IN THE MATTER OF

LOUIS BASS, INC.

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

Docket C-3562. Complaint, March 13, 1995--Decision, March 13, 1995

This consent order prohibits, among other things, a Wisconsin corporation, doing business as Crestwood Company, from making false or unsubstantiated performance claims about any communication aid it offers in the future, and from making representations concerning the efficacy of the communication devices in enabling individuals with disabilities to communicate through facilitated communication, unless the respondent possesses competent and reliable scientific evidence to substantiate the representation.

Appearances

For the Commission: *Jeffrey Klurfeld, Kerry O'Brien* and *Erika Wodinsky.*

For the respondent: *David Meany, Michael, Best & Friedrich*, Milwaukee, WI.

COMPLAINT

The Federal Trade Commission, having reason to believe that Louis Bass, Inc. (d/b/a Crestwood Company), a corporation ("respondent"), has violated the provisions of the Federal Trade Commission Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, alleges:

PARAGRAPH 1. Respondent Louis Bass, Inc. (d/b/a Crestwood Company), is a Wisconsin corporation, with its principal office or place of business at 6625 North Sidney Place, Glendale, Wisconsin.

PAR. 2. Respondent has advertised, offered for sale, sold, and distributed communication aids for individuals with disabilities, including the "Crestalk" and the "Canon Communicator." These products are "devices" within the meaning of Sections 12 and 15 of the Federal Trade Commission Act.

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

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

A. NEW ROAD TO COMMUNICATIONS
Mickey communicates with Crestalk™ one letter at a time...
Mickey, 18, who is autistic, is communicating with his teacher, Dave Mikulecky, by using the very latest technique called "Facilitated Communication."
Mickey needs only light support on his forearm to type out the words that help him express his thoughts and feelings.
He is using Crestwood's new electronic aid called, "CRESTALK,™" which can be used by many adults or children with communication difficulties.
{depicting the device's screen with the words "I LIKE DAVE DAVE FRIEND" appearing on it}
(Exhibit A)

B. Mickey communicates with Crestalk® one letter at a time...
Mickey, 18, who is autistic, is communicating with his teacher, Dave Mikulecky, by using the very latest technique called "Facilitated Communication."
Mickey needs only light support on his forearm to type out the words that help him express his thoughts and feelings.
He is using Crestwood's new electronic aid called, "CRESTALK,®" which can be used by many adults or children with various types of communication difficulties.
With the help of his facilitator, Dave Mikulecky, Mickey writes, "I LIKE DAVE DAVE FRIEND"
{depicting the device's screen with the words "I WANT A GRILLED CHEESE SANDWICH" appearing on it}
(Exhibit B)

C. Many autistic children are using Facilitated Communication with the Canon very successfully. (Exhibit C)

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

A. The Crestalk enables autistic individuals to communicate through facilitated communication.

B. The Canon Communicator enables autistic individuals to communicate through facilitated communication.

PAR. 6. In truth and in fact:

A. The Crestalk does not enable autistic individuals to communicate through facilitated communication.

B. The Canon Communicator does not enable autistic individuals to communicate through facilitated communication.

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

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

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

PAR. 9. The acts or practices of respondent as alleged in this complaint constitute unfair or deceptive acts or practices and the making of false advertisements in or affecting commerce in violation of Sections 5(a) and 12 of the Federal Trade Commission Act.

Commissioner Azcuenaga recused.

EXHIBIT A

FOR
CHILDREN AND ADULTS

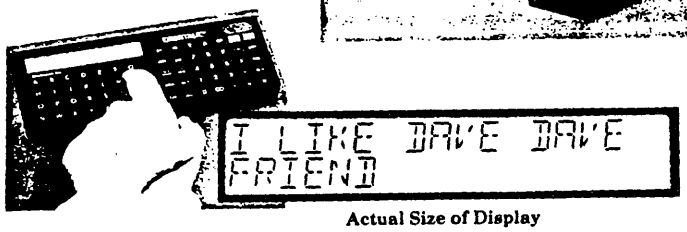
NEW ROAD TO COMMUNICATIONS

Mickey communicates with Crestalk™ one letter at a time . . .

Mickey, 18, who is autistic, is communicating with his teacher, Dave Mikulecky, by using the very latest technique called **"Facilitated Communication."**

Mickey needs only light support on his forearm to type out the words that help him express his thoughts and feelings.

He is using Crestwood's new electronic aid called, "CRESTALK,™" which can be used by many adults or children with communication difficulties. See page 9.



Actual Size of Display

1992-93 Catalog
CRESTWOOD COMPANY
Phone: (414)352-5678

MORE NEW DYNAMIC AIDS

- ▶ Talking Laser Beam®
- ▶ Big Orange Switch
- ▶ Sonic Frame-Mirror
- ▶ 39 Adapted Toys
- ▶ Talking Pictures® Kit V — In Sign Language

EXHIBIT A

EXHIBIT B

A New Exciting Portable Communication Aid — At An Incredibly Low Price

Mickey communicates with Crestalk® one letter at a time . . .

Mickey, 18, who is autistic, is communicating with his teacher, Dave Mikulecky, by using the very latest technique called "Facilitated Communication."

Mickey needs only light support on his forearm to type out the words that help him express his thoughts and feelings.

He is using Crestwood's new electronic aid called, "CRESTALK®" which can be used by many adults or children with various types of communication difficulties.

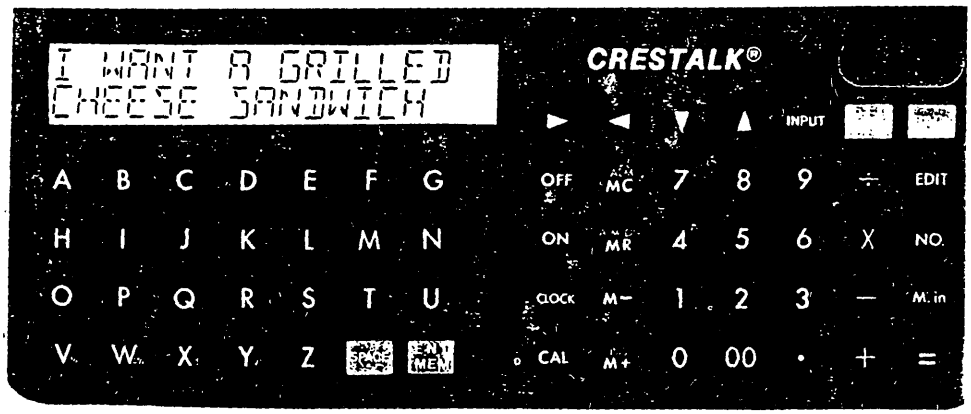
With the help of his facilitator, Dave Mikulecky, Mickey writes, "I LIKE DAVE DAVE FRIEND"

CRESTALK® is an efficient and economical communication device for children and adults who have difficulty expressing their needs orally and cannot be understood by others — a giant step forward towards greater independence. Extraordinary electronic aid is lightweight and portable to carry with you wherever you go. Easy to use, just press keys lightly to express thoughts, wants, needs, and feelings. Message prints 16 characters per line on 2 line display panel. Display continues scrolling for longer messages.

With 20K MEMORY you can also preprogram hundreds of sentences easily and then retrieve them on the spot quickly. Calculator function. High quality, compact. Batteries included. 1 year manufacturer's warranty. Spec sheet available.

3000 Crestalk® & Case With Handle $129.95

2119 New Book: Communication Unbound — Facilitated Communication, by Dr. Douglas Biklen, 1993. See #2119, p. 21 ..... $17.95



ACTUAL SIZE - 3½" x 8¼" x 1"

PORTABLE - Weight 9 ozs.

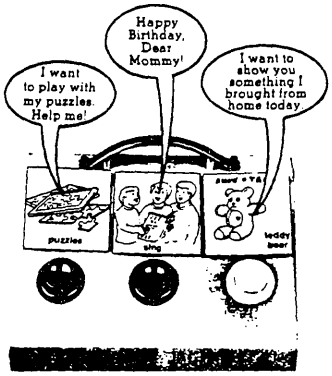
EXHIBIT C

CRESTWOOD INTRODUCES TALK BACK™ III

A new message center enables nonverbal and unintelligible children and adults to communicate with Real Speech!

WIDE VARIETY OF USES: Yes, no, I don't know; likes and dislikes, identifying information, favorite TV show; music games; food, clothing; messages; etc., etc.

VERSATILE: YOU CAN record up to three messages in any language Use at school, home, hospital, nursing home, rehabilitation center, recreational area, etc. Patent pending



Liza Sanders, Director of Speech Pathology and Audiology, of Central Virginia Training Center in Lynchburg, VA wrote *"Easy to program and use. I really like the voice quality! Very portable and easy to display or change pictures. This is really a great communication device for someone who is beginning to learn to communicate but can't use anything sophisticated."*

FEATURES

- Press one button to record up to three messages for a total of 20 seconds. Will mix phrase length to provide individual messages of 5, 10, or 20 seconds.
- Easy to play back. Lightly press one of three buttons or one of three optional external switches (not supplied).
- Can reprogram instantly.
- Very high quality sound.
- Built-in shelf to hold 3 pictures.
- Learning time - seconds.
- Built-in microphone.
- Battery failure will not result in lost messages. Automatic control conserves battery life. 9 volt battery is included.
- Carrying handle. Lightweight - only 1½ lbs.
- 6 month warranty.

Talk Back™III can be used together with Crestwood's (3 in 1) Momentary Control Center Switch or any other single momentary switch with 1/8" plug, for those requiring switch operation. See #3087, pg. 14.

3036 Talk Back™III $249.95
3087 Momentary Control Center Switch $149.95

3037 MESSAGE CENTER PACKAGE — SAVE $40.00
Talk Back™III with
Control Center Switch (3 in 1) $359.00

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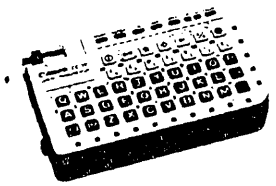
2 CANON TAPE COMMUNICATORS



Many autistic children are using Facilitated Communication with the Canon very successfully.

TWO NEW 1992 MODELS to help improve communication. Model CC-7P PAPER printout only and Model CC-7S-SOUND and/or PAPER printout. Both have the following features 1) Press the keys and print out MESSAGES ON TAPE 2) MESSAGE MEMORY Each stores up to 7,000 characters and prints out frequently used phrases Easy to use record and recall modes 3) CALCULATOR FUNCTION 4) ENLARGED PRINT Lower case and capitals, regular or double width 5) Insert any momentary switch with ⅛" plug (p. 13) to row and column scan intersect Enables person who can't press keys to print out message (Switch not included) 6) Built-in rechargeable battery pack gives 6-7 hours of continuous use. Compact, 7" x 4 3/16" x 1 3/16" Weight 7P Model - 17.6 ozs., 7S Model - 18.5 ozs ASK US FOR A SPEC SHEET

Only Model CC-7S has SOUND MEMORY YOU can record up to 240 seconds total recording time, microphone provided Playback done thru built-in speaker

SET INCLUDES Canon Communicator, battery pack, charger, keyboard cover, saliva guard, soft case, neck strap, and 20 rolls of paper OPTIONAL ACCESSORIES wheelchair attachment, armbelt, extension bells No return on any Canon or equipment

This does not void 1 yr Canon warranty of parts and labor

3053 Canon CC-7P Print Only ..... DLVD PRICE $850.00
3054 Canon CC-7S Speech/Print ..... DLVD PRICE $1,100.00
3051 20 Rolls of Paper $19.50

DECISION AND ORDER

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

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

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

1. Respondent Louis Bass, Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the State of Wisconsin, with its office and principal place of business located in the City of Glendale, State of Wisconsin.

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

DEFINITIONS

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

A. The term *"communication aid"* means any alphabet display chart, computer, typewriter or other device, which is created or marketed for use by persons with communication impairments, including the "Crestalk" and "Canon Communicator."

B. The term *"facilitated communication"* means any method or technique or process that entails an individual providing physical support to a person with a communication impairment, while that person types or points to a communication aid.

I.

It is ordered, That respondent, Louis Bass, Inc. (d/b/a Crestwood Company), a corporation, its successors and assigns, and its officers, agents, representatives and employees, directly or through any corporation, subsidiary, division or other device, in connection with the manufacturing, labelling, advertising, promotion, offering for sale, sale, or distribution of any communication aid, in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from misrepresenting, in any manner, directly or by implication, that such product enables autistic individuals to communicate through facilitated communication.

II.

It is further ordered, That respondent, Louis Bass, Inc. (d/b/a Crestwood Company), a corporation, its successors and assigns, and its officers, agents, representatives and employees, directly or through any corporation, subsidiary, division or other device, in connection with the manufacturing, labelling, advertising, promotion, offering for sale, sale, or distribution of any communication aid, in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from representing, in

any manner, directly or by implication, that such product enables individuals with disabilities to communicate through facilitated communication, unless such representation is true and, at the time of making such representation, respondent possesses and relies upon competent and reliable scientific evidence that substantiates the representation. For purposes of this order, "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.

III.

It is further ordered, That respondent, Louis Bass, Inc. (d/b/a Crestwood Company), a corporation, its successors and assigns, and its officers, agents, representatives and employees, directly or through any corporation, subsidiary, division or other device, in connection with the manufacturing, labelling, advertising, promotion, offering for sale, sale, or distribution of any communication aid, in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from representing, in any manner, directly or by implication, the performance or attributes of any such product, unless, at the time of making such representation, respondent possesses and relies upon competent and reliable evidence, which when appropriate must be competent and reliable scientific evidence, that substantiates such representation.

IV.

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

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

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

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

V.

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

VI.

It is further ordered, That the corporate respondent shall, within sixty (60) days from the date of service of this order upon it, distribute a copy of this order to each of its officers, agents, representatives, licensees, independent contractors, and employees involved in the preparation and placement of advertisements or promotional materials, or is in communication with customers or prospective customers, or who has any responsibilities with respect to the subject matter of this order; and for a period of three (3) years, from the date of issuance of this order, distribute a copy of this order to all of respondent's future such officers, agents, representatives, licensees, independent contractors, and employees.

VII.

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

Commissioner Azcuenaga recused.

IN THE MATTER OF

ABOVO, INC., ET AL.

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

Docket C-3563. Complaint, March 22, 1995--Decision, March 22, 1995

This consent order prohibits, among other things, a Massachusetts company and its president from making false or unsubstantiated performance claims about any communication aid they offer in the future, and from making representations concerning the efficacy of their communication devices in enabling individuals with disabilities to communicate through facilitated communication, unless the respondents possess competent and reliable scientific evidence to substantiate the representation.

Appearances

For the Commission: *Jeffrey Klurfeld* and *Kerry O'Brien.*

For the respondents: *Leland B. Seabury, Ely & King*, Springfield, MA.

COMPLAINT

The Federal Trade Commission, having reason to believe that Abovo, Inc., a corporation, and Susan L. Lakso, individually and as an officer of said corporation ("respondents"), have violated the provisions of the Federal Trade Commission Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, alleges:

PARAGRAPH 1. Respondent Abovo, Inc. is a Massachusetts corporation, with its principal office or place of business at Cabotville Industrial Park, 165 Front Street, 4th Floor, B Building, Chicopee, MA.

Respondent Susan L. Lakso is an officer of the corporate respondent. Individually or in concert with others, she formulates, directs and controls the acts and practices of the corporate respondent, including the acts and practices alleged in this complaint. Her principal office or place of business is the same as that of the corporate respondent.

PAR. 2. Respondents have manufactured, advertised, offered for sale, sold, and distributed the "Abovo Personal Communicating Device" ("Abovo PCD"), a communication aid for individuals with disabilities. These products are "devices" within the meaning of Sections 12 and 15 of the Federal Trade Commission Act.

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

PAR. 4. Respondents have disseminated or have caused to be disseminated advertisements for the Abovo PCD, including but not necessarily limited to the attached Exhibits A-F. These advertisements contain the following statements and depictions:

A. You're doing very well...let's finish...
{depicting Susan Lakso and John using the Abovo PCD in conjunction with the technique of facilitated communication}
Six months ago, John was thought to be mentally retarded. For over 30 years, his speech and motor skills didn't allow him to communicate meaningfully through speech, writing, or American sign language. Until six months ago, he had never been able to carry on purposeful dialog. It is hard to imagine how frustrating that was for John. In fact, he is intelligent, caring, and witty. But he had no way to let anyone else know. Over the past six months, John has been demonstrating his abilities to communicate by using an innovative technique, and a breakthrough product. The technique is facilitated communication. The product is the personal communicating device from Abovo.
{depicting the device with the words "SUSAN HEW RE YOU TODAY" appearing on its screen}
Together, they open up a world of communication possibilities for John and countless other individuals across America and around the world.
... This is a breakthrough product for persons who have not been able to communicate verbally. This product allows persons like John to have the opportunity to communicate their thoughts, their feelings, and their needs. It allows people for the first time, perhaps in their entire life, to be able to have full conversations with family members, teachers, and important people.
For individuals like John with disabilities that restrict speech and motor skills, acquiring this ability is nothing short of revolutionary.... You'll also be able to understand how this innovative product line, the first ever, designed specifically for facilitated communication, can make a phenomenal difference in the lives of persons like John who are non-verbal. . . .
Providing a voice for persons who are non-verbal has been a team effort driven by a shared desire -- the desire to bring to market a product line that raises the potential for facilitated communication to a level never before achieved....
Although the individuals who use Abovo products are a diverse group, they share a need and desire to communicate and express themselves. Our products are being used by persons with motor disabilities resulting from such conditions as apraxia,

and motor speech disorders, autism, mental retardation, RETT syndrome, stroke, tracheotomy, laryngeal cancer, traumatic brain injury, Alzheimer's disease, Parkinson's disease, multiple sclerosis, muscular dystrophy, and cerebral palsy.... The ability to meaningfully communicate changes the lives of persons with restricted speech or motor skills....
Thank you for sharing Abovo's interest in giving persons who are non-speaking the ability to communicate.
(Exhibit A: promotional video)

B. Communication Breakthrough For Non-Speaking Persons...
The Abovo™ Personal Communicating Device (PCD™) may be used for facilitated communication or unassisted typing. A proven aid for people who have been labeled as having autism, mental retardation, RETT Syndrome and other speaking disabilities. (Exhibit B: print ad)

C. "Just because a person can't speak doesn't mean he has nothing to say."
Personal Communicating Device™ For Non-Speaking Persons...
The Abovo™ Personal Communicating Device (PCD™) may be used for facilitated communication or unassisted typing. A proven aid for people who have been labeled as having autism, mental retardation, RETT Syndrome and other speaking disabilities. (Exhibit C: print ad)

D. Breakthrough Typing Device for Non-Speaking Persons...PCD
The Abovo™ Personal Communicating Device (PCD) was designed especially for personal communication through typing. This advanced portable device allows Facilitated Communication for people who have autism, mental retardation, RETT Syndrome and other speaking disabilities. (Exhibit D: print ad)

E. Personal Communicating Device...PCD™
Breakthrough in Facilitated Communication and unassisted typing.
The Abovo PCD™ was designed especially for personal communication through typing. The portable PCD™ allows Facilitated Communication for people who have been labeled as having autism, mental retardation, RETT Syndrome and other speaking disabilities. (Exhibit E: print ad)

F. Breakthrough Typing Device for Persons with Speaking Disabilities.
The Abovo™ Personal Communicating Device (PCD) was designed especially for personal communication through typing. This advanced portable device allows Facilitated Communication for people who have been labeled as having autism, mental retardation, RETT Syndrome and other speaking disabilities. (Exhibit F: print ad)

PAR. 5. Through the use of the statements and depictions contained in the advertisements referred to in paragraph four, including but not necessarily limited to the advertisements attached as Exhibits A-F, respondents have represented, directly or by implication, that the Abovo PCD enables autistic and mentally retarded individuals to communicate through facilitated communication.

PAR. 6. In truth and in fact, the Abovo PCD does not enable autistic and mentally retarded individuals to communicate through

facilitated communication. Therefore, the representation set forth in paragraph five was, and is, false and misleading.

PAR. 7. Through the use of the statements and depictions contained in the advertisements referred to in paragraph four, including but not necessarily limited to the advertisements attached as Exhibits A-F, respondents have represented, directly or by implication, that the Abovo PCD enables individuals who are disabled as a result of apraxia, motor speech disorders, RETT Syndrome, stroke, tracheotomy, laryngeal cancer, traumatic brain injury, Alzheimer's disease, Parkinson's disease, multiple sclerosis, muscular dystrophy, and/or cerebral palsy to communicate through facilitated communication.

PAR. 8. Through the use of the statements and depictions contained in the advertisements referred to in paragraph four, including but not necessarily limited to the advertisements attached as Exhibits A-F, respondents have represented, directly or by implication, that at the time they made the representations set forth in paragraph five and seven, 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 five and seven, 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. The acts or 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.

EXHIBIT A

ABOVO, INC. PROMOTIONAL DOCUMENTARY
"LISTEN TO WHAT I TYPE"

You're doing very well ... let's finish...

{depicts Susan Lakso facilitating with John}

Six months ago, John was thought to be mentally retarded. For over 30 years, his speech and motor skills didn't allow him to communicate meaningfully through speech, writing, or American sign language. Until six months ago, he had never been able to carry on purposeful dialog. It is hard to imagine how frustrating that was for John. In fact, he is intelligent, caring, and witty. But he had no way to let anyone else know. Over the past six months, John has been demonstrating his abilities to communicate by using an innovative technique, and a Breakthrough product. The technique is facilitated communication. The product is the personal communicating device from Abovo.

{"SUSAN HEW RE YOU TODAY" appears on the device's screen}

Together, they open up a world of communication possibilities for John and countless other individuals across America and around the world.

Hello, my name is Susan Lakso. I'm the founder of the Abovo Project, and the President of Abovo, the makers of the Personal Communicating Device you just saw John using. This is a breakthrough product for persons who have not been able to communicate verbally. This product allows persons like John to have the opportunity to communicate their thoughts, their feelings, and their needs. It allows people for the first time, perhaps in their entire life, to be able to have full conversations with family members, teachers, and important people.

For individuals like John with disabilities that restrict speech and motor skills, acquiring this ability is nothing short of revolutionary. The film you are about to see describes a breakthrough product, the new Abovo Personal Communicating device. John and so many others are using this product to make the most of facilitated communication. In the next few minutes, we'll show you the Abovo product line, describe important features and benefits, and introduce you to the people who turn the Abovo project into reality. You'll also be able to understand how this innovative product line, the first ever, designed specifically for facilitated communication, can make a phenomenal difference in the lives of persons like John who are non-verbal.

Whether using the facilitator, or for independent typing, the Abovo product line was designed with one goal in mind: to help people communicate.

The Abovo personal communicating device, or PCD, is a portable electronic tool designed for single finger communication by persons who wish to communicate through typing. The Abovo PCD is the main component in the first and only line of products designed specifically as electronic tools for facilitated communication. While other companies have promoted their existing products, everything from label-makers to salesman's appointment calendars, for use with facilitated communication, only Abovo products were conceived for this purpose. Developed in conjunction with leading specialists in facilitated communication, microelectronics and human factors design, the Abovo PCD simplifies the motor skill involved in typing.

Let's take a look at some of the special features and benefits you'll find in the Abovo product line.

In Latin, Abovo means, "From the ground up." The Abovo PCD was conceived and developed from the ground up as a tool for facilitated communication. This approach offers the user substantial benefits.

Using the Abovo PCD is simple and intuitive. it is ergonomically designed to minimize the motor skill necessary for typing. Forty-one large keys are recessed in size to accept a finger. The keys' tactile feel and single impression action prevent unintended multiple entries.

The Abovo PCD's light weight and small size helps it fit in a coat pocket, purse, or briefcase. Dimensions are only 3-1/2" x 8-1/2" x 2". By comparison, the smallest notebook computers are many times larger and heavier. The PCD attaches conveniently to the user's chair arm, tray, or table top. You can use it just about anywhere. It's rechargeable. Nicad batteries are built-in and last about eight to ten hours between charges. An on-screen message tells you when it's time to charge, and if you want, you can even continue using your PCD while it's charging.

The Abovo PCD is easy to read, whether you are typing, facilitating, or observing. The super twist liquid crystal display is clearly visible from all angles. An optional remote display receives an infrared signal from PCD, allowing others to read the typist's words from any convenient line of sight location. An optional distribution unit creates a network of up to eight remote displays for use around a board room, classroom, or family dinner table.

The Abovo PCD has an 8,000 character memory built-in. It can store the equivalent of five pages of typewritten text. The data in memory is retained even when the user turns the power off, and the memory can be downloaded to a personal computer. This is especially useful for writers or researchers working with facilitated communication.

The Abovo PCD P model includes a built-in printer that prints directly to a thermal tape. The typist may print directly from the keyboard, one character at a time, print everything in the 40 character display, or print the complete 8K memory buffer.

A four function calculator is built-in, giving the typist complete arithmetic capabilities directly from the keyboard. This is particularly useful for classroom work, homework assignments, and conducting money transactions.

The Abovo product line includes a range of standard and optional accessories that enable you to customize your system to your needs. The typing stand cradles the PCD. It's made of extremely durable closed cell foam, with a non-skid surface that won't slide on a tabletop. The typing stand can also be firmly attached to the typist's chair arm or tray. The stand snugly accommodates the PCD and on the opposite side a remote display unit for visible communication with others. The typing stand also does double duty as a shipping cushion, reducing the amount of packaging. The remote display unit gives users the ability to Communicate with others, up to 20 feet away. This enables everyone who wants to see the PCD's display to do so without leaving to crowd in behind the typist. The remote display unit has an infrared sensor that receives a signal from the PCD showing exactly what appears on the PCD's display.

The distribution unit is ideal when the typist wishes to Communicate with many people at once. This unit receives the infrared message from the PCD, and

distributes it by wire to as many as eight remote display units. This is ideal for use in a classroom, board room, or around the family dinner table. The unit is conveniently powered by the PCD charger, and plugs into a standard 110V AC outlet.

The PC wedge opens the Abovo typist to the world of computerized Communications. The PC wedge is an interface device that downloads the memory of the PCD to Apple or IBM-compatible personal computers. It uses the industry-standard ASCII Character format, which is accessible to popular software Packages. With access to a computer, Abovo users can take advantage of modem-based services, including the Abovo bulletin board.

Providing a voice for persons who are non-verbal has been a team effort driven by a shared desire -- the desire to bring to market it product line that raises the potential for facilitated communication to a level never before achieved. One member of the Abovo product development team described his work as a high-tech mission for humanity. The team's work is not stopped with the introduction of the Abovo product line just described. New ideas are constantly under development, and work is underway on complimentary technologies.

Today the Abovo project continues to focus on creating communication tools to give a voice to non-verbal individuals who wish to communicate through typing.

Although the individuals who use Abovo products are a diverse group, they share a need and desire to communicate and express themselves. Our products are being used by persons with motor disabilities resulting from such conditions as apraxia, and motor speech disorders, autism, mental retardation, RETT syndrome, stroke, tracheotomy, laryngeal cancer, traumatic brain injury, Alzheimer's disease, Parkinson's disease, multiple sclerosis, muscular dystrophy, and cerebral palsy. Individuals with disorders affecting speech use the Abovo PCD for unassisted typing. A person who is hearing impaired, for example, can use the PCD to communicate with another individual who doesn't interpret signing. For every user, the Abovo PCD allows for communication that inspires confidence, independence, and dignity.

As a speech language pathologist, too, I'm always interested in the person as a person, and when dealing with adults, you would like them to be able to access equipment or technology that continues to allow them to function as an adult, and feel like an adult. And when we look at the equipment that's aesthetically appealing, and I think helps the individual to feel more like a viable adult, and not that he or she is using some type of equipment that is demeaning. So, in general, I see multiple use for this equipment, and am personally having some excellent experiences on an individual basis and in classroom settings with this equipment.

One of the major advantages I see with this equipment for classroom use is that we have the remote unit that allows the teacher to read immediately what the student is transmitting. And it allows for more face-to-face kind of communication which is more normal. I also see this equipment as almost a necessity in hospital rehabilitation settings that might have a population of newly laryngectomized, newly tracheotomized patients, or patients that are on a ventilator that don't have access to oral communication. This would then allow them a chance to express their thoughts, feelings, concerns, and have their information read in a more adult manner.

Mom suffered a stroke about two years ago, and it's been tough communicating with her. A lot of times, because she's voice impaired, and also because of the aphasia she suffered. It's been playing 20 questions. Really couldn't know exactly what she wanted until maybe two, three, four minutes, and sometimes she gets so frustrated she'd just stop. The nice thing about the typing is that it's easy to communicate, and it is amazing how much is actually retained that we just haven't been able to see. We hope that this will help us in terms of making things better for my mom, and for her enjoyment.

The ability to meaningfully communicate changes the lives of persons with restricted speech or motor skills. Abovo is proud that our products can have so profound an impact on these individuals and their families, friends and teachers. Facilitated communication is a powerful tool, and the personal Communicating device from Abovo maximizes its potential, from the mistake-proof keyboard, to the remote displays, to the computer interface. No other product gives the user more options, more flexibility, and more independence than the Abovo PCD. It's easy to learn more about the personal communicating device.

You can call Abovo, area code 413 594-5279. You can fax Abovo, area code 413 594-8175, or you can write to Abovo at the Cabotville Industrial Park, 165 Front Street, PO Box 89, Chikopee, Massachusetts.

Thank you for sharing Abovo's interest in giving persons who are nonspeaking the ability to communicate.

EXHIBIT B

ictor of Child Obesity

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could be reduced
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:ported last month
of the American
Anaheim, CA.
umption has been
n have a problem
tivity," said Laurel
inical professor of
nedicine and pedi-
of California-San
developer of
n's leading weight
for children and

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always a symptom
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amily communica-

turing needed to
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when parents mis-
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)," said John Gray,
ks, Men Are from
n Venus and What
eal. "Parents need
rture a child's self-
ealthy boundaries
get what they want

, diet, exercise and
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, Ms. Mellin stated.
obesity treatments
ly on these factors

demonstrated by
obesity has risen
the last 20 years.
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far outshines adult obesity treatment outcomes."

Involving the parents in treatment should not be construed as "blaming the parents for a child's obesity," said Ms. Mellin. "Often, only one child in a family is obese. That child may be particularly vulnerable to obesity because of genetics or temperament. The success of these programs demonstrates that there is an opportunity to build on the strength of the family unit as part of child obesity treatment."

For effective, long-term weight loss, a program must emphasize small, sustainable modifications in diet, exercise and communication. Parents should be involved from the start, receiving instruction on how limits are met as well as developing a healthier family lifestyle.

Ms. Mellin said child-onset obesity has been associated with higher rates of morbidity and mortality. There also are psychological consequences of being an overweight child, she noted.

In addition, overweight children have a 70 percent chance of being obese adults, which puts them at higher risk for many diseases.

Among adults who are morbidly obese (150 to 200 percent overweight), "moderate weight loss can mean a 20 to 75 percent reduction in risk factors for several chronic diseases, a leading researcher reported in another session at the ADA meeting.

George Blackburn, MD, PhD, a national authority on obesity, cited a recent study that found significantly overweight patients who lost 10-20 percent of their body weight and kept it off during a three-year follow-up period reduced their risk factors for hypertension, Type II diabetes mellitus, cardiovascular disease, gastrointestinal tract and sleeping disorders and a variety of dyslipidemias.

"The most critical pounds lost are the first and beyond a certain point taking off more pounds wasn't necessarily better from a health perspective," Dr. Blackburn said. "The key is to lose fat while increasing the percentage of lean tissue. It's essential to modify life-long eating habits, not just go on a crash diet."

Ideally, at least 75 percent of weight loss should be body fat.

He endorsed the U.S. government report, *Healthy People 2000*, that identi-

EXHIBIT C

"Just because a person can't speak doesn't mean he has nothing to say."

Personal Communicating Device™ For Non-Speaking Persons...

The Abovo™ Personal Communicating Device (PCD™) may be used for facilitated communication or unassisted typing. A proven aid for people who have been labeled as having autism, mental retardation, RETT Syndrome and other speaking disabilities. Victims of TBI, Stroke, Parkinsons disease, Alzheimers disease, CP, laryngeal cancer and other conditions affecting speech may also benefit from the PCD™. Available options include: remote display units for communicating up to 20 feet away; printer version; alpha or qwerty keyboard and capability to download/interface with Apple® and IBM® compatible computers. Call, fax or write for further information.

- ***Design for single finger typing***
- ***Recessed, easy-to-strike keys***
- ***Easy to read, 40-character display***
- ***Portable, easy to use and carry***
- ***Bold Alpha or Qwerty keyboard***
- ***Non-Repeatable Keystrokes***

"Call 413-594-5279 to order the Abovo™ video, "Listen to what I Type", an informative introduction to the PCD™ product line.

See us at TASH Booth 415

A · B · O · V · O™

Technologies For Communicating

P.O. Box 89, Dept. T, Chicopee, MA USA 01014-0089 413-594-5279 fax: 413-594-8175

EXHIBIT C

EXHIBIT D

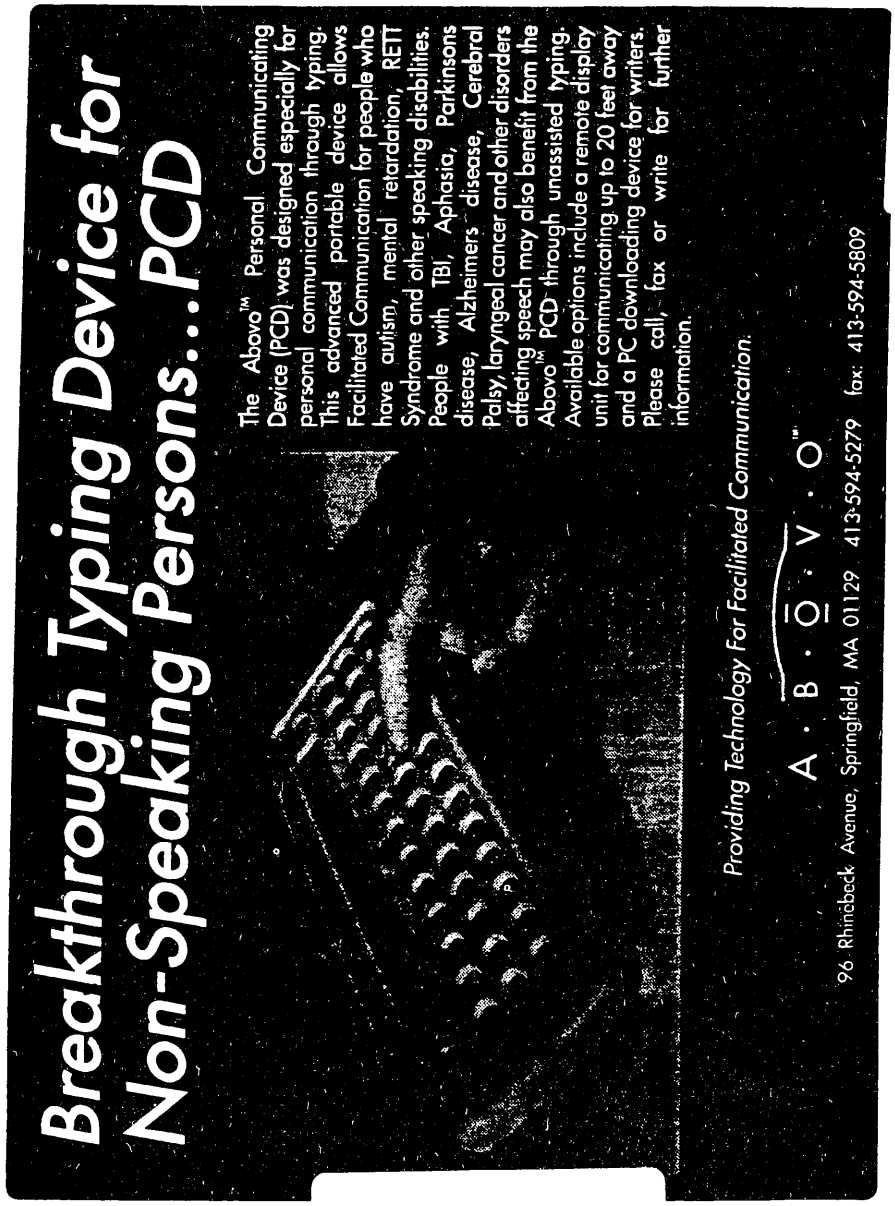
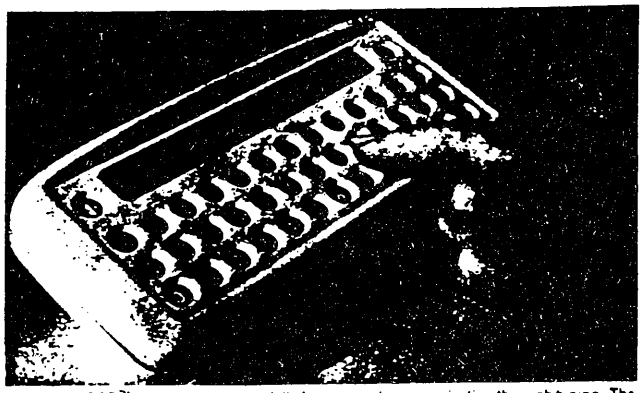


EXHIBIT D

EXHIBIT E

Personal Communicating Device...PCD™

Breakthrough In Facilitated Communication and unassisted typing.



The Abovo PCD™ was designed especially for personal communication through typing. The portable PCD™ allows Facilitated Communication for people who have been labeled as having autism, mental retardation, RETT Syndrome and other speaking disabilities. Individuals with TBI, CP, laryngeal cancer and other disorders affecting speech may use the PCD™ for unassisted typing. Features include:

- ***Design for single finger typing***
- ***Recessed, easy-to-strike keys***
- ***Easy to read, 40-character display***
- ***Portable, easy to use and carry***
- ***Bold graphic tactile keyboard***
- ***8K character memory***

Options include. Remote display units for group or classroom communications; printer version; downloading capability to Apple® and IBM®/compatible computers. Call, write or fax for more information on the Abovo PCD™.

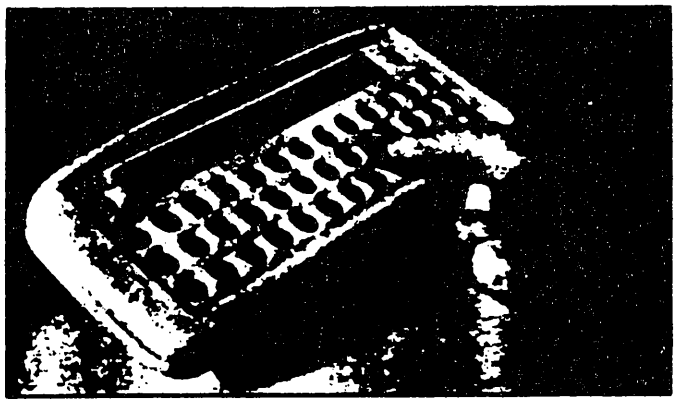
A · B · Ō · V · O®

Technologies For Communicating.

96 Rhinebeck Ave., Dept. CP, Springfield, MA 01129 413-594-5279 fax: 413-594-5809

EXHIBIT F

Breakthrough Typing Device for Persons with Speaking Disabilities.



The Abovo™ Personal Communicating Device (PCD) was designed especially for personal communication through typing. This advanced portable device allows Facilitated Communication for people who have been labeled as having autism, mental retardation, RETT Syndrome and other speaking disabilities. Victims of TBI, stroke, Parkinsons disease, Alzheimers disease, CP, laryngeal cancer and other disorders affecting speech may also benefit from the Abovo™ PCD through unassisted typing. Available options include a remote display unit for communicating up to 20 feet away and a PC downloading device for writers. Please call, fax or write for further information.

A · B · O · V · O

96 Rhinebeck Avenue, Springfield, MA 01129
413-594-5279 fax 413-594-5809

EXHIBIT F

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 San Francisco 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 attorney, and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the respondents of all the jurisdictional facts set forth in the aforesaid draft of complaint, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondents that the law has been violated as alleged in such complaint, 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 Abovo, Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the State of Massachusetts, with its office and principal place of business located in the City of Chicopee, State of Massachusetts.

Respondent Susan Lakso is an officer of said corporation. She formulates, directs and controls the policies, acts and practices of said corporation and her principal office and place of business is located at the above stated address.

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

ORDER

DEFINITIONS

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

A. The term "*communication aid*" means any alphabet display chart, computer, typewriter or other device, which is created or marketed for use by persons with communication impairments, including the "Abovo Personal Communicating Device."

B. The term "*facilitated communication*" means any method or technique or process that entails an individual providing physical support to a person with a communication impairment, while that person types or points to a communication aid.

I.

It is ordered, That respondents, Abovo, Inc., a corporation, its successors and assigns, and its officers, and Susan L. Lakso, individually and as an officer and director of said corporation, and respondents' agents, representatives and employees, directly or through any corporation, subsidiary, division or other device, in connection with the manufacturing, labelling, advertising, promotion, offering for sale, sale, or distribution of any communication aid, in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from misrepresenting, in any manner, directly or by implication, that such product enables autistic and/or mentally retarded individuals to communicate through facilitated communication.

II.

It is further ordered, That respondents, Abovo, Inc., a corporation, its successors and assigns, and its officers, and Susan L. Lakso, individually and as an officer and director of said corporation, and respondents' agents, representatives and employees, directly or through any corporation, subsidiary, division or other device, in connection with the manufacturing, labelling, advertising, promotion, offering for sale, sale, or distribution of any communication aid, in or

affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from representing, in any manner, directly or by implication, that such product enables individuals with disabilities to communicate through facilitated communication, 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. For purposes of this order, "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.

III.

It is further ordered, That respondents, Abovo, Inc., a corporation, its successors and assigns, and its officers, and Susan L. Lakso, individually and as an officer and director of said corporation, and respondents' agents, representatives and employees, directly or through any corporation, subsidiary, division or other device, in connection with the manufacturing, labelling, advertising, promotion, offering for sale, sale, or distribution of any communication aid, in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from representing, in any manner, directly or by implication, the performance or attributes of any such product, 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 such representation.

IV.

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

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

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

V.

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

VI.

It is further ordered, That the individual respondent shall, for a period of five (5) years after the date of service of this order upon her, promptly notify the Commission, in writing, of her discontinuance of her present business or employment and of her affiliation with a new business or employment. For each such new affiliation, the notice shall include the name and address of the new business or employment, a statement of the nature of the new business or employment, and a description of respondent's duties and responsibilities in connection with the new business or employment.

VII.

It is further ordered, That the corporate respondent shall, within sixty (60) days from the date of service of this order upon it, distribute a copy of this order to each of its officers, agents, representatives, licensees, independent contractors, and employees involved in the preparation and placement of advertisements or promotional materials, or is in communication with customers or prospective customers, or who has any responsibilities with respect to the subject matter of this order; and for a period of three (3) years, from the date of issuance of this order, distribute a copy of this order

to all of respondent's future such officers, agents, representatives, licensees, independent contractors, and employees.

VIII.

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

Commissioner Azcuenaga recused.

IN THE MATTER OF

WRIGHT MEDICAL TECHNOLOGY, INC., ET AL.

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

Docket C-3564. Complaint, March 23, 1995--Decision, March 23, 1995

This consent order requires, among other things, a Tennessee-based research and development corporation to transfer to the Mayo Foundation, the licensor of the implant technology to Orthomet, Inc., a complete copy of all assets relating to Orthomet's business of researching and developing orthopaedic implants for use in human hands, and also requires Wright Medical Technology to obtain Commission approval before acquiring any interest in any firm that has received, or has applied for, Food and Drug Administration approval to market orthopaedic hand implants in the United States.

Appearances

For the Commission: *Richard B. Dagen* and *Benjamin H. Tahyar.*

For the respondents: *Linda R. Blumkin, Fried, Frank, Harris, Shriver & Jacobson*, New York, N.Y. *Edward R. Mandell, Parker, Chapin, Flattau & Klimpl*, New York, N.Y.

COMPLAINT

The Federal Trade Commission ("Commission"), having reason to believe that respondents, Wright Medical Technology, Inc., a corporation subject to the jurisdiction of the Commission, Kidd, Kamm Equity Partners, L.P. ("KKEP"), a limited partnership subject to the jurisdiction of the Commission, KKEP's general partner, Kidd, Kamm Investments, L.P. ("KKI"), a limited partnership subject to the jurisdiction of the Commission, and KKI's general partner, Kidd, Kamm Investments, Inc. ("KKI, Inc."), a corporation subject to the jurisdiction of the Commission, have agreed to acquire all of the outstanding shares of common and convertible preferred stock issued by Orthomet, Inc., a corporation subject to the jurisdiction of the Commission, in violation of Section 7 of the Clayton Act, as amended, 15 U.S.C. 18, and Section 5 of the Federal Trade Commission Act ("FTC Act"), 15 U.S.C. 45; and it appearing to the

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

I. THE RESPONDENTS

1. Respondent Wright Medical Technology, Inc. ("WMTI") is a corporation organized and existing under the laws of the State of Delaware, with its principal offices located at 5677 Airline Road, Arlington, Tennessee.

2. Respondent Kidd, Kamm Equity Partners, L.P. ("KKEP") is a limited partnership organized, existing, and doing business under and by virtue of the laws of the State of Delaware, with its principal offices located at Three Pickwick Plaza, Greenwich, Connecticut.

3. Respondent Kidd, Kamm Investments, L.P. ("KKI") is a limited partnership organized, existing, and doing business under and by virtue of the laws of the State of Delaware, with its principal place of business located c/o Kidd, Kamm & Company, 9454 Wilshire Boulevard, Suite 920, Beverly Hills, California.

4. Respondent Kidd, Kamm Investments, Inc. ("KKI, Inc.") 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 c/o Kidd, Kamm & Company, 9454 Wilshire Boulevard, Suite 920, Beverly Hills, California.

5. For purposes of this proceeding, WMTI, KKEP, KKI, and KKI, Inc. are, and at all times relevant herein have been, engaged in commerce as "commerce" is defined in Section 1 of the Clayton Act, as amended, 15 U.S.C. 12, and WMTI is a corporation, KKEP is a limited partnership, KKI is a limited partnership, and KKI, Inc. is a corporation whose businesses are in or affecting commerce as "commerce" is defined in Section 4 of the FTC Act, as amended, 15 U.S.C. 44.

II. THE ACQUIRED COMPANY

6. Orthomet, Inc. ("Orthomet") is a corporation organized and existing under the laws of the State of Minnesota, with its principal offices located at 6301 Cecilia Circle, Minneapolis, Minnesota.

7. Orthomet is, and at all times relevant herein has been, engaged in commerce as "commerce" is defined in Section 1 of the Clayton

Act, as amended, 15 U.S.C. 12, and is a corporation whose business is in or affecting commerce as "commerce" is defined in Section 4 of the FTC Act, as amended, 15 U.S.C. 44.

III. THE ACQUISITION

8. On or about October 15, 1994, WMTI and Orthomet entered into an Agreement and Plan of Merger whereby WMTI would make a cash tender offer for all the outstanding shares of common stock and for all the outstanding shares of convertible preferred stock issued by Orthomet for a total aggregate price of approximately $66 million (the "Acquisition").

IV. THE RELEVANT MARKETS

9. The relevant lines of commerce in which to analyze the effects of the Acquisition are (i) manufacture and sale of orthopaedic implants used or intended for use in the human hand approved by the United States Food and Drug Administration ("FDA") for sale in the United States, and (ii) the research and development of orthopaedic implants used or intended for use in the human hand.

10. The relevant section of the country in which to analyze the effects of the Acquisition is the United States.

11. The relevant markets set forth in paragraphs nine and ten are highly concentrated, whether measured by Herfindahl-Hirschmann Indices ("HHI") or two-firm and four-firm concentration ratios.

12. Entry into the relevant markets is difficult.

13. Orthomet is a potential competitor of WMTI in the market for orthopaedic implants used or intended for use in the human hand approved by the FDA. WMTI and Orthomet are actual competitors in the market for the research and development of orthopaedic implants used or intended for use in the human hand.

V. EFFECTS OF THE ACQUISITION

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

a. Eliminate Orthomet as a potential competitor of WMTI in the market for orthopaedic implants used or intended for use in the human hand approved by the FDA;

b. Increase the likelihood that WMTI will unilaterally exercise market power in the market for orthopaedic implants used or intended for use in the human hand approved by the FDA; and

c. Eliminate actual competition between WMTI and Orthomet in the market for the research and development of orthopaedic implants used or intended for use in the human hand.

15. All of the above increase the likelihood that firms in the relevant markets will increase prices and restrict output both in the near future and in the long term.

VI. VIOLATIONS CHARGED

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

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

DECISION AND ORDER

The Federal Trade Commission having initiated an investigation of the proposed acquisition of all the outstanding shares of common and convertible preferred stock of Orthomet, Inc. ("Orthomet") by Wright Medical Technology, Inc. ("WMTI"), a subsidiary of Kidd, Kamm Equity Partners, Inc. ("KKEP"), KKEP's general partner, Kidd, Kamm Investments, L.P. ("KKI"), and KKI's general partner, Kidd, Kamm Investments, Inc. ("KKI, Inc."), and the respondents having been furnished thereafter with a copy of a draft of complaint that the Bureau of Competition presented to the Commission for its consideration and which, if issued by the Commission, would charge respondent with violations of Section 7 of the Clayton Act, as amended, 15 U.S.C. 18, and Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45; and

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

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

1. Respondent WMTI 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 5677 Airline Road, Arlington, Tennessee.

2. Respondent KKEP is a limited partnership 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 Three Pickwick Plaza, Greenwich, Connecticut.

3. Respondent KKI is a limited partnership organized, existing, and doing business under and by virtue of the laws of the State of Delaware, with its principal place of business located c/o Kidd, Kamm & Company, 9454 Wilshire Boulevard, Suite 920, Beverly Hills, California.

4. Respondent KKI, Inc. 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 c/o Kidd, Kamm & Company, 9454 Wilshire Boulevard, Suite 920, Beverly Hills, California.

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

ORDER

I.

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

A. *"WMTI"* means Wright Medical Technology, Inc., its subsidiaries, divisions, groups and affiliates controlled by WMTI, and their respective directors, officers, employees, agents and representatives, and their respective successors and assigns.

B. *"KKEP"* means Kidd, Kamm Equity Partners, L.P., its subsidiaries (including WMTI), divisions, groups and affiliates controlled by KKEP, and their respective general partners, directors, officers, employees, agents and representatives, and their respective successors and assigns.

C. *"KKI"* means Kidd, Kamm Investments, L.P., its subsidiaries, divisions, groups and affiliates controlled by KKI, and their respective general partners, directors, officers, employees, agents and representatives, and their respective successors and assigns.

D. *"KKI, Inc."* means Kidd, Kamm Investments, Inc., its subsidiaries, divisions, groups and affiliates controlled by KKI, Inc., and their respective directors, officers, employees, agents and representatives, and their respective successors and assigns.

E. *"Orthomet"* means Orthomet, Inc., a corporation organized, existing, and doing business under and by virtue of the laws of the State of Minnesota, with its principal place of business located at 6301 Cecilia Circle, Minneapolis, Minnesota.

F. *"Respondents"* mean WMTI, KKEP, KKI, and KKI, Inc.

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

H. *"Acquisition"* means the acquisition by WMTI of outstanding shares of stock of Orthomet pursuant to a cash tender offer commenced on October 17, 1994.

I. *"Mayo"* means the Mayo Foundation for Medical Education and Research, a Minnesota Charitable Corporation, with its principal place of business located at 200 First Street SW, Rochester, Minnesota.

J. *"Mayo PIP Orthopaedic Finger Implant Design"* means the Mayo proximal interphalangeal prosthesis design together with modifications, enhancements, and improvements, whether or not

patentable, that is the subject of a technology license contract between Mayo and Orthomet dated as of December 24, 1992.

K. *"Mayo MCP Orthopaedic Finger Implant Design"* means the metacarpophalangeal prosthesis design developed as a cooperative effort between Mayo and Orthomet, together with modifications, enhancements, and improvements, whether or not patentable, that is the subject of a technology license contract between Mayo and Orthomet dated as of May 1, 1993.

L. *"Mayo CMC Orthopaedic Finger Implant Design"* means the carpometacarpal prosthesis design developed as a cooperative effort between Mayo and Orthomet, together with modifications, enhancements, and improvements, whether or not patentable, that is the subject of a technology license contract between Mayo and Orthomet dated as of May 1, 1993.

M. *"Licensed Inventions"* means (1) the Mayo PIP Orthopaedic Finger Implant Design, (2) the Mayo MCP Orthopaedic Finger Implant Design, and (3) the Mayo CMC Orthopaedic Finger Implant Design.

N. *"Technology License Contracts"* means the contracts between Mayo and Orthomet (1) relating to the Mayo PIP Orthopaedic Finger Implant Design and any amendments thereto, (2) relating to the Mayo MCP Orthopaedic Finger Implant Design and any amendments thereto, and (3) relating to the Mayo CMC Orthopaedic Finger Implant Design and any amendments thereto.

O. *"Orthopaedic Finger Implants"* means orthopaedic implants designed for use in the proximal interphalangeal joint, the metacarpophalangeal joint, and the carpometacarpal joint of the human hand.

P. *"Orthomet/Mayo Orthopaedic Finger Implant Business"* means Orthomet's or WMTI's business of researching and developing Orthopaedic Finger Implants for eventual commercialization based upon the Licensed Inventions.

Q. *"Orthomet/Mayo Orthopaedic Finger Implant Research Assets"* means all tangible and intangible assets constituting or otherwise relating to the Orthomet/Mayo Orthopaedic Finger Implant Business, including but not limited to:

1. All books, records, CAD files and other documents;

2. All data, materials, and information relating to the Orthomet/Mayo Orthopaedic Finger Implant Business, including, but

not limited to, FDA approvals for Orthopaedic Finger Implants, list of clinicians, clinical testing, surgical techniques and protocols, surgical instrumentation design development, and biomechanical materials;

3. All intellectual property, including, but not limited to, patents and patent applications, formulas, processes, technology, know-how, trade secrets, manufacturing information, specifications, plans, drawings, designs and data, product prototypes, and other tangible embodiments of know-how, including, but not limited to, the technology and know-how required to manufacture commercially acceptable products; and

4. All product testing and laboratory research data and samples, including, but not limited to, bench testing, wear testing, and materials testing.

R. *"Orthopaedic Finger Implant Licensee"* means the party or parties, other than respondents, to whom Mayo licenses the Licensed Inventions.

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

T. *"510(k) Application"* means an application made to the FDA pursuant to 21 U.S.C. 360(k), or successor provisions.

U. *"IDE Application"* means an application made to the FDA pursuant to 21 CFR 812.20, or successor provisions, for an investigational device exemption.

II.

It is further ordered, That:

A. Within five (5) days after the date this order becomes final, respondents shall:

1. Transfer to Mayo a full and complete copy of the Orthomet/Mayo Orthopaedic Finger Implant Research Assets;

2. Grant Mayo a license to such assets, where applicable, with full right of sublicense thereunder, in perpetuity; and

3. Make any and all such arrangements and transfers as are necessary to enable Mayo to license an Orthopaedic Finger Implant Licensee.

B. Upon reasonable notice and request from the Orthopaedic Finger Implant Licensee, respondents shall provide reasonable assistance to the Orthopaedic Finger Implant Licensee regarding the Orthomet/Mayo Orthopaedic Finger Implant Research Assets transferred pursuant to paragraph II.A of this order. Such assistance shall include consultation with knowledgeable employees of respondents at the Orthopaedic Finger Implant Licensee's facilities or at such other place as is mutually satisfactory to respondents and the Orthopaedic Finger Implant Licensee for a period of time sufficient to satisfy the Orthopaedic Finger Implant Licensee's management. However, respondents shall not be required to continue providing such assistance for more than six (6) months. Respondents may require reimbursement from the Orthopaedic Finger Implant Licensee for all the actual hourly cost of pay and benefits for respondents' personnel providing the assistance and, if travel is required, the travel cost and per diem subsistence incurred by respondents in providing the assistance to the Orthopaedic Finger Implant Licensee.

C. Pending the transfer (and licensing, where applicable) of Orthomet/Mayo Orthopaedic Finger Implant Research Assets, respondents shall take such actions as are necessary to maintain the viability and marketability of Orthomet/Mayo Orthopaedic Finger Implant Research Assets and to prevent the destruction, removal, wasting, deterioration, or impairment of Orthomet/Mayo Orthopaedic Finger Implant Research Assets except for ordinary wear and tear.

III.

It is further ordered, That:

A. If respondents do not, within six (6) months of the date this order becomes final, obtain the Commission's approval for an Orthopaedic Finger Implant Licensee pursuant to the procedures set forth in Section 2.41(f) of the Commission's Rules of Practice, 16 CFR 2.41(f), respondents shall:

1. Take whatever steps are necessary to effect the immediate termination of the Technology License Contracts within five (5) days after the end of the six (6)-month period;

2. After the termination of the Technology License Contracts, refrain from entering into any agreement of any sort with Mayo

relating to the Licensed Inventions or to the Orthomet/Mayo Orthopaedic Finger Implant Research Assets; and

3. Within ten (10) days of the termination of the Technology License Contracts ordered in this paragraph, divest to Mayo absolutely and in good faith the Orthomet/Mayo Orthopaedic Finger Implant Research Assets and grant Mayo, where applicable, a license to such assets with full right of sublicense thereunder, in perpetuity. Respondents shall retain no interest or rights in the Orthomet/Mayo Orthopaedic Finger Implant Research Assets. Mayo shall have the exclusive power and authority to grant a license relating to the Licensed Inventions.

The purpose of licensing an Orthopaedic Finger Implant Licensee other than respondents is to ensure the continuation of the Orthomet/Mayo Orthopaedic Finger Implant Research Assets as an ongoing research project for Orthopaedic Finger Implants to be approved by the FDA for sale in the United States and to remedy the lessening of competition resulting from the Acquisition as alleged in the Commission's complaint.

B. Upon reasonable notice and request from the Orthopaedic Finger Implant Licensee, respondents shall provide reasonable assistance to the Orthopaedic Finger Implant Licensee regarding the Orthomet/Mayo Orthopaedic Finger Implant Research Assets divested pursuant to paragraph III.A of this order. Such assistance shall include consultation with knowledgeable employees of respondents at the Orthopaedic Finger Implant Licensee's facilities or at such other place as is mutually satisfactory to respondents and the Orthopaedic Finger Implant Licensee for a period of time sufficient to satisfy the Orthopaedic Finger Implant Licensee's management. However, respondents shall not be required to continue providing such assistance for more than six (6) months. Respondents may require reimbursement from the Orthopaedic Finger Implant Licensee for all the actual hourly cost of pay and benefits for respondents' personnel providing the assistance and, if travel is required, the travel cost and per diem subsistence incurred by respondents in providing the assistance to the Orthopaedic Finger Implant Licensee.

IV.

It is further ordered, That respondents shall not without the prior approval of the Commission, directly or indirectly, through subsidiaries, partnerships, or otherwise:

A. For a period of ten (10) years from the date this order becomes final, acquire more than 1% of the stock, share capital, equity, or other interest in any concern, corporate or non-corporate, that (1) has filed a 510(k) Application or IDE Application relating to Orthopaedic Finger Implants or, within two (2) years prior to any such proposed acquisition, has announced publicly its intention to submit either of such applications, or (2) has received FDA approval relating to Orthopaedic Finger Implants.

B. For a period of ten (10) years from the date this order becomes final, acquire any assets (including, but not limited to, any technology, know-how, and other intellectual property) that relate to Orthopaedic Finger Implants (1) for which a 510 (k) Application or IDE Application has been filed or for which the intention to file such applications has been publicly announced within two (2) years prior to any such proposed acquisition, or (2) for which FDA approval has been received. The foregoing prohibition shall not apply to (i) the acquisition of materials, supplies, inventory, testing equipment or manufacturing equipment in the ordinary course of business, or (ii) the acquisition of product evaluations and product testing and laboratory research data (relating to Orthopaedic Finger Implants owned by respondents), including, but not limited to, bench testing, wear testing and materials testing, from outside laboratories, outside testing facilities or other third parties, in the ordinary course of respondents' business.

C. For a period of ten (10) years from the date the Technology License Contracts are terminated pursuant to paragraph III.A of this order, enter into any agreement with Mayo relating to Orthopaedic Finger Implants.

V.

It is further ordered, That,

A. Within sixty (60) days after the date this order becomes final and every sixty (60) days thereafter until respondents have fully complied with the provisions of paragraphs II and III of this order, respondents shall submit to the Commission a verified written report setting forth in detail the manner and form in which they intend to comply, are complying, and have complied with paragraphs II and III of this order. Respondents shall include in their compliance reports, among other things that are required from time to time, a full description of the efforts being made to comply with these paragraphs of this order, including a description of all substantive contacts or negotiations undertaken by respondents, and assistance offered by respondents to Mayo for accomplishing the provision (and licensing, where applicable) of Orthomet/Mayo Orthopaedic Finger Implant Research Assets required by this order, including the identity of all parties contacted by respondents. Respondents shall include in their compliance reports copies of all written communications to and from such parties, all internal memoranda, and all reports and recommendations concerning the requirements of paragraphs II and III of this order.

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

VI.

It is further ordered, That, for the purpose of determining or securing compliance with this order, respondents shall permit any duly authorized representatives of the Commission:

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

under the control of respondents, relating to any matters contained in this consent order; and

B. Upon five (5) days' notice to respondents, and without restraint or interference from respondents, to interview officers or employees of respondents.

VII.

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

VIII.

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

IN THE MATTER OF

IVAX CORPORATION

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

Docket C-3565. Complaint, March 27, 1995--Decision, March 27, 1995

This consent order permits, among other things, IVAX, a Florida corporation, to acquire Zenith Laboratories, except for Zenith's rights to market or sell extended release generic verapamil under Zenith's exclusive distribution agreement with G.D. Searle & Co. Respondent is also required, for ten years, to obtain Commission approval before acquiring any stock in any entity that manufactures, or is an exclusive distributor for another manufacturer of, extended release generic verapamil in the United States.

Appearances

For the Commission: *Ann Malester* and *Melissa Heydenreich.*

For the respondent: *Armando A. Tabernilla*, in-house counsel, Miami, FL.

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 IVAX Corporation ("IVAX"), hereinafter sometimes referred to as respondent, has agreed to acquire through a merger all of the voting stock of Zenith Laboratories, Inc. ("Zenith"), in violation of Section 7 of the Clayton Act, as amended, 15 U.S.C. 18 and Section 5 of the Federal Trade Commission Act ("FTC Act"), 15 U.S.C. 45; and it appearing to the Commission that a proceeding in respect thereof would be in the public interest, hereby issues its complaint, stating its charges as follows:

I. DEFINITIONS

1. *"FDA"* means the United States Food & Drug Administration.

2. *"Isoptin SR"* means the sustained-release form of verapamil hydrochloride for which Knoll Pharmaceutical Company holds an approved New Drug Application.

3. *"Generic verapamil"* means any pharmaceutical drug receiving the therapeutic equivalence evaluation code "AB" by the FDA, which designates such product as being therapeutically equivalent to Isoptin SR.

II. RESPONDENT

4. Respondent IVAX is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Florida, with its office and principal place of business located at 8800 N.W. 36th Street, Miami, Florida.

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

6. Respondent manufactures and sells generic verapamil to wholesalers, retailers, mail order firms, hospitals, and managed care organizations.

III. ACQUIRED COMPANY

7. Zenith Laboratories, Inc., is a corporation organized, existing, and doing business under and by virtue of the laws of the State of New Jersey, with its office and principal place of business located at 140 LeGrand Avenue, Northvale, New Jersey.

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

9. At the time of the Acquisition described in paragraph ten of this complaint, Zenith was the exclusive distributor of generic verapamil for G.D. Searle & Co., which product it marketed and sold to wholesalers, retailers, mail order firms, hospitals, and managed care organizations.

IV. ACQUISITION

10. On or about August 26, 1994, IVAX and Zenith entered into an agreement whereby IVAX will acquire all of the voting securities of Zenith ("Acquisition").

V. THE RELEVANT MARKET

11. For purposes of this complaint, the relevant line of commerce in which to analyze the Acquisition is the sale of generic verapamil.

12. For purposes of this complaint, the relevant section of the country in which to analyze the Acquisition is the United States.

13. The relevant market set forth in paragraphs eleven and twelve is highly concentrated, whether measured by the Herfindahl-Hirschmann Index or two-firm concentration ratio.

14. Entry into the relevant market would not be timely, likely or sufficient to deter or counteract the adverse competitive effects described in paragraph sixteen of this complaint because it is difficult and time-consuming to develop a bioequivalent, sustained-release pharmaceutical drug and receive the necessary FDA approvals for it. In addition, generic drugs in development or awaiting FDA approval have no impact on approved generic-drug pricing until they have been approved by the FDA.

15. IVAX and Zenith are the only two companies that supply generic verapamil and as such are the only two actual competitors in the relevant market.

VI. EFFECTS OF THE ACQUISITION

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

a. By eliminating direct actual competition between IVAX and Zenith;

b. By increasing the likelihood that IVAX will unilaterally exercise market power; and

c. By increasing the likelihood that generic verapamil customers will be forced to pay higher prices and/or endure having reduced amounts of generic verapamil available for purchase.

17. All of the above increase the likelihood that the only remaining firm in the relevant market will increase prices and restrict output both in the near future and in the long term.

VII. VIOLATIONS CHARGED

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

19. The acquisition described in paragraph ten, if consummated, would constitute a violation of Section 7 of the Clayton Act, as amended, 15 U.S.C. 18, and Section 5 of the FTC Act, as amended, 15 U.S.C. 45.

DECISION AND ORDER

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

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

The Commission having thereafter considered the matter and having determined that it had reason to believe that the respondent

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

1. Respondent IVAX Corporation ("IVAX") is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Florida, with its office and principal place of business located at 8800 N.W. 36th Street, Miami, Florida.

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

ORDER

I.

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

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

B. *"Zenith"* means Zenith Laboratories, Inc., its subsidiaries, divisions, and groups and affiliates controlled by Zenith, their directors, officers, employees, agents, and representatives, and their successors and assigns.

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

D. *"Acquisition"* means the acquisition of all voting securities of Zenith by IVAX.

E. *"FDA"* means the United States Food & Drug Administration.

F. *"Isoptin SR"* means the sustained-release form of verapamil hydrochloride for which Knoll Pharmaceutical Company holds an approved New Drug Application.

G. *"Verapamil HCl"* means any pharmaceutical drug receiving the therapeutic equivalence evaluation code "AB" by the FDA, which designates such product as being therapeutically equivalent to Isoptin SR.

H. *"Searle Distribution Agreement"* means the agreement, dated March 7, 1994, between G.D. Searle & Co. ("Searle") and Zenith, pursuant to which Zenith is appointed the exclusive distributor of Verapamil HCl for Searle.

II.

It is further ordered, That, respondent shall not acquire, or otherwise obtain, any rights to market or sell Verapamil HCl pursuant to the Searle Distribution Agreement.

III.

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

A. Acquire any stock, share capital, equity or other interest in any concern, corporate or non-corporate, engaged at the time of such acquisition in, or within the two (2) years preceding such acquisition engaged in, the manufacture of Verapamil HCl in the United States, or any concern that is an exclusive distributor of Verapamil HCl in the United States for a manufacturer of Verapamil HCl; provided, however, that each pension, benefit, or welfare plan or trust controlled by respondent may acquire, for investment purposes only, an interest of not more than two (2) percent of the stock or share capital of such person or concern; and further provided, however, that an acquisition will be exempt from the requirements of this paragraph III.A. if it is solely for the purposes of investment and respondent will hold cumulatively no more than two (2) percent of the shares of any class of security;

B. Acquire any assets used in or previously used in (and still suitable for use in) the manufacture of Verapamil HCl in the United States; provided, however, that this paragraph III.B. shall not apply

to any acquisition of goods, services, or equipment in the ordinary course of business;

C. Enter into any agreement with a manufacturer of Verapamil HCl granting respondent the exclusive right to distribute such manufacturer's Verapamil HCl for resale.

IV.

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

V.

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

VI.

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

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

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

IN THE MATTER OF

INTERCO INCORPORATED, ET AL.

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

Docket C-2929. Consent Order, Sept. 26, 1978--Modifying Order, March 27, 1995

The order reopens a 1978 consent order (92 FTC 405) that settled allegations that the respondents had engaged in anticompetitive practices, including illegally fixing resale prices for their products. This order modifies the consent order so that the respondents are permitted to implement lawful price-restrictive cooperative advertising programs and to unilaterally terminate resellers for failure to adhere to previously announced resale prices or sales periods.

ORDER GRANTING IN PART AND DENYING IN PART REQUEST TO REOPEN AND MODIFY ORDER ISSUED SEPTEMBER 26, 1978

On October 26, 1994, London Fog Industries, Inc. ("London Fog"), as successor to Londontown Corporation, filed its Petition to Reopen Proceedings and Modify Consent Order ("Petition") in Docket No. C-2929, pursuant to Section 5(b) of the Federal Trade Commission Act, 15 U.S.C. 45(b), and Section 2.51 of the Federal Trade Commission's Rules of Practice, 16 CFR 2.51. London Fog asks the Commission to reopen and modify the consent order issued by the Commission on September 26, 1978 ("order"), in *Interco Inc.*, 92 FTC 405 (1978).[1]

In its Petition, London Fog asks the Commission to reopen the order and modify provisions that limit London Fog's ability to restrict the prices advertised by its dealers for London Fog apparel and unilaterally to terminate a dealer for failure to adhere to previously announced resale prices. In support of its Petition, London Fog maintains that reopening and modification is warranted by the public interest.[2] London Fog's Petition was placed on the public record for thirty days; one comment was received. For the reasons discussed below, the Commission has determined to reopen and modify the order.

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[1] The order previously was reopened and modified in 1986, *Interco, Inc.*, 108 FTC 133 (1986) (deleting paragraphs II.1 and II.2 applicable to footwear), and in 1988, *Interco, Inc.*, 110 FTC 153 (1988) (deleting prohibition on preticketing with suggested resale prices).

[2] London Fog does not claim that reopening is required by changed conditions of law or fact.

I. STANDARD FOR REOPENING A FINAL ORDER OF THE COMMISSION

Section 5(b) of the Federal Trade Commission Act, 15 U.S.C. 45(b), provides that the Commission shall reopen an order to consider whether it should be modified if the respondent "makes a satisfactory showing that changed conditions of law or fact" so require. A satisfactory showing sufficient to require reopening is made when a request to reopen identifies significant changes in circumstances and shows that the changes eliminate the need for the order or make continued application of it inequitable or harmful to competition. S. Rep. No. 96-500, 96th Cong., 2d Sess. 9 (1979) (significant changes or changes causing unfair disadvantage); Louisiana-Pacific Corp., Docket No. C-2956, Letter to John C. Hart (June 5, 1986), at 4 (unpublished) ("Hart Letter").[3]

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

The language of Section 5(b) plainly anticipates that the burden is on the petitioner to make a "satisfactory showing" of changed conditions to obtain reopening of the order. The legislative history also makes clear that the petitioner has the burden of showing, other than by conclusory statements, why an order should be modified. The Commission "may properly decline to reopen an order if a

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

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

II. REOPENING IS IN THE PUBLIC INTEREST

London Fog asserts in its Petition that its inability under the order to maintain price-restrictive cooperative advertising programs and unilaterally to terminate resellers that decline to adhere to previously announced resale prices and sale periods impedes its ability to compete. Because of the restrictions, London Fog maintains, it is unable effectively to restructure its dealer network, introduce new product lines, and terminate business relationships with retailers that advertise and price London Fog products in a matter inconsistent with the brand's image and quality and with London Fog's marketing strategies.

London Fog's inability to institute price restrictive cooperative advertising programs and unilaterally to terminate discounting dealers has, in London Fog's view, caused an erosion of its dealer base, especially high end, customer service oriented department and specialty stores. According to London Fog, discounting of London Fog products by a number of retailers that use London Fog products as price leaders has caused other retailers to stop carrying London Fog products. London Fog contends that the order restrains it from effectively implementing marketing plans to meet this competitive challenge and to make it more competitive in the long run.

London Fog once sold its London Fog coats to "better" department and specialty stores,[4] but the company no longer counts that category of retailers among its customers. London Fog attributes its diminished appeal to better stores to the constant discount promotions of London Fog brand merchandise by discounting retailers that have changed the image of London Fog from a product marketed at "every day prices"[5] to a promotional product, reducing the appeal of London Fog merchandise to the better stores.

London Fog states that the discount pricing strategy of some retailers is damaging the quality image of its products and making its product less desirable to stores that compete by offering high levels of customer service with every day pricing rather than "discount" prices. Since the order became final, according to London Fog, many high-end service oriented stores have terminated their relationship with London Fog. These same retailers continue to carry coats marketed by London Fog's competitors even though some of these brands also are sold at discounters, apparently because London Fog's competitors are better able to control how their products are advertised and promoted by discounters, according to London Fog.

London Fog claims that its competitors are able to do business with both categories of retailers by using marketing programs that are not permitted to London Fog under the order. The ability to use price restrictive cooperative advertising programs and unilaterally to terminate a retailer for failure to adhere to previously announced resale prices and sale periods encourages service oriented stores to compete with the discount stores with respect to these brands, according to London Fog. London Fog claims that the requested modifications would give it the necessary latitude to compete more effectively for sales to better department and specialty stores.

London Fog has demonstrated that discount advertising is harming London Fog's quality image and affecting its ability to market its product through certain retailers. It also has shown that the

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[4] According to London Fog, these stores provide a significant level of customer service and do not offer everyday discounts, although most have seasonal sales with price reductions. In general, the merchandise offered by better department and specialty stores is higher priced than that carried by mainstream department stores and is marketed as high quality, designer, prestige or status items.

[5] According to London Fog, an "every day pricing" strategy means pricing a product at a certain retail price, to be distinguished from designating a high "original" price against which discounts are immediately taken. London Fog explains that every day prices are not necessarily higher than discount or promotional prices; the every day price at one store might be the discount price at another. The difference is the consumer's perception of the product (discounted brand versus non-discounted brand) and the degree of the bargain he or she is getting.

order is inhibiting London Fog's efforts to implement certain marketing strategies that could increase its sales. Therefore, London Fog has established that reopening would be in the public interest.

III. THE ORDER SHOULD BE MODIFIED

London Fog requests that the order be modified to permit London Fog to implement price restrictive cooperative advertising programs and unilaterally to terminate a reseller who refuses to sell London Fog brands at London Fog's previously published resale prices. For this purpose, London Fog has requested that the following proviso be added to paragraph I of the order:

> Provided that nothing in this order shall be construed to prohibit the implementation of a lawful price restrictive cooperative advertising program or the unilateral termination of a reseller for failure to adhere to previously announced resale prices or sale periods.

The Commission previously has modified orders to permit implementation of price restrictive cooperative advertising programs. Such programs are not *per se* unlawful and do not prevent a dealer from selling at discount prices or from advertising discount prices at the dealer's own expense. *See Advertising Checking Bureau, Inc.*, 109 FTC 146, 147 (1987).[6] The Commission also noted that "[t]he fact that a distributional restraint may have an incidental effect on resale prices is not by itself enough to condemn the practice as *per se* unlawful." *Id.* The Commission has said that price restrictive cooperative advertising programs likely are procompetitive or competitively neutral in most cases "by, for example, . . . channeling the retailer's advertising efforts in directions that the manufacturer believes consumers will find more compelling and beneficial. This, in turn, may stimulate dealer promotion and investment and, thus, benefit interbrand competition." 109 FTC at 147.[7]

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[6] *See also* Clinique Laboratories, Inc., Docket C-3027 (Feb. 8, 1993), reprinted in [1987-1993 Transfer Binder] Trade Reg. Rep. (CCH) ¶ 23,330; U.S. Pioneer Electronics Corp., Docket C-2755 (April 8, 1992), reprinted in [1987-1993 Transfer Binder] Trade Reg. Rep. (CCH) ¶ 23,172; *The Magnavox Co.*, 113 FTC 255 (1990).

[7] In Advertising Checking Bureau, the Commission announced rescission of its 1980 Policy Statement Regarding Price Restrictions In Advertising Programs (viewing such programs as *per se* unlawful). 109 FTC at 146 n.1; *see* Statement of Policy Regarding Price Restrictions in Cooperative Advertising Programs -- Rescission, 6 Trade Reg. Rep. (CCH) ¶ 39,057 (May 21, 1987).

Modifying the order to permit London Fog to institute lawful price restrictive cooperative advertising programs is consistent with Commission policy and cases. Such restrictions may not necessarily be part of an illegal RPM scheme and have been recognized as reasonable in many circumstances.[8] London Fog's use of price restrictive cooperative advertising programs, absent further agreement on the price or price levels to be charged by the retailers, is not likely to restrict interbrand competition or reduce output. Of course, any cooperative advertising program implemented by London Fog as part of a scheme to fix resale prices would be *per se* unlawful and would violate paragraph I.1 of the order. In addition, the proviso's limitation to a "lawful price restrictive cooperative advertising program" will retain the order's prohibition against such programs if they are part of a plan to implement resale price maintenance.

The new proviso to paragraph I also would permit London Fog unilaterally to terminate a reseller for failure to adhere to previously announced prices. This conduct is lawful under *United States v. Colgate Co.*, 250 U.S. 300, 307 (1919), which permits a supplier to "announce its resale prices in advance and refuse to deal with those who do not comply."[9] Accordingly, the Commission has determined to add the described proviso to paragraph I of the order. The modification would permit London Fog to attract high end retailers and implement its overall marketing plans.

IV. ADDITIONAL MODIFICATIONS OF THE ORDER

London Fog has requested other modifications to remove language that London Fog maintains is inconsistent with the new proviso to paragraph I of the order. We consider each of these requests below.

Paragraph I.4. According to London Fog, paragraph I.4. of the order limits its ability to disseminate advertising and promotional materials in connection with a price restrictive cooperative advertising program, by requiring London Fog to state that suggested

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[8] *See* In re Nissan Antitrust Litig., 577 F.2d 910 (5th Cir. 1978), *Cert. denied*, 439 U.S. 1072 (1979) (price restrictive cooperative advertising not *per se* unlawful); *see also Business Elec. Corp. v. Sharp Elec. Corp.*, 485 U.S. 717 (1988).

[9] The restriction in the order was in the nature of fencing in relief. Fencing in provisions in orders restrict otherwise lawful conduct to prevent repetition of the violation or to mitigate the effects of prior unlawful conduct.

prices are "suggested only" in any "list, book, advertising, promotional material or other document." To enable London Fog to implement a price-restrictive cooperative advertising program, London Fog requests that the Commission delete the underlined language in paragraph I.4., and replace it with the language in parentheses, as follows:

. . .it shall be clearly stated on the pages of any list, book, advertising, promotional material or other document (list, order form, catalog or stock control book) where any suggested resale price or sale period appears:

"THE [RESALE PRICES OR SALE PERIODS] QUOTED HEREIN ARE SUGGESTED ONLY. YOU ARE FREE TO DETERMINE YOUR OWN [RESALE PRICES OR SALE PERIODS]."

The Commission believes that language of the proviso added to paragraph I of the order is sufficient to permit London Fog to implement a price restrictive cooperative program, notwithstanding paragraph I.4. Regardless of the type of document on which London Fog chooses to disseminate suggested prices, dealers remain free to determine their own resale prices, even if London Fog may condition the payment of advertising allowances on the advertisement of a particular price. To further clarify that London Fog is permitted under the order to specify prices in connection with such a program, paragraph I.4 should be modified to state that "except, however, in connection with a lawful price restrictive cooperative advertising program, the provision of such allowances may be conditioned on particular advertised prices."

Paragraph I.6. London Fog has requested that paragraph I.6 of the order be deleted. Paragraph I.6 bars London Fog from "[c]ommunicating with any reseller or prospective reseller concerning its deviation or alleged deviation from any resale price or sale period." London Fog claims that this paragraph of the order prevents it from sharing market information with and recommending pricing strategies to its retailers, communications that would tend to enhance the competitiveness of London Fog's products in the marketplace. The provision does not bar London Fog from disseminating market information and pricing strategies and recommendations to its retailers. Instead, it prohibits London Fog from communicating concerning a reseller's "deviation" from "resale price[s] or sale period[s]." Communications about deviations from

the seller's suggested resale prices could provide an opportunity to achieve an unlawful meeting of the minds concerning price and should continue to be prohibited.

London Fog claims that implementation of a price restrictive cooperative advertising program would involve communications barred by paragraph I.6. Because communications to implement a price restrictive cooperative advertising plan would be permissible under the new proviso to paragraph I, deletion of paragraph I.6 is not necessary. Under the proviso, London Fog can communicate with resellers within the context of London Fog's cooperative advertising program regarding advertising that is ineligible for reimbursement. In addition, an announcement by London Fog, consistent with Colgate and the new proviso to paragraph I, that it would terminate discounters could be characterized as a communication prohibited by this provision. In an excess of caution, in order to make clear that communications permitted under the new proviso are not barred by paragraph I.6, the phrase "except communications consistent with the proviso to paragraph I" should be added.

Paragraph I.7. London Fog also requests that paragraph I.7 of the order be modified by deleting the underlined words, as follows:

> Suggesting or requiring that any reseller or prospective reseller refrain from or discontinue advertising any product at a certain resale price.

London Fog says that the provision may inhibit its communications with dealers in connection with a lawful price restrictive cooperative advertising program. The requested modification would permit London Fog to suggest prices at which a reseller may wish to advertise a product without permitting London Fog to require a reseller to advertise products at a specified price. It also would allow London Fog to share information with its dealers regarding advertised prices for London Fog merchandise and to make seasonal advertising suggestions without violating the order. London Fog would continue to be barred under the order from fixing advertised prices. A lawful price restrictive cooperative advertising program permitted under the new proviso of paragraph I necessarily allows London Fog to condition the payment of advertising allowances on specific advertised prices. These communications could be barred as "suggestions" for pricing under this provision of

the order. Therefore, the words "Suggesting or" should be deleted from paragraph 1.7 of the order.

Paragraph I.8. London Fog has requested that the Commission add the language in parentheses to paragraph I.8., which prohibits:

> Representing that any action (other than termination or any action related to a lawful price restrictive cooperative advertising program) may or will be taken against any reseller if it deviates from any resale price or sale period.[10]

The addition of the phrase "other than termination" is consistent with the new proviso to paragraph I of the order and will allow London Fog to represent its intention to terminate a reseller for failure to adhere to London Fog's previously announced resale prices. The modification would not allow London Fog to threaten to terminate a dealer for discounting. Consistent with Colgate, London Fog would have the option to terminate the dealer, not to threaten the dealer to attempt to coerce its compliance. The language "other than termination" will be added to paragraph I.8 as described above.

The remainder of the modification that London Fog requests is too broad. Addition of the phrase "or any action related to a lawful price restrictive cooperative advertising program" does not appear to be necessary for a lawful price restrictive cooperative advertising program, and it could permit London Fog to use its cooperative advertising program to retaliate against discounting dealers and to coerce an agreement on resale prices. Under the new proviso to paragraph I, London Fog may withhold cooperative advertising credits for advertisements that do not meet the cooperative program's specifications. The order, as modified, does not contemplate that London Fog could take (or threaten to take) other action to enforce a price restrictive cooperative advertising program. Therefore, the request to add "or any action related to a lawful price restrictive cooperative advertising program" to paragraph I.8 of the order is denied.

Paragraph 1.9. London Fog has requested that the Commission delete paragraph I.9, which prohibits "[t]hreatening to withhold or withholding advertising allowances . . . from any reseller . . . because said reseller advertises or sells at a certain resale price." The

[10] By letter dated December 30, 1994, London Fog requested that the word "lawful" be added before the words "price restrictive cooperative advertising program."

paragraph should be modified to the extent that it is inconsistent with the new proviso to paragraph I that permits London Fog to condition the payment of advertising allowances on the price at which a retailer advertises a product. The Commission similarly modified the orders in Pioneer and Magnavox to permit price restrictive cooperative advertising programs.[11] The requested modification of paragraph I.9 is not warranted, however, to the extent that the provision bars London Fog from conditioning such allowances on the retailer's "sell[ing] at a certain resale price." The modifications to the order do not permit London Fog to use a cooperative advertising program to fix resale prices or to coerce retailer adherence to them. Therefore, paragraph I.9 will be modified by deleting the words "advertises or."

Paragraph I.12. London Fog also has requested that the Commission add the bold language to and delete the underlined language from paragraph I.12, which prohibits:

> Terminating, suspending, delaying shipments to or taking or threatening any action (**other than terminating**) against any reseller because the reseller has, or was alleged to have, sold or advertised any product at a certain resale price, or because the reseller may engage in any such activity in the future. Provided that each of the respondents retains the right to terminate any reseller for lawful business reasons not inconsistent with this paragraph or any other paragraph of this order.

This paragraph would bar London Fog from unilaterally terminating a reseller consistent with Colgate and the new proviso to paragraph I of the order. The deletion of the word "Terminating" from paragraph I.12 makes it consistent with the new proviso. Unilateral termination of a dealer for discounting is not unlawful. Therefore, the word "Terminating" will be deleted from paragraph I.12.

The addition of the words "other than terminating" to paragraph I.12, however, would allow London Fog to threaten to terminate resellers for failure to adhere to resale prices. Threats to obtain dealer acquiescence in resale prices are "plainly relevant and persuasive to a meeting of the minds" that could result in an unlawful agreement to fix resale prices. *See Monsanto Co. v. Spray-Rite*

[11] *See* note 6 *supra.*

Corporation, 465 U.S. 752, 765 & n.10 (1984); *see also Lenox, Inc.*, 111 FTC 612, 617 (1989). London Fog may, consistent with the order, announce in advance its intention to terminate any dealer who fails to adhere to London Fog's previously announced resale prices and it may terminate any such dealer, but it may not threaten a dealer to coerce compliance with or agreement to suggested retail prices. Therefore, London Fog's request to add the words "other than terminating" to paragraph I.12 is denied.

V. CONCLUSION

London Fog has shown that reopening the order and adding the proviso to paragraph I and making the above described modifications are warranted in the public interest. The order as modified retains the prohibition on resale price maintenance, but will permit London Fog to engage in otherwise lawful, potentially procompetitive conduct.

Accordingly, *It is ordered*, That this matter be, and it hereby is, reopened and that the Commission's modified order in Docket No. C-2929 be, and it hereby is, modified, as of the effective date of this order, as follows:

(a) Paragraph I is modified by adding the following proviso:

> Provided, that nothing in this order shall be construed to prohibit the implementation of a lawful price restrictive cooperative advertising program or the unilateral termination of a reseller for failure to adhere to previously announced resale prices or sale periods.

(b) Paragraph I.4 of the order is modified by adding the following language at the end of the provision:

> Except, however, in connection with a lawful price restrictive cooperative advertising program, the provision of such allowances may be conditioned on particular advertised prices.

(c) Paragraph I.6 of the order is modified by adding "except communications consistent with the proviso to paragraph I," as follows:

Communicating, except communications consistent with the proviso to paragraph I, with any reseller or prospective reseller concerning its deviation or alleged deviation from any resale price or sale period.

(d) Paragraph I.7 of the order is modified by deleting the words "Suggesting or," as follows:

Requiring that any reseller or prospective reseller refrain from or discontinue advertising any product at a certain resale price.

(e) Paragraph I.8 is modified by adding the words "(other than termination)," as follows:

Representing that any action (other than termination) may or will be taken against any reseller if it deviates from any resale price or sale period.

(f) Paragraph I.9 is modified by deleting the words "advertises or," as follows:

Threatening to withhold or withholding advertising allowances or any other assistance, payment, service or consideration from any reseller, or limiting or restricting the eligibility of any reseller to receive such benefits because said reseller sells at a certain resale price.

(g) Paragraph I.12 is modified by deleting the word "Terminating," as follows:

Suspending, delaying shipments to or taking or threatening any action against any reseller because the reseller has, or was alleged to have, sold or advertised any product at a certain resale price, or because the reseller may engage in any such activity in the future. Provided that each of the respondents retains the right to terminate any reseller for lawful business reasons not inconsistent with this paragraph or any other paragraph of this order.

Commissioner Starek concurring in part and dissenting in part.

STATEMENT OF COMMISSIONER ROSCOE B. STAREK, III
CONCURRING IN PART AND DISSENTING IN PART

I concur in the Commission's decision to reopen and modify the order in Docket No. C-2929 in the public interest. However, for the reasons described in my statements in California and Hawaiian Sugar Co.[12] and Service Corporation International,[13] I do not join in the analysis the Commission uses to reach its result. Moreover, I dissent with respect to the decision to deny the respondent's requested modifications to the "fencing-in" relief contained in paragraphs I.4, I.6, I.7, I.8, I.9, and I.12.

The Commission states that respondents petitioning for order modification under the public interest standard "must demonstrate as a threshold matter some affirmative need to modify the order." Order at 2. The Commission has applied this "threshold" inconsistently and has often found it satisfied by very tenuous showings. In this matter, even a relatively strict interpretation of "affirmative need" does not create a significant obstacle to modification. Thus, the Commission can require a separate affirmative need showing in this case without engaging in the sort of tortuous reasoning that less hospitable facts have required in some past cases. Nevertheless, I continue to favor an integrated cost-benefit analysis in the evaluation of petitions for order modification under the public interest rubric of Section 2.51. Such an analysis supports the conclusion that the order in this case should be reopened and modified.

I would grant respondent's requests to delete any language in the underlying order that expands on the core prohibition against unlawful resale price maintenance ("RPM"). Although RPM remains unlawful *per se*,[14] its competitive effects in most circumstances are ambiguous at worst. In this context, fencing-in relief is inappropriate: the otherwise lawful fenced-in conduct carries little risk of significant competitive harm and is at least as likely to be

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[12] Order Reopening the Proceeding and Modifying Cease and Desist Order in Docket No. C-2858 (Jan. 17, 1995) (Starek, concurring).

[13] Order Reopening and Modifying Order in Docket No. 9071 (May 12, 1994) (Starek, concurring).

[14] *See Dr. Miles Medical Co. v. John D. Park & Sons Co.*, 220 U.S. 373 (1911) (RPM held unlawful upon mere proof of agreement). *See also Business Elecs. Corp. v. Sharp Elecs. Corp.*, 485 U.S. 717, 720, 724 (1988) (reaffirming and distinguishing the *per se* rule against RPM).

procompetitive. Where the Commission has reopened an existing order for purposes of modification, this analysis suggests that requests to alleviate or eliminate fencing-in prohibitions should be granted liberally.[15]

Presented with an opportunity to pare this 1978 order to its core prohibitions and to eliminate constraints on efficient conduct, the Commission instead attempts in today's order to specify with greater precision the metes and bounds of permissible conduct in respondent's vertical relationships. As long as the core prohibition remains in place, and where the Commission cannot find that the fenced-in conduct is likely to be anticompetitive, granting the relief as requested appears more likely to serve the public interest than this sort of fine-tuning.

[15] In fashioning a new order to address RPM, the Commission should strictly tailor injunctive relief to the *per se* allegations. Where the Commission has reopened an existing order for purposes of modification, the same considerations favor granting requests for reducing or eliminating fencing-in relief. Here, the Commission has already determined that the competitive benefits of reopening and modification outweigh the interest in repose and finality, and has proceeded to modify the order. Under these circumstances, the costs of granting the requested modifications certainly are not higher than the costs of devising alternative modifications. Therefore, the Commission's choice of modifications can be based on the relative competitive merits. Having reopened the order, I would have preferred to grant all of the requested modifications to the fencing-in provisions

IN THE MATTER OF

PITTSBURGH PLATE GLASS COMPANY

SET ASIDE ORDER IN REGARD TO ALLEGED VIOLATION OF SEC. 2(a) OF THE CLAYTON ACT

Docket 6699. Consent Order, April 19, 1957 -- Set Aside Order, April 4, 1995

This order reopens a 1957 consent order -- which prohibited the respondent from discriminating in price between competing purchasers by charging auto manufacturers less for automotive safety glass than it charged glass distributors and glass dealers -- and sets aside the consent order pursuant to the Commission's Sunset Policy Statement, under which the Commission presumes that the public interest requires terminating competition orders that are more than 20 years old.

ORDER REOPENING PROCEEDING AND SETTING ASIDE ORDER

On December 9, 1994, PPG Industries, Inc., the successor to Pittsburgh Plate Glass Company, ("PPG"), filed a Petition to Reopen and Set Aside Consent Order ("Petition") in this matter. PPG requests that the Commission set aside the 1957 consent order in this matter pursuant to Rule 2.51 of the Commission's Rules of Practice, 16 CFR 2.51, and the Statement of Policy With Respect to Duration of Competition Orders and Statement of Intention to Solicit Public Comment With Respect to Duration of Consumer Protection Orders, issued July 22, 1994, published at 59 Fed. Reg. 45,286-92 (Sept. 1, 1994) ("Sunset Policy Statement"). In the Petition, PPG affirmatively states that it has not engaged in any conduct violating the terms of the order. The request was placed on the public record, and the thirty-day comment period expired on January 16, 1995. Two public comments were received.

The Commission in its July 22, 1994, Sunset Policy Statement said, in relevant part, that "effective immediately, the Commission will presume, in the context of petitions to reopen and modify existing orders, that the public interest requires setting aside orders in effect for more than twenty years."[1] The Commission's order in Docket No. 6699 was issued on April 19, 1957, and has been in effect for more than 37 years. Consistent with the Commission's July 22,

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

1994, Sunset Policy Statement, the presumption is that the order should be terminated. Nothing to overcome the presumption having been presented, the Commission has determined to reopen the proceeding and set aside the order in Docket No. 6699.

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

It is further ordered, That the Commission's order in Docket No. 6699 be, and it hereby is, set aside, as of the effective date of this order.

IN THE MATTER OF

RECKITT & COLMAN PLC

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-3571. Complaint, April 4, 1995--Decision, April 4, 1995

This consent order allows, among other things, Reckitt & Colman to acquire L&F Products Inc., with the required prior approval, on the condition that it sells its own rug cleaning assets, within six months, to a Commission approved acquirer. If the divestiture is not completed on time, the consent order permits the Commission to appoint a trustee to complete the transaction. In addition, the consent order requires the respondent to obtain Commission approval, for ten years, before acquiring any interest in the carpet-deodorizer business in the United States.

Appearances

For the Commission: *Ann Malester, Michael R. Moiseyev, David L. Inglefield* and *Elizabeth A. Jex.*

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

COMPLAINT

The Federal Trade Commission ("Commission"), having reason to believe that respondent, Reckitt & Colman plc ("Reckitt & Colman"), a corporation subject to the jurisdiction of the Federal Trade Commission, has agreed to acquire substantially all of the assets and liabilities of the household products, professional products and personal products businesses of L&F Products Inc., a corporation subject to the jurisdiction of the Federal Trade Commission, in violation of Section 7 of the Clayton Act, as amended, 15 U.S.C. 18, and Section 5 of the Federal Trade Commission Act ("FTC Act"), 15 U.S.C. 45; and it appearing to the Commission that a proceeding in respect thereof would be in the public interest, hereby issues its complaint, stating its charges as follows:

I. DEFINITIONS

For the purposes of this complaint the following definitions apply:

1. *"Carpet deodorizer products"* means powder products designed to combat and eliminate offensive odors in rugs and carpets that are distributed to consumers primarily through grocery, drug, and mass merchandise stores.

II. RESPONDENT

2. Respondent Reckitt & Colman is a corporation organized, existing, and doing business under and by virtue of the laws of England and Wales, with its principal place of business located at One Burlington Lane, London, England W4 2RW. Reckitt & Colman does business in the United States through its wholly-owned subsidiary Reckitt & Colman Inc., with its principal place of business located at 1655 Valley Road, Wayne, New Jersey.

III. THE ACQUIRED COMPANY

3. L&F Products Inc. 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 225 Summit Avenue, Montvale, New Jersey.

IV. JURISDICTION

4. Respondent is and, at all times relevant herein has been, engaged in commerce as "commerce" is defined in Section 1 of the Clayton Act, as amended, 15 U.S.C. 12, and is a corporation whose businesses affect commerce as "commerce" is defined in Section 4 of the FTC Act, as amended, 15 U.S.C. 44.

V. THE ACQUISITION

5. On September 26, 1994, Reckitt & Colman entered into an asset purchase agreement with Eastman Kodak Company ("Kodak"), L&F Products Inc. ("L&F"), a wholly-owned subsidiary of Kodak, and Sterling Winthrop Inc., a wholly-owned subsidiary of L&F, to

acquire substantially all of the assets and liabilities of the household products, professional products and personal products businesses of L&F ("the Acquisition"). Reckitt & Colman will also purchase 100% of the outstanding voting securities of Schulke & Mayr GmbH and certain other wholly-owned subsidiaries of L&F (collectively, "the transferred subsidiaries"). Prior to the consummation of the sale of the L&F assets to Reckitt & Colman, Kodak intends to cause Sterling to transfer the assets and voting securities of the transferred subsidiaries to L&F and one or more affiliates of Kodak unless Reckitt & Colman otherwise consents.

VI. TRADE AND COMMERCE

6. The relevant line of commerce in which to analyze the effects of the Acquisition is the development, manufacture, marketing and sale for resale of carpet deodorizer products.

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

8. The relevant market set forth in paragraphs six and seven above is highly concentrated, whether measured by the Herfindahl-Hirschmann Index or two-firm and four-firm concentration ratios.

9. Entry into the development, manufacture, marketing and sale of carpet deodorizer products is difficult, time-consuming and expensive.

10. Reckitt & Colman and L&F are actual competitors in the relevant market.

VII. EFFECTS OF THE ACQUISITION

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

(a) Eliminating actual, direct and substantial competition between Reckitt & Colman and L&F in the relevant market; and

(b) Enhancing the likelihood of collusion or coordinated interaction between or among the firms in the relevant market.

VIII. VIOLATIONS CHARGED

12. The Acquisition described in paragraph five, if consummated, would constitute a violation of Section 7 of the Clayton Act, as amended, 15 U.S.C. 18, and Section 5 of the FTC Act, as amended, 15 U.S.C. 45.

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

DECISION AND ORDER

The Federal Trade Commission having initiated an investigation of certain acts and practices of the respondent named in the caption hereof, and the respondent having been furnished thereafter with a copy of a draft of complaint that the Bureau of Competition proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge respondent with violations of Section 7 of the Clayton Act, as amended, 15 U.S.C. 18, and Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45; and

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

The Commission having thereafter considered the matter and having determined that it had reason to believe that the respondent has violated the said Acts, and that a complaint should issue stating its charges in that respect, and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of sixty (60) days, now in further conformity with the procedure 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 Reckitt & Colman plc ("Reckitt & Colman") is a corporation organized, existing and doing business under and by virtue of the laws of England and Wales with its principal executive offices located at One Burlington Lane, London, England W4 2RW. Reckitt & Colman does business in the United States through its wholly-owned subsidiary Reckitt & Colman Inc., with its offices and principal place of business at 1655 Valley Road, Wayne, New Jersey.

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

ORDER

I. DEFINITIONS

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

A. "*Reckitt & Colman*" means Reckitt & Colman plc, its predecessors, successors and assigns, the divisions, subsidiaries, affiliates, companies, groups, partnerships and joint ventures that Reckitt & Colman controls, directly or indirectly, and their directors, officers, employees, agents and representatives, and their respective successors and assigns.

B. "*Kodak*" means Eastman Kodak Company, its predecessors, successors and assigns, the divisions, subsidiaries, affiliates, companies, groups, partnerships and joint ventures that Kodak controls, directly or indirectly, and their directors, officers, employees, agents and representatives, and their respective successors and assigns.

C. "*L&F*" means the United States Assets and Businesses acquired by Reckitt & Colman in the Acquisition.

D. "*Respondent*" means Reckitt & Colman.

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

F. "*Acquisition*" means Reckitt & Colman's acquisition of substantially all of the assets and liabilities of the household products, professional products and personal products businesses of L&F Products Inc. pursuant to an asset purchase agreement dated September 26, 1994, with Eastman Kodak Company, L&F Products

Inc., a wholly-owned subsidiary of Kodak, and Sterling Winthrop Inc., a wholly-owned subsidiary of L&F Products Inc.

G. "*Carpet Deodorizer Products*" means powder products designed to combat and eliminate offensive odors in rugs and carpets that are distributed to consumers primarily through grocery, drug, and mass merchandise stores. Carpet Deodorizer Products does not include Rug Cleaning Products.

H. "*Carpet Deodorizer Assets*" means all of Reckitt & Colman's United States rights, title and interest in and to:

(1) Carpet Deodorizer Products, including, but not limited to, the brands, trademarks and tradedress "Carpet Fresh," "Rug Fresh"; and

(2) All of Reckitt & Colman's Carpet Deodorizer Products assets and businesses delineated in Schedule A, attached hereto and made a part hereof.

Carpet Deodorizer Assets excludes any assets or businesses acquired in the Acquisition.

I. "*Rug Cleaning Products*" means products designed to clean rugs and carpets that are applied by aerosol spray, or in liquid, foam or other forms and that are distributed to consumers primarily through grocery, drug, and mass merchandise stores. Rug Cleaning Products does not include Carpet Deodorizer Products.

J. "*Rug Cleaning Assets*" means all of Reckitt & Colman's United States rights, title and interest in and to:

(1) Rug Cleaning Products, including, but not limited to, the right to use the brands, trademarks and tradedress "Woolite Heavy Traffic Carpet Cleaner," "Woolite One Step Carpet Cleaner," "Woolite Spot & Stain Carpet Cleaner," "Woolite Fabric and Upholstery Cleaner," and "Woolite Pet Stain Carpet Cleaner" in connection with the production, marketing and sale of Rug Cleaning Products; and

(2) All of Reckitt & Colman's Rug Cleaning Products assets and businesses delineated in Schedule B, attached hereto and made a part hereof.

Rug Cleaning Assets excludes any assets or businesses acquired in the Acquisition.

K. "*Woolite Fabric Care Products*" means products designed to clean fabric and clothing that are applied by aerosol spray, or in

liquid, foam or other forms and that are distributed to consumers primarily through grocery, drug, and mass merchandise stores. Woolite Fabric Care Products excludes Rug Cleaning Products.

L. "*Woolite Assets*" means all of Reckitt & Colman's United States rights, title and interest in and to:

(1) Woolite Fabric Care Products, including, but not limited to, the brand and trademark "Woolite"; and

(2) All of Reckitt & Colman's Woolite Fabric Care Products assets and businesses delineated in Schedule C, attached hereto and made a part hereof.

Woolite Assets excludes any assets or businesses acquired in the Acquisition.

M. "*Air Freshener Products*" means products that are specifically designed to scent the air in the home that are applied by aerosol spray, or in liquid, solid, wick or other forms and that are distributed to consumers primarily through grocery, drug, and mass merchandise stores.

N. "*Air Freshener Assets*" means all of Reckitt & Colman's United States rights, title and interest in and to:

(1) Air Freshener Products, including, but not limited to, the brands and trademarks "Airwick," "Stick Ups," "Air Waves," "Wizard," "Botanicals," and "Airwick Neutra Air"; and

(2) All of Reckitt & Colman's Air Freshener Products assets and businesses delineated in Schedule D, attached hereto and made a part hereof.

Air Freshener Assets excludes any assets or businesses acquired in the Acquisition.

II. DIVESTITURE OF CARPET DEODORIZER ASSETS

It is ordered, That:

A. Reckitt & Colman shall divest the Carpet Deodorizer Assets, absolutely and in good faith, within six (6) months of the date this order becomes final, and shall also divest such additional ancillary assets and effect such arrangements as are necessary to assure the

marketability, viability, and competitiveness of the Carpet Deodorizer Assets; provided, however, that Reckitt & Colman is not required to divest any of the Carpet Deodorizer Assets identified in Schedule A, Part 2, if such assets are not required by the acquirer.

B. Reckitt & Colman shall divest the Carpet Deodorizer Assets only to an acquirer that receives the prior approval of the Commission, and only in a manner that receives the prior approval of the Commission. The purpose of the divestiture of the Carpet Deodorizer Assets is to ensure the continuation of the assets as an ongoing, viable enterprise engaged in the same businesses in which the Carpet Deodorizer Assets presently are employed, and to remedy the lessening of competition resulting from the Acquisition as alleged in the Commission's complaint.

C. Upon reasonable notice from the acquirer of the Carpet Deodorizer Assets to Reckitt & Colman, for a period of six (6) months following the date of the divestiture, Reckitt & Colman shall provide such personnel, information, assistance, advice and training to the acquirer as is necessary to transfer the Carpet Deodorizer Assets pursuant to paragraph II.A. of this order and establish such business as a viable, ongoing concern. Such assistance shall include reasonable consultation with knowledgeable employees of Reckitt & Colman as necessary to satisfy the acquirer's management that its personnel are appropriately trained in the manufacture, distribution and marketing of Carpet Deodorizer Products. Reckitt & Colman shall not charge the acquirer a rate more than its own direct costs for providing such assistance.

D. Reckitt & Colman shall cooperate and assist the acquirer in obtaining approvals for the transfer of all registrations, leases, licenses, certifications, permits, or similar documents relating to the Carpet Deodorizer Assets.

E. Reckitt & Colman shall take such actions as are necessary to maintain the viability and marketability of the Carpet Deodorizer Assets and to prevent the destruction, removal, wasting, deterioration or impairment of any of the Carpet Deodorizer Assets except in the ordinary course of business and except for ordinary wear and tear.

III. RUG CLEANING DIVESTITURE

It is further ordered, That:

A. Reckitt & Colman shall divest, absolutely and in good faith, within six (6) months of the date the Commission approves the Acquisition pursuant to paragraph V of the order in Docket No. C-3306, the Rug Cleaning Assets, and shall also divest such additional ancillary assets and effect such arrangements as are necessary to assure the marketability, viability, and competitiveness of the Rug Cleaning Assets; provided, however, that Reckitt & Colman is not required to divest any of the Rug Cleaning Assets identified in Schedule B, Part 2, if such assets are not required by the acquirer.

B. Reckitt & Colman shall divest the Rug Cleaning Assets only to an acquirer that receives the prior approval of the Commission, and only in a manner that receives the prior approval of the Commission. The purpose of the divestiture of the Rug Cleaning Assets is to ensure the continuation of the assets as an ongoing, viable enterprise engaged in the same businesses in which the Rug Cleaning Assets presently are employed, and to remedy the lessening of competition resulting from the Acquisition as described in the Commission's letter approving the Acquisition.

C. Upon reasonable notice from the acquirer of the Rug Cleaning Assets to Reckitt & Colman, for a period of six months following the date of the divestiture, Reckitt & Colman shall provide such personnel, information, assistance, advice and training to the acquirer as is necessary to transfer the Rug Cleaning Assets pursuant to paragraph III.A. of this order and establish such business as a viable, ongoing concern. Such assistance shall include reasonable consultation with knowledgeable employees of Reckitt & Colman to satisfy the acquirer's management that its personnel are appropriately trained in the manufacture, distribution and marketing of Rug Cleaning Products. Reckitt & Colman shall not charge the acquirer a rate more than its own direct costs for providing such assistance.

D. Reckitt & Colman shall cooperate and assist the acquirer in obtaining approvals for the transfer of all registrations, leases, licenses, certifications, permits, or similar documents relating to the Rug Cleaning Assets.

E. Reckitt & Colman shall take such actions as are necessary to maintain the viability and marketability of the Rug Cleaning Assets

to prevent the destruction, removal, wasting, deterioration or impairment of any of the Rug Cleaning Assets except in the ordinary course of business and except for ordinary wear and tear.

IV. TRUSTEE PROVISIONS

It is further ordered, That:

A. (1) If Reckitt & Colman has not divested, absolutely and in good faith and with the Commission's prior approval the Carpet Deodorizer Assets within six (6) months of the date this order becomes final, the Commission may appoint a trustee to divest the Carpet Deodorizer Assets and the Air Freshener Assets; provided, however, that the trustee is not required to divest any of the Carpet Deodorizer Assets identified in Schedule A, Part 2, or any of the Air Freshener Assets identified in Schedule D, Part 2, if such assets are not required by the acquirer.

(2) If Reckitt & Colman has not divested, absolutely and in good faith and with the Commission's prior approval the Rug Cleaning Assets within six (6) months of the date the Commission approves the Acquisition pursuant to the order in Docket No. C-3306, the Commission may appoint a trustee to divest the Rug Cleaning Assets and the Woolite Assets; provided, however, that the trustee is not required to divest any of the Rug Cleaning Assets identified in Schedule B, Part 2, or any of the Woolite Assets identified in Schedule C, Part 2, if such assets are not required by the acquirer.

B. In the event the Commission or the Attorney General brings an action pursuant to Section 5(l) of the Federal Trade Commission Act, 15 U.S.C. 45(l), or any other statute enforced by the Commission, Reckitt & Colman shall consent to the appointment of a trustee in such action. Neither the appointment of a trustee nor a decision not to appoint a trustee under this paragraph shall preclude the Commission or the Attorney General from seeking civil penalties or any other relief available to it, including a court-appointed trustee, pursuant to Section 5(l) of the Federal Trade Commission Act, or any other statute enforced by the Commission, for any failure by Reckitt & Colman to comply with this order, or the order in Docket No. C-3306.

C. If a trustee is appointed by the Commission or a court pursuant to paragraph IV.A.(1) or paragraph IV.A.(2) of this order, Reckitt &

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

2. Subject to the prior approval of the Commission and under the terms and conditions described in paragraph IV.A. of this order, the trustee shall have the exclusive power and authority to divest the Carpet Deodorizer Assets and the Air Freshener Assets, and/or the Rug Cleaning Assets and the Woolite Assets, together with any additional, incidental assets of Reckitt & Colman that may be reasonably necessary to assure the viability and competitiveness of the Carpet Deodorizer Assets and the Air Freshener Assets, and/or the Rug Cleaning Assets and the Woolite Assets.

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

4. The trustee shall have twelve (12) months from the date the Commission approves the trust agreement described in paragraph IV.C.3. of this order to accomplish the divestiture(s). If, however, at the end of the twelve-month period, the trustee has submitted a plan of divestiture or believes that divestiture(s) 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 divestiture period two (2) times.

5. The trustee shall have full and complete access (subject to the terms and conditions described in paragraph IV.A. of this order) to the personnel, books, records, and facilities related to the Carpet Deodorizer Assets, Air Freshener Assets, Rug Cleaning Assets and Woolite Assets and to any other relevant information, as the trustee

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

6. Subject to Reckitt & Colman's absolute and unconditional obligation to divest at no minimum price the assets described in paragraph IV.A. of this order (and subject to the terms and conditions described paragraph IV.A. of this order), and to remedy the lessening of competition resulting from the Acquisition as alleged in the Commission's complaint and as described in the Commission's letter approving the Acquisition, the trustee shall use his or her best efforts to negotiate the most favorable price and terms available with each acquirer for each divestiture described in paragraph IV.A of this order. If the trustee receives *bona fide* offers from more than one acquirer for each divestiture, and if the Commission determines to approve more than one such acquirer, the trustee shall divest the assets described in paragraph IV.A. of this order to each acquirer selected by Reckitt & Colman from among those approved by the Commission for each divestiture.

7. The trustee shall serve, without bond or other security, at the cost and expense of Reckitt & Colman, 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 Reckitt & Colman, 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 sale and all expenses incurred. After approval by the Commission and, in the case of a court-appointed trustee, by the court, of the account of the trustee, including fees for his or her services, all remaining monies shall be paid at the direction of Reckitt & Colman and the trustee's power shall be terminated. The trustee's compensation shall be based at least in significant part on a commission arrangement contingent on the trustee's divesting the assets described in paragraph IV.A. of this order.

8. Reckitt & Colman 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, claims, or expenses result from misfeasance, negligence, willful or wanton acts, or bad faith by the trustee.

9. If the trustee ceases to act or fails to act diligently, a substitute trustee shall be appointed in the same manner as provided in paragraph IV.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 each divestiture required by this order.

11. The trustee shall have no obligation or authority to operate or maintain the assets described in paragraph IV.A. of this order.

12. The trustee shall report in writing to Reckitt & Colman and to the Commission every thirty (30) days concerning the trustee's efforts to accomplish the divestitures.

V. HOLD SEPARATE

It is further ordered, That, Reckitt & Colman shall comply with all terms of the Agreement to Hold Separate, attached to this order and made a part hereof as Appendix I. The Agreement to Hold Separate shall continue in effect according to its terms until Reckitt & Colman has divested all of the Rug Cleaning Assets and all of the Carpet Deodorizer Assets as required by this order.

VI. PRIOR APPROVAL

It is further ordered, That, for a ten (10) year period commencing on the date this order becomes final, Reckitt & Colman shall not, without the prior approval of the Commission, directly or indirectly, through subsidiaries, partnerships or otherwise:

(1) Acquire any stock, share capital, equity or other interest in any concern, corporate or non-corporate, engaged in at the time of

such acquisition, or within the two years preceding such acquisition engaged in the development, production, distribution, or sale for resale of Carpet Deodorizer Products in the United States; or

(2) Acquire any assets used or previously used (and still suitable for use) in the manufacture, distribution, or sale for resale of Carpet Deodorizer Products in the United States.

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

VII. COMPLIANCE REPORTS

It is further ordered, That:

A. Within sixty (60) days after the date this order becomes final and every sixty (60) days thereafter until Reckitt & Colman has fully complied with the provisions of paragraphs II, III, IV and V of this order, Reckitt & Colman shall submit to the Commission a verified written report setting forth in detail the manner and form in which it intends to comply, is complying, and has complied with those provisions. Reckitt & Colman 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 each divestiture, including the identity of all parties contacted. Reckitt & Colman also shall include in its compliance reports, subject to any legally recognized privilege, copies of all written communications to and from such parties, all internal memoranda, and all reports and recommendations concerning each divestiture.

B. One (1) year from the date this order becomes final and annually thereafter for nine (9) years on the anniversary date of this order, Reckitt & Colman shall submit to the Commission a verified written report setting forth in detail the manner and form in which it has complied and is complying with this order.

VIII. ACCESS

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 Reckitt & Colman, Reckitt & Colman 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 Reckitt & Colman or L&F relating to any matters contained in this consent order; and

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

IX. CORPORATE CHANGE

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

SCHEDULE A

Reckitt & Colman shall divest all of the Carpet Deodorizer Products assets and businesses pursuant to the terms of this order. The assets and businesses identified in paragraph I.H.(2) of this order shall include all assets, properties, business and goodwill, tangible and intangible, utilized by Reckitt & Colman in the development, production, distribution and sale of Carpet Deodorizer Products in the United States, including, but not limited to, the following:

PART 1

(1) All customer lists, vendor lists, catalogs, sales promotion literature, existing advertising materials, marketing information, product development information, research materials, technical information, management information systems, software, inventions, trade secrets, technology, know-how, specifications, designs, drawings, processes and quality control data;

(2) Intellectual property rights, patents and patent applications and the formulas, copyrights, trademarks, trade names, tradedress, service marks, and UPC codes;

(3) All rights, title and interest in and to the contracts 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;

(4) All rights under warranties and guarantees, express or implied;

(5) All Environmental Protection Agency and all other federal and state regulatory agency registrations and applications, and all documents related thereto;

(6) All books, records, files, financial statements, business plans and supporting documents;

(7) All items of prepaid expense; and

(8) A perpetual license at no royalty to use the brands, trademarks and tradedress "Airwick Neutra Air" and "Botanicals" in connection with the production, marketing and sale of Carpet Deodorizer Products in the United States.

PART 2

(1) A perpetual license at no royalty to use the brand, trademark and tradedress "Airwick" in connection with the production, marketing and sale of Carpet Deodorizer Products in the United States;

(2) All machinery, fixtures, equipment, molds, vehicles, furniture, tools and all other tangible personal property;

(3) Inventory;

(4) Accounts and notes receivable; and

(5) All rights, title and interest in and to owned or leased real property, together with appurtenances, licenses and permits.

SCHEDULE B

Reckitt & Colman shall divest all of the Rug Cleaning Products assets and businesses pursuant to the terms of this order. The assets

and businesses identified in paragraph I.J.(2) of this order shall include all assets, properties, business and goodwill, tangible and intangible, utilized by Reckitt & Colman in the development, production, distribution and sale of Rug Cleaning Products in the United States, including, but not limited to, the following:

PART 1

(1) A perpetual license at no royalty to use the brand, trademark, and tradedress "Woolite" in connection with the production, marketing and sale of Rug Cleaning Products in or into the United States;

(2) All customer lists, vendor lists, catalogs, sales promotion literature, existing advertising materials, marketing information, product development information, research materials, technical information, management information systems, software, inventions, trade secrets, technology, know-how, specifications, designs, drawings, processes and quality control data;

(3) Intellectual property rights, patents and patent applications and the formulas, copyrights, trademarks, trade names, service marks, and UPC codes;

(4) All rights, title and interest in and to the contracts 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;

(5) All rights under warranties and guarantees, express or implied;

(6) All Environmental Protection Agency and all other federal and state regulatory agency registrations and applications, and all documents related thereto;

(7) All books, records, files, financial statements, business plans and supporting documents; and

(8) All items of prepaid expense.

PART 2

(1) All machinery, fixtures, equipment, molds, vehicles, furniture, tools and all other tangible personal property;

(2) Inventory;

(3) Accounts and notes receivable; and

(4) All rights, title and interest in and to owned or leased real property, together with appurtenances, licenses and permits.

SCHEDULE C

The trustee shall divest all of the Woolite Fabric Care Products assets and businesses pursuant to the terms of this order. The assets and businesses identified in paragraph I.L.(2) of this order shall include all assets, properties, business and goodwill, tangible and intangible, utilized by Reckitt & Colman in the development, production, distribution and sale of Woolite Fabric Care Products in the United States, including, but not limited to, the following:

PART I

(1) All customer lists, vendor lists, catalogs, sales promotion literature, existing advertising materials, marketing information, product development information, research materials, technical information, management information systems, software, inventions, trade secrets, technology, know-how, specifications, designs, drawings, processes and quality control data;

(2) Intellectual property rights, patents and patent applications and the formulas, copyrights, trademarks, trade names, tradedress, service marks, and UPC codes;

(3) All rights, title and interest in and to the contracts 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;

(4) All rights under warranties and guarantees, express or implied;

(5) All Environmental Protection Agency and all other federal and state regulatory agency registrations and applications, and all documents related thereto;

(6) All books, records, files, financial statements, business plans and supporting documents; and

(7) All items of prepaid expense.

PART 2

(1) All machinery, fixtures, equipment, molds, vehicles, furniture, tools and all other tangible personal property;

(2) Inventory;

(3) Accounts and notes receivable; and

(4) All rights, title and interest in and to owned or leased real property, together with appurtenances, licenses and permits.

SCHEDULE D

The trustee shall divest all of the Air Freshener Products assets and businesses pursuant to the terms of this order. The assets and businesses identified in paragraph I.N.(2) of this order shall include all assets, properties, business and goodwill, tangible and intangible, utilized by Reckitt & Colman in the development, production, distribution and sale of Air Freshener Products in the United States, including, but not limited to, the following:

PART 1

(1) All customer lists, vendor lists, catalogs, sales promotion literature, existing advertising materials, marketing information, product development information, research materials, technical information, management information systems, software, inventions, trade secrets, technology, know-how, specifications, designs, drawings, processes and quality control data;

(2) Intellectual property rights, patents and patent applications and the formulas, copyrights, trademarks, trade names, tradedress, service marks, and UPC codes;

(3) All rights, title and interest in and to the contracts 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;

(4) All rights under warranties and guarantees, express or implied;

(5) All Environmental Protection Agency and all other federal and state regulatory agency registrations and applications, and all documents related thereto;

(6) All books, records, files, financial statements, business plans and supporting documents; and

(7) All items of prepaid expense.

PART 2

(1) All machinery, fixtures, equipment, molds, vehicles, furniture, tools and all other tangible personal property;

(2) Inventory;

(3) Accounts and notes receivable; and

(4) All rights, title and interest in and to owned or leased real property, together with appurtenances, licenses and permits.

APPENDIX I

AGREEMENT TO HOLD SEPARATE

This Agreement to Hold Separate ("Hold Separate") is by and between Reckitt & Colman plc ("Reckitt & Colman"), a corporation organized, existing, and doing business under and by virtue of the laws of England and Wales, with its office and principal place of business at One Burlington Lane, London 4W 2RW, England, which does business in the United States through its wholly-owned subsidiary Reckitt & Colman Inc., with its offices and principal place of business at 1655 Valley Road Wayne, New Jersey; and the Federal Trade Commission ("the Commission"), an independent agency of the United States Government, established under the Federal Trade Commission Act of 1914, 15 U.S.C. 41, *et seq.* (collectively the "Parties").

PREMISES

Whereas, on September 26, 1994, Reckitt & Colman entered into an agreement with Eastman Kodak Company ("Kodak") to acquire substantially all of the United States assets and liabilities of the household products, professional products and personal products businesses of L&F Products Inc. (Such assets and businesses hereinafter referred to as "L&F"), as well as the voting securities of

certain wholly-owned subsidiaries of L&F or Kodak that sell products outside the United States (hereinafter "Acquisition"); and

Whereas, on October 22, 1990, the Commission, with the consent of Reckitt & Colman, issued its complaint and made final its order to settle charges that the acquisition by Reckitt & Colman of the Boyle-Midway Division of American Home Products Corporation violated Section 7 of the Clayton Act, as amended, 15 U.S.C. 18, and Section 5 of the Federal Trade Commission Act ("FTC Act"), as amended, 15 U.S.C. 45 (In the Matter of Reckitt & Colman plc, FTC Docket No. C-3306); and

Whereas, the order in docket No. C-3306 provides that for a period of ten (10) years Reckitt & Colman shall not acquire, without the prior approval of the Commission, directly or indirectly, through subsidiaries, partnerships, or otherwise, any interest in, or the whole or any part of the stock or share capital of any person or business that is engaged in the rug cleaning products business in the United States, or, except in the ordinary course of business, any assets used or previously used in (and still suitable for use in) the rug cleaning products business; and

Whereas, Reckitt & Colman produces and markets, among other things, Carpet Deodorizer Products and Rug Cleaning Products, as defined in paragraph I of the agreement containing consent order ("consent agreement" or "consent order") to which this Hold Separate is attached and made a part thereof as Appendix 1; and

Whereas, L&F, with its principal office and place of business located at 225 Summit Avenue, Montvale, New Jersey, produces and markets, among other things, Carpet Deodorizer Products and Rug Cleaning Products, as defined in paragraph I of the consent order; and

Whereas, the Commission is now investigating the Acquisition to determine whether it would violate any of the statutes enforced by the Commission and whether the Commission should approve the Acquisition pursuant to the order In the Matter of Reckitt & Colman plc, FTC Docket No. C-3306; and

Whereas, the Commission has determined to grant Reckitt & Colman the prior approval required for its acquisition of L&F conditioned, however, upon Reckitt & Colman divesting, as required under the consent agreement, the Carpet Deodorizer Assets and the Rug Cleaning Assets, as defined in paragraph I of the consent agreement; and

Whereas, if the Commission accepts the consent agreement, the Commission must place it on the public record for a period of at least sixty (60) days and may subsequently withdraw such acceptance pursuant to the provisions of Section 2.34 of the Commission's Rules; and

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

Whereas, the Commission is concerned that if the Acquisition is consummated, it will be necessary to preserve the Commission's ability to require the divestiture of the Carpet Deodorizer Assets and the Rug Cleaning Assets, as defined in paragraph I of the consent agreement, and the Commission's right to have the Carpet Deodorizer Assets and the Rug Cleaning Assets continue as viable competitors; and

Whereas, the purpose of the Hold Separate and the consent agreement is:

1. To preserve the Carpet Deodorizer Assets, the Air Freshener Assets, and the Rug Cleaning Assets as viable, independent, ongoing enterprises pending the divestiture of the Carpet Deodorizer Assets, the Air Freshener Assets, and Rug Cleaning Assets required under the terms of the consent agreement;

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

3. To preserve the Carpet Deodorizer Assets, the Air Freshener Assets, and the Rug Cleaning Assets as ongoing and competitive entities engaged in the same businesses in which they are presently employed until each of the respective divestitures required under the terms of the consent agreement is achieved; and

Whereas, Reckitt & Colman's entering into this Hold Separate shall in no way be construed as an admission by Reckitt & Colman that the Acquisition is illegal; and

Whereas, Reckitt & Colman understands that no act or transaction contemplated by this Hold Separate shall be deemed immune or

exempt from the provisions of the antitrust laws of the FTC Act by reason of anything contained in this consent agreement.

Now, therefore, the Parties agree, upon the understanding that the Commission has not yet determined whether the Acquisition will be challenged, and in consideration of the Commission's conditional approval of the Acquisition and its agreement that, at the time it accepts the consent agreement, for public comment it will grant early termination of the Hart-Scott-Rodino waiting period, and unless the Commission determines to reject the consent agreement, it will not seek further relief from Reckitt & Colman with respect to the Acquisition, except that the Commission may exercise any and all rights to enforce this Hold Separate and the consent agreement to which it is annexed and made a part thereof, and the order in Docket No. C-3306, and in the event the required divestiture of the Carpet Deodorizer Assets is not accomplished, to appoint a trustee to seek divestiture of the Air Freshener Assets as well as the Carpet Deodorizer Assets, and in the event the required divestiture of the Rug Cleaning Assets is not accomplished, to appoint a trustee to seek divestiture of the Woolite Assets as well as the Rug Cleaning Assets, or to seek civil penalties or a court appointed trust or other equitable relief, as follows:

1. Reckitt & Colman agrees to execute and be bound by the consent agreement.

2. Reckitt & Colman agrees that from the date this Hold Separate is accepted until the earlier of the dates listed below in subparagraphs 2.a and 2.b, it will comply with the provisions of paragraph four of this Hold Separate:

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

b. The day after the divestiture of the Carpet Deodorizer Assets required by the consent order has been completed.

3. Reckitt & Colman agrees that from the date this Hold Separate is accepted until the day after the divestiture of the Rug Cleaning Assets required by the consent order has been completed it will comply with the provisions of paragraph five of this Hold Separate.

4. Reckitt & Colman agrees to manage and maintain the Carpet Deodorizer Assets and the Air Freshener Assets, as they are presently constituted, on the following term and conditions:

a. Reckitt & Colman shall appoint four individuals, one each from among Reckitt & Colman's current employees working in Reckitt & Colman's marketing, sales, materials management, and finance operations, to manage and maintain the Carpet Deodorizer Assets and the Air Freshener Assets. These individuals, ("the management team") shall manage the Carpet Deodorizer Assets and the Air Freshener Assets independently of the management of Reckitt & Colman's other businesses, except that these individuals will arrange for the Reckitt & Colman Carpet Deodorizer Products and the Reckitt & Colman Air Freshener Products to be marketed and sold by Reckitt & Colman's marketing and sales forces. The management team shall not thereafter, until the Carpet Deodorizer Assets are divested pursuant to the consent order, be in any way involved in the marketing, selling or materials management of any other Reckitt & Colman product.

b. The management team, in its capacity as such, shall report directly and exclusively to an independent auditor/manager, to be appointed by Reckitt & Colman. The independent auditor/manager shall have exclusive control over the operations of the Carpet Deodorizer Assets and the Air Freshener Assets, with responsibility for the management of the Carpet Deodorizer Assets and the Air Freshener Assets and for maintaining the independence of those businesses.

c. Reckitt & Colman shall not exercise direction or control over, or influence directly or indirectly, the independent auditor/manager or the management team or any of its operations relating to the operations of the Carpet Deodorizer Assets and the Air Freshener Assets; provided however, that Reckitt & Colman may exercise only such direction and control over the management team and the Carpet Deodorizer Assets and the Air Freshener Assets as is necessary to assure compliance with this Hold Separate or the consent order.

d. Reckitt & Colman shall maintain the viability and marketability of the Carpet Deodorizer Assets and the Air Freshener Assets and shall not cause or permit the destruction, removal, wasting, deterioration, or impairment of any assets or businesses it may have to divest except in the ordinary course of business and

except for ordinary wear and tear. Reckitt & Colman shall not sell, transfer, or encumber the Carpet Deodorizer Assets or the Air Freshener Assets except in the ordinary course of business, or to effect the divestitures contemplated by the consent order pursuant to the terms of the consent order.

e. Except for the management team, Reckitt & Colman shall not permit any other Reckitt & Colman employee, officer, or director to be involved in the of the Carpet Deodorizer Assets or the Air Freshener Assets except to the extent the services of Reckitt & Colman's sales, marketing, and materials management personnel are necessary as set forth in subparagraph 4.a.

f. Except as required by law, and except to the extent that necessary information is exchanged in the course of evaluating the Acquisition, defending investigations or defending or prosecuting litigation, or negotiating agreements to divest assets, Reckitt & Colman shall not receive or have access to, or the use of, any material confidential information not in the public domain about the Carpet Deodorizer Assets or the Air Freshener Assets or the activities of the management team in managing those businesses, nor shall the management team receive or have access to, or use of, any material confidential information not in the public domain about Reckitt & Colman's competing Carpet Deodorizer Products or Air Freshener Products businesses, or the activities of Reckitt & Colman in managing its Carpet Deodorizer Products or Air Freshener Products businesses. Reckitt & Colman may receive on a regular basis from the management team aggregate financial information necessary and essential to allow Reckitt & Colman to prepare United States consolidated financial reports, tax returns, and personnel reports. Any such information that is obtained pursuant to this subparagraph shall be used only for the purposes set forth in the subparagraph. ("Material confidential information" as used herein, means competitively sensitive or proprietary information not independently known to Reckitt & Colman from sources other than the management team, including, but not limited to, customer lists, price lists, marketing methods (except to the extent marketing and sales plans need to be divulged to the Reckitt & Colman marketing and sales force in the ordinary course of business), patents, technologies, processes, or other trade secrets).

g. Nothing in this Hold Separate shall prohibit Reckitt & Colman from providing cash management, tax preparation and/or insurance

functions for the Carpet Deodorizer Assets and the Air Freshener Assets heretofore provided by Reckitt & Colman. Reckitt & Colman personnel providing such support services must retain and maintain all material confidential information relating to the Carpet Deodorizer Assets and the Air Freshener Assets on a confidential basis and, except as permitted by this Hold Separate, such persons shall be prohibited from providing, discussing, exchanging, circulating, or otherwise furnishing such information to or with any person whose employment involves any other Reckitt & Colman Carpet Deodorizer Product business or Rug Cleaning Products business. Reckitt & Colman personnel providing these support services to the Carpet Deodorizer Assets and the Air Freshener Assets shall execute a confidentiality agreement prohibiting the disclosure of any Carpet Deodorizer Assets or Air Freshener Assets confidential information.

h. Reckitt & Colman shall not change the composition of the management team, and the independent auditor/manager shall have the power to remove employees only for cause.

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

j. Reckitt & Colman shall establish written procedures to be approved by the independent auditor/manager, covering the management, maintenance, and independence of the Carpet Deodorizer Assets and the Air Freshener Assets and the conduct of the management team in accordance with this consent agreement. Reckitt & Colman shall also circulate to its employees and appropriately display a notice of this Hold Separate Agreement and consent order in the form attached hereto as Appendix A.

k. All earnings and profits from the Carpet Deodorizer Assets and the Air Freshener Assets shall be available for use in those businesses until divestiture. In computing earnings and profits for the Carpet Deodorizer Assets and the Air Freshener Assets, Reckitt & Colman may deduct from the revenues generated by the Carpet Deodorizer Assets and the Air Freshener Assets only direct product costs and indirect overheads allocated to those businesses.

l. Reckitt & Colman shall make available for use in the Carpet Deodorizer Assets and the Air Freshener Assets businesses until divestiture an amount not lower than those budgeted for 1995 and 1996 for advertising, trade promotion, and product development of

the Reckitt & Colman Carpet Deodorizer Products and Air Freshener Products, and shall increase such spending as deemed reasonably necessary by the management team in light of competitive conditions. If necessary, Reckitt & Colman shall provide the management team with any funds to accomplish the foregoing.

m. Reckitt & Colman shall pay all direct product costs and indirect overheads for the Carpet Deodorizer Assets and the Air Freshener Assets businesses. The management team and the independent auditor/manager shall serve at the cost and expense of Reckitt & Colman, and the Carpet Deodorizer Assets and the Air Freshener Assets businesses shall not be charged with the compensation and expenses of the independent auditor/manager.

n. If the independent auditor/manager ceases to act or fails to act diligently, a substitute independent auditor/manager shall be appointed in the same manner as provided in subparagraph 4.b. of this Hold Separate. Any replacement for independent auditor/manager shall be appointed with the consent of the Commission.

o. Reckitt & Colman shall indemnify the management team and the independent auditor/manager against any losses or claims of any kind that might arise out of involvement under this Hold Separate, except to the extent that such losses or claims result from misfeasance, gross negligence, willful or wanton acts, or bad faith by the management team or the independent auditor/manager.

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

5. To ensure the complete independence and viability of L&F and to assure that no competitive information is exchanged between L&F and Reckitt & Colman, Reckitt & Colman shall hold L&F as it is presently constituted separate and apart on the following terms and conditions:

a. L&F, as defined in paragraph I of the consent agreement, shall be held separate and apart and shall be operated independently of Reckitt & Colman, except to the extent that Reckitt & Colman must exercise direction and control over L&P to assure compliance with this Hold Separate Agreement, the consent order, or the order in Docket No. C-3306.

b. Reckitt & Colman shall assign to L&F its rights under the transition services agreements and all supply agreements contemplated, respectively, by Sections 5.12 and 5.13 of the September 26, 1994, Asset Purchase Agreement among Eastman Kodak Company, L&F Products Inc., Sterling Winthrop Inc., and Reckitt & Colman plc; and, as contemplated by Sections 5.12 and 5.13 of the September 26, 1994 Asset Purchase Agreement, Sterling Winthrop Inc. ("Sterling") personnel will continue the support and administrative services being provided by such Sterling personnel to L&F as of the date this Hold Separate was signed, and all arrangements, existing on the date this Hold Separate was signed, that provide for the supply by Sterling of materials to L&F will remain in place. Reckitt & Colman shall enforce all its rights to cause such Sterling personnel providing support and administrative services and maintaining existing supply arrangements to retain and maintain all material confidential information relating to L&F on a confidential basis and, except as is permitted by this Hold Separate, such persons shall be prohibited from providing, discussing, exchanging, circulating, or otherwise furnishing any such information to or with any other person, whose employment involves any other Reckitt & Colman business, including the Reckitt & Colman Rug Cleaning Products business.

c. Reckitt & Colman shall appoint four individuals, one each from among L&F's current employees working in L&F's marketing, sales, materials management, and finance operations to manage and maintain L&F. These individuals, ("the management team") shall manage L&F independently of the management of Reckitt & Colman's other businesses. The management team shall not thereafter, until the Rug Cleaning Assets are divested pursuant to the consent order, be in any way involved in the marketing, selling or materials management of any competing Reckitt & Colman products.

d. The management team, in its capacity as such, shall report directly and exclusively to an independent auditor/manager, to be appointed by Reckitt & Colman. The independent auditor/manager shall have exclusive control over the operations of L&F with responsibility for the management of L&F and for maintaining the independence of those businesses. Provided, however, that the auditor/manager appointed pursuant to this paragraph five shall not be the same auditor/manager appointed pursuant to paragraph four.

e. Reckitt & Colman shall not exercise direction or control over, or influence directly or indirectly, L&F, the independent auditor/manager or the management team or any of their operations relating to the operations of L&F; provided however, that Reckitt & Colman may exercise only such direction and control over the management team and L&F as is necessary to assure compliance with this Hold Separate, the consent order, and the order in Docket No. C-3306.

f. Except as required by law, and except to the extent that necessary information is exchanged in the course of evaluating the Acquisition, defending investigations or defending or prosecuting litigations or negotiating agreements to divest assets, Reckitt & Colman shall not receive or have access to, or the use of, any material confidential information not in the public domain about L&F or the activities of the management team in managing L&F; nor shall L&F or the management team receive or have access to, or use of, any material confidential information not in the public domain about Reckitt & Colman's businesses or the activities of Reckitt & Colman in managing its businesses. Reckitt & Colman may receive on a regular basis from L&F aggregate financial information necessary and essential to allow Reckitt & Colman to prepare United States consolidated financial reports, tax returns, and personnel reports. Any such information that is obtained pursuant to this subparagraph shall be used only for the purposes set forth in this subparagraph. ("Material confidential information" as used herein, means competitively sensitive or proprietary information not independently known to Reckitt & Colman from sources other than L&F or the management team including, but not limited to, customer lists, price lists, marketing methods, patents, technologies, processes, or other trade secrets).

g. Nothing in this Hold Separate shall prohibit Reckitt &Colman from providing cash management, tax preparation and/or insurance functions for L&F heretofore provided by Sterling or Kodak. Reckitt & Colman personnel providing such support services must retain and maintain all material confidential information relating to L&F on a confidential basis and, except as permitted by this Hold Separate, such persons shall be prohibited from providing, discussing, exchanging, circulating, or otherwise furnishing such information to or with any person whose employment involves any other Reckitt & Colman Carpet Deodorizer Product business or Rug Cleaning

Products business. Reckitt & Colman personnel providing these support services to L&F shall not be involved in any other Reckitt & Colman Carpet Deodorizer Products business or Rug Cleaning Products business, and shall execute a confidentiality agreement prohibiting the disclosure of any L&F confidential information.

h. L&F shall be staffed with sufficient employees to maintain the viability and competitiveness of L&F, which employees shall be selected from L&F's existing employee base and may also be hired from sources other than L&F. Each director, officer and management employee of L&F shall execute a confidentiality agreement prohibiting the disclosure of any L&F confidential information.

i. Reckitt & Colman shall not change the composition of the management team and the independent auditor/manager shall have the power to remove employees only for cause.

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

k. Reckitt & Colman shall establish written procedures to be approved by the independent auditor/manager, covering the management, maintenance, and independence of L&F and the conduct of the management team in accordance with this consent agreement.

l. All earnings and profits of L&F shall be retained separately by L&F. If necessary, Reckitt & Colman shall provide L&F with sufficient working capital to operate at the rate of operation in effect during the twelve (12) months preceding the date of this Hold Separate.

m. Reckitt & Colman shall cause L&F to continue to expend funds for the advertising, trade promotion, and product development of L&F products at levels not lower than those budgeted for 1995 and 1996, and shall increase such spending as deemed reasonably necessary by the management team in light of competitive conditions. If necessary, Reckitt & Colman shall provide L&F with any funds to accomplish the foregoing.

n. If the independent auditor/manager ceases to act or fails to act diligently, a substitute independent auditor/manager shall be appointed in the same manner as provided in subparagraph 5.d. of this Hold Separate. Any replacement for independent

auditor/manager shall be appointed with the consent of the Commission.

o. The management team and the independent auditor/manager shall serve at the cost and expense of Reckitt & Colman. Reckitt & Colman shall indemnify the management team and the independent auditor/manager against any losses or claims of any kind that might arise out of involvement under this Hold Separate, except to the extent that such losses or claims result from misfeasance, gross negligence, willful or wanton acts, or bad faith by the management team or the independent auditor/manager.

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

6. Should the Commission seek in any proceeding to compel Reckitt & Colman to divest itself of the Carpet Deodorizer Assets or the Rug Cleaning Assets or any additional assets, as provided in the consent agreement, or to seek any other equitable relief, Reckitt & Colman shall not raise any objection based on the expiration of the applicable Hart-Scott-Rodino Antitrust Improvements Act waiting period or the fact that the Commission has permitted the Acquisition. Reckitt & Colman also waives all rights to contest the validity of this Hold Separate.

7. For the purpose of determining or securing compliance with this Hold Separate, subject to any legally recognized privilege, and upon written request with reasonable notice to Reckitt & Colman made to its principal office in the United States, Reckitt & Colman shall permit any duly authorized representative or 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 Reckitt & Colman or L&F relating to compliance with this Hold Separate; and

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

8. This Hold Separate shall not be binding until approved by the Commission.

APPENDIX A

NOTICE OF DIVESTITURE AND
REQUIREMENT FOR CONFIDENTIALITY

Reckitt & Colman has entered into a consent order and Hold Separate Agreement with the Federal Trade Commission relating to the divestiture of certain Reckitt & Colman carpet deodorizer assets and products, including Carpet Fresh, Rug Fresh, Botanicals, and Airwick Neutra Air; or alternatively, if that divestiture is not accomplished within six months, the additional divestiture of certain Reckitt & Colman air freshener assets and products, including Airwick, Stick Ups, Air Waves, Wizard, Botanicals, and Airwick Neutra Air. Until such divestitures as are required by the consent order are accomplished, the Reckitt & Colman carpet deodorizer assets and products, including Carpet Fresh, Rug Fresh, Botanicals, and Airwick Neutra Air, and the Reckitt & Colman air freshener assets and products, including Airwick, Stick Ups, Air Waves, Wizard, Botanicals, and Airwick Neutra Air must be managed and maintained as a separate, ongoing business, independent of all other competing lines of Reckitt & Colman as provided by the Agreement to Hold Separate. All competitive information relating to these product lines must be retained and maintained by the persons responsible for the management of these products on a confidential basis and such persons shall be prohibited from providing, discussing, exchanging, circulating or otherwise furnishing any such information to or with any other person whose employment involves any competing Reckitt & Colman carpet deodorizer or air freshener product. Similarly, all persons responsible for the management of any competing Reckitt & Colman carpet deodorizer product or air freshener product shall be prohibited from providing, discussing, exchanging, circulating or otherwise furnishing any such information to or with any other person responsible for the Carpet Fresh, Rug Fresh, Botanicals, or Airwick Neutra Air carpet deodorizer products, or the Airwick, Stick Ups, Air Waves, Wizard, Botanicals, or Airwick Neutra Air air freshener products.

Any violation of the consent order or the Hold Separate Agreement, incorporated by reference as part of the consent order, subjects the violator to civil penalties and other relief as provided by law.