

Complaint

116 F.T.C.

IN THE MATTER OF

## MONSANTO COMPANY

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-3458. Complaint, Sept. 1, 1993--Decision, Sept. 1, 1993*

This consent order permits, among other things, a Missouri-based manufacturer of chemicals, including lawn and garden products, to acquire the Ortho Consumer Products Div. of Chevron Corp., and requires the respondent to divest certain assets to Commission-approved acquirers within one year. It also prohibits, among other things, Monsanto, for a period of 10 years, from acquiring, without prior Commission approval, an interest in any company engaged in the manufacture or formulation for sale in the U.S. of any non-selective herbicide for residential use.

*Appearances*

For the Commission: *Howard Morse* and *Allee A. Ramadhan*.

For the respondent: *Kenneth A. Letzler*, *Abe Krash* and *Richard A. Kleine*, in-house counsel, St. Louis, MO.

## COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, and by virtue of the authority vested in it by said Act, the Federal Trade Commission (Commission), having reason to believe that respondent Monsanto Company (Monsanto), a corporation, has agreed to acquire the assets of the Ortho Consumer Products Division of the Chevron Corporation (Chevron), in violation of Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45, and that such acquisition, if consummated, would violate Section 7 of the Clayton Act, as amended, 15 U.S.C. 18, and Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45, and 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 Monsanto is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware, with its principal place of business at 800 North Lindbergh Blvd., St. Louis, Missouri.

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

#### II. THE ACQUISITION

3. Pursuant to a letter agreement dated January 5, 1993, Monsanto agreed in principle to acquire from Chevron substantially all of the assets of the Ortho Consumer Products Division for a price of approximately \$416 million.

#### III. THE RELEVANT MARKET

4. The relevant line of commerce within which to analyze the effects of Monsanto's proposed acquisition of the Ortho Consumer Products Division of Chevron is the residential non-selective herbicide market, which consists of manufacturing or formulating, marketing and selling non-selective herbicide products for residential use in general control of brush, plants, weeds and grasses.

5. The relevant section of the country or geographic area within which to analyze the effects of the proposed acquisition is the United States.

## IV. MARKET STRUCTURE

6. The United States residential non-selective herbicide market is already highly concentrated, whether measured by the Herfindahl-Hirschmann Index or by two-firm and four-firm concentration ratios.

## V. ENTRY CONDITIONS

7. Entry into the United States residential non-selective herbicide market is difficult or unlikely.

## VI. EFFECTS OF THE ACQUISITION

8. The effects of the proposed acquisition, if consummated, may be substantially to lessen competition or to tend to create a monopoly in the relevant market in the following ways, among others:

(a) It will eliminate actual, direct and substantial competition between Monsanto and Chevron and increase Monsanto's ability unilaterally to exercise market power in the United States residential non-selective herbicide market;

(b) It will substantially increase the already high concentration in the United States residential non-selective herbicide market;

(c) It will raise barriers and impediments to entry into the United States residential non-selective herbicide market; and

(d) It will eliminate Ortho as a substantial independent competitive force in the United States residential non-selective herbicide market.

## VII. VIOLATIONS CHARGED

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

10. The proposed acquisition of the Ortho Consumer Products Division by Monsanto, if consummated, would constitute a violation of Section 7 of the Clayton Act, as amended, 15 U.S.C. 18, and Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45.

## DECISION AND ORDER

The Federal Trade Commission, having initiated an investigation of respondent's proposed acquisition of the Ortho Consumer Products Division of Chevron Corp., and the respondent having been furnished thereafter with a copy of this draft of complaint which the Bureau of Competition proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge respondent with violation of the Clayton Act and the Federal Trade Commission Act; and

The respondent, its attorney, and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the respondent of all the jurisdictional facts set forth in the aforesaid draft of the 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 the 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 filed thereafter by interested persons 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 jurisdiction findings and enters the following order:

1. Monsanto Company 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 800 North Lindbergh Boulevard, St. Louis, Missouri.

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

## ORDER

### I.

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

A. “*Monsanto*” means Monsanto Company, its predecessors, successors and assigns, divisions, subsidiaries, affiliates, companies, groups, partnerships and joint ventures that Monsanto Company controls, directly or indirectly, and their directors, officers, employees, agents and representatives, and their respective successors and assigns.

B. “*Chevron*” means Chevron Corporation, its predecessors, successors and assigns, divisions, subsidiaries, affiliates, companies, groups, partnerships and joint ventures that Chevron Corporation controls, directly or indirectly, and their directors, officers, employees, agents and representatives, and their respective successors and assigns.

C. “*Acquisition*” means the acquisition by Monsanto from Chevron of the assets of the Ortho Consumer Products Division of Chevron, as referenced in Commission Premerger Report Number 93-0514.

D. “*Chevron Assets*” means:

1. The Kleenup Assets;
2. The Shackle C Assets; and
3. The Formula II Assets.

E. “*Kleenup Assets*” means the brand or trademark “Kleenup” obtained by Monsanto in connection with the Acquisition and used by Chevron for nonselective herbicides; provided, however, that the

Ortho brand or trademarks and trade dress are not part of the Kleenup Assets or the Chevron Assets and need not be divested pursuant to this order.

F. “*Shackle C Assets*” means the irrevocable rights to acquire, through September 19, 2000, a total of 102,455 gallons of the Shackle C product described in the product specification attached hereto as Exhibit A.

G. “*Formula II Assets*” means all rights, title and interest in and to any formulation of nonselective herbicide products for residential use obtained by Monsanto in connection with the Acquisition intended for sale by Chevron as a substitute for the current glyphosate-based herbicide products sold by Chevron under the brand or trademark “Kleenup,” as set forth in Exhibit B attached hereto.

H. “*EPA*” means the United States Environmental Protection Agency.

## II.

*It is further ordered, That:*

For purposes of protecting interim competition pending the introduction of new glyphosate-based herbicide suppliers pursuant to paragraph III of this order, including necessary governmental approvals, Monsanto shall:

A. For a period of twelve (12) months after this order becomes final, offer to sell to each current purchaser, except Chevron, of Shackle C for use in the formulation of nonselective herbicide products for residential use in the United States up to one hundred fifty percent (150%) of the volume of Shackle C that such customer purchased during the twelve (12) months preceding the date on which this order becomes final, under the terms and conditions of the customer's existing contract. If the divestitures of the Shackle C Assets or Kleenup Assets are not accomplished within twelve (12) months after the date on which this order becomes final, the require-

ments of this paragraph II.A. shall be extended until such divestitures are accomplished.

B. Offer to formulate and sell to each person that acquires the Shackle C Assets, pursuant to paragraph III.B. of this order, a portion of such Shackle C Assets in the form of glyphosate-based herbicides using any or all of the formulations sold by Chevron at the time of the Acquisition, for such acquirer's resale pending the acquirer's obtaining of the necessary federal regulatory agency approval to formulate, distribute and sell nonselective, glyphosate-based herbicides for residential use. Such offer by Monsanto to formulate the acquirer's Shackle C shall be on a cost-plus basis and other commercially reasonable terms for a fixed period of up to twelve (12) months from the date on which the acquirer is approved by the Commission. If an acquirer fails to secure the necessary federal regulatory agency approval to formulate, distribute and sell nonselective, glyphosate-based herbicides for residential use within twelve (12) months after the date on which the acquirer is approved by the Commission, the requirements of this paragraph II.B. shall be extended for such acquirer for up to an additional twelve (12) months pending such approval.

### III.

*It is further ordered,* That within twelve (12) months after the date on which this order becomes final, Monsanto shall divest, absolutely and in good faith, the Chevron Assets in accordance with the following:

A. The divestiture of the Kleenup Assets shall be only to an acquirer that receives the prior approval of the Commission and in a manner that receives the prior approval of the Commission. The acquirer of the Kleenup Assets shall also be an acquirer of Shackle C Assets pursuant to paragraph III.B. of this order. Any divestiture agreement shall include a requirement that for a period of three (3) years after the date on which this order becomes final, such acquirer's interests in and rights to the Kleenup Assets shall not be

assignable except upon the prior approval of the Commission. The purpose of the divestiture is to remedy the lessening of competition resulting from the Acquisition as alleged in the Commission's complaint and to enable the acquirer to formulate and sell nonselective herbicides for residential use.

(1) Monsanto shall make available to the acquirer of the Kleenup Assets access to such Monsanto personnel (including, but not limited to, former Chevron personnel employed by Monsanto), assistance and training as the acquirer reasonably needs (for a period of time not to exceed six (6) months from the date on which the acquirer is approved by the Commission), to transfer the Kleenup Assets to the acquirer.

(2) Monsanto shall provide such cooperation and assistance to the acquirer of the Kleenup Assets under this order as are reasonably necessary to enable the acquirer to formulate and sell nonselective herbicides for residential use.

B. The divestiture of the Shackle C Assets shall be 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; *provided, however*, that Monsanto shall not be required to divest to more than three (3) acquirers. If there is more than one acquirer of the Shackle C Assets, one such acquirer must also be the acquirer of the Kleenup Assets under paragraph III.A. of this order. Any divestiture agreement shall include a requirement that for a period of three (3) years after the date on which this order becomes final, such acquirer's interests in and rights to the Shackle C Assets shall not be assignable except upon the prior approval of the Commission. The purpose of the divestiture is to remedy the lessening of competition resulting from the Acquisition as alleged in the Commission's complaint and to enable the acquirer or acquirers to formulate and sell nonselective, glyphosate-based herbicides for residential use.

(1) At the time of the divestiture, Monsanto shall make available to each acquirer of the Shackle C Assets access to such Monsanto



personnel (including, but not limited to, former Chevron personnel employed by Monsanto), assistance and training as each acquirer reasonably needs (for a period of time not to exceed six (6) months from the date on which the acquirer is approved by the Commission), to transfer the Shackle C Assets to the acquirer.

(2) Monsanto shall grant to each acquirer, (a) nonexclusive rights to any and all research and development, technical information, know-how, patents and all EPA and other federal and state regulatory agency filings and registrations of Chevron relating to nonselective, glyphosate-based herbicides (including, without limitation, combinations of glyphosate and one or more other active ingredients), and (b) for as long as the acquirer holds rights to Shackle C Assets obtained pursuant to paragraph III of this order, nonexclusive rights to reference any Monsanto test data for nonselective, glyphosate-based herbicides for purposes of obtaining governmental regulatory approvals, to the extent that Chevron had such rights prior to the Acquisition.

(3) Monsanto shall provide such cooperation to each acquirer of the Shackle C Assets under this order (including, but not limited to, cooperation in obtaining EPA registrations and any other governmental regulatory approvals to the extent that Chevron had such registrations and approvals prior to the Acquisition) necessary to formulate, distribute and sell nonselective, glyphosate-based herbicides for residential uses in any form (including, but not limited to, in any glyphosate concentration); *provided, however*, that Monsanto shall have no obligation to conduct additional studies to develop data solely for any such acquirer.

(4) In connection with the divestiture of Chevron Assets under this order, Monsanto shall not restrict the ability of any acquirer of the Shackle C Assets to use, or to acquire the right to use, any active ingredient other than glyphosate, nor shall Monsanto restrict the ability of any acquirer to make any lawful product comparison in the labeling, advertising or other promotion of its glyphosate-based product.

C. The divestiture of the Formula II Assets shall be only to an acquirer that receives the prior approval of the Commission and only in a manner that receives the prior approval of the Commission. The divestiture shall include a requirement that for a period of three (3) years after the date on which this order becomes final such acquirer's interests in and rights to the Formula II Assets shall not be assignable except upon the prior approval of the Commission. The purpose of the divestiture is to remedy the lessening of competition resulting from the Acquisition as alleged in the Commission's complaint and to enable the acquirer to formulate and sell nonselective herbicides for residential uses.

(1) Monsanto shall make available to the acquirer of the Formula II Assets access to such Monsanto personnel (including, but not limited to, former Chevron personnel employed by Monsanto), assistance and training as each acquirer reasonably needs (for a period not to exceed six (6) months from the date on which the acquirer is approved by the Commission), to transfer the Formula II Assets to the acquirer.

(2) Monsanto shall provide reasonable cooperation to the acquirer of the Formula II Assets under this order, including, but not limited to, cooperation in obtaining nonexclusive rights to such additional Chevron research and development, technical information, know-how, patents and EPA and other federal and state regulatory agency filings and registrations of Chevron as Chevron (a) has used in the development of Formula II products for residential use or (b) contemplates using to make or market Formula II products for such use.

#### IV.

*It is further ordered,* That, pending divestiture of the Chevron Assets, Monsanto shall take such action as is necessary to maintain the viability and marketability of the Chevron Assets (including, but not limited to, research and development, technical information, know-how, patents and EPA filings and registrations) and shall not

cause or permit any destruction, removal, wasting, deterioration or impairment of those assets, except for ordinary wear and tear in the ordinary course of business that does not affect the viability and marketability of the Chevron Assets.

V.

*It is further ordered, That:*

A. If Monsanto has not fully complied, absolutely and in good faith, with paragraph III of this order within the time period provided in such paragraph, Monsanto shall consent to the appointment by the Commission of a trustee to divest the remaining portion(s) of the Chevron Assets. In the event 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, Monsanto 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 available relief, including a court-appointed trustee, for any failure by Monsanto to comply with this order.

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

(1) The Commission shall select the trustee, subject to the consent of Monsanto, which consent shall not be unreasonably withheld. The trustee shall be a person with experience and expertise in acquisitions and divestitures. If Monsanto has not opposed, in writing, the selection of any proposed trustee within fifteen (15) days after notice by the staff of the Commission to Monsanto of the identity of any proposed trustee, Monsanto 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 Chevron Assets, and to make any further arrangements that may be reasonably necessary to assure the viability and competitiveness of the pertinent assets.

(3) The trustee shall have twelve (12) months from the date the Commission approves the trust agreement described in paragraph V.B(8) to accomplish the divestiture. If, however, at the end of the twelve-month period, the trustee has submitted a plan of divestiture or believes that divestiture can be accomplished 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.

(4) The trustee shall have full and complete access to the personnel, books, records, and facilities related to the Chevron Assets, or any other relevant information, as the trustee may reasonably request. Monsanto shall develop such financial or other information as such trustee may reasonably request and shall cooperate with any reasonable request of the trustee. Monsanto shall take no action to interfere with or impede the trustee's accomplishment of the divestiture. Any delays in divestiture caused by Monsanto shall extend the time for divestiture under paragraph V.B(3) in an amount equal to the delay, as determined by the Commission or, for a court-appointed trustee, by the court.

(5) Subject to Monsanto's absolute and unconditional obligation to divest at no minimum price, the trustee shall use his or her best efforts to negotiate the most favorable price and terms available with each acquirer for the divestiture. The divestiture shall be made in the manner and to the number of acquirers set out in paragraph III of this order.

(6) The trustee shall serve, without bond or other security, at the cost and expense of Monsanto, on such reasonable and customary terms and conditions as the Commission or a court may set. The trustee shall have authority to employ, at the cost and expense of Monsanto, such consultants, accountants, attorneys, investment bankers, business brokers, appraisers, 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 divestiture and all expenses incurred. After approval by the Commission and, in the case of a court-appointed trustee, by the court, of the account of the trustee, including fees for his or her services, all remaining monies shall be paid at the direction of Monsanto and the trustee's power shall be terminated. The trustee's compensation shall be based in significant part on a commission arrangement contingent on the trustee's divesting the Chevron Assets.

(7) Monsanto 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 trusteeship, 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.

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

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

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

(11) The trustee shall have no obligation or authority to operate or maintain the Chevron Assets.

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

## VI.

*It is further ordered,* That, within sixty (60) days after the date on which this order becomes final and every sixty (60) days thereafter until Monsanto has fully complied with the provisions of paragraphs II, III, IV, and V of this order, Monsanto 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, or has complied with those provisions. Monsanto shall include in its compliance reports, among other things that are required from time to time, a full description of all substantive contacts or negotiations for the divestiture of the Chevron Assets, including the identities of all parties contacted. Monsanto also 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.

## VII.

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

A. Acquire any stock, share capital, equity or other interest in any concern, corporate or non-corporate, engaged in the manufacture or formulation (either directly or by contract) for sale in the United States of any nonselective herbicide for residential use.

B. Acquire the brand or trademark of any nonselective herbicide for residential use used in the United States.

C. Acquire from any other person the exclusive rights to manufacture, distribute or sell for residential use in or to the United States a pesticidal active ingredient (within the meaning of 7 U.S.C. 136(u)) that contributes significantly to the actual or perceived efficacy of any nonselective herbicide.

On the anniversary of the date on which this order becomes final, and on every anniversary thereafter for the following nine (9) years, Monsanto shall file with the Commission a verified written report of its compliance with this paragraph VII of this order.

### VIII.

*It is further ordered,* That, for the purposes of determining or securing compliance with this order, and subject to any legally recognized privilege, upon written request and on reasonable notice to Monsanto, Monsanto 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 Monsanto relating to any matters contained in this order; and

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

### IX.

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

EXHIBIT A

MONSANTO AGRICULTURAL  
COMPANY

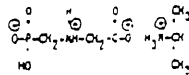
EXHIBIT A  
C-3458  
B144600

PRODUCT SPECIFICATION

PRODUCT                      Shackles C    Issue No. \_\_\_\_\_  
N No.                              2139    Date Effective: 8/1/88

GENERAL DESCRIPTION

A light amber to light brown liquid containing 41.0% by weight and 4 lbs./gallon of active, N-phosphonomethyl glycine, isopropylamine Salt (CP 70139)



CHARACTERISTICS	LIMITS	TYPICAL	METHOD NO.
(R) Appearance	Clear solution, light amber to light brown color.		Visual
(R) Assay, IPA salt glyphosate, wt. %	41.00 - 43.0	41.4	AQC-294-87
(R) Sp. Gr. @ 20/15.6°C	Determine	1.1720	AQC-292-86
(R) IPA Salt of glyphosate - Lbs./gallon	4.00 min.	4.05	Calculated (1)
(R) IPA Salt of glyphosate - Lbs./liter	480 min.	485	Calculated (2)
(R) Surfactant (MON 0818), wt. %	14.0 - 17.0	15.4	AQC-140-82 (3)
(OR) Water Content, wt. %	38.5 - 45.0	43.2	Determined by difference
(R) pH	4.4 - 4.9	4.5	AQC-139-81
(R) Insolubles in water, ppm	100 max.	30	AQC-121-74
(R) Cloud Point, °C	60 min.	75	AQC-120-81
(R) Carbon, ppm	5 max.	< 5	AQC-2950-83
(R) Dilution Test	Not turbid after 1 hour.		AQC-316-82
(R) Gardner Color	4 - 7	5	AQC-226-81

Approved by: \_\_\_\_\_



Decision and Order

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## EXHIBIT A

FINISHED PRODUCT SPECIFICATION  
SHACKLE C

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<u>CHARACTERISTICS</u>	<u>LIMITS</u>	<u>TYPICAL</u>	<u>METHOD NO.</u>
(R) NNG Content, ppb	600 max.		AQC-684-86

NOTES:

- (1) IPA Salt of Glyphosate, Lb/Gal =  $\frac{\% \text{ IPA Salt} \times \text{Sp. Gr.} \times 8.33722}{100}$
- (2) Ipa Salt of Glyphosate, Gm/Liter =  $\frac{\% \text{ IPA Salt} \times \text{Sp. Gr.} \times 9.990}{100}$
- (3) The surfactant method determines surfactant amount in units of "lb/gallon", however the specification is expressed as "wt. %". To convert from "lb./gallon" to "wt. %" units, use the following:
- $$(\text{Surfactant, wt. \%}) = \frac{(\text{Surfactant, Lb/Gallon}) \times 100}{(\text{Specific Gravity}) \times 8.33722}$$

For a typical specific gravity of 1.1720, the 14.0 - 17.0 wt. % specification limit is equivalent to 1.37 - 1.66 lb/gallon. Since specific gravity will vary, wt. % must be calculated and compared to specification for each lot.

TYPICAL FORMULATION

<u>Ingredient</u>	<u>% By Weight</u>
Glyphosate (98%)	31.32 (30.70)
Iscropropylamine	10.70
Surfactant (MON 0818)	15.40
Water	42.58

Manufacturing should target for a surfactant content of 15.40%. The specification range of 14.0 - 17.0% is to allow for normal process variation around a target value of 15.4%.

PLANT QUALITY CONTROL SYNOPSIS:A. Circulating Plant - Sampling

Shackle C is stored in storage tanks in Formulation. When a tank is full, it is circulated for six hours and a sample is removed for complete analysis. The circulation is continued for two hours and another sample is taken. When a tank is on specification, which is determined by the analysis of the two samples, the material is transferred to Glyphosate Packaging via pipeline.

## EXHIBIT A

4027 028

FINISHED PRODUCT SPECIFICATION  
SHACKLE C

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PLANT QUALITY CONTROL SYNOPSIS: (Continued)

Packaging has two lot tanks which receive product from Formulation. When a transfer is made to one of these tanks, the material is circulated for a minimum of four hours and sampled. This sample is analyzed for assay and specific gravity. The assay must be 41.00% active before Packaging can start. The specific gravity measurement is used to calculate the minimum average gross fill weight for the lot. This tank then constitutes a lot and is ready for packaging.

Plant personnel withdraw a 4 oz. sample from a filling head at two hour intervals while a given lot is packaged. Each two hour sample should be labeled with the date, time, lot number and sampler's name. A sampling log is kept, which must be filled in for each sample taken to show chain of custody.

B. Fayetteville Plant - Sampling

Shackle C is stored in a storage tank at the formulation plant. When the tank is full, it is circulated and sampled for complete analysis. When on specification, the storage tank is transferred to the lot tank.

The lot tank is circulated for 7 hours and sampled. the circulation is continued for another hour and another sample is taken. When the tank is on specification, which is determined by the analysis of the two samples, the material is drummed.

Plant personnel withdraw a 15-20 ml. aliquot from every 10th filled drum while a given lot is packaged. A sampling record is maintained indicating date, time, lot number and sampler's name for the composite sample.

C. Composite Sample Analysis

When the entire lot is packaged, the laboratory will composite the lot sampling and run a complete lot analysis. If the lot passes all specifications, including weight control limits, it is released for shipment.

D. Retains

The laboratory will retain a four ounce sample of each lot composite for a minimum of five years. Analytical records will be maintained for a five year period.

## EXHIBIT B

The Formula II assets identified in Paragraph I.G. of this order shall include all rights obtained by Monsanto in connection with the Acquisition relating specifically to the formulation of a nonselective lawn and garden herbicide product developed or currently under development by Chevron as replacement or substitute for Chevron's Kleenup products and including as active ingredients a combination of 24D, MCPP, fusilade and diquat. The Formula II assets include, without limitation, the following:

(1) All Environmental Protection Agency and other federal and state regulatory agency registrations and applications for Formula II products, including the precise recipe or mixture of the four active ingredients and toxicology, stability, effectiveness, and such other studies as were conducted to support the EPA or other regulatory applications.

(2) All rights, title and interest in and to the contracts, if any, entered in the ordinary course of business with customers (together with associated bid and performance bonds), suppliers, sales representatives, brokers and distributors, agents, inventors, product testing and laboratory research institutions, providers of electronic data exchange services, personal property lessors, personal property lessees, licensors, licensees, consignors and consignees relating exclusively to Formula II products.

## CONCURRING STATEMENT OF COMMISSIONER DENNIS A. YAO

I concur with the Commission's vote to condition Monsanto's acquisition of Ortho's assets on the divestiture of the Kleenup brand name, related formulas, and the inventory of and certain purchase rights for Monsanto's patented product, glyphosate, currently held by Ortho. I write to address some of the economic issues raised by a proposed acquisition that would merge two competing products and would include a reacquisition of patented product by the patent holder.

Since Ortho's glyphosate inventory was acquired from Monsanto, the patent holder, one might argue that Monsanto's reacquisition of its own patented product would not entail any enlargement of patent power. This view, however, would over-simplify the economic analysis that is appropriate in a case like this. A critical fact here is that the proposed acquisition involves not only a reacquisition of patent rights or patented product alone, but also an acquisition of other assets whose value is significantly intertwined with that of the patented product. Regardless of how one would assess a reacquisition of patent rights or patented product alone, an acquisition of such a combination of assets by the patent holder potentially raises antitrust concerns.

The importance of assets that are related to the patent or patented product is underscored by the fact that a significant commercial value is generally achieved only when a patented idea is combined with complementary assets -- for example, productive capital, technology, a brand name, or a marketing and distribution network. Complementary assets can be characterized as either general or specific. A specific asset is one whose value is diminished when it is redeployed to its next-best use.<sup>1</sup> Once complementary assets add to the value of a patented idea, it is often difficult to disentangle what components of value derive from the patented idea itself or from other assets. This is particularly true for specific assets because, by definition, the value of optimally combined specific assets is more than the sum of its parts.

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<sup>1</sup> Possible examples of specific assets are specialized plant and equipment, a unique production technology, a product's particular brand name image, or a specialized distribution network.

Specific complementary assets are potentially a source of product differentiation, which often makes it difficult for a patent holder to gain monopoly profit merely by controlling the price and quantity of the patented input. Moreover, the next-best use of these assets could be in combination with other inputs to form a new rival product that competes with products based on the patented idea. For these reasons, the acquisition or merger of such assets may have an anticompetitive effect. Indeed, it may be argued that the more specific the assets, the greater the potential for anticompetitive effect.

In this case, it appears that the two glyphosate-based products, Monsanto's Roundup and Ortho's Kleenup, are differentiated products, using different formulas and reflecting different brand name images. Therefore, Monsanto's proposed acquisition of Ortho involves a patented product and several specific complementary assets potentially relevant to the residential nonselective herbicide market: Ortho's inventory of and purchase rights for glyphosate products, the Ortho brand name and specialized distribution network, and the Kleenup brand name and formula. The Kleenup brand name is linked directly to the market for residential nonselective herbicides and to the functional properties of glyphosate as well.

Thus, this transaction involves more than simply a reacquisition of patented products. Among other things, the proposed acquisition would eliminate brand name competition between Monsanto's Roundup and Ortho's Kleenup, raising the concentration of assets in the market for residential nonselective herbicides and likely increasing Monsanto's ability unilaterally to exercise market power in the relevant market.

Divestiture of the Kleenup brand name and related formulas mitigates the likely anticompetitive effects of the merger, particularly when combined with divestiture of the Ortho glyphosate inventory and purchase rights, which increases the value of the divested Kleenup brand name by permitting Kleenup to remain a glyphosate product. For this and other reasons, I concur.

## IN THE MATTER OF

MICHAEL S. LEVEY, ET AL.

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF  
SECS. 5 AND 12 OF THE FEDERAL TRADE COMMISSION ACT*Docket C-3459. Complaint, Sept. 23, 1993--Decision, Sept. 23, 1993*

This consent order prohibits, among other things, the California-based producers of infomercials from misrepresenting infomercials as independent programming rather than paid advertising and from selling any baldness or impotence product not approved by the Food and Drug Administration; and requires the respondents to have competent and reliable scientific evidence to support any representations about the efficacy or safety of any food, drug or device they sell. In addition, the respondents are required to pay \$275,000 in consumer redress.

*Appearances*

For the Commission: *Kathryn C. Nielsen* and *Patricia Hensley*.

For the respondents: *Harvey Saferstein* and *Alexander Wiles*,  
*Irell & Manella*, Topanga, CA.

## COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that Positive Response Marketing, Inc., a corporation, also trading and doing business as Positive Response Television and Positive Response Advertising, and Michael S. Levey, individually and as an officer of said corporation, hereinafter sometimes referred to as respondents, have violated the provisions of said Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

PARAGRAPH 1. (a) Respondent Michael S. Levey (“Levey”) is an officer and shareholder of Positive Response Marketing, Inc. Individually or in concert with others, he formulates, directs and controls the acts and practices of Positive Response, including the acts and practices alleged in this complaint. Levey resides at 1975 North Topanga Canyon Boulevard, Topanga, California.

(b) Respondent Positive Response Marketing, Inc. (“Positive Response”), is a corporation organized, existing and doing business under and by virtue of the laws of the State of California. Positive Response also trades and does business as Positive Response Television and Positive Response Advertising. Positive Response has its principal office and place of business at 1861 North Topanga Canyon Boulevard, Topanga, California.

PAR. 2. (a) From 1987 until approximately February 1989, Levey was an employee and shareholder of Twin Star Productions, Inc. (“Twin Star”). Individually or in concert with others, Levey formulated, directed and controlled the acts and practices of Twin Star, including the acts and practices alleged in this complaint. Levey and Positive Response developed, wrote, directed, edited and produced the television advertisements for numerous products advertised, offered for sale, sold and distributed by Twin Star to consumers throughout the United States, including the “Euro Trym Diet Patch,” a weight-loss product; “Foliplerx,” a hair-loss product; and “Y-Bron,” an impotence treatment. These advertisements, which are referred to as program-length commercials, run for 30 minutes or less and fit within normal television broadcasting time slots. Respondents’ commercials were broadcast on network, independent and cable television stations throughout the United States.

(b) Since March 1989, Levey and Positive Response have been engaged in and continue to be engaged in developing, writing, directing, editing and producing television advertisements for numerous products advertised, offered for sale, sold and distributed by National Media Corporation and Media Arts International, Ltd., to consumers throughout the United States, including the “Magic Wand,” an immersion-style kitchen mixer. These advertisements,

which are referred to as program-length commercials, run for 30 minutes or less and fit within normal television broadcasting time slots. The commercial for the Magic Wand is part of a series of commercials titled “Amazing Discoveries.” Respondent Levey acts as the host for the series. Respondents’ commercials are broadcast on network, independent and cable television stations throughout the United States.

PAR. 3. The Euro Trym Diet Patch, Foliplerx and Y-Bron are “drugs” within the meaning of Sections 12 and 15 of the Federal Trade Commission Act.

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.

#### False and Unsubstantiated Efficacy Claims

PAR. 5. Respondents have disseminated or have caused to be disseminated advertisements for the Euro Trym Diet Patch, including but not necessarily limited to a 30-minute television commercial identified as “The Michael Reagan Show” and attached as Exhibit A. This advertisement contains the following statements:

1. Mike Reagan: “You know, we have all kinds of patches we hear about all the time. We hear about the patch you put behind your ear for motion sickness. We hear about the patch for people with heart problems. Now there’s also a patch for regulating your pulse. You have a diet patch. How can your diet patch help people lose weight?”
- Dr. Keith Kenyon: “Well, remember, we are bodies electric. That’s why an EKG measures the electrical current from your heart. Now what my solution does, it’s an electrically charged solution, and we put it on acupuncture points, and acupuncture points connect our electrical system of our body. When we put this electrical charge solution on our acupuncture points, it sends a signal to the brain, the hunger part of the brain, the appetite control center of the brain, and it does this non-



- transdermally, and the electrical signal makes you feel that you're not hungry."
2. Man: "Just a little thing like this will really be helping me a lot in trying to reduce weight because it really takes that sensation of hunger and craving for food. It really takes it away."
3. Woman: "For the first time, I have found something that really works. I'm not hungry any more and I'm losing weight and it's so easy."
4. Man: "I'm a single guy. I'm young. I have a lot to live for. I want to lose this weight. That's when I started using the Diet Patch. The Diet Patch allowed me to lose the weight, even though I had tried other diets in the past. The one thing that was missing was that I was always hungry. So, after I got off the diet, I subsequently gained more weight. But the Diet Patch really works for me and it allowed me to keep off the weight and not feel hungry."
5. Mike Reagan: "Richard, tell me. There are so many diets out there. There's the powder diets, the pill diets and so on. Why is everybody buying the Diet Patch?"
- Richard Crew: "Well, because they discovered that, really, pills and powders are really not the answer. The most effective weight-loss system is to reduce the quantity of food that you eat, in other words, reduce your caloric intake. Now, when you do that, you will obviously get hungry. Therefore, the patch prevents hunger (from) taking place and therefore the diet sustains itself. In other words, you can stay on it longer."
6. Dr. Marshall Berger: "But seriously, I don't have any ill effects as far as being uptight or hyper. It's very easy for me to monitor my intake of food. I'm just not hungry. I don't think about the food and it's just very easy for me."
7. Mike Reagan: "And what you believe is your Euro Trym Diet Patch is going to solve that problem?"
- Christine Westheim: "Yes. Most of the people that have been using the Diet Patch have found it to be a solution to a problem that they've been dealing with most of their lives."
8. Announcer: "If you're among the 88 million Americans that need to lose weight, there's good news. Now you can join the thousands that have said goodbye forever to pills, powders and fad starvation diets since they've

discovered the easiest, the safest, the most effective fat-fighting weapon ever, the original Euro Trym Diet Patch System. And the Diet Patch is so simple to use. After activating the non-transdermal patch, simply apply it to the appetite control center's acupressure point and forget about it. For the next 12 to 14 hours, the Euro Trym Diet Patch puts you back in control of your appetite so you can begin immediately to shed those unwanted pounds. It even works while you're sleeping. Whether your weight-loss goal is 20, 30, 50 or even 100 pounds or more, with the Euro Trym Diet Patch you can finally have the body of your dreams, and maybe someone else's, too."

9. Mike Reagan: "I mean, Dr. Kenyon, is everybody experiencing this kind of weight loss? Is this typical?"
- Dr. Keith Kenyon: "Well, 70 to 80 percent it succeeds with. Of course, nothing works on everybody. Nothing in medicine works on everybody. But there is a high percentage of successful weight loss with this product."
10. Mike Reagan: "Now, I understand that a small but well-monitored study was done by a doctor, what, Robert Rogers in Florida?"
- Richard Crew: "Yes, that's correct."
- Mike Reagan: "You want to tell us about that?"
- Richard Crew: "Yes, I will . . . I went to see him a few months ago and we talked about the product and he's also been in touch with Dr. Kenyon a few times on the telephone. And he's conducting, he's prescribing the patch and the system to patients of his and he's getting some remarkable results. There's some there, there's one with a ten-pound loss, we have one that's over 50 pounds, and there's a lady that's actually lost 80 pounds. But one interesting case was when the lady who lost about 100 pounds before she came to Rogers, not on the patch but just through her own efforts, because she followed a system which lowered the caloric rate, but she got to a plateau and she used the patch and she instantly started to lose weight again and she since lost another 35 pounds, which I think is marvelous."

PAR. 6. Through the use of the statements contained in the advertisements referred to in paragraph five, including but not

necessarily limited to the “The Michael Reagan Show” advertisement attached as Exhibit A, respondents have represented, directly or by implication, that:

- (a) Use of the Euro Trym Diet Patch prevents feelings of hunger.
- (b) Use of the Euro Trym Diet Patch enables users to lose substantial amounts of weight.
- (c) Use of the Euro Trym Diet Patch enables users to lose weight in a large majority of cases.
- (d) Competent and reliable tests or studies establish that the Euro Trym Diet Patch promotes weight loss.

PAR. 7. In truth and in fact:

- (a) Use of the Euro Trym Diet Patch does not prevent feelings of hunger.
- (b) Use of the Euro Trym Diet Patch does not enable users to lose substantial amounts of weight.
- (c) Use of the Euro Trym Diet Patch does not enable users to lose weight in a large majority of cases.
- (d) No competent and reliable test or study establishes that the Euro Trym Diet Patch promotes weight loss.

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 Michael Reagan Show” advertisement attached as Exhibit A, 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. Respondents have disseminated or have caused to be disseminated advertisements for Foliplexx, including but not necessarily limited to a 30-minute television commercial identified as “Breakthrough ‘88” and attached as Exhibit B. This advertisement contains the following statements:

1. Sarah Simmons: “We learned of Foliplexx International quite by accident. When our remote crew went into the field to interview Americans across the country who are experiencing hair loss, they ran into several people who had been using the Foliplexx System quite successfully. These people indicated that their hair loss had stopped and, in many instances, they were actually experiencing re-growth.”
2. Announcer: “Regardless of your age, the fast-acting powerful Foliplexx System will provide an environment so perfect, so nutritionally charged, that thousands have already had their hair-loss stopped and are enjoying the relief and excitement of seeing re-growth. Do not confuse Foliplexx with any other product or system you tried or heard about before. Foliplexx is the only bio-active system having the complex synergistically combined ingredients just proclaimed as safe and effective by medical professionals.”
3. Steve Carlson: “Mr. Sarradet, it looks like you have a fan here. Can you tell me how long it takes to notice results when someone starts on your Foliplexx System?”
- Richard Sarradet: “Well, Steve, usually they’re reporting noticeable results in anywhere from three to six weeks. The first indications are the stopping of hair loss. First thing I noticed was that there was less of my hair in the bottom of the shower, which made me quite happy.”
- Steve Carlson: “Is the Foliplexx System guaranteed to work?”
- Richard Sarradet: “Our own in-house study shows that it works for a strong percentage of people who still have living follicles realizing, of course, that so far, nothing works for everybody. Now, to answer your question. The Foliplexx System comes with an unconditional 90-day guarantee, and we feel that’s plenty of time for people

to find out if the system will work for them. Now, the fact that we offer such an incredible money-back policy and we've kept the price of the product low, we feel that anyone experiencing hair loss or who wants to prevent future hair loss has absolutely nothing to lose by trying our system."

4. Man:

"I've been very concerned about my hair loss. I have a receding hair line, long, wide forehead and a rather definite bald spot at the top of my head. And so, my hair was falling out. I could see a lot of hair in the comb every day. And, by jingle, I started using, Foliplexx and it seems to have stopped. Appearance is very, very important. One should always look one's best, I feel. And when your hair begins to fall out, until recently, it's been a permanent, well, disaster."

5. Sarah Simmons:

"Demetre, when you and I were talking earlier, you told me some very impressive results your clients had been getting using the Foliplexx formulation. Would you mind telling our viewing audience something about that?"

Demetre Addis:

"I'd be happy to, Sarah. This gentleman's name is Ron. And Ron came to us with a problem quite common known as 'losing his hair' or 'balding.' Ron's problem was in the crown area here. There was literally almost no hair at all, and now, since we've been using the Foliplexx formula, you can see that this whole area is filled in considerably. The hair is looking thicker and healthier.

Behind us, we have another example, results that we get from the Foliplexx formula. This gentleman's name is Phil and he's Terry's client. Since she's been using the Foliplexx formula on him, his recession area is where he had the problem and it's all filling in. The results are sensational and we're all very pleased with it."

6. Ron:

"The first thing that I noticed when I started using the system was a lot less hair loss. I noticed that there was not a lot of hair in the shower at the bottom. But I was losing my hair. I felt that I was losing my youth, and I was kind of depressed about that and I didn't want to be in that situation. And the system was out there to be used and so I started using it and I'm very happy with the results. I was at a party and a friend,

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I had run into him, that I hadn't seen in some time and he took, and noticed that I was growing quite a bit of hair back there. And he is losing his hair in the back and like he was kind of envious of me getting my hair back."

7. Man: "I noticed that the hair started coming back. There was real short hairs you noticed with a guy that's going bald. And I noticed that they started growing and getting longer, and I started even getting thicker hair. So I've been real pleased with the results. I've just been on the program about two months. I'm just so damn happy! I can't believe it!"
8. Announcer: "If you or someone you know is experiencing the agony, frustration and embarrassment of hair loss, there is good news. The new powerful Foliplexx System has just been approved by its exclusive North American manufacturer for release without prescription. Independent tests reviewed by the medical and scientific professionals who attended the International Hair Loss Symposium proclaimed the ingredients in Foliplexx to be safe and effective regardless of nationality, ethnic origin or hair color. That means that anyone ready to do something about their hair loss can stop just complaining and start taking action now."
9. Announcer: "The doctors and scientists that attended the International Hair Loss Symposium concluded that there is indeed a safe and effective treatment for those thousands of men and women worldwide experiencing unwanted hair loss. The Foliplexx formulation was extremely effective on patients regardless of nationality, ethnic origin or hair color."
10. Sarah Simmons: "Then, in your opinion, doctor, does the Foliplexx System just released by Mr. Sarradet's company...can that actually work?"
- Dr. Ward Dean: "Well, I've personally interviewed a number of people who've already been on the program and they're quite excited and satisfied with the results, and frankly, I'm quite impressed myself. I think the results speak for themselves."

PAR. 11. Through the use of the statements contained in the advertisements referred to in paragraph ten, including but not

necessarily limited to the "Breakthrough '88" advertisement attached as Exhibit B, respondents have represented, directly or by implication, that:

(a) Use of Foliplexx curtails loss of hair, thus relieving or preventing baldness.

(b) Use of Foliplexx promotes growth of new hair where hair has already been lost, thus curing or reversing the advance of baldness.

(c) Foliplexx is an effective remedy for baldness in a large percentage of cases.

(d) Competent and reliable tests or studies establish that Foliplexx relieves, cures, prevents, or reverses the advance of baldness.

PAR. 12. In truth and in fact:

(a) Use of Foliplexx does not curtail loss of hair, and does not relieve or prevent baldness.

(b) Use of Foliplexx does not promote growth of new hair where hair has already been lost, and does not cure or reverse the advance of baldness.

(c) Foliplexx is not an effective remedy for baldness in a large percentage of cases.

(d) No competent and reliable test or study establishes that Foliplexx relieves, cures, prevents, or reverses the advance of baldness.

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

PAR. 13. Through the use of the statements contained in the advertisements referred to in paragraph ten, including but not necessarily limited to the "Breakthrough '88" advertisement attached as Exhibit B, respondents have represented, directly or by implication, that at the time they made the representations set forth

in paragraph eleven, respondents possessed and relied upon a reasonable basis that substantiated such representations.

PAR. 14. In truth and in fact, at the time they made the representations set forth in paragraph eleven, respondents did not possess and rely upon a reasonable basis that substantiated such representations. Therefore, the representation set forth in paragraph thirteen was and is false and misleading.

PAR. 15. Respondents have disseminated or have caused to be disseminated advertisements for Y-Bron, including but not necessarily limited to a 30-minute television commercial identified as "Let's Talk" and attached as Exhibit C. This advertisement contains the following statements:

1. Lyle Waggoner: "Now, you've given the ingredients in the product Y-Bron here to some of your patients with favorable results. Is that correct?"  
 Dr. Marvin Hausman: "That's correct. We've used yohimbine which is a product that has activity in the central nervous system; in the - in the head region, it causes an increase in libido - a sexual desire. We've also had evidence that it increases penile-erectile response."
2. Lyle Waggoner: "Carl, what happened when you used this formulation? What kind of results did you . . . could you see or feel?"  
 Carl: "Well, suddenly, the erections were very different than before . . . And you know, your sex drive greatly improves. It's like a miracle happens."  
 Lyle Waggoner: "Dr. Hausman, is this a typical reaction?"  
 Dr. Marvin Hausman: "Yes, it depends on the diagnosis and the reason for using the program and the medication. Many people experience excellent results with this treatment program."
3. Case Study 4C711: "I started taking the Y-Bron and within three, two or three weeks, it began to have an effect on me. I began to feel it, I began to have an erection and not only had the erection, I was able to maintain the erection until we both received, we both attained satisfaction."
4. Case study 5P021: "I'm 58 years old. I've been married 40 years, and very, very happily married. My wife was very happy with me. But I became unhappy with myself because



I found that I was impotent. What is impotence? Impotence is when you can't function with your loved one. And you hide, you do things, you stay away from close quarters with your loved one, your mate, due to your inadequacies. Then I found the Y-Bron program. Now I'm so happy. My whole life has changed. I'm like I was when I was first married: young, vibrant, and full of life, looking forward to the future."

5. Case study 05005: "It happened just a couple of years ago. My wife and I used to argue over the most ridiculous things: who's gonna mow the lawn, who's gonna cook. But I knew what the problem was. It wasn't her, it was me. I was impotent. The problem was so severe, we got a divorce. When I went into the Y-Bron program, after just few weeks, I started to see the results. It was fantastic. I felt youthful, energetic. I felt like a new man."
6. Case study 1B007: "And I'm very, very happy now. I know that I'm having a good relationship, an intimate sexual relationship with my lady, and I'm the happiest guy in the world. Well actually, this has lasted now for several years. I am 64 years old. We still have this marvelous relationship, and I think I owe it all to Y-Bron, because before then, I-I didn't think there was any hope. I just thought I'd just kind of get old and fade away and not have any kind of a sex life at all. It's proved entirely different. I feel like I'm 30 years old. I love it."
7. Lyle Waggoner:  
Gary Ballen: "Okay, but Y-Bron does increase the libido?"  
"Absolutely."
8. Announcer: "Every day we're surrounded by pollution, anxiety and stress that can often lead to frustrating and embarrassing male impotency. But for thousands, this silent suffering has been ended, thanks to Y-Bron. A safe and effective formulation to address the problem of non-organic impotency. After recently undergoing two clinical studies, the Y-Bron formulation was shown successful in increasing desire and ability by raising the libido level in many male test subjects. The test results were so impressive that now Y-Bron comes with a 60-day money-back guarantee so you have nothing to lose."

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9. Lyle Waggoner: "Mr. Ballen, we were talking before we went on the air about your product Y-Bron, and you were telling me that this has been changing people's lives. Could you share that with our audience?"
- Gary Ballen: "Yes, Lyle, I can. We originally developed the product to treat male impotence. However, after various clinical tests, we discovered that not only did it help, frankly, the impotent, but it also helped those who were experiencing a loss of sexual desire."
10. Audience member: "Mr. Ballen, are there any side effects from your Y-Bron product?"
- Gary Ballen: "There are no known -- We've done two clinical trials, and there are no side effects. But, however, there are no negative side effects. However, there are some very good side effects. Most people report a feeling of well-being, of less stress, of being more sensual with their partner, feeling more sensual. Warmer, just a . . . even younger."
11. Lyle Waggoner: "Welcome back to Let's Talk. Now we're talking about the silent suffering of sexual dysfunction. And a new product, called Y-Bron, just released that appears to increase the sex drive and has been a tremendous help in treating impotent men. Now, I have a question. Dr. Hausman, if a person, if a man, has dysfunction or a loss of sex desire, is Y-Bron the answer?"
- Dr. Marvin Hausman: "Oh, from the studies we've been presented with today, the studies have shown that Y-Bron could be effective in increasing male sexual libido, male sexual desire."

PAR. 16. Through the use of the statements contained in the advertisements referred to in paragraph fifteen, including but not necessarily limited to the "Let's Talk" advertisement attached as Exhibit C, respondents have represented, directly or by implication, that:

- (a) Use of Y-Bron relieves, cures, prevents, or reverses impotence.
- (b) Use of Y-Bron increases sexual drive, ability, desire, or libido.

(c) Y-Bron is an effective remedy for impotence or increases sexual drive, ability, desire, or libido in a substantial percentage of cases.

(d) Competent and reliable tests or studies establish that Y-Bron is an effective remedy for impotence or increases sexual drive, ability, desire, or libido.

PAR. 17. In truth and in fact:

(a) Use of Y-Bron does not relieve, cure, prevent, or reverse impotence.

(b) Use of Y-Bron does not increase sexual drive, ability, desire, or libido.

(c) Y-Bron is not an effective remedy for impotence nor does it increase sexual drive, ability, desire, or libido in a substantial percentage of cases.

(d) No competent and reliable test or study establishes that Y-Bron is an effective remedy for impotence or increases sexual drive, ability, desire, or libido.

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

PAR. 18. Through the use of the statements contained in the advertisements referred to in paragraph fifteen, including but not necessarily limited to the "Let's Talk" advertisement attached as Exhibit C, respondents have represented, directly or by implication, that at the time they made the representations set forth in paragraph sixteen, respondents possessed and relied upon a reasonable basis that substantiated such representations.

PAR. 19. In truth and in fact, at the time they made the representations set forth in paragraph sixteen, respondents did not possess and rely upon a reasonable basis that substantiated such representations. Therefore, the representation set forth in paragraph eighteen was and is false and misleading.

## Deceptive Demonstrations

PAR. 20. Respondents have prepared advertisements for the Magic Wand, including but not necessarily limited to a 30-minute television commercial identified as “Amazing Discoveries: Magic Wand.” This advertisement depicts an immersion-style kitchen mixer crushing the pulp of a whole, fresh pineapple and states that it is done “in seconds, literally seconds.” The pulp is then used to make a tropical drink. The advertisement also depicts the immersion-style kitchen mixer whipping skim milk, which is shown in the advertisement being used as mouse-like desserts and cake frosting.

PAR. 21. Through the use of the statements and depictions contained in the advertisements referred to in paragraph twenty, including but not necessarily limited to the “Amazing Discoveries: Magic Wand” advertisement, respondents have represented, directly or by implication, that:

(a) The immersion-style kitchen mixer can crush a whole, fresh pineapple in seconds.

(b) Skim milk whipped by the immersion-style kitchen mixer can be used as mousse-like desserts and cake frosting.

PAR. 22. In truth and in fact:

(a) The immersion-style kitchen mixer cannot crush a whole, fresh pineapple in seconds, or in any reasonable period of time.

(b) Skim milk whipped by the immersion-style kitchen mixer cannot be used as mousse-like desserts and cake frosting, because it stays whipped for only a few minutes.

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

PAR. 23. Through the use of the statements and depictions contained in the advertisements referred to in paragraph twenty, including but not necessarily limited to the “Amazing Discoveries:

Magic Wand” advertisement, respondents have represented, directly or by implication, that:

(a) The demonstration of the immersion-style kitchen mixer included an unaltered, whole, fresh pineapple used to make a tropical drink.

(b) The demonstration of the immersion-style kitchen mixer included mousse-like desserts and cake frosting made from skim milk whipped by the immersion-style kitchen mixer.

PAR. 24. In truth and in fact:

(a) The demonstration of the immersion-style kitchen mixer did not include an unaltered, whole, fresh pineapple used to make a tropical drink. Respondents substituted crushed pineapple pulp with a slice of pineapple on top to resemble a whole, fresh pineapple.

(b) The demonstration of the immersion-style kitchen mixer did not include mousse-like desserts and cake frosting made from skim milk whipped by the immersion-style kitchen mixer. Respondents substituted Cool Whip dairy topping to resemble mousse-like desserts and prepared frosting mix to resemble cake frosting.

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

#### Deceptive Format

PAR. 25. Through the advertising and dissemination of “The Michael Reagan Show,” “Breakthrough ‘88,” “Let’s Talk,” and “Amazing Discoveries: Magic Wand” advertisements, respondents have represented, directly or by implication, that these commercials are independent television programs and not paid commercial advertising.

PAR. 26. In truth and in fact, “The Michael Reagan Show,” “Breakthrough ‘88,” “Let’s Talk,” and “Amazing Discoveries: Magic Wand” advertisements are not independent television

programs and are paid commercial advertising. Therefore, the representation set forth in paragraph twenty-five was, and is, false and misleading.

#### Deceptive Endorsements

PAR. 27. Through the statements and depictions contained in the advertisements referred to in paragraphs five, ten and fifteen, including but not necessarily limited to “The Michael Reagan Show,” “Breakthrough ‘88,” and “Let’s Talk” advertisements, respondents have represented, directly or by implication, that various testimonials and endorsements contained therein:

(a) Reflect the typical or ordinary experiences of consumers after using the advertised products.

(b) Were obtained from individuals or other entities who, at the time of providing their endorsements, were independent from all of the individuals and entities marketing the product.

PAR. 28. In truth and in fact, the various testimonials and endorsements contained in the advertisements referred to in paragraphs five, ten and fifteen:

(a) Do not reflect the typical or ordinary experiences of consumers after using the advertised products.

(b) Were in some instances obtained from individuals or other entities who, at the time of providing their endorsements, were not independent from all of the individuals and entities marketing the product.

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

PAR. 29. Respondents have disseminated or have caused to be disseminated advertisements for various products, including but not necessarily limited to the “Amazing Discoveries: Magic Wand” advertisement, which display the purported seal of an organization

called the National Association of Advertising Producers (“NAAP”), and contain the following statement:

“The following special promotional program has been approved by the national Association of Advertising Producers for its integrity and excellence.”

PAR. 30. Through the use of the statements and depictions contained in the advertisements referred to paragraph twenty-nine, including but not necessarily limited to the “Amazing Discoveries: Magic Wand” advertisement, respondents have represented, directly or by implication, that:

(a) The NAAP is an existing organization whose qualifications give it the expertise to evaluate commercials for their integrity and excellence.

(b) The NAAP is an entity that, at the time of providing the endorsements, was independent from all of the individuals and entities marketing the product.

PAR. 31. In truth and in fact,;

(a) The NAAP is not an existing organization whose qualifications give it the expertise to evaluate commercials for their integrity and excellence.

(b) The NAAP is not an entity that, at the time of providing its endorsements, was independent from all of the individuals and entities marketing the product.

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

PAR. 32. The acts and practices of respondents as alleged in this complaint constitute unfair or deceptive acts or practices and the making of false advertisements in or affecting commerce in violation of Sections 5(a) and 12 of the Federal Trade Commission Act.

Commissioner Azcuenaga recused.

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Complaint

## EXHIBIT A

## TRANSCRIPT OF EUROTRYM DIET PATCH COMMERCIAL

Announcer: This program deals with an exciting new method of losing weight with the non-transdermal diet patch. The opinions expressed here may not necessarily be that of the general medical or scientific communities.

Woman: For the first time I have found something that really works.

Woman: And I have just started on the patch and I have already lost 15 pounds and it was so easy.

Announcer: Welcome to this edition of the Michael Reagan Show. Now here's Michael.

Mike Reagan: Hi, everyone, I'm Mike Reagan and welcome to our show. Today's topic, the Diet Patch, must be of great interest to everyone out there. We've had a record breaking turn-out of people that wish to be in the audience for today's program and I must apologize to those people that we had to turn away for lack of room here in the studio.

Do you know that there is an estimated 88 million Americans across this nation who are considered by medical experts to be overweight? I don't know if I, I didn't talk to a medical expert, but I feel overweight all the time. I mean I think they all tried to show up here for today's show just to find out about what we're going to be talking about. The Diet Patch. Introduced to the general public only six months ago, the Diet Patch has become a fat-fighting weapon that has caused a craze to develop across America. Our special guest with us today is none other than Dr. Keith Kenyon, a surgeon and practicing physician in Southern California, and also a respected author. Dr. Kenyon, I am told by our research staff, is considered to be the inventor of the Diet Patch.

Welcome to our show, Dr. Kenyon.

Dr. Keith Kenyon: Thank you, Mike.

Mike Reagan: You know, we have all kinds of patches we hear about all the time. We hear about the patch you put behind your ear for motion sickness. We hear about the patch for people with heart problems. Now there's also a patch for regulating your pulse. You have a Diet Patch. How can your Diet Patch help people lose weight?



- Dr Keith  
Kenyon: Well, remember, we are bodies electric. That's why an EKG measures the electrical current from your heart. Now what my solution does, it's an electrically charged solution, and we put it on acupuncture points, and acupuncture points connect our electrical system of our body. When we put this electrical charge solution on our acupuncture points, it sends a signal to the brain, the hunger part of the brain, the appetite control center of the brain, and it does this non-transdermally, and the electrical signal make you feel that you're not hungry.
- Mike Reagan: Okay, I mean there's many acupuncture points. We've read about them, we've seen them in magazines and all that. Do you have a special acupuncture point that you put this patch?
- Dr. Keith  
Kenyon: Yes, there is a special acupuncture point that's best for it. It's two finger breadths away, two of your finger breadths away from your --
- Mike Reagan: I have big fingers.
- Dr. Keith  
Kenyon: And therefore you have the acupuncture point
- Mike Reagan: Okay.
- Dr. Keith  
Kenyon: -- spread apart. Two finger breadths above the hand-wrist junction on the palm side right where your watch will be and those there electrically stimulates the appetite control center right from there through your electrical system of the body.
- Mike Reagan: Boy, that really -- that sounds so simple. Just a little patch like that put there and it gets to your hunger control system and tells you to stop eating.
- Dr. Keith  
Kenyon: That's right.
- Mike Reagan: That is amazing. Also joining us today on the show is Mr. Richard Crew, President of Am Euro Sciences International. And with him is Christine Westheim, who is the Marketing Director for Am Euro Sciences, which is the manufacturer and distributor of the Diet Patch called Euro Trym, which uses Dr. Kenyon's formulation. Welcome to the show.
- Christine  
Westheim: Thank you.
- Mike Reagan: Christine, good to have you here. You look trim and fit.
- Christine  
Westheim: Thank you.
- Mike Reagan: You use one of your own patches?
- Christine  
Westheim: Yes, I do. Right on the wrist.

- Mike Reagan: Right there. That's why you're trim and fit.  
Christine Westheim: That's right.
- Mike Reagan: Listen, you're out there in the marketplace. Eighty-eight million Americans think they have a weight problem. Is this true?  
Christine Westheim: Well, in fact, Michael, really we think the figures are a lot higher than that. America's excess weight has become a very, very serious health problem today.
- Mike Reagan: And what you believe is your Euro Trym Diet Patch is going to solve that problem?  
Christine Westheim: Yes. Most of the people that have been using the Diet Patch have found it to be a solution to a problem that they've been dealing with most of their lives.
- Mike Reagan: Richard Crew, you are the President of Am Euro Sciences. Tell me, how'd you come up with the name Am Euro?  
Richard Crew: Well, America and Europe are two different cultures. And yet we have a common problem. We over there just have as many people overweight or the percentage overweight as you have here. And by bringing the two different scientific approaches, the medical profession over there and the medical profession here, it was easy having met Dr. Kenyon, to utilize the formulation that he's created to solve that problem and therefore create the Diet Patch which is having such a terrific success in Europe.
- Mike Reagan: Yeah, you know 200 years ago we left -- did we leave your country or you left ours?  
Richard Crew: No, you threw us out.  
Mike Reagan: Oh, that was it.  
Richard Crew: Yes.  
Mike Reagan: And since then, you've been talking that way?  
Richard Crew: Yes. And, had you not thrown us out you'd have been talking this way.
- Mike Reagan: I think I would have liked to talk your way. I love going to Europe. It's a wonderful place to go. It's great. I'll tell you, you have certainly gotten my antenna up and I know that your Diet Patch has caught the attention of everybody here in America. But I'm going to introduce a couple more people to our show right now. And joining us today also are Dr. Michael Levitt, a successful practicing physician from Phoenix, Arizona. First, I'd like to ask you, Dr. Levitt, here we are in the '80s, people are still worried about weight. I mean, why are people

- so weight-conscious, I mean, they're still weight-conscious, here in the '80s, with all these things to do.
- Dr. Michael Levitt: Well, obesity is a very serious condition and the overweight patient has a greater tendency to develop diseases such as heart disease, diabetes or high blood pressure. Psychological effects also enter into this picture such as anxiety, depression or guilt.
- Mike Reagan: Would you say it's not just a matter of getting in or out of tight jeans or looking good in a bikini at the beach. It's more than that.
- Dr. Michael Levitt: That's right. It's definitely more than vanity. It's a serious health problem.
- Mike Reagan: So being overweight is still a health problem even here in the '80s, something we've got to take care of. Christine, I know you're a marketing director, you're out there. The people that you talk to, are they aware of these health problems?
- Christine Westheim: Well, to a degree, Michael. Most people are aware of the life-threatening risks involved in being overweight, but I still feel the one thing that motivates people the most to lose those unwanted pounds is vanity.
- Mike Reagan: Motivates me.
- Christine Westheim: Well, people --
- Mike Reagan: How many other people does it motivate? Yeah, okay. Motivates you people.
- Christine Westheim: That's right. We are so proud of this product and the results virtually speak for themselves.
- Mike Reagan: I want to hear more. I mean, this is exciting. Do you find this exciting? This is really neat to find out all this information. It's so simple. Boy, you have certainly got my attention. Listen, when we come back we're going to talk to Marshall Berger, a dentist from Hollywood, Florida, who has partially been using the Diet Patch for just three weeks and we'll see what he has to say about its effectiveness and how it feels and how he likes the program. Now, don't go away. We're going to be right back.
- Announcer: If you're among the 88 million Americans that need to lose weight, there's good news. Now you can join the thousands that have said goodbye forever to pills, powders and fad starvation diets since they've discovered the easiest, the safest, the most effective fat-fighting weapon ever, the original Euro Trym Diet Patch system. And the Diet Patch is so simple to use. After activating the non-transdermal patch, simply apply it to the appetite control center's acupressure point and forget about it. For the next 12 to 14 hours the Euro Trym Diet Patch

puts you back in control of your appetite so you can begin immediately to shed those unwanted pounds. It even works while you're sleeping. Whether your weight-loss goal is 20, 30, 50 or even 100 pounds or more, with the Euro Trym Diet Patch you can finally have the body of your dreams, and maybe someone else's too.

And as a bonus when your order your first month's supply of the original Diet Patch system directly from the exclusive distributor, you'll receive an additional one month's supply absolutely free. That's a savings of up to 50 percent over buying from home parties or multi-level salesmen. Here's the breakthrough that you've been waiting for. America's only weight-loss system that you don't have to worry about sticking with because it sticks to you. The Euro Trym Diet Patch system.

To order your complete Diet Patch system for just \$49.95, have your credit card ready and call toll-free 1-800-451-1223. Order now and you'll receive your second month's supply as a bonus absolutely free. Call 1-800-451-1223 or send check or money order to Diet Patch, P.O. Box 54879, Phoenix, Arizona 85078. Include \$4.00 for shipping and handling. Call 1-800-451-1223 now.

- Woman: I'm 60 years of age and I'm proud to say that because of the Diet Patch, I'm down to the weight that I was when I was 19 years of age and I feel great.
- Woman: And I've just started on the Patch and I've already lost 15 pounds and it was so easy.
- Man: Just a little thing like this will really be helping me a lot in trying to reduce weight because it really takes that sensation of hunger and craving for food. It really takes it away.
- Dr. Robert Rogers: The Euro Trym Diet Patch is great because I find my patients say that it is so easy to apply and it doesn't have any side effects like the amphetamines and furthermore it makes them feel terrific. They have a great psychological uplift seeing themselves have control of their appetite now and then. Know that they're going to be able to lose weight.
- Woman: For the first time, I have found something that really works. I'm not hungry any more and I'm losing weight and it's so easy.
- Mike Reagan: Hi. Welcome back, everybody, to our program with our featured guest, Dr. Keith Kenyon, the inventor of the Diet Patch that is sweeping America. And, of course, Mr. Richard Crew, President of Am Euro Sciences International, the manufacturer and distributor of the Euro Trym Diet Patch program.

- Richard, tell me. There are so many diets out there. There's the powder diets, the pill diets and so on. Why is everybody buying the Diet Patch?
- Richard Crew: Well, because they discovered that, really, pills and powders are really not the answer. The most effective weight-loss system is to reduce the quantity of food that you eat, in other words, reduce your caloric intake. Now, when you do that, you will obviously get hungry. Therefore the patch prevents hunger (from) taking place and therefore the diet sustains itself. In other words, you can stay on it longer.
- Dr. Keith Kenyon: And the Patch, of course, is absolutely the safe thing to do. There are no drugs in it, no amphetamines, no even -- not even phenylpropanolomine.
- Mike Reagan: I don't know about that last word --
- Dr. Keith Kenyon: That's just a common drug.
- Mike Reagan: Not having drugs in it because if it doesn't have drugs in anything you don't get all that jittery and nervous energy that people get from taking those programs.
- Richard Crew: That's right, Michael, we just said no.
- Mike Reagan: Now, I'd like to introduce you to Marshall Berger, a dentist and user of the Euro Trym Diet Patch system. Marshall. Now, let me tell -- you're here from Hollywood, Florida. You came all the way to the show and thank you very much for coming here. Tell me, what has been your experience with using the Diet Patch system?
- Marshall Berger: It's wonderful. It's really great. This is the first type of a diet program that I've used that has been very effective and it's just beautiful.
- Mike Reagan: You've used other programs?
- Marshall Berger: Yeah, I've got 15 to 20 pounds that I've been struggling with for a hundred years and it's just terrible. This is something the other things that I've tried jumped me up and as a dentist, it's a high-intensity type of a job and, you know, you wouldn't want to have a dentist with shaky hands working over you.
- Mike Reagan: Old Dr. Fuddle Fingers.
- Marshall Berger: That's right.
- Mike Reagan: No way.
- Marshall Berger: But seriously, I don't have any ill effects as far as being uptight or hyper. It's very easy for me to monitor my intake of food. I'm just not hungry. I don't think about the food and it's just very easy for me.
- Mike Reagan: Tell me, how much weight have you lost?

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- Marshall Berger: Well, I've been using it for three weeks and I'm half way there. It's great. It's just been easy. I just can't believe how easy it is.
- Mike Reagan: So you lost, what, 10 pounds?
- Marshall Berger: Nine pounds.
- Mike Reagan: I mean, Dr. Kenyon, is everybody experiencing this kind of weight loss? Is this typical?
- Dr. Keith: Well, 70 to 80 percent it succeeds with. Of course, nothing works on everybody. Nothing in medicine works on everybody. But there is a high percentage of successful weight loss with this product.
- Mike Reagan: That, boy, that's good to know. Marshall, what's your goal?
- Marshall Berger: I got about another 10 pounds to go and maybe even 15.
- Mike Reagan: Well, Marshall, sounds like you're definitely on your way.
- Marshall Berger: It's working out great.
- Mike Reagan: Congratulations. I think that's great. Dr. Reed, you have been sitting here for a while. I'm going to reintroduce you to everybody. This is Dr. Michael Reed. You have been so patient, so patient, and thank you so much for being here today. Tell me, at your clinic do you find a lot of people going in there asking how they can lose weight?
- Dr. Michael Reed: Yes, Michael. It seems more and more people are definitely interested in weight loss these days and the physicians at my health center are very much tuned into the patients' needs. I'm especially happy with this Euro Trym procedure because it is natural and it's effective and safe.
- Mike Reagan: Is that why it works so well, the Euro Trym Diet Patch system?
- Dr. Michael Reed: Well, it's a complete system and it involves behavior modification which means how to learn to develop better eating habits and lower your caloric intake and the patch system seems to be a very effective way of doing this in most cases. I'm also especially happy that Dr. Kenyon's formulation is homeopathic, which has been shown to be extremely effective and non-toxic and also extremely safe to use.
- Mike Reagan: So, it doesn't have any side effects. That's what you're saying?
- Dr. Michael Reed: No, none whatsoever.
- Mike Reagan: Marshall, did you find any side effects when you used it? Except for girls chasing you all over Florida?
- Marshall Berger: No side effects at all.
- Mike Reagan: Dr. Kenyon, are there any side effects to your formulation?
- Dr. Keith: Virtually no negative side effects but there are some positive side effects. You get a feeling of well-being. You get more energy and you just feel better about yourself.
- Kenyon:

- Mike Reagan: Boy, you know, I do. I think everybody here, you know, when you've done something good for your body, I think everybody just naturally feels better. Don't you, audience? Now tell me once again, for everybody that's watching. Where do you put this patch?
- Dr. Keith Kenyon: You put it on the pericardium 6, that's two finger-breadths below hand-wrist junction.
- Mike Reagan: That's an acupuncture point, right? Pericardium 6, I'm learning all this language today.
- Dr. Keith Kenyon: That's the most common acupuncture point that we use for this.
- Christine Westheim: Michael, why don't you give the Euro Trym Diet Patch a try?
- Mike Reagan: Wait a minute. Now wait. Wait. That isn't nice. Are you trying to tell me something? Is she trying to tell me that maybe I'm a little -- Okay, I'll tell you what. I will, only because it's my show, I'll do it. Listen, it really sounds too good to be true. I'm going to give it a try. How do we do this? First, I have to move my coffee cup. Okay. This is what I do and I move all this information over here. You're going to put this on me.
- Dr. Keith Kenyon: I'm going to put it --
- Mike Reagan: You started this. I'm going to blame you for this.
- Christine Westheim: I know.
- Dr. Keith Kenyon: I'm going to put it on your right arm.
- Mike Reagan: Of course, on a Reagan, where else would you put it? My goodness gracious. The next eight years you might be able to put it on the left. Who knows.
- Dr. Keith Kenyon: All right. Now we just take this --
- Mike Reagan: Just like a bandaid.
- Dr. Keith Kenyon: It's a bandaid. Now what we want to do is clean off your wrist a little bit because --
- Mike Reagan: Just don't take any blood.
- Dr. Keith Kenyon: I'm trying not to. It's painless. We open this up --
- Mike Reagan: Okay.
- Dr. Keith Kenyon: -- and we put this drop on the patch.
- Mike Reagan: That seems simple enough. Just one drop.
- Dr. Keith Kenyon: That's all I need.

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- Mike Reagan: Okay.
- Dr. Keith: I don't know how many you need but that's all I need. There
- Kenyon: we are, right there, at that point.
- Mike Reagan: Just put it on.
- Dr. Keith: Just put it on. And then you tap it.
- Kenyon:
- Mike Reagan: It's that simple.
- Dr. Keith: It's that simple.
- Kenyon:
- Mike Reagan: It's great. That's easy. That's easy, I mean, how do I look?  
Do I look thinner?
- Christine: You look thinner. It's going to take a little time, but it will
- Westheim: work I promise you.
- Mike Reagan: I mean, how long will it take to work? I mean, we only have a  
half hour here on the show. Does it work within a half hour?  
What does it take?
- Christine: Well, generally, you'll begin to see the effects within four hours
- Westheim: or perhaps up into the second day of using the program.
- Man: Frances and I have been married 32 years and we enjoy doing  
things together.
- Woman: And we finally have lots of fun since we have lost weight.
- Man: Now that we've lost some weight, we really enjoy taking walks  
together and it's a new way of life for us. We feel better about  
each other and feel better about ourselves. We really enjoy  
each other's company much more.
- Woman: You know, since you've lost 20 pounds, I can hardly keep up  
with you.
- Woman: This little simple patch has really changed our lives. I  
recommend it to anyone.
- Dr. Robert: Well, I found now with the Euro Trym Patch that my patients
- Rogers: are having such an easier time of weight control. It's so easy to  
apply and there are no side effects. And they just feel great. It  
gives them an uplift and feel and act as if they're becoming  
younger and more vivacious and their spirits are up. It's really  
a great addition to my practice.
- Woman: I just use this patch. I put it on every day and I feel that I'm not  
hungry. Look how easy that is.
- Woman: If anybody would have told me that something so small and so  
simple to use would help me to lose weight, I would have never  
believed them. But it does work.
- Announcer: If you're among the 88 million Americans that need to lose  
weight, there's good news. Now you can join the thousands  
that have said goodbye forever to pills, powders and fad starva-



tion diets since they've discovered the easiest, the safest, the most effective fat-fighting weapon ever, the original Euro Trym Diet Patch system. And the Diet Patch is so simple to use. After activating the non-transdermal patch, simply apply it to the appetite control center's acupressure point and forget about it. For the next 12 to 14 hours, the Euro Trym Diet Patch puts you back in control of your appetite so you can begin immediately to shed those unwanted pounds. It even works while you're sleeping. Whether your weight-loss goal is 20, 30, 50 or even 100 pounds or more, with the Euro Trym Diet Patch you can finally have the body of your dreams. And maybe someone else's too.

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To order your complete Diet Patch system for just \$49.95, have your credit card ready and call toll free 1-800-451-1223. Order now and you'll receive your second month's supply as a bonus absolutely free. Call 1-800-451-1223 or send check or money order to Diet Patch, P.O. Box 54879, Phoenix, Arizona 85078. Include \$4.00 for shipping and handling. Call 1-800-451-1223 now.

Mike Reagan: Excuse me. I was just seeing that my patch was still there. Do I look thinner yet? Okay. All right. Come on, I look thinner. It's going to be a day or so. But listen, welcome back to our show. We are talking about the fabulous new Euro Trym and its inventor, Dr. Keith Kenyon, a surgeon, an author, a scientist in the field of weight loss.

Dr. Kenyon, I would imagine that the patch system has become so popular that there is probably several companies out there right now trying to get your formula. Is that correct?

Dr. Keith Kenyon: Yes, but there are lots and lots of companies. However, imitation may be the sincerest form of flattery, but this patch is the original patch. It's the original patch that works and it is the only original patch.

Mike Reagan: I have a sample that is, if that's the way you feel, that's the way you feel. I mean, Mr. Crew, you are the President of Am Euro,

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who is the distributor, of course, and manufacturer of the patch. From the sounds of it, you're destined to be a very successful company.

Richard Crew: Well, because we have the original, I am very excited. Very excited.

Mike Reagan: Now, I understand that a small but well-monitored study was done by a doctor, what, Robert Rogers, in Florida?

Richard Crew: Yes, that's correct.

Mike Reagan: You want to tell us about that?

Richard Crew: Yes, I will. He's located in Melbourne and --

Mike Reagan: Melbourne, Florida.

Richard Crew: Yes, Melbourne, Florida, yes.

Mike Reagan: Okay. I never heard of Melbourne, Florida.

Richard Crew: All right, well, it's just south of Orlando. I went to see him a few months ago and we talked about the product and he's also been in touch with Dr. Kenyon a few times on the telephone. And he's conducting, he's prescribing the patch and the system to patients of his and he's getting some remarkable results. There's some there, there's one with a ten-pound loss, we have one that's over 50 pounds, and there's a lady that's actually lost 80 pounds. But one interesting case was when the lady who lost about 100 pounds before she came to Rogers, not on the patch but just through her own efforts, because she followed a system which lowered the caloric rate, but she got to a plateau and she used the patch and she instantly started to lose weight again and she since lost another 35 pounds, which I think is marvelous.

Mike Reagan: When we come back, we'll talk with British actress Julie Edwards. Woo, woo. Who has told our research staff that the Diet Patch has also become quite a craze among figure-conscious actors and actresses through the television and motion-picture industries. Don't go away, we'll be right back and I never thought I would say this, may the patch be with you.

Woman: All through school I was a fat unhappy person. I couldn't go out with my friends and I just couldn't have a good time. I just didn't feel very confident about myself. But now that I've lost a lot of weight, things are just different. I'm 21 and I have a boyfriend and we go out, we have a wonderful time together. I'm a really happy person. In fact, my mother has tried to lose weight for years. She has tried Nutri-System, Weight Watchers, pills, crash diets, and I'm going to recommend the diet patch to her.

- Man:** I'm a single guy. I'm young. I have a lot to live for. I want to lose this weight. That's when I started using the Diet Patch. The Diet Patch allowed me to lose the weight, even though I had tried other diets in the past. The one thing that was missing was that I was always hungry. So, after I got off the diet, I subsequently gained more weight. But the Diet Patch really worked for me and it allowed me to keep off the weight and not feel hungry.
- Announcer:** If you're among the 88 million Americans that need to lose weight, there's good news. Now you can join the thousands that have said goodbye forever to pills, powders and fad starvation diets since they've discovered the easiest, the safest, the most effective fat-fighting weapon ever, the original Euro Trym Diet Patch system. And the Diet Patch is so simple to use. After activating the non-transdermal patch, simply apply it to the appetite control center's acupressure point and forget about it. For the next 12 to 14 hours, the Euro Trym Diet Patch puts you back in control of your appetite so you can begin immediately to shed those unwanted pounds. It even works while you're sleeping. Whether your weight goal is 20, 30, 50 or even 100 pounds or more, with the Euro Trym Diet Patch you can finally have the body of your dreams, and maybe someone else's too.
- And as a bonus, when you order your first month's supply of the original Diet Patch system directly from the exclusive distributor, you'll receive an additional one month's supply absolutely free. That's a savings of up to 50% over buying from home parties or multi-level salesmen. Here's the breakthrough that you've been waiting for. America's only weight-loss system that you don't have to worry about sticking with because it sticks to you. The Euro Trym Diet Patch system. To order your complete Diet Patch system for just \$49.95, have your credit card ready and call toll-free 1-800-451-1223. Order now and you'll receive your second month's supply as a bonus absolutely free. Call 1-800-451-1223 or send check or money order to Diet Patch, P.O. Box 54879, Phoenix, Arizona 85078. Include \$4.00 for shipping and handling. Call 1-800-451-1223 now.
- Mike Reagan:** Welcome back again, everybody, and if we all seem to look a little thinner and trimmer up here, it's because of the Euro Trym Diet Patch from Am Euro Sciences. The Diet Patch that is sweeping America. And we're pleased to have as our featured guest, its inventor, Dr. Keith Kenyon. Also just joining us is

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- someone that you may have seen before, beautiful British actress, Julie Edwards. Hi, Julie.
- Julie Edwards: Hi, Michael.
- Mike Reagan: You were telling me before the show started that you've worked with a lot of actresses, both in Europe and here in the United States, and maintaining a trim figure goes far beyond that, the vanity situations. Is that correct?
- Julie Edwards: Oh, sure. Definitely so. And in order to be successful, the audience is looking for a role model. And you have to be that role model. I think today you have to be trim. 'Cause that's what they're looking for.
- Mike Reagan: They find themselves losing jobs because of it.
- Julie Edwards: I think so 'cause I think that's the trend. You have to be slim. There are not too many parts for the heavy set person today. Or even the odd role or two.
- Mike Reagan: Unless you're John Candy. But do you find that actresses in Hollywood are, and actors, are starting to use the Euro Trym Diet Patch system in their work?
- Julie Edwards: Definitely. Because it's easy. It's difficult to walk off stage and say, just a moment, can I fix my shake, I got to have that shake, or the pills that are on the market, they make you nervous, irritable, and you just can't have that in this business.
- Mike Reagan: Well, thank you, Julie, for taking time out of your busy career to come join us today and tell us what's happening in Hollywood and Europe and show business.
- Julie Edwards: Oh, it's my pleasure, Michael. Thank you and thank you Dr. Kenyon for bringing this to the industry. It's a boon.
- Mike Reagan: It is now time for me to say goodbye to you. Thank you so much for being with us. I hope you have found it as informative as I know we have here in the studio. Until next time, this is Mike Reagan. Goodbye everybody and may the patch be with you.

## EXHIBIT B

## TRANSCRIPT OF FOLIPLEXX COMMERCIAL

- Screen: The following is a paid program.
- Announcer: The following special program deals with a new and exciting product just released and available without prescription to address the problem of nonheredity-related thinning hair and baldness. The medical representations expressed here are the

opinions of the professionals who appear in this program and may not necessarily reflect that of the general scientific community. The dramatic, positive results shown in this presentation can only be realized with the continuous usage of the Foliplexx System.

Woman: I love guys with dark thick hair so I can run their -- my fingers through it.

Man: My girlfriend likes it better ... that to know that I'm not going to be bald in another couple of years.

Woman: I mean it could be gray hair and a full head of hair and they look distinguished, but bald is just . . . out.

Man: Most people never admit that they're losing any hair, 'cause it's, it's embarrassing, it's, it's an ego type thing.

Woman: They should really take advantage of it to use whatever product there is to have the hair put on their heads. It adds to youth and that's for sure.

Man: Okay, even at my age, by jingle, you know, you want to look your best.

Announcer: Welcome to Breakthrough '88, the continuing program dedicated to keeping you on the leading edge of the latest discoveries. Now, here's your hosts - Steve Carlson and Sarah Simmons.

Steve Carlson: Welcome to this edition of Breakthrough '88. Now, first let me begin by thanking everyone who has been sending in letters suggesting different topics for Breakthrough '88 to research. It's your letters that determine the topics of each of our programs. Today's program is in response to literally hundreds of letters that our research staff has received asking us if there exists a real cure for a condition suffered by many people across America -- hair loss.

Sarah Simmons: When we began this project, Steve and I were both surprised at how many Americans suffer from hair loss or premature baldness. Our own survey indicated that approximately 38% of the U.S. male population is suffering from an inordinate amount of hair loss. With that figure represents nearly 50 million males alone across America. We were unable to determine an exact figure that would accurately represent the number of women who shared this same problem, but we do know that many, many women have the same concern. And this concern for both men and women is very emotionally charged. Hair loss and baldness can take a severe toll on the self-esteem of anyone who experiences this problem.

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## Complaint

- Steve Carlson: And plenty of entrepreneurs have responded to our quest for a cure for baldness -- a search for something that will grow hair. Hundreds of hucksters over the years have introduced some very imaginative potions, elixirs and cures that promise to grow hair. Unfortunately, they don't work.
- Sarah Simmons: Fortunately, though, a few of the ethical manufacturers of pharmaceuticals have jumped on the bandwagon, too. The introduction of the drug minoxidil, approximately two years ago, had the hair loss sufferers very excited. But, after discovering the unpleasant and potentially dangerous side effects, it was back to the drawing boards for a more suitable solution to this age-old problem.
- Steve Carlson: Our research staff headed up by our medical advisor, Dr. Ward Dean, has spent several weeks preparing today's edition of Breakthrough '88. And we are very excited about this program, because our team has discovered a very ethical company headquartered in Salt Lake City, Utah - Folipléxx International. They claim to have discovered a non-drug, safe treatment for thinning hair.
- Sarah Simmons: We learned of Folipléxx International quite by accident. When our remote crew went into the field to interview Americans across the country who are experiencing hair loss, they ran into several people who had been using the Folipléxx System quite successfully. These people indicated that their hair loss had stopped and, in many instances, they were actually experiencing re-growth.
- Steve Carlson: Joining us on Breakthrough '88 is the president of Folipléxx International, Mr. Richard Sarradet, from his offices in Salt Lake City, Utah. Thank you for joining us, Mr. Sarradet.
- Richard Sarradet: Well, thank you, Steve. It's a pleasure to be here. I'd like to add that I am a personal fan of Breakthrough '88.
- Steve Carlson: Well, good, I'm glad to hear that. Tell me, Mr. Sarradet, what made you focus your company on hair loss?
- Richard Sarradet: Well, initially, I guess, the reasons were quite personal, Steve. I myself was suffering from a severe hair loss problem and, like all men, I was very anxious to find the solution. When certain drugs were put on the market that were known to help enhance hair-growth, we were all very excited. But, as time wore on, we saw that these side effects were very dangerous. I just felt there had to be a better, a safer, and a non-drug way of addressing the problem of thinning hair, and that's when I set out to put together the Folipléxx System.

- Sarah Simmons: Mr. Sarradet, how does Foliplexx compare with the Helsinki formulation that we've seen advertised on television, read about in the magazines?
- Richard Sarradet: Well, Sarah, the research done at the Helsinki Medical Center in Finland was the first meaningful and recognized effort to study the problem of hair loss. In fact, we used the Helsinki formulation in the Foliplexx System. But, what makes our system so unique and effective is the fact that our team has worked on several new ingredients that enhanced the product since then.
- Sarah Simmons: Then Foliplexx is not just the Helsinki Formulation re-marketed and re-labeled?
- Richard Sarradet: Oh, absolutely not, Sarah! To compare the Helsinki Formulation to the Foliplexx System would be like comparing the Wright Brothers' airplane to the Super Concorde. I mean, they both certainly do fly, but research has yielded many, many more results since then, to say the least.
- Sarah Simmons: That's an interesting comparison, Mr. Sarradet. Does the Foliplexx System contain minoxidil?
- Richard Sarradet: No, Sarah, the Foliplexx System contains no drugs. Drugs you have to get by prescription. As I mentioned earlier, we were very concerned about the side-effects of drugs. The Foliplexx formulation is practically all natural ingredients. I would like to reinforce for you viewers here, that, that we are not marketing a drug here. Nor do we make any claims that could be construed as drug claims. I'd like to add, however, that the Foliplexx System, in our experience, our own experience with it, is that we're getting better and more permanent results with the Foliplexx System. Our team is extremely proud of Foliplexx.
- Steve Carlson: Mr. Sarradet, can you stay with us for a while? Perhaps we could have some more questions later.
- Richard Sarradet: Absolutely.
- Steve Carlson: I will be right back with more about Foliplexx and hair loss after this.
- Announcer: If you or someone you know is experiencing the agony, frustration and embarrassment of hair loss, there is good news. The new powerful Foliplexx System has just been approved by its exclusive North American manufacturer for release without prescription. Independent tests reviewed by the medical and scientific professionals who attended the International Hair Loss Symposium proclaimed the ingredients in Foliplexx to be

safe and effective regardless of nationality, ethnic origin or hair color. That means that anyone ready to do something about their hair loss can stop just complaining and start taking action now. The Foliplexx System has won the respect of hair-care professionals worldwide, including the owner of prestigious Demetre Salon near Beverly Hills, California. Demetre prescribes Foliplexx to all his clients suffering from hair loss.

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Before you consider costly and risky hair transplants or painful and marring scalp surgery, use the Foliplexx System, the natural and safe effective thinning-hair supplement now available without prescription. And the Foliplexx System comes to you with an unprecedented unconditional 90-day money-back guarantee. That means you have nothing to lose but the insecurity and lack of self-confidence that comes with hair loss. Bring back the self-esteem, the vibrance, and the energy of the feeling of youth that comes with having full, thick, attractive hair.

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Man: I've been in the hair industry for 18 years, and, it's sort of like a, I think it's a dream come true. And the product formulation become much better. The public is now waiting and willing to have a product like this, and I think we can start giving them the results they are looking for. Most people never admit that they're losing any hair 'cause it's, it's, it's embarrassing, it's an ego-type thing, and it's ... we keep it very private.



- Woman: I love guys with dark thick hair, so I can run their -- my fingers through it.
- Man: People are very interested in getting better results 'cause they associate hair and being in good shape and everything with the younger type person. And who doesn't want to be as young as they can possibly be? After you reach a certain age, you'd like to freeze and put it on hold the rest of your life.
- Woman: People with more hair just look much younger.
- Man: Looking around at people, confidence levels to me seem higher. The better a person looks, in appearance, the better they feel about themselves, so, by having the fullness and the thickness, and the desired effect of your hair definitely will help your over-all image.
- Steve Carlson: Welcome back to Breakthrough '88. I'm Steve Carlson.
- Sarah Simmons: And I'm Sarah Simmons. The problem of hair loss is of such concern among those who are suffering from it, that several noted medical professionals, hair stylists, and interested persons attended a symposium in Phoenix, Arizona earlier this year. Our own medical consultant, Dr. Ward Dean, spoke at the symposium because of his own interest in hair loss, and he and our remote film crew brought back this special report.
- Announcer: In January of 1988, prestigious members of the medical and scientific communities gathered together to discuss their individual research in the areas of baldness and thinning hair. It was in response to their patients' needs that the focus of the symposium was on a nonsurgical, safe, an effective treatment for thinning hair. Because of the interest world-wide in the area of hair loss, the symposium was video-taped for translation into various foreign languages, and eventual distribution through the global medical network.
- Dr. William C. Fiuretti: The double impacts of increased blood flow to bring nutrients to the peripheral tissue such as skin or hair follicles, as well as the ability to enhance nutrient uptake by the kallikreins offer significant potential for the use of kallikreins as a cosmetic ingredient.
- Announcer: The doctors and scientists that attended the International Hair Loss Symposium concluded that there is indeed a safe and effective treatment for those thousands of men and women worldwide experiencing unwanted hair loss. The Foliplexx formulation was extremely effective on patients regardless of nationality, ethnic origin or hair color.
- Steve Carlson: Well, I don't know about you, Sarah, but that was a little technical.

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- Sarah Simmons: Don't worry, Steve. Fortunately, we have our own medical staff consultant, Dr. Ward Dean, with us, who hopefully will do some translating.
- Steve Carlson: Hopefully. Welcome, Dr. Dean.
- Dr. Ward Dean: Thank you.
- Steve Carlson: You doctors certainly have your own language, don't you. Could you explain to Sarah and myself and our viewers exactly what causes hair loss?
- Dr. Ward Dean: Sure, Steve, I'll try. I've brought along a model here which may help me explain. As you can see, the hair follicle is really quite complex. There's three primary causes of hair loss. The first is an increase in the level of testosterone in the scalp and this partially explains -- testosterone is the male hormone -- and this partially explains why more men than women are bald. Second, is a reduction in the circulation to the hair follicle. And third, is a change in the environment around the hair follicle.
- Sarah Simmons: Doctor, is there anything that we can do about hair falling out?
- Dr. Ward Dean: Well, I've already talked about several things you can do, earlier in the program. The problem with most therapies for hair loss is that they address only a single cause of hair loss. The Foliplexx program seems to address all three causes.
- Sarah Simmons: Then, in your opinion, doctor, does the Foliplexx System just released by Mr. Sarradet's company ... can that actually work?
- Dr. Ward Dean: Well, I've personally interviewed a number of people who've already been on the program and they're quite excited and satisfied with the results, and frankly, I'm quite impressed myself. I think the results speak for themselves.
- Steve Carlson: Doctor, could this be the breakthrough that we've all been looking for?
- Dr. Ward Dean: Well, it certainly seems to be a step in the right direction. And there seem to be several advantages of this program over other programs. First, is that it's extremely safe; second, is that it is more effective than other programs; and third, is that it is not a drug and, therefore, requires no doctor's prescription.
- Steve Carlson: Mr. Sarradet, it looks like you have a fan here. Can you tell me how long it takes to notice results when someone starts on your Foliplexx System?
- Richard Sarradet: Well, Steve, usually they're reporting noticeable results in anywhere from three to six weeks. The first indications are the stopping of hair loss. First thing I noticed was that there was less of my hair in the bottom of the shower, which made me quite happy.
- Steve Carlson: Is the Foliplexx System guaranteed to work?

- Richard Sarradet: Our own in-house study shows that it works for a strong percentage of people who still have living follicles realizing, of course, that so far, nothing works for everybody. Now, to answer your question. The Foliplexx System comes with an unconditional 90-day guarantee, and we feel that's plenty of time for people to find out if the system will work for them. Now, the fact that we offer such an incredible money-back policy and we've kept the price of the product low, we feel that anyone experiencing hair loss or who wants to prevent future hair loss has absolutely nothing to lose by trying our system.
- Sarah Simmons: Mr. Sarradet, how can people purchase the Foliplexx System? Can you purchase it in the store?
- Richard Sarradet: The only way anyone can purchase the Foliplexx System is by calling our facilities directly. Now, we have done this for two very important reasons. First, to ensure product freshness because we believe that's what's important to good results. And, second, is that we can hold the price down so everyone can afford Foliplexx. Now, we are also in negotiation with other countries right now -- Spain, England, Australia -- to market our products. In addition, we are receiving correspondence from other countries and we hope to be opening those markets up real soon.
- Steve Carlson: That's very interesting, Mr. Sarradet. Seems that hair loss and baldness is a problem world-wide. We'll be back with more Breakthrough '88 after this.
- Man: He told me about the product, and I tried it, and it's made my scalp healthier.
- Woman: It feels so much better, and I don't have the dandruff flakes flaking off into my fingernails.
- Woman: If there was a man with hair and a man without, I'd rather go with the man with hair.
- Woman: I mean, if you're with a man that doesn't have any hair, or has very little, I mean it's just, what do you do, rub their head?
- Woman: Well, I look at it this way. I mean, how would a man like to go out with a woman with no hair. I mean, you're not complete if you don't have hair. It definitely makes a person sexy, and I don't know, I just -- I don't think I'd consider going out with someone that, that didn't have at least a handful of hair to grab on to. It, it really means a lot to me -- a guy with hair. And I think I'd prefer wavy or curly hair, because that's sort of a natural look, and, I don't know, like I said before -- I'd put myself in their position, and if I was a man, I don't think I would appreciate a woman with no hair.

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- Woman: To me, a man with a lot of hair, the first thing that I notice about a guy is his hair, and I'm sure the first thing he notices about me is hair. And if I see a guy with great thick hair, in great condition, I'm interested.
- Man: I've been very concerned about my hair loss. I have a receding hair line, long, wide forehead and a rather definite bald spot at the top of my head. And so, my hair was falling out. I could see a lot of hair in the comb everyday. And, by jingle, I started using Foliplexx and it seems to have stopped. Appearance is very, very important. One should always look one's best, I feel. And when your hair begins to fall out, until recently, it's been a permanent, well, disaster.
- Woman: As a middle-aged woman, believe me, I know what it is, a woman turning gray is as bad as a man turning bald. And my husband is losing his hair, unfortunately, and I'd like to see as-much hair on his head as we had, he had thirty years ago! And, whatever it takes, they should really take advantage of it, to use whatever product there is to have the hair put on their heads. It adds to youth and that's for sure.
- Man: Okay, even at my age, by jingle, you know, you want to look your best because what can you do when you can't put your best foot forward, so you got to put your best head forward.
- Announcer: If you or someone you know is experiencing the agony, frustration and embarrassment of hair loss, there is good news. The new powerful Foliplexx System has just been approved by its exclusive North American manufacturer for release without prescription. Independent tests reviewed by the medical and scientific professionals who attended the International Hair Loss Symposium proclaimed the ingredients in Foliplexx to be safe and effective regardless of nationality, ethnic origin or hair color. That means that anyone ready to do something about their hair loss can stop just complaining and start taking action now. The Foliplexx System has won the respect of hair-care professionals world-wide, including the owner of prestigious Demetre's Salon near Beverly Hills, California. Demetre prescribes Foliplexx to all his clients suffering from hair loss.
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system having the complex synergistically combined ingredients just proclaimed as safe and effective by medical professionals.

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Sarah Simmons: Foliplexx, just released in January of this year and approved for distribution by its manufacturer, is causing quite a sensation across the United States. We felt that one of the best people around to comment on the Foliplexx System and its results would be a well-known hair stylist. Along with our remote film crew, I went to Demetre's, a famous salon near Beverly Hills, California.

Demetre, when you and I were talking earlier, you told me some very impressive results your clients had been getting using the Foliplexx formulation. Would you mind telling our viewing audience something about that?

Demetre Addis: I'd be happy to, Sarah. This gentleman's name is Ron. And Ron came to us with a problem quite common known as "losing his hair" or "balding." Ron's problem was in the crown area here. There was literally almost no hair at all, and now, since we've been using the Foliplexx formula, you can see that this whole area is filled in considerably. The hair is looking thicker and healthier.

Behind us, we have another example, results that we get from the Foliplexx formula. This gentleman's name is Phil, and he's Terry's client. Since she's been using the Foliplexx formula on

him, his recession area is where he had the problem and it's all filling in. The results are sensational, and we're all very pleased with it.

Steve Carlson: Well, thank you, Sarah. It was a very nice report. I've been asked to remind you at this point, that if you're interested in ordering the Foliplexx System, please do not call this station directly. They're not equipped for the flood of phone calls. Use the 24-hour-toll-free number that you've seen throughout the program, and you'll be able to talk with. The Foliplexx people directly, and place your order. You know, we have time to go to Mr. Sarradet one more time. Mr. Sarradet, when someone telephones your company and orders the Foliplexx System, how long does it take for them to receive it?

Richard Sarradet: Well, our computerized auto-processing center is, is set up to guarantee shipment by UPS within 48 hours. See, we are quite aware that when someone makes the decision to do something about hair loss, they don't want to wait the four to six weeks it takes for most mail-order companies. Customers that order today should receive their product in five to seven working days.

Sarah Simmons: It sounds like you pay a great deal of attention to customer service.

Richard Sarradet: Yes, Sarah, we do. In fact, our customers will receive, with their Foliplexx System, a special telephone number they can call with any questions they have about the usage of our products. In fact, we are very interested in hearing from our customers about how well they're doing and how well they like our products.

Steve Carlson: Well, thanks very much for joining us.

Richard Sarradet: Well, thank you. It's really been a pleasure.

Steve Carlson:

Ron: We'll be back with more Breakthrough '88 after this.

Ron: The first thing that I noticed when I started using the system was a lot less hair loss. I noticed that there was not a lot of hair in the shower at the bottom. But I was losing my hair, I felt that I was losing my youth, and I was kind of depressed about that and I didn't want to be in that situation. And the system was out there to be used and so I started using it and I'm very happy with the results. I was at a party and a friend, I had run into him, that I hadn't seen in some time, and he took, and noticed that I was growing quite a bit of hair back there. And he is losing his hair in the back and like he was kind of envious of me getting my hair back.

- Woman: A bald man turns me off. I don't even look at bald men. Basically, to me, they're older, they represent someone like my grandfather, someone I wouldn't pick out ever to go out with at all.
- Man: I'm single and it's real important to me to be able to look my best and to have hair, it helps a lot. And it's very important to look good when you go out, and if you want to meet some new people, it helps to be able to make a nice impression on them, and it's real important to me to look my best.  
I noticed that the hair started coming back. There was real short hairs that you noticed with a guy that's going bald. And I noticed that they started growing and getting longer, and I started even getting thicker hair. So I've been real pleased with the results. I've just been on the program about two months. I'm just so damn happy! I can't believe it!
- Woman: A bald man really doesn't have a chance with me because, he can't really turn me off because I don't look at him in the first place for him to be able to turn me off.
- Announcer: If you or someone you know is experiencing the agony, frustration and embarrassment of hair loss, there is good news. The new powerful Foliplexx System has just been approved by its exclusive North American manufacturer for release without prescription. Independent tests reviewed by the medical and scientific professionals who attended the International Hair Loss symposium proclaimed the ingredients in Foliplexx to be safe and effective regardless of nationality, ethnic origin or hair color. That means that anyone ready to do something about their hair loss can stop just complaining and start taking action now. The Foliplexx System has won the respect of hair-care professionals world-wide, including the owner of prestigious Demetre salon near Beverly Hills, California. Demetre prescribes Foliplexx to all his clients suffering from hair loss.
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- Steve Carlson: Thank you for joining us on this edition of Breakthrough '88. We also wish to thank the medical professionals and our own medical advisor, Dr. Ward Dean, for providing the research and guidance in preparing this program.
- Sarah Simmons: And our thanks to Richard Sarradet, President of Foliplexx International, for introducing what seems to be the first non-surgical, non-drug method of dealing with the national problem of hair loss.
- Steve Carlson: See you next time, on the next edition of Breakthrough '88.
- Man: As I've seen results from the Foliplexx System, I feel younger, and certainly more attractive, and even more sexy.
- Woman: Yes, he is more sexy now, I think.
- Woman: A bald man to me means age, and I just, I'm not really into dating very much older men.
- Man: Okay, even at my age, by jingle, you know, you want to look your best.
- Three Women: Absolutely sexy!
- Screen: Foliplexx International is solely responsible for the contents of the preceding program.
- Announcer: The preceding was a paid program.



## EXHIBIT C

## TRANSCRIPT OF Y-BRON COMMERCIAL

Screen: The following is a paid program.  
The following special program deals with the new homeopathic product Y-Bron just released to deal with the problem of non-organic male impotency. Because of the topic, viewer discretion is suggested. The opinions expressed are those of the doctors and professionals that appear, and may not necessarily be that of the general medical or scientific communities.

Dr Marvin Hausman: On the low end, I think we should say that about every one out of eight men in the United States have male sexual dysfunction or impotence.

Man: There you go.

Lyle Waggoner: Do women have an impotence problem?

Announcer: Welcome to Let's Talk, with Lyle Waggoner.

Lyle Waggoner: Thank you. And welcome to Let's Talk. Now, we have another interesting show today. As usual, we ask you, the viewing audience, to let us know what you want to talk about. Well, you picked quite a subject today. Sex and sensuality. It's certainly a motivating force in our lives. We see it all around us. In advertising, the music, the clothing that we wear, just to mention a few things. However, for the 20 million men in this country today, who are sexually impotent, or experiencing some degree of that problem, sex takes on a very different light which can lead to extreme frustration and a possible breakdown in a relationship. So the focus of today's Let's Talk is on male impotence, or the inability to perform sexually. Now, since we'll be dealing with some explicit sexual problems, we recommend using viewer discretion. In other words, today's program may not be appropriate for the younger viewers. Now, the first thing that we are going to be talking about is this product called Y-Bron. It's manufactured by Smith-Davis Pharmacals. Now, it's been reported to be changing people's lives by stimulating sexual desire. I understand that the product is not only for the men who are sexually impotent, but also for the guys who may need to put a little zest back into their sexual relationship. Right now I'd like to introduce today's guests. First of all, we have with us Mr. Gary Ballen. He's president of public relations at Smith-Davis Pharmacals. Next, Dr. Marvin Hausman, a board certified urologist, a researcher and medical director of the Center for Sexual Function in Los Angeles. And

finally, Dr. Leonard Rapoport, a board certified practicing surgeon and medical consultant. Gentlemen, welcome to Let's Talk.

Mr. Ballen, we were talking before we went on the air about your product Y-Bron, and you were telling me that this has been changing people's lives. Could you share that with our audience?

Gary Ballen: Yes, Lyle, I can. We originally developed the product to treat male impotence. However, after various clinical tests, we discovered that not only did it help, frankly, the impotent, but it also helped those who were experiencing a loss of sexual desire.

Lyle Waggoner: Is Y-Bron a drug?

Gary Ballen: No. Not in the conventional sense. It's a natural therapeutic product developed in the homeopathic manner which is considered safe and efficacious.

Lyle Waggoner: So it's all natural?

Gary Ballen: Absolutely.

Lyle Waggoner: Okay. Dr. Hausman, what makes people develop the lack of sexual drive or, and, possibly become impotent?

Dr. Marvin Hausman: Well, you have to view this in, in terms of two phases or two, two causations: the organic versus the emotional or psychologic. The organic or physical is any decrease in blood flow such as can occur in patients with diabetes, heart disease, people with atherosclerosis. Many people don't realize, but when they take anti-high blood pressure medications, they have associated sexual dysfunction. A person who has low-back injury cannot perform adequately because of the association of the pain with the, with the movement during sexual activity. On the other hand, we have the psychologic or emotional: stresses of society, job stress, marital discord, even performance anxiety. Just a fear of failure of a man engaging in sexual function can lead to total failure.

Lyle Waggoner: I see. Lots of things then.

Dr. Marvin Hausman: Yeah, that's right.

Hausman:

Lyle Waggoner: Now, you've given the ingredients in the product Y-Bron here to some of your patients with favorable results. Is that correct?

Dr. Marvin Hausman: That's correct. We've used yohimbine which is a product that has activity in the central nervous system; in the - in the head region, it causes an increase in libido - in sexual desire. We've also had evidence that it increases penile-erectile response.

- Lyle Waggoner: We have a little surprise for you today. One of Dr. Hausman's patients and his wife will be joining us today so, please, let's welcome Carl and Maria.
- Lyle Waggoner: Thank you Carl and Maria for being with us. Now, Carl, as we understand it, you had lost your sexual desire and ability, but you were helped through Dr. Hausman's treatment program. Is that correct?
- Carl: That's correct, Lyle.
- Lyle Waggoner: Please talk with us about that.
- Carl: A few years ago I lost my sexual desire and, you know, frequency of erections and things were looking pretty bad, and you know I suffered many, many years and finally I ran into a friend of Dr. Hausman. And, you know, I wrote him a little note and asked him for advice. And so he referred me to Dr. Hausman and I was enrolled into the program. And that was only three months ago and the program really worked great for me because my, you know, health condition and outlook for life and, you know, philosophy and, you know, sex drive greatly improved. And we both enjoy life a lot more now. We go hiking, swimming and dancing and food tastes better and, you know.
- So we really enjoy life better. It does make a big difference.
- Lyle Waggoner: So in just three months you showed an improvement.
- Carl: Absolutely.
- Lyle Waggoner: Maria, are you happy with the results?
- Maria: Very much so.
- Lyle Waggoner: I'll bet you are. But, you know, for years he said he suffered with this problem.
- Maria: That's right.
- Lyle Waggoner: Now, how did that make you feel? Wasn't it very emotionally stressful?
- Maria: Very emotional for me, yes.
- Lyle Waggoner: What did you think it was? Did you think it was partly your fault?
- Maria: I just didn't know about it, but I tried to help him in many ways.
- Lyle Waggoner: Carl, what happened when you used this formulation? What kind of results did you . . . could you see or feel?
- Carl: Well, suddenly, the erections were very different than before . . . . And you know, your sex drive greatly improves. It's like a miracle happens.
- Lyle Waggoner: Dr. Hausman, is this a typical reaction?
- Dr. Marvin: Yes, it depends on the diagnosis and the reason for using the program and the medication. Many people experience excellent results with this treatment program.
- Hausman:

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- Lyle Waggoner: All right. So the program really worked, right Carl?  
Carl: Certainly does. And I would suggest for other men who have similar problems, and I understand that more than 30 million men in America suffer from these problems, so you know, don't be afraid about your macho image and go and look for help.
- Lyle Waggoner: Just go get it taken care of.  
Carl: Absolutely.
- Lyle Waggoner: All right, Carl, Maria, thanks very much for being with us today.  
Okay, we're going to take a little, short break now and we'll be right back and talk more about sexual impotence and the lack of sex drive and things that we can do about these problems right now, so stay with us.
- Announcer: Often called the epidemic of the 20th century, male impotency or the inability to have a normal relationship silently strikes an estimated one out of every eight men over the age of 40. Every day we're surrounded by pollution, anxiety and stress that can often lead to frustrating and embarrassing male impotency. But far thousands, this silent suffering has been ended, thanks to Y-Bron. A safe and effective formulation to address the problem of non-organic impotency. After recently undergoing two clinical studies, the Y-Bron formulation was shown successful in increasing desire and ability by raising the libido level in many male test subjects. The test results were so impressive that now Y-Bron comes with a 60-day money-back guarantee so you have nothing to lose. And Y-Bron is all natural, homeopathic and completely safe. Now men from all walks of life, regardless of age, are having renewed and fulfilled relationships with their spouses. For many, Y-Bron has given back the energy and the youthful feeling of manhood. When you decide to give Y-Bron a try, your order will be immediately processed and shipped to you confidentially packaged so you too can try feeling the happiness, the self-confidence, the security and all the joy that life has to offer through a successful and complete relationship. To order Y-Bron confidentially packaged for just \$49.95 have your credit card ready and call toll-free 1-800-922-4414. So you can begin to quickly experience the wonderful benefits of the all-natural, homeopathic Y-Bron formula, your order will be processed within 48 hours. Call 1-800-922-4414 or send check or money order to: Y-Bron, P.O. Box 54879, Phoenix, Arizona 85078. Include \$4.50 for shipping and handling. Call 1-800-922-4414 now.

- Case Study 1B007: And I'm very, very happy now. I know that I'm having a good relationship, an intimate sexual relationship with my lady, and I'm the happiest guy in the world. Well actually, this has lasted now for several years. I am 64 years old. We still have this marvelous relationship, and I think I owe it all to Y-Bron, because before then, I-I didn't think there was any hope. I just thought I'd just kind of get old and fade away and not have any kind of a sex life at all. It's proved entirely different. I feel like I'm 30 years old. I love it.
- Case Study 8R409: And I was introduced to the Y-Bron program. After I was on the program, I experienced a very definite change. It's not a, it's not an instantaneous change. I didn't expect that. But it was a very positive change and it's made a very positive change in my lifestyle and in my marriage and we're very, very happy with the program.
- Lyle Waggoner: Welcome back to Let's Talk. Now today's topic is male sexual dysfunction and the lack of sexual drive. We've been talking with Dr. Marvin Hausman. He's the director of the Center for Sexual Function in Los Angeles. Dr. Hausman, we've been saying numbers such as 20 million males, 30 million. Just how common is sexual impotence?
- Dr. Marvin Hausman: On the low end, I think we should say that about one out of every eight men in the United States have male sexual dysfunction or impotence. If we consider all the stresses of society and the psychogenic causes and marital discord, I'd have to guess that approximately 20 million men have some degree of sexual dysfunction or sexual problems.
- Lyle Waggoner: One out of eight, you say.
- Dr. Marvin Hausman: On the low end.
- Lyle Waggoner: One, two, three, four, five, six . . . eight. He, he's the one? That's a tremendous amount of people, really unbelievable. Now, I think we all understand that there is a surgical approach to this problem, such as penile implants. Now, Dr. Rapoport, this is kind of your area. You're a certified, a board-certified surgeon. Can you tell us about the surgical approach?
- Dr. Leonard Rapoport: Yes, Lyle. There are several mechanical devices which can be implanted by a surgeon and used to maintain and create an erection. Now the simplest of these is a rather formidable-looking device which is really just an implant. As you know, the penis has three tubular structures. The center one is for the passage of urine. The two side ones, when engorged with blood, create an

erection. And two of these objects are placed within those side ones --

Lyle Waggoner: Two of them!

Dr. Leonard: Two, yes, in order to create an erection. With a stiff one like this, even though it's slightly hinged, it is ... creates some cosmetic difficulties, and the underclothes have to be worn accordingly.

Lyle Waggoner: Well, you know, before you put that down, I may be ruining an image here, but that looks awfully long!

Dr. Leonard: Well, well, yes, yes, I would point out that first of all they come in sizes.

Rapoport: They do?

Lyle Waggoner: Yes, they do. And second of all, that a large part of this is in the posterior portion of the penis, which is really, isn't really seen. Then we have several of another variety, which are inflatable. This inflatable one is particularly interesting. It's inserted, once again two. And to activate it, one compresses the pump, which is here and the head of the penis . . .

Lyle Waggoner: So that one won't work either?

Dr. Leonard: There you go! And once it has gotten erect like that, it is fairly simple to press the valve just a little further back, and as you see, it will release and go down.

Rapoport: That's inside, and you can feel . . .

Lyle Waggoner: Entirely internal.

Dr. Leonard:

Rapoport: That's, that's really amazing.

Dr. Leonard: Now there is another device, somewhat more complicated like this, which involves insertion and it has a, an area where the fluid is kept, a reservoir if you will. And it has a pump and a valve. Now in this one, when one pumps the pump, as you can see, the reservoir will permit the material to go in . . .

Lyle Waggoner: I'll be darned.

Dr. Leonard: And it creates an erection.

Rapoport:

Lyle Waggoner: All of that goes inside the person?

Dr. Leonard: Yes, sir.

Rapoport:

Lyle Waggoner: The, the valve, the reservoir . . .

Dr. Leonard: Well, I should say that the reservoir goes in the lower part of the abdomen. The valve itself goes into the scrotum, where it is felt to be like a third testicle. And then to release it, you just press the valve in the scrotum.

Rapoport: That appears to me to be a, a major operation.

- Dr. Leonard Rapoport: Well, it's certainly not minor surgery. And, and moderately expensive at that. The most conservative method should be tried first.
- Lyle Waggoner: After an implant has been implanted, can a natural erection be achieved?
- Dr. Leonard Rapoport: No. All your erections must, must stem from the use or the device.
- Lyle Waggoner: So never again would you have an erection naturally.
- Dr. Leonard Rapoport: That's correct. If the implants were taken out, you would never again have any erection.
- Lyle Waggoner: All right. Let's open up a question-and-answer period here with the audience. Anybody here in the audience have a question?
- Audience Member: Yes, sir.
- Audience Member: Question for Dr. Hausman. At what age do men normally develop a sexual problem?
- Dr. Marvin Hausman: There is no particular age. Men at any age can develop a sexual problem. It depends on the diagnosis, it depends on what's going on in their lives, the stress factors. I don't think you could define any particular age. Sexual dysfunction can occur at any age.
- Audience Member: Is Y-Bron effective for women too?
- Gary Ballen: Basically, we don't know.
- Lyle Waggoner: Well, I'm curious about that. Is, do women have an impotent (sic) problem?
- Gary Ballen: Yeah, it's different, but there is a problem, yes.
- Audience Member: Mr. Ballen, are there any side effects from your Y-Bron product?
- Gary Ballen: There are no known -- We've done two clinical trials, and there are no side effects. But, however, there are no negative side effects. However, there are some very good side effects. Most people report a feeling of well-being, of less stress, of being more sensual with their partner, feeling more sensual. Warmer, just a . . . even younger.
- Lyle Waggoner: If that's a side effect, I'll take a lot of them. I think I saw another hand. Yes, ma'am.
- Audience Member: I'd like to ask anyone on the panel if Y-Bron is an aphrodisiac.
- Dr. Marvin Hausman: I, I don't know what Webster's exact definition of aphrodisiac is, but I think that people usually . . .
- Lyle Waggoner: Well as I understand it, and I think, it's something that makes you sexy.
- Dr. Marvin Hausman: Or increases your desire or your . . .

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- Lyle Waggoner: Increases your desire.
- Dr. Marvin Hausman: We use it in the male term libido, the sexual libido of an individual. I don't know any product that's been defined as being used in that, in that sense purely.
- Gary Ballen: I think aphrodisiac, a lot of people would think that it's instant, you -- soon as you take anything you instantly would have this.
- Lyle Waggoner: Okay, but Y-Bron does increase the libido?
- Gary Ballen: Absolutely.
- Lyle Waggoner: But it's not an instant . . . .
- Gary Ballen: Absolutely. It's a cumulative effect.
- Lyle Waggoner: I see. Does that answer your question?
- Audience: Thank you.
- Member:
- Lyle Waggoner: Okay, anybody else? Yes, ma'am.
- Audience: I would like to know if Y-Bron is addictive.
- Member:
- Gary Ballen: Y-Bron is not a drug, it is a natural product and it is - in no way - is it addictive.
- Lyle Waggoner: All right. Thank you very much. Well, it looks like Y-Bron is stirring up quite a lot of interest here. We'll be right back with more of Let's Talk and find out what we can do now to help with male sexual dysfunction, so stay tuned.
- Case Study 4C711: This product helped me attain, or reattain, what I had once before, and made me feel good about myself. And the better I felt about myself, the better I could perform. And the better I could perform, the better I felt about myself. In all of my life.
- Case Study 5P021: I'm 58 years old. I've been married 40 years, and very, very happily married. My wife was very happy with me. But I became unhappy with myself because I found that I was impotent. What is impotence? Impotence is when you can't function with your loved one. And you hide, you do things, you stay away from close quarters with your loved one, your mate, due to your inadequacies. Then I found the Y-Bron program. Now I'm so happy. My whole life has changed. I'm like I was when I was first married: young, vibrant, and full of life, looking forward to the future.
- Man: The product does everything it says it will do. I'm 65 years old and I'm as good now as I was 20 years ago.
- Announcer: Often called the epidemic of the 20th century, male impotency or the inability to have a normal relationship silently strikes an estimated one out of every eight men over the age of 40. Every day we're surrounded by pollution, anxiety and stress that can often lead to frustrating and embarrassing male



impotency. But for thousands, this silent suffering has been ended, thanks to Y-Bron. A safe and effective formulation to address the problem of non-organic impotency. After recently undergoing two clinical studies, the Y-Bron formulation was shown successful in increasing desire and ability by raising the libido level in many male test subjects. The test results were so impressive that now Y-Bron comes with a 60-day money-back guarantee so you have nothing to lose.

And Y-Bron is all natural, homeopathic and completely safe. Now men from all walks of life regardless of age are having renewed and fulfilled relationships with their spouses. For many, Y-Bron has given back the energy and the youthful feeling of manhood. When you decide to give Y-Bron a try, your order will be immediately processed and shipped to you confidentially packaged so you too can try feeling the happiness, the self-confidence, the security and all the joy that life has to offer through a successful and complete relationship. To order Y-Bron confidentially packaged for just \$49.95 have your credit card ready and call toll-free 1-800-922-4414. So you can begin to quickly experience the wonderful benefits of the all-natural, homeopathic Y-Bron formula, your order will be processed within 48 hours. Call 1-800-922-4414 or send check or money order to: Y-Bron, P.O. Box 54879, Phoenix, Arizona 85078. Include \$4.50 for shipping and handling. Call 1-800-922-4414 now.

Lyle Waggoner: Welcome back to Let's Talk. Now we're talking about the silent suffering of sexual dysfunction. And a new product, called Y-Bron, just released that appears to increase the sex drive and has been a tremendous help in treating impotent men. Now, I have a question. Dr. Hausman, if a person, if a man, has dysfunction or a loss of sex desire, is Y-Bron the answer?

Dr. Marvin Hausman: Oh, from the studies that we've been presented with today, the studies have shown that Y-Bron could be effective in increasing male sexual libido, male sexual desire.

Lyle Waggoner: All right. We talked earlier with Dr. Rapoport about the surgical approach. Now, I would imagine that surgery of that nature is very expensive. How much does it cost?

Dr. Leonard Rapoport: Well, Lyle, from a low of about two or three thousand dollars for the less expensive process, to a high of twelve thousand or more for the more complicated ones.

Lyle Waggoner: Twelve thousand. Oh, my goodness.

Dr. Leonard Rapoport: Yes.

Lyle Waggoner:

- Lyle Waggoner: Is it possible that Y-Bron could replace surgery?
- Dr. Leonard Rapoport: Well, certainly any urologist like my colleague Dr. Hausman would advocate the use of a non-surgical, non-invasive technique prior to a surgically invasive technique. And my feelings would be identical. Before one would embark on a surgical approach to sexual dysfunction, one should certainly try the conservative management into which Y-Bron fits.
- Lyle Waggoner: Makes sense to me. Mr. Ballen, is this a complicated product?
- Gary Ballen: Yes, it's very complicated. The manufacturing of that product is very technical, and extraction processes and all. It is a complicated product.
- Lyle Waggoner: All right. I have time for a few more questions from the audience. Anyone have something they want to -- Yes, number 8.
- Audience Member: I want to know if I can be number 7 if I use this stuff, and if I did use this, how hard would it be to get it. Is it in the stores, and do you have to have a prescription or what?
- Gary Ballen: We are now making the product available to the public directly through our company. We're doing that at this time to ensure product freshness and reliability of the product.
- Lyle Waggoner: Mr. Ballen, we found out earlier in the show that age is really not a factor here. Impotency can hit anybody at any time. What age group are you targeting your market approach?
- Gary Ballen: We're targeting our market at any adult who may need help or who our product Y-Bron may help. And that can be just about anybody.
- Lyle Waggoner: Dr. Hausman, why is it so difficult for people to come and seek out a solution to this problem? Why do they keep it to themselves for so long?
- Dr. Marvin Hausman: For a while, it's a whispered diagnosis. Men are very embarrassed about their lack of ability. In our society, a male is taught to produce. He produces in school, he produces on the job, he produces an erection. And when he has a problem he feels that his maleness is gone.
- Man: I tried the product and found it to be 100% effective. What it did for me was made my love life what it should be and I feel as though my manlihood has been restored.
- Case Study 4C711: I started taking the Y-Bron and within three, two or three weeks, it began to have an effect on me. I began to feel it, I began to have an erection, and not only had the erection, I was able to maintain the erection until we both received, we both attained satisfaction.

- And it was beautiful. Life was important to me again. It made me feel good and I know it made her feel good. We're happier as we walked down the street and held each other.
- Case Study  
OS005: It happened just a couple of years ago. My wife and I used to argue over the most ridiculous things: who's gonna mow the lawn, who's gonna cook. But I knew what the problem was. It wasn't her, it was me. I was impotent. The problem was so severe, we got a divorce. When I went into the Y-Bron program, after just a few weeks, I started to see the results. It was fantastic. I felt youthful, energetic. I felt like a new man.
- Announcer: Often called the epidemic of the 20th century, male impotency or the inability to have a normal relationship silently strikes an estimated one out of every eight men over the age of 40. Every day we're surrounded by pollution, anxiety and stress that can often lead to frustrating and embarrassing male impotency. But for thousands this silent suffering has been ended, thanks to Y-Bron. A safe and effective formulation to address the problem of non-organic impotency. After recently undergoing two clinical studies, the Y-Bron formulation was shown successful in increasing desire and ability by raising the libido level in many male test subjects. The test results were so impressive that now Y-Bron comes with a 60-day money-back guarantee so you have nothing to lose. And Y-Bron is all natural, homeopathic and completely safe. Now men from all walks of life, regardless of age, are having renewed and fulfilled relationships with their spouses. For many, Y-Bron has given back the energy and the youthful feeling of manhood. When you decide to give Y-Bron a try, your order will be immediately processed and shipped to you confidentially packaged so you too can try feeling the happiness, the self-confidence, the security and all the joy that life has to offer through a successful and complete relationship.
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- Lyle Waggoner: Welcome back to Let's Talk. Now we have just enough time for a couple of more questions from the audience. I think I saw somebody's hand up here. Who had a question? Yes, sir.

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- Audience Member: What type of misuse could we maybe expect from Y-Bron?
- Gary Ballen: None that I know of.
- Lyle Waggoner: There is no misuse, you could use as much as you want, as little as you want?
- Gary Ballen: Well, you have to follow the directions, but the product is totally safe. You couldn't overdose with it, or anything like that. It's totally safe.
- Lyle Waggoner: Terrific. Who else has a question? Anybody up here? Oh, right behind me. Yes, ma'am.
- Audience Member: I was wondering, to Mr. Ballen, this is. Is it going to be manufactured in England at all, because I think we need it there.
- Gary Ballen: Well, we hope to get it there very soon, within the next year.
- Lyle Waggoner: Now thank you audience for your questions. We're just about out of time, but I'd like to thank our guests, Mr. Gary Ballen, Dr. Marvin Hausman, and of course, Dr. Leonard Rapoport. And congratulations to Smith-Davis Pharmacals for their amazing new product Y-Bron. I'm sure that Y-Bron's release will be good news to many many people silently suffering with the embarrassment of their sexual problems. So until next time thank you very much for being with us here on Let's Talk. Bye for now.
- Screen: HOMEOPATHY  
 The name HOMEOPATHY is derived from the Greek "homios" (similar) and "pathos" (disorder). Homeopathy is expressed in the old Latin sentence "Similis similibus curentur" . . . Let likes be treated by likes. Therefore Homeopathy is based on symptomatology using recognized remedies for alleviation. A Homeopathy preparation has a unique advantage . . . it is derived from botanical, mineral or animal sources and is given in minute doses as a single Homeopathic preparation. Sometimes several preparations may be combined for effectiveness, but all such preparations, singly or in combination, are perfectly safe to take. They have no after effects and are non-habit forming.  
 The testimonials contained in this broadcast are re-enacted by professional actors.  
 Individual results may vary always consult a Medical Doctor for professional advice.
- Announcer: The preceding was a paid program.

## 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 Seattle 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 a complaint should issue stating its charges in that respect, and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of sixty (60) days, now in further conformity with the procedure prescribed in Section 2.34 of its Rules, the Commission hereby issues its complaint, makes the following jurisdictional findings and enters the following order:

1. Respondent Positive Response Marketing, Inc., is a California corporation with its principal office and place of business at 1861 Topanga Canyon Boulevard, Topanga, California. Positive Response also trades and does business as Positive Response Television and Positive Response Advertising.

2. Respondent Michael S. Levey resides at 1975 Topanga Canyon Boulevard, Topanga, California. He is an officer and shareholder of Positive Response Marketing, Inc.

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

## ORDER

### DEFINITIONS

For purposes of this order:

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

2) “*Material connection*” shall mean any relationship between an endorser of any product or service and any individual or other entity advertising, promoting, offering for sale, selling or distributing such product or service, which relationship might materially affect the weight or credibility of the endorsement and which relationship would not reasonably be expected by consumers.

### I.

*It is ordered*, That respondent Positive Response Marketing, Inc., a corporation, its successors and assigns, and its officers, and respondent Michael S. Levey, individually and as an officer of said corporation, and respondents’ agents, representatives and employees, directly or through any partnership, corporation, subsidiary, division or other device, do forthwith cease and desist from selling, broadcasting or otherwise disseminating, or assisting others to sell, broadcast or otherwise disseminate, in part or in whole:

A. The 30-minute television advertisement for the Euro Trym Diet Patch described in the complaint and sometimes known as “The Michael Reagan Show.”

B. The 30-minute television advertisement for Foliplexx described in the complaint and sometimes known as “Breakthrough ‘88.”

C. The 30-minute television advertisement for Y-Bron described in the complaint and sometimes known as “Let’s Talk” or “Let’s Talk with Lyle Waggoner.”

## II.

*It is further ordered,* That respondent Positive Response Marketing, Inc., a corporation, its successors and assigns, and its officers, and respondent Michael S. Levey, individually and as an officer of said corporation, and respondents’ agents, representatives and employees, directly or through any partnership, corporation, subsidiary, division or other device, do forthwith cease and desist from:

A. Representing, directly or by implication, in connection with the advertising, packaging, labeling, promotion, offering for sale, sale or distribution of the Euro Trym Diet Patch or any other substantially similar weight control or weight reduction product in or affecting commerce, as “commerce” is defined in the Federal Trade Commission Act, that:

- (1) Use of such product prevents feelings of hunger;
- (2) Use of such product enables users to lose substantial amounts of weight;
- (3) Use of such product enables users to lose weight in a large majority of cases; or
- (4) Any competent and reliable test or study establishes that such product promotes weight loss.

For purposes of this part II a “substantially similar weight control or weight reduction product” shall be defined as any product that is advertised as causing or aiding weight loss through acupressure, acupathy or homeopathy that uses a bandaid or patch to apply a solution to the skin or that purportedly contains as its active ingredient *calcareo carbonica*.

B. Representing, directly or by implication, in connection with the advertising, packaging, labeling, promotion, offer for sale, sale or distribution of any other product in or affecting commerce, as “commerce” is defined in the Federal Trade Commission Act, that:

- (1) Use of the product prevents or reduces feelings of hunger;
- (2) Use of the product enables users to lose substantial amounts of weight;
- (3) Use of the product enables users to lose weight in a substantial number of cases; or
- (4) Any competent and reliable test or study establishes that use of the product promotes weight loss, unless the representation is true and, at the time of making the representation, respondents possess and rely upon competent and reliable scientific evidence that substantiates the representation.

C. Failing to disclose clearly and prominently in any advertisement for any weight control or weight reduction product in or affecting commerce, as “commerce” is defined in the Federal Trade Commission Act, that dieting and/or exercise is required in order to lose weight; *provided, however*, that this disclosure shall not be required if respondents possess and rely upon competent and reliable scientific evidence demonstrating that the product in question is effective without dieting and/or exercise.

### III.

*It is further ordered*, That respondent Positive Response Marketing, Inc., a corporation, its successors and assigns, and its officers, and respondent Michael S. Levey, individually and as an



officer of said corporation, and respondents' agents, representatives and employees, directly or through any partnership, corporation, subsidiary, division or other device, do forthwith cease and desist from:

A. Representing, in any manner, directly or by implication, in connection with the advertising, packaging, labeling, promotion, offering for sale, sale or distribution of Foliplexx or any other substantially similar product in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, that:

- (1) Use of such product curtails loss of hair;
- (2) Use of such product promotes growth of new hair where hair has already been lost;
- (3) Use of such product relieves, cures, prevents or reverses baldness;
- (4) Such product is an effective remedy for baldness in a large majority of cases; or
- (5) Any competent and reliable test or study establishes that such product relieves, cures, prevents or reverses the advance of baldness.

For purposes of this part III, a "substantially similar product" shall be defined as any product that is advertised as preventing or reversing baldness or hair loss and that purportedly contains as an ingredient one or more of the following: sulfanated mucopolysaccharides, polysorbates, trichoepptides, takanal, kallikrein, alphatocopheral, methyl nicotinate, retinyl palmitate, allantoin, or bovine serum albumin.

B. Representing, in any manner, directly or by implication, in connection with the advertising, packaging, labeling, promotion, offering for sale, sale or distribution of any other product in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, that:

- (1) Use of the product prevents or reduces loss of hair;

(2) Use of the product promotes growth of new hair where hair has already been lost;

(3) Use of the product relieves, cures, prevents or reverses baldness;

(4) The product is an effective remedy for baldness in a substantial number of cases; or

(5) Any competent and reliable test or study establishes that the product relieves, cures, prevents or reverses baldness, 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.

C. Advertising, packaging, labeling, promoting, offering for sale, selling, or distributing any product that is represented as promoting hair growth or preventing hair loss, unless the product is the subject of an approved new drug application for which purpose under the Federal Food, Drug, and Cosmetic Act, 21 U.S.C. 301 *et seq.*, *provided that* this subpart shall not limit the requirements of part III.A and B herein.

#### IV.

*It is further ordered,* That respondent Positive Response Marketing, Inc., a corporation, its successors and assigns, and its officers, and respondent Michael S. Levey, individually and as an officer of said corporation, and respondents' agents, representatives and employees, directly or through any partnership, corporation, subsidiary, division or other device, do forthwith cease and desist from:

A. Representing, in any manner, directly or by implication, in connection with the advertising, packaging, labeling, promotion, offering for sale, sale or distribution of Y-Bron or any other substantially similar product in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, that:

- (1) Use of such product relieves, cures, prevents or reverses impotence;
- (2) Use of such product increases sexual drive, ability, desire or libido;
- (3) Such product is an effective remedy for impotence or increases sexual drive, ability, desire or libido in a substantial number of cases; or
- (4) Any competent and reliable test or study establishes that such product is an effective remedy for impotence or increases sexual drive, ability, desire or libido.

For purposes of this part IV, a “substantially similar product” shall be defined as any product that is advertised for sale over-the-counter as a sexual stimulant or as a treatment for impotence and that purportedly contains as its active ingredient yohimbine or any derivative thereof.

B. Representing, in any manner, directly or by implication, in connection with the advertising, packaging, labeling, promotion, offering for sale, sale or distribution of any other product in or affecting commerce, as “commerce” is defined in the Federal Trade Commission Act, that:

- (1) Use of the product relieves, cures, prevents, reverses or is an effective remedy for impotence;
- (2) Use of the product increases sexual drive, ability, desire or libido;
- (3) The product is an effective remedy for impotence or increases sexual drive, ability, desire or libido at any stated measure of efficacy; or
- (4) Any competent and reliable test or study establishes that the product relieves, cures, prevents or reverses impotence or increases sexual drive, ability, desire or libido, 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.

C. Advertising, packaging, labeling, promoting, offering for sale, selling, or distributing any product that is represented as increasing sexual desire or improving sexual performance, unless the product is the subject of an approved new drug application for such purpose under the Federal Food, Drug, and Cosmetic Act, 21 U.S.C. 301 *et seq.*, *provided that* this subpart shall not limit the requirements of part IV.A and B herein.

V.

*It is further ordered,* That respondent Positive Response Marketing, Inc., a corporation, its successors and assigns, and its officers, and respondent Michael S. Levey, individually and as an officer of said corporation, and respondents' agents, representatives and employees, directly or through any partnership, corporation, subsidiary, division or other device, do forthwith cease and desist from misrepresenting, in any manner, directly or by implication, in connection with the advertising, packaging, labeling, promotion, offering for sale, sale or distribution of the Magic Wand or any other immersion-style kitchen mixer of similar size and construction in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, that:

- A. The product can crush a whole, fresh pineapple in seconds.
- B. Skim milk whipped by the product can be used as mousse-like desserts and cake frosting.

VI.

*It is further ordered,* That respondent Positive Response Marketing, Inc., a corporation, its successors and assigns, and its officers, and respondent Michael S. Levey, individually and as an officer of said corporation, and respondents' agents, representative and employees, directly or through any partnership, corporation, subsidiary, division or other device, in connection with the advertising, packaging, labeling, promotion, offering for sale, sale

or distribution of any product or service in or affecting commerce, as “commerce” is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

A. Making any representation, in any manner, directly or by implication, regarding the efficacy or safety of any food, drug or device, as those terms are defined in Section 15 of the Federal Trade Commission Act, 15 U.S.C. 55, unless at the time of making such representation respondents possess and rely upon competent and reliable scientific evidence that substantiates the representation; *provided, however*, that any such representation for any food product that is specifically permitted in labeling for such food product by regulations promulgated by the Food and Drug Administration pursuant to the Nutrition Labeling and Education Act of 1990 will be deemed to be substantiated by competent and reliable scientific evidence; provided further that any such representation for any over-the-counter drug product that is specifically permitted in labeling for such over-the-counter drug product in Final Regulations establishing conditions under which such product is safe and effective promulgated by the Food and Drug Administration under the Food, Drug and Cosmetic Act, will be deemed to be substantiated by competent and reliable scientific evidence.

B. Making any representation, in any manner, directly or by implication, regarding the performance, benefits, efficacy or safety of any product or service (other than a representation covered under subpart VI.A above), 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.

## VII.

*It is further ordered*, That respondent Positive Response Marketing, Inc., a corporation, its successors and assigns, and its officers, and respondent Michael S. Levey, individually and as an officer of said corporation, and respondents' agents, representatives

and employees, directly or through any partnership, corporation, subsidiary, division or other device, in connection with the advertising, packaging, labeling, promotion, offering for sale, sale or distribution of any product or service in or affecting commerce, as “commerce” is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

A. Failing to disclose, clearly and prominently, a material connection, where one exists, between an endorser of any product or service and any respondent or respondents.

B. Representing, in any manner, directly or by implication, that any endorsement (as “endorsement” is defined in 16 CFR 255.0 (b)) of the product or service represents the typical or ordinary experience of members of the public who use the product or service, unless such is the case.

C. Representing, in any manner, directly or by implication, by words, depictions or symbols, that such product or service has been endorsed by a person, group or organization that is an expert with respect to the endorsement message unless:

(1) The endorser is an existing person, group or organization whose qualifications give it the expertise that the endorser is represented as possessing with respect to the endorsement; and

(2) The endorsement is supported by an objective and valid evaluation or test using procedures generally accepted by experts in that science or profession to yield accurate and reliable results.

## VIII.

*It is further ordered,* That respondent Positive Response Marketing, Inc., a corporation, its successors and assigns, and its officers, and respondent Michael S. Levey, individually and as an officer of said corporation, and respondents’ agents, representatives and employees, directly or through any partnership, corporation, subsidiary, division or other device, in connection with the advertising, packaging, labeling, promotion, offering for sale, sale

or distribution of any product or service in or affecting commerce, as “commerce” is defined in the Federal Trade Commission Act, in connection with any advertisement depicting a demonstration, experiment or test, do forthwith cease and desist from making any representation, in any manner, directly or by implication, that any demonstration, picture, experiment or test depicted in the advertisement proves, demonstrates or confirms any material quality, feature or merit of any product, when such demonstration, picture, experiment or test does not prove, demonstrate or confirm the representation for any reason, including but not limited to:

A. The undisclosed use or substitution of a material mock-up or prop.

B. The undisclosed material alteration in a material characteristic of the advertised product or any other material prop or device depicted in the advertisement.

C. The use of a visual perspective or camera, film, audio or video technique that, in the context of the advertisement as a whole, materially misrepresents a material characteristic of the advertised product or any other material aspect of the demonstration.

#### IX.

*It is further ordered,* That respondent Positive Response Marketing, Inc., a corporation, its successors and assigns, and its officers, and respondent Michael S. Levey, individually and as an officer of said corporation, and respondents’ agent, representatives and employees, directly or through any partnership, corporation, subsidiary, division or other device, in connection with the advertising, packaging, labeling, promotion, offering for sale, sale or distribution of any product or service in or affecting commerce, as “commerce” is defined in the Federal Trade Commission Act, do forthwith cease and desist from creating, producing, selling or disseminating:

A. Any advertisement that misrepresents, directly or by implication, that it is not a paid advertisement.

B. Any commercial or other video advertisement fifteen (15) minutes in length or longer or intended to fill a broadcasting or cablecasting time slot of fifteen (15) minutes in length or longer that does not display visually, in a clear and prominent manner and for a length of time sufficient for an ordinary consumer to read, within the first thirty (30) seconds of the commercial or other advertisement and immediately before each presentation of ordering instructions for the product or service, the following disclosure:

“THE PROGRAM YOU ARE WATCHING IS A PAID  
ADVERTISEMENT FOR [THE PRODUCT OR SERVICE].”

*Provided that*, for the purposes of this provision, the oral or visual presentation of a telephone number or address for viewers to contact to place an order for the product or service shall be deemed a presentation of ordering instructions so as to require the display of the disclosure provided herein.

## X.

*It is further ordered*, That respondent Positive Response Marketing, Inc., its successors and assigns, and respondent Michael S. Levey shall pay to the Federal Trade Commission, by cashier's check or certified check made payable to the Federal Trade Commission and delivered to the Regional Director, Federal Trade Commission, 915 Second Avenue, Suite 2806, Seattle, Washington, the sum of two hundred seventy-five thousand dollars (\$275,000). Respondents shall make this payment on or before the tenth day following the date of entry of this order. In the event of any default on any obligation to make payment under this section, interest, computed pursuant to 28 U.S.C. 1961(a), shall accrue from the date of default to the date of payment. The funds paid by respondents shall, in the discretion of the Federal Trade Commission, be used by the Commission to provide direct redress to purchasers of the Euro



Trym Diet Patch, Foliplexx and/or Y-Bron. If the Federal Trade Commission determines, in its sole discretion, that redress to purchasers of these products is wholly or partially impracticable or is otherwise unwarranted, any funds not so used shall be paid to the United States Treasury. Respondents shall be notified as to how the funds are disbursed, but shall have no right to contest the manner of distribution chosen by the Commission.

XI.

*It is further ordered,* That respondent Positive Response Marketing, Inc., shall, for a period of ten (10) years from the date of issuance of this order, distribute a copy of this order to each of its operating divisions, to each of respondent's present and future principals and officers, and to every present and future employee, agent and representative who performs discretionary functions in sales or advertising, and shall secure from each such person a signed statement acknowledging receipt of the copy of the order.

XII.

*It is further ordered,* That respondent Michael S. Levey shall, for a period of ten (10) years from the date of issuance of this order, notify the Commission within thirty (30) days of the discontinuance of his present business or employment and of his affiliation with any new business or employment. Each notice of affiliation with any new business or employment shall include the respondent's new business address and telephone number, current home address, and a statement describing the nature of the business or employment and his duties and responsibilities.

XIII.

*It is further ordered,* That respondent Positive Response Marketing, Inc., shall notify the Federal Trade Commission at least thirty (30) days prior to any proposed change in the corporation,

such as a dissolution, the emergence of a successor corporation, the creation or dissolution of a subsidiary, transfer of the business by assignment to another entity, or any other change in the corporation that may affect compliance obligations under the order.

#### XIV.

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

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

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.

C. All advertisements and promotional materials subject to this order.

*It is further ordered,* That respondents shall, within sixty (60) days after 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.

Commissioner Azcuenaga recused.

## IN THE MATTER OF

## CONSOL, INC.

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

*Docket C-3460. Complaint, Sept. 27, 1993--Decision, Sept. 27, 1993*

This consent order permits, among other things, the Pennsylvania-based provider of coal export terminal services to acquire Island Creek Coal, Inc., but it requires the respondent to divest the Curtis Bay Company to a Commission-approved acquirer within 12 months, and to obtain, for the next 10 years, prior Commission-approval before acquiring any interest in any concern that provides export coal terminal services in the Port of Baltimore or within 50 miles of it.

*Appearances*

For the Commission: *Howard Morse* and *Allee Ramadhan*.

For the respondent: *Randy Smith, Crowell & Moring*, Washington, D.C. and *Debbie Feinstein, Arnold & Porter*, Washington, D.C.

## COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, and by virtue of the authority vested in it by said Act, the Federal Trade Commission (Commission), having reason to believe that respondent Consol, Inc. (Consol), a joint venture corporation, wholly and equally owned by E.I. du Pont de Nemours (du Pont) and RWE Aktiengesellschaft (RWE), has agreed to acquire the stock of Island Creek Coal, Inc., including the Curtis Bay Company which owns and operates the Bayside Coal Pier, a coal export terminal located in Baltimore, Maryland, in violation of Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45, and that such acquisition, if consummated, would violate Section 7 of the Clayton Act, as amended, 15 U.S.C. 18, and Section 5 of the Federal

Trade Commission Act, as amended, 15 U.S.C. 45, and 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 Consol is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware, with its principal place of business at 1800 Washington Road, Pittsburgh, Pennsylvania. Consol is fifty (50) percent owned by du Pont and fifty (50) percent owned by RWE.

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

#### II. THE ACQUISITION

3. Consol has agreed to acquire from Occidental Petroleum Corporation (OPC) the voting securities of Island Creek Coal, Inc. (Island Creek), a wholly-owned indirect subsidiary of OPC, for approximately \$480 million, including \$25 million in cash and contingency payments valued in excess of \$454 million. Island Creek operates coal mines and an export coal terminal in Baltimore, Maryland, and is headquartered at 250 West Main Street, Lexington, Kentucky.

#### III. THE RELEVANT MARKET

4. The relevant line of commerce within which to analyze the effects of Consol’s proposed acquisition is coal export terminal services, which include receiving coal on rail cars, unloading those rail cars, storing coal, blending of coals, and loading coal onto deep draft seagoing vessels for shipment to foreign countries.

5. The relevant section of the country within which to analyze the effects of the proposed acquisition is Baltimore, Maryland. Coal fields located in Pennsylvania, Maryland, and northern West Virginia served by the B&O portion of the CSX railroad and/or Continental Railroad must ship their coal for export to Baltimore.

#### IV. MARKET STRUCTURE

6. Consol and Island Creek are the two leading providers of export coal terminal services in the relevant market.

7. The Consol coal terminal located at the port of Baltimore has an annual practical capacity of approximately 11.5 million tons. Consol shipped approximately 9.1 million tons of coal for export in 1992, generating approximately \$18 million in revenue.

8. Island Creek's Bayside coal terminal, located at the port of Baltimore, has an annual practical capacity of approximately 6.3 million tons. Bayside shipped approximately 972 thousand tons of coal for export in 1992, generating approximately \$2 million in revenue.

9. The export coal terminal services market in the relevant geographic area is already highly concentrated, whether measured by the Herfindahl-Hirschmann Index or four-firm concentration ratios. Consol is the leading provider of export coal terminal services in the relevant market with approximately 65% of export capacity. In 1992, the Consol terminal serviced 90% of the export coal tonnage at the port of Baltimore. Island Creek's Bayside export coal terminal in Baltimore has approximately 35% of export capacity. In 1992, the Bayside terminal serviced 10% of the total export coal tonnage at Baltimore.

#### V. ENTRY CONDITIONS

10. Entry into the Baltimore export coal terminal services industry would take well in excess of two years and is unlikely because of the need for high capital expenditures, substantial sunk

costs, depressed demand, and the time required to obtain environmental permits and to design and build an export coal terminal.

#### VI. EFFECTS OF THE ACQUISITION

11. The effects of the proposed acquisition, if consummated, may be substantially to lessen competition or to tend to create a monopoly in the relevant market in the following ways, among others:

(a) It will eliminate Island Creek's terminal as a substantial independent competitive force in the relevant market;

(b) It will eliminate actual, direct and substantial competition between Consol and Island Creek;

(c) It will substantially increase the already high concentration in the relevant market;

(d) It will allow Consol to unilaterally exercise market power, which will result in higher prices being paid by coal producers for coal export services;

(e) It will result in a transfer of wealth between buyers (coal producers) and sellers (export coal terminals) of coal terminal services; and

(f) It may lead to a reduction of coal production in northern Appalachia and result in a misallocation of resources.

#### VII. VIOLATIONS CHARGED

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

13. The proposed acquisition of Island Creek from OPC by Consol, if consummated, would constitute violation of Section 7 of the Clayton Act, as amended, 15 U.S.C. 18, and Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45.

## DECISION AND ORDER

The Federal Trade Commission, having initiated an investigation of the proposed acquisition by Consol, Inc. of the stock of Island Creek Coal, Inc., and the respondent having been furnished thereafter with a copy of this draft of complaint which the Bureau of Competition proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge respondent with violation of the Clayton Act and the Federal Trade Commission Act; and

The respondent, its attorney, and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the respondent of all the jurisdictional facts set forth in the aforesaid draft of the 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 the 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 filed thereafter by interested persons 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. Consol 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 1800 Washington Road, Pittsburgh, PA.
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.

As used in this order, the following definitions shall apply:

(a) “*Consol*” means Consol, Inc. (a wholly and equally owned joint venture between E.I. du Pont de Nemours and RWE Aktiengesellschaft), Consol, Inc.’s joint venture parents, its predecessors, successors and assigns, divisions, subsidiaries, affiliates, companies, groups, partnerships and joint ventures that Consol controls, directly or indirectly, and their directors, officers, employees, agents and representatives, and their respective successors and assigns.

(b) “*OPC*” means Occidental Petroleum Corporation, its predecessors, successors and assigns, divisions, subsidiaries, affiliates, companies, groups, partnerships and joint ventures that OPC controls, directly or indirectly, and their directors, officers, employees, agents and representatives, and their respective successors and assigns.

(c) “*Curtis Bay*” means the Curtis Bay Company or all assets of the Curtis Bay Company, including, but not limited to, the Bayside Coal Pier and all assets used in the maintenance or operation of the Bayside Coal Pier located in the Port of Baltimore, Maryland.

(d) “*Acquisition*” means the acquisition by Consol from OPC of the stock of Island Creek Coal, Inc., a subsidiary of OPC.

(e) “*Commission*” means the Federal Trade Commission.

(f) “*Export Coal Terminal Services*” means the receiving of coal by rail, its storage, blending, and loading on vessels for shipment to a foreign country.

## II.

*It is ordered*, That Consol shall comply with all the terms of the Hold Separate Agreement executed on June 25, 1993, and attached hereto as Appendix A and made a part of this order. The Hold Separate Agreement shall continue in effect until such time as



Consol or the trustee has accomplished the divestiture required by paragraphs IV and V of this order or until such time as the Hold Separate Agreement provides.

### III.

*It is further ordered,* That, pending divestiture of Curtis Bay, Consol shall take such action as is necessary to maintain the viability and marketability of Curtis Bay and shall not cause or permit the destruction, removal, wasting, deterioration or impairment of Curtis Bay, except in the ordinary course of business that does not affect the viability and marketability of Curtis Bay, ordinary wear and tear excepted.

### IV.

*It is further ordered,* That within twelve (12) months after the date this order becomes final Consol shall divest, absolutely and in good faith, Curtis Bay. The divestiture shall be made only in a manner that receives the prior approval of the Commission and only to an acquirer that receives the prior approval of the Commission. The purpose of the divestiture is to maintain Curtis Bay as an independent competitor in the coal export terminal services business and to remedy the lessening of competition resulting from the Acquisition as alleged in the Commission's complaint. The divestiture shall also be consistent with covenants in applicable Revenue Bonds requiring that the facility be used as "docks, wharves or storage facilities" and in the Safe Harbor Leases requiring that the equipment covered by those leases not be removed from the facility and be maintained in operable condition, including the provision of any certifications or reports required by the Internal Revenue Code.

## V.

*It is further ordered, That:*

A. If Consol has not fully complied, absolutely and in good faith, with paragraph IV of this order within the time period provided in such paragraph, Consol shall consent to the appointment by the Commission of a trustee to divest Curtis Bay. In the event 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, Consol shall similarly 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 Consol to comply with this order.

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

(1) The Commission shall select the trustee, subject to the consent of Consol, which consent shall not be unreasonably withheld. The trustee shall be a person with experience and expertise in acquisitions and divestitures. If Consol has not opposed the selection of a proposed trustee within fifteen (15) days after notice by the Commission's staff to Consol of the identity of the proposed trustee, Consol 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 Curtis Bay, and to make any further arrangements that may be reasonably necessary to maintain the viability and competitiveness of the business.

(3) The trustee shall have twelve (12) months from the date the Commission approves the trust agreement described in paragraph V.B.8. to accomplish the divestiture. If, however, at the end of the twelve-month period, the trustee has submitted a plan of divestiture or believes that the divestiture can be accomplished 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 only extend the trustee's divestiture period one (1) time for such reasonable time as the trustee may request, not to exceed one (1) additional year.

(4) The trustee shall have full and complete access to the personnel, books, records, and facilities related to Curtis Bay, or to any other relevant information, as the trustee may request. Consol shall develop such financial or other information as such trustee may request and shall cooperate with any request of the trustee. Consol shall take no action to interfere with or impede the trustee's accomplishment of the divestiture. Any delays in the granting of divestiture caused by Consol shall extend the time for divestiture under paragraph V.B (3) in an amount equal to the delay, as determined by the Commission or, for a court-appointed trustee, by the court.

(5) Subject to Consol's absolute and unconditional obligation to divest at no minimum price, and the purpose of the divestiture as stated in paragraph IV of this order, the trustee shall use his or her best efforts to negotiate the most favorable price and terms available for the divestiture. The divestiture shall be made in the manner set out in paragraph IV 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 Consol from among those approved by the Commission.

(6) The trustee shall serve, without bond or other security, at the cost and expense of Consol, on such reasonable and customary terms and conditions as the Commission or, in the case of a court-appointed trustee, the court may set. The trustee shall have authority to

employ, at the cost and expense of Consol, such consultants, accountants, attorneys, investment bankers, business brokers, appraisers, 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 divestiture and all expenses incurred. After approval by the Commission and, in the case of a court-appointed trustee, by the court, of the account of the trustee, including fees for his or her services, all remaining monies shall be paid at the direction of Consol and the trustee's power shall be terminated. The trustee's compensation shall be based in significant part on a commission arrangement contingent on the trustee's divesting Curtis Bay.

(7) Consol 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 trusteeship, 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, negligence, willful or wanton acts, or bad faith by the trustee.

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

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

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

(11) The trustee shall have no obligation or authority to operate or maintain Curtis Bay.

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

## VI.

*It is further ordered,* That, within sixty (60) days after the date this order becomes final and every sixty (60) days thereafter until Consol has fully complied with the provisions of paragraph IV of this order, Consol 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, or has complied with those provisions. Consol shall include in its compliance reports, among other things that are required from time to time, a full description of all substantive contacts or negotiations for the divestiture, including the identity of all parties contacted. Consol also 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.

## VII.

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

A. Acquire any stock, share capital, equity or other interest in any concern, corporate or non-corporate, presently engaged in, within the past two years engaged in, or in the process of attempting to engage in providing export coal terminal services in the Port of Baltimore, Maryland or within 50 miles of the Port of Baltimore, Maryland.

B. Acquire any assets used for, or previously used for (and still suitable for use for) the providing of coal export terminal services from any concern, corporate or non-corporate, presently engaged in, within the past two years engaged in, or in the process of attempting to engage in providing export coal terminal services in the Port of Baltimore, Maryland or within 50 miles of the Port of Baltimore, except in the ordinary course of business.

C. On the anniversary of the date on which this order becomes final, and on every anniversary thereafter for the following nine (9) years, Consol shall file with the Commission a verified written report of its compliance with this paragraph of this order.

### VIII.

*It is further ordered*, That, for the purposes of determining or securing compliance with this order, and subject to any legally recognized privilege, upon written request and on reasonable notice to Consol, Consol 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 Consol relating to any matters contained in this order; and

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

### IX.

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

## AGREEMENT TO HOLD SEPARATE

This Agreement to Hold Separate (the "Agreement") is by and between Consol, Inc. (Consol), a corporation organized and existing under the laws of the State of Delaware, with its principal office and place of business located at 1800 Washington Road, Pittsburgh, PA., 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*, Consol intends to purchase 100% of the voting securities of Island Creek Coal, Inc. (Island Creek) a subsidiary of Occidental Petroleum Corporation (hereinafter the "Acquisition"); and

*Whereas*, Consol and Island Creek both own and operate coal export terminals in the Port of Baltimore, Maryland; and

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

*Whereas*, if the Commission accepts the 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* with respect to the coal export terminals owned by Island Creek and Consol 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 Island Creek's Curtis Bay Company ("Curtis Bay") as described in paragraph I of the Consent Order and the Commission's right to seek to restore Curtis Bay as a viable competitor in the coal export terminal services business; and

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

- (i) Preserve Curtis Bay as a viable independent business pending its divestiture as a viable and ongoing enterprise,
- (ii) Remedy any anticompetitive effects of the Acquisition, and
- (iii) Preserve Curtis Bay as an ongoing, viable entity engaged in the coal export terminal services business in the event that divestiture is not achieved; and

*Whereas*, Consol entering into this Agreement shall in no way be construed as an admission by Consol that the Acquisition is illegal; and

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

*Now, therefore*, the Parties agree, upon understanding that the Commission has determined that it has reason to believe the acquisition may substantially lessen competition, and in consideration of the Commission's agreement that, unless the Commission determines to reject the Consent Order, it will not seek further relief from Consol with respect to effects of the Acquisition on coal export terminal services in the Port of Baltimore, Maryland, except that the Commission may exercise any and all rights to enforce this Agreement and the Consent Order to which it is annexed and made a part thereof, and, in the event the required divestiture is not accomplished, to seek divestiture of Curtis Bay pursuant to the Consent Agreement, and other relief, as follows:



1. Consol agrees to execute and be bound by the attached Consent Order.

2. Consol agrees that from the date this Agreement is accepted until the first of the dates listed in subparagraphs 2.a-2.c, 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. 120 days after publication in the Federal Register of the Consent Order, unless by that date the Commission has finally accepted such Order; or

c. The day after the divestiture required by the Consent Order have been completed.

3. Consol will hold Curtis Bay, as it is presently constituted, separate and apart on the following terms and conditions:

a. Curtis Bay shall be held separate and apart and shall be operated independently of Consol (meaning here and hereinafter, Consol excluding Curtis Bay and excluding all personnel connected with Curtis Bay on behalf of Island Creek as of the date this Agreement was signed) except to the extent that Consol must exercise direction and control over Curtis Bay to assure compliance with this Agreement or the Consent Order.

b. Consol shall not exercise direction or control over, or influence directly or indirectly, Curtis Bay; *provided, however*, that Consol may exercise only such direction and control over Curtis Bay as is necessary to assure compliance with this Agreement or the Consent Order.

c. Consol shall maintain the viability and marketability of Curtis Bay and shall not sell, transfer, encumber (other than in the normal course of business), or otherwise impair its marketability or viability.

d. Except for the single Consol director, officer, employee or agent serving on the "New Board" (as defined in subparagraph 3.i),

Consol shall not permit any director, officer, employee, or agent of Consol to also be a director, officer or employee of Curtis Bay.

e. Except as required by law or as reported by the auditor (provided for in subparagraph 3.f) and except to the extent that necessary information is exchanged in the course of defending investigations or litigation, obtaining legal advice, acting to assure compliance with this Agreement or the Consent Order (including accomplishing the divestiture), and except to the extent that certain designated individuals on Consol's accounting staff may provide accounting services to Curtis Bay (at no cost to Curtis Bay), Consol shall not receive or have access to, or the use of, any of Curtis Bay's "material confidential information" not in the public domain, except as such information would be available to Consol in the normal course of business if the Acquisition had not taken place. Any such information that is obtained pursuant to this subparagraph shall only be used for the purposes set out in this subparagraph. ("Material confidential information," as used herein, means competitively sensitive or proprietary information not independently known to Consol, and includes but is not limited to customer lists, customers, price lists, prices, individual transactions, marketing methods, patents, technologies, processes, or other trade secrets).

f. Consol may retain an independent auditor to monitor the operation of Curtis Bay. Said auditor may report to Consol on all aspects of the operation of Curtis Bay other than information on customer lists, customers, price lists, prices, individual transactions, marketing methods, patents, technologies, processes, or other trade secrets.

g. Consol shall not change the composition of the management of Curtis Bay except that the non-Consol (as Consol is defined in subparagraph 3.a hereof) directors or members serving on the New Board (as defined in subparagraph 3.i hereof) shall have the power to remove employees for cause.

h. All material transactions out of the ordinary course of business and not precluded by subparagraphs 3.a-3.g hereof, shall be subject to a majority vote of the New Board (as defined in subparagraph 3.i hereof). The Curtis Bay management shall prepare capital and operating budgets each six (6) months, which shall be subject to

approval of a majority of the New Board (as defined in subparagraph 3.i hereof).

i. Consol shall elect a new three-person board of directors of Curtis Bay (“New Board”) once it obtains title to Curtis Bay. Consol may elect the directors to the New Board provided, however, that no director of the New Board shall have had prior responsibility for, or knowledge of confidential information regarding, Consol’s coal export terminal services business, and no more than one Consol director, officer, employee, or agent shall be a director of the New Board (“Consol director”). Except as permitted by this Agreement, no Consol director, so long as he or she serves as a director, shall receive, in his or her capacity as a director of the New Board, material confidential information and shall not disclose any such information received under this Agreement to Consol or use it to obtain any advantage for Consol. Such Consol director shall participate in matters which come before the New Board only for the limited purpose of considering a capital investment or other transactions exceeding \$500,000 and carrying out Consol’s responsibilities under this Agreement or the Consent Order. Except as permitted by this Agreement, such Director shall not participate in any matter, or attempt to influence the votes of the other directors with respect to matters that would involve a conflict of interest if Consol and Curtis Bay were separate and independent entities. Meetings of the New Board during the term of this Agreement shall be stenographically transcribed and the transcripts retained for two (2) years after the termination of this Agreement.

j. Any Consol employee who obtains or may obtain confidential information under this Agreement shall enter a confidentiality agreement prohibiting disclosure of confidential information until the day after the divestiture required by the Consent Order have been completed.

k. All earnings and profits of Curtis Bay shall be retained separately in or on behalf of Curtis Bay. If necessary, Consol shall provide Curtis Bay with sufficient working capital to operate at the current rate of operation.

1. Should the Federal Trade Commission seek in any proceeding to compel Consol (meaning here and hereinafter Consol including Curtis Bay) to divest itself of Curtis Bay or to compel Consol to divest any assets or businesses of Curtis Bay that it may hold, or to seek any other injunctive or equitable relief, Consol shall not raise any objection based upon the expiration of the applicable Hart-Scott-Rodino Antitrust Improvements Act waiting period or the fact that the Commission has permitted the Acquisition. Consol also waives all rights to contest the validity of this Agreement.

4. 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 Consol made to its principal office, Consol shall permit any duly authorized representative or representatives of the Commission:

a. Access during the office hours of Consol 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 Consol relating to compliance with this Agreement;

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

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