III of this order, as appropriate; 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 respondents from among those approved by the Commission. If requested by the trustee or Acquirer, respondents shall provide the Acquirer with the assistance required by paragraph IV of this order.

7. The trustee shall serve, without bond or other security, at the cost and expense of respondents, on such reasonable and customary terms and conditions as the Commission may set. The trustee shall have the authority to employ, at the cost and expense of respondents, such consultants, accountants, attorneys and other representatives and assistants as are reasonably necessary to carry out the trustee's duties and responsibilities. The trustee shall account for all monies derived from the sale and all expenses incurred. After approval by the Commission and, in the case of a court-appointed trustee, by the court, of the account of the trustee, including fees for his or her services, all remaining monies shall be paid at the direction of the respondents. The trustee's compensation shall be based at least in significant part on a commission arrangement based on a percentage of the selling price of the assets divested.

8. Respondents shall indemnify the trustee and hold the trustee harmless against any losses, claims, damages, liabilities, or expenses arising out of, or in connection with, the performance of the trustee's duties, including all reasonable fees of counsel and other expenses incurred in connection with the preparations for, or defense of, any claim whether or not resulting in any liability, except to the extent that such liabilities, losses, damages, claims, or expenses result from misfeasance, gross negligence, willful or wanton acts, or bad faith by the 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 report in writing to respondents and the Commission every sixty (60) days concerning the trustee's efforts to accomplish divestiture.

12. If a divestiture application filed pursuant to this paragraph III is pending before the Commission, and respondents petition the Commission to modify this order based on the conditions in paragraph II.D., then the Commission shall not approve the divestiture application until it rules on the petition to modify.

IV.

It is further ordered, That:

A. Upon reasonable notice and request from the Acquirer to respondents, respondents shall provide information, technical assistance and advice to the Acquirer with respect to Pharmacia's 9-AC Assets such that the Acquirer will be capable of continuing the current research and development. Such assistance shall include reasonable consultation with knowledgeable employees of respondents and training at the Acquirer's facility for a period of time sufficient to satisfy the Acquirer's management that its personnel are adequately knowledgeable about Pharmacia's 9-AC Assets. However, respondents shall not be required to continue providing such assistance for more than one (1) year after divestiture of Pharmacia's 9-AC Assets. Respondents may require reimbursement from the Acquirer for all of their own direct costs incurred in providing the services required by this paragraph. Direct costs, as used in this paragraph, means all actual costs incurred exclusive of overhead costs.

B. Upon reasonable notice and request from the Acquirer, respondents shall provide information, technical assistance and advice sufficient to assist the Acquirer in obtaining all necessary FDA approvals to manufacture 9-AC for use in clinical trials in the United States. Upon reasonable notice and request from the Acquirer, respondents shall also provide consultation with knowledgeable employees of respondents and training at the Acquirer's facility for a period of time, not to exceed one (1) year, sufficient to satisfy the Acquirer's management that its personnel are adequately trained in the manufacture of 9-AC. Respondents may require reimbursement from the Acquirer for all of their own direct costs incurred in providing the services required by this paragraph. Direct costs, as used in this paragraph, means all actual costs incurred exclusive of overhead costs.

V.

It is further ordered, That respondents shall comply with all terms of the Interim Agreement, attached to this order and made a part hereof as Appendix I. Said Interim Agreement shall continue in

effect until the provisions in paragraphs II., III. and IV. of this order are complied with or until such other time as is stated in said Interim Agreement.

VI.

It is further ordered, That if, following approval of the divestiture required by paragraph II. of this order, disputes arise between respondents and the Acquirer regarding: (1) fulfillment of the terms of the supply agreement described in paragraph II.C of this order; (2) the continuation of the clinical trials for the testing of 9-AC described in Attachment A to Appendix I of this order; or (3) the continuation of the defense of existing patents and the pursuit of the filing of new patents relating to Pharmacia's 9-AC, the Acquirer may elect to cause the issue to be submitted to outside, independent, binding arbitration in the District of Columbia. In the event the Acquirer so elects, respondents shall agree to submit to such arbitration, and the issue shall be settled by arbitration in accordance with the Commercial Arbitration Rules of the American Arbitration Association ("AAA") and AAA's Supplementary Procedures for International Commercial Arbitration or any successor rules thereto. Judgment upon the award rendered by the arbitrator(s) may be entered in any court having jurisdiction thereof. The decision of the arbitrator, after confirmation by the court pursuant to 9 U.S.C. 9, or succeeding statutory provisions, shall be final and binding upon the parties, and the failure of the respondents thereafter to abide by the arbitrator's award shall be a violation of this order.

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 respondents have fully complied with the provisions of paragraphs II.A. and II.B. or III. of this order, respondents shall submit to the Commission a verified written report setting forth in detail the manner and form in which they intend to comply, are complying, and have complied with this order. Respondents shall include in their compliance reports, among other things that are required from time to time, a full description of

the efforts being made to comply with paragraphs II., III., IV. and V. of this order, including a description of all substantive contacts or negotiations for accomplishing the divestiture and the identity of all parties contacted. Respondents shall include in their compliance reports copies of all written communications to and from such parties, all internal memoranda, and all reports and recommendations concerning divestiture.

B. One (1) year from the date this order becomes final, annually on the anniversary of the date this order becomes final, and at all other times as the Commission may require, until respondents have fully complied with paragraphs II.C., IV. and V., respondents shall file a verified written report with the Commission setting forth in detail the manner and form in which they have complied and are complying with paragraphs II.C., IV. and V. of this order.

VIII.

It is further ordered, That, for the purpose of determining or securing compliance with this order, respondents 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 respondents, relating to any matters contained in this order; and

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

IX.

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

APPENDIX I

INTERIM AGREEMENT TO MAINTAIN RESEARCH AND DEVELOPMENT

This Interim Agreement to Maintain Research and Development ("Interim Agreement") is by and among Pharmacia Aktiebolag ("Pharmacia"), a corporation organized, existing, and doing business under and by virtue of the laws of Sweden, with its office and principal place of business at Frösundaviks allè 15, S-171 97 Stockholm, Sweden, The Upjohn Company ("Upjohn"), a corporation organized, existing, and doing business under and by virtue of the laws of the State of Delaware, with its principal place of business located at 7000 Portage Road, Kalamazoo, Michigan 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 20, 1995, Pharmacia entered into a Combination Agreement with Upjohn providing for the combination of Pharmacia and Upjohn (hereinafter "Merger"); and

Whereas, Pharmacia is involved in, among other things, the research and development of 9-Amino-20(S)-camptothecin ("9-AC"), a topoisomerase I inhibitor; and

Whereas, Upjohn is involved in, among other things, the research and development of Camptosar ("CPT-11"), a topoisomerase I inhibitor; and

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

Whereas, if the Commission accepts the Agreement Containing Consent Order ("consent order"), the Commission must place it on the public record for a period of at least sixty (60) days and subsequently may either withdraw such acceptance or issue and serve its complaint and decision in disposition of the proceeding 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 ongoing and future research of Pharmacia's 9-AC, as defined in paragraph I of the consent order,

during the period prior to the final acceptance of the consent order by the Commission (after the 60-day public comment period) and until the divestiture required by paragraphs II or III of the consent order has been accomplished may not be possible and divestiture resulting from any proceeding challenging the legality of the Merger might not be possible, or might be less than an effective remedy; and

Whereas, the Commission is concerned that if the Merger is consummated, it will be necessary to preserve the Commission's ability to require the divestiture of Pharmacia's 9-AC Assets, and the Commission's right to have Pharmacia's 9-AC Assets continue as viable assets independent of Upjohn; and

Whereas, the purpose of the Interim Agreement and the consent order is:

1. To ensure continued research and development of Pharmacia's 9-AC in the same manner in which Pharmacia's 9-AC would be researched and developed absent the Merger; and

2. To preserve the Commission's ability to remedy any anticompetitive effects of the Merger; and

Whereas, Pharmacia's and Upjohn's entering into this Interim Agreement shall in no way be construed as an admission by Pharmacia and Upjohn that the Merger is illegal; and

Whereas, Pharmacia and Upjohn understand that no act or transaction contemplated by this Interim 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 Interim Agreement;

Now, therefore, the Parties agree, upon the understanding that the Commission has not yet determined whether the Merger will be challenged, and in consideration of the Commission's agreement that, at the time it accepts the consent order for public comment, it will grant early termination of the Hart-Scott-Rodino waiting period, as follows:

1. Pharmacia and Upjohn agree to execute and be bound by the consent order.

2. Pharmacia agrees that from the date this Interim Agreement is accepted until the earliest of the time listed in subparagraphs 2.a. -

2.b., it will comply with the provisions of paragraph 4 of this Interim Agreement:

a. Three 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;

b. The time that the divestiture obligations required by the consent order are completed.

3. Pharmacia and Upjohn agree to take such actions as are necessary to prevent the destruction, removal, wasting, deterioration or impairment of Pharmacia's 9-AC Assets, except for ordinary wear and tear.

4. With respect to the continued research and development of Pharmacia's 9-AC, Pharmacia agrees:

a. To continue to pursue its obligations under the Cooperative Research and Development Agreement with the National Cancer Institute and the previously determined 9-AC research and development plan, as set forth in confidential Attachment A to this Interim Agreement; and

b. To fund the research and development of Pharmacia's 9-AC at levels no less than those contained in the budget for 1995, as set forth in confidential Attachment B to this Interim Agreement; and

c. To use its best efforts to support and defend Pharmacia's rights relating to 9-AC in U.S. Patent # 5,106742 dated April 21, 1992 (Camptothecin Analogs as Potent Inhibitors of Topoisomerase I), U.S. Patent # 5,225,404 dated July 6, 1993 (Methods of Treating Colon Tumors with Tumor-Inhibiting Camptothecin Compounds), and U.S. Serial # 08/323081 filed October 14, 1994 (pending patent application for Lyophilizate of Lipid Complex of Water Insoluble Camptothecins); and

d. To use its best efforts to obtain all necessary approvals and releases from the National Cancer Institute to accomplish the requirements of paragraphs II and III of the consent order; and

e. Within thirty days of acceptance of this Interim Agreement by the Commission, to have available for clinical trials at least sufficient inventory of Pharmacia's 9-AC sufficient to supply the clinical trials set forth in confidential Attachment A to this Interim Agreement that are likely to be initiated through November 1996.

5. Upjohn agrees to allow Pharmacia to fulfill its obligations under paragraphs 2 and 4 of this Interim Agreement, without restraint or interference from Upjohn.

6. Should the Commission seek in any proceeding to compel Pharmacia to divest itself of the Pharmacia 9-AC Assets, as provided in the consent order, or seek any other equitable relief relating to Pharmacia's 9-AC Assets, Pharmacia and Upjohn shall not raise any objection based on the expiration of the applicable Hart-Scott-Rodino Antitrust Improvements Act waiting period or the fact that the Commission has permitted the Merger. Pharmacia and Upjohn shall also waive all rights to contest the validity of this Interim Agreement.

7. Should the Commission, pursuant to paragraph II.D. of the consent order, act on a petition from Pharmacia and Upjohn to modify the consent order based on the circumstances described in subparagraph II.D.1, this Interim Agreement shall be automatically modified to reflect any changes made by the Commission.

8. For the purpose of determining or securing compliance with this Interim Agreement, subject to any legally recognized privilege, and upon written request with reasonable notice to Pharmacia and Upjohn made to its General Counsel, Pharmacia and Upjohn shall permit any duly authorized representative or representatives of the Commission:

a. Access during the office hours of Pharmacia and Upjohn 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 Pharmacia and Upjohn relating to compliance with this Interim Agreement; and

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

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

IN THE MATTER OF

GENETUS ALEXANDRIA, INC., ET AL.

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

Docket C-3639. Complaint, Feb. 12, 1996--Decision, Feb. 12, 1996

This consent order prohibits, among other things, the Virginia-based corporations and their officers from misrepresenting the nature or extent of a physician's participation in any treatment procedure, the safety or efficacy of any treatment procedure, and the extent to which a treatment is covered by a patient's medical insurance. The consent order requires the respondents to pay $250,000 in consumer redress to the Commission.

Appearances

For the Commission: *Sondra L. Mills* and *Eric J. Bash.*

For the respondents: *Charles D. Nelson*, in-house counsel, Washington, D.C.

COMPLAINT

The Federal Trade Commission, having reason to believe that Genetus Alexandria, Inc., a corporation ("Genetus"), George Oprean, individually and as President and a director of said corporation, and Linda Huffman Oprean, individually and as an officer and a director of said corporation, have violated the provisions of the Federal Trade Commission Act, and that Galen Medical Centers, Ltd., a corporation, is a successor corporation to Genetus and is an *alter ego* of Genetus and/or George Oprean, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, alleges:

PARAGRAPH 1. Respondent Genetus Alexandria, Inc. ("Genetus") is a corporation formed under the laws of the Commonwealth of Virginia with its office and principal place of business located at 2843 Duke Street, Alexandria, Virginia. From approximately March of 1991 through July of 1994, Genetus operated a clinic for the treatment of impotence at this location.

Respondent Galen Medical Centers, Ltd. ("Galen") is a corporation formed under the laws of the Commonwealth of Virginia with its office and principal place of business located at 2843 Duke Street, Alexandria, Virginia. Some time after May 10, 1994, Galen acquired certain assets of, and became obliged to guarantee payment of certain debts incurred by, respondent Genetus. Commencing in approximately July of 1994, Galen began operating the impotence treatment clinic previously operated by Genetus located at 2843 Duke Street, Alexandria, Virginia. Galen also operates a clinic for treating impotence located at 714 Park Avenue in Baltimore, Maryland. Galen is a successor corporation to Genetus and is the *alter ego* of Genetus and/or George Oprean.

Respondent George Oprean is the President, Secretary, Treasurer and a director of respondent Genetus. George Oprean is also the President and a director of respondent Galen. Individually, or in concert with others, he formulates, directs, controls and performs the acts and practices of Genetus and Galen, including the acts and practices alleged in this complaint. His principal office or place of business is the same as that of Genetus and Galen.

Respondent Linda Huffman Oprean ("Linda Oprean") is the Vice President and a director of Genetus and is also a director of Galen. She was licensed as a registered nurse by the Virginia Board of Nursing from approximately June of 1991 until approximately July 13, 1994, when this license was revoked by the Virginia Board of Nursing. Individually, or in concert with others, including respondent George Oprean, she formulates, directs, controls and performs the acts and practices of Genetus and Galen, including the acts and practices alleged in this complaint. Her principal office or place of business is the same as that of Genetus, Galen and George Oprean.

PAR. 2. Since approximately March of 1991, respondents have been engaged in the offering for sale and the sale of services in connection with the treatment of impotence. Impotence is the inability of a man to attain and maintain an erection of sufficient rigidity and/or duration to permit him to engage in sexual intercourse. Impotence is frequently a symptom or side-effect of serious diseases, such as arteriosclerosis, aneurysms, high blood pressure, diabetes, strokes, kidney disease, and spinal cord injuries. Impotence can be a side-effect of various prescription medications or alcoholism, and can also be caused by depression, stress, anxiety and other psychological factors.

Impotence can be treated by various methods. Some methods treat the underlying physical, psychological or behavioral causes of impotence. Other methods produce an erection without treating the underlying cause of the impotence. The only treatment method offered by Genetus consisted of injections of the drug Prostaglandin E1 or of a solution containing a combination of Prostaglandin El, Papaverine and Phentolamine (hereinafter referred to as "Tri-mix"). Prostaglandin E1 or Tri-mix may, if injected in appropriate doses into the patient's penis, cause an erection to occur for a patient experiencing impotence. Injections of Prostaglandin E1 or Tri-mix do not, however, treat the underlying condition that causes a patient's impotence.

Patients purchasing Genetus' treatments typically received an examination and a test injection of Prostaglandin El and had blood and urine specimens taken and submitted to a laboratory. Genetus prepared the prescribed dosage of the Prostaglandin El or Tri-mix and sold these drugs directly to patients. Genetus also taught patients how to self-inject the Prostaglandin El or Tri-mix and sold them a self-injection device and additional supplies of the drug.

In many instances, Genetus submitted claims for reimbursement for services, laboratory tests, drugs and devices directly to the patients' medical insurance companies. In other instances, patients paid Genetus directly and submitted the invoices themselves to their medical insurers for reimbursement. Genetus typically required its patients to make an initial cash payment and to pay for all or part of the charges not paid to Genetus by the patients' insurance companies.

PAR. 3. In the course and conduct of Genetus' business, respondents Genetus, George Oprean and Linda Oprean have disseminated or caused to be disseminated advertisements and promotional materials for the purpose of promoting the sale of impotence treatment services described above in paragraph two. The self-injection device prescribed and sold by Genetus is a "device" for purposes of Section 12 of the Federal Trade Commission Act. Prostaglandin El, Papaverine, Phentolamine, and the Tri-mix combination prescribed and sold by Genetus are "drugs" for purposes of Section 12 of the Federal Trade Commission Act. Genetus, George Oprean and Linda Oprean placed, or caused to be placed, advertisements on various radio stations broadcast generally to the public to promote their impotence treatment services to prospective patients. Genetus, George Oprean and Linda Oprean further

advertised their impotence treatment services through the use of fact sheets, letters, brochures, and pamphlets provided to patients and prospective patients.

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

PAR. 5. Respondents Genetus, George Oprean and Linda Oprean have disseminated or have caused to be disseminated radio advertisements and promotional materials, including but not necessarily limited to the attached Exhibits A, B, and C.

PAR. 6. The radio advertisements and promotional materials referred to in paragraph five contained the following statements:

A. Did you know that impotence is a medical problem? It can be caused by diabetes, alcohol, smoking or stress. There are over 200 prescription and non-prescription medications that can cause impotence. This is Phil Chenier speaking to you on behalf of Genetus. Before Genetus, most men with impotence suffered needlessly not knowing that there was help available. Now thanks to the doctors and medical staff at Genetus, thousands of men are functioning better than ever before. At Genetus, you'll be medically evaluated, tested and treated and when you leave on your very first visit, you will be functional again. Many members of the Genetus staff have experienced some problem with impotence. They understand what a man goes through when impotence creeps up on him. They know how it can affect his life and relationships. So if you are having any problem with impotence, call the impotence specialists at Genetus today at 703/461-9269. That's 703/461-9269 for Genetus. Your best chance to restore your life. (Exhibit A);

B. Impotence. The word itself would strike down the strongest of men, but no more. Medical science has discovered a simple, safe and effective way to treat impotence. I am George Oprean speaking for Genetus where all we do is treat impotence. If you are one of the seven hundred thousand men in this area that are afflicted by impotence, I want you to know that you don't have to suffer anymore. By calling 703/461-9269 you can permanently arrest your impotence. At Genetus, you will be medically evaluated and treated, and when you leave you will be functional -- or as I like to say, you're back in business. Impotence is not curable. It knows no age, color or creed. But it is 100% treatable. You no longer have to say I'm sorry or feel guilty. Call 703/461-9269 and find out for yourself what a new beginning feels like. That's 703/461-9269. And believe me, it works. (Exhibit B);

C. . . . .

THE GENETUS PROGRAM

Impotence is a disease but not a primary disease. When you call you will be given an appointment to see one of the Genetus physicians. You will be given a complete medical evaluation. The purpose of the evaluation is to find out what is the underlying cause of your impotence. You will also be given a diagnostic

injection of Prostaglandin E-1, and you will be asked to keep track of two very important things duration and rigidity. The erection should last at least one hour. It may last longer or less than an hour. You rate the rigidity on a scale of 1-10. This information is important to us so that we can adjust your final dosage to [sic] that you are pleased with the end product.

Prostaglandin E-1, or PG-1 is the medication that is used to produce the erection. PG-1 is a vaso dilator that expands the vessels in the penis and draws the blood into the penis so that an erection can occur. Without getting blood into the penis and keeping it in the penis you cannot have or maintain an erection.

PG-1 has no side effects or contraindications which means that it does not effect [sic] any other organ in your body nor does it effect [sic] any medication that you might be taking. It passes out of your body in your urine and there are no residual effects. It is the safest drug that can be used.

You will be asked to return within 72 hours. At that time all your lab work will be back and you will tell us about the duration and rigidity. It is at this time that the medical staff will determine your maintenance dosage. You will also be taught how to use the Inject Ease system so that you can self inject. In fact you will self inject yourself with normal saline so that we know you know the proper method.

There after [sic] each time you use the PG-1 you will achieve an erection that will last you at lease [sic] an hour, even after ejaculation takes place.

IN MOST CASES YOUR INSURANCE WILL COVER THE MAJORITY OF THE COSTS [sic] IT DEPENDS ON YOUR COMPANY AND YOUR COVERAGE.

. . . .

(Exhibit C).

PAR. 7. Through the use of the statements contained in the radio advertisements and promotional materials referred to in paragraph six, including but not necessarily limited to the promotional materials attached as Exhibits A, B and C, respondents Genetus, George Oprean and Linda Oprean have represented, directly or by implication, that:

A. Each patient purchasing Genetus' services would be examined by a physician at Genetus.

B. Each patient purchasing Genetus' services would receive a medical diagnosis and treatment of the underlying cause of his impotence.

C. Each patient purchasing Genetus' services would be evaluated and treated by a physician or other medical practitioner licensed to do so.

PAR. 8. In truth and in fact:

A. Not every patient who purchased Genetus' services was examined by a physician; in fact, many patients were examined solely by respondent Linda Oprean, who was not a physician.

B. Not every patient who purchased Genetus' services received a medical diagnosis and treatment of the underlying cause of his impotence.

C. Not every patient was evaluated and treated by a physician or other medical practitioner licensed to do so; in fact, many patients were evaluated or treated solely by respondent Linda Oprean, who was not licensed to perform these activities.

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

PAR. 9. Through the use of the statements contained in the radio advertisements and promotional materials referred to in paragraph six, including but not necessarily limited to the radio advertisements and promotional materials attached as Exhibits A, B and C, respondents Genetus, George Oprean and Linda Oprean have represented, directly or by implication, that:

A. Prostaglandin El has no side-effects or contraindications.
B. The treatment program offered by Genetus is unqualifiedly safe.
C. The treatment program offered by Genetus would arrest each patient's impotence.

PAR. 10. In truth and in fact:

A. Prostaglandin El has possible side-effects, including priapism (a prolonged erection) and fibrosis of penile tissue, and use of Prostaglandin El is contraindicated for certain patients.

B. The treatment program offered by Genetus was not unqualifiedly safe.

C. The treatment program offered by Genetus did not arrest each patient's impotence.

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

PAR. 11. In the course and conduct of Genetus' business, respondents Genetus, George Oprean and Linda Oprean represented,

directly or by implication, to doctors who were employed by Genetus, to patients who received various services from Linda Oprean, and to insurance companies to whom Genetus and its patients submitted claims for reimbursement for goods and services provided to patients, that Linda Oprean was a "nurse practitioner" under the laws of Virginia.

PAR. 12. In truth and in fact, respondent Linda Oprean is not now, and never has been, a "nurse practitioner" under the laws of Virginia; rather she was licensed in Virginia only as a registered nurse. Therefore, the representations set forth in paragraph eleven were, and are, false and misleading.

PAR. 13. In the course and conduct of Genetus' business, respondents Genetus, George Oprean and Linda Oprean represented, directly or by implication, to patients and to insurance companies that:

A. All medical tests and laboratory procedures billed by Genetus had been performed.

B. All patients had been diagnosed by, and services performed or ordered by, a medical practitioner licensed to do so.

C. All claims submitted by Genetus to insurance companies for reimbursement were signed, or approved for signature, by a physician.

PAR. 14. In truth and in fact:

A. Not all medical tests and laboratory procedures billed by Genetus were performed.

B. Not all patients were diagnosed by, nor were services rendered or ordered by, a medical practitioner licensed to do so in many instances, patients were purportedly diagnosed by, and services rendered or ordered by, respondent Linda Oprean, who was not licensed to perform these services.

C. Not all claims submitted by Genetus to insurance companies for reimbursement were signed, or approved for signature, by a physician; in many instances, claims were instead signed by respondent Linda Oprean without a physician's knowledge or permission.

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

PAR. 15. Through the representations in paragraph thirteen and through the letter attached hereto as Exhibit C, respondents Genetus, George Oprean and Linda Oprean also falsely represented to patients and prospective patients that in most cases, the majority of the costs of Genetus' treatment program would be covered by the patients' medical insurance, depending on the insurance company and the patients' coverage.

PAR. 16. In truth and in fact, the majority of the costs billed to insurance companies for Genetus' treatment program were not, in most cases, covered by the patients' insurance for reasons independent of the scope of the patients' health insurance policy. In fact, insurers frequently rejected claims for goods and services billed by Genetus for numerous reasons, including, but not limited to:

A. The reasons set forth in paragraph fourteen; and

B. The fact that the amounts Genetus charged for certain goods and services bore no reasonable relationship to their costs and substantially exceeded the amounts insurers had agreed to pay for such goods and services.

Consequently, patients were responsible for paying most or all of the costs billed by Genetus.

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

PAR. 17. The acts and practices of respondents as alleged in this complaint constitute unfair or deceptive acts or practices in or affecting commerce in violation of Sections 5(a) and 12 of the Federal Trade Commission Act.

PAR. 18. Respondent Galen is a successor corporation to respondent Genetus and is the *alter ego* of respondents Genetus and/or George Oprean. As such, Galen is liable for the false, misleading and deceptive acts and practices in violation of Sections 5(a) and 12 of the FTC Act committed by Genetus and George Oprean as alleged herein.

EXHIBIT A

GENETUS CHENIER TAPE #2

VOICEOVER:

Did you know that impotence is a medical problem? It can be caused by diabetes, alcohol, smoking or stress. There are over 200 prescription and non-prescription medications that can cause impotence. This is Phil Chenier speaking to you on behalf Genetus. Before Genetus, most men with impotence suffered needlessly not knowing that there was help available. Now thanks to the doctors and medical staff at Genetus thousands of men are functioning better than ever before. At Genetus, you'll be medically evaluated, tested and treated and when you leave on your very first visit, you will be functional again. Many members of the Genetus staff have experienced some problem with impotence. They understand what a man goes through when impotence creeps up on him. They know how it can affect his life and relationships. So if you are having any problem with impotence. Call the impotence specialist at Genetus today at 703/461-9269. That's 703/461-9269 for Genetus. Your best chance to restore your life.

EXHIBIT B

GENETUS - GEORGE OPREAN TAPE

VOICEOVER:

Impotence. The word itself would strike down the strongest of men, but no more. Medical science has discovered a simple, safe and effective way to treat impotence. I am George Oprean speaking for Genetus where all we do is treat impotence. If you are one of the seven hundred thousand men in this area that are afflicted by impotence, I want you to know that you don't have to suffer anymore. By calling 703/461-9269 you can permanently arrest your impotence. At Genetus, you will be medically evaluated and treated, and when you leave you will be functional -- or as I like to say, you're back in business. Impotence is not curable. It knows no age, color or creed. But it is 100% treatable. You no longer have to say I'm sorry or feel guilty. Call 703/461-9269 and find out for yourself what a new beginning feels like. That's 703/461-9269. And believe me, it works.

EXHIBIT C

GENETUS CORP.

Welcome to GENETUS:

Thank you for your inquiry about GENETUS and its impotence treatment program. Enclosed is the information you requested.

As you read this information, I would like you to understand a few things. First, male sexual dysfunction (more commonly referred to as impotence) is primarily a medical problem. Second, there are very few people who are suffering from this problem solely as a result of physchological difficulties. Third, THAT IMPOTENCE IS NOT CURABLE, BUT IS 100% TREATABLE.

The medical community has only recently recognized male sexual dysfunction as being primarily a medical problem. Previously, due to the lack of understanding and disinterest it was universally thought of as a mental problem, giving rise to the lie that "It's all in your head." In fact, psychogenic impotence occurs in less than 10% of the male population. Today, it is generally agreed that most impotence is a symptom of a physical disorder originating elsewhere in the body and can be serious if not diagnosed and treated.

Until recently, the subject of impotence was never discussed publicly. The media and others shunned the topic. Even today in this enlightened age, many local and national television, radio outlets and magazines will not accept advertising that would let people know there is a medically approved treatment program, like ours, that is effective for 95% of the men suffering from any form of impotence.

We at GENETUS take pride in the leading role that we have taken in providing a safe effective treatment program and more important in making the public aware of the fact that IMPOTENCE IS A MEDICAL PROBLEM AND JUST LIKE DIABETES IS NOT CURABLE BUT IS TREATABLE.

Impotence can and does destroy a man's self esteem, confidence and personal relationships, believe me I know because I have been there.

The staff at GENETUS is here to help in any way we can. GENETUS MEANS A NEW BEGINNING. It has been that for hundreds of thousands of men, and it could be yours too.

Sincerely;

George Oprean
President

THE GENETUS PROGRAM

Impotence is a disease but not a primary disease. When you call you will be given an appointment to see one of the Genetus physicians. You will be given a complete medical evaluation. The purpose of the evaluation is to find out what is the underlying cause of your impotence. You will also be given a diagnostic injection of Prostaglandin E-1, and you will be asked to keep track of two very important things duration and rigidity. The erection should last at least one hour. It may last longer or less than an hour. You rate the rigidity on a scale of 1-10. This information is important to us so that we can adjust your final dosage to that you are pleased with the end product.

Prostaglandin E-1, or PG-1 is the medication that is used to produce the erection. PG-1 is a vaso dilator that expands the vessels in the penis and draws the blood into the penis so that an erection can occur. Without getting blood into the penis and keeping it in the penis you cannot have or maintain an erection.

PG-1 has no side effects or contraindications which means that it does not effect any other organ in your body nor does it effect any medication that you might be taking. It passes out of your body in your urine and there are no residual effects. It is the safest drug that can be used.

You will be asked to return within 72 hours. At that time all your lab work will be back and you will tell us about the duration and rigidity. It is at this time that the medical staff will determine your maintenance dosage. You will also be taught how to use the Inject Ease system so that you can self inject. In fact you will self inject yourself with normal saline so that you know the proper method.

There after each time you use the PG-1 you will achieve an erection that will last you at lease an hour, even after ejaculation takes place.

IN MOST CASES YOUR INSURANCE WILL COVER THE MAJORITY OF THE COSTS IT DEPENDS ON YOUR COMPANY AND YOUR COVERAGE.

Appointments are required so please call before you come.

DECISION AND ORDER

The Federal Trade Commission having initiated an investigation of certain acts and practices of the respondents named in the caption hereof, and the respondents having been furnished thereafter with a copy of a draft of a complaint which the Bureau of Consumer Protection proposed to present to the Commission for its consideration, and which, if issued by the Commission would charge respondents Genetus Alexandria, Inc. ("Genetus"), George Oprean, and Linda Huffman Oprean ("Linda Oprean"), with violation of the Federal Trade Commission Act, and would charge respondent Galen Medical Centers, Ltd. ("Galen") as a successor to Genetus and an *alter ego* of Genetus and/or George Oprean; and

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

The Commission having thereafter considered the matter and having determined that it had reason to believe that the respondents Genetus, George Oprean, and Linda Oprean had violated said Act, and that respondent Galen is the successor corporation to Genetus and an *alter ego* of Genetus and/or George Oprean, and that the complaint should issue stating its charges in those respects, 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 2.34 of its Rules, now in further conformity with the procedure prescribed by Section 2.34 of its Rules, the Commission hereby issues its complaint, makes the following jurisdictional findings and enters the following order:

1. Respondent Genetus Alexandria, Inc. is a corporation organized, existing and doing business under and by virtue of the

laws of the Commonwealth of Virginia, with its office and principal place of business located at 2843 Duke Street, Alexandria, Virginia.

Respondent Galen Medical Centers, Ltd. is a corporation organized, existing and doing business under and by virtue of the laws of the Commonwealth of Virginia, with its office and principal place of business located at 2843 Duke Street, Alexandria, Virginia.

Respondent George Oprean is the President, Secretary, Treasurer and a director of Genetus and is the President and a director of Galen. He formulates, directs, controls and implements the policies, acts and practices of Genetus and Galen. His address is 2843 Duke Street, Alexandria, Virginia.

Respondent Linda Huffman Oprean is the Vice President and a director of Genetus and is a director of Galen. Together with George Oprean, she formulates, directs, controls and implements the policies, acts and practices of Genetus and Galen. Her address is 2843 Duke Street, Alexandria, Virginia.

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

ORDER

DEFINITIONS

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

1. *"Impotence"* means the inability of a man to attain and maintain an erection of sufficient rigidity and/or duration to enable him to engage in sexual intercourse.

2. *"Treatment procedure"* means any method of treating impotence or any other medical condition, disease or symptom, including, but not limited to, injections, drug therapy, hormone replacements, use of devices to induce erections, vascular surgery, use or implantation of devices, behavior modification, counseling, psychotherapy, or any other method.

I.

It is ordered, That respondents Genetus Alexandria, Inc., a corporation, ("Genetus"), Galen Medical Centers, Ltd. ("Galen"), their successors and assigns, and their officers, and George Oprean, individually and as President and a director of Genetus and Galen, and Linda Huffman Oprean ("Linda Oprean"), individually and as an officer and a director of Genetus and as a director of Galen, and respondents' agents, representatives and employees, directly or through any corporation, subsidiary, division or other device, in connection with the advertising, promotion, offering for sale or sale of any treatment procedure in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from, in any manner, directly or by implication:

A. Falsely representing in any manner, directly or by implication, that each individual purchasing any impotence treatment procedure will receive an examination by a physician, or otherwise misrepresenting the nature or extent of physician participation in any treatment procedure;

B. Falsely representing in any manner, directly or by implication, that each individual purchasing any impotence treatment procedure will receive a medical diagnosis and treatment of the underlying cause of his impotence, or otherwise misrepresenting the nature or extent of medical diagnosis or treatment provided in connection with any treatment procedure;

C. Falsely representing in any manner, directly or by implication, the qualifications, credentials, or licenses held by any person involved in providing any treatment procedure;

D. Representing in any manner, directly or by implication, that Prostaglandin E1, Papaverine, or Phentolamine, or any combination thereof, has no side-effects or contraindications, or otherwise misrepresenting the side-effects or contraindications of any drug or treatment procedure;

E. Falsely representing in any manner, directly or by implication, that any impotence treatment procedure is unqualifiedly safe, or otherwise misrepresenting the safety of any treatment procedure;

F. Falsely representing in any manner, directly or by implication, that any impotence treatment procedure will arrest impotence, or

otherwise misrepresenting the efficacy or the duration of results of any treatment procedure;

G. Falsely representing in any manner, directly or by implication, the extent to which medical insurance will cover the costs of any treatment procedure;

H. Falsely representing in any manner, directly or by implication, that medical procedures were performed;

I. Falsely representing in any manner, directly or by implication, that claims submitted to insurance companies were signed, or approved for signature, by a physician;

J. Misrepresenting the safety, side-effects, or efficacy of, or the extent, nature, or duration of results of, any treatment procedure.

II.

It is further ordered, That respondents and their officers, agents, servants, employees, attorneys, subsidiaries, affiliates, successors, assigns, and all persons in active concert or participation with them who receive actual notice of this order by personal service or otherwise, and each of them, shall take no further actions to collect any payments from customers of Genetus on any outstanding accounts receivable of Genetus; provided, however, that this paragraph shall not prohibit respondents from fulfilling any legal obligations arising out of any *bona fide* pledge or assignment of such accounts receivable made to third party creditors of Genetus prior to September 1, 1994.

III.

It is further ordered:

A. That respondents Genetus, George Oprean and Linda Oprean shall jointly and severally pay to the FTC as consumer redress the sum of $250,000; provided, however, that this liability will be suspended, subject to the provisions of subparts B and C below, upon the execution and submission to the Commission of a truthful sworn declaration by respondents Genetus, Galen, George Oprean, and Linda Oprean, in the form shown on Exhibit A to this order, no later than three (3) days after the date of service of this order, that shall reaffirm and attest to the truth, accuracy and completeness of the

financial statement provided by each such respondent dated August - - - , 1995, and previously submitted to the Commission.

B. That the Commission's acceptance of this order is expressly premised upon the financial statements and related documents provided by respondents to the FTC referred to in subpart A above. After service upon respondents of an order to show cause, the FTC may reopen this proceeding to make a determination whether there are any material misrepresentations or omissions in said financial statements and related documents. Respondents shall be given an opportunity to present evidence on this issue. If, upon consideration of respondents' evidence and other information before it, the FTC determines that there are any material misrepresentations or omissions in said financial statements and related documents showing that any of the respondents failed to disclose the existence of assets in the financial statements, that determination shall cause the entire amount of $250,000 to become immediately due and payable to the FTC, and interest computed at the rate prescribed in 28 U.S.C. 1961, as amended, shall immediately begin to accrue on any unpaid balance of this amount. Proceedings initiated under Part III are in addition to, and not in *lieu* of, any other civil or criminal remedies as may be provided by law, including any proceedings the FTC may initiate to enforce this order.

C. That any funds paid by respondents pursuant to subparts A and B above shall be paid into a redress fund administered by the FTC and shall be used to provide direct redress to consumers who purchased Genetus' services. If the FTC determines, in its sole discretion, that redress to consumers is wholly or partially impracticable, any funds not so used shall be paid to the United States Treasury. Respondents shall be notified as to how the funds are disbursed, but shall have no right to contest the manner of distribution chosen by the Commission.

IV.

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

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

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

V.

It is further ordered, That, for a period of five (5) years from the date of entry of this order, respondents shall distribute a copy of this order to each of their operating divisions, to each of their managerial employees, and to each of their officers, agents, representatives, or employees engaged in the preparation or placement of advertising or other material covered by this order and shall secure from such person a signed statement acknowledging receipt of this order.

VI.

It is further ordered, That respondents shall notify the Commission at least thirty (30) days prior to any proposed change in the corporation 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 out of this order.

VII.

It is further ordered, That, for a period of ten (10) years from the date of entry of this order, each individual respondent named herein shall promptly notify the Commission of the discontinuance of his or her present business or employment, with each such notice to include the respondent's new business address and a statement of the nature of the business or employment in which the respondent is newly engaged as well as a description of respondent's duties and responsibilities in connection with the business or employment.

VIII.

It is further ordered, That this order will terminate on February 12, 2016, or twenty years from the most recent date that the United States or the Federal Trade Commission files a complaint (with or without an accompanying consent decree) in federal court alleging any violation of the order, whichever comes later; provided, however, that the filing of such a complaint will not affect the duration of:

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

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

IX.

It is further ordered, That respondents shall, within sixty (60) days after service upon them of this order 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 they have complied with the requirements of this order.

EXHIBIT A

DECLARATION OF _____ PURSUANT TO 28 U.S.C. 1746

Pursuant to 28 U.S.C. 1746, I, _____, hereby state that the information contained in the financial statement of _____, provided to the Federal Trade Commission on _____, 1995, was true, accurate and complete at such time.

I declare under penalty of perjury that the foregoing is true and correct.

Dated: _____ _____

[signature]

IN THE MATTER OF

FRANK A. LATRONICA, JR., ET AL.

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

Docket C-3640. Complaint, Feb. 12, 1996--Decision, Feb. 12, 1996

This consent order requires, among other things, the distributor and the manufacturer of the Duram Emergency Escape Mask to possess competent and reliable scientific evidence to substantiate claims that their mask will absorb, filter out, or otherwise protect the user from any hazardous gas or fumes associated with fires, and for claims that the mask is appropriate for use in mines. In addition, the consent order requires the respondents to provide a disclosure statement on all package labels and inserts for the mask, or any substantially similar products.

Appearances

For the Commission: *Alan E. Krause* and *C. Steven Baker.*

For the respondents: *George Miron, Feith & Zell,* Washington, D.C.

COMPLAINT

The Federal Trade Commission, having reason to believe that Frank A. Latronica, Jr., individually and doing business as Life Safety Products; and Duram Rubber Products, a partnership, ("respondents"), have violated the provisions of the Federal Trade Commission Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, alleges:

PARAGRAPH 1. Respondent Frank A. Latronica, Jr., is an individual doing business as Life Safety Products. His principal office or place of business is located at 412 North Pacific Coast Highway, Suite 357, Laguna Beach, California.

PAR. 2. Respondent Duram Rubber Products is a registered partnership of Kibbutz Ramat Hakovesh with its principal office or place of business at Kibbutz Ramat Hakovesh, 44930 Israel.

PAR. 3. Respondents have advertised, offered for sale, sold, and distributed the Duram Emergency Escape Mask to the public.

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

PAR. 5. Respondents have disseminated or have caused to be disseminated advertisements and other promotional materials for the Duram Emergency Escape Mask, including, but not necessarily limited to, the attached Exhibit 1. This advertisement contains the following statements:

A. "WHEN SECONDS COUNT . . .

The Duram Emergency Escape Mask Provides Protection from Deadly Toxic Smoke and Gases."

B. "The Duram mask provides up to 20 minutes of protection in the most toxic environment; sufficient time to escape safely."

C. "The Duram Smoke Filier [sic] Mask is a disposable hood designed to provide emergency respiratory protection to enable safe escape from fires and related dangers such as heavy smoke, most poisonous fumes, dust, and lethal gases."

D. "Test results show that the mask filters 94% of the smoke and enables regular breathing in an environment filled with heavy smoke."

E. "APPLICATIONS . . . .

Factories and mines (in case of explosions)."

PAR. 6. Through the use of the statements contained in the advertisements referred to in paragraph five, including but not necessarily limited to the advertisement attached as Exhibit 1, respondents have represented, directly or by implication, that:

A. The Duram Emergency Escape mask will absorb or filter out all significant toxic smoke and poisonous fumes and lethal gases associated with fires.

B. The Duram Emergency Escape Mask will protect the user from all significant hazards associated with toxic smoke, poisonous fumes and lethal gases in fires for up to twenty minutes.

C. The Duram Emergency Escape Mask is appropriate for use in mines.

PAR. 7. In truth and in fact:

A. The Duram Emergency Escape Mask will not absorb or filter out all significant toxic smoke or poisonous fumes or lethal gases associated with fires, because it does not absorb or filter out carbon monoxide, a lethal gas associated with fires.

B. The Duram Emergency Escape Mask will not protect the user from all significant hazards associated with toxic smoke, or poisonous fumes or lethal gases in fires for up to twenty minutes, because it does not absorb or filter out carbon monoxide, a lethal gas associated with fires.

C. The Duram Emergency Escape mask is not appropriate for use in mines because it does not meet the standards developed by the National Institute for Occupational Safety and Health and the United States Bureau of Mines for Respiratory Protective Devices, as set forth in 30 CFR 11.

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

PAR. 8. Through the use of the statements contained in the advertisements referred to in paragraph five, including but not necessarily limited to the advertisement attached as Exhibit 1, respondents have represented, directly or by implication, that at the time they made the representations set forth in paragraph six, respondents possessed and relied upon a reasonable basis that substantiated such representations.

PAR. 9. In truth and in fact, at the time they made the representations set forth in paragraph six, respondents did not possess and rely upon a reasonable basis that substantiated such representations. Therefore, the representation set forth in paragraph eight was, and is, false and misleading.

PAR. 10. Through the use of the statements contained in the advertisements referred to in paragraph five, including but not necessarily limited to the advertisement attached as Exhibit 1, respondents have represented, directly or by implication, that scientific tests prove that the Duram Emergency Escape Mask filters 94% of the smoke in an environment filled with heavy smoke.

PAR. 11. In truth and in fact, scientific tests do not prove that the Duram Emergency Escape Mask filters 94% of the smoke in an environment filled with heavy smoke. Therefore, the representation set forth in paragraph ten was, and is, false and misleading.

PAR. 12. In the advertising and sale of the Duram Emergency Escape Mask, respondents have represented that the Duram Emergency Escape Mask absorbs or filters out all significant toxic smoke, poisonous fumes and lethal gases associated with fires. Respondents have failed to disclose to consumers that the Duram Emergency Escape Mask does not absorb or filter out carbon monoxide, a lethal gas associated with fires. This fact would be material to consumers in their purchase or use decisions regarding the Duram Emergency Escape Mask. The failure to disclose this fact, in light of the representations made, was, and is, a deceptive practice.

PAR. 13. In providing the advertisements and promotional materials referred to in paragraph five to its distributors, respondent Duram Rubber Products has furnished the means and instrumentalities to those distributors to engage in the acts and practices alleged in paragraphs five through twelve.

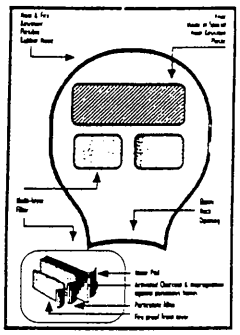
PAR. 14. The acts and practices of respondents as alleged in this complaint constitute unfair or deceptive acts or practices in or affecting commerce in violation of Section 5(a) of the Federal Trade Commission Act.

EXHIBIT 1

EXHIBIT 1

When Seconds Count ...

The Duram Emergency Escape Mask Provides Protection from Deadly Toxic Smoke and Gases



- **Increased Survivability**
  The Duram mask provides up to 20 minutes of protection in the most toxic environment; sufficient time to escape safely.

- **Ease of Use**
  The extreme flexibility and special design enables the user to don the mask very quickly; easily adjusting to any head shape, long or short hair, glasses or jewelry.

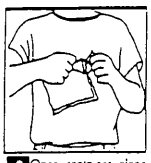
- **Compact**
  Constructed of a unique flame resistant rubber, the Duram Mask is thin, strong and very light weight. The 4"x5"x¼" low profile package makes it comfortable to carry in a coat pocket, briefcase or purse.

- **Visibility**
  The wide visor made of heat-resistant material, enables clear visibility with a wide 180 degree angle of vision.

- **Storage**
  The Duram Mask is vacuum sealed in a foil container to guarantee the effectiveness of the filter for 4 years (travel case and wall mount fixture also available)

- **Affordability**
  At a cost $49.95 respiratory protection is affordable for residential personal or corporate applications

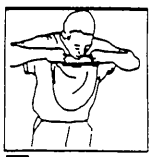
The Duram Mask is protected by patents and pending patents worldwide. US Patent No. 4870959



1 Open container along dotted line.

2 Extract mask from the vacuum sealed wrapper

3 Hold mask upside down, facing your body



4 Tuck edge under your chin

5 Pull mask over your head

6 Adjust mask to proper fit (see reverse)

The Duram Smoke Filter Mask is a disposable hood designed to provide emergency respiratory protection to enable safe escape from fires and related dangers such as heavy smoke, most poisonous fumes, dust, and lethal gases.

Smoke Is Very Dangerous

Research conducted by the NFPA (National Fire Protection Association) has determined that most deaths in fires result from smoke inhalation.

Utilizing advanced filtration technology, this mask gives the user extra time to find a way out and escape safely. Test results show that the mask filters 94% of the smoke and enables regular breathing in an environment filled with heavy smoke.

Applications

- Private homes, apartment houses, and high-rise buildings.
- Hotels, public facilities, and office buildings.
- Aircrafts, cruise ships, and trains.
- Factories and mines (in case of explosions).
- Industrial areas with severe ecological problems such as air pollution, heavy dust or chemical exposure.

For Complete Information Contact

LIFE SAFETY
PRODUCTS

1-800-359-4323

4130 South Sandhill Road
Suite A-5
Las Vegas, Nevada 89121

DECISION AND ORDER

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

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

The Commission having thereafter considered the matter and having determined that it had reason to believe that the respondents have violated the said Act, and that complaint should issue stating its charges in that respect, and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of sixty (60) days, and having duly considered the comments received 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 Frank A. Latronica, Jr., is an individual doing business as Life Safety Products with his principal office or place of business at 412 North Pacific Coast Highway, Suite 357, Laguna Beach, California.

2. Respondent Duram Rubber Products is a registered partnership of Kibbutz Ramat Hakovesh organized, existing and doing business under and by virtue of the laws of the country of Israel, with its principal office or place of business at Kibbutz Ramat Hakovesh 44930 Israel.

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

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

ORDER

DEFINITIONS

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

(1) *"Duram Emergency Escape Mask"* shall mean the over-the-head escape hood manufactured by Duram Rubber Products, an Israeli company.

(2) *"Substantially similar product"* shall mean any mask, hood or other product that is designed or advertised as offering the user protection from the hazards associated with fires.

(3) *"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.

I.

It is ordered, That respondents Frank A. Latronica, Jr., individually and doing business as Life Safety Products; and Duram Rubber Products, a partnership, its successors and assigns, and its officers; and respondents' agents, representatives, and employees, directly or through any corporation, subsidiary, division, or other device, in connection with the labeling, advertising, promotion, offering for sale, sale, or distribution of the Duram Emergency Escape Mask, or any substantially similar product, in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from representing, directly or by implication that:

A. Such product is capable of absorbing, removing, filtering out, or otherwise protecting the user from any hazardous gas or fumes associated with fire, unless such representation is true and, at the time of making such representation, respondents possess and rely upon competent and reliable scientific evidence that substantiates the representation; or

B. Such product can protect the user from any hazards associated with fire, unless such representation is true and, at the time of making such representation, respondents possess and rely upon competent and reliable scientific evidence that substantiates the representation; or

C. Such product is appropriate for use in mines, unless such representation is true and, at the time of making such representation, respondents possess and rely upon competent and reliable evidence that substantiates the representation.

II.

It is further ordered, That respondents Frank A. Latronica, Jr., individually and doing business as Life Safety Products; and Duram Rubber Products, a partnership, its successors and assigns, and its officers; and respondents' agents, representatives, and employees, directly or through any corporation, subsidiary, division, or other device, shall include, as specified below, the following disclosure in any advertisement or promotional material for the Duram Emergency Escape Mask, or any substantially similar product, that is advertised, offered for sale, or sold by respondents that is incapable of absorbing, removing, filtering or otherwise providing significant protection from carbon monoxide, if that advertising or promotional material expressly or impliedly represents that the device protects the user from any hazard associated with fire:

> NOTICE: This device does not filter carbon monoxide -- a lethal gas associated with fire.

In any print advertisement or promotional material, the above disclosure shall be printed in a typeface and color that are clear and prominent in at least ten-point bold type print, in close conjunction with the representation. In multipage documents, the disclosure shall appear on the cover or first page.

In any advertisement disseminated on television broadcast, cablecast, home video or theatrical release, the above disclosure shall be displayed in a legible superscript with a simultaneous voice-over recitation of the disclosure in a manner designed to ensure clarity and prominence.

In any radio advertisement, the above disclosure shall be spoken in a manner designed to ensure clarity and prominence.

Nothing contrary to, inconsistent with, or in mitigation of the above disclosure shall be used in any advertisement in any medium.

III.

It is further ordered, That respondents Frank A. Latronica, Jr., individually and doing business as Life Safety Products; and Duram Rubber Products, a partnership, its successors and assigns, and its officers; and respondents' agents, representatives, and employees, directly or through any corporation, subsidiary, division, or other device, shall include, as specified below, the following disclosure on all package labels and package inserts for the Duram Emergency Escape Mask, or any substantially similar product, advertised, offered for sale, or sold by respondents that is incapable of absorbing, removing, filtering or otherwise providing significant protection from carbon monoxide:

> WARNING: This device does not filter carbon monoxide -- a lethal gas associated with fire.

The above-required language shall be printed in at least ten-point bold type print in a typeface and color that are clear and prominent. Nothing contrary to, inconsistent with, or in mitigation of the above disclosure shall be used on any such package label or product insert.

IV.

It is further ordered, That respondents Frank A. Latronica, Jr., individually and doing business as Life Safety Products; and Duram Rubber Products, a partnership, its successors and assigns, and its officers; and respondents' agents, representatives, and employees, directly or through any corporation, subsidiary, division, or other device, in connection with the labeling, advertising, promotion,

offering for sale, sale, or distribution of any fire protection or safety related product, 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 any such product protects or assists in protecting the user from respiratory hazards associated with fire, explosions, air pollution, chemical exposure or other environments where normal breathing is impaired, unless, 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 the representation.

V.

It is further ordered, That respondents Frank A. Latronica, Jr., individually and doing business as Life Safety Products; and Duram Rubber Products, a partnership, its successors and assigns, and its officers; and respondents' agents, representatives, and employees, directly or through any corporation, subsidiary, division, or other device, in connection with the labeling, advertising, promotion, offering for sale, sale, or distribution of any fire protection or safety related product, 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 or interpretations of any test or study.

VI.

It is further ordered, That respondents shall:

A. Within thirty (30) days from the date of service of this order, deliver by first class mail, a dated notification letter, on Life Safety Products letterhead stationery, in the form set forth in Appendix A to this order, to each person, partnership or corporation who purchased a Duram Emergency Escape Mask from Life Safety Products. The notification letter shall be delivered by itself in a format that does not include any additional communication from respondent.

B. Within sixty (60) days from the date of service of this order, deliver by first class mail, a dated notification letter, on Life Safety

Products letterhead stationery, in the form set forth in Appendix A to this order, to each person, partnership, or corporation who purchased a Duram Emergency Escape Mask from any of the catalog retailers to whom Life Safety Products sold the Duram Emergency Escape mask for resale. The notification letter shall be delivered by itself in a format that does not include any additional communication from respondent.

VII.

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

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

VIII.

It is further ordered, That respondents shall:

A. Within thirty (30) days from the effective date of this order deliver a copy of this order to each of their officers, agents, representatives, and employees who are engaged in the preparation or placement of advertisements, promotional materials, product labels or other such sales materials covered by this order.

B. For a period of ten (10) years from the effective date of this order deliver a copy of this order to each of their future officers, agents, representatives, and employees who are engaged in the preparation or placement of advertisements, promotional materials, product labels or other such sales materials covered by this order, within three (3) days after the person assumes such position.

IX.

It is further ordered, That the respondent Duram Rubber Products shall notify the Federal Trade Commission at least thirty (30) days prior to any proposed change in its partnership structure, including but not limited to dissolution, assignment or sale resulting in the emergence of a successor partnership or corporation, the creation or dissolution of subsidiaries or affiliates, the planned filing of a bankruptcy petition or any other partnership change, that may affect compliance obligations arising under this order.

X.

It is further ordered, That respondent Frank A. Latronica, Jr., doing business as Life Safety Products, shall, for a period of ten (10) years from the date this order becomes final, notify the Commission within thirty (30) days of the discontinuance of his present business or employment and of each affiliation with a new business or employment. Each notice of affiliation with any new business or employment shall include his new business address and telephone number, current home address, and a statement describing the nature of the business or employment and the duties and responsibilities. The expiration of the notice provision of this Part X shall not affect any other obligation arising under this order.

XI.

It is further ordered, That each respondent shall, within sixty (60) days after service of this order upon it, 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.

XII.

This order will terminate on February 12, 2016, or twenty years from the most recent date that the United States or the Federal Trade Commission files a complaint (with or without an accompanying consent decree) in federal court alleging any violation of the order,

whichever comes later; provided, however, that the filing of such a complaint will not affect the duration of:

A. Any paragraph in this order that terminates in less than twenty years;

B. This order's application to any respondent that is not named as a defendant in such complaint; and

C. This order if such complaint is filed after the order has terminated pursuant to this paragraph.

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

APPENDIX A

Dear Purchaser of a Duram Emergency Escape Mask:
Please note this important safety information:

The Duram Emergency Escape Mask you purchased does not filter carbon monoxide -- a lethal gas associated with fire. This mask will not protect you from the effects of carbon monoxide gas.

This means that if you are wearing the Duram Emergency Escape Mask during a fire, exit immediately. You should know that carbon monoxide is colorless and odorless.

Our company, Life Safety Products, is sending all Duram Emergency Escape Mask ("Duram Mask") purchasers this alert as a result of a consent order with the Federal Trade Commission. According to the Federal Trade Commission, advertisements for the Duram Mask claimed that the mask would protect you from all significant fire hazards for up to 20 minutes. These hazards included toxic smoke, poisonous fumes, and lethal gases.

The advertisements for the Duram Mask did not make it clear that the mask does not filter carbon monoxide -- a lethal gas associated with fires.

We have now agreed not to make any claims about the mask's ability to protect you from fire hazards, unless we have reliable scientific evidence to back up these statements.

We also have learned that these masks are not appropriate for use in U.S. mines.

While the Duram Mask will not protect you from carbon monoxide gas, it will protect you from other potentially lethal gases associated with fire. These gases include hydrogen chloride, hydrogen cyanide, nitrogen dioxide, and sulfur dioxide.

Life Safety Products

IN THE MATTER OF

L'AIR LIQUIDE S.A., ET AL.

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

Docket C-3216. Consent Order, July 15, 1987--Set Aside Order, Feb. 15, 1996

This order reopens a 1987 consent order--which required L'Air Liquide to divest certain specified air separation gases assets and required prior Commission approval before making certain acquisitions--and sets aside the consent order pursuant to the Commission's Prior Approval Policy Statement, under which the Commission presumes that the public interest requires setting aside the prior approval requirements in outstanding merger orders and making them consistent with the policy.

ORDER SETTING ASIDE ORDER

On November 15, 1995, L'Air Liquide S.A. (formerly known as L'Air Liquide Societe Anonyme pour L'Etude et L'Exploitation des Procedes Georges Claude) ("L'Air Liquide"), the respondent named in the consent order issued by the Commission on July 15, 1987, in Docket No. C-3216 ("order"), filed its Petition To Reopen and Vacate Order ("Petition") in this matter. L'Air Liquide asks that the Commission reopen and vacate the 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 and Procedure, 16 CFR 2.51, and consistent with the Statement of Federal Trade Commission Policy Concerning Prior Approval And Prior Notice Provisions, issued on June 21, 1995 ("Prior Approval Policy Statement" or "Statement").[1] L'Air Liquide's Petition requests that the Commission "reopen the order in Docket No. C-3216, terminate the prior approval and related reporting obligations in paragraph VII, and vacate the order." Petition at 3. The thirty-day public comment period on L'Air Liquide's Petition ended on January 8, 1996. No comments were received. For the reasons discussed below, the Commission has determined to grant L'Air Liquide's Petition.

The Commission, in its Prior Approval Policy Statement, "concluded that a general policy of requiring prior approval is no

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

longer needed," citing the availability of the premerger notification and waiting period requirements of Section 7A of the Clayton Act, commonly referred to as the Hart-Scott-Rodino ("HSR") Act, 15 U.S.C. 18a, to protect the public interest in effective merger law enforcement. Prior Approval Policy Statement at 2. The Commission announced that it will "henceforth rely on the HSR process as its principal means of learning about and reviewing mergers by companies as to which the Commission had previously found a reason to believe that the companies had engaged or attempted to engage in an illegal merger." As a general matter, "Commission orders in such cases will not include prior approval or prior notification requirements." *Id.*

The Commission stated that it will continue to fashion remedies as needed in the public interest, including ordering narrow prior approval or prior notification requirements in certain limited circumstances. The Commission said in its Prior Approval Policy Statement that "a narrow prior approval provision may be used where there is a credible risk that a company that engaged or attempted to engage in an anticompetitive merger would, but for the provision, attempt the same or approximately the same merger." The Commission also said that "a narrow prior notification provision may be used where there is a credible risk that a company that engaged or attempted to engage in an anticompetitive merger would, but for an order, engage in an otherwise unreportable anticompetitive merger." *Id.* at 3. As explained in the Prior Approval Policy Statement, the need for a prior notification requirement will depend on circumstances such as the structural characteristics of the relevant markets, the size and other characteristics of the market participants, and other relevant factors.

The Commission also announced, in its Prior Approval Policy Statement, its intention "to initiate a process for reviewing the retention or modification of these existing requirements" and invited respondents subject to such requirements "to submit a request to reopen the order." *Id.* at 4. The Commission determined that, "when a petition is filed to reopen and modify an order pursuant to . . . [the Prior Approval Policy Statement], the Commission will apply a rebuttable presumption that the public interest requires reopening of the order and modification of the prior approval requirement consistent with the policy announced" in the Statement. *Id.*

The complaint in this matter ("complaint") alleged that L'Air Liquide's acquisition of Big Three Industries, Inc. ("BTI") would violate Section 7 of the Clayton Act, as amended, 15 U.S.C. 18, and Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45, by lessening competition and tending to create a monopoly in the production and sale of merchant oxygen and nitrogen in the Southern Rocky Mountain region, West Texas, North Texas and South Texas, and Florida, and by lessening competition and tending to create a monopoly in the production and sale of merchant argon in the United States.

The complaint alleged that the acquisition would eliminate actual competition between L'Air Liquide and BTI in the relevant markets; increase concentration in the relevant markets; and enhance the likelihood of collusion or interdependent coordination between or among the remaining firms in the relevant markets. The Commission's order required L'Air Liquide to divest certain specified air separation gases assets. After obtaining the Commission's approval, L'Air Liquide completed the required divestiture. Paragraph VII of the order prohibits L'Air Liquide from acquiring without prior approval of the Commission the stock or assets of any United States merchant air separation gases producer. Paragraph VII further requires L'Air Liquide to submit annual reports of compliance with the prior approval requirement.

The presumption is that setting aside the prior approval requirement in this order is in the public interest. Nothing to overcome the presumption has been presented, and nothing in the record suggests that L'Air Liquide would engage in the same acquisition as alleged in the complaint. Accordingly, and because the only remaining obligation under the order is the prior approval requirement and the attendant reporting obligations, the Commission has determined to reopen the proceeding in Docket No. C-3216 and set aside the order.

Accordingly, *It is hereby ordered*, That this matter be, and it hereby is, reopened, and that the Commission's order issued on July 15, 1987, be, and it hereby is, set aside as of the effective date of this order.